

THE MONTANA SUPREME COURT VS. THE RULE OF LAW

A BARRIER TO PROSPERITY

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Executive Summary

There is a consensus among researchers that adherence to the rule of law is crucial to vigorous economic growth. Montana's economy has lagged the economy of most of the United States since the 1980s, and this MPI Study explains one reason why: The Montana Supreme Court, the final authority in the state on most legal questions, has not honored the rule of law. Its failure to do so has harmed wealth and job creation in Montana.

In this Study, Professor Rob Natelson, the Institute's Senior Fellow in Constitutional Jurisprudence, first examines what it means to honor the rule of law. He identifies five components: clarity, stability, notice, fairness, and restraint. He then shows how the rule of law is important to a state's economy. The American Founders understood this, and Professor Natelson cites provisions they inserted into the U.S. Constitution to protect the rule of law.

He then explains why the Montana Supreme Court is more influential within state boundaries than most tribunals of its kind, giving it a significant impact on the Montana economy.

The heart of the Study is its comparison of rule-of-law standards with the court's actual practices. The comparison is based partly on previous scholarly research and partly on a new case-by-case analysis of some of the court's most important opinions. Professor Natelson concludes that the court frequently diverges from rule-of-law standards, and that this conduct presents a serious barrier to prosperity in Montana.

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I. What is the Rule of Law?

A. Elements of the Rule of Law.

Researchers use the term “rule of law” in either a broad or narrow way. The broad definition goes beyond the judicial system to include factors from the wider constitutional and legal environment, such as whether a country protects democratic freedoms and civil liberties. The narrower definition focuses on how the judicial system is administered. This Study uses the narrower definition, since its purpose is to examine the behavior of the Montana Supreme Court.

The narrower meaning of the term “rule of law” contains at least five components: clarity, stability, notice, fairness, and restraint. These components are listed from the lesser to the greater. The earlier items on the list tend to nestle within the latter ones.

These rule-of-law components are independent of whether courts adopt liberal or conservative rules; these components pertain more to how the rules are administered. Both liberal and conservative justices can either honor the rule of law, or violate it.²

1. Clarity.

A court following the rule of law enunciates principles and legal rules that are *clear*. If the rules are not clear, they may work unjustly, and people may not be able to understand them. Citizens may incur undue expense interpreting the law or insuring against alternative possible meanings.

It is not enough that individual rules be clear.

Different parts of the court’s jurisprudence must work together and be consistent and coherent. Otherwise, conflicts among rules create muddled law.

Producing clear jurisprudence requires good judicial skills. In particular, it requires what Professor Lee J. Strang³ calls “theoretical wisdom,” and what most of us call academic intelligence. The judge must be able to deal with abstract ideas and express himself well. Muddled or contradictory decisions suggest that the author is not smart enough to serve adequately on the bench.

2. Stability.

A court honoring the rule of law keeps its jurisprudence *stable*. In other words, the tribunal avoids the unpredictability that comes from disruptive or needless changes. Stable jurisprudence is generally more efficient to administer than mutable jurisprudence. Moreover, unpredictability is unfair (people have a hard time figuring out what the law is), and unpredictable jurisprudence discourages people from investing and making other improvements in their lives.

Stability is at the heart of the Anglo-American legal tradition. Courts in England and the United States traditionally follow

a guideline called *stare decisis*, a Latin phrase meaning “to stand by the decisions.” *Stare decisis* requires judges deciding later cases usually to follow the rules and principles laid down in prior cases. *Stare decisis* enables people to predict the consequences of their actions.

Sometimes, of course, conditions have changed so much that a court must alter the rules to keep up with conditions—otherwise rules originally designed to work justice may create injustice. In general, however, responsible courts follow precedent and leave major legal changes to the legislature. Stability is especially crucial for business-related jurisprudence, such as the law of contracts, finance, and property, where citizens rely heavily on consistent rules. As the post-Soviet history of Russia demonstrates, legal instability is a powerful deterrent to investment and economic growth.

Keeping the law stable, like ensuring clarity, requires good judicial skills. A judge must have the diligence and intelligence (“theoretical wisdom”) to know what the precedents are and to deduce their underlying principles. A judge also must display what Professor Strang calls “justice-as-lawfulness”—that is, “the virtue of giving one’s society’s laws their due.” This, in turn, requires sufficient temperance and humility to respect the wisdom of those who have gone before.

A court honoring the rule of law keeps its jurisprudence stable.

Correspondingly, the judge also must possess the discretion necessary to determine when change is necessary.

3. Notice.

By *notice*, we mean two different things. First, the members of the general public must be able to understand in advance what they may and may not do. This kind of notice requires decisions that are clear and stable.

Second, notice requires that people whose rights will be affected by a case be informed of pending proceedings, and receive an opportunity to be heard. The court may not play favorites by granting notice to some while denying it to others; it must follow pre-established procedures. Thus, if a tribunal decides a case without informing disfavored parties or hearing their arguments—as the Montana Supreme Court sometimes does⁴—the tribunal has violated the rule of law. This tells investors and others that the authorities may change the rules without informing them first, and thus compromise their rights without a hearing. Such conduct is very damaging to economic prosperity.

This second kind of notice was central to the American Founders' understanding of the Fifth Amendment's mandate that no one "be deprived of life, liberty, or property without due process of law."⁵

4. Fairness.

A tribunal that follows the rule of law endeavors to be impartial, to apply like rules in like situations, and to take account of different relevant circumstances. *Fairness* is often called *equity*⁶ or *justice*. Clarity, stability, and notice are essential to fairness, but they are not sufficient. A court that clearly and consistently announced that it would uphold *all* death sentences in murder cases, no matter how extenuating the circumstances, would be compliant with the standards of clarity, stability, and notice—but it would not be acting fairly.

To follow the rule of law, a court must impose rewards, compensation, and penalties according to what the parties deserve. A court generally does not follow the rule of law when it punishes the innocent or relieves the guilty. Fairness requires equal treatment for those situated similarly. In this respect, justice is blind. A court does not follow the rule of law if it systematically treats Caucasians better than African-Americans, or

Republicans better than Democrats, or family friends better than strangers, or opponents of free enterprise better than advocates of free enterprise.⁷

Fairness or justice is a way of responding to individuals. It is not the same thing as "social justice." The latter term usually refers to policies designed to advance the interest of some by inflicting loss (sometimes unjust loss) on others.

5. Restraint: Respecting Judicial Limits.

Judges who follow the rule of law exercise restraint by respecting practical and constitutional limits. This form of restraint does not mean blind deference to the legislative or executive branches. It means avoiding judicial legislation. As the Montana Supreme Court has acknowledged, "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits."⁸

The judiciary's "narrow limits" are the traditional legal questions judges are equipped to address: Did the parties enter into an enforceable contract? What does the deed's property description mean? What must the prosecutor prove when prosecuting a specific crime? Judges are guided on such questions by their law school training, their legal experience, and their law books. But judges have little or no expertise in such matters as how to fund public schools or how far the legislature should regulate sexual morals. Their legal background offers little assistance on such matters.

One reason we expect judges to avoid legislating is that we are committed to popular government. Judicial lawmaking is not democracy, but oligarchy. There also are sound economic reasons against judicial lawmaking, discussed in Part II.

Thus, when a plaintiff asks a judge to resolve an issue that should be decided by other branches of government, the judge should dismiss the case. In legal language, the case is a "political question" and therefore "not justiciable." This principle is enshrined in the Montana Constitution at Article III, Section 1:

The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No

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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.

The principle also is enshrined in the U.S. Constitution's requirement that each state retain a republican form of government.⁹

B. Why Would a Court Act Any Differently?

These rule-of-law standards seem straightforward enough. Why don't all courts respect them? There

Governments that disregard the rule of law may invade property rights or otherwise reduce potential economic rewards, thereby crippling incentives to produce.

are a number of reasons.

Judges are sometimes deficient in the judicial virtues. On rare occasions, a judge may accept bribes.

More commonly,

they may be power-hungry or unduly influenced by personal or political concerns. They may be overconfident in the accuracy of their own views, or contemptuous of the voters or the legislature. They may be incompetent—that is, they may lack the training, ability, or inclination or do their jobs well. They may suffer from influences that impair their independence or that affect their judgment. A court may labor under institutional defects, such as a poor state constitution or a backlog that prevents timely disposal of cases.

This Study does not speculate on *why* the Montana Supreme Court sometimes fails to honor the rule of law. This Study merely sets forth examples of how the court has failed to do so.

II. Why State Adherence to the Rule of Law is Important to Economic Prosperity

A state or nation's economic success is partly the result of the government policies it pursues. Economists have studied how a state or nation's economy is influenced by such policies. Among the state policies that influence economic growth are the size of government,

public spending priorities, trade policy, education, levels of taxation, tax structure, and economic regulation. In addition, researchers have examined how the success of a state or nation's economy is affected by its commitment to the rule of law.

Although researchers disagree on whether a high-quality justice system is absolutely necessary to prosperity or merely helpful,¹⁰ they do agree that the rule of law promotes prosperity and that disregard of the rule of law is a barrier to it.¹¹ Here are some of the reasons:

- Investment is central to growth, and investors depend on clear, stable, predictable legal protection for property and contracts.
- If the law is unclear, mutable, and/or unpredictable, people must find ways to protect themselves and their families, contracts, and property against legal uncertainty. This can be costly. A jurisdiction that does not offer clear, stable, predictable law thereby imposes additional costs on workers, investors, business people, and consumers. This raises the cost of productive activity, and may prevent some productive activities entirely.
- Governments that disregard the rule of law may invade property rights or otherwise reduce potential economic rewards, thereby crippling incentives to produce.
- Legislators are likely to make better policy decisions than judges. This is because legislators are numerous, subject to popular will, come from more walks of life, and are in constant contact with their constituents. Better government decisions raise the quality and lower the cost of services.
- Judicial lawmaking tends to favor government and wealthy established interests at the expense of small businesses, entrepreneurs, and consumers. This is because participating in court cases is expensive. Judicial lawmaking is often skewed in favor of those with access to the courts and against the small businesses that create most new jobs and economic growth.

III. The U.S. Constitution and the Rule of Law

The American Founders were strongly committed to the rule of law. During the pre-Independence struggle with Great Britain, Josiah Quincy, Jr., a Massachusetts patriot, wrote about how Parliament's Boston Port Bill fractured existing contracts, in violation of the accepted principles of *fairness* and *notice*.¹² Other advocates of the colonial cause focused on the unfairness of British judicial practices, by which people accused of crime could be denied trial by jury and be sent to England for trial.¹³ John Adams defined the essence of republican government as the rule of law rather than of men.¹⁴

The Founders' commitment to the rule of law was confirmed by personal experience. When recession hit after the Revolutionary War, most states adopted debtor-relief acts that altered legal rules retroactively to the prejudice of creditors. This led to the collapse of public credit, and prolongation of the post-War recession. Commitment to the rule of law is one reason the Founders adopted a written Constitution rather than an "unwritten" or "living" constitution such as that of Britain.

Alexander Hamilton complained in FEDERALIST NO. 73 of "that inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments." He and James Madison prescribed the Constitution as a cure for legal instability. Madison wrote in FEDERALIST NO. 44:

The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs [i.e., corrupt opportunities] in the hands of enterprising and influential speculators, and snares to the more-industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence

and industry, and give a regular course to the business of society.

Here are some of the ways the Constitution furthered the rule of law:

- It *clearly* delineated the structure, functions, and limitations of government. (Claims that much of the Constitution is vague derive from ignorance of the legal and historical background that help define many of its phrases.)¹⁵
- The Constitution promoted legal *stability* by its nature as a written document. It further promoted stability by establishing a bicameral Congress¹⁶ and the presidential veto.¹⁷
- Numerous clauses protected citizens' rights to *notice*.

John Adams defined the essence of republican government as the rule of law rather than of men.

Among these were the Ex Post Facto Clauses of Article I, Sections 9 and 10; the Contracts Clause of Article I, Section 10; and the Sixth Amendment's requirement of notice in criminal prosecutions.

- Numerous provisions promoted *fairness*, including those requiring uniformity in certain federal laws and policies,¹⁸ and those clauses designed to protect the fairness of prosecutions and trials.¹⁹ Still other sections promoted both notice and fairness by banning bills of attainder and retrospective criminal laws.²⁰
- The Constitution's Article III enumerated the powers of the judiciary and limited its authority to deciding "cases and controversies," as those terms were understood in Anglo-American jurisprudence.

In addition to structuring, empowering, and limiting the federal government, the Constitution promoted *state* adherence to the rule of law. For example, the Constitution included a ban on state ex post facto laws²¹ and a mandate that all states have republican governments.²² Later, the Fourteenth Amendment was added, requiring that states grant "due process" and "equal protection of the laws."²³ But as this Study shows, state violations of the rule of law sometimes occur anyway.²⁴



IV. The Montana Supreme Court and the Rule of Law: In General

A. The Montana Supreme Court's Signal Importance

The Montana Supreme Court, like the highest courts of other states, is the final judicial authority on matters of state law. However, for several reasons the Montana Supreme Court may exercise even more power than comparable panels in most other states.

