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## STILL-IN-FLUX: REINTERPRETING MONTANA'S RIGHTS-OF-MINORS PROVISION

Rebecca Stursberg\*

### I. INTRODUCTION

The rights enumerated in the Declaration of Rights of the Montana Constitution are considered fundamental.<sup>1</sup> Those fundamental rights are extended to minors by a provision unique to the Montana Constitution.<sup>2</sup> Article II, Section 15 states:

Rights of persons not adults. The rights of persons under the age of 18 shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.<sup>3</sup>

Like several other provisions contained within the Declaration of Rights,<sup>4</sup> Article II, Section 15 is an invention of the 1972 Constitutional Convention. Montana's 1889 Constitution was silent on the rights of minors, as was the proposed state constitution of 1884.<sup>5</sup> In the decade leading up to the Convention, however, juvenile law garnered attention in federal and state courts nationwide.<sup>6</sup> The United States Supreme Court issued a series of decisions gradually affording greater protections to minors, thereby reconsidering and reframing the relationship between minors and the government.<sup>7</sup> The Convention delegates were attuned to this shift when they drafted Article II, Section 15. Indeed, the provision recognized that, at the time of the Convention, "no area of law [was] in greater flux than that of kids' legal rights."<sup>8</sup> The provision was pitched to voters as a "[n]ew provision giving

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\* Rebecca Stursberg is a student at the University of Montana School of Law. She would like to thank Professor Anthony Johnstone for his inspiration and guidance, as well as her colleagues on the *Montana Law Review* for their hard work.

1. *Butte Community Union v. Lewis*, 712 P.2d 1309, 1311 (Mont. 1986) (quoting *In re C.H.*, 683 P.2d 931, 940 (Mont. 1984)), *superseded by* constitutional amendment *as recognized in Zempel v. Uninsured Emp'rs' Fund*, 938 P.2d 658 (Mont. 1997) and *Wadsworth v. State*, 911 P.2d 1165 (Mont. 1996)).

2. MONT. CONST. art. II, § 15.

3. *Id.*

4. *See, e.g.*, MONT. CONST. art. II, §§ 8–10.

5. RICK APPLGATE, BILL OF RIGHTS STUDY 301 (Mont. Constitutional Convention Study No. 10, 1972).

6. *Id.* at 301.

7. *See, e.g.*, *Kent v. United States*, 383 U.S. 541 (1966); *In re Gault*, 387 U.S. 1 (1967); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

8. APPLGATE, *supra* note 5, at 301.

children all of the rights that adults have unless a law meant to protect children prohibits their enjoyment of the right.”<sup>9</sup>

This note explores how this provision, referred to interchangeably as Article II, Section 15 and the rights-of-minors provision throughout, has developed since its adoption. Part II of this note discusses the sources of the provision, including key United States Supreme Court precedent on juvenile rights in the years immediately before the Convention, and the evolution of the provision through several stages of the 1972 Montana Constitutional Convention. Part III examines the structure and substance of Article II, Section 15 by dividing the provision into three subparts and illustrating how each sub-part functions through relevant Montana Supreme Court decisions. Part IV discusses the potential flaws of the Court’s interpretation and application of the rights-of-minors provision by focusing again on each sub-part, and suggests new approaches to understanding and applying its rules. Part V concludes the note.

## II. HISTORICAL AND JURISPRUDENTIAL SOURCES OF THE RIGHTS-OF-MINORS PROVISION

This part details the historical and doctrinal background of Article II, Section 15. As mentioned, the rights of minors received increasing attention in the years leading up to the Montana Constitutional Convention in both state and federal courts, as well as society at large. This context helps to explain Montana’s impetus in creating and adopting a rights-of-minors provision.

### A. *Constitutional Convention Commission Study*

In 1967, the Montana Legislature formed a Legislative Council to study whether the current Montana Constitution, drafted in 1889, adequately served the needs of a changing, increasingly urban electorate.<sup>10</sup> The Council recommended substantial constitutional revision, and in 1970 Montana voters approved a referendum to amend the Constitution.<sup>11</sup> The state legislature quickly established the Montana Constitutional Convention Commission to prepare for the upcoming convention.<sup>12</sup> In turn, the Commission hired a team of analysts and researchers to prepare reports on each

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9. PROPOSED 1972 CONSTITUTION FOR THE STATE OF MONTANA: OFFICIAL TEXT WITH EXPLANATION, 6 (1972) [hereinafter VOTER INFORMATION PAMPHLET].

10. LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION 8 (G. Alan Tar ed., The Oxford Cmts. on the State Constitutions of the U.S., 2011).

11. *Id.* at 9.

12. *Id.*

issue to be addressed in the new constitution.<sup>13</sup> The Convention delegates—elected by Montana voters to draft the new constitution—relied on these reports for education and guidance throughout the drafting process.<sup>14</sup> One of the delegates selected, Rick Applegate, researched and prepared the Declaration of Rights Commission Study.<sup>15</sup> In it, Applegate evaluated the Declaration of Rights of the 1889 Constitution and considered some of the legal and political trends of the time that might call for revision or deletion of existing provisions and incorporation of new ones.<sup>16</sup> The study explored three entirely new areas of individual rights.<sup>17</sup> One of those areas was the rights of minors.<sup>18</sup>

The 1960s witnessed significant change in the arena of juvenile law. Two common battlegrounds for this movement were juvenile courts and public schools.<sup>19</sup> Applegate's study drew directly from then-recent court decisions, academic work, and efforts by both governmental and citizen-led groups to lay the foundation for Article II, Section 15.<sup>20</sup> In particular, he directly cited several United States Supreme Court and other federal decisions concerning the rights of minors in schools and in the courts.<sup>21</sup> It is important to briefly discuss this precedent and to touch on additional sources to understand the backdrop for the proposal and ultimate ratification of Article II, Section 15.

### 1. Federal Precedent

Beginning with *Kent v. United States* in 1966, the United State Supreme Court incrementally extended constitutional protections to minors in conflict with the law.<sup>22</sup> In *Kent*, a 16-year-old boy was arrested in connection with a rape and armed robbery.<sup>23</sup> Police interrogated the boy for seven

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13. *Id.*

14. *Id.* at 12.

15. APPLLEGATE, *supra* note 5, at 301.

16. *Id.*

17. *Id.*

18. *Id.*

19. *See, e.g., Kent v. United States*, 383 U.S. 541 (1966); *In re Gault*, 387 U.S. 1 (1967); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

20. APPLLEGATE, *supra* note 5, at 301–05.

21. *Id.*

22. *See, e.g., Kent*, 383 U.S. 541. (holding that juvenile court's waiver of exclusive jurisdiction over a youth charged with a criminal offense requires basic due process, including a hearing with assistance of counsel); *In re Gault*, 387 U.S. 1 (1976) (holding juvenile delinquency proceedings must comport with due process under the Fourteenth Amendment and guaranteeing to youths in those proceedings timely notice of charges, the right to counsel, the right to remain silent, and the right to confront and cross-examine witnesses); *Tinker*, 393 U.S. 503 (holding suspension of school children for wearing black armbands in protest of U.S. involvement in Vietnam violated those students' First Amendment rights to free speech and freedom of expression).

