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OPTING FOR CHANGE OR CONTINUITY? THINKING ABOUT ‘REFORMING’ THE JUDICIAL ARTICLE OF MONTANA’S CONSTITUTION

Andrew P. Morriss*

Although Montanans rejected the proposed Constitutional Convention in the November 2010 election, the issues raised by the debate remain. As Montanans consider whether to revisit their state Constitution through initiative, referenda, or legislative action, they have the opportunity to reconsider the structure of their judiciary. This opportunity is important because state judiciaries play an increasingly significant role in American government for multiple reasons. Some state high courts have taken up former United States Supreme Court Justice William Brennan’s call for state constitutional jurisprudence to advance civil liberties. As state administrative agencies wrestle with increasingly difficult regulatory issues, state courts have become important players in an expanding regulatory environment.

In areas as diverse as public-education finance and takings, state courts have assumed leading policy roles. As a result, Robert Williams’ authoritative analysis of state constitutions concludes: “[S]tate courts in many jurisdictions have developed into major policy-making branches of state government.” Judicial climates affect business location decisions and thus the...

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overall health of state economies. Even where state courts are not directly
driving policy, they are important checks on state legislatures and executive
branch agencies. Montanans need to consider to what extent they wish their
state judiciary to exercise this role and how they wish to choose and control
the individuals who exercise this power.

If Montanans revisit their Constitution in the future, and the process
results in changes to the Judiciary Article, it will not be the first time Mont-
ana has experienced significant change in its judiciary. Since its formation
out of the Idaho Territory in 1864, Montana has operated under three sets of
judicial institutions. From its organization until statehood, the Montana
Territory had a judicial branch established by Congress and filled with cir-
cuit-riding judges who often sat both as appellate and trial judges, ap-
pointed by and serving at the pleasure of the President. From statehood in
1889 to the adoption of the 1972 Constitution, the State of Montana had
quite a different set of judicial institutions, with judges elected by the
State’s population to fixed terms of six years and a separation between the
State’s supreme and trial courts. The 1972 Constitution modified the de-
tails of the 1889 Constitution’s judicial provisions, extending terms and in-
corporating some features of the merit-selection system, giving Montana its
third form of judicial institutions. Is it time for further changes?

As a non-resident (although a frequent visitor, with great affection for
the state), I cannot answer that question. This paper attempts to provide a
framework for analysis that Montanans can use in assessing whether or not
their constitutional provisions regarding the judiciary require revision. Since the 1972 Convention, legal and social-scientific analyses of courts
and judges have advanced. These studies provide insights unavailable to
those drafting the earlier constitutions.

On the other hand, Montana’s legal history provides reasons to think
carefully about being too hasty to restructure the state government. Within
a few years of its organization as a territory, Montana’s statutes developed

5. See e.g. Lawrence J. McQuillan & Hovannes Abramyan, U.S. Tort Liability Index: 2010 Report
(P. Research Inst. 2010).


drafted constitutions in 1866 and 1884; the former was lost before it could be ratified and, while the
latter was ratified, it was never accepted by Congress and so never took effect. See Larry M. Elison &
were originally partisan; there was a brief experience with non-partisan elections in 1909–1911; partisan
elections returned until abolished in 1935.

8. Mont. Const. art. VII.

9. In doing so, I am avoiding both the length and comprehensive footnotes common to law-review
articles, as I believe few non-academics could be troubled to read a lengthy, heavily footnoted treatise.
The sources cited provide excellent guides to the relevant literatures and include many references for
those interested in reading further.
into a confusing jumble due to the abrogation of the Second and Third Territorial Legislature’s work by a ham-handed and partisan Congress and to a botched 1869–1871 effort at compiling the session laws into a single volume. One result of the ensuing legal confusion was the 1895 adoption of a massive legal reform—784,000 words and 170 pounds of laws—which dramatically changed the new state government and the body of Montana law in a variety of ways, including some that few involved in the process seemed to have anticipated. If nothing else, the State’s experience with the radical reforms of 1895 ought to warn of the potential perils of wholesale “reform” efforts in which the volume of changes swamps the ability of institutions to carefully consider the details.

The 1972 Convention suggests another way in which well-intentioned reform processes do not always work out as planned. The 1889 Constitution prohibited legislators from being “appointed to any civil office under the state” during their terms. In 1971, the Montana Supreme Court interpreted this as a bar to participation in the convention; thus, the 1972 Convention excluded then-current legislative officeholders. One need not be cynical to conclude the members of the 1971 Legislature probably did not anticipate such an outcome. Before deciding to launch any future convention process, Montanans might consider who is likely to be writing any new constitution and whether such a conclave would deliver in practice those improvements available in theory.

In particular, Montanans may wish to consider the degree to which partisan politics might play a role in a future convention, particularly with respect to the judiciary. Since judges and courts are still areas where most Americans at least pay lip service to the goal of minimizing politics, it is worth considering whether a convention or other method would risk further politicization of the judicial branch.

