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ARTICLES

THE HERCULES OF HELENA: JUSTICE JAMES C. NELSON AND THE JURISPRUDENCE OF PRINCIPLE

Anthony Johnstone*

INTRODUCTION

The late legal philosopher Ronald Dworkin conceived an ideal American judge, “a lawyer of superhuman skill, learning, patience and acumen.”¹ He also is a judge of principle, with a strong philosophical bent. Like all good judges, he accepts the conventional rules of law in his jurisdiction, and follows the precedent established by his predecessors to the extent a prior case controls a current case. Most cases are easy cases for this judge and others, and fit well within the conventional rules and established precedent. A very good judge, in Dworkin’s view, looks beyond the immediate rules and precedent to ensure the case also fits within the legal system as a whole. Some cases, however, are hard cases that fit more than one reading of the rules and precedent, even after canvassing the whole legal system. In those cases the judge of principle looks outside the rules and precedent, turning instead to the political theory he finds at the foundation of the legal

* Assistant Professor, University of Montana School of Law. Thanks to Haley Nelson and Samir Aarab for research assistance; to Jon Byington, Tom Huff, and participants at the Montana Law Faculty Scholarly Colloquium for helpful comments; to the *Montana Law Review* staff for editorial assistance; and to my family for their support. Thanks also to Jim Nelson for a decade of engagement in the courtroom and classroom that challenged the author (among many others) to rethink and refine several of the ideas presented in this review. The author served as counsel for the State of Montana in the following cases discussed below: *Baxter v. State*, 224 P.3d 1211 (Mont. 2009); *Donaldson v. State*, 292 P.3d 364 (Mont. 2012); *W. Tradition Partn. v. Atty. Gen. of State*, 271 P.3d 1 (Mont. 2011), *rev’d sub nom. Am. Tradition Partn. v. Bullock*, 132 S.Ct. 2490 (2012).

1. Ronald Dworkin, *Hard Cases*, in *Taking Rights Seriously* 105 (Harv. U. Press 1978).

system. The judge searches that theory for the principles that best justify the law, chooses the reading of the law most consistent with those justifying principles, and elaborates the rule and justification in his decision. For his labors Dworkin calls this judge of principle “Hercules.”²

Helena is not Olympus, and retired Montana Supreme Court Justice Jim Nelson is not Hercules. No human judge is. Yet over his nearly two decades on the Montana Supreme Court, Nelson exemplified Herculean judging in both its strengths and its weaknesses. Past issues of the *Montana Law Review* have celebrated Justice Nelson’s dedication to the idea of law. As the editors wrote in a prior volume, the University of Montana School of Law is indebted to Justice Nelson for his “remarkable dedication to Montana’s law students,” including teaching as an adjunct in 2000 and 2013, “his frequent visits to law school events, and for his intense and sincere interest in students’ legal and ethical education.”³ This review, invited by the editors, considers the judicial career of Justice Nelson in both quantitative and qualitative dimensions.⁴ It begins with an empirical assessment of Nelson’s judicial record in Part I. After a brief biographical sketch, it considers metrics of ideology and influence on the Montana Supreme Court, and situates Justice Nelson among his colleagues.⁵ The review continues with an analytical assessment of Nelson’s judicial philosophy in Part II. Focusing on constitutional cases, it examines the development of two principles, personal autonomy and equal dignity, central to his reading of the Montana Constitution. Part III synthesizes the empirical and analytical assessments and identifies some limits to Justice Nelson’s jurisprudence of principle. The review concludes by proposing some tentative conclusions about Justice Nelson’s legacy.

I. JUDICIAL RECORD

James C. Nelson was born February 20, 1944 in Moscow, Idaho.⁶ After graduating with a B.S. degree from the University of Idaho in 1966, he

2. *Id.* at 105–107.

3. Montana Law Review, *Tribute to Justice James C. Nelson*, 68 Mont. L. Rev. 251 (2007).

4. This approach is suggested by Richard A. Posner in *Cardozo: A Study in Reputation* (Chicago 1990).

5. This is not the first citation analysis of the Montana Supreme Court. See e.g. Fritz Snyder, *The Citation Practices of the Montana Supreme Court*, 57 Mont. L. Rev. 453 (1996) (studying the authorities cited by the Montana Supreme Court over three periods: 1914–1915, 1954–1955, and 1994). Nor is it the first ideological mapping of the Montana Supreme Court. See Michael J. Woodruff, *State Supreme Court Opinion Publication in the Context of Ideology and Electoral Incentives* (NYU Dept. of Pol., Working Paper, 2011, available at <http://ssrn.com/abstract=2171543>) (analyzing all authored opinions by the Montana Supreme Court from 1998 to 2009 and finding both ideology and electoral incentives condition the likelihood of publication).

6. Montana Judicial Branch, *Justice James C. Nelson*, <http://courts.mt.gov/supreme/bios/nelson.mcpx> (accessed May 9, 2014).

2014 *JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE* 201

served as a First Lieutenant in the U.S. Army until 1969.⁷ Nelson's experience with criminal defense work in the Army confirmed his interest in law school, and after his discharge he enrolled at George Washington University.⁸ While in law school, he attended classes in the night division and worked full time as a financial analyst for the United States Securities and Exchange Commission.⁹ He graduated with honors in 1974, and returned to the Northwest to join his father-in-law's general practice in Cut Bank, Montana.¹⁰ Auspiciously, he arrived in Montana the year after the 1972 Montana Constitution took effect. Nelson was elected as a Democrat to the office of Glacier County Attorney, serving from 1979 until his appointment to the Supreme Court in 1993.¹¹ As a prosecutor and in private practice, Nelson tried about 60 jury cases and argued several cases before the Montana Supreme Court.¹² Outside of the courtroom, he served in several civic capacities including as a volunteer fireman, and served as an appointee to the state Board of Oil and Gas Conservation for 11 years under three governors, one Democrat and two Republicans.¹³

On March 31, 1993, Justice R. C. McDonough retired from the Montana Supreme Court after six years on the bench.¹⁴ McDonough was a delegate to the 1972 Constitutional Convention and, like Nelson, a law graduate of George Washington University who served as a rural County Attorney (Dawson County in McDonough's case).¹⁵ Governor Marc Racicot, who had served as a prosecutor and Attorney General while Nelson served as Glacier County Attorney,¹⁶ appointed Nelson to the open seat. Justice James C. Nelson began service in May 1993.¹⁷ In 1994 he won a retention election to serve out the remainder of the term, carrying every county 229,890 (79%) to 62,733 (21%).¹⁸ Again in 1996 he ran uncontested for retention, winning 278,914 (80%) to 68,083 (20%), and carrying every

7. *Id.*

8. Cary Griffith, *The Life and Career of James C. Nelson, Justice, Montana Supreme Court*, <http://www.lawcrossing.com/article/355/James-C-Nelson-Justice-Montana-Supreme-Court/> (accessed May 9, 2014).

9. Jennifer McKee, *Nelson Compiles History of Service*, *Billings Gazette* (Sept. 26, 2004).

10. Griffith, *supra* n. 8; McKee, *supra* n. 9.

11. McKee, *supra* n. 9.

12. *Id.*

13. *Id.*

14. J.A. Turnage, *Annual Report of the Montana Judicial System Calendar Year 1993* 7 (1994) (available at http://courts.mt.gov/content/annual_reports/1993rpt.pdf).

15. J.A. Turnage, *Annual Report of the Montana Judicial System Calendar Year 1992* 13 (1993) (available at http://courts.mt.gov/content/annual_reports/1992rpt.pdf).

16. State of Mont., *Thumbnail History of Montana Governors*, <http://mt.gov/govt/formergov/default.mcp> (accessed May 9, 2014).

17. Turnage, *supra* n. 14, at 7.

18. Mont. Sec. of State, *1994 General Canvas* (1994) (available at <http://sos.mt.gov/Elections/archives/1990s/1994/94GEN/1994gen.pdf>).

county.¹⁹ In 2004 state Rep. Cindy Younkin, a Republican from Bozeman, mounted an aggressive challenge to Nelson,²⁰ whom she accused of being “activist.”²¹ The race became the second most expensive statewide race that year behind the gubernatorial campaign.²² Nelson defeated Younkin 220,727 (53%) to 194,941 (47%) percent, winning 23 counties but losing 33 mostly rural counties.²³ On February 1, 2012, Justice Nelson announced that he would not run for reelection, explaining in one report that “he timed the announcement to give those interested in running as much advance notice as possible . . . because campaigns are expensive, time consuming and increasingly partisan.”²⁴

A. Ideology

Over nearly two decades on the Montana Supreme Court, Nelson served with sixteen justices including three chief justices: Jean Turnage (1985–2000), Karla Gray (2001–2008), and Mike McGrath (2009–2012).²⁵ Over that time period, the ideological makeup of the Court changed as its personnel changed. There are several possible methods of assessing judicial ideology.²⁶ One can estimate judicial ideology *ex ante* by, for example, the party of the appointing body (the president for federal judges or the governor for some state judges). One can estimate judicial ideology *ex post* by, for example, studying judges’ voting patterns on all cases or an ideologically salient subset of cases. The voting pattern study is promising but requires empirical work beyond the scope of this review. The partisan appointment model is inapplicable because the majority of Montana Supreme

19. Mont. Sec. of State, *1996 General Canvas* (1996) (available at <http://sos.mt.gov/Elections/archives/1990s/1996/96GEN/1996gen.pdf>).

20. Jennifer McKee, *Court Candidate Younkin’s Interests Vary Widely*, Billings Gazette (Sept. 27, 2004); Ray Ring, *State Judges Get Political*, High Country News (Oct. 11, 2004); Mike Dennison, *‘Outside Money’ Haunts Court Race*, Great Falls Tribune (Sept. 27, 2004).

21. Jennifer McKee, *Younkin Cites Opponent’s ‘Activist’ Cases*, Billings Gazette (Oct. 12, 2004) (“Younkin released a list of nine court decisions she said uphold her charge that Nelson is a judicial ‘activist,’ meaning he makes court decisions that uphold progressive social policies not legal tradition.”).

22. Associated Press, *Most Election Winners Outspent Their Foes*, Billings Gazette (Nov. 22, 2004) (“They combined for \$483,579 in contributions. Nelson raised \$258,444 and spent \$257,930 through Nov. 17, while Younkin raised \$225,135 and spent \$223,336.”).

23. Mont. Sec. of State, *2004 General Statewide Election Results* (2004) (available at <http://sos.mt.gov/Elections/archives/2000s/2004/2004-GenState.pdf>).

24. Associated Press, *Montana Supreme Court Justice Nelson to retire*, Billings Gazette (Feb. 1, 2011).

25. The Associate Justices are John C. Harrison (1961–1994), Fred J. Weber (1981–1995), William E. Hunt (1985–2000), Terry N. Trieweiler (1990–2003), Karla M. Gray (1991–2000), Charles E. Erdmann (1995–1997), Jim Regnier (1997–2004), John Warner (2003–2009), W. William Leaphart (1995–2010), Brian Morris (2005–2013), Patricia O’Brien Cotter (2001–present), James A. Rice (2001–present), Mike Wheat (2010–present), and Beth Baker (2011–present).

26. See generally Lee Epstein et al., *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* 65–89 (Harv. U. Press 2013).

2014 JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE 203

Court justices take and retain office by election rather than appointment. Instead this review assesses Justice Nelson's approach to judging by considering several of his opinions in a selected few hard cases.²⁷

First, however, it is worth setting Nelson in context on the Court's ideological spectrum over time. Although comprehensive data on the justices' voting patterns on the Montana Supreme Court is lacking, there is detailed data on the justices' campaign contributions and contributors. Because justices on the Court are elected in political campaigns, data about campaign contributors, including contributors to the justices' opponents in contested races, can shed light on how contributors assess the ideology of each justice in deciding whether to support the justice as a candidate with a financial contribution. Campaign contributors in general come from a "donor class" that is notoriously under-representative of the typical voter in socioeconomic terms.²⁸ Yet in judicial elections, campaign contributors over-represent a legal and political elite that is more interested in, and likely more informed about, a judicial candidate's work than the electorate at large.²⁹ A recent analysis by political scientist Adam Bonica uses campaign finance data already at hand to map each contributor and candidate relative to every other contributor and candidate, and estimate the location of each at an "ideal point" on the ideological map. The premise is that "contributors will on average prefer ideologically proximate candidates to those who are more distant,"³⁰ or in simpler terms "birds of a feather flock together."

"Ideology" in nonpartisan judicial elections is a term used advisedly. The location of a justice at one end or another of the ideological space only means that the several hundred to several thousand campaign contributors who supported a Montana Supreme Court justice (and perhaps the justice himself) also tended to support similarly oriented political candidates at the state and federal levels. An ideologically oriented contributor's support for a particular justice may reflect preferences for outcomes (e.g., pro-prosecution), dispositions (e.g., deferential in judicial review of executive and legislative actions), legal philosophy (e.g., textualist), perceived fidelity to the

27. See Part II, *infra*.

28. See Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. Penn. L. Rev. 73 (2004); see also Lawrence Lessig, *Keynote Address: On What Being a (Small r) Republican Means*, 74 Mont. L. Rev. 37, 39 (2013) ("In the United States in 2010, 0.26% of Americans gave more than \$200 in a congressional election; 0.05% gave the maximum amount to any congressional candidate; 0.01%—the 1% of the 1%—gave \$10,000 or more in the election cycle.").