One reason is that there are no intermediate courts of appeal in Montana. The high court decides many cases that in other jurisdictions would be resolved at the intermediate level. In addition, the Montana Supreme Court has very broad authority over the state's attorneys. Its agencies license and discipline all lawyers. In 1974 it created the State Bar of Montana, and it requires all lawyers to be members.²⁵

Montana legal writers rarely challenge the court in any fundamental way. Writers on law are nearly all attorneys and/or law professors, and Montana attorneys are subject to court discipline. Montana law professors all work for a single institution, The University of Montana School of Law. That school's relationship with the court is a cozy one: The court benefits the law school by requiring applicants for a Montana law license to have graduated from a law school accredited by the American Bar Association, which fortifies UM's monopoly position.²⁶ Nearly all UM law faculty members are members of the State

The court's jurisprudence has an out-sized effect on Montana public affairs.

Bar, and therefore subject to the discipline imposed by the Montana Supreme Court; most faculty attend at least some State

Bar meetings. The school "courts" the justices by regularly inviting present and former justices to speak and teach. The school hosts Montana Supreme Court arguments at least annually, and it honors the justices at an annual dinner.

The three principal magazines of legal commentary within the state all are associated indirectly with the court. The *Montana Lawyer* is published by the State Bar. The *Montana Law Review* and the *Public Land Law Review* are both published by the UM law school, and the *Montana Law Review* traditionally receives

funds from the State Bar. Thus, the Montana Supreme Court is rarely subject to the kind of fundamental criticism endured by other governmental institutions.²⁷

Adding to the strength of the court is the fact that Montana's legislators, who serve only part time and lack a strong policy support staff, usually are in a weak position from which to challenge the justices. As is discussed below,²⁸ the court regularly has invalidated legal efforts to curb agencies of state government, including itself.

For all these reasons, the court's jurisprudence has an out-sized effect on Montana public affairs.

B. Methodology and Sources

The purpose of this Study is to compare the Montana Supreme Court's methods with rule-of-law standards. The sources for this Study are of several kinds. Although critical scholarly examination of the court's methodology is rare, there are some published articles that offer valuable insight. Moreover, the author collected information about the court during the 23 years he served as a law professor at The University of Montana. The most important sources, however, are the court's own decisions and opinions.

The decisions and opinions selected are only those that shed light on rule-of-law issues. Excluded are holdings that, however good or bad their results, raise no serious rule-of-law issues. Recall that a court can be wrong, but still honor the rule of law.

Some of the court's rule-of-law deficiencies date back many years, but this Study focuses exclusively on decisions issued within the last three decades, with the overwhelming bulk of them within the last 15 years. Those decisions show certain clear patterns, which are explained below. The author also found sub-patterns followed by particular justices or groupings of justices (concurring or dissenting), but this Study does not discuss sub-patterns. This is partly for reasons of space, and partly to avoid actual or apparent fixation on personalities.

We can say, however, that on rule-of-law practices none of the justices have been clearly better or worse than the others. (This came as quite a surprise to the author.) For instance, Justice Nelson is reputedly liberal and Justice Rice is reputedly conservative. Both have issued ringing dissents from some rule of law violations. But both also have joined the majority in other decisions that violated the rule of law.²⁹ In other

words, the majorities that have abused the rule of law have been shifting majorities, but still majorities.

Over the last three decades there have been no judicial heroes on the court, and not even any innocents.

V. The Court's Decisions

A. Clear as Mud

The level of clarity and coherence in Montana Supreme Court decisions is frequently sub-par. Many opinions are rambling, confused, overly long, and filled with boilerplate.³⁰

To some degree, the problem derives from the way the court handles the statutes enacted in 1895 as part of the Field Code—a compilation named for their original author, New York lawyer David Dudley Field. These enactments, together with the annotations that supported them, were intended to resolve most legal questions in the areas covered. One of the five codes, the Civil Code, is still largely on the books. It is designed to govern private law subjects such as contracts, property, and agency.

There is no question that the Field Code statutes have many problems, and that the legislature should have repealed them long ago.³¹ Nevertheless, they remain statutory law, and judges are supposed to apply them. But as several scholars have documented, the court frequently misinterprets or ignores Field Code statutes.³² As a result, a given transaction may be governed by two inconsistent rules, one statutory and one based on case law.

There are other ways in which the court renders law confusing and unclear. Sometimes the justices just fail to grasp basic legal concepts. A good illustration is *Travelers Insurance Co. v. Holiday Village Shopping Center Ltd. Partnership*.³³

The *Travelers* case involved a real estate transaction of a kind very common among shopping center developers. A group of landowners, of which the most important was Hill County, Montana, leased their land for a long time period to a tenant who planned to construct a shopping center.³⁴ To obtain money to build the center, the tenant/developer asked for a loan from Travelers Insurance Company.

Travelers needed collateral to protect itself and its policy holders in case the tenant/developer didn't pay. In the event of foreclosure, it needed to be able to convey clear title. So the tenant/developer gave

Travelers a mortgage covering the leasehold, while the landlords agreed to “subordinate” to the mortgage their own interests in the property. “Subordination” in this context means that if the mortgage were foreclosed, the landlords’ interests would be extinguished, giving the foreclosure purchaser clear title.

As sometimes happens in such cases, the tenant/developer failed to pay the loan. Travelers therefore sought to foreclose on the leasehold and the landlords’ interests. The Montana Supreme Court allowed foreclosure on the leasehold, but refused to foreclose on the landlords’ interests.

The court wrote that (1) the subordination agreement was not a valid mortgage because it had used the verb “subordinate” rather than the verb “mortgage,” and (2)

the landlords’ interests could not be subordinate to Travelers’ mortgage because the landlords’ interests were held in fee simple,³⁵ and “by definition, a fee simple interest is absolute and without condition and limitation.” This left Travelers only with the leasehold, and not with the clear title it had been guaranteed.

To anyone familiar with real estate law, the court’s decision is bizarre. First, Montana has no requirement that a mortgage agreement use the precise verb “mortgage.” The statute communicates that the word is entirely optional; other terms can be used instead. Second, the intent behind the agreement between the landlords and Travelers Insurance was evident: the landlords were giving their interests as collateral. Third, the court was wrong to say that a fee simple cannot be subject to conditions or limitations. Fee simple titles often are limited and routinely are subject to liens of all kinds. If you have financed your home, then you probably have a fee simple subject to a lien.

Arguably, this decision left a portion of Montana real estate law in chaos. The court’s claim that a fee simple cannot be subordinated could, when taken to its logical conclusion, void almost every real property lien in the state, and thereby tank the housing market. Even read narrowly, the ruling left a cloud over real estate investment. The court seemed to be saying

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that a common and eminently respectable financing technique was illegal in Montana. Companies like Travelers could no longer invest with confidence in Montana shopping centers.

Another way the court sometimes unsettles the law is by issuing “rules” that are internally-contradictory or otherwise impossible to apply. Consider *Montana Environmental Information Center v. Department of Environmental Quality* (hereinafter “MEIC”).³⁶

MEIC involved the two provisions in the Montana Constitution guaranteeing to each citizen a “clean and healthful environment.”³⁷ The first of these is located in Article II, the constitution’s declaration of rights. It is addressed to state actions that impair the environment. The second is located in Article IX, and is addressed to both state and individual actions.

Another way the justices sow confusion is through uninformed pontification on issues other than those presented in the case.

In previous cases, the Montana Supreme Court generally had taken the position that a right listed in Article II is “fundamental,” so that a state action could override it only if that action was necessary to promote a “compelling state interest.”

(“Compelling state interest” is a malleable term to describe a goal the court thinks is very important.) In MEIC, the court added that if a private party proposes to do something that “implicates” the right to a clean and healthful environment, the private party must prove that he is serving a compelling state interest.

The word “implicate” in this context means to “affect as a consequence,” and of course any land use—farming, homebuilding, outdoor recreation—“implicates” the environment. Thus, according to MEIC, before any significant activity on private land can proceed, the property owner must prove to the satisfaction of the court that his action serves a compelling state interest. All such activities would be illegal until the court approved them. By making all private land serve the state in that way, the MEIC rule, if enforced, would be a step toward totalitarianism.

But there is more. Article II of the Montana constitution protects “acquiring, possessing and protecting property and seeking [one’s] safety, health

and happiness in all lawful ways.” By the reasoning of cases like MEIC, those rights also should be “fundamental” and not infringed without a compelling state interest. Thus under the Article II property right, an owner seeking a building permit or planting a crop may proceed unless an opponent shows a compelling state interest to stop him. But under the Article IX environmental right, an owner seeking a building permit or planning a crop may not proceed unless he shows a compelling state interest to *allow* him. The two rules are essentially self-contradictory.³⁸

Another way the justices sow confusion is through uninformed pontification on issues other than those presented in the case. Comments on issues unnecessary to a decision are called “dicta.” Most courts tend to avoid dicta as a matter of good judicial practice. Two years after MEIC, court-watchers were stunned by dicta in the opinion deciding *Cape-France Enterprises v. Estate of Peed*.³⁹

Cape-France was, or should have been, a routine contract case. A company owned some land and two women wished to purchase it. After the contract, but before the final sale, unforeseen difficulties arose. Among these was the discovery that water beneath the land might be polluted, after which the state demanded that a test well be drilled before the sale was complete. Because the unforeseen costs had largely destroyed the contract’s value to the seller, the court allowed the seller to withdraw from the contract.

If the court had stopped there, the case would have been unremarkable. Instead, the majority opinion went on to discuss how the constitution’s environmental rights require individuals and companies to prove compelling state interests before they do certain things on their property. Merely honoring a contract is not a compelling interest, the court added. The court did not inform the readers what a compelling interest might be.

Cape-France sent a chill down the spines of Montana business people. The court was essentially threatening to block any land-related actions it did not think sufficiently “compelling.” The court offered little basis for predicting what was “compelling” and what was not.⁴⁰

B. Stable as Quicksand

By the late 1980s, Montana lawyers had become aware of the state supreme court’s propensity for overturning

its own prior decisions. Practitioners wryly commented that it was malpractice in Montana not to appeal any losing case, no matter how ill-grounded, because the justices might do anything.

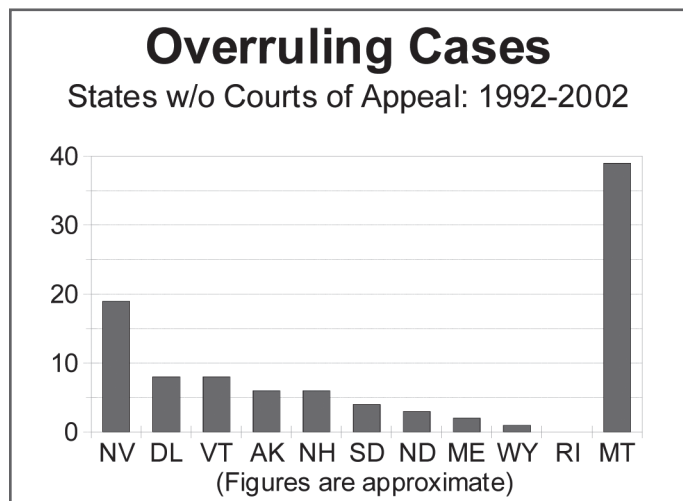
Stability is at the heart of the Anglo-American legal tradition, so one might predict expressions of alarm, or at least concern, from Montana legal commentators. Perhaps for reasons suggested earlier, little was written about this development.

By 2002, however, the author of this Study had become intrigued by what he had heard about

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the court's propensities to overrule its own cases. He decided to investigate. Using the Westlaw legal database, he determined how many of its own cases the court had overruled during the

previous decade. He then compared that number to the number of cases reversed by the high courts of the other ten states lacking intermediate appellate review. He summarized his findings in the following chart:



As this graphic shows, from 1992 to 2002, the Montana Supreme Court reversed its own cases more than twice as many times as the next-most-active tribunal (the Nevada Supreme Court), and perhaps ten times as much as the average.

In 2004, Jeffrey T. Renz, a clinical instructor at the University of Montana School of Law, published

his own analysis of “overruling” data extending continuously from 1891 to 2000.⁴¹ Renz concluded:

Beginning in 1970, the court’s rate of overruling precedent increased geometrically as it doubled, redoubled, and redoubled again during each succeeding decade.

The results give rise to one conclusion: the current court has been the most active in Montana’s history. It has been rewriting law at an unprecedented rate. The rate is reflected not only in the number of decisions that overruled precedent, but also in the number of past cases that were overturned. The 109 “overruling” decisions invalidated 249 cases.⁴²

Renz then proceeded to compare Montana with similar states for the decade from 1991 through 2000, with results nearly identical to those this Study’s author had found earlier:

... the rate of overruling in Montana exceeded the rates of these other states, not by a few cases, but by multiples of up to seventeen . . . To place these findings in a different perspective, the rate at which Vermont was overruling its precedent generated a Vermont Bar Journal article criticizing the practice. Yet the Vermont Supreme Court had overruled only thirty-nine cases over the course of sixteen years.