Again, the 1972 Convention offers a cautionary example. The exclusion of sitting legislators from the Convention by the Montana Supreme Court’s ruling was expected to reduce the role of politics in the 1972 Convention’s deliberations. Certainly the 1972 Convention’s leadership saw

11. Id. at 360.
12. Id. at 397–402. To take just one example, this “reform” process led to problematic results in real-property law as former University of Montana law professor Robert Natelson noted in 1990. Robert G. Natelson, Running with the Land in Montana, 51 Mont. L. Rev. 17 (1990).
15. Id.
16. Nor need one have a negative view of politicians’ ambitions to conclude that it would be even more surprising if today’s state political leadership made the same “mistake” and failed to find a means to provide for their own participation in any convention convened to rewrite the state Constitution.
the deliberations as less partisan as a result of the exclusion; in his preface to the official record of the proceedings, Convention Chairman Leo Graybill, Jr. wrote:

The delegates brought none of the acrimony and bitterness to the Convention that sometimes develops between seasoned politicians with preconceived positions on major state issues. Thus the delegates were able to approach the principal issues before the Convention in an objective manner, and they also avoided a good deal of the pressures to which legislators are subjected. The probable unforeseen result of the Supreme Court’s action was a constitutional body relatively free from influence and dedicated to basic changes in Montana’s constitutional framework.17

With “all of the major, active politicians serving in the Legislature” being “frozen out” of the Convention and without current officeholders’ ambitions clouding the picture, Chairman Graybill contended:

The delegates seemed unconsciously to apply an overriding democratic principle to their deliberations. They asked themselves, “Does it fit the future? Can it work in the future? How will the future generations respond?” Their concern for a time far beyond the present seems to me to be a rare and remarkable trait.18

While the Convention as a whole may have succeeded in setting aside partisanship, this was not the case with respect to consideration of the Judiciary Article. The Judiciary Committee made its recommendations on a series of 5–4 near-party-line votes.19 Party identification even trumped the divide between lawyers and non-lawyers on the Committee.20 Such divisions may have been coincidental, but the votes suggest that politics were not quite as far removed from the Convention as Chairman Graybill suggested.

This fact does not mean that constitutional revision is necessarily a bad idea. Montana’s Constitution is the product of the time in which it was drafted, and, like the sartorial fash-

18. Id. at vol. 1, i, iii.
19. The Judiciary Committee consisted of David L. Holland, Chair (D); Catherine Pemberton, Vice Chair (R); J. Mason Melvin (D); Leslie “Joe” Eskildsen (D); Rod Hanson (D); Cedar B. Aronow (D); John M. Schiltz (D); Jean M. Bowman (R); and Ben E. Berg, Jr. (R). Convention biographies appear in Montana Constitutional Convention Proceedings, supra n. 17, at vol. 1, 31–64; committee assignments are listed at vol. 1, 22–23. Judiciary Committee votes are listed at vol. 1, 537–543. The only delegate to cross party lines was J. Mason Melvin, a Democrat from Gallatin County, who consistently voted with the Republican minority on the Committee. Melvin’s background as a county sheriff and former FBI agent suggests he may have been a relatively conservative Democrat. Id. at vol. 1, 53.
20. Four members of the Judiciary Committee were lawyers (Holland, Aronow, Schiltz, and Berg). Id. at vol. 1, 31–64. Three of these were Democrats and one a Republican. Id. There were no recorded votes in which the Republican lawyer joined the Democratic lawyers in backing a proposal before the Committee, nor were there instances of either Democratic or Republican non-lawyers siding with one another against the lawyers. Id. at 537–543.
ions of the late 1960s and early 1970s have not held up well in subsequent decades. Moreover, the subsequent growth of fields such as public-choice theory makes for a more transparent understanding of constitutional choices about topics ranging from voting rules to jurisdiction. Montanans may thus decide that the need to revise the state Constitution trumps concerns about where such efforts may lead. If they do, how might a debate over the shape of the judiciary be structured?

Conceptually, there are four important groups of issues surrounding the constitutional provisions necessary to establish a state judiciary:

1. Structure of the court system, including the number and type of courts established and the role of alternative methods of dispute resolution;
2. Selection of judicial officers, including their requisite qualifications;
3. Constraints on judicial action; and

This paper briefly considers each, summarizing the issues involved, and framing the questions Montanans will need to consider if they opt to revisit their Constitution.

Why listen to an outsider on questions about how Montanans should structure their judiciary? I offer two perspectives that might be useful. First, I have studied and written about Montana’s nineteenth-century legal history at least as much as any non-Montanan. That history remains relevant to the State’s legal future because Montana law still incorporates a great deal of the legislation created then; even the State’s legal symbols include references to key events in that history. Second, as an economist in the public-choice school who has conducted empirical research on courts, I can apply the insights of that theory and research.


23. See Morriss, Private Actors & Structural Balance, supra n. 22, at 115-116 (on symbolism, including the Montana Highway Patrol’s use of “3-7-77” and statues at the state capitol).

I. Structure

How should Montana’s judicial branch be structured? While there is a virtually infinite number of possible variations, there are five major differences in the ways American states have structured their judicialities through their constitutions: (1) how much structure to put in the constitution and how much to leave to legislative discretion; (2) how much to compensate judges; (3) whether or not to have an intermediate court of appeals in addition to a supreme court; (4) whether or not to have specialized courts; and (5) the role of alternative dispute resolution (“ADR”) methods, such as mediation and arbitration, in the court system.

A. Constitutionalizing Structure

Among the first questions a judiciary article of the Montana Constitution must address is the extent to which the state Constitution ought to determine the details of the structure of the state court system. The federal Constitution provides for the authority and scope of the federal judiciary but is not self-executing, leaving the details of the court system to Congress. The Montana Constitution includes some details regarding the current structure of Montana courts (e.g. term length); other details are left to the legislature (e.g. numbers and locations of district courts). To what extent should a state constitution spell out the number, levels, salaries, and so forth of the state judiciary?

