July 1990

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THE KING'S RESURRECTION: SOVEREIGN IMMUNITY RETURNS TO MONTANA

John A. Kutzman*

INTRODUCTION

In a series of recent cases, the Montana Supreme Court has not only resurrected the doctrine of sovereign immunity for the "king," but it also has extended this monarchical imperative to "the king's men, his feudal lords, and all their vassals." Under sovereign immunity the government is not liable for its torts or those of its employees. Notwithstanding Montana's constitutionally guaranteed democratic form of government, the state has become the king, the local governments have become feudal lords, and governmental agents have become the vassals of both. Although in 1972 Montana became the first state to enact a constitutional provision abrogating sovereign immunity and requiring full governmental tort liability, these recent cases have eviscerated that provision.

In these offending cases the court has broadly construed Montana Code Annotated section 2-9-111, a statute that purports to grant only legislative immunity, to protect school districts and local governments from liability for purely administrative acts.

This Comment asserts that the majority of the Montana Supreme Court fails to distinguish between legislative and administrative functions in determining which governmental activities are

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* I wish to thank professors Larry Elison, Greg Munro, David Patterson, and practitioner Don Molloy for their generous criticism, advice, and suggestions regarding this Comment.


4. The legislature has joined the judiciary in whittling away at the constitutional abrogation of sovereign immunity. Recent legislative activities include: 1) statutory maximum limits on the state's monetary liability in tort actions and 2) the total grant of immunity as an affirmative defense. Prosser urges a distinction between limits on the amount of damages that may be awarded, which he calls remedial immunity, and the affirmative defense of immunity, which he calls procedural immunity. PROSSER, supra note 2, at 1044. For purposes of convenience this Comment will refer to the former as "damage caps" and the latter as "sovereign immunity." Under damage caps the state may be liable but only for a prescribed maximum amount of damages. Under sovereign immunity, by contrast, the state is not liable at all. For an example of damage caps, see MONT. CODE ANN. § 2-9-108 (1989). For an example of sovereign immunity, see MONT. CODE ANN. § 2-9-111 (1989).
immune.5 A legislative function is one in which a governmental entity establishes rules for the regulation of future conduct.6 For example, a school board acts legislatively when it creates an employee handbook setting out rules for employee conduct. A judicial function, by contrast, is one in which the governmental entity applies its previously established rules to resolve disputes between one or more parties. A school board acts judicially when it decides a dispute between a teacher and a school principal. An administrative function is one that concerns the governmental entity’s day-to-day functions and is neither legislative nor judicial in character. For example, a school board acts administratively when it hires, supervises, and fired employees.7

Thus, because governmental entities exercise three different functions, analysis of their actions must rest on the character of the act in question rather than the character of the governmental entity. In other words, merely because a governmental entity is a legislative body—one that primarily engages in legislative functions—does not necessarily mean that all its functions are legislative in character. Justice Sheehy has vigorously advocated this approach in his dissents to the recent sovereign-immunity decisions, but to no avail.8

Instead, the court steadfastly has refused to distinguish between legislative and administrative power. This refusal has led the court repeatedly and incorrectly to apply the legislative-sovereign-immunity statute to administrative decisions made by non-elected employees who have no independent political authority. In so doing, the court dramatically and unwisely has expanded the scope and reach of legislative sovereign immunity, thereby protecting almost every conceivable government action and, thus, effectively resurrecting blanket sovereign immunity in Montana.

This Comment accepts the need for limited legislative sovereign immunity but argues that the courts have unwisely extended that immunity to administrative acts. Part I examines the common-law origins of the concept that the sovereign can do no wrong. Part II focuses on the 1972 Constitution’s clear abrogation of sovereign immunity. Part III explores recent legislative acts and judicial decisions that have resulted in the resurrection of sovereign

5. The following analysis draws heavily from interviews with University of Montana Law Professors William Corbett and David Patterson, in Missoula, Montana (May 9, 1990).
7. Recently the United States Supreme Court held that a judge acted administratively rather than judicially when he fired a probation officer. Forrester v. White, 484 U.S. 219, 229 (1988).
8. See infra Part IV.
immunity. Part IV criticizes the court’s refusal to distinguish between legislative and administrative acts. Part V analyzes how the current poorly drafted legislative-immunity statute essentially re-imposes blanket sovereign immunity. Part VI offers a proposed amended statute limiting immunity to actual legislative acts.

I. HISTORICAL BACKGROUND: THE KING CAN DO NO WRONG

Sovereign immunity originated in the ancient notion that the king could do no wrong.9 Under this notion, the king was immune from civil suit:

[O]ur king is equally sovereign and independent within these his dominions, as any emperor is in his empire; and owes no kind of subjection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the king even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command execution of it; but who . . . shall command the king?10

Thus, the sovereign’s immunity stemmed not only from his theoretical inability to do wrong, but also from the practical impossibility of enforcing a remedy against him.11

Justice Holmes offered a better explanation of the doctrine in Kawananakoa v. Polyblank,12 when he wrote that “[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”13 The doctrine also benefits taxpayers by limiting claims against the public purse.14 Furthermore, some scholars argue that legislative sovereign immunity protects separation of powers by placing the legislative process beyond the reach of tort-based judicial interference.15

9. 1 W. BLACKSTONE, COMMENTARIES, *244 [hereinafter BLACKSTONE].
10. Id. at *242 (citation omitted).
11. Modern scholars argue that even Blackstone and Coke misunderstood the meaning of the phrase “the King can do no wrong,” and that it only meant that the sovereign had no privilege to commit torts. See, e.g., Borchard, Government Liability in Tort, 34 YALE L.J. 1, 2, n.2 (1924).
12. 205 U.S. 349 (1907).
13. Id. at 353.
14. In Russell v. Men of Devon, 100 Eng. Rep. 359, 362 (1788), the court said “[I]t is better that an individual should suffer an injury than that the public should suffer an inconvenience.”
15. PROSSER, supra note 2, at 1039. Blackstone noted that subjecting the sovereign to
The Montana territorial supreme court judicially adopted sovereign immunity in *Langford v. King.* In that 1868 case the court held that "unless permitted by some law of this Territory, or of the general government, no citizen of this Territory can sue it." *Langford*, thus, held that immunity was the rule and liability the exception. Therefore, the state would not be liable unless the legislature specifically authorized such liability on a case-by-case basis.

