THE MONTANA SUPREME COURT

AN INSTITUTION IN NEED OF REFORM

A NOTE FROM OUR PRESIDENT

Dear Readers,

With legislation increasingly facing frequent legal challenges, many Montanans are concerned about the appearance of bias in our courts. To make matters worse, the media's coverage of legal challenges of legislation often fails to seriously investigate accusations of bias. Members of the public, especially those of us without a law degree, are left in the dark and without answers. This is a problem, especially when Montanans are then asked to vote for judges in a non-partisan election.

We believe that Montanans need serious, independent research to educate lawmakers and the public about judicial issues. We decided to start by commissioning an issue paper from a preeminent authority on Constitutional Law in Montana: Professor Rob Natelson. We hope this issue paper provides readers with a deeper understanding of the Montana Supreme Court's activities over the last decade, along with a better grasp of the principles of sound constitutional jurisprudence.

Kendall Cotton

Kendall Cotton

ABOUT THE AUTHOR

Robert G. Natelson at Crystal Lake, MT

Robert G. Natelson is Professor of Law (ret.), The University of Montana and Senior Fellow in Constitutional Jurisprudence at the Independence Institute in Denver, Colorado. His original research on constitutional law and constitutional history has been cited by Supreme Court justices 39 times since 2013, placing him among the top legal scholars in the nation. He has more than fifty years' experience in the legal system, including the practice of law in two states and scholarship covering the courts of all fifty states.

Rob was active in Montana civic life for many years. He was a highly successful leader of ballot issue campaigns, and he ran for governor in 1996 and 2000. He continues his close ties with Montana, where he has children and grandchildren. Rob regularly visits and travels throughout the state, both to see family members and friends, and to explore Montana's great outdoors.

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Acknowledgments

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Kendall offered helpful comments on the manuscript. So also did Professor Andrew Morriss, former Dean at the Texas A&M School of Law. Professor Morriss is deeply conversant with Montana affairs: He is a Senior Fellow at another Montana policy center and has published widely on Montana history and law. Thanks also to Liam McCullom (J.D., University of Montana, Class of 2026) for cite-checking work.

I am indebted to many Montana lawyers who assisted me. They suggested cases, commented on cases, and described their experiences with their state's highest court. I am omitting their names to protect them from retaliation.

Finally, I am grateful to the many Montanans who, during the 1990s, persuaded me to turn my attention to the court. It has been an educational adventure.

Rob Natelson
Denver, Colorado
March 7, 2024

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Part I: The Background

A. Content of this Issue Paper

This Issue Paper offers Montanans a professional assessment of their state Supreme Court.[1] It is the author's second assessment. The first was a study published in 2012 by the Montana Policy Institute. That study examined leading decisions issued during the three decades prior to July 31, 2012, and assessed them against universally-recognized "rule of law" standards.

This new Issue Paper covers a shorter time period—July 31, 2012 to December 31,

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[1]*Bibliographical Footnote*. This note draws together in one place a list of all sources cited more than once.

Michael P. Dougherty, *Montana's Constitutional Prohibition on Aid to Sectarian Schools: "Badge of Bigotry" or National Model for the Separation of Church and State?* 77 MONT. L. REV. 41, (2016) [hereinafter *Dougherty*]

Andrew P. Morriss, *Opting for Change or Continuity? Thinking About "Reforming" the Judicial Article of Montana's Constitution*, 72 MONT. L. REV. 27 (2011) [hereinafter *Morriss*]

MONTANA CONSTITUTIONAL CONVENTION, PROPOSED 1972 CONSTITUTION FOR THE STATE OF MONTANA: OFFICIAL TEXT WITH EXPLANATION (official voter information pamphlet) [hereinafter "V.I.P"]

MONTANA CONSTITUTIONAL CONVENTION, 1971-1972, VERBATIM TRANSCRIPT (1981) [hereinafter VERBATIM TRANSCRIPT]

PIERCE C. MULLIN & RICHARD ROEDER ET AL., THE PROPOSED 1972 CONSTITUTION FOR THE STATE OF MONTANA (1972) [hereinafter MULLIN & ROEDER].

Robert G. Natelson, *Constitutional Coup? The Case that Promulgated a New Constitution for Montana*, 7 BRIT. J. AM. LEGAL STUD. 319 (2018) [hereinafter *Natelson, Cashmore*]

Robert G. Natelson, *Why Nineteenth Century Bans on "Sectarian" Aid are Facially Unconstitutional: New Evidence on Plain Meaning*, 19 FED. SOC'Y REV. 98 (2018) [hereinafter "*Natelson, Sectarian*"]

ROBERT G. NATELSON, THE MONTANA SUPREME COURT VS. THE RULE OF LAW (Montana Policy Institute, 2012), https://i2i.org/wp-content/uploads/The-MT-Supreme-Court-VS-The-Rule-of-Law.pdf [hereinafter "RULE OF LAW"]

Tyler M. Stockton, *Originalism and the Montana Constitution*, 77 MONT. L. REV. 117, 137 (2016) [hereinafter *Stockton*]

2023[2]—but its scope is wider. It addresses:

- leading Montana Supreme Court decisions since July 31, 2012, employing the earlier study's "rule of law" criteria;
- ways in which the court's jurisprudence has improved and failed to improve since 2012;
- features of the Montana state constitution that partly account for weaknesses in the court's constitutional jurisprudence;
- a fundamental error in interpretation that also partly accounts for weaknesses in the court's constitutional jurisprudence;
- how three profoundly erroneous decisions issued in 1999 contributed to some of the court's later errors; and
- the court's conduct since 2012 in conflicts with other branches of government and with the people's reserved rights of initiative and referendum.

B. The 2012 Study

The 2012 study was entitled *The Montana Supreme Court vs. the Rule of Law*. It is freely available,[3] so the following is only a brief synopsis.

As the title indicates, the study measured the court's case decisions against universally-recognized "rule of law" standards. It identified those standards as *clarity*, *stability*, *notice*, *fairness*, and *judicial restraint*. It explained why adherence to those standards is a necessary condition for economic prosperity and for complying with the U.S. Constitution's mandate that all states have a "republican form of government."[4]

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[2] In addition, this Issue Paper includes some discussion of the 2024 case of Forward Montana v. Montana, ___ Mont. ___, ___ P.3d ___, 2024 WL 351378 (2024).

[3] RULE OF LAW, *supra* note 2.

[4] U.S. CONST. art. IV, § 4.

The study documented reasons why the Montana Supreme Court is a more powerful component of the state's political system than the highest tribunals of most other states. It noted that the sheer extent of the court's power renders it crucial that the justices adhere to rule-of-law standards. It examined leading decisions issued over the three decades from 1982 until July 31, 2012, and tested them against the five rule-of-law components. In general, those decisions fell short on all five components.

C. The Montana Constitution

The 2012 study touched on some characteristics of the Montana state constitution that helped explain, although did not justify, deficiencies in the court's 1982-2012 jurisprudence. As detailed below, those characteristics also fostered deficiencies in its 2012-2023 jurisprudence. This Part I (C) offers some additional background.

1. Adoption of the Montana Constitution.[5]

The current state constitution was written early in 1972 by a convention consisting of 100 popularly-elected delegates. It was declared ratified after a contested referendum held on June 6, 1972.

Prior to 1972, Montana operated under a charter that became effective upon statehood in 1889. It shared certain common features with other state charters adopted during the latter half of the 19th century.

Among these features was the division of authority among different offices and agencies, and restrictions on state fiscal and contracting powers. The division of authority and restrictions on powers were the product of sad experience. Earlier in the 19th century, the absence of sufficient checks in state constitutions had encouraged official cronyism and

[5]The only peer-reviewed academic study of the adoption of the Montana constitution is *Natelson, Cashmore, supra* note 2. This section is based largely on that article.

other forms of corruption. Overspending (mostly on infrastructure) resulted in several states defaulting on public debt, or coming close to doing so.[6] After more checks on official power were inserted into state constitutions, those problems abated.

In the late 1960s, a coalition of liberal/progressive groups achieved political dominance within Montana.[7] They began to discuss "updating" the Montana constitution to allow government to be "more flexible"—that is, less restrained.

Several circumstances assisted them. First, the Anaconda Company, often a conservative force in Montana politics, was in the process of withdrawing from the state. Second, interest groups, such as the National Municipal League and the League of Women Voters, offered political and technical support for liberal constitutional change. Third, the federal government was funding efforts to re-write state charters to make them more liberal. This may explain why Montana was only one of several states ratifying new constitutions during the same period. Others included Florida (1969), Illinois (1971), Virginia (1971), and Louisiana (1975). There was a similar campaign in Texas, where an unsuccessful constitutional convention was followed by legislative amendment proposals—proposals the voters rejected.[8]

Whatever the precise dynamics in other states, it is clear that in Montana proponents of constitutional reform made extensive use of taxpayer funds.[9] They ran a promotional campaign and persuaded the legislature to authorize election of delegates to a

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[6]John Joseph Wallis, *Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852*, 65 J. ECON. HIST. 211, 216-17 (2005) (describing defaults and near defaults due to excessive debt and infrastructure spending).

[7]The Democratic Party was dominant in Montana at the time, but what gave the liberal coalition super-majority control was the addition of liberal Republicans. Liberal Republicans were then a significant feature of the political landscape, not only in Montana, but throughout the northern states.

[8] Texas State Historical Ass'n, Constitutional Convention of 1974, https://www.tshaonline.org/handbook/entries/constitutional-convention-of-1974.

[9]*Natelson, Cashmore, supra* note 2, at 330-31 (describing some of the uses of state resources) & 343 (describing the use of state and federal resources).

new constitutional convention. The election produced a decisive liberal majority.

As a group, these delegates were enthusiastic, well-meaning, dedicated, and conscientious. But they faced certain challenges—some of which they did not fully appreciate. Unlike, for example, the delegates to the 1787 U.S. Constitutional Convention, none seems to have had prior experience in constitution-drafting. A Montana Supreme Court decision barring state lawmakers from serving as delegates[10] limited the convention's collective experience with political processes.

One way to partially offset the lack of experience would have been to provide the delegates with useful and balanced information about constitutions and constitution-writing.[11] Instead, staffers, the convention leadership, and a National Municipal League lobbyist seem to have regulated the information flow to produce some pre-determined results.[12]

A challenge of which the delegates were more aware was the political dissimilarity between the convention as a group and the ratifying electorate. Although liberals had won a landslide victory in the delegate elections, the long-term preferences of the Montana electorate were significantly more conservative. If the proposed constitution turned out to be too liberal—or if the electorate perceived it as such—the proposal would lose in the ratification referendum.

Still another challenge was the law governing that referendum. For the constitution to be approved, the law required that the constitution win more than a majority of the Yes/No vote. It required an affirmative majority of all those who voted on *any* issue or candidate. If Mary Jones voted on another measure but abstained on the constitution, the

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[10]Forty-Second Legis. Assembly v. Lennon, 156 Mont. 416, 481 P.2d 330 (1971).

[11] For example, during the contemporaneous process in Texas, a panel of legal scholars headed by Professor George D. Braden was commissioned to provide an exhaustive analysis of the state constitution compared to its analogues in other states. THE CONSTITUTION OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS (George D. Braden et. al., eds., 1977) (2 vols.).

[12]*See Natelson, Cashmore, supra* note 2, at 333-36, for a fuller discussion of the information imbalance.

law treated her as a "No" vote on the constitution. The implications of this rule were publicized widely in the run-up to the June 6 referendum.

The convention and state authorities addressed the known challenges in several ways. The date of the referendum, the structure of the election, and the form of the ballot were shaped to encourage a "Yes" vote. The constitution's advocates dominated the mass media and, as noted above, deployed government resources to persuade the voters to approve the document.

The advocates also issued representations of constitutional meaning designed to assuage conservative doubts about the document. Part I(C)(3) explains the significance of these representations.

Despite the proponents' advantages, the referendum was extremely close. Among the Yes/No voters, those voting "Yes" amounted to fewer than 50.6 percent. But many electors who voted on all or some of the three other issues opted not to cast ballots on the constitution. Because of the previous publicity on the issue, it was virtually certain that some abstained because they knew their abstention would be counted as a "No."

Official returns showed the number of affirmative votes as less that 49 percent of those participating in the election. Perhaps a thorough recount would have shown different results, but a thorough recount was never conducted.

In view of these circumstances, Frank Murray, the Democratic Secretary of State, refused to certify that the constitution had been ratified. After an altercation with Murray, Governor Forrest Anderson, also a Democrat, purported to certify it himself. Anderson's decision stuck: The Supreme Court, in a controversial 3-2 decision,[13] ruled that the document had been approved.

[13]Montana ex rel. Cashmore v. Anderson, 160 Mont. 175, 500 P.2d 921 (1972), *cert. denied*, 410 U.S. 931 (1973).

2. Some Features of the Montana Constitution

The 1972 constitution elicits very strong opinions among Montanans. Those on the political right often see it as profoundly defective, even evil. Those on the left—including the state's "old guard" and the state's dominant media—celebrate it as among the very best of state charters, if not the absolute best.

The truth lies between those two extremes.

From a drafting standpoint, most of the 1972 Montana Constitution is unexceptionable. The preamble is majestic. The instrument is well organized and of workable length. It includes a declaration of rights. As is typical among state constitutions, it prescribes three branches of government, with a bicameral legislature, and a divided executive.

But it also suffers from flaws, and a few of those flaws are serious. Some derive from political ideas prevailing in 1972 that the intervening years have wholly or partially discredited.[14] Some derive from the delegates' lack of access to impartial information. For example, the 1889 constitution's checks on state fiscal powers were presented to the delegates as mere impediments to be cleared away; no one explained to the delegates the reasons behind them.

Other flaws derived from inadequate legal advice. Even in 1972, a competent constitutional lawyer could have predicted that the ban on appropriations for "sectarian"

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[14] *E.g., Morriss, supra* note 2, at 28 ("Since the 1972 Convention, legal and social-scientific analyses of courts and judges have advanced") & 30-31 ("some of the legal fashions of the late 1960s and early 1970s have not held up well in subsequent decades").

For example, the constitution shows some bias toward consolidation and centralization, *e.g.*, MONT. CONST., art. X, § 9 (combining state educational administration in two statewide boards) & art. VI, § 7 (limiting executive departments to 20). These represented advanced thinking in 1972. Today, many argue for competition among fragmented agencies as a better way to improve public services. *E.g.*, DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (1993).

education might violate the First Amendment.[15] Yet the potential First Amendment problems with the anti-sectarian clause were not raised at the convention. Competent constitutional lawyers also might have suggested that drafters add more guidance on how to interpret the document.[16]

In one case where the document did provide an interpretive guideline, the guideline was drafted incorrectly.[17] Article I, Section 10 permits courts to overrule the right of individual privacy on the showing of a "compelling state interest." The phrase was borrowed from the U.S. Supreme Court's "strict scrutiny" test, but it is only *one element* of that test.[18] The Montana Constitution is silent as to whether the other elements are included.

Furthermore, a competent constitutional lawyer would have told the delegates that the "compelling state interest" formula was not a good one if they wished to protect individual privacy, because the term was not a reliable guard against government overreach. For example, its first appearance was in a World War II case that *upheld* federal incarceration of 70,000 innocent American citizens of Japanese descent.[19]

The Montana Constitution's most serious and most pervasive defect consists of terms that are unclear or contradictory.[20] One illustration is Article II, Section 3, which recognizes

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[15]Part II(D)(7).

[16]*Morriss, supra* note 2, at 44 (mentioning the importance of such guidelines); *cf.* COLO. CONST. art. X, § 20(1) (providing an interpretive guideline for that article); U.S. CONST. art. I, § 8, cl. 18; art. IV, § 3, c. 2; amend. IX & amend. X (all providing interpretive guidelines).

[17]Part I(C)(2) (discussing the "compelling state interest" test).

[18]The wording of the test varies, but essentially it is as follows: (1) a government action that significantly infringes a fundamental right is void unless (2) the government proves (3) that the measure is necessary ("narrowly tailored"), (4) to further a compelling state interest (compelling governmental purpose).

[19]Korematsu v. United States, 323 U.S. 214 (1944).

[20]This problem is not unique to the Montana Constitution. *Morriss, supra* note 2, at 44 ("Several decades of battles in state courts over how to interpret vague education-finance language or open-courts provisions provide examples of the difficulties that can arise when constitutions err

> rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways.

Unlike the right to property, which had been honed by centuries of case precedent, when the constitutional convention met, the right "of pursuing life's basic necessities" had never been defined.[21] Thus, questions abound: What is a "basic necessity?" Food? Presumably so, but how much food and of what quality? Shelter? Presumably so, but how elaborate a shelter? Are vacations basic necessities? Is an automobile a basic necessity? On the automobile question, does it make a difference if a person lives in densely-populated Missoula (where urban transportation is available) or in sparsely-populated Petroleum County (where it is not)? Does the constitution impose different rules for people in different parts of the state?

In light of such questions, it is unremarkable that the Montana Supreme Court's treatment of the "basic necessities" right has been radically inconsistent.[22]

The constitution's text also is unclear as to whether "all lawful ways" modifies only the "seeking safety, health and happiness" rights or the other rights set forth in the same section. As illustrated by the decision in *Montana Cannabis Industry Ass'n v. Montana*,[23] the "all lawful ways" language can largely nullify any right it applies to.

Other uncertainties arise from the imprecise drafting of the constitution's environmental rights. Article II, Section 3 guarantees "the right to a clean and healthful

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on the side of vagueness.").

[21] Anthony B. Sanders, *Montana's Basic Necessities Clause and the Right to Earn a Living*, 84 MONT. L. REV. 75, 81 (2023) ("'pursuing life's basic necessities; is *sui generis* to Montana. A search of that phrase in American case law prior to 1972 yields zero results in the Lexis "All Courts" database.").