23. *Kent*, 383 U.S. at 543.

hours that day, and again the following morning until five in the evening.<sup>24</sup> The boy was detained for almost a week at a home for children without arraignment or a determination by a judicial officer that probable cause existed for his apprehension.<sup>25</sup> The boy's mother retained counsel, who filed motions with the juvenile court requesting a hearing on the question of waiver of its jurisdiction, arguing that the juvenile court should retain jurisdiction because his client was suitable for rehabilitation under its auspices.<sup>26</sup> That court declined to rule on the motions, hold a hearing, or confer with the boy, his attorney or parents, and the court waived jurisdiction without making findings or providing a justification.<sup>27</sup> The boy was ultimately convicted. After numerous appeals, the United States Supreme Court granted certiorari and reversed.<sup>28</sup> It held that a juvenile court's waiver of exclusive jurisdiction over a youth charged with a criminal offense requires basic due process, including a hearing with the assistance of counsel.<sup>29</sup>

Not long after its decision in *Kent*, the United States Supreme Court decided the landmark juvenile rights case *In re Gault*. There, a 15-year-old boy was taken into police custody and committed to the Arizona State Industrial School until his 21st birthday for making lewd phone calls to his neighbor.<sup>30</sup> In reversing, the Court remarked, "the condition of being a boy does not justify a kangaroo court."<sup>31</sup> The Court held that minors in delinquency proceedings are entitled to certain due process protections, including the right to counsel, timely notice of charges, the right to remain silent, and the right to confrontation and cross-examination of witnesses because these protections are implicit within the concept of fundamental fairness and due process.<sup>32</sup> The following year, the Court held that the burden of proof beyond a reasonable doubt also falls among the "essentials of due process and fair treatment" guaranteed to youth in delinquency proceedings.<sup>33</sup>

Shortly after *Gault*, the United States Supreme Court decided a seminal students' rights case, *Tinker v. Des Moines Community School District*. In *Tinker*, three junior high and high school students were suspended for wearing black armbands to school in protest of the Vietnam War.<sup>34</sup> The Court held that children, as "persons" under the United States Constitution,

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24. *Id.* at 543–44.

25. *Id.* at 544–45.

26. *Id.*

27. *Id.* at 546.

28. *Id.* at 551–52, 563.

29. *Id.* at 561–62.

30. *Id.* at 4, 7.

31. *Id.* at 28.

32. *Id.*

33. *In re Winship*, 397 U.S. 358, 359, 364 (1970).

34. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

possess constitutional rights, including the freedom of speech and freedom of expression. “It can hardly be argued,” the Court cautioned, “that students or teachers shed their constitutional rights . . . at the schoolhouse gate.”<sup>35</sup> In the wake of *Tinker*—and often citing to it—students across the country continued to challenge school codes and regulations.<sup>36</sup> One area subject to frequent litigation was the constitutionality of school codes proscribing student hair length.<sup>37</sup> Courts diverged on the issue but generally based their holdings on whether the hair style was shown to disrupt the school environment and educational process.<sup>38</sup> On the eve of the Convention, a federal district court in Montana upheld a Hamilton High School hair code and the suspension of a student who had violated it.<sup>39</sup>

## 2. *Additional Sources*

In addition to federal precedent, the Commission study drew directly from a variety of primary and secondary sources in its discussion of the rights of minors. These sources included law review articles, a collection of essays, and a book titled, “Up Against the Law: The Legal Rights of People Under 21,” effectively a layman’s pocket guide to juvenile rights in the United States.<sup>40</sup> Additionally, the study cited three separate proposals for rights-of-minors provisions advanced by governmental and citizen-led organizations.<sup>41</sup> To conclude the study, Applegate cited a report from the 1970 White House Conference on Children.<sup>42</sup> “[T]he main question is not whether the rights of young persons . . . are identical with those of adults . . . . [T]he issue is ‘how the limits of adult control may be drawn so as not to infringe on the child’s right to grow in freedom in accordance with the spirit of civil liberties embodied in the Constitution.’”<sup>43</sup>

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35. *Id.* at 506.

36. APPLGATE, *supra* note 5, at 302.

37. *Id.* (citing James D. Moore, *In-Hair-Ent Rights and Tonsorial Tutelage*, 32 MONT. L. REV. 294 (1971)); *see, e.g.*, *Meyers v. Arcata Union High Sch. Dist.*, 75 Cal. Rptr. 68 (1969); *Yoo v. Moynihan*, 262 A.2d 814 (Conn. 1969); *Breen v. Kahl*, 296 F. Supp. 702 (W.D. Wis. 1969); *Richards v. Thurston*, 304 F. Supp. 449 (D. Mass. 1969); *Griffin v. Tatum*, 425 F.2d 201 (5th Cir. 1970); *Crossen v. Fatsi*, 309 F. Supp. 114 (D. Conn. 1970); *Reichenberg v. Nelson*, 310 F. Supp. 248 (D. Neb. 1970); *Farrell v. Smith*, 310 F. Supp. 732 (D. Maine 1970); *Dunham v. Pulsifer*, 312 F. Supp. 411 (D. Ver. 1970); *Corley v. Daubauer*, 312 F. Supp. 811 (E.D. Ark. 1970); *Whitsell v. Pampas Indep. Sch. Dist.*, 316 F. Supp. 852 (N.D. Tex. 1970).

38. *See, e.g.*, *Breen*, 296 F. Supp. 702; *Reichenberg*, 310 F. Supp. 248; *Whitsell*, 316 F. Supp. 852.

39. APPLGATE, *supra* note 5, at 302.

40. *Id.* at 301 n.1.

41. *Id.* at 304 n.13, 305 n.14.

42. *Id.* at 302 n.3, 303 n.7, 305 n.18.

43. *Id.* at 305 (quoting a report from the White House Conference on Children).

*B. Constitutional Convention*

It was against this backdrop that the Convention delegates drafted and adopted a unique rights-of-minors provision. With the aid of Applegate's study and an eye to *Gault, Tinker*, and the hair-length cases, the Bill of Rights Committee set out to ensure "that persons under the age of majority have the same protections from governmental and majoritarian abuses as do adults."<sup>44</sup>

Delegate Monroe introduced the provision on the Convention floor:

The committee took this action in recognition of the fact that young people have not been held to possess basic civil rights—although it has been held that they are persons under the due process clause of the 14th Amendment, the Supreme Court has not ruled in their favor under the equal protection clause of that same amendment . . . . [T]he broad outline of the kinds of rights young people possess does not yet exist.<sup>45</sup>

The delegates acknowledged the inherent difficulty in defining the scope of juvenile rights.<sup>46</sup> As Applegate discussed, the trend in federal and state courts at the time appeared to afford youth greater procedural and substantive protections, especially in the juvenile justice system.<sup>47</sup> However, he noted, courts still recognized a valid distinction between children and adults and agreed that minors require special treatment by the institutions with which they interact.<sup>48</sup> Thus, the issue in crafting the rights-of-minors provision became how to delimit adult control so as not to infringe on children's rights "to grow in freedom in accordance with the spirit of civil liberties embodied in the Constitution."<sup>49</sup>

To strike this balance between granting special treatment to minors while still providing civil liberties, the Framers included in the provision an exception to the general rule that minors have the same fundamental rights as adults: certain laws may infringe those rights based on a clear showing that the protection of the special status of minors is enhanced.<sup>50</sup> This balancing act makes clear that Article II, Section 15 rests on the two often-competing premises that youth should have the same fundamental rights as adults and that youth are fundamentally different from adults.

Several delegates voiced their skepticism about the purpose and utility of Article II, Section 15. After Delegate Monroe introduced the provision on the Convention floor, the following debate ensued:

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44. 5 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1750 (1979) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT]; 2 CONSTITUTIONAL CONVENTION TRANSCRIPT 636 (1979).

45. 5 CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 44, at 1750.

46. *Id.* at 1750–51.

47. APPLGATE, *supra* note 5, at 303.

48. *Id.* at 301.

49. *Id.* at 305 (quoting a report from the White House Conference on Children).

50. 5 CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 44, at 1750.

DELEGATE RYGG: I'm just wondering—I read this and I still wonder. Could you give me an example of what we're doing? Just one concrete example so that I could find out just what you're trying to do?

DELEGATE MONROE: [Y]oung people are not generally protected by constitutional standards of fairness and due process of law, such as the right to counsel, trial by peers or jury, the right against self-incrimination, and the right to know the nature and cause of accusation . . . I've got a file in here; the Montana Advisory Council on Children and Youth has compiled documentation of specific instances where a child's—or rights of children and youth are just nonexistent, really.

Other delegates echoed Delegate Rygg's confusion.

DELEGATE BROWN: Mr. Chairman, I don't see, really, the purpose of this article, even after the explanation. The Bill of Rights covers all people, and it doesn't say only those over the age of majority or those over 65 or anything else; it covers all people . . . And, I really don't see where this serves any useful purpose.

