"Purely the Creature of the Inventive Genius of the Court": State Ex Rel. Whiteside and the Creation and Evolution of the Montana Supreme Court's Unique and Controversial Writ of Supervisory Control

Larry Howell
University of Montana School of Law, larry.howell@umontana.edu

Follow this and additional works at: http://scholarship.law.umt.edu/faculty

Part of the Courts Commons

Recommended Citation
Larry Howell, "Purely the Creature of the Inventive Genius of the Court": State Ex Rel. Whiteside and the Creation and Evolution of the Montana Supreme Court's Unique and Controversial Writ of Supervisory Control, 69 Mont. L. Rev. 1 (2008), Available at: http://scholarship.law.umt.edu/faculty/32

This Article is brought to you for free and open access by the Faculty Publications at The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of The Scholarly Forum @ Montana Law.
"PURELY THE CREATURE OF THE INVENTIVE GENIUS OF THE COURT": STATE EX REL.
WHITESIDE AND THE CREATION AND EVOLUTION OF THE MONTANA SUPREME COURT’S UNIQUE AND CONTROVERSIAL WRIT OF SUPERVISORY CONTROL

Larry Howell*

I. INTRODUCTION ....................................... 2
II. WHITESIDE’S HISTORICAL CONTEXT ............... 9
   A. Blowing the Whistle on a National Scandal ...... 9
   B. The Marbury v. Madison of Discovery Disputes 13
III. RESURRECTING THE POWER OF THE COURT OF KING’S BENCH ........................................... 16
   A. A Brief History of Superintending Control ...... 16
   B. Following the Money to a Landmark Ruling .... 19
   C. A New Writ for Exercising a Power of “Unlimited Means” ..................................... 22
IV. AN ANCIENT REMEDY FOR A “WITHERING CURSE” .... 32
   A. The Honorable William Clancy .................. 32
   B. The Justices’ Long Trip to Washington ......... 40

* Assistant Professor of Law and Director of Legal Writing, The University of Montana School of Law. This article is dedicated to Professor Emeritus William F. “Duke” Crowley, a fine law teacher and storyteller who was raised in the small mining community of Walkerville just above Butte, Montana. Professor Crowley’s knowledge of both writ practice and Montana history helped spark my interest in the unusual writ of supervisory control. Any errors, however, are mine alone. I would also like to thank Professors Fritz Snyder and Andrew King-Ries for their valuable comments, and Phil Cousineau of the Jameson Law Library for his research assistance, as well as his skill in mediating overdue book fines at other libraries. Thanks to Dean Ed Eck for providing summer research support. I also owe a debt of gratitude to retired University of Montana history professor H.D. Hampton for his suggestions, as well as his generosity over the years. Finally, thanks to Ellen for her encouragement and support.
I. INTRODUCTION

State Senator Fred Whiteside knew he was in the eye of a political hurricane when he rose to address a joint session of the Montana Legislature in Helena on January 10, 1899.1 He was, after all, in the midst of exposing what Montana's preeminent historian, the late Michael P. Malone, labeled "one of the most remarkable, most sordid political spectacles in the history of the United States."2 Just hours before, on the night of January 9, Whiteside had appeared before a special joint legislative committee,3 where he testified about a brazen scheme to bribe state legislators into electing infamous "copper king" William Andrews


2. Malone, supra n. 1, at 111. Other Montana historians have also written about Fred Whiteside's role in Montana's infamous "War of the Copper Kings." See James McClellan Hamilton, History of Montana: From Wilderness to Statehood 584–600 (Merrill G. Burlingame ed., 2d ed., Binford & Mort 1970); K. Ross Toole, Montana: An Uncommon Land 182–94 (U. Okla. Press 1959) [hereinafter Toole, Uncommon Land]; C.B. Glasscock, The War of the Copper Kings: Builders of Butte and Wolves of Wall Street 171–95 (Grosset & Dunlap 1935). For the most detailed and colorful chronicle of Whiteside's bribery charges, see Christopher P. Connolly, The Devil Learns to Vote: The Story of Montana 121–65 (Covici Friede 1938). However, Connolly had a substantial conflict of interest. Although he later became a noted muckraking journalist, in 1899 he was a lawyer working for Marcus Daly, Clark's archrival "copper king," who was also striving to dominate Montana politics. At Daly's behest, Connolly also represented Fred Whiteside in the libel lawsuit against Clark's newspaper that resulted in the Montana Supreme Court decision that is the focus of this article. Dennis Swibold, The Education of a Muckraker: The Journalism of Christopher Powell Connolly, 53 Mont.: The Mag. of W. History 2, 6 (2003). Whiteside's memoirs, which he dictated to his daughter shortly before his death in 1935, also describe these events, although with self-effacing, and disappointing, brevity. See Fred Whiteside, Three Hundred Grand 74–79 (Est. of Fred Whiteside 1980).


4. Until 1913, each state's two senators were elected by state legislators. U.S. Const. art. I, § 3 (superseded by U.S. Const. amend. XVII).
Clark to the United States Senate. Clark, through his hirelings, had openly offered legislators as much as $10,000 each for their votes and was committed to spending $1,000,000 if necessary, a staggering sum at the time. Clark's son Charles, his campaign treasurer, summed up their election strategy this way: "We'll send the old man to the Senate or to the poorhouse."

What Whiteside had no way of knowing, however, was that reverberations from his whistle-blowing would still be felt more than a century later. On July 3, 2007, the Montana Supreme Court issued an order repealing the existing Montana Rules of Appellate Procedure. In its initial order proposing to amend the Rules, the Court explained that the previous rules "have been amended piece-meal over the years and, in many instances, are confusing, internally inconsistent, and comport neither with this Court's jurisprudence nor with current appellate practice and procedure in this State." In short, the Court concluded its rules were outdated. The new rules, which became effective October 1, 2007, alter the old rules in many fundamental ways, including changing the terminology applied to parties, the method of counting time, and even the office where the notice of appeal is filed.

The most interesting substantive change, however, is not new at all. Instead, Rule 14(3), concerning the Court's power of supervisory control over lower courts, actually takes the Court full circle, back to the beginning of the previous century when the state was just a decade old and Fred Whiteside was a household name.

5. See Sen. Comm. Rpt. 56-1052 at 1 (Apr. 23, 1900). This 3-volume, 3,000-page report includes documents, exhibits and testimony from U.S. Senate hearings into Clark's corrupt efforts to become a member of the world's most exclusive club, as well as from various earlier proceedings in Montana.


9. Malone, supra n. 1, at 113; Connolly, supra n. 2, at 125.


Considered "the most turbulent period in the entire political history of the commonwealth,"\(^{16}\) it was a time when Montana was known primarily not for its rugged mountains and vast open spaces, but rather for the "massive corruption of the machinery of government"\(^{17}\) brought on by the infamous War of the Copper Kings.\(^{18}\) In late 1900, at the end of one of the more tumultuous years of this turbulent time, the Montana Supreme Court issued a decision bearing Whiteside's name that still ranks among its more significant and controversial.\(^{19}\) In *State ex rel. Whiteside v. District Court of First Judicial District*,\(^{20}\) the Court announced the creation of a "distinctive"\(^{21}\) new writ of supervisory control, a previously unknown judicial tool that would allow the Court great latitude "to control the course of litigation in the inferior courts."\(^{22}\) This past summer, after applying various tests and standards for issuing the writ for much of the last century, the Court finally codified in Rule 14(3) the original supervisory control test it announced in *Whiteside* 108 years ago.\(^{23}\)

Unlike the traditional common law writs, such as prohibition, certiorari, or mandamus, which generally could only issue to a lower court that either exceeded or refused to exercise its jurisdiction,\(^{24}\) this new supervisory writ allowed the Supreme Court to intervene in litigation in trial courts even when those courts "were proceeding within their jurisdiction."\(^{25}\) By inventing this new writ, the Court in 1900 addressed what is still considered today one of the thorniest issues in appellate law: how to allow immediate review of crucial but discretionary interlocutory rulings that otherwise could not be appealed until after trial under the final

\(^{18}\) For a good overview of this "legendary struggle between mining barons," see Malone & Roeder, *supra* n. 16, at 152–77.
\(^{19}\) *State ex rel. Whiteside v. Dist. Ct. of First Jud. Dist.*, 63 P. 395 (Mont. 1900).
\(^{20}\) Id.
\(^{21}\) *Superintending Control over Inferior Tribunals*, 112 A.L.R. 1351, 1372 (1938) [hereinafter *Superintending Control II*] ("In Montana, a distinctive 'supervisory writ' or 'writ of supervisory control' has been evolved by the Supreme Court, as a necessary consequence of the constitutional provision granting to it 'general supervisory control over all inferior courts . . . .'").
\(^{22}\) *Whiteside*, 63 P. at 400.
\(^{23}\) See *infra* nn. 435–39.
\(^{25}\) *Whiteside*, 63 P. at 400.
judgment rule. Through its new writ, the Court effectively resolved that dilemma three-quarters of a century before a commission appointed by the American Bar Association would recommend that appellate courts across the country adopt some similar method of discretionary interlocutory review.

The judicial foresight that led to the writ’s creation is all the more remarkable considering the political and social turmoil afflicting the state—and the Supreme Court—at the time. The writ was a direct result of, and a creative method of dealing with, the state’s pervasive corruption, a fact that has been overlooked by both legal scholars and historians. A close examination of Montana cases from this period reveals that the Court invented the writ primarily to control a corrupt Butte judge who was presiding over some of the most significant litigation in America—the legal battles between the copper kings over the vast ore deposits under “the richest hill on earth” at a time when the spread of electricity and telephones made copper one of the world’s most important natural resources.

After the War of the Copper Kings ended in the early 1900s and with it much of the corruption that had led to the writ in the first place, the Montana Supreme Court struggled with the writ’s creation for most of the twentieth century. The struggle reached its peak a half-century after Chief Justice Theodore Brantly’s opinion in Whiteside, when another Montana chief justice derided the writ of supervisory control as “purely the creature of the inventive genius of the court without being prescribed or authorized by either the Codes, the statutes or any other written law of this state.” That criticism resurfaced at the 1972 Montana Constitutional Convention when the Judiciary Committee proposed abolishing the writ, calling it an “unseemly avoidance of the express provisions of the 1889 Constitution.” Fortunately, convention

28. See infra part IV.
29. Id. at 34–35.
31. Id. at 132–48.
32. Id. at 159.
delegates rejected that recommendation, choosing instead to ratify and even strengthen the Supreme Court's supervisory control powers.35 Approval of the 1972 Constitution by voters therefore should have put to rest any lingering questions about the writ's legitimate place in Montana jurisprudence. With the new Montana Rules of Appellate Procedure, the Court has gone further yet, in effect paying judicial homage to Brantly's opinion in Whiteside, albeit without acknowledging the test's origins.36

This article is intended to provide the first comprehensive examination of the writ of supervisory control, from its creation as a way of controlling one corrupt judge to the current justices' recent disagreements, and more recent agreements over its use. Part II of this article examines the fascinating historical background of the Whiteside decision and its origins in one of America's great political scandals: the openly corrupt election of copper king William Andrews Clark to the U.S. Senate in 1899. That the Whiteside decision resulted from that infamous scandal is not apparent from reading the opinion itself, as it contains virtually no background facts about the underlying litigation, and instead focuses solely on the Court's various types of jurisdiction. Part II focuses on the role of the plaintiff, state Senator Fred Whiteside, in exposing Clark's efforts to bribe his way into the Senate. Although largely forgotten today, Whiteside is Montana's foremost whistleblower and one of its more remarkable citizens. This part will also look at the reasoning in the decision bearing his name, and how its author, Chief Justice Brantly, took the Court

---

35. Compare Mont. Const. art. VIII, § 2 (1889) with Mont. Const. art. VII, § 2(2) (1972). The 1972 provision deleted the phrase “under such limitations and regulations as may be prescribed by law” from the Court's grant of supervisory power, eliminating any question of whether the power was self-executing. Compare also State ex rel. Whiteside v. Dist. Ct. of First Jud. Dist., 63 P. 395 (Mont. 1900) with Tripp, 305 P.2d at 1117 (Bottomly, J., dissenting).

36. In its comments to the proposed rule, the Court surprisingly does not include Whiteside, the case that started it all, among the supervisory control cases it discusses. See Order, supra n. 11, at 38-41.

37. The only other law review article focusing on the general use of supervisory control in Montana was written 60 years ago by a former justice and provides only a cursory overview of the writ's use. See Claude F. Morris, The Writ of Supervisory Control, 8 Mont. L. Rev. 14 (1947). A more recent student comment limits itself to discussing supervisory control in the discovery context. Mark S. Williams, The Use of Supervisory Control in Discovery Matters, 52 Mont. L. Rev. 465 (1991).

38. See e.g. State ex rel. Inter-Fluve v. Mont. Eighteenth Jud. Dist. Ct., 112 P.3d 258, 264-66 (Mont. 2005) (Gray, C.J., concurring and dissenting; Rice, J., dissenting); see also infra part VII.

39. See Mont. R. App. P. 14(3) (2007); see also infra part VII.
further than any previous American court had gone in exercising a state supreme court's constitutional power to supervise lower courts.

Part III of this article will examine the Whiteside decision in the context of traditional nineteenth-century legal views regarding the authority of a jurisdiction's highest court to review the actions of lower courts via direct appeal, on the one hand, and through prerogative, or extraordinary, writs on the other. This part begins with an overview of the broad power of "superintending control," which was exercised by the court of King's Bench in England over common law courts. A weakened version of that royal power came to be exercised by state supreme courts in America, but they soon began drawing a fast distinction between their appellate jurisdiction and their superintending jurisdiction. Unlike the court of King's Bench, American courts came to view superintending control as "a peculiar" power only to be exercised under extraordinary circumstances.\textsuperscript{40} Therefore, the Montana Supreme Court's creation and frequent use of a powerful but previously unknown supervisory writ constitutes the most forceful assertion of the power of superintending control of any American court.

Part IV of this article will show that the reason the Court strongly asserted this power when it did was to respond to Montana's pervasive corruption. In particular, the writ was created to control a district judge in Butte, William Clancy, who had been "bought and paid for"\textsuperscript{41} by one copper king, and whose biased rulings in his patron's favor were wreaking financial havoc on competing mining operations. Before Whiteside, the Court's opinions reveal increasing frustration because jurisdictional limits on direct appeals and the traditional prerogative writs prevented the Court from responding in a timely way to this judge's discretionary pretrial rulings. As that frustration built, the honesty of the Supreme Court justices themselves was called into question during the U.S. Senate investigation into William Clark's election. A few months after that embarrassing experience, the Court invented a powerful new method of discretionary judicial review, which it began using almost exclusively to supervise the crooked Butte judge.

\textsuperscript{40} Superintending Control and Supervisory Jurisdiction of the Superior over the Inferior or Subordinate Tribunal, 51 L.R.A. 33, 34–35 (1901) [hereinafter Superintending Control I].

\textsuperscript{41} Toole, State of Extremes, supra n. 17, at 109.
Part V of this article will then examine development of the writ of supervisory control over the last century until Montana's adoption of a new Constitution in 1972. Undoubtedly because the Court created and used the writ during the high-profile litigation arising from the War of the Copper Kings, the number of cases seeking supervisory control became substantial. At times over the decades before the 1972 Constitutional Convention the Court broadened the writ's use, at other times the Court tried to constrict it, and at still others justices questioned the writ's very legitimacy, coming within one vote of abolishing the writ in the 1950s.

Part VI will explain how, seven decades after the writ's creation, the smoldering debate about its legitimacy should have been silenced by adoption of the 1972 Constitution. Delegates to the Constitutional Convention rejected the Judiciary Committee's proposal to abolish the Supreme Court's power of supervisory control. Instead, the judiciary article adopted by delegates and included in the 1972 Constitution strengthened those powers by eliminating the power of the legislature to limit the Court's supervisory control jurisdiction.

Part VII will then examine the court's jurisprudence concerning the writ after adoption of the new Constitution. In particular, this part will examine how in the 1980s and 1990s the Court confused its standards for exercising supervisory control over a lower court with its much more restrictive standards for exercising original jurisdiction over important litigation that bypassed trial courts altogether and was filed directly in the Supreme Court. This section will also look at how the Court, until the last few years, was in the midst of another periodic expansion of the writ, leading to strong internal disagreements. In the last couple of years, however, that disagreement has largely disappeared. The Court has reached an apparent consensus that has resulted in very few petitions being granted.

Finally, Part VIII will return to the Whiteside decision, and explain how the Court's creation of the writ of supervisory control in 1900 was almost a century ahead of its time in resolving one of the most difficult issues in appellate law: whether and how to allow discretionary appellate review of important interlocutory orders when justice dictates, even though the black-letter final judgment rule prohibits "piecemeal" review of non-final rulings.
II. Whiteside’s Historical Context

A. Blowing the Whistle on a National Scandal

When Fred Whiteside stood that morning in January 1899 to address his corrupt colleagues, “[a]n atmosphere of unbearable tension and shifting eyes gripped the proceeding.”  Whiteside himself was certainly apprehensive about exposing the powerful and rich Clark; the night before, he had begun carrying a pistol in each pocket of his overcoat for protection. Holding up $30,000 in bribe money he had obtained from Clark’s lawyer with the false promise of securing his own vote and that of several other legislators, the newly elected state senator from Flathead County proceeded to shame his crooked colleagues in a speech that would have made Jefferson Smith sit down and take notes:

I know that the course I have pursued will not be popular, but so long as I live, I propose to fight the men who have placed the withering curse of bribery upon this state. I had rather go back to the carpenter's bench where I learned my trade, and spend the rest of my days in toil and obscurity, and be able to hold my head erect and look the world in the face, than to be a silent party to the knowledge of this crime. . . . My own life has been threatened, but I defy the men who have made the threat; for, when weighed against honesty and honor, life has no value; and if this be the last act of my life, it is worth its price to the people of this state.

42. Malone, supra n. 1, at 115.
43. Not only was Clark one of the richest men in America at the time, reputedly worth $50,000,000 in 1900, he was arguably Montana’s most influential citizen, having been elected presiding officer at both the 1884 and 1889 Montana Constitutional Conventions. Malone, supra n. 1, at 196; Hamilton, supra n. 2, at 271.
44. Whiteside, supra n. 2, at 76.
45. Toole, Uncommon Land, supra n. 2, at 187.
46. Whiteside’s autobiographical account of his near-mythical life, which he dictated to his daughter a year before his death in 1935, provides a fascinating look at the rapid changes Montana experienced beginning in the last quarter of the nineteenth century. Born in Illinois in 1857, Whiteside reportedly was the great-grandson of Captain William Clark of Lewis and Clark fame. He decided as a teenager to seek adventure and fortune in frontier Montana after hearing news of the deaths of Custer and his troops at the Battle of the Little Bighorn in 1876. Whiteside arrived in Miles City in 1878 and spent several years as a professional buffalo hunter. During that time one hunting partner was killed and scalped by Indians, while another partner was a Nez Perce who had fought with Chief Joseph against the U.S. Army. Besides being a legislator and Montana’s preeminent whistleblower, Whiteside was at different times a miner, newspaper publisher, fruit farmer, oil man, and successful architect and contractor who built several famous buildings in Montana’s booming cities, including the Broadwater Natatorium in Helena and the massive Hennessy Block in Butte. Whiteside, supra n. 2, at vii–1, 10–12, 32, 45–46, 52–54, 57.
47. See Mr. Smith Goes to Washington (Columbia Pictures 1939) (motion picture).
48. Connolly, supra n. 2, at 146–47 (internal quotations omitted).
Whiteside’s accusation, dramatically supported by envelopes full of $1,000 bills, created an uproar, one that soon spread far beyond Montana. Notwithstanding Whiteside’s efforts, legislators still elected Clark to the U.S. Senate, although it took multiple ballots over the next three weeks, forcing Clark to raise the price he was willing to pay for a single vote to as much as $50,000. But Whiteside and others quickly filed complaints about the manner of his election with the U.S. Senate Committee on Privileges and Elections.