Including structural details in a constitution makes future change more costly, since amending a constitution requires more steps and a larger majority (depending on the provisions for amendment) than amending a statute. The only reason to put the structural details of the courts into the state constitution is to make it harder for future legislators, who could be in a fit over a particular court ruling, to alter the structure of the courts and meddle in their operation. The temptation for a legislature to interfere is significant. Consider Professor Charles Geyh’s description of the successful efforts by the legislative and executive branches to interfere with the federal courts’ independence:

[A]t the turn of the Nineteenth century, Congress packed and unpacked the lower courts for partisan ends in the “Midnight Judges” affair, and impeached judges for their strident, pro-Federalist sympathies; a generation later, Georgia defied the Supreme Court altogether, and President Andrew Jackson declared that he had the constitutional authority to do likewise; during Reconstruction, a radical Republican Congress stripped the Court of jurisdiction to

25. U.S. Const. art. III.
27. Id. at art. VII, § 6.
undo an important piece of Reconstruction legislation, and, the story goes, packed and unpacked the Supreme Court for political purposes. During the populist and progressive period, proposals to curb or eliminate judicial review and end life tenure abounded, culminating in a successful effort by Franklin Delano Roosevelt to intimidate the Supreme Court into changing its pattern of decisionmaking [sic] by proposing to pack the Court with New Deal sympathizers. And a generation later, Richard Nixon campaigned to end Warren Court liberalism in the wake of calls to impeach Earl Warren and William O. Douglas, and did so by replacing retiring justices with avowedly more conservative successors.28

Despite this impressive record of meddling, Geyh concludes that at the federal level, the political branches’ ability to interfere with the courts outside of the appointments process has diminished, concentrating politicians’ interest on appointments.29 Both Richard Epstein and Richard Posner have reached similar conclusions, finding the structure of the federal judiciary has effectively insulated it from most political pressures, at least in the modern era.30 My coauthors and I reached a similar conclusion when we examined specific patterns of decisions by federal district judges in limited areas.31

Nonetheless, we might draw from this history the lesson that, when possible, the political branches will endeavor to restrict courts’ independence. It may be that an independent judiciary is a good thing overall for self-interested politicians,32 but at any particular moment, politicians may not see their general interest as trumping the benefits of meddling. Constitutional safeguards of judicial independence are thus important to retain. The primary means of doing so is to provide judges with guaranteed compensation and a sufficiently long term.

With respect to the number, location, and size of courts, there is little reason to restrict the abilities of future legislatures. These are primarily administrative matters that changes in Montana’s population and economy may or may not make necessary, and preserving legislative flexibility is likely the best course.

29. Id. at 159.
B. Compensation

Judicial salaries are a structural detail that merits consideration in a state constitution. One of the longest-running themes in the literature on judges is the persistent complaint that they are underpaid. Although judicial salaries at both the state and federal levels compare favorably with average salaries in many professions, they compare poorly to the salaries partners make at elite law firms. Moreover, legislatures at the federal and state levels are often reluctant to grant judges salary increases that keep pace with inflation, preferring to allow judicial salaries to erode until they can be used as an excuse to raise the legislators' own salaries as well. For example, nationally, state-supreme-court-chief judges’ salaries rose by only a total of 2.75% from 2003 to 2009, compared to Social Security’s Cost-of-Living-Adjustments of 2.1%, 2.7%, 4.1%, 3.3%, 2.3%, and 5.8% during that period. Establishing a constitutionally mandated formula for pay increases would eliminate this temptation and help ensure that Montana’s judges continue to be paid at a level necessary to attract interest in judgeships by qualified lawyers.

Montana law currently sets judicial salaries based on the average salary of judges in North Dakota, South Dakota, Wyoming, and Idaho. This practice has resulted in judicial salaries ($115,160, $113,964, and $106,870 for the Montana Supreme Court Chief Justice, associate justices, and trial court judges, respectively) well below the national medians ($152,495, $145,984, and $130,312 respectively), placing Montana fiftieth in terms of judicial compensation in 2009. Of course, Montana is not New York, and it would be unreasonable to expect the level of state judicial salaries to be as high as in places with extraordinary costs of living. However, tying judicial salaries to the average of other relatively low-paying states would appear to be a poor way to attract the State’s best legal talent to the courts.

Allowing for judicial salaries to increase each year based on an increase in an objective formula (e.g. the Consumer Price Index or the rate of

| 33. For a brief overview of the perennial federal judicial salary crises, see Blake Denton, The Federal Judicial Salary Crisis, 2 Drexel L. Rev. 152 (2009). For an example of the problem of linkage at the state level, see Daniel G. De Pasquale, Supreme Court of New York Appellate Division, First Department, 26 Touro L. Rev. 759 (2010).
| 38. Id. at 2. It appears that Montana judges should get a raise in 2010 under the current formula, as all the states used to benchmark Montana judge salaries pay their judges more generously.
increase in Social Security payments), unless a super-majority of the Montana Legislature voted to suspend the increase (thus allowing for fiscal emergencies), would largely remove the issue from day-to-day politics. Increasing judicial salaries is hardly likely to make a revised Judiciary Article a reason for voters to support a new constitution or amendment; nonetheless, whatever the level of judicial salaries, Montana ought to protect the independence of its state judiciary by properly indexing judges’ salaries to the cost of living and protecting the formula by placing it in the state Constitution.39

C. Intermediate Courts of Appeal

Robert Williams has noted: “One of the most important innovations in state court structure in the twentieth century is the advent of intermediate appeals courts.”40 Professor Charles Geyh summarized the impact of this development:

Armed with the discretion to set their own agendas, supreme courts have increasingly allowed the intermediate courts of appeals to have the final word in garden-variety disputes where appellate review is limited to correcting trial court errors, and confined their dockets to more controversial cases in which the law is unclear and their primary mission is to “say what the law is.” The net effect has been to highlight the policy-making role that state supreme courts play when filling gaps in constitutional and statutory law and making common law.41

Thirty-nine states have such courts; the remainder do not. Should Montana?