The 1889 Montana Constitution did not change the *Langford* doctrine. Article VII provided that a Board of Examiners would consider all claims against the state prior to reporting to the legislature. The legislature could then accept or reject liability. Thus, immunity was automatic under the 1889 Constitution unless the state voluntarily chose to assume liability in a particular case.

Traditionally, the liability of a local government depended on whether it engaged in a "governmental" or a "proprietary" function. A "governmental function" was one that governments, rather than private enterprises, usually exercised; a "proprietary function," on the other hand, was one that a private enterprise might perform. Local governments could not claim sovereign immi-

civil liability would destroy "the free agency of one of the constituent parts of the sovereign legislative power." *Blackstone, supra* note 9, at *243-44. The Montana Supreme Court has adopted a similar view. In *Bieber v. Broadwater County*, 232 Mont. 487, 759 P.2d 145 (1988), the court observed that

> the oft articulated rationale for retaining government immunity ... is to insulate a decision or law making body from suit in order to prevent its decision or law making processes from being hampered or influenced by frivolous lawsuits.


16. 1 Mont. 33 (1868).
17.  Id. at 38.
18. The 1889 *MONTANA CONSTITUTION* provided, in pertinent part:

> The governor, secretary of state, and attorney general shall constitute ... a board of examiners, with power to examine all claims against the state, except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law. And no claim against the state, except for salaries and compensation of officers fixed by law, shall be passed upon by the legislative assembly without first having been considered and acted upon by said board.

*MONT. CONST.* of 1889, art. VII, § 20.

munity for lawsuits arising from their "proprietary functions," because those activities did not involve the exercise of sovereign power.23

Although the local-government-immunity rule seemed to promise immunity to cities, in practice courts deemed most city activities to be proprietary functions for which the city could not claim immunity. Cities enjoyed little or no actual immunity because of their independent corporate structure and power.24 Counties, on the other hand, could claim slightly more immunity because the law considered them mere creatures of state government.25 As components of state government, counties took shelter under the broad rule of state sovereign immunity.26

said:

A city has two classes of powers: The one legislative, public, governmental, in the exercise of which it is a sovereignty, and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the [p]rivate advantage of the inhabitants of the city and of the city itself as a legal personality.

Id. at 534, 49 P. at 21 (quoting Illinois Trust & Savings Bank v. City of Arkansas City, 76 F. 271 (8th Cir. 1896)). Frequently courts had trouble deciding whether immunity applied when the challenged function fell into the gray area between governmental and proprietary activities. For example, in State ex rel. Kern v. Arnold, 100 Mont. 346, 49 P.2d 976 (1935), the supreme court noted that firefighting was a governmental function but held that ownership of firefighting equipment was a proprietary function. Id. at 364, 49 P.2d at 980. Prosser notes that "the distinction itself is basically unworkable . . . ." PROSSER, supra note 2, at 1054.

23. IV J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 1626 (5th ed. 1911)[hereinafter DILLON]. Some scholars referred to governmental functions as "public powers," and proprietary functions as "corporate or municipal powers." Id. Examples of proprietary functions include operating a system of streetlights, Milligan v. City of Miles City, 51 Mont. 374, 153 P. 276 (1915); maintaining a ferry across the Missouri River, Jacoby v. Chouteau County, 112 Mont. 70, 112 P.2d 1068 (1941); constructing a drainage ditch, Johnson v. City of Billings, 101 Mont. 462, 54 P.2d 579 (1936); and operating an ice-skating rink, Cassady v. City of Billings, 135 Mont. 390, 340 P.2d 509 (1959).

24. Cf. Pfost, 219 Mont. at 211, 713 P.2d at 498. Courts declined to apply full sovereign immunity to municipalities because municipalities were simultaneously "governments" and "corporations." PROSSER, supra note 2, at 1051.

25. In Johnson v. City of Billings, 101 Mont. 462, 54 P.2d 579 (1936), the court said: Nonliability [of counties] is declared for the reason that counties are arms or branches of the state government and, as such, partake of or share in the sovereignty of the state and its attributes; consequently, as the sovereign cannot be sued without its consent, its arms or branches are likewise immune, unless liability is specifically imposed upon them by statute.” Id. at 470, 54 P.2d at 580. Montana, thus, followed the practice of a majority of jurisdictions. See also RESTATEMENT (SECOND) OF TORTS § 895C (1979); DILLON, supra note 23, § 1626.

26. Occasionally, courts carved out an exception to the general rule of county sovereign immunity. See, for example, Johnson, 101 Mont. at 478-79, 54 P.2d at 583-84, in which the supreme court held that counties were liable to the same extent as cities for negligent highway design and construction. The court reached this result notwithstanding the general rule of sovereign immunity for counties.
Thus, by 1963, the legal concept of sovereign immunity had evolved so that the state possessed blanket sovereign immunity unless it specifically consented to liability on a case-by-case basis.27 Local government liability depended on the governmental-proprietary function dichotomy. Cities had sovereign immunity for governmental functions.28 Counties, as creatures of the state, shared in the state’s general sovereign immunity, subject only to narrow exceptions in which plaintiffs still had to clear the governmental-function hurdle. Prior to the 1972 Constitution, immunity was the rule in Montana while liability was merely an infrequent and insignificant exception.

II. CONSTITUTIONAL ABROGATION OF SOVEREIGN IMMUNITY

The 1972 Constitution greatly simplified the application of sovereign immunity in Montana by eliminating it. Transcripts of the constitutional convention clearly indicate that the delegates wanted to ensure full legal redress for every citizen regardless of the private or public nature of the defendant.

