The Montana Supreme Court in Politics

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THE MONTANA SUPREME COURT IN POLITICS

James J. Lopach*

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I. INTRODUCTION

The Montana Supreme Court recently has had a profound effect on the functioning of the state’s political system. This judgment is based upon the Court’s decisions concerning the administration of justice and welfare assistance sections of the Montana Constitution. The court in these cases has relied upon questionable interpretations of the state constitution and disregarded the legitimate processes and decisions of the 1972 Montana Constitutional Convention, the Montana Legislature, and the democratic initiative. The court’s activism, at least in the instances of tort reform and welfare reform, has placed it inappropriately at the center of the state’s politics. The constitutional design for the state’s political system will be realized only if the legislature is allowed to be, as intended, the people’s branch of government. The Montana Supreme Court should encourage this role rather than promote itself as the legislature’s rival in policy matters.

II. THE LEGISLATURE IN MODERN MONTANA POLITICS

The Montana Legislature has had a shameful past. Thousands

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of students of the state's history have read accounts of legislators selling their political souls to lobbyists of "the Company." Even legislators with the integrity to resist the temptations of evening-time Helena frequently were overpowered by the expertise of corporate agents amidst the intense pressures of legislative workload and deadlines. It is a mistake, however, to think that the state's political culture condones today this type of legislative behavior or that the people of Montana have not officially condemned it. Discussion of the proper role of the Montana Legislature in the state's political system should turn more upon the deliberations and decisions of the 1972 Montana Constitutional Convention than upon vivid tales of lobbyists coaching from the gallery and legislators drinking at the Placer Hotel watering hole. The modern Montana Constitution called for a strong legislature kept close to the electorate.

The delegates to the 1972 Montana Constitutional Convention were not ambiguous about their intentions for the lawmaking function. Their only uncertainty was whether the "shortcomings" of the legislature under the 1889 constitution would be best overcome by a bicameral or unicameral body. The dominating philosophy of the Legislative Committee, which informed both the bicameral and unicameral proposals, was: "The power to make laws in a representative government is a power delegated to a specific unit of government. . . . The people also reserve the power to remain a part of the law-making structure by reserving to themselves the power to initiate laws and repeal them." The delegates' principal point was elementary but received emphasis: In Montana, an elected legislature is the proper body to make laws.

Unlike the state constitutional conventions of the late nineteenth century that sought to control legislative abuses by denying powers, the 1972 Montana Constitutional Convention checked potential misbehavior through democratic controls. Montana voters

4. Montana historians and political commentators have reserved the phrase, "the company," for the activities of the Anaconda Company and the Montana Power Company during the first half of the twentieth century when their economic interests were mutual and their reputed political power was astounding.
5. The "pressure cooker" metaphor is often used to describe the operations of the Montana Legislature. Its origin is probably Waldron, The Legislative Assembly in a Modern Montana Constitution, 33 Mont. L. Rev. 14, 48 (1972).
7. Id.
8. See J. Lopach, We the People of Montana 3-4 (1983).
could choose a bicameral or unicameral legislature, but either way it would have features conducive of popular government. Delegates provided for single-member districts because they would afford "more accurate and accountable representation." Rural and urban representation would be fair because it would be "proportionally the same," based on the United States Supreme Court's one person—one vote principle. And an "open and visible legislature" would be achieved by mandates for meetings and hearings "open to the public" and for recorded votes.

Because the Constitutional Convention made the idea of the people's branch an operational reality, delegates did not hesitate to empower fully the legislature. One delegate pointed out this trend in the convention by saying, "we have left everything [else] under the sun to the Legislature," and another delegate commented upon the "progressing tendency of this body, which was initiated in almost the opening day of the debate and has been growing progressively ever since, to transfer responsibilities to the Legislature." Once again the convention knew what it was doing. The legislative committee's comments on the majority proposal spoke of the "need to restore the balance of power between the legislature and a permanent executive" and the need for the legislature "to be equal to the other two branches of government." The constitutional design was, very simply, that the legislature would be a strong lawmaking branch of government, both responsive and accountable to the people.

This should be the backdrop for commenting upon contemporary Montana legislative politics. The state supreme court should define its role relative to the legislature in the Montana political system with these principles and objectives in mind. The supreme court, in disposing of cases which come before it, should use restraint as well as reasoning to assist the legislature to perform its intended role. A court minority ignored such counsel in 1986 when it criticized Constitutional Initiative 30 as a "long-term submission to the unbridled will of the Legislature" and said: "Any student

10. Id. at 381.
11. Id. at 387.
13. Id. at art. V, § 11(2).
15. Miles Romney. Id. at 2297.
17. Id.
18. State ex rel. Montana Citizens for the Preservation of Citizens’ Rights v. Walter-
of the long-time history of the Montana Legislature will recognize the folly of that direction."\(^{19}\) When the court wounds the legislature in its reputation and role, it upsets the governmental balance created by the 1972 constitutional convention and causes dysfunction in the state's political system.

### III. THE TORT REFORM STORY

#### A. Revising the Sovereign Immunity Doctrine

The tale of modern tort reform in Montana also has its beginning in the 1972 constitutional convention. Delegate Proposal No. 30 had the aim of "eliminating the defense of sovereign immunity,"\(^{20}\) and the proposal of the Bill of Rights Committee contained the following language: "The state and its subdivisions shall have no special immunity from suit."\(^{21}\) Article II, section 18 of the 1972 Montana Constitution as ratified reads: "The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property. This provision shall apply only to causes of action arising after July 1, 1973." The comments of the Bill of Rights Committee emphasized that any prior justification for the doctrine of sovereign immunity had been replaced by considerations of equity: "All parties should receive fair and just redress whether the injuring party is a private citizen or a governmental agency."\(^{22}\)

The debate on sovereign immunity on the floor of the convention was not extensive and covered principally the existing doctrine, reform in other states, and what role reform would leave the legislature. Speaking in support of his proposed amendment to add the phrase, "for injury to a person or property"\(^{23}\) (which was unanimously adopted), Delegate Otto Habedank argued that constitutional repeal of sovereign immunity would allow the legislature to make adjustments: "Limited as it is, for injury to a person or property, the Legislature is still free to make it more open if they desire to in the future. But we at least have assured the people of the State of Montana that they can sue for negligent injury."\(^{24}\) Then Delegate Oscar Anderson questioned Bill of Rights Committee spokesman, Delegate Marshall Murray, whether the committee

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\(^{21}\) Id. at 637.

\(^{22}\) Id.


\(^{24}\) Id.
would object to the addition, "the Legislature may provide for reasonable limitations." Murray found no objection, commenting that the North Dakota constitution contained such a provision. Anderson, however, did not offer the amendment.

Such a change came two years later in the form of an amendment to the constitution. Fifty-five percent of the electorate approved the measure proposed by the legislature which permitted the legislature to restore governmental immunity "as may be specifically provided by law by a two-thirds vote of each house of the legislature." The legislature was seeking to stem the claims on the public treasury since the new constitution had gone into effect. There had been over $8 million in tort suits against the state and $125,000 paid out in settlements and judgments. The office of the attorney general, in describing the measure for the ballot, said that it "would allow specific exceptions to the waiver of sovereign immunity by two-thirds vote of each house of the legislature." The amendment specifically authorized an extraordinary majority of the legislature to close the doors of the courts to civil suits against the state.

