Stare Decisis in Montana

Jeffrey T. Renz
Professor of Law, University of Montana School of Law, jeff.renz@umontana.edu

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ARTICLE

STARE DECISIS IN MONTANA*

Jeffrey T. Renz**

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** Assistant Professor, University of Montana School of Law; Director, Criminal Defense Clinic.
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INTRODUCTION

As the year 2000 approached we began to hear rumblings about the Montana Supreme Court. The court was "inconsistent." It was overruling cases at a high rate. It was "malpractice not to appeal." This perception pervaded the Montana bar. It pervades the bar today.1 Were members of the bar simply complaining about their losses or was their per-

ception reality? My examination of the Montana Supreme Court's decisions answers this question. The court was overruling cases at a very high rate.

Why was this so? Was the court's high rate of overruling a result of forces beyond the court's control? Did it reflect a philosophy or lack of philosophy among the court's members? Some answers to these questions may be derived by examination and measurement. Therefore I looked closely at the Montana Supreme Court for the period of 1991-2000. My review of this period reveals that the court's high rate of overruling was not a result of external circumstances.

In Part I, I begin with a short review of the role that stare decisis plays in the American judicial system. Part II compares the interests fostered and frustrated by a rule of adherence to precedent. Because this is in part an empirical study, I have set forth my methodology in Part III. Part IV compares the frequency with which the Montana Supreme Court (1991-2000) overruled precedent with that of other state supreme courts during the same period. It also includes a decade by decade comparison of Montana Supreme Court panels, examining the frequency with which those courts overruled precedent. The court's defenders have articulated some explanations and justifications for its practice. In Part V, I treat each justification as a testable hypothesis. Some of these hypotheses could be tested empirically. Others required an analysis of the court's opinions. As the reader will see, each hypothesis failed under scrutiny. Part VI reviews the grounds articulated by the court when it overruled precedent and concludes that the court frequently ignored the values of stare decisis. Part VII examines the court's most common practice, that of overruling on grounds that a prior decision was manifestly wrong. I conclude that the court's reliance on this justification has lacked a principled foundation. Finally, in Part VIII, I offer a principled approach to stare decisis.

I. THE "RULE" OF ADHERENCE TO PRECEDENT

Before we may engage in any discussion of a principled approach to stare decisis, we should consider that rule's history, its virtues, and its failings.

Montana inherited the rule of stare decisis along with the
rest of English common law, with one modification: state jurisdictions did not adhere to or follow England's strict rule of adherence to precedent. Professor Craig Klafter suggests that England's strict rule was a result of the aristocracy's reaction to the growing middle class. A strict rule of stare decisis preserved the privileges and prerogatives the landed class had enjoyed.

Klafter argues that the Revolution severed the connection between English and American law and that American courts, in their search to find a way to justify not following English precedent, adopted a modified version of stare decisis. Under this modified form, English precedent was persuasive but American precedent would be binding. American precedent was lacking, however, so American courts questioned and tested the English decisions in light of logic, morality, and utility. This practice came to characterize the American approach to stare decisis even with respect to local precedents.

So, under the American system, an appellate court may depart from precedent, typically by distinguishing the precedent. Yet even in the United States, appellate courts rarely abolish the precedent, changing what all had thought was a familiar legal landscape, and adopt a new rule.


For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.


3. As of 1934, Professor A.L. Goodhart noted that in England when a prior case is directly on point, "[i]t is more than a model; it has become a fixed and binding rule." Arthur L. Goodhart, Precedent in English and Continental Law, 50 Law Q. Rev. 40, 41 (1934).


5. Id.

6. Id. at 67-93.
II. THE VIRTUES AND FAULTS OF STARE DECISIS

Stare decisis has its virtues and shortcomings. Several interests and policies justify adherence to precedent in a common law system. Nevertheless, each interest that may justify adherence to precedent generally has a countervailing shortcoming. Appellate courts must take note of these virtues and faults when deciding whether or not to overrule precedent.

I discuss the virtues and their corresponding shortcomings in the following sections.

A. The Equality Interest.

Stare decisis ensures a degree of fairness. By virtue of the rule of stare decisis, similarly situated people can expect to be treated like those in the precedential case.

The equality value of stare decisis fails, however, if the application of stare decisis leaves the law tipped in favor of one party or one group. For example, prior to the 1960s, some states treated like litigants alike according to their race, and stare decisis preserved this doctrine of separate-but-equal until the mid-1950s. In that case, adherence to precedent was employed to maintain inequality.

B. The Interests of Predictability and Reliability.

One of the better known values of stare decisis is the value of predictability or reliability. "[L]aw is essentially an expectation."7 People and institutions should be able to plan their financial and legal affairs with the expectation that the rules will not change significantly so as to frustrate those plans.8 This fosters entrepreneurial behavior by reducing risk and uncertainty.9

9. The judicial branch differs from the legislative branch on the value of predictability. I would agree that the legislative branch is specifically empowered to
The predictability value does not extend equally to all areas of the law, however. It applies most strongly to interpretation of contracts, to interpretation of probate instruments, and to property relationships. These relationships are prospective, tend to be long-term, and tend to be memorialized in reliance upon existing law.

The value of predictability applies less strongly in other areas of the law. In torts cases, for example, we would argue that an actor should be free to act without the risk of incurring unforeseen liability. This argument, however, is really about insurance. Insurers should know what their likely exposure will be so they may set their premiums accordingly. Because insurers rely on a large pool of insureds, and because insurers reinsure, a court's failure to adhere to stare decisis has a more limited and indirect effect in torts cases. Insurers may adjust their actuarial tables following a change in the common law. They are less likely to be exposed to unforeseen liability.

Predictability has less value when a court changes a procedural rule, and has the least value when a court changes a rule prospectively. The Montana Supreme Court, after all, is free (under the Montana Constitution) to write and change its procedural rules almost at will, subject only to a legislative veto. Nevertheless, in any given case the parties may have relied upon a prior interpretation of a procedural rule and a change in that interpretation will always work to one party's detriment. This, however, triggers the predictability value less and the fairness value more.

C. Interests in Efficiency and Standardization.

Stare decisis increases decision making efficiency. A court does not have to spend as much time crafting, justifying, and explaining a decision when it makes the decision on the basis of precedent.

Standardization is a combination of predictability and make significant changes to the rules, changes that would wreck the plans of those who rely upon the preexisting rules. Unlike the judicial branch, which decides a single case at a time and may alter the rule in the context of that single case, the legislature is better equipped to consider arguments about the rule change's effect upon existing social relationships. Participants are free to go to the legislature to argue against the rule change or to argue for a mitigation of the rule change (delaying its implementation or exempting certain relationships, for example) on predictability and other grounds.

10. MONT. CONST. art. VII, § 2(3).
efficiency. Adherence to a preexisting rule tends to cement it. The rule becomes standardized as it is tested by new and different facts. As a result, we can more easily predict what and how strong the rule is in a later, slightly different context.

D. Avoiding Arbitrary Decision Making and the Values of Institutional Legitimacy and Authority.

From a positivist's standpoint, the validity of a rule depends in part upon the legitimacy of the institution that issues it. If I declare that all amendments to the state constitution must have one subject, no one is likely to pay attention to my pronouncement. When a state supreme court says the same thing, this has binding effect, not only because we confer the judicial power upon the supreme court, but also because we accept and recognize the institution's authority to declare the rule. When the institution loses legitimacy, however, we are less likely to accept its pronouncements as authoritative. Its rule making may be viewed as the whim of its members, to be ignored when convenient, rather than as a rule to be honored.

Resort to stare decisis avoids the de-legitimization of arbitrary rulemaking by appealing to preexisting principles. We may analogize arbitrary decision making by a court to the concept of "checkerboard" statutes. "Checkerboard" laws are a kind of distributive justice. That is, instead of resolving political disagreements by watering down or strengthening a controversial provision, the legislature resolves the disagreement by distributing the burden or the benefit arbitrarily,

11. H.L.A. Hart refers to the rules that establish legitimacy as "rules of recognition." H.L.A. HART, THE CONCEPT OF LAW 97-107 (1961). Under Hart's construct, the Montana Supreme Court has authority to say what the law is because a rule of recognition, the Montana Constitution, recognizes its power to do so. A rule of recognition notwithstanding, Hart recognizes, using a scoring official as an analogy, that at some point an official who is consistently incorrect will lose legitimacy with the players and fans. Then the game "is no longer cricket or baseball but 'scorer's discretion.'" Id. at 141. Henry Monaghan takes a slightly different, pragmatic view when writing about the role of stare decisis in the United States Supreme Court. In his view, there are some principles that are so well established that, if they were overruled, massive destabilization would follow that would threaten the functioning of government and the constitutional order. Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 COLUM. L. REV. 723, 749-752 (1988).

12. The public's reaction to Marshall v. State ex rel. Cooney, 1999 MT 33, 293 Mont. 274, 975 P.2d 325, which I discuss in Section VI, and the Montana Bar's sense that the court lacks predictability because it overrules too many cases, are symptoms of lost legitimacy.
for example, making some activity illegal on odd-numbered days and legal on even-numbered days. Such laws "treat similar accidents or occasions ... differently on arbitrary grounds." 13

Checkerboard laws suffer from a lack of coherence or integrity. They are checkerboard because their checkeredness lacks an element of utility or function. Alternate-side-of-the-street parking rules, for example, would seem arbitrary and checkerboard, but for the fact that they have utility. Stated another way, checkerboard laws bear no rational relationship to the object they seek to achieve by their checkeredness (except for the object of trying to please both sides of an issue).

Using this analogy, we see that stare decisis reduces arbitrariness. A court avoids checkeredness when it treats accidents or occasions in the same manner as did the precedent that it follows.

Nevertheless, resort to lack of arbitrariness may be arbitrary when we preserve a precedent solely for the sake of stare decisis. In a case in which the precedent lacks utility and adherence to it denies justice, following the precedent simply because it is precedent grants stare decisis its own value independent of other utilitarian or justice values. We might call this "blind" adherence to precedent.

E. Separation of Powers.

Finally, stare decisis is branch-respecting. 14 When a state appellate court interprets a statute and the legislature declines the opportunity to revise the statute in order to "reverse" the judiciary's interpretation, the court's interpretation should become part of the statute. When a later court overrules the earlier interpretation it acts more legislatively than judicially. If the judicial power is the power to decide disputes and to make binding orders, 15 then we must ask, what dispute is to be resolved by re-interpreting a statute that has previously received an authoritative interpretation? What, other than an appeal to policy, would warrant overruling the prior construction? Stare decisis counsels that the power to revise or

overrule a statute's construction ought to be left to the legislature, not to a second-guessing appellate court. This is particularly true when arguments for overruling are made on the same policy grounds raised or available in the earlier cases.

F. Stare Decisis, the Value of Justice, and Their Relationship to Abstract, Personal Judgments.

Before we leave this discussion of the virtues and failings of stare decisis, we should consider a question that is often raised: Should we adhere to stare decisis when precedent perpetuates injustice? Conversely, should we not readily overrule precedent to ensure justice? When a court overrules precedent only on the basis of its view of justice, has it acted in a principled manner or does its decision reflect a personalized judgment?

