

We the People *of* Montana...



THE CASE FOR A NEW MONTANA CONSTITUTIONAL CONVENTION



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INTRODUCTION

Every twenty years, Montanans have an opportunity to decide whether to call a new constitutional convention. In 1990, Montanans voted overwhelmingly against a new convention, but in 2010, the tally was much closer. The question will be on the ballot again in 2030.

A Montana constitutional convention is a time-limited meeting of popularly elected delegates and its powers are limited to proposing either a new constitution or amendments to the existing one. Its proposals have no effect unless ratified by the voters. Montanans have held three previous constitutional conventions—in 1884, 1889, and 1972.

The current constitution has some undoubted strengths, but also suffers from numerous weaknesses, including some that are very serious. One measure of the problems is that, despite the state supreme court’s tight restrictions on constitutional amendments, voters have altered the document 38 times in less than 54 years.

Even aside from the excessive need for amendments, the constitution as now enforced is quite different from the version approved by the voters in 1972. This is because an overly-ambitious state judiciary has altered it in important ways. Some of these judicial innovations have foisted public policies on Montanans that no one voted for. Others have limited Montanans’ ability to control their own government.

This paper sets forth the facts behind those conclusions and explains why a new convention is necessary.

Fourteen states held constitutional conventions between 1965 and 1975. Eight states adopted new constitutions. In addition to Montana, they were Connecticut, Florida, Illinois, Louisiana, North Carolina, Pennsylvania, and Virginia.

A Brief Survey of Montana Constitutional History¹

Every twenty years, Montanans may decide whether to call a new constitutional convention.² In 1990, Montanans voted overwhelmingly against a new convention, but in 2010, the tally was much closer.³ The question will be on the ballot again in 2030.

A Montana constitutional convention is a time-limited meeting of popularly elected delegates—one delegate per state house district, or 100 in all.⁴ It is convened and empowered by a special law called an *enabling act*. The convention's powers are essentially limited to proposing either a new constitution or amendments to the existing one.⁵ Its proposals have no effect unless ratified by the voters.⁶

Montanans have held three previous constitutional conventions. The first was in 1884, when Montana was still a territory. That conclave prepared a constitution in the hope that Congress would approve both the document and Montana's application for statehood.⁷ The application for statehood was rejected, but Montanans applied again and held a second convention in 1889. The document produced by that gathering was modeled partly on the 1884 draft,⁸ and became Montana's first state constitution.⁹

In 1970, voters authorized a third constitutional convention, which met at the end of 1971 and, after a holiday break, continued until March 24, 1972. It wrote the constitution currently in effect.

The current constitution has some undoubted strengths, and the state's establishment figures and special interest groups regularly heap praise upon it.¹⁰ But the document also has some serious weaknesses. One measure of these weaknesses is that, despite the state supreme court's tight restrictions on

¹This Issue Paper relies in part on Professor Natelson's peer-reviewed study of the ratification of the Montana Constitution: Robert G. Natelson, *Constitutional Coup? The Case that Promulgated a New Constitution for Montana*, 7 BRIT. J. AM. LEGAL STUD. 319 (2018) [hereinafter *Natelson, Cashmore*]. Additional material comes from ROBERT G. NATELSON, THE MONTANA SUPREME COURT: AN INSTITUTION IN NEED OF REFORM (Frontier Inst., 2024), available at <https://natelsonrob.com/wp-content/uploads/2025/07/FI-Montana-Supreme-Court-2024-Final.pdf> [hereinafter NATELSON, FRONTIER].

²MONT. CONST. ART. XIV, § 3.

³The "No" vote in 1990 was 82%; in 2010 it was 58.5%. *Montana Constitutional Convention Question, CC-2* (2010), BALLOTPEdia, [https://ballotpedia.org/Montana_Constitutional_Convention_Question,_CC-2_\(2010\)](https://ballotpedia.org/Montana_Constitutional_Convention_Question,_CC-2_(2010)).