Hearings in front of that committee from January to April 1900 brought Montana’s lurid political corruption to the attention of the national press, which reacted with “unqualified revulsion.” Reporters were particularly appalled by the parade of woeful Montana legislators forced to travel to Washington, D.C., where they “appeared before the committee to explain, with downcast eyes, how they had acquired such sudden wealth.” Some testimony was so absurd it was comical. One of Clark’s men, confronted with an affidavit he had signed previously in which he admitted bribing legislators, told the committee his own prior sworn statement was a “pack of dam [sic] lies.”

Week after week, the hearings “revealed to all the world the ugly political culture which had germinated in Montana” at the start of the new century. The scale of corruption even caught

49. Hamilton, supra n. 2, at 585.
50. Toole, Uncommon Land, supra n. 2, at 188; Malone, supra n. 1, at 115–17. A grand jury was immediately convened to investigate the bribery charges, but refused to indict anyone amid rumors that Clark’s men had bribed the grand jurors. Malone, supra n. 1, at 118.
51. Whiteside quickly paid a political price for his integrity. On January 26, 1899, a Clark-friendly legislative committee that had been investigating Whiteside’s narrow election victory decided to toss out numerous ballots because the “X” was placed after Whiteside’s name instead of before it. As a result, Whiteside was “unseated,” and replaced in the Montana Senate by his general election opponent, a Clark supporter. Hamilton, supra n. 2, at 587. In response, Whiteside again took the floor and gave “what must rank as the most remarkable speech in the history of the Montana legislature.” Malone, supra n. 1, at 118. Comparing his corrupt colleagues to “a horde of hungry, skinny, long-tailed rats around a big cheese,” Whiteside told them that their explanations for why they voted for Clark “would be much more clear and to the point if they would just get up and tell us the price and sit down.” Id. (internal quotations omitted).
53. Id. at 117.
55. Id.
56. Malone, supra n. 1, at 129.
57. Id. at 124.
59. Malone, supra n. 1, at 123.
the eye of Mark Twain, who wrote that Clark “bought legislatures and judges as other men buy food and raiment. By his example he has so excused and so sweetened corruption that in Montana it no longer has an offensive smell.”

Whiteside’s testimony was compelling, but perhaps even more damning to senators on the committee was the testimony of all three justices of the Montana Supreme Court. Reluctant witnesses who tried to get out of appearing, the justices were instead subpoenaed and forced to travel in February 1900 from Helena to Washington, D.C. There, they testified about how Clark had tried to influence their decision—including offering a $100,000 bribe to one justice—in proceedings to disbar Clark’s attorney for his role in the bribery scheme. On April 10, 1900, the Committee on Privileges and Elections unanimously found Clark’s election “null and void on account of briberies, attempted briberies, and corrupt practices by his agents.” Clark resigned rather than be expelled by the full Senate.

The scandal Whiteside exposed had ramifications beyond just forcing Clark’s resignation and revealing to the nation “the bad repute into which the State had fallen.” It also helped ensure the eventual adoption of the Seventeenth Amendment to the U.S. Constitution, which took the power to elect U.S. senators away from state legislators and gave it directly to voters.

---

62. Sen. Comm. Rpt. 56-1052 at 14 (“The majority of the committee think that the transactions connected with the judges of the supreme court of Montana need special consideration.”).
63. *Id.* at 1631, 1667, 1732.
64. *Id.* at 1633–68, 1732–42.
65. *Id.* at 1.
66. Malone, *supra* n. 1, at 126. Clark, however, was not ready to abandon his senatorial aspirations. Instead, he hatched an astonishingly desperate scheme to reclaim his seat, further blackening both his and Montana’s reputation. Before Clark formally submitted his resignation letter, Clark’s allies in Montana lured the anti-Clark governor out of state. This allowed the lieutenant governor, a Clark supporter, to receive the letter as acting governor. He then immediately appointed Clark to the seat Clark had just vacated. Upon hearing the news, the shocked governor denounced the scheme as “another one of the many dirty tricks, perjuries and crimes resorted to by Clark.” He quickly returned to Helena and revoked the appointment. Clark’s persistence ultimately paid off, however. He won the seat without incident the next year after his supporters took over the legislature in the fall 1900 election. His résumé complete, Clark served one undistinguished term and chose not to run again in 1907. *Id.* at 126–30, 148–56, 195 (internal quotations omitted).
69. U.S. Const. amend. XVII.
Despite that lasting and fundamental impact on America's system of government, Fred Whiteside is now largely forgotten,\textsuperscript{70} relegated to a handful of Montana history books and a bronze plaque on a hallway wall in the state Capitol.\textsuperscript{71} Today, few know his name and fewer still the details of his stand against what he labeled "the withering curse"\textsuperscript{72} of political corruption that afflicted Montana.

Even in the one place where Whiteside's name still comes up—the opinions of the Montana Supreme Court\textsuperscript{73}—it is only remotely related to his role as Montana's preeminent whistleblower. Over the last century, Montana justices and appellate lawyers have become acquainted with the name Whiteside only because it appears in the caption of the case in which the Court announced the creation of its "unique"\textsuperscript{74} supervisory writ.\textsuperscript{75}

As the decades of the twentieth century passed, Whiteside's status as a landmark legal decision became severed from its connection to one of America's great political scandals. Because the Whiteside opinion is devoid of underlying facts, contemporary readers unfamiliar with Fred Whiteside's heroic role in American politics have no way of discerning the fascinating historical context of the case bearing his name. The opinion itself gives no background whatsoever on either the litigants or the events behind the litigation. All one knows about the parties from reading the Whiteside decision is that a plaintiff named Fred Whiteside, who is not further identified in any way, brought a libel suit "against the Miner Publishing Company and others."\textsuperscript{76} The opinion neglects to mention that one of the "others" was William An-

\textsuperscript{70} See Whiteside, supra n. 2, at vii.
\textsuperscript{71} In 1974, as congressional hearings into another, even larger political scandal riveted the nation, the Montana Legislature belatedly recognized Whiteside's role in state history by decreeing that a plaque honoring "his leadership in fighting corruption in this state" be displayed in the Capitol rotunda. Mont. H. Res. 66 (1974); see Mont. Code Ann. § 2-17-808(1)(b) (2003) (directing that Whiteside's plaque continue to be displayed for at least the next 50 years). On a wall near the old Supreme Court chambers, the plaque reads in part: "He fought for honesty in government, against staggering opposition at times—setting an example worthy of emulation. . . . For these and many other acts of valiant patriotism, this memorial is erected to Fred Whiteside by a grateful citizenry."
\textsuperscript{72} Connolly, supra n. 2, at 146.
\textsuperscript{73} See e.g. Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257, 265 (Mont. 2005).
\textsuperscript{74} Montana Constitutional Convention, supra n. 34, at vol. I, 493.
\textsuperscript{75} State ex rel. Whiteside v. Dist. Ct. of First Jud. Dist., 63 P. 395, 400–01 (Mont. 1900).
\textsuperscript{76} Id. at 395 (emphasis added).
drews Clark, owner of the defendant newspaper, Montana's most prominent citizen, and "possibly the richest man in the world." Nor does the reader learn anything about the claim itself; the opinion does not even bother to recite the allegedly libelous language, much less describe the event—Whiteside's exposure of Clark—that led to the unflattering newspaper reports.

The decision's lack of background facts, combined with its focus on seemingly arcane writ practice and procedure, likely explains why such a significant decision has been ignored by historians writing about Montana's infamous War of the Copper Kings. The lack of historical details makes the decision of little interest, at least to non-lawyers, even though Whiteside's libel suit was part of a strategy funded by Clark's archrival copper king, Marcus Daly, to gather evidence for the U.S. Senate investigation into Clark's election. It is as if the Supreme Court did not want the decision's legal importance to be obscured by—or perhaps associated with—the famous parties and infamous events that led to it.

B. The Marbury v. Madison of Discovery Disputes

Whiteside nominally concerned a truly old-fashioned discovery dispute: whether a witness who refused to provide subpoenaed documents at his deposition, and was jailed for contempt by the official conducting the deposition, was properly released by a district judge through a writ of habeas corpus. But the case is not important for the actual result reached. In the opinion's first paragraph (albeit a very long paragraph), the Court rejected Whiteside's petition for a writ of certiorari to annul the lower court's order without even reaching the merits of whether the witness should have been released. Certiorari was not appropriate, the Court held, because regardless of whether the district court reached the correct result, it had jurisdiction to hear habeas petitions, and certiorari could only be used to review jurisdictional errors. If the case had ended there, as several later justices would

78. See supra n. 43.
79. Malone, supra n. 1, at 120 (internal quotation marks and citation omitted).
80. Id. at 121.
81. Whiteside, 63 P. at 395.
82. Id. at 396–97.
83. Id.
vehemently argue it should have, the opinion would be little noted.

Instead, Whiteside achieved landmark status because of what came after the Court ruled against Fred Whiteside, in the part of the opinion later criticized as unsupported—and unsupportable—dicta. After denying Whiteside's petition for cert, the Court embarked on a lengthy exegesis on its "power and jurisdiction" under the 1889 Constitution, particularly its grant of "supervisory control over all inferior courts." Although that provision was similar to ones found in many other state constitutions, the Montana Supreme Court reached two conclusions that would set Whiteside apart from decisions of other American courts. It first held that this supervisory power allowed it "to control the course of litigation in the inferior courts" even if those courts were "proceeding within their jurisdiction." Many courts had concluded that they could not use their supervisory powers to control discretionary acts within a lower court's jurisdiction. But the Montana Supreme Court eliminated that restriction, instead bestowing upon itself a power it said was "unlimited in the means at our disposal for its appropriate exercise."

The Court's next step, though, is what made the Whiteside decision truly unique. At the end of the opinion, the Court created a previously unknown tool for exercising this unlimited power to control lower courts, one that, "for want of a better name, may be denominated a supervisory writ." As would quickly become apparent in the next few years, the Court in Whiteside invented a powerful new method for reviewing interlocutory rulings by trial judges. In doing so, it resolved in 1900 what commentators today consider one of appellate procedure's major difficulties—how to overcome the harshness of the "final judgment rule" in appropriate cases. Considered the most fundamental rule of appellate

85. Id. at 1117 (Bottomly, J., dissenting).
86. Whiteside, 63 P. at 398–401.
87. Mont. Const. art. VIII, § 2 (1889).
88. Whiteside, 63 P. at 398.
89. Id. at 400.
90. See infra part III.
91. Whiteside, 63 P. at 400.
92. Id. at 401.
93. See infra part VIII.
practice, the final judgment rule generally prohibits appeals courts from hearing appeals of interlocutory trial court rulings—no matter how crucial to the course of the litigation or how egregiously wrong—until after a final judgment has been entered. The Montana Supreme Court’s broad new prerogative writ, which quickly became known as the “writ of supervisory control,” solved that dilemma in a way that has long been considered “distinctive” and “unique in the United States.” The Court’s creation of a writ previously unknown in American jurisprudence was an act of judicial foresight decades ahead of its time.

Despite the unique and controversial nature of Montana’s writ of supervisory control, two significant aspects of its creation have gone unremarked upon by historians and legal scholars. The first is that creating the writ was a bold yet surreptitious assertion of the ancient power of “superintendence” over lower courts that originated in the court of King’s Bench in England. In Whiteside, the Court completely omits any discussion of the royal origins of its new writ, perhaps cognizant of how frontier Montanans might react if their Supreme Court openly announced it was claiming a power derived from the inherent authority of the King of England.

The second overlooked aspect of the writ is that the Court almost certainly invented it to combat the pervasive corruption that had spread throughout Montana, corruption that, as Mark Twain noted, had also tainted the judiciary. Although the Court never said as much, an examination of key cases and historical events before and after Whiteside leaves little doubt about this underlying purpose of the Court’s decision.

By inventing and then using a powerful new writ when it did—in the midst of the epic political and legal battles of the War of the Copper Kings—the Court forcefully asserted its supreme judicial powers at a crucial time in Montana’s formative years. As a result, Whiteside can be considered Montana’s equivalent of Mar-

95. Id.
96. Mont. Ore-Purchasing Co. v. Lindsay, 63 P. 715, 716 (Mont. 1901).
97. Superintending Control II, supra n. 21, at 1372.
98. Montana Constitutional Convention, supra n. 34, at vol. I, 493.
99. See infra part VIII.
100. See infra part III.A.
101. See Twain, supra n. 60, at 72.
102. See infra part IV.
bury v. Madison—undoubtedly a key reason why at the time of his death in 1922, the opinion’s author, Chief Justice Theodore Brantly, was considered by his peers to be “the John Marshall of Montana.”

III. Resurrecting the Power of the Court of King’s Bench

A. A Brief History of Superintending Control

While the Montana Supreme Court’s creation of the writ of supervisory control was technically unprecedented, it was in fact rooted in authority that was centuries old. The writ was derived from the royal power inherent in the king of England who, as “the fountain of justice,” presided over the court of King’s Bench and had sole discretion to issue “prerogative” writs to lower courts.

103. Marbury v. Madison, 5 U.S. 137, 177 (1803) (famously holding that “[i]t is emphatically the province and duty of the judicial department to say what the law is”). The White-side decision arguably claimed more judicial power for the Montana Supreme Court than Marbury did for the United States Supreme Court. As explained in part III.A, infra, while Whiteside asserted the same unlimited prerogative power of “superintendence” over lower courts as that possessed by the court of King’s Bench in England, in Marbury, Chief Justice Marshall “rejected a vision of the Supreme Court as a court that inherited the prerogative power of the King’s Bench.” Edward A. Hartnett, Not the King’s Bench, 20 Const. Commentary 283, 316 (2003). See also James E. Pfander, Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers, 101 Colum. L. Rev. 1515, 1589 (2001) [hereinafter Pfander, Marbury] (explaining that while Marshall’s opinion in Marbury did “abandon” the Court’s power to supervise inferior courts, in later years “Marshall did much to reclaim the supervisory powers that Marbury placed at risk by whittling certain statements down to size and by expanding the scope of the Court’s appellate jurisdiction”).

104. In Memoriam, Theodore Brantly, 64 Mont. vii, xxiii (1922). In these published tributes to Brantly, Montana’s longest-serving Chief Justice, prominent members of the bench and bar repeatedly praised his handling of the political and legal turmoil that beset the state when he became Chief Justice in 1899, as well as his unimpeachable integrity during those corrupt times. The chairman of Brantly’s memorial committee described the era and its Chief Justice this way:

Great financial interests were at grips for the control of property worth untold millions. The dockets of our courts were crowded with this litigation, all involving questions of the greatest moment. The like of it had not been known before, and will probably never be known again. The battle waged so fiercely, and the passions of men were so deeply stirred, that the influence of the contending factions permeated the political and social life of the state, and sometimes the family life of the people. Bitter political feuds, disassociated from this struggle over financial and property rights, rocked the very foundations of society, and brought to the courts many questions of grave concern. Through it all no breath of suspicion ever tarnished his name, no slanderer found a listener, and no charge was ever made or indeed could be made, that his judicial conduct was swayed even a hair’s breadth by any unworthy motive.

Id. at xv.

105. Superintending Control I, supra n. 40, at 34 (citing Dufford v. Decue, 31 N.J.L. 302, 1865 WL 2377 (N.J. 1865)).
This broad power of "superintending control" by the highest court in a jurisdiction over lower courts is "ancient in its inception," as the court of King's Bench probably adopted it from the Saxons after the Norman Conquest.  

Because this power came from the inherent authority of the king, it originally was "most comprehensive" and included "all manner of supervision, revision, and control, including that of an appellate nature." Blackstone summed up the unfettered power this way:

[It is the peculiar business of the court of king's bench to superintend all other inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them: and this, not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice.]

The court of King's Bench exercised its broad superintendency over lower courts through the writ of error as well as through prerogative writs, primarily certiorari, prohibition and mandamus. Because a writ of error generally could only be brought after a final judgment, certiorari was the usual method used by King's Bench judges to exercise superintending power before final judgment to "inspect the record and see that the courts kept within the limits of their jurisdiction and proceeded according to the rules of the common law." In particular, King's Bench judges used certiorari in order to "administer the same justice to the parties as the lower court."

The highest courts in the American colonies "succeeded to this power of the King's bench, and retained it after their separation [footnotes 106-113]."
from the British Crown.”*114 As the Wisconsin Supreme Court noted in one of the leading cases on superintending control:

> It is very apparent that when the makers of the [Wisconsin] constitution used the words “superintending control over all inferior courts” they definitely referred to that well-known superintending jurisdiction of the court of king’s bench. In England it was a branch of the king’s power lodged with the king’s court; in this country it is a branch of the sovereign power of the people, committed by them as a sacred charge to this court . . . .*115

Even though early American courts recognized that their power of superintending control was derived from the broad power exercised by the court of King’s Bench, within a few decades after independence state courts started drawing a clear distinction between their appellate jurisdiction and their superintending jurisdiction. They generally exercised the former only after final judgment through writs of error, while they exercised the latter through the prerogative or extraordinary writs.*116 As Dean Roscoe Pound of Harvard Law School noted in his seminal work on the history of appellate procedure, “from the outset review upon writ of error according to the practice of the King’s Bench became the model for appellate procedure” in America.*117 Congress, in 1803, greatly influenced this model by mandating that equity appeals in federal courts were to be governed by the rules and restrictions applicable to English writ of error procedures, “and these rules came to have a marked influence upon the rules and practice of the highest courts of the states.”*118

As a result of these developments, American courts, unlike their English counterparts, came to view their superintending power “as a peculiar, distinctive and discretionary authority only to be exercised under extraordinary circumstances, or when all other remedies either failed or were slow, difficult, and inadequate.”*119 In particular, the issue of whether superintending con-

114. Superintending Control I, supra n. 40, at 34; see also Pfander, *Marbury*, supra n. 103, at 1534 (“If English practice clearly linked the ‘supremacy’ of King’s Bench to its power to issue the supervisory writs of mandamus, prohibition, and the like, then the ‘supreme’ courts of the American colonies and states were quick to exercise similar powers of superintendence by virtue of their supremacy.”).


116. Superintending Control I, supra n. 40, at 34.

117. Pound, supra n. 26, at 108.

118. *Id.* at 108. The U.S. Supreme Court, meanwhile, provided little guidance in this area because it rejected the idea that it had superintending power over lower federal courts, since no such power was in the Constitution. See *Hartnett*, supra n. 103, at 316.

119. Superintending Control I, supra n. 40, at 34.
trol allowed review of discretionary decisions within a lower court's jurisdiction led to conflicting views in American courts. Most courts held they could not review discretionary decisions except through the normal appellate process after final judgment, but a few others held superintending control allowed them to review important discretionary rulings immediately through the use of extraordinary writs. That would be one of the major issues the Montana Supreme Court would confront at the turn of the last century when it took up Fred Whiteside's petition for certiorari in his libel suit against William Andrews Clark. The Court's decision to side with the majority rule on this issue was the key step that would lead to the creation of a brand new writ.

B. Following the Money to a Landmark Ruling

Back in January 1899, after Whiteside's dramatic exposure of Clark's senatorial bribery campaign, "[n]ewspaper reporters tumbled over one another in their eagerness to get the story on the wires." Newspapers in Montana were notoriously partisan at the time, and one owned by Clark, the Butte Miner, attacked Whiteside as a pawn of Marcus Daly, Clark's archrival copper king. Alleging Daly directed the entire drama and paid Whiteside to play his leading part, the Miner called Whiteside "a moral leper" as well as "a masculine strumpet, a political bawd, a well-

120. See e.g. Detroit Tug & Wrecking Co. v. Gartner, 42 N.W. 968, 972 (Mich. 1889) ("It is true that the constitution has given this court a general superintending control over all inferior courts, but in the exercise of this jurisdiction it has never been claimed that this court can substitute our discretion for that of the inferior tribunal . . . ."); see also Superintending Control I, supra n. 40, at 110 ("The general rule is that the power will not be exercised to review or control the discretion of a subordinate tribunal.").

121. See e.g. State ex rel. Jackson v. Howard Co. Ct., 41 Mo. 247, 1867 WL 4881, *3 (1867) ("[T]his court would exercise a superintending control over [a lower court's] discretion so far as to compel the court to proceed according to a sound and just discretion, and to prevent the exercise of it in an unjust and arbitrary manner . . . .").