29. For example, in the 2012 Montana Supreme Court primary and general election campaigns, candidates collected \$335,451 in contributions, 46% of which came from lawyers and lobbyists. After the candidates' self-financed contributions, the next largest share (4%) came from civil servants and public officials, a category including judges, prosecutors, and other government lawyers. See Nat'l Inst. On Money in State Politics, *Top Contributors to High Court Candidates*, http://www.followthemoney.org/database/StateGlance/state_candidates.phtml?s=MT&y=2012&f=J (accessed May 9, 2014).

30. Adam Bonica, *Mapping the Ideological Marketplace*, 58 Am. J. of Pol. Sci. 367, 367 (2013).

constitution, or even diligence and other ordinary values. Not all campaign contributors are ideologically motivated, but enough of them are so motivated as to produce clusters of candidates at either end of the ideological scale. Those clusters correlate with more liberal candidates at one end, and more conservative candidates at the other. By this admittedly coarse measure, Nelson was the most liberal of the seventeen justices to have served on the Montana Supreme Court since his appointment in 1993.³¹ As an empirical matter, it at least suggests that Justice Nelson has enjoyed significant popular support in the electorate as a judge that legal and political elites understand to be relatively liberal. Whether Nelson produced influential opinions from his relatively liberal position on the Court is the next question.

B. Influence

Like ideology, influence is susceptible to several methods of estimation. A more qualitative analysis is developed below.³² One of the simplest quantitative methods is citation analysis. Like lawyers, judges generally have a deep list of prior opinions to cite for basic legal propositions, and it can be presumed a judge will select those opinions that establish those propositions most persuasively.³³ For more complex legal issues where the legal rule may be unclear, judicial authors still must find authority from which to draw an analogy or a persuasive but not controlling rule from another jurisdiction. Commentators in law reviews and treatises face and make similar choices for both basic and more complex legal analyses. Lawyers, too, will turn to some cases over others because of their influence potential. Even when a case is cited critically, or distinguished, it may be considered sufficiently influential to merit such treatment. Over time and in the aggregate, some cases rise above others in their influence with judges, commentators, and lawyers, and their resulting increase in published citations can be a broad measure of opinion quality.³⁴ Any one justice might

31. From Adam Bonica, *State Supreme Court Ideal Point Estimates* (2012) (Computer File, available at http://www.stanford.edu/~bonica/files/bw_ssc_db.zip). The underlying state campaign finance data comes from the Helena-based National Institute for Money in State Politics. See Bonica, *supra* n. 30, at 375.

32. See Part II, *infra*.

33. For example, one of the most commonly cited cases from Justice Nelson's tenure is *Bruner v. Yellowstone County*, 900 P.2d 901, 903 (Mont. 1995), a case in which Justice Weber developed the canonical statement of the standard for summary judgment. While that opinion's influence is closely related to the pervasive presence of summary judgment cases on the Montana Supreme Court's docket, its influence also arises from the concise and clear statement of the standard that makes it so useful to subsequent courts. Several justices had the opportunity to state the rule in other summary judgment cases, but his successors found Weber's statement to be the most influential.

34. The methodology for the citation analysis is based on several searches on Westlaw on December 2–4, 2013. The search included, for each of the years 1993–2012 inclusive, the top ten cases in the

2014 *JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE* 205

write some opinions that are cited more for procedural convenience than for the substantive resolution of a hard case, but assuming that cases are evenly distributed across justices, the relative citation frequency of a justice's opinions provides one measure of the justice's overall influence. By this measure, Justice Nelson is the most influential justice to have sat on the Montana Supreme Court in the last 20 years. Of the thousands of cases published over his tenure, and among the seventeen justices sitting at some point during that period, Nelson authored majority opinions in five of the ten Montana Supreme Court cases most cited by courts. Table 1 lists these cases. Of the 200 Montana Supreme Court cases from 1993–2012 that are most cited by all sources, Nelson authored majority opinions in 60 of them.³⁵

Table 1: Most Cited Mont. Opinions: By Cases (1993–2012)

Top Ten Case Cites				Case Cites
<i>Bruner v. Yellowstone County</i>	1995	Weber	900 P.2d 901	233
<i>Carbon County v. Union Reserve Coal Co., Inc.</i>	1995	Nelson	898 P.2d 680	232
<i>State v. Finley</i>	1996	Nelson	915 P.2d 208	142
<i>Sacco v. High Country Independent Press, Inc.</i>	1995	Nelson	896 P.2d 411	114
<i>Motarie v. Northern Montana Joint Refuse Disposal Dist.</i>	1995	Leaphart	907 P.2d 154	113
<i>Hulse v. State, Department of Justice, Motor Vehicle Division</i>	1998	Nelson	961 P.2d 75	111
<i>Mead v. M.S.B., Inc.</i>	1994	Trieweiler	877 P.2d 1018	99
<i>Oliver v. Stimson Lumber Co.</i>	1999	Regnier	993 P.2d 11	98
<i>Whitlow v. State</i>	2008	Nelson	183 P.3d 861	98
<i>State v. Van Kirk</i>	2001	Cotter	32 P.3d 735	85

This picture is incomplete, however. Due to his long tenure, Justice Nelson is the only justice to have written opinions for all 20 years he sat on the court. The ten most cited cases published each year show the relative influence of the justices sitting on the court that year, and thereby control for the length of each justice's tenure. Because there are at least seven justices issuing opinions each year, any justice with more than one opinion in the ten most cited cases is "overperforming" relative to the other justices in citation terms. As Table 2 demonstrates, even when compared with his colleagues on the court in any given year, Justice Nelson's influence in citation

Montana Supreme Court Cases database under the filter "Most Cited." Those 210 cases were combined, excluding one case written in 1993 by Justice Nelson's predecessor Justice McDonough (*Palmer by Diacon v. Farmers Ins. Exchange*, 861 P.2d 895 (Mont. 1993)). The combined cases were then ranked four ways according to citations as of the search date by: (1) citations in cases, (2) citations in law reviews and journals, (3) citations in appellate and trial court documents, (4) citations in all primary and secondary sources counted by Westlaw's "most cited" function. The data was checked for accuracy against an overall list of the 200 "Most Cited" Westlaw cases published from 1993–2012 (searched on April 6, 2014).

35. *Id.*

terms is dominant. In thirteen of his twenty years on the bench, Justice Nelson wrote as many or more of the most-cited opinions issued that year relative to the other justices. He outpaced the other justices by writing multiple most-cited opinions every year except 1993 (his first partial year on the court), 1999 (the year he wrote *Armstrong v. State*), 2004 (his contested election year and the year he concurred in *Snssetsinger v. Montana University System*), and 2012 (his final year on the court and the year he dissented in *Donaldson v. State*).

Table 2: Most Cited Mont. Opinions: By Cases (1993–2012)

<i>Year</i>	<i>Authors of ten most-cited majority opinions (number of opinions)</i>	<i>Other authors of multiple ten most-cited opinions (number of opinions)</i>
1993	Gray (3)	Turnage (2)
1994	Nelson (5)	Trieweiler (2)
1995	Nelson (4)	Trieweiler, Weber (2)
1996	Nelson (5)	Trieweiler (3)
1997	Nelson (5)	Regnier, Trieweiler (2)
1998	Trieweiler (3)	Gray, Nelson , Regnier (2)
1999	Leaphart (3)	Hunt, Regnier, Trieweiler (2)
2000	Nelson (4)	Regnier (3)
2001	Nelson (4)	Cotter (3)
2002	Cotter, Nelson (3)	Trieweiler (2)
2003	Nelson , Trieweiler (3)	Regnier (2)
2004	Leaphart, Regnier (3)	Cotter (2)
2005	Leaphart (3)	Cotter, Morris, Nelson (2)
2006	Leaphart, Nelson (3)	Cotter (2)
2007	Nelson (5)	Leaphart, Morris (2)
2008	Nelson (5)	Leaphart (2)
2009	Leaphart, Morris, Nelson (3)	
2010	Cotter, Leaphart, Nelson (3)	
2011	Wheat (5)	Nelson (3)
2012	Cotter, Rice (3)	Baker (2)

Several factors account for Nelson's influence through citations. Some of his opinions, such as *Carbon County v. Union Reserve Coal Co., Inc.*, fortuitously address emerging legal and fact issues like the legal status of coal seam methane gas produced from traditional coal lands.³⁶ The hallmark of a commonly cited Nelson opinion, however, is its exhaustive—Dworkin might say Herculean—doctrinal analysis from Montana and other jurisdictions, even when a case was not deemed sufficiently weighty or complex to merit argument or a full seven-justice panel. In *Whitlow v. State*, for example, his unanimous opinion for a five-member panel of the Court spends eleven paragraphs on a detailed summary of federal and state cases, harmonizing several strands of law on ineffective assistance of counsel to clarify that counsel's performance should be assessed under an objective standard of reasonableness.³⁷ Justice Nelson authored a similarly scholarly

36. *Carbon County v. Union Reserve Coal Co., Inc.*, 898 P.2d 680 (Mont. 1995).

37. *Whitlow v. State*, 183 P.3d 861, 864–868 (Mont. 2008).

2014 JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE 207

unanimous opinion explicating the torts of negligent and intentional infliction of emotional distress in *Sacco v. High Country Independent Press*.³⁸ In *State v. Ariegwe*, involving a speedy trial claim, Nelson's unanimous opinion for the full Court spent 83 paragraphs giving "[the Court's] own meaning" to the federal *Barker v. Wingo*³⁹ speedy trial balancing test, including a three-page, single-spaced outline of the revised test, followed by another 63 paragraphs of application.⁴⁰ Despite their concurrence in the new test, a four-member majority of the Court specially concurred "only to bemoan the law's complexity," and "wish the best to counsel and the trial courts in working with these principles."⁴¹ The opinion stretched to 30,000 words, longer than a typical law review article. This is characteristic of Hercules, who Dworkin notes would write opinions of "extraordinary and sometimes tedious length."⁴²

The benefits of herculean opinion writing to the law sometimes comes at a cost to the parties, however. *Whitlow*, for example, was decided nearly 26 months after submission on the briefs. Moreover, Justice Nelson's attempts to clarify the law did not always succeed, even at the time. One of his most enduring opinions, *State v. Finley*,⁴³ announced a revised common law rule for plain error review in criminal cases that has been cited more than one hundred times.⁴⁴ Yet Nelson's opinion gained only one concurrence, from Chief Justice Turnage. Two justices specially concurred separately in the result but disagreed with the rule, and three justices agreed with the rule but dissented from the result.⁴⁵ The ultimate utility of even such divided opinions, however, can be demonstrated by the extent of lawyers' reliance on the opinions in briefs. The citation data in Table 3 suggests that lawyers as well as judges find Nelson's opinions useful.

While Justice Nelson's treatise-like opinions in commonplace crime, property, and tort cases draw the attention of judges and practitioners, academic commentators are drawn more to groundbreaking "hard cases," especially those that arise under the innovative provisions of the 1972 Montana Constitution. As Table 4 shows, Nelson's work also is cited heavily in law reviews and other academic journals. The seminal privacy case *Gryczan v. State*⁴⁶ leads the rankings as one of the most academically influential opin-

38. *Sacco v. High Country Indep. Press*, 896 P.2d 411 (Mont. 1995).

39. *Barker v. Wingo*, 407 U.S. 514 (1972).

40. *State v. Ariegwe*, 167 P.3d 815, 829–851 (Mont. 2007).

41. *Id.* at 864 (Rice, J., concurring).

42. Ronald Dworkin, *Law's Empire* 379 (Harv. U. Press 1986).

43. *State v. Finley*, 915 P.2d 208 (Mont. 1996).

44. *Id.* at 212–215.

45. *Id.* at 222–223 (Gray, J., specially concurring); *id.* at 223 (Erdmann, J., specially concurring); *id.* at 223–226 (Leaphart, J., dissenting).

46. *Gryczan v. State*, 942 P.2d 112 (Mont. 1997).

Table 3: Most Cited Mont. Opinions: By Briefs (1993–2012)

Top Ten Briefs				Brief Cites
<i>Iwen v. U.S. West Direct</i>	1999	Regnier	977 P.2d 989	316
<i>Sacco v. High Country Independent Press, Inc.</i>	1995	Nelson	896 P.2d 411	304
<i>Kloss v. Edward D. Jones & Co.</i>	2002	Trieweiler	54 P.3d 1	294
<i>Oliver v. Stimson Lumber Co.</i>	1999	Regnier	993 P.2d 11	250
<i>State v. Van Kirk</i>	2001	Cotter	32 P.3d 735	248
<i>Newville v. State, Dept. of Family Services</i>	1994	Warner	883 P.2d 793	247
<i>State v. Finley</i>	1996	Nelson	915 P.2d 208	246
<i>Hulse v. State, Dept. of Justice, Motor Vehicle Div.</i>	1998	Nelson	961 P.2d 75	240
<i>Plumb v. Fourth Judicial Dist. Court, Missoula County</i>	1996	Trieweiler	927 P.2d 1011	231
<i>Travelers Cas. & Sur. Co. v. Ribl Immunochem Research, Inc.</i>	2005	Morris	108 P.3d 469	230

ions issued by the Montana Supreme Court, along with Justice Nelson's elaboration of his theory of personal autonomy in *Armstrong v. State*.⁴⁷ Justice Trieweiler's bookends to the contract-law saga, which one commentator called "The War Against Arbitration in Montana"⁴⁸—*Casarotto v. Lombardi*⁴⁹ and *Kloss v. Edward D. Jones & Co.*⁵⁰—come nearest to *Gryczan* in influence with nearly half as many citations. Nelson takes partial credit for *Kloss*, however, due to his similarly influential concurrence arguing that an arbitration agreement must be scrutinized by the strict standard for a waiver of constitutional rights to a jury trial and access to courts.⁵¹ The concurrence itself has been cited in 22 law review articles. These join Trieweiler's pioneering application of the state constitutional "clean and healthful environment" duty and right in *Montana Environmental Information Center v. Department of Environmental Quality*⁵² among the cases of greatest interest to commentators.