[22] *Compare* Wadsworth v. Montana, 275 Mont. 287, 911 P.2d 1165 (1996) (broad treatment of the right) *with* Wiser v. Montana, 331 Mont. 28, 129 P.3d 133 (2006) and Mont. Cannabis Indus. Ass'n v. Montana, 366 Mont. 224, 286 P.3d 1161 (2012) (narrow treatment).

[23] 366 Mont. 244, 286 P.3d 1161 (2012).

environment and . . . acquiring, possessing and protecting property . . ." Article IX, Section 1 provides in part, "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Among the questions this language provokes are:

- Property rights are limited by environmental factors, traditionally enforced by *the law of nuisance*. Do the environmental rights merely reflect the law of nuisance or are they additions?
- Assuming they are additions, how "clean" must the environment be? How "healthful" must it be? If the answer is "It depends," then on what factors does it depend? How are they to be weighed? Who weighs them?
- Economic prosperity makes people healthier. Yet the conditions necessary for prosperity may generate pollution. Consider a "rare earth" mine for supplying raw materials for electric vehicle batteries. The mine may (1) hurt human health by causing pollution but (2) benefit health even more by creating prosperity. Does the mine violate the right to a healthful environment?
- Is the ecological damage from the rare earth mine balanced against the claimed ecological benefits of electric vehicles? If so, how? Who does the balancing?
- Do increases in atmospheric carbon dioxide violate Montanans' right to a clean and healthful environment by warming the climate? Does it matter that far more people die of excessive cold than of excessive heat?[24]
- Developing one's land is a recognized property right. Yet the Article IX environmental right applies to individuals as well as the state. If development threatens the environment, which right prevails? Who decides?

These issues are subjects for public policy and private decision making, not for

[24]Doyle Rice, *Study: Cold kills 20 times more people than heat*, USA TODAY, May 20, 2015, https://www.usatoday.com/story/weather/2015/05/20/cold-weather-deaths/27657269/.

constitutional law. Judges have no expertise for resolving them. Even if judges did have the necessary expertise, granting them the final word is inconsistent with representative democracy.

During the 1972 ratification debates, the constitution's opponents questioned the content and extent of the environmental right. In response, advocates of the document responded in the only salable way possible: They assured the public that the environmental rights merely direct the legislature to take environmental values into account—they do not empower judges to decide whether laws and regulations are sufficiently "healthful" or "clean." In legal language, cases arising under the constitution's environmental rights were represented as "not justiciable." This representation was repeated many times,[25] and likely helped the constitution win its close victory.

Yet as we shall see, the Montana Supreme Court has disregarded that representation and has repeatedly issued decisions conflicting with it.[26]

The constitution's lack of clarity creates legal instability and uncertainty. By giving activist judges pretexts for deciding policy questions that belong to the people and their legislative representatives,[27] this lack of clarity promotes judicial oligarchy—a reality that

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[25]Most—not all—of the evidence is collected in Robert G. Natelson, *Montana Constitution Project Unveiled at UM,* MONT. LAWYER, May, 2008, at 14-15.

Partly because of a similar difficulty of definition, the U.S. Supreme Court has decided that whether a state has a "republican Form of Government" is non-justiciable. *Cf.* U.S. CONST. art. IV, § 4; Luther v. Borden, 48 U.S. 1 (1849).

[26] Part II(E)(2)(c).

[27]*See* Part II(E)(2)(c) (the Montana Supreme Court's use of the privacy right); Part II(E)(2)(b) (use of the environmental rights); Part II(D)(8) (use of uncertainties in university governance).

For another example of contradiction or uncertainty within the constitution, compare MONT. CONST. art. X, § 9(1) (giving the state board of education responsibility "for long-range planning, and for coordinating and evaluating policies and programs for the state's educational systems") with *id*. § 8 ("The supervision and control of schools in each school district shall be vested in a board of trustees").

conflicts sharply with the populist vision the constitution's framers were trying to implement.

3. A Fundamental Mistake in Interpreting the Montana Constitution

Another source of problems in the Montana Supreme Court's constitutional jurisprudence is the tribunal's adherence (most of the time) to an erroneous rule of constitutional interpretation.

When construing most legal documents, lawyers and judges typically seek the understanding (or "intent") of *those who rendered the document effective*. If the document is a contract, the jurist seeks the understanding (or intent) of the contracting parties. If the document is a statute, the guide is the intent of the lawmakers. If evidence of the lawmakers' actual intent is not available, the interpreter enquires into the public meaning of the text—that is, how the lawmakers likely understood it.

Thus, when judges speak of the "intent of the framers," they usually are speaking loosely. After all, no competent jurist interprets a statute (for example) by focusing on the intent of the attorneys in the legislature's drafting office. Competent jurists seek the intent or understanding of the lawmakers who adopted the measure. The intent of the drafters is important only insofar as it sheds light on the intent of the lawmakers.

It follows that in construing a constitution, the interpreter's task is to ascertain the understanding of the *ratifiers.*[28] In the case of the Montana constitution, the ratifiers were the voters at the June 6, 1972 ratification referendum.

The Montana Supreme Court has acknowledged the rule that the ratifiers'

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[28]For an extended discussion, see Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007). In some early state constitutions, the drafters and ratifiers were the same. *E.g.* VA. CONST. (1776).

understanding controls the meaning of the state constitution.[29] But all too often, the court consults only comments by the framers—the delegates at the constitutional convention. A 2016 survey of Montana Supreme Court decisions found that between 1972 and 2015, the justices cited or referred to the constitutional convention transcripts at least 164 times, while referring to ratification sources only thirteen times[30]—a pattern that continued through the period covered by this Issue Paper.[31]

In the 2008 case of *Montana v. Schneider*, the court justified its approach by claiming that the transcript represents the constitution's "legislative intent."[32] But this makes no sense. The convention did not "legislate" the document. The people legislated it when they voted on June 6, 1972—and at that time the transcript was still unpublished and unavailable to the general public.[33]

The court's heavy reliance on convention transcripts would be a mistake for interpreting almost any constitution, but it is particularly misleading for the Montana constitution. As noted in Part I(C)(1), there were significant differences between the political views of the convention delegates and those of the general public. In at least some cases, the general public, with its more conservative tenor, almost certainly understood constitutional meaning differently from the convention delegates.

Why does the court rely so heavily on the convention transcript? Part of the answer may be its relative convenience and availability. Part of the answer may lie in promotion

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[29]Mont. Ass'n of Counties v. State of Montana, 389 Mont. 183, 194-95 404 P.3d 733, 741 (2017) ("It is our task to interpret the Constitution by giving 'effect to the intent of the people adopting it").

[30]*Stockton, supra* note 2, at 137.

[31]*E.g.*, Bd. of Regents of Higher Educ. v. Montana, 409 Mont. 96, 102-04, 512 P.3d 748, 751-52 (2022); Brown v. Gianforte, 404 Mont. 269, 283-88, 488 P.3d 548, 557-60 (2021); Gazelka v. St. Peter's Hosp., 392 Mont. 1, 13, 420 P.3d 528, 537 (2018); Cross v. Van Dyke, 375 Mont. 535, 543, 332 P.3d 215, 220 (2014).

[32]347 Mont. 215, 220, 197 P.3d 1020, 1025 (2008).

[33]The transcripts did not become available until 1981. *Stockton, supra* note 2, at 138.

of the transcript by surviving delegates.[34] But part of the answer also be that sometimes the transcript offers more politically liberal results than the ratification record, and, as documented below, the court displays a distinctly liberal bias.[35] One of the justices, in fact, openly advertises her adherance to the left side of the political spectrum.[36]

The result of this interpretive error is frequent distortion of what the constitution actually means. If Montana voters had predicted some of the results of this mode of interpretation, they probably would have consigned the document to a crushing defeat.[37]

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[34]*Id*. at 139 (noting the convenience) & 117 (noting the practice of convention delegates suing to enforce their own "intent").

[35]*See, e.g*., Part II(D) (discussing the court's bias); Part II(E)(2)(b) (discussing environmental cases) & Part II(E)(1)(c) (discussing abortion cases).

[36] During much of the period Justice Gustafson has been on the court, she has displayed two flags in the back yard of her home. Both are political statements, and neither is an American or Montana flag.

The more troubling of the two portrays a so-called "peace symbol" on a rainbow-striped background. The symbol is, of course, a long-standing icon of the global Left. The rainbow stripes are, or reasonably can be interpreted as, a statement of support for the controversial LBGTQ+ agenda. Both signal a lack of impartiality and perhaps hostility to litigants with other viewpoints.

The display violates several sections of the court's own Montana Code of Judicial Ethics. *See* Rule 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety"); Rule 1.2, Comment 3 ("Conduct that compromises or appears to compromise the . . . impartiality of a judge undermines public confidence in the judiciary"); Rule 3.1 ("a judge shall not . . . (C) participate in activities that would appear to a reasonable person to undermine the judge's . . . impartiality"); Rule 3, Comment 3 ("Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality"); Rule 3.7, Comment 1 ("The activities permitted by paragraph (A) do not include those sponsored by or on behalf of organizations which have as a primary purpose advocating in political processes for or against change in the laws related to limited subject areas").

One wonders how the court, the media, and other opinion molders would have responded if a justice displayed "MAGA" iconography.

[37]This is almost certainly true of the trio of 1999 decisions discussed in Part II(E)(2). It is likely true also of Bd. of Regents of Higher Educ. v. Montana, 409 Mont. 96, 512 P.3d 748 (2022) (limiting gun rights), discussed in Part II(D)(8).

Part II: Cases From 2012 through 2023 Tested by "Rule of Law" Standards

A. Clarity

Legal rules should be clear, particularly those addressing crime and economic transactions. The 2012 study found that the court's decisions often fell below this standard.[38]

The overall level of clarity among many different cases can be difficult to measure, but this author's general impression is that the court's post-2012 opinions are more coherent than those written previously. Some of the credit for this belongs to Justice Baker, whose opinions usually are quite clear.[39]

Yet there still are plenty of cases marred by incoherence or needless repetition. An example of incoherence is MEA-MFT v. McCulloch.[40] The state's largest teacher's union challenged the constitutionality of a proposed legislative referendum (LR 123) that would have given tax relief based on specified revenue and expenditure calculations. The legislature delegated the calculations to the Legislative Fiscal Analyst, an employee of the legislature.

The plaintiff union posed the issue as whether the measure "unlawfully delegated legislative powers." Chief Justice McGrath's opinion for the court initially characterized the issue the same way.[41] As a practical matter, however, the calculations had to be delegated to someone, and the union and trial court said it should have been delegated to

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[38] RULE OF LAW, *supra* note 2.

[39] Illustrative of her legal ability is her opinion in Cross v. VanDyke, 375 Mont. 535, 322 P.3d 215 (2014) (distinguishing the constitutional law practice requirements of a supreme court justice from the Attorney General). But McLaughlin v. Mont. State Legislature, 405 Mont. 1, 493 P. 3d 980 (2021) is uncharacteristically weak. *See* Part III(B).

[40] 366 Mont. 266, 291 P.3d 1075 (2012).

[41] 366 Mont. 268, 291 P.3d at 1077.

the executive branch. But if the calculation was a legislative function, delegating it to the executive branch would run afoul of the Montana Constitution's ban on executive officials exercising legislative functions.[42]

As it turned out, Justice McGrath rescued the union from this conundrum by, in mid-opinion, recharacterizing the calculation as an executive function.[43] This gave the union a victory despite its ill-drafted pleadings—and left us with a decision that contradicts itself.

Another illustration of incoherence is the following excerpt from Justice McKinnon's opinion for the court in *Board of Regents of Higher Education v. Montana.*[44] The author's comments are added in [brackets].

> The intent of the Framers controls our interpretation of a constitutional provision. [This, as explained in Part I(C)(3), is not really true.] . . . We must discern the Framers' intent from the plain meaning of the language used and may resort to extrinsic aids only if the express language is vague or ambiguous . . . . . Even in the context of clear and unambiguous language, however, we determine constitutional intent not only from the plain language, but also by considering the circumstances under which the Constitution was drafted, the nature of the subject matter the Framers faced, and the objective they sought to achieve. [The last sentence directly contradicts the one immediately preceding.] . . . We must also consider that Montana's Constitution is a prohibition upon legislative power, rather than a grant of power. [This is not entirely true, either.][45]

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[42]MONT. CONST. art. III, § 1.

[43]366 Mont. at 273, 291 P.3d at 1080 ("plainly entailing execution of the law").

[44]409 Mont. 96, 512 P.3d 748 (2022). *See also* Gazelka v. St. Peter's Hosp., 392 Mont. 1, 420 P.3d 528 (2018) (a disorganized and repetitive opinion).

[45]The Montana Constitution, like the U.S. Constitution, is a grant of power from the people. *See* MONT. CONST., art. II, § 1 ("All political power is vested in and derived from the people."). The confusion in Justice McKinnon's opinion arises from the fact that the Montana constitution grants

> By the plain language of Mont. Const. art. X, § 9, the Board retains full independence over the MUS [Montana University System]. However, the Board remains subject to the legislative powers to appropriate and audit, legislatively determined terms of office, and the oversight of additional educational institutions as prescribed by law.[46] [Which is it? "full independence" or "subject to the legislative powers?"]

Also illustrative is Justice Sandefur's opinion for the court in *Lenz v. FSC Securities Corp*.[47] The decision had the evident purpose of correcting what one commentator has called "The War Against Arbitration in Montana."[48] Yet the opinion created uncertainties as well. For example, the opinion rendered the contract doctrine of "unconscionability" more confusing than it really is.[49]

The court issues too many opinions of unnecessary length. *Clark Fork Coalition v. Montana Department of Natural Resources & Conservation*[50] involved what Justice Sandefur's opinion for the court characterized as "narrow issues" of "statutory and constitutional construction."[51] Moreover, there was a controlling case precedent. Yet Justice Sandefur's opinion contained 15,670 words—not counting an additional 3505

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a lump of sovereign power, subject to exceptions, while the U.S. Constitution grants enumerated powers and reserves the portion of the "lump" not enumerated.

[46]409 Mont. at 96, 512 P.3d at 751.

[47]391 Mont. 84, 414 P.3d 1262 (2018).

[48]Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 39 (2005) (discussing the Montana Supreme Court's attack on contractual arbitration clauses).

[49]If a court finds a contract or a contract term "unconscionable," the court will void it. There are two kinds of unconscionability: (1) procedural, as when the conduct of one party compromises the free will of other party and (2) substantive, which means the contract violates public policy. An example of the latter is a loan at an illegal rate of interest.

The opinion confuses the two, and then treats a violation of public policy as outside the doctrine entirely. The opinion also is repetitive, overly long, and fails to appreciate that the reasons behind denial of arbitration in insurance contract actually extend beyond insurance contracts.

[50]403 Mont. 225, 481 P.3d 198 (2021).

[51]*Id*. at 236, 481 P.3d at 201.

words in the footnotes. He likewise employed nearly 13,000 words in his opinion in *Larson v. Montana*[52] and 16,970 words in his dissent in *Wittman v. City of Billings*.[53] In *Egan Slough Community v. Flathead County Board of County Commissioners*,[54] Justice Gustafson wrote over 12,000 words—most of them unnecessary to the resolution of the case.

Not all long opinions are unclear, and in some cases lengthy opinions are necessary. But length can impede clarity: contradictions are more likely, and the longer the opinion is, the more difficult it can be to find the key parts. In addition, the time spent writing and editing long opinions often can be used more fruitfully.

B. Stability

The rule of law requires reasonable consistency. That is one reason respect for precedent is central to our Anglo-American legal system. In fact, judges usually should follow case precedents even if they were arguably wrong when decided.

To some degree, we can measure stability through statistics. Before the 2012 study, another legal scholar and the present author entered queries in the leading legal database (Westlaw) and found that the Montana Supreme Court was overruling its own decisions by several orders of magnitude more than any other high court in states that, like Montana, do not have an intermediate appeals bench.[55] In preparing this Issue Paper, the author applied the same query to all of the Montana Supreme Court's reported decisions after the end date of the last study—that is, after July 31, 2012—though October 2, 2023.

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[52]394 Mont. 167, 434 P.3d 241 (2019). One reason for the opinion's excessive length was the unnecessary citation of long lists of cases, a practice disparagingly referred to as "string citation." *E.g.*, 434 P.3d at 256, 262.

[53]409 Mont. 111, 129-76, 512 P.3d 1209, 1220-48 (2022).

[54]408 Mont. 81, 506 P.3d 996 (2022).

[55]RULE OF LAW, *supra* note 2, at 8.

The results show that while the rate of overruling is still fairly high, the situation has improved markedly. The 2012 study reported that for the decade of 2001-10, the court issued 73 decisions overruling at least 230 precedents—an annual rate of 7.3 overruling cases and 23 overruled cases. During the 19-month period from Jan 1, 2011 to July 31, 2012, the court issued 10 cases overruling at least 39 precedents—an annual rate of 6.3 cases overruling 24.6 cases.

However, for the period from August 1, 2012 to October 2, 2023, the query found 32 cases overruling 47 precedents, or an annual average of only 2.9 cases overruling 4.2.[56]

That is the good news. Now for two items of bad news:

The first item of bad news is that the court often fails to follow its own rules. The court says that when a government action impairs a "fundamental right," the action is invalid unless the state can show that there is a "compelling state interest" supporting it.[57] But it does not follow this standard consistently. When fundamental rights come into conflict, it favors some over others for no discernable reasons.