122. Glasscock, supra n. 2, at 173.


124. Compl., ¶ 12 (1st Cause of Action), Whiteside v. Miner Publg. Co., Dist. Ct. of Second Jud. Dist. (Apr. 28, 1899) (reprinted in Sen. Comm. Rpt. 56-1052 at 599–605 (Apr. 23, 1900)). Although little doubt exists that Whiteside's charges were accurate, one historian has noted that Whiteside and the three other legislators who helped expose Clark's bribery all "had direct political or economic ties to Marcus Daly," which raised a question about the purity of their motives. Malone, supra n. 1, at 116. Whiteside, for instance, had building contracts with Daly's omnipresent Anaconda Copper-Mining Company. Id. However, he had also been considered a Clark supporter prior to the 1899 legislative session. Id. at 114.
paid harlot."\textsuperscript{125} That colorful reporting led Whiteside to sue Clark and the \textit{Butte Miner} for libel.

Whiteside's lawyers' strategy was to "follow the money," advice later made famous by another whistleblower during an even bigger political scandal—Watergate—three-quarters of a century later.\textsuperscript{126} If they could officially trace the $1,000 bills Whiteside had received to Clark's men, it would prove Clark was behind the bribery conspiracy. To track the large bills, Whiteside's lawyers deposed the cashier at the Union Bank & Trust Company in Helena, subpoenaing both him and the bank's "large bills register," in which the bank recorded who had withdrawn or deposited $1,000 bills.\textsuperscript{127} The cashier refused to produce the register, so the notary presiding over the deposition ordered him jailed for contempt until he changed his mind.\textsuperscript{128} A Helena district judge granted his release via a writ of habeas corpus,\textsuperscript{129} setting the stage for the Montana Supreme Court's landmark decision in \textit{Whiteside}.

Because the judge's decision to issue a writ of habeas corpus was not appealable as a matter of law,\textsuperscript{130} Whiteside's lawyers had to petition the Montana Supreme Court to review it via a writ of certiorari. Their problem was that Montana law did not allow certiorari to issue to a lower court unless it had exceeded its jurisdiction.\textsuperscript{131} The Helena district judge had the jurisdiction to hear and determine habeas petitions, so his decision to issue the writ was not an excess of jurisdiction, and therefore could not be reviewed via certiorari.\textsuperscript{132} As a result, Whiteside's petition for cert was denied and the "large bills register" remained at the bank.\textsuperscript{133}


\textsuperscript{126} \textit{See All the President's Men} (Warner Bros. 1976) (motion picture) (in a memorable scene set in an empty underground parking garage, the anonymous source known as Deep Throat, played by Hal Holbrook, gives Washington Post reporter Bob Woodward, played by Robert Redford, the ground rules for the famous relationship that brought down the Nixon presidency: "You tell me what you know, and I'll confirm. I'll keep you in the right direction if I can, but that's all. Just . . . follow the money.").

\textsuperscript{127} \textit{State ex rel. Whiteside v. Dist. Ct. of First Jud. Dist.}, 63 P. 395, 395–96 (Mont. 1900).

\textsuperscript{128} Id. at 396.

\textsuperscript{129} Id.

\textsuperscript{130} Id. at 397.

\textsuperscript{131} \textit{See State ex rel. King v. Dist. Ct. of Second Jud. Dist.}, 62 P. 820, 821 (Mont. 1900) ("The review [under certiorari] must be confined to the inquiry whether the tribunal, board, or officer has acted without jurisdiction. Such is the rule of the common law, the declaration of the statute, and the doctrine of this court.").

\textsuperscript{132} \textit{Whiteside}, 63 P. at 401.

\textsuperscript{133} Id.
The Court reached that conclusion quickly, just a quarter of the way through its opinion. But along the way, Chief Justice Brantly foreshadowed the Court's upcoming broad assertion of its supervisory powers. Interestingly, he began by addressing a personal slight the Court had inflicted on him as a district judge three years before. Whiteside's lawyers, aware of the potential jurisdictional flaw in their petition, based their argument that certiorari was nevertheless appropriate on an 1897 case, State ex rel. Nolan v. Brantly. Brantly had presided over the case as the then-district judge in Deer Lodge, home of the state prison. In that capacity, he granted a convicted murderer's habeas petition and set him free because the prosecutor had not verified the charging document nor made any other showing of probable cause before trial. The attorney general sought certiorari. The Supreme Court granted the writ and reversed Brantly, holding that the prisoner had waived his rights by not raising them before trial. Based on that determination of the merits, with no discussion of the jurisdictional limitations on certiorari, the Court concluded that Brantly had exceeded his jurisdiction by granting the prisoner's habeas petition.

In Whiteside, Brantly seized the opportunity to overrule the precedent bearing his name, writing that it was "decided upon a misconception of the functions of the writ of certiorari" under the law of Montana. "The writ, used as it was in State v. Brantly, was wrested from its legitimate functions, and made to accomplish an object for which it is inappropriate; for the case is rested expressly upon the ground that the district court had no jurisdiction to order the prisoner released." Brantly let the Court off the hook somewhat, placing blame for that shortcoming on lawyers for the inmate, who failed to argue that no jurisdictional defect existed in Brantly's ruling.

Brantly's correction of this judicial slight is significant because it provided the opening that let him shift the discussion to the Court's previously unexplored supervisory powers. Whiteside's lawyers had made a slippery-slope argument, asserting that

134. Id. at 397.
136. Id. at 410.
137. Id. at 412.
138. Id.
139. Whiteside, 63 P. at 397.
140. Id.
141. Id.
if certiorari had not been available to reverse what District Judge Brantly had done in Nolan, then nothing could be done if the current district judge in Deer Lodge decided “under a misapprehension of the law” to release convicted criminals from the prison en masse via writs of habeas corpus, which he had jurisdiction to issue. That argument led Chief Justice Brantly to respond curtly that “the fears of counsel are more imaginary than real. As we shall presently see, this court has ample power, under its constitutional grant of supervisory control over the district courts, to prevent any such disaster.” Brantly concluded this part of the opinion by noting that if the Court’s annulment of his own order releasing the murderer in Nolan had “been accomplished by an exercise of the constitutional power of supervisory control, such action might have been justified . . . .”

That leads to the groundbreaking part of Whiteside, in which the Court, as discussed in more detail in Part VIII below, proceeded to confront and effectively resolve what Pound later would label one of the “intrinsic difficulties” of appellate procedure in America: how to review unappealable interlocutory trial court rulings when immediate review would further the interests of justice. And Brantly’s use of the qualified phrase “might have been justified” is revealing because, as explained in Part III-C below, he ultimately concluded that certiorari would still have been inappropriate even under the Court’s supervisory power. That conclusion led directly to the creation of the entirely new writ of supervisory control.

C. A New Writ for Exercising a Power of “Unlimited Means”

Brantly began the second part of the Whiteside decision with an explanation of why the Court did not just end its opinion at that point, after dismissing Fred Whiteside’s petition for certiorari:

What has been said in the foregoing paragraph disposes of this case, and we would rest here were it not for the fact that counsel for [Whiteside] so earnestly insists that, though we should reach the conclusion stated, we should nevertheless, in this case, annul the

---

142. Id. at 397.
143. Id.
144. Id. (emphasis added).
145. Pound, supra n. 26, at 28.
146. Id. at 30.
order of the district court by the exercise of our supervisory power, on the ground that it was made in violation of law.\textsuperscript{147} Thus, despite subsequent criticism that the remainder of the opinion is dicta,\textsuperscript{148} the Court was in fact responding to Whiteside's fallback argument, which the Court noted the defendant also had addressed.\textsuperscript{149} That would seem to make the resulting analysis of the extent of the Court's power of supervisory control—although not the creation of the writ itself—essential to the determination of the case, and therefore not dicta.\textsuperscript{150} The Court could have simply dodged the issue, but addressing an argument briefed by both parties that could have changed the outcome of the case does not seem like dicta. However, the Court did not issue the writ it had just created, so the writ's creation, as distinct from the Court's overall analysis of its supervisory powers, is dicta because it was not necessary to the resolution of the case. That the Court created the writ but did not use it provides further support for the argument, made in Part IV below, that the Court wanted this new remedy available for other cases, specifically those involving Butte's infamous judge William Clancy.

The Court logically began its analysis of supervisory control with the 1889 Constitution. The provision in question stated: "The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, and shall have a general supervisory control over all inferior courts, under such regulations and limitations as may be prescribed by law."\textsuperscript{151} Another provision also gave the Court "the power in its discretion to issue and to hear and determine writs of habeas corpus, mandamus, quo-warranto, certiorari, prohibition and injunction, and such other original and remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction."\textsuperscript{152} The Court summarized its constitutional powers as being of four types: (1) appellate jurisdiction; (2) supervisory control over inferior courts; (3) discretionary power to hear and determine the enumerated extraordinary writs; and (4) power to issue any writs necessary to exercise its appellate juris-

\begin{itemize}
\item \textsuperscript{147} Whiteside, 63 P. at 397.
\item \textsuperscript{148} See State ex rel. Tripp v. Dist. Ct. of Fourth Jud. Dist., 305 P.2d 1101, 1117 (Mont. 1957) (Bottomly, J., dissenting).
\item \textsuperscript{149} Whiteside, 63 P. at 398.
\item \textsuperscript{150} Black's Law Dictionary 1102 (Bryan A. Garner ed., 8th ed., West 2004).
\item \textsuperscript{151} Mont. Const. art. VIII, § 2 (1889) (superseded in 1972 by Mont. Const. art. VII, § 2) (emphasis added).
\item \textsuperscript{152} Id. at art. VIII, § 3.
\end{itemize}
This fourth power the Court described as "entirely unnecessary" because it was inherent in the grant of appellate jurisdiction, concluding that it was provided out of an "abundance of caution." Because "superintending" and "supervisory" are synonyms, as delegates to the 1889 Constitutional Convention recognized, the difference in wording is not legally significant. Nor did the Court in

153. Whiteside, 63 P. at 398.
154. Id.
155. See Superintending Control I, supra n. 40, at 37-74. According to this exhaustive annotation, at least 16 state constitutions gave their state's highest court some version of superintending or supervisory control over inferior courts at the time, while several other states granted the power via statute, and in still other states courts asserted it under their common law authority.
157. The judiciary article in the 1889 Montana Constitution, as originally approved by convention delegates, actually used the traditional phrase "superintending control." That language had been taken directly from Montana's unsuccessful 1884 Constitution. Delegates only changed "superintending control" to "supervisory control"—by unanimous consent with no discussion—on the next-to-last day of the 1889 convention, upon the recommendation of the nonsubstantive Revisions Committee. Proceedings and Debates of the Constitutional Convention 219, 377, 381, 962 (State Publg. Co. 1921). Perhaps an early proponent of the use of "plain English" in legal documents served on the Revisions Committee. Interestingly, delegates to the 1972 Constitutional Convention were misinformed about this change in terminology by the Montana Constitutional Convention Commission. In one of a series of reports provided to delegates prior to the 1972 convention, the Commission incorrectly stated that the wording of the Montana Supreme Court's powers in the 1889 Constitution was "identical" to that of the 1884 Constitution. Montana Constitutional Convention Occasional Papers, Rpt. No. 5, Jud. Depts., art. VIII, § 2 (1971-1972).
158. Given, however, that very few other courts use the term "supervisory control," one cannot help but wonder if at least some of the criticism of the Montana Supreme Court's use of its supervisory power is based on the false impression that few other courts even have this power. If one only researches "writ of supervisory control," for instance, almost every case concerns Montana's writ. Of the almost 900 state court cases containing that phrase found in a recent Westlaw search, all but a handful were either from Montana or discussed Montana's use of the writ. Compare search in Westlaw, ALLCASES library, using the search "supervisory control' w/2 writ" (July 30, 2007) (yielding 891 results) with search in Westlaw, ALLCASES library, using the search "superintending control' w/2 writ % montana" (July 30, 2007) (yielding 19 results). Of that handful, many of the recent cases concerned pro se petitions by prison inmates, who apparently liked the name of the writ even though it did not exist in the court they were petitioning. See e.g. Gonzalez-Lora v. Ctr. Clerk of St. Francis Co., 2007 WL 701054 (Ark. 2007). However, researching the more common phrase "superintending control" in conjunction with "writ" finds more than 1000 additional cases from other states. Search in Westlaw, ALLCASES library, using the search "superintending control' /p writ" (July 30, 2007) (yielding 1114 results). But the fact that Montana has almost as many cases involving supervisory or superintending con-
Whiteside distinguish between the terms when it analyzed cases from other state courts:

A similar clause is found in the constitutions of many of the states of the Union, and, we believe, the courts unanimously agree that the various constitutional conventions used the language purposely to confer a power separate and independent of any other power to meet exigencies to which ordinary appellate powers of the court are not commensurate.\(^\text{159}\)

As the above passage shows, the Montana Supreme Court concurred in the American view that its supervisory power was entirely distinct from both its ordinary appellate jurisdiction and its separate power to issue the traditional prerogative writs.\(^\text{160}\) “[T]he supervisory power was granted to meet emergencies to which those other powers and instrumentalities are not commensurate.”\(^\text{161}\) The Court borrowed language from the Colorado Supreme Court to explain the policy behind this power, which was to ensure the court system functioned properly—“to keep the courts themselves “within bounds,” and to insure the harmonious working of our judicial system.’”\(^\text{162}\)

In describing the scope of the power, the Montana Supreme Court relied heavily on the Wisconsin Supreme Court’s influential decision in State ex rel. Fourth National Bank of Philadelphia v. Johnson,\(^\text{163}\) decided just the year before. In that case, the Wisconsin court described the power of superintending control as an “independent jurisdiction, which enables and requires [the court] in a proper case to control the course of ordinary litigation in such inferior courts.”\(^\text{164}\) That statement is echoed in Whiteside, although without direct attribution. The Montana Supreme Court stated that its power of supervisory control is also “independent”\(^\text{165}\) of the other types of jurisdiction granted to the Court. And the Court tracks the language of its Wisconsin counterpart almost word for word in describing the primary purpose of the power—“to enable

\(^{159}\) Whiteside, 63 P. at 398–99.

\(^{160}\) Id. at 399.

\(^{161}\) Id. at 400.

\(^{162}\) Id. at 399, quoting People v. Richmond, 26 P. 929 (Colo. 1891).


\(^{164}\) Id. at 1087.

\(^{165}\) Whiteside, 63 P. at 399.
this court to control the course of litigation in the inferior courts.\textsuperscript{166}

Despite the reliance on the Colorado and Wisconsin Supreme Courts, the Montana Supreme Court nevertheless adopted a more expansive view of its supervisory power than either of those courts had at the time. The view it adopted harkened back to the broad power exercised by the court of King's Bench. Both the Wisconsin and Colorado courts, for instance, had recently indicated the power generally would not be used to review rulings within a lower court's jurisdiction.\textsuperscript{167} But the Montana Supreme Court rejected that limitation, announcing that it would not only use this power when inferior courts acted outside their jurisdiction, but also "where these courts are proceeding within the jurisdiction, but by a mistake of law, or willful disregard of it, are doing a gross injustice, and there is no appeal, or the remedy by appeal is inadequate."\textsuperscript{168} The Court's description of its supervisory power is therefore akin to Blackstone's description of the superintending power of the court of King's Bench being properly used not only in "restraining excesses" of lower courts when they exceed their jurisdiction, "but also by quickening their negligence, and obviating their denial of justice" when those courts fail to follow the law or abuse their discretion.\textsuperscript{169}

Regardless of how broad this power was, the Montana Supreme Court recognized a potential problem in exercising it: the absence of enabling legislation. The 1889 Constitution concluded the provision granting the Court both its appellate and supervisory jurisdiction with the phrase "under such regulations and limitations as may be prescribed by law."\textsuperscript{170} Between statehood and 1972, when that restrictive language was removed at the last constitutional convention,\textsuperscript{171} the legislature never passed a statute addressing supervisory control. As a result, the Court's creation of the writ in the absence of express authorization by the legislature has also been harshly criticized by later justices:

\textsuperscript{166} Id. at 400.
\textsuperscript{167} Fourth Natl. Bank, 79 N.W. at 1087 (holding superintending control is generally only appropriate "when an inferior court either refuses to act within its jurisdiction, or acts beyond its jurisdiction to the serious prejudice of the citizen"); People ex rel. Green v. Ct. of App., 61 P. 592, 593 (Colo. 1900) (holding whether the lower court "correctly or incorrectly applied the rule of law to the facts thus presented is not open to inquiry" under superintending control).
\textsuperscript{168} Whiteside, 63 P. at 400.
\textsuperscript{169} Blackstone, supra n. 108, vol. 3 at *110.
\textsuperscript{170} Mont. Const. art. VIII, § 2 (1889).
\textsuperscript{171} See id. at art. VII, § 2 (1972).
It most certainly was not the intent of the framers of the Constitution to empower or authorize the supreme court to exercise or usurp the powers and functions of the legislature by designing, inventing or evolving any wholly new device or procedure for exercising the "supervisory power" granted, such as the unregulated, unlimited and uncontrolled "writ of supervisory control" of which our founding fathers had never heard and which had never been recognized or used at common law or in our territorial courts and which to this day has never been recognized or sanctioned by the legislative department of our state government . . . .172

That criticism again misses the mark, however, as Brantly convincingly explained why self-execution was not an issue. While not conceding that the Court actually needed enabling legislation, he nevertheless found some in the Code of Civil Procedure. A statute in the Code stated that whenever jurisdiction was granted to the Court, whether by the Constitution or statute, "all means necessary to carry into effect [that jurisdiction] are also given," and that if no specific method of exercising jurisdiction was provided, then "any suitable process or mode of proceeding may be adopted which may appear most conformable to the Code."173 Brantly logically noted that if this provision was not intended to apply to the Court's supervisory control jurisdiction, then it seemed to lack any purpose whatsoever, as the Constitution expressly granted means to exercise the Court's other two types of jurisdiction over appeals and the traditional writs.174 Brantly concluded this part of the opinion by giving an indication of the active manner in which the Court would soon be exercising its supervisory power, noting that the statute cited was "ample to authorize its use in its utmost vigor."175

Having determined that its supervisory powers over inferior courts included the power to review non-jurisdictional errors, and having found enabling legislation, the next question was how the Court should exercise the power.176 Whereas certiorari was the writ of choice for the court of King's Bench,177 and certiorari, prohibition and mandamus were all apparently acceptable to the Wis-

173. *Whiteside*, 63 P. at 400 (quoting Code of Civ. Pro. § 205 (Codes and Stats. of Mont. 1895)). However, the quotation is not completely accurate, as the code section actually concludes "most conformable to the spirit of this Code.").
174. *Id.*
175. *Id.*
176. *Id. at 400.*
consin Supreme Court, the Montana Supreme Court rejected the use of those prerogative writs as "unsuitable as a class for supervisory purposes within the meaning of the provision." Because the traditional prerogative writs were specifically listed in the Constitution, the Court concluded that the purposes for which they could be used were limited to their generally accepted purposes at the time the Constitution was adopted. That meant that neither certiorari nor mandamus nor prohibition could be used for supervisory control as envisioned by the Supreme Court because all were limited to correcting jurisdictional errors. Therefore, Brantly concluded, in a strikingly strong choice of words, the Court "may not pervert them from their legitimate uses."

This is a crucial point in the Whiteside decision. If Brantly had continued to follow the precedent he had relied on to that point for much of the analysis of the power of supervisory control, or any of the other cases cited, he would not have needed to create a new writ to exercise that power. Because this new writ would serve as an invitation to practitioners to seek supervisory control, without it the Court would almost certainly have exercised its supervisory powers much less frequently, to much less criticism. And the reasoning in the recent opinion from the Wisconsin Supreme Court on this point, decided shortly before Whiteside, made perfect sense. If the court of King's Bench used certiorari to effect its superintending control power, and if a state constitution granted the same power to a state supreme court, then it would seem logical for that court to be able to use certiorari in the same way. As the Wisconsin Supreme Court observed, "[t]he conclusion is inevitable that with the constitutional grant of superintending control this court took at the same time all the ancient writs necessary to enable it to exercise that high power, including certainly the writs of mandamus, prohibition, [and] certiorari ..."