This time, Delegate Dahood attempted to clarify the purpose of the provision, framing it in different terms than those used by Delegate Brown.

DELEGATE DAHOOD: There is a constitutional controversy through this land as to whether or not the basic protections of the Bill of Rights shall be applied to those persons who are not adults, with respect to arrest, detention and trial . . . [W]hat we are doing by this article is focusing on the basic guarantees that citizens have with respect to their person, their property and their liberty . . . All we're going to do is make sure that the young boys and the young girls, the young men, the young women, prior to reaching the age of majority, are going to know that during that particular period of maturity they shall have all the basic rights that are accorded to all citizens of the State of Montana, and they are going to be better trained to be more responsible citizens . . . [T]his will make sure that this Constitution and this Bill of Rights does apply to all citizens regardless of age.<sup>51</sup>

The debate leaves certain questions unanswered. For instance, while Delegate Dahood made clear that the Bill of Rights applies to all citizens regardless of age, the plain text of the provision permits the limitation of certain rights to “enhance the protection of minors.” Yet, the delegates did not clearly define what it means to enhance the protection of minors. Delegate Monroe cited laws defining the legal drinking age or setting forth driver's license requirements as examples since such laws are designed specifically to protect minors.<sup>52</sup> Beyond that, the delegates provided little guidance for the courts, lawmakers, and litigators. Furthermore, the delegates did not specifically address the provision's “but not limited to” language. The only likely reference to the language is Delegate Monroe's statement that “whatever rights and privileges might be given to [young people] in the

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51. *Id.* at 1751.

52. *Id.*

future, we also want to protect.”<sup>53</sup> Ultimately, Article II, Section 15 was adopted with a vote of 76–11.<sup>54</sup> Nevertheless, the confusion voiced by Delegates Rygg and Brown still plagues the provision.

### C. Ratification

To educate voters prior to the election, the Convention delegates circulated a voter information pamphlet, equipped with an explanation of most sections of the proposed constitution.<sup>55</sup> The pamphlet presented Article II, Section 15 as a “[n]ew provision giving children all of the rights that adults have unless a law meant to protect children prohibits their enjoyment of the right.”<sup>56</sup> Another pamphlet widely circulated in Montana prior to the vote, the Roeder Pamphlet, described Article II, Section 15 as follows: “Section 14 declares that 18 is the age of adulthood for all purposes. Section 15 attempts to extend to those under 18 the procedural safeguards and rights extended adults. It stresses that when society proceeds on the assumption that minors need special treatment in the legal process it must also be careful not to abridge other rights.”<sup>57</sup> The Neely Critical Look, yet another information pamphlet circulated to Montana voters, explained that the “effect of the provision will eventually be felt in . . . criminal law and school supervision.”<sup>58</sup>

### III. ANATOMY OF THE RIGHTS-OF-MINORS PROVISION: MONTANA COURTS

Rights of persons not adults. The rights of persons under the age of 18 shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.<sup>59</sup>

This part of the note explains Article II, Section 15 by dividing the provision into three sub-sections: the general rule, the exception to the general rule for “enhanced protections,” and the “but not be limited to” language, respectively. It will discuss relevant case law to assess how Montana courts have interpreted each sub-section, and lay the groundwork for Part IV, which will address flaws in the courts’ interpretation and application of

53. *Id.*

54. *Id.* at 1751–52.

55. ELISON & SNYDER, *supra* note 10, at 5.

56. VOTER INFORMATION PAMPHLET 6 (1972).

57. CONCERNED CITIZENS FOR CONSTITUTIONAL IMPROVEMENT, PROPOSED CONSTITUTION FOR THE STATE OF MONTANA 2 (1972), available at <https://perma.cc/3WL6-ZA9K> (last visited Aug. 14, 2018).

58. GERALD J. NEELY, A CRITICAL LOOK: MONTANA’S NEW CONSTITUTION 6 (1972), available at <https://perma.cc/P6TZ-96UQ> (internal punctuation marks omitted) (last visited Aug. 14, 2018).

59. MONT. CONST. art. II, § 15.

2018

STILL IN FLUX

267

Article II, Section 15, and explore potential approaches to the provision moving forward.

### A. General Rule

Right of persons not adults. *The rights of persons under the age of 18 shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.*<sup>60</sup>

Perhaps most straightforward is the Court's interpretation of the general rule of the rights-of-minors provision: that youth possess the same fundamental rights afforded to adults under Article II of the Montana Constitution.<sup>61</sup> Similar to how the Due Process Clause of the Fourteenth Amendment incorporates the Bill of Rights to the states, Article II, Section 15 incorporates the Declaration of Rights to minors. This general rule comes with certain limitations, both textual and doctrinal. For example, Article II, Section 14 provides: "[a] person 18 years of age or older is an adult for all purposes, except that the legislature or the people by initiative may establish the legal age for purchasing, consuming, or possessing alcoholic beverages."<sup>62</sup> Indeed, it would make little sense to extend the provision setting the age of adulthood to minors. Similarly, other provisions of Article II appear to be incompatible with or irrelevant to the rights-of-minors provision, such as Section 32 (Civilian control of the military) or Section 35 (Servicemen, servicewomen, and veterans).<sup>63</sup> The Montana Supreme Court has also limited the scope of Section 15. As student-author Jennifer Shannon illustrates in her comment on the rights-of-minors provision, the Court has refused to extend the right to counsel to children in dependent neglect proceedings despite the corollary right guaranteed to their parents under the due process clause of Article II, Section 17.<sup>64</sup> Still, as Delegate Dahood explained, the provision "will make sure that this Constitution and this Bill of Rights does apply to all citizens regardless of age."<sup>65</sup>

Since its adoption, Article II, Section 15 has come into play most frequently in the juvenile justice system and youth courts, as well as in family law and healthcare law, particularly concerning minors' rights to abortion. Montana courts have read the general rule of Article II, Section 15 in con-

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60. MONT. CONST. art. II, § 15 (emphasis added).

61. See, e.g., *In re C.H.*, 683 P.2d 931, 940–41 (Mont. 1984); *In re C.T.P.*, 87 P.3d 399, 406 (Mont. 2004).

62. MONT. CONST. art. II, § 14.

63. MONT. CONST. art. II, § 32; MONT. CONST. art. II, § 35.

64. Jennifer Shannon, *The Analysis is Simple: A Child's Right to Counsel in Dependent Neglect Proceedings Under the Montana Constitution*, 79 MONT. L. REV. 401, 422–25 (2018).

65. 5 MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 44, at 1750.

junction with the other provisions contained in the Declaration of Rights.<sup>66</sup> This reading is consistent with the plain language of the provision, as well as the Bill of Right's Committee's goal in drafting and proposing it: "to recognize that persons under the age of majority have the same protections from governmental and majoritarian abuses as do adults."<sup>67</sup>

For example, Article II, Sections 15, 24, and 25 together guarantee minors the fundamental rights to counsel and to be free from self-incrimination in delinquency proceedings. The Court first recognized this right in *In re C.T.P.* There, local law enforcement questioned 17-year-old C.T.P. in connection with an incident that resulted in over \$3,500 of damage to a Townsend golf course.<sup>68</sup> In his discussions with the investigating officers, C.T.P. admitted he had been in Townsend the morning of the incident and failed to explain why his jeans were grass-stained.<sup>69</sup> At his subsequent youth court trial, one of the deputies was allowed to testify to these statements.<sup>70</sup> C.T.P. was found guilty of criminal mischief and adjudicated a delinquent youth.<sup>71</sup> On appeal, the Montana Supreme Court held that the district court committed plain error in admitting the extrajudicial statements.<sup>72</sup> The Court instructed that "Montana youths are constitutionally guaranteed the same fundamental rights as adults . . . . [A] youth *must* be advised of his right against self-incrimination and his right to counsel, and the record does not reflect that this was done for C.T.P."<sup>73</sup> The Court noted further that "an extrajudicial statement that would be constitutionally inadmissible in a criminal matter may not be received into evidence in a proceeding which alleges that a youth is delinquent."<sup>74</sup> Article II, Section 15 allowed the Court to reach this conclusion; as the Court makes clear, the rights-of-minors provision extends the protections of Section 24 and 25 to minors.

