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REICHERT v. STATE EX REL. MCCULLOCH AND THE OPEN DOOR FOR INCREASED PRE-ELECTION SUBSTANTIVE JUDICIAL REVIEW

Carina Wilmot*

I. Introduction

In *Reichert v. State ex rel. McCulloch*,[1] the Montana Supreme Court addressed the constitutionality of a legislative referendum proposing changes to the qualification and selection of Montana Supreme Court justices. In reviewing the referendum, the Court focused on the threshold issues of ripeness and recusal before addressing its constitutionality.[2] *Reichert* highlights the complexity of ripeness as a threshold question and clarifies when and how the Court conducts pre-election judicial review.

This note focuses only on the procedural holding of ripeness, from which Justice Baker dissented. This note does not analyze judicial recusal or the constitutionality or severability of the referendum provisions in question. The focus of this note is on the analysis of the strengths and limitations of the *Reichert* opinion, arguing that the Court confuses pre-election judicial review of substantive challenges with pre-election review of procedural and legal sufficiency challenges. The note discusses how the Court treats these three types of review in the same manner and, in so doing, contravenes current statutory requirements. Ultimately, this note proposes a new framework to distinguish between procedural, legal sufficiency, and substantive reviews and when they should occur, which would both clarify the Court's role and enable the Court to follow the current statutes.

Section II discusses *Reichert*'s facts and background. Section III explains the Court's holding and discusses the dissent. Section IV provides a brief overview of related law on ripeness, Montana's legislative processes, defective proposed laws, and the applicability of judicial review. Section V analyzes the Court's holding on ripeness and pre-election judicial review in Montana. Section V also looks at *Reichert*'s impact on future ripeness challenges, pre-election judicial review, and legislative considerations and suggests an alternative framework for analyzing ballot issues brought before

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1. *Reichert v. State ex rel. McCulloch*, 278 P.3d 455 (Mont. 2012).
2. *Id.* at 462–463.

the Court. Section VI concludes the note by explaining how premature adjudication of substantive issues within a referendum could be avoided and thereby remain consistent with Montana's current statutes on referenda and substantive review.

II. Factual Background

In 2011, the Montana Legislature passed Senate Bill 268, submitting to the electorate proposed revisions to Montana Code Annotated §§ 3–2–101 and 102 in regards to Montana Supreme Court justice residency requirements and elections.[3] The bill was to be submitted to voters on June 5, 2012, as a special election on Legislative Referendum No. 119 ("LR–119").[4] LR–119 proposed to change the qualification and selection of Montana Supreme Court justices by requiring the justices to be qualified electors of the state and requiring the justices to reside in a particular district from which they would run for election.[5] The proposal also included a provision that the justices select the chief justice from amongst themselves.[6]

A group of citizens filed suit against the state of Montana seeking a declaratory judgment that LR–119 was constitutionally defective.[7] The plaintiffs requested the court to decertify LR–119, thereby preventing it from being placed on the ballot.[8] The State argued the referendum was constitutional and that the issue was not ripe for adjudication.[9] Seven Montana legislators ("Legislators") sought to intervene on behalf of the State but were denied.[10] The district court granted summary judgment to the plaintiffs on March 20, 2012, concluding that: (1) the issue was ripe for judgment; (2) LR–119 was unconstitutional on its face because it attempted to change constitutional qualifications for Supreme Court justices and intro-

3. Appellees' Response Br., *Reichert v. State ex rel. McCulloch*, 2012 WL 1431734 at *2 (No. DA 12-0187, 278 P.3d 455 (Apr. 10, 2012)). The Montana Constitution provides for the qualification and selection of state Supreme Court justices. Mont. Const. art. VII, §§ 8, 9. Although district court judges are required to reside in their districts, Supreme Court justices are merely required to be residents of Montana for two years before taking office. Mont. Const. art. VII, § 9(1). Jurisdiction of the Montana Supreme Court extends to all parts of the state. Mont. Const. art. VII, § 2(4). Justices are voted on in statewide elections. Mont. Code Ann. § 3–2–101 (2011).

4. *Reichert*, 278 P.3d at 458.

5. *Id*. at 459.

6. *Id*.

7. *Id.* (The suit was filed against the state of Montana, by and through Secretary of State Linda McCulloch).

8. *Id.*

9. *Id*. (the district court denied the Legislators' motion to intervene; the Montana Supreme Court dismissed an appeal of that decision; and the Montana Supreme Court denied an additional petition for writ of supervisory control).