Similarly, the court says it upholds a law that does not impair a fundamental right unless the person objecting to it shows it to be unconstitutional beyond a reasonable doubt.[58] Justice Sandefur argues that this rule is improper, and he may be correct.[59] But

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[56]The query was DA(AFT 7-31-2012) & "IS OVERRULED" "WE OVERRULE" "ARE OVERRULED" OVERRULING ("TO THE EXTENT" /P (OVERRUL! REVERS!)) "WE EXPRESSLY OVERRULE" "ARE EXPRESSLY OVERRULED" "IS EXPRESSLY OVERRULED".

Other than the date, this was the same query as that used in 2012, operating on the same database.

Just before publication, the author conducted a supplemental search for the period from Oct. 3, 2023 through Dec. 31, 2023. During that period, one additional case overruled five previous ones. Matter of Z.N.-M, 413 Mont. 502, 538 P.3d 21 (2023).

[57]*E.g.*, Armstrong v. Montana, 296 Mont. 361, 989 P.2d 364 (1999).

[58]Bd. of Regents of Higher Educ. v. Montana, 409 Mont. 96, 102, 512 P.3d 748, 751 (2022); Brown v. Gianforte, 404 Mont. 269, 283, 488 P.3d 548, 557 (2021); Gazelka v. St. Peter's Hosp., 392 Mont. 1, 4, 420 P.3d 528, 531 (2018); Williams v. Bd. of Cnty. Comm'rs of Missoula Cnty., 371 Mont. 356, 362, 308 P.3d 88, 93 (2013); Espinoza v. Mont. Dep't of Revenue, 393 Mont. 446, 458, 435 P.3d 603, 608 (2018).

[59]His contention is that proof beyond a reasonable doubt is a way of measuring factual

the point here is that the court is inconsistent. Sometimes it follows the "reasonable doubt" rule, but it also seems to waive it for parties in certain favored categories.[60]

When a court fails to follow rules adopted in prior cases, it silently overrules those prior cases. Those silent overrulings do not show up in the statistics.

The other item of bad news is that there are some cases that really should be overruled, and the justices have not done so.

There are at least three reasons for overruling a case precedent:

- If the legislature or the people (by initiative or referendum) have mandated that the case be overruled.
- When conditions have changed so much that a ruling designed to further a good principle now undermines that principle. For example, a minimum time rule adopted when the major medium of long-distance communication was the U.S. Mail may undermine its purpose in the days of electronic mail.
- When the prior decision was an abuse of the judicial power or otherwise clearly erroneous.

Part II(E)(2) discusses three major cases the court should have overruled as abuses of the judicial power. All were decided in 1999, during the period of the court's maximum overreach. Instead of setting them aside, however—or at least isolating them to their facts—the court has doubled down on them.

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proof, not comparing legal texts. Espinoza v. Mont. Dept. of Revenue, 393 Mont. 446, 479-80, 435 P.3d 603, 622 (2018) (Sandefur, J., concurring).

[60] *E.g.*, Mont. Immigrant Just. All. v. Bullock, 383 Mont. 318, 371 P.3d 430 (2016) (striking down statute denying illegal aliens state benefits as preempted by federal statute, although the measure could have been reconciled with the federal statute and although U.S. CONST., art. I, § 9, cl. 1, recognizes the power of states to regulate migration across their own borders). *See generally* Part II(D).

C. Notice

The 2012 study identified instances in which the court issued decisions without proper notice to those affected.[61] It also identified instances in which the court delayed issuing its opinion until it was too late for the losing party to respond effectively.

This pattern has, unfortunately, continued. In *Montana Association of Counties v. Montana,*[62] (referred thoughout this paper as the *MACo* case) the court decided the validity of a ballot issue without holding a factual hearing or permitting a trial court to hear the case first. In *Larson v. Montana*,[63] it delayed its opinion until it was too late for disaffected parties to do anything about it.

Moreover, as part of the 2021 McLaughlin Controversy discussed in Part III, the court quashed a legislative subpoena at the request of a person who did not receive the subpoena and without notice to the legislative body that issued it.[64]

Another serious notice failure occurred in *Espinoza v. Department of Revenue*.[65] The plaintiffs challenged the authority of the Department of Revenue to issue a particular rule. But the court decided the case on an entirely different ground—that the underlying statute was unconstitutional. As Justice Rice pointed out in his dissent:

> [T]his case was pled and litigated as a challenge brought by the Plaintiffs against the Department's enactment of Rule 1 . . . No challenge to the constitutionality of [the statute] was ever made or noticed and, therefore, the Attorney General was not provided an opportunity to appear and defend its constitutionality. While the State is a party, and therefore, had notice of the

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[61] RULE OF LAW, *supra* note 2, at 11.

[62] 389 Mont. 183, 404 P.3d 733 (2017).

[63] 394 Mont. 167, 434 P.3d 241 (2019) (ruling that the Green Party was ineligible for the ballot nearly three months after the election, although the case had been submitted on briefs more than two months before the election).

[64] *See* Part III.

[65] 393 Mont. 446, 435 P.3d 603 (2018).

> proceeding itself, no challenge to the statute was made within the proceeding, and, consequently, the issue was not noticed, briefed, or argued. The Court has raised the constitutionality of the statute *sua sponte* [on its own accord]. Striking a statute under such circumstances, including without notice, briefing or argument, and an opportunity for the parties and Attorney General to argue the issue, is a violation of due process and an inappropriate exercise of the Court's powers.[66]

The Attorney General was not the only party denied due notice. So were the plaintiffs and other supporters of the underlying statute.

Still another case illustrating the court's disregard of notice requirements is *City of Missoula v. Mountain Water Co.*[67] During the course of the litigation, the trial court allowed the city to abuse normal procedures for the exchange of documents. Over an extended period of time, the city stonewalled Mountain Water's (entirely proper) request for disclosure. But then only three weeks before trial, the city dumped 26,351 documents onto the company's lawyers. This rendered it extremely difficult for the company's lawyers to both review those papers and prepare for trial. Oddly, however, the court—over the dissents of Justice Rice and McKinnon—did not discipline the city's lawyers or require a new trial.

D. Fairness

1. Introduction

Since the early 1980s, the court has shown a pattern—not unbroken, but clearly discernable—of favoring some kinds of parties over others. Favored parties are those in the traditional liberal political pantheon: labor unions, public schools, environmental

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[66]Espinoza v. Mont. Dep't of Revenue, 393 Mont. 446, 495, 435 P.3d 603, 631 (2018). (Rice, J. dissenting).

[67]384 Mont. 193, 378 P.3d 1113 (2016).

groups, government interests (including tribal governments), liberal Democrats, and (most recently) undocumented immigrants. Disfavored parties include property owners, taxpayers, businesses, traditional religions, and conservative Republicans.

A dramatic example of how this favoritism works is the 2012 case of *Reichert v. State ex rel. McCulloch*.[68] In that case, the justices *permitted* a group of liberal citizens with no apparent standing to sue to maintain a challenge to a proposed referendum passed by the legislature. Yet the court *prohibited* the conservative lawmakers who had supported the measure from intervening as parties—even though their interest was distinctly more significant than that of the plaintiffs.

More recently, in *Forward Montana v. Montana*,[69] the court *granted* politically "progressive" plaintiffs reimbursement for attorneys' fees for their successful challenge of an allegedly unconstitutional law. The court did so although it previously had *denied* attorneys' fees to conservative plaintiffs in an analogous situation—and even though the burden and expense born by the conservative plaintiffs had been far heavier.

It is telling, perhaps, that several Montana lawyers have assured the author that they can predict case results just by knowing the political profiles of the parties. The cases profiled in this Part II(D) seem to bear them out.[70] On the other hand, when two favored groups or two disfavored groups are on opposite sides of the issue, the level of predictability is less.[71]

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[68]365 Mont. 92, 117-18, 278 P.3d 455, 473 (2012).

[69] ___ Mont. ___, ___ P.3d ___, 2024 WL 351378 (2024). The earlier case was Western Tradition Partnership, Inc. v. Attorney General, 363 Mont. 220, 271 P.3d 1 (2011), *reversed sub nom*. American Tradition Partnership, Inc. v. Bullock, 567 U.S. 516 (2012). For a detailed the respective burdens, see Forward Montana, ___ P.3d at ___ (Rice, J. dissenting) (concluding that "this case was a catwalk compared to *Western Tradition*").

[70]*See also* MEA-MFT v. McCulloch, 366 Mont. 266, 291 P.3d 1075 (2012) (where the court rescued the state's leading teachers' union from a mistake central to the case). This case is discussed in Part II(A).

[71]*E.g.*, Citizens for a Better Flathead v. Bd. of Cnty. Comm'rs of Flathead Cnty., 385 Mont. 156, 381 P.3d 555 (2016) (awarding the victory to county officials against an environmental group); N. Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs, 366 Mont. 399, 288 P.3d 169 (2012)

The 2012 study illustrated the extent of the court's political bias by tabulating its treatment of ballot measures over the preceding 30 years.[72] The study identified which ballot measures could be characterized as either "conservative" or "liberal." It then dropped the others and tabulated the results of the cases adjudicating the validity of the conservative and liberal measures.

Of course, either a conservative or a liberal measure may suffer from legal faults. But the court found faults only in the conservative ones. Over a period of three decades, the court struck down almost every conservative ballot issue while upholding every liberal one. The alignment was nearly perfect. A pattern that consistent does not arise by accident.

In the period covered by this Issue Paper, the pattern has continued, both in ballot measure cases and in other kinds of cases.

2. Ballot Issue Bias, 2012-2023

During the period between July 31, 2012 (the end-date of the last study) and the end of 2023, the court voided the following "conservative" measures:

- a legislative referendum for tax relief;[73]
- a legislative referendum for election of Supreme Court justices by district;[74]
- a legislative referendum limiting illegal immigrants' access to state

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(awarding victory to public school interests over an environmental group). *Cf.* Mont. AFL-CIO v. McCulloch, 384 Mont. 331, 380 P.3d 728 (2016) (handing a victory to establishment conservative and liberal interests, who were on the same side).

[72]RULE OF LAW, *supra* note 2, at 18.

[73]MEA-MFT v. McCulloch, 366 Mont. 266, 291 P.3d 1075 (2012), struck down LR 123, a tax relief measure before the public vote on it. *See* Part II(A).

[74]McDonald v. Jacobsen, 409 Mont. 405, 515 P.3d 777 (2022). This decision was erroneous on justiciability as well as substantive grounds. Part II(E)(1).

services;[75]

- a constitutional initiative strengthening the rights of crime victims (the *MACo* case);[76] and
- a constitutional initiative to reform and cap property taxes.[77]

By contrast, the bench upheld both "liberal" initiatives that came before it:

- A constitutional initiative that would expand the state constitution's guarantee of free elementary and secondary education to include free kindergarten;[78] and
- an open primary constitutional initiative designed largely to promote election of moderate-to-liberal candidates over conservative candidates.[79] In that case, the court applied standards distinctly different from those it had applied to conservative ballot measures.[80]

Larson v. Montana,[81] while not involving a ballot issue per se, also fit the general pattern. Over Justice McKinnon's dissent, Justice Sandefur's opinion for the court created a new cause of action against the secretary of state over the sufficiency of petitions for ballot qualification—and then granted a victory to the state Democratic Party over its Republican counterpart.

Specifically, *Larson* granted the Democratic request to disqualify the Green Party

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[75]Mont. Immigrant Just. All. v. Bullock, 383 Mont. 318, 371 P.3d 430 (2016). *See also* Part II(B).

[76]Mont. Ass'n of Counties v. State of Montana, 389 Mont. 183, 404 P.3d 733 (2017). It is hard to defend this decision. *See* Part II(E)(2)(a).

[77]Monforton v. Knudsen, 413 Mont. 367, ___ P.3d ___ (2023).

[78]Meyer v. Knutsen, 409 Mont. 19, 510 P.3d 1246 (2022).

[79]Montanans for Election Reform Action Fund v. Knudsen, 414 Mont. 135, ___ P.3d ___, 2023 WL 8103461 (2023). See Part II(E)(2)(a).

[80]*See* Part II(E)(2)(a).

[81]394 Mont. 167, 434 P.3d 241 (2019).

from the ballot.[82] The court set aside the Secretary of State's determination of ballot sufficiency based on its own intensive review of 87 petition signatures. This was an unusual breach in the judicial deference usually afforded coordinate branches of government.

The sole break in the "liberals/win, conservatives/lose" pattern was more apparent than real. Initiative 171 can be classified as a "conservative" measure because it would have prevented the state from cooperating with the federal Patient Protection and Affordable Care Act (Obamacare). In *Hoffman v. Montana*,[83] the court refused to employ its original (trial) jurisdiction to void I-171 before the election.

The reason this victory was merely apparent was that state authorities already had rendered I-171 politically unsalable. They affixed a fiscal note to the measure "informing" voters that it would cost the state a net of nearly $3 billion over the next five years. The figure was "based on an assumption" that if the state refused to participate in the Affordable Care Act "the federal government would end the state's Medicaid Plan" and certain other grant programs. However, two years earlier, the U.S. Supreme Court had ruled specifically that the federal government could not punish non-participating states in that way.[84] Thus, the court could allow conservatives a "victory" because another state agency already had assured their defeat.[85]

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[82]The Democrats sought to keep the Green Party off the ballot to avoid a split in the left-of-center vote. The Republicans wanted the Green Party to be on the ballot so as to split that vote.

The Democrats brought in legal counsel, not admitted to practice in Montana, from the Democratic National Committee's national law firm, Perkins Coie. The Montana Supreme Court conceded that counsel's appearance was improper, but ruled that it did not prejudice the other side.

One wonders if this was true. It is hard to believe the presence of a high-powered, highly-specialized law firm on one side did not prejudice the other side. The Perkins Coie lawyer signed legal papers at all stages of the case, suggesting extensive involvement.

[83]374 Mont. 405, 328 P.3d 604 (2014).

[84]Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

[85]Among the ballot measures considered by the court during this period, I-181 is not included in this Issue Paper because one cannot place it clearly in either the conservative or the

In sum: During the 2012 to 2023 period, the court continued the pattern of (1) sustaining every liberal ballot measure challenged for legal insufficiency while (2) voiding nearly every conservative ballot measure.

3. Favoring Environmental Interests

Part I(C)(2) pointed out that poorly-drafted provisions in the state constitution invite pretexts for judicial overreaching. Dramatic examples have occurred in environmental cases, where the Montana Supreme Court has seized policy making authority from the legislature.

In 1999, the court decided *Montana Environmental Information Center v. Department of Environmental Quality* ("*MEIC*").[86] *MEIC* ruled that the judicial branch, not the legislature, would define the scope of the environmental rights. During the 2012-2023 period, the court relied on *MEIC* to micromanage environmental policy in a way that favors the interests of environmental groups over landowners.

A good example is Chief Justice McGrath's treatment in *Park County Environmental Council v. Montana Dep't of Environmental Quality*.[87] A mining company had applied for exploration licenses—not for permission to mine, but only to explore. First, the Department of Environmental Quality (DEQ), which supposedly represents the expertise necessary to examine environmental questions, reviewed the application. Next, the district judge exhaustively reviewed the DEQ's review. Then the Supreme Court reviewed the district judge's review.

In addition to second-guessing DEQ, Chief Justice McGrath struck down a 2011

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liberal column. The measure would have created a Montana Biomedical Research Authority. That sounds "liberal," but I-181 was opposed by both right and left leaning establishment groups. The court denied jurisdiction under MCA § 3-2-202. Mont. AFL-CIO v. McCulloch, 384 Mont. 331, 380 P.3d 728 (2016).

[86]296 Mont. 207, 988 P.2d 1236 (1999).

[87]402 Mont. 168, 477 P.3d 288 (2020).

statute designed to reduce project delays. He said the statute did not leave "adequate" remedies for enforcing the Montana Constitution's environmental rights. As the court did in *MEIC*, he based his conclusion largely on the supposed expectations of constitutional convention delegates while neglecting entirely the representations made to the ratifying electorate.[88]

In *Park County,* the proposed mineral exploration was not on public land, but on *the applicant's own land*. Of course, property rights are as much a part of the Montana Constitution as environmental rights. Both are recognized in the same section of Article II. Yet *Park County*, like *MEIC*, exalted environmental rights while minimizing property rights. Justice McGrath preemptively decided that mining is subject to whatever laws or regulations the state wishes to adopt, apparently no matter how confining they may be.[89]

On the other hand, since 2012 the court generally has rebuffed attempts by environmentalist groups to force landowners and state agencies to make the same environmental analysis over and over again.[90] Additionally, it has avoided using the Article IX right to police private conduct.

MEIC is discussed further in Part II(E)(2)(b).

4. Disfavoring Economic Rights (other than the Abortion Business)

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[88] *Id*. at 192-94, 477 P.3d at 303-04.

[89] *Id*. at 201, 477 P.3 at 308 ("Government regulation of mining has never been held to pose an undue burden on private property rights."). This is not really true. *See* Sterling v. Constantin, 287 U.S. 378 (1932).

[90] *E.g.*, Clark Fork Coal. v. Mont. Dep't of Nat. Res. & Conservation, 403 Mont. 225, 481 P.3d 198 (2021); N. Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs, 366 Mont. 399, 288 P.3d 169 (2012). It should be pointed out, though, that the *N. Plains* ruling benefitted the public school system, a traditional favorite of the court. *See* Part II(D)(7). In his opinion for the court, Chief Justice McGrath went out of its way to emphasize that this decision protected "substantial income for public schools." 288 P.3d at 175.

The dismissive treatment of property rights in *Park County* also surfaces in other kinds of cases. The court never requires authorities to justify limits on property rights by showing a "compelling state interest." Nor does it interpret regulatory statutes narrowly to limit state intrusion. On the contrary, it construes property rights narrowly and anti-property regulations broadly.