⁴MONT. CONST. ART. XIV, § 4.

⁵The limited nature of the convention's powers was confirmed in *Montana ex rel. Kvaalen v. Graybill*, 159 Mont. 190, 496 P.2d 1127 (1972) (denying convention authority to spend funds for voter education).

⁶MONT. CONST. ART. XIV, § 7 ("Unless so submitted and approved by a majority of the electors voting thereon, no such revision, alteration, or amendment shall take effect.").

⁷The text of the 1884 constitution is available at <https://natelsonrob.com/wp-content/uploads/2026/02/1884-Const.pdf>.

⁸WE THE PEOPLE OF MONTANA . . . THE WORKINGS OF A POPULAR GOVERNMENT 5 (James J. Lopach, ed. 1983) ("About 90 percent of the 1889 document carried forward language of the 1884 draft that had, in turn, borrowed heavily from the Colorado constitution of 1876.") [This work is cited hereinafter as LOPACH.]

⁹MONT. CONST. (1889), available at <https://natelsonrob.com/wp-content/uploads/2025/12/1889-MT-Const.pdf>.

¹⁰For examples, see *Natelson, Cashmore*, *supra* note 1, 321, n.8 & n.9. See also the many claims that Montana's constitution is "unique." E.g., Constance Van Kley, *A Constitution Unique to Montana and Uniquely Montanan*, STATE COURT REPORT, Jan. 2, 2025, available at <https://statecourtreport.org/our-work/analysis-opinion/constitution-unique-montana-and-uniquely-montanan>; Thom Bridge, *Schweitzer Warns Montana Constitution is under Attack*, BILLINGS GAZETTE, Jun. 19, 2022, p. C-2, column 1 (referring to Montana's "unique constitution"); Erin P. Billings, *Judges Offer Tips to Improve Constitution*, HELENA INDEPENDENT RECORD, Jun. 28, 1997, p. 2A, col. 1 ("The drafters of Montana's 25-year old constitution created a unique and visionary document . . .").

constitutional amendments,¹¹ voters have altered it 38 times in 54 years.

Even aside from the many amendments, the constitution as now enforced is quite different from the version approved by the voters on June 6, 1972. This is because an overly ambitious state judiciary has altered it in important ways.¹² As explained below, some of the judicial alterations foist public policies on Montanans that no one voted for. Others impair the ability of Montanans to control their own government.

The 1889 Constitution

As one might expect of a document produced in Montana, the 1889 constitution had a populist cast.¹³ Moreover, like other 19th century Western state charters, it reflected a deep commitment to accountable government and to personal freedom.¹⁴ It protected civil liberty with an exceptionally long bill of rights. It protected property as well, and featured guardrails against excessive taxation and debt.

The fiscal restrictions were not merely the results of political philosophy. Rather, they reflected the lessons of recent history: During the 1840s, several states overextended themselves on infrastructure spending, leading to defaults on public debt.¹⁵

Forces for Change

The oft-stated claim that the 1972 state constitution is “unique” and purely Montanan¹⁶ is not fully accurate. In fact, the 1972 constitution was largely the product of a nationwide campaign, initiated during the late 1960s, to induce states to adopt more liberal constitutions.¹⁷ This effort was supported by federal grants, particularly from the Department of Housing and Urban Development.

Participants in this campaign sought to reduce restrictions on government, especially fiscal restrictions. They also sought to encourage unicameralism and reduce the number of elected lawmakers and executive officials.

Skeptics might interpret this campaign as an effort to protect bureaucracy by deepening it and by reducing democratic control. But advocates presented it as an effort to update government, eliminate pesky restrictions and provide officials with the “flexibility” they needed to address “modern problems.”¹⁸

¹¹See below.

¹²See below.

¹³E.g., MONT. CONST. (1889), art. III, § 31 (protecting against importation of out-of-state peace officers); art. XIV, § 6 (protecting against railroad consolidations); art. VII, § 1 (providing for seven separately elected executive officers).