10. *Reichert*, 278 P.3d at 459.

duced an unconstitutional residency requirement; and (3) the unconstitutional provision could not be severed from the remainder of LR–119.[11]

On April 4, 2012, the State requested an expedited appeal.[12] The State explained if the Court were to reverse the district court's order, a supplemental ballot would need to be ready for mailing to voters by April 20 to comply with state and federal deadlines for the upcoming primaries.[13] The Court expedited the briefing and invited the Legislators to file an amicus brief.[14] The Legislators filed an amicus brief, arguing that the issue was not ripe for adjudication and that the Montana Code of Judicial Conduct indicates that all non-retiring justices of the State Supreme Court should recuse themselves.[15]

III. Holding and Dissent

In a majority opinion written by Justice Nelson, the Court first considered the threshold issues of recusal and ripeness before turning to the substantive issues of LR–119's constitutionality and the severability of a provision on the referendum.[16] The Court held recusal was not required by either due process or the Montana Code of Judicial Conduct.[17] The Court next determined the issue was ripe for decision because it was an issue of law and that it was not necessary to wait for a vote on the referendum because the hardship to the parties of withholding consideration of the issues would be great.[18] Substantively, the Court held that a provision in the referendum was an unconstitutional amendment to the State Constitution and the constitutionally infirm provision was not severable.[19]

Justice Baker concurred with the majority that recusal of justices was not required but, as the only dissenter, argued the substantive issues in the case were not ripe for adjudication.[20] She did not comment on the constitutionality of LR–119 or its severability, stating it would only be necessary to consider those issues if the referendum passed and became law.[21] Justice Baker argued although pre-election challenges have been sparingly considered by the Court, they were only considered on issues that could be reme-

11. *Id.* at 460.
12. *Id.* at 461.
13. *Id.*
14. *Id.*
15. Amicus Br. of Seven Mont. Legislators, *Reichert v. State ex rel. McCulloch*, 2012 WL 1431731 at **1–2 (No. DA 12-0187, 278 P.3d 455 (Apr. 10, 2012)).
16. *Reichert*, 278 P.3d at 462.
17. *Id.* at 471.
18. *Id.* at 474.
19. *Id.* at 481, 482–483.
20. *Id.* at 483–484 (Baker, J., concurring in part and dissenting in part).
21. *Id.* at 485.

died solely with another election.[22] Justice Baker stated the Court was relying on repealed statutory authority and that this authority has been replaced with § 13–27–316(6), which reserves the right to challenge a constitutional defect within a proposed ballot measure only after it has been "approved by a vote of the people."[23] Finally, she asserted if the election were to move forward and the referendum did not pass, there would be no constitutional issues to consider.[24]

IV. Discussion of Law Prior to *Reichert v. State ex rel. McCulloch*

A. Ripeness

In order for Montana's courts to have the power to consider a case, the controversy needs to be justiciable.[25] The concept of justiciability includes the ripeness doctrine, which has its own set of substantive rules.[26] Ripeness analysis weighs the fitness of the issues and the hardship to the parties if review is withheld.[27] "Ripeness is concerned with whether the suit is being brought at the proper time."[28] A case is considered ripe when it presents an "actual, present" controversy that is not a hypothetical or speculative dispute.[29] Courts' decisions are seen as advisory opinions when they are based on an abstract or hypothetical question.[30]

The United States Supreme Court has stated advisory opinions violate the separation of powers as prescribed by the U.S. Constitution.[31] However, if a law is passed and its substantive constitutionality is challenged, citizens may not be certain about the statute's legality and how to change their behavior in accordance with the statute.[32] In an effort to mitigate citizen uncertainty, courts may then offer advisory opinions and accelerated judicial review.[33]

In Montana, there is a well-developed body of law concerning ripeness challenges to referenda and initiatives. The Montana Supreme Court has

22. *Reichert*, 278 P.3d at 484.

23. *Id*. (citing Mont. Code. Ann. § 13–27–316).

24. *Id.*

25. *Id.* (majority).

26. *Id.* at 472.

27. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–149 (1967).

28. *Tex. v. U.S.*, 497 F.3d 491, 496 (5th Cir. 2007).

29. *Mont. Power Co. v. Mont. Pub. Serv. Commn.*, 26 P.3d 91, 95 (Mont. 2001).

30. *Plan Helena, Inc. v. Helena Regl. Airport Auth. Bd.*, 226 P.3d 567, 569 (Mont. 2010) (citing *Chovanak v. Matthews*, 188 P.2d 582, 584–585 (Mont. 1948)).

31. *Flast v. Cohen*, 392 U.S. 83, 96–97 (1968).

32. Michael A. Bamberger, *Reckless Legislation*: *How Lawmakers Ignore the Constitution* 168 (Rutgers U. Press 2000).

33. *Id.* at 168–169.

held that pre-election review by justices "should not be routinely granted."[34] Interference by the Court via pre-election judicial review is only deemed acceptable when it is absolutely essential.[35] The Montana Supreme Court periodically engages in substantive pre-election judicial review of referenda,[36] although that type of review is not practiced by a majority of state supreme courts.[37]

In pre-election review, there is no presumption of constitutional validity for proposed statutes.[38] Pre-election review can also occur when the case involves a "substantive constitutional defect" or where the proposal is unconstitutional on its face.[39] Up until 2010, the Montana Supreme Court has primarily conducted pre-election judicial review on challenges to procedural errors without having to decide substantive issues in the content of proposed ballot measures.[40]

B. Montana's Legislative Processes, Defective Proposed Laws, and Applicability of Judicial Review

1. Bills, Initiatives, and Referenda

A bill is a proposed statute developed by a legislative body.[41] When a bill is drafted by various persons and groups, it is sent to the Legislative Services Division ("LSD"), an independent agency containing the Legal Services Office.[42] The LSD reviews the proposed bill to ensure that it complies "with the state and federal constitutions" and that it does "not conflict with or duplicate existing law."[43] The LSD also conducts its review on proposed bills for conformity with the *Bill Drafting Manual* and makes re-

34. *Harper v Greely*, 763 P.2d 650, 656 (Mont. 1988) (citing *State ex rel. Boese v. Waltermire*, 730 P.2d 375, 378 (Mont. 1986)).