The amendment became effective on July 1, 1975, and it was implemented by the next legislature. The 1977 session made the state and local government units immune from noneconomic damages and exemplary and punitive damages, and it extended immunity for "economic damages suffered as a result of an act or omission of an officer, agent, or employee of that entity in excess of $300,000 for each claimant and $1 million for each occurrence." The legislature defined noneconomic damages as including recovery for pain and suffering, loss of consortium, mental distress, and loss of reputation.

B. White v. State

In 1983 the Montana Supreme Court effectively wiped out this chapter of governmental tort reform. The majority opinion in *White v. State,* written by Justice Frank Morrison, completely ignored the clear legislative authorization in the 1974 constitu-

25. *Id.* at 1763.
26. *Id.*
29. *Id.*
tional amendment and ruled that the exceptions to state and local
tort immunity created by the legislature in 1977 were unconstitu-
tional. The basis of the reasoning was a judicially discovered fun-
damental guarantee in the Montana Constitution, the right to
bring a civil action for all personal injuries, and substantive equal
protection analysis. 34

The court majority found the right to bring a civil action for
full recovery for every injury in article II, section 16. The “admin-
istration of justice” provision reads:

Courts of justice shall be open to every person, and speedy
remedy afforded for every injury of person, property, or character.
No person shall be deprived of this full legal redress for injury
incurred in employment for which another person may be liable
except as to fellow employees and his immediate employer who
hired him if such immediate employer provides coverage under
the Workmen's Compensation Laws of this state. Right and jus-
tice shall be administered without sale, denial, or delay. 35

The court said that the phrase “every injury embraces all recog-
nized compensable components of injury, including the right to be
compensated for physical pain and mental anguish and the loss of
enjoyment of living.” 36 After asserting without analysis that the
right to full recovery was “fundamental,” 37 the court reasoned that
“strict scrutiny attaches” 38 to the alleged abridgement—the legis-
lature’s prohibition of recovery for noneconomic damages. The ma-
jority found that the 1977 implementation of the 1974 amendment
was unconstitutional because the state’s argued interest of remain-
ing solvent to provide necessary and inherently dangerous public
services was not compelling. 39 This ruling gave rise to another
equal protection question because it permitted unlimited recovery
for noneconomic damages while the statute limited recovery for ec-
onomic damages. The court’s solution was to void the discrimina-
tory limits on economic damages, once again using the fundamen-
tal right/strict scrutiny equal protection analysis. 40 Lastly, the
court upheld governmental immunity from punitive damages, us-
ing the rational basis test because the constitution does not grant a
right to collect such damages. 41
The White decision is objectionable because it ignores the legislature’s legitimate role in governmental liability law as defined by constitutional language and intent, judicial precedent, and accepted legal and political theory. Because the decision turns upon the court’s interpretation of article II, section 16, “the administration of justice,” it is necessary to understand the work of the 1972 Montana Constitutional Convention on that provision. The Montana Constitution of 1889 had a similar section. Article III, section 6 read: “Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character; and that right and justice shall be administered without sale, denial, or delay.” The Bill of Rights Committee, in the comments on its proposal, said that its aim was to retain the 1889 administration of justice section “with one addition.” The purpose of the new language was to overturn the Ashcraft v. Montana Power Co. decision of the Montana Supreme Court which denied an employee “redress against third parties for injuries caused by them if his immediate employer is covered under the Workmen’s Compensation Law.” The singularity of the change in the administration of justice section of the 1889 Constitution was mentioned several times. The Bill of Rights Committee observed that the Ashcraft decision violated the “spirit of the guarantee of a speedy remedy for all injuries of person, property, or character.” But then it stressed: “It is this specific denial—and this one only—that the committee intends to alter . . . .” The committee referred to the change as a “technical” matter, and on the convention floor committee member Marshall Murray admitted that the committee was “perhaps legislating” in recommending that such a narrow correction be written into the constitution.

Because the 1972 Constitutional Convention emphasized that it was preserving, with one exception, the existing law of administration of justice, it is essential to understand the prevailing interpretation of the law surrounding article III, section 6 of the 1889 Montana Constitution. The Montana Supreme Court in the 1919

43. MONT. CONST. of 1889, art. III, § 6.
44. MONT. CONST. CONV., Vol. II, at 636.
45. 156 Mont. 368, 480 P.2d 812 (1971).
47. Id. (emphasis in original).
48. Id.
49. Id. at 637.
case of *Shea v. North-Butte Mining Co.* held that a plaintiff's limited right of recovery through the Industrial Accident Board did not raise a question of constitutional significance. The court said that article III, section 6 meant that:

> [t]he courts must be accessible to all persons alike, without discrimination, at the time or times and the place or places appointed for their sitting, and afford a speedy remedy for every wrong recognized by law as being remediable in a court. The term "injury" as therein used, means such an injury as the law recognizes or declares to be actionable. Many of the state Constitutions contain similar provisions, and the courts, including our own, have held either expressly or impliedly that their meaning is that above stated.

In 1976, after the new Montana Constitution was in effect, the constitutional interpretation was unchanged. The supreme court in *Reeves v. Ile Electric Co.*, ruled that the force of article II, section 16 of the 1972 Constitution was identical to article III, section 6 of the 1889 Constitution: "Assuming arguendo, that plaintiff would have a claim under common law, the legislature is not constitutionally prohibited from eliminating a common law right as it did in *Shea* and *Stewart.*" The *Reeves* decision rejected a plaintiff's section 6 challenge to a statute which barred suit and held that the "legislature may eliminate a remedy recognized by the common law, together with all rights of action for an injury or death." Five years later the court's ruling on a similar question was identical: "[a]ccess to the courts is not an independent fundamental right; access is only given such a status when another fundamental right—such as the right to dissolve the marital relationship—is at issue . . . . In cases not involving a fundamental right, access may be hindered if there exists a rational basis for doing so."

The court majority in the *White* case, therefore, was hardly justified in finding a fundamental right of access to the courts in article II, section 16. The 1972 Constitutional Convention did not so alter the meaning of the 1889 constitutional language it transplanted, and the court's own interpretation of the pertinent sec-

51. 55 Mont. 522, 179 P. 499 (1919).
52. Id. at 533, 179 P. at 502.
54. Id. at 110, 551 P.2d at 651.
55. *White*, 203 Mont. at 376, 661 P.2d at 1279 (Weber, J., concurring and dissenting in part).
https://scholarship.law.umt.edu/mlr/vol48/iss2/2
tions of both constitutions rejected the existence of such a right.\textsuperscript{57} Convention delegates were aware of other possible interpretations of their work—that maybe, as Delegate Habedank related, “we lawyers are writing the Constitution, trying to slip matters into this Constitution for our own personal gain.”\textsuperscript{58} There can be no doubt that a fundamental right of access to the courts to seek full recovery for every injury would be of economic benefit to plaintiffs’ attorneys. But Delegate Wade Dahood, Chairman of the Bill of Rights Committee and, himself, a trial lawyer, should have put an end to such an interpretation of article II, section 16 when he responded on the convention floor to a charge that the proposed administration of justice section would prevent the legislature from enacting a no-fault insurance law:

[I] wish to read the release that was made yesterday in response to it: “It is totally beyond legal logic for everyone to contend that the Bill of Rights proposal has an effect on the no-fault insurance concept.” . . . On behalf of the committee, I am going to add to the comments in the Bill of Rights proposal, so that there can never be any question about it under any circumstance nor by anyone, the following: “Further, it is the intent of the committee that the additional wording shall not be construed to preclude the adoption of a no-fault insurance plan for the State of Montana.”\textsuperscript{59}

If the legislature could alter access to the courts and remedies by enacting no-fault insurance, certainly the legislature pursuant to clear constitutional authorization could limit the liability of the state’s governmental units.