Justice Nelson's third most-cited opinion, *State v. Siegal*, considers the constitutionality of a warrantless search by thermal imaging, holding it to be an unreasonable search and violation of the right to privacy.⁵³ Like the Court's recognition of a privacy right to same-sex intimacy in *Gryczan*, *Siegal's* analysis of thermal imaging searches proved to be ahead of its time. Within a few years, the United States Supreme Court reached the basic privacy theories of both *Siegal* and *Gryczan* in *Kyllo v. United States*⁵⁴ and *Lawrence v. Texas*,⁵⁵ respectively. In *Lawrence*, the Supreme

47. *Armstrong v. State*, 989 P.2d 364 (Mont. 1999).

48. Scott J. Burnham, *The War Against Arbitration in Montana*, 66 Mont. L. Rev. 139 (2005).

49. *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994).

50. *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1 (Mont. 2002).

51. *Id.* at 11–17 (Nelson, J., specially concurring).

52. *Mont. Env'tl. Info. Ctr. v. Dept. of Env'tl. Quality*, 988 P.2d 1236 (Mont. 1999).

53. *State v. Siegal*, 934 P.2d 176, 192 (Mont. 1997).

54. *Kyllo v. United States*, 533 U.S. 27, 29 (2001) (holding "the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment.").

Table 4: Most Cited Mont. Opinions: By Journals (1993–2012)

Top Ten Law Journal Cites				Jour. Cites
<i>Gryczan v. State</i>	1997	Nelson	942 P.2d 112	171
<i>Casarotto v. Lombardi</i>	1994	Trieweler	886 P.2d 931	83
<i>Montana Environmental Information Center v. Department of Environmental Quality</i>	1999	Trieweler	988 P.2d 1236	68
<i>Kloss v. Edward D. Jones & Co.</i>	2002	Trieweler	54 P.3d 1	67
<i>Armstrong v. State</i>	1999	Nelson	989 P.2d 364	62
<i>In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures</i>	2000	Leaphart	2 P.3d 806	56
<i>State v. Siegal</i>	1997	Nelson	934 P.2d 176	55
<i>Snetsinger v. Montana University System</i>	2004	Regnier	104 P.3d 445	50
<i>Western Tradition Partnership, Inc. v. Attorney General of State</i>	2011	McGrath	271 P.3d 1	50
<i>Baxter v. State</i>	2009	Leaphart	224 P.3d 1211	49

Court relied on *Gryczan* to show the growing recognition of a liberty interest in same-sex intimacy.⁵⁶ The Supreme Court also vindicated Nelson more recently, summarily siding with his notable dissent in *Western Tradition Partnership v. Bullock*, already widely noted in academic commentary.⁵⁷ The *Montana Law Review* has chosen Justice Nelson's work more than that of any other justice for case note analysis. Out of 54 case notes published since 1993, 24 of the cases feature Nelson opinions.⁵⁸ No fewer than 15 of the case notes concern cases in which Nelson dissented.

55. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding private consensual intimacy among adults of the same-sex is a protected exercise of liberty under the Due Process Clause of the Fourteenth Amendment).

56. *Id.* at 576.

57. *W. Tradition Partn., Inc. v. Bullock*, 271 P.3d 1, 16–36 (Mont. 2011) (Nelson, J., dissenting), *rev'd sub nom. Am. Tradition Partn., Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012).

58. Heather M. Latino, *Erger v. Askren: Protecting the Biological Parent's Rights at the Child's Expense*, 58 Mont. L. Rev. 599 (1997) (Nelson, J., concurring); Ryan M. Archer, *Searching for the Montana Open Range: A Judicial and Legislative Struggle to Balance Tradition and Modernization in an Evolving West*, 63 Mont. L. Rev. 197, 198 (2002) (Nelson, J., majority); Penny Lee Merreot, *Rescuing Your Attacker: State of Montana Ex Rel. Kuntz v. Montana Thirteenth Judicial District Court*, 63 Mont. L. Rev. 229 (2002) (Nelson, J., majority); Elaine M. Dahl, *Taking Liberties: Analysis of in Re Mental Health of K.G.F.*, 64 Mont. L. Rev. 295 (2003) (Nelson, J., majority); Chase Naber, *Murky Waters: Private Action and the Right to A Clean and Healthful Environment an Examination of Cape-France Enterprises v. Estate of Peed*, 64 Mont. L. Rev. 357, 358 (2003) (Nelson, J., majority); James D. Johnson, *State v. Reesman: Totality of the Circumstances or A Recipe for Mulligan Stew?*, 65 Mont. L. Rev. 159, 174 (2004) (Nelson, J., majority and dissenting); *Cassie Coleman, Love or Confusion? Common Law Marriage, Homosexuality and the Montana Supreme Court In Snetsinger v. Montana University System*, 66 Mont. L. Rev. 445, 446 (2005) (Nelson, J., concurring); Kimberly McKelvey, *State v. Carter: Rejecting Crawford v. Washington's Third Formulation As a Per Se Definition of Testimonial*, 67 Mont. L. Rev. 121, 122 (2006) (Nelson, J., majority); Jeffrey D. Perkins, *Embracing Big Brother? State v. A Blue in Color, 1993 Chevrolet Pickup*, 68 Mont. L. Rev. 471, 472 (2007) (Nelson, J., concurring); Myles Braccio & Jessie Lundberg, *"The Mother of All Balancing Tests": State v. Ariegwe and Montana's Revised Speedy Trial Analysis*, 69 Mont. L. Rev. 463, 464 (2008) (Nelson, J., majority); Hanna Warhank, *Blazer v. Wall: The Restriction of the Easement by Reservation Doctrine*, 71 Mont. L. Rev. 183 (2010) (Nelson, J., majority); Eric Henkel, *Two Crimes for the Price of One: Reshaping*

Beyond Nelson's own influential opinions for the Court, several of the other majority opinions most cited in academic work arose from claims framed around his earlier decisions. *Snetsinger v. Montana University System*,⁵⁹ a challenge to a state university policy providing benefits to opposite-sex but not same-sex couples who sign an affidavit of common law marriage, raised claims previously suggested by Nelson. These included a privacy-based extension of *Gryczan* and a hybrid dignity claim first developed in *Walker v. State*.⁶⁰ Instead of adopting these broader theories, however, Justice Regnier's opinion for the Court in *Snetsinger* resolved the case narrowly on equal protection grounds, implicitly under rational basis review.⁶¹ Ironically, the Court relied on the equality-based reasoning of Chief Justice Turnage's limited concurrence in *Gryczan* instead of the broader privacy grounds adopted by the Court itself.⁶² Concurring alone, Nelson

Felony Homicide in State v. Russell, 71 Mont. L. Rev. 205 (2010) (Nelson J., concurring and dissenting); Aaron M. Neilson, *A Look at Kulstad v. Maniaci in Light of Changing Cultural Norms*, 71 Mont. L. Rev. 449 (2010) (Nelson, J., concurring); Ross Sharkey, *Rohlf's v. Klemenhagen, LLC: Is It Time to Revise Montana's Dram Shop Act?*, 72 Mont. L. Rev. 127 (2011) (Nelson, J., dissenting); David Bigger, *State v. Ellis: Protecting the Rights of Parents to Be Secure Against Unreasonable Searches and Seizures*, 72 Mont. L. Rev. 151 (2011) (Nelson, J., majority); Lee C. Baxter, *Gonzales v. City of Bozeman: The Public Duty Doctrine's Unconstitutional Treatment of Government Defendants in Tort Claims*, 72 Mont. L. Rev. 299 (2011) (Nelson, J., dissenting); Justin Harkins, *When Consumer Protection Becomes Preordained: Malcolm v. Evenflo and Montana's Products Liability Standard*, 73 Mont. L. Rev. 161 (2012) (Nelson, J., dissenting); Stephanie Holstein, *State v. Allen: The Connection Between the Right to Be Secure from Unreasonable Searches and Seizures and Montana's Individual Right of Privacy*, 73 Mont. L. Rev. 179 (2012) (Nelson, J., concurring); William Mac Morris, *A Lack of Deference: Rational Basis with Bite in Caldwell v. Maco Workers' Compensation Trust*, 73 Mont. L. Rev. 417 (2012) (Nelson, J., concurring); Paul M. Leisher, *Examining Montana's Right to Attack Unconstitutional Prior Convictions at Sentencing: State v. Maine*, 74 Mont. L. Rev. 183 (2013) (Nelson, J., majority); Carina Wilmot, *Reichert v. State Ex Rel. McCulloch and the Open Door for Increased Pre-Election Substantive Judicial Review*, 74 Mont. L. Rev. 441 (2013) (Nelson, J., majority); Thomas J. Bourguignon, *Montana Cannabis Industry Association v. State of Montana and the Constitutionality of Medical Marijuana*, 75 Mont. L. Rev. 167 (2014) (Nelson, J., dissenting); Caitlin Boland, *Lightning v. the Lightning Bug: A Problem of Statutory Interpretation in State v. Cooksey*, 75 Mont. L. Rev. 149 (2014) (Nelson, J., concurring and dissenting).

59. *Snetsinger v. Mont. U. Sys.*, 104 P.3d 445 (Mont. 2004).

60. *Walker v. State*, 68 P.3d 872 (Mont. 2003).

61. *Snetsinger*, 104 P.3d at 452 ("The principal purpose of the Equal Protection Clause, Article II, section 4, of the Montana Constitution, is to ensure citizens are not subject to arbitrary and discriminatory state action. Therefore, we conclude there is no justification for treating the two groups differently, nor is the University System's policy rationally related to a legitimate governmental interest.").

62. *Id.* This shift in the recognized source of rights protecting same-sex couples has a parallel in federal constitutional law. In *Lawrence v. Texas*, Justice O'Connor (like Chief Justice Turnage) rejected the liberty rationale of the Court's opinion recognizing a privacy right to same-sex intimacy, and instead concurred on equal protection grounds. See *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring in the judgment). Later, the Court in *United States v. Windsor* appeared to incorporate equal protection rather than privacy into its recognition of "equal dignity" for same-sex married couples. *U.S. v. Windsor*, ___ U.S. ___, 133 S. Ct. 2675, 2695 (2013) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.").

2014 JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE 211

accepted the invitation to address the broader dignity claim. His concurrence offered a detailed elaboration of the three sentences in the Article II, section 4 guarantee of individual dignity, equal protection of the laws, and protection against discrimination.⁶³ Fourteen of the 50 academic citations to *Snetsinger* address Nelson's concurrence.

Baxter v. State, a challenge to the homicide laws as applied to physicians assisting in the deaths of consenting, terminally ill adults, similarly raised privacy and dignity claims developed by Justice Nelson in earlier opinions.⁶⁴ Again, in an opinion by Justice Leaphart, the Court declined to reach the broad constitutional issues in favor of a narrower resolution, this time on statutory consent defense grounds.⁶⁵ In a special concurrence, Nelson engaged the Article II, section 4 guarantee of individual dignity, deepening the analysis begun in his *Snetsinger* concurrence.⁶⁶ The statutory consent defense was an afterthought, a resort to constitutional avoidance in a case that pleaded only constitutional causes of action.⁶⁷ From the start, the case was framed on Nelson's constitutional theory, not the Court's statutory theory. It likely would not have been brought had Nelson's opinions not previously suggested his (and perhaps the Court's) receptivity to the constitutional arguments grounded in dignity and privacy. Indeed, almost exactly a year before plaintiff's counsel in *Baxter* filed her complaint, she presented her theory of the case at a Montana Law Review Browning Symposium keyed by—and dedicated to—Nelson.⁶⁸

II. JUDICIAL PHILOSOPHY

Justice Nelson's interests and influence run throughout Montana law, including his close doctrinal analysis of the common law, his careful statutory and regulatory interpretation, and even his defense of the Montana Field Code.⁶⁹ His most notable legacy, however, is his approach to the 1972 Montana Constitution. In Nelson's view, the state constitution is "the most progressive, people-friendly, and pro-civil-rights organic document of any

63. *Snetsinger*, 104 P.3d at 454–466 (Nelson, J., concurring).

64. *Baxter*, 224 P.3d at 1211 (Mont. 2009).

65. *Id.* at 1214–1215.

66. *Id.* at 1224–1233.

67. Compl., *Baxter v. State*, 2007 WL 5859055 at *7 (Mont. 1st J. Dist. Oct. 18, 2007).

68. Kathryn L. Tucker, *Privacy and Dignity at the End of Life: Protecting the Right of Montanans to Choose Aid in Dying*, 68 Mont. L. Rev. 317 (2007) ("Such a case would likely assert that mentally competent, terminally ill Montanans have a right protected under the Montana State Constitution's guarantees of privacy and dignity to choose to control their own deaths by obtaining medications from their physicians for this purpose."); see also Montana Law Review, *supra* n. 3, at 251.