¹⁴On the libertarian nature of 19th century Western state constitutions, see Robert G. Natelson, *Constitutions of Liberty – Colorado, Montana & Other Western States*, LAW & LIBERTY, Feb. 24, 2026, available at <https://lawliberty.org/constitutions-of-liberty/>.

¹⁵John Joseph Wallis, *Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852*, 65 J. ECON. HIST. 211 (2005).

¹⁶See, e.g., *supra* note 10.

¹⁷See generally Natelson, *Cashmore*, *supra* note 1.

¹⁸Similarly, an author sympathetic to this point of view has denigrated the protections in the 1889 constitution as “a hodge podge of petty detail and special favor.” LOPACH, *supra* note 8, at 2. By contrast, “Modern constitutional revision

Partly as a result of this campaign, Montana was one of fourteen states that held constitutional conventions between 1965 and 1975.¹⁹ Eight of those states adopted new constitutions. In addition to Montana, they included Connecticut, Florida, Illinois, Louisiana, North Carolina, Pennsylvania, and Virginia.²⁰



It must be admitted, however, that there were some good reasons for constitutional revision in Montana. Many provisions in the 1889 charter were out of date. Some of these provisions had been designed to aid the transition between territory and statehood, and were no longer relevant.²¹ Others, such as the \$100,000 debt limit,²² had become antiquated by reason of inflation. Provisions controlling railroads inserted when railroads comprised a transportation monopoly²³ seemed less necessary after the railroads had been challenged by competition from trucks and planes. Finally, the experience of seven decades invited consideration of new ways of doing things that might make government better.

The 1972 Convention

The election for convention delegates was held in 1971. Montana was then experiencing a liberal political tide, and the election results showed it. Fifty-eight of

has been an attempt to make state government capable of dealing with the implications of an increasingly urbanized and industrialized life." *Id.* At 12.

¹⁹John Dinan, *Explaining the Prevalence of State Constitutional Conventions in the Nineteenth and Twentieth Centuries*, 34 J. POL. HISTORY 297, 301-302 (listing conventions by state and year), available at <https://www.cambridge.org/core/journals/journal-of-policy-history/article/explaining-the-prevalence-of-state-constitutional-conventions-in-the-nineteenth-and-twentieth-centuries/56913797B260E375E566F7DDFBD9F8D3>.

²⁰*State Constitution*, BALLOTPEDIA, https://ballotpedia.org/State_constitution, and accompanying state pages. North Carolina's new constitution was proposed to the voters by the state bar, rather than a convention. See *North Carolina State Constitution*, BALLOTPEDIA, https://ballotpedia.org/North_Carolina_Constitution.

²¹*E.g.*, MONT. CONST. (1889), art. VII, § 3 (stating as a qualification for attorney general that he has been admitted to practice in "the territory of Montana").

²²MONT. CONST. (1889), art. XIII, § 2.

²³*E.g.*, MONT. CONST. (1889), art. XV, § 5 (declaring railroads to be public highways subject to legislative regulation).

the 100 delegates were Democrats. The six elected independents were liberal, as were even some of the 36 elected Republicans.²⁴

As a group, these delegates were enthusiastic and idealistic. But most also knew that whatever they produced would have to pass muster with a more conservative electorate.

Unfortunately, the 1972 delegates labored under some significant disadvantages. One disadvantage was their cumulative lack of experience. Due to a decision by the Montana Supreme Court, lawmakers and officeholders were barred from serving as delegates,²⁵ thereby disqualifying many Montanans knowledgeable about the workings, and limitations, of government. Although there were a few lawyers and academics, none of them seem to have had any background in constitution-writing. This situation compared very unfavorably with, for example, the 1787 federal convention, whose delegates were politically experienced and, in some cases, old hands at drafting constitutions.²⁶