In the same vein, the Court has held that Article II, Section 15 read in conjunction with Article II, Section 26 guarantees minors the right to a trial by jury.<sup>75</sup> In *State v. E.M.R.*, a minor was charged with five counts of misdemeanor "dog at large" and one count of felony animal cruelty.<sup>76</sup> At trial, after the jury indicated it was deadlocked, the youth court instructed the

66. See, e.g., *In re C.T.P.*, 87 P.3d at 405; *Pengra v. State*, 14 P.3d 499, 501 (Mont. 2000); *State v. E.M.R.*, 292 P.3d 451, 456 (Mont. 2013).

67. 5 CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 44, at 1750.

68. *In re C.T.P.*, 87 P.3d at 401–03.

69. *Id.*

70. *Id.* at 404.

71. *Id.* at 402.

72. *Id.* at 405.

73. *Id.* (emphasis in original).

74. *In re C.T.P.*, 87 P.3d at 405.

75. *State v. E.M.R.*, 292 P.3d 451, 456 (Mont. 2013).

76. *Id.* at 453.

jury to consider the legislative purpose of the Montana Youth Court Act.<sup>77</sup> On appeal, the Montana Supreme Court held that instructing the jury on this legislative policy “impermissibly injected irrelevant considerations into the finding of facts and prejudicially affected E.M.R.’s substantial rights,” namely the right to have guilt or innocence determined by the jury on the basis of the evidence introduced at trial.<sup>78</sup> Again, the Court grounded its reasoning in Article II, Section 15.

Similarly, Article II, Sections 15 and 10 together guarantee the same right of privacy afforded to adults under the Montana Constitution to minors. In *Pengra v. State*,<sup>79</sup> the plaintiff-father brought suit against the State of Montana for negligence after the rape and murder of his wife by a prison probationer whom the State knew to be violent.<sup>80</sup> The parties settled before trial, and the father asked the court to seal the settlement agreement, arguing that his minor daughter possessed elevated privacy rights which demanded that the settlement agreement be protected.<sup>81</sup> The trial court denied the motion to seal the settlement agreement and the father appealed.<sup>82</sup> Relying in part on the plain language of Article II, Section 15 and reading it with Section 10, the Court held that minors have the same—not elevated—rights as adults.<sup>83</sup>

### B. Equal Protection

In addition to its determination that Article II, Section 15 generally provides minors with rights equivalent to those of adults, the Montana Supreme Court has held that courts must read Article II, Section 15 in conjunction with the Equal Protection Clause contained in Article II, Section 4 of the Montana Constitution.<sup>84</sup> According to the Court, this is because one of the primary purposes of Article II, Section 15 was to rectify the fact that minors had not received full recognition under the Equal Protection Clause of the United States Constitution.<sup>85</sup> The basic premise of equal protection is “that persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment.”<sup>86</sup> This right is guaranteed by Article II, Section 4, which expressly prohibits discrimination based on

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77. *Id.* at 454.

78. *Id.* at 456.

79. 14 P.3d 499 (Mont. 2000).

80. *Id.* at 500.

81. *Id.* at 500–01.

82. *Id.* at 501.

83. *Id.*

84. *In re S.L.M.*, 951 P.2d 1365, 1372 (Mont. 1997); *In re S.M.K.-S.H.*, 290 P.3d 718, 722 (Mont. 2012).

85. *In re S.M.K.-S.H.*, 290 P.3d at 722.

86. *Id.* at 723 (quoting *Kershaw v. Mont. Dep’t of Transp.*, 257 P.3d 358, 362 (Mont. 2011)).

“race, color, sex, culture, social origin or condition, or political or religious ideas.”<sup>87</sup> Section 4 contains no such protection for age.<sup>88</sup>

Under Montana law, the first step of an equal protection analysis requires the court to identify the classes involved and decide whether they are similarly situated to each other.<sup>89</sup> If they are not, the analysis ends. If the classes are similar, the court will then determine whether a suspect classification exists.<sup>90</sup> A suspect class is one “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>91</sup> Montana marches lock-step with the United States Supreme Court holding that age is not a suspect classification.<sup>92</sup> The next step of the analysis requires the court to “define the nature of the interest affected,” or whether a fundamental right is infringed.<sup>93</sup> If so, the court will apply strict scrutiny, requiring a compelling state interest to infringe the fundamental right.<sup>94</sup>

The Court does not always adhere to its own edict that Article II, Section 15 must be read in conjunction with Article II, Section 4. In *Pengra*, for example, the Court did not undertake an equal protection analysis when considering Article II, Section 15.<sup>95</sup> Instead, it concluded that “[b]ased on the absence of an elevated-protection provision in either the Montana Constitution or the statute, we conclude that minors do not have a greater right to privacy than do adults in settlement agreements for tort claims against the State.”<sup>96</sup> Similarly, in *E.M.R.*, the Court bypassed any consideration of equal protection in its Article II, Section 15 analysis.<sup>97</sup> Rather, it succinctly concluded that the “inviolable” right to a trial by jury secured in Article II, Section 26 extends to children via Article II, Section 15.<sup>98</sup> Instead, the Court generally conducts an equal protection analysis only when the parties raise an equal protection challenge. The following examples are illustrative.

In *In re C.H.*, the youth court adjudicated 14-year-old C.H., a “youth in need of supervision,” for habitual school truancy, and issued a Consent Order instructing C.H. to attend all high school classes and counseling ses-

87. MONT. CONST. art. II, § 4.

88. *Id.*

89. *In re S.L.M.*, 951 P.2d at 1371.

90. *Id.*

91. *Id.* (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

92. *Id.* (citations omitted).

93. *Id.*

94. *Id.*

95. See *Pengra v. State*, 14 P.3d 499 (Mont. 2000).

96. *Id.* at 501.

97. See *State v. E.M.R.*, 292 P.3d 451 (Mont. 2013).

98. *E.M.R.*, 292 P.3d at 456.

sions.<sup>99</sup> The Consent Order specified that C.H.’s failure to comply with these terms and conditions might prompt the youth court to declare her a delinquent youth, a more severe designation.<sup>100</sup> C.H. violated the terms of the Consent Order and the youth court adjudicated her a delinquent youth and sentenced her to the Mountain View Home for Girls (“Mountain View Home”) for 45 days.<sup>101</sup> C.H. appealed, challenging the statutory scheme that allowed her to be adjudicated a delinquent youth and confined to Mountain View Home.<sup>102</sup> She alleged that the statutes were unconstitutional under the Equal Protection and Due Process Clauses and that they violated her right to be free from cruel and unusual punishment.<sup>103</sup>

The Court began its equal protection analysis by identifying the similarly situated classes as youths in need of supervision and delinquent youths who have violated a youth court order.<sup>104</sup> The Court then determined that delinquent youths do not constitute a suspect class because the classification is age-based.<sup>105</sup> Next, the Court addressed the nature of the individual interest affected. C.H. argued that by sentencing her to Mountain View Home for 45 days, the youth court impermissibly infringed upon her physical liberty.<sup>106</sup> The Court held that, in contrast to the federal constitution, the Montana Constitution protects a fundamental right to physical liberty.<sup>107</sup> Having made this determination, the Court proceeded to the final step of the analysis: identifying a compelling interest sufficient to justify the infringement of C.H.’s physical liberty.<sup>108</sup> The Court concluded that the rehabilitation, supervision, and care afforded C.H. by her court-ordered commitment served a compelling state interest.<sup>109</sup>

Similarly, in *In re S.L.M.*, the Court held unconstitutional a provision of the Montana Youth Court Act, the Extended Jurisdiction Prosecution Act (EJPA), which effectively allowed juveniles to receive harsher, longer sentences than adults convicted of the same offense.<sup>110</sup> Petitioners, a group of juveniles sentenced under the EJPA, challenged its constitutionality, claiming it violated their equal protection, due process, and double jeopardy rights, as well as their rights under Article II, Section 15.<sup>111</sup>

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99. *In re C.H.*, 683 P.2d 931, 933–35 (Mont. 1984).