The Bill of Rights Committee, reporting on an early draft of the abrogation provision,29 noted that sovereign immunity unfairly disadvantaged citizens whom the government had injured, saying, “The committee finds [sovereign immunity] repugnant to the fundamental premise of . . . American justice: all parties should receive fair and just redress whether the injuring party is a private citizen or a governmental agency.”30 Clearly the committee did not believe governmental defendants should be permitted to use their public status to commit torts with impunity.31

27. In 1963, the legislature reduced the scope of state sovereign immunity by providing for assumption of liability by implied consent. By purchasing liability insurance, state and local governments implicitly waived their right to assert the affirmative defense of sovereign immunity. In no case, however, could the plaintiff’s recovery exceed the amount of the defendant’s chosen level of insurance coverage. REVISED CODES OF MONTANA § 40-4402 (1947). The state and its political subdivisions took advantage of their freedom to choose their own level of coverage and frequently deliberately underinsured in order to limit recovery. See infra note 31.

28. See supra note 23.

29. The proposed abrogation provision read: “The state and its subdivisions shall have no special immunity from suit. This provision shall apply only to causes of action arising after June 1, 1973. II MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPTS at 637 (1972) (Bill of Rights Committee Proposal)[hereinafter TRANSCRIPTS]. The committee noted that the 1973 effective date would allow governmental entities enough time to purchase adequate insurance to cover their impending total exposure to civil liability. Id. at 638.

30. Id. at 637.

31. Additional committee comments indicate dissatisfaction with the legislature’s 1963 provision for an insurance-based waiver of sovereign immunity; the committee noted that a governmental agency could still limit its liability under that provision by purchasing a low
Arguing in favor of abrogation, Delegate Murray stated: "We feel that the doctrine of sovereign immunity, which we are attempting to do away with by this particular provision, really means that the king can do whatever he wants but he doesn't have to pay for it; and we'd like to change that doctrine." Delegate Murray also noted a trend away from sovereign immunity in other jurisdictions.

Delegate Dahood, chairman of the Bill of Rights Committee, stated:

What our committee is really concerned about is making sure that an antiquated doctrine that had no place within American jurisprudence in the first instance is removed from the face of justice in the State of Montana.... The way the situation stands in the State of Montana at the present time, unless there is some type of insurance coverage, a governmental servant could run you down in the street, be drunk at the time he does it, go through a red stoplight, and you can't recover a dime for your hospital and medical bills and for the support of yourself and your family during your disability. Now surely, no soundthinking individual can think that that is right.... We have the opportunity now, as long as in Montana no one else will accept it, to make sure that we have full redress and full justice for all of our citizens.... We submit it's an inalienable right to have remedy when someone injures you through negligence and through wrongdoing, regardless of whether he has the status of a governmental servant or not.

This language clearly indicates that the framers of the 1972 Constitution knew the full implications of what they were doing when they abrogated the state's common-law sovereign immunity.

III. THE LEGISLATIVE REFORMS OF 1977 AND THE RETURN OF SOVEREIGN IMMUNITY

In 1974 the voters qualified the constitutional abrogation of sovereign immunity by amending article II, section 18, to allow the legislature to make exceptions to the constitutional waiver of immunity by a two-thirds vote of each house. The legislature exer-
cised that authority for the first time in 1977.

The 1977 Legislature relied on the 1974 constitutional amendment in enacting a comprehensive immunity package.\textsuperscript{37} The legislature cited the increasing difficulty of purchasing affordable insurance, the uniqueness of the government's exposure to widespread tort liability, and potential tax consequences to the people of the state as factors justifying the re-imposition of limited sovereign immunity.\textsuperscript{38} The 1977 reforms included both damage caps and immunity statutes.\textsuperscript{39}

A. Damage Caps

The 1977 legislature sought to restrict the financial consequences of tort liability by creating a damage cap limiting economic damages to $300,000 per claimant and $1 million per occurrence.\textsuperscript{40} However, in \textit{White v. State},\textsuperscript{41} the supreme court held those damage caps unconstitutional because they interfered with an injured party's right to full legal redress.\textsuperscript{42}

Shortly after \textit{White}, the legislature passed a modified version of the earlier damage-cap statute.\textsuperscript{43} While the legislature kept the levels the same, it specifically limited damage caps to lawsuits based on acts or omissions by officers, agents, or employees of the immunity waiver now reads: "The state, counties, cities, towns, and all other local government entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a \textfrac{3}{5} vote of each house of the legislature." \textit{MONT. Const. art. II, § 18} (emphasis added to new language supplied by 1974 amendment).


40. \textit{MONT. Code Ann.} §§ 2-9-104 (1981)(repealed 1983 Mont. Laws 675 § 4). This provision also insulated the state and its political subdivisions from non-economic damages. The state or political subdivision had discretion to accept liability for non-economic damages or damages in excess of the statutory cap, but no insurer would be liable for the excess unless the policy specifically provided for it. \textit{Id.}


42. \textit{Id.} The right to full legal redress appears at article II, section 16 of the 1972 MONTANA CONSTITUTION.

state or its political subdivisions.\textsuperscript{44}

In \textit{Pfost v. State},\textsuperscript{45} the supreme court held that this amended statute, like its predecessor, unconstitutionally interfered with the right to full legal redress.\textsuperscript{46} The court noted that the statute discriminated between plaintiffs with less than $300,000 in damages and those with "catastrophic" damages in excess of the $300,000 cap. Those whose damages were lower than the statutory cap could obtain full legal redress, but those with higher damages could not.\textsuperscript{47} Recognizing that full legal redress is a fundamental right, the court subjected the statute to strict scrutiny. Under that type of rigorous analysis, the amended damage-cap statute did not pass muster.\textsuperscript{48}

