Keeping Faith with the Vision: Interpreting a Constitution for This and Future Generations

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Recommended Citation
Available at: https://scholarship.law.umt.edu/mlr/vol71/iss2/3
Referring to the words of the United States Constitution, Justice Oliver Wendell Holmes observed that "they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters." So, too, with the Montana Constitution. The delegates to the 1971-1972 Constitutional Convention ("Con Con") and, ultimately, Montanans themselves created a living document—"a cohesive set of fundamental principles, carefully drafted and committed to an abstract ideal of just government." Our 1972 Constitution was born of a desire—indeed, a vision—to improve the quality of life, to establish equality of opportunity, and to secure the blessings of liberty for this and future generations. The principles articulated in it, like those of the federal Constitution, were "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." Hence, their words must be understood "in the light of our whole experience and not merely in that of what was said thirty-eight years ago." And for the most part, this set of principles has thrived and endured. It has been tested in and nurtured by Mont-
tana’s courts over the last four decades. The vision is alive. It must be passed from this to future generations.

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When asked to do a paper on constitutional interpretation and the importance of the courts, I immediately faced the dilemma of what to say, in a few pages, on a topic about which books are written. I elected the simplest approach—that is, to offer my personal perspectives on the topic.

With that in mind, I believe it is only fair to say, at the outset, that I have two biases in writing this article. First, I am, unabashedly, a champion of Montana’s 1972 Constitution. And second, a point which follows from the first, I do not want to see the Constitution upended. Yet, I fear we may be on the brink of doing just that because Montanans (who will vote this year on whether to hold another constitutional convention) do not, generally speaking, understand the Constitution’s vision, its guarantees, and the unique civil rights they now enjoy under it.

The framers of the 1972 Constitution recognized that “legitimate government is founded on the will of the people” and that Montanans have “the right . . . to govern themselves.” These fundamental principles of popular sovereignty and self-government were incorporated into the Constitution as the first two sections of the Declaration of Rights. Article II, § 1 states that “All political power is vested in and derived from the people[,]” and “All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.” Article II, § 2, in turn, recognizes that the people “have the exclusive right of governing themselves as a free, sovereign, and independent state” and “may alter or abolish the constitution and form of government whenever they


7. The principle of Occam’s razor seemed appropriate: When a multitude of approaches are available, the simplest explanation or strategy tends to be the best one. See Merriam-Webster’s Collegiate Dictionary 803 (10th ed. 1997).

8. I do not purport to speak for any past or present member of the Montana Supreme Court. This article has not been vetted with any past or present member of the Montana Supreme Court. Indeed, I expect that there are—as there should be—conflicting and differing views on the matters discussed herein. Moreover, my views are offered with my great respect for my colleagues—with whom I usually, but not always, agree.

9. Unless otherwise indicated, references in this article to “Constitution,” “Article,” and “Section” are to Montana’s 1972 Constitution and its constituent parts.


11. Montana’s Declaration of Rights is set out in art. II, §§ 1–35.

12. Id. at art. II, § 1.
deem it necessary.'" It is not surprising, therefore, that the framers also included a provision (Article XIV, § 3) calling for periodic review of the Constitution. As explained during the Con Con debate, this provision gives the people "a chance to continually, in sort of a generation after generation, take a hard, questioning and political look at their Constitution—see if there is need for a convention." It is thus "a further guarantee that the people will retain a firm hold on the power of constituting government." Not only that, periodic review is also intended to get the people involved in, and make them knowledgeable of, their Constitution. As explained by Delegate Gene Harbaugh:

I think that one of the things that fosters [voter apathy] is taking a constitution and putting it on the shelf for 90 years. Very few people in the state, I believe, today are aware of what the present Constitution says, and I think that this method of bringing the Constitution before the people will insure that this will not happen again. And I think we want the people of our state to know what's in the Constitution; otherwise, there's not much point in having a constitution.

These points are well-taken. I have always maintained that our Constitution is the peoples' document. It is, in my view, the most progressive, people-friendly, and pro-civil-rights organic document of any state constitution. Notably, as professors Elison and Snyder have pointed out, seventeen provisions of the Declaration of Rights have no parallel in the Bill of Rights of the United States Constitution. In this spirit, therefore, it is entirely fitting that our Constitution should be subject to reexamination by the people from time to time.

Of course, the framers contemplated that this reexamination would promote public familiarity with the Constitution and result in an informed

13. Id. at art. II, § 2.
14. Id. at art. XIV, § 3 ("If the question of holding a convention is not otherwise submitted during any period of 20 years, it shall be submitted as provided by law at the general election in the twentieth year following the last submission.").
16. Id. (Delegate Mark Etchart).
17. Id. (Delegate Harbaugh).
18. Larry M. Elison & Fritz Snyder, The Montana State Constitution: A Reference Guide 20 (Greenwood Press 2001) (citing Ronald K.L. Collins, Reliance on State Constitutions—The Montana Disaster, 63 Tex. L. Rev. 1095, 1122 (1985)). Collins lists the following Article II sections not contained in the Bill of Rights: § 4 (dignity, equality, and nondiscrimination), § 8 (right to participate), § 9 (right to know), § 10 (right of privacy), § 14 (adult rights), § 15 (rights of non-adults), § 16 (administration of justice), § 18 (state subject to suit), § 20 (initiation of criminal proceedings), § 23 (detention), § 27 (imprisonment for debt), § 28 (rights of the convicted), § 29 (award of litigation expenses in eminent domain proceedings), § 30 (treaty and descent of estates), § 32 (civilian control of the military), § 33 (importation of armed persons), and § 35 (special considerations for servicepersons and veterans). Id. at 1122 n. 184.
determination of whether it needs revision. Indeed, the momentous decision of whether to hold another constitutional convention must proceed from a true understanding of what the present Constitution says, what it protects, and the unique vision it brings to governance. As noted, our Constitution is a cohesive set of principles, carefully drafted and committed to an abstract ideal of just government, born of a vision to improve the quality of life, to establish equality of opportunity, and to secure the blessings of liberty for this and future generations. But it is not merely a cookbook of heady aspirations. Rather, it is a compact of overlapping and interrelated rights and guarantees—such as the rights of popular sovereignty, self-government, and suffrage; the rights to examine documents and observe the deliberations of all public agencies and to participate in the operation of those agencies; the rights to assemble peaceably, to protest governmental action, and to speak freely; the rights to a quality educational system and to equality of educational opportunity; the rights to dignity, privacy, and expression; the rights to acquire, possess, and protect property and to obtain just compensation when property is taken or damaged for public use; the right to obtain full legal redress in a court of justice for every injury to person, property, or character, including injuries perpetrated by the government; the rights to equal protection of the laws, due process of law, and trial by jury; the rights in criminal cases to appear and defend in person and by counsel, to meet the witnesses face to face, to receive a speedy public trial, and to be free from self-incrimination, double jeopardy, and cruel and unusual punishment; the guarantee that the Legislature shall not pass a special act, an ex post facto law, a law impairing the obligation of contracts, or a law making an irrevocable grant of special privileges; and the rights to a clean and healthful environment, to pursue life’s basic necessities, and to seek safety, health, and happiness in all lawful ways. These are not simply ambitions to strive for when convenient. They are commands. They are not only mandatory, but prohibitory as well. They limit the power of the government and secure to the people those protections that