180. Mont. Const. art. VIII, § 3 (1889).
182. Id. at 400.
183. See infra part V.
185. Id.
Brantly never addressed that argument head on, instead be-
laboring certiorari’s “well-known and well-defined purposes” 
outside the context of supervisory control.186 His explanation of 
why it and the other prerogative writs were not proper supervi-
sory writs boiled down to little more than begging the question: 
“None of them, except certiorari and prohibition, go exclusively to 
courts, or tribunals, or officers exercising judicial functions, and 
these two have always been limited to questions of jurisdiction 
only.”187 The last part of that sentence is an overstatement at 
best, as it conflicts with Dean Pound’s observation that 
“[c]ertiorari was at common law the mode of review of proceedings 
not according to the course of the common law . . . . It was also 
used as a mode of exercising the superintending jurisdiction of the 
ultimate court of review.”188

On this point, Brantly appears to have been influenced by two 
earlier Wisconsin cases, Attorney General v. Blossom189 and Atto-
ney General v. Chicago & Northwestern Railway Co.,190 which he 
also cited.191 In Blossom, for instance, the Wisconsin court stated 
that certiorari and the other traditional writs were “no more 
adapted to the exercise of a ‘general superintending control over 
inferior courts,’ than would have been the spear of Goliath to the 
seige of Acre.”192 And in Chicago & Northwestern Railway the 
court, after citing Blossom with approval, stated that if none of the 
traditional writs were sufficient to exercise superintending control 
over lower courts, then “the court might well devise new ones, as 
Lord Coke tells us, as ‘a secret in law.’”193 But as noted above, in 
its more recent case decided just the year before and also cited by 
Brantly in Whiteside,194 the Wisconsin Supreme Court had ex-
pressly repudiated those two prior statements, holding that the 
existing common law writs

form a veritable arsenal of legal weapons by means of which all or-
dinary excesses or defaults on the part of inferior courts which call 
for the exercise of such power can be corrected and controlled. Nor,

186. Whiteside, 63 P. at 399.
187. Id. (emphasis added).
188. Pound, supra n. 26, at 288 (emphasis deleted).
191. Whiteside, 63 P. at 399.
192. Blossom, 1 Wis. at 325, 1853 WL 3603 at *12.
193. Chi. & N.W. Ry. Co., 1 Wis. at 515, 1874 WL 3392 at *149.
194. Whiteside, 63 P. at 399 (The Court mistakenly identifies this case as State v. John-
son. The case’s correct caption is State ex rel. Fourth Natl. Bank of Phila. v. Johnson, 79 
N.W. 1081 (Wis. 1899)).
for the same reason, is it necessary to consider the suggestion . . . to
the effect that the court may devise new writs in case of the inade-
quacy of the common-law writs to meet the case in hand.\textsuperscript{195}

Despite the Wisconsin court's backtracking from its own earlier
suggestion that perhaps a new writ could be devised to supervise
lower courts, Brantly seized upon that very notion.

His rigid insistence on limiting the powers of the extraordi-
nary writs, particularly certiorari, while at the same time adopt-
ing an expansive interpretation of the power of supervisory con-
trol, is one of the more intriguing aspects of the case. Three possi-
ble explanations come to mind. The first, to take Brantly at his
word, is that the restricted nature of the writs, especially certio-
rari, in Montana was so clearly established that stare decisis left
him little choice. Brantly was correct that the law in Montana
limited the traditional uses of certiorari, prohibition and manda-
mus to correcting errors in which a court exceeded or refused to
exercise its jurisdiction. Two years after statehood, in 1891, the
Court had held that "the framers of the constitution understood
exactly what jurisdiction was being granted by placing [the com-
mon law writs] within the power of the court to issue, hear, and
determine."\textsuperscript{196} Less than a month before deciding Whiteside, the
Court had definitively reaffirmed this rule: "Certiorari cannot be
used for the purpose of correcting errors committed in the exercise
of jurisdiction."\textsuperscript{197}

Nevertheless, those cases concerned the traditional use of the
common law writs under the Court's original writ jurisdiction, not
their potential for use under the Court's separate grant of supervi-
sory jurisdiction. The Court legitimately could have expanded the
use of certiorari, under both the unfettered discretion the Consti-
tution granted it to issue the prerogative writs\textsuperscript{198} as well as under
the statute the Court quoted giving it "all means necessary to
carry into effect" its supervisory jurisdiction.\textsuperscript{199} The Louisiana
Supreme Court had taken that route with mandamus that same
year:

The difficulty, it is said, lies in the fact that the writ of mandamus
will only issue to direct a judge to perform some purely ministerial
act, and will not lie to compel him to do a thing, the doing of which is
within his discretion. This is undeniably true as a general proposi-

\textsuperscript{195} Fourth Natl. Bank, 79 N.W. at 1088.
\textsuperscript{196} In re MacKnight, 27 P. 336, 337 (Mont. 1891).
\textsuperscript{197} State ex rel. King v. Second Jud. Dist. Ct., 62 P. 820, 821 (Mont. 1900).
\textsuperscript{198} Mont. Const. art VIII, § 3 (1889).
\textsuperscript{199} Whiteside, 63 P. at 400.
tion, but the functions of that writ have been considerably broad-
ened by the terms in which the supervisory jurisdiction mentioned
above has been conferred upon this court . . . 200

Brantly, however, was not persuaded by that or similar prece-
dents:

[W]e have not overlooked the fact that the courts of many of the
states, as appears from the cases cited, have frequently used the
writs of certiorari and mandamus as supervisory writs. We do not
feel inclined to follow them, for this course would, under our view of
the well-settled functions of these writs in this jurisdiction, be an
unauthorized use of them.201

That leads to a second possible explanation of why the Court
created a new writ. Remember that in the first part of Whiteside,
before the discussion shifted to supervisory control, Brantly had
effectively overruled the Court’s decision in State ex rel. Nolan v.
Brantly from three years earlier.202 In that case the Court had
used certiorari to reverse Brantly’s decision as a district judge to
grant a convicted murder’s habeas petition, but did so without
ever discussing how certiorari was proper given that Brantly had
acted within his jurisdiction. Brantly was considered by his peers
to have a brilliant legal mind,203 so he likely perceived a reversal
in a murder case, based on what he viewed as shoddy reasoning,
as a blot on his judicial record. Therefore, he may have had a spe-
cial interest—vindication—in following stare decisis and adhering
to a narrow view of the scope of certiorari.

The third and most interesting explanation concerns the po-
litical context in which Whiteside was decided. While corruption,
as Mark Twain later noted, might have been so rampant in Mon-
tana that “it no longer ha[d] an offensive smell,”204 the three jus-
tices of the Montana Supreme Court nevertheless seem to have
been holding their noses for some time. By late 1900, when they
created the writ of supervisory control, they had encountered that
corruption both professionally and personally. To these “men of

1900).
201. Whiteside, 63 P. at 401 (emphasis added).
203. See generally In Memoriam, supra n. 104. Almost a half century after Brantly’s
opinion in Whiteside, his reputation had not diminished. The chief justice who succeeded
Brantly wrote in 1944 that he was “generally regarded as the state’s ablest jurist,” one who
“possessed a strong sense of justice, great industry, and large ability.” Llewellyn L. Cal-
laway, Justices of the Supreme Court of the State of Montana, 5 Mont. L. Rev. 34, 44–45
(1944).
204. Twain, supra n. 60, at 72.
unimpeachable character and the highest integrity, perhaps the smell was one they could no longer ignore.

IV. AN ANCIENT REMEDY FOR A “WITHERING CURSE”

A. The Honorable William Clancy

Some of the strongest evidence establishing that the Supreme Court created the writ of supervisory control in response to what Fred Whiteside called the “withering curse of bribery” comes from a close examination of court cases preceding its creation. In the year or two before Whiteside, Montana’s corruption had confronted the justices on the Court numerous times, most often in the form of appeals and writ petitions challenging decisions from the Butte courtroom of District Judge William Clancy. Clancy was the first of two Butte judges “bought and paid for” by the third copper king, F. Augustus Heinze. Heinze, who was dubbed a “courthouse miner” due to his litigiousness, was waging a scorched-earth legal fight against his competitors. As explained below, the Supreme Court almost certainly created the writ of supervisory control to allow immediate review of significant pretrial rulings by Clancy, who at the turn of the century was presiding over the copper kings’ competing claims to the world’s largest copper deposits.

Coming at a time when the spread of electricity and telephones had caused the demand for copper to explode, so much money was at stake in this litigation that the concurrent battle between William Clark and Marcus Daly to dominate Montana politics was “merely a noisy diversion from the really significant contest, the battle over ownership of the massive ore deposits.

205. Hamilton, supra n. 2, at 592.
206. Connolly, supra n. 2, at 147.
207. For the most detailed description of Judge Clancy’s prominent role in the War of the Copper Kings, see id. at 184–90, 220–25, 283–94.
208. Toole, State of Extremes, supra n. 17, at 109; see also Hamilton, supra n. 2, at 241. The other judge, Edward Harney, would not take office until early 1901, shortly after Whiteside was decided. Malone, supra n. 1, at 160.
209. Malone, supra n. 1, at 142.
210. See Toole, State of Extremes, supra n. 17, at 112 (“By 1902, Heinze was involved in fourteen cases before the Supreme Court alone. He had thirty-seven attorneys on his staff who, all told, were involved in nearly one hundred lawsuits, covering mining property that was valued at nearly $200,000,000.”).
211. Malone, supra n. 1, at 142.
212. Montana became the world’s leading producer of copper during the 1890s as Butte became known as the “Richest Hill on Earth.” See id. at 53–56.
neath the Butte hill." These legal battles began in earnest in the mid-1890s, between Heinze and various other mining interests. Those other interests, including Daly's famous Anaconda Copper-Mining Company and Clark's various mining properties, would soon become consolidated under the ownership of the Amalgamated Copper Company, after the financial titans behind Standard Oil, including the Rockefeller family, formed that holding company to corner the copper market in April 1899.

Even before the formation of Amalgamated Copper, Heinze and his Montana Ore Purchasing Company were already involved in numerous lawsuits, particularly against a company owned by Boston bankers, the Boston & Montana Consolidated Copper & Silver Mining Company, which hoped to sell out to Amalgamated Copper. These lawsuits, like "most of the cases vital to Heinze ended up in the court of one of history's most bizarre judges, William Clancy." A populist elected to the bench in 1896, Clancy was a "curbstone lawyer of . . . little education," who was stubbornly loyal to his friends, including Heinze. He was a favorite of Butte's miners and other members of the lower economic classes, who "delighted in stories of his crudities" and believed he would "safeguard the interests of the common man from the capitalistic grasp of the plutocrats." One Clancy anecdote is too revealing of his reputation not to repeat. One day, an acquaintance stopped him on the street and bet the judge he knew what Clancy had eaten for breakfast that day. Clancy took the bet, and the man said "ham and eggs," noting the yolk and grease in Clancy's long white beard. "You lose," Clancy reportedly replied. "That was yesterday's breakfast."

The Montana Supreme Court in the late 1890s had become familiar with this "burlesque of judicial dignity" who invariably ruled for Heinze regardless of the facts or law. Much of Heinze's strategy was to simply tie up his competitors in court, while using

213. Id. at 131.
214. Id. at 141.
215. Amalgamated Copper soon bought Daly's Anaconda Copper-Mining Company. After Clark, Heinze's ally initially, was elected again to the Senate in 1900, he also sold to Amalgamated, leaving Heinze to battle the "copper trust" by himself. See id. at 137–59.
216. Id. at 141; see also Connolly, supra n. 2, at 220–22.
217. Malone, supra n. 1, at 144.
219. Id. at 157 (internal quotations omitted).
220. Id.
221. Id. at 156.
mining's "Apex Law"\textsuperscript{222} to gain access to their ore deposits through pretrial rulings by the judges he owned.\textsuperscript{223} Historian K. Ross Toole noted that the process of getting the Supreme Court to review those rulings was "ponderous,"\textsuperscript{224} an apparent reference to the fact Clancy's rulings often could not be appealed until after a final judgment had been entered. "Heinze continued meanwhile to steal hundreds of tons of rich ore. It was, in any event, Heinze's tactic to delay—a process in which Clancy [was] fully cooperative, Clancy often snoring loudly through hours of testimony, his head sunk on his uncombed beard."\textsuperscript{225} Nor could Heinze's opponents disqualify Clancy, as Montana at that time had no law allowing substitution of judges for alleged bias.\textsuperscript{226} The only legal recourse Heinze's opponents had was at the Montana Supreme Court.

By the time \textit{Whiteside} was decided in December 1900, justices on the Court had chastised Clancy in numerous opinions for his biased rulings in favor of Heinze, even in cases in which they affirmed the decision being challenged under the applicable standard of review. The first time the Court indicated its displeasure was on November 21, 1898, after Clancy had refused to issue an injunction against Heinze's Montana Ore Purchasing Company in a suit for trespass brought by another mining company.\textsuperscript{227} Although issuing an injunction was normally a discretionary act entitled to great deference on appeal, the Court held that Clancy had abused his discretion because even he had found that the evidence supported the injunction. Despite that finding, Clancy had refused to issue the injunction "upon the wholly untenable ground that an injunction would throw out of employment a large number of men" working in Heinze's mine.\textsuperscript{228} The Court also chastised Clancy for limiting the plaintiff to presenting either affidavit testimony or live witness testimony at the hearing, but not both. The Court held the statute Clancy cited in support of his ruling was

\begin{flushleft}
\textsuperscript{222} Toole, \textit{State of Extremes}, \textit{supra} n. 17, at 109–12. The Apex Law essentially allowed the owner of a mining claim on which a vein of ore surfaced—or "apexed"—to follow and mine the vein underground even when it traveled laterally under adjoining mining claims. \textit{Id.} at 109.
\textsuperscript{223} \textit{Id.} at 112.
\textsuperscript{224} \textit{Id.}
\textsuperscript{225} \textit{Id.}
\textsuperscript{226} Malone, \textit{supra} n. 1, at 177.
\textsuperscript{228} \textit{Id.}
\end{flushleft}
“not susceptible of the interpretation which the court below gives it.”

A couple of months later, on February 13, 1899, the Court had harsher words for Clancy in another appeal concerning a preliminary injunction, this time one he granted to Heinze to prevent Boston & Montana from mining on its own property. The Court again found Clancy had “clearly” abused his discretion, noting that even Heinze's own expert witnesses did not support his claim of underground trespass. The Court was even more irked that Clancy had included in the injunction an order prohibiting the defendant from suing Heinze over any related claims without an order from Clancy authorizing the litigation in advance. That provision, the Court stated, showed that Clancy's handling of the whole case “violated the plainest rules which confine [his] power within the bounds of law and sound legal discretion.”

A week later, on February 20, 1899, the Court issued the first of several opinions in a lawsuit before Clancy that highlighted the dilemma a corrupt trial judge created for the Court. Unlike the two decisions just discussed, each of which concerned Clancy's ruling on preliminary injunctions, these decisions concerned Heinze's request that Clancy appoint a receiver to control Boston & Montana. That difference is important because a trial court's ruling granting or denying a preliminary injunction could be immediately appealed, but the appointment of a receiver was an interlocutory ruling that could only be appealed after trial and entry of final judgment. Therefore, if Clancy ordered a receiver to take control of Boston & Montana, the only immediate remedy was for the company to seek an extraordinary writ from the Supreme Court. Although the Court's rulings in this lawsuit led historian Michael Malone to conclude that generally “Heinze fared quite well with the Supreme Court,” a closer reading reveals the Court's building frustration with its inability to respond to

229. Id. at 114.
234. Malone, supra n. 1, at 144.
Clancy's rulings because of the jurisdictional limits governing writs under Montana law. This frustration would soon lead to the creation of a new supervisory writ in *Whiteside*.

The lawsuit in question concerned Boston & Montana's attempt to transfer its corporate charter from Montana to New York, which would create diversity jurisdiction and allow the company to remove Heinze's litigation to federal court and away from Judge Clancy.235 However, the transfer took place without convening a shareholders' meeting. That oversight allowed two of Heinze's men, who had purchased a tiny fraction of Boston & Montana's shares, to sue on grounds their rights as shareholders had been violated.236 More importantly, it also allowed them to ask Clancy to appoint another Heinze surrogate as receiver to run the company during the litigation. That would effectively give control over the company, whose assets were valued at $40,000,000, to Heinze, subject only to supervision by Heinze's favorite judge.237

In its first petition for extraordinary relief to the Montana Supreme Court, Boston & Montana filed a lengthy affidavit in support of a writ of prohibition preventing Clancy from taking any action on Heinze's request for a receiver.238 Despite the affidavit's litany of incidents of bias by Clancy, the Supreme Court held that even if those allegations were true, it could not do anything at that time because Clancy had the jurisdiction to appoint a receiver to run the company until the shareholders' legal dispute was resolved.

We cannot grant the writ upon the showing made of Judge Clancy's prejudice or enmity. . . . The facts that Judge Clancy does not like . . . counsel for relators, that he has decided various cases against relators, and is on friendly terms with the officers of [Heinze's] Montana Ore Purchasing Company, and may not select a fit person as receiver, if he appoints one, are far from sufficient to oust the lower court of jurisdiction.239

Interestingly, this is also the first case in which the Court was asked by a litigant to issue a writ under its "supervisory powers" over lower courts. The opinion only briefly touches upon this re-

235. *Id.* at 144–46.
238. *Id.* at 221.
239. *Id.* at 226.
quest. However, its cursory conclusion is consistent with what the Court would later conclude in Whiteside: because the legislature had expressly provided that a writ of prohibition could only correct a lower court that had exceeded its jurisdiction, its purpose could not be expanded under the Court's supervisory powers.

Just one week later, on February 27, 1899, the Court issued another opinion in the same lawsuit denying Boston & Montana's petition for certiorari after Clancy had actually appointed the receiver. Citing the same reasoning, the Court held that certiorari, like prohibition, could only correct jurisdictional errors, and Clancy was within his jurisdiction in appointing a receiver.

A month later, on March 31, 1899, the Court denied another petition by Boston & Montana for a writ of prohibition against Judge Clancy. By this time, Boston & Montana, recognizing the financial havoc Heinze's receiver would wreak on the company, had voluntarily transferred all assets from the New York company back to its Montana predecessor and offered an accounting and full restitution to Heinze's minority shareholders for any damages they had incurred. Based on that offer to completely undo the minority shareholders' injuries, Boston & Montana requested that Clancy rescind his order appointing a receiver. Clancy, however, refused to rule on the company's motions, so the company sought another writ prohibiting him from continuing the receiver's appointment. Once again, the Court denied the request because Clancy still had jurisdiction.

However, the Court's per curiam opinion also provided a subtle piece of legal advice to Boston & Montana: "Whatever wrong may have been done the relator by the action of the court in these matters, this application does not invoke the proper remedy for it." Boston & Montana seized upon that advice and filed the proper petition for mandamus, seeking a writ to force Clancy to exercise his jurisdiction and rule one way or the other on the outstanding motions. After holding a hearing, the Supreme Court

240. Id.
241. Id.
243. Id. at 282.
244. Bos. & Mont. III, 56 P. 687 (Mont. 1899).
245. Id. at 689.
246. Id. at 687–88.
247. Id. at 689.
248. Id.
249. Bos. & Mont. IV, 56 P. 865, 865 (Mont. 1899).
issued the writ, finding that Clancy had no valid justification for refusing to rule on the motions, that his response had been “evasive” and that his treatment of Boston & Montana had been “unjustifiable and unfair and oppressive.” Clancy then ruled on the motions in April 1899, denying them all and allowing Heinze’s receiver to retain control of Boston & Montana.

Even though Boston & Montana lost the motions, the Supreme Court decision forcing Clancy to rule nevertheless helped the company. In February, the Legislature had changed the Code of Civil Procedure to make any order concerning appointment of a receiver immediately appealable, perhaps also in response to Clancy’s behavior. Therefore, after this latest adverse ruling, the company could finally ask the Supreme Court to review the merits of Clancy’s rulings via a direct appeal. Given the opportunity to look more closely at Clancy’s work, the Court was not impressed. On April 11, 1899, shortly after the appeal was filed and more than a year before it was ultimately decided, the Court granted Boston & Montana’s request to suspend all Clancy’s orders regarding the receivership and ordered the receiver to surrender possession of the lucrative mine.