These questions are commonly raised by reference to *Plessy v. Ferguson*,¹⁶ and *Brown v. Board of Education*.¹⁷ *Plessy* held that separate railway car accommodations based on race were lawful, so long as the accommodations were equal.¹⁸ *Brown* rejected *Plessy*'s separate but equal doctrine.¹⁹

It is very easy for us, living in the Twenty-First Century, to say that we "know" *Plessy* was unjust. If we know that *Plessy*'s rule was unjust, then we should conclude not only that it was proper to overrule *Plessy* in 1954, but also that the United States Supreme Court should have overruled *Plessy* before 1954. For our superior knowledge also means we know that *Plessy* was always unjust. Therefore, our conclusion that *Plessy* should have been overturned earlier than it was eventually reaches the year 1896, when *Plessy* was decided. We may conclude, then, that Justice Harlan's dissent should have been the majority opinion.²⁰

But Harlan's was not the majority opinion, and we see therefore that any statements in the abstract about *Plessy*'s injustice fail to tell us why *Plessy* was properly overruled.

*Plessy* was decided by judges who had been, with the exception of the recently appointed Justice White, born before

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1840. All would have been exposed to the physical anthropological findings of Dr. Samuel Morton and the neo-Darwinist theory of Harvard's Louis Agassiz. Morton's and Bean's studies on skull size and their conclusions that Africans had cranial capacities significantly smaller than Caucasians influenced educated people of the time. Agassiz, America's leading naturalist in the mid-Nineteenth Century, contended that Blacks and Whites were separate species.

The *Plessy* justices would not have known that Morton had manipulated his data. Agassiz had yet to be wrecked on Darwin's shore.\(^{21}\) It should be no surprise then that *Plessy* tastes of the flavor of protection of the inferior being, all the while disclaiming equality of the races.\(^{22}\)

We are able to say today that *Plessy* was unjust because "separate but equal" failed as a social experiment. Lacking Justice Harlan's foresight and lacking experience with the doctrine, we might not have said that in 1896. Had we been a member of the *Plessy* majority, we might well have believed that we were doing good. Operating on these conceptions, later we would have considered it an injustice to overrule *Plessy*. We would have laid down the "White Man's Burden" had we forced a so-called "less gifted" group to compete with white children in public schools, much less to expose them to the harm of sitting with white passengers on Louisiana's railroad trains.

By 1954, however, Nineteenth Century biological determinism had long been debunked and the era's theory of eugenics had been extinguished in the ovens of Central Europe. The data upon which these theories rested had been shown to have been manipulated.\(^{23}\) Blacks were seen to have performed so well in the Second World War that military units had been desegregated—without the terrible results that would have been predicted in 1896.\(^{24}\)

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22. *Plessy*, 163 U.S. at 544-545 (comparing establishment of special schools for Black children with the establishment of special schools for the poor or for girls).
23. Franklin P. Mall, *On Several Anatomical Characters of the Human Brain Said to Vary According to Race and Sex, with Especial Reference to the Weight of the Frontal Lobe*, 9 Am. J. of Anatomy 1, 7-12, 32 (1909) (concluding that Robert Bean's data on brain tissue had been affected by Bean's knowledge of the sources of each brain he measured).
Thurgood Marshall brilliantly saw the role of social science in this debate and employed it for his purposes.\textsuperscript{25} Changes in circumstances and demonstrations by historical fact that separate was not equal led to the overruling of \textit{Plessy}.\textsuperscript{26} Thus we see that \textit{Brown} overruled \textit{Plessy} not because "separate but equal" was unjust, but because experience with the rule proved it to be unjust. This is the difference between the overturning of precedent for principled reasons and the overturning of precedent on the basis of abstract, personal judgment.

Judicial decision making that is premised on abstract or personal notions of justice or injustice departs from the rule of law. When personal notions of justice govern a dispute, the rule of law becomes the rule of judges. While applying personal notions of justice and injustice might have shortened \textit{Plessy}’s harm, in the long run applying personal notions of justice and injustice result in personalized, not democratic, rules of law. Reasonable adherence to precedent preserves the rule of law by limiting the freedom of judges to decide cases. The rule of law and reasonable adherence to the precedents that interpret and elaborate on that law, over the long run, preserve liberty and foster justice.

\textit{G. Conclusion.}

All of these things said, it is proper for a court to depart from precedent on occasion, whether by distinguishing the new case or overruling the old case. Principles that arise from prior decisions occasionally need repair. This is true not because the later court thinks the earlier decision poorly reasoned (that is mere second-guessing), but because experience or change shows that the principle is either incomplete or flawed. This experience can be in the practical application of a rule. Change, by which I mean changes in society (including evolution of the law), may also show that a rule, once valid and practical, has lost its utility. As we shall see, although the Montana Supreme Court paid lip-service to the idea that earlier rules needed repair, the court rarely applied this idea in a principled way during the 1991-2000 decade.

\textsuperscript{25} \textit{See Brown}, 347 U.S. at 495 n.11 (noting social science studies of the effects of segregation on the development of Black children).
\textsuperscript{26} \textit{Id.} at 492-493.
III. METHODOLOGY

I employed two Westlaw search strings27 that produced a citation list of over 170 Montana Supreme Court decisions, among which were nearly all, if not all, cases in which the court had overruled precedent during 1991-2000. This search string also produced cases in which the court did not overrule its precedents. A quick reading of the cases eliminated those. I conducted similar searches for 1891-1991.28

I repeated the same searches for eleven other states for the 1991-2000 period. I examined decisions from Delaware, Maine, New Hampshire, North Dakota, South Dakota, Rhode Island, Nevada, Vermont, and Wyoming. These states, like Montana, lack intermediate appellate courts. Out of curiosity, I ran the same searches for the Idaho and Washington Supreme Courts, as two other illustrative states in the region.

Once I had identified the Montana “overruling” decisions, I read each one. I sought and found patterns among the court’s declarations that a precedent ought to be overruled. I discuss those patterns in Part VI of this article.

IV. HISTORICAL AND STATE-BY-STATE COMPARISONS

A. Historical Comparison.

The rate at which the Montana Supreme Court has overruled precedent increased substantially in recent decades. Figure 1 describes the change in the rate of overruling from 1891 to date:

27. "IS OVERRULED" "WE OVERRULE" "ARE OVERRULED" OVERRULING ("TO THE EXTENT" +P (OVERRUL! REVERS!)) & DA(AFT 12-31-1990). "WE EXPRESSLY OVERRULE" "ARE EXPRESSLY OVERRULED" "IS EXPRESSLY OVERRULED."

28. Because the court, in the demurrer and exception days, tended to declare that it or a lower court had overruled or reversed a demurrer, I added the limiter "% ((OVERRUL! REVERS!) +4 (OBJECTION* DEMURRER)) (MOTION +3 OVERRUL!)," to the first search string in order to reduce the volume of unrelated cases. To determine the effect of the limiter, I added it to the 1991-2000 search string and discovered that it eliminated only one case in which the court had overruled precedent.
Beginning in 1970, the court's rate of overruling precedent increased geometrically as it doubled, redoubled, and redoubled again during each succeeding decade.

The results give rise to one conclusion: the current court has been the most active in Montana's history. It has been rewriting law at an unprecedented rate. The rate is reflected not only in the number of decisions that overruled precedent, but also in the number of past cases that were overturned. The 109 "overruling" decisions invalidated 249 cases.

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29. It is fair to call this the current court. Four members of the current court sat in 2000. A fifth member, Justice Cotter, elected in 2001, defended the court's overruling practice at public meetings during the election.

30. The decisions, and the cases that they overruled, are collected in the Appendix.

31. The total may exceed 249. In 1997, the court began including catch-all phrases when it overruled precedent. In State v. Lawrence, 285 Mont. 140, 161, 948 P.2d 186, 199 (1997) (overruling State v. McSloy, 127 Mont. 265, 261 P.2d 663 (1953)), for example, the court stated: "Our research does not reveal any cases citing McSloy for the particular position here advanced by Appellant, but if any exist, they too are overruled to the extent they are inconsistent with Rule 613(b)." See Dobrocke v. City of Columbia Falls, 2000 MT 179, ¶ 47, 300 Mont. 348, ¶ 47, 8 P.3d 71, ¶ 47 (overruling two cases "and any other cases" that hold that notice of a defect is required before a landowner has a duty of care), overruled by Roberts v. Nickey, 2002 MT 37, 308 Mont. 335, 43 P.3d 263; State v. Lane, 1998 MT 76, ¶ 41, 288 Mont. 286, ¶ 41, 957 P.2d 9, ¶ 41 (overruling four reported decisions "and any other Montana case that has held that the written judgment and
B. State-by-State Comparison.

Viewing the historical rate in isolation does not tell us much about its relevance. Perhaps a high rate of overruling was normal for late-Twentieth Century appellate courts. Accordingly I measured the frequency with which supreme courts overruled precedent in states that, like Montana, lack intermediate appellate courts. Figure 2 displays the frequency of overruling for the period 1991-2000 in ten states (including Montana) that lack intermediate appellate courts.

![Figure 2. No. of cases overruling, by state (1991-2000).](https://scholarship.law.umt.edu/mlr/vol65/iss1/3)

As Figure 2 illustrates, the rate of overruling in Montana exceeded the rates of these other states, not by a few cases, but by multiples of up to seventeen (if we overlook Rhode Island). To place these findings in a different perspective, the rate at which Vermont was overruling its precedent generated a Vermont Bar Journal article criticizing the practice. Yet the Vermont Supreme Court had overruled only thirty-nine cases over the course of sixteen years.

These data give rise to a second observation: the Montana Supreme Court has been the most active among similar state supreme courts.

commitment is the valid, final judgment."). We cannot fault the court for lack of thoroughness.

These two observations tell us only that the Montana Supreme Court overrules precedent more frequently than it once did, and that it overrules precedent more frequently than similar state supreme courts. This may, however, be the result of circumstances unique to Montana and beyond the control of the court. I now examine that question.

V. FIVE HYPOTHESES

During the 1999-2000 election cycle, the court's frequency of overruling was a topic of discussion. Some criticized the court's practice; others defended or justified it. Each justification suggested that some circumstance, beyond the court's control, explained the frequency with which it overruled precedent. Those who explained the court's practice offered five arguments: (1) the court is overruling more cases because its case load has increased; (2) the court is overruling more cases because there is a greater body of case law today than there has been in the past (I call this the "so many cases, so little time" justification); (3) the court is not overruling any more cases than have past courts—instead the court is simply being honest in doing expressly what past courts did impliedly or sub rosa; (4) the court is doing nothing more than correcting conflicts between cases; (5) the court's actions are a result of the 1972 Constitution. We may treat each explanation as a testable hypothesis. In the following sections, I test each hypothesis to determine if it explains the results we observed above.