These data give rise to a second observation: the Montana Supreme Court has been the most active among similar state supreme courts.⁴³

Renz was an untenured teacher on a year-to-year contract. For him to publish these results when tenured colleagues were consciously disregarding them was an act of considerable courage.⁴⁴ No doubt one could quibble about some of the details of his research. But a record of the overall phenomenon was now in print.

For this Study, the author sought to bring Renz’s “overruling” figures for the Montana Supreme Court up to date. The author entered a query modeled on Renz’s into the Westlaw database⁴⁵ for the decade 2001 to 2010, and for the ensuing 19 months until July 31, 2012. Renz had found 109 “overruling” decisions during the decade from 1991 through 2000; the new query uncovered 73 for the 2001-10 decade.



This is lower than in the preceding period, but still far above judicial norms. Moreover, these 73 decisions upended *at least* 230 precedents, and very likely more.⁴⁶ One 2008 case overrode no fewer than 35 prior decisions!⁴⁷ Much the same pattern continued in the 19 months from the end of 2010 through July 31, 2012.⁴⁸

Another consideration makes the 2001-10 figures particularly arresting. The court's membership has changed slowly, so one might expect fewer overrulings as the justices re-construct the law to be more to their liking. Yet the court remains hyperactive, and its jurisprudence continues to be highly unstable.

Not all of these reversals have direct economic impact. Some, for example deal with subjects such as criminal law.⁴⁹ But many others upset economic expectations. Consider four illustrative rulings: a case muddying Montana's system of water rights; a case involving the interpretation of insurance contracts; a decision upending the use of land in and along streams; and a decision infringing the First Amendment free speech rights of citizens operating as corporations.

The title of the water rights case is in the accompanying endnote,⁵⁰ but it is so long that this Study will call it the *Water Rights Case*.

Under the Montana "prior appropriation" doctrine, water is assigned primarily on a property rights system, with each user's right obtaining priority according

The court's membership has changed slowly... yet the court remains hyperactive, and its jurisprudence continues to be highly unstable.

to how early the user (or his predecessors in interest) diverted the water and put it to beneficial use. As a general proposition, in time of shortage a person whose

predecessor first diverted water in 1920 will be able to take a larger share of his allotment than an owner on the same stream whose predecessor diverted water in 1921. Owners of senior (higher priority) rights pay for the benefits it brings them, and invest heavily in reliance on their position in the hierarchy.

Prior to 1973, state law authorized a procedure by which recreational and environmental uses to water could be granted a place in the hierarchy without

diverting the water. Rights to such water were called "Murphy rights." But if one simply left water in the stream (e.g., for fish) and did not use the Murphy procedure, the claim did not obtain a place in the hierarchy. After 1973, the Murphy procedure was no longer necessary, but the hierarchy was not altered retroactively. Thus, as of 2002 the priority of thousands of Montana water rights still depended on pre-1973 rankings: Those who did not divert water but complied with the Murphy procedure had a place in line, but those who did not divert water and failed to comply with the Murphy procedure had a place in line *only* if they had staked their claim after 1973. The Montana Supreme Court confirmed this situation in 1988 in *Matter of Dearborn Drainage Area*, widely known as the "Bean Lake Case."⁵¹

In the 2002 *Water Rights Case*, the justices changed their minds. They announced that they would be inserting pre-1973, non-Murphy recreational and environment uses into the priority scheme *retroactively*. This would allow environmental activists who alleged earlier in-stream uses to cut ahead of hundreds, perhaps thousands, of others. To my knowledge, the extent of the economic and personal damage has never been calculated. But there is no question the case sent a negative message to all considering investing in Montana.

*Allstate Ins. Co. v. Wagner-Ellsworth*⁵² is another example of the justices damaging economic expectations by changing the law retroactively. This case dealt with the issue of whether emotional distress resulting in physical consequences was "bodily injury" as the term was used in an insurance policy. In 2004 the court had ruled unanimously that when an insurance policy covered "bodily injury" the words did *not* include emotional distress resulting in physical consequences.⁵³ This enabled insurance companies to write their policies and fix their premiums based on that interpretation.

Yet in the 2008 *Allstate* case the Montana Supreme Court decided that "bodily injury" *did* include emotional distress resulting in physical consequences. The court did not identify any new circumstances arising during the past four years that would justify a change of course. It simply changed its collective mind.

One may debate whether the court's earlier decision or its later resulted in the better rule. But responsible

courts do not overrule prior decisions merely because they have second thoughts about the prior holdings. That is not fair to the citizens and businesses who try to organize their affairs in reliance on the law, and it is economically destructive.

Another effort to change the rules retroactively was thwarted this year by the U.S. Supreme Court.

To understand this case, one must know that under federal constitutional law each state government owns the beds of rivers that were navigable (i.e., on which goods could be transported for commerce) when that state entered the union. For Montana, that was 1889. The beds of non-navigable streams, as well as the beds of non-navigable portions of streams otherwise navigable, are private property.

For over a century, utilities had operated installations on private beds within several of the state's rivers. The state never charged them rent, apparently acknowledging that the riverbeds were private rather than state land.

In 2003, the state decided it wanted to change the rules retroactively. The goal was to gouge the utilities for millions of dollars in "past rent." So the state joined private parties in a federal lawsuit against the utility called "PPL Montana." The federal court dismissed the lawsuit on jurisdictional grounds, but PPL proceeded to state court for a declaration that the riverbeds were private, so it could be secure from such claims in the future. The state counterclaimed for rent, and the trial court ruled for the state.

Governmental shakedowns of innocent parties are more reminiscent of third-world tyrannies than of countries honoring the rule of law. The Montana Supreme Court should have reversed the trial court, but instead it affirmed. The justices ruled that the stretches of river occupied by PPL were navigable when Montana became a state. This put PPL and its customers on the hook for tens of millions of dollars in previously-unsuspected obligations.⁵⁴

PPL asked the U.S. Supreme Court for review, and in February 2012 the U.S. Supreme Court unanimously reversed.⁵⁵ Although there is insufficient space for a detailed recitation of the opinion, suffice to say that the U.S. Supreme Court found that the state court had erred at every turn: It had misapplied the rules of law pertaining to segments of a river; it had focused too much on present use rather than on use at the

time of statehood, and it had tried to replace federal constitutional law with Montana's so-called "public trust" doctrine.⁵⁶

The fourth case is the most famous. It was the Montana

Supreme Court's audacious and widely-publicized effort to partially repeal the First Amendment.

Virtually since the founding of the republic, citizens have had the First Amendment right to promote or oppose candidates for public office by speaking out themselves and purchasing media advertising to promote their views. As an incident of that right, citizens may speak through associations. Many years ago, the U.S. Supreme Court recognized that this right is not lost simply because citizens decide to incorporate their association under state law.⁵⁷

The U.S. Supreme Court's controversial *Citizens United* case of 2010,⁵⁸ which some tried to paint as a departure from previous law, was very much within this venerable tradition. That case held that Congress may not prevent people from supporting or opposing candidates for political office, as long as corporate spending is independent of the candidates' own campaigns. Although *Citizens United* partially voided a law passed by Congress, its rule applied equally to state governments. This was because a long string of decisions had held that the First Amendment restricted the states as well as Congress.⁵⁹

The right of incorporated associations to participate in politics is important to economic prosperity. Although the right certainly can be abused, it offers a way in which small donors and businesses can protect themselves against the efforts of politicians and bureaucrats to encroach on freedom. That is why *Citizens United* has received so much criticism from advocates of "command and control" policies.

In 2011, the Montana justices decided *Western Tradition Partnership, Inc. v. Attorney General*.⁶⁰ This case upheld I-304/305, a 1912 voter initiative that forbade corporate speech on political candidates. Essentially, the justices held that the First Amendment didn't apply fully in Montana because Montana's

Governmental shakedowns of innocent parties are more reminiscent of third-world tyrannies than of countries honoring the rule of law.



“unique” history of corporate influence and corruption gave state government power to override it.

Their treatment of history, however, was amateurish and inaccurate.⁶¹

Conduct like this serves to make wise citizens wary about investing too much in Montana.

Not only were the two events cited as examples of corporate electorate corruption well over a century old,

but both were irrelevant to the case: One had nothing to do with elections, and the other had nothing to do with independent corporate political expenditures. Moreover, neither event was in any sense “unique.” To make matters worse, the Montana justices relied heavily on an argument the U.S. Supreme Court already had rejected.⁶² That is why the U.S. Supreme Court summarily reversed, slapping them down for the second time in five months.⁶³

Additional examples of the Montana Supreme Court’s disregard of the rule-of-law value of stability appear in later portions of this Study.

C. Decisions Without Notice

As pointed out in Part II, free enterprise depends on investors and businesses understanding clearly what the law is. Judicial decisions that are unclear, mutable, and retroactive impair prosperity.

Citizens and businesses also are entitled to proper notice when a pending case may affect their rights. Unfortunately, the Montana Supreme Court sometimes impairs the rights of citizens without hearing them first.

One way the court has done this is to pronounce on matters not before the court where affected parties are absent. For example, in *State of Montana ex rel. Montanans for the Preservation of Citizen’s Rights v. Waltermire*,⁶⁴ the court removed from the ballot a pro-free enterprise constitutional initiative in a proceeding where the initiative’s advocates were not parties and had not been heard. The case is discussed further in Part V.D.2. Similarly, in *Kaptein v. Conrad School District*,⁶⁵ three concurring justices expounded at length on state constitutional restrictions on aid to religious schools, although this momentous and complicated issue had not been briefed, or even mentioned, in the proceedings.⁶⁶

Conduct like this serves to make wise citizens wary about investing too much in Montana.

D. Unfairness

1. Introduction

Judicial fairness requires adherence to standards of *clarity*, *stability*, and *notice*. Unclear jurisprudence fails to inform citizens what is expected of them. Mutable jurisprudence does the same; and retroactive change is particularly unjust to those who have relied on the former rules. It also is unjust to dispose of people’s rights without first notifying them and giving them a chance to be heard.

Fairness also requires judicial impartiality. A recent Chamber of Commerce-backed study of state judicial systems ranked Montana near the bottom (44th of 50) among the states in judicial impartiality.⁶⁷ Consistently with this finding, the Montana Supreme Court’s jurisprudence shows marked tilts in favor of the state bureaucracy and against the legislature, and in favor of government and against economic freedom. Although many other kinds of cases could be selected to support this conclusion⁶⁸ for reasons of space this Study focuses on how the court addresses those ballot issues potentially affecting Montana’s economic climate.

2. Leaning Against Free Enterprise: The Ballot-Issue Cases

In Montana, measures may be brought to the ballot by (1) referral by the legislature (legislative referendum), (2) a citizen petition referring an adopted bill to the voters for review (petition referendum, formerly sometimes called initiative referendum), or (3) a citizen initiative. Referenda and initiatives must meet certain legal requirements, but traditionally courts have interpreted those requirements to promote, rather than impede, popular sovereignty. This policy flows from the principle, expressed in the Montana Constitution, that “All political power is vested in and derived from the people” and that “All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.”⁶⁹ The Montana Supreme Court still enforces this policy—in selected cases.⁷⁰

Some ballot measures are not clearly pro- or anti-free enterprise. Term limits are an example. Other ballot measures appear to promote free enterprise, but are really advanced for other reasons. For example, Initiative 105 was a 1986 statutory initiative to limit property taxes, but its sponsors’ real goal was to induce the voters to defeat CI-27, a much more stringent measure. Once I-105 had served that purpose, the

legislature largely gutted it. Similarly, C-27 (not to be confused with CI-27) would have limited any general sales tax to 4 percent, even though Montana had no general sales tax. C-27's actual purpose was to encourage voters to adopt one.

But other ballot issues, whatever their individual merits or demerits, are clearly designed either to promote or hinder free enterprise. Limits on taxing and spending, protections for property rights, and measures promoting government accountability tend to promote free enterprise, while measures raising taxes or imposing heavy regulations tend to curb it. Of course, the fact that a specific business or business group supports or opposes a measure does not prove that the measure advances or retards free enterprise. Some businesses benefit from government regulations and spending or from restrictions on competition.

Fairness requires that courts be scrupulously careful to assure that they treat ballot issues representing different political views with equal respect. The following pages examine how the Montana Supreme Court has treated initiatives that promote and restrict economic freedom. We shall begin first with Constitutional Initiative 23.

Constitutional Initiative 23 : Excessive federal spending and borrowing impair free enterprise by draining money from the private economy. During the 1980s, many citizens sought to correct this problem through a balanced budget amendment to the U.S. Constitution. Among these was a group of Montanans seeking a state constitutional amendment directing Montana officeholders to promote a federal balanced budget amendment and imposing penalties on them if they did not. The sponsors obtained the requisite number of signatures to put Constitutional Initiative 23 on the 1984 ballot.

Opponents challenged the measure. Instead of allowing the suit to be heard first at the trial level, the Montana Supreme Court took original jurisdiction (i.e., trial jurisdiction) over the case and declared the initiative unconstitutional. The court announced this result in *State of Montana ex rel. Harper v. Waltermire*,⁷¹ a decision this Study refers to as *Harper*.