In 2010, the court upheld what was essentially an official plundering expedition against a Montana utility, which the U.S. Supreme Court unanimously reversed.[91] But a more recent plundering expedition has gone unchecked. This was the Missoula City Council's seizure of Mountain Water Company. The case was *City of Missoula v. Mountain Water Company*.[92]

From this author's perspective, the Missoula City Council's decision seems to have been based more on socialist ideology than on any real need. It was essentially undisputed that the company had done a competent job delivering its product, and had been "a good corporate citizen."[93]

The company argued that the city was attacking its fundamental right to property and should be required to justify its attack with a "compelling state interest." In her opinion for the court, Justice Cotter wrote that the company had provided "no legal authority in support of their contention that the private property right is elevated in the constitution above the right of eminent domain."[94] This was an astounding statement: It is elementary that eminent domain is a state power, not a "right." And like any other state power, it should override an Article II right only if the government shows a compelling state interest.

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[91]PPL Mont., LLC v. Montana, 565 U.S. 576 (2012), *reversing* 355 Mont. 402, 229 P.3d 421 (2010). The case was an attempt by the state to impose retroactive "rents" on the utility.

[92]384 Mont. 193, 378 P.3d 1113 (2016).

[93]384 Mont. at 229, 378 P.3d at 1138.

[94]384 Mont. at 220, 378 P.3d at 1133.

To uphold the seizure, the trial court applied a state statute[95] by which the city need show only that the expropriation was "more necessary" than leaving the company alone. The factors listed by the trial judge to show that condemnation was "more necessary" illustrated both socialist bias and (what may be the same thing) economic ignorance.[96] For example, the private company's profit motive was treated as a factor supporting condemnation.[97] But in the real world, the profit motive usually is an incentive to efficiency and to good customer service. The trial court also cited "public opinion" as a factor in favor of expropriation[98]—although a central purpose of all constitutional rights is to protect minorities *against* public opinion.

The Montana Supreme Court affirmed the trial court's conclusion and essentially agreed with its methodology.

In *MC, Inc. v. Cascade City-County Board of Health,*[99] Great Falls Casino owners had constructed smoking areas at great expense, relying on a standing interpretation of state law by both state and local authorities. When the authorities changed their position and claimed the smoking areas did not comply with state law, the trial court sided with the casino owners.

In a unanimous opinion authored by Justice Rice, the court reversed. The tribunal's decision required the smoking areas to be abandoned or completely remodeled, at great additional expense.

One defect in this decision was the court's failure to apply, or even consider, the "rule of practical construction." This is a centuries-old guideline for interpreting unclear statutes. The rule of practical construction is that a consistent and long-standing practice

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[95]MONT. CODE ANN. § 70-30-111.

[96]Justice Rice collected some of these factors in his dissent. 384 Mont. at 234-35, 378 P.3d at 1142.

[97]384 Mont. at 211, 378 P.3d at 1127.

[98]384 Mont. at 224, 378 P.3d at 1135.

[99]378 Mont. 267, 343 P.3d 1208 (2015).

can "liquidate" (clarify) an unclear legal text. The statute in *MC, Inc.* was unclear but it also was the subject of a long-standing uniform interpretation—one favorable to the casino owners.

In *MC, Inc*., the court granted no deference to the enforcing agencies' longstanding interpretation of the law. On the other hand, in *Park County Environmental Council v. Montana Dep't of Environmental Quality*,[100] the court decided that an agency's regulations should be afforded "great deference."[101] The chief relevant distinction between the cases seems to be that in *MC, Inc*. the agency interpretation respected property rights while in *Park County* the agency's interpretation did not.

Of course, the rule should be exactly the opposite. In cases like *MC, Inc.*, the agency's view should be respected because it is an admission against the agency's interest. In cases like *Park County*, where the agency's interpretation serves its own interest, the court should be more skeptical.[102]

Chief Justice McGrath's opinion for the court in *Park County* stated that "Government regulation of mining has never been held to pose an undue burden on private property rights."[103] In fact, however, whether a mining regulation conflicts with property rights depends on the terms of the regulation and the rights being regulated. Regulations that serve no public purpose are invalid under the Due Process Clause of the U.S. Constitution's Fourteenth Amendment.[104]

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[100]402 Mont. 168, 477 P.3d 288 (2020).

[101]402 Mont. at 180-81, 477 P.3d at 295. *Park County* is discussed further in Part II(D)(3).

[102]This may be one reason why the U.S. Supreme Court is edging away from its *Chevron* doctrine. Amy Howe, *Justices schedule major cases on deference to federal agencies*, SCOTUS Blog, Nov. 17, 2023, at https://www.scotusblog.com/2023/11/justices-schedule-major-cases-on-deference-to-federal-agencies/.

[103]402 Mont. at 201, 477 P.3d at 308.

[104]U.S. CONST. amend. XIV, § 1 (". . .nor shall any State deprive any person of life, liberty, or property, without due process of law").

States have broad discretion to regulate mining, but that discretion is not unlimited. Sterling v. Constantin, 287 U.S. 378 (1932).

The same pattern—favorable treatment for regulations that limit property rights and disfavor for regulations that protect property—appears in the court's treatment of land zoning. In *Williams v. Board of County Commissioners of Missoula County*,[105] Justice Cotter, writing for the court, first recited the maxim that laws are presumed constitutional and are not found unconstitutional unless proven to be so beyond a reasonable doubt. But it is plain the court granted no deference to in this case.[106]

The court voided a statute that promoted economic freedom by allowing landowners to veto zoning proposals covering their own property. The court assumed that the measure delegated "legislative power" to the landowners, and then enlisted rules normally applied when a legislature delegates discretion to government officials.

The claim that the protest provision was a delegation of legislative power is, to be blunt, utter nonsense. The provision merely limited the statute's coverage by creating an exception upon the happening of a particular event. Laws frequently impose rules *unless* an otherwise-affected person takes certain action, such as filing a particular document. In the *Williams* case the document was a protest signed by a specified minimum of property owners. Lawyers call such exceptions "provisos" or "conditions subsequent." For a state's highest court not to understand this is extraordinary.

Justice McKinnon's dissent also was flawed. She erroneously characterized the statute's condition *subsequent* as a condition *precedent*, which it clearly was not. This gave the majority a reason to dismiss her concerns.[107]

On the other hand, in *Egan Slough Community v. Flathead Co Board of County*

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[105]371 Mont. 356, 308 P.3d 88 (2013).

[106]In his dissent, Justice Rice observed that there is a fundamental right to property; there is no right to zone. *Id.* at 379, 308 P.3d at 103. His observation highlights the perversity of the court's anti-property, pro-regulation bias.

[107]If the statute provided that filing a document with a certain number of signatures imposed a zoning scheme on everyone else, the filing would have been a condition precedent. ("Precedent" because it preceded the zoning.) It also likely would have been a delegation of legislative power. As this example illustrates, conditions precedent and subsequent can be subject to different legal rules.

Commissioners,[108] the court gave great deference to a zoning restriction that impaired property rights. In fact, it went out of its way to do so, opining at great length on matters that did not control the result.

Also worthy of notice is *Wittman v. City of Billings*.[109] The conclusion of Justice Rice's opinion for the court was unremarkable: A homeowner does not have a "reverse condemnation" claim for damages due to a single (although very serious) backup in a city sewer system. However, the opinion was written in a confusing manner and contained landmines for the future. For example:

- The opinion said that compensation is due only if the government seizes property for "public use," not for other uses. This rule, construed liberally, would free a city from having to compensate if it simply decreed that X must transfer his land to Y.[110]
- It asserted that compensation is due only if a taking is "permanent."[111] But in our property law system, most interests in land are *not* permanent. A city should not escape compensation by condemning a 100-year lease (or even a one-year lease) rather than a fee simple. Later in the opinion, the court seemed to back down from the requirement of permanence.[112]
- The opinion drew a sharp distinction between government exercises of eminent domain (requiring compensation) and the "police power" (not requiring compensation). In fact, exercises of the police power that destroy

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[108]408 Mont. 81, 506 P.3d 996 (2022).

[109]409 Mont. 111, 512 P.3d 1209 (2022).

[110]409 Mont. at 124, 512 P.3d at 1217; *cf.* Kelo v. City of New London, 545 U.S. 469 (2005) (sustaining as constitutional, although subject to compensation, the transfer of land from one owner to another).

[111]409 Mont. at 127, 512 P.3d at 1218.

[112]409 Mont. at 127, 512 P.3d at 1219 ("though we do not categorically hold that temporary invasions cannot sustain a condemnation claim").

the value of property generally require compensation.[113]

- The opinion seems to largely read out of the state constitution the rule that compensation is due for "damaging" property as well as "taking" it—a point central to Justice Sandefur's dissent.[114]

5. Favoring Tribal Governments

Just as the court tends to favor governments in general,[115] it also tends to favor Indian tribal governments. (Of course, the interests of a tribal government may be at odds with those of individual Indians.) *In re Crow Water Compact*[116] upheld a water compact that benefited the tribe while compromising the ability of prior water users (mostly not tribal members) to develop their rights further.

To be sure, a mainstream court may have reached the same decision. But out of the mainstream was the ruling in *Northern Cheyenne Tribe v. Roman Catholic Church*.[117] It was a ruling that illustrated the wry maxim that no good deed shall go unpunished.

For many years, a mission of the Roman Catholic Church had maintained a charitable presence on the Northern Cheyenne reservation, providing tribal members with

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[113] Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992). This often is called a "regulatory taking."

[114] Other examples of the court's deference to government infringements on economic rights during the 2012-2023 period include Billings Yellow Cab, LLC v. Montana, 376 Mont. 463, 335 P.3d 1223 (2014) (upholding an anti-competitive regulation against equal protection and due process challenges); Mont. Cannabis Indus. Ass'n v. Montana, 366 Mont. 224, 286 P.3d 1161 (2012) (rejecting a challenge to a state ban on sale of an otherwise legal product); Netzer Law Office, P.C. v. Montana, 410 Mont. 513, 520 P.3d 335 (2022) (upholding a measure forbidding business owners from conditioning employment on vaccination status); and Westview Mobile Home Park v. Lockhart, 413 Mont. 477, 538 P.3d 1 (2023) (prohibiting no-cause terminations of periodic tenancies in mobile home parks).

[115] Parts II(D)(7) & (8).

[116] 382 Mont. 46, 364 P.3d 584 (2015).

[117] 368 Mont. 330, 296 P.3d 450 (2013).

educational services and direct assistance. It also occasionally gave money to the tribal government.

The mission conducted fund raising appeals depicting the poverty and misery of some tribal members. The accuracy of the depictions was not questioned.

The tribe sued the Catholic Church, stating several claims, including one for "cultural genocide." The Montana Supreme Court affirmed most of the trial judge's dismissals but resurrected the tribe's claim for a "constructive trust."

To understand the oddity of the "constructive trust" ruling, some background is necessary. In comparatively rare situations, courts require a defendant who has obtained a benefit to transfer all or some of that benefit to the plaintiff. Transfer of a benefit is called *restitution of unjust enrichment* or simply "restitution." (This is different from "restitution" in criminal law, where the word is a synonym for compensation.)

The courts have developed different kinds of restitution for different circumstances. A constructive trust—which is a remedy, not a real trust—may be the most severe form of restitution. Before inflicting it on a defendant, therefore, courts generally require proof that the defendant imposed a loss on the plaintiff or is guilty of some wrongdoing.

The *Restatement of Restitution*, a widely recognized authority,[118] explains that a plaintiff is entitled to a constructive trust only when "a defendant is unjustly enriched by the acquisition of title to identifiable property *at the expense of the claimant* or in *violation of the claimant's rights*."[119] (Italics added.) If the defendant has profited by, for example, violating the plaintiff's patent or copyright privileges, a court may impose a constructive trust on the defendant. This forces the defendant to give up his ill-gotten gains.

In the *Northern Cheyenne Tribe* case, the Church was guilty of no wrongdoing and

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[118] The RESTATEMENT OF RESTITUTION is one the series of "Restatements" issued by the American Law Institute. While not binding authority, they are considered highly persuasive. *See* Brooklyn Law School, *Restatements of the Law*, https://guides.brooklaw.edu/restatements.

[119] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, § 55 (2023).

its fund raising did not occur at the tribe's expense nor in violation of its rights. Nevertheless, the Montana Supreme Court imposed a constructive trust on the Church. Justice Morris's opinion deployed precedents in a misleading way—by, for example, drawing conclusions about the remedy of constructive trust from rules governing other forms of restitution. The opinion also failed to explain this: How could it ever be "just" to divert donor contributions given to a religious order for a religious mission and bestow them on a secular tribal government instead?

The only way to defend the *Northern Cheyenne Tribe* decision is to argue that the court was following a 2002 case precedent.[120] That precedent misconstrued a state statute and overruled centuries of *prior* precedent. It was what lawyers call a "rogue case," and should itself have been limited or overruled.[121]

6. Favoring Undocumented Immigrants

Similarly reflective of the court's bias in favor of certain kinds of parties is *Ramon v. Short*,[122] where the court waived the normal rules of standing for an undocumented immigrant.

In the same general category is *Montana Immigrant Justice Alliance, MEA-MFT v. Bullock*.[123] In 2011, the legislature placed Legislative Referendum 121 on the 2012 ballot. The measure required proof of citizenship for receiving state services. The electorate approved by nearly 80 percent of the vote. The court ruled that LR 121 was preempted by federal immigration law, and therefore unconstitutional.

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[120]In re Estate of McDermott, 310 Mont. 435, 51 P.3d 486 (2002).

[121]The court's holding in *N. Cheyenne Tribe* raises the following question: A church raises money in Mississippi for the relief of the needy in that state. As part of its fundraising appeal the church depicts poverty within Mississippi. May the Mississippi state government obtain a cut of the proceeds? One hopes the answer is "No."

[122]399 Mont. 254, 460 P.3d 867 (2020).

[123]383 Mont. 318, 371 P.3d 430 (2016)

The court says it upholds laws against constitutional challenge unless proved unconstitutional beyond a reasonable doubt. But the court clearly did not apply that standard in *Montana Immigrant Justice Alliance*. If it had done so, then it could have avoided its "preemption" conclusion and saved all or part of LR 121.[124]

7. Favoring Government Schools

The public education establishment (not to be confused with public school students) has been a favorite of the Montana Supreme Court.[125] During the 2012-2023 period, the justices awarded the state's teachers' union victory in several cases.[126] The biggest victory for public school interests—one that ultimately turned to ashes—was in *Espinoza v. Montana Department of Revenue*.[127]

Various surveys have shown that American public schools have been underperforming for decades. Surveys also show that the quality of education can be improved by competition—that is, by giving families effective choice as to which schools will best serve their children. Other western democracies, including all three Canadian

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[124]The justices relied on Arizona v. United States, 567 U.S. 387 (2012), to support their claim of preemption. However, the *Arizona* case did not ban all state laws pertaining to immigration, and it refused to void one of the four state laws at issue. If the Montana justices had applied the presumption of constitutionality, they easily could have distinguished LR 121 from the three voided Arizona laws. Those laws imposed *criminal penalties* on illegal immigrants. By contrast, LR 121 merely provided that Montana taxpayers didn't have to give illegal immigrants financial benefits.

An additional error was the court's repeated statement that federal power over immigration is "exclusive." In fact, it is supreme but not exclusive. *See* U.S. CONST. art. I, § 9, cl. 1. *See also* Robert G. Natelson & Andrew T. Hyman, *The Constitution, Invasion, Immigration, and the War Powers of States*, 13 BRIT. J. AM. L. STUDIES 1 (2024).

[125]RULE OF LAW, *supra* note 2, at 22.

[126]In addition to the *Espinoza* decision discussed above, see Mont. Immigrant Just. All. v. Bullock, 383 Mont. 318, 371 P.3d 430 (2016); MEA-MFT v. McCulloch, 366 Mont. 266, 291 P.3d 1075 (2012).

[127]393 Mont. 446, 435 P.3d 603 (2018), *rev'd* 591 U.S. ___, 140 S.Ct. 2246 (2020).

provinces bordering Montana, have long offered extensive school choice programs.

Over the past few decades, most American states have adopted school choice laws in one form or another. Some laws provide state scholarships ("vouchers") that families use to pay tuition. Some laws create charter schools, which are tuition-free public institutions not subject to most bureaucratic constraints. Other measures grant families tax deductions or tax credits for tuition and other expenses. And still others allow taxpayers to take tax credits if they donate to a private scholarship charity.

Montana has been far behind the national trend—partly because of the erroneous belief that Montana public schools do not suffer from the failures present elsewhere and partly because of the extraordinary power of the state's public school lobby.

In 2015, more than two decades after the first Montana school choice bill was introduced, the legislature finally enacted Senate Bill 410. It allowed taxpayers to take tax credits for donating to scholarship organizations. Tax credits were limited to only $150 per year.

Despite its modest scope, the government school lobby fiercely opposed SB 410. When the Department of Revenue, then headed by a left-leaning former Missoula mayor, wrote regulations to implement the law, those regulations purported to exclude contributions to religiously-affiliated schools.

A group of parents sued the Department of Revenue, arguing that although the Department had authority to implement the law, it had no authority to change it. The attorney general conceded the point, and when the case reached the Montana Supreme Court all the justices seem to have agreed that the Department had overstepped its bounds.

That should have been the end of the case. Yet the justices went beyond that issue and—without prior notice to the parties—considered the validity of SB 410 under the Montana Constitution.[128] The relevant constitutional language was Article X, Section 6(1).

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[128] *See* Part II(C).

It read in part:

> The legislature . . . shall not make any direct or indirect appropriation or payment from any public fund or monies . . . for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.