33. See Jeff Renz, The Quiet Revolution in the Montana Supreme Court, GREAT FALLS TRIBUNE, February 13, 2000, at 8A.

34. This hypothesis was offered by former Associate Justice Trieweiler, while a candidate for Chief Justice.

35. This defense was offered by Associate Justice Cotter and Associate Justice Leaphart, who were candidates for Associate Justice during the 2000 and 2002 elections, respectively. See Bob Anez, Primary Will Cut Court Race from Four to Two, HELENA INDEPENDENT RECORD, May 24, 2000, available at http://www.helenair.com/articles/2000/05/24/stories/helena/c1a.txt.


37. No defender of the court's practice has argued that a high rate of overruling was necessary to correct older biases of a "pro-Anaconda Copper Company Court," for example, or that the high rate of overruling was explained by other valid reasons for overruling precedent.
Hypothesis 1: "The Court's Case Load is Much Larger."

This hypothesis assumes that a higher rate of overruling correlates to a higher case load. Put simply, if a court that issues 100 decisions per year overrules precedent in two of those decisions, then a court that issues 200 decisions is likely to overrule precedent in four of its decisions. This theory sounds reasonable. Statistical analysis, however, does not support this explanation for the Montana Supreme Court's practice.

The National Center for State Courts maintains statistics on new case filings for all state supreme courts. The new case filings for Montana and nine other states are set forth in Table 1.

<table>
<thead>
<tr>
<th>State</th>
<th>Filings</th>
</tr>
</thead>
<tbody>
<tr>
<td>MONTANA</td>
<td>6124</td>
</tr>
<tr>
<td>NORTH DAKOTA</td>
<td>3818</td>
</tr>
<tr>
<td>DELAWARE</td>
<td>5414</td>
</tr>
<tr>
<td>RHODE ISLAND</td>
<td>4319</td>
</tr>
<tr>
<td>MAINE</td>
<td>7689</td>
</tr>
<tr>
<td>SOUTH DAKOTA</td>
<td>3829</td>
</tr>
<tr>
<td>NEVADA</td>
<td>15339</td>
</tr>
<tr>
<td>VERMONT</td>
<td>5896</td>
</tr>
<tr>
<td>NEW HAMPSHIRE</td>
<td>8271</td>
</tr>
<tr>
<td>WYOMING</td>
<td>3426</td>
</tr>
</tbody>
</table>

Table 1. New Case Filings During 1991-2000.

During 1991-2000, two states had case loads similar to Montana's. Montana had 6124 new filings, Vermont had 5896 new filings, and New Hampshire had 8271. The Vermont Supreme Court overruled precedent in twenty-four decisions during 1991-2000. The New Hampshire Supreme Court issued eight decisions that overturned past precedent during the same decade. In contrast, Montana overruled precedent in 109 cases. Similar case loads in these states did not lead to a similar high frequency of overruling.

When we reduce each state's frequency of overruling to a rate of overruling per 1000 new filings, we generate this set of results:

39. Id.
Table 2. Number of cases overruling precedent, per 1000 new filings (1991-2000).

<table>
<thead>
<tr>
<th>State</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>MONTANA</td>
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</tr>
<tr>
<td>NORTH DAKOTA</td>
<td>4.98</td>
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<td>DELAWARE</td>
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</tr>
<tr>
<td>WYOMING</td>
<td>2.63</td>
</tr>
</tbody>
</table>

These two comparisons demonstrate that case load does not explain the frequency of overruling in Montana. Case load correlates to frequency of overruling in nine state supreme courts. When Montana's data are included, however, this statistical relationship disappears.

Although Montana's data dampens the statistical inference that there is a relationship between case load and frequency of overruling among state courts, this observation merely compares the Montana Supreme Court with nine other state supreme courts. It is possible that the Montana Supreme Court has historically overruled more frequently than other state courts and that growth in the case load is the sole or primary

40. The frequency of overruling should vary among states. It is therefore possible that normal variation explains Montana's data. We can test this with the correlation coefficient (Pearson's r) between caseload and overruling decisions, omitting and including Montana's totals. The correlation coefficient measures the consistency with which one set of data changes as a second set of data changes. A correlation coefficient of +1 would show perfect correlation. A coefficient of 0 shows no correlation. A correlation coefficient of -1 demonstrates an inverse correlation (as A goes up, B goes down). In this case, we want to measure the strength of the correlation between case filings and rates of overruling. When Montana's data are omitted, the correlation coefficient between case filing and number of overruling cases is .73 ($R^2 = .54$). This demonstrates high correlation between caseload and the rate at which the supreme courts in these nine states overruled precedent. That is, as case filings increased, the number of cases overruling precedent tended to increase. When we add Montana's data to those of the other nine states, however, the correlation coefficient drops to .25 ($R^2 = .06$). This demonstrates little relationship between caseload and number of cases overruling precedent. More important, Montana's numbers are so skewed, they demonstrably reduce the strength of the relationship that we observed when Montana's numbers were omitted.
explanation for the rate at which it overruled cases in the 1990s.

We test this hypothesis by looking at the rate at which the court overruled prior decisions, compared to its historic case load.\(^{41}\) This is the result:

<table>
<thead>
<tr>
<th>Decade</th>
<th>Rate per 1000 case load</th>
</tr>
</thead>
<tbody>
<tr>
<td>1891-1900</td>
<td>3.5</td>
</tr>
<tr>
<td>1901-1910</td>
<td>1.3</td>
</tr>
<tr>
<td>1911-1920</td>
<td>0.7</td>
</tr>
<tr>
<td>1921-1930</td>
<td>2.7</td>
</tr>
<tr>
<td>1931-1940</td>
<td>6.0</td>
</tr>
<tr>
<td>1941-1950</td>
<td>7.0</td>
</tr>
<tr>
<td>1951-1960</td>
<td>13.1</td>
</tr>
<tr>
<td>1961-1970</td>
<td>7.3</td>
</tr>
<tr>
<td>1971-1980</td>
<td>8.6</td>
</tr>
<tr>
<td>1981-1990</td>
<td>13.1</td>
</tr>
<tr>
<td>1991-2000</td>
<td>23.5(^{42})</td>
</tr>
</tbody>
</table>

Table 3. Rate of overruling per 1000 cases, by decade (Montana Supreme Court, 1891-2000).

The mean rate for 1891-2000 is 7.9 cases per 1000. The mean rate for 1891-1990 is 6.4 cases per 1000. Employing the mean rate during 1891-1990, we would predict that the court would have overruled decisions in thirty cases (which is still quite high when compared to the other nine states), not 109 cases, during the 1991-2000 decade.\(^{43}\) This result tells us that

\(^{41}\) Note that the rate for 1991-2000 differs from that shown in Table 2. Because statistics for new case filings were not readily available for earlier decades, I have employed a measure of caseload that is different from the measure that I used to compare state courts. Here I have estimated the caseload by employing the total number of opinions issued by the Montana Supreme Court and reported on Westlaw during each decade.

\(^{42}\) During the 1990s, the Montana Supreme Court issued more unreported orders and “non-cite” opinions than it had in the past. I have not included these in the total caseload for any decade because the court deliberately treated them as non-precedential.

\(^{43}\) If we base the expected value on a regression analysis—that is, if we extrapolate the past rate of growth, the expected value for 1991-2000 is 53.3 cases, half of what we observed during this period.
case load does not explain the 1991-2000 rate.44

Consider one more obvious measure. The court's case load increased roughly linearly since 1941.45 No decade saw a case load increase greater than seventy-four percent over the preceding decade. The mean rate of increase was forty-one percent during this period. The 1991-2000 case load increased by twenty-nine percent over the preceding decade, marking a return to 1941-1970 case load growth rates.

The rate of overruling, in comparison, has more than doubled each decade since 1970.46 This is one more indicator that case load does not explain the court's work during 1991-

44. One final statistical tool tests the historical caseload hypothesis. The Spearman Rank Correlation Coefficient (Spearman's r) compares the rankings of two sets of scores. The 1991-2000 data point lies more than two standard deviations from the mean. Because the 1991-2000 data-point is an outlier, a rank correlation is more appropriate than Pearson's r. See Lothar Sachs, APPLIED STATISTICS: A HANDBOOK OF TECHNIQUES 395 (2d ed. 1984); Michael O. Finkelstein, STATISTICS FOR LAWYERS 348 (2d ed. 2001). Spearman's r ignores the actual number of cases, except to rank them. We may think of this test in this way: If the rank of the total case load for every decade was the same as the rank for the total cases overruling for the same decade, then we would have a perfect correlation. In that instance Spearman's r would be 1.0. Spearman's r for 1891-2000 is 0.46, which indicates poor rank correlation. (The 10% significance level is .549.) In other words, the ranking of the caseload had little connection to the ranking for the number of overruling cases.

45. See Figure 3.

46. See supra Figure 1.
Testing therefore compels us to reject the case load hypothesis. No test confirms the hypothesis that the court's rate of overruling is explained by the court's case load. Each test refutes the hypothesis. We must therefore look to the next hypothesis on our list.

_Hypothesis 2: “So Many Cases, So Little Time!”_

The second theory assumes that, because of the passage of time, there is more outdated and conflicting precedent languishing in the reports and therefore more precedent to overrule. Put differently, cases decided at the end of the Nineteenth Century would have less application to disputes that arose at the end of the Twentieth.

The data do not bear out this theory. The appellate courts of Delaware, New Hampshire, Maine, and Vermont were deciding appeals before Lewis and Clark came to the Great Falls of the Missouri. Yet their rates of overruling fail to approach that of the Montana Supreme Court. 47

_Hypothesis 3: “The Current Court has More Integrity.”_

The third explanation, that the current court is more intellectually honest because it does expressly what past courts have done impliedly or quietly, is not borne out by data. In fact, the opposite is true. During 1991-2000, the Montana Supreme Court was more active in impliedly overruling cases than were past courts.

In order to test this hypothesis, I pulled from Westlaw a list of every case decided by the Montana Supreme Court since 1889. I relied on Westlaw's _KeyCite_ service to determine which among those cases had been “red-flagged.” 48 I eliminated from the list those cases I had previously identified as having been expressly overruled. I reviewed Westlaw's history of the remaining red-flagged cases to identify those which were arguably impliedly or

47. _See supra_ Table 2.

48. Westlaw employs red and yellow flags to warn practitioners when a case lacks precedential effect or when the case's precedential effect has been questioned in some way. For example, a case that has been overruled or reversed or whose opinion has been vacated, among other things, will be red-flagged. A case that has been, among other things, distinguished by any court anywhere will be yellow-flagged.
tacitly overruled.

The resulting set included cases in which a later case "abrogated," "limited," "disagreed with," "declined to follow," "disapproved," "rejected," "abandoned," "departed from," "repudiated," "refused to follow," or "criticized" the questioned case, or in which a later case "recognized" that one of the foregoing had occurred with respect to the questioned case. I did not include cases in which the later case recognized that the questioned holding had been superseded by a statute, rule, or constitutional provision. I also did not include cases that had been distinguished. 49 I examined those cases that "abrogated, et cetera" earlier cases to determine what had been done. When a later case "recognized" an earlier adverse action, I read that later case to determine which case had "taken" the adverse action. For convenience, I will refer to these as "tacit" overrulings.