19. See Armstrong, 989 P.2d at 383; Mont. Const. preamble.
20. See id.
22. Id. at art. II, §§ 8, 9.
23. Id. at art. II, §§ 6, 7.
24. Id. at art. X, § 1(1), (3).
25. Id. at art. II, §§ 4, 7, 10.
26. Id. at art. II, §§ 3, 29.
28. Id. at art. II, §§ 4, 17, 26.
29. Id. at art. II, §§ 22, 24, 25.
30. Id. at art. II, § 31; Mont. Const. art. V, § 12.
31. Id. at art. II, § 3; Mont. Const. art. IX, § 1.
are fundamental to the exercise of liberty in a free society. As recognized by the Bill of Rights Committee, these protections “come not from government but from the people who create that government.” At its core, our 1972 Constitution is a document dedicated to “a more responsible government that is Constitutionally commanded never to forget that government is created solely for the welfare of the people so that the people can more fully enjoy the heritage of American liberty within the structure of that government.” This coming 20-year reexamination of our Constitution must not proceed in ignorance of how important that Constitution is and its unique balance of interrelated rights and responsibilities within its provisions.

In this respect, it bears noting that the Constitution was approved by a margin of only 2,532 votes. And it is obvious to even a casual observer that the political climate in Montana—along with that of the rest of the country and the world—has changed since 1972. Montana is a less progressive, more conservative state.

Yet, the present generation faces challenges that are no less significant than those faced by the Con Con delegates in 1972. Indeed, many of those challenges are even more exigent and far-reaching: climate change, terrorism, economic globalization, worldwide recession, natural disasters, corporatization, runaway technology, and government hell-bent on maintaining its own secrecy while routinely invading the personal lives and affairs of the governed, to name but a few.

Roe v. Wade (decided the year after our 1972 Constitution was adopted) set off the most polarizing and divisive debate in society and in national and state politics since slavery. Like the cosmic microwave radiation left over from the Big Bang, the issue of choice hisses in the background of political decisions, legislation, judicial appointments, and religious agendas. Hardly a legislative session goes by without a bill or an initiative to limit or interfere with a woman’s right to control her own reproductive decisions. When it comes to this issue, the principle of separation of church and state has virtually collapsed at both the national and the state level.

33. Id. at 619.
34. See supra nn. 21–31.
35. Elison & Snyder, supra n. 18, at xv.
39. See e.g. Webster v. Reprod. Health Servs., 492 U.S. 400, 563–572 (1989) (Stevens, J., concurring in part and dissenting in part) (analyzing a Missouri statute that endorsed a particular theological position on when life begins, and noting that “the intensely divisive character of much of the national
There is, also, a pervasive and virulent anti-gay and lesbian sentiment in most of the country, including Montana. Reflective of this, Montanans in 2004 considered the issue of same-sex marriage—which some have said is "the last major civil-rights milestone yet to be surpassed in our two-century struggle to attain the goals we set for this nation at its formation." 40 Rejecting the founding principle that all persons are created equal, 41 a full two-thirds (67%) of Montana voters 42 chose to amend our Constitution to deny gay and lesbian couples the right to marry. 43 Article XIII, § 7 is the only provision in Montana’s Constitution that affirmatively strips an entire class of citizens of an elemental civil right accorded, presumptively and without thought or hesitation, to all other Montanans. 44 It is a disgraceful stain on an otherwise venerable document dedicated to equality and the advancement of civil rights. Article XIII, § 7 was "born of animosity toward the class of persons affected" 45 and a desire to exclude a politically unpopular group from mainstream society. It is the first time in Montana’s history that invidious discrimination has been constitutionalized—and in apparent contradiction to the promises of equality 46 and the inalienable right to the pursuit of happiness 47 set out in Montana’s Declaration of Rights.

Similarly, extractive industries, business entities, and the Legislature continue to chafe against Montanans’ inalienable right to a clean and healthful environment. 48 Indeed, despite the constitutional mandate that it


41. See Declaration of Independence ("We hold these Truths to be self-evident, that all Men are created equal . . .").


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


46. Mont. Const. art. II, § 3.

47. Id. at art. II, § 3; see e.g. MEIC v. Dept. of Envtl. Quality, 988 P.2d 1236 (Mont. 1999) (concerning the discharge of groundwater containing high levels of arsenic and zinc); Cape-France Enters. v. Est. of Peed, 29 P.3d 1011 (Mont. 2001) (concerning the drilling of a well, which could cause significant degradation of uncontaminated aquifers); Seven Up Pete Venture v. State, 114 P.3d 1009 (Mont. 2005) (concerning cyanide leaching for mining purposes).
provide for the maintenance and improvement of a clean and healthful environment, the Legislature has instead effectively abdicated this duty in favor of the federal government’s minimal standards—none of which purport to implement Montana’s constitutional requirement of a clean and healthful environment.