C. \textit{Pfost v. State}

The \textit{White} case was decided in April of 1983, and immediately after the decision the Montana Legislature made a second attempt to impose limitations on governmental liability pursuant to the 1974 constitutional amendment. The enactment read:

Neither the state, a county, municipality, taxing district, nor any other political subdivision of the state is liable in tort action for damages suffered as a result of an act or omission of an officer,

\textsuperscript{57} See Burke, \textit{supra} note 42, at 64-79 for a discussion of the Montana Supreme Court’s changing interpretation of \textit{Mont. Const. art. II, § 16} (1972). Burke documents the court’s reconceiving of its precedents and its switching from what she labels the “minimal significance” interpretation to the “fundamental right” interpretation. Burke’s discussion presumes the court properly had complete discretion for choosing among available precedents and analyses from other states.

\textsuperscript{58} \textit{Mont. Const. Conv., Vol. V}, at 1758.

agent, or employee of that entity in excess of $300,000 for each
claimant and $1 million for each occurrence. 60

The legislature sought to avoid the censure of the supreme court by omitting any reference to economic and noneconomic damages, thus making the limitations generally applicable.

The legislature was unsuccessful. On December 31, 1985, the Montana Supreme Court ruled in Pfost v. State 61 that the new limits of liability placed an unconstitutional restriction on a plaintiff seeking $6 million in damages. 62 The opinion of Justice John Sheehy, which presented the views of the four-person majority, explained how the statutory provision violated the equal protection clause of the Montana Constitution. The White case was central to the court’s reasoning:

In legal effect, § 2-9-107, is but § 2-9-104 in another guise. In each case the injured party suffers a restriction of his right to full legal redress. Our decision in White therefore controls the outcome of this case—the legislature has invaded a fundamental right granted to individuals, and it has not shown a compelling state interest for doing so. 63

The disturbing element of the court’s opinion is the justices’ facility in overriding the judgment of the legislature. It is clear that the 1983 enactment created two categories of litigants which were treated differently: Those whose injuries amounted to $300,000 or less and those with injuries over $300,000. Only plaintiffs in the first group could receive full recovery. But the legislature’s findings, 64 which accompanied its action, demonstrated that the legislature acted with reflection and foundation, i.e., not arbitrarily. Reasons offered for limiting governmental liability were inadequate insurance coverage, risks inherent in performing essential governmental functions, and the likelihood of increased taxes and decreased public services. 65 The court, however, by determining that full legal redress was a fundamental right, created a presumption of unconstitutionality and shifted to the political branches the burden of proving a compelling state interest.

The court gave indication that it was well aware that its activism forced the state to prove more than a rational basis for its action. It reviewed the doctrine that state constitutional law is a

62. Id. at ____ , 713 P.2d at 496.
63. Id. at ____ , 713 P.2d at 504-05.
65. Pfost, ___ Mont. at ____ , 713 P.2d at 504.
body of legal principles independent of the federal constitution and potentially more protective of individual rights.\textsuperscript{66} It asserted that it was capable of fashioning new fundamental rights through its interpretation of the equal protection clause in the state constitution, even though the United States Supreme Court refused to do so when interpreting the federal equal protection clause.\textsuperscript{67} And it implied that article II, section 34 of the Montana Constitution\textsuperscript{68} could be the source of even more fundamental rights.\textsuperscript{69} One judgment of the politics of this episode is both old and new. This was the judiciary legislating, but practiced this time in the state arena. This simple tactic of finding a fundamental right and applying the strict scrutiny analysis allowed the court to substitute its policy discretion for that of the legislature.

The dissenting opinion of Justice Fred Weber expressed to what degree the majority opinion had frustrated the workings of the Montana political system:

\begin{quote}
The majority opinion in \textit{Pfost} now tells the people, members of the legislature and the governor that they cannot adopt a statute that in any way limits the dollar amount of recovery from the State as legal redress for injury to person, property or character. If limited sovereign immunity is to be granted, it requires either a limitation on the type of damages for which compensation can be paid, or a dollar limitation upon the total amount of recovery. Both of these alternatives have now been effectively eliminated by the opinions of this Court. Absolute immunity appears to be the only remaining alternative. However, whether a statute that grants total sovereign immunity would still be permissible is an unsettled question. The effect of \textit{White} and \textit{Pfost} appears to be an improper judicial repeal of the exception in Art. II, § 18, Mont. Const., as adopted by the people in 1974.\textsuperscript{70}
\end{quote}

Strategic options appeared to be exhausted because even constitutional amendment had failed the proponents of governmental tort reform. The court had used two sections of the constitution against another section—the equal protection and administration of justice provisions—to check the specific authorization to limit governmental liability. The majority opinion, however, inadvertently pointed out the next stage of the battle. Quoting the California Supreme

\begin{itemize}
\item \textsuperscript{66} \textit{Id. at \textendash }, 713 P.2d at 500.
\item \textsuperscript{67} \textit{Id. at \textendash }, 713 P.2d at 502.
\item \textsuperscript{68} "The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people." \textit{Mont. Const.}, art. II, § 34.
\item \textsuperscript{69} \textit{Pfost}, \textit{Mont. at \textendash }, 713 P.2d at 504.
\item \textsuperscript{70} \textit{Id. at \textendash }, 713 P.2d at 515 (Weber, J., dissenting).
\end{itemize}
Court in *Serrano v. Priest*, Justice Sheehy wrote for the *Pfost* majority: "'A constitutional provision creating the duty and power to legislate in a particular area always remains subject to general constitutional requirements governing all legislation unless the intent of the Constitution to exempt it from such requirements plainly appears.'"

The *Pfost* case was decided on the last day of 1985, and, by the time the Forty-ninth Montana Legislature met in special session the following spring, a strengthened liability coalition was making political progress. The reform movement’s increased strength came from the addition of interests seeking reform in private tort law, principally corporations and defense counsel. Their concerns, goals, and strategy, which were almost identical to the program of governmental tort reformers, have been expressed in an unpublished discussion paper: “During recent years tort law in Montana has changed dramatically . . . . the field of torts, as it existed even five years ago, is no longer recognizable. These legal changes, virtually all made through Montana Supreme Court decisions, have pointed solely in the direction of expanding plaintiffs’ rights.”

The two forces, after heated debate, partisan strife, and seeming stalemate in the March, 1986, special session, finally came together in an effort to amend the Montana Constitution.

At the start of the special session, Republican legislators pushed for a constitutional referendum that would permit the legislature to bypass the *Pfost* decision and impose limits of liability affecting both public and private tort suits. The Democrats’ position was that the two kinds of tort liability should be treated separately. The parties also disagreed about what size of a legislative majority should be required for imposing limits of liability. Republicans argued for simple majorities, while Democrats wanted two-
thirds of each house. Agreement was reached on the issue of combining public and private tort reform—the Democrats accepted the Republican approach—but lack of compromise on the question of legislative majorities killed any chance of proposing a constitutional referendum. The principal interests, though, united in the successful Initiative 30 campaign.