The constitutional resolution of the *Espinoza* case should have been a slam-dunk in favor of Senate Bill 410. As Justice McKinnon acknowledged, statutes not infringing on a fundamental right supposedly are upheld unless proved unconstitutional beyond a reasonable doubt.[129] Further, tax credits are not "appropriations or payments" from a public fund. They merely reduce the taxpayer's tax bill, as Justice Baker pointed out in her dissent. The U.S. Supreme Court had upheld similar programs for years, and the Montana court itself had sustained an analogous tax credit program under the 1889 constitution.[130]

But the most important reason the case should have been a slam-dunk is that the Montana Constitution's "anti-sectarian" language discriminated both *among* religions and *against* religion—thereby violating cardinal rules of the U.S. Constitution's First Amendment. Indeed, some qualified to speak to this subject, including your author, had been warning for years about the First Amendment problems in this "anti-sectarian" language.[131]

Article X, Section 6(1) was a continuation of a similar provision in the 1889 constitution, which in turn was one of many inserted in 19th century state constitutions. At the time—and for many decades thereafter—the word "sectarian" essentially meant

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[129]396 Mont. at 458, 435 P.3d at 608.

[130]Mont. State Welfare Bd. v. Lutheran Soc. Services, 156 Mont. 381, 480 P.2d 181 (1971).

[131]Because of the discriminatory nature of Article X, Section 6(1), it may also violate U.S. CONST. amend. XIV, § 1 (no state shall "deny to any person within its jurisdiction the equal protection of the laws").

"bigot."[132] It commonly was applied to religions other than mainline Protestantism. Public schools were overtly Protestant, and mainline Protestants sought to prevent competition from "sectarian" schools—i.e., those run by Catholics, Jews, Mormons, and even evangelicals.[133] Anti-sectarian laws survived because the Supreme Court had not yet applied the First Amendment to the states.[134]

The 1972 constitutional convention delegates were warned specifically of the odiferous meaning of the anti-sectarian clause,[135] and even in 1972, "sectarian" still retained a derogatory meaning."[136] Yet the delegates insisted in carrying the language over into their own draft, largely to protect the public school monopoly. During the ratification debates, voters were advised that the 1972 provision would merely continue the 1889 one.[137] Thus it is not true, as sometimes claimed, that the 1972 convention

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[132]For example, during the 1889 Montana constitutional convention, at the behest of one of the delegates, the clerk read a memorial that urged "unprejudiced and nonsectarian consideration." PROCEEDINGS AND DEBATES AT THE CONSTITUTIONAL CONVENTION HELD IN THE CITY OF HELENA, MONTANA, JULY 4, 1889 AUG. 17, 1889, p. 67 (1921). The necessary implication is that "sectarian" views are prejudiced.

[133]*Natelson, Sectarian, supra* note 2. This article was cited by Justice Alito in his *Espinoza* concurrence. Espinoza v. Mont. Dep't of Revenue, 591 U.S. ___ (2020), 140 S.Ct. 2246, 2270 (Alito, J., concurring).

[134]These clauses often are attributed to the 19th century statesman, James G. Blaine, and therefore frequently are called "Blaine Amendments." *E.g.*, *Dougherty, supra* note 2, at 43-45 (2016). However, this attribution is unfair. First, some of them antedate Blaine's proposed constitutional amendment, *e.g.*, NEB. CONST. (1866-67), art. I, § 16 [now *id.*, art. VII, § 11]. Second, Blaine was decidedly not anti-Catholic, and his proposed amendment avoided the word "sectarian." *Natelson, Sectarian, supra* note 2 (pointing out that Blaine's mother was Catholic, and he firmly refused to join the Catholic-bashing popular at the time).

As Secretary of State (1889-1892), Blaine initiated the Pan America project to form better relations with the mostly Catholic nations of Latin America.

[135]*E.g.,* VERBATIM TRANSCRIPT, *supra* note 2, at 2012 (comments of Delegate Schlitz).

[136] Thus, after listing an obsolete definition, the 1989 *Oxford English Dictionary* OED recited as its second entry the following: "2. Pertaining to a sect or sects; confined to a particular sect; bigotedly attached to a particular sect." It added that "In recent use" the word "sectarian" was "often a pejorative synonym of *denominational*, esp. with reference to education." 14 THE OXFORD ENGLISH DICTIONARY 843 (2d ed. 1989).

[137]*See, e.g.,* MULLIN & ROEDER, *supra* note 2, at 5 ("Section 6 of the proposed Article contains the prohibition in the 1889 Constitution against state aid to sectarian schools with only

somehow "cleansed" the non-sectarian clause of its original bigotry.[138] Quite the contrary.

Nevertheless, Justice McKinnon's opinion voided SB 410 for violating the state constitution's "anti-sectarian" clause. She treated the court's 1971 precedent simply by ignoring it. She treated the federal constitutional issue the same way. "[W]e do not address federal precedent,"[139] she wrote.

Both Justice Gustafson and Justice Sandefur wrote tortured concurrences to "prove" that the Montana law somehow violated the federal Constitution. Justices Baker and Rice dissented. They were vindicated when the U.S. Supreme Court reversed.[140]

8. Favoring the State Bureaucracy

The Montana Supreme Court often defeats efforts to curb the power of the state bureaucracy. One way it does this, as discussed in Part II(D)(4), is to give great deference to state agency regulations, at least when they impair rather than protect economic rights. Another part of the same pattern is the court's decision in *Montana Association of Counties v. Montana ("MACo")*, where the justices sided with county governments by overturning a voter initiative that would have inserted a victims' bill of rights in the constitution.[141] Still another was *Board of Regents v. Montana,*[142] where the justices granted a victory to the state university bureaucracy at the expense of both the legislature

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minor style revisions."); V.I.P, *supra* note 2, at 15 (stating, "Proposed section still prohibits state aid to private schools."); *Many Changes Possible Under New Education Article*, MONTANA TAXPAYER, Apr., 1972, p. 4 ("Retained in the new constitution is the prohibition against spending any public money by any state or local agency for any sectarian institution.")

[138]For the claim, *see, e.g.*, *Dougherty, supra* note 2. The 1972 delegates' justifications for continuing the "anti-sectarian" language—"protecting the public schools" and "preventing sectarian prejudice"—were the same pretexts used in the 19th century. *E.g.* VERBATIM TRANSCRIPT, *supra* note 2, at 2008 (Delegate Burkhardt), 2016 (Delegate McNeil), 2037 (Delegate Burkhardt).

[139]393 Mont. at 459, 435 P.3d at 609.

[140]591 U.S. ___, 140 S.Ct. 2246 (2020).

[141]389 Mont. 183, 404 P.3d 733 (2017). *See also* Part II(E (2)(a).

[142]409 Mont. 96, 512 P.3d 748 (2022).

and a fundamental constitutional right. The *Board of Regents* case merits further explanation:

In 2021, the legislature adopted House Bill 102, which authorized the concealed carry of firearms throughout the state. Knowing that the Board of Regents generally forbade firearms on its campuses, the legislature removed a pre-existing exemption and conditioned a $1 million appropriation on the board agreeing to waive any court challenge.

The board sought to invalidate the portions of HB 102 applying to the universities. It relied on Article X, Section 9(2) of the 1972 Montana Constitution, which says:

> The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system.

However, the "full power" phrase cannot be read literally, and few have assumed it can be. This is because if the board of regents really had "full power" over the university system, the system would be a kingdom (or oligarchy) of its own. The board could exempt state campuses from the criminal code or impose the death penalty for campus offenses for which the legislature had prescribed only jail time.

The assumption that the "full power" phrase is not to be read literally is supported by the Montana Constitution's vesting of the entire legislative power (except for initiative and referendum) in the state legislature.[143] This makes it clear that the board of regents is merely an executive branch agency. As such it is prohibited from exercising legislative power[144] and is charged with enforcing the laws the legislature makes. The board's "full power" necessarily refers only to the kind of authority the Attorney General enjoys over the Department of Justice, the Secretary of State enjoys over the Department of State, and the Governor exercises over most of the executive branch.

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[143] MONT. CONST. art. V, § 1.

[144] *Id.,* art. III, § 1.

This conclusion is confirmed by the constitution's ratification record: A famous taxpayer-financed newspaper insert promoting the constitution told voters that the regents' authority was to "supervise education" and "coordinate education."[145] Nothing from that era suggests that the regents' "full power" overrides generally-applicable state laws on other subjects, such as firearms.

The board's power was further narrowed by a 1975 Montana Supreme Court decision that ruled that although the board was free to decide issues such as a university president's salary, it still had to defer to the legislature's earmarks on appropriations.[146]

Yet in *Board of Regents v. Montana,* the court, through Justice McKinnon, struck down the university portion of HB 102. She argued that the board's firearms ban was an *educational* decision: "The presence of firearms on MUS campuses presents an unacceptable risk to a safe and secure educational environment."[147] But this is an argument that, as the saying goes, proves too much. If a firearms ban qualifies as an educational decision, then you can justify almost any rule of conduct by claiming it somehow "promotes education."

Like so many of the court's other opinions, the decision in *Board of Regents v. Montana* ignored evidence from the constitution's ratification and relied instead on portions of the 1972 constitutional convention transcript. Yet the opinion did cite a part of the transcript that contradicted its own holding: Delegate Champoux's remark that universities should respond to the people rather than "the growing power of the centralized, bureaucratic state."[148] Of course, that sentiment argues for leaving policy questions to a legislature elected for short terms rather than a bureaucratic agency (the board of regents) appointed for long terms.

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[145] MULLIN & ROEDER, *supra* note 2, at 5.

[146]Bd. of Regents of Higher Educ. v. Judge, 168 Mont. 433, 543 P.2d 1323 (1975).

[147]409 Mont. at 108, 512 P.3d at 755.

[148]VERBATIM TRANSCRIPT, *supra* note 2, at 2054.

In reading the court's *Board of Regents* opinion, one gets the impression that, ultimately, legal arguments didn't matter. For the past four decades the court has protected the state bureaucracy from popular control, and remains determined to do so.

9. Implications in the Lower Courts

The conduct of a state's highest tribunal strongly influences the kinds of cases successful in the lower courts and, therefore, the kinds of cases commenced there. The Montana Supreme Court's favoritism for liberal and pro-government causes may very well explain a current phenomenon that, to the author's knowledge, is unprecedented in size and extent. This is the massive judicial obstruction of bills adopted since the Republicans took control of both the state legislature and the governor's office in January, 2021.

During that time, an extraordinary 57 separate lawsuits have been initiated in Montana district courts seeking to void bills adopted by the people's elected representatives. All have been brought by liberal or pro-government plaintiffs challenging conservative measures.[149]

Examining these district court suits is beyond the scope of this paper. No doubt some have merit. But the sheer volume suggests that liberal and pro-government plaintiffs and their lawyers are aware of that the Montana Supreme Court is biased in their favor and assume that bias will further the success of their efforts.

[149] *Email Attachments*, Kyle Schmauch, Communications Director for the Senate Majority at the Montana Legislature, to Robert G. Natelson, Dec. 8, 2023. The attachments—that is, the 2021 and 2023 legislative session lists—are available at https://i2i.org/wp-content/uploads/2021-23-MT-bill-litigation.pdf.

E. Judicial Restraint—Or Not

The 2012 study noted that judicial restraint is a component of the rule of law.[150] This is because the Montana Constitution vests only "the judicial power" in the state courts.[151] When the constitution was adopted in 1972, the judicial power was universally understood to be limited by longstanding rules developed over the centuries by courts in England and the United States. These rules dictate what kind of controversies the courts can hear. They also determine what issues they can decide and which issues they leave to be resolved by other means. When the justices disregard or eviscerate those rules, they violate the very constitution they have sworn to uphold.

By contrast, overly-activist judges decide cases that do not qualify for adjudication and resolve issues the constitution reserves for the legislature and executive. In other words, they endeavor to dictate policy and methods of enforcement.

American history is marked by occasions in which overly-activist judges ventured beyond the scope of their mission and were later forced to withdraw. Unfortunately, the Montana Supreme Court has not yet learned this lesson. A highly activist bench, it both takes cases it should not take and invades the provinces of the executive branch, the legislature, and the people.

1. Taking Cases the Court Shouldn't Decide

A fundamental limitation on "the judicial power" is that before a court may consider a case, the case must be *justiciable*. Justiciability is a complex subject, so there is no room

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[150] RULE OF LAW, *supra* note 2, at 2-3.

[151] MONT. CONST. art. VII, § 1 ("The judicial power of the state is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law"); *id.*, art. III, § 1 ("The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted").

to summarize it fully in this Issue Paper. Suffice to say that one requirement of justiciability is that a plaintiff must have *standing to sue*. As outlined by the U.S. Supreme Court, standing requires the plaintiff to make an initial showing that the defendant has caused harm to the plaintiff—or immediately threatens harm—and that the court can remedy the situation. The harm must be real, not theoretical. A plaintiff does not have standing to sue merely because he doesn't like something or has apprehensions about it.

Sometimes a plaintiff thinks the defendant may injure him in the future. But the plaintiff does not have standing unless he can show an immediate threat. If the potential harm is not immediate, the case is *not ripe for review*. If the harm did not occur and the threat is past, then the plaintiff has no standing because the case has become *moot*.

The judiciary is constituted for resolving genuine, pressing legal disputes. It is not a source of free legal advice or for addressing hypothetical cases. By requiring plaintiffs to have standing, courts assure that they do not stray outside their own territory. The standing requirement also helps ensure that the court hears all the evidence and legal arguments on both sides.

The Montana Supreme Court claims it follows the federal rules of standing, including "ripeness" and "mootness." For example, in *In re T.D.H., J.H. & J.H.*, Justice Baker wrote this for the bench:

> Under the Montana Constitution, a court lacks power to resolve a case brought by a plaintiff who does not show "that he has personally been injured or threatened with immediate injury . . . In order to present a justiciable controversy, a petitioner must have "existing and genuine, as distinguished from theoretical, rights or interests. [152]

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[152]380 Mont. 401, 409 356 P.3d 457, 463-64 (2015). *See also* McDonald v. Jacobsen, 409 Mont. 405, 515 P.3d 777 (2022); In re Big Foot Dumpsters & Containers, 408 Mont. 187, 507 P.3d 169 (2022); Larson v. Montana, 394 Mont. 167, 201, 434 P.3d 241, 262 (2019); MEA-MFT v. McCulloch, 366 Mont. 266, 270, 291 P.3d 1075, 1078 (2012).

That is an accurate statement of the law, but the justices do not apply it with any consistency. Plaintiffs in certain favored categories (see Part II(D)) often are excused from them. When a plaintiff without standing is allowed to sue, moreover, what ensues is precisely what the rules of standing are designed to prevent: The court acts on incomplete evidence, sometimes even without a factual hearing, and issues a bad decision.

A premier illustration is *Marshall v. Montana*,[153] one of the "toxic trio" of 1999 cases on which the court built during the 2012-2023 time period.[154] In *Marshall*, the plaintiffs challenged a constitutional amendment requiring popular approval of tax increases. Although most of the plaintiffs benefitted from government spending, they showed no immediate injury. No tax increase had been rejected or even proposed. The flow of taxpayer money to the plaintiffs had continued unabated. Sometime in the future the voters might reject a tax hike earmarked for the plaintiffs and if that happened, then they might have standing. But in the meantime, the case was "not ripe for review."

Yet the court ignored the issue of standing, took the case without a prior district court hearing, held no factual hearing itself, and struck down the constitutional amendment.

In 2017 the court repeated the performance. In the *MACo* case,[155] the plaintiffs sought to void another popularly-adopted constitutional amendment. The justices allowed the case to proceed although the plaintiff presented no evidence of previous or immediately-threatening injury.

Ignoring the requirement of standing is not the only way the court avoids it. Sometimes the tribunal simply invents new categories of harm. *Montana Immigrant Justice Alliance v. Bullock* considered the validity of a popularly-approved law that denied state services to illegal immigrants. The court granted standing to challengers who

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[153]293 Mont. 274, 975 P.2d 325 (1999).

[154] Part II(E)(2).

[155]389 Mont. 183, 404 P.3d 733 (2017).

"feared" the law might be applied to them *even though they were in the country legally*.[156]

In *McDonald v. Jacobsen*, the court granted standing to liberal former politicians because they preferred voting for Supreme Court justices statewide rather than in districts.[157] In *Brown v. Gianforte*, the court granted standing to a similar group of liberal former politicians merely because they were "adult Montana residents."[158]

When all else fails, the court applies what it calls a "public interest exception" to the standing rule. This allows the court to decide almost any case it wants to.[159]

2. The "Toxic Trio:" *Marshall*, *MEIC*, and *Armstrong* and their Successors

In 1999, the Montana Supreme Court—then at the height of its activist career—issued three decisions that served as a foundation for further expansion of the court's political power. One of these decisions was marred by serious lapses in judicial practice. All three misapplied provisions of the Montana Constitution. Nevertheless, the justices have not overruled them, and continue to build on them.

The first case in the "toxic trio" was *Marshall v. Montana,*[160] discussed earlier in the

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[156]383 Mont. 318, 371 P.3d 430 (2016).

[157]409 Mont. 405, 515 P.3d 777 (2022),

[158]404 Mont. 269, 278, 488 P.3d 548, 553 (2021).

[159]*E.g.*, Ramon v. Short, 399 Mont. 254, 460 P.3d 867 (2020):

> This Court "reserves to itself the power to examine constitutional issues that involve broad public concerns to avoid future litigation on a point of law." . . . Accordingly, the public interest exception applies where: (1) the case presents an issue of public importance; (2) the issue is likely to recur; and (3) an answer to the issue will guide public officers in the performance of their duties.

399 Mont. at 266, 460 P.3d at 874.

See also In re Big Foot Dumpsters & Containers, 408 Mont. 187, 192, 507 P.3d 169, 174 (2022) (reciting, although not utilizing, the exception).

[160]293 Mont. 274, 975 P.2d 325 (1999).