35. *State ex rel. Mont. Citizens for Preservation of Citizens' Rights v. Waltermire*, 729 P.2d 1283, 1285 (Mont. 1986).

36. *See e.g. Cobb v. State*, 924 P.2d 268 (Mont. 1996); *Nicholson v. Cooney*, 877 P.2d 486 (Mont. 1994); *Burgan & Livingstone v. Murray*, 354 P.2d 552 (Mont. 1960); *Walker v. State*, 137 P.2d 663 (Mont. 1943).

37. James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referenda*, 64 Notre Dame L. Rev. 298, 304 (1989).

38. *Ravalli Co. v. Erickson*, 85 P.3d 772, 775 (Mont. 2004).

39. *Cobb*, 924 P.2d at 311.

40. Anthony Johnstone, *The Constitutional Initiative in Montana*, 71 Mont. L. Rev. 325, 356–357 (2010).

41. *See e.g. Montana Bill Drafting Manual* 1 (Mont. Legis. Servs. Div. 2012), available at http://leg.mt.gov/content/Publications/2012%20bill%20drafting%20manual.pdf (accessed Apr. 7, 2013).

42. *Id.*

43. Montana Legislature, *Legislative Services Division*, http://leg.mt.gov/css/Services%20Division/default.asp (accessed Apr. 7, 2013); Montana Legislature, *Bill Drafting Process for Legislators*, http://leg.mt.gov/css/Bills/bill-drafting-guide.asp (accessed Apr. 7, 2013).

vision recommendations.[44] However, there is no requirement that the legislature must follow the substantive recommendations of the LSD.[45] There are no additional procedures in the legislature, the executive, or the judiciary for determining facially unconstitutional bills or reviewing the substantive content of proposed bills.[46]

An initiative is a proposal by the people to make new law or amend the state constitution that goes into effect after an affirmative vote by the people.[47] The Montana Constitution provides for both "initiatives" and "constitutional initiatives."[48] The Montana Legislature proposed a general initiative and referendum amendment in 1906, which was passed by a wide margin when presented to the people.[49] The right of a constitutional initiative was added 66 years later to the Montana Constitution at the 1972 Constitutional Convention.[50]

The Montana Constitution is unique in that it allows the people of Montana to change its laws via referenda.[51] The referendum process allows Montanans to exercise their state constitutional rights of popular sovereignty and self-government when they vote on issues.[52] There are three types of referenda: (1) "legislative referenda" proposed by the legislature for changes or additions to existing statutes; (2) "constitutional referenda" proposed by the legislature for changes or additions to the state constitution; and (3) "initiated referenda" proposed by the people to reject or amend previously enacted statutes.[53] The referendum in *Reichert* was submitted as a legislative referendum to propose changes to existing statutes.[54]

There are three ways in which the Montana Constitution may be amended: (1) through legislative referenda; (2) through a further constitutional convention; or (3) by initiative.[55] A proposed constitutional amendment referendum must receive an affirmative vote of two-thirds of the legislature before it is referred to the people.[56] As a Senate bill, LR–119 did not receive a two-thirds vote by either the Senate or the House and would not

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44. *Id.*

45. *Bill Drafting Process for Legislators*, *supra* n. 43.

46. *Id.*

47. Lisa Mecklenberg Jackson, *Researching Initiatives and Referenda: A Guide for Big Sky Country-Montana*, 26:3-4 Legal Reference Services Quarterly 177, 178 (2008).

48. Mont. Const. art. III, § 4; Mont. Const. art. XIV, § 9.

49. M. Dane Waters, *Initiative and Referendum Almanac* 266 (Carolina Academic Press 2003).

50. *Id.*

51. Amicus Br. of Seven Mont. Legislators, *supra* n. 15, at *8; Mont. Const. art. III, § 5.

52. *Harper*, 763 P.2d at 655.

53. Mont. Const. art. III, § 5; Mont. Const. art. XIV, § 8.

54. Appellees' Response Br., *supra* n. 3, at *2.

55. Mont. Const. art. XIV, § 8; Mont. Const. art. XIV, § 1; Mont. Const. art. XIV, § 9.

56. Mont. Const. art. XIV, § 8.

have qualified as a constitutional referendum had it been so presented.[57] This may explain why LR–119 was presented as a statutory revision as opposed to a bona fide constitutional amendment.