D. **Constitutional Initiative 30**

The petition to place Constitutional Amendment 30 on the November 4, 1986, general election ballot called for three major changes in article II, section 16 of the Montana Constitution. The intent for these alterations was a constitutional overruling of the Montana Supreme Court’s rulings in the *White* and *Pfost* cases. The proposed amendment dropped the word “every” which modified the word “injury” in the section’s first sentence, so it read: “Courts of justice shall be open to every person, and speedy remedy afforded for injury of person, property, or character.” The second major change was elimination of the words “this full” in section 16’s second sentence, so it read: “No person shall be deprived of legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen’s Compensation laws of this state.” Finally, the proposed amendment added to section 16 the following language applicable to both private and public tort liability:

This section shall not be construed as a limitation upon the authority of the legislature to enact statutes establishing, limiting, modifying, or abolishing remedies, claims for relief, damages, or allocations of responsibility for damages in any civil proceeding; except that any express dollar limits on compensatory damages for actual economic loss for bodily injury must be approved by a two-thirds vote of each house of the legislature.

The attorney general’s statement on the petition form, which presented that office’s interpretation of the purpose and consequence of the proposed amendment, read:

This initiative would amend the Montana Constitution to authorize the Legislature to determine the rights and remedies for in-

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74. Petition to Place Constitutional Amendment No. 30 on the Election Ballot 1 (1986).
75. *Id.*
76. *Id.*
jury or damage to person, property, or character. Currently the Constitution does not permit limits on these rights and remedies. A two-thirds vote of each house of the Legislature would be required to set dollar limits on damages for economic loss resulting from bodily injury.77

Constitutional Initiative 30 was the result of a long series of political and legal battles involving technical points of political and legal theory. Proper resolution of the matter called for the strengths of representative government, not of direct democracy. The initiative campaign was conducted on three levels of significance, and the first level, the public campaign, was fought on a largely fictitious battleground created by the contenders. The proponents' arguments suggested that passage would result in lower insurance rates and attorney fees, while opponents said that the amendment would result in even higher insurance company profits and loss of constitutional guarantees, such as "the right of privacy, the right to open meetings, the right to private property and ownership as well as other important rights."78 The second level of significance implicated the interests of those most intensely involved. Municipal and business corporations and defense counsel championed the Montana Legislature as the shaper of liability law, while trial attorneys, as the representatives of future plaintiffs, argued that the Montana Supreme Court should have final say in liability law. Outside of the narrow confines of voter manipulation and special interest was the third perspective on the campaign. The issue here was, should Montana follow the modern trend in American politics and continue to weaken its legislature. The Montana electorate, probably not addressing the question of who should govern in the state, ratified the proposed amendment by giving it 55 percent of the vote.79

The November 4, 1986, balloting did not take place without challenge. A group known as Montanans for the Preservation of Citizens' Rights and other plaintiffs invoked the original jurisdiction of the Montana Supreme Court in late August, 1986, seeking a declaration that Initiative 30 was unconstitutional and an injunction preventing the measure from going to the voters.80 The plain-

77. Id.
79. The Missoulian, on November 6, 1986, reported the outcome of the Constitutional Initiative 30 balloting. With 100 percent of the results, 172,260 voters were for the measure and 136,594 voters were against the measure. Missoulian, Nov. 6, 1986, col. 1.
80. Application for Writ of Injunction and Brief for Plaintiffs and Relators, State ex rel. Montanans for the Preservation of Citizens' Rights v. Waltermire, ____ Mont. _____. 729
tiffs made four principal arguments that Constitutional Amendment Initiative 30 was unconstitutional and void: (1) "it attempts more than one amendment by one ballot measure thus precluding a separate vote on each"; (2) it attempts to transfer judicial powers belonging in the judicial branch to the legislative branch in violation of the separation of powers . . . ."; (3) the attorney general's statement of purpose appearing on the petition form "is misleading, untrue and written so as to create prejudice in favor of the measure . . . ."; and (4) the attorney general's statement of implication appearing on the petition form "is untrue, misleading and written so as to create prejudice in favor of the measure . . . ." The Montana Supreme Court heard oral argument on October 7, 1986, and issued its order on the same day. A majority of four (Chief Justice Jean Turnage, and Justices Fred Weber, John Harrison, and L.C. Gulbrandson) denied the writ of injunction. The Pfost minority plus Justice Harrison comprised the new majority. Dissenting were Justices John Sheehy, William Hunt, and Joseph Gary (sitting in place of Justice Frank Morrison).

After the election the same set of plaintiffs called upon the Montana Supreme Court in its original jurisdiction to declare unconstitutional and void the initiative and the election and to enjoin the canvassing of the votes and the certification of the results. Because the court majority in the pre-election case had denied an injunction on the grounds of respect for the initiative process, the plaintiffs' case had not been disposed of on the merits. As a result, the plaintiffs in their second appearance incorporated "all allegations set forth in their original Application for Writ of Injunction" and included several additional arguments. The Montana Secretary of State's Voter Information Pamphlet, plaintiffs alleged, was "misleading, untrue, and prejudicial," and the secretary of

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81. Id. at 12.
82. Id. at 13.
83. Id. at 14.
84. Id. at 15.
86. Amended Application for Writ of Injunction and Brief for Plaintiffs and Relators, State ex rel. Montanans for the Preservation of Citizens' Rights v. Waltermire, Docket 86-400 [hereinafter Amended Application].
87. State ex rel. Montanans for the Preservation of Citizens' Rights, Mont. at , 729 P.2d at 1285-86.
88. Amended Application, supra note 85, at 1.
89. Id. at 3.
state published in the newspapers of the state a summary rather than the full text of the amendment, as required by the Montana Constitution. 90

The supreme court, in the second Montanans for the Preservation of Citizens’ Rights case, thus had before it a wide variety of arguments for deciding whether to void Initiative 30. Of these probably the most surprising was the central issue of White and Pfost, whether the administration of justice provision of the Montana Constitution was an historic fundamental right. The presence of this issue was surprising because of the firmness of the court’s rulings in White and Pfost. The continued appearance of the issue, however, is not surprising because its resolution defines the critical roles and relationship of the court and legislature in the Montana political system.