The legislature, however, did not abandon the idea of a damage cap, but replaced the previous damage-cap statutes\textsuperscript{49} with a "temporary" cap of $750,000 per claimant, $1 million per incident.\textsuperscript{50} Recently, a politically realigned majority on the court overruled the equal-protection analysis used in \textit{White} and \textit{Pfost} and held that full legal redress is not a fundamental right.\textsuperscript{51} Thus,

\begin{itemize}
\item \textsuperscript{44} See \textit{Mont. Code Ann.} § 2-9-107 (1985) (repealed 1986 Mont. Laws 22 § 4 (Special Session)).
\item \textsuperscript{45} 219 Mont. 206, 713 P.2d 495 (1985).
\item \textsuperscript{46} Id. at 223, 713 P.2d at 505-06.
\item \textsuperscript{47} Id. at 215, 713 P.2d at 500.
\item \textsuperscript{48} Id. at 219-223, 713 P.2d at 503-06.
\item Meanwhile, a group calling itself the Montana Liability Coalition, frustrated by the supreme court's repeated refusals to accept damage caps, organized a drive to amend the state constitution in a way that would force the court to uphold such legislation in the future. On November 4, 1986, the Liability Coalition's proposal (Constitutional Initiative 30) passed a general election. \textit{Id.} at 81. A subsequent decision of the supreme court invalidated the election result because of technical flaws in the way the state presented the initiative to the voters. \textit{State ex rel. Montana Citizens for the Preservation of Citizen's Rights v. Waltermire}, 227 Mont. 85, 738 P.2d 1255 (1987). Thus, for three years the state and its political subdivisions relied on the constitutionally questionable damage caps of "temporary" section 2-9-108.
\end{itemize}
under the current court’s reading of the state constitution, damage caps are not subject to attack under the “full legal redress” argument. With the demise of White and Pfost, it now appears that courts finally may give effect to the so-called “temporary” damage cap provisions of section 2-9-108.

B. Sovereign Immunity

In addition to its experiments with damage caps, the 1977 legislature also re-imposed limited sovereign immunity with section 2-9-111. This provision immunizes the state and its political subdivisions from liability arising from legislative acts. Section 2-9-111 provides:

Immunity from suit for legislative acts and omission[s].
(1) As used in this section:
   (a) the term “governmental entity” includes the state, counties, municipalities, and school districts;
   (b) the term “legislative body” includes the legislature vested with legislative power by Article V of the Constitution of the State of Montana and any local governmental entity given legislative powers by statute, including school boards.
(2) A governmental entity is immune from suit for an act or omission of its legislative body or a member, officer or agent thereof.
(3) A member, officer, or agent of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with the introduction or consideration of legislation or action by the legislative body.
(4) The immunity provided for in this section does not extend to any tort committed by the use of a motor vehicle, aircraft, or other means of transportation.

In its early decisions the Montana Supreme Court correctly construed section 2-9-111 to grant immunity only to legislative acts. However, the court’s recent decisions have incorrectly extended legislative immunity to purely administrative acts.

52. Damage caps, like sovereign immunity, apply to the state and its political subdivisions. MONT. CODE ANN. § 2-9-108 (1989). Thus, a plaintiff who has successfully cleared the sovereign immunity hurdle of MONTANA CODE ANNOTATED section 2-9-111 still faces the prospect of financially inadequate recovery because of the damage caps.

The supreme court had its first opportunity\(^{54}\) to construe section 2-9-111 in *W.D. Construction, Inc. v. Board of County Commissioners*.\(^ {55}\) In that case, the court held that subsection (2) immunized the Gallatin County Board of Commissioners from suit for negligence in approving a subdivision plat in violation of its own established subdivision-approval procedure.\(^ {56}\) The court noted that the commissioners’ decision not to require compliance with the county’s own subdivision regulations was an act by a legislative body and that it, therefore, came “expressly within the plain language of subsection (2) [of section 2-9-111].”\(^ {57}\) This passage from the court’s opinion indicates that the court stopped after finding that the county commission was a legislative body; it did not independently analyze the character of the act in question. Nonetheless, the court reached the correct result, in spite of its dubious reliance on the identity of the actor, because the decision to depart from established subdivision procedures raised political issues affecting the entire county. Therefore, the action by the commissioners was legislative in character.\(^ {58}\)

*Barnes v. Koepke*\(^ {59}\) presented a similar question. The plaintiff alleged that the Glacier County commissioners acted maliciously in declining to renew a lease with the plaintiff’s employer.\(^ {60}\) The county’s sole motive, according to the plaintiff, was its desire to destroy him professionally by depriving him of a place to work.\(^ {61}\) The supreme court, noting that the alleged tortious act concerned a decision of the county commissioners acting as a unit, held that legislative immunity applied to insulate the county from liability.\(^ {62}\) Thus in this case, as in *W.D. Construction*, the court declined to analyze the character of the act and instead concluded that all acts of a legislative body must necessarily be legislative in character.

\(^{54}\) In *B.M. v. State*, 200 Mont. 58, 649 P.2d 425 (1982), the court construed *Montana Code Annotated* section 2-9-102 to deny immunity to a school district, noting that the legislature had not seen fit to immunize such bodies. For some reason not readily apparent from the opinion, the court did not consider the effect of *Montana Code Annotated* section 2-9-111. *B.M.*, 200 Mont. at 62, 649 P.2d at 427.


\(^{56}\) *Id.* at 352, 707 P.2d at 1113.

\(^{57}\) *Id.* at 351, 707 P.2d at 1113.


\(^{60}\) *Id.* at 472, 736 P.2d at 133.

\(^{61}\) *Id.*

\(^{62}\) *Id.*
However, the court reached the correct result in *Barnes* in spite of its focus on the identity of the decision-maker, because the decision to discontinue the lease, like the decision to approve the subdivision plat in *W.D. Construction*, involved political considerations affecting the entire county. The action itself, therefore, was legislative in character. 63

Although both *W.D. Construction* and *Barnes* reached the correct result, language in both opinions reveals that the court focused on the identity of the actor rather than the character of the act. 64 In both cases plaintiffs attempted to challenge actual legislative decisions made by legislative bodies. The best analysis would have been to ground both decisions in the legislative character of the challenged acts, but the court, instead, chose to emphasize the identity of the actor. By focusing on the decisionmaker rather than the decision itself, the court laid the precedential foundation for its subsequent erroneous decisions extending legislative immunity to purely administrative acts.