In its ruling, the Court presaged its upcoming decision in Whiteside by stressing the difference between its broad powers to hear appeals and its much more limited power to issue extraordinary writs, a difference the writ of supervisory control would soon bridge:

This change in the remedy pursued carries with it an extension of the relief which may be granted. [An appeal] opens for examination and for determination not alone the question of the power of the lower court, but it also authorizes us to decide whether that power has been wisely or unwisely exercised....

During the remainder of 1899, the only significant ruling involving Clancy’s conduct in the shareholder litigation between Boston & Montana and Heinze’s surrogates came in an opinion in which the Court again chastised Clancy even though it declined to issue a writ against him. In that case, the Court denied Boston & Montana’s petition for a writ of mandamus to force Clancy to correct a bill of exceptions he had unilaterally amended to the com-

250. Id. at 866.
251. Id. at 867; Forrester v. Bos. & Mont. Consol. Copper & Silver Mining Co., 56 P. 868, 869 (Mont. 1899) [hereinafter Forrester II].
252. Forrester II, 56 P. at 869.
253. Id. at 870-71.
254. Id. at 869.
pany's prejudice, holding that Clancy's amendments were "imma-
terial." Nevertheless, the Court concluded the opinion by stat-
ing that "[t]he conduct of the judge to which we have adverted is
unworthy of emulation." For the next year, until mid-1900, the Court issued no signifi-
cant Clancy-related decisions. That changed with the resolution
of the appeal of Clancy's refusal to vacate the receivership. As one could predict, the Court reversed Clancy, but did so in a way
that further indicated its growing recognition that Clancy was in-
capable of ruling fairly in cases involving his patron, F. Augustus
Heinze. On May 7, 1900, the Court issued its initial decision, holding Clancy had erred by refusing to even consider evidence
that Boston & Montana had rescinded the stock transfer to the
New York company and had offered to make a full accounting and
restitution to Heinze's minority shareholders. "If [that evi-
dence] had been received, it would have been the duty of the court
down, in the absence of some counter showing, to discharge the
order . . . appointing the receiver." With that clear guidance, the
Court then remanded with instructions that Clancy admit the
evidence and then decide whether to vacate the receivership. However, a month later, on June 8, 1900, the Court sua sponte
modified its earlier decision and instead ordered Clancy to simply
enter judgment in accord with that
opinion. Apparently recog-
nizing the futility of giving Clancy another chance to rule cor-
rectly, the Court held that "[u]pon further consideration" no addi-
tional hearing was necessary for Clancy to reach the proper result
and rescind his order appointing a receiver. "The duty of the
court below was plain and unmistakable; when the offer [of full
restitution] was made the court should have ordered a judgment
to be entered conformable to the terms of the offer, and then dis-
charged the order of appointment."

256. Id. at 42.
257. Forrester v. Bos. & Mont. Consol. Copper & Silver Mining Co., 60 P. 1088 (Mont. 1900) [hereinafter Forrester IV].
258. Id. at 1089.
259. Id.
260. Id. at 1090.
262. Id.
263. Id.
B. The Justices' Long Trip to Washington

Had the high-stakes mining litigation in Judge Clancy's courtroom been the only encounters justices of the Montana Supreme Court had with Montana's rampant corruption, the frustration evident in these nine opinions—issued in just one lawsuit, and all concerning Clancy's conduct—is more than sufficient to conclude that the Court created its unique supervisory writ to control that crooked judge. But during the same period the justices were struggling to respond to Clancy's behavior, they were summoned in the middle of winter to Washington, D.C., to answer uncomfortable questions about their own honesty before an investigative committee of the United States Senate.\(^{264}\) That arduous trip would have personally brought home the negative impact Montana's sordid political climate was having on the reputation of the state's elected officials, including justices of the Montana Supreme Court.

In early 1900, all three justices were contacted by the Committee on Privileges and Elections and asked to testify in its investigation of William Clark's election to the Senate the previous year.\(^{265}\) The committee wanted to ask them about reported efforts to influence the outcome of disbarment proceedings the previous year against Clark's lawyer, John B. Wellcome,\(^{266}\) who had paid the thousands of dollars to Whiteside and other legislators to secure their votes for Clark.\(^{267}\) Although the justices rejected the efforts to bribe or otherwise influence the outcome of the case—in fact, they ended up disbarring Wellcome on December 23, 1899\(^{268}\)—they did not pursue any official legal recourse against the persons attempting to influence them, deciding that exposing the effort would reflect poorly on the reputation of the Court.\(^{269}\) That lack of official action would cause them some discomfort at the senate hearing.

The disbarment proceedings began on May 5, 1899, when Fred Whiteside responded to Clark's tainted election to the Senate

\(^{264}\) Infra nn. 283–91.  
\(^{266}\) Id. at 1633, 1652, 1733.  
\(^{267}\) Whiteside, supra n. 2, at 75; see also In re Wellcome, 59 P. 445 (Mont. 1899) [hereinafter Wellcome III].  
\(^{268}\) Wellcome III, 59 P. at 454. The opinion strongly endorses Whiteside's veracity, noting that his "manner and behavior under examination" provided some of the "most convincing proof of the truth" of his testimony. Id. at 452.  
\(^{269}\) Infra nn. 286–88.
by filing a complaint with the Supreme Court seeking to have Wellcome disbarred. 270 The disbarment proceedings, like Whiteside's libel suit, were encouraged by Clark's archrival, Marcus Daly, because they would provide a vehicle for gathering admissible evidence for the Senate to consider in its investigation of Clark's election. 271 In July 1899, the Montana Supreme Court tried to dodge this political hot potato. It issued an order declining to exercise jurisdiction over Whiteside's complaint because while Whiteside had alleged serious crimes, Wellcome had not been prosecuted criminally. 272 However, on August 1, the Court changed its mind, accepted jurisdiction and ordered Wellcome to respond to the charges after Attorney General C. B. Nolan filed an affidavit asking the Court to take the case because a grand jury had refused to indict Wellcome despite strong evidence of guilt. 273

After accepting the case and setting a hearing for the fall, the justices themselves were soon targeted by Clark supporters seeking to have the case against Wellcome dismissed. Justice William Hunt was solicited first, by his family doctor, who relayed a message that an unnamed party would pay Hunt $100,000 if the Court dismissed the disbarment proceedings. 274 Shortly after Hunt rejected the bribe, another justice, William Pigott, had an odd encounter with a lawyer for Clark, who said he had heard from another Clark supporter that the justices could be bought, although it would cost as much as $5,000,000. The lawyer told Justice Pigott that he refused to believe the justices would sell out, and had chastised the other Clark supporter. 275 Pigott later testified he thought the lawyer was trying to create a smokescreen to allow deniability about any involvement in the unsuccessful attempt to bribe Justice Hunt. 276 Chief Justice Brantly was also approached later by the Reverend A. B. Martin, president of a small college in Deer Lodge on whose board both Brantly and Clark served. 277 Martin began the conversation by showing Brantly a letter from Clark to Martin, in which Clark urged the minister to talk to Brantly and "give him a better understanding of the Wellcome proceedings and not allow that splendid man to be dis-

270. In re Wellcome, 58 P. 45, 45 (Mont. 1899) [hereinafter Wellcome I].
272. Wellcome I, 58 P. at 47.
273. In re Wellcome, 58 P. 47, 52 (Mont. 1899) [hereinafter Wellcome II].
275. Id. at 1653-54, 1668.
276. Id. at 1664-65.
277. Id. at 1735.
barred.”\(^{278}\) Brantly quickly cut off the discussion and no bribe was mentioned.\(^{279}\)

Initially, the justices only discussed these incidents among themselves, deciding not to report even the overt attempt to bribe Hunt, apparently to keep the Court above the political fray.\(^ {280}\) However, Pigott did tell Attorney General Nolan about the doctor’s conversations with Hunt,\(^ {281}\) and Nolan relayed that information to the Committee on Privileges and Elections.\(^ {282}\) As a result, the committee telegraphed the justices, informing them that their “public duty” required them to come to the Capitol to testify.\(^ {283}\) All three resisted, sending telegrams declining to appear voluntarily.\(^ {284}\) The committee then had them subpoenaed by a U.S. marshal,\(^ {285}\) forcing them to travel by train across the country in February against their wishes to discuss what their testimony indicates was a distasteful, embarrassing subject.

Hunt, in particular, faced hostile questions from Clark’s lawyers, who sought to impugn his credibility by focusing on his failure to report the $100,000 bribe offer to law enforcement. One exchange with Clark’s lead attorney, Charles Faulkner, reveals how unpleasant it must have been for a sitting Supreme Court justice to face repeated questions about his integrity while the nation’s press paid close attention:

Mr. Faulkner. Now, Judge, as I understand it, you regarded this proposition that you claim to have been made by Dr. Treacy as an attempt to influence your judgment as a judge on the supreme bench in the trial of case by a monetary consideration?

Mr. Hunt. Yes, sir; I thought it was a proposition of that kind.

Mr. Faulkner. You did?

Mr. Hunt. I did.

Mr. Faulkner. You never attempted to bring that to the attention of the public prosecutor of that county?

Mr. Hunt. No, sir.

Mr. Faulkner. You can state to the committee what reasons you had for not bringing such an offense as that, occupying the highest judicial position in the State, to the attention of those officers.

Mr. Hunt. Yes, sir. It was a great humiliation to me. I did not care to disclose it. I preferred not to disclose it beyond two or three confi-

\(^{278}\) Id. at 1736, 2026.
\(^{279}\) Id. at 1736–37.
\(^{281}\) Id. at 1663–64.
\(^{282}\) Id. at 1637.
\(^{283}\) Id. at 1631.
\(^{284}\) Id. at 1732.
\(^{285}\) Id. at 1631, 1667, 1732.
dential friends, and I told Judge Pigott that night that that was my feeling.

Mr. Faulkner. Then, in order to save your own humiliation, you were willing to have such a crime attempted to be perpetrated without its being meted with proper punishment?

Mr. Hunt. I do not put it that way.

Mr. Faulkner. How do you put it?

Mr. Hunt. I simply give you the reasons that came into my mind.

Mr. Faulkner. It was to save yourself from humiliation which alone prevented you from giving the law authorities of the county proper notice of this attempted crime?

Mr. Hunt. No, sir; I do not put it that way altogether.

Mr. Faulkner. How, then, do you put it?

Mr. Hunt. I felt this way about it: It would have been a very embarrassing thing for me, as a judge, to have brought the matter up in court. Judge Pigott and I were both in a somewhat similar position, and I simply preferred to do nothing about it.286

Chief Justice Brantly got off much easier in his questioning, as Clark's lawyers chose not to cross examine him at all.287 Justice Pigott, however, also struggled to explain why the Court did nothing concerning the attempt to influence its decision in the Wellcome disbarment, remarkably testifying at one point that he doubted a jury would take the word of his colleague on the Court over that of his would-be briber:

Mr. Pigott. There are two reasons, if you will permit me to state them, why I advised Judge Hunt not to proceed against Dr. Treacy as for a contempt, or criminally. The first was that a question would arise between a layman and the court as to veracity. The second was that Dr. Treacy's standing was so high that a criminal prosecution, I thought, must necessarily have been futile, for the reason that a jury would not believe upon the testimony of Judge Hunt alone, as opposed to the testimony of Dr. Treacy, beyond a reasonable doubt, that Dr. Treacy was guilty. Another reason was that it was not desirable, and, in my opinion, never is, for any man, whether judge or not, to publish the fact that he has been improp-erly approached.

Mr. Faulkner. Not even to vindicate the law that the judge is neces-sarily sworn to support?

Mr. Pigott. In a case of that kind, under the circumstances of this case, where it seemed apparent to me, at least, and to the chief justice and to Mr. Justice Hunt, that there could be no successful criminal prosecution, I say yes to your question. I will go further than that, if you desire, and say that even if it could be proved, I think it is a matter for each judge to determine for himself whether he would bring the courts into disrepute or raise a question of the in-

287. Id. at 1739.
tegrity of the courts, which would necessarily be raised by a crim-
inal proceeding or a proceeding as for a contempt under the circum-
stances I have detailed.
Mr. Faulkner. Do you think it would bring a court more into disre-
pute to enforce the law than to have allowed it to hang, and to be
developed in the method in which this has been developed?
Mr. Pigott. Do I think so?
Mr. Faulkner. Yes.
Mr. Pigott. I don’t know.288

Despite being forced to squirm under cross examination, the
justices’ testimony was not seriously discredited. In fact, it ended
up being singled out by the committee’s majority as evidence wor-
thly of “special consideration” because it proved Clark’s agents
would resort to bribery to get what Clark wanted.289 Accepting
the justices’ testimony in full, the majority report found that “Sen-
tator Clark’s agents, in their desperation on account of the decision
of the court to take jurisdiction in the Wellcome case, attempted
an improper approach to the judges of the court . . . which fact can
not but have a certain influence in the consideration of the other
acts of those agents in connection with the Senatorial election.”290

The official acceptance of the justices’ version of events, how-
ever, did not change the fact that the nation had heard questions
raised about whether they, like many of the elected officials in
Montana, were for sale. In his memoirs, written four decades
later when he was eighty-four, Justice Hunt still recalled the bad
press he and the Court had received: “The substance of our testi-
mony was published throughout the land with varying comments
upon the exposure of the wickedness in Montana politics . . . Some of the newspapers in Montana friendly to Clark broke forth
with abuse of the judges and made me the principal target for
scurrility.”291 Nor did the committee’s finding that the justices
were credible change the fact that back in Butte a notoriously cor-
r upt trial judge was still presiding over some of the most signifi-
cant litigation in America. Those two facts would almost certainly
have been on the minds of the justices on their long train ride
home.

288. Id. at 1662–63.
289. Id. at 14–15.
290. Id. at 15.
291. William Henry Hunt: The Montana Years, 30 Mont.: The Mag. of W. History 54,
C. Fred Whiteside’s Timely Petition for Certiorari

Certainly Judge Clancy still had the justices’ attention. Within a few months of their return from Washington and within two weeks of when the Committee on Privileges and Elections released its report, the Court decided the appeal, discussed above, reversing Judge Clancy’s refusal to rescind his appointment of Heinze’s surrogate as receiver of the Boston & Montana Company, and remanding for Clancy to reconsider the evidence. A month after that, the Court sua sponte modified its decision, eliminating the remand, and simply suspended Clancy’s order imposing the receivership. And a few months after that, Fred Whiteside’s lawyers filed their petition with the Montana Supreme Court asking it to use its previously unexamined power of supervisory control to expand the traditional scope of certiorari to allow review of a district judge’s nonappealable discretionary ruling.

By the time Whiteside’s petition for certiorari was submitted to the Court on October 2, 1900, the actual goal of the petition had become all but irrelevant. Whiteside was seeking cert to reverse a Helena district judge’s writ of habeas releasing the Union Bank’s cashier from jail for his refusal to produce the bank’s “large bills register,” which presumably contained proof Clark’s men had obtained the $1000 bills used to bribe legislators. Yet by the fall of 1900, the fact that Clark had bribed legislators had been proven in both the Wellcome disbarment proceedings, decided in December 1899, and also in the U.S. Senate committee investigation, decided just a few months before in the spring of 1900. Therefore, Whiteside would have had little remaining need for the large bills register. More importantly, the Supreme Court would have had no real need to do anything more than summarily deny Whiteside’s petition because it sought to use certiorari to review a discretionary ruling despite Montana’s longstanding rule restricting that writ to jurisdictional errors.

---

292. Supra nn. 238-44.
293. Forrester IV, 60 P. 1088, 1090 (Mont. 1900).
294. Forrester V, 61 P. 309, 309 (Mont. 1900).
296. State ex rel. Whiteside v. Dist. Ct. of First Jud. Dist., 24 Mont. 539 (1900) (the petition’s date of submission appears only in the Montana Reporter).
297. Whiteside, 63 P. at 396.
298. Wellcome II, 59 P. at 454.
300. Whiteside, 63 P. at 397-98.
Instead, the Court issued a lengthy opinion in which it created an entirely new method of judicial review, one that would allow it to "control the course of litigation" in lower courts even when those courts acted within their discretion.\(^{301}\) The conclusion seems almost inescapable that in taking that step, the justices were heavily influenced by their inability to respond adequately to Judge Clancy via direct appeals and traditional writs, as well as by the embarrassing attempts made to influence their decision in the Wellcome disbarment proceedings.

One last piece of evidence further supports this conclusion, and also helps make sense of one of the more puzzling aspects of the \textit{Whiteside} decision. In its opinion, the Court went to great analytical lengths to create an extraordinary and powerful new judicial tool. But then the Court completely left out any discussion about whether that tool should be applied in the case before it. Although courts generally will not consider remedies the parties do not request, certainly an exception might be appropriate when the remedy in question did not exist until it was created in that very decision. Yet after its lengthy dissertation on its "unlimited" power to supervise lower courts and why a new writ of supervisory control was needed to effect that power, the Court simply dismisses Whiteside's petition for certiorari, holding somewhat ironically that "we have no power" to review the lower court's ruling because it acted within its jurisdiction.\(^{302}\) One can envision Whiteside's lawyers, who included future U.S. Senator Thomas J. Walsh,\(^{303}\) slapping their foreheads in frustration.

But that part of \textit{Whiteside} makes sense if the Court wanted its powerful remedy ready for use in other cases it was familiar with that had much higher stakes. The Court seems to have chosen a by-then pointless discovery dispute in Whiteside's libel suit to announce to lawyers in more important cases with more pressing needs that a new tool existed to review significant but unappealable interlocutory rulings by trial judges like William Clancy.

The first use of the new writ supports this conclusion. It came in what Malone describes as F. Augustus Heinze's single most audacious lawsuit, known as the Copper Trust case, which was naturally assigned to Clancy's court.\(^{304}\) Heinze had located and filed claims on two extremely small slivers of land which were un-

\(^{301}\) \textit{Id.} at 400.
\(^{302}\) \textit{Id.} at 400–01.
\(^{303}\) \textit{Id.} at 397; Swibold, \textit{supra} n. 2, at 6.
\(^{304}\) Malone, \textit{supra} n. 1, at 147.
claimed in the midst of Anaconda Copper's cluster of mines. Heinze sardonically named these minuscule claims, which amounted to only nine one-thousandths (.009) of an acre, the Copper Trust. He then "demonstrated the silliness of the Apex Law" by having a surrogate "henchman" named Burdette O'Connor use those claims in late 1899 as the basis of a lawsuit against Anaconda.305 Claiming that the copper veins Anaconda was mining apexed on his tiny Copper Trust, Heinze asked Clancy to issue a temporary restraining order prohibiting Anaconda from mining its lucrative claims. Clancy, of course, issued the restraining order and ordered Anaconda to show cause why he should not make it permanent. He soon rescinded the restraining order, however, after Anaconda shut down the affected mines and threw more than 500 miners out of work, making Clancy fear for both his re-election and personal safety.306 As for the remainder of the case, historian Malone wrote that it "died quietly two years later in the Montana Supreme Court."307

From a historian's perspective, the case may have died a quiet death. But that Supreme Court decision,308 issued on August 1, 1901, was in fact a legal milestone. In addition to the temporary restraining order, which Clancy had withdrawn on his own, the judge had also granted a motion to allow Heinze's man O'Connor unfettered access to inspect and survey Anaconda's mines, an order that could not be appealed until after trial.309 As the Supreme Court would later note, the order put "the property of the relators practically under the power of O'Connor, to be used at his pleasure."310 Seizing upon the creation of the writ in Whiteside, Anaconda sought a writ of supervisory control to reverse the inspection order.311 In considering Anaconda's application, the Court first concluded that Clancy's order was not justified even under the vagaries of the Apex Law because it was undisputed that O'Connor's claim did not extend to much of the property the inspection order covered.312 Then the Court moved on to the question of remedy. In another opinion by Chief Justice Brantly, the

305. Id.
306. Id. at 147–48.
307. Id.
309. Id. at 1022.
310. Id. at 1027.
311. Id. at 1022.
312. Id. at 1026.
Court reaffirmed its decision in Whiteside from a few months earlier, rejecting the argument by Heinze's lawyers that the Court overrule it. Concluding that Clancy's legally unjustified inspection order was "a means of injustice and oppression," the Court issued the first writ of supervisory control, ordering Clancy to set aside the inspection order. In fact, given Clancy's improper ruling, Brantly wrote that "a refusal by this court, with the views we entertain, to use its power to prevent the threatened wrong, would be a betrayal of the trust reposed in it by the constitution."