Part II(E)(I) discussion of standing to sue. The opinion in *Marshall* was issued on February 24, 1999. The second case was *Montana Environmental Information Center v. Department of Environmental Quality* [*MEIC*].[161] It was issued on October 20, 1999. The decision in *Armstrong v. Montana*[162]—which we shall call *"Armstrong"*—was announced on October 26, 1999.

a. Marshall and Its Successors

By its ruling in *Marshall,* the court allocated to itself power to veto the people's decisions in amending their state constitution.[163] Understanding this decision requires some background.

Historically, it is the prerogative of the party proposing a constitutional amendment to fix the content of the proposed amendment. It is prerogative of the ratifiers to decide whether to approve it.

An amendment may be very narrow, such as the U.S. Constitution's Third Amendment on the quartering of troops. Or an amendment it may be very broad, such as the U.S. Constitution's Fourteenth Amendment. In American *legislative* practice, an amendment can even replace the entire wording of a bill. The only limit is that the original language and the replacement must address the same subject. Such an amendment is called a "complete substitute."[164]

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[161]296 Mont. 207, 988 P.2d 1236 (1999).

[162]296 Mont. 361, 989 P.2d 364 (1999).

[163]Denying re-election to offending justices is not a practical remedy. Court elections are staggered over time, and political parties do not participate in (and therefore provide information about) judicial elections.

[164]The Affordable Care Act ("Obamacare") was a complete substitute. Robert G. Natelson, *The Founders' Origination Clause (and Implications for the Affordable Care Act)*, 38 HARVARD J. L. & PUB. POL. 629, 682-87 (2015). It is doubtful that a complete substitute would be a valid amendment of the U.S. Constitution because of the Article V requirement that an amendment be to "this Constitution." U.S. CONST. art. V.

Under the 1889 constitution, either the legislature or a constitutional convention could propose amendments for consideration by the voters. The Montana Supreme Court subsequently ruled that a legislatively-proposed amendment—like any other bill—could address only a "single subject."[165] But this was a loose requirement: All that was necessary was that the various terms of the amendments were united by some common purpose.

The 1972 Montana Constitution also permits the legislature or a constitutional convention to propose amendments for consideration by the voters. In addition, the 1972 constitution permits private citizens to propose amendments though the initiative process. The single subject rule does not apply to the initiative procedure.[166]

History shows that state officials may try to manipulate the referendum process to favor a "Yes" or "No" vote on particular amendments. One way to do so is to bundle them together to force electors to vote "yes" or "no" on the entire package. The 1889 Montana Constitution forestalled this maneuver by requiring the secretary of state to design the ballot so electors could vote "yes" or "no" on different proposals. The 1972 constitution carried forth this requirement in Article XIV, Section 11:

> If more than one amendment is submitted at the same election, each shall be so prepared and distinguished that it can be voted upon separately.[167]

This section says nothing about the *content* of a proposed amendment. It does not change the traditional rule that the proposer decides the content of his proposal. Article XIV, Section 11 is merely a direction to the secretary of state not to aggregate different

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[165]*E.g.*, State ex rel. Corry v. Cooney, 70 Mont. 355, 225 P. 1007 (1924).

[166]The 1972 constitution, although adopted after "single subject" case law, expanded direct democracy and contained no single subject rule limitation. *See* State of Montana ex rel. Mont. Citizens for the Pres. of Citizens' Rts. v. Waltermire, 224 Mont. 273, 729 P.2d 1283 (1986) and State of Montana ex rel. Mont. Sch. Boards Ass'n. v. Waltermire, 224 Mont. 296, 729 P.2d 1297 (1986) (holding that a constitutional challenge to a ballot measure could not proceed prior to the election unless the measure was "facially invalid" while acknowledging that multiple subjects did not render a measure facially invalid); Mont. Ass'n of Counties v. Montana, 389 Mont. 183, 404 P.3d 733 (2017) (ruling that the single subject rule does not apply to constitutional initiatives).

[167]MONT. CONST. art. XIV, § 11.

proposals into a single ballot question. This history behind this section shows its limited purpose.[168]

In 1998, a citizen petition garnered enough signatures to qualify Constitutional Initiative 75 for the ballot. CI-75 would have imposed a voter-approval requirement on most tax increases. The drafters knew the "single subject" requirement probably did not apply to constitutional initiatives, but to be cautious they wrote their proposal to comply with the single subject rule. To assure clarity they inserted cross-references to three sections of the constitution being altered.[169]

The voters approved CI-75 in November, 1998. Almost immediately, representatives of special interests, claiming an "emergency," asked the court to exercise its original jurisdiction (trial jurisdiction) and strike down the measure. The court's ensuing conduct was extraordinary. As noted earlier, it did not require the plaintiffs to demonstrate legal "standing."[170] It did not hold a factual hearing on whether there was an emergency or on any other factual issue. Nor did it investigate the history of Article XIV, Section 11. It

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[168]The language apparently originated in the 1845 New Jersey Constitution. That state's high court construed it to regulate only how an amendment was presented to the voters, not its content. New Jersey v. Sec'y of State, 62 N.J.L. 107, 40 A. 740, 746 (1898).

The Montana predecessors to art. XIV, § 11 also confirm that it affects only the mode of presentation, not the content. Article XVI, Section 13 of the abortive 1884 constitution read in part:

> Any amendments to this Constitution may be proposed in either house of the Legislative Assembly. . . and the *Secretary of State* shall cause the said amendment or amendments to be published . . . Should more amendments than one be submitted at the same election, they shall be so prepared and *distinguished by number or otherwise* that each call be voted upon separately. (Italics added.)

Similarly, MONT. CONST. (1889), art. XIX, §9 provided:

> Should more amendments than one be submitted at the same election, they shall be *so prepared and distinguished by numbers or otherwise* that each can be voted upon separately; provided, however, that not more than three amendments to this constitution shall be submitted at the same election. (Italics added.)

[169]Disclosure: The author chaired the CI-75 drafting committee. He was not a party to the ensuring litigation.

[170]Part II(E)(1).

merely held oral argument and swiftly struck down CI-75.

In its opinion, the court invented a new definition of "amendment" and imposed the new definition retroactively on the CI-75 election. The justices ruled the measure void "[b]ecause CI-75 expressly amends three parts of Montana's Constitution but does not allow a separate vote for each amendment."[171]

The *Marshall* rule sometimes is called the "separate vote" requirement because it requires a separate popular election for each part of the constitution changed, no matter how necessary each change might be to the purpose of the amendment. This is an almost impossible standard to meet, because almost any amendment alters more than one part of the pre-existing constitution. For example, the U.S. Constitution's very narrow Third Amendment effectively restricted several distinct enumerated powers the Constitution grants Congress and the President.[172]

Despite the absurdity of the *Marshall* decision—and the court's later implicit admission that it should not have taken jurisdiction[173]—the case was followed and even expanded during the 2012-2023 period.

Constitutional Initiative 116 would have adopted a crime victim's "bill of rights." A lobbying group of county governments sued to void it. Again, the court took the case directly, without sending it to the district court and without a showing of standing.[174]

The drafters of CI-116 had avoided cross-reference altered parts of the constitution. Nevertheless, in the *MACo* case[175] the court relied on a version of *Marshall* to void the measure:

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[171]293 Mont. at 284, 975 P.2d at 331.

[172]*E.g.*, U.S. CONST. art. I, § 8, cl. 11 (declare war), cl. 12 (support armies), cl. 14 (establish rules for the armed forces), art. II, § 2 (President as commander in chief).

[173] Monforton v. Knudsen, 413 Mont. 367, 539 P.3d 1078 (2023) (stating that such cases may be considered only before the popular referendum). The case is discussed below.

[174]Part II(E)(1)

[175]389 Mont. 183, 404 P.3d 733 (2016).

> We conclude that the proper inquiry is whether, if adopted, the proposal would make two or more changes to the Constitution that are substantive and not closely related . . . Furthermore, if a proposed constitutional amendment adds new matter to the Constitution, that proposition is at least one change in and of itself. Then, if a measure has the effect of modifying an existing constitutional provision, it proposes at least one additional change to the constitution, whether that effect is express or implicit . . . [176]

Thus, the amendment's *text* is "at least one change in and of itself" and the *effect* of the text is "at least one additional change." In other words, *any* proposal comprises at least two amendments!

The court then determines whether the alleged changes are "substantive and closely related." This determination is almost entirely subjective. By way of illustration: A significant factor for deciding whether to grant bail is the risk the accused might pose to the victim and others.[177] Yet the court ruled in *MACo* that CI-116's restriction on bail was "not closely related to victims' rights."[178]

The next of *Marshall's* successors was *Monforton v. Knudsen.*[179] At issue was a proposed amendment to cap property taxes and property tax assessments. Certainly, the measure looked like a single amendment: It changed only one section of the constitution, and its provisions formed a tight integrated whole. As Justice Rice's opinion for the court admitted, the subjects it addressed were tightly "conjoined." Yet his opinion still voided it for containing multiple amendments that were "substantive and not closely related."

As in the *MACo* case, the court counted the proposed new text as one amendment and effect of the text as another. The court claimed that the changes were not "closely

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[176]389 Mont. at 196, 404 P.3d at 742.

[177]*Seven Key Factors in Setting Bail*, https://www.findlaw.com/legalblogs/criminal-defense/7-key-factors-in-setting-bail/.

[178]389 Mont. at 201,404 P.3d at 744.

[179]413 Mont. 367, 539 P.3d 1078 (2023).

related"—largely because property valuation, tax rates and tax imposition and collection historically were performed by different branches of government. It did not matter that the proposal addressed only one section of the Constitution or that everything in the amendment was "conjoined." What mattered was that the proposal happened to impact different segments of the state bureaucracy!

In *Monforton*, the justices also changed the procedure for challenging amendments on "separate vote" grounds. In *Marshall* and *MACo* the court ruled on the "separate vote" issue after the election. In *Hoffman v. Montana*,[180] the court said single-subject challenges to statutory initiatives likewise were to be decided after the election. But in *Monforton*, it ruled that "separate vote" issues are "ballot sufficiency" questions and should be addressed only *before* the election. This ruling implicitly admitted that *Marshall* and *MACo* never should have been decided, because the Montana Constitution bans post-election challenges to ballot sufficiency.[181]

Incidentally, those who decide to read Justice Rice's *Monforton* opinion will find it dense and hard to follow. Experienced lawyers will recognize this as a common symptom of judicial strain and bad logic.

Shortly before this paper was published, the court issued *Montanans for Election Reform Action Fund v. Knudsen.*[182] It appears to confirm what court observers have suspected all along: The strict "separate vote" requirement applies only to conservative ballot measures, not to liberal ones.

At issue in *Montanans for Election Reform Action Fund* was a proposed constitutional amendment to revolutionize how Montanans elect members of the legislature, members of Congress, and most other statewide offices. (For whatever reason, judicial offices are exempt.) Under the amendment, primary elections would be a free-for-

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[180]374 Mont. 405, 409, 328 P.3d 604, 607 (2014).

[181]MONT. CONST. art III, § 4 ("The sufficiency of the initiative petition shall not be questioned after the election is held.").

[182]414 Mont. 135, ___ P.3d ___, 2023 WL 8103461 (2023).

all in which signatures from only five percent of registered voters would be required to get on the ballot. The top four vote getters in the primary would advance to the general election. The winner of the election would be the person who garnered a bare plurality of the vote. Because there was no provision for a run-off if no one obtained a majority, the winner could be chosen by barely over a quarter of the electorate.

One apparent reason for the amendment was to reduce conservatives' dominance among Republican officeholders by permitting Democratic voters to cast ballots against them in the primary. In addition, the amendment's provision for multi-candidate general elections likely would increase the number of liberal statewide victories by enabling Montana's liberal minority to win by garnering narrow pluralities.[183]

The amendment would alter several sections of the Montana constitution. These include sections governing (1) elections to the legislature,[184] (2) the legislature's power to regulate elections generally,[185] (3) candidate qualifications,[186] and (4) arguably even freedom of speech.[187] Yet the court held that all these changes were "closely related."

In so concluding, the court accepted the sponsor's argument that the changes were "integral" to the entire scheme. That was the very argument the court rejected in *Marshall* and *Monforton,* each of which voided tightly-drafted proposals.

A complete analysis of the court's rationale in *Montanans for Election Reform* would consume more space than it is worth. From what already has been said, it should be obvious that the court applied very different standards to this "liberal" initiative than it

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[183]Robert G. Natelson, *More on How National Popular Vote would import third world "elections" to America*, May 27, 2019, https://i2i.org/more-on-how-national-popular-vote-would-import-third-world-elections-to-america/ (noting that in countries where multi-candidate elections are common, they often produce winners who have garnered small pluralities but have been rejected by the overwhelming majority of voters).

[184]MONT. CONST. art. IV, § 3.

[185]*Id.,* art. V, § 3.

[186]*Id.,* art. IV, § 4.

[187]*Id.*, art. II, § 7 (because of the amendment's limitation of ballot language).

applied to previous "conservative" ones.

b. MEIC and its Successors

The *MEIC* case was the second in the "toxic trio." *MEIC* ignored the constitution's ratification history and built on vague and contradictory constitutional provisions to assume judicial power over state environmental policy.[188] The court's justification was chaotic.

MEIC held that under the Montana Constitution's Article II environmental right, any government action must be justified by a "compelling state interest" if it "implicates" the environment. This holding was based on the premise that all rights listed in Article II are protected unless restricted by a "compelling state interest." Note, however, that the Article II Bill of Rights also protects private property, so under the *MEIC* rationale, property rights cannot be implicated without a compelling state interest. (The court did not define what it meant by "implicates.")

The constitution's Article IX environmental right is different from the Article II environmental right in that the Article IX right restricts private parties as well as the government. Despite their different scope, the court said the two rights were "interrelated and interdependent"—so the Article IX right also cannot be infringed without a compelling state interest.

All this leaves us with the following result:

If a landowner wishes to develop his land in a way that "implicates" the environment:

- The owner *may not act* without a compelling state interest, and
- the owner *may not be prevented from acting* without a compelling state

[188] *See* Part II(D)(3).

interest.

This contradiction created a framework for the court to rule as it pleases on almost any activity it thinks "implicates" the environment. If that conclusion seems overblown, consider *Cape-France Enterprises v. In re Estate of Peed.*[189] Justice Nelson's opinion for the court expanded an opinion an ordinary contract case to assert the court's right to invalidate any *private* arrangements the court believed did not serve a compelling *state* interest.

Although the court has not pursued the exorbitant claim of *Cape-France*, it continues to rely on *MEIC* to regulate state environmental policy.[190] If Montanans become dissatisfied with the court's decisions, that's just too bad: The "separate vote" line of cases blocks any constitutional amendment to reverse them.

c. *Armstrong* and Its Successors

Armstrong was decided only six days after *MEIC*. Justice Nelson wrote the opinion for the court declaring that the Montana right to privacy included a sweeping right to abortion. As one scholar has noted, the court's method of interpreting the state constitution in *Armstrong* was dramatically different from the method it adopted in *MEIC*.[191] This, of course, raises suspicions that the outcomes in either or both cases was political rather than judicial.

Almost nothing in the constitution's background justifies *Armstrong's* conclusion that the document protects abortion. Indeed, the opposite is true.

As explained in Part I(C)(3), a constitution is properly construed by examining the

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[189]**Error! Main Document Only.**305 Mont. 513, 29 P.3d 1011 (2001).

[190]*E.g.*, Clark Fork Coal. v. Mont. Dep't of Nat. Res. & Conservation, 403 Mont. 225, 481 P.3d 198 (2021); Park Cnty. Env't Council v. Mont. Dep't of Env't Quality, 402 Mont. 168, 477 P.3d 288 (2020); N. Plains Res. Council v. Mont. Bd. of Land Comm'rs, 366 Mont. 399, 288 P.3d 169 (2012). *See also* Part II(D)(3).

[191]*Morriss, supra* note 2, at 44-45.

understanding of, or meaning to, the ratifiers. When the Montana Constitution was adopted, the now-defunct U.S. Supreme Court case of Roe v. Wade[192] had not been decided. Montana had a strong pro-life, anti-abortion law. Given the then-controversial nature of the issue, if the voters in the 1972 ratification referendum had thought the proposed constitution affected abortion, that probably would have rendered the document sufficiently controversial to ensure its defeat.

None of the records from the time leading up to ratification implied (much less stated) that Section 10 would protect abortion. On the contrary, a *Great Falls Tribune* editorial congratulated the convention delegates for leaving abortion out of the constitution.[193] An analysis prepared and published by Billings attorney Gerald Neely listed abortion as one of the matters "left out of the proposed Bill of Rights."[194] The convention's official voter information pamphlet said only that Section 10 was a "[n]ew provision prohibiting any invasion of privacy unless the good of the state makes it necessary."[195] A *Helena Independent Record* story—substantially repeated in other news outlets—told its readers that the convention had decided to leave the issue to the legislature.[196]

Probably the most important ratification-era document was a newspaper supplement prepared by supporters of the constitution and distributed to virtually every daily newspaper subscriber in the state. The supplement explained Article II, Section 10 this way:

> Section 10 establishes a right to privacy. The courts in Montana have

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[192]410 U.S. 113 (1973),

[193]*Congratulations Con-Con Delegates*, GREAT FALLS TRIBUNE, Mar. 1972.

[194]Gerald J. Neely, *The Bill of Rights: Analysis*, CON CON NEWSLETTER, Mar. 10, 1972, at 7. But in a pamphlet published around the same time, Neely pointed out that a different portion of the constitution could be construed to *prohibit* abortion. GERALD J. NEELY, MONTANA'S NEW CONSTITUTION: A CRITICAL LOOK (1972) (unpaginated).

[195]V.I.P, *supra* note 2, at 6 (1972).

[196]*Abortion Issue Flares, Fails in Con-Con*, HELENA INDEPENDENT-RECORD, Mar. 7, 1972.