100. *Id.* at 933.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 938.

105. *See id.*

106. *Id.* at 938–39.

107. *Id.* at 940.

108. *Id.* at 940–41.

109. *Id.* at 941.

110. *In re S.L.M.*, 951 P.2d 1365, 1375 (Mont. 1997).

111. *Id.* at 1367.

Again, the Court undertook an equal protection analysis. First, the Court identified the two classes involved: one consisted of juveniles sentenced as adults under the EJPA, while the second consisted of adults sentenced for committing the same offense as the juveniles in question.<sup>112</sup> The two classes, the Court reasoned, were similarly situated because they both included persons who have committed the same act and are sentenced as adults.<sup>113</sup> Next, the Court determined that because a classification between adult and juvenile offenders is based on age, no suspect classification was at play.<sup>114</sup> The Court then defined the nature of the individual interest affected by the EJPA as physical liberty.<sup>115</sup> As established in *In re C.H.*, physical liberty is a fundamental right guaranteed under the Montana Constitution and extended to minors by Article II, Section 15.<sup>116</sup> The Court determined that the confinement terms under the EJPA infringed petitioners' physical liberty.<sup>117</sup> Such infringement, the Court held, triggers strict scrutiny and the need for a compelling state interest.<sup>118</sup> Unable to identify such an interest, the Court held the EJPA violated Article II, Section 4 (equal protection) and Article II, Section 15 of the Montana Constitution.<sup>119</sup> It declined to address the double jeopardy and due process challenges.<sup>120</sup>

*Wicklund v. State*<sup>121</sup> provides yet another example of a Montana court's dual equal protection and Section 15 analysis. *Wicklund* arose out of a minor's challenge of the Parental Notice of Abortion Act under Article II, Sections 4 and 15.<sup>122</sup> The Act, as written at the time, required pregnant minors seeking abortions to notify their parents about the pregnancy and their decision to have an abortion, and to obtain parental consent or satisfy stringent judicial bypass requirements.<sup>123</sup> The plaintiffs contended that the Act unconstitutionally invaded the privacy rights of minors seeking abortions.<sup>124</sup>

Undertaking an equal protection analysis, the court first identified the classes involved—pregnant minors who want to obtain an abortion and pregnant minors who do not—and determined that they were similarly situ-

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112. *Id.* at 1371.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1371–73.

117. *Id.* at 1373.

118. *Id.* at 1373–75.

119. *Id.* at 1375.

120. *Id.* at 1367.

121. 1999 Mont. Dist. LEXIS 1116 (Mont. Feb. 11, 1999).

122. *Id.* at \*1.

123. MONT. CODE ANN. § 50–20–21 (1995).

124. *Wicklund*, 1999 Mont. Dist. LEXIS, at \*7.

ated.<sup>125</sup> Next, the district court concluded the class of “minor pregnant woman” does not constitute a suspect class.<sup>126</sup> It then determined that the individual interest affected was the right to privacy guaranteed by Article II, Section 10 and incorporated to minors through Article II, Section 15.<sup>127</sup> The right to privacy, the court noted, includes personal-autonomy privacy, which in turn encompasses a woman’s right to decide whether to terminate her pregnancy.<sup>128</sup>

Finally, the district court determined that the Act invades the privacy rights of minors seeking an abortion.<sup>129</sup> The district court cited numerous studies and empirical evidence to reach this conclusion, including the fact that minors who choose not to tell their parents about their pregnancy often have a good reason for not doing so, such as fear of domestic violence or being forced to leave home.<sup>130</sup> In other instances, the district court noted, minors are employed, living apart from their parents, and already have children.<sup>131</sup> Still other minors wish to protect information of their pregnancy for fear of being pressured into obtaining an abortion.<sup>132</sup> Based on this information, the district court concluded that the Act infringed fundamental privacy rights of minors who wish to terminate their pregnancies, triggering strict scrutiny and the showing of a compelling state interest.<sup>133</sup> As discussed in greater detail below, the district court ultimately determined that the State’s asserted interests failed to justify the intrusion.<sup>134</sup>

### C. Exception for “Enhanced Protections”

Rights of persons not adults. The rights of persons under the age of 18 shall include, but not be limited to, all the fundamental rights of this Article *unless specifically precluded by laws which enhance the protection of such persons*.<sup>135</sup>

While the general rule extends the fundamental rights enjoyed by adults to minors, the Montana Supreme Court has determined that the exception carved from the rule—that a law designed to enhance the protection of minors may infringe upon fundamental rights—must meet a special kind of scrutiny: not only must the State show a compelling interest, but it must

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125. *Id.* at \*4–5.

126. *Id.* at \*5.

127. *Id.* at \*5–6.

128. *Id.* at \*6–7.

129. *Id.* at \*11.

130. *Id.* at \*6–11.

131. *Id.* at \*7–8.

132. *Id.* at \*9.

133. *Id.* at \*11.

134. *Id.* at \*11–19.

135. MONT. CONST. art. II, § 15 (emphasis added).

also demonstrate that the exception is designed to enhance the protection of minors.<sup>136</sup> Much like the verbatim transcripts of the Convention debate, the Court's rights-of-minors jurisprudence provides only a broad outline of the types of laws which enhance protections and rights of minors. To start, the Court has identified certain laws which fail this special strict scrutiny because they reduce—rather than enhance—those rights.<sup>137</sup> For example, the Court held in *In re S.L.M.* that the EJPA's infringement of petitioners' physical liberty did not enhance his or her rights. "A juvenile enjoys all the rights and privileges of an adult unless the law at issue affords *more*, not less, protection to the juvenile," the Court stated.<sup>138</sup> "Infringement of an EJPA offender's liberty for a longer period of time than an adult under like circumstances does not *enhance* a juvenile's rights."<sup>139</sup>

Still, this doctrine of "enhanced protections" is hard to trace. Again, before the Court can determine the presence of an enhanced protection, it must first reach the conclusion that a minor's fundamental right has been infringed.<sup>140</sup> As discussed above, the Court might reach this conclusion with or without an equal protection analysis; either way, it is the invasion of the fundamental right—not the suspect classification—that triggers strict scrutiny and the need for a compelling state interest. Once strict scrutiny is triggered, the Court determines whether a compelling state interest that enhances the protection of minors' rights exists to justify the infringement. "In contrast to the federal constitution, the Montana Constitution specifically compares the rights of children with those of adults. It recognizes that the State's interest in protecting children may conflict with their fundamental rights."<sup>141</sup> However, as demonstrated in the rights-of-minors cases, the Court has not established a consistent approach to the enhanced protections subpart of the rights-of-minors provision. This makes it difficult for courts and lawyers to determine when and how to analyze enhanced protections.

In *In re C.H.*, the Court concluded that C.H.'s confinement at Mountain View Home infringed upon her fundamental right to physical liberty.<sup>142</sup> However, according to the Court, the state possessed a compelling interest in C.H.'s right to be supervised, cared for, and rehabilitated.<sup>143</sup> This com-

136. See, e.g., *In re S.L.M.*, 951 P.2d 1365, 1373 (Mont. 1997); *State v. Strong*, 203 P.3d 848, 851 (Mont. 2009). The confusion surrounding Article II, Section 15 is apparent in *In re S.L.M.* There, the Court explains that the State must show a compelling state interest and demonstrate that the exception is designed to enhance the rights of minors, rather than the protection of minors. This not only misstates the rule but demonstrates the Court's inconsistent application.

137. See, e.g., *In re S.L.M.*, 951 P.2d 1365; *Wicklund*, 1999 Mont. Dist. LEXIS 1116.

138. *In re S.L.M.*, 951 P.2d at 1375 (emphasis in original).

139. *Id.*

140. See, e.g., *In re S.L.M.*, 951 P.2d at 1373; *In re C.H.*, 683 P.2d 931, 940–41 (Mont. 1984).

141. *Id.* at 940.