2. Potential Defects in Ballot Issues

The Montana Supreme Court has grouped potential defects into two arenas: procedural and substantive. After drafting, initiatives and referenda go through one non-binding LSD review for conformity with the *Bill Drafting Manual*, including review for procedural and legal sufficiency issues.[58] The procedural review includes formatting concerns, sufficiency of signatures, and procedural limitations set forth by statute.[59] The legal sufficiency review, defined by statute, involves review for issues such as improper appropriations, multiple subjects, conflicts with other ballot issues being brought at the same time, and other constitutional restrictions on initiatives.[60]

In addition, initiatives and referenda must also meet the requirements of Montana Code Annotated § 13–27–312, which includes a final review for "legal sufficiency" by the Attorney General's office.[61] If the ballot issue is found to be legally deficient, the proponent has a cause of action to challenge the decision within 10 days of the determination.[62] If the ballot issue is approved for legal sufficiency, the opponents have a cause of action to challenge the decision within 10 days after certification is given to the Governor that the petition is properly filed.[63] However, the Attorney General's review for legal sufficiency of a proposed issue states that "[r]eview of the petition for legal sufficiency does not include consideration of the substantive legality of the issue if approved by the voters."[64]

3. Types of Judicial Review

There are four types of judicial review differentiated by statute: two for pre-election review and two for post-election review. Pre-election judi-

57. Mont. Sen. Bill 268, *Referendum to Require Election of Supreme Court Justices from Districts*, 62d Legis., 2011 Reg. Sess., available at http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20111&P_BLTP_BILL_TYP_CD=SB&P_BILL_NO=268&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ= (accessed Apr. 7, 2013).

58. Mont. Code Ann. § 13–27–202(2)(a); Mont. Code Ann. § 5–11–112; *Bill Drafting Process for Legislators*, *supra* n. 43.

59. Mont. Code Ann. § 5–11–112; *Bill Drafting Process for Legislators*, *supra* n. 43; Mont. Code Ann. § 13–27–103; Mont. Code Ann. § 5–4–102 (limiting the title of a bill to no more than 100 words).

60. Mont. Code Ann. § 13–27–312; Mont. Const. art. V, § 11(3); Mont. Const. art. III, § 4.

61. Mont. Code Ann. § 13–27–202(4); Mont. Code Ann. § 13–27–312.

62. Mont. Code Ann. § 13–27–316(1).

63. Mont. Code Ann. § 13–27–316(2).

64. Mont. Code Ann. § 13–27–312(7).

cial review is prescribed for challenges to sufficiency of the form of the petition, the initiative's process to get to ballot, and form of the petition.[65] Review of the sufficiency of a petition is conducted pre-election and is not allowed to be challenged after an election is held.[66] The legislature has also prescribed—and the Court has accepted jurisdiction over—pre-election review of initiatives challenged for procedural legal sufficiency stemming from the Attorney General's legal sufficiency determination.[67] Montana Code Annotated § 13–27–316(3) allows post-election challenges to legal sufficiency and to the substance of an enacted law.[68] To avoid unnecessary harm when these challenges are made post-election, an injunction may be granted.[69]

A few pre-*Reichert* challenges to the substance of a referendum highlight how the Court has handled pre-election review since Montanans ratified the 1972 Constitution. Following adoption of the 1972 Constitution, *Cobb v. State*[70] was the first case where the Court found that a constitutional referendum warranted pre-election substantive judicial review.[71] The constitutional referendum at issue in *Cobb* sought to eliminate the office of the Montana Secretary of State.[72] The referendum delegated duties of the Secretary of State to other state offices but left one duty identified in the 1972 Constitution unassigned.[73] The Court found the one unassigned duty would leave a "substantive constitutional defect" that could only be cured by another election, and the proposed referendum was therefore held unconstitutional.[74]

Pre-election judicial review of the substance of a legislative referendum was also found ripe for decision in *Nicholson v. Cooney*.[75] The referendum at issue was an income tax measure to raise minimum corporate taxes. Plaintiffs challenged the referendum by asserting that Article VIII, section 9 of the Montana Constitution limits the people to make appropriations that will exceed anticipated revenue.[76] The Court found the limit did not apply to the people who would be making the appropriation via a refer-

65. Mont. Code Ann. § 13–27–317.

66. Mont. Const. art. III, § 4(3).

67. Mont. Code Ann. § 13–27–316(3); *see State ex rel. Livingston v. Murray*, 354 P.2d 552, 553–554 (Mont. 1960).

68. Mont. Code Ann. § 27–8–201.

69. Mont. Code Ann. § 27–19–201.

70. *Cobb*, 924 P.2d 268.

71. *Id.* at 270–271.

72. *Id.* at 268.

73. *Id.* at 270.

74. *Id.*

75. *Nicholson*, 877 P.2d 486.

76. *Id.* at 490–491 (citing Mont. Const. art. VIII, § 9).

endum but rather to the legislature.[77] The Court held the referendum was not unconstitutional on its face.[78]

The Court also rejected a substantive challenge to an initiative in *State ex rel. Montana School Board Association v. Waltermire*.[79] At issue was a tax initiative to limit the establishment or increase of sales tax or personal income tax to those brought by legislative referendum and approved by a vote of the people.[80] Plaintiffs challenged the initiative by asserting it was in violation of Article XIV, section 11 of the Montana Constitution, which requires that initiatives present only one amendment in a single ballot measure.[81] The Court declined to consider whether the initiative was unconstitutional for addressing more than one subject.[82] The Court stated that considering ballot issues that were not unconstitutional on their face would be an "unjustified infringement" on the right of the people to present initiatives.[83] The Court further clarified that pre-election review may occur only when an initiative is unconstitutional on its face (for example, when it contradicts a constitutional provision).[84]