In this new century, Montanans, along with other Americans, seem all too eager to accept greater interference by the government in their private lives and affairs. They willingly trade individual privacy for illusory security, personal autonomy for legislated morality, transparency in government for secrecy, and whiz-bang technology for almost any price. In these times of economic recession, war, terrorist paranoia, and religious zealotry, my fear is that a new constitutional convention may well produce a document that is less grounded in respect for the fundamental human rights and liberties Montanans now enjoy—and, unfortunately, largely take for granted—and more influenced by partisan and sectarian ideology, corporate self-aggrandizement, and the agendas of special interests. Giving up constitutional protections and guarantees for a feel-good sense of security, for economic gain, or for partisan or religious ideology is not unlike buying into a Ponzi scheme: It is a swindle where the short term “gains” ultimately lead to the collapse of the subterfuge and the loss of an irreplaceable investment. Indeed, I believe that Montanans have much to lose by compromising their present Constitution and little, or nothing, to gain by it. And I doubt that most people appreciate this fact; at least, they will not appreciate it until it is too late to undo the damage. I do not want to see the 2010 vote on whether to call a new constitutional convention hijacked by those who want to change the Constitution for their own narrow and self-serving purposes.

Accordingly, and without apology, I am an ardent advocate for Montana’s 1972 Constitution. I do not want to see it undone. The document is visionary. It has always been ahead of its time in the protection of liberty, and our Court has repeatedly recognized that Montana’s Constitution affords greater rights and heightened protections than does its federal countera

49. Mont. Const. art. IX, § 1.
50. See 1995 Mont. Laws ch. 471 (providing, as a general rule, that state air quality, water quality, and waste control regulations shall be no more stringent than federal regulations or guidelines); see also Mont. Code Ann. §§ 75–2–207, 75–5–203, 75–6–116, 75–10–107 (2009).
51. A Ponzi scheme is a fraudulent investment arrangement in which returns are paid not from any underlying business venture, but from monies obtained from later investors. The fraud consists of funneling proceeds received from new investors to previous investors in the guise of profits from the alleged business venture, thereby cultivating an illusion that a legitimate profit-making business opportunity exists and inducing further investment. As a result of the absence of sufficient (or any) assets able to generate funds necessary to pay the promised returns, the success of such a scheme guarantees its demise because the operator must attract more and more funds, which thereby creates a greater need for funds to pay previous investors, all of which ultimately causes the scheme to collapse. Mosley v. Am. Express Fin. Advisors, Inc., 2010 MT 78, ¶ 3 n. 1, __ P.3d __ (Mont. 2010).
part. If a fully informed citizenry determines to alter or abolish it, knowing what guarantees, rights, and protections they will lose or, hopefully, gain, so be it. The Constitution guarantees that right to the people. However, I come to my task in the firm belief that our Constitution’s core principles, values, and structure should not be sacrificed on the altars of politics, religion, and greed.

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Proceeding, then, with my discussion of constitutional interpretation and the importance of the courts, it is useful to address the latter point first. The Framers of the federal Constitution recognized that “The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.” To ensure against such tyranny, the Framers provided that the federal power would be dispersed among three distinct branches—the Legislative, the Executive, and the Judicial—each subject to substantive and procedural limitations. The framers of the Montana Constitution divided the power of state government in the same manner. This system of separated powers and checks


56. Mont. Const. art. III, § 1 (“The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial.”).
and balances is "a self-executing safeguard against the encroachment or ag-grandizement of one branch at the expense of the other" and, as such, is "a vital check against tyranny."

Among the three coequal branches of government, "It is emphatically the province and duty of the judicial department to say what the law is." At the core of this power is the judiciary's "independent responsibility"—its "ultimate and supreme function"—to interpret the Constitution and ensure that legislative and executive acts are consistent with it, a determination that is "the very essence of judicial duty." This principle—that the judiciary is supreme in the exposition of the law of the Constitution—has long been respected as "a permanent and indispensable feature of our constitutional system." The judiciary's power to enforce the Constitution and award appropriate relief provides an important safeguard against abuses of legislative and executive power and ensures an independent judiciary. In this respect, the judiciary serves as guardian of the people's constitutional liberties.

For these reasons, the notions that the legislature has "plenary power" and that the judiciary should not "second-guess" acts of the legislative branch are false. In this connection, Alexander Hamilton wrote:

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution.

58. Id. at 121.
63. Cooper v. Aaron, 358 U.S. 1, 18 (1958).
65. See Alexander Hamilton, The Federalist No. 78, supra n. 54, at 524 (The courts have the duty "to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."); Trop v. Dulles, 356 U.S. 86, 103 (1958) ("The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights."); State v. Finley, 915 P.2d 208, 213 (Mont. 1996) ("Appellate courts have the inherent duty to interpret the constitution and to protect individual rights set forth in the constitution . . . .") overruled in part on other grounds, State v. Gallagher, 19 P.3d 817, 822 (Mont. 2001).
Noting that the will of the people declared in the Constitution is superior to
the will of the legislature declared in its statutes, Hamilton stated:

It is not otherwise to be supposed that the constitution could intend to enable
the representatives of the people to substitute their will to that of their constit-
uents. It is far more rational to suppose that the courts were designed to be an
intermediate body between the people and the legislature, in order, among
other things, to keep the latter within the limits assigned to their authority.69

In fact, the Framers expressed particular concern about “the dangerous
concentration of governmental powers into the hands of the legislature.”70
James Madison, for example, recognized that the representatives of the ma-
jority in a democratic society, if unconstrained, may pose a threat to liberty
similar to that posed by a too powerful executive.71 “[L]egislative usurpa-
tions,” he wrote, “which by assembling all power in the same hands, must
lead to the same tyranny as is threatened by executive usurpations.”72 He
further explained:

[In] a representative republic, where the executive magistracy is carefully lim-
ited both in the extent and the duration of its power; and where the legislative
power is exercised by an assembly, which is inspired by a supposed influence
over the people with an intrepid confidence in its own strength; which is suffi-
ciently numerous to feel all the passions which actuate a multitude; yet not so
numerous as to be incapable of pursuing the objects of its passions, by means
which reason prescribes; it is against the enterprising ambition of this depart-
ment, that the people ought to indulge all their jealousy and exhaust all their
precautions.