142. *Id.*

143. *Id.* at 941.

pellling state interest outweighed C.H.'s fundamental right to physical liberty.<sup>144</sup> In reaching this conclusion, the Court reasoned that the rights of children do not equate with those of adults.<sup>145</sup> Unlike adults, children are especially vulnerable and unable to make critical decisions in an informed, mature manner.<sup>146</sup> Furthermore, the State must recognize the importance of the parental role in child-rearing.<sup>147</sup> Therefore, the Court reasoned that the compelling state interest determination involves balancing the juvenile's right against the State's intrusion.<sup>148</sup> "This is precisely what the drafters of the 1972 Montana Constitution had in mind when they explicitly recognized that persons under 18 years of age would enjoy the same fundamental rights as adults, unless exceptions were made for their own protection," wrote the Court.<sup>149</sup>

In *In re S.L.M.*, the Court similarly found that the challenged state act—the EJPA—infringed the juvenile defendants' fundamental right to physical liberty.<sup>150</sup> This time, the Court ruled that the State lacked a compelling interest in treating juveniles as adults and restricting their physical liberty to a greater degree than similarly situated adults.<sup>151</sup> Citing directly to Article II, Section 15 the Court clarified that, under the Montana Constitution, "a juvenile enjoys all the rights and privileges of an adult unless the law at issue affords *more*, not less, protection to the juvenile."<sup>152</sup> Infringing a juvenile's physical liberty for a longer period of time than a similarly situated adult does not afford more—or enhanced—protection.<sup>153</sup>

The district court in *Wicklund* approached the enhanced protection analysis in a slightly different manner. After concluding that the Parental Notice of Abortion Act infringed minors' fundamental privacy rights, the court stated, "the next step [in the analysis] is the determination of whether there is a compelling state interest sufficient to justify the Act's infringement on the class' fundamental right to privacy."<sup>154</sup> It considered the four compelling interests the State advanced to justify the infringement: "(a) protecting minors against their own immaturity; (b) fostering family unity and preserving the family as a viable social unit; (c) protecting the constitutional rights of parents to rear children who are members of their house-

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144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *In re S.L.M.*, 951 P.2d 1365, 1375 (Mont. 1997).

151. *Id.*

152. *Id.* (emphasis in original).

153. *Id.*

154. *Wicklund v. State*, 1999 Mont. Dist. LEXIS 1116, at \*11 (Mont. Feb. 11, 1999).

hold; and (d) reducing teenage pregnancy and unnecessary abortion.”<sup>155</sup> Turning to studies on teen pregnancy and abortion, the district court concluded that the undisputed psychological and medical evidence undermined the compelling interests advanced by the State.<sup>156</sup>

The district court then proceeded to “the last step” of its analysis—the determination of whether the Act, despite its proscription of the plaintiffs’ fundamental privacy rights, enhanced the protection of minors.<sup>157</sup> The court again cited empirical evidence that medical risks for abortions are considerably lower than the risks associated with pregnancy and childbirth, and that adolescents show no substantial psychological effects from abortion.<sup>158</sup> Rather, the court reasoned that choosing to continue a pregnancy can entail severe social and economic consequences, such as failing to complete high school, and increased medical and health risks for the children who are likely to be born prematurely and have low birth weight.<sup>159</sup> In light of this evidence, the court concluded that the Act did not enhance the protection of minors and found it unconstitutional.<sup>160</sup>

#### D. *The “But Not Be Limited To” Language*

Right of persons not adults. *The rights of persons under the age of 18 shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.*<sup>161</sup>

The Court has not addressed the provision’s “but not limited to” language. The plain language of Article II, Section 15 declares the scope of the provision may extend beyond the fundamental rights contained within Article II.<sup>162</sup> As previously mentioned, the delegates’ discussion of the rights-of-minors provision provides limited guidance as to what this might mean. Likewise, the Court has not defined this language in construing the provision as a whole. In fact, the Court sometimes omits it altogether in referencing and applying the right.<sup>163</sup> This language—and its potential future use—is explored in Part IV.

155. *Id.*

156. *Id.* at \*12–19.

157. *Id.* at \*20–21.

158. *Id.*

159. *Id.* at \*21.

160. *Id.* at \*22.

161. MONT. CONST. art. II, § 15 (emphasis added).

162. MONT. CONST. art. II, § 15.

163. *See, e.g., In re C.H.*, 683 P.2d 931, 940 (Mont. 1984) (stating “Article II, Sec. 15 provides: ‘The rights of persons under 18 years of age shall include . . . all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.’”).

IV. ANALYSIS OF THE COURT'S INTERPRETATION  
OF ARTICLE II, SECTION 15

A. *The Problem with Equal Protection*

The purpose of Article II, Section 15 as expressed by the Framers was to fully recognize that minors are entitled to the same rights as adults, including not only equal protection but all other rights contained in Article II.<sup>164</sup> At the same time, the Court has determined that Article II, Section 15 necessitates consideration of Article II, Section 4 because one of the primary purposes of Section 15 is to remedy the fact that minors had not received full recognition under the Equal Protection Clause of the United States Constitution.<sup>165</sup> This pronouncement is incongruous with the Court's reasoning on the rights-of-minors provision. Not all minors' rights cases involve an equal protection claim, and the Court's instruction that an analysis under Section 15 should trigger equal protection considerations potentially leads to redundant or even futile inquiries incompatible with the text, history, and structure of Article II, Section 15.

As many of the cases illustrate, Section 15 does not necessarily require an equal protection analysis. "The basic premise of equal protection is that persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment."<sup>166</sup> Children are sometimes similarly situated to adults, as in *In re S.L.M.* However, as the rights-of-minors cases illustrate, children's rights do not equate with those of adults.<sup>167</sup> Furthermore, the plain text of Article II, Section 15 expressly allows for different treatment if such treatment enhances the protections of minors.<sup>168</sup>

The Court's insistence that Article II, Section 15 requires an equal protection analysis is confusing for other reasons. As discussed earlier, the Court itself does not undertake an equal protection analysis each time a challenge is brought or decided under Article II, Section 15.<sup>169</sup> Furthermore, Montana marches lock-step with the United States Supreme Court in holding that age-based distinctions do not constitute suspect classifications.<sup>170</sup> As a result, where the Court has invalidated laws or reversed decisions under Article II, Section 15, it has done so because those laws or decisions infringe upon a fundamental right and lack a compelling state

164. 5 MONTANA CONSTITUTIONAL TRANSCRIPT, *supra* note 44, at 1750–53.

165. *In re S.M.K.-S.H.*, 290 P.3d 718, 722 (Mont. 2012).

166. *Id.* at 723 (quoting *Kershaw v. Mont. Dep't of Transp.*, 257 P.3d 358, 362 (Mont. 2011)).

167. *In re C.H.*, 683 P.2d at 941.

168. MONT. CONST. art. II, § 15.

169. *See, e.g.*, *Pengra v. State*, 14 P.3d 499 (Mont. 2000); *In re C.T.P.*, 87 P.3d 399 (Mont. 2004); *State v. E.M.R.*, 292 P.3d 451 (Mont. 2013).

170. *In re C.H.*, 683 P.3d at 938; *In re Wood*, 768 P.2d 1370, 1375 (Mont. 1989); *In re S.L.M.*, 951 P.2d 1365, 1371 (Mont. 1997) (citing *In re Wood*, 768 P.2d at 1375).

interest that enhances the protection of minors, not because the laws trigger strict scrutiny by targeting a suspect class.<sup>171</sup>

Even the Court's decision to align with the United States Supreme Court in holding that children are not a class "saddled with such disabilities . . . as to command extraordinary protection from the majoritarian political process"<sup>172</sup> seems incompatible with Article II, Section 15 itself and the premises on which it rests. The Bill of Rights Committee proposed Article II, Section 15 "in recognition of the fact that young people have not been held to possess basic civil rights."<sup>173</sup> The Court has explicitly acknowledged that Article II, Section 15 is unique to the Montana Constitution, stating, "no such provision exists in the federal constitution."<sup>174</sup> Despite its own recognition of this critical distinction between the federal and Montana constitutions vis-à-vis the rights of minors, the Court has adopted from federal precedent the holding that age does not constitute a suspect class. Ultimately, federal equal protection considerations of age do not necessarily fit Montana's unique guarantee of fundamental rights to minors. The Court could reconsider its holding that Article II, Section 15 must be read alongside the equal protection clause contained in Section 4, or consider including age in its list of suspect classifications.