V. Analysis

Ripeness was a threshold issue for the *Reichert* Court. Plaintiff citizens challenged the substantive, not procedural, constitutionality of LR–119.[85] The issue of ripeness was raised by both the Legislators and the appellant.[86] The Legislators argued in their amicus brief that there was no substantial risk of significant irreparable harm in waiting to adjudicate the case until LR–119 was passed.[87] The State also wanted the Court to wait until after the referendum was voted on because the referendum might never become law, and there was not a specific statute vesting a Montana court with jurisdiction over legislative referenda.[88] The remainder of this note will analyze four issues: (A) whether the facts and circumstances rendered the case ripe; (B) the interplay between pre-election judicial review for bills, referenda, and initiatives; (C) what *Reichert* might mean for future

77. *Id.*
78. *Id.* at 487, 491.
79. *State ex rel. Mont. Sch. Bd. Assn. v Waltermire*, 729 P.2d 1297 (Mont. 1986).
80. *Id.* at 1298.
81. *Id.*
82. *Id*. at 1299–1300.
83. *Id*.
84. *Id*.
85. *Reichert*, 278 P.3d at 459.
86. *Id.*; Amicus Br. of Seven Mont. Legislators, *supra* n. 15, at *2.
87. Amicus Br. of Seven Mont. Legislators, *supra* n. 15, at **4–5.
88. Br. of Appellant, *Reichert v. State ex rel. McCulloch*, 2012 WL 1313628 at **7–10 (No. DA 12-0187, 278 P.3d 455 (Apr. 6, 2012)).

ripeness challenges and pre-election judicial review; and (D) a proposed framework the Court could rely on for determining when to hear challenges to ballot issues.

A. Ripeness

In *Reichert*, the Court conducted a ripeness analysis, weighing the fitness of the issues and the hardship to the parties if review were to be withheld.[89] The Court analyzed fitness according to whether the referendum was unconstitutional on its face and analyzed hardship by assessing the impact on the parties of deferring a decision.[90] The Court reviewed Montana case law and reaffirmed that a court has a duty to determine whether an initiative is unconstitutional on its face.[91] The Court clarified it had a "duty to exercise jurisdiction" when a challenged measure is facially defective.[92] In essence, the Court looked to the substance of a challenged measure as part of the process of assuming jurisdiction. Declaratory judgments related to ballot issues where there is a justiciable controversy give rise to jurisdiction.[93] Therefore, if the Court were to determine that a measure is facially unconstitutional, it would have jurisdiction. If the measure is not facially unconstitutional, the Court would not have jurisdiction.

The Court spent considerable time exploring the potential hardship to the parties if the decision were to be withheld. The majority effectively expanded the definition of "extraordinary" pre-election review to include considerations of time, energy and money in its hardship analysis.[94] The dissent argued in response that the hardship was insufficient to outweigh the people's right to vote, even though withholding consideration might make "the process tortuous and more costly than necessary."[95]

The dissent properly argued that the majority relied on a case decided on the basis of a repealed statute.[96] The majority opinion relied on a series of Montana decisions, but focused on the holding in *Cobb*, where the Court affirmed an injunction preventing a facially unconstitutional referendum from being placed on the ballot.[97] In *Cobb*, the Court looked at the substance of the referendum to determine its facial validity.[98] The dissent discussed the repealed statute on which *Cobb* was based and argued that, pur-

89. *Reichert*, 278 P.3d at 472.
90. *Id.*
91. *Id.* at 473–474.
92. *Id.*
93. *State Bar of Mont. v. Krivec*, 632 P.2d 707, 709 (Mont. 1981).
94. *Reichert*, 278 P.3d at 474.
95. *Id*. at 485 (Baker, J., concurring in part and dissenting in part).
96. *Id*. at 484.
97. *Id*. at 474 (majority) (citing *Cobb*, 924 P.2d at 270).
98. *Id*. at 484 (Baker, J., concurring in part and dissenting in part).

suant to the current statute, § 13–27–316(6), the legislature had preserved substantive constitutional challenges to referenda only after they have been voted on by the people.[99] The majority did not address the dissent's concern about *Cobb*'s reliance on a repealed statute, nor did the majority address the mandates of the current statute.

Section 13–27–316 provides the only statutory grounds for challenging a ballot measure's legal sufficiency determination prior to a vote by the people on the measure. The statute excludes review of the substantive legality, but preserves "the right to challenge a constitutional defect in the substance of an issue *approved by a vote of the people.*"[100] In conducting pre-election review of the substantive legality of LR–119, an issue outside the scope of the legal sufficiency challenge permitted by § 13–27–316, the Court acted contrary to the mandates of the statute.

The Court also did not adhere to the principle of the separation of powers of the state government into the legislative, executive, and judicial branches.[101] While the power of the judiciary is an "important safeguard against abuses of legislative and executive power,"[102] separation of powers argues against the Court assuming the power to review referenda that are not yet law.[103] In *Reichert*, the Court held the legislative branch created a referendum with unconstitutional elements.[104] The Montana Constitution does not require a legislative referendum be declared constitutional before it is submitted to the voters and ratified into law.[105] It is up to the Court, and no other branch of the tripartite system in Montana, to determine a law's constitutionality. However, the Court, in assuming the power to conduct pre-election review contrary to statute, is overstepping its role in the tripartite system.