A close reading of Whiteside, in which the writ had been created but not used, reveals that the Court foreshadowed that it would use the writ for the first time to chastise a crooked judge like Clancy. The purpose of supervisory control was, as Brantly wrote in Whiteside, "to keep the courts themselves 'within bounds,' and to insure the harmonious working of our judicial system."

Clancy had repeatedly strayed out of bounds, but the final judgment rule and jurisdictional limits on the traditional writs had proven incapable of allowing the Court to rein him in and restore judicial harmony. The writ of supervisory control changed that, and created a new recourse for lawyers unhappy with arbitrary pretrial rulings by a trial judge.

It was a recourse Montana practitioners would soon seek frequently, especially in the litigation between Heinze and the Amalgamated Copper trust. Reading the Montana Reports for the next few years gives the impression that the writ was created exclusively for use in Butte mining litigation. Of the twenty-nine instances in which the Montana Supreme Court discussed issuing a writ of supervisory control between 1900 (when it decided Whiteside) and January 1905 (when the two Butte judges Heinze controlled left office after being defeated in the 1904 election), all but three of those cases were seeking writs directed at the judges of Butte's Second Judicial District. Most of those applications were aimed at reversing Clancy, for whom the Court could barely hide its disdain. In a 1902 case in which the Court used supervi-
sory control to vacate Clancy’s summary contempt finding against a litigant on the wrong side of Heinz, a concurring justice pointedly responded to the argument that the unlimited power of supervisory control posed a greater danger of abuse than any posed by a lower court judge like Clancy. Supervisory control, the justice wrote,

is a tremendous power, but not more so than the alleged arbitrary power said to be reposed in the inferior courts. It is to be exercised only when solemn duty shall force interference. There may be, occasionally, times when the ordinary processes and procedure of the law are inadequate. If courts tyrannically deprive citizens of their liberty or property, and there be no appeal or other remedy except petition to the supreme court for a writ of supervisory control, at such times the supreme court, under the power conferred upon it by the people for their own protection, must exercise this dangerous power,—dangerous because it is possible that it may be improperly exercised. The danger of its improper exercise by the supreme court, removed, as its justices are, from local clamor and prejudice, is not as great as uncontrollable power in a single judge . . . .\textsuperscript{320}

That statement is as close as the Court ever came to acknowledging it created the writ specifically to control Judge Clancy. For much of the twentieth century, long after Clancy was gone, Montana’s justices would struggle over what standards to apply in determining when to exercise this admittedly dangerous power.

V. THE COURT’S STRUGGLES WITH SUPERVISORY CONTROL FROM 1901 TO 1972

In issuing its new writ, the Court’s decision in the Anaconda case applied Whiteside’s three-part test for the first time. In order for the writ to issue, the lower court must have made a mistake of law resulting in a “gross injustice” for which there was no adequate remedy by appeal.\textsuperscript{321} Although on its face the test would seem difficult to meet, the Court nevertheless immediately began receiving numerous applications for the new writ. Most were denied, many because the alleged error could be addressed adequately on appeal.\textsuperscript{322} The influx of applications, however, led to the first instance of what would become an observable pattern over the next century:

\textsuperscript{320} State ex rel. Sutton v. Dist. Ct. of Second Jud. Dist., 69 P. 988, 990 (Mont. 1902) (Milburn, J., concurring).
\textsuperscript{321} Whiteside, 63 P. at 400.
\textsuperscript{322} See e.g. State ex rel. Shores v. Dist. Ct. of Second Jud. Dist., 71 P. 159, 161 (Mont. 1903).
When the Court grants a few applications for the writ, they are quickly followed by many more. The work of the Court then begins to bog down because of the pressure of this new business. Shortly thereafter, the Court tightens the requirements, cutting down the flow of petitions until some new "exigent" case or cases requires that writs be granted, and the cycle begins again.\footnote{323}{William F. Crowley, The Writ of Supervisory Control 4 (unpublished and undated manuscript presented at a continuing legal education seminar) (copy on file with the author). Much of part V of this article examines ground originally covered in this short but valuable paper Professor Crowley provided to the author.}

The first fluctuations in that cycle began in 1905, in yet another case involving F. Augustus Heinze, when the Court stated: "The writ of supervisory control is one to be seldom issued, and then only when other writs may not issue and other remedies are inadequate, and when the acts of the court complained of as threatened will be arbitrary, unlawful, and so far unjust as to be tyrannical."\footnote{324}{State ex rel. Heinze v. Dist. Ct. of Second Jud. Dist., 81 P. 345 (Mont. 1905).} That requirement of judicial tyranny succeeded in reducing the number of writs issued for a decade, but then the Court virtually invited applications for the writ by issuing it for the first time merely to prevent needless litigation.\footnote{325}{Crowley, supra n. 323, at 4.} In \textit{State ex rel. Mannix v. District Court}, the Court was confronted by a probate case that had dragged on for years before several different judges.\footnote{326}{State ex rel. Mannix v. Dist. Ct. of Fourteenth Jud. Dist., 152 P. 753, 753-55 (Mont. 1915).} It issued a writ of supervisory control simply to bring the case to an end. "To refuse relief in this case would relegate the relator and other creditors to the delays necessarily incident to tedious litigation to which they will be compelled to resort in order to have the administration readjusted and set in order."\footnote{327}{Id. at 758.} That new basis for supervisory control seemingly contradicted the statement in \textit{Whiteside} that the power was intended "to keep the courts themselves within bounds" and that any effect on "the rights of suitors in particular causes . . . is incidental purely."\footnote{328}{State ex rel. Whiteside v. Dist. Ct. of First Jud. Dist., 63 P. 395, 399 (Mont. 1900) (internal quotations omitted).} But the Court never discussed how the trial court's conduct amounted to a gross injustice, much less how it rose to the level of judicial tyranny. As Professor Crowley noted, \textit{Mannix} would have a profound impact in the future. "By focusing on the effect its action would have on the overall litigation, rather than the nature of the district judge's acts, the Court opened up alternative grounds
for use of its supervisory power. Predictably, new applications proliferated . . . ."\textsuperscript{329}

Two cases involving change of venue motions illustrate the vacillation the Court experienced during much of the 1900s. In \textit{State ex rel. Interstate Lumber Company v. District Court}, decided in 1918, the Court in an opinion by Chief Justice Brantly issued a writ of supervisory control ordering the trial judge to change venue.\textsuperscript{330} After noting that there was no immediate appeal from a ruling on a venue motion and no other writ would issue because the court had not exceeded its jurisdiction, the Court concluded that simply "suffering the additional expense and inconvenience" of a trial in the wrong county was sufficient injury to merit supervisory control.\textsuperscript{331} Six years later—and more importantly, two years after Brantly's death,\textsuperscript{332}—the Court revisited that question in \textit{State ex rel. Bonners Ferry Lumber Company v. District Court}.\textsuperscript{333} Using surprisingly harsh language, the Court called Brantly's \textit{Interstate Lumber} opinion "so manifestly erroneous that it ought not to stand of record unchallenged to mislead litigants and their counsel."\textsuperscript{334} The Court then announced a return to the strict standard of judicial tyranny.\textsuperscript{335} After summarizing a series of cases, beginning with \textit{Whiteside}, in which the writ had not issued, the Court concluded:

> If the present application be granted, no valid excuse could be offered for refusing a like application to review any alleged erroneous ruling of a trial court from the time an action is instituted until the final judgment is rendered, and, if such procedure were once adopted and followed, the time of this court would be consumed in hearing and determining such applications, with the result that the appellate jurisdiction would be destroyed for all practical purposes.\textsuperscript{336}

Despite that strong language, the Court failed to stick to its announced intention, and instead continued to issue supervisory writs over the years to prevent needless litigation. In \textit{State ex rel. Crowley v. District Court}, for instance, the Court exercised super-

\begin{itemize}
\item \textsuperscript{329} Crowley, supra n. 323, at 4.
\item \textsuperscript{330} State ex rel. Interstate Lumber Co. v. Dist. Ct. of First Jud. Dist., 172 P. 1030, 1033 (Mont. 1918).
\item \textsuperscript{331} Id.
\item \textsuperscript{332} See In Memoriam, supra n. 104.
\item \textsuperscript{333} State ex rel. Bonners Ferry Lumber Co. v. Dist. Ct. of Second Jud. Dist., 222 P. 1050 (Mont. 1924).
\item \textsuperscript{334} Id. at 1050.
\item \textsuperscript{335} Id. at 1052.
\item \textsuperscript{336} Id.
\end{itemize}
visory control in 1939 to reinstate several causes of action that had been dismissed while others were allowed to proceed to trial.\textsuperscript{337} \textit{Crowley} may illustrate the use of supervisory control at its most liberal. The Court not only failed to explain how the conduct amounted to a gross injustice, but asserted it was "well settled that the supervisory power of this court was designed to control summarily the course of litigation in the trial courts where for any reason relief by appeal would be inadequate."\textsuperscript{338} Significantly, the Court cited a recent change in philosophy about the very purpose of the courts:

[It is not apparent why the case should go to trial on the first six causes, and then, after appeal, be sent back for trial again on the other three. Certainly that course would be inefficient, costly and time-consuming, and would benefit no one. \textit{It is just such instances as this which under the modern theory that the courts are for the benefit of the litigants and the public interest, warrant the exercise of our power of supervisory control.}\textsuperscript{339}

As this judicial vacillation shows, individual justices over the years had strong and differing views of the writ. Justice Claude F. Morris dissented in \textit{Crowley}, decrying the "ultraliberal" use of supervisory control epitomized by the majority opinion.\textsuperscript{340} However, a few years later Morris, in the first and only other law review article discussing supervisory control generally, praised both the writ and its creator. Calling Brantly "a man endowed with unusual powers of logic and reasoning," Morris described the \textit{White-side} decision as a "splendid interpretation of the supervisory control clause of the Constitution."\textsuperscript{341}

The Court's chief justice from 1948 to 1957 had a very different view. Not only did the Court deny virtually all requests for supervisory control during Hugh R. Adair's tenure as chief justice,\textsuperscript{342} but he and another justice questioned the writ's very legitimacy. In fact, in January 1957, in one of the last decisions in which Adair participated as chief justice,\textsuperscript{343} the Court came within one vote of abolishing the writ of supervisory control. In \textit{State ex rel. Tripp v. District Court}, the five-member Court, by a three-to-two vote, issued a writ of supervisory control to reverse a

\begin{footnotesize}
\begin{footnotes}
\item \textsuperscript{337} \textit{State ex rel. Crowley v. Dist. Ct.}, 88 P.2d 23, 30 (Mont. 1939).
\item \textsuperscript{338} \textit{Id.}
\item \textsuperscript{339} \textit{Id.} (emphasis added).
\item \textsuperscript{340} \textit{Id.} at 31 (Morris, J., dissenting).
\item \textsuperscript{341} Morris, \textit{supra} n. 37, at 15.
\item \textsuperscript{342} Crowley, \textit{supra} n. 323, at 5.
\end{footnotes}
\end{footnotesize}
district court order granting a new trial. However, Adair and the other dissenting justice issued stinging separate opinions in which they not only disagreed with the majority's use of the writ in that case, but urged that Whiteside and its numerous progeny be overruled entirely.

Adair's dissent attacked Brantly's reasoning in Whiteside on almost every front, starting with the assertion that the power of supervisory control was "unlimited" in the means by which the Court could exercise it. "At no time has this court been granted any unlimited power either appellate, original or supervisory," Adair wrote. Even though in Whiteside Brantly had omitted any mention of the historical origins of supervisory control in the court of King's Bench, Adair nevertheless seized upon those origins to denigrate the writ:

There is nothing in the law of this state that recognizes any such thing as 'the inherent power of judges' or 'the divine right of kings.' These doctrines belonged to an entirely different system of government to correct the evils of which, government under a written constitution and under written laws was designed and adopted.

Adair was particularly offended by the manner in which Whiteside had relied on a general provision of the Code of Civil Procedure to overcome the restrictive language in the 1889 Constitution that only allowed supervisory control "under such regulations and limitations as may be prescribed by law." Adair angrily wrote:

[I]t most certainly was not the intent of the framers of the Constitution to empower or authorize the supreme court to exercise or usurp the powers and functions of the legislature by designing, inventing or evolving any wholly new device or procedure for exercising the "supervisory power" granted, such as the unregulated, unlimited and uncontrolled "writ of supervisory control" of which our founding fathers had never heard and which had never been recognized or used at common law or in our territorial courts and which to this day has never been recognized or sanctioned by the legislative department of our state government and which is purely the creature of the inventive genius of the court without being prescribed or au-

345. Id. at 1114–15, 1119–20 (Adair, C.J., dissenting; Bottomly, J., dissenting) (emphasis in original).
346. Id. at 1113 (emphasis in original).
347. Id. at 1114 (emphasis in original).
Adair was joined in his attack on Whiteside by another justice, who concluded more succinctly that "the court-called writ of supervisory control, as used in the majority opinion herein, is unauthorized by our Constitution, our statutes, and is unknown to the common law and the law of this state. It is simply this court's created device and fiction."350

The writ of supervisory control survived the tenure of Chief Justice Adair, if only by a single vote. In fact, within a few years, the Court became increasingly comfortable not only using the writ to prevent needless litigation in the occasional case, but adopting that purpose "as a primary objective of supervisory control."351 For example, in 1966 a unanimous Court used supervisory control to reverse a district court's denial of a motion to dismiss, simply because such a ruling was not immediately appealable and the defendant therefore would "be forced to participate in needless litigation if this Court does not issue a writ of supervisory control."352 Despite its increased use—or perhaps because of it—the writ of supervisory control would face its biggest challenge in just a few years, when Montana voters decided to call a constitutional convention.

VI. THE 1972 MONTANA CONSTITUTIONAL CONVENTION

The antipathy felt by some in the legal profession toward the Montana Supreme Court's creation and use of its unique writ of supervisory control resurfaced in the debates among lawyers who had been elected delegates to the Montana Constitutional Convention in early 1972. Disregarding the recommendation of the Judiciary Committee, convention delegates ultimately voted to retain the Supreme Court's power of supervisory control in the new Constitution, and even removed the restrictive language indicating it was not self-executing.353 As a result, the subsequent ratification of that Constitution by voters ended any lingering questions about the legitimacy of the writ of supervisory control.

350. Id. at 1117 (Bottomly, J., dissenting).
351. Crowley, supra n. 323, at 5.
The Judiciary Committee at the convention quickly found itself divided five-to-four over what the new constitution's judicial article should look like, which resulted in both a majority and minority report to the full convention.354 Although much of the disagreement focused on the method of selecting judges,355 it also concerned whether to retain the Montana Supreme Court's supervisory control over lower courts. In comments accompanying its proposal, the committee majority picked up where Chief Justice Adair had left off, focusing on the lack of explicit enabling legislation authorizing the writ:

The revision deletes the supreme court's power of supervisory control over inferior courts. As written in the 1889 Constitution, the power was given to the supreme court under such regulations and limitations as may be prescribed by law. Although the legislature has never provided regulations, the supreme court in 1900 assumed the power to act supervisory—going so far as to invent a writ of supervisory control, unique in the United States. The use of the writ has grown to the point where it is used when other specifically authorized writs, or appeals, would serve as well. The provision was deleted as (1) unnecessary and (2) to avoid an unseemly avoidance of the express provisions of the 1889 Constitution.356

The Judiciary Committee's minority proposal,357 on the other hand, not only retained supervisory control, but also deleted any requirement for enabling legislation to exercise that power.358

When the competing proposals were presented to the full convention, delegates voted to begin debate by taking up the minority proposal.359 Shortly afterward, delegate John Schiltz, a Billings lawyer,360 immediately moved to strike the power of supervisory control, giving a description of the origins of the writ that was accurate in its major points:

This is an old hangover from the 1889 Constitution, and it looks like just general words, but as a result of those three magic words, the Supreme Court... invented a writ, an extraordinary writ, called the writ of supervisory control, whereby they controlled a judge and his court in the city of Butte—this was part of the War of the Copper Kings. Since then... every time the Supreme Court of Montana

354. Montana Constitutional Convention, supra n. 34, at vol. I, 484.
355. Id. at 485.
356. Id. at 493.
357. In the interest of full disclosure, Catherine Howell Pemberton, the vice chair of the Judiciary Committee and member of the minority, was the author's aunt. A rancher's wife from outside Broadus, she was elected as a delegate to represent Bighorn, Powder River, and Carter Counties in southeastern Montana. See id. at 55.
358. Id. at 510.
359. Id. at vol. III, 1034–35.
360. Montana Constitutional Convention, supra n. 34, at vol. I, 55.
used it, up until about the last 20 years, it said, "This writ must be used very carefully and only under unusual circumstances." In the last 16 or 17 years, this writ has been used with great frequency when an appeal would have lain just as well or when some other appropriate writ would have served the same purpose. I think that you will find that the district judges find themselves universally insulted by the use of the writ of supervisory control. It isn't used as carefully and as sparingly as it used to be.  

Two other lawyer delegates objected to the motion to strike, in the process citing wildly inaccurate statistics that downplayed the frequency with which the writ had been used. Delegate Ben E. Berg, a Bozeman lawyer and member of the Judiciary Committee, stated that staff research revealed the writ had only been sought twenty-one times since 1900, and only been granted fifteen times. He also ignored the Court's common use of the writ to prevent unnecessary litigation, instead telling delegates research revealed the writ had only been issued to control lower courts whose acts were "arbitrary, unlawful, and so far unjust as to be tyrannical." Berg concluded by stating that the writ, "whether it's unique in Montana or not, has a fitting place within our jurisprudence. It is carefully circumscribed by the court. It has not been used flagrantly; it has not been abused."  

Jerome J. Cate, a Billings lawyer, reinforced Berg's flawed statistics, telling the delegates: "Of those 21 times that the writ has been asked for in our court, I think I have had something to do with about five of them, and we've got it once out of the five times that we've asked for it." Cate then made a strongly populist argument that likely resonated with the predominantly Democratic delegates:

I'll tell you why you need the writ of supervisory control and why it's good for the people to retain the writ of supervisory control . . . . If you run into a situation in a lawsuit where a judge . . . absolutely

361. Id. at vol. III, 1039. Delegate Schiltz's comments are the only instance the author could find in which anyone explicitly connected the writ's creation to judicial corruption in Butte.

362. Id. Even without the benefits of computer databases, the shoddy research Berg cites is hard to fathom because during just the previous decade the Court had considered almost twice as many petitions for supervisory control as Berg claimed had been considered since the writ was created in 1900. Search in Westlaw, MT-CS library, using the search "sy("supervisory control"/writ) & da(aft 12/1959 & bef 1/1970)" (Aug. 22, 2007) (yielding 39 results).

363. Montana Constitutional Convention, supra n. 34, at vol. III, 1039.

364. Id.

365. Id. at 1040.

ignores the law, if you did not have the writ of supervisory control, you would have to go all the way through the trial and then appeal it to the Montana Supreme Court. Now, if you're a big company, you don't want the writ of supervisory control. If you've got a lot of money—and money has a lot to do with lawsuits, you know—if you've got a lot of money, you don't want the writ of supervisory control. But for the people, the little people, they need the writ of supervisory control because it’s a way to keep the judges honest and it’s a way to avoid having to go all the way through a trial and all the expenses of an appeal in order to get an issue decided.\textsuperscript{367}

Berg and Cate's inaccurate statistics caught the attention of at least one delegate, lawyer Franklin Arness of Libby:

Mr. Chairman, I wonder if those figures are right. I've asked for it, that I can think of, I think three times and gotten it once; it seems that Mr. Cate and I account for one-third of all the writs that have ever been granted [sic]. It's hard for me to believe that. I suppose it may be. Maybe we're hyperactive.\textsuperscript{368}

Rather than try to resolve Arness's question about the writ's frequency, the delegates literally laughed it off and quickly voted to defeat the Judiciary Committee's proposal to abolish supervisory control.\textsuperscript{369}

As a result of that debate, limited and flawed though it was, the writ of supervisory control received the highest stamp of approval possible. The Court's supervisory power was not only retained in the 1972 Constitution, but the new judiciary article deleted the restrictive language in the 1889 Constitution\textsuperscript{370} that critics like Chief Justice Adair had seized upon to argue that the power was not self-executing.\textsuperscript{371} Although delegates were badly misinformed during the debate about the frequency of the writ's use, Delegate Schiltz noted in support of his motion to abolish the writ that it had been issued with "great frequency" of late,\textsuperscript{372} and written comments accompanying the Judiciary Committee majority proposal discussed that same point.\textsuperscript{373} Even more significantly, Delegate Cate's comments specifically advocated the Court's use of the writ for the express purpose of avoiding needless litigation,\textsuperscript{374} the most liberal and controversial reason for exercising supervisory control. Therefore, ratification of the new Consti-

\textsuperscript{367} Montana Constitutional Convention, supra n. 34, at vol. III, 1040.
\textsuperscript{368} Id.
\textsuperscript{369} Id. at 1040–41.
\textsuperscript{370} Compare Mont. Const. art. VII, § 2 (1972) with Mont. Const. art. VIII, § 3 (1889).
\textsuperscript{371} See supra nn. 345–47.
\textsuperscript{372} Montana Constitutional Convention, supra n. 34, at vol. I, 493.
\textsuperscript{373} Id. at 1039.
\textsuperscript{374} Id. at 1040.
tution by voters on June 6, 1972, should have removed any legal questions about the writ’s legitimacy, even when used solely to save the parties the delay and expense of unnecessary litigation.