The legislative department derives a superiority in our governments from
other circumstances. Its constitutional powers being at once more extensive
and less susceptible of precise limits, it can with the greater facility, mask
under complicated and indirect measures, the encroachments which it makes
on the co-ordinate departments. It is not unfrequently a question of real-ni-
cety in legislative bodies, whether the operation of a particular measure, will,
or will not extend beyond the legislative sphere.73

Madison decried the potential for a tyranny of the majority, pointing
out that it is as important to guard the minority in our society against injust-
ICE by the majority as it is to guard society itself against the oppression of
its rulers.74 Hamilton similarly expressed concern about “serious oppres-
sions of the minor party in the community” and intrusions by the majority

69. Id. at 525.
72. James Madison, The Federalist No. 48, supra n. 54, at 333.
73. Id. at 333–334.
74. See James Madison, The Federalist No. 51, supra n. 54, at 351. In Gryczan, the Court noted
that “[o]f all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppres-
sive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber
baron’s cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment
us for our own good will torment us without end for they do so with the approval of their own con-
on the rights of individuals. He thought that an independent judiciary was “peculiarly essential” to the protection of those rights. Indeed, it is now settled that the courts play a “special role in safeguarding the interests of those groups that are relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” Such protection is guaranteed as a matter of constitutional law by Montana’s Declaration of Rights, which declares at the outset that government “is instituted solely for the good of the whole”—not just the majority.

Accordingly, the importance of the courts and an independent judiciary cannot be overemphasized. It is not sufficient to acknowledge merely that the judiciary is one of three coequal and independent branches of government. It must further be recognized that on the shoulders of the court system rests the responsibility and obligation to resolve disputes, to interpret and apply statutes, and to establish precedent. Those who maintain that judges do not make law and policy are mistaken. Every published decision of a court of record makes law—precedent—and those judicial decisions together comprise what we know as the “common law.” Each decision is binding on the litigants in the given case and, as well, on future litigants in other cases and on the other branches of government, unless the decision is statutorily or judicially overruled. And when it comes to the Constitution, the judiciary bears an even weightier responsibility and obligation. The courts must interpret and say what the law is under that seminal document. They must articulate what the Constitution means within the context of its language, its spirit, and the question at issue. They must uphold laws that are in accord with it and strike down laws that are not. They must protect the processes of constitutional government and the rights of the governed.

Of course, “courts” in the abstract do not make these decisions. Rather, judges—especially, appellate judges—do. In this regard, the interpretive authority of the Montana Supreme Court vis-à-vis the Montana

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75. See Alexander Hamilton, The Federalist No. 78, supra n. 54, at 527.
76. See id. at 524, 527.
78. Mont. Const. art. II, § 1 (emphasis added).
Constitution is grounded in the ideal that our State’s nonpartisan, no-term-limits judiciary is insulated from the pressures of party politics. Montana’s judges and justices, thus, bear the responsibility of exercising their power of judicial review so as to decide cases and constitutional questions without regard to partisan ideology.

Unlike federal judges and justices, however, Montana’s judiciary is elected. While various members of the federal bench have leveled criticism at state systems that elect judges rather than appoint them, such criticism is, in my experience, quite misplaced. From observing the process of filling federal judicial vacancies—vacancies on the United States Supreme Court especially—it is apparent that the appointment-and-confirmation process is itself dominated by partisanship and payback and takes place in hearings that provide little more than posturing and political theater—where the defining (albeit never-mentioned) issue is whether the nominee is pro-life or pro-choice.

Furthermore, it has been suggested that elected judges’ impartiality and votes on high-profile cases may be affected by having to run for reelection or retention; in other words, a judge’s decision-making may be skewed by conscious or unconscious concern over how her decision or vote will play in the press, with the public, or with a political party, lobby, or special-interest group. I do not share this view. To say that such thoughts do not occasionally cross one’s mind would be disingenuous. However, the implication that such fears ultimately drive the judge’s decision-making is (again, in my experience) overstated. The elected judges and justices with whom I am familiar make decisions based on the facts and the law as they see it, regardless of whose ox is gored in the process. While a judge may not be reelected because of his voting record generally, or because of some other problem in his professional or personal life, a judicial election decided on the basis of one unpopular decision is relatively rare.

In any event, based on three statewide campaigns, it has been my experience that Montanans want nonpartisan judges and will not elect candidates who fail that threshold test. Moreover, Montana, with its severe campaign-contribution restrictions, has not faced the sort of buy-a-judge problems that have poisoned elections in states where there are sky-is-the-limit individual and corporate contributions. Also, in December 2008, our

81. See Mont. Const. art. IV, § 8.
83. See id. at 788–789.
Court adopted a new Code of Judicial Conduct, which should further ameliorate any nagging concerns about partisan partiality and campaign fundraising.86

That said, however, the United States Supreme Court’s recent decision in Citizens United v. Federal Election Commission87 may change the entire landscape of judicial elections in Montana and elsewhere. This decision held that provisions of the Bipartisan Campaign Reform Act of 2002, which prohibits corporations and unions from using their general treasury funds to make “electioneering communications,” violate the right to free speech under the First Amendment to the United States Constitution.88 While the Court’s decision nominally involves candidates for federal office, Justice Stevens aptly points out that:

[T]he consequences of today’s holding will not be limited to the legislative or executive context. The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch, see, e.g., O’Connor, Justice for Sale, Wall St. Journal, Nov. 15, 2007, p. A25; Brief for Justice at Stake et al. as Amici Curiae 2, the Court today unleashes the floodgates of corporate and union general treasury spending in these races. Perhaps “Caperton motions” will catch some of the worst abuses. This will be small comfort to those States that, after today, may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems.89

I wholeheartedly agree with Justice Stevens’s observations. Indeed, if Montana’s judicial races ultimately become little more than exercises in pandering to special interests and corporations and are decided on slick ads and sound bites, then the people of this state should seriously consider amending the Constitution to provide for judicial appointments based on merit. The judiciary must not become prostitutes for big business and special interests—Citizens United notwithstanding.