69. See Andrew P. Morriss et al., *Debating the Field Civil Code 105 Years Late*, 61 Mont. L. Rev. 371 (2000).

state constitution.”⁷⁰ Beyond the Constitutional Convention delegates themselves, Justice Nelson has served as that document’s most visionary and vocal advocate. The editors of the *Montana Law Review* wrote, “no jurist has been a more courageous and vigilant protector of ordinary Montanans’ constitutional freedoms.”⁷¹ Therefore his constitutional jurisprudence merits special attention.

Justice Nelson describes his interpretative method as “one of fidelity to the constitutional vision—one informed by the intent of the framers, by the plain language of the constitution, and, importantly, by the ineffable spirit of the living document, read as an integrated whole, in the context of the times.”⁷² This description captures in Dworkinian terms the themes Nelson sounds in his constitutional opinions. But in the hard cases, those that, Nelson explains, “provoke[] passionate disagreement due to conflicting perceptions or understandings of the issues and the law,” or even “involve constitutional principles that, like quantum particles, become known only when identified and articulated by the Court in the given case,”⁷³ his explanation falls short of a full account for his methodology. The “intent of the framers” (or even the original meaning)⁷⁴ and the “plain language” simply run out of determinative content in the application of open-textured terms like “dignity” and “privacy” to hard cases. Sometimes, in the now-commonplace umpire analogy Nelson adapted, judges must either “call ‘em as we see ‘em,” or even recognize that “they ain’t nothin’ ‘til we call ‘em.”⁷⁵ Yet as Nelson acknowledges, the state constitution’s primary guarantees are “popular sovereignty”⁷⁶ and “self-government.”⁷⁷ How does he reconcile the potential subjectivity of those constitutional calls with the democratic legitimacy the constitution itself requires?

The answer, in Nelson’s terms, is found in “the ineffable spirit of the living document, read as an integrated whole, in the context of the times.”⁷⁸

70. James C. Nelson, *Keeping Faith with the Vision: Interpreting A Constitution for This and Future Generations*, 71 Mont. L. Rev. 299, 301 (2010).

71. *Montana Law Review*, *supra* n. 3, at 251.

72. Nelson, *supra* n. 70, at 322.

73. *Id.* at 314.

74. As the leading practitioner of originalism clarifies, the originalist judge looks for “the original meaning of the text, not what the original draftsmen intended.” Antonin Scalia, *A Matter of Interpretation* 38 (Princeton 1997). It is the meaning of the words when ratified, and not the intent of the drafter, that carries the force of law for most originalists.

75. Nelson, *supra* n. 70, at 314–315.

76. See Mont. Const. art. II, § 1 (“All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.”).

77. See *id.* at art. II, § 2 (“The people have the exclusive right of governing themselves as a free, sovereign, and independent state. They may alter or abolish the constitution and form of government whenever they deem it necessary.”).

78. Nelson, *supra* n. 70, at 322.

2014 *JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE* 213

By this Nelson means more than a loose form of policymaking based on a judge's conscious preferences. His fidelity to the Montana Constitution is a fidelity to several delegates' specific intentions (though not necessarily the ratifiers' general understandings or the words' original meanings) that the broad constitutional text be read broadly. Nelson finds this captured in the 1972 Convention's Bill of Rights Committee report on Article II, section 34, an interpretative instruction that "[t]he enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people."⁷⁹

This provision, unchanged from the 1889 Constitution, is an odd vessel for judicially innovated rights.⁸⁰ The Article II Declaration of Rights already contains 35 enumerated rights, at least 17 of which have no federal counterpart,⁸¹ many of which were drafted and debated and added to the 1889 Constitution by the 1972 Convention itself.⁸² The Bill of Rights Committee reported that section 34 "is a crucial part of any effort to revitalize the state government's approach to civil liberties questions" and "may be the source of innovative judicial activity in the civil liberties field."⁸³ However, the voters who made section 34 law through ratification would not have known this relatively esoteric reading, since the official voter information pamphlet explained only that section 34 is "[i]dentical to [the] 1889 constitution."⁸⁴ And it is unclear that even if the voters understood the document to invite, in Nelson's terms, "future generations to interpret the Constitution in the light of their whole experience,"⁸⁵ they would have expected judges to do that for them. To resolve future problems with the 1972 text, the people reserved the constitutional initiative power to make it easier to

79. See Mont. Const. art. II, § 34.

80. This does not deny that section 34, like the Ninth Amendment to the United States Constitution, could not be read by its plain terms to require judges to construe other constitutional provisions in a way that does not (at least without express legislative abrogation) "deny, impair, or disparage" traditionally recognized rights (or "natural rights") that preexisted the constitution. See e.g. Randy Barnett, *The Ninth Amendment: It Means What It Says*, 85 Tex. L. Rev. 1 (2006); Michael McConnell, *The Ninth Amendment in Light of Text and History*, 2010 Cato Sup. Ct. Rev. 13, 14 (2009–2010). But that reading is antithetical to the reading of it as an authorization for judges to innovate new rights that themselves may disparage the people's traditionally retained rights, including the enumerated rights to popular sovereignty and self-government.

81. Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide* 20 (Greenwood Press 2001) (citing Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 Tex. L. Rev. 1095, 1122 (1985)).

82. See *Proposed 1972 Constitution for the State of Montana: Official Text with Explanation*, 3 (Mont. Const. Conv. 1972).

83. *Montana Constitutional Convention Transcript Vol. II*, 645 (Mont. Leg. Council 1979).

84. See *Proposed 1972 Constitution*, supra n. 82, at 7. The official volumes of reports and transcripts were not published until 1979.

85. Nelson, supra n. 70, at 318.

pace their constitution and government to changing times.⁸⁶ For Nelson, however, the adaptation of the Montana Constitution to “the changing conditions and the evolving norms of our society” is primarily, if not exclusively, an interpretative task of innovative judicial activity rather than a legislative task of popular political activity.⁸⁷

To the extent the legal content of the Montana Constitution’s text cannot fully account for Justice Nelson’s jurisprudence, especially in hard cases, political morality does. Morality may sound like an odd motivation for a judge so suspicious of legal moralism. In *Gryczan*, Nelson’s opinion for the Court quoted *The Humanitarian Theory of Punishment*, C.S. Lewis’s traditional defense of retributive punishment against a therapeutic approach to criminal justice. The essay argued that “[i]t may be better to live under robber barons than under omnipotent moral busybodies . . . those who torment us for our own good will torment us without end for they do so with the approval of their own conscience.”⁸⁸ Throughout his strongest defenses of liberty and equality, Nelson attacked legal moralism. In his opinion for the Court in *Gryczan*, he wrote “[o]ur Constitution does not protect morality,” and “it is not the function of this or of any court to interpret the law on the basis of what may be morally acceptable or unacceptable to society at any given time.”⁸⁹ In *Armstrong*, Nelson reiterated in his opinion for the Court that theology is “an impermissible basis on which to make law or interpret the Constitution.”⁹⁰ In his concurrence in *Snetsinger*, arguing for the constitutional equality of gay and lesbian Montanans, he protested against “majoritarian oppression”⁹¹ by “[m]ajoritarian morality and prevailing political ideology.”⁹² In *Baxter v. State*, Nelson defended a right to phy-

86. See generally Anthony Johnstone, *The Constitutional Initiative in Montana*, 71 Mont. L. Rev. 325 (2010).

87. Nelson, *supra* n. 70, at 319 (cataloging only judicial interpretations, not legislation or amendments, as examples of constitutional adaptation).

88. *Gryczan*, 942 P.2d at 125 (quoting C.S. Lewis, *The Humanitarian Theory of Punishment*, in *God in the Dock* 287, 292 (Eerdmans Publishing Co. 1970)). Lewis may be the wrong writer to make Nelson’s point. Lewis was a Christian apologist who noted elsewhere in his essay that he was defending “the old view,” under which “the problem of fixing the right sentence was a moral problem,” to be solved by a judge trained in jurisprudence, “a science which deals with rights and duties, and which, in origin at least, was consciously accepting guidance from the Law of Nature, and from Scripture.” *Id.* at 288.

89. *Gryczan*, 942 P.2d at 125.

90. *Armstrong*, 989 P.2d at 382.

91. *Snetsinger*, 104 P.3d at 454 (Nelson, J., specially concurring).

92. *Id.* at 461–462; see also *Donaldson v. State*, 292 P.3d 364, 393–394 (Mont. 2012) (Nelson, J., dissenting) (“fundamental rights are not subject to filtering through the sieve of majoritarian morality or religious doctrine.”); *Kulstad v. Maniaci*, 220 P.3d 595, 611 (Mont. 2009) (Nelson, J., concurring) (“whether rationalized on the basis of majoritarian morality, partisan ideology, or religious tenets, homophobic discrimination is still bigotry.”).

2014 *JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE* 215

sician-assisted suicide against both “political ideology” and “religious beliefs.”⁹³

In these same opinions, however, Justice Nelson reveals the morality in his own jurisprudence. Repeatedly, in cases involving issues ranging from abortion to same-sex partnerships to physician-assisted suicide, Nelson associated constitutional rights with an individual’s “moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives.”⁹⁴ This morality is a political morality—a liberal political morality that Nelson locates in the principles he finds expressed in the Montana Constitution’s Declaration of Rights. These rights are the constitutional principles with which he, in overtly moral terms, “keeps faith.”⁹⁵ His reading of the constitution is what Dworkin called a “moral reading of the constitution.”⁹⁶

A. *Hercules and the Moral Reading of the Constitution*

Dworkin claims that lawyers and judges do, and should, “treat the Constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments.”⁹⁷ Not all of the Constitution, or the Montana Constitution, expresses principles that are susceptible to a moral reading in Dworkin’s view. Many provisions, such as the requirement that the President must be at least 35 or that Montana Supreme Court Justices serve for eight-year terms, establish rules not principles.⁹⁸ Several provisions do express such principles, however, and according to Dworkin these give rise to our greatest national constitutional aspirations and controversies. The Fourteenth Amendment’s guarantee of “equal protection of the laws,” for Dworkin, does not express merely the framers’ or ratifiers’ original expected application of the text “equal protection,” but the principle of equality itself.⁹⁹ Therefore the Fourteenth Amendment established not just the expected application of ending “the most egregious Jim Crow practices of the Reconstruction period,” but also “a principle of quite breathtaking scope and power: the principle that government must treat everyone as of equal status and with equal concern.”¹⁰⁰

93. *Baxter*, 224 P.3d at 1233 (Nelson, J., concurring).

94. *Armstrong*, 989 P.2d at 383; see also *Snetsinger*, 104 P.3d at 461; *Baxter*, 224 P.3d at 1230.

95. See Nelson, *supra* n. 70.

96. Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Harv. U. Press 1996).

97. *Id.* at 3.

98. *Id.* at 8.

99. *Id.* at 9–10.

100. *Id.* One of Dworkin’s most insightful critics notes the contradiction in an approach that assigns judges alone the exposition of our shared constitutional principles based on equality. Michael McConnell argues “[p]art of ‘equal concern and respect’ is the understanding that each citizen’s ideas about

Dworkin concedes that the moral reading of such broad principles draws on political morality that is “inherently uncertain and controversial.”¹⁰¹ So, according to Dworkin’s view of American constitutional practice, judges must have the last word on the meaning of this political morality and the application of these constitutional principles. Judges, particularly appointed federal judges, and especially Supreme Court justices, must “decide some issues of political morality for everyone.”¹⁰² This seemingly anti-democratic aspect of judicial review is necessary, Dworkin argues, to ensure “that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not political power alone, a transformation that cannot succeed, in any case not fully, within the legislature itself.”¹⁰³ For Dworkin, the judiciary stands alone in the constitutional process as a “forum of principle.”¹⁰⁴

Aware of the broad power a court wields as a forum of principle, Dworkin claims there are “two important restraints that sharply limit the latitude the moral reading gives to individual judges.”¹⁰⁵ The first, text informed by history, turns out not to be much of a restraint at all because he “favor[s] a particular way of stating the constitutional principles at the most general possible level.”¹⁰⁶ The text of the Bill of Rights and Fourteenth Amendment, therefore, “commit the United States to the following political and legal ideals: government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document.”¹⁰⁷ The second, law as integrity, allows judges to make moral judgments from constitutional principles only when “they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges.”¹⁰⁸ In Dworkin’s famous metaphor, “judges are like authors jointly creating a chain novel in which

justice and the public good are entitled to an equal hearing . . . there is no mandarin class whose views, by virtue of station or status or position, are thought to provide ‘the best answer’ to questions about which we are divided—even if they are judges or law professors.” He continues, “In the face of disagreements among the citizens about issues of justice and the public good, the only way to show equal concern and respect is to govern democratically, subject to constraints to which the people themselves have agreed.” Michael McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s ‘Moral Reading’ of the Constitution*, 65 *Fordham L. Rev.* 1269, 1290–91 (1997).

101. Dworkin, *supra* n. 96, at 2.

102. Ronald Dworkin, *A Matter of Principle* 70 (Harv. U. Press 1985).

103. *Id.*

104. *Id.* at 71.