The results are set out in Table 4:

<table>
<thead>
<tr>
<th>Decade</th>
<th>No. of cases tacitly overruling</th>
<th>No. of cases tacitly overruled</th>
</tr>
</thead>
<tbody>
<tr>
<td>1891-1900</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>1901-1910</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>1911-1920</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>1921-1930</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>1931-1940</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>1941-1950</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>1951-1960</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>1961-1970</td>
<td>9</td>
<td>9</td>
</tr>
<tr>
<td>1971-1980</td>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td>1981-1990</td>
<td>21</td>
<td>32</td>
</tr>
<tr>
<td>1991-2000</td>
<td>33</td>
<td>69</td>
</tr>
</tbody>
</table>

Table 4. Cases Tacitly Overruling Precedent, by Decade (1891-2000).

The hypothesis that the current court does expressly what prior Montana Supreme Courts did tacitly is not supported by

49. A case that is repeatedly distinguished loses precedential value. I did not include such cases in the first set unless later cases "recognized" that repeatedly distinguished cases had been abrogated, limited, et cetera.
the data. In fact, the data shows that the current court was as active in tacitly overruling precedent as it was in expressly overruling past decisions. Moreover, the current court swept with a wide broom, overruling an average of two cases with every decision that tacitly overruled precedent.

The numbers for the 1991-2000 period are lower now than they will be. Later courts may recognize that the Montana Supreme Court of the 1990s tacitly overruled additional decisions. So we must reject the intellectual honesty theory.

Hypothesis 4: “Too Many Decisions are in Conflict.”

The next justification for overruling argues that the court is merely doing its job by reconciling conflicting precedent. To determine if this explains the court's behavior, I read each of the 109 cases in order to identify the court's grounds for overruling. The results of my examination do not confirm this hypothesis. Of the 109 decisions expressly overruling precedent in the 1991-2000 decade, only sixteen resolved conflicts between or among prior decisions or lines of decision.50 I should note, however, that in eighteen additional cases the court purported to resolve conflicts between precedents.51 These, however, were cases that would normally have been distinguished on their facts or distinguished by changes in the language of the statute at issue. In those eighteen, a simple explanation as to why the earlier cases are distinguishable would have sufficed. The conflict hypothesis does not fully explain the court's action. I will elaborate further on this below, when I examine the court's decisions.

Hypothesis 5: “Blame the Constitution! Full Speed Ahead!”

The final explanation is that the adoption of the 1972 Constitution so altered the legal landscape that dozens of prior decisions became obsolete. My reading of the cases shows that this is not so. The hypothesis is readily destroyed by two observations. Of the 109 decisions, one dozen decided an issue of constitutional law. Only two suggested that the 1972 Constitution compelled the court's action.52

50. See infra Part VI(A)(1).
51. See infra Table 5.
52. Marshall v. State ex rel. Cooney, 1999 MT 33, 293 Mont. 274, 975 P.2d 325, Town
I conclude that the frequency with which the Montana Supreme Court overruled precedent was extraordinary and that it cannot be explained by factors beyond the court's control. Nevertheless that is only half of the question. The court's decisions may not be explained by external factors, but they may still be reasonable. To test this, we must turn to the cases themselves.

VI. THE COURT'S ARTICULATED REASONS FOR OVERRULING

The Montana Supreme Court overruled precedent in 109 cases during 1991-2000. This number describes only magnitude when we compare it with the frequency of overruling by other state courts and with the historical practice of the Montana Supreme Court. The number does not explain why the court overruled precedent in 109 cases. If the court overruled precedent in 109 cases because overruling was necessary, that tells us something about the state of the law. Then we may conclude that the law may have been stable, but that it was riddled with conflicting precedents and antiquated rules. On the other hand, if the court has been overruling precedent without good reason, that tells us something about the court.

To answer these questions I read each Montana Supreme Court opinion that overruled precedent with the following categories and questions in mind:

- What was the nature of the case? That is, was it a criminal case, a personal injury case, or another kind of proceeding?
- Who would benefit in the future from the change in the court's direction? My review of the cases generated these categories:
  1. parties opposing the exercise of government civil power were favored or disfavored;
  2. criminal defendants were favored or disfavored;
  3. shareholder dissenters were favored or disfavored;
  4. plaintiffs in workers compensation, personal injury, civil rights, or employment cases were favored or disfavored;
  5. easement challengers were favored or disfavored;
  6. spouses seeking property in dissolution proceedings

Pump, Inc. v. Bd. of Adjustment, 1998 MT 294, 292 Mont. 6, 971 P.2d 349. I discuss Marshall below. The 1972 Montana Constitution has had a profound effect on Montana's jurisprudence. It just does not show up in those cases in which the court expressly overruled precedent.
were favored or disfavored;
(7) natural or non-custodial natural parents were favored or disfavored;
(8) children in child protection and similar cases were favored or disfavored;
(9) tenants in landlord-tenant disputes were favored or disfavored; and
(10) accused contemnors were favored or disfavored.
I tally these results below.⁵³

* What was the issue before the court? If the nature of the case was “Personal Injury” and the answer to the second question was “Personal Injury Plaintiff Favored,” the case could nevertheless encompass such issues as common law negligence, civil procedure, or statutory interpretation. I identified fifteen issues (the number in parentheses represents the number of cases in which they appear):
- statutory construction (48);
- constitutional law (12);
- criminal procedure (12);
- torts (10);
- evidence (7);
- civil procedure (5);
- jurisdiction (4);
- standard of appellate review (4);
- marital property (2);
- property (2);
- administrative law (2);
- taxation, contracts, appellate procedure, and standards of proof (1 each).⁵⁴

* What were the majority's grounds for overruling? Most grounds were articulated by the court. When the grounds were not articulated I gleaned them from the opinion. While some readers may disagree with my categorization of a given case, I believe the patterns that I set forth here are accurate. My analysis revealed seven general categories:
  (1) The court perceived a conflict between lines of cases but the conflict was in fact nonexistent. These cases are those in which most courts distinguish rather than overrule the precedent.

⁵³ See infra Table 6.
⁵⁴ These total 112, not 109, because some cases addressed more than one issue.
(2) There was an actual conflict between prior decisions or between lines of authority.

(3) The court decided that a prior decision or prior line of cases was wrong or that another rule was better. These holdings were often justified by the court's manifest error doctrine—its declaration that the prior decisions were "manifestly wrong."

(4) The court overruled a prior decision or prior decisions even though it did not have to, because either an act of the legislature or changes wrought by the 1972 Constitution had superseded the prior line of authority.

(5) The development of the law called into question the utility or soundness of the overruled line of cases.

(6) Experience with the rule or the development of society called into question the utility of the overruled line of cases.

(7) The court overruled precedent, but overruling was not necessary to the resolution of issues raised by the case.

Here are the total number of decisions, by category, for 1991-2000:

55. See discussion infra Section VII. It is inaccurate to call the manifest error doctrine a "doctrine." If there were an objective test to distinguish among decisions that were correct, in error, or manifestly in error, then we might call the manifest error claim a doctrine. All we can say now, however, is that an opinion is manifestly in error when a majority of justices say that it is.

Another rule is better or the existing rule is wrong & 47 \\
Actual conflict between prior decisions & 16 \\
Perceived (but non-existent) conflict with another line of decisions & 18 \\
Development of law calls into question validity of past holding(s) & 14 \\
Experience has shown the rule to be unworkable or invalid & 9 \\
Legislature / new constitution has superseded the earlier case & 4 \\
Overruling is superfluous to the resolution of future cases & 2


Next, did the court favor any group of litigants? The decisions revealed this pattern:

<table>
<thead>
<tr>
<th>Nature of Outcome</th>
<th>No. of Decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pers. Injury/Workers' Comp./Civil Rights/Employee Pls. Favored</td>
<td>36</td>
</tr>
<tr>
<td>Pers. Injury/Workers' Comp./Civil Rights/Employee Pls. Disfavored</td>
<td>5</td>
</tr>
<tr>
<td>Pers. Injury/Workers' Comp./Civil Rights/Employee Pls. Neutral</td>
<td>1</td>
</tr>
<tr>
<td>Criminal Defendants Favored</td>
<td>21</td>
</tr>
<tr>
<td>Criminal Defendants Disfavored</td>
<td>14</td>
</tr>
<tr>
<td>Criminal Defendants Neutral</td>
<td>3</td>
</tr>
<tr>
<td>Government Opponent Favored</td>
<td>2</td>
</tr>
<tr>
<td>Government Opponent Disfavored</td>
<td>5</td>
</tr>
<tr>
<td>Spouse Seeking Marital Property Favored</td>
<td>5</td>
</tr>
<tr>
<td>Spouse Seeking Marital Property Disfavored</td>
<td>2</td>
</tr>
<tr>
<td>Spouse Seeking Marital Property Neutral</td>
<td>1</td>
</tr>
<tr>
<td>Easement Challenger Favored</td>
<td>2</td>
</tr>
<tr>
<td>Easement Challenger Disfavored</td>
<td>1</td>
</tr>
<tr>
<td>Easement Challenger Neutral</td>
<td>1</td>
</tr>
</tbody>
</table>


57. The total is 100 because State v. Lawrence overruled two sets of cases for unrelated propositions and for different reasons. 285 Mont. 140, 159, 161, 948 P.2d 186, 198-99 (1997) (holding that claimed lapse of memory is an inconsistent statement that may be impeached, and overruling McSloy because McSloy was based on a now-repealed statute that was replaced by the Montana Rules of Evidence).

58. The results for the remaining categories of litigants were not statistically significant. (N ≤2.)
A. Valid Reasons for Overruling.

Some of the Montana Supreme Court's grounds for overruling are valid. Some are not. Occasionally a conflict arises between precedents or lines of precedent. The two may clash in a given case before the court. The outcome of the case may necessarily extinguish one line of authority. This circumstance will compel the court to overrule one set of authorities.

Past holdings can become obsolete in several ways. Society may evolve into forms that render the old rule meaningless, unworkable, or unjust. The passage of time may prove the fallacy of the underlying principle or the reliability of the facts on which the old rule was based. The law evolves. New duties may accrue in the law and new immunities may arise as new facts call for new solutions. Development of the law may render "the old rule no more than a remnant of abandoned doctrine." Finally, a rule that read well on paper may, once put into practice, prove unworkable or specious. These are valid reasons to overrule precedent. The Montana Supreme Court has had valid reasons for overruling precedent, although in a minority of the cases in which it has acted. I now consider them.