For the time being, however, having now served, since my appointment in May 1993, with three different Chief Justices90 and ten different compositions of Montana Supreme Court justices, I can say confidently that Montana has enjoyed a consistently hardworking, fair, impartial, and well-managed Supreme Court. To be sure, there have been—and there no doubt will continue to be—serious disagreements from time to time over issues,

86. See 2008 Mont. Code of Jud. Conduct, Application I(A) at 6, Canon 4 at 36, Rules 4.1 to 4.4 at 36–42.
88. See id. at 913.
89. See id. at 968 (Stevens, Ginsburg, Breyer, & Sotomayor, JJ., concurring in part and dissenting in part).
90. Jean A. Turnage, Karla M. Gray, and Mike McGrath.
particularly constitutional ones. Yet, while interpretative philosophies vary from justice to justice, members of the Court have approached each case open-minded and willing to listen to arguments and counterarguments of counsel and the discussion of colleagues during conference. Each case is fully vetted before votes are cast and final opinions are signed. Deciding cases is a process—and an interesting and challenging one at that. But each member of the Court with whom I have served has taken his or her power of judicial review seriously—especially when it comes to interpreting Montana’s Constitution. I believe that each justice on Montana’s Supreme Court appreciates and values the special grandness and vision of our Constitution—regardless of how any given case might be decided.

As a final observation, before delving into my approach to constitutional interpretation, I note that every change of membership on the Court has lent a different dynamic to the Court’s deliberations and decisions. Elison and Snyder give a snapshot of how the Courts of the 1970s, ’80s, and ’90s differed, and I will leave it to those who study and characterize the various makeups of the Court and its decisions in a global fashion to judge and grade the Courts since. But as a general proposition, I do not think that members of the public fully recognize and appreciate just how important judicial appointments and elections are—especially those for the Supreme Court. Relative to elections for governor and legislative seats, judicial elections in general are not high-profile and do not draw significant public attention. Indeed, they often are “under the radar.” And yet, one member of the Court casting one vote can, and often does, change the outcome of a case and the course of constitutional law for generations. Indeed, where constitutional issues and fundamental rights are at stake, the outcome of a particular case will affect not only the litigants in that case, but also litigants in future cases for years to come. In matters of constitutional interpretation, the courts are, thus, critical.

That said, if a new constitutional convention is called, I urge the delegates not to “fix” the judiciary. Aside from always being short of judges, staff, and money and eventually needing an intermediate appellate court, the judicial branch and the judiciary are not broken. They work just fine.


92. Elison & Snyder, supra n. 18, at xvii–xviii.
Montana's judges and justices are, for the most part, doing a good job in keeping the vision of the Constitution alive.

* * *

Turning now to constitutional interpretation, I first note two caveats on the ensuing discussion.

First, while courts follow a variety of rules in conducting constitutional analysis, I do not attempt to cover this particular aspect of my topic in any great detail, as doing so would take me far beyond the scope of this article. It suffices here to note a number of the rules and the fact that a few of us believe some of the rules should be changed.

Second, I have no intent to pontificate on how justices should or should not decide cases in general, or constitutional issues in particular. Each justice has his or her own approach and philosophy, and one is probably no better or worse than another. The beauty of the Supreme Court and its decision-making process is that the members of the Court bring seven individual interpretational approaches and philosophies to the table. The result is that the whole—i.e., the Court's decision—is usually greater than the sum of its parts—i.e., the interpretational approaches and philosophies of the individual justices.

I must stress here that the Court's opinion in a given case represents the thoughts, input, criticism, and agreement of each member of the Court who signs on to it. Opinion writing is a collaborative enterprise. While the

93. For example, the constitutionality of a legislative enactment is prima facie presumed. We attempt to construe a statute in a manner that avoids unconstitutional interpretation. The question of constitutionality is not whether it is possible to condemn, but whether it is possible to uphold the legislative action. The party challenging a statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt; and, if any doubt exists, it must be resolved in favor of the statute. The constitutionality of a statute is a question of law, and our review of constitutional questions is plenary. See Powell v. State Compen. Ins. Fund, 15 P.3d 877, 881 (Mont. 2000); State v. Trull, 136 P.3d 551, 557 (Mont. 2006); State v. Knudson, 174 P.3d 469, 471 (Mont. 2007).


95. I refer to the opinion joined by at least four members of the Court as the "Court's opinion," as that is how the decision is correctly denominated. The Court's opinion represents the law of the case and stands as stare decisis. Where at least four members of the Court agree on a particular disposition of the case but under differing legal rationales for which there are not four votes, the result is a plurality opinion plus a concurring opinion, see e.g. State v. Price, 207 P.3d 298 (Mont. 2009), or an opinion stating the disposition of the case followed by multiple concurring opinions, see e.g. State v. Newman, 127 P.3d 374 (Mont. 2005). Such opinions do not establish precedent on any legal principle for which there are not four votes. In rare instances, the Court's opinion is not signed by four justices, but instead consists of a lead opinion and separate concurrences, where the concurring justices join some, but not all, parts of the lead opinion. See e.g. State v. Sanchez, 177 P.3d 444 (Mont. 2008); Nelson v. State, 195 P.3d 293 (Mont. 2008). Concurring and dissenting opinions are not the opinion of the Court. Finally, the Court does not function as a committee where there may be a majority report and a minority report. Although judges (myself included) sometimes refer to the Court's opinion as the "majority opinion,"
author normally gets the “credit” (or the scorn, as the case may be) for the opinion in the minds of the press and the public, the Court’s opinion is really that: the collective views of the four (or more) justices who signed it. Only the concurrences and dissents represent the individual thoughts of the particular justice (or justices).