2. Administrative Acts

In *Bieber v. Broadwater County*, 65 county commissioner William Duede, one member of a three-member board, fired county road worker James Bieber for allegedly damaging county equipment. 66 The other two commissioners subsequently ratified the firing and Bieber then sued for wrongful discharge. 67 Arguing that mere supervisory hiring and firing decisions are not legislative acts, Bieber contended that legislative immunity should not apply. 68 Nonetheless, the court concluded that by ratifying Duede’s individual action the commissioners converted the firing into an action by a legislative body, for which the county could claim immunity under the “express language” of section 2-9-111. 69

63. *See supra* note 58. The provision of hospital services is a matter of public policy.
64. *W.D. Constr.*, 218 Mont. at 351, 707 P.2d at 112 (“Gallatin County is immune from suit for an act of its legislative body, the Board of County Commissioners.”); *Barnes*, 226 Mont. at 472, 736 P.2d at 133 (“The decision complained of... was clearly one made by the legislative body of Glacier County, that is, its County Commissioners.”).
66. *Id.* at 488, 759 P.2d at 146.
67. *Id.* at 488-89, 759 P.2d at 146.
69. *Bieber*, 232 Mont. at 489, 759 P.2d at 147. Recently, the court reaffirmed this analysis. In *Miller v. Fallon County*, — Mont., 783 P.2d 419 (1989), one member of a three-member county commission had administrative authority over a road district in Fallon County. *Id.* at —, 783 P.2d at 421. The plaintiff alleged that the county road crew had negligently failed to post a sign at a dangerous curve on a county road within that commis-

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In *Peterson v. Great Falls School District No. 1*, the court repeated the error in *Bieber* and unwisely applied legislative immunity to another wrongful-discharge suit based on a purely administrative act. Peterson, a janitor employed in the Great Falls School District, refused to empty 55-gallon trash drums into a dumpster on the grounds that doing so would create an unsafe workplace and would also violate public policy. An administrative assistant employed by the school district then fired Peterson. The school board, like the county in *Bieber*, later ratified the firing at its next regularly scheduled meeting. Peterson sued for wrongful discharge but the trial court granted the district's motion for summary judgment based on section 2-9-111 and the Montana Supreme Court affirmed.

Peterson argued that the administrative assistant's decision to fire her constituted an administrative function and that she should be able to sue. Rejecting this argument, the court specifically emphasized language in subsection (3) of section 2-9-111, which immunizes individual members of legislative bodies for "the introduction or consideration of legislation or action by the legislative body." Under this reading of subsection (3), the court held that the challenged act need not be legislative in character for the broader immunity of subsection (2) to apply. The court also noted that the title of the statute, "Immunity from suit for legislative acts and omission," was not a useful indication of legislative intent in light of the text of the body of the statute. *But see Peretti v. State*, in which the court said "the title of an act is

70. *Peterson*, 237 Mont. at 379, 773 P.2d at 317-18. The court also noted that the title of the statute, "Immunity from suit for legislative acts and omission," was not a useful indication of legislative intent in light of the text of the body of the statute. *But see Peretti v. State*, in which the court said "the title of an act is
Relying on Bieber, the court concluded that the school board’s ratification of the firing converted the administrative assistant’s non-legislative action into an action of the legislative body. Thus, the school board’s legislative immunity under section 2-9-111 protected the school district from suit. 78

In State ex rel. Eccleston v. District Court 79 the supreme court extended its agency analysis to janitors. The plaintiff, who was injured in a fall down icy gymnasium steps, sued the school janitors for negligence in failing properly to light the stairway and in failing to remove snow and ice from it. 80 The plaintiff attempted to forestall a finding of immunity by arguing that no legislative body had been involved in the negligent acts of the janitors, 81 but the court instead imputed the negligence to the school board. The court said the janitors were legislative agents, and it found a legislative action in the board’s failure to appropriate funds for additional janitors. 82 Thus, in failing to shovel the steps the janitors were simply doing the best they could under a regrettable shortage of funds. Under this analysis, the court found that the janitors’ decision not to shovel the steps was the discharge of an official duty resulting from the board’s decision not to hire more janitors. 83 The court concluded that the janitors were immune under section 2-9-111. 84

Bieber, Peterson, and Eccleston have laid the foundation for the return of blanket sovereign immunity to Montana. In all three decisions the court flatly refused to distinguish between legislative and administrative acts. Under Bieber and Peterson local governments can immunize their non-legislative employees by ratifying any act from which liability might arise. Under Eccleston the courts can impute the otherwise actionable negligence of individuals to the nearest legislative body’s failure to appropriate adequate

presumed to indicate the legislature’s intent with regard to the provisions contained therein.” — Mont. at ___, 777 P.2d at 333 (emphasis added). The court decided Peretti just two months after Peterson. Justice Gulbrandson wrote both opinions.

78. Peterson, 237 Mont. at 379-80, 773 P.2d at 318.
80. Id. at ___, 783 P.2d at 364-65.
81. — Mont. at ___, 783 P.2d at 367. Section 2-9-111 extends immunity to agents of the legislative body as long as the tort claim against the agent arises “from the lawful discharge of an official duty associated with the introduction or consideration of legislation or action by the legislative body.” MONT. CODE ANN. § 2-9-111 (1989).
82. Eccleston, — Mont. at ___, 783 P.2d at 368.
83. Id.
84. Id. Interestingly, the court has determined that although local school districts may claim legislative-sovereign immunity, individual units of the Montana University System may not. See Mitchell v. University of Montana, — Mont. ___, 783 P.2d 1337, 1339 (1989).
funds, thereby immunizing both the individual and the legislative body. The court’s willingness to read legislative content into every conceivable government action has brought virtually all official activity in the state of Montana under the umbrella of sovereign immunity.

Justice Sheehy, who has vigorously dissented from each of the recent legislative-immunity decisions, took the majority to task in Eccleston, pointing out that

[t]his court, having in a line of cases needlessly and illogically enlarged governmental immunity for negligence, now marches overzealously to the ultimate nonsense: a janitor in charge of brooming off snow from the steps outside of a school gymnasium is engaged as an agent in legislative action. . . . The majority in this case have carried governmental immunity to a far greater reach than was ever extended in the severest of monarchical history. They have not only excused the king; they have excused the king's men, his feudal lords and all their vassals.”