The issue was raised in the plaintiff’s assertion that the attorney general’s statements of purpose and implication concerning Initiative 30 were false, misleading, and prejudicial. In this context plaintiffs argued orally before the court that the right of full recovery for every injury had “always been a ‘fundamental right’ limiting the legislature from limiting rights and remedies in lawsuits.” 91 The Montana Liability Coalition responded in its reply brief that White and Pfost represented the court’s “creation out of whole cloth of a ‘fundamental right’ limiting the legislature.” 92 Attorneys for the Montana Liability Coalition used an historical analysis going back to the Magna Carta to show that “England, Montana and other states in the United States and the court cases in those states totally reject” the concept that access to the courts is a fundamental right. 93 This argument continued that nearly identical provisions in other state constitutions had been interpreted “contrary to the holdings of the Montana Supreme Court.” 94 Provisions

90. Id. at 7-8.
92. Id.
93. Id. But see Burke, supra note 42, at 55-57 and n.16 at 56 for a discussion of “three standard but conflicting interpretations by the highest court of the states” of “access and remedy provisions in state constitutions.” Id. at 57. Burke argues that “[a]t least one state has interpreted the provision to recognize a fundamental constitutional right to a remedy for all injuries.” Id. at 56. However, she explains that the constitutional provision in that state, Arizona, is not exactly an “open court provision”: “[A]rizona has a more specific constitutional requirement. Article 18, § 6 provides, ‘The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.’” Id. at 56, n.17.
94. Supplemental Reply Brief, supra note 90, at 48.
"guaranteeing to every person a remedy by due course of law for injury done him in person or property"\textsuperscript{95} were found not to include a fundamental right sufficient to trigger strict scrutiny (Louisiana and New Hampshire);\textsuperscript{96} to be a mandate to the judiciary and not a limitation on the legislative branch (Oklahoma);\textsuperscript{97} and to refer to a remedy provided by statute or common law, not being a delegation to the courts to legislate a remedy (Tennessee).\textsuperscript{98}

It seemed unlikely that the supreme court would void Constitutional Initiative 30 for substantive reasons. The White and Pfost rulings that the amendment addressed were bold assertions of policy and ignored the value of predictability in the state's law. To reject again the careful design of a constitutional amendment would have portrayed the justices as far less judicial than even they wanted to be seen. A four-justice majority (Sheehy, Harrison, Hunt, and Gary), however, felt comfortable in striking down the amendment on procedural grounds.\textsuperscript{99}

IV. THE WELFARE REFORM STORY

The Montana Supreme Court maintained center stage in the long tort reform drama because of its willingness to find and enforce a fundamental constitutional right. Well aware of the court's activism, litigants either played to this disposition or created increasingly elaborate arguments to offset it. The strength of the court's bent can also be appreciated in the unraveling of another story of court-legislature conflict, that of welfare reform. The judicial involvement here follows the same pattern as tort reform. The court ignored constitutional intent and legislative prerogative and installed itself as the state's chief policy maker.

A. Welfare Policy in the 1972 Constitutional Convention

As with tort reform, the discussion of welfare reform must be grounded in the state constitution. Two committees of the 1972 constitutional convention took up the issue of public assistance. The Bill of Rights Committee considered whether the constitution should contain a fundamental right to the necessities of life, and the Public Health, Welfare, Labor and Industry Committee dealt with the state's role in providing welfare payments. The two com-

\textsuperscript{95} Id. at 47.
\textsuperscript{96} Id. at 48.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 49.
committees met together and held a joint hearing concerning their common concern.\textsuperscript{100} Their agreed upon conclusions were that welfare assistance was not a fundamental right and its provision rested with the discretion of the legislature.

Testimony before the two committees detailed the failings of the state welfare program and urged the identification of a right to public assistance.\textsuperscript{101} The proposal of the Bill of Rights Committee for the "Inalienable Rights" section arguably hinted in that direction. It read: "All persons are born free and have certain inalienable rights which include the right of pursuing life's basic necessities . . . ."\textsuperscript{102} But this was, said Delegate Lyle Monroe, nothing more than a "constitutional sermon so that maybe the Legislature, from time to time, can improve and update—and upgrade our public assistance program from time to time as they see fit."\textsuperscript{103} It was not, the Bill of Rights Committee report said, a constitutional guarantee of welfare assistance: "The intent of the committee on this point is not to create a substantive right for all for the necessities of life to be provided by the public treasury."\textsuperscript{104} The pertinent language in the committee's proposal, the right "of pursuing life's basic necessities," appears in the ratified 1972 constitution.\textsuperscript{105}

The remarks and product of the Public Health, Welfare, Labor and Industry Committee reflect the same two themes: no fundamental right to welfare assistance and commitment of this policy area to the legislature's discretion. In consideration was article X, section 5 of the 1889 Montana Constitution. It read: "The several counties of the state shall provide as may be prescribed by law for those inhabitants who, by reason of age, infirmity or misfortune, may have claims upon the sympathy and aid of society."\textsuperscript{106} The committee's principal concern was which level of government, state or local, should carry the funding responsibility for welfare assistance. Three options were discussed: the counties, as was the present case, the state, or leaving the choice to the discretion of the legislature.\textsuperscript{107} The committee rejected county funding because it was clear that population mobility, mainly moving from rural to urban areas, created funding inequities.\textsuperscript{108} Giving the state the re-
Responsibility of paying for welfare assistance was also rejected by the committee: "We believed that this would be equally as restrictive as the existing section and believe the matter should be one for legislative discretion."\(^{109}\) This was the agreed upon solution. The committee proposal read: "It shall be the duty of the Legislative Assembly to provide economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities or misfortune may have need for the aid of society."\(^ {110}\) In its comments the committee contrasted this language to the county oriented 1889 constitutional provision and said that its intent was "to provide that the legislative assembly shall decide where this tax burden should rest, counties as at the present or a state wide levy, or some combination thereof."\(^ {111}\) The ultimate, relevant language of the 1972 Montana Constitution was: "The legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have need for the aid of society."\(^ {112}\)

Discussion on the convention floor concerning the Public Health, Welfare, Labor and Industry Committee's proposal for economic assistance revealed confusion, provoked suggestions for amendment, and elicited clarifying statements. Delegate William Swanberg spoke for the committee and emphasized that the committee's proposal shifted funding responsibility from counties to the discretion of the legislature.\(^ {113}\) Then Delegate Charles McNeil for the first of several times pointed out what he determined to be the essential change from the 1889 language: "The majority proposal establishes a constitutional right to a claim for the same necessary services, for the same economic assistance . . . . Our present Constitution has a permissive 'may,' where this is mandatory."\(^ {114}\) McNeil's proposed remedy was deletion of the economic assistance provision.\(^ {115}\)

The floor discussion on the McNeil motion focused on the desirability of making the state the responsible agent for welfare service and not on whether the proposal created a right to such assistance. Delegate Lyle Monroe said: "[t]hose people who cannot otherwise provide for themselves is [sic] the responsibility of soci-

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110. Id. at 674.
111. Id. at 675.
112. MONT. CONST. art. XII, § 3(3) (1972).
113. MONT. CONST. CONV., Vol. VI, at 2278-81.
114. Id. at 2285.
115. Id.
The responsibility should lie with the state." Delegate Harold Arbanas made the same point: "What I saw happening in the Convention . . . was a move away from the local and county . . . . And I would read this article in the Public Health and Welfare as following that same trend . . . ." In response to a request to summarize the intent of the economic assistance section, Leo Graybill, President of the Constitutional Convention, said:

Well, the committee report in section 2, says that the Legislative Assembly which of course, is the state shall provide economic such economic assistance as is necessary . . . . and the present Constitution involves the counties. And Mr. Swanberg has made it clear that, while they didn’t assign the duty to the state, they’re leaving it open under section 2 to the State Legislature, whether to have it statewide or countywide. I don’t think we’re determining; we’re giving the power to the Legislature.

No delegates responded when President Graybill concluded, "Now if any members of the committee think I have misstated the section, please speak up."