The speed with which the *Harper* court moved toward invalidation was stunning. The court heard the case only 17 days after it was filed and issued an order invalidating the initiative two days later. On the other hand, the justices were more leisurely when it came to

offering reasons for their decision. They did not issue a written opinion until nearly two months later, well after the election was over.⁷²

The *Harper* opinion cited two independent bases for voiding CI-23. The first, and presumably controlling, basis was that the measure was a mere legislative resolution and not a constitutional amendment. This reason was meritless, since the state constitution contains no restrictions on the content of an amendment. Indeed, much of the court's discussion on the point was circular.

Fairness requires that courts be scrupulously careful to assure that they treat ballot issues representing different political views with equal respect.

The other basis—that legislatures and conventions operating under the U.S. Constitution's amendment process may not be coerced—was better grounded. But this segment of the opinion appears to have been dicta rather than the principal reason for the holding.

Constitutional Initiative 30: Businesses have long sought measures to limit damages in civil cases. When the legislature adopted such a measure in 1983, the Montana Supreme Court declared it unconstitutional. Accordingly, tort reform advocates obtained sufficient signatures to place CI-30 on the 1986 ballot. CI-30 would have amended the state constitution to allow the legislature to limit damages.

Although the court refused to entertain a pre-election challenge to CI-30, once the voters had approved it the court exercised original jurisdiction and struck it down.⁷³ The court's stated reason was the secretary of state's failure to publish the measure properly and the underlining, rather than striking, of two words in the voter information pamphlet.

Technical election irregularities are common. Few elections would survive if all procedures had to be perfect. In recognition of this, most courts invalidate elections for procedural irregularities only if the challengers introduce fairly strong evidence that the irregularities changed the outcome or, at least, very likely did so.⁷⁴ At the time of the CI-30 decision, Montana case precedent required that those challenging an election show that the irregularities changed the result.⁷⁵ Yet the court voided CI-30 without mentioning that precedent and without any



concrete evidence that a sufficient number of voters were misled.

On a rehearing of the case, CI-30 advocates asked the court to order a new election, as it had the authority to do. The court refused. Alternatively, they asked it to certify the measure for the 1988 ballot. This also the court refused to do.

Constitutional Initiative 27: The same technical glitch that had afflicted the 1986 CI-30 election had also afflicted the 1986 vote on Constitutional Initiative 27. CI-27 would have abolished the state property tax. Its sponsors' goals were to force expenditure reductions and a shift toward more economically-friendly transaction taxes. Thus, CI-27 counts as a measure designed to promote free enterprise and prosperity.

The court voided CI-30 without mentioning that precedent and without any concrete evidence that a sufficient number of voters were misled.

Because of the defect in the election, a district court judge ordered a re-vote on CI-27 for 1988. The secretary of state proceeded with plans for the

new election on both CI-27 and CI-30. In order to obtain a binding judgment on the issue, an advocate of both measures asked the Montana Supreme Court to confirm their position on the ballot. The court ruled that the request was not justiciable.⁷⁶

But the court found no such problem when *opponents* of CI-30 sued. In response to their complaint, the justices again exercised original jurisdiction, and ordered the secretary of state to remove CI-30 from the ballot. *State of Montana ex rel. Montanans for the Preservation of Citizen's Rights v. Waltermire*,⁷⁷ In the same opinion the justices ordered CI-27 off the ballot as well. No one in the lawsuit—or in any other proceeding—had requested such relief, and no advocates of CI-27 were parties to the case or had been heard on the issue.

Constitutional Referendum 18 and Initiative Referendum 112: In *Harper v. Greely*,⁷⁸ decided in 1988, the court sustained a ballot measure tending to reduce the level of government. Essentially, C-18 clarified the constitution to assure that the legislature had discretion to set the amount of welfare relief. By a 5-2 vote, the justices upheld it against a charge that its

ballot language was misleading. By a similar margin, the court in 1994 permitted the electorate to suspend and vote on a tax increase (IR-112), after nearly 90,000 Montanans had petitioned to do so.⁷⁹

Senate Bill 37: In 1996, the legislature referred to the voters Senate Bill 37, a proposed constitutional amendment to streamline state government by abolishing the secretary of state's office and transferring the functions to other officials. In *Cobb v. State of Montana*,⁸⁰ the court enjoined (barred) the secretary of state from submitting the measure to the voters. The purported reason was the proposal's failure to re-assign one of the secretary of state's duties. Legislation could have remedied the defect, but as in the *Harper* balanced budget case, the court added a content requirement to constitutional amendments that the state constitution itself did not feature.

Constitutional Initiative 75: At the 1998 general election, the voters approved CI-75, an amendment requiring voter approval of most tax increases.⁸¹ Soon after the election, opponents sued to invalidate it. Although the measure changed no existing revenue stream, the court accepted original jurisdiction because CI-75 purportedly created an emergency.

The challengers' principal argument was that CI-75 was unconstitutional because it was not a "single amendment"—that it explicitly altered several parts of the state constitution in violation of Article XIV, Section 11. That section requires that separate amendments be voted on separately.⁸²

Considered objectively, the CI-75 case was a difficult one for the challengers. First, there is nothing suspect about an amendment impacting more than one part of a constitution. Most amendments do. Second, Article XIV, Section 11 is merely a direction to the secretary of state not to lump together all of that year's ballot measures in one "yes" or "no" election. The text, placement, and history of the provision all show that it has nothing to do with a proposal's content.⁸³

Third, the court's own case law permitted amendments with very wide reach, so long as each portion was tied to the others by a common purpose. In fact, newer cases—those decided after adoption of the 1972 constitution—suggested that the court had abandoned even that lax content restriction.⁸⁴ Fourth, CI-75 had been approved for circulation, endorsed by 50,000 petition signers, and ratified by the electorate under

existing law. The Fourteenth Amendment to the U.S. Constitution forbids a state from changing the rules of an election after the election already has been held.⁸⁵

None of this deterred the justices. In *Marshall v. State of Montana*,⁸⁶ they held that CI-75 was invalid because it amended three “parts” of the state constitution. To reach this result, they expressly overruled three precedents retroactively and arguably overruled two others as well.⁸⁷ The principal case cited in support, *Armatta v. Kitzhaber*,⁸⁸ was an Oregon decision which had not been issued when officials approved CI-75 for circulation.

Constitutional Initiative 97, Constitutional Initiative 98, and Initiative 154: Seven years passed before tax-limitation advocates made another serious effort. In 2006, they circulated three petitions: CI-97 would have limited taxes and spending.⁸⁹ CI-98 would have permitted recall of justices and judges without judicial second-guessing of the reasons for the recall.⁹⁰ I-154 would have rendered it more difficult to take private property for public use.⁹¹ Opponents challenged the measures, claiming that signatures had been gathered illegally.

The proponents had resorted primarily to paid rather than volunteer signature gatherers, a decision made necessary in part because hostile union activists were physically intimidating volunteers.⁹² Some of the paid gatherers apparently misbehaved, and the proponents suffered failures in legal representation.⁹³

In *Montanans for Justice v. State of Montana*,⁹⁴ the Montana Supreme Court removed all three measures from the ballot. The stated reasons were (1) some signature gatherers who signed affidavits did not personally gather signatures, but rather collected them from people who did, (2) signature gatherers listed false addresses for themselves on the petitions, and (3) several witnesses testified that some signature gatherers induced people to sign all three petitions by representing that the witness was signing three copies of one.

The applicable statute actually was ambiguous on the subject of whether signature gatherers who signed petitions had to be personally present when the signatures were gathered or if they merely had to supervise other gatherers. The statute had

been amended a short time before and had never been authoritatively construed. Liberal groups simultaneously collecting signatures for their own initiatives apparently had interpreted the statute in much the same way as had the sponsors of CI-97, CI-98, and I-154, since they were following similar practices.⁹⁵

As noted earlier, elections generally are not voided for irregularities unless the challengers introduce strong evidence that those irregularities affected the results.

The courts apply the same principle in initiative petition cases: To invalidate a petition for insufficient signatures the challengers have to demonstrate that so many signatures are void that the number of valid signatures is insufficient for the petition to qualify for the ballot.⁹⁶ The Montana Supreme Court had adopted that principle in a case upholding a “liberal” ballot measure—that is, an initiative allowing the state to go into debt so as to attract more federal funds.⁹⁷

In *Montanans for Justice* there was no firm evidence that either of the first two defects reduced the number of voters who had signed the petitions. As for the third ground, the court heard from nine signers who said they had been personally misled, and some of those claimed to hear gatherers misleading others. This evidence covered no more than a handful of signatures, and was the only direct testimony on the subject. It was contradicted by other witnesses. To buttress its conclusion, the court cited rumors and other hearsay (i.e., second and third-hand reports). The court justified this by noting that the sponsors’ lawyer had not objected to the hearsay. But of course failure to object does not convert unreliable evidence into reliable evidence.

One of the three petitions had garnered about 3300 more signatures than required for the ballot. The other two each had qualified with more than 5000 signatures to spare. A fair and impartial tribunal would have required the challengers to produce far more evidence than they did.

Failure to object does not convert unreliable evidence into reliable evidence.



Legislative Referendum 119: The court's recent voiding of this ballot issue is discussed below.⁹⁸

Legislative Referendum 123 : This measure was adopted by the state legislature and referred to the voters for the 2012 election. In a nutshell, it provided for refunding to taxpayers, in the form of tax credits, of a portion of state budget surpluses. The percentage to be refunded would not be particularly large. First, the refund applied only to "general fund" surpluses. (The general fund is well under half the budget.) Second, there would be no refunds if the surplus was less than five million dollars. Third, there would be no refunds unless the surplus exceeded by more than 25% the amount of surplus already built into the budget. Even then, only half the extra cash would be refunded. It is difficult to imagine a more cautious and circumscribed program for returning overpayments to the taxpayers who made them.

Still, LR-123 was too generous for some government unions, and they sued in Lewis and Clark County District Court to invalidate it. Perhaps taking into account the state Supreme Court's record in such matters, the district judge struck down the measure.

The order was accompanied by no opinion stating why the justices ruled as they did. The order declared only that "This Court's opinion, analysis and rationale will follow in due course."

accompanied by no opinion stating why the justices ruled as they did. The order declared only that "This Court's opinion, analysis and rationale will follow in due course."⁹⁹

Constitutional Initiative 64: The court is friendlier to ballot issues that do not attempt to reduce the size of government. In *Cole v. State of Montana ex rel. Brown*,¹⁰⁰ the justices considered a challenge to CI-64, Montana's 1992 initiative imposing term limits. Although term limits are popular among conservatives, they also have garnered wide support among liberals.¹⁰¹

In approving CI-64, the voters imposed term limits on eight different state offices.¹⁰² In 2002, two state legislators being "termed out" and two of their

constituents challenged the measure as a violation of the "single part" rule proclaimed three years earlier in *Marshall v. Montana*, the CI-75 case. Again the justices took original jurisdiction, although it was hard to see what "urgency and emergency factors" existed in a ten-year-old initiative to "make the normal appeal process inadequate."

There was no reasonable doubt that term limits initiative violated the "single part" rule adopted in *Marshall*. The initiative imposed term limits on eight different state officeholders whose qualifications and terms of office were defined in different parts of the state constitution. However, the justices dismissed the case on the ground that the plaintiffs had waited too long to sue. The plaintiffs had not violated any statute of limitation, but the court found them to be guilty of *laches*.

"Laches" is a rule that says that one cannot pursue certain remedies if one has negligently delayed suing, and if allowing the suit to proceed after the delay would unfairly damage another.

For several reasons, the court's use of laches in *Cole* was, to say the least, odd. First: Laches is a bar only to a court granting *equitable* remedies,¹⁰³ such as an injunction. The plaintiffs were seeking an injunction, but they also were seeking a declaratory judgment, which is not an equitable remedy. Laches should not have prevented that form of relief.

Second: As one justice pointed out in dissent, whether laches applies depends on fact-gathering at the trial level. But the Montana Supreme Court had taken original jurisdiction, and it had made none of the necessary factual findings.

Third: Laches cases almost always arise because allowing the plaintiff to sue belatedly would harm the defendant. All the prior laches cases cited in *Cole* were of this type. (In *Montanans for Justice*, the court itself defined laches this way.¹⁰⁴) But there was no claim in *Cole* that any defendant had been prejudiced. The court finessed this by stating that the parties unfairly prejudiced were the candidates who didn't run for re-election because they assumed that terms limits were valid. But those parties had neglected to pursue their rights as much as the plaintiffs had. The same legal principle by which the court denied relief to the plaintiffs—"Equity aids only the vigilant"—also applied to the candidates who didn't run for re-election.

Fourth: The court could point to no other cases in which a constitutional amendment was invalidated for laches—only cases involving statutes.