Thus, with the Bieber, Peterson, and Eccleston rulings sovereign immunity has returned to Montana with a vengeance. Plaintiffs who have been injured by governmental defendants now face an insurmountable procedural wall, which the courts and the legislature have erected in direct violation of the state constitution.

IV. SEPARATION OF POWERS: THE DIFFERENCE BETWEEN LEGISLATIVE AND ADMINISTRATIVE ACTS

In Bieber, Peterson, and Eccleston the court erred in extending the legislative immunity of section 2-9-111 to purely administrative acts. The word “administrative” does not appear anywhere in the text of the statute. The word “legislative,” by contrast, appears seven times. Furthermore, the title of the statute is “[i]mmunity from suit for legislative acts and omission[s],” not administrative acts. The court has steadfastly and incorrectly refused to distinguish between legislative and administrative acts in the recent cases, but the statute itself does not require this result.

An early opinion of the Montana Supreme Court indicates that statutory expression of only one type of governmental power excludes all others. In Board of Commissioners v. Northern Pacific Railroad Co., for example, the court construed a statute attaching a portion of the Crow Indian Reservation to Yellowstone

85. Id. at —, 783 P.2d at 370 (Sheehy, J., dissenting)(emphasis added).
87. 10 Mont. 414, 25 P. 1068 (1891).
County “for judicial purposes.” The court explained that because “judicial purposes alone [were] expressed, ... both legislative and executive [purposes were] excluded. There seems here to be an application of the maxim, [e]xpressio unius, exclusio alterius.”

Thus, *Northern Pacific* means that if a statute expresses only one type of governmental power, it thereby excludes all other types of power. Section 2-9-111 refers only to legislative power. *Northern Pacific* suggests that that section necessarily excludes purely administrative power. Thus, the court read the legislative-immunity provision incorrectly when it imported administrative content into section 2-9-111. This analysis suggests that the entire line of recent administrative-immunity decisions is based on faulty statutory construction.

In *City of Billings v. Nore*, the court elaborated on the difference between legislative and administrative power. The court noted that “one reasonable test to be used” in distinguishing between legislative and administrative acts “is whether the act was one creating a new law (legislative) or executing an already existing law (administrative).” The court’s language suggests that administrative acts are the same as executive acts.

The Montana Supreme Court has emphasized repeatedly that the “plain language” of the legislative-immunity statute does not require a distinction between legislative and administrative acts. In *Eccleston* the court finally explained that it was construing the phrase “consideration of legislation or action by the legislative

88. Id. at 419, 25 P. at 1060 (quoting Act of March 5, 1885, 1885 Mont. Laws 74).
89. Id. at 421, 25 P. at 1060-61 (citations omitted).
91. 148 Mont. at 104, 417 P.2d at 463. The court drew heavily on the *Nore* analysis in the more recent case of Chouteau County v. Grossman, 172 Mont. 373, 563 P.2d 1125 (1977). Taxpayers in *Grossman* sought unsuccessfully to use a referendum to block expenditure of “funds of any nature” on a paving plan. 172 Mont. at 375, 563 P.2d at 1126. The court noted that the power of referendum applies “only to legislative action and not to administrative acts.” Id. at 377, 563 P.2d at 1127. Thus, the initiative and referendum area offers a ready source of case law on the distinction between legislative and administrative activity.
92. Cases involving similar facts from other jurisdictions have gone further in equating the two terms. See, e.g., City of Aurora v. Zwerdlinger, 194 Colo. 192, 196, 571 P.2d 1074, 1077 (1986) (“[A]cts that are necessary to carry out existing legislative policies and purposes or which are properly characterized as executive are deemed to be administrative, while acts constituting a declaration of public policy are deemed to be legislative.”).
93. Subsection (3) of the statute immunizes members, officers, and agents of legislative bodies “from suit for damages arising from the lawful discharge of an official duty associated with the introduction or consideration of legislation or action by the legislative body.” MONT. CODE ANN. § 2-9-111(3) (1989).
94. *Bieber*, 232 Mont. at 490, 759 P.2d at 147; *Peterson*, 237 Mont. at 379, 773 P.2d at 318; *Eccleston*, Mont. at ___, 783 P.2d at 367.
body” as disjunctive. Thus, the court interprets the statute as if the word "other" modified the word "action." To the current supreme court, "other" means "administrative."

But the word "administrative" does not appear in the statute. If the "plain language" of the statute does not expressly require a legislative-administrative distinction, neither does it expressly immunize administrative acts. Justice Sheehy has argued in the recent immunity cases that the majority's construction of section 2-9-111 is grammatically flawed. In Eccleston he pointed out that the majority had added and subtracted words in order to arrive at its construction of the statute.

Northern Pacific indicates that Justice Sheehy is correct. If the legislature had intended to immunize administrative activity, it could have done so expressly in a way that would not require the recent artful reading by the supreme court. The only immunity expressly granted by the statute is for legislative activity: under the Northern Pacific rule, administrative activity must necessarily be excluded.

Furthermore, the majority's interpretation overlooks the distinct steps in the legislative process. First a legislator introduces legislation, then the body considers the legislation, and finally the body acts upon the legislation by adopting or rejecting it. The word "action" in section 2-9-111 merely means action upon legislation, not some other type of non-legislative activity. Under the majority's interpretation of the word "action," legislators would be immune from liability for introducing and debating legislation, but subject to tort liability for voting on it. "Action," then, must mean the voting phase of the legislative process. This construction is superior to the supreme court's because it does not require the injection of additional verbiage. Clearly the court has overstepped its authority in reading administrative content into the word "action."

The Montana Supreme Court's recent holdings—that legislative immunity protects non-legislative acts—flatly contradict Montana's constitutional abrogation of sovereign immunity. By refusing to distinguish between legislative and administrative acts the court has cloaked all conceivable governmental activity in the mantle of sovereign immunity. In large part, however, the court's

96. Eccleston, __ Mont. at __, 783 P.2d at 368.
97. See, e.g., Peterson, 237 Mont. at 381, 773 P.2d at 319 (Sheehy, J., dissenting) (majority's position was based on "an incorrect reading of the statute").
98. Eccleston, __ Mont. at __, 783 P.2d at 370 (Sheehy, J., dissenting) ("We are required not to insert what has been omitted or to omit what has been inserted.").
formalistic approach to this problem stems from the poorly drafted text of the statute itself. The recent questionable results in the immunity area indicate a need for the legislature to amend the present legislative-immunity statute.