1. Actual Conflict Between Prior Decisions.

Conflicts between past decisions or between lines of authority may arise in several ways. Occasionally it is the fault of attorneys who fail to advise the court of existing authority. As a result, the court may decide a case in a way that conflicts with that authority. This frequently happens in cases in which one party lacks counsel. The Montana Supreme Court was presented with that situation in *State v. Docken*. Before *Docken*, the court had held in an earlier case that when a suspended sentence was revoked and a second suspended sentence imposed, the second sentence could not be extended beyond the term of the first. Some years later, the court decided

58. The results for the remaining categories of litigants were not statistically significant. (N 2.)

59. See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling Lochner v. New York, 198 U.S. 45 (1905)).


Speldrich v. McCormick, which addressed the same issue. Speldrich was a prisoner appearing pro se and was not the best attorney. Neither he, nor the Assistant Attorney General opposing him, called Downing to the court's attention. As a result, Speldrich, although addressing the same kind of facts presented in Downing, reached the opposite conclusion. Docken resolved the conflict by overruling Downing and applying Speldrich.

Perceived conflicts between decisions will commonly arise as the result of dictum in one of the decisions. In those instances the court can resolve the conflict without overruling the case by noting that the conflicting language is dictum. For example, Downing v. Grover stated, in dictum, that a prescriptive easement could be proven by a preponderance of the evidence. An earlier decision, Kostbade v. Metier, had addressed the standard of proof directly. The case held that a prescriptive easement must be shown by clear and convincing evidence. Kostbade had not been considered by either of the parties in Downing or by the author of the Downing opinion, since the standard of proof was not at issue. As night follows day, however, the warring parties in Wareing v. Schreckendgust each pointed to the standard that favored their argument. The court relied upon the earlier precedent and overruled Downing. This was unnecessary, as the court could simply have pointed out that the Downing language was dictum and was therefore not precedent.

Authorities not in conflict in earlier cases will clash when the facts of a particular case bring two principles into opposition. Such was the case in Hilands Golf Club v. Ashmore. The Hilands Golf Club had sought judicial review of an adverse decision by the Montana Human Rights Commission. It served

64. Docken, 274 Mont. at 302-303, 908 P.2d at 216. The Montana Defender Project, which I directed, represented Docken in this appeal.
66. Downing, 237 Mont. at 175, 772 P.2d at 852. I wonder where Downing found the standard. The opinion cites to Grimsley v. Estate of Spencer, 206 Mont. 184, 670 P.2d 85 (1983), an action over the prescriptive use of water. Grimsley's only reference to "preponderance" is actually a reference to the standard of review applied to the trial court's findings in an equity case. 206 Mont. at 201, 670 P.2d at 94.
a copy of its petition upon Ashmore by mail. Ashmore, relying upon an earlier administrative law decision,\(^70\) pointed out that a petition for judicial review was a new proceeding. Therefore, the petitioner was required to serve the petition and summons on the opposing party in person in order to perfect its appeal. Hilands pointed to precedent that arose in the course of a Montana Administrative Procedure Act appeal, which had held that mail service, sans summons, would suffice. It also noted that another decision\(^71\) had approved mail service. The court, relying in good part on the principle that we ought to keep things simple so long as a party is not prejudiced, overruled Fife, and approved service by mail.\(^72\)

Conflicts between lines of authority do arise. In some of these and in other cases, the court acted properly to resolve the conflicts by overruling earlier decisions. The next significant area is that of the obsolete rule.

2. The Development of the Law Calls into Question the Validity of the Past Holding or Experience has Shown the Rule to be Unworkable or Invalid.

Because Montana is one of fifty state jurisdictions, our common law does not develop in isolation. Frequently, and more frequently in the 1990s, the court looked beyond the state line and considered what was taking place elsewhere. The decisions of federal courts of appeals and of state appellate courts often informed the court that a line of Montana authority was questionable. This category is illustrated by Busta v. Columbus Hospital Corporation\(^73\) and Pierce v. ALSC Architects, P.S..\(^74\)

In Busta, the court surveyed the evolution of proximate cause in Montana, noting that foreseeability had crept into the definition of proximate cause, mainly by way of the court’s intervening cause jurisprudence. Looking outside the state, the
court also observed that Montana was not alone in this error,\textsuperscript{75} nor in recognizing that foreseeability has no role in proximate cause. Thus, the court properly overruled the line of cases that imported foreseeability into proximate cause. 

\textit{Pierce} addressed the accepted work defense.\textsuperscript{76} The accepted work defense provides that a contractor is relieved of liability for its negligent construction, etc., when the work is accepted by the owner. Responsibility for a later injury caused by negligent construction then falls upon the owner. The accepted work doctrine had been approved, but not applied, in the 1932 case of \textit{Ulmen v. Schweiger}.\textsuperscript{77} Since then, it had been applied in Montana. The modern rule, now applied in the majority of state jurisdictions, provides that a contractor remains liable after the work has been accepted, when injury to a third party from the contractor’s negligence is foreseeable.\textsuperscript{78} \textit{Pierce} adopted the modern rule, overruling \textit{Ulmen} and its progeny.

The conclusion that a rule is unworkable is related to a conclusion that the rule is obsolete, but only in the sense that, in the second instance, the old rule, once practical, no longer fits. When a rule is adopted and the court later recognizes that it simply does not work in practice, the court properly discards it. But, unlike the obsolescence cases, the court may discard the rule without relying on the decisions of other jurisdictions. For example, \textit{Leary v. Kelly Pipe Co.}\textsuperscript{79} addressed the question of peremptory challenges to prospective jurors. \textit{Leary} held that a party must show actual prejudice when he objects to a grant of additional peremptory challenges to a co-party who he believes is adverse to him. But how, unless you examine a juror’s innermost thoughts, do you prove actual prejudice by the

\begin{itemize}
  \item \textsuperscript{75} Foreseeability has a role in negligence. It helps determine whether the defendant owed a duty to the plaintiff. When a reasonable person could foresee that his act or omission might injure another or his property, the law imposes a duty to refrain from the act or omission. Foreseeability does not tell us whether the act or omission of the defendant was a proximate cause of injury. One can cause injury when the injury would not be foreseeable.
  \item \textsuperscript{76} 270 Mont. at 107-108, 916 P.2d at 1260 (addressing question of whether the defendant could raise the accepted work defense).
  \item \textsuperscript{77} 92 Mont. 331, 12 P.2d 856 (1932).
  \item \textsuperscript{78} See Emmanuel S. Tipon, \textit{Modern Status of Rules Regarding Tort Liability of Building or Construction Contractor for Injury or Damage to Third Person Occurring after Completion and Acceptance of Work; “Foreseeability” or “Modern” Rule, 75 A.L.R.5th 413 (2000).
  \item \textsuperscript{79} 169 Mont. 511, 549 P.2d 813 (1976).
\end{itemize}
exclusion of that potential juror? The court considered that question in *King v. Special Resource Management, Inc.*, and noted that it had previously criticized the rule. The actual prejudice rule proved unworkable, therefore, the court overruled *Leary*.

The Montana Supreme Court does overrule prior authority for the right reasons. This occurred, however, in a minority of the 109 cases listed in the Appendix. More commonly, the court overruled precedent when it had no need to or when it merely wished to.

**B. Invalid Reasons for Overruling.**

Unlike the preceding examples, the court's overruling practice is overwhelmingly premised on invalid reasons. In some cases the court perceives a conflict with a line of authority when the conflict is ethereal. The court also overrules superfluously when the act of overruling is not necessary to the result. Finally, the largest category is that in which the court believes the old rule is wrong or a new rule is better. Many of these cases are premised upon a doctrine of manifest error.

1. **Perceived, but, in Fact, Nonexistent Conflict with Another Line of Authority.**

We discover an interesting example of overruling cases unnecessarily in the "CI-75" case, *Marshall v. State ex rel. Cooney*. Constitutional Initiative 75 proposed referring most taxes and many fees, and most increases in taxes and fees, to voters at the election immediately following their enactment by the local or state legislative body. Montana voters approved CI-75 in the 1998 general election. Its opponents immediately challenged the initiative in court. The opponents contended that CI-75 violated the single amendment rule of article XIV, section 11, of the Montana Constitution, and this issue formed the heart of the *Marshall* dispute. Section 11 provided that if "more than

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82. 1999 MT 33, 293 Mont. 274, 975 P.2d 325.
83. MONT. CONST. art. VII, § 17 (amended 1998). The text may be found in Appendix A to the State of Montana's Response to the Original Application for Declaratory Judgment and Injunctive Relief in *Marshall*. 

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one amendment is submitted at the same election," then each amendment must be prepared so as to be "voted on separately."84

In three cases decided between 1906 and 1924,85 the court had addressed a substantially similar single amendment rule86 in different contexts. Suffice it to say that Teague, Hay, and Cooney concluded that a constitutional amendment, referred to the voters, that incidentally affected other parts of the constitution did not violate the single amendment rule. CI-75's supporters pointed to Teague and its successors and argued that the court had interpreted the 1889 Constitution's version of the single subject rule as permitting the survival of CI-75.

In Marshall, the court observed that CI-75 differed significantly from the constitutional amendments considered in Teague, Hay, and Cooney.87 Unlike the provisions at issue in Teague, Hay, and Cooney, the court concluded that CI-75 expressly amended at least three separate provisions of the Montana Constitution.88 This meant that Marshall was readily distinguishable from the earlier three cases and the court duly noted this.89

Instead of overruling the three cases, the court could have distinguished them. After all, they were perfectly good law for the proposition for which they stood. Nevertheless the court overruled them, "to the extent that" they were "in conflict" with the holding in Marshall.90 The opinion does not discuss why the court did not distinguish the three cases instead of overruling them.

Marshall ignited a firestorm of criticism directed at the court and several of its justices. For years following the

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84. MONT. CONST. art. XIV, § 11.
85. State ex rel. Teague v. Bd. of Comm'rs, 34 Mont. 426, 87 P. 450 (1906); State ex rel. Hay v. Alderson, 49 Mont. 387, 142 P. 210 (1914); State ex rel. Corry v. Cooney, 70 Mont. 355, 225 P. 1007 (1924).
86. MONT. CONST. art. XIX, § 9 (1889) (amended 1970).
88. Id. ¶¶ 20, 28 (Nelson, J., concurring). The Initiative created a new provision that referred to the state or local electorate most new taxes and many fees or increases in taxes and fees. It also expressly amended that provision of the constitution that denied the Governor the power to veto referenda by granting the Governor power to veto tax increases that were referred to the people for approval. MONT. CONST. art. VI, § 10(1). The third amendment expressly repealed the legislative and other immunity from suit provisions of article II, section 18, in cases where public officials violated the provisions of the initiative.
89. Marshall, ¶ 18.
90. Id. ¶ 23.
Marshall decision, an advertisement for the Montana Conservatives carried on radio stations across Montana pointed out that the court had gone out of its way to overrule 100 years of precedent to reach the result that it desired. The desired result, according to the Montana Conservatives, was to defeat the will of the people.

As a result of Marshall, the court lost much of its legitimacy with many Montana citizens. It is true that CI-75's supporters may have criticized the court had Marshall distinguished rather than overruled Teague and its friends. But they could not have accurately claimed that the court went out of its way to strike down CI-75 by overruling a line of authority.