105. Dworkin, *supra* n. 96, at 10.

106. *Id.* at 7.

107. *Id.* at 7–8.

108. *Id.* at 10.

2014 JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE 217

each writes a chapter that makes sense as part of the story as a whole.”¹⁰⁹ The moral reading requires the judge “to find the best conception of constitutional moral principles—the best understanding of what equal moral status for men and women really requires, for example—that fits the broad story of America’s historical record.”¹¹⁰ This ambitious work of fitting a case into the preexisting constitutional structure, and, in hard cases that do not fit, articulating the judge’s most principled judgment about our political morality that justifies the result, is the work of Hercules.¹¹¹

Now return to Justice Nelson’s statement of his own judicial philosophy: “fidelity to the constitutional vision—one informed by the intent of the framers, by the plain language of the Constitution, and, importantly, by the ineffable spirit of the living document, read as an integrated whole, in the context of the times.”¹¹² Text, history, and integrity are all there. This is not surprising. Nelson is one of the few American justices to expressly rely on Dworkin in his judicial work.¹¹³ In the *Armstrong* case, recognizing a state constitutional privacy right to abortion, Nelson cites Dworkin’s philosophical writings more often than he cites the transcripts of the Montana Constitutional Convention, interchangeably using one to bolster the other.¹¹⁴ Most tellingly, Nelson refers to Dworkin alone in asserting that the Montana Constitution “is a compact of overlapping and redundant rights and guarantees,” one that “encompasses a cohesive set of principles, carefully drafted and committed to an abstract ideal of just government.”¹¹⁵ Or, in Nelson’s felicitous formulation, “Montana’s Constitution, and especially the Declaration of Rights, is not simply a cook book of disconnected and discrete rules written with the vitality of an automobile insurance policy.”¹¹⁶ Justice Nelson, like Dworkin’s Hercules, conceives of law as a seamless web of coherent principles justifying the judgments required by these hard cases.¹¹⁷

109. *Id.*

110. *Id.* at 11.

111. Dworkin, *supra* n. 1, at 106–107.

112. Nelson, *supra* n. 70, at 322.

113. See Neomi Rao, *A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court*, 65 U. Chi. L. Rev. 1371, 1373 n. 6 (1998) (citing just three references to Dworkin by the United States Supreme Court).

114. Compare *Armstrong*, 989 P.2d at 376–383 (citing Dworkin) with *Armstrong*, 989 P.2d at 373–377, 374 n. 5 to 377 n. 7 (citing *Mont. Const. Conv. Verbatim Transcr. Vols. V–VI* (Mont. Leg. Council 1979)). The opinion cites other philosophers too. See *Armstrong*, 989 P.2d at 372–373 (citing John Locke), 373 (John Stuart Mill), 374–375 (Mill), 378 (Joel Feinberg).

115. *Armstrong*, 989 P.2d at 383 (citing seven overlapping textual grounds for the holding).

116. *Id.*

117. Dworkin, *supra* n. 1, at 115–116. For Nelson, as with Dworkin, the web extends across doctrinal boundaries, such as contract and constitutional law. See e.g. *Albinger v. Harris*, 48 P.3d 711, 720 (Mont. 2002) (relying in part on Article II, section 4 of the Montana Constitution, “To preserve the integrity of our gift law and to avoid additional gender bias, we decline to adopt the theory that an engagement ring is a gift subject to an implied condition of marriage.”).

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B. Justice Nelson's Moral Readings of the Montana Constitution

This Herculean process of principled justification lends a particular structure to Nelson's constitutional reasoning. In one of his earliest examples of a moral reading, *Gryczan v. State*, Justice Nelson's opinion for the Court held a statute criminalizing "deviate sexual conduct" was "unconstitutional as applied to Respondents and other consenting adults engaging in private, same-gender, non-commercial, sexual conduct."¹¹⁸ The opinion juxtaposes the "reasonable expectation of privacy" informational privacy principle derived from *Katz v. United States*¹¹⁹ and the "ordered liberty" personal autonomy principle derived from *Palko v. Connecticut*.¹²⁰ It then justifies an extension of these principles beyond their past applications by reference to the express "right of individual privacy" in Article II, section 10 of the Montana Constitution.¹²¹ The resulting reading of the textual privacy right supports a liberty principle: "the right of personal autonomy or the right to be let alone."¹²² *Gryczan* begins two primary threads in Justice Nelson's jurisprudence. The first is doctrinal, and develops the Article II, section 10 right to privacy into a broad principle of personal autonomy, particularly involving medical care and bodily integrity. The second is substantive, and develops the equal dignity of gay and lesbian Montanans, particularly involving their status in families.

1. Privacy & Autonomy

Armstrong most clearly illustrates Justice Nelson's principle-based method.¹²³ His opinion for the Court nested its core holding, "the right to seek and to obtain a specific lawful medical procedure, a pre-viability abortion, from a health care provider of her choice," in successively greater principles of "a woman's right of procreative autonomy," "the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from the interference of the government," and "the personal autonomy component" of the Article II, section 10 right of individual privacy.¹²⁴ The increasing levels of generality

118. *Gryczan*, 942 P.2d at 126.

119. *Katz v. U.S.*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

120. *Palko v. Conn.*, 302 U.S. 319, 325 (1937).

121. *Gryczan*, 942 P.2d at 121.

122. *Id.* at 125.

123. This approach to privacy as autonomy in *Armstrong* is indebted to the work of the late Scott Fisk, who clerked for Justice Nelson for two years beginning in 1999 after publishing a significant student comment elaborating upon *Gryczan's* approach to privacy. See *Armstrong*, 989 P.2d at 374, citing Scott A. Fisk, *The Last Best Place to Die: Physician Assisted Suicide and Montana's Constitutional Right to Personal Autonomy Privacy*, 59 Mont. L. Rev. 301 (1998).

124. *Armstrong*, 989 P.2d at 384.

2014 JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE 219

reinforce Nelson's view of overlapping and redundant rights. They also invite more hard cases, as lawyers recognize the breadth of potential rights claims the general principle might justify.

After *Armstrong*, for example, several other plaintiffs sought "the right to make medical judgments affecting her or his bodily integrity and health in partnership with a chosen health care provider free from the interference of the government," as the Court had declared the applicable principle. In *Wiser v. State Department of Commerce*,¹²⁵ denturists sought to overturn an arguably protectionist regulation by the State Board of Dentistry that required certain denture patients to get referrals from dentists.¹²⁶ The Court, bypassing the question of whether the regulation was even rationally related to a legitimate state interest, let alone a compelling one, narrowed the broad principle of *Armstrong* to exclude "medical care from professionals who have not been determined by the regulating authority to be qualified to provide the desired service."¹²⁷ The rejection of the "personal autonomy" privacy claim fit the holding of *Armstrong* only to the extent it disregarded the principles underlying that holding. In *Armstrong*, too, the regulating authority—the legislature—had determined that only licensed physicians were competent to perform abortions.¹²⁸ That determination was unsupported by a sufficient medical justification in *Armstrong*, but the Court found no sufficient medical justification in *Wiser* either. Instead, ruling that no fundamental right was at stake, the Court fell back to the state's "police power by which it can regulate for the health and safety of its citizens."¹²⁹ Nelson silently concurred in the *Wiser* majority opinion.

More recently, the Court declined to vindicate the broader *Armstrong* principle of medical autonomy in *Montana Cannabis Industry Association v. State*.¹³⁰ Medical marijuana providers, like the denturists in *Wiser* and the physician assistants in *Armstrong*, claimed a right for their patients to make otherwise lawful medical decisions with their chosen health care pro-

125. *Wiser v. State Dept. of Com.*, 129 P.3d 133 (Mont. 2006).

126. *Id.* at 136.

127. *Id.* at 137–138.

128. *Armstrong*, 989 P.2d at 370–371. There may be other reasons to distinguish between the right to an abortion and the right to dentures, but those reasons are encompassed neither in *Armstrong*'s broad holding nor in *Wiser*'s narrow distinction.

129. *Wiser*, 129 P.3d at 138. The case presented a second narrowing of a broad principle, rejecting a right to pursue employment claim. *Id.* In *Wadsworth v. State*, 911 P.2d 1165, 1174 (Mont. 1996), a state conflict-of-interest policy precluded the Department of Revenue's real estate appraisers from seeking additional private employment as appraisers. Justice Nelson, writing for the court, declared a broad and fundamental constitutional right "to the opportunity to pursue employment," and invalidated the conflict of interest policy. Like *Wadsworth*, *Wiser* was restricted in his choice of clients by the law; *Wadsworth* could only work for the State, *Wiser* could only work for patients referred by dentists. In *Wiser* the court held the state's police power narrowed the *Wadsworth* principle. *Wiser*, 129 P.3d at 139.

130. *Mont. Cannabis Indus. Ass'n v. State*, 286 P.3d 1161 (Mont. 2012).

vider.¹³¹ Yet a recent Montana law limited the number of patients a provider could serve and prohibited payment for medical marijuana services and products. Rather than applying the *Armstrong* principle, the Court distinguished it by noting that abortion, unlike medical marijuana, was constitutionally protected.¹³² That distinction turns the *Armstrong* principle upside-down. The reason abortion is constitutionally protected is because the Court views it as a private medical judgment. Indeed, *Armstrong* itself relied in part on the independent legality of abortion, “a specific lawful medical procedure,”¹³³ just as the plaintiffs in *Montana Cannabis* relied on the independent lawfulness of medical marijuana. Yet the Court did not find a fundamental right, and in the absence of such a right the state’s police power again prevailed.¹³⁴ Justice Nelson dissented on questionable preemption grounds, seeking to reserve the question of “whether Montana’s medical marijuana laws pass muster under the Montana Constitution.”¹³⁵ Under *Wadsworth*, *Gryczan*, *Armstrong*, and other cases, *Wiser* notwithstanding, he suggested that medical marijuana might fall under a fundamental constitutional right, possibly under the *Armstrong* principle.¹³⁶

2. Dignity & Equality

Justice Nelson announced a similarly broad principle under Article II, section 4, the individual dignity provision of the Montana Constitution.¹³⁷

131. *Id.*

132. *Id.* at 1167.

133. *Armstrong*, 989 P.2d at 384.

134. *Mont. Cannabis Indus. Ass’n*, 286 P.3d at 1166. As in *Wiser*, the court also rejected an “opportunity to pursue employment” claim, this time on the ground that the providers “are ultimately horticulturists” that can find other work as horticulturists under the law. *Id.* Although the holding of *Wadsworth* was clear not to recognize a right to a particular job, the principle of “a right to pursue life’s basic necessities, to acquire property, and to be free from the State’s interference with his lawful activities” sweeps broadly. *Wadsworth*, 911 P.2d at 1173.

135. See *Mont. Cannabis Indus. Ass’n*, 286 P.3d at 1173 (Nelson, J., dissenting). Nelson’s justiciability argument is premised on the Supremacy Clause’s binder of “the Judges in every State” to federal law criminalizing marijuana as “the supreme Law of the Land.” U.S. Const. art. VI, cl. 2. Yet federal law precludes state judges from adjudicating federal crimes, 18 U.S.C. § 3231, and the *Montana Cannabis* plaintiffs’ claim to constitutional protection from state laws would, if successful, protect them from state sanctions regardless of federal law. See Thomas J. Bourguignon, *Montana Cannabis Industry Association v. State of Montana and the Constitutionality of Medical Marijuana*, 75 Mont. L. Rev. 167 (2014).

136. *Mont. Cannabis Indus. Ass’n*, 286 P.3d at 1172 (Nelson, J., dissenting) (“where a statute or administrative regulation implicates a fundamental right, we apply *strict scrutiny*”); but see *id.* at 1172 (“The question, rather, is whether the constitutional provisions upon which Plaintiffs rely include the rights they claim.”).

137. Mont. Const. art. II, § 4 (“Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”).

2014 JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE 221

That novel provision bears a structure sympathetic to a moral reading: it begins with a philosophical concept of inviolable human dignity rooted in the Reformation and Enlightenment,¹³⁸ proceeds to the traditional legal conception of equal protection of the laws, and finishes a specific application of that conception to prohibit discrimination in several special circumstances. In *Walker v. State*, a challenge to conditions and treatment at Montana State Prison as cruel and unusual punishment, Justice Nelson's opinion for the Court explored the meaning of the dignity clause as a free-standing principle, although Walker himself did not raise it.¹³⁹ Drawing on an influential examination of the clause by Matthew Clifford and Thomas Huff, Nelson wrote for the Court "[t]he plain meaning of the dignity clause commands that the intrinsic worth and the basic humanity of persons may not be violated."¹⁴⁰ The Court held the horrific facts of Walker's case violated that right to dignity, and ordered the prison "to conform the operations of its administrative segregation units to the requirements of this Opinion."¹⁴¹ Chief Justice Gray dissented, noting that the history of section 4 suggested it was "a package intended in its entirety to prohibit intrusion on a person's dignity through discrimination," and that "[n]othing in the [Constitutional Convention] transcripts supports a free-standing, separate dignity right."¹⁴²

The free-standing dignity principle announced in *Walker* has had even less legal effect than the privacy principle announced in *Armstrong*. However, shortly after his final reelection in 2004, Justice Nelson began an ambitious process of elaborating a moral reading of Article II, section 4 in a series of concurrences and dissents, usually alone. This jurisprudential work coincided with the other great project of his final term: recognizing the legal equality of gay and lesbian Montanans in the state constitution.