V. THE TEXT OF THE STATUTE: A CONCEPTUAL MORASS

In the recent immunity decisions the court has repeatedly and erroneously extended legislative immunity to purely administrative acts. That the court could do this illustrates that the present legislative-immunity statute sweeps too broadly, immunizing more than it should. Furthermore, the statute’s definitions of “government entity” and “legislative body” confuse important concepts in a way that incorrectly suggests that all government entities are legislative bodies. The statute’s lack of a definition for legislative activity makes judicial misinterpretation possible and perhaps inevitable.

A. Definitions

The language employed by the legislature in section 2-9-111 is unclear and even self-contradictory. The first three provisions in the statute confuse the terms “governmental entity” and “legislative body.” Generally, the statute incorrectly focuses on the identity of the actor rather than the nature of the activity.

The statute defines “legislative body” incorrectly. Subsection (1) defines “legislative body” as the state legislature and any local government entity given legislative powers by statute. Under the express terms of subsection (1)(a), any governmental entity with legislative powers, no matter how limited and no matter how many other functions it exercises, is a legislative body. The immunity protects the entire entity, not just the portion of the entity that exercises legislative power. The statute would consider a city government with separate executive, judicial, and legislative powers to be a legislative body, without limiting immunity only to the legislative branch. Thus, the statute fails to confine legislative immunity to legislative activity.

The overly broad definition of “legislative body” in subsection (1) invites judicial extension of immunity to purely administrative acts. Subsection (2) immunizes the entire governmental entity

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99. Part V focuses primarily on MONTANA CODE ANNOTATED section 2-9-111 (1989). For purposes of convenience, this Comment will refer to section 2-9-111 as “the statute” throughout Part V unless the possibility of confusion with some other statute requires identifying it by section number. Unless otherwise indicated, any reference to a subsection in Part V is a reference to a subsection of section 2-9-111.

from suit for any action of its legislative body, as well as acts or omissions by the legislative body’s members, officers, or agents. But under the express language of subsection (1), the whole entity can be considered a legislative body. Thus, courts can use the expansive subsection (1) definition of “legislative body” to immunize the entire entity for any conceivable act by any member of any branch of the entity. Therefore, under subsections (1) and (2) of the present statute courts can treat all actions of an entity with legislative powers as legislative actions for which the entity can claim legislative sovereign immunity. Surely, the state legislature did not intend to immunize governmental entities for every conceivable act, as the constitution clearly forbids blanket sovereign immunity.

Although the 1974 amendment authorized the legislature to enact exceptions to the 1972 waiver of sovereign immunity, it definitely did not authorize the resurrection of blanket sovereign immunity. The legislature could not use its limited authority under the 1974 amendment to defy the dictates of the constitution. The best construction of the current immunity statute would interpret it as a narrow exception to the constitution’s general prohibition of sovereign immunity. The text of the statute, however, is still ambiguous. For that reason the legislature should re-draft the statute, limiting immunity to acts that are properly legislative in character.

B. Agency

Subsection (2) of section 2-9-111 extends the governmental entity’s immunity to suits arising from acts committed by agents of

102. Subsection (4) exempts torts committed with automobiles, aircraft, or other means of transportation from claims of immunity. MONT. CODE ANN. § 2-9-111(4) (1989).
103. But see City of Billings v. Nore, 148 Mont. 96, 417 P.2d 458 (1966); Chouteau County v. Grossman, 172 Mont. 373, 563 P.2d 1125 (1977). These cases indicate that not all actions of an entity with legislative powers are necessarily legislative actions. See also Part IV, supra.
104. See supra note 36 and accompanying text.
105. The Maine legislative-immunity statute, unlike the Montana statute, specifies the type of activity to which legislative immunity applies:

Notwithstanding section 8104-A [describing specific instances of liability], a governmental entity is not liable for any claim which results from:
(1) Undertaking of legislative act. Undertaking or failing to undertake any legislative or quasi-legislative act, including, but not limited to, the adoption or failure to adopt any statute, charter, ordinance, order, rule, policy, resolution or resolve

the legislative body. The legislature mistakenly neglected to prescribe the scope of a legislative-agency relationship that would qualify for legislative immunity. The overly broad definition of legislative body contained in subsection (1) suggests that any governmental employee might be considered an agent of the legislative body. Thus, courts may believe the statute extends legislative immunity to mere employees who do not exercise legislative functions. This is precisely what happened in Peterson and Eccleston.

By not specifying the scope of the agency, the statute permits extension of legislative immunity to any conceivable employee, regardless of how far removed that employee is from legislative control or supervision. Allowing local governments to ratify and, thus, convert all acts of mere employees into protected legislative acts, results in the re-imposition of blanket sovereign immunity, despite the constitution's express provision to the contrary. Therefore, the legislature must re-draft the present statute so that only those employees who assist in legislative functions are deemed agents for the purpose of granting legislative immunity.

VI. RECOMMENDATIONS

Judicial recognition of the difference between legislative and administrative functions would help limit legislative immunity to legislative functions, but such judicial innovation does not appear to be forthcoming. And even if the court were to reverse the recent immunity decisions, that alone would not clarify the confusing language in the present legislative-immunity statute. Current circumstances call for a statute that insulates the legislative process from tort-based attack without extending the immunity beyond functions that are properly legislative in character.

Accordingly, the legislature should amend section 2-9-111 to prevent judicial misapplication of the type that occurred in the recent cases. The following suggested statute would protect both the state's interest in the integrity of its legislative processes and the citizen's interest in fair compensation for governmental torts:


107. The Virginia legislative immunity statute provides a clearer extension of immunity to legislative agents: "Any recovery based on the following claims is hereby [prohibited as a matter of sovereign immunity]: . . . 2. [a]ny claim based upon an act or omission of the General Assembly . . . or any member or staff thereof acting in his official capacity . . . ." Va. Code Ann. § 8.01-195.3 (Supp. 1989). This language indicates that an agent of a legislative body must be a member of that body's staff, not just any employee of the entity to which the legislative body is connected.
Immunity from suit for legislative acts and omissions.