Another disadvantage was that, to an alarming extent, the convention leadership and staff restricted the information flow to the delegates. In particular, traditional and conservative views were excluded, as was scholarship that did not support the views of the convention leadership and staff. For example, all of the speakers invited to address the convention were left-of-center. A lobbyist for the liberal National Municipal League—but no one from the other side of the spectrum—received special access to the delegates. Much of the written material provided to the delegates was drafted by the League.²⁷

A notable example of how this system of information censorship worked was a booklet²⁸ provided to the delegates that contained suggested sample constitutions. The booklet included several liberal constitutions, including those from New Jersey and Puerto Rico. It also included a “model constitution” written by the National Municipal League. *But the booklet excluded the charters of all states in the Rocky Mountain West and of all the states bordering Montana!* The most likely explanation, of course, is that constitutions from nearby states such as South Dakota and Wyoming tended to be more conservative or libertarian than the convention leadership and staff preferred.²⁹

These restrictions on information flow was a serious handicap for the delegates in that pre-internet era.

In view of those disadvantages, we can be grateful that the delegates performed as

²⁴Natelson, *Cashmore*, *supra* note 1, at 332.

²⁵The Forty-Second Legislative Assembly v. Lennon, 156 Mont. 416, 481 P.2d 330 (1971). This decision was reaffirmed in Mahoney v. Murray, 159 Mont. 176, 496 P.2d 1120 (1972).

²⁶Between 1776 and 1787, eleven states (as well as Vermont) had adopted state constitutions, and New Hampshire, South Carolina, and Vermont had each adopted two. Convention delegates serving in Congress also had participated in drafting the Articles of Confederation.

²⁷Natelson, *Cashmore*, *supra* note 1, at 334-35.

²⁸*Comparison of the Montana Constitution with the Constitutions of Selected Other States*, MONTANA CONSTITUTIONAL CONVENTION OCCASIONAL PAPERS (1971), available at <https://natelsonrob.com/wp-content/uploads/2026/02/Occasionalpapers5.pdf>.

²⁹Natelson, *Cashmore*, *supra* note 1, at 334.

well as they did. Some of the document’s many strengths are outlined below. But as also described below, the delegates made some serious mistakes.

The 1972 Ratification Campaign and Referendum

The convention adjourned on March 24, 1972, and a vote was set for June 6. The period between March 24 and June 6 saw much campaigning for and against the constitution.

During this campaign, the document’s advocates won conservative support by emphasizing that it was a moderate or “middle of the road” document rather than a liberal or progressive one—more liberal than the 1889 constitution, but still middle of the road. When provisions were susceptible to more than one interpretation, as in the case of the environmental rights, advocates portrayed them in a conservative way.³⁰

Despite advocates’ efforts, when the election returns came in, it appeared that the constitution had failed of adoption. There were barely more “yes” votes than “no” votes. But the election rules were that the new document had to win approval from a majority of everyone who voted that day on any issue, not just a majority of those who chose to vote specifically on the constitution.³¹ This was universally understood, because before the election, state authorities and the press informed the public again and again that an elector could vote “no” on the constitution merely by voting on other issues but abstaining on the constitutional question. And many electors did just that.

As a result of the election results, Montana’s Secretary of State, Frank Murphy, a Democrat, refused to certify a victory for the constitution. Democratic governor Forrest Anderson had no such hesitation. “Government must be free to act,” he announced, “and I proclaim the passage of this Constitution, declaring it to be a major step in that direction.”³² Shortly thereafter, Dr. William F. Cashmore, a Helena physician, and Stanley C. Burger, a Farm Bureau representative, filed a challenge in the Montana Supreme Court.

The result was one of the most consequential state court decisions in American history: *Cashmore v. Anderson*.³³

After oral argument on the case, the five justices took an initial vote in their supreme court chambers. They voted 3-2 against the constitution.