Intermediate courts of appeals purport to offer three main advantages.42 First, they relieve the burden on the state supreme court, allowing that court to shift appeals off its calendar and focus its resources on more

39. The National Center for State Courts reviewed New York’s judicial salary structure and recommended: “Judicial salary issues should be insulated from the political process. Judicial pay levels should be set regularly and justified based on accepted, easy to measure, objective benchmarks that render the process more transparent and less political.” David B. Rottman, et al., Natl. Ctr. for St. Cts., Judicial Compensation in New York: A National Perspective 3 (2007) (available at http://www.courts.state.ny.us/publications/pdfs/NCSCJudicialCompReport.pdf). The Center recommendation also included a commission to regularly review salaries, rather than the automatic increases recommended here. Id.


41. Geyh, supra n. 40, at 1264–1265.

42. See Edwin H. Stern, Frustrations of an Intermediate Appellate Judge (and the Benefits of Being One in New Jersey), 60 Rutgers L. Rev. 971, 986–987 (2008) (“Intermediate appellate courts exist so that courts of last resort need not be burdened with the volume of cases and continued application of established law while states maintain the right to appeal. They also exist to advance the evolution of law based on their experience with the volume of cases.”); James D. Hopkins, The Role of an Intermediate Appellate Court, 41 Brook. L. Rev. 459, 462 (1975).
thoughtful consideration of the most important legal issues.\footnote{Having an intermediate court is no guarantee of thoughtfulness, however. \textit{See} Porter \& Tarr, \textit{supra} n. 1, at 150–151 (criticizing the Ohio Supreme Court for an "approach to cases, which generally has not been conducive to thoughtful policy development. Even when dealing with complex legal issues, the court has the reputation of substituting speed for thoroughness of consideration.").} Second, by increasing the judicial resources devoted to appeals of right, intermediate appellate courts promise to speed resolution of initial appeals. Finally—mirroring the claimed benefit of the "percolation" of issues among the federal circuit courts of appeal prior to the consideration of the issues by the United States Supreme Court—intermediate courts might enhance the quality of the state supreme court's decisions by giving the Court the benefit of considering multiple appellate opinions addressing the issue.

The costs of such courts are the increased costs of operating an additional layer of courts, the increased legal fees incurred by litigants in seeking and participating in a second layer of appeals, and the uncertainty that results from conflicting intermediate court opinions (where such differences exist by virtue of divisions in the intermediate court) prior to the state supreme court's resolution of issues.\footnote{\textit{See} David J. Schenck, \textit{Are We Finally Ready to Reshape Texas Appellate Courts for the 21st Century?}, 41 Tex. Tech L. Rev. 221, 225–226 (2009) (describing the "simple arithmetic of conflicts" in Texas's intermediate courts of appeals).}

Problems can be exacerbated by foolish structures. For example, in Texas, appellate jurisdiction is divided in the first and fourteenth districts (centered in Houston) between two intermediate courts, with cases from the same geographical area randomly assigned between the two courts.\footnote{\textit{Tex. Govt. Code Ann. § 22.202(h) (2004).}} As one commentator noted, this produces the absurd situation in which none of the residents, lawyers, and trial judges in an area with a population of more than two million people "can safely predict the state of the law in any matter before a higher court rules on it."\footnote{\textit{Schenck, supra} n. 44, at 227. As another lawyer put it, this is "practicing law on a guess and a gamble." \textit{Scott Brister, Is It Time to Reform Our Courts of Appeal?}, 40 Houston Lawyer 22, 26 (April 2003). \textit{See also} Andrew T. Solomon, \textit{A Simple Prescription for Texas's Ailing Court System: Stronger Stare Decisis}, 37 St. Mary's L.J. 417, 418–419 (2006) (describing car crash in Houston in which one victim was able to sue the city for negligence and one was not, because the cases were assigned to different courts of appeal); \textit{Montes v. City of Houston}, No. 14–99–00174–CV, 2000 WL 1228618, slip op. at 1, 4 (Tex. App. Aug. 31, 2000) and supp. op. on reh'g, 2000 WL 1562355, slip op. at 1 (Tex. App. Oct. 19, 2000) (barring the passenger from suing), pet. denied, 66 S.W.3d 267, 267 (Tex. 2001), \textit{Reyer v. City of Houston}, 4 S.W.3d 459, 462 (Tex. App. 1999), pet. denied, (allowing the passengers to sue). Even more entertaining is the case of \textit{Miles v. Ford Motor Co.}, 914 S.W.2d 135 (Tex. 1995), in which one party perfected an appeal two months before the final judgment was signed and so prevailed in the race to determine which court of appeals would hear the case. \textit{Id.} at 139. The history of the overlapping jurisdiction of Texas appellate courts (which extends beyond the two in Houston noted above) is described in \textit{James T. Wirthen, The Organizational \& Structural Development of Intermediate Appellate Courts in Texas, 1892–2003}, 46 S. Tex. L. Rev. 33, 63–66 (2004).} Problems can also be exacerbated by the state supreme court's failure to address conflicting intermediate court
opinions in a timely way, something Texas lawyers have complained about for some time.\textsuperscript{47}

Because Montana has a relatively small population and its courts have a relatively small caseload, the burden-shifting role of an intermediate appellate court is less necessary in Montana than in a more populous state. The first state intermediate appellate court with full-time judges was established in Ohio in 1883,\textsuperscript{48} when the State's population was just over 3 million.\textsuperscript{49} With just a third of that population today, Montana's caseload may not justify an intermediate court. The Montana Supreme Court also provides comparatively speedy resolution of cases, reducing the benefits to litigants of an additional layer of appellate review. Moreover, the Montana Supreme Court's opinions show no sign that the Court's deliberations suffer from an overwhelming workload. It seems unlikely the benefits of increased decision quality that might flow from an intermediate court would be worth the increased costs. Thus, the only reason to add an additional layer of review would be if Montanans wished the Supreme Court to take on an even greater policy-making role than it already occupies.