> recognized the existence of a right to privacy. But at a time when opportunities for invasion of privacy are increasing in number and sophistication, section 10 emphasizes that this right is essential for the preservation of a free society.[197]

As you can see, this language suggests that Section 10 codified the *existing* right to privacy to strengthen it against *future* challenges. There was no suggestion that Section 10 would change the existing right to privacy or void laws already on the books. Also, it is unlikely that most Montanans in 1972 thought that the state's pro-life law somehow meant they did not live in a "free society."

The court's opinion in *Armstrong* disregarded all of this. It quoted (out of context) two English philosophers, John Locke and John Stuart Mill—both of whom lived when abortion was a crime and never wrote a word in support of its legalization. Next, it turned to the in-convention discussion among the delegates. However, the only in-convention reference to abortion was an oral committee report favoring reservation of the subject to the legislature.[198] The delegates' discussion of the privacy right focused mostly on what they perceived was growing government electronic surveillance.[199]

The court rested its case on the comments of a single delegate, Bob Campbell. Yet not even Campbell mentioned abortion. He merely suggested that the right to privacy might be more extensive than protection against surveillance. He cited the U.S. Supreme Court case of *Griswold v. Connecticut*,[200] a then-controversial decision that held that a state could not ban a married couple's use of contraceptives. He added "We don't know how the interpretations will go from there, what the Supreme Court will do."[201]

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[197]MULLIN & ROEDER, *supra* note 2. The document—paid for in part by taxpayer funds—was unsigned, but was primarily the work of Montana State University professors Pierce C. Mullin and Richard Roeder. *See Natelson, supra*, at 343-44.

[198]VERBATIM TRANSCRIPT, *supra* note 2, at 1640.

[199]*Id.*at 295, 1671-73, 1680-84, 1851-52.

[200]381 U.S. 479 (1965).

[201]VERBATIM TRANSCRIPT, *supra* note 2, at 1681. If we give this sole reference to *Griswold*

It is a good stretch from Campbell's admission of ignorance to a constitutional right to commercial abortion services. Further, there is no evidence that Campbell's views were representative of the views of the other 99 delegates. And, as we have seen, there is strong evidence that they did not influence the views of the ratifiers. Yet Campbell's remarks remain the wisp of straw upon which *Armstrong* and its apologists rely.[202]

Armstrong ruled that Section 10 guaranteed the use of commercial abortion services. It went even further than the U.S. Supreme Court's opinion in *Roe v. Wade*, because unlike *Roe*, the *Armstrong* case gave no weight to the state's interest in life or potential life, nor any consideration for the welfare of the unborn child.[203]

Armstrong further proclaimed that, after considering the views of the "medical community," the justices, not the legislature, would decide which health regulations on abortion were acceptable. It added that a pregnant women need not sue in order to upend an abortion statute. In contravention of the usual rules of standing, abortionists could sue

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any weight, then it demonstrates that the result in *Armstrong* was not supported by Gryczan v. Montana, 283 Mont. 433, 942 P.2d 112 (1997), as Justice Nelson claimed.

Gryczan voided Montana's anti-sodomy law on privacy grounds. One may debate whether the decision is justified by the Montana Constitution's right to privacy. Still, *Gryczan*—like *Griswold*—addressed "non-commercial, consensual adult sexual activity" within private bedrooms. In *Armstrong*, the court was addressing commercial services offered for money in public clinics. Moreover, in *Griswold* and *Gryczan*, there were no unborn children involved, so the state did not have the interest in life (or potential life) recognized even by Roe v. Wade.

[202]*Cf.* Ben McGee, *How Strong is Armstrong? What to Make of Montana's Ambiguous Autonomy Rights in a Post-*Roe *World,* 83 MONT. L. REV. 323, 330 (2022). McGee does not address the relevant ratification evidence, but he bulks up the importance of Campbell's comments by citing a news story about a California Supreme Court decision published *six months earlier* and by stating that Campbell spoke at a "pivotal moment on the Convention floor." *Id.* at 330. McGee does not explain why that moment was more pivotal than any other, nor does he show that Campbell's remarks were representative of those of the other delegates or of the ratifiers.

[203]The *Armstrong* court wrote:

> [T]he State has no more compelling interest or constitutional justification for interfering with the exercise of this right if the woman chooses to terminate her pre-viability pregnancy than it would if she chose to carry the fetus to term.

296 Mont. at 379, 989 P.2d at 377.

on their behalf.[204]

Since 2012, the court has compounded its mistakes in *Armstrong* by continuing to micro-manage abortion policy. It has rejected "standing" concerns,[205] overruled legislative decisions as to which health professionals may perform abortions,[206] decided whether an expectant mother should be shown an ultra-sound image of her baby, and defined which "informed consent" rules are permissible.[207]

Armstrong said the court would judge whether providers were qualified to perform abortions based on the views of the "medical community," rather than the legislature. But in the 2019 case of *Weems v. Montana*[208] a 4-3 majority granted a preliminary injunction based on the court's *anticipation* what the "medical community" would decide when it actually decided the issue. The opinion was written by Justice Baker, with Justices Rice, McKinnon, and Shea dissenting. In a final hearing in the same case, the court concluded that the "medical community" had decided that certain paraprofessionals should be permitted to perform early-term abortions—even though the state produced two highly credentialled members of that "community" who argued that they should not.[209]

This extraordinary compliance with the demands of the abortion industry stands in stark contrast with the deference the court gives to state regulation over other

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[204]296 Mont. at 364, 989 P.3d at 368. This conflicts with the court's observation that "Under the Montana Constitution . . . a litigant may assert only his own constitutional rights." In re T.D.H., J.H. & J.H., 380 Mont. 401, 409, 356 P.3d 457, 463 (2015). The court similarly exempted abortionists from normal standing requirements in Weems v. Montana, 395 Mont. 350, 357, 440 P.3d 4, 9 (2019)

[205]Weems v. Montana, 395 Mont. 350, 440 P.3d 4 (2019).

[206]Weems v. Montana, 412 Mont. 132, 529 P.3d 798 (2023).

[207]Planned Parenthood of Montana v. Montana, 409 Mont. 378, 515 P.3d 301 (2022). The state did win a short-term procedural victory in Planned Parenthood of Montana v. Montana, 378 Mont. 151, 342 P.3d 684 (2015) (holding that a trial court's invalidation of an earlier parental notification statute did not bar the state from defending later, different statutes).

[208] Weems v. Montana, 395 Mont. 350, 440 P.3d 4 (2019).

[209]Weems v. Montana, 412 Mont. 132, 529 P.3d 798 (2023).

businesses,[210] including other health care providers.[211] The court distinguishes its preference for abortion providers in part because abortion is a "lawful" procedure. But when *Armstrong* was decided, it was "lawful" only because the U.S. and Montana Supreme Courts declared it to be so. Now that that *Roe v. Wade* has been overturned, abortion on demand is "lawful" only because the Montana Supreme Court has declared it to be so.

The 2023 legislature passed House Bill 575, which prohibits abortion of viable unborn children, rendering such abortions no longer "lawful." HB 575 already has been enjoined by a district judge. If the case reaches the Montana Supreme Court, it will be informative to see if the court upholds the law on the ground that late-term abortions are no longer "lawful."

Of course, such a holding is highly unlikely.

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[210]*Supra* Part II(D)(4). *See also* Mont. Cannabis Indus. Ass'n v. Montana, 366 Mont. 224, 286 P.3d 1161 (2012). In *Mont. Cannabis* the medical marijuana plaintiffs argued that their business, like that of abortionists, was protected by the right to privacy. Justice Wheat, writing for the court, responded by saying that abortion, unlike medical marijuana use, was a constitutional right. But abortion was a constitutional right only because the court had so decreed.

[211]Wiser v. Montana, 331 Mont. 28, 129 P.3d 133 (2006) (upholding market-clogging regulations on denturists).

Part III: The McLaughlin Controversy

The Law is the true embodiment

Of everything that's excellent

It has no kind of fault or flaw

And I, my Lords, embody the Law

—The Lord High Chancellor in *Iolanthe*,

by William S. Gilbert and Arthur Sullivan

A. The Facts

1. Reichert v. State ex rel. McCulloch

The McLaughlin Controversy arose in 2021 as a contest between the Montana Supreme Court and the legislative and executive branches of government. In some respects, the contest continues today, since after receiving an outside complaint, an agency of the Supreme Court has launched a professional conduct proceeding against the Attorney General and some of his subordinates because of their challenges to the court during the controversy.[212]

Fully explaining the subject requires us to begin with the 2012 case of *Reichert v. State ex rel. McCulloch*.[213]

In 2011, the legislature referred Legislative Referendum 119 to the people. LR 119 would have eliminated statewide, at-large, election of Supreme Court justices in favor of election by district. LR 119 required each candidate seeking election from a district to reside within that district.

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[212] *See* Part III(B).

[213] 365 Mont. 92, 278 P.3d 455 (2012).

A group of citizens, among them former constitutional convention delegates, sued to invalidate LR-119. By traditional measures the plaintiffs had no standing to sue.[214] They were not candidates for election to the court; they were only citizens with nothing to differentiate them from any other citizens. But the court permitted them to proceed as parties, while excluding as parties lawmakers who had sponsored and supported LR-119. The latter were permitted only to file an *amicus curiae* (friend of the court) brief.

In their brief, the lawmakers asked the justices to recuse themselves and replace themselves with district judges. The reason was conflict of interest: The decision would affect each justice's re-election prospects. However, the justices refused to disqualify themselves. They contended that because district judges were potential candidates for the Supreme Court, district judges also had a conflict of interest. And because, in the Supreme Court's view, all members of the judiciary were conflicted, sitting justices should remain on the case under the common law "rule of necessity."

Justice Nelson wrote the opinion for the court. He ruled LR-119 invalid. He offered two reasons. First, by requiring residence in one's district, LR-119 added an additional qualification for Supreme Court candidates. Justice Nelson observed that the state constitution set forth qualifications for the court. He contended those listed qualifications were exclusive—meaning the legislature could not add any. Second, he argued that the court was "not a representative body," and its functions required it to be elected statewide. Because the Montana Supreme Court issued decisions for the entire state, he contended, all its justices had to be elected by the entire state.

Of course, in the real world there is a great difference between the degree of "conflict" faced by a sitting justice contemplating re-election and a district judge who might or might not at some indefinite future time run for the high court.[215] The justices could have avoided even the latter remote "conflict" by recusing themselves and limiting

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[214] *See* Part III(E)(1).

[215] The prospect of a retention election impacts judicial decision making. *Morris, supra* note 2, at 46-47 (summarizing research into the subject).

their replacements to district judges who (1) filed affidavits disclaiming an interest in running for the high court or (2) were beyond an age that made it practicable for them to do so.

Justice Nelson's claim that the legislature could not add to the constitution's listed qualifications was flatly erroneous. The Montana Constitution specifically provides that the mode of electing Supreme Court justices is "as provided by law"[216]—a phrase traditionally encompassing the power to draw election districts.[217] Moreover, the constitution specifically grants the legislature authority to enact additional qualifications for "any public office."[218]

There also is little to support the conclusion that residency in, and election by, districts is inconsistent with statewide decision making. On the contrary:

- The members of the Montana Public Service Commission are elected by district, but make quasi-judicial decisions for the entire state.
- In Montana before statehood, the three justices of the territorial supreme court, although all appointed by the President, were assigned trial duties in different districts and each was required to live in his district.[219]
- In Montana today, the power of district judges is not limited to their districts; they have statewide jurisdiction.
- The history of the Anglo-American court system includes examples of officials

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[216]MONT. CONST. art. VII, §8.

[217]*See generally*, Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1 (2010) (cited by Chief Justice John Roberts in Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 836 (2015) (Roberts, C.J., dissenting)).

[218]MONT. CONST. art. IV, § 4 ("Any qualified elector is eligible to any public office except as otherwise provided in this constitution. *The legislature may provide additional qualifications* but no person convicted of a felony shall be eligible to hold office until his final discharge from state supervision.") Italics added.

[219]Montana Organic Act, 13 Stat. 88-89.

tied to districts serving on a statewide bench. Before 1818, for example, the members of the Connecticut upper house (called "assistants") were elected by district and also served as the state's highest tribunal.[220]

2. The Legislature Clashes with the Court

Early in 2021, the legislature decided to try its hand once again at judicial reform. It passed Senate Bill 140, abolishing judicial nomination commissions.

Beth McLaughlin is the court administrator for the Montana judicial branch. She is appointed by the Montana Supreme Court and supervised by the Chief Justice. In March, 2021, toward the end of the legislative session, an anonymous source disclosed a tranche of dozens of emails between her and members of the state's judiciary. The emails showed that McLaughlin had coordinated a poll of Montana judges to determine their views on SB 140. She conducted this poll for the benefit of the Montana Judges Association (MJA). Although judges are public employees, the MJA is a private trade organization. It is not part of state government.

The emails recorded district judges expressing approval and disapproval of SB 140 and making comments on it, including assessments of its constitutionality. The poll revealed that most judges opposed SB 140. Apparently in response to this result, Chief Justice McGrath met with the governor to lobby against the bill.

Lawmakers became concerned that encouraging judges to express their pre-adoption views on a bill might prejudice their later treatment of it—a view similar to that expressed at the 1787 convention that framed the U.S. Constitution.[221] Lawmakers also

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[220]Charter of Connecticut (1662), https://avalon.law.yale.edu/17th_century/ct03.asp (providing for election of "assistants" by district: "the respective Towns, Cities, and Places for which they shall be elected or deputed"). Oliver Ellsworth, one of the Constitution's framers, served as an assistant, and therefore as a judge, before becoming the third U.S. Chief Justice. The Connecticut charter served as the state's constitution until 1818.

[221]The following extract from James Madison's notes is pertinent:

were concerned that judges might be conferring, at public expense, on other bills, and perhaps deciding their fate before they were passed.

On Friday, April 2, 2021, a legislative committee asked McLaughlin to provide copies of emails pertaining to the poll or otherwise issued after the legislative session began. By the following Thursday, April 8, lawmakers had concluded she was "slow-walking" the request. In addition, lawmakers knew that after a relatively short period, the Department of Administration (which has custody of state electronic records) would delete those emails in the normal course of business. Accordingly, the chairman of the Senate Judiciary Committee sent a subpoena to the Department of Administration. It demanded judicial records from January 4 to April 8. The subpoena excluded records pertaining to decision making on cases before the courts. The committee sent courtesy copies to McLaughlin and others in the judicial branch.

The very next day, the Department released over 5000 records to the committee. They were only some of the materials subpoenaed because many emails already had been deleted, apparently by McLaughlin's office. The released documents showed judges commenting actively on other bills and expressing opinions on their constitutionality. Through these documents and other sources, lawmakers learned that there had been many earlier polls run by the court administrator. The court administrator's office had been providing taxpayer-funded services for the MJA since 1991.

<First> Clause <of Proposition 8th> relating to a Council of Revision taken into con-consideration.

Mr. Gerry doubts whether the Judiciary ought to form a part of it, as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality . . . It was quite foreign from the nature of [the]. office to make them judges of the policy of public measures. <He moves to postpone> the clause . . .

Mr. King seconds the motion, observing that *the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation.*

1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, pp. 97-98 (Max Farrand, ed. 1937) (Jun. 4, 1787) (Italics added).

The legislature also learned—and this would have been no surprise to anyone who has served in Montana state government—that the Chief Justice and other judges had been lobbying with public resources.

On Saturday, April 10, McLaughlin initiated a suit against the Department of Administration, invoking the Supreme Court's original (trial) jurisdiction. It asked the court to stop the document release. McLaughlin's attorney apparently had extraordinary access to the justices, because the very next day (a Sunday) they issued an order quashing the subpoena. This order was issued without prior notice to the Department of Administration (which was a party) or to the legislature (which was not).

On Monday, April 12, the legislature retained the Department of Justice (Attorney General) to represent its interests. The AG's lieutenant, Kristen Hansen, explained in a letter to the court that the purposes of the subpoena included determining whether emails had been improperly deleted, whether McLaughlin was using state resources for the benefit of a private organization (the MJA), and whether the policies and procedures of the Judicial Standards Commission were sufficient. (The Judicial Standards Commission is created by the legislature[222] but staffed by Supreme Court appointments.)

Hansen's letter also informed the justices—in rather strong language—that she did not consider the order of Sunday, April 11 to be valid against the legislature. McLaughlin thereupon filed a new petition.

On Wednesday, April 14, the legislature created a "Special Select Committee on Judicial Accountability and Transparency" under the leadership of Senator Greg Hertz. This committee revised the subpoena to McLaughlin, asking her to testify and produce her state-owned computer. The committee also sent a "preservation request" to all district court judges and judicial staff asking them to preserve correspondence with McLaughlin from between January 4 and April 9. The committee did not subpoena any district court

[222]MONT. CONST. art. VII, § 11.

judges, but it did subpoena the Supreme Court justices to appear before the legislature and bring records with them.

On Friday, April 16, the Supreme Court quashed all these subpoenas, pending judicial consideration. The Chief Justice wrote to the legislature stating that the emails demanded were privileged and not subject to legislative demand. However, all the justices did testify before the legislature on April 19.

Justice Rice disqualified himself from the proceedings, and the court appointed District Judge Donald L. Harris to replace him.

Meanwhile, the legislature moved in the Supreme Court for the disqualification of all justices for conflict of interest. On May 12, the court issued an opinion denying this motion.[223] (We shall call this decision *McLaughlin I*.) Justice McKinnon, writing for the court, claimed that because the legislature had targeted the entire judicial branch, all judges in Montana were conflicted. She cited the *Reichert* case and its resort to "the rule of necessity."