Just prior to the vote on his motion, Delegate McNeil protested that the convention had not understood his intent: "[a]ll of the comments here . . . have been oriented toward whether it’s going to be a shift from the county to the state. My concern is we’re shifting from the Legislative ‘may’ provide economic assistance to a shift to a constitutional mandate that they ‘shall.’" McNeil’s motion to delete the economic assistance section failed, 30 to 59. He immediately brought the matter again before the convention with a motion to substitute "The Legislature may" for "It shall be the duty of the Legislative Assembly to." His purpose was to force the delegates to vote directly on the issue of whether the proposed economic assistance section should contain "a constitutional right to welfare."

The proceedings of the Constitutional Convention show that Delegate McNeil’s second motion was not received as he wished. While one delegate, who served on the Bill of Rights Committee and seemed unaware of the consequence of its work concerning welfare assistance, claimed that “all of us have a right to assistance

116. Id.
117. Id. at 2286.
118. Id. at 2287.
119. Id.
120. Id. at 2290.
121. Id. at 2291.
122. Id.
if we cannot provide for ourselves,”¹²³ Delegate George Heliker, Chairman of the Public Health, Welfare, Labor and Industry Committee, argued that the motion was unnecessary because the proposed economic assistance section did not establish a right to welfare. Rather, it left the matter to the discretion of the legislature. Committee chairman Heliker said: “this is not an issue it seems to me that you should get unnecessarily excited about, and I direct your attention to the language ‘as may be necessary,’ which leaves it to the Legislature.”¹²⁴ In response to a subsequent motion of similar intent that would have inserted the phrase “methods for” between the phrases “It shall be the duty of the Legislative Assembly to provide” and “economic assistance,”¹²⁵ Heliker made his point again:

It [the proposed change] is unnecessary, superfluous, and besides, it’s excess baggage. The language of the majority is perfectly clear—“the Legislature shall provide,” and that leaves it to the Legislature to find the means and the methods and the funds to provide, and they may do it as they see fit.¹²⁶

Convention delegates rejected the second McNeil motion by a vote of 27 to 64.¹²⁷ The subsequent and third motion also was rejected, 36 to 52.¹²⁸ These votes do not stand for the proposition that delegates wrote a right to welfare into the constitution. They instead indicate that the delegates saw no need for the proposed changes. The majority report of the welfare committee and the state constitution as ratified made welfare assistance a matter for the deliberation and determination of the legislature.

B. The Court Checks Legislative Implementation

In 1985 the Montana Legislature had the occasion to use this policy-making discretion granted by the constitution. The forty-ninth legislative session was dominated by budgetary politics. Legislators were faced with expanding demands and, at best, the prospect of no increase in state revenue over the next biennium. The partisan battle between program reductions and new taxes was largely resolved in favor of the Republican approach. In the area of welfare policy this meant reducing or eliminating benefits for certain recipients. The specific categories slated for special treatment

¹²³. Delegate Lyle Monroe, id.
¹²⁴. Id. at 2293.
¹²⁵. Id. at 2297.
¹²⁶. Id. at 2298-99.
¹²⁷. Id. at 2293-94.
¹²⁸. Id. at 2299-300.
were able-bodied persons without dependent minor children who were under thirty-five years of age or between the ages of thirty-five and fifty. The first group was made not eligible for general relief assistance; the second group could receive welfare aid for no more than three months in any twelve-month period.

A challenge to such legislative discrimination among classes of potential welfare recipients was inevitable. The Butte Community Union sought to enjoin enforcement of the new welfare law, and the Montana Supreme Court in 1986 declared the law unconstitutional and granted a permanent injunction. The opinion, written by Justice Frank Morrison for an unanimous court, turned aside the argument that there was a constitutional right to welfare assistance. But the court found that welfare benefits were of such constitutional significance that the justices could feel free in substituting their judgment for that of the legislators concerning what kind of welfare system was appropriate for the state. The vehicle of this judicial activism was a new equal protection analysis devised and applied by the court.

If the court had determined that the Montana Constitution contained a fundamental right to welfare, then it would have been prepared to use the strict scrutiny/compelling interest test employed in the tort reform cases. There was, however, no basis for such a finding. Ordinarily, this would have left the court with the reasonable relationship test for determining the constitutionality of the legislature's welfare classifications. Such an analysis would have called for a presumption of constitutionality that would have been sustained if the legislature had some reasonable basis for its action—i.e., if there had been a reasonable relationship between

129. MONT. CODE ANN. § 53-3-205(3) (1985) read: "Able-bodied persons under the age of 35 years without dependent minor children living in the household are not eligible for nonmedical general relief assistance."

130. MONT. CODE ANN. § 53-3-209(2) (1985) read: "Able-bodied persons age 35 through 49 without dependent minor children living in the household are eligible for no more than 3 months of non-medical general relief assistance within any 12-month period . . . ."


132. Justice Morrison wrote: "We find that the Montana Constitution does not establish a fundamental right to welfare for the aged, infirm or misfortunate . . . . In order to be fundamental, a right must be found within Montana's Declaration of Rights or be a right 'without which other constitutionally guaranteed rights would have little meaning.' Welfare is neither." Id. at ___, 712 P.2d at 1311 (citing Matter of C.H., ___ Mont. ___, ___ P.2d 931, 940 (1984)).

133. Justice Morrison wrote: "[b]ecause the constitutional convention delegates deemed welfare to be sufficiently important to warrant reference in the Constitution, we hold that a classification which abridges welfare benefits is subject to a heightened scrutiny under an equal protection analysis and that HB 843 must fall under such scrutiny." Butte Community Union, ___ Mont. at ___, 712 P.2d at 1311.
the welfare classifications used and the legislature’s purpose of operating a fiscally responsible public assistance program. That test is by its terms deferential to the legislature, and its result was avoided by nonemployment. The justices then resorted to contrivance to achieve their desired result. The Montana Supreme Court followed the lead of United States Supreme Court Justice Thurgood Marshall in Dandridge v. Williams. There “Marshall states in his dissent that welfare does not fit in the two classifications and that classifications in welfare favor an interventionist approach on the part of the Court.”

The United States Supreme Court had developed a third or heightened scrutiny equal protection analysis and used it sparingly, most notably in gender classification cases. This mid-level approach undoubtedly represented a compromise among justices after the Equal Rights Amendment failed of ratification. One position on the Court was that gender should be a suspect classification, while other justices would have continued to apply the traditional equal protection analysis. The new formula called for an “exceedingly persuasive justification” for the gender-based governmental action and proof of a “substantial relationship” between the governmental goal and the means employed. The United States Supreme Court, however, refused to allow welfare benefits to qualify for such mid-level equal protection analysis.