In *Snetsinger v. State*, Justice Regnier's opinion for the Court invalidated on apparent rational-basis grounds a domestic partnership benefits policy that excluded same-sex couples.¹⁴³ Nelson's lengthy 8,000-word concurrence went beyond the Court's narrow opinion to argue that "laws and policies that make people's rights dependent on gender or sexual orientation violate the inviolable human dignity clause of Article II, Section

138. Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 Mont. L. Rev. 301, 308–312 (2000).

139. *Walker v. State*, 68 P.3d 872 (Mont. 2003). *Id.* at 887 (Gray, C.J., dissenting) ("Walker did not raise 'dignity' or 'humanity' in the District Court until filing his Proposed Findings of Fact and Conclusions of Law and even there, he did not cite to Article II, section 4 of the Montana Constitution.").

140. *Id.* at 884.

141. *Id.* at 885.

142. *Id.* at 888–889 (Gray, C.J., dissenting).

143. *Snetsinger*, 104 P.3d at 450–453.

4.”¹⁴⁴ He began with a sharp attack on what he called “the majoritarian oppression that gays and lesbians suffer daily in this State,” and the government’s “intolerance and bigotry . . . impeccably adorned in sanctimonious rhetoric, sterile logic, and hollow assurances.”¹⁴⁵ He then developed, drawing on Clifford and Huff, a broad equality principle “based on Montana’s unique Constitutional guarantee of the inviolability of human dignity coupled with the right to equal protection of the law and the prohibition against private and State discrimination.”¹⁴⁶ In a synthesis of equal protection doctrine, *Walker*’s dignity principle, and *Armstrong*’s personal autonomy principle, Nelson wrote “[l]aws and policies which single out, degrade and demonize persons based on their gender or sexual orientation—i.e., for simply being who they are—casts a shadow on the individual dignity of such persons and devalues those persons’ basic humanity and the intrinsic worth that all people possess.”¹⁴⁷ That dignity is political as well as individual, recognizing the “essential equality” of citizens as the “moral basis for democratic government.”¹⁴⁸

Despite its breadth and depth, the *Snetsinger* concurrence offers a conventional account of dignity as equality. This is rooted not in Nelson’s own *Gryczan* or *Walker* opinions, but in Chief Justice Turnage’s partial dissent from *Gryczan*’s privacy holding on equal protection grounds, and Chief Justice Gray’s dissent from *Walker* grounded in the equality conception of dignity advanced by the provision’s framers in the convention and ratification. What distinguishes Justice Nelson’s approach is his uncompromising insistence on recognizing the constitutional equality of sexual orientation as a matter of strict scrutiny—and even stricter disapprobation of those who do not meet it—while the Court often took narrower paths to similar results.

In *Kulstad v. Maniaci*, for example, the Court awarded Kulstad a parental interest in the children adopted by Maniaci, her separated same-sex partner, when they were still together.¹⁴⁹ Justice Morris’s opinion for the Court rejected Maniaci’s constitutional claim to extend the narrow and divided federal substantive due process decision in *Troxel v. Granville*, which invalidated a Washington statute granting broad visitation rights to any person.¹⁵⁰ Instead, the Court ruled on statutory, record-based grounds that Kul-

144. *Id.* at 466 (Nelson, J., concurring). Nelson also argued that the equal protection clause of section 4, bolstered by the unenumerated rights reservation of section 34, rendered classifications based on sexual orientation suspect and deserving of strict scrutiny. *Id.*

145. *Id.* at 454.

146. *Id.* at 460.

147. *Snetsinger*, 104 P.3d at 461.

148. *Id.* (quoting Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 Mont. L. Rev. 15, 23 (2004)).

149. *Kulstad*, 220 P.3d 595.

150. *Id.* at 604–606 (distinguishing *Troxel v. Granville*, 530 U.S. 57 (2000)).

2014 JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE 223

stad's continued parental relationship would be in the children's best interests.¹⁵¹ Morris opened his opinion for the Court, "Far too often this Court faces a situation in which minor children have no adult fit to parent them . . . [t]his case presents the increasingly unusual situation of two adults fit to parent minor children."¹⁵² Concurring, Justice Nelson opened with an unusually direct commentary on Maniaci's counsel, a "defense team" of public interest lawyers whose disavowal of "sexual orientation as playing any part in their involvement in this case," he argued, "is belied by each of these participants' foundational beliefs opposing homosexuality."¹⁵³ Nelson wrote, "[W]hether rationalized on the basis of majoritarian morality, partisan ideology, or religious tenets, homophobic discrimination is still bigotry."¹⁵⁴ He then turned to the full implications of his strong conception of equal dignity in this case and future cases. "Lesbian and gay Montanans must not be forced to fight to marry, to raise their children, and to live with the same dignity that is accorded heterosexuals."¹⁵⁵

This project culminated in Justice Nelson's longest and most forceful opinion, a dissent in *Donaldson v. State*.¹⁵⁶ That case involved claims by several individuals in committed, same-sex relationships for equal protection of spousal benefit laws, but not marriage itself. These claims were as broad in their technical scope as they were deep in their personal impact, seeking in effect mandatory judicial relief requiring the rewriting of hundreds of statutes conferring spousal benefits only on married opposite-sex couples.¹⁵⁷ Chief Justice McGrath's opinion for the Court rejected plaintiffs' claim for "orders enjoining the State to provide them a 'legal status and statutory structure' that protects their rights," but allowed them to amend their complaint "to choose what statute or statutes to put in issue and upon what legal grounds."¹⁵⁸ The Court did not engage the constitutional "marriage amendment"¹⁵⁹ adopted in 2004, and instead confirmed "[p]laintiffs expressly do not challenge Montana law's restriction of marriage to heterosexual couples."¹⁶⁰ However Justice Rice, concurring, sug-

151. *Id.* at 609–610.

152. *Id.* at 597.

153. *Id.* at 610, 611 n. 2 (Nelson, J., concurring).

154. *Id.* at 611 (Nelson, J., concurring).

155. *Kulstad*, 220 P.3d at 611 (Nelson, J., concurring).

156. *Donaldson v. State*, 292 P.3d 364 (Mont. 2012).

157. *Id.* at 367. Plaintiffs did not urge narrower and more tractable grounds for an equal protection challenge, such as the relatively new and unusual provision invalidating any "contractual relationship entered into for the purpose of achieving a civil relationship that is prohibited." Mont. Code Ann. § 40–1–401(4).

158. *Id.* at 366–367.

159. Mont. Const. art. XIII, § 7 ("Marriage. Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.").

160. *Donaldson*, 292 P.3d at 365.

gested the marriage amendment barred plaintiffs' equal protection claims because of its constitutional confirmation of the "exclusive treatment of marriage."¹⁶¹

Justice Nelson introduced his 32,000-word dissent with an impassioned broadside against the Court and the State, self-conscious that "it will be my last opportunity, sitting as a member of this Court, to address the fundamental constitutional rights of gay, lesbian, and bisexual people and the discrimination which the State of Montana is perpetrating against these individuals."¹⁶² Comparing the Court's narrow, technical opinion to the broad, moralistic anti-canon of *Dred Scott v. Sanford*¹⁶³ and *Plessy v. Ferguson*,¹⁶⁴ among others, Nelson claimed "today's decision takes civil rights in this State backward to a time when court decisions supported and facilitated other equally pernicious forms of government-sanctioned discrimination, including slavery and racial segregation."¹⁶⁵ He then proceeded to an exhaustive analysis of plaintiffs' claim for declaratory judgment, concluding that a judgment declaring the spousal benefit statutes unconstitutional, but not mandatorily enjoining the legislature to act, would be justiciable.¹⁶⁶ Nelson then applied conventional state and federal equal protection doctrine, deepening his *Snetsinger* analysis of the basis for strict scrutiny with detailed references to the history of discrimination on the basis of sexual orientation in Montana.¹⁶⁷ In doing so he drew on the Second Circuit's recent opinion in *Windsor v. United States*.¹⁶⁸

The dissent concluded his analysis of plaintiffs' claims by returning to dignity principles, arguing "the State's treatment of the committed couples here based on their sexual orientation is a frontal assault on their dignity as autonomous, rational, independent human beings."¹⁶⁹ Here, Nelson previewed the broad "equal dignity" rationale of the Supreme Court's subsequent opinion in *Windsor*: "Responsibilities, as well as rights, enhance the dignity and integrity of the person [Federal non-recognition of state same-sex marriages] places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify."¹⁷⁰ Finally, Nelson argued the mar-

161. *Id.* at 374 (Rice, J., concurring).

162. *Id.* at 376 (Nelson, J., dissenting). He also questioned the Attorney General's defense of the laws. *Id.* at 379 (Nelson, J., dissenting).

163. *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

164. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

165. *Donaldson*, 292 P.3d at 376 (Nelson, J., dissenting).

166. *Id.* at 391 (Nelson, J., dissenting).

167. *Id.* at 394-407 (Nelson, J., dissenting).

168. *Windsor v. U.S.*, 699 F.3d 169 (2d Cir. 2012).

169. *Donaldson*, 292 P.3d at 407-408 (Nelson, J., dissenting).

170. *U.S. v. Windsor*, ___ U.S. ___, 133 S.Ct. 2675, 2694, (2013) (citation omitted).

2014 JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE 225

riage amendment itself was unconstitutional under Article II, sections 4 and 5 as an establishment of religion in general, and a codification of “a religious canon—here, select portions of Genesis and Leviticus” in particular.¹⁷¹ In general, and consistent with his view of the constitution as a fixed and integrated text primarily written for judicial exposition, Nelson takes a narrower view than other justices of the people’s authority to amend the constitution.¹⁷²

The dissent ends with a poignant valedictory, predicting “a not-too-distant generation of Montanans will consign today’s decision, the Marriage Amendment, and the underlying intolerance to the dustbin of history and to the status of a meaningless, shameful, artifact.”¹⁷³ Although he expresses regret that he was unsuccessful in concluding “the work this Court started 15 years ago in *Gryczan*” with a majority opinion, Justices Cotter and Wheat joined the dissent, leaving it one vote short of a majority.¹⁷⁴ Justice Cotter distanced herself and Justice Wheat from Nelson’s criticism of the Court and the constitutionality of the marriage amendment, however.¹⁷⁵ But Justice Nelson’s project did not go unnoticed. In 2014 the American Bar Association awarded Nelson the Stonewall award for advancement of lesbian, gay, bisexual, and transgender issues, noting in his biography the “scathing 117 page dissent” in *Donaldson*.¹⁷⁶

III. THE LIMITS OF PRINCIPLE

Justice Nelson’s moral reading of the Montana Constitution inspires some and infuriates others. But does it influence? Do Nelson’s broad, deep, Herculean opinions accomplish justice more effectively than the narrower

171. *Donaldson*, 292 P.3d at 418 (Nelson, J., dissenting). The dissent does not address the implication that the original state codification of marriage also would have been invalid under this argument. See 1895 Mont. Civ. Code § 210 (describing marriage as “[h]usband and wife”).

172. See e.g. *Montanans Opposed to I-166 v. Bullock*, 285 P.3d 435, 441 (Mont. 2012) (Nelson, J., dissenting) (claiming, in relation to an initiative disapproving of *Citizens United*, that “[m]ost thinking Montanans view this grandstanding for what it actually is: political pandering which accomplishes nothing substantive and which wastes the valuable state resources and limited time of the elected officials involved,” and arguing it should be stricken from the ballot); *Stop Over Spending Montana v. State*, 139 P.3d 788, 800 (Mont. 2006) (Nelson, J., dissenting) (observing “[c]ommon experience . . . that neither typical petition signers nor voters have read, much less understand, the entirety of a proposed constitutional amendment as lengthy and as complex as the one at issue here,” and arguing for the invalidation of deficient initiative petitions); *Marshall v. Cooney*, 975 P.2d 325, 332–333 (Mont. 1999) (Nelson, J. specially concurring) (arguing CI–75, a proposed amendment that attempted to require a vote on tax increases, implicitly and unconstitutionally amended legislative funding mandates contained in Article IX, section 2(2); Article XII, section 1(2); and Article XIII, section 2).

173. *Donaldson*, 292 P.3d at 422 (Nelson, J., dissenting).

174. *Id.*

175. *Id.* at 374 (Cotter, J., dissenting).

176. American Bar Association, *Stonewall Award*, http://www.americanbar.org/groups/sexual_orientation/stonewall_award.html (accessed May 9, 2014).

opinions reached by his judicial colleagues? Consider the *Armstrong* personal autonomy principle's progressive erosion by the police power in *Wiser* and *Montana Cannabis*. Consider the sidetracking of *Walker*'s dignity principle into vehement but lonely concurrences in *Snetsinger* and *Kulstad*, and the one-vote-short dissent in *Donaldson*. Must a judge's "best conception of constitutional moral principles"¹⁷⁷ account for whether that conception is realized in law? Dworkin suggested that it should. Part of what makes a conception the "best" is that "each interpretive legal argument is aimed to secure a state of affairs that is superior, according to principles embedded in our practice, to alternatives."¹⁷⁸ This consequentialist claim suggests two key limits in applying the theory of Dworkin to the practice of Justice Nelson (and all judges of principle).