VII. THE COURT’S STRUGGLES WITH SUPERVISORY CONTROL FROM 1972 TO THE PRESENT

Although any legal questions about the writ of supervisory control’s legitimacy as a broad method of interlocutory review died with ratification of the 1972 Constitution, members of the Court nevertheless continued to disagree about the writ’s purpose and the applicable standards for its use under the new Constitution. Interestingly, the Court apparently has never considered the significance of the endorsement by convention delegates of the writ’s most liberal use—to prevent needless litigation—as no Montana cases discuss the debate over supervisory control at the convention.

Perhaps as a result of that oversight, the Court soon resumed its inconsistent application of supervisory control. For example, in *Kinion v. Design Systems, Inc.*, the plaintiff sought supervisory control to review an unappealable interlocutory ruling vacating a default judgment and forcing it to proceed to what was arguably a pointless trial.\(^375\) The Court summarily rejected the petition without getting to the merits of the lower court’s ruling. Instead, it held that the very idea of using supervisory control to review an unappealable interlocutory ruling—something it had done scores of times—was beyond the pale: “To permit review of such an order prior to final judgment through the device of supervisory control or other extraordinary writ is to accomplish indirectly that which cannot be done directly.”\(^376\) However, a few years later, in *First Bank, (N.A.) Western Montana Missoula v. District Court*, the Court granted supervisory control to reverse a lower court’s ruling denying a motion to dismiss,\(^377\) which was also an interlocutory ruling only subject to appeal after final judgment. Despite that similarity to *Kinion*, the Court in *First Bank* said it would exercise supervisory control “to protect [the defendant] from participating


\(^{376}\) Id. (quotations omitted).

in needless litigation, a purpose for which a writ of supervisory control is intended.\textsuperscript{378}

More recently, this same disagreement resurfaced again in \textit{Lane v. Montana Fourth Judicial District Court}, where the Court was asked to grant supervisory control to review the lower court's denial of summary judgment, which also can only be appealed after final judgment.\textsuperscript{379} The Court granted the writ, holding that if the district court had erroneously denied the motion, "the attendant delay and expense[] would cause a gross injustice."\textsuperscript{380} That led Chief Justice Karla Gray to vociferously dissent: "[I]t appears that this Court will now—whenever it chooses—exercise supervisory control over any legal ruling in any trial court on an issue of law when delay and expense might accompany finishing the trial court proceedings and pursuing an appeal."\textsuperscript{381}

The continued inconsistency over whether the writ would issue to prevent needless litigation has not been the biggest problem with the Court's supervisory control jurisprudence after ratification of the 1972 Constitution. That distinction goes to the Court's confusion of its standards for exercising supervisory control with the standards the Court uses to decide whether to accept original jurisdiction over important cases filed directly in the Supreme Court without ever passing through a lower court.

Under the 1889 Constitution, the Court had long interpreted its grant of original jurisdiction as including the power to decide original proceedings for declaratory judgment that were filed directly with the Court.\textsuperscript{382} Because those cases had never been filed in any other court, they would not seem to concern the Court's supervisory powers over lower courts. The Court had held it would accept jurisdiction over these original declaratory judgments "where legal questions of an emergency nature are presented and ordinary legal procedures will not afford timely or adequate relief."\textsuperscript{383} In 1984, in \textit{Grossman v. Department of Natural Resources}, the Court held that it had the same power under the 1972 Constitution.\textsuperscript{384} It stated it would accept original declaratory judgment actions in cases "where the issues have impact of major importance on a statewide basis, or upon a major segment

\textsuperscript{378} Id.
\textsuperscript{379} \textit{Lane v. Mont. Fourth Jud. Dist. Ct.}, 68 P.3d 819, 822 (Mont. 2003).
\textsuperscript{380} Id.
\textsuperscript{381} Id. at 826 (Gray, C.J., dissenting).
\textsuperscript{383} Id.
of the state, and where the purpose of the declaratory judgment proceedings will serve the office of a writ provided by law . . . .”

That case was apparently still fresh in the Court’s collective mind a few months later, when the attorney general, in *State ex rel. Greely v. Water Court*, asked it to exercise supervisory control over statewide water rights litigation involving various Indian tribes. Even though *Greely* involved a petition for supervisory control over a lower court, the opinion ignored decades of cases discussing supervisory control. Instead, the Court deliberately applied the much more restrictive test for accepting original declaratory judgment actions, stating that “[w]hile *Grossman* is a declaratory judgment proceeding and the present proceeding is for supervisory control, the factors considered in taking of original jurisdiction are relevant and worthy of discussion here . . . .” After focusing at length on the statewide importance of the litigation—a consideration that had never entered into the Court’s prior supervisory control analysis—the Court held it would exercise supervisory control largely because “the resolution of the issues in this cause will have a profound effect on the people of the State of Montana.”

The Court’s decision in *Greely* to disregard almost a century’s worth of supervisory control case law probably resulted from the unique nature of that litigation, which did have major statewide ramifications. However, it quickly led to a line of cases in which the Court began confusing its rarely exercised original jurisdiction over declaratory judgment actions with its frequently exercised supervisory jurisdiction over lower courts. The confusion began when the Court started citing *Greely*, a supervisory control case, as the leading authority for determining whether to exercise its other types of original jurisdiction. In 1986 the Court cited *Greely* for the test it applied to decide whether to grant an original application for an injunction against the secretary of state, even though the case had nothing to do with a lower court, much less the Court’s need to supervise one. Since then, *Greely* has become the main authority cited for the Court’s three-part test on whether to accept jurisdiction over original declaratory judgment actions,

---

385. *Id.*
387. *Id.* at 837.
388. *Id.* at 840.
which requires that the case involve: (1) constitutional issues of major statewide importance; (2) pure legal questions of statutory or constitutional construction; and (3) urgency and emergency factors that make the normal appeal process inadequate.\textsuperscript{390}

Although the Court’s reliance on \textit{Greely} for that test may be defensible because \textit{Greely} did at least analyze the Court’s prior original jurisdiction declaratory judgment decisions, the Court’s next misstep was simply sloppy. The Court began applying the so-called \textit{Greely} test to determine whether to grant supervisory control, creating an entirely new line of supervisory control authority that was inconsistent with the decades of cases that preceded it. The first case in which it did so was \textit{State ex rel. Racicot v. District Court of the Seventh Judicial District}\textsuperscript{391} (hereinafter \textit{Racicot II}), decided in 1990. There, the attorney general sought a writ of supervisory control to reverse a lower court ruling that allowed the name of an independent candidate for local office on the ballot even though he had missed the filing deadline.\textsuperscript{392} The case seems to have fit the \textit{Whiteside} criteria for exercising supervisory control because it concerned a legal ruling that created a gross injustice for the other candidates who had filed on time, and the looming election provided insufficient time for an appeal to run its course. But rather than analyze the case under its traditional supervisory control analysis, the Court cited the \textit{Greely} test, concluding without analysis that the test was met—without ever explaining how a local election was a constitutional issue of major statewide importance.\textsuperscript{393}

The Court’s problematic reliance on the \textit{Greely} test in \textit{Racicot II} is especially puzzling because just a few months earlier the Court had decided a case that suggested it recognized the problem. In \textit{State ex rel. Racicot v. District Court of the First Judicial District}\textsuperscript{394} (hereinafter \textit{Racicot I}), the Court had also been asked by the attorney general to exercise supervisory control over a

\textsuperscript{390} In each of the following cases, the Court cited the so-called \textit{Greely} test to decide whether to accept jurisdiction over original declaratory judgment actions that had never been filed in a lower court: \textit{White v. State}, 759 P.2d 971, 973 (Mont. 1988); \textit{Butte-Silver Bow Loc. Gouv. v. State}, 768 P.2d 327, 329 (Mont. 1989); \textit{State ex rel. Gould v. Cooney}, 831 P.2d 593, 594 (Mont. 1992); \textit{Montanans for the Coal Trust v. State}, 996 P.2d 856, 861 (Mont. 2000).

\textsuperscript{391} \textit{State ex rel. Racicot v. Dist. Ct. of the Seventh Jud. Dist.}, 798 P.2d 1004 (Mont. 1990) [hereinafter \textit{Racicot II}].

\textsuperscript{392} \textit{Id.} at 1006.

\textsuperscript{393} \textit{Id.}

\textsuperscript{394} \textit{State ex rel. Racicot v. Dist. Ct. of the First Jud. Dist.}, 794 P.2d 1180 (Mont. 1990) [hereinafter \textit{Racicot I}].
lower court in an election case, this time concerning the supreme court and other judges. In analyzing whether supervisory control was proper, the Court stated:

In considering whether to accept jurisdiction under a writ of supervisory control, this Court has always proceeded on a case-by-case basis and has granted the writ in diverse circumstances. We have issued the writ to further judicial economy and to prevent procedural entanglements. In many cases we have issued the writ to prevent an injustice to the petitioner which would arise if the petitioner were forced to await appeal. Often the particular facts of the case required immediate review to prevent a gross injustice or to prevent deprivation [of] the petitioner's fundamental rights while awaiting appeal.

*The present case does not fit squarely into any of the previous situations in which we have granted supervisory control. We do believe, however, that it is appropriate. The District Court's decision directly affects Montana voters' constitutional right to elect Supreme Court Justices and District Court Judges.*

Despite acknowledging that the statewide importance of the case did not fit its traditional supervisory control analysis, the Court in *Racicot I* did not cite *Greely* as justification for granting supervisory control. That suggests that the Court realized that the *Greely* test was not an appropriate test for that purpose.

Nevertheless, the Court issued its flawed decision in *Racicot II* a couple of months later, applying that very test. It soon compounded that mistake by expressly citing *Racicot II* for the proposition that the *Greely* test was now *the* test for granting supervisory control:

We have held that assumption of original jurisdiction for the purpose of exercising supervisory control is appropriate when:

1. Constitutional issues of major state-wide importance are involved;
2. The case involves purely legal questions of statutory and constitutional construction; and
3. Urgency and emergency factors exist, making the normal appeal process inadequate.

*State ex rel. Racicot v. District Court* (1990), 244 Mont. 521, 524, 798 P.2d 1004, 1006.

Fortunately, in *Racicot II* and the few other cases in which the Court applied the *Greely* test, the outcome was not affected because either the Court still found that supervisory control was

---

395. *Id.* at 1182 (emphasis added).
appropriate under the more demanding test\textsuperscript{397} or, if not, because the petition did not even present an emergency or a mistake of law, much less a matter of statewide importance.\textsuperscript{398} The Court’s application of the Greely test in these cases is difficult to understand, though, because during this same period it also continued to apply its traditional supervisory control analysis in other cases, including using supervisory control simply to benefit a litigant by preventing needless litigation.\textsuperscript{399}

Within a few years, the Court realized the confusion it had created, and attempted to correct it. Unfortunately, its efforts were not completely successful because the Court did not explain what had led it to make the mistake. The Court’s first effort at clarification occurred in 1996, in \textit{Plumb v. Fourth Judicial District Court}.\textsuperscript{400} There, the Court was asked to use supervisory control to reverse a lower court ruling allowing the defendant to use a new statutory “empty chair” defense and blame a non-party for the plaintiff’s injuries.\textsuperscript{401} Even though the case concerned the constitutionality of the statute, thus arguably satisfying the statewide importance test required by Racicot II, the Court acknowledged that Racicot II conflicted with Whiteside and its progeny.\textsuperscript{402} “We have, essentially, two lines of authority which set forth the standard for when supervisory control would be exercised. However, those standards are not consistent.”\textsuperscript{403}

But rather than explain that the Racicot II test should never have been applied to supervisory control at all, and was instead the test the Court used to determine whether to accept original declaratory judgment actions, the \textit{Plumb} decision asserted that the mistake had simply been to turn a disjunctive test into a conjunctive one: “While it is correct that prior to Racicot we had exercised supervisory control under all three circumstances set forth in the Racicot test, that decision has subsequently been interpreted to mean that all three circumstances must be present.


\textsuperscript{399} See e.g. Potter v. Dist. Ct. of Sixteenth Jud. Dist., 880 P.2d 1319, 1322 (Mont. 1994) (exercising supervisory control to reverse trial court’s refusal to quash a search warrant because “it would be fundamentally unfair and prejudicial, not to mention a waste of time and the limited resources of the court and counsel, to require this case to proceed further.”).


\textsuperscript{401} Id. at 1014.

\textsuperscript{402} Id.

\textsuperscript{403} Id.
before supervisory control will be accepted."\textsuperscript{404} The Court concluded by stating that "to the extent that the Racicot decision suggests that all three elements must be established before supervisory control is exercised, and to the extent that subsequent decisions have applied the test in that fashion, they are reversed [sic]."\textsuperscript{405}

The Court's failure to explain fully its mistake created several problems. First, the Court was technically correct that without the statewide importance element, the remaining two parts of the Racicot II test were similar to the Whiteside test. But even the modified Racicot II test left out Whiteside's explicit requirement of a "gross injustice," thus leaving Plumb to suggest that any legal error for which there was no immediate remedy by appeal was sufficient. Additionally, as the dissent in Plumb noted, if read literally the majority opinion held that the Racicot II test was now disjunctive, so any one of the three elements by itself was sufficient to merit supervisory control—for example, if the case only "involves a purely legal question of statutory or constitutional construction."\textsuperscript{406} Chief Justice Jean Turnage complained, accurately it would turn out,\textsuperscript{407} that "the majority opinion is an open invitation for petitioners to come to this Court and point to this case as precedent asking this Court to intervene and decide the case for them without the necessity of proceeding with a normal appeal process."\textsuperscript{408} Finally, by overruling Racicot II without explaining that it was still applicable to original declaratory judgment actions, the Court opened the door to potential confusion by leaving it to practitioners to determine if the test still remained valid in that context.

Plumb's unsatisfactory effort to clear up the confusion led the Court a year later to try again, with more success. In Preston v. Eighteenth Judicial District Court, the Court optimistically stated that Plumb had "recently clarified the standard for exercising supervisory control."\textsuperscript{409} But the Court then proceeded to tacitly admit Plumb had done the opposite by trying again in more detail. After once more discussing the difference between the Whiteside and Racicot II lines of authority, the Court tried to rectify Plumb's

\begin{flushleft}
\textsuperscript{404} Id. at 1015.  \\
\textsuperscript{405} Id.  \\
\textsuperscript{406} Plumb, 927 P.2d at 1022 (Turnage, C.J., concurring and dissenting).  \\
\textsuperscript{407} See infra n. 419.  \\
\textsuperscript{408} Plumb, 927 P.2d at 1022 (Turnage, C.J., concurring and dissenting).  \\
\end{flushleft}
disjunctive-versus-conjunctive holding by stating it "followed the Whiteside line of authority for determining when supervisory control is appropriate." The Court then left no doubt it had returned to the writ's origins by phrasing its holding in terms of the original Whiteside test: "[A] writ of supervisory control is appropriate in the instant case because . . . the District Court is proceeding under a mistake of law which does a gross injustice . . . . Under the circumstances presented, remedy by appeal would be inadequate." Although Preston made clear that Whiteside was the controlling authority, it did not completely undo the confusion created by Racicot II because it once again did not explain that the Racicot II test had been mistakenly taken from cases involving an entirely different type of original jurisdiction, the jurisdiction to hear declaratory judgment actions that had never been filed in district court.

Following Plumb and Preston, with their lengthy discussions about how supervisory control was again available to prevent needless litigation, the Court entered another cycle in which it tended to grant supervisory control liberally. As in the 1950s and 1960s, that liberal use drew the ire of the Court's chief justice. In Truman v. Eleventh Judicial District, for instance, the Court granted supervisory control to reverse a trial court's admission of a key piece of evidence: "[T]he admission of improper evidence or improper jury instructions will render the results unreliable and the cost to Truman in both time and finances will be substantially increased. Consequently, we conclude that an appeal is an inadequate remedy and justice requires this Court to exercise supervisory control . . . ." That led Chief Justice Gray to accuse the Court of drifting into accepting supervisory control over nearly any kind of pretrial ruling, whether based on a purely legal conclusion or a discretionary act, where the ultimate result could be a reversal on appeal and the necessity of further proceedings thereafter. Evidentiary rulings, rulings on motions to dismiss or summary judgment, and speedy trial rulings are not "extraordinary circumstances" which create significant injustice for which an appeal is an inadequate remedy.

The same dynamic occurred in Lane, where the Court granted supervisory control to review the lower court's denial of summary

410. Id.
411. Id. at 818.
413. Id. at 661 (Gray, C.J., dissenting).
judgment, which the defendant argued he was entitled to under the theory of res judicata.\textsuperscript{414} The Court held that supervisory control was proper because if the summary judgment motion had been improperly denied, then requiring the defendant to wrongly defend against the same claim for a second time would cause a gross injustice.\textsuperscript{415} However, after granting supervisory control, the Court actually affirmed the denial of summary judgment.\textsuperscript{416} That meant, of course, that none of the Whiteside criteria were satisfied because the lower court had neither made a legal error nor caused a gross injustice for which appeal was an inadequate remedy. That odd result provoked another lengthy dissent from the chief justice. After repeating the same points she made in Truman about problems with reviewing virtually any pretrial ruling that might prolong the litigation,\textsuperscript{417} Chief Justice Gray raised a more fundamental concern:

At the bottom line, the Court is using supervisory control jurisdiction to transform the traditional structures and roles of the trial courts and this Court. A "gross injustice" apparently now means only an erroneous—or potentially erroneous—ruling or an alleged pretrial abuse of discretion which, if not corrected by this Court's intervention, will permit the proceedings in the trial court to proceed in their normal course with their associated delays and expenses. In the future, will any rational attorney refrain from petitioning for supervisory control on any nonappealable ruling at any stage in trial court proceedings? On what grounds will the Court ever find reason to deny supervisory control? And how in the world does such an approach comport with either the trial courts' general authority to control the proceedings before them or our primary role as an appellate court?\textsuperscript{418}

Chief Justice Gray also cited statistics that backed up her claims. In the six years before the Court had decided Plumb in 1996, it had granted supervisory control in thirty-five cases, but in the six years after, the Court had granted supervisory control in sixty cases.\textsuperscript{419}

Following the odd result in Lane, in which the Court issued a writ of supervisory control only to conclude the case did not satisfy any of the criteria for the writ, Gray's criticisms seem to have had an impact, both procedurally and substantively. In 2005, the

\begin{flushleft}
\textsuperscript{415} Id.
\textsuperscript{416} Id. at 825.
\textsuperscript{417} Id. at 826 (Gray, C.J., dissenting).
\textsuperscript{418} Id.
\textsuperscript{419} Id. at 827.
\end{flushleft}
Court in *Inter-Fluve v. Montana Eighteenth Judicial District Court*, as in *Lane*, ended up affirming the lower court's ruling on a petition for supervisory control.\(^4\) This time, however, the Court denied the writ after examining the merits, thereby at least avoiding the appearance of issuing a supervisory writ when the lower court had reached the correct result and needed no supervision.\(^4\) But as the Chief Justice noted, that result still created a problem. Gray concurred in denying the writ, but dissented in the Court's approach to the case:

> It is my view that we should first determine whether a petition for supervisory control meets our criteria for the exercise of supervisory control; we did so in this case. If and when we determine a supervisory control petition does not meet our criteria, we should state that conclusion in a very brief order and then merely deny the petition. Taking the time, and using our limited resources, to present a full legal analysis under circumstances such as those before us here is simply unwise from a variety of perspectives.\(^4\)

That logical procedural approach subsequently has been adopted by the Court. Since *Inter-Fluve*, every time the Court has denied a petition for supervisory control, it has done so in the summary manner Gray suggested. These denials are simply reported in a table of unpublished cases,\(^4\) which will substantially reduce the Court's opinion-writing work load.