\subsection*{D. Specialized Courts}

Oklahoma and Texas have divided their final courts of appeal into two bodies, one handling criminal matters and the other handling civil matters. In both states, the lower appellate and (at least some) trial courts are not bifurcated in this manner. Alabama and Tennessee have different intermediate courts for criminal and civil matters. Many states have specialized trial-level courts, ranging from district courts that hear only criminal cases to "drug courts" and domestic-violence courts that focus on particular types of offenses. The Court of Appeals for the Federal Circuit hears appeals only in limited areas, giving it some specialization (in patent appeals, for example) and some breadth (since it also hears other appeals). Specialized courts have also been proposed for other areas, including "science" courts.\textsuperscript{50}

Advocates of specialized courts generally focus on the benefits of appointing judges with greater expertise and technical sophistication, as well

\begin{itemize}
  \item \textsuperscript{47} See e.g. Brister, \textit{supra} n. 46, at 23–24 (noting the Texas Supreme Court "rarely" resolves conflicts, doing so "literally once in a blue moon," possibly due to "mulish aversion" to them).
  \item \textsuperscript{48} Daniel J. Meador, Maurice Rosenberg, & Paul D. Carrington, \textit{Appellate Courts: Structures, Functions, Processes, and Personnel} 366 (Michie Co. 1994).
  \item \textsuperscript{49} Ohio History C., \textit{Ohio's Population}, http://www.ohiohistorycentral.org/qf-population.php (last accessed Sept. 27, 2010).
  \item \textsuperscript{50} See e.g. Andrew W. Jurs, \textit{Science Court: Past Proposals, Current Considerations, and a Suggested Structure}, 15 Va. J. L. & Tech. 1 (2010).
\end{itemize}
as on the overall benefit of increasing capacity for additional cases. In some instances, concentrating particular types of cases in a court is thought to provide better perspective on the scope of the problem (e.g. domestic violence courts). The risk associated with specialization is that the narrow jurisdictions attract greater investment by special interests seeking to influence the selection of the judges; it is more cost-effective than for a court of more general jurisdiction. In addition, operating additional courts costs states more financially.

Montanans would have three choices to make about specialized courts in a constitutional convention or other proposed revision of the Judiciary Article. First, they could use the Constitution to mandate certain specialty courts (e.g. a separate set of family or probate courts). Second, they could use the Constitution to exclude certain types of specialty courts (e.g. requiring one supreme court rather than allowing the bifurcated models of Texas and Oklahoma). Third, they could leave these issues to future legislatures. Given the small size of Montana’s population and the likelihood that the benefits of any specialization would vary over time, leaving the matter to the Legislature would be a reasonable choice.

E. Institutionalizing Alternative Dispute Resolution ("ADR")

Through the groundbreaking Wrongful Discharge from Employment Act ("WDEA"), Montana’s Legislature encouraged parties to employment disputes to engage in ADR rather than litigation. My survey of the WDEA’s impact, based on court files now several years out of date, did not find evidence that these incentives were working to any significant extent. Should Montanans wish to encourage greater use of ADR in civil cases, stronger incentives must be built into the legal system. One option is to provide a constitutional sanction for ADR. Another is to ensure that any language concerning “open courts” in a new Constitution does not pose a

51. The standard explanation for the Texas Court of Criminal Appeals is that it was created to reduce the backlog in the Texas courts. See Solomon, supra n. 46, at 436. When I was practicing in Texas in the mid-to-late 1980s, a more common explanation among attorneys I knew was that it ensured that “tough on crime” former prosecutors could be put in charge of criminal matters, leaving the plaintiff and defense bars to contest control of the Texas Supreme Court without disrupting criminal law jurisprudence. When a constitutional reform proposed merging it into the Texas Supreme Court in the 1970s, however, opposition reportedly came from criminal defense lawyers. See Joe R. Greenhill, The Constitutional Amendment Giving Criminal Jurisdiction to the Texas Courts of Civil Appeals and Recognizing the Inherent Power Of The Texas Supreme Court, 33 Tex. Tech L. Rev. 377, 388 (2002).

52. See generally Morriss, Comment: A Public Choice Perspective on the Federal Circuit, supra n. 24, at 816.

53. See Morriss, The Story of the WDEA, supra n. 22.

54. Id.
problem for legislation mandating ADR resolution or providing incentives for parties to choose ADR.

II. SELECTION

Even well-designed court systems will not function efficiently unless they are overseen by competent judges. The criteria and method used to select judges is thus crucial to the success of judicial institutions.

A. Choosing Judges

The American Bar Association's ("ABA") Commission on the 21st Century Judiciary characterized improving judicial selection as "among the most contentious subjects that the Commission has been directed to address." There is an extensive literature on the topic. Because opinions on the subject are so strong, this is likely to be a controversial issue at any future constitutional convention or in the context of other means of amendment.