Marshall was not the only case of its kind. Unlike Great Britain, Montana enjoys the well established principle that the court should not emphasize one piece of evidence over another in a jury trial.\(^{91}\) One way of emphasizing testimony is by sending a transcript or an audible recording into the jury room. The principle does not apply to non-testimonial evidence, such as a surveillance tape. A surveillance tape, even though it may contain statements by a defendant or by a witness, is not evidence of testimony, but it is evidence of a transaction. Therefore, it is allowed in the jury room as the court held in the 1987 case of State v. Morse.\(^{92}\)

In a later decision, State v. Bales,\(^ {93}\) a negligent homicide case, the prosecutor offered an audio tape of a police officer's interrogation of the defendant. On the tape, the defendant says that he had a couple of beers and that he "killed his girlfriend." The tape was admitted and went into the jury room. Bales contended that the tape was testimonial and that it should not have gone into the jury room as a piece of evidence. The State pointed to Morse, which was inapposite, to support its position. Even though Morse was distinguishable and was good law for its proposition, the court overruled it "to the extent that" it conflicted with the court's evidentiary decision.\(^ {94}\) Oddly, following these gymnastics, the court concluded that sending the interrogation tape to the jury room was harmless error and affirmed the conviction. This makes this case eligible not only for the perceived conflict category, but also for the next

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94. Id. ¶ 22.
category—superfluous overruling.

2. Overruling, While Otherwise Reasonable, Appears to Be Superfluous to the Resolution of Future Cases or to the Issue Before the Court.

The court occasionally identifies peculiarities in the opinions of earlier decisions in the course of surveying the law applicable to the issue at hand. These quirks, whether they are apparent or potential conflicts between or among statements in earlier cases, appear to make the court, or at least a majority of the panel, uneasy. The court has addressed these quirks by overruling one or more prior decisions. In these cases overruling was not necessary to the outcome of the issue before the court. Here are some examples:

In State v. Helfrich, the court held unconstitutional the "criminal defamation" statute. This means, of course, that the statute could not be enforced. Why, then, would the court overrule the holding in Griffin v. Opinion Publishing Co., which stated that truth is an affirmative defense to the charge of criminal defamation and that "good faith" and "justifiable ends" also constitute affirmative defenses that must be proven by the defendant? If the statute is void and no longer enforceable, then it should not matter whether good faith is an affirmative defense that must be proven by the defendant or whether absence of good faith is an element to be proved by the state.

A superfluous overruling occurred in Bush v. Montana Department of Justice, which established the prerequisites for the giving of a breath alcohol or blood alcohol test under Montana's implied consent laws. The implied consent statute required that an officer have "reasonable grounds to believe" that a motorist was driving under the influence, among other things, and that the motorist be under arrest for DUI before the officer could demand a breath sample. The court tangled with

two lines of cases. One line equated "reasonable grounds to believe" with a probable cause standard.100 The other line equated it with the lesser "particularized suspicion" standard.101 The court adopted the particularized suspicion standard and overruled those cases that required probable cause. Nevertheless it went on to note that the implied consent statute also required that the motorist be under arrest before a breath sample could be demanded. The prerequisite for arrest is . . . probable cause! The court thus held that probable cause is a prerequisite to demanding a breath sample.102

These overrulings were superfluous. In Helfrich, the statute having been struck down, the question of the burden of proof was not material to the decision. The Helfrich holding will give succor to a future lawyer seeking support for a claim that the plaintiff bears the burden of proving absence of good faith in a civil libel action. The reasonable suspicion/probable cause issue continues to give the court difficulty in other areas, and Bush adds unnecessarily to the confusion. Perhaps some future panel will overrule these cases "to the extent that . . . ."

3. Cases Overruled Unnecessarily Because the Legislature or the 1972 Constitution Has "Overruled" the Earlier Case.

Some defenders of the court have suggested that the adoption of the 1972 Constitution explains the high rate of overruling cases.103 We now come directly to that claim. The court has overruled precedent because of changes in written law, but only in five cases.104 Of these five, only two involved a change between the 1889 and 1972 Constitutions.105

If the legislature or the Constitutional Convention has rewritten the law, why is it necessary to overrule a case that interpreted the now repealed or amended provision? The

100. See Bush, ¶ 9.
101. Id.
102. Id. ¶ 22. Probable cause after Bush is also a prerequisite to the other subdivisions of Montana Code Annotated section 61-8-402.
103. See supra text pp. 61-62.
legislature has done the overruling for us. The situation then
calls for nothing more than to point out that the law has
changed. The precedent remains good authority for the former
legislative act—the former act simply is no longer in effect.

For example, Teamsters v. Cascade County School District
No. 1106 construed the Code's definition of "school teacher" to
include teachers in the higher education system. Two decades
later, in Talley v. Flathead Valley Community College,107 a
community college instructor, relying on Teamsters, claimed
that he had been tenured under the rules governing school
teachers. The College quickly pointed out the fact that the
higher education code had been amended. Community college
instructors were now expressly included under the new code,
and not under any common law, primary, or secondary school
definition of teacher. The College was right, but the court found
it necessary to overrule Teamsters.108 The mischief will appear
if the legislature later amends the statute to return to the
Teamsters definition of "teacher."

4. The Old Rule Was Wrong or a New Rule Is Better.

Most frequently, the Montana Supreme Court panel of the
1990s disagreed with a holding of one of its predecessors. This
practice is the greatest source of instability in the court's
jurisprudence. The court ratcheted a rule one way, then
another, sometimes seemingly to fit the facts or the result. In
doing so, it invited mischief beyond instability—the kind of
mischief that comes from an untried rule. One such case is
State v. Lane.109

When a defendant is sentenced for a crime, the sentence is
audibly pronounced from the bench and is then reduced to
writing. Occasionally the sentencing judge would omit a
provision from the sentence and call the defendant back into
court to correct the omission. Defendants objected to this

108. Talley, 259 Mont. at 485, 857 P.2d at 704 (failing to explain why overruling was
necessary when the legislature had already done it).
Graveley, 275 Mont. 519, 915 P.2d 184 (1996), State v. Mason, 253 Mont. 419, 833 P.2d
1058 (1992), State v. Wirtala, 231 Mont. 264, 752 P.2d 177 (1988), and State v. Enfinger,
222 Mont. 438, 722 P.2d 1170 (1986)).
process on double jeopardy grounds when the second sentence was more severe, claiming that the judge could not increase a sentence once it had been imposed.

A mixture of conflicting statements in the Code was one source of confusion over the judge's power. According to the Code, a "sentence" is a judicial disposition of a criminal case following conviction. A "judgment," however, is the court's adjudication of guilt and the sentence pronounced by the court. The Code then declares that a sentence must be rendered in open court and the defendant must be present when this is done. In other words, the sentence is typically audible. Although the Code demands a judgment be rendered in open court, the Code also demands that the judgment be signed and entered on the record. As a result, the judgment, which sets out the adjudication of guilt and sets forth the sentence, is both audible and written.

In Enfinger, the defendant complained on appeal because the district court orally sentenced him, then called him back and imposed a more severe sentence. The court held that Enfinger's sentence was not final until it was filed, that is, until it was reduced to writing. The court noted that this rule was well-established. Because the sentence was not final, defendants were not put twice in jeopardy by the second imposition of sentence. Wirtala and Mason were decided on similar facts and followed Enfinger.

Graveley presented different facts. At his sentencing hearing, Gravely was sentenced to serve forty years in the custody of the Department of Corrections. The lower court orally declared that ten of those years were to be spent "in a

111. Id. § 46-1-202(10).
113. MONT. CODE ANN. §§ 46-16-121(1) to -123 (1999).
117. Enfinger, 222 Mont. at 444, 722 P.2d at 1174.
118. Enfinger, 222 Mont. at 444, 722 P.2d at 1174 (quoting State v. Diaz, 673 P.2d 501, 502 (N.M. 1983)).
119. Wirtala, 231 Mont. at 270, 752 P.2d at 181; Mason, 253 Mont. at 425, 833 P.2d at 1061-62.
120. 275 Mont. 519, 915 P.2d 184 (1996).
The sentence was imposed in open court and the defendant was hauled off to the State Prison. After his arrival he discovered that the sentence recited in his written judgment provided that he would be committed to the custody of the Department of Corrections for a period of forty years, omitting the ten-year "prison environment" condition. He complained, thinking apparently that under the oral pronouncement he would spend only ten years in prison. He contended that the more severe sentence could not be imposed without returning him to open court. The court concluded, however, that the difference favored the defendant (he could spend less than ten years in a prison environment) and affirmed the lower court. Justice Leaphart dissented, contending that the instant the defendant was removed from the court room he began serving the oral sentence. Anything imposed later put the defendant twice in jeopardy.

Lane completed the possible combinations of written and oral sentences. In Lane's case, the oral sentence was pronounced in open court in the presence of the defendant. The written sentence, however, turned out to be much more favorable to him. One year after the written sentence had been signed, the sentencing judge entered a nunc pro tunc order that conformed the written judgment to the more severe, audible, version. Lane, who had a dozen years of precedent on his side, not surprisingly argued that the first written judgment was final and could not be altered. Not so, said the court. The sentence imposed in open court now "controls" because the defendant has a right to be present when sentence is imposed. Enfinger, Wirtala, Mason, and Graveley were overruled.

One thing binds all five cases: the criminal defendant came up on the short end each time. In each, the rule was adopted, tweaked, or overruled, preserving a sentence that fell more heavily on the appealing defendant. This was not purposeful, but you cannot persuade these prisoners that the decisions were

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121. Gravely, 275 Mont. at 522, 915 P.2d at 186.
122. Gravely, 275 Mont. at 526, 915 P.2d at 189.
123. Gravely, 275 Mont. at 526, 915 P.2d at 189.
125. Id. ¶ 10.
126. Id. ¶ 48.
127. Id. ¶¶ 40, 41.
not designed to keep them in prison longer.

When the court attempted to craft the "right" rule—without asking whether the old rule was working well—it created new mischief. Enfinger, Wirtala, and Mason did not conflict with Lane. The court premised the Lane result on the defendant's right of confrontation, that is, his right to be present at his sentencing. Remember, in all three of the prior cases, the defendant was returned to court for imposition of the corrected oral sentence. Lane reopens the question that Enfinger, Wirtala, and Mason had answered affirmatively. Can a district judge recall a defendant on the same day and, in open court, orally "correct" an oral sentence?