### B. Clarifying Enhanced Protections

The Court might also clarify what it means to enhance the protection of minors. At the Constitutional Convention, Delegate Monroe provided two examples of laws designed to enhance the protections of minors: laws setting the legal drinking age and laws setting the minimum age required to obtain a driver's license.<sup>175</sup> While the Court has ruled that certain laws enhance protections of minors and that others reduce those protections, it has not specifically explained why or how.

The Court can establish a clear analytical approach to the "enhanced protections" determination. The plain language of the rights-of-minors provision states that a law infringing a minor's fundamental rights must en-

171. See, e.g., *In re S.L.M.*, 951 P.3d at 1372 (holding that age-based distinctions do not trigger strict scrutiny, but also that the imposition of an adult sentence as well as a juvenile disposition infringes a juvenile's fundamental right to physical liberty, triggering strict scrutiny); *Wicklund v. State*, 1999 Mont. Dist. LEXIS 1116, at \*6, \*11 (Mont. Feb. 11, 1999) (holding that the class of minor pregnant women is not a suspect class, but that minors have a fundamental right to individual privacy, and that the statute at issue infringes this right).

172. *In re S.L.M.*, 951 P.3d at 1371 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

173. 5 CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 44, at 1750.

174. *In re C.H.*, 683 P.2d at 941.

175. 5 CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 44, at 1751.

hance the protections of minors to pass constitutional muster.<sup>176</sup> The Court has thrown a compelling state interest requirement into the mix but has failed to complete its analysis. As illustrated in *In re C.H.*, *In re S.L.M.*, and *Wicklund*, the Court's compelling state interest analysis serves an identical purpose to the enhanced protection inquiry and is therefore redundant as it stands. In *In re C.H.*, the compelling state interests of supervising, caring for, and rehabilitating C.H. outweighed her fundamental right to physical liberty.<sup>177</sup> According to the Court, the compelling state interest was designed for C.H.'s "own protection" in compliance with Article II, Section 15.<sup>178</sup> In *In re S.L.M.*, the Court concluded that "the State has not shown a compelling interest to be advanced by this unequal treatment . . . nor has it shown that the EJPA provides juveniles with increased, rather than decreased, protection under the law."<sup>179</sup> And in *Wicklund*, although the district court separated the compelling state interest and enhanced protection inquiries into two discrete steps—determining first whether the Act advanced a compelling state interest and second whether the compelling interest enhanced the protections of minors—it could have easily consolidated these steps into one.<sup>180</sup> The redundancy is evident in the district court's analysis. Turning from the compelling state interest to the enhanced protection prong, the court restates that the "undisputed evidence contradicts the compelling state interests and statements of purposes expressed in the Act."<sup>181</sup> The court then explicitly redirects the reader to its compelling state interest analysis, and cites the same empirical data in support of both determinations.<sup>182</sup>

The rights at issue in an Article II, Section 15 inquiry are the rights contained in Article II of the Montana Constitution—fundamental rights. Under Montana (and federal) law, infringement of a fundamental right triggers strict scrutiny, which in turn requires not only a compelling state interest, but also narrow tailoring.<sup>183</sup> Without ever holding or announcing it, the Court has essentially integrated narrow tailoring into its Article II, Section 15 analysis. As demonstrated in *In re C.H.*, *In re S.L.M.*, and *Wicklund*, the Court has required that a law infringing the rights of minors be narrowly tailored to enhance the protections of such persons. Therefore, the Court might consider reframing and explicitly recognizing this approach to, and analysis of, Article II, Section 15.

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176. MONT. CONST. art. II, § 15.

177. *In re C.H.*, 683 P.2d at 941.

178. *Id.* at 941.

179. *In re S.L.M.*, 951 P.2d 1365, 1375 (Mont. 1997).

180. *Wicklund v. State*, 1999 Mont. Dist. LEXIS 1116, at \*11, \*20 (Mont. Feb. 11, 1999).

181. *Id.* at \*21.

182. *Id.* at \*21–22.

183. *See, e.g., Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 450 (Mont. 2004).

C. *The “But not be limited to” Language: Room to Grow?*

At the 1972 Montana Constitutional Convention, Delegate Monroe expressed the desire of the Bill of Rights Committee, that “whatever rights and privileges might be given to [juveniles] in the future, we also want to protect them.”<sup>184</sup> Aside from this possible reference, neither the Convention documents nor the Court’s rights-of-minors jurisprudence provide an explanation of the “but not be limited to” clause of Article II, Section 15. The Court has neglected to address the meaning of this part of the provision. In fact, the Court frequently replaces this language with ellipses when citing the provision.<sup>185</sup> This sub-section suggests one possible reading of this language: an invitation to extend to minors the fundamental rights of Article II in a way that accommodates their unique status and the fundamental differences between youth and adults.

In its line of cases on Article II, Section 15 the Montana Supreme Court has proffered conflicting interpretations of the provision. On the one hand, the Court has stated that “it is axiomatic that the younger a minor is, the more protection she may require,”<sup>186</sup> and that “Montana recognizes that youths are to be given special treatment by the courts.”<sup>187</sup> The Court has further concluded that “youths are entitled to same *or greater* due process rights as adults.”<sup>188</sup> In *In re C.H.*, the Court recognized that “minors and adults are qualitatively different,” and, therefore, that the “constitutional rights of children cannot be equated with those of adults.”<sup>189</sup> Despite these pronouncements recognizing the fundamental distinctions between minors and adults, the Court has also declared that minors do not enjoy a fundamental right to treatment as juveniles.<sup>190</sup> While this may be the case, perhaps the “but not be limited to” language can modulate the fundamental rights they do enjoy—those in Article II with the limitations discussed above.

184. 5 CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 44, at 1750.

185. *See, e.g., In re C.H.*, 683 P.2d at 940 (stating that “Article II, Section 15 provides: ‘The rights of persons under 18 years of age shall include . . . all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.’”).

186. *Planned Parenthood v. State*, 342 P.3d 684, 688 (Mont. 2015) (declining to decide the constitutionality of two laws requiring involvement of a minor’s parents before that minor may obtain an abortion because the lower court erred in granting summary judgment to plaintiffs on issue preclusion grounds).

187. *In re Appeal of Cascade Cty. Dist. Court*, 219 P.3d 1255, 1258 (Mont. 2009) (holding constitutional a Youth Court Act statute allowing formal youth court disposition for violation of informal consent adjustment).

188. *In re G.T.M.*, 222 P.3d 626, 630 (Mont. 2009) (emphasis added).

189. *In re C.H.*, 683 P.2d at 941 (citing *Bellotti v. Baird*, 443 U.S. 662 (1979)).

190. *In re Wood*, 768 P.2d 1370, 1376 (Mont. 1989) (holding constitutional statute allowing for transfer from youth court to district court), *superseded by statute as recognized in State v. Butler*, 977 P.2d 1000 (Mont. 1999).

Arguably, the history and text of Article II, Section 15—a provision entirely unique to the Montana Constitution—lends itself to the proposition that juveniles are, in fact, entitled to treatment as juveniles. The rights-of-minors provision incorporates Article II to persons under the age of 18; in general, the fundamental rights of adults and minors are coextensive.<sup>191</sup> The provision also permits the infringement of minors' fundamental rights when that infringement enhances the protection of minors.<sup>192</sup> This is permissible precisely because of the fundamental differences between children and adults.<sup>193</sup> In the same way, the “but not be limited to” language of the provision might recognize this distinction. In other words, the “but not be limited to” language contemplates something beyond “all the fundamental rights of this Article.” Arguably, this does not just incorporate the rights enumerated in Article II to minors; it molds them to fit the special characteristics of youth.