Finally: There is the question, “When should the plaintiffs have sued?” The court’s answer was that “nothing prevented Plaintiffs here from raising their challenge in 1992 when the voters enacted CI-64.” But one of the plaintiffs had not run for office until 1994. And although the other plaintiff took office shortly before 1992, no court would have permitted him to challenge term limits then. This is because in 1992 any potential harm would have been far too remote—based on the assumptions that (1) he would run in 1994, (2) he would win in 1994, (3) he would run again in 1998, (4) he would win again in 1998, and (5) he would try to run in 2002 for the forbidden third term. In several cases, in fact, the Montana Supreme Court has refused to entertain a challenge to ballot issues when only one election intervened.¹⁰⁵

Initiative 137: In 1998, the voters adopted I-137, an environmental measure that outlawed a common method of mining gold. The initiative was part of a larger campaign by the political left to put disfavored industries out of business.

A company that had contracted with the state to mine in accordance with the proscribed method challenged I-137. Among other grounds, the company cited violation of its state constitutional right to be free from laws “impairing the obligation of contracts.”¹⁰⁶ That provision is part of the state declaration of rights appearing in Article II of the Montana Constitution. The court’s precedents had labeled Article II rights “fundamental” and entitled to high protection. They could be infringed only by showing a “compelling state interest.”¹⁰⁷

The court disregarded those precedents. In *Seven Up Pete Venture v. State of Montana*,¹⁰⁸ it refused to grant the company the same protection it had granted for other violations of Article II rights. In fact, it even refused the much-lesser level of protection afforded in cases involving the U.S. Constitution’s Contracts Clause when a state tries to impair one of its own contracts. Only six years before, in the *MEIC* case, the Article IX environmental right had been held “fundamental” merely because it was associated with an Article II right. In *Seven Up Pete Venture* a genuine Article II right was belittled nearly to the vanishing

point. Distilled to its essence, the court’s message to the plaintiff amounted to little more than, “Yes, the state destroyed the value of your contract, but the state considers the environment more important, so tough.”

Initiative 143: With the encouragement of environmentalists and commercial hunting interests, the electorate adopted I-143 in 2000. This measure was designed to destroy the Montana business of game farms by forbidding them from charging fees for hunting. I-143 had the desired effect. Game farm owners, who had long been licensed and encouraged by state agencies, were financially ruined. They sought compensation under the federal and state constitutions for this “taking” of their businesses. The court’s decisions in *Kafka v. Montana Dept. of Fish, Wildlife, and Parks*¹⁰⁹ and *Buhmann v. State of Montana*¹¹⁰ upheld I-143 and denied any and all compensation.

“Yes, the state destroyed the value of your contract, but the state considers the environment more important, so tough.”

Kafka and *Buhmann* are extraordinary decisions worth more space than is available in this Study. Suffice to say that—

- The court delayed a decision for over a year and a half after the cases had been argued.
- The court denied a jury trial on whether there was a taking of property for public use.
- The court held that the Montana Constitution’s takings clause offered no more protection than the federal takings clause, despite the wider wording of the Montana provision.¹¹¹
- Despite its location in Article II of the constitution, the right to compensation was not deemed “fundamental.”
- Under federal takings law, an owner must be paid when a regulation wipes out all value of a piece of property.¹¹² The plaintiffs argued, therefore, that they were entitled to the going-concern value of their businesses because I-143 had destroyed that value. The court denied them compensation because when the owners were forced to liquidate their businesses, their inventory and equipment retained some slight salvage value.



Initiative 164: The goal of this measure, adopted in 2010, was to put payday lenders out of business. The court upheld I-164 even though the express words of the governing statute should have invalidated it. The decision was *Montana Consumer Finance Assn. v. State of Montana*.¹¹³ The plaintiff challenged the legal sufficiency of the attorney general's ballot language on the grounds that it was biased and incomplete. Biased it certainly was: It was structured in a way that encouraged an affirmative vote.¹¹⁴ The ballot language also was, as the court found, incomplete.

Although the court did not remove the pro-initiative bias, it did revise the attorney general's language to render it more complete. Under state law a court's revision of ballot language invalidates all signatures collected on petitions featuring the former, inaccurate language.¹¹⁵ Honest application of the law would have resulted in I-164's removal from the ballot.

But the court left I-164 on the ballot. The voters approved it, and payday lenders departed Montana.

Initiative 304/305: The case of *Western Tradition Partnership, Inc. v. Attorney General*¹¹⁶ already has been discussed. In that case, decided in 2011, the Montana Supreme Court upheld an initiative despite its inconsistency with controlling decisions by the U.S. Supreme Court. The higher court promptly reversed.¹¹⁷

***But the court left
I-164 on the ballot.
The voters approved
it, and payday lenders
departed Montana.***

Initiative 166: As explained above, the Montana Supreme Court struck down Constitutional Initiative 23, which would have promoted a federal balanced

budget amendment, on the ground that the measure was not truly a constitutional amendment. The court did so although the state constitution contains no limitations on how the people can amend their constitution—other than those imposed by controlling federal law.

By contrast, the state constitution *does* limit the scope of the statutory initiative process. It provides that the “people may enact laws by initiative on all matters except appropriations of money and local or special laws.” Thus, statutory initiatives (1) must constitute “laws,” (2) may not appropriate money, and (3) may not be local or special laws.

In 2012, liberal groups promoted Initiative 166, an anti-corporation measure. It provided in part that

It is policy of the state of Montana that each elected and appointed official in Montana, whether acting on a state or federal level, advance the philosophy that corporations are not human beings with constitutional rights and that each such elected and appointed official is charged to act to prohibit, whenever possible, corporations from making contributions to or expenditures on the campaigns of candidates or ballot issues. As part of this policy, each such elected and appointed official in Montana is charged to promote actions that accomplish a level playing field in election spending.

It included several additional provisions in the same vein.

Clearly, Initiative 166, if adopted, would not be a “law.” It was purely precatory in nature—as, in fact, it had to be, since a mandatory direction restricting the expression of elected officials would run afoul of the free speech protections in the U.S. and state constitutions. Moreover, because it was neither a constitutional provision nor a statute, it violated Montana's statutory definition of “law.”¹¹⁸ Certainly if CI-23 was invalid as a mere resolution, then I-166 was similarly invalid.

Yet on August 10, 2012, the Montana Supreme Court upheld I-166 against a challenge to the attorney general's prescribed ballot language. The court disclaimed power to review the legal sufficiency of the measure until after the election because the applicable statute limited the court's function to review of the Attorney General's determination, and the Attorney General's determination was limited to the measure's sufficiency for the ballot.

One could reasonably agree or disagree with the court on the meaning of the statute. But it is striking to compare the court's position in this instance with its position in the I-164 case, where it simply disregarded clear statutory language. Or to compare its gentle treatment of I-166 with the standards it imposes on pro-free enterprise ballot issues.

Possibly the court will invalidate I-166 after the election, assuming it passes. Past history renders this doubtful. But even if the measure does not survive post-election court review, it will have served its principal purpose: rallying left-of-center voters to the polls for the 2012

election. This, in turn, will favor election of the more liberal of two candidates to replace Justice Nelson, who is retiring.

The following chart shows the Montana Supreme Court's disposition over the last three decades of ballot issues clearly tending to increase the size and power of government, and therefore to hurt free enterprise:

Ballot Measure	Year	Court Disposition
I-137	2005	Upheld
I-143	2008	Upheld
I-143 (different case)	2008	Upheld
I-164	2010	Upheld
I-304/305	2012	Upheld
I-166	2012	Upheld

This second chart shows the Supreme Court's disposition over the last three decades of ballot issues tending to *reduce* the size and power of government. There are more of these cases, since Montana's more litigious special interest groups tend to benefit from government support, so they aggressively challenge ballot issues that limit government.

Ballot Measure	Year	Court Disposition
CI-23	1984	Struck from ballot
CI-27	1987	Struck from ballot
CI-30	1987	Struck from ballot
C-18	1988	Upheld
IR-112	1993	Upheld
SB-37	1996	Struck from ballot
CI-75	1999	Voided after passage
CI-97	2006	Struck from ballot
CI-98	2006	Struck from ballot
I-154	2006	Struck from ballot
LR-119	2012	Struck from ballot
LR-123	2012	Struck from ballot

The likelihood of this pattern occurring by coincidence is very low. In absence of other explanatory factors, we can infer that the Montana Supreme Court imposes far more exacting standards on ballot measures that would curb government than on ballot measures that would expand it.

Studying the court's opinions in individual cases strengthens this inference. The discussion above offers the following examples (among others):

- In 1999, the court reversed decades of precedent to impose a new rule that invalidated CI-75, a measure to control taxes and spending. Only three years later it engaged in procedural contortions to avoid applying the same rule to CI-64, a term limits amendment popular among liberals as well as conservatives.
- Years before, the court had upheld a liberal ballot issue (to increase state debt) by ruling that a challenge to the number of signatures on a petition failed unless the challenger proved that too few valid signatures had been gathered to meet the required minimum. But in 2006, the court struck down three conservative initiatives without anything like that showing, and without any mention of the controlling precedent.
- In 2010 and 2012 the court upheld I-164 and I-166, two liberal measures. It upheld the first by disregarding the ballot-issue statutes. It upheld the second by relying on the ballot-issue statutes.
- The court voided a conservative constitutional amendment (CI-23) because it was a mere "resolution" —even though the Montana constitution contains no restriction on the content of amendments. But the court sustained a liberal statutory initiative that also was a mere resolution (I-166). It did so although the Montana constitution *does* ban using the statutory initiative process for mere resolutions.

Such conduct violates the fundamental standard of fairness necessary to the rule of law.

In absence of other explanatory factors, we can infer that the Montana Supreme Court imposes far more exacting standards on ballot measures that would curb government than on ballot measures that would expand it.



3. Using Their Power to Protect Themselves

Another way the court violates fairness standards rests in its treatment of legal efforts to render it more accountable.

In 1983, the court decided *Foster v. Kovich*.¹¹⁹ This case largely gutted Initiative 73, the law allowing the voters to recall misbehaving judges and officials from office. The court ruled that the judges would determine what constituted “official misconduct” justifying recall. Petitions that did not state grounds satisfactory to the judges would be disqualified. Recall elections scheduled pursuant to such petitions would be cancelled.

CI-98, proposed in 2006, would have reversed this ruling. But as we have seen the Montana Supreme Court also invalidated CI-98. These cases illustrate how the Montana Supreme Court can use its power to secure its own position.

The most recent decision of this type is *Reichert v. State of Montana*.¹²⁰ In 2011, after years of grumbling about the court’s methods, state lawmakers decided to offer voters an opportunity for reform. They referred to the people Legislative Referendum 119, a statutory measure to change the way justices were elected. Instead of all seven justices running statewide, each would run in a single district. Having judges campaign locally, the sponsors apparently believed, would render it more likely that voters would be familiar with candidates. It also would create more balance among geographic areas and interests and open the field to candidates without the resources and contacts to run statewide.

LR-119 therefore divided the state into seven districts. LR-119 added to the candidates’ constitutional qualifications the requirements that at the time of their first election they reside and be registered to vote in their district. Each elector would vote on candidates in his district rather than statewide.

Opponents challenged LR-119 in district court. They claimed that the legislature, even with the approval of the people, had no power to adopt a statute dividing the state into districts or adding qualifications beyond those set forth in the constitution.

The wording of the state constitution contradicts these contentions. Article VII, Section 8 asserts that

“Supreme court justices and district court judges shall be elected by the qualified electors as provided by law.” Regulation of elections “*as provided by law*” has included districting decisions since before our country was founded.¹²¹ As for qualifications, Article IV, Section 4 is even more unequivocal:

Eligibility for public office. 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.

Of course, if the legislature alone may enact additional qualifications, the legislature-and-people, through a referendum, certainly can.

Based on previous experience, some state lawmakers were concerned that the attorney general’s office might not defend LR-119 vigorously. Accordingly, seven lawmakers who had voted for the measure, including its principal sponsor, asked the district court to permit them to intervene (become parties) so they could raise any arguments the attorney general omitted. The district court denied intervention and the supreme court affirmed. Both courts suggested that the lawmakers instead request permission to file briefs as *amici curiae* (friends of the court).

Relegating the lawmakers to *amici curiae* status barred them from raising defenses the attorney general failed to raise—such as, for example, Article IV, Section 4.¹²² This was a milder version of the court’s conduct in the *Waltermire* CI-30/CI-27 case, where the justices kicked a measure off the ballot without giving its advocates an opportunity to be heard.¹²³

To be sure, the court ultimately did agree to address another contention the lawmakers (but not the attorney general) had asserted. This was that the six justices considering re-election should recuse (disqualify) themselves for conflict of interest, and allow district justices to replace them for the occasion. The conflict lay in the fact that *striking down* LR-119 would enable sitting justices to run for re-election in the same single statewide district that elected them, while *upholding* LR-119 would require them to run in narrower districts, where they likely would face local challengers and more public scrutiny.

Recusal should not have been a difficult issue. Due process requires recusal when “sitting on the case ... would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.”¹²⁴ There is little doubt that avoiding a change in electoral district would “offer a possible temptation” to any elected official.