It is important to separate consideration of selection methods from opinions about particular individuals serving as judges. Bad selection methods may produce excellent officeholders on occasion. The Territorial Judiciary was an abysmally designed institution in general, but Montana was fortunate to have Decius Wade serve as its Territorial Chief Justice from 1871 to 1887; he was one of the best judges to serve on any territorial court. Conversely, even well-designed selection methods are likely to produce problematic results from time to time. New York, for example, uses a form of the merit-selection process, yet found itself with a chief judge in the grips of mental illness, stalking a woman with whom he had had an affair and illegally using massive quantities of prescription drugs (more than 5,000 pills over 18 months), even as he won praise for the quality of his judicial opinions. Thus, choosing well-designed selection methods does not guarantee good choices will be made; it merely makes them more likely. Moreover, as Charles Geyh noted, "which of the various sys-

57. See Morri s, Legal Argument in the Opinions of Montana Territorial Chief Justice Decius S. Wade, supra n. 22.
tems for judicial selection is 'best' depends upon what one is looking for.”59 And even defining “merit” in judicial selection turns out to be surprisingly hard.60

American jurisdictions have experimented with a variety of judicial selection methods, ranging from selection by the legislature for short terms, to election in partisan and non-partisan elections, to selection by merit commissions, complete with protected tenure. Although elite, legal opinion currently favors merit-selection processes (which, perhaps coincidentally, put substantial control of judicial selection in the hands of elites), election was the dominant means of selection chosen by states beginning in the mid-nineteenth century.61 Longer terms are also currently in favor because they provide greater independence for the judiciary.62 The primary arguments against judicial elections rest on the claims that selecting good judges requires legal expertise which voters lack63 and that the electoral process undermines judicial impartiality by forcing candidates to raise money from lawyers or campaign in ways that some think may undermine judges’ independence.64

The form of selection may not be that important in some senses. Kermit Hall’s research suggests that all forms of American judicial selection produce judges who look very similar in demographic and other background terms.65 However, many states selected their judges via elections beginning in the mid-nineteenth century because people believed that these elections rooted the judiciary in democratic legitimacy. New states frequently had bad experiences with their appointed territorial judiciary, and perhaps elections seemed democratic.66 Legal elites turned against elect-

59. Geyh, supra n. 40, at 1278. The most innovative and intriguing proposal I have seen is a student’s proposal for election by lot among members of the state bar: William Bunting, Student Author, Election-by-Lot as a Judicial Selection Mechanism, 2 N.Y.U. J. L. & Liberty 166 (2006). The author makes a surprisingly compelling case that using a lottery among lawyers would resolve many of the problems with both appointive and elective systems.
64. See e.g. Adam Liptak & Janet Roberts, Campaign Cash Mirrors a High Court’s Rulings, N.Y. Times (Oct. 1, 2006) (available at http://www.nytimes.com/2006/10/01/us/01judges.html). The paper found that Ohio Supreme Court justices rarely disqualified themselves from cases in which the parties had made contributions to their campaigns. On average, the justices ruled in favor of the contributors 70 percent of the time. One justice favored his contributors 91 percent of the time. Id.
Elections are a problematic way to select judges for several reasons. First, the idea of electing an official by majority vote—one whose job description includes protecting potentially unpopular individuals, interests, and minorities against majorities—at least raises some difficult questions. Second, electing judges in a state can bias judicial decisions against out-of-state interests, even when the state simultaneously hopes to entice those same interests into investing in the state. Former West Virginia Supreme Court Justice Richard Neely illustrated this problem when he explained the pressures to decide in favor of a local party against an out-of-state one:

I am a backwoods judge who decided ordinary cases that are of absolutely no concern to anyone but the litigants. Most of my day is consumed by working as the inside man at the judicial skunkworks where I slog through tedious criminal, workers’ compensation, and product liability cases. If I say to myself, “the hell with those Frenchmen at Michelin!” and give some injured West Virginian a few hundred thousand dollars, it doesn’t shatter the foundations of West Virginia’s commercial world. Since I’m paid to choose between deciding for Michelin and sleeping well, I choose sleeping well. Why hurt my friends when there is no percentage in it?

Partisan elections involve both considerable ballot drop-off, with fewer votes in judicial elections than in up-ballot races for governor and other offices, and partisan voting, with high correlations between party votes for governor and party votes for judges. Moreover, the atmosphere has changed since the Supreme Court’s decision in Republican Party of Minnesota v. White, which applied the First Amendment to candidates in judicial elections. With the post-White trend favoring those challenging restric-

71. Philip L. Dubois, From Ballot to Bench: Judicial Elections and the Quest for Accountability 65–100 (Univ. of Tex. Press 1980) (concluding that many voters base their votes on party identification).
tions on partisan speech by judicial candidates, elections may become more problematic.

As Charles Geyh has argued at length, the net impact of the trend toward more heavily contested, partisan elections for judicial positions reflects a shift toward using elections as a means of promoting political accountability rather than their original purpose of promoting judicial independence from the executive and legislative branches.\(^7\) If the goal is to allow voters to reject judges who have made unpopular decisions, partisan elections serve that purpose:

The critical question is whether this is the kind of accountability that we want judicial elections to promote. If, as [Prof. Melinda Graham] Hall and a significant segment of the political science community believe, independent judges are essentially unconstrained policymakers who decide cases by acting on their personal "preferences" or "attitudes," then the answer would seem to be yes, because elections will produce "public policies that better represent the citizenry" by "creating incentives for judges to pay attention to citizen preferences when deciding highly visible and publicly salient issues."