In a recent decision, the Montana Supreme Court adopted a line of federal precedent holding that the meaningful protection of minors requires different treatment that accounts for the fundamental differences between minors and adults.<sup>194</sup> This precedent can be instructive for the Court's interpretation of Article II, Section 15 moving forward.

### 1. Eighth Amendment Cases

A relatively recent line of decision handed down by the United States Supreme Court has clarified its position that minors are entitled to unique constitutional protections in the criminal justice context. In 2005, the Court held in *Roper v. Simmons*<sup>195</sup> that sentencing an individual to death for a crime committed as a minor is unconstitutional under the Eighth Amendment.<sup>196</sup> In 2010, the Court held in *Graham v. Florida*<sup>197</sup> that a sentence of life without parole is constitutionally impermissible for individuals convicted of non-homicidal crimes committed as a minor.<sup>198</sup> Then, in 2012, the

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191. MONT. CONST. art. II, § 15. See also *In re S.L.M.*, 951 P.2d 1365, 1373 (Mont. 1997) (stating that “[c]learly under Article II, Section 15, minors . . . enjoy all the fundamental rights of an adult under Article II.”).

192. MONT. CONST. art. II, § 15. See also *In re S.M.K.–S.H.*, 290 P.3d 718, 724 (Mont. 2012) (stating that “[f]urthermore, the Youth Court extended S.M.K.–S.H.’s probation to enhance his protections and to provide him with additional support to make good life decisions.”).

193. See *In re C.H.*, 683 P.2d at 941 (noting that “the fact that a youth has been adjudged a delinquent youth ‘usually demonstrates the need for stronger and wiser authority,’ and that adults and children are ‘quantitatively different.’”).

194. *Steilman v. Michael*, 407 P.3d 313 (Mont. 2017).

195. 543 U.S. 551 (2005).

196. *Id.* at 578.

197. 560 U.S. 48 (2010).

198. *Id.* at 82.

Court in *Miller v. Alabama*<sup>199</sup> extended this prohibition to individuals convicted of homicide committed as minors, absent an individualized sentencing determination requiring the sentencing judge to consider mitigating factors such as age and the nature of the crime.<sup>200</sup> Finally, in 2016, the Court held in *Montgomery v. Louisiana*<sup>201</sup> that *Miller* applied retroactively.<sup>202</sup> The Court further held that a sentence of life without the possibility of parole is unconstitutional for any juvenile, except for a small category of youth whose crimes reflect “irreparable corruption.”<sup>203</sup>

In each opinion, the Court cited to three critical attributes that distinguish youth from adults that warrant different legal treatment for minors and adults: first, children lack maturity and possess an underdeveloped sense of responsibility that gives rise to recklessness, impulsivity, and risk-taking; second, children are more vulnerable to negative influences and peer pressure; and third, a child’s character is transient and less developed than an adult’s, meaning that his or her actions are less likely to be evidence of irretrievable depravity.<sup>204</sup>

## 2. *Steilman v. Michael*

The Montana Supreme Court adopted *Miller* and *Montgomery* in *Steilman v. Michael*.<sup>205</sup> Citing the three distinctions between youth and adults outlined in *Roper*, *Graham*, *Miller*, and *Montgomery*, the Court concluded that the sentence of life without parole itself is cruel and unusual for juvenile offenders under the Eighth Amendment.<sup>206</sup> Therefore, the Court held that Montana judges must consider the distinctive attributes of youth when sentencing youth to life without parole under both mandatory and discretionary sentencing schemes.<sup>207</sup> The Court confined its holding to a strict definition of life without parole. The Court reasoned that because *Steilman*, who at 17 received a term-of-years sentence of 110 years for deliberate homicide, could be eligible for parole after serving 55 years contingent upon his behavior, his sentence was not a de facto life sentence.<sup>208</sup> In short, *Miller* and *Montgomery* do not apply to a term-of-years sentence.<sup>209</sup>

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199. 567 U.S. 460 (2012).

200. *Id.* at 489.

201. 136 S. Ct. 718 (2016).

202. *Id.* at 736–37.

203. *Id.*

204. *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005).

205. *Steilman v. Michael*, 407 P.3d 313, 317–18 (Mont. 2017).

206. *Id.*

207. *Id.* at 318–19.

208. *Id.* at 319–20.

209. *Id.*

Three justices dissented from the majority opinion. Justice Wheat, with whom Justice Sandefur concurred, concluded that sentencing a 17-year-old to 110 years with a conditional minimum of 45 years is the practical equivalent of a sentence of life without parole and therefore falls within the scope of *Miller*.<sup>210</sup> In a separate dissent, Justice McKinnon concluded that imposition of life without parole on juvenile offenders requires more than the consideration of the mitigating factors of youth; it requires evidence of irreparable corruption.<sup>211</sup> This is because *Montgomery* makes clear that, except for the rarest occasions of permanent corruption, the distinctive attributes of youth eradicate any justifications for imposing such a sentence.<sup>212</sup>

### 3. *Harmonizing Steilman and Article II, Section 15*

The idea that children and adults are constitutionally different is not peculiar to United States Supreme Court precedent. In fact, in deciding *Roper* and its progeny, that court took its lead from a growing consensus in state supreme courts and legislatures that distinctive attributes of youth necessitate different treatment of minors for sentencing purposes.<sup>213</sup> Nor is the idea peculiar to the Eighth Amendment, Article II, Section 22 of the Montana Constitution, or the sentencing realm. As mentioned previously, these very distinctions guide lawmakers in establishing minimum drinking and driving ages. They are also embodied in the “enhanced protections” exceptions to Article II, Section 15. Accordingly, the “but not be limited to” language of Article II, Section 15, which the Framers and the Montana Supreme Court have left open for interpretation, leaves room for the Court to integrate the precepts of *Roper* and its progeny and *Steilman*. The Court could use this clause to recognize that the protection of minors’ fundamental rights requires considerations inherently distinct from those applied to adults. As Justice McKinnon points out in her dissent, “children are constitutionally different from adults in their level of culpability.”<sup>214</sup> The “but not be limited to” language might extend this pronouncement beyond the realm of sentencing. As the dissent acknowledges, what may pass constitutional muster for adults—here, a sentence of life without parole—may violate the Constitution with respect to minors.<sup>215</sup>

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210. *Id.* at 321 (Wheat, J., dissenting).

211. *Id.* at 324 (McKinnon, J., dissenting).

212. *Id.* (citing *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016)).

213. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 579–87 apps. A–D (2005) (surveying states that permit and prohibit the imposition of the death penalty on juveniles; state statutes establishing a minimum age for jury service; state statutes establishing a minimum age for marriage without parental or judicial consent.).

214. *Steilman*, 407 P.3d at 324 (McKinnon, J., dissenting).

215. *Id.*

The reasoning in *Steilman* aligns with the considerations of Article II, Section 15. The general rule of the rights-of-minors provision incorporates Article II, Section 22 to minors. Therefore, minors enjoy the fundamental right to be free from cruel and unusual punishment. Limiting the fundamental right to be free from such punishment cannot be said to enhance the protection of minors. However, the “but not be limited to” language affords the Montana Supreme Court and lawmakers the opportunity to adapt Article II, Section 22 to the distinctive attributes of youth.

#### V. CONCLUSION

The scope and purpose of Article II, Section 15 have yet to be clarified. At minimum, Article II, Section 15 should not be construed to provide fewer, or more proscribed, fundamental rights to minors. Nationwide, state and federal courts are increasingly aware that the conditions of youth require special treatment. Article II, Section 15 can be construed to provide this treatment. The provision’s plain language extends the fundamental rights possessed by adults to minors. Arguably, it also allows for the incorporation of rights to minors in a way that reflects the differences between minors and adults. The “but not limited to” language, left open-ended by the Convention delegates, can bridge this divide. So, along with growing judicial recognition of the constitutional differences between minors and adults, Montana courts can interpret Article II, Section 15 to accommodate the “distinctive attributes of youth.”