Recent Court statistics also indicate that Gray's substantive criticisms about the Court's post-*Plumb* increase in the frequency with which it issued the writ have been taken to heart by the Court. As Gray noted in her *Lane* dissent, the Court had granted supervisory control sixty times in the six years after *Plumb*, from 1997 through 2002,\(^4\) an average of ten per year. That was almost double the thirty-five times the writ had issued in the six years from 1991 through 1996,\(^4\) or about six times per year. More recent statistics from the Court show the trend has reversed dramatically, and the Court is now in the midst of a substantial contraction in the number of supervisory writs issued. In 2004,

---


\(^4\) *Id.* at 261.

\(^4\) *Id.* at 264–65 (Gray, C.J., concurring & dissenting).

\(^4\) See *e.g.* *Damschen v. Fourth Jud. Dist.*, 138 P.3d 427 (Mont. 2006) (the first time the Court denied the writ in this summary fashion).

\(^4\) *Lane*, 68 P.3d at 822 (Gray, C.J., dissenting).

\(^4\) *Id.*
the Court issued the writ seven times, which was close to the average before Plumb. In 2005, the Court issued only three supervisory writs. And in 2006, it only issued one writ of supervisory control. The Court's statistics also suggest that the recent reluctance to issue the writ is resulting in fewer applications for it. In 2004, the Court received sixty-two petitions for supervisory control; in 2005 that dropped to forty-four; and in 2006, only thirty-three petitions were filed, barely half of the number filed just two years earlier.

In 2007, the Court took a long-overdue step that should further eliminate some of the recurring difficulties it has had in applying a consistent standard for the writ of supervisory control since its creation 107 years ago in Whiteside. In a major revision of the Montana Rules of Appellate Procedure that took effect October 1, 2007, the Court for the first time codified the Whiteside test for supervisory control, as well as clarified the other uses of the writ. The Court also clarified its different types of original jurisdiction, clearing up much of the confusion created in the 1980s and 1990s by Greely and Racicot II, and which Plumb and Preston only partially addressed.

Before these new rules were adopted, Rule 17 of the former Montana Rules of Appellate Procedure lumped supervisory control jurisdiction in with original jurisdiction to issue the traditional common law writs, such as habeas and mandamus. Rule 17, which was originally adopted in 1965, generally stated:

The institution of such original proceedings in the supreme court is sometimes justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making due consideration in the trial courts and due appeal to this court an inadequate remedy, or when supervision of a trial court other than by appeal is deemed necessary or proper.

433. Id. at 14(2), (4).
Rule 17 provided no further guidance, much less a specific test for exercising supervisory control.

Rule 14 of the new rules, however, corrects those shortcomings. In separate subsections, it explains the criteria for issuing both the traditional extraordinary writs and the writ of supervisory control. It also contains a separate subsection addressing the Court's original jurisdiction over declaratory judgment actions that codifies the Greely test. The provision of the rule setting forth the standards for supervisory control states:

(3) Supervisory control. The supreme court has supervisory control over all other courts and may, on a case-by-case basis, supervise another court by way of a writ of supervisory control. Supervisory control is an extraordinary remedy and is sometimes justified when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and when one or more of the following circumstances exist:

a. The other court is proceeding under a mistake of law and is causing a gross injustice;

b. Constitutional issues of state-wide importance are involved;

c. The other court has granted or denied a motion for substitution of a judge in a criminal case.

In comments to the proposed rule, the Court stated that it was intended to codify the Court's decision in Plumb as clarified by Preston, and omitted any mention whatsoever of Whiteside. However, as the wording makes clear, subsection (3)(a) actually pays tribute to Chief Justice Brantly's landmark opinion creating the writ, which Preston did as well. In Whiteside, Brantly held the writ was to be used in "exigent" cases in which lower courts "by a mistake of law . . . are doing a gross injustice, and there is no appeal, or the remedy by appeal is inadequate." Rule 14(3)(a) adopts each of those criteria. The return to the writ's origins is further shown by a significant wording change between the proposed rule and the adopted rule. In the rule as initially proposed, (3)(a) required that the lower court's mistake of law cause only a "significant injustice." After receiving comments, at least one of which urged the Court to substitute the phrase "gross injus-

436. Order, supra n. 11, at 38 (explaining "the requirements for supervisory control include the expanded criteria which the Court adopted in Plumb v. Fourth Judicial District Court . . . while retaining the requirements of emergency factors, inadequate remedy of appeal, and purely legal questions (see Preston v. Eighteenth Judicial Dist. Ct. . . . for further illumination of Plumb)" (emphasis deleted; citations omitted)).
438. Order, supra n. 11, at 36.
tice,"439 the Court amended the proposed rule by substituting that original wording, which Brantly had first used in Whiteside.

Although the new rule clarifies the criteria, the Court's comment to the proposed rule actually muddies the waters for two reasons. First, by stating that "the requirements for supervisory control include the expanded criteria which the Court adopted in Plumb,"440 the Court again missed an opportunity to explain the confusion created by its flawed Racicot II opinion and Plumb's ineffectual effort to reconcile Racicot II and Whiteside.441 That confusion is mitigated somewhat by the Court's citation to Preston "for further illumination of Plumb,"442 but could have been avoided altogether by simply not mentioning Plumb. The second potential source of confusion in the Court's comments concerns the cases it lists—with apparent disapproval—in which it had "cited other reasons [than those in the proposed rule] for granting supervisory control, such as judicial economy, clarification of the law, and irreparable harm."443 The implication certainly seems to be that those reasons will no longer suffice, and that those cases are no longer good law. Yet, as Preston clearly stated, both it and Plumb were cases in which supervisory control was granted primarily to prevent needless litigation: "Our recent decision in Plumb sanctions the exercise of supervisory control in order to prevent a litigant from being placed at a significant disadvantage and to prevent unwarranted expenses and delays in the ultimate resolution of the litigation."444

This confusion in the comments concerning Plumb's "expanded criteria" for supervisory control apparently results from Rule 14(3)(b)'s codification of the use of supervisory control in Greely to control lower court litigation, even when no mistake of law exists, as long as the litigation concerns constitutional issues of major statewide significance.445 As noted previously, that application of supervisory control ignored all previous supervisory control cases, and also was unnecessary because the Court had

439. The author's written comments to the Court suggested returning to the original "gross injustice" standard to avoid the suggestion that Whiteside and its progeny were no longer valid authorities. Ltr. from Larry Howell, Asst. Prof. U. Mont. Sch. of L., to Karla Gray, Chief Justice, Mont. Sup. Ct., Comments on Proposed Rules 3 (Apr. 13, 2007) (original at Montana Supreme Court Clerk's Office and copy on file with author).

440. Order, supra n. 11, at 38.
441. See supra nn. 400–11.
442. Order, supra n. 11, at 38.
443. Id. at 39.
recognized its ability to exercise original jurisdiction over cases of statewide importance through its power to hear and decide declaratory judgment actions. But even if that type of case is an appropriate exercise of supervisory control, the new rule should at least cite the original case for that proposition, Greely, rather than the confusing Plumb decision.

As for the confusion in the comments concerning whether preventing needless litigation is a legitimate purpose of supervisory control, the Court will undoubtedly continue to struggle with that issue from time to time, just as it has for decades. But as it considers those cases, it should bear in mind that not only did Plumb and Preston both sanction the writ primarily to prevent needless litigation, but that delegates to the 1972 Constitutional Convention were also urged to retain the writ for that specific use. Fortunately, the confusion created by the comments should be minimal in the long run, as they only accompanied the proposed rules and are not part of the rules as adopted.

Finally, the new rule adds another purpose for supervisory control—to review motions to disqualify judges in criminal cases—to "better protect the accused's constitutional right to a speedy trial."

Through its new rule—as opposed to the comments—the Court has provided a degree of clarity and guidance about its power to control litigation in lower courts that had long been missing. While retaining the unlimited power to decide supervisory control petitions on a case-by-case basis, the Court has provided notice that it intends, once again, to issue the writ only when, as Whiteside stated 107 years ago, "denial of a speedy remedy would be tantamount to a denial of justice."

VIII. An Act of Remarkable Foresight

It is fitting that the Montana Supreme Court's writ of supervisory control had its origins in the power of superintending control exercised by the court of King's Bench, because the legal problem it was intended to solve (as opposed to the political problem of corruption) also began there. The Court's new writ was intended

446. See supra nn. 386–90.  
447. Montana Constitutional Convention, supra n. 34, at vol. III, 1040.  
449. Order, supra n. 11, at 39.  
to address perhaps the most difficult issue in appellate procedure: whether and how to allow immediate review of important interlocutory lower court rulings when fairness and justice mandate, even though the black-letter final judgment rule prohibits "piecemeal adjudication" of non-final orders and judgments.\(^4\) By the late 1900s, the harshness of the final judgment rule had led numerous experts in appellate procedure to call for some method of discretionary, case-by-case appellate review of crucial interlocutory rulings.\(^5\) Yet almost a century before, the Montana Supreme Court had invented an effective method to accomplish just that.

The final judgment rule, considered the "dominant rule of appellate procedure in both federal and state courts," prevents a party from appealing to a higher court until the lower court has issued a final judgment.\(^6\) A final judgment is just that, one that "ends litigation on the merits and leaves nothing for the court to do but execute the judgment."\(^7\) This well-known rule "originated in the English writ of error, a process by which the King's Bench could correct erroneous judgments rendered by lower common law courts."\(^8\) Because only one record of proceedings in the lower court existed, the court of King's Bench could not review the proceedings until it physically had the record, which could only occur after the lower court had decided the case.\(^9\) The principle behind the final judgment rule is one of efficient use of resources:

A single appeal which consolidates all issues is more economical in that it prevents "piecemeal adjudication" of intermediate orders. It prevents potential harassment of opponents; reduces costs to the parties and the courts; prevents delay in the trial courts; and reduces congestion in appellate courts.\(^10\)

However, the final judgment rule's rigidity created a significant problem in many cases, because "some types of orders so affect a party's right to an orderly and correct resolution of the litigation that a right should be afforded to correct them by immediate appeal."\(^11\) Calling these competing interests one of the "intrinsic difficulties"\(^12\) of appellate procedure, Dean Pound

\(^{452}\) See infra nn. 463-69.
\(^{455}\) Martineau, *Modern Appellate Practice*, supra n. 94, at 49.
\(^{456}\) Id. (citation omitted).
\(^{457}\) Id. at 48 (citations omitted).
\(^{459}\) Pound, *supra* n. 26, at 28.
summed up the tension between the final judgment rule and the need for immediate review of some rulings this way:

On the one hand, this involves delay and hence the general tendency has been to limit appeals to review of final judgments. But, on the other hand, this limitation may involve depriving a litigant of important rights, or else sending the case back after trial and final judgment and causing even worse delay or waste of the first trial.\textsuperscript{460}

Courts have long struggled with this tension, often creating classes of orders that were immediately appealable as exceptions to the final judgment rule “to avoid arbitrary harshness in particular cases.”\textsuperscript{461} But these exceptions have become so common that “[t]he rule no longer provides either efficiency or certainty, and it has become increasingly difficult to discern what the final judgment rule stands for in modern appellate practice.”\textsuperscript{462}

Pound was one of the earlier commentators to advocate that appellate courts adopt a method of discretionary judicial review allowing them to choose, on a case-by-case basis, which interlocutory rulings merited immediate review. After reviewing how several states had created standing exceptions to the final judgment rule, Pound noted in 1941 that all of them had been controversial and of questionable effectiveness. “It would seem better to make interlocutory appeals depend upon discretion of the appellate court exercised in view of each case . . . .”\textsuperscript{463}

In 1977, the American Bar Association entered the discussion, elaborating on Pound’s call for discretionary review on a case-by-case basis. In its \textit{Standards Relating to Appellate Courts}, the ABA Commission on Standards of Judicial Administration promulgated model guidelines for appellate procedure. Standard 3.12 addressed what orders were appealable:

\begin{enumerate}
\item 3.12 Appealable Judgments and Orders.
\end{enumerate}

\textsuperscript{460} \textit{Id.} at 30.

\textsuperscript{461} Martineau, \textit{Modern Appellate Practice}, supra n. 94, at 48.

\textsuperscript{462} \textit{Id.} In federal courts, the expansion and constriction of the collateral order doctrine illustrates the struggle to find a balance between finality and fairness. Created by the U.S. Supreme Court in 1949, the doctrine allowed the appeal of a “small class” of orders that concerned “important and unsettled questions of law, separate from the merits, the erroneous determination of which could cause irreparable harm” to the appealing party. \textit{Id.} at 55. However, the doctrine soon “became a frequent device of courts of appeals to avoid the strictures of the final judgment rule.” Robert J. Martineau, \textit{Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution}, 54 U. Pitt. L. Rev. 717, 740 (1993) [hereinafter Martineau, \textit{Defining Finality}]. As a result, the Supreme Court began imposing “severe limitations” on the doctrine in the late 1970s and 1980s. \textit{Id.} at 742.

\textsuperscript{463} Pound, supra n. 26, at 350.
(a) Final Judgment. Appellate review ordinarily should be available only upon the rendition of final judgment in the court from which appeal or application for review is taken.

(b) Interlocutory Review. Orders other than final judgments ordinarily should be subject to immediate appellate review only at the discretion of the reviewing court where it determines that resolution of the questions of law on which the order is based will:

1. Materially advance the termination of the litigation or clarify further proceedings therein;
2. Protect a party from substantial and irreparable injury;
or
3. Clarify an issue of general importance in the administration of justice.\footnote{464}

Echoing Pound, the commentary to Standard 3.12 criticizes the approach in some courts that allowed appeal from certain designated types of interlocutory rulings because those designations "inevitably include orders which in some cases do not have important immediate effects, but are appealable nevertheless, and exclude orders which in particular circumstances ought to be subject to immediate review but are not."\footnote{465} Instead, Standard 3.12 chose what it labeled a "more satisfactory approach," allowing interlocutory review of any ruling that fit into one of the three categories in subsection (b).\footnote{466} In 1994, the ABA included Standard 3.12 without change in its most recent Standards Relating to Appellate Courts.\footnote{467}

Toward the end of the twentieth century, more legal commentators began weighing in, calling for discretionary review. Urging other states to follow the lead of Wisconsin, which had adopted Standard 3.12, one appellate expert noted:

The discretionary appeal . . . provides the relief valve in those cases in which strict adherence to the final judgment rule would not serve the best interests of the parties or the public, but with an individualized balancing of interests made on a case by case basis. Just as important, jurisdiction of the appellate court is never an issue, because the court has discretionary jurisdiction over any interlocutory order.\footnote{468}

\footnote{464. ABA Appellate Standards 1977, supra n. 27, at 25 (emphasis added).}
\footnote{465. Id. at 26. Montana does also allow immediate appeal of a few types of pretrial rulings that would make no sense to wait to appeal after a final judgment had been entered, such as rulings granting or denying preliminary injunctions or class certification, as well as important early rulings in probate cases, such as appointment of a personal representative or determination of the validity of a will. See Mont. R. App. P. 6(3), (4).}
\footnote{466. ABA Appellate Standards 1977, supra n. 27, at 25.}
\footnote{467. ABA Appellate Standards 1994, supra n. 458, at 30–31.}
\footnote{468. Martineau, Defining Finality, supra n. 462, at 777.}
Subsequently, two other commentators wrote:

[W]e recommend the adoption of a new rule that would create a right to request interlocutory review of any non-final order, but would vest the appellate courts with discretion to decide which cases it will actually hear. In our view, a discretionary review provision is not only more honest, but is less likely to result in too many or too few additional appeals.\(^{(469)}\)

No legal commentator seems to have discovered that the Montana Supreme Court not only created an effective method of discretionary review to address the experts' widely shared concerns, but did so in 1900, four decades before even Roscoe Pound had publicly recognized the need.\(^{(470)}\) If one compares the language of Standard 3.12 with the original test for supervisory control, as well as the permutations of the test applied by the Court over the years, it becomes clear that creation of Montana's unique writ was an act of remarkable judicial foresight.

The original purpose of the writ as set out in Whiteside—to correct legal mistakes that resulted in a gross injustice that could not be remedied by appeal\(^{(471)}\)—is substantially the same as the purpose of subsection (b)(2) of Standard 3.12—to protect a party from "substantial and irreparable injury."\(^{(472)}\) As noted in Part V above, within a few years of creating the writ, the Court had also begun using it to prevent needless litigation, which is just another way of stating the purpose set forth in subsection (b)(1) of Standard 3.12, to "advance the termination of the litigation or clarify further proceedings."\(^{(473)}\) Finally, as discussed in Part VII, the Court also began using this same method of discretionary review over lower courts in cases concerning matters of statewide importance, which is virtually identical to Standard 3.12(b)(3)'s authori-


\(^{(470)}\) In 1977, the commentary to Standard 3.12 did acknowledge that some appellate courts use extraordinary writs to accomplish discretionary review, but was not referring to Montana as it only identified the writs of mandamus and prohibition as being used for that purpose. *ABA Appellate Standards 1977*, supra n. 27, at 28.


\(^{(472)}\) *ABA Appellate Standards 1977*, supra n. 27, at 25.

\(^{(473)}\) *Id.*
zation of discretionary review to clarify issues "of general importance in the administration of justice." 474

In other words, Montana's writ of supervisory control, created during the legal and political crises brought on by the War of the Copper Kings, serves all the purposes of discretionary appellate review that the nation's leading experts think are important today. No wonder Chief Justice Theodore Brantly was considered by his peers to be the John Marshall of Montana. 475

IX. Conclusion

Fifty years ago Hugh R. Adair, then chief justice of the Montana Supreme Court and the most strident critic of the Court's decision in Whiteside, belittled the writ of supervisory control as "purely the creature of the inventive genius of the court." 476 While Adair was wrong in his assessment of the writ's legitimacy, he was correct in his description of the writ's genesis. It was an act of "inventive genius," Chief Justice Theodore Brantly's genius in particular. That genius is all the more remarkable when one considers the tremendous pressures being exerted at the time on state government in general and the judiciary in particular. As one of Brantly's contemporaries noted upon his death, those pressures "rocked the very foundations of society, and brought to the courts many questions of grave concern." 477 Historians have described the era as "perhaps the most turbulent period in the entire political history" of Montana. 478

Yet even though the Montana Supreme Court invented the writ of supervisory control under and in response to great political and social pressures, the writ has stood the test of time, as shown most recently by its codification in Montana's new rules of appellate procedure. The hundred-plus years since the Court issued the Whiteside decision on Christmas Eve in 1900 have proven Chief Justice Adair's words, but not his meaning, true. Instead, it was another chief justice, Llewellyn L. Callaway, who accurately assessed Brantly's creation:

[When the time came in our judicial history that wrong defeated justice because under the device of ancient remedies the law seemed

474. Id.
475. See In Memoriam, supra n. 104, at vii, xxiii.
477. In Memoriam, supra n. 104, at xvii.
478. Malone & Roeder, supra n. 16, at 159.
without remedy, in harmony with the maxim that "for every wrong there is a remedy,” the Chief Justice declared the Constitution of Montana warrants the issuance of a writ of supervisory control. The impact of this decision upon litigation was, and has continued to be, tremendous in this state. Used within proper limitations this extraordinary writ has been a great step forward in the administration of justice.\textsuperscript{479}

\footnote{479. Callaway, \textit{supra} n. 203, at 45.}