If, on the other hand, as the mainstream legal community believes, independent judges do their best to follow "the law," flexibly defined . . . then the answer is presumably no, because elections create incentives for judges to set the law to one side and "pay attention to citizen preferences" when deciding cases.\(^7\)

Despite the criticisms of judicial elections, the scholarly consensus disfavoring judicial elections, and the critiques of judicial elections filling American law reviews, most states have shown little interest in eliminating judicial elections.\(^75\) Both the strong attachment to judicial elections, even as many voters ignore judicial races, and surveys that report dislike for judicial campaigning suggest that moving away from elections should be a step taken only after a great deal of deliberation.

Merit-selection systems pose their own challenges, including the crucial question of how the commission should be selected.\(^76\) And we do want some form of accountability to the public’s views. A story related by former New York Mayor Ed Koch about a judge who was mugged captures the importance of accountability:

A judge I helped elect was mugged recently. And do you know what he did?

He called a press conference and said: "This mugging of me will no way

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\(^7\) Supra nn. 28–29 and accompanying text.
\(^7\) Geyh, supra n. 40, at 1272 (internal citations omitted).
\(^75\) See Geyh, supra n. 63, at 57 (noting that even many reformers have "accepted elections as a permanent part of the judicial selection landscape, reformers are now embarking on new programs of incremental change").
REFORMING MONTANA’S JUDICIAL ARTICLE

What makes Koch’s anecdote ringing true is that judges ought to reflect something of their community’s values, including the value it puts on preventing and punishing crime. What makes the anecdote troubling is that we do not want judges to reflect too much of the community’s values, since we want them to stand up for counter-majoritarian assertions of rights. Unfortunately, no method of judicial selection guarantees getting the balance right by ensuring the judges are “mugged” just the right number of times.

B. Qualification Requirements

There is considerable discussion about the requisite qualifications for judicial office, particularly in the context of United States Supreme Court nominations. While my own research makes me skeptical about the impact of most demographic and background variables, the issue is largely irrelevant to an electoral system because voters are allowed to decide whether a particular candidate is qualified. Adding constitutional restrictions only reduces voter choice by limiting the pool of potential candidates.

Two areas are worthy of discussion, particularly if Montana opts for a method other than election to select judges. First, it may be desirable to require some level of legal experience to adequately equip a judge to interpret contracts and statutes, understand the rules of evidence, and so forth. Of course, merely being licensed for a period of time is no guarantee of ability, but requiring a minimum level of experience is a reasonable screening device. Second, requiring some specific Montana legal experience may also be desirable. To the extent Montanans desire a uniquely Montanan legal culture, requiring a minimum amount of legal experience in Montana would ensure that judges have been exposed to the local norms and practices. This factor is quite important; both a reputation in the legal community and exposure to local norms have the potential to affect how a judge rules. Of course, both lack of experience generally and, more specifically, a lack of long-term residency could be raised as an issue in an election campaign. Thus, including such restrictions in the Constitution may not be necessary.

III. CONSTRAINTS

Because judges have extraordinary powers, a major concern is how to ensure those powers are exercised in appropriate ways. For example, state

78. See Sisk, Heise, & Morriss, Charting the Influences on the Judicial Mind, supra n. 24.
courts led the 1960s revolution in tort law by abolishing traditional defenses and dramatically changing how doctrines like negligence are applied.79 How might a Constitution provide guidance to state courts?

Two sets of constraints might be considered for the Montana Constitution. First, a state constitution can provide greater or lesser degrees of guidance on how courts are to exercise their constitutionally granted powers. Several decades of battles in state courts over how to interpret vague education-finance language or open-courts provisions provide examples of the difficulties that can arise when constitutions err on the side of vagueness. For instance, the Montana Supreme Court's sharply divided 4–3 decision in Meech v. Hillhaven West, Inc.80 over the constitutionality of the WDEA arose from the lack of clear constitutional language in the “full legal redress” clause of the state Constitution.81 At the same time, though, over-specificity is also problematic since it can lead to a lengthy and confusing state constitution. Alabama's Constitution is an extreme example of how over-specificity can be problematic; the Constitution is approximately 220,000 words in length, more than twice the length of the next-longest state constitution.82 Should Montana hold a constitutional convention in the future or pursue reforms in another forum, one way to avoid such problems is to carefully review all provisions, not just the Judiciary Article, with an eye toward clarifying pleasing-but-vague phrasing that might sow the seeds of future conflicts, while also emphasizing brevity. Of course, it is far easier to recommend such a course of action than to actually strike the balance.

Second, a state constitution may provide guidance on how courts should interpret its clauses. Montana courts have taken quite different approaches to interpreting the current state Constitution at different times. For example, on October 20, 1999, the Montana Supreme Court issued an opinion in Montana Environmental Information Center v. Department of Environmental Quality83 that relied heavily on the records of the 1972 Constitutional Convention to interpret Article II, § 3 and Article IX, § 1 of the state Constitution. Six days later, the court issued an opinion in Armstrong v. State of Montana84 interpreting Article II, § 10 with barely a mention of the Convention debates.

REFORMING MONTANA'S JUDICIAL ARTICLE

This difference is problematic because the circumstances of the adoption of Article II, § 10 did not support the Court's decision in Armstrong. The closeness in time of the two decisions highlights the inconsistency in methodology, but the problem is more general. A consistent framework for when the drafters' intent should control outcomes would make the law more predictable and courts less susceptible to charges that they are result-oriented. A future constitution could address this issue outside the context of specific cases and hot-button issues like abortion and economic development by providing guidance to the courts on how to interpret the constitution and the extent to which they should look to the convention's records as guidance.