First, the human judge (Dworkin calls him Herbert) has limited knowledge and time to apply to cases, even the hard ones.¹⁷⁹ Hercules "need not worry about the press of time and docket."¹⁸⁰ The judicial role constrains the human judge to consider only the arguments that come before his court, and to decide both easy and hard cases in a timely manner. These practical constraints also limit theoretical ambitions. In the same way the engineer's work builds upon but does not engage in theoretical physics, the judge's work builds upon but does not engage in political philosophy. So, Professor Cass Sunstein notes, "courts generally seek, because of their own understanding of their limited capacities, to offer low-level rationales on which diverse people may converge."¹⁸¹ Dworkin maintains that human judges should still aspire to decide cases like Hercules. "He does what they would do if they had a career to devote to a single decision; they need, not a different conception of law from his, but skills of craft husbandry and efficiency he has never had to cultivate."¹⁸² One of the most important skills judges develop is the capacity to decide cases the same way engineers build bridges—without resort to basic principles. Even a human judge with a knack for philosophy must convince his less philosophical colleagues on the court (and possibly a higher court) that his decision not only fits the law in the conventional way, but also is justified by the right principles drawn from the right political morality.

This leads to a second limit on human judges: Hercules stands alone, but the appellate judge sits with others. Those others include the judge's colleagues on the bench, but not only them. They also include the judge's

177. Dworkin, *supra* n. 96, at 11.

178. Ronald Dworkin, *In Praise of Theory*, 29 *Ariz. St. L. J.* 353, 364 (1997).

179. Dworkin, *supra* n. 1, at 125.

180. Dworkin, *supra* n. 42, at 380.

181. Cass Sunstein, *From Theory to Practice*, 29 *Ariz. St. L. J.* 389, 401 (1997).

182. Dworkin, *supra* n. 42, at 265.

2014 *JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE* 227

fellow citizens. “An actual justice,” Dworkin concedes, “must sometime adjust what he believes to be right as a matter of principle, and therefore as a matter of law, in order to gain the votes of the other justices and to make their joint decision sufficiently acceptable to the community.”¹⁸³ Dworkin insists, however, that such compromises are “compromises with the law” according to the Herculean ideal.¹⁸⁴ This position does not take account of the fact that “the law” in our legal system includes structure as well as substance, and any theory that aspires to integrity across the system must account for the dynamics the structure was designed to produce. Even within a judiciary of judges constrained only by each others’ principles, interpretation occurs “in a collective judicial structure that produces intractable disagreement, doctrinal and methodological inconsistency over time, and partial compliance with shared norms.”¹⁸⁵ These checks and balances are a feature, not a bug, of a constitutional legal system comprising multi-member courts and multi-level judiciaries, as well as separation of powers and federalism, all designed to promote self-government at least as much as right answers. In this system of shared interpretive authority, Professor Adrian Vermeule explains, “non-ideal theory is the only kind of interpretive theory that non-ideal judges can use.”¹⁸⁶

Our own Montana Constitution shares this interpretative authority even more broadly than the federal Constitution, as a practical matter. It gives voters the authority to elect judges according to their own moral readings of the Constitution, and even to rewrite it by simple majority approval of amendments. Dworkin’s chain-novel metaphor for judges, “in which each writes a chapter that makes sense as part of the story as a whole,”¹⁸⁷ breaks down when each chapter has several authors, including at times the very people who are the subject of the story. Dworkin’s moral reading of the American Constitution, after all, is premised on a constitutional system of text deeply entrenched by the super-majoritarian Article V amendment process¹⁸⁸ read by judges deeply entrenched by life-tenured appointments of past presidents.¹⁸⁹ Dworkin’s argument for courts as “forums of princi-

183. *Id.* at 380.

184. *Id.* at 381.

185. Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 *J. Contemp. Legal Issues* 549, 554 (2005).

186. *Id.* at 584.

187. Dworkin, *supra* n. 96, at 10.

188. *See* U.S. Const. art. V (requiring two-thirds of both houses of Congress to propose, or two-thirds of the states to convene a convention for proposing, amendments that must be ratified by three-fourths of the states).

189. *See id.* at art. II, § 2, cl. 2 (the President “by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court”); *id.* at art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

ple,” reconciles how “justices exercise a veto over the politics of the nation, forbidding the people to reach decisions which they, a tiny number of appointees for life, think wrong,” under an “ancient, fundamental, and uncertain law,” in a democracy.¹⁹⁰ Montana’s constitutional system, in contrast, consists of a relatively recent and specific text that—however deep the principled commitments of its drafters—is malleable by the simple-majoritarian constitutional initiative¹⁹¹ and read by judges subject to regular elections by present voters.¹⁹² “The qualities that it is desirable for judges to have, and the actions it is desirable for them to take, depend on the judicial and institutional environment in which they find themselves,”¹⁹³ Professor Vermeule explains. Whether or not Dworkin is correct that judicial review at the federal level is “an institution that calls some issues from the battleground of power politics to the forum of principle,”¹⁹⁴ judicial review under the Montana Constitution is more amenable to democratic influence. Any workable model of the judicial role in such a legal system must account for how, not simply whether, the judge engages with that influence.

This is not to say there is no place for judges of principle here. The Montana Supreme Court can be as much a forum of principle as the United States Supreme Court. Under the Montana Constitution, however, its justifying principles must be more directly derived from the people. In other words, the forum of principle might be said to include not just the judges who offer their own best readings of the text and justifications for the law, but also the people who continue to rewrite the text and rethink the justifications. This difference does not threaten the legitimacy of Justice Nelson’s (or any other judge’s) moral reading of the Montana Constitution. But it does shift the provenance of that legitimacy from the judge’s own best conception of moral principles to the people’s contemporary endorsement of them. The limits of any one judge’s principles in such a constitutional system as Montana’s are those narrowed bounds of overlapping consensus Montanans hold on broad and deep questions of political morality.¹⁹⁵ Given

190. Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469 (1981).

191. See Mont. Const. art. XIV, § 9 (allowing ten percent of qualified electors to propose, and a majority voting thereon to approve, constitutional amendments).

192. See *id.* at VII, § 8(1) (“Supreme court justices and district court judges shall be elected by the qualified electors as provided by law.”).

193. Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 Harv. L. Rev. 4, 70 (2009).

194. Dworkin, *supra* n. 190, at 517. See generally Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 Sup. Ct. Rev. 103 (contrasting the countermajoritarian and majoritarian views of the Supreme Court’s relationship to political power, and finding that the Court is “semi-autonomous”: judicial review “exists somewhere between a realm in which judges are free to reach any outcome, regardless of the likely public or political response, and a world in which judicial decisions are so heavily constrained by the power of other institutions and actors that those decisions simply mirror the preferences of these other actors.”).

195. See John Rawls, *Political Liberalism* 133–172 (Columbia U. Press 1993).

2014 *JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE* 229

this, a principled judge who puts a premium on law as integrity and seeks coherence in his decisions cannot read the constitution in isolation when other readers (judges and voters) also possess interpretative authority. Nor can a judge rely on a holistic reading of the constitution as a set of inextricably intertwined guarantees when that constitution is easily edited by a majoritarian amendment process.¹⁹⁶ If a constitution is to be grounded in popular sovereignty, the people must have the opportunity to correct what they perceive to be the Court's mistakes through amendment. A Hercules seeking perfection may come closest to it by settling for non-ideal theory, or second-order perfection, producing narrower and shallower rulings, rather than broader and deeper rulings, and sometimes by withholding judgment.¹⁹⁷ Such limited rulings invite democratic deliberation rather than hasty political mobilization, and in doing so help preserve the stability of the court and constitutional text.¹⁹⁸ After all, "[c]ases that do not purport to be the last word on a controversial constitutional question are less likely to encourage voters to test that premise."¹⁹⁹

This lends perspective to the arc of Justice Nelson's influence over his career. Nelson has noted that "Montana is a less progressive, more conservative state" since the framing and ratification of the Montana Constitution.²⁰⁰ Betsy Griffing recently suggested that the Montana Supreme Court enjoyed a "golden age" of "new judicial federalism" in the 1990s but now "a current majority is neither willing nor able to apply the heightened protections under the Montana Constitution."²⁰¹ This assumes that the point of judicial federalism is ever more expansive rights protections rather than, consistent with federalism generally, a balance of government rights and powers that better reflects the values of Montanans than the decisions of the United States Supreme Court. That aside, there is something to Griffing's golden age thesis. Between the arrival of Justice Regnier in 1997 and the departure of Justice Triewiler in 2003, Justice Nelson authored three major legs of his moral reading of the constitution: *Gryczan*, *Armstrong*, and

196. See *Armstrong*, 989 P.2d at 383 (citing seven overlapping textual grounds for the holding).

197. See Cass Sunstein, *Second-Order Perfectionism*, 75 Fordham L. Rev. 2867 (2007). In this theory of minimalism, "[m]inimalists try to decide cases rather than to set down broad rules; they ask that decisions be *narrow rather than wide*," and "In addition to deciding the cases at hand narrowly, minimalists generally try to avoid issues of basic principle and instead attempt to reach *incompletely theorized agreements*." Cass Sunstein, *Foreword—Leaving Things Undecided*, 110 Harv. L. Rev. 4, 15, 20 (1996) (emphasis added).

198. Relatedly, Jack Tuholske notes the relatively low rate of constitutional amendments in defending the court's "conservative approach to constitutional interpretation." Jack Tuholske, *Going With the Flow: The Montana Court's Conservative Approach to Constitutional Interpretation*, 72 Mont. L. Rev. 237, 258 (2011).

199. Johnstone, *supra* n. 86, at 380.

200. Nelson, *supra* n. 70, at 303.

201. Betsy Griffing, *The Rise and Fall of the New Judicial Federalism Under the Montana Constitution*, 71 Mont. L. Rev. 383, 392 (2010).

Walker. Beginning with *Snetsinger* in 2004 after his reelection, and throughout his final term as justice, further development of his principles of personal autonomy and equal dignity occurred mainly in his own concurrences and dissents. Those principles faced limits, and those limits were the other judges Montanans elected to serve on the Court, each of whom was more likely to write a narrower, shallower decision than Nelson's.

The sharpest contrast of Nelson's broad approach with the narrower, more consensus-oriented approach of his colleagues occurred in *Baxter v. State*. There, Justice Leaphart's opinion for the Court resolved the legality of physician-assisted suicide on statutory grounds, finding a consent defense and effectively "remanding" the case to the democratic process for further deliberation.²⁰² Justice Nelson would have reached a broader and deeper ruling. He adopted Clifford's and Huff's statement of a dignity principle: "the normative ideal of individual persons as intrinsically valuable, as having inherent worth as individuals, at least in part because of their capacity for independent, autonomous, rational, and responsible action."²⁰³ In doing so, Nelson noted an important point Clifford and Huff make about pluralism. In order to base dignity in a public conception within our shared political morality, "the right to treatment with dignity must not be defined according to some parochial, sectarian religious or some controversial, philosophical notion of human dignity—those richer conceptions of dignity about which we have agreed to disagree."²⁰⁴ Even though Clifford and Huff themselves suggested a suitably public conception of dignity that included the right to physician-assisted suicide that Baxter sought, the case itself casts doubt on that premise. After all, Justice Rice wrote an equally principled dissent that argued "[t]he prohibition against homicide—intentionally causing the death of another—protects and preserves human life, is the ultimate recognition of human dignity."²⁰⁵ Moreover, the philosophers that built the concept of dignity did not themselves have a shared conception of dignity. Immanuel Kant and John Stuart Mill (once favorably cited by Nelson in *Armstrong*), for example, had written in opposition to suicide even to escape suffering.²⁰⁶

202. *Baxter*, 224 P.3d at 1222.

203. *Id.* at 1230 (Nelson, J., concurring).

204. *Id.* at 1230–1231 (quoting Clifford & Huff, *supra* n. 138, at 326–327).

205. *Baxter*, 224 P.3d at 1233 (2009) (Rice, J., dissenting).

206. See Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals* 57 (Longmans, Green, and Co., Thomas Kingsmill Abbott, 4th ed., 1889) (a man who "destroys himself in order to escape from painful circumstances" wrongly uses his own body "merely as a mean" rather than "as an end in itself"); John Stuart Mill, *On Liberty*, <http://www.bartleby.com/130/5.html>, (1869) (for "limiting [a man's] power of voluntarily disposing of his own lot in life"). See generally Rao, *supra* n. 113, at 1397 ("The rhetorical ploy of using philosophers in controversial political cases circumvents the institutional limits of the Court and provides a backdoor method for judicial policy making.").