The majority in *Reichert* may have offered accelerated judicial review, in part, to clear up citizens' potential uncertainty on how heavily to rely on passed laws. There is a presumption of constitutionality for fully enacted laws.[106] However, even if a law is effective immediately, Montana's in-

99. *Id.*

100. *Reichert*, 278 P.3d at 484; Mont. Code Ann. § 13–27–316 (emphasis added). *See also* Mont. Code Ann. § 13–27–312(7) ("Review of the petition for legal sufficiency does not include consideration of the substantive legality of the issue if approved by the voters.").

101. Mont. Const. art. III, § 1.

102. James C. Nelson, *Keeping Faith with the Vision: Interpreting a Constitution for This and Future Generations*, 71 Mont. L. Rev. 299, 307 (2010).

103. Amicus Br. of Seven Montana Legislators, *supra* n. 15, at *3.

104. *Reichert,* 278 P.3d at 478 (majority).

105. Mont. Const. art. XIV, § 9 (This section of the Constitution governs amendments to the Constitution by initiative, and there is no indication that the legislature is responsible for only submitting "substantively constitutional" initiatives.); Mont. Const. art. III, § 5 ("The people may approve or reject by referendum *any* act of the legislature except an appropriation of money." (emphasis added)).

106. *Davis v. Union Pac. R.R. Co.*, 937 P.2d 27, 31 (Mont. 1997).

junctive relief statutes provide a mechanism to enjoin enforcement of a law pending a constitutional challenge.[107] The Court may have been trying to maximize its power and flexibility by opening the door to increased pre-election judicial review. However, increased pre-election judicial review raises the issues of whether the judiciary is issuing advisory opinions and whether it is acting paternalistically by asserting itself between the legislature and the people, thereby limiting the ability of the people to have a voice in the direction they want the laws of their state to go.

B. The Interplay between Bills, Initiatives, and Referenda in Montana

Bills, initiatives, and referenda proposals in Montana are all required to go through legal sufficiency reviews.[108] The reviews are similar for all three types of proposals as they are all based on the requirements set forth in the Montana Legislature's *Bill Drafting Manual*.[109] Both initiatives and referenda go through a non-binding substantive review by the LSD.[110] One can argue that referenda should be treated more like bills and given greater deference in the form of a less-stringent substantive review because the legislature goes through an extensive drafting and review process in creating proposals. On the other hand, since referenda do not go into effect unless approved by a vote of the people and can be subject to direct judicial challenges, it can also be argued that referenda should continue to be treated similar to initiatives and subject to a more stringent review.

Even with two legal sufficiency reviews of initiatives and referenda done first by the LSD and second by the Attorney General's office, the Court has reviewed numerous ballot challenges for procedural insufficiency both pre-election and post-election.[111] Precedent makes clear that challenges to procedural sufficiency may not be questioned after an election.[112] "[C]hallenges to election procedures should be made before the election occurs."[113] Since election procedure cannot be questioned after an election occurs, substance of referenda should not be questioned before they become law. The substance of a petition should not be looked at pre-election, as the

107. Mont. Code Ann. §§ 27–19–101 et seq.

108. Mont. Code Ann. § 13–27–202; *Bill Drafting Process for Legislators*, *supra* n. 43.

109. Mont. Code Ann. § 13–27–202.

110. Mont. Code Ann. § 13–27–312(7) (referencing the binding review of the Attorney General's office). There are no statutes providing a cause of action based on LSD reviews, indicating that the LSD reviews are non-binding.

111. *See e.g. State ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984); *State ex rel. Mont. Citizens for Preservation of Citizens' Rights*, 729 P.2d at 1283.

112. *Montanans for Equal Application of Initiative Laws v. State ex rel. Johnson*, 154 P.3d 1202, 1212 (Mont. 2007); Mont. Code Ann. § 13–27–312(7) (applies to proposed ballot statements and therefore to both initiatives and referenda).

113. *Mont. Chamber of Com. v. Argenbright*, 226 F.3d 1049, 1058 (9th Cir. 2000).

petition is not yet enacted into law, because it may not pass by a vote of the people. Some courts have found that because courts are powerless to review the substance of bills, they also do not have the power to review the substance of ballot issues.[114] Montana should follow these courts and only look at the substance of ballot issues after they become law.

Timing challenges arise "because the initiative process must balance responsiveness to petitioners in an election year against allowing sufficient time to process and publish amendments before balloting."[115] The *Reichert* majority seemingly agreed with this timing concern when it considered the hardship of the "consum[ption of] resources," specifically in regard to saving taxpayer money and time.[116] The majority stated that placing a facially invalid ballot in front of voters creates a "sham out of the voting process."[117]

C. Reichert*'s Impact*

Since the *Reichert* decision, two cases have shown the impact of the Court's ripeness analysis. In *MEA-MFT v. McCulloch*,[118] a legislative referendum that would provide a tax credit and potential tax refund in years of a projected surplus was declared facially unconstitutional for violation of separation of powers.[119] The Court justified a substantive pre-election review under the *Reichert* hardship analysis, again focusing on the wasteful consumption of resources that would result from allowing a defective measure to proceed to voters.[120] The Court's heavy reliance on *Reichert* shows that "extraordinary" pre-election judicial review now clearly includes consideration of the potential waste of time and money. This reaffirms *Reichert*'s expansion of constitutional review beyond *Cobb*'s holding, where the Court said a ballot issue can be enjoined if it creates a constitutional defect "which could not be remedied except by another election."[121] The Court has not yet clearly defined the amount of resources to be consumed that justify a hardship, which it could have done if, for example, it had detailed the minimum amounts of time and money to qualify for a hardship.