What happened next will never be fully known, but at some point thereafter, one of the justices switched his vote, reputedly due to improper political influence from

³⁰For links to relevant materials, see Robert G. Natelson, *Montana Supreme Court Isn’t Enforcing the State’s Constitution, but Rewriting It*, <https://natelsonrob.com/montana-supreme-court-isnt-enforcing-the-states-constitution-but-rewriting-it/>.

³¹MONT. CONST. Art. XIV, § 8 (1889) (“unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration, or amendment shall take effect”); *Natelson, Cashmore*, *supra* note 1, at 345.

³²*Statement by Governor Forrest H. Anderson, Helena*, June 20, 1972, available at <https://natelsonrob.com/wp-content/uploads/2026/02/1972-0620-Anderson-Proclamation.pdf>.

³³160 Mont. 175, 500 P.2d 921 (1972); see generally, *Natelson, Cashmore*, *supra* note 1 (discussing the case in detail).

U.S. Senator Lee Metcalf.³⁴

Whatever the reason, ratification was declared, and the new document became the official constitution of Montana. But the disputed election results led to a deep divide among Montanans. To this day, views sometimes seem to be split between those who believe the 1962 constitution is virtually sacred writ, and those who affirm it is the product of Satan.

Of course, it really fits neither of those two extremes.

Even after the divisive ratification election, objections to the constitution could have been reduced by a careful, restrained, and highly competent state supreme court. Such a court would have construed the constitution's unclear and contradictory phrases in acceptable ways. It would have left political questions to the political process.

Unfortunately, as explained below, Montanans have not had the benefit of a careful, restrained, and highly competent state supreme court. The justices' interpretations of key constitutional provisions often seem confused, far-fetched, or self-serving. Some of their rulings directly contradict how the document was portrayed to the voters during the 1972 ratification campaign.

The likelihood that the constitution was not properly ratified, coupled with the judicial decisions with effects quite different from those represented to the public, places the document under a cloud and lends force to the case for a convention.

Certainly, Montanans are entitled to a "basic law" that all admit was adopted legitimately.

The Strengths of the 1972 Constitution

Of course, any assessment of the current constitution's virtues depends largely on the knowledge and values of the persons doing the assessment. My own view is that it has enough strengths that a convention should focus on revising the current document rather than scrapping it entirely.

The Montana Constitution's strengths are outline in the following chart.

³⁴Natelson, *Cashmore*, *supra* note 1, at 362.

STRENGTHS OF MONTANA'S CONSTITUTION

- The preamble is beautifully written.
- The general organizational scheme is adequate and, indeed, is similar to that of many other state constitutions.
- Much of the bill of rights is unexceptionable.
- The document's provisions for initiative and referendum are necessary and appropriate. They facilitate the exercise of what America's Founders called the "censorial power"—that is, the people's capacity to check government through the use of extraordinary procedures.
- There seem to be few objections to such details as the size of the legislature and the number, qualifications, powers, and terms of the executive officers.
- The provisions for amendment seem appropriate.



The foregoing list is not intended to be exhaustive.

Weaknesses in the 1972 Constitution

Defects in the current constitution fall into four broad categories:

-*Poor draftsmanship.* Unlike the framers of the U.S. Constitution, the Montana drafters often used terms that had no established legal meaning and that they left undefined. Additionally, some provisions contradict each other, at least in part. In some instances, Montana Supreme Court interpretations have aggravated rather than minimized these problems.

- *Legal Defects.* Some provisions conflict with holdings by the U.S. Supreme Court. At least one violates the First Amendment.

-*Authoritarian mandates.* Although the document sometimes is said to be "libertarian,"³⁵ several provisions impose jarring mandates on individuals and private entities.

- *Inadequate safeguards.* The constitution lacks financial and other safeguards that long experience has shown to be necessary.

These defects must be distinguished from another problem for which the drafters were in no way responsible: The state supreme court has distorted the meaning of some words and phrases in ways that neither the drafters nor the ratifiers intended. That issue is covered below.

³⁵ Van Kley, *supra* note 20 ("The state's 1972 charter is populist, pro-conservation, and libertarian").