2014 JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE 231

The legal indeterminacy of dignity as a freestanding principle began with the framers of the constitutional text itself. The text was drawn from a similar provision in the Puerto Rico Constitution, which its Supreme Court read primarily as an equality and anti-discrimination provision.²⁰⁷ There was no direct comment on the dignity clause during the Constitutional Convention. According to Clifford and Huff, “[a]pparently its ordinary meaning as a principal ideal of our ethical tradition naturally associated with equal protection and non-discrimination was obvious to the delegates.”²⁰⁸ As Chief Justice Gray explained in *Walker*, the only evidence of the framers’ conception of dignity is that it protected the individual from “unwarranted discrimination.”²⁰⁹ To the extent the delegates themselves reported on “the dignity and rights of the individual” as well as “man’s right of self-determination,” it was in a minority report proposing a “right to work.”²¹⁰ The federal equal protection guarantee demonstrates that even the narrower equality conception of dignity can support principles that permit or prohibit affirmative action.²¹¹ Like most such concepts, especially in hard cases, dignity is amenable to several conceptions that are broadly consistent with a moral reading of the constitution. If judges are to decide whether their own best conception of dignity trumps such important policies as homicide laws, labor laws, or affirmative action laws, yet cannot agree among themselves on the operative conception, or find such a conception in the text and history of the principle itself, it becomes harder to justify judicial review on the basis of a moral reading alone. This is particularly true with elected judges reading an easily amended constitution. As Justice Harlan observed, the prudent judge roots liberty in a recognition of the society’s living tradi-

207. See Clifford & Huff, *supra* n. 138, at 322–23. Clifford and Huff argue the Puerto Rico Supreme Court, “made clear that the dignity right prohibits state actions which infringe upon human dignity in ways that do not directly involve discrimination or equal protection.” *Id.* at 323 (citing *Puerto Rico Urban Renewal Housing Corporation v. Peña Ubiles*, 95 D.P.R. 311 (1967)). This appears to overread the case. *Peña Ubiles* is a contract case that invokes “the dignity of the human being” but nowhere cites the dignity provision. Compare *Peña Ubiles*, 95 D.P.R. at 311–315 with P.R. Const. Art. II, § 1 (“La dignidad del ser humano es inviolable”).

208. See Clifford & Huff, *supra* n. 138, at 317.

209. *Walker*, 68 P.3d at 888 (Gray, C.J., dissenting) (quoting *Mont. Const. Conv. Verbatim Transcr.*, *supra* n. 114, at Vol. V, 1642–1643 (Del. Dahood) (“The intent of Section 4 is simply to provide that every individual in the State of Montana, as a citizen of this state, may pursue his inalienable rights without having any shadows cast upon his dignity through unwarranted discrimination.”)).

210. *Mont. Const. Conv. Verbatim Transcr.*, *supra* n. 114, at Vol. II, 694–695.

211. See Dworkin, *supra* n. 96 (contrasting the liberal and conservative moral readings of the Constitution on issues such as affirmative action). The Supreme Court recently explained, contrary to some conceptions of dignity and equality, that “[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.” *Parents Involved in Comm. Schools v. Seattle School Dist. No 1*, 551 U.S. 701, 746 (2007), quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000); see also *Parents Involved*, 551 U.S. at 797 (Thomas, J., concurring) (“To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society.”).

tion. A decision “which radically departs from [that tradition] could not long survive, while a decision which builds on what has survived is likely to be sound.”²¹² For Nelson, any majoritarian tradition would be suspect.

Justice Nelson’s skepticism of political majorities left him in an ambivalent embrace of the judicial elections that returned him to the bench three times in nearly twenty years. Having run in one of the most expensive judicial campaigns in Montana history in 2004, Nelson experienced the impact of campaign finance on judicial elections. He has written that “Montanans want nonpartisan judges and will not elect candidates who fail that threshold test.”²¹³ After the United States Supreme Court’s decision in *Citizens United v. Federal Election Commission*,²¹⁴ which opened the door to unlimited corporate and other independent expenditures in political campaigns including judicial campaigns, Nelson warned “[t]he judiciary must not become prostitutes for big business and special interests—*Citizens United* notwithstanding.”²¹⁵ When the Montana Supreme Court bucked the trend by upholding Montana’s corporate campaign expenditure law in *Western Tradition Partnership*, it became clear to Nelson that *Citizens United* was coming to Montana. Alongside Justice Baker, Nelson wrote a separate 14,000-word dissent from what he called “the distasteful position of having to defend the applicability of a controlling precedent with which I profoundly disagree.”²¹⁶ In Dworkin’s terms, fit conflicted with justification. He correctly predicted “a summary reversal on the merits” for the Court’s opinion.²¹⁷ Concerned “that judicial elections will become little better than the corporate bidding wars that elections for partisan offices have already become,” Nelson suggested “that Montana’s voters may—and probably should—amend the Montana Constitution to implement a merit system for selecting judges.”²¹⁸ Recently, Nelson confirmed that he’s “changing his mind” about the desirability of judicial elections, concluding that for judges “elective systems are realistically a thing of the past.”²¹⁹

212. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

213. Nelson, *supra* n. 70, at 310.

214. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

215. Nelson, *supra* n. 70, at 311.

216. *W. Tradition Partn.*, 271 P.3d at 18.

217. *Id.* at 36; *see Am. Tradition Partn.*, 132 S.Ct. at 2491.

218. *W. Tradition Partn.*, 271 P.3d at 34. *See also* W. William Leaphart, *First Right of Recusal*, 72 Mont. L. Rev. 287, 297 (2011) (arguing for the guarantee of an impartial judiciary to remain meaningful after *Citizens United*, “Montana needs to provide litigants before the Montana Supreme Court the opportunity to challenge a justice’s impartiality they reasonably believe has been compromised.”); Larry Howell, *Once Upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings*, 73 Mont. L. Rev. 25, 30 (2012) (arguing “that because judicial elections are fundamentally different from political elections,” after *Citizens United* “states should be allowed to shield them from the risk of corruption posed by unlimited independent corporate expenditures.”).

219. James C. Nelson, ACSblog, *Justice at Risk—or Circling the Drain?* <https://www.acslaw.org/acsblog/justice-at-risk—or-circling-the-drain/> (Apr. 2, 2014).

2014 JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE 233

There is cause for Justice Nelson's pessimism about the future of Montana's nonpartisan judicial elections.²²⁰ The post-*Citizens United* era will require increased vigilance by policymakers and voters in understanding the flows of money and speech in political campaigns.²²¹ Nelson's distrust of majoritarian politics is more deeply rooted than these recent campaign finance concerns, however. Throughout his judicial career, he did not simply question or challenge what he viewed as majoritarian ideology. He often attacked it as ignorance, superstition, and bigotry.²²² In these controversies, Justice Nelson may or may not stand on the right side of history in substance, but at times his style obstructed the rest of the state's journey to get there.

For example, when Justice Nelson suggests the territorial-era homicide prohibition codified in the 1973 Criminal Code at issue in *Baxter* was "driven by political ideology or religious beliefs,"²²³ or that the 1895 Civil Code "husband and wife" definition of marriage at issue in *Donaldson* was "bigotry" "rationalized on the basis of majoritarian morality, partisan ideology, or religious tenets,"²²⁴ he is arguing from anachronism.²²⁵ Murder and marriage laws enacted in the 19th-century hardly could enact bigotry toward medical or social developments never considered during legislative or popular deliberation on those issues. If these new developments lead old laws to violate contemporary privacy, equality, or dignity principles, it is due not to the action of past political majorities but to the inaction of the current political majority. Blaming such inaction on animosity may be inaccurate. Worse, it may be counterproductive toward the full realization of these principles by "raising the stakes" of political dissent in a way that can harden opposition and reduce opportunities for accommodation.²²⁶

Notably, in those cases in which Nelson is most critical of majoritarian morality, he may have misdirected his disdain. In 2007, the year *Baxter* was filed, nearly twice as many Montanans supported allowing physician-as-

220. See *Sanders Co. Republican C. Comm. v. Bullock*, 698 F.3d 741 (9th Cir. 2012) (invalidating state prohibition on political party endorsements in judicial races).

221. See Johnstone, *supra* n. 86, at 21–35 (proposing reforms to increase accountability, enforcement, and participation in state campaign finance laws).

222. See *Snetsinger*, 104 P.3d at 479 (Rice, J., dissenting) ("The [Nelson] concurrence taunts the will of the people with repeated criticisms of majoritarian morality.").

223. *Baxter v. Montana*, 224 P.3d 1211, 1233 (Nelson, J., concurring).

224. *Donaldson*, 292 P.3d 364, 407 (Nelson, J., dissenting).

225. *Armstrong*, which did involve a law arguably grounded in contemporary legal moralism, is a different case. But one would not recognize the difference in the similar judicial posture Nelson takes towards the legislature and political majorities in all of these cases.

226. See William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 144 Yale L. J. 1279 (2005) (arguing for cautious, pluralism-facilitating judicial review that lowers rather than raises the stakes of politics).

sisted suicide than opposed it.²²⁷ In 2008, more Montanans considered themselves pro-choice than pro-life on the issue of abortion.²²⁸ As of 2013, more Montanans may support same-sex marriage than oppose it.²²⁹ Polls do not enact laws, or repeal them. But on these issues, and perhaps others, Nelson's principles may align with the majoritarian political morality, with both the people and the Court set against the laws of legislatures past. This should not surprise. In Montana's constitutional system, the constitutional text and the justices who read it owe their legitimacy to electoral majorities, too. If the people share the blame for unconstitutional laws, they also share the credit for Montana's Constitution and Court.

Judicial review may be pro-majoritarian rather than counter-majoritarian, or there may be no clear majority on the issue.²³⁰ Especially in cases where the majority may be evolving, a strongly principled, even anti-majoritarian approach such as Nelson's may be counterproductive to the realization of the best conception of the constitution's meaning. Broad, deep, principled decisions cannot move those who already agree with them, and will not move those who disagree with them. Instead, such decisions can give a false sense of security to those who see their political morality read into the constitution. Those who see their political morality read out of the constitution can mobilize in the amendment process and judicial elections, relatively low-salience events in which a motivated minority can prevail. In these conditions a judge like Nelson, who "firmly believe[s] that Montana's Constitution is the finest, most progressive state constitution in the country," and "want[s] to keep it that way,"²³¹ may choose to avoid broad, deep, final answers at the risk of destabilizing the Court or the constitutional text. The better course in hard cases may be to reach narrow,

227. Craig Wilson et al., MSU-Billings Poll: National, State and Local Issues 18 (Nov. 2010) (in a poll conducted October 19–22, 2010, 56.3% support allowing physician-assisted suicide, 30.5% oppose allowing physician-assisted suicide, with a margin of error of +/- 5%) (available at http://www.msubillings.edu/cas/nams/MSUB_Poll_Oct_2010.pdf); see also Craig Wilson et al., MSU-Billings Poll: National, State and Local Issues 14 (Nov. 1999) (in a poll conducted November 19–22, 1999, 61% support allowing physician-assisted suicide, 31.5% oppose allowing physician-assisted suicide, with a margin of error of +/- 5%) (available at <http://www.msubillings.edu/cas/nams/poll99.pdf>).

228. Craig Wilson et al., MSU-Billings Poll: National, State and Local Issues 10 (Oct. 2008) (in a poll conducted October 16–20, 2008, 53.3% consider themselves pro-choice, 34.4% consider themselves pro-life, with a margin of error of +/- 5%) (available at <http://www.msubillings.edu/cas/nams/Poll2008.pdf>).

229. Craig Wilson et al., MSU-Billings Poll: National, State and Local Issues 15 (Oct. 2013) (in a poll conducted October 7–10, 2013, 46.6% support same-sex marriage, 42.6% oppose same-sex marriage, with a margin of error of +/- 5%) (available at http://www.msubillings.edu/urelations/releases/2013/2013_State_Poll.pdf); see also Craig Wilson et al., MSU-Billings Poll: National, State and Local Issues 14 (Oct. 2010) (in poll conducted October 19–22, 2010, 33.9% support same-sex marriage, 51.6% oppose same-sex marriage, with a margin of error of +/- 5%) (available at http://www.msubillings.edu/cas/nams/MSUB_Poll_Oct_2010.pdf).

230. See Pildes, *supra* n. 194.

231. Nelson, *supra* n. 70, at 322.

2014 *JUSTICE NELSON AND JURISPRUDENCE OF PRINCIPLE* 235

shallow, provisional decisions that invite the legislature to reconsider the law in light of the Court's clarification of the principles at issue. Perhaps the best course, in terms of realizing the best conception of the principles embedded in the constitutional text, is for the Court to reach such decisions flanked by principled concurrences and dissents that begin democratic engagement with the issue rather than end it (as a broad and deep opinion for the Court would do). This is the mode in which the Court operated in *Snet-singer*, *Kulstad*, *Baxter*, and *Donaldson*, and in those cases Justice Nelson wrote separate concurrences and dissents rather than majority opinions.

CONCLUSION

In his hardest cases, Justice Nelson leaves a legacy of principles, if not always majority opinions. Such an uncompromising commitment to principle may be counterproductive to the practical accomplishment of justice in a democracy where the differing moral conceptions of fellow citizens matter. He would, it seems, have it no other way. Judiciousness is not the only measure of a judge. Justice Nelson's burning constitutional vision helped illuminate the more pragmatic work of his colleagues in a judicially minimalist mode. In concurrence and dissent, Justice Nelson served as the nagging conscience of the Court. Despite his trenchant criticism of those who mix morality with the law, more than any of his colleagues he insisted upon a moral reading of the constitution.

At the School of Law in spring semester of 2013, Justice Nelson co-taught a course in Montana Constitutional Law. Even as students occasionally expressed impatience with his lengthy concurrences and dissents, one thing became clear. His vision of equal dignity and, to a lesser extent, personal autonomy, was shared by most of his two-dozen law students of varied backgrounds and beliefs. Through the force of his principles, Nelson has inspired a new generation of lawyers to make a moral case for the Montana Constitution. Even where he has not spoken for the Court, he may have spoken for the future.