On June 10, the court decided *Brown v Gianforte*.[224] It upheld the constitutionality of SB 140.[225] Justice Rice, despite recusing himself from the *McLaughlin* proceedings, penned a concurring opinion in which he labeled the conduct of the legislature and Attorney General's office "dishonest," "contemptuous," and "destructive to the democratic system."

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[223]McLaughlin v. Mont. State Legislature, 404 Mont. 166, 489 P.3d 482 (2021).

[224]404 Mont. 269, 488 P.3d 548 (2021)

[225]Although the question was a close one, the court's decision appears to be correct.

One commentator argues that the court should have considered ratification materials rather than merely the convention transcripts, J.T. Stepleton, *Reconsidering* Brown v. Gianforte *and The Elimination of The Montana Judicial Nominating Commission,* 83 MONT. L. REV. 379 (2022). He is right about that, see Part I(C)(3), but his quotations from ratification materials generally do not support his conclusion that a nominating commission was the only way to ensure consideration of "merit" in gubernatorial appointees. They state that the legislature would decide how candidates would be screened, with a commission as *one option. Id.* at 389-91.

On July 14, the court issued a decision we shall call *McLaughlin II*.[226] Justice Baker's opinion for the court confirmed the quashing of the subpoenas. She contended that judicial conduct was not a proper subject of legislation, and therefore not a proper subject for a legislative subpoena.

On September 5, 2023, the McLaughlin Controversy returned to the news when the Office of Disciplinary Counsel, acting on the complaint of a California lawyer licensed in Montana, launched a professional misconduct proceeding against Attorney General Austin Knudsen. The charges centered on allegedly "contemptuous, undignified, discourteous, and/or disrespectful" comments the Attorney General and his staff had made about the court during the controversy, and their refusal to acknowledge any legal force in the court's Sunday, April 11 order quashing the first legislative subpoena.[227]

The charges brought by the Office of Disciplinary Counsel will be heard by the Commission on Practice. Both the Office of Disciplinary Counsel and the Commission on Practice are appointed by and operate "under the direct supervision of the Montana Supreme Court"[228]—the same party allegedly wronged by the Attorney General's conduct. The Office of Disciplinary Counsel and the Commission on Practice both follow rules prescribed by the Montana Supreme Court,[229] and an appeal from the decision of the Commission on Practice goes to the Montana Supreme Court.[230]

Ironically, there have been "contemptuous, undignified, discourteous, and/or disrespectful" comments from the court's own ranks. In addition to Justice Rice's charges

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[226]McLaughlin v. Mont. State Legislature, 405 Mont. 1, 493 P.3d 980 (2021).

[227]Complaint, In re Knudsen, Commission on Practice of the Supreme Court of Montana, Case Number: PR 23-0496, Sept. 5, 2023.

[228]Office of Disciplinary Counsel for the State of Montana, Our Authority, https://montanaodc.org/.

[229]Rules for Lawyer Disciplinary Enforcement, https://img1.wsimg.com/blobby/go/0dfa798d-443a-4159-b66e-3a404e41e7a3/downloads/RLDE%202021%20(with%20Order).pdf?ver=1704481035701.

[230]*Id.*, Rule 16.

of dishonesty in his *Brown v. Gianforte* concurrence, Justice Sandefur's *McLaughlin II* concurrence accused the court's legislative and executive branch opponents of "irresponsible rhetoric . . . that has and will likely continue to spew forth from those intoxicated with their long-sought unitary control over the political branches of government." Justice Sandefur further assailed "the absurdity of those patently false and intentionally inflammatory political talking-points," that reveal "a far more sinister motive." He accused the Attorney General and legislature of creating a "smoke-screen of the catchy but demonstrably false allegations leveled against the judiciary in an unscrupulously calculated and coordinated partisan campaign."[231]

Tempers had flared on all sides. Thus far, however, there has been a professional conduct complaint only against the Attorney General, not against Justices Rice or Sandefur.

B. An Assessment

During public controversies, few participants invariably conduct themselves with unblemished restraint. No doubt some people on both sides of the McLaughlin Controversy wish they could "unsay" some things. In the Montana mass media, the court has come out rather better than the legislature, whether because of "liberal bias" or because of normal respect for judges and contempt for politicians.

Nevertheless, this author believes the court bears most of the blame.[232] There are many reasons for this conclusion. Fully explaining all of them would require exhaustive legal analysis. But here is a summary:

First: As demonstrated in the 2012 study, the Montana Supreme Court has a long history of disregarding the rules of judicial restraint that prevail elsewhere. Every judicial

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[231] *McLaughlin II*, 405 Mont. at 41-42, 493 P.3d at 1004–05.

[232] *Accord: Editorial, Conflicts of Supreme Judicial Interest*, WALL STREET J., Dec. 27, 2021.

invasion of the provinces of the legislature or executive is a provocation to the personnel of those two branches.

Second: As a general proposition, lobbying with public resources is illegal in Montana.[233] The scope of illegitimate conduct surely includes using public resources to organize polls and otherwise facilitate the lobbying of a private organization.

Third: Inducing judges to discuss the merits or constitutionality of legislation on which they may be called to rule is improper.

Fourth: The Montana Constitution provides that "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."[234] The Montana Supreme Court has enforced this language broadly against other agencies. It is hard to justify concealing from the public—much less the legislature—correspondence sent and received with public resources on a matter of public interest.

Fifth: On several occasions when the justices could have dampened the conflict, they poured gasoline upon it. For example, they could have replaced compromised justices with district judges, who were far less conflicted than the justices. Although the legislature had subpoenaed the justices and their employee (the court administrator), it had sent the district judges only a document-preservation request.

Alternatively, the justices could have trimmed down the legislative subpoena to a more targeted scope rather than quashing it entirely. They could have acknowledged more forthrightly that taxpayer-financed polling to influence legislative action was, if not illegal, at least imprudent. They could have acknowledged that state ethics laws applying to other employees apply to them.[235]

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[233]MONT. CODE ANN. § 2-2-121(5).

[234]MONT. CONST., art. II, § 9.

[235]According to one source (a Montana lawyer, who like the other lawyer-sources is

Sixth: The justices could have instructed their ethics watchdogs to let matters lie. The elaborate complaint against the Attorney General from the Office of Disciplinary Practice comes across as retaliatory and mean-spirited.[236] Moreover, one of its prominent features is the Lieutenant Attorney General's assertion that the court's April 11 order purporting to quash the legislative subpoena was invalid. Although her language was direct, her conclusion seems unquestionably correct under the court's own jurisprudence: The legislature was not a party to the case in which it was issued, and the court recently confirmed that it has no jurisdiction over a non-party.[237]

In addition to weaknesses in the merits of the complaint against the Attorney General, there are serious due process concerns. The U.S. Supreme Court is likely to give substantial deference to a state's professional conduct procedures. But even that deference may be tempered when a procedure for destroying a person's livelihood is one in which the allegedly injured party, the complainant, the trier of fact, and the appeals board all are, or are answerable to, the same entity.

Seventh: Just before publication of this Issue Paper, the court issued an opinion that bears the mark of a continuing vendetta. In *Forward Montana v. Montana*,[238] the tribunal approved a district court order striking down a provision in a campaign finance

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unmentioned for protection against retaliation), there were efforts from the Attorney General's office to moderate a compromise. Although some justices responded positively to the initiative, the court as a whole did not.

[236]This retaliation against a lawyer for public criticism is reminiscent of one of the more sordid episodes in free speech law. Early in the 20th a lawyer who owned the *Rocky Mountain News* criticized the Colorado Supreme Court in his editorials. The court responded by fining the editor for contempt. Ultimately, the U.S. Supreme Court upheld the fine against a First Amendment challenge. Paterson v. Colorado, 205 U.S. 454 (1907).

The affirmance was issued over the dissents of Justices Harlan and Brewer, two of history's more highly regarded jurists. Because of intervening developments in free speech law, the same result would be unlikely today. *See* DAVID B. KOPEL, COLORADO CONSTITUTIONAL LAW AND HISTORY 66-71 (2d ed., 2022) (reproducing the opinions and discussing the background).

[237] Mont. Dep't of Pub. Health & Hum. Serv. v. Parker, ___ Mont. ___, ___ P.3d ___, 2023 WL 8449583 (Mont. 2023).

[238] ___ Mont. ___, ___ P.3d ___, 2024 WL 351378 (2024). *See also* Part II(D).

bill designed to curb judicial conflicts of interest. The court also delved deeply into the merits of the internal procedures by which the legislature passed the measure—traditionally a matter entirely out of bounds for the judicial branch. To top it off, the court (with Justices Rice and Sandefur dissenting) assessed attorneys' fees against the legislature, although in analogous circumstances it previously had denied them to conservative plaintiffs.

Eighth: The justices' opinions issued during the controversy were defensive, disingenuous, and unconvincing. For example:

(A) The court maintained that because the judiciary is a separate branch of government, the legislature may not investigate it against its will. But as everyone familiar with public affairs knows, American legislatures investigate other branches of government all the time. That is part of their job. Indeed, the Montana Constitution provides "The legislature shall by law insure strict accountability of all revenue received and money spent by the state . . .."[239] There would be no way to adopt laws insuring strict accountability if the legislature could not investigate how other branches were conducting affairs.

(B) The court claimed the legislature could not investigate alleged violations of law—that this is an executive rather than a legislative function. But violations may suggest that the legislature needs to strengthen or reconsider the law as part of its duty of assuring "strict accountability."

(C) The court contradicted itself. In *McLaughlin I* it stated that no justices had any role in the polling conducted for the MJA.[240] In *McLaughlin II* it seemed to say the opposite.[241]

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[239]MONT. CONST. art. VIII, § 12.

[240]404 Mont. at 174, 489 P.3d at 487 ("each justice has made abundantly clear, on several occasions, that they did not participate in the activity that is the primary subject of the Legislature's investigation—the poll conducted by the MJA.").

[241]Trump v. Mazars USA, LLP 405 Mont. at 20, 493 P.3d at 991:

(D) The justices' claim that their impartiality was not compromised in the McLaughlin Controversy was, in Attorney General Knudsen's word, "ludicrous." How is an employer to assess dispassionately an investigation against its own employee for actions taken with the employer's active or passive agreement?

For the justices to decide such a case seems to contradict their own conflict of interest standards.[242] Their response—that district judges not subpoenaed might also be biased—was unconvincing. The legislature never subpoenaed the district justices, and two cases Justice McKinnon relied on to justify non-recusal both involved very different circumstances.[243]

(E) In several respects the court's *McLaughlin* opinions were misleading enough to suggest bad faith. For example, in *McLaughlin II*, Justice Baker's opinion described the U.S. Supreme Court case of *Trump v. Mazars USA, LLP*[244] as a case

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> As the liaison between the Judicial Branch and the Legislature, the Court Administrator acts within her job duties when she . . . conducts a poll to allow district judges, through the Montana Judges Association, to provide the Legislature with relevant information regarding how proposed legislation will affect Judicial Branch functions. *See* § 3-1-702(10), MCA (providing that the Court Administrator's duties include those "*that the supreme court may assign*").
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> Italics added.

[242]Bullman v. Montana, 374 Mont. 323, 327, 321 P.3d 121, 124 (2014) ("Montana's Code of Judicial Conduct Rule 2.12 requires that a judge disqualify himself 'in any proceeding in which the judge's impartiality might reasonably be questioned'").

[243]Justice McKinnon wrote, "Montana judges have in the past presided over cases where the Court Administrator has been a party, without a conflict of interest." 489 P.3d at 486. The two cases she cited were Montana v. Berdahl, 386 Mont. 281, 389 P.3d 254 (2017) and Boe v. Court Adm'r for Jud. Branch of Pers. Plan & Policies, 335 Mont. 228, 150 P.3d 927 (2007).

However, in both cases, the administrator was involved only tangentially and was not charged with misconduct under court direction, as in the *McLaughlin* controversy. Further, the two cases are hardly evidence of judicial impartiality: In both, the court ruled for its administrator.

Justice McKinnon's opinion also made much of the fact that the legislature's lawyers did not accuse the bench of actual bias. But what Montana lawyer would dare to do so under the circumstances?

[244]591 U.S. 848 (2020).

governing congressional demand for (as she put it) "the President's information."[245] She therefore concluded that the "principles" of *Mazars* applied to the McLaughlin Controversy.

But the central fact of *Mazars* was not that Congress seeking merely "the President's information." In writing that phrase, Justice Baker left something out: The central fact was that Congress was demanding the President's private, personal, business, and family information. SCOTUS therefore authorized a much narrower scope than if Congress had sought *public* information.[246] Of course, in the McLaughlin controversy, the Montana legislature was seeking public information.

Similarly, several justices were guilty of selective, deceptive quotation from Chief Justice John Marshall's famous opinion in *Marbury v. Madison.*[247] The justices' message was that the courts, and only the courts, determine constitutionality, and that it is the duty of all other government actors to obey.[248]

But that was not at all what Chief Justice Marshall wrote. Here are his actual words. Note the underlined passages:

> If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory . . .

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[245]405 Mont. at 11, 493 P.3d at 986.

[246] *E.g.*, 591 U.S. at 870 ("While we certainly recognize Congress's important interests in obtaining information through appropriate inquiries, those interests are not sufficiently powerful to justify access to the President's *personal papers* when other sources could provide Congress the information it needs.") Italics added.

[247]5 U.S. 137 (1803)

[248]Brown v. Gianforte, 404 Mont. at 281, 488 P.3d at 556 (Justice Shea). *See also id.* at 562 (Justice Rice); *McLaughlin I*, 404 Mont. at 175, 489 P.3d at 488 (Justice McKinnon); *McLaughlin II*, 493 P.3d at 987 (Justice Baker).

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. Marbury v. Madison, 5 U.S. 137, 177-78 (1803) (Italics added.)

In other words, Marshall was discussing how a *court must act in the cases brought before it*. He was not proclaiming superiority over other branches of government. He certainly was not proclaiming that only the courts may consider constitutional issues. Nor could he make such a claim: Judgments about constitutionality comprise a part of the duties of many government agencies. In Montana, these include the legislative counsel, the Attorney General's office, the governor's legal counsel, legislative judiciary committees, and others.

It is true, of course, that judicial refusal to enforce a law negates it as to that particular case. Moreover, a Supreme Court refusal may have a wide impact because lower courts in the same jurisdiction will follow suit. But that is a far cry from what the justices claimed.

Part IV: Conclusion

The author's 2012 study on the Montana Supreme Court reported that the tribunal's decisions often failed to meet universally-recognized rule-of-law standards of clarity, stability, notice, fairness, and judicial restraint. This new Issue Paper covering the

2012-2023 period shows some improvement in the clarity and stability categories: Since 2012, the court's opinions generally have become clearer and its formerly-frenetic rate of discarding its own case precedents has abated considerably. Still, the court continues to issue unclear opinions, and the justices frequently disregard their own rules. Inconsistency in applying the court's own rules is particularly noticeable in how the justices waive standing requirements for favored plaintiffs, how they review statutes for constitutionality, and how they enforce constitutional rights.

The court continues to earn low marks in the notice, fairness, and judicial restraint categories. In controversial cases, the court sometimes fails to notify parties who are entitled to be notified. As Justice Rice pointed out in his *Espinoza* dissent, this failure sometimes is serious enough to violate the due process guarantee in the U.S. Constitution.

In the realm of fairness: The court displays distinct favoritism for some kinds of parties and causes over others. This favoritism closely tracks political lines, with "liberal" parties and causes enjoying distinct advantages over their "conservative" counterparts. In particular, the contrast between how the court has treated "liberal" ballot measures and how it has treated "conservative" ballot measures is too sharp for any honest person to dispute.

As for the category of judicial restraint: The 2012 study identified some truly astounding examples of overreach, in which the court disregarded traditional judicial standards when issuing decisions aggrandizing itself at the expense of the legislature, the executive, and even the electorate. There were fewer such cases in the 2012-2023 period. Moreover, during the later period there were occasional decisions—such as that in *Brown v. Gianforte*—that probably would have gone the other way before 2012.

On the other hand, the court has overruled or limited none of its earlier overreaching cases. This Issue Paper identified three of the worst—labeling them the "toxic trio"—and showed that the court has preserved and even expanded them. A normal mode of redress would be the constitutional amendment process. But the court has

asserted an absolute veto over that.

Judges are human. They have their own political opinions and prior conceptions. Political opinions and prior conceptions may skew the deliberations of even the most conscientious judge. However, in this area, as in so many others, there is a spectrum. A conscientious and competent judge, while acknowledging preconceived notions, works hard to limit their effect on case results.

No one reading Montana Supreme Court decisions can conclude that most of the justices are making a serious effort to shield their work from their personal political opinions. On the contrary, this appears to be a unusually political bench and one without much insight into how its conduct is, or can be, perceived by others.[249]

Montana lawyers have long recognized the political nature of this court. The McLaughlin Controversy ripped off the covers for all to see.

Proposing remedies is outside the scope of this already-too-long Issue Paper. One, however, is worth mentioning.

Most of the 1972 Montana Constitution is unobjectionable and some of it is exemplary. On the other hand, some parts are ambiguous, contradictory, or without clear meaning. Characteristics of this kind are invitations to judicial oligarchy.

Most of the 1972 constitution's drafters shared a populist vision of democratic governance. The irony is that defects in the document they produced have helped the court undermine that vision.

The court's problems are far wider and deeper than can be traced to the state constitution. Nevertheless, any comprehensive solution to judicial unfairness and over-activism should include carefully-considered constitutional reform.

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[249] The justices' failure to recuse themselves in cases such as Reichert v. State ex rel. McCulloch, Part III(A)(1), the conduct leading up to and during the McLaughlin Controversy, Part III(A)(2) and Justice Gustafson's extraordinary demonstration of overt political bias, *supra* note 37, all testify to the lack of insight.

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