The Montana Supreme Court knew well that it was not obligated by the national court’s ruling because the state case was argued under the Montana Constitution. Justice Morrison wrote: “We will not be bound by decisions of the United States Supreme Court where independent state grounds exist for developing

134. Id. at ___, 712 P.2d at 1312.
136. Butte Community Union, ___ Mont. at ___, 712 P.2d at 1313.
138. See Frontiero v. Richardson, 411 U.S. 677 (1973). In a plurality opinion, Justices Brennan, Douglas, White, and Marshall argued that sex classifications were inherently suspect.
140. Dandridge, 397 U.S. at 487. Professor Laurence H. Tribe gave the following analysis of Dandridge: “The assumption in Dandridge was that laws distributing welfare benefits do not ‘affect . . . freedoms guaranteed by the Bill of Rights,’ [Id. at 484.] and that ‘the myriad of potential recipients’ with claims to ‘limited public welfare funds’ [Id. at 487.] represent a monolithic group among whom invidious distinctions are difficult to perceive. The wide berth afforded legislative judgments is thus thought to result from the remoteness of such judgments from the fundamental interests and suspect classifications that are necessary to trigger strict scrutiny.” L. Tribe, AMERICAN CONSTITUTIONAL LAW 1128 (1978).
heightened and expanded rights under our state constitution.\textsuperscript{141} The Montana court thereby made its intent clear. The justices would give access to welfare benefits a significance that was denied by both the Montana Constitutional Convention and the Montana Legislature. Operating within the substantial discretion provided by independent and adequate state grounds, the Montana court picked and chose among available United States Supreme Court actions—adopting the mid-level test, rejecting the\textit{Dandridge} majority's refusal to apply it to social welfare benefits, and adopting the civil rights activism of Justice Marshall. The Montana court's prerogative of judicial review and its freedom to choose the factors of its analysis, a politically charged discretion, made the court arbiter of the state's welfare policy.

The beginning point of the Montana Supreme Court's analysis is the state constitution's treatment of welfare assistance. The justices interpreted article XII, section 3(3)\textsuperscript{142} as "[d]irect[ing] the Legislature to provide necessary assistance to the misfortunate,"\textsuperscript{143} rather than as directing the legislature to provide such assistance as the legislature deems is necessary. This mention of welfare benefits in the state constitution, the justices argued, makes "a right to welfare" of such importance that its "abridgement requires something more than a rational relationship to a governmental objective."\textsuperscript{144} This meant that the court was to take welfare policy away from the legislature: "The old rational basis test allows government to discriminate among classes of people for the most whimsical reasons. Welfare benefits grounded in the Constitution itself are deserving of great protection."\textsuperscript{145}

The court's vehicle for moving into the area of welfare policy was a "meaningful middle-tier analysis," a "balancing" test which considered the "constitutionally significant interests" involved and the "governmental interest to be served by such infringement."\textsuperscript{146} Justice Morrison wrote for the court:

\begin{quote}
We hold that a finding that HB 843 is constitutional requires the State to demonstrate two factors: (1) that its classification of welfare recipients on the basis of age is reasonable; and (2) that its interest in classifying welfare recipients on the basis of age is
\end{quote}

\begin{footnotes}
\item[141.]\textit{Butte Community Union,} \hbox{Mont. at ---}, 712 P.2d at 1313.
\item[142.] "The legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who by reason of age, infirmities, or misfortune may have need for the aid of society."
\item[143.] \textit{Id.}
\item[144.] \textit{Id.}
\item[145.] \textit{Id. at ---}, 712 P.2d at 1314.
\item[146.] \textit{Id.}
\end{footnotes}
more important than the people's interest in obtaining welfare benefits.  

The court, in applying the reasonableness part of its test, clearly did not equate it with the deferential test of rationality in the traditional equal protection analysis. There, "reasonable" means some basis for a legislative judgment or not totally willful. Here the court said the legislature's action was "arbitrary," or without reasonable foundation, because the "state has failed to show that misfortunate people under the age of 50 are more capable of surviving without assistance than people over the age of 50." It was not enough that the legislature, in its considered judgment, thought that such was the case in the ordinary nature of things. It was enough that the judges thought that the legislators were wrong; consequently, the judges substituted their opinion.

The Montana Supreme Court's use of a balancing analysis provided an opportunity for the justices to put into effect their own policy calculus. Balancing "deeply involves judges in policy choices" because it consists of weighing competing interests. When one of the factors is a fundamental right that the people have enshrined explicitly in the constitution, the judge's role is relatively clear because the constitution itself supplies the reasoned justification. But when the balance is to be struck between interests that the constitution has left to the legislature, the judge's role is problematic. Then balancing is "little more than a ritual incantation that masks from judges as well as observers the true processes of interpretation." Behind the mask judges are acting as legislators:

[W]hen one looks behind the metaphor one is usually left with an explanation that says no more than: "In this situation, the claims of Interest A outweigh the claims of Interest B." That sort of statement announces a decision, it does not provide a reasoned justification. Cardozo frankly conceded the point: "If you ask how he [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself."

Despite the Montana Supreme Court's protestation that it

147. Id.
148. Id.
149. Id.
150. W. Murphy, American Constitutional Interpretation 311 (1986).
151. Id. at 312.
152. Id. (quoting B. Cardozo, The Nature of the Judicial Process 113 (1921)).
“does not pass on the merits of welfare,”¹⁵³ that is exactly what it did. Assertion rather than justification and activism rather than deference were the principal ingredients of the court’s balancing analysis:

Next, the state’s objective in enacting HB 843—saving money—must be balanced against the interest of misfortunate people under the age of 50 in receiving financial assistance from the State. The trial record does not show the State to be in such a financially unsound position that the welfare benefit granted constitutionally, can be abrogated.¹⁵⁴

Two elements in the court’s statement are determinative of the judgment of unconstitutionality. First, the court shows no respect for the legislature’s processes of representation and deliberation in that body’s arriving at a conclusion about the state’s financial condition.¹⁵⁵ Secondly, the court assigns a meaning to the state constitution’s mention of welfare benefits that the constitutional convention did not intend.¹⁵⁶

The effect of the supreme court’s ruling in Butte Community Union has been disruption of Montana’s political system. The court’s activism has frustrated successive meetings of the state legislature where a central concern was containing welfare spending. The initial irony is, of course, that delegates to the Montana Constitutional Convention thought that they were leaving the continuing oversight of welfare policy to the legislative process. The final irony is the 1987 legislature’s consideration of a constitutional amendment to grant the legislature complete discretion in making welfare policy.

¹⁵³. Butte Community Union, ___ Mont. at ___, 712 P.2d at 1314.
¹⁵⁴. Id.
¹⁵⁶. The forty-ninth session of the Montana Legislature, meeting in special session in June 1986, enacted legislation which limited general relief assistance for all able-bodied persons without dependent minor children to two months within any twelve-month period (ch. 10, § 1, Spec. Sess. June 1986). The Butte Community Union again challenged the legislature’s attempt to limit welfare assistance. The District Court of Montana’s First Judicial District found the limitation to be unconstitutional, saying: “This case is controlled by the test established by the Montana Supreme Court in Butte Community Union v. Lewis, ___ Mont. ___, 712 P. 2d 1309 (1986).” Butte Community Union v. Lewis, Cause No. 50268, decided December 30, 1986, at 7. The Montana Department of Social and Rehabilitation Services has indicated it will appeal the decision to the Montana Supreme Court. The Missoulian, Judge blocks welfare change, Dec. 31, 1986, p. 1, col. 6.
In recent years there has been a considerable amount of writing about the potential and expanding role of state constitutions in American public law. These documents, through imaginative advocacy and state judicial decision, have become the foundation of doctrinal change that has been unobtainable through the federal judiciary interpreting the United States Constitution. Commentators observe that state constitutions are not the mirror image of the United States Constitution, and, similarly, state supreme courts should not feel themselves bound by the United States Supreme Court's interpretation of provisions in the federal document that are identical or analogous to language in state constitutions. Thus, in the era of the Burger Court or the Rehnquist Court, respect by the high court for the independent and adequate state grounds doctrine would allow a state supreme court to become a little Warren Court. The desirability of this development, though, is a different matter than its possibility.