Justice Baker dissented in *MEA-MFT* and was also joined by Justices Rice and Cotter.[122] The dissenters did not find this case extraordinary, at

114. *Tilson v. Mofford*, 737 P.2d 1367, 1369 (Ariz. 1987).
115. Johnstone, *supra* n. 40, at 362.
116. *Reichert*, 278 P.3d at 474.
117. *Id.*
118. *MEA-MFT v. McCulloch*, 291 P.3d 1075 (Mont. 2012).
119. *Id.* at 1080–1081.
120. *Id.* at 1079.
121. *Cobb*, 924 P.2d at 269.
122. *MEA-MFT*, 291 P.3d at 1082 (Baker, Rice & Cotter, JJ., dissenting).

least in part because the new law would not take effect until almost two months after a vote by the people.[123] The dissenters also argued the issue was not ripe for adjudication because, in their view, deciding a case on substantive merits before a vote by the people constitutes deciding the validity of a *proposed law*.[124]

In *Montanans Opposed to I–166 v. Bullock*,[125] the Court clarified that legal sufficiency review does not include the power to substantively review ballot issues.[126] Justice Baker concurred with the majority, stating that "the statutes now reflect a clear preference to defer ruling on the constitutionality of a proposed initiative petition until *after* the results of the election at which it is submitted to the voters."[127] *Montanans Opposed to I–166* is distinguishable from *Reichert* because I–166 was an initiative and the cause of action was solely based on § 13–27–316(2), which allows opponents to challenge the Attorney General's approval of legal sufficiency without seeking other relief such as a declaratory judgment.[128] The Court therefore restrained its focus to the Attorney General's legal sufficiency review.[129] Justice Nelson's dissent argued that the majority wrongly differentiated between a legal sufficiency review and a substantive review.[130] He also argued the measure was facially unconstitutional and would not pass a legal sufficiency review because a citizen initiative cannot enact a policy, only laws.[131] Justice Nelson suggests that in challenges to legal sufficiency, the Court should analyze whether the challenged initiative is facially unconstitutional. However, Justice Nelson refers to the referendum in *Reichert* as facially unconstitutional without answering the question of whether the Court should either limit its review to legal sufficiency because of § 13–27–316(2) or expand its review to address the substance of the measure.

Regardless of how the Court decides to analyze future ballot issues, the *Reichert* decision will likely affect how the Legislature handles future referenda. It is clear the Legislature and Court disagree about what is and is not constitutional and that a majority of the current Justices have declined to adopt Justice Baker's deference to the statutory limitations imposed by § 13–27–316. One effect of an increased ability of the judiciary to conduct

123. *Id.* at 1081.

124. *Id.* at 1082.

125. *Montanans Opposed to I–166 v. Bullock*, 285 P.3d 435 (Mont. 2012).

126. *Id.* at 436.

127. *Id.* at 437 (Baker, J., concurring) (emphasis in original).

128. *Id.* at 436 (majority); Mont. Code Ann. § 13–27–316(2).

129. *Montanans Opposed to I–166*, 285 P.3d at 436.

130. *Id.* at 444 (Nelson, J., dissenting).

131. *Id.*

pre-election review may be to invite more proposals to directly modify Montana's 1972 Constitution.

Reichert may also cause the Legislature to review and revise statutes concerning pre-election review for substantive issues within referenda and initiatives. Revisions of the statute could come in various forms: by clarifying when substantive review should occur rather than only focusing statutes on legal sufficiency review; by clarifying that judicial pre-election review is not to occur for substantive challenges, or alternatively, allowing pre-election causes of action challenging the substance of a ballot issue; by distinguishing between the types of challenges (procedural sufficiency, legal sufficiency, and substantive constitutionality); and/or by defining "case," "controversy," and "law" to help courts avoid issuing advisory or policy opinions.

D. Proposed Framework for Future Challenges

Although it is not within the Court's purview to become involved with the politics surrounding referenda, the Court may be able to distinguish between the three different types of review: pre-election procedural sufficiency review, pre- or post-election legal sufficiency review, and post-election substantive review. While *Reichert* focused on the substance of the measure, the Court relied heavily on *Cobb* without distinguishing it as a review for legal sufficiency.

One potential approach to address a referendum's potential defect(s) is for the Court to differentiate challenges to procedural sufficiency, legal sufficiency, and substantive constitutionality. The procedural challenges, following Montana law, could continue to be made pre-election to avoid mootness issues.[132] Even if struck down by the Court, defects in procedural sufficiency might be remedied and brought again to ballot by following proper procedure. Procedural defects are similar across ballot issues regardless of the content of the challenged measure. For example, if a proposed constitutional amendment was challenged and struck down for improper publication, the amendment could be brought again to the people, provided that the measure was published in full twice each month for two months before the election.[133] Defining the review as procedural sufficiency would make it clear the defects could be remedied and the measure could be proposed again with necessary adjustments. The Court could also conduct a ripeness analysis for this type of review to ensure it would be considered at the proper time.