Judges are not the only ones who need to be constrained, however. Legislatures and the executive branch also need to be constrained from interfering with judicial power. Although the record of state courts asserting their independence from interference is mixed at best, language providing the courts with guarantees of independence is also important. Once again, however, striking the right balance is likely to prove tricky.

IV. REMOVAL

If selecting judges is controversial, removing them is even more so. The federal government and many states rely on impeachment processes so cumbersome that imprisoned judges continue to hold their appointments for months even after their convictions become final, drawing their salaries while serving their sentences because the legislature cannot expeditiously remove them. These are not new complaints. In 1965, a bar report recommended that "impeachment should be supplemented by effective machinery for the investigation of complaints against judges and for the removal of those found unfit or guilty of misconduct in office." Some states have allowed recall of sitting judges (seven did so in the early twenties).

85. The Convention occurred prior to the U.S. Supreme Court's decision in Roe v. Wade, at a time when abortion was illegal in Montana, weakening a link between the state Constitution's provision of privacy rights and abortion. That the Convention's discussion of the constitutional language did not include discussion of abortion further suggests the delegates did not believe the language covered abortion. Of course, the Montana Supreme Court might have been using an interpretative strategy that did not depend on the drafters' intent. Its heavy reliance on drafters' intent in MEIC suggests some explanation of when intent matters would be useful in predicting future outcomes.


87. See generally Geoffrey P. Miller, Bad Judges, 83 Tex. L. Rev. 431, 459 (2004) ("Impeachment is not a satisfactory solution to the problem of bad judges, however. Legislators usually do not want to get involved in the impeachment matters, which are distracting and offer few political payoffs."). Miller offers an impressive catalog of the ways judges can be "bad." Id. at 433–455.

eighteenth century); others provide means for the electorate to remove judges through contested or retention elections. For example, California voters removed former Chief Justice Rose Bird and two associate justices in 1986 after a contentious campaign that focused on death-penalty issues but was in fact funded by business interests.

Judicial elections serve as one check on judges, making removal by the electorate possible at regular intervals. However, elections are not sufficient, as the case of former Texas Supreme Court Chief Justice Don Yarbrough illustrates. An unknown lawyer with a name similar to former Senator Ralph Yarborough and former gubernatorial candidate Donald Yarborough, Don Yarbrough was elected Chief Justice in 1976. Only a few months later, he resigned under threat of impeachment.

The main innovation in judicial removal was the shift to retention elections within a merit-selection system, an innovation introduced to "quiet the fears of the devotees of the elective method." Intended as part of a reform aimed at depoliticizing the judiciary, retention elections today are not obviously superior to other forms of judicial election (partisan or nonpartisan) in accomplishing that goal. Interviews with judges suggest that concern over retention elections affects decision making. As Professor Tarr notes, uncertainty about the likelihood of an electoral challenge may affect judicial decision-making as well, because judges may seek to avoid decisions that will bring the wrath of interest groups down on them. The prospect of an election in which a single decision can be taken out of context and used to attack a judge may have a chilling effect on judicial independence. In a series of interviews conducted with judges who ran in retention elections from

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89. Tarr, supra note 67, at 607.
92. Id.
94. Tarr, supra n. 67, at 612–613.
1986–1990, fifteen percent indicated that, as the election approached, they sought to avoid controversial cases and rulings, while another five percent indicated that they became more conservative in sentencing in criminal cases.

Even judges who try to avoid being influenced by the prospect of a reelection campaign acknowledge that it may subconsciously influence their judgments. Thus, describing a judge's predicament in deciding controversial cases while facing reelection, former California Justice Otto Kaus suggested that "[i]t was like finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."95

Recent reform proposals suggest longer terms and other restrictions on retention elections.96 Tarr concludes: "Taken altogether, these proposals testify to a growing realization that retention elections cannot prevent the politicization of judicial selection absent supplemental reforms designed to address the politicization of judicial elections generally, not just the politicization of retention elections."97

These concerns are not shared by members of the public at large. As evidenced by both public-opinion polls and the rejection of reform initiatives aiming to replace elections, the public continues to believe in the importance of a means of removal through elections.98 If Montanans decided to depart from selecting judges by popular election, then establishing a method of expeditiously removing bad judges would be particularly important to preserving the quality of the judiciary. Although Montana currently enjoys a skilled judiciary, selecting a mechanism for removal should nonetheless be a priority so the State has the tools to address the problem in the future.

V. Conclusion

The question for any future constitutional amendment is the extent to which it might improve on what the State has now with respect to the judiciary (indeed, with respect to the Constitution as a whole). The answer, as usual when you ask a law professor, is "it depends." It depends on all sorts of things that a voter trying to make up her mind on whether or not to call a constitutional convention cannot know. Yes, we can surely imagine a "better" judiciary article, if only we could agree what "better" means. There are

95. Id. at 614–615 (internal citations omitted).
97. Tarr, supra n. 67, at 616.
98. Id. at 617 (summarizing polls and rejected initiatives).
surely better ways to elect and remove judges, better ways to pay them, better ways to organize them, better ways to protect their independence, and better ways to keep them from stepping outside whatever bounds are set. There is no shortage of suggestions on how to do all of these things better. But there are worse ways of doing all of these things as well. Improving on what Montana has already will be harder than it looks.