The appropriateness of judicial activism should depend upon political theory and not policy results. Where the state constitution explicitly contains fundamental rights that are not found in the United States Constitution, the state supreme court should feel free to develop its own jurisprudence for those guarantees. Where the state constitution contains the same explicit fundamental rights as found in the United States Constitution, the state supreme court should feel free to develop a jurisprudence more protective of those freedoms than formulated by the United States Supreme Court. Examples in the Montana Constitution of the first category of rights are the right to a clean and healthful environment, the prohibition of discrimination on the basis of sex, the right of participation, the right to know, the right of privacy, and the right to bear arms. The second category of rights, Montana equivalents of federal constitutional guarantees,
are free exercise of religion,\textsuperscript{164} freedom of speech,\textsuperscript{165} freedom of assembly,\textsuperscript{166} and due process of law.\textsuperscript{167} Mainline American political theory argues that the judiciary has a special role in protecting rights given a fundamental status by the constitution. There is an ill fit, however, between democratic theory and a judicial activism propelled by a mixture of judicially discovered rights and desired results. One well known commentator has denounced this offshoot of the "renaissance of state constitutional law":

The case for an independent role for state courts should not be taken to be a case for unthinking activism. Judges are not knights errant, charged with doing good at every turn in the road. Judicial review by state courts, like that in federal courts, raises important questions about the proper place in a democratic society for counter-majoritarian court decisions.

The debate, familiar in both academic and popular circles, over the legitimate bounds of judicial review by federal courts raises questions that apply, in somewhat altered form, to state court's displacing legislative or other political judgments.\textsuperscript{168}

It is not difficult to identify some reasons why the caution against judicial activism applies "in somewhat altered form" to the states. Often state supreme court justices are elected, as they are in Montana, and thus there exists an avenue of accountability absent at the federal level. State constitutions are easier to amend and, in fact, are amended more often than the United States Constitution. In Montana this is made possible by two methods of proposing amendments, legislative resolution\textsuperscript{169} and citizen initiative.\textsuperscript{170} The result is that it is not impossible for a state citizenry to check an adventurous court. State courts are much more a part of the English common law tradition than is the federal judiciary, a heritage of judge-made law. Even with considerable codification of substantive law in the twentieth century, the American legal system remains a mixture of common law and statutory law. This hybrid legal framework leaves the state judiciary substantial lawmaking discretion and admits of a justification rooted in a savior metaphor:

[i]t is only within the past ten or fifteen years that there have

\begin{itemize}
  \item \textsuperscript{164} Id. at art. II, § 5.
  \item \textsuperscript{165} Id. at art. II, § 7.
  \item \textsuperscript{166} Id. at art. II, § 6.
  \item \textsuperscript{167} Id. at art. II, § 17.
  \item \textsuperscript{168} Howard, The Renaissance of State Constitutional Law, supra note 156, at 4.
  \item \textsuperscript{169} MONT. CONST. art. XIV, § 8.
  \item \textsuperscript{170} Id. at art. XIV, § 9.
\end{itemize}
been suggestions in some judicial opinions to the effect that courts, faced with an obsolete statute and a history of legislative inaction, may take matters into their own hands and do whatever justice and good sense may seem to require. These suggestions have, for the most part, been put forward with an understandable degree of hesitant reluctance. As the idea becomes more familiar to us, I dare say that we will come to see that the reformulation of an obsolete statutory provision is quite as legitimately within judicial competence as the reformulation of an obsolete common law rule.\textsuperscript{171}

The countervailing arguments are quite evident and convincing. A state court’s reworking of a statute is of much less serious concern than its revision of a constitution. Even statutory law in Montana has some special standing.\textsuperscript{172} After New York rejected in the mid-nineteenth century the original substantive codes of David Dudley Field, Montana—along with North Dakota, South Dakota, Idaho, and California—gave them a home.\textsuperscript{173} Some of the motivation for this legal pioneering must have been the typical pro-code sentiment of “taking excess power away from judges,”\textsuperscript{174} as undoubtedly Montanans were inspired with the populist theories then spreading across the high plains. A wide range of measures can show that Montana still is a state that treasures popular government. This persisting value of popular sovereignty should be a primary consideration when the Montana Supreme Court determines its relationship to the political branches.

The stories of tort reform and welfare reform are not in line with this tradition. In both instances the Montana Supreme Court read a right into the state constitution and they used a formidable analysis to overturn legislative classifications. Commentators have called such equal protection analysis, when used by the United States Supreme Court, substantive equal protection.\textsuperscript{175} They thereby have compared it to the highly criticized and now discarded doctrine of substantive due process employed by judges to


\textsuperscript{172} See MONT. CODE ANN. § 1-1-108 (1985) (“In this state there is no common law in any case where the law is declared by statute.”) and § 1-2-101 (1985) (“In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to assert what has been omitted or to omit what has been inserted.”).


\textsuperscript{174} FRIEDMAN, supra note 172, at 92.

\textsuperscript{175} See, e.g., Winter, Poverty, Economic Equality, and the Equal Protection Clause, 1972 SUP. CT. REV. 41.
discover new property rights and void economic regulations.\textsuperscript{176} This kind of equal protection analysis is criticized for "lying well outside what seems the core area of judicial competence."\textsuperscript{177} Its use to allocate economic resources involves "the kind of policy one concerned with institutional competence would leave to the judgment of the legislative branch."\textsuperscript{178} Its application to a legislative enactment "would be child's play to a judge whose policy preferences impel him in that direction."\textsuperscript{179} Thus the Montana Supreme Court has been the willful actor in the state's political system. Rather cavalierly it has disregarded a recent constituent assembly and the authorized and good faith decisions of legislative representatives. The court's insistence that it must have the last word in state policymaking has severely damaged democratic politics.

\textsuperscript{176} See Lochner v. New York, 198 U.S. 45 (1905). W. Eaton, in Courts under Siege, Critical Legal Issues: Working Paper Series No. 7 (Washington Legal Foundation, 1986), argues that the activism of the Lochner era was "much more benign" than the activism of the Warren era: "[T]he acts of the Lochner Court were relatively discreet and limited. The power of the Court was exercised only after government had affirmatively exercised its own power. By contrast, the Warren usurpation operated in a generative, rather than a reactive manner. It did not wait for government to pass a law which it then struck down as abhorrent to its social philosophy. Rather, it solicited a clientele, received countless proposals to create new 'rights', and finally chose those 'rights' it wished to enshrine as 'constitutional.'" Id. at 20-21.

\textsuperscript{177} Winter, supra note 174, at 100. See also J. Wallace, Whose Constitution? An Inquiry into the Limits of Constitutional Interpretation, Critical Legal Issues: Working Paper Series No. 6 (Washington Legal Foundation, 1986). Judge Wallace's argument against judicial activism contains the following observation: "[s]eparation of powers becomes a meaningless slogan if judges may confer constitutional status on whichever rights they happen to deem important, regardless of a textual basis." Id. at 6.

\textsuperscript{178} Winter, supra note 174, at 100.

\textsuperscript{179} Id. at 101.