Other mischief followed. Formerly the judgment was final when "signed and entered on the record." In his concurring opinion, Justice Nelson pointed out that the court's holding in Lane left the time of finality up in the air. Lane, as a result, occasioned amendments to Montana Rule of Appellate Procedure 5(b), and to Montana Code Annotated section 46-18-116. Rule 5(b) specifically referenced the entry of judgment referred to in Montana Code Annotated section 46-18-116, and treated notices of appeal filed between the time of the oral pronouncement of sentence and the entry of judgment as having been filed on the day judgment was entered. The court revised Rule 5(b) to provide that the time for filing a notice of appeal ran from the entry of the written judgment. The legislature corrected the damage to section 46-18-117 by repealing it and amending section 46-18-116. Section 46-18-116 now provides that a written sentence that differs from the oral may be corrected on request filed within 120 days of the filing of the written judgment. It also provides, however, that the court may correct a "factually erroneous sentence or judgment at any time." We do not know yet whether a "factually erroneous" sentence is one that differs from what the sentencing judge intended.

In this same category ("The Old Rule Was Wrong or a New Rule Is Better") the court has a habit of ignoring a fundamental

129. Lane, ¶ 59.
132. Id. § 46-18-116(3).
principle: that the legislature's acquiescence in a supreme court's interpretation of a statute is presumptive evidence of the correctness of the construction. One of the purposes of statutory construction is to create certainty in the law. It is the antithesis of stability when an appellate court adopts one construction of a statute and a later panel, merely by exercising greater wisdom than the first, adopts an opposite construction. Such an approach is not branch-respecting. State v. Strizich illustrates the problem.

Anyone who has practiced in the criminal law arena knows the difference between a motion and order to suppress, and a motion and order in limine. An order to suppress addresses a claim that the state's officers obtained physical evidence or a defendant's statement by violating the law. An order in limine, in contrast, is a pretrial order that typically applies the rules of evidence and determines the admissibility of legally obtained evidence.

In Montana, the legislature has limited the state's ability to appeal the results of criminal cases. Among other things, the state may appeal from "any court order" "suppressing evidence" or "suppressing a confession or admission." Such appeals are taken before trial—that is, before jeopardy attaches to the defendant.

In State v. Carney, the court held that rulings on the admissibility of evidence, made during trial, could not be appealed by the State. Jeopardy had attached, and permitting the state to appeal an evidentiary ruling would expose the defendant to multiple trials— forbidden by double jeopardy clauses of the Montana and United States Constitutions. In State v. Yarns and State v. T.W., the court concluded that double jeopardy was not a concern when evidentiary rulings were made.

137. Id. § 46-20-103(2)(e).
138. Id. § 46-20-103(2)(f).
139. 219 Mont. 412, 714 P.2d 532 (1986).
in the context of a pretrial order granting or denying a motion in limine. In such cases the order was a pre-trial order and jeopardy had not attached because the appeal was filed before the trial. Like a pretrial order suppressing evidence on constitutional grounds, an appeal from the order was permitted by Montana Code Annotated section 46-20-103(2)(e), the statute that speaks of appeals from orders "suppressing" evidence.

In 1991, five years after T.W., the legislature overhauled Title 46, the criminal procedure code. It left Montana Code Annotated section 46-20-103(2)(e) unchanged, leading to the conclusion that the legislature approved the court's interpretation of the statute. The following year Yarns approved T.W.

In Strizich, the defendant asked the court to reconsider its holdings in T.W. and Yarns. Strizich presented a minor twist. In Strizich the State had appealed from City Court to the District Court after the City Court had issued an adverse order governing the admissibility of evidence. All such appeals result in a trial de novo in the district court.

Notably, nothing was called to the Strizich Court's attention that was not available to the T.W. and Yarns panels. The court looked at decisions from other jurisdictions that distinguished suppression orders from orders in limine. It considered policy claims that speculated that permitting appeals of pretrial orders in limine, "would require that this court micro-manage the discretionary functions of trial courts" and "would allow the State to avoid justice court or city court jurisdiction altogether anytime it decides it would be tactically advantageous to do so." It concluded, "that certainly was not the intent of the Legislature when it authorized appeals based on the 'suppression of evidence'." T.W. and Yarns are overruled.

By the time Strizich was decided, the construction of the statute had been settled for over a decade. The Strizich Court was not presented with evidence or information that demonstrated that the expanded rule had in fact compelled the court to "micro-manage." No one had called to the court's attention an abuse of the expanded power to appeal. The court observed that the prosecution might avoid city or justice court jurisdiction

140. 1991 Mont. Laws 3011.
141. Yarns, 252 Mont. at 50, 862 P.2d at 546.
142. Strizich, 286 Mont. at 10, 952 P.2d at 1371.
143. Strizich, 286 Mont. at 10, 952 P.2d at 1371.
144. Strizich, 286 Mont. at 10, 952 P.2d at 1371.
when it was tactically advantageous to do so. However, despite ten years’ experience with the rule, the court did not conclude that prosecutors had regularly avoided city or justice court jurisdiction by that device, even though they may have done so in Strizich. In any event, the court’s concern about prosecutors avoiding city or justice court jurisdiction was equally applicable to motions to suppress, filing of which was required before trial. 145 A pretrial motion in limine, in contrast, is not required to preserve the admissibility issue. 146 In many cases a defendant could defeat the prosecution’s expanded power to appeal simply by raising the evidentiary objection during trial, after jeopardy had attached.

The flavor of Strizich pervades nearly all of the court’s "The Old Rule Was Wrong or a New Rule Is Better" jurisprudence and much of its overruling jurisprudence. On reading Strizich, we realize that the court feels free to second-guess its predecessors. As it did in Strizich, the court has repeatedly ignored the legislature's acquiescence in long-standing statutory construction, seemingly substituting its wisdom for the wisdom of earlier Montana Supreme Courts and for the wisdom of members of dozens of legislative sessions.

Rasmussen v. Lee 147 offers another example. For over fifty years, Montana Code Annotated section 70-27-108(2) and its R.C.M. predecessor permitted an agricultural tenant to holdover for an additional year when the landlord did not demand possession within sixty days after expiration of the lease term. 148 The Hamilton–Holliday line of cases interpreted and applied this provision to holdovers without regard to whether the termination was for non-payment of rent or for other reasons. 149

146. See MONT. R. EVID. 103(a)(1); State v. Fuhrman, 278 Mont. 396, 402-403, 925 P.2d 1162, 1165 (1996), overruled on other grounds by State v. Van Kirk, 2001 MT 184, 306 Mont. 215, 32 P.3d 735 (holding that a motion in limine may be used to preserve evidentiary issue without objection at trial).
149. Holliday, 174 Mont. at 396, 571 P.2d at 95; Pipkin, 167 Mont. at 290, 538 P.2d at 349-350; Miller, 149 Mont. at 129, 423 P.2d at 597; Kenfield, 145 Mont. at 178, 399 P.2d at 1002; Enott, 140 Mont. at 209, 369 P.2d at 415; Hamilton, 121 Mont. at 248, 191 P.2d
Nevertheless, in *Rasmussen*, the court reinterpreted the statute, despite a half-century of legislative acquiescence in the interpretation, and held that this provision applies only where the termination is for non-payment of rent.

The goal of stability in the law was fostered by the *Hamilton–Holliday* line of cases. For fifty years, tenants and landlords knew what their respective rights and interests were upon termination of the lease. Agricultural leases could be written in reliance upon a settled interpretation of the statute. *Rasmussen* put existing leases in jeopardy. If that was not enough, *Rasmussen* was distinguishable on its facts from its predecessors.

*Lane, Strizich,* and *Rasmussen* illustrate several points. In each of these cases, as in all forty-seven decisions in which the court discarded a rule it did not like, the court second-guessed the analysis or reasoning of those who had gone before it and reached a different conclusion. In each case the rule had been long established. Additionally, the rule appeared to be working well. Finally, in those cases that questioned the correctness of the original statutory interpretation, the legislature had acquiesced in the statutory interpretation.

This last point cannot be emphasized enough. Of the court’s 109 decisions overruling precedent, forty-eight involved questions of statutory interpretation or the application of a statute that had been resolved by the Montana Supreme Court in the past. At some point, and especially where the legislature did not act to overrule the court’s interpretation, parties are entitled to rely upon the court’s statutory construction. When a court does not honor a settled construction simply because it disagrees with it, it defeats predictability. Businesses cannot feel confident in their business decisions. Lawyers cannot give reliable advice. Individuals cannot act secure in the belief that their actions comply with the law. After all, the law’s interpretation may change next week.

The court often rationalized its action by describing the earlier decision as “manifestly wrong.” In the following section, I discuss the problem with the court’s “manifest error” principle. The problem is that there is no manifest error principle.
VII. MANIFEST ERROR?

When the court has concluded that an earlier decision was wrong or that another rule is better, it has frequently claimed that overruling was proper because the prior decision was "manifestly wrong." 151 A review of the decisions in this area reveal that the court's manifest error jurisprudence was not premised upon a principle that it consistently applied.

Nevertheless when we examine the opinions that form the foundation of the court's asserted basis for its power to overrule prior decisions that are "manifestly wrong," a principle emerges. It is not, however, employed by today's court. We begin with State ex rel. Peery v. District Court, 152 to which the current court has pointed as its authority for overruling a decision that is manifestly wrong. Peery addressed the question of whether stare decisis directs the court's interpretation of a constitutional provision when the court is satisfied that the interpretation was "manifestly wrong." 153 Peery relied upon statements from earlier Montana Supreme Court decisions that said the same thing: "The rule of stare decisis will not prevail where it is demonstrably made to appear that the construction placed upon the constitutional provision in the former decision is manifestly wrong." 154 This, of course, is no principle at all. It is, rather, a self-interested grant of power, a lesser degree of l'état, c'est moi.

Among the cases that Peery cites, only State ex rel. Sparling applied this statement in a manner that explains it. State ex rel. Sparling and State ex rel. Kain considered two statutes adopted to address the Great Depression. 155 The legislature had sought to grant relief to distressed landowners who, by reason of drought and the economic times, were unable to pay their property taxes. Kain applied an earlier decision, Sanderson v. Bateman, 156 which had struck down a similar law in 1927. 157 The Sanderson case addressed a 1923 legislative act

151. See supra notes 55-56 and accompanying text.
152. 145 Mont. 287, 400 P.2d 648 (1965).
153. Peery, 145 Mont. at 310, 400 P.2d at 660.
156. 78 Mont. 235, 253 P. 1100 (1927).
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that permitted delinquent property tax payers to redeem their property from the county by paying the past due taxes plus seven percent, even if interest on the past due taxes exceeded seven percent. The court applied a constitutional provision that prohibited the legislature from transferring or extinguishing obligations or liabilities to the state or local governments\(^\text{158}\) and struck down the law. In \textit{Kain}, the court concluded that the 1933 redemption act was practically indistinguishable from the 1923 version. It applied the rule of stare decisis and voided the 1933 act on the same grounds as \textit{Sanderson}.\(^\text{159}\) The \textit{Sparling} Court, two years later, considered a yet more generous version of the 1933 law that permitted the landowner to tender the past due taxes, without payment of any interest or penalties.\(^\text{160}\) The \textit{Sparling} Court, however, recognized the breadth and depth of the emergency and concluded that it was not bound by stare decisis.\(^\text{161}\) The court overruled \textit{Kain} and \textit{Sanderson} on "manifest error" grounds—concluding that interest and penalties were not the obligations and liabilities to which the constitution referred.