Even more to the point is the Montana Code of Judicial Conduct, which mandates that “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.”¹²⁵ Of course, in the real world, we *never* expect impartiality from officeholders faced with boundary changes in the districts that elected them. Rather, the assumption, well grounded in experience, is that officeholders in such a situation will be biased. That is precisely why Montana, along with many other states, provides for a non-partisan reapportionment commission.¹²⁶

To their credit, two of the six justices did recuse themselves. But the other four did not. Unsurprisingly, the *Reichert* court held that the Code of Judicial Conduct did not require their withdrawal, since their impartiality could not “reasonably be questioned.”¹²⁷

After disposing of that issue, the court declared LR-119 facially invalid and struck it from the ballot. The basis for this ruling was that despite the state constitution’s clear language, the legislature and voters could not provide for district elections and could not add any qualifications for office.

The *Reichert* decision is notable for what it included, and what it didn’t. It did include implicit criticism of the policy behind the referendum: “LR-119 would transform the Supreme Court into a representative body identical to the Legislature in the method of selection, but tasked with a judicial function instead of a legislative function. . . .”¹²⁸ But “Courts are not representative bodies.”¹²⁹

On the other hand, the opinion *did not* mention that defining districts is a common way legislatures “provide by law” for elections. Nor did it mention that district-based selection of non-legislative bodies is common. (The Montana public service commission is one example.) And the opinion included *no* discussion of the constitutional provision most central to the case—Article IV, Section 4. The court cited

it, very briefly, only once, in a footnote, and with an inaccurate summary of its content.¹³⁰

The *Reichert* decision had a fairly predictable effect almost immediately. Anticipating voter approval of LR-119, a pro-property rights lawyer from Bozeman had planned to run for the court

Unsurprisingly, the Reichert court held that the Code of Judicial Conduct did not require their withdrawal, since their impartiality could not “reasonably be questioned.”

from her district. When the *Reichert* decision was announced, she felt compelled to withdraw. Like most other lawyers without ties to liberal special interests, she was not positioned to manage a statewide race.¹³¹ Her withdrawal assured the re-election of one of the incumbent justices.

4. “Here’s What We Want. We’ll Give You the Reasons in a Few Weeks.”

In ballot issue cases, the court repeatedly has announced rulings without issuing formal opinions explaining its reasons. This occurred in the *Harper* balanced budget case, the *Cole* term limits case, and just this year in both the *Reichert* judicial districting decision and the LR-123 tax refund case. In *Reichert*, papers were fully submitted on April 12, 2012, and the court issued its decision the same day. But the court did not produce an opinion explaining its reasons until May 18, five weeks later. As of this writing, the court still has not issued an opinion in the LR-123 tax refund case.

Naturally, this practice feeds the perception of unfairness by seeming to communicate: “Here’s what we want. We’ll give you some reasons after we’ve invented them.”

Moreover, the practice of issuing decisions without formal opinions is arguably illegal. Mont. Rev. Code § 3-2-601 provides as follows:

In the determination of causes, all decisions of the supreme court must be given in writing, the grounds of the decision must be stated, and each justice agreeing or concurring with the decision must so indicate by signing the decision. Any justice disagreeing with a decision must so indicate by written dissent.



True, the court eventually issued opinions in each of those cases except the one dealing with LR-123. But delaying the opinion until after the decision defeats the statute's purposes. The exercise of opinion-writing is a crucial assurance of good and fair decision making. At one time, the Montana Supreme Court understood this. In a 1978 case, it quoted the following from the *State Trial Judge's Book*:

The function of an opinion is to state the reason which led the court to decide the case the way it did. Moreover, since in the process of preparing an opinion the judge must discipline his thinking, he is more apt to reach a just decision in a complex case if he reduces his reasoning to writing. Referring to the fruitful effect of the process, Chief Justice Hughes once commented, "The importance of written opinions as a protection against judicial carelessness is very great."

Opinions may be of service to the litigants and counsel in determining what their future course should be. The opinion may point the way to an appeal, or it may eliminate one. In either event the practical value to those most concerned is great.¹³²

In other words, a ruling issued in absence of a decision is:

- unfair to the litigants and counsel, faced with "determining what their future course should be;"
- more likely to be wrong than a ruling supported by an opinion;
- more likely to be issued on impulse, and therefore;
- more likely to be biased and unfair.

E. Legislating Rather Than Adjudicating.

The Montana Constitution includes phrases that are vague and even potentially contradictory. Some of these, such as the right to "dignity" and "privacy" purport to restrict government.¹³³ Some pertain to government organization.¹³⁴ Some purport to create entitlements. Among the entitlements are the environmental rights in Article II and Article IX,¹³⁵ and the educational rights in Article X.¹³⁶

To be sure, it is sometimes claimed that many phrases in the U.S. Constitution also are vague. But this is not generally true, since most of those phrases had understood content deriving from Anglo-American

law and practice. For example, the First Amendment phrase "freedom of the press" had been defined over nearly a century previous to the time the First Amendment was adopted.¹³⁷ By contrast, at the time the Montana Constitution was adopted phrases such as "clean and healthful environment" and "full educational potential" had no defined legal meaning. The term "compelling state interest," when inserted into the privacy right, had some history in the federal courts, but had come to signify no more than "a purpose the court thinks is very important."

In addition to vagueness, the state constitution suffers from apparent contradictions. It is clearly impossible to meet both of the goals of Article X, Section 1—that the state "develop the full educational potential of each person" while guaranteeing "[e] quality of educational opportunity . . . to each person." "[D]eveloping the full educational potential" of Person X may require a different amount of "educational opportunity" than given to Person Y. Put another way, limiting X to the same amount of "educational opportunity" provided to Y may result in failing to develop X's "full educational potential."

The pre-ratification public explanations of these provisions offer only some guidance. During the 1972 constitutional convention the delegates apparently established that the privacy right might protect against undue wiretapping. They agreed that the issue of abortion should be left to the legislature¹³⁸—a decision in accordance with the legislature's previous decision to adopt strict pro-life laws. As for the environmental rights, during the ratification campaign the constitution's advocates assured the electorate that those provisions were merely directions to the state and not a basis for private lawsuits.¹³⁹ But most other such questions remained unresolved when the voters approved the 1972 constitution.

When following the rule of law, judges restrain themselves to issuing judicial rather than legislative decisions. In other words, they make the kind of decisions for which there are legal standards, and for which they are equipped to make. Judges exceed their rightful power when they legislate. Traditional courts faced with meaningless constitutional language defer to the elective policy branches. When the U.S.

When following the rule of law, judges restrain themselves to issuing judicial rather than legislative decisions.

Supreme Court was unable to determine the meaning of the U.S. Constitution's rule that all states retain a "republican form of government," that tribunal declared the issue a non-justiciable "political question" for Congress to resolve.¹⁴⁰

By contrast, when the Montana Supreme Court is faced with vague or contradictory constitutional provisions it sometimes uses the occasion to legislate. Not only does the court legislate, but it sometimes overrules decisions of the actual state legislature and fails to follow the ratification-era evidence of meaning that is available.

To illustrate: *Montana Environmental Information Center v. Dept. of Environmental Quality*¹⁴¹ recognized the right of private parties to sue despite strong ratification-era evidence that the environmental rights were not to be applied that way. Also in the teeth of the historical evidence, *Armstrong v. State of Montana*¹⁴² held that the privacy right barred the legislature from requiring that abortions be conducted only by licensed physicians. *Gryczan v. State of Montana*¹⁴³ held that the privacy right protected homosexual conduct, although the state banned sodomy when the constitution was adopted. (The court later went farther and forced the state university system to extend health care coverage to employees' homosexual partners.¹⁴⁴)

Similarly, the court has imposed its own vision on public education—specifically a vision of largely centralized state funding and control. The two leading cases, *Helena Elementary School Dist. No. 1 v. State of Montana*,¹⁴⁵ decided in 1989, and *Columbia Falls Elementary School District No. 6 v. State of Montana*, decided in 2005,¹⁴⁶ are classic illustrations of defects in judicial lawmaking.

Both cases were battles—to the extent they were not collusive—between government interests. At stake were the resources and lives of taxpayers, families, and businesses; but the voices of taxpayers, families, and businesses were largely excluded. In *Helena Elementary*, the court decided that "equal education opportunity" mandated more equality of expenditures, which, as a practical matter, required more central funding. The court so ruled despite evidence that, above a certain level prevailing everywhere in the United States, spending has little effect on educational quality, and that centralized funding reduces educational quality.¹⁴⁷ Through this litigation, in other words, government interests forced more money from taxpayers, while providing less value.

In *Columbia Falls*, Plaintiffs complained that schools were not meeting the constitutional mandate that they recognize American Indian culture.

The state could have responded, at least as mitigation, by itemizing local responses. It also could have referenced frequent proposals for charter schools and other forms of school choice as partial remedies. But the state offered no defense at all.

Accordingly, the court resolved the issue by requiring more centralized resolution and, presumably, more centralized funding.

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VI. Likely Consequences for Montana and Montanans of Failing to Follow the Rule of Law

The connection between the rule of law and prosperity is now accepted. When a state supreme court adheres to rule-of-law standards of clarity, stability, notice, fairness, and respect for judicial limits, it promotes free enterprise and economic growth. When it dishonors these standards, it impedes growth. The effects, for good or evil, may be particularly marked in Montana because of the state supreme court's strong institutional position.

Unfortunately, the Montana Supreme Court often disregards rule of law standards. Judicial opinions are sometimes muddled or ambiguous, or do not fit well into existing jurisprudence. The court overrules its own precedents at an astonishing rate, resulting in rule changes that are frequent and sometimes retroactive. It has failed to give due notice to people whose rights may be impaired or clouded by its decisions. The court seems to be biased unfairly against free enterprise, particularly in its treatment of ballot issues. The justices also have engaged in judicial lawmaking in a way damaging to prosperity.

Over the last half-century, Montana has declined from one of the wealthier states to one of the most impoverished. A number of public policy choices help to explain this decline, but among them is the Montana Supreme Court's disregard for the rule of law. The conduct of that tribunal is, unfortunately, a serious barrier to prosperity. Until the court is reformed and judicial standards improved, Montanans may remain among America's poorest citizens.



End Notes

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Professor Natelson served as a law professor from 1985 to 2010—all but the first two years on the faculty at The University of Montana School of Law, where he became the school’s leading publisher and probably its best-known scholar. He is most widely recognized for his publications in Constitutional Law, but he also has done important research in real estate law, legal history, and other subjects. While a law professor, he taught Constitutional Law, Advanced Constitutional Law, First Amendment, Legal and Constitutional History, and a range of business-related courses, such as Real Property, Real Estate Transactions, Remedies, Commercial Law, Trust Law, and Contracts. He also was politically active in Montana, and was the runner up among five candidates in the 2000 primaries for governor.

Professor Natelson is the author or co-author of six books and scores of scholarly and popular articles. Probably his best seller is *The Original Constitution: What It Actually Said and Meant* (2d ed., 2011). His biography and bibliography are available at <http://constitution.i2i.org/about>.

The author acknowledges Rebecca Maxam for her editing assistance. Ms. Maxam, who was raised in Montana, is a member of the Class of 2014 at Sturm College of Law, the University of Denver. She also is an intern for MPI’s Colorado sister organization, the Independence Institute.

² The author now lives in Colorado, whose state supreme court generally is thought of as liberal. But few would charge it with regularly violating rule-of-law values in the way the Montana tribunal does.

³ For Professor Strang’s analysis, see Lee J. Strang, *Originalism and the Aristotelian Tradition: Virtue’s Home in Originalism*, 80 *FORDHAM L. REV.* 1997, 2019-22 (2012).

⁴ See Part V.C.

⁵ Since the Founding, the U.S. Supreme Court has stretched “due process” far beyond its original meaning to include, for example, a requirement that the states comply with most of the Bill of Rights. But the original core survives as well.

⁶ *Equity* has another important legal meaning. It is the name of a body of jurisprudence inherited from England and still applied in certain kinds of cases. Some other bodies of jurisprudence inherited from England include (1) the common law, as originally applied in certain English courts, (2) admiralty (the law of ships and navigation), and

(3) the law of domestic relations, including marriage and divorce, which American states inherited from the English church courts.

⁷ Part V.D.2.

⁸ *Reichert v. McCulloch*, 365 Mont. 92, 278 P.3d 455, 476 (2012).

⁹ On the elements of republican government, see Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 *TEX. L. REV.* 807 (2002).

¹⁰ “Economics and the rule of law”, *The Economist*, Mar. 13, 2008, available at http://www.economist.com/node/10849115?story_id=10849115.

¹¹ “One Rule for the Rich,” *The Economist*, Mar 13th 2008; Jason Higbee & Frank A. Schmid, “The Rule of Law and Economic Growth”, *International Economic Trends*, Aug. 2004. For inclusion among other factors see *Robert J. Barro, Determinants Of Economic Growth: A Cross-country Empirical Study*, 19-20 (National Bureau of Economic Research, 1996), available at http://www.nber.org/papers/w5698.pdf?new_window=1.

¹² *Josiah Quincy, Observations On The Act Of Parliament, Commonly Called The Boston Port Bill* 11-12 (Edward & Charles Dilly, Boston 1774).

¹³ For the history, see *Robert G. Natelson, The Roots of American Judicial Federalism*, available at http://constitution.i2i.org/files/2011/11/Roots_Am_Federalism.pdf.