Accordingly, what follows are my own personal perspectives on constitutional interpretation. I discuss my interpretational approach and some of my considerations in deciding constitutional issues, and I offer some observations about the process itself.96

In this regard, I initially am reminded of the oft-told story about three umpires’ responses to the question, “How do you call pitches?” The first umpire says, “Some are balls and some are strikes, and I call ‘em as they is.” The second umpire says, “Some are balls and some are strikes, and I call ‘em as I see ‘em.” Finally, the third umpire says, “Some are balls and some are strikes, and they ain’t nothin’ ‘til I call ‘em.”97 Without trivializing what appellate judges do, I suggest that the resolution of constitutional questions reflects each of these approaches. In some cases, the answer is clear. We “call ‘em as they is.”98 In others, the constitutional question provokes passionate disagreement due to conflicting perceptions or understandings of the issues and the law. In those cases, we “call ‘em as we see ‘em.”99 And still others involve constitutional principles that, like quantum particles,100 become known only when identified and articulated by the Court in the given case. In other words, “they ain’t nothin’ ‘til we call

96. At this point, I must also acknowledge the indispensable contributions of my clerks—especially my two permanent clerks, Maria Roberts and Brent Larson—to the opinions I have written. Although I have had many clerks, I have never had a bad one. Each has contributed his or her special talents, thoughts, philosophy, perspectives, and hard work to our final product. Similarly, my three judicial assistants over the years—Doris Shepherd, Sarah Braden, and Lorrie Cole—have provided their talents for writing and editing and, most importantly, their common sense to my chambers’ efforts. Our rule of thumb is that if it doesn’t make sense to the non-lawyers on our team, then it needs to be rewritten.


98. See e.g. Marshall v. State ex rel. Cooney, 975 P.2d 325 (Mont. 1999); Woirhaye, 972 P.2d 800; Lott v. State, 150 P.3d 337 (Mont. 2006).


100. See Brian Greene, The Fabric of the Cosmos: Space, Time, and the Texture of Reality 202–208, 540 (Knopf 2004) (discussing the “quantum measurement problem,” which is defined as the problem of
In all of these scenarios, the unique role of appellate judges in our system is the same: to interpret the Constitution, to determine what it means, and to say what it says—in a sense, to call the constitutional pitch one way or the other.

As already noted, I strongly believe in the vision of the Montana Constitution. Therefore, when we are properly presented with a constitutional question, I start with the premise that the Constitution is a living document, whose vitality stems not only from its original vision but also from its adaptability to changing conditions and evolving norms. This approach, of course, contrasts with the view of "originalists"—most notably Justices Antonin Scalia and Clarence Thomas—who believe that a constitution should be interpreted based exclusively on public understandings of the text at the time it was ratified. However, while the originalist approach may provide some fodder for debate when it comes to interpreting the federal Constitution, I believe that it is ill-suited and, indeed, inappropriate when it comes to interpreting a constitution such as Montana’s.

For one thing, Montana’s Constitution is not quite 40 years old. It is written in plain and, for the most part, unambiguous modern language using words, phrases, and terminology we understand in the same way that the framers did. It states facts; it makes demands of the government; and it reserves rights to the governed. For example, "All persons are born free and have certain inalienable rights," including "the right to a clean and healthful environment and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways." “The dignity of the human being is inviolable.”


102. See e.g. State v. Makarchuk, 204 P.3d 1213, 1217 (Mont. 2009) (constitutional challenges generally must be raised and argued first in the district court); Armstrong, 989 P.2d at 368 (the challenger must have standing).

103. See Liu, supra n. 6, at 1. Incidentally, while "originalism" is also referred to sometimes as "strict constructionism," see id. at 2, I see the latter approach as qualitatively different. In my view, "strictly construing" constitutional text means interpreting the constitution and articulating its meaning in accordance with the text’s plain and unambiguous language, regardless of how the framers might have understood that language. This, in fact, is a basic rule of constitutional interpretation. Montanans for Equal Application of Initiative Laws v. State ex rel. Johnson, 154 P.3d 1202, 1211 (Mont. 2007) (“Where constitutional language is unambiguous and speaks for itself, our obligation is to interpret the language from the provision alone without resorting to extrinsic methods of interpretation.” (citing Great Falls Trib. Co. v. Great Falls Pub. Sch., 841 P.2d 502, 504 (Mont. 1992))).


105. Mont. Const. art. II, § 3.
person shall be denied the equal protection of the laws” or be discriminated against “in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”

“No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies . . . .”

“The right of any person to keep or bear arms in defense of his own home, person, and property . . . shall not be called in question . . . .”

“The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations,” and “The legislature shall provide for the administration and enforcement of this duty.”

“The legislature shall provide a basic system of free quality public elementary and secondary schools.”

While the Montana Supreme Court has, over time, shaped the meaning of these provisions (and others) by interpreting them on a case-by-case basis to yield a particular result under a given factual scenario, we (all Montanans) can still understand the constitutional words as the framers understood them. We do not have to search for the meanings of terms, phrases, and concepts written over two centuries ago in the language of the late 1700s—a time when society, culture, mores, and technology were dramatically different from those of the present in fundamental ways. Thus, even if one adopted an originalist approach to the interpretation of Montana’s Constitution, researching public understandings of the text in 1972 would be more instructive than determinative.

But this point aside, I believe that the design and purpose of our Constitution actually preclude the use of the originalist approach. To clarify, I do not suggest that the record of the 1972 Constitutional Convention may never be consulted. When interpreting constitutional provisions, the Court often refers to that record, and I have done so myself in various concur-

106. Id. at art. II, § 4.
107. Id.
108. Id. at art. II, § 9.
109. Id. at art. II, § 12.
110. Id. at art. IX, § 1(1), (2).
111. Mont. Const. art. X, § 1(3).
112. Randolph, 547 U.S. at 123 (Stevens, J., concurring) (“The study of history for the purpose of ascertaining the original understanding of constitutional provisions is much like the study of legislative history for the purpose of ascertaining the intent of the lawmakers who enact statutes. In both situations the facts uncovered by the study are usually relevant but not necessarily dispositive.”).
rences and dissents. Rather, I suggest that an approach which requires the constitutional text to be interpreted based solely on the framers’ and the public’s understandings in 1972, and which precludes an interpretation of the words “in the light of our whole experience” and “what this country [or, for present purposes, this state] has become,” is inappropriate. In fact, it is not at all what the framers intended or hoped to achieve.