The \textit{Sparling} Court noted the rule that stare decisis should apply unless "it is demonstrably made to appear that the [earlier] construction... is manifestly wrong."\(^\text{162}\) The \textit{Kain} Court had observed that a constitutional interpretation at issue in the case should stand, absent "cogent reasons to the contrary."\(^\text{163}\) In other words, the "manifest error" doctrine should be applied conservatively. Under the \textit{Sparling/Kain} principle, a later appellate court's view that an earlier court's interpretation contained an error, even an apparent error, should not result in overruling in the absence of other, cogent reasons.

The court went on to describe cogent reasons to overrule \textit{Kain} and \textit{Sanderson}.\(^\text{164}\) Its description of these reasons adds to this conservative view of manifest error. Remember, the \textit{Sparling} Court concluded that interest and penalties were not the obligations and liabilities the constitution referred to,

\begin{itemize}
  \item \textit{Mont. Const.} art. V, § 39 (1889).
  \item \textit{Kain}, 94 Mont. at 97, 20 P.2d at 1059.
  \item 99 Mont. at 523, 44 P.2d at 748; 1935 Mont. Laws 133.
  \item \textit{Sparling}, 99 Mont. at 525-26, 44 P.2d at 749.
  \item \textit{Sparling}, 99 Mont. at 525, 44 P.2d at 749 (citing \textit{Kain}, 94 Mont. at 97, 20 P.2d at 1059).
  \item \textit{Kain}, 94 Mont. at 97, 20 P.2d at 1059.
  \item \textit{Sparling}, 99 Mont. at 527-30, 44 P.2d at 750-751.
\end{itemize}
contrary to Kain and Bateman.\(^{165}\)

In the course of addressing its departure, the court noted that the precedents did not “relate to titles or involve vested rights, and do not establish rules of trade, property, or contract, etc.”\(^{166}\) Overruling the precedents would therefore not alter rules upon which people had relied and would not affect vested rights. Second, the court observed that the development of the law had called into question the validity of Sanderson and Kain. Other states had altered their own precedents with respect to similar statutes or had reached different conclusions.\(^{167}\) With respect to Sanderson’s and Kain’s definition of “penalty,” the court noted disagreements in other Montana cases.\(^{168}\) Finally, the court observed that an emergency had been “established.”\(^{169}\) The court concluded that these were cogent reasons to overrule the prior decisions.

This highlights the difference between the “manifest error” doctrine employed by the Montana Supreme Court today and the doctrine upon which the court purports to draw. The current doctrine suffers from the mark of Kain. Today’s doctrine is best described as error that is manifest whenever a majority of the court says it is. The source of the doctrine is different. The original “manifest error” doctrine recognized that, although an earlier opinion may have contained errors of reasoning or analysis, and a later court may recognize an error, that is not necessarily a reason for the later court to overrule the prior case. Prudence is called for. If the “erroneous” rule is of the kind that people rely upon in the conduct of their affairs, then it especially should not be altered absent “cogent reasons.”\(^{170}\) If development of the law, changes in society, or changes in the context in which the rule operated call into question the validity of the old rule, it may be overruled.

It is reasonable to conclude that the court need not be convinced that the rule is outdated or questionable. If the rule was in error in the beginning, the court could overrule it more freely, provided it or a similar rule had been questioned by other

\(^{165}\) Sparling, 99 Mont. at 530, 44 P.2d at 751.

\(^{166}\) Sparling, 99 Mont. at 525, 44 P.2d at 749.

\(^{167}\) Sparling, 99 Mont. at 526, 44 P.2d at 749.

\(^{168}\) Sparling, 99 Mont. at 528, 44 P.2d at 750.

\(^{169}\) Sparling, 99 Mont. at 526, 44 P.2d at 750 (noting, however, that an emergency alone would not warrant overruling precedent).

\(^{170}\) Kain, 94 Mont. at 97, 20 P.2d at 1059.
jurisdictions or so long as experience suggested it was less functional than first thought. These should not be theoretical observations, like the kind we see in *Strizich*, but practical determinations made on information in the briefs, or, if necessary, on the basis of information provided in a friend of the court brief.

**VIII. TOWARD A PRINCIPLED APPROACH TO STARE DECISIS**

The current Montana Supreme Court lacks a consistent approach to stare decisis. The court overrules cases unnecessarily, injuring the legitimacy of the institution. The court overrules cases when it dislikes long established rules, rules of recent vintage, or when it disagrees with the thinking of its predecessors. This fosters instability in the law. The court should adopt a more principled and conservative approach.

We must consider another matter. To some degree, albeit not consciously, the Montana Supreme Court has followed a civil law model. In those cases categorized as “*The Old Rule was Wrong or the New Rule is Better,*” the court has considered either a Restatement, another common law rule, a statute that has codified the common law, or it has applied a statute differently than did a prior court. In these cases, the court appears to apply the

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171. This realization is not far-fetched. In 1931, Cambridge’s Professor Arthur Goodhart predicted:

> [I]n no distant time the American doctrine will approximate to that of the civil law. This will be due in large part to five reasons: (1) the uncontrollable flood of American decisions, (2) the predominant position of constitutional questions in American law, (3) the American need for flexibility in legal development, (4) the method of teaching in the American law schools, and (5) the restatement of the law by the American Law Institute.

ARTHUR L. GOODHART, ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 65 (1931).


173. An example of a such a common law rule is the “fence out” rule, overruled in *Larson-Murphy v. Steiner*, 2000 MT 334, 303 Mont. 96, 15 P.3d 1205.

174. See Whidden v. John S. Nerison, Inc., 1999 MT 10, 294 Mont. 346, 981 P.2d 271 (concluding that the “at will” doctrine has been repealed by the Wrongful Discharge Act).

175. Workers’ compensation legislation has replaced the common law, for example. See Sherner v. Conoco, Inc., 2000 MT 50, 298 Mont. 401, 995 P.2d 990 (reinterpreting the intentional injury exception to workers’ compensation’s exclusive remedy).

statute or Restatement provision in order to achieve a just result. This is typical of a civil law tradition where the judge's "function is merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union."\textsuperscript{177} A statute is thus interpreted, but no single or binding interpretation is necessarily followed or employed.\textsuperscript{178} As a result, in a civil law jurisdiction, the meaning and application of a statute may change to fit new circumstances even if the text of the statute does not change.\textsuperscript{179}

I doubt that the court has adopted a civil law approach consciously, although this pattern appears in its decisions. Nevertheless, the court has not expressed a sentiment to follow a civil law tradition, so I will turn to what I think is necessary to correct the current court's approach to stare decisis.

A principled approach should begin with the values that are advanced by a doctrine of stare decisis. These include predictability, fairness, efficiency, institutional integrity, and respect for the legislative branch.\textsuperscript{180} When a court considers overruling precedent, it should first weigh these values.

What impact will overruling have on predictability and stability of social relations? In the areas of contracts, wills and estates, commercial dealings, and property, predictability is highly important. Many rely upon existing law when preparing a document that describes future relations. Interpretations of the constitution ought also to remain stable because the constitution is the fundamental law. Instability in constitutional interpretation invites instability in the rules that are extrapolated from the constitution.

Long-standing interpretations of a statute ought to remain undisturbed out of respect for the legislative branch. One might argue that because Montana elects its judges, the act of overruling an earlier interpretation of a statute is less antidemocratic. However, we do not elect judges to make or remake state policy outside the area of the common law. The judicial power is the power to decide disputes and to make

\textsuperscript{177} JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 36 (Stanford Univ. Press, 2d ed. 1985).
\textsuperscript{178} Id. at 45-46.
\textsuperscript{179} Id. at 47.
\textsuperscript{180} See supra Part II.
binding orders.\textsuperscript{181} When a statute has received an authoritative construction from an earlier Montana Supreme Court, there is no dispute over the interpretation to decide. When a court overrules its earlier construction of a statute because it now questions the earlier reasoning, it is not deciding—it is legislating. It treats precedent as if it were the property of the court to be disposed of freely. Precedent, however, is public property.

When authorities appear to be in conflict, the court should prefer distinguishing them to overruling them. Precedent should be overruled when the conflict between two lines of authority cannot be reconciled. Whenever the court overrules a prior decision, “to the extent that . . . ,” we may conclude that the prior case may be distinguished.

The court should develop a principled manifest error doctrine. It should not be enough for a majority of the court's members to question the reasoning of an earlier panel, even if it may be fairly characterized as “wrong.”\textsuperscript{182} A principled manifest error doctrine will weigh the values of stare decisis when members of the court think the precedent was incorrectly decided. Before a “wrong” decision is overruled, it should also be in disrepair, it should have been regularly disregarded, or it should have fallen into disrespect. It should be seen as working unfavorably before it is overruled.\textsuperscript{183} \textit{State ex rel. Sparling} offers an example of this approach.

But this is not really a manifest error doctrine. It is a doctrine of flexible stare decisis, a doctrine that American jurisdictions have tended towards throughout the Twentieth Century. So, in the end, it is not necessary that the prior court be wrong. It is only necessary for the rule to be flawed in application. In that case, and I draw the line at reinterpreting an act of the legislature, the court should not hesitate to discard it.

\textsuperscript{182} See supra Part VI(B)(4). It is fair to say the reasoning of the cases overruled in \textit{Strizich} were “wrong,” but the resulting rule worked well enough in practice. See Monaghan, supra note 11, at 762 (“Whether a precedent is seen as clearly wrong is often a function of the judge's self-confidence more than of any objective fact.”).
CONCLUSION

Between 1991 and 2000, the Montana Supreme Court overruled cases at an unprecedented rate. No other state court took a similar approach. In no other decade was the Montana Supreme Court as active.

Many may disagree with my categorization of these cases. It is perfectly arguable that some decisions I find justifiable are not, and that some decisions I criticize are justifiable. Any number of decisions could fall into more than one category.

Nevertheless, the pattern illustrates something. Moving a case here or changing the category of one or two there does not alter the picture. The court was active and was often irrationally active. If we set aside a tendency to act in a civil law tradition, the court's activity can be explained only by a lack of adherence to principle when overruling its precedent. By remembering and applying the values of stare decisis, the court may return predictability to Montana's jurisprudence.

EPILOGUE

A review of the Montana Supreme Court's approach to precedent during 1991-2000 remains relevant today. In the three years that have passed since the end of 2000, the Montana Supreme Court has overruled its precedent in thirty-two cases, a rate similar to that of 1991-2000.
APPENDIX A


17. Marshall v. State ex rel. Cooney, 1999 MT 33, 293 Mont. 274, 975 P.2d 325 (overruling State v. Cooney, 70 Mont. 355, 225 P. 1007 (1924); State v. Alderson, 49 Mont. 387, 142 P. 210 (1914) (Hay); State v. Bd. of Comm’rs, 34 Mont. 426, 87 P. 450 (1906) (Teague)).