¹⁴ John Adams, *A Defence Of The Constitutions Of The United States*, at ii, xxii (1787) (“a government of laws, might be justly denominated a republic”) & 87 (“An empire of laws is a characteristic of a free republic only”), *inter alia*.

¹⁵ For a discussion, see Robert G. Natelson, *The Original Constitution: What It Actually Said And Meant* 38-39 (2d ed., 2011).

¹⁶ U.S. CONST., art. I, § 1.

¹⁷ U.S. CONST., art. I, § 7, cl. 2. *See also* II-2-2 (approval by both the President and a two thirds vote of Senate required for treaties).

¹⁸ *See, e.g.*, U.S. CONST., art. I, § 8, cl. 1 (uniformity, general welfare). *See also id.* at art. I, § 9, cl. 4 (apportionment); I-9-6 (no commercial and tax preferences); I-8-4 (uniform rule of naturalization and bankruptcies); I-9-8 (no titles of nobility). This probably also is a requirement of the Necessary and Proper Clause. *See Gary Lawson, Geoffrey Miller Robert G. Natelson & Guy I. Seidman, The Origins Of The Necessary And Proper Clause* 78-80 & 171-74 (2010).

- ¹⁹ *E.g., id.*, art. I, § 3, cl. 7 (conviction on impeachment does not include further punishment); art. I, § 9, cl. 2 (habeas corpus guarantee). *See also* the Fourth, Fifth, Sixth, and Eighth Amendments.
- ²⁰ *Id.*, art. I, § 9, cl. 3.
- ²¹ U.S. CONST., art. I, §10. cl. 1.
- ²² U.S. CONST., art. IV, §4.
- ²³ U.S. CONST., amend. XIV (“... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).
- ²⁴ Famous additional cases include Jim Crow laws in southern states and the dictatorship of Huey Long in 1930s Louisiana.
- ²⁵ *See* <http://www.montanabar.org/displaycommon.cfm?an=1&subarticlenbr=14> (“The State Bar of Montana was created by order of the Montana Supreme Court in January, 1974. In it’s [*sic*] Order, the Court provided that all persons practicing law in the state were obliged to be members of the State Bar.”).
- ²⁶ In an unreported Montana Supreme Court concurrence several years ago, Justice William Leaphart expressly favored retaining the A.B.A. approval requirement partly to protect the UM law school. The justice’s father, Charles Leaphart, served as dean of the school.
- ²⁷ For example, insofar as the author is aware, no Montana journal has published a serious examination of the court’s most important decision: *State of Montana ex rel. Cashmore v. Anderson*, 160 Mont. 175, 500 P.2d 921 (1972). This controversial ruling upheld, three justices to two, the ratification vote on the 1972 Montana Constitution. The court’s legal analysis was strained, and some alleged that one justice switched his vote due to improper political pressure. When this author proposed an article investigating the subject, Montana Law Review editors rejected the idea as too hot to handle, even after more than 35 years.
- ²⁸ Part V.D.2-3.
- ²⁹ Just to quell one possible question: Montana is a low population state where people know each other, so doubts often arise as to whether criticism or praise results from personalities. That is certainly not the case here: The author is acquainted with Justice Nelson and Justice Rice and likes them both—as people—very much.
- ³⁰ These observations are consistent with a U.S. Chamber of Commerce-backed study that ranked the Montana judicial system as 45th among 50 states in the competence of judges. *See* U.S. Chamber Institute for Legal Reform, *Ranking the States: Lawsuit Climate* 25 (2010), available at <http://www.instituteforlegalreform.com/sites/default/files/images2/stories/documents/pdf/lawsuitclimate2010/2010LawsuitClimateReport.pdf>.
- ³¹ *See* Scott J. Burnham, *Let’s Repeal The Field Code!*, 67 MONT. L. REV. 31 (2006) (discussing the Field Code contracts statutes); Andrew P. Morriss, “*This State Will Soon Have Plenty of Laws*”—Lessons from One Hundred Years of Codification in Montana, 56 MONT. L. REV. 359 (1995) (discussing adoption of the Field Code); Robert G. Natelson, *Running With the Land in Montana*, 51 MONT. L. REV. 17 (1990) (discussing the Field Code statutes governing land covenants).
- ³² *See* the sources in the preceding note.
- ³³ 290 Mont. 217, 931 P.2d 1292 (1997).
- ³⁴ The leasehold was assigned several times, but that is irrelevant to the decision.
- ³⁵ A *fee simple* interest is a kind of land ownership that could possibly last forever. By contrast, a leasehold usually is scheduled to end at a fixed time, and a *life estate* lasts only for a designated person’s life. As a general proposition, renters own leaseholds, while homeowners and landlords own fees simple, because the homeowners’ and landlords’ interests can potentially last forever.
- ³⁶ 296 Mont. 207, 988 P.2d 1236 (1999). The court’s opinion in this case was written by former Justice Terry Triewweiler, who twice ran for Chief Justice but later abruptly resigned from the court. Triewweiler was known to be unsuited temperamentally for judicial duties, and sometimes cluttered his opinions with unprofessional rants. *See, e.g., Casarotto v. Lombardi* 268 Mont. 369, 384-85, 886 P.2d 931, 940-41 (1994) (concurring opinion assailing named federal judge).
- ³⁷ The two environmental rights provisions were not supposed to be justiciable at all. *See* Part V.E.
- ³⁸ This conflict was first pointed out in Robert G. Natelson, “*No Armed Bodies of Men: Montanans’ Forgotten Constitutional Right (With Some Passing Notes on Recent Environmental Rights Cases)*”, 63 MONT. L. REV. 1, 17-18 (2002).
- ³⁹ 305 Mont. 513, 29 P.3d 1011 (2001).
- ⁴⁰ For an example of how a gratuitous concurring opinion can add to uncertainty, see *Kaptein v. Conrad School District*, 281 Mont. 152, 931 P.2d 1311, 1317-19 (1997) (concurring opinion by Nelson, J.).
- ⁴¹ Jeffrey T. Renz, *Stare Decisis in Montana*, 65 MONT. L. REV. 41 (2004).
- ⁴² Renz, at 53.
- ⁴³ Renz, at 54.
- ⁴⁴ The author is informed that Renz suffered accordingly.
- ⁴⁵ Renz’s exact query was not duplicable. The query used for this Study, run on July 31, 2012, was da(aft 12-31-2000) & “is overruled” “we overrule” “are overruled” overruling (“to the extent” /p (overrul! revers!)) “we expressly overrule” “are expressly overruled” “is expressly overruled”. As Renz did, this author then reviewed all the cases to remove false positives.



- ⁴⁶ “At least” because some may have been lost in counting strings of decisions the court says are thereby overruled, and because the court itself sometimes is inexact as to how many cases it is overruling. For example, it may state only that the “*Smith v. Jones* line of decisions” is overruled, without itemizing how many decisions are in that line. Thus, the figures in the text are minimum numbers.
- ⁴⁷ *State v. Herman*, 343 Mont. 494, 188 P.3d 978 (2008).
- ⁴⁸ The court issued ten cases overruling at least 39 precedents.
- ⁴⁹ *E.g.*, *State v. Hardaway*, 307 Mont. 139, 36 P.3d 900 (2001) (reversing precedent in a criminal search case).
- ⁵⁰ In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Surface and Underground, Within the Missouri River Drainage Area, Including All Tributaries of the Missouri River in Broadwater, Cascade, Jefferson and Lewis and Clark Counties, Montana, 311 Mont. 327, 55 P.3d 396 (2002).
- ⁵¹ 234 Mont. 331, 766 P.2d 228 (1988).
- ⁵² 344 Mont. 445, 188 P.3d 1042 (2008).
- ⁵³ *Jacobsen v. Farmers Union Mut. Ins. Co.*, 320 Mont. 375, 87 P.3d 995 (2004).
- ⁵⁴ *PPL Montana v. Montana*, 355 Mont. 402, 229 P.3d 421 (2010), *reversed*, ___ U.S. ___, 132 S.Ct. 1215 (2012).
- ⁵⁵ *PPL Montana, LLC v. Montana*, ___ U.S. ___, 132 S.Ct. 1215 (2012).
- ⁵⁶ The “public trust” doctrine is a misapplication of the traditional rule that public officials are bound by fiduciary duties. Essentially, it represents a socialization of resource ownership. However, Montana water law is not really dominated by the public trust doctrine. Rather, it is a mishmash of prior appropriation property rules, public trust, and various other doctrines, which are often inconsistent.
- ⁵⁷ *E.g.*, *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *NAACP v. Alabama*, 357 U.S. 449 (1958). It is ironic that “progressives” have complained so loudly about *Citizens United*, since these and other cases recognizing corporate speech rights were decided by Supreme Courts dominated by “progressive” justices.
- ⁵⁸ *Citizens United v. Federal Elections Commission*, ___ U.S. ___, 130 S. Ct. 876 (2010).
- ⁵⁹ The first square holding (as opposed to dicta) was *Near v. Minnesota*, 283 U.S. 697 (1931).
- ⁶⁰ 363 Mont. 220, 271 P.3d 1 (2011). The case was later known as *American Tradition Partnership v. Bullock*.
- ⁶¹ Robert G. Natelson, *Montana’s Supreme Court Relies on Erroneous History in Rejecting Citizens United*, available at [http://www.campaignfreedom.org/wp-content/uploads/2012/06/2012-06-Natelson-Montanas-Supreme-](http://www.campaignfreedom.org/wp-content/uploads/2012/06/2012-06-Natelson-Montanas-Supreme-Court-Relies-on-Erroneous-History.pdf)
- Court-Relies-on-Erroneous-History.pdf*. See also by the same author, Montana Supreme Court’s “History” Turns Out To Be Weak, at <http://constitution.i2i.org/2012/07/08/montana-supreme-court%E2%80%99s%E2%80%99Chistory%E2%80%99D-turns-out-to-be-weak/>.
- ⁶² See Natelson, *Erroneous History*, note 61.
- ⁶³ *American Tradition Partnership v. Bullock*, ___ U. S. ___, 132 S.Ct. 2490 (2012).
- ⁶⁴ 231 Mont. 406, 757 P.2d 746 (1988)
- ⁶⁵ 281 Mont. 152, 931 P.2d 1311, 1317-19 (1997) (concurring opinion by Nelson, J.).
- ⁶⁶ The author was so informed by one of the attorneys in the case. The issue is complicated because it involves the “Blaine Amendment” section of the Montana Constitution (Article X, Section 6), which is of uncertain meaning and may be invalid under the U.S. Constitution.
- ⁶⁷ U.S. Chamber Institute for Legal Reform, *Ranking the States: Lawsuit Climate* 24 (2010), available at <http://www.instituteforlegalreform.com/sites/default/files/images2/stories/documents/pdf/lawsuitclimate2010/2010LawsuitClimateReport.pdf>.
- ⁶⁸ *E.g.*, *Montana Shooting Sports Assn., Inc. v. State of Montana*, 344 Mont. 1, 185 P.3d 1003 (2008) (refusing to enforce a statute barring “political activity” [specifically, lobbying at taxpayer expense] by the state Department of Fish, Wildlife, and Parks); *Rothwell v. Allstate Ins. Co.*, 293 Mont. 393, 976 P.2d 512 (1999) (taking a very broad view of “public policy,” and thereby forbidding employer and employee from contracting around statutory indemnification rule); Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139 (2005) (discussing the Montana Supreme Court’s attack on contractual arbitration clauses).
- ⁶⁹ MONT. CONST. art. II, §1.
- ⁷⁰ *Montanans for Justice v. State of Montana*, 334 Mont. 237, 259-60, 146 P.3d 759, 775 (2006) (“The right of Montanans to change our constitution by initiative is a unique right granted by Article II, Section 2 of the 1972 Montana Constitution. It is our judicial duty to preserve this right wherever possible and to decline to interfere unless it appears to be absolutely essential.”).
- ⁷¹ 213 Mont. 425, 691 P.2d 826 (1984).
- ⁷² The case was filed on September 11, 1984, the hearing was on September 28, the court’s order on October 1, but the opinion not issued until November 28.
- ⁷³ *State of Montana, ex rel. Montana Citizens for the Preservation of Citizens’ Rights v. Waltermire*, 227 Mont. 85, 227 Mont. 106, 738 P.2d 1255 (1987). The justices split 4-3.

⁷⁴ See, e.g., *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978); *Taylor v. Town of Atlantic Beach Election Comm’n.*, 363 S.C. 8, 609 S.E.2d 500 (2005).

⁷⁵ *Martin v. State Hwy Commn.*, 107 Mont. 603, 88 P.2d 41 (1939).

⁷⁶ *Marbut v. Secretary of State*, 231 Mont. 131, 752 P.2d 148 (1988).

⁷⁷ 231 Mont. 406, 757 P.2d 746 (1988)

⁷⁸ 234 Mont. 259, 763 P.2d 650 (1988).

⁷⁹ *Nicholson v. Cooney*, 265 Mont. 406, 877 P.2d 486 (1994). The label “initiative referendum” (hence “IR-112”) is a misnomer for a petition referendum. IR-112 was triggered by a formal petition placing a legislative tax hike (House Bill 671) on the ballot for voter review. In the 1994 election, the tax increase was defeated by a 3-1 margin.