Montana’s Constitution was written and adopted to be a living document—that is, one which adapts to the changing conditions and evolving norms of our society—not a collection of rules to be rigidly applied based solely on knowledge, experience, and understandings at the time of ratification. Indeed, the Preamble states flatly that the people of Montana ordained and established the Constitution to secure the blessings of liberty and to improve the quality of life and equality of opportunity “for this and future generations.” Furthermore, so that it may accomplish these goals and continue to serve generation after generation, Article XIV, § 3 requires the Constitution to undergo periodic review by the people. In this connection, we must keep in mind that political power derives from the people, that government is instituted solely for the good of the whole, and that the people may alter or abolish the Constitution and form of government whenever they deem it necessary. The framers implemented these fundamental rights—set out in the first two sections of the Declaration of Rights—in conjunction with Article XIV, § 3 so that the people would “retain a firm hold on the power of constituting government.” They believed that periodic review would strengthen, rather than weaken, the Constitution and the government and would ensure that the Constitution remained relevant as times changed. But nothing in the Con Con debates suggests that the framers intended the Constitution to be scrapped or gratuitously overthrown.

116. See Liu, supra n. 6, at 1.
117. Mont. Const. preamble (emphasis added).
118. “If the question of holding a convention is not otherwise submitted during any period of 20 years, it shall be submitted as provided by law at the general election in the twentieth year following the last submission.” Mont. Const. art. XIV, § 3.
119. Id. at art. II, § 1.
120. Id.
121. Id. at art. II, § 2.
122. Constitutional Convention Transcript Vol. 1, supra n. 15, at 358 (Delegate Mark Etchart).
tously revised every 20 years if it is already working fine—as it is now. To the contrary, they viewed the Constitution as a living document, adaptable to the changing conditions and evolving norms of our society. They included a requirement for periodic review as the mechanism to guarantee that the Constitution would continue to be relevant, should the three branches of government fail to implement its vision, and also to ensure that Montanans would know what is in their Constitution.124

Lending further support for this view of the Constitution as a living document is the Bill of Rights Committee’s explanation of Article II, § 34.125 The committee stated that this provision “is a crucial part of any effort to revitalize the state government’s approach to civil liberties questions” and “may be the source of innovative judicial activity in the civil liberties field.”126 The fact that the delegates contemplated a “revitalization” of the government’s approach to civil liberties through “innovative” judicial activity under the Constitution belies any notion that the delegates intended restrictive interpretations of the document based exclusively on public understandings of its words in 1972. In point of fact, they wanted future generations to interpret the Constitution in the light of their whole experience.

For example, when the right of individual privacy127 was written and adopted in 1972, the framers unquestionably were concerned about invasions of privacy through modern technologies.128 It is doubtful, however, that they specifically envisioned the use of thermal imaging by the police to observe persons and activities within one’s home or business. Still, nothing in the language of the Constitution leads to the conclusion that they expected the courts to ignore the development of such technology and the capacity of it to invade individual privacy. In fact, the framers intended the privacy provision to adapt with time to modern circumstances and thereby maintain the intended prohibition against warrantless invasions of privacy by means of surveillance equipment, in whatever form that equipment might come.129

Likewise, nothing in the language of Article X suggests that the framers expected student education to remain static from 1972 to 2010, 2030, or 2100. To the contrary, they expected the State to “develop the full educational potential of each person,” a requirement whose satisfaction necessa-

124. See supra n. 17, and accompanying text.
125. Mont. Const. art. II, § 34 (“The enumeration in this constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people.”).
129. See Siegal, 934 P.2d at 192.
rily depends on, and must be evaluated under, present circumstances. Our society is continually developing, particularly in the area of science and technology; and, as a result, the present generation must know more, about more, than the past generation, even if, necessarily, less than the next generation. The framers expected the Legislature to step up to the plate and keep the vision of "full educational potential" alive.130

Other examples abound, but the point is that when it comes to issues of humanity, government, society, culture, and technology, the framers intended our Constitution to be as relevant in 2010 as it was in 1972. And they succeeded. The Constitution is relevant precisely because it has proven adaptable to the changing conditions and the evolving norms of our society. The Constitution adapted to protect citizens from warrantless surveillance using thermal imaging in 1997131 (at a time when such protection was not recognized under federal law132). It adapted to protect adult, consenting homosexuals from governmental interference in their intimate relations in 1997133 (again, when such protection was not recognized under federal law134). It adapted to protect a woman's right to obtain a legal medical procedure by a licensed healthcare provider free from legislative interference in 1999,135 to protect against the degradation of Montana's waters in 1999,136 and (in my view, at least) to protect the right to physician aid in dying in 2009.137 The notion that these and other established constitutional protections could not have been recognized and enforced without some evidence that they existed in the minds of the Con Con delegates and the public in 1972 is not only implausible, but downright absurd and, more importantly, contrary to the intent and vision of those who drafted and ratified the Constitution.

The framers did not write, and the people did not adopt, a Constitution devoid of life—a cookbook of disconnected and discrete rules written with the vitality of an automobile insurance policy138—a compendium of unenforceable illusory rights139—an expression of mere dreams and aspirations

130. Indeed, in my view, a quality education is a fundamental right. See KAPELIN v. Conrad Sch. Dist., 931 P.2d 1311, 1318 (Mont. 1997) (Nelson & Leaphart, JJ., specially concurring).
131. See Siegel, 934 P.2d at 192.
133. See Gryczan, 942 P.2d 112.
135. See Armstrong, 989 P.2d 364.
136. See MEIC, 988 P.2d 1236.
137. See Baxter, 354 Mont. at 254–269 (Nelson, J., specially concurring).
to strive for when convenient. No. Montana's Constitution is a living document—a being. And, it is proper—indeed, mandatory—that it be interpreted in the context of that life and vision.

Therefore, while it is appropriate that the Con Con delegates' understandings be considered as instructive when interpreting Montana's Constitution, those understandings are by no means dispositive, especially where the changing conditions and evolving norms of Montana society, or the plain language of the provision at issue, dictate or allow a different or less-cabined, less-originalist interpretation. It is axiomatic that:

Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

These observations are as compelling in 2010 as they were in 1910, if not more so. I believe the language of Montana's Constitution has the "capacity of adaptation to a changing world," and it must be interpreted with this capacity in mind so that the Constitution retains its vitality and the rights therein are not "lost in reality."