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132. Mont. Const. art. III, § 4(3). *See e.g. Montanans for Equal Application of Initiative Laws*, 154 P.3d 1202; *Mont. Chamber of Com.*, 226 F.3d at 1052.

133. Mont. Code Ann. § 13–27–311.

The Court could redefine the current facial constitutionality review to be a pre- or post-election legal sufficiency review. "Legal sufficiency" review would include review as currently defined by the Constitution and statutes. Legal sufficiency review could be done either pre- or post-election. This review would fall within the confines of how the Court defines "facially unconstitutional" review, as articulated by Justice Nelson in *Montanans Opposed to I–166*, and it would include violations such as the single-subject and single-amendment rules.[134]

Cobb has clearly set the standard for pre-election analysis of constitutional referenda where, consistent with the ripeness doctrine, the Court can review for a facial defect. Review for facial deficiency under *Cobb* includes ensuring a constitutional referendum and proposed ballot issue address every element of the constitution it attempts to amend and striking down proposed amendments with defects that could only be remedied by another election. Review for facial deficiency would be similar across ballot issues, regardless of content of the challenged measure. Similar to a procedurally insufficient measure, a legally insufficient measure could be remedied and proposed again. The Court can limit its legal sufficiency review in such a way that would allow it to still hear a pre-election cause of action related to "legal sufficiency" and stay within statutory limitations by not conducting a broader substantive review.

Although the Court currently reviews all substantive considerations of statutory referenda to determine if they are "facially unconstitutional," the third type of review would be a post-election substantive review. There are various reasons why it is preferable to wait until after a proposal is enacted before conducting a substantive review. Post-election substantive reviews are viable for statutes that are challenged for constitutional defects, regardless of whether the statutes were enacted by a bill, initiative, or referendum. Examples of such defects would include contradictions to the Constitution because of a violation of separation of powers (*MEA-MFT*) or violations to the Constitution (*Reichert*). Here, the Court could identify the specific defects as substantively constitutional or unconstitutional, and the measures would not be able to be brought again, even with revisions, because they are unconstitutional on their merits. No ripeness analysis would be necessary as a post-election-only analysis would keep the judiciary within its role of hearing challenges only to enacted law and not allow the judiciary to offer advisory opinions.

134. Mont. Const. art. V, § 11(3) (requiring that each bill can only contain one subject); Mont. Const. art. XIV, § 11 (requiring that if more than one constitutional amendment is to be submitted at the same election, each amendment needs to be voted on separately). *See e.g. Marshall v. State ex rel. Cooney*, 975 P.2d 325 (Mont. 1999).

V. Conclusion

Reichert exemplifies the complexity and importance of ripeness questions and presents an unresolved issue as to how and when pre-election judicial review should occur. The Court focused on the threshold issue of ripeness prior to deciding the substantive issues of the case. The Court did not properly analyze the referendum within the ripeness doctrine because LR–119 was being challenged for its substance, not for procedural or legal sufficiency. By relying on *Cobb*, the Court did not properly support its ripeness argument as *Cobb* was based on a repealed statute allowing for pre-election substantive review. The *Reichert* Court did not address the dissent's concerns about the lack of supporting precedent for pre-election judicial review on the substance of a ballot issue or about those Montana statutes that clearly state that a substantive review does not fall within the purview of a legal sufficiency review. Moreover, the Court has improperly grouped legal sufficiency reviews with substantive constitutionality reviews for purposes of conducting pre-election review of a ballot issue.

Reichert highlights a gap in Montana's statutes in terms of how the judicial system can determine whether a referendum is constitutional before it is voted on, passed, and thereby presumed constitutional. Although statutes are in place to treat referenda similar to initiatives for purposes of legal sufficiency review, there are no statutes in place for substantive judicial review of referenda. Due to the lack of statutes discussing when substantive review is to be conducted, *Reichert* opens the door to increased pre-election judicial review. The Court needs to further clarify between judicial legal sufficiency review and substantive constitutionality review, as well as when the two types of review can occur.

From *Reichert* one can infer the Court is carving a new avenue for pre-election judicial review of legislative referenda by including a hardship analysis based on the consumption of resources when deciding if a case or controversy is "extraordinary." However, the analysis of hardship based on the consumption of resources will likely be susceptible to political manipulation. There is no bright line of when consumption of resource factors such as potential waste of time, waste of money, and citizen uncertainty would trigger the "extraordinary" pre-election judicial review of a referendum.

The *Reichert* majority stated that allowing facially unconstitutional ballot measures to proceed to an election would create a "sham out of the voting process."[135] Nevertheless, the Court needs to stay within the confines of judicial power under the separation of powers doctrine. The Court

135. *Reichert*, 278 P.3d at 474.

is setting dangerous precedent by overstepping the boundaries of judicial power. Ultimately, *Reichert* may be inconsistent with the ripeness doctrine because the Court should not conduct pre-election substantive review unrelated to procedure or legal sufficiency. Proponents of ballot measures and voters are in need of clear legislation or a clear decision from the Court differentiating between the various judicial reviews and when they can occur.