(1) As used in this section:
   (a) the term "governmental entity" includes the state, counties, municipalities, school districts, and any other local government entity vested with legislative power by statute;¹⁰⁸
   (b) the term "legislative body" includes the legislature vested with legislative power by Article V of the Constitution of the State of Montana and that branch or portion of any other governmental entity empowered by its charter to consider and enact statutes, charters, ordinances, orders, rules, policies, resolutions, or resolves;¹⁰⁹
   (c) the term "legislative act" means activity by a legislative body that results in creation of a law or declaration of public policy; the term "legislative act" does not include administrative activities undertaken in the execution of such law or public policy.¹¹⁰

(2) A governmental entity is immune from suit for a legislative act or omission by its legislative body, or any member or staff thereof engaged in legislative acts.¹¹¹

(3) A member, officer, or staff of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with the introduction or consideration of legislation.¹¹²

(4) The immunity provided for in this section does not extend to any tort committed by the use of a motor vehicle, aircraft, or other means of transportation.

Notably, subsection (1)(a) of the proposed statute grants immunity only to those entities having legislative powers. Local governmental units which lack legislative powers or which do not appear in the list in subsection (1)(a) do not qualify for legislative immunity.

¹⁰⁸. This definition combines the lists of entities contained in clauses (a) and (b) of subsection (1) of the current statute. Compare Mont. Code Ann. § 2-9-111(1) (1989).
¹¹¹. The emphasized language represents an addition to the current language of Mont. Code Ann. § 2-9-111(2) (1989). The current statute extends immunity to acts by officers and agents, but does not define the scope of the agency relationship and does not require a legislative purpose.
¹¹². The proposed statute replaces the word "agent" in Mont. Code Ann. § 2-9-111(3) (1989) with the word "staff" in order to clarify that immunity only attaches to agents who are engaged in legislative functions. This modification draws on Va. Code Ann. § 8.01-195.3 (Supp. 1989). See also supra note 107. The proposed statute also deletes the phrase "action by the legislative body," which is found in the present language of Mont. Code Ann. § 2-9-111(3) (1989).
Subsection (1)(b) defines "legislative body" by specifying the types of functions ordinarily exercised by such a body, thereby correcting the current statute's unsound focus on the identity of the actor rather than on the character of the act. Subsections (1)(a) and (1)(b), read together, exclude non-legislative activity from the operation of the statute. Subsection (1)(c) defines "legislative act" in terms of the type of activity involved, and expressly excludes administrative and executive actions.

This proposed immunity statute would more adequately balance the state's need to protect the democratic process and the citizen's need for adequate tort compensation than does the current statute. Subsection (2) would prevent disgruntled citizens from using tort theories to attack the political decisions of the state and local governments. Thus, the proposed statute achieves precisely the objective articulated by the supreme court in its recent decisions. However, subsection (1)(c) of the proposed statute would limit immunity to decisions that create public policy, thereby foreclosing immunity for administrative acts like those at issue in the recent immunity cases. Thus, the proposed statute offers badly needed protection to ordinary citizens who may suffer injury at the hands of the state.

CONCLUSION

The current legislative-immunity statute, as construed by the Montana Supreme Court, effectively re-imposes blanket sovereign immunity in violation of the Montana Constitution. Sadly, as Justice Sheehy pointed out without hyperbole in Eccleston, the majority in that case, in addition to Bieber and Peterson, have not only resurrected the king's sovereign immunity, but have also extended it to his "men, his feudal lords, and all their vassals."

The court in the recent immunity cases has developed two theories that lead inexorably to the immunization of almost all governmental activity in Montana. The current ratification doctrine allows local governments to cloak all governmental activity with legislative garb in the hope of receiving sovereign immunity. Furthermore, the court also has demonstrated its willingness to connect the negligence of employees with the miserly budgeting

113. In Bieber v. Broadwater County, 232 Mont. 487, 759 P.2d 145 (1988), the court said "the oft articulated rationale for retaining government immunity . . . is to insulate a decision or law making body from suit in order to prevent its decision or law making processes from being hampered or influenced by frivolous lawsuits." Id. at 491, 759 P.2d at 148.

strategies of the nearest legislative body, for which both the body and the individuals can claim immunity. Under the recent decisions, it is difficult to conceive of any action by a local government for which it could not claim legislative sovereign immunity.

In Bieber, Peterson, and Eccleston the court has strained to convert a limited grant of legislative immunity into a wholesale re-imposition of blanket sovereign immunity. These recent developments countermand the will of the electorate as expressed both in the constitution and in the statutes. The delegates to the 1972 Constitutional Convention realized what they were doing when they chose to discard sovereign immunity. Moreover, the people of the state accepted that choice when they ratified the proposed constitution. In 1974, the people granted the legislature limited authority to make limited exceptions to the constitutional waiver of immunity. If the people, speaking through the legislature, had wanted to immunize administrative activity, they could have done so expressly. It is not the proper function of the courts to second-guess the legislature by imposing their own preference for blanket immunity through strained construction of the statutes.

Sovereign immunity wastes more than it saves. Admittedly, the doctrine eases the financial burden on local governments by forestalling most damage claims. But sovereign immunity does not mean that government will no longer commit torts. It does not deter wrongful discharge. It does not facilitate the careful allocation of resources. What it does do is to deliver the state and local governments from the judicial consequences of their actions. The supreme court has given the government a license to commit torts with impunity. Blanket sovereign immunity does not eliminate the human costs of tortious activity—it merely shifts them to the innocent citizens who can least afford to pay.

The constitution allows the state legislature to make exceptions to the constitutional abrogation of sovereign immunity. The current-legislative immunity statute, however, is more than a mere exception. The Montana Supreme Court's recent decisions have essentially extended legislative immunity to all conceivable governmental activities. Limitation and amendment of the legislative-immunity statute along the lines suggested in this Comment would prevent future erroneous decisions and bring the law into conformity with the state constitution.