Accordingly, my interpretational approach to questions involving the Montana Constitution is one of fidelity to the constitutional vision. I believe this vision is informed by the intent of the framers, by the text of the Constitution, and, importantly, by the ineffable spirit of the living document. Read as an integrated whole, the Constitution—the peoples' organic law—not only establishes the structure of tripartite governance, but also, just as importantly, protects the purity, beauty, and diversity of our state's land, air, and water, provides for a system of education which will develop the full educational potential of each successive generation, and ensures that values which matter most to Montanans—fair treatment, independence, accountability and transparency in government, individual privacy, and

140. See id.; Baxter, 354 Mont. at 259 (Nelson, J., specially concurring).
143. Weems, 217 U.S. at 373.
human dignity—are not infringed by the government or at least no more than is necessary to provide for the common good. While to a large extent each is legally discrete, I nonetheless attempt to resolve constitutional questions keeping this context and vision in mind. The letter of the Constitution goes hand in hand with its spirit.

There are cases where the Court must balance constitutional provisions against each other. In fact, the Constitution expressly requires that the presumptive right to know be balanced against the demands of individual privacy. Moreover, various provisions of the Constitution often must be read and applied together—keeping in mind the “overlapping and redundant” nature of those provisions. For example, in the search-and-seizure context, the Court reads Article II, § 10 (right of individual privacy) and Article II, § 11 (right to be free from unreasonable searches and seizures) together. In the case of a mentally ill inmate who was being abused at the Montana State Prison, the Court read and applied Article II, § 4 (the dignity clause) together with Article II, § 22 (the prohibition against cruel and unusual punishments) to require that such mistreatment be stopped. The Court also read Article II, § 3 and Article IX, § 1 together in Montana’s first case involving the right to a clean and healthful environment and has read Article II, § 9 (right to know) together with Article II, § 8 (right to participate in the operation of governmental agencies). I suggest that other provisions of the Constitution could be read and applied together as well, in the appropriate case. By way of example: the right to acquire, possess, and protect property (Article II, § 3) with the right to just compensation for a taking or damaging of private property for public use (Article II, § 29), and the right of access to the courts (Article II, § 16) with the

144. See Baxter, 354 Mont. at 263 (Nelson, J., specially concurring) ("[The right of human dignity] is the only right in Article I carrying the absolute prohibition of ‘inviolability.’ No individual may be stripped of her human dignity under the plain language of the Dignity Clause. No private or governmental entity has the right or the power to do so. Human dignity simply cannot be violated—no exceptions.").

145. See e.g. Mont. Const. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." (emphasis added)).

146. See e.g. Great Falls Trib. v. Dist. Ct., 608 P.2d 116, 119 (Mont. 1980) (right to know must be balanced against defendant’s right to an impartial jury).


149. See Bullock, 901 P.2d at 75; State v. Cotterell, 198 P.3d 254, 259 (Mont. 2008).

150. See Walker, 68 P.3d at 883–885.

151. See MEIC, 988 P.2d at 1249.

152. See Great Falls Trib., 82 P.3d at 886.

153. See Buhmann, 201 P.3d at 101–103 (Nelson & Swandal, JJ., dissenting).
right to due process of law (Article II, § 17), the abrogation of sovereign immunity (Article II, § 18), or the right to a jury trial (Article II, § 26).\textsuperscript{154}

Finally, I strongly believe (and have argued\textsuperscript{155}) that, consistent with the interpretational approach I have described above, the Montana Supreme Court should take up the framers' challenge "to revitalize the state government's approach to civil liberties questions" and to utilize Article II, § 34 (unenumerated rights) as "the source of innovative judicial activity in the civil liberties field."\textsuperscript{156} Unfortunately, as professors Elison and Snyder point out, this part of the constitutional vision—the revitalization of civil liberties in Montana through innovative judicial activity—has not been realized.\textsuperscript{157} In my view, it should be.

* * *

In conclusion, I believe in Montana's 1972 Constitution. Our courts (judges and justices, really)—and the Montana Supreme Court in particular—bear the critical responsibility of construing and interpreting that document. The courts say what the law is; what the Constitution means. Indeed, this power of judicial review is elemental. It is one of the fundamental checks and balances in our tripartite structure of government. A strong and independent judiciary stands as the guardian of the peoples' constitutional rights, liberties, and obligations. And it is the protector of the minority from the tyranny of the majority.

Judges and justices differ in their individual philosophies and approaches to discharging their power of judicial review. That is a strength, not a weakness, in our system of justice. The collaborative agreement or disagreement of trial and appellate judges in reviewing a constitutional issue stands as the strongest guarantee that the issue will be thoroughly examined in light of the arguments and the record and that the issue will be correctly decided.

My individual approach to questions involving Montana's Constitution is one of fidelity to the constitutional vision—one informed by the intent of the framers, by the plain language of the Constitution, and, importantly, by the ineffable spirit of the living document, read as an integrated whole, in the context of the times.

I firmly believe that Montana's Constitution is the finest, most progressive state constitution in the country. I want to keep it that way. In my

\textsuperscript{154} See also the combination of provisions referred to above. See supra nn. 21–31.
\textsuperscript{155} See e.g. Dorwart, 58 P.3d at 145–148 (Nelson & Trieweiler, JJ., specially concurring); Snetsinger, 104 P.3d at 463–464 (Nelson, J., specially concurring).
\textsuperscript{156} Constitutional Convention Transcript Vol. II, supra n. 10, at 645; Dorwart, 58 P.3d at 145–146 (Nelson & Trieweiler, JJ., specially concurring).
\textsuperscript{157} Elison & Snyder, supra n. 18, at 86.
over three decades as an attorney and 17 years as one of Montana’s appellate judges, I have been privileged and honored to support, protect, and defend our Constitution. And I look forward to ending my career doing the same.

Montana’s Constitution is the living embodiment of the human need to be governed not only efficiently, but also fairly, respectfully, and justly. Our Constitution fosters the common good of the people but guarantees that the individual will not be swallowed up by the whole. The 12,000 words of Montana’s Constitution “have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.”

We inherit the past but borrow the future from our children. Our Constitution has served us well, and it will continue to serve future generations of Montanans in that same fashion. The promise of Montana’s Constitution will endure. We must keep faith with its vision.

158. Holland, 252 U.S. at 433.