Disclosure: The author of this study led the successful petition drive and was named a defendant in the ensuing lawsuit, but plaintiffs eventually dropped the case against him and reimbursed his court costs.

⁸⁰ 278 MONT. 307, 924 P.2d 268 (1996).

⁸¹ *Disclosure:* The author chaired the drafting committee for CI-75. He did not lead the ensuing petition drive or referendum campaign, nor was he a party in the ensuing case.

⁸² MONT. CONST. XIV, §11 provides that “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.”

⁸³ This provision apparently originated in New Jersey, where it was understood not to affect the content of an amendment. *State v. Wurts*, 62 N.J.L. 107, 40 A. 740 (1898). Its predecessor provisions in the abortive 1884 Montana Constitution and in the 1889 constitution confirm its role as a direction to election officers. Article XVI, Section 13 of the 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.)

MONT. CONST. (1889), art. XIX, §9:

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.)

Even the few courts that had held similar provisions to affect content had rejected the Montana Supreme Court’s “single part” approach. *State ex rel. Adams v. Herriod*, 10 S.D. 109, 72 N.W. 93 (1897); *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N.W. 785 (1882).

⁸⁴ *State of Montana ex rel. Montana Citizens for the Preservation of Citizens’ Rights v. Waltermire*, 224 Mont. 273, 729 P.2d 1283 (1986) and *State of Montana ex rel. Montana School Boards Assn. v. Waltermire*, 224 Mont. 296, 729 P.2d 1297 (1986) held that a constitutional challenge to the content of a ballot measure could not proceed prior to the election unless the measure was “facially invalid.” Accord: *Reichert v. McCulloch*, 365 Mont. 92, 278 P.3d 455, 473 (2012). In the first of these cases, the court also held that multiple subjects did not render a measure facially invalid. But if “multiple subjects” is a defect, it *must* be facial; so one must of necessity conclude that multiple subjects was, after 1972, no longer a defect. This made sense, since the 1972 constitution, adopted after previous case law, expanded direct democracy and contained no text to support a single subject rule.

⁸⁵ See, e.g., *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978).

⁸⁶ 293 Mont. 274, 975 P.2d 325 (1999).

⁸⁷ See note 84.

⁸⁸ 327 Or. 250, 959 P.2d 49 (1998). However, the rule adopted in *Marshall* was stricter than that adopted in *Kitzhaber*.

⁸⁹ The text of CI-97 can be found at <http://sos.mt.gov/elections/archives/2000s/2006/CI/CI-97.asp>.

⁹⁰ The text of CI-98 can be found at <http://sos.mt.gov/elections/archives/2000s/2006/CI/CI-98.asp>.

⁹¹ The text of I-154 can be found at <http://sos.mt.gov/elections/archives/2000s/2006/I/I-154.asp>.

⁹² Telephone Conversation with Trevis Butcher, July 29, 2012. Butcher was the leader of the sponsoring organizations.

⁹³ *Id.* Butcher states that his organization had great difficulty obtaining effective legal representation despite having approached over 30 Montana attorneys. One reason was that court-mandated accelerated procedures left little time for preparation. Another was that nearly all lawyers contacted were tied to adverse interests or were otherwise unwilling to buck the state’s legal and political establishment. On the latter point, see also Part IV.A.

⁹⁴ 334 Mont. 237, 146 P.3d 759 (2006).



- ⁹⁵ State Senator Joe Balyeat (R.-Bozeman) collected relevant documentation and issued it in a press release that garnered no press coverage. Joseph Balyeat, *Senator Balyeat Alleges Liberal Initiative Backers are Guilty of Very Charges They've Levied Against Conservative Initiatives* (Oct. 3, 2006), available at Montana Policy Institute website: www.montanapolicy.org
- ⁹⁶ Note, for example how carefully the court distinguished valid and invalid signatures in *Floridians Against Expanded Gambling v. Floridians for a Level Playing Field*, 945 So.2d 553 (Fla. DCA 2006) and *Dawson v. Meier*, 78 N.W.2d 420 (N.D. 1956).
- ⁹⁷ *Martin v. State Hwy Comm'n*, 107 Mont. 603, 88 P.2d 41 (1939).
- ⁹⁸ *Reichert v. McCulloch*, 365 Mont. 92, 278 P.3d 455 (2012).
- ⁹⁹ *MEA-MFT v. McCulloch*, Order issued Aug. 10, 2012.
- ¹⁰⁰ 308 Mont. 265, 42 P.3d 760 (2002).
- ¹⁰¹ CI-64 passed by 264,174 votes to 130,695, a better than two-thirds margin. See <http://ia600301.us.archive.org/5/items/canvassgenerale1992montrich/canvassgenerale1992montrich.pdf>. The measure received nearly 63 percent of the vote in liberal Missoula County. *Id.*
- ¹⁰² CI-64 also attempted to impose them on the Montana congressional delegation, but the U.S. Supreme Court invalidated such efforts. *United States Term Limits, Inc. v. Thornton* (1995), 514 U.S. 779 (1995).
- ¹⁰³ Equitable remedies are those that historically were administered by the High Court of Chancery in England. The most common is the injunction; among the others are constructive trust, accounting for profits, and (originally) rescission.
- ¹⁰⁴ 334 Mont. at 245, 146 P.3d at 766 (the delay “prejudiced the party against whom relief is sought.”).
- ¹⁰⁵ See the CI-30 cases described above.
- ¹⁰⁶ MONT. CONST. art. II, §31.
- ¹⁰⁷ *E.g.*, *Environmental Information Center v. Department of Environmental Quality*, 296 Mont. 207, 988 P.2d 1236 (1999).
- ¹⁰⁸ 327 Mont. 306, 114 P.3d 1009 (2005).
- ¹⁰⁹ 348 Mont. 205, 201 P.3d 70 (2008).
- ¹¹⁰ 348 Mont. 80, 201 P.3d 8 (2008).
- ¹¹¹ MONT. CONST. art. II, §29:
Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

By contrast, U.S. CONST. art. V says only, “nor shall private property be taken for public use, without just compensation.”

- ¹¹² *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).
- ¹¹³ 357 Mont. 237, 238 P.3d 765 (2010).
- ¹¹⁴ The attorney general’s statement of purpose read in part as follows:
Under Montana law. . . payday[] lenders may charge fees equaling one-fourth of the loan, which is the same as an annual interest rate of 300 percent for a 31 day loan or 650 percent for a 14-day loan. Title lenders may charge interest equaling one-fourth of the loan, which is the same as an annual interest rate of 300 percent for a 30 day loan. I-164 reduces the interest, fees, and charges that payday, title, and retail installment lenders may charge to an annual interest rate of 36 percent.
Perhaps the following statement would be just as “impartial.”
Under Montana law. . . consumers and payday[] lenders may agree to fees as up to one-fourth of the loan because the loan is often quite small and of very short duration. For the same reason, consumers and title lenders may similarly agree. I-164 forbids consumers and title lenders from making this sort of agreement, limiting them to annual interest rates of more than 36 percent, no matter how small the loan, no matter how short the duration, no matter what market conditions are, and no matter how poor a consumer’s credit record is—thereby preventing many from getting loans no matter how much they need the money.
- ¹¹⁵ Mont. Code Ann. §13-37-316(4):
A petition for a proposed ballot issue may be circulated by a signature gatherer upon transmission of the sample petition form by the secretary of state pending review under this section. If, upon review, the attorney general or the supreme court revises the petition form or ballot statements, any petitions signed prior to the revision are void.
- ¹¹⁶ 363 Mont. 220, 271 P.3d 1 (2011). The case was later known as *American Tradition Partnership v. Bullock*.
- ¹¹⁷ *American Tradition Partnership v. Bullock*, ___ U. S. ___, 132 S.Ct. 2490 (2012).
- ¹¹⁸ Mont. Code Ann. § 1-1-101 (A “law” is “a solemn expression of the will of the supreme power of the state.”) & Mont. Code Ann. § 1-1-102 (“The will of the supreme power is expressed by: (1) the constitution; (2) statutes.”)
- ¹¹⁹ *Foster v. Kovich*, 207 Mont. 139, 673 P.2d 1239 (1983).
- ¹²⁰ 365 Mont. 92, 278 P.3d 455 (2012). Other examples could have been selected, but space prohibits. See, e.g., *Citizens Right to Recall v. State ex rel. McGrath*, 333 Mont. 153, 142 P.3d 764 (2006) (upholding attorney general’s summary of initiative permitting recall of judges despite clear negative bias).

- ¹²¹ See, e.g., Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 10-17 (2010).
- ¹²² The attorney general's brief appealing the district court decision did not mention that section. The Supreme Court knew of the section, but did not address it in its opinion, and misrepresented its content in a footnote. See below in this Part.
- ¹²³ Part V.D.2.
- ¹²⁴ *Caperton v. A.T. Massey Coal Co., Inc.* 556 U.S. 868, 879 (2009) (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986)).
- ¹²⁵ Rule 2.12(A).
- ¹²⁶ MONT. CONST. art. V, §14.
- ¹²⁷ This statement is literally true. The code *requires* disqualification if “the judge’s impartiality might reasonably be questioned.”
- ¹²⁸ 278 P.3d at 478.
- ¹²⁹ *Id.* at 476.
- ¹³⁰ *Id.* at 479, fn. 11. The note stated:
MONT. CONST. art. IV, § 4 (except for those public offices whose qualifications are specified in the Constitution, the only qualifications to hold a public office are that the person be a qualified elector and not under state supervision for a felony conviction, but the Legislature “may provide additional qualifications” for such office). The actual section reads:
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.
Note that “except as otherwise provided in this constitution” means that the constitution contains some additional restrictions on electors holding public office, but the section clearly permits the legislature to add others to “any public office.” The court misrepresented the section so as to suggest that the qualifications listed for justices in Article IX were the only ones that could be imposed. Even if one were to assume that Article IV, Section 4 were ambiguous, norms of judicial deference to legislative and popular rule dictate that it be construed to uphold LR-119.
- ¹³¹ “Bozeman attorney drops bid for Montana Supreme Court,” *Missoulian*, April 19, 2012, available at http://missoulian.com/news/state-and-regional/bozeman-attorney-drops-bid-for-montana-supreme-court/article_dd2826b8-8a49-11e1-98cb-001a4bcf887a.html.
- ¹³² *Ballantyne v. The Anaconda Co.*, 175 Mont. 406, 409, 574 P.2d 582, 584 (1978).
- ¹³³ MONT. CONST. art. II, §4 (“The dignity of the human being”); art. II, §10 (“The right of individual privacy . . . shall not be infringed without the showing of a compelling state interest.”).
- ¹³⁴ See, e.g., the potential conflict between MONT. CONST. art. X, §9(3) (“There is a board of public education to exercise general supervision over the public school system”) and art. X, §8 (“The supervision and control of schools in each school district shall be vested in a board of trustees”).
- ¹³⁵ MONT. CONST. art. II, §3 & art. IX, §1 (“clean and healthful environment”).
- ¹³⁶ MONT. CONST. art. X, §1 (“full educational potential of each person” & “Equality of educational opportunity”).
- ¹³⁷ Robert G. Natelson, *The Original Constitution: What It Actually Said And Meant* 173-77 (2d ed., 2011).
- ¹³⁸ Comments of Delegate Dahood, Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, p. 1640.
- ¹³⁹ Robert G. Natelson, *Montana Constitution Project Unveiled at UM*, 33-MAY MONT. LAW. 14 (2008).
- ¹⁴⁰ *Luther v. Borden*, 48 U.S. 1 (1849) (holding that the Guarantee Clause of Article IV, §4 is non-justiciable). The meaning of “republican form” is now clearer. See, e.g., Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807 (2002).
- ¹⁴¹ 296 Mont. 207, 988 P.2d 1236 (1999).
- ¹⁴² 296 Mont. 361, 989 P.2d 364 (1999).
- ¹⁴³ 283 Mont. 433, 942 P.2d 112 ((1997).
- ¹⁴⁴ *Snetsinger v. Montana University System*, 325 Mont. 148, 104 P.3d 445 (2004) (so holding under the Equal Protection Clause). In fairness, it must be noted that the university system had disregarded the state’s public policy in favor of marriage by extending benefits to heterosexual couples living together outside of marriage.
For another example of judicial lawmaking under the privacy right, see *State v. Boyer*, 308 Mont. 276, 42 P.3d 771 (2002).
- ¹⁴⁵ 236 Mont. 44, 769 P.2d 684 (1989).
- ¹⁴⁶ 326 Mont. 304, 109 P.3d 257 (2005). The court did hold yet another lawsuit to be non-justiciable, but only because the legislature was still responding to the court’s order in the *Columbia Falls* case. *Stroebe v. State of Montana*, 331 Mont. 23, 127 P.3d 1051 (2006).
- ¹⁴⁷ E.g., Sam Peltzman, *Political Economy of Public Education: Non-College-Bound Students*, 39 J.L. & Econ. 73 (1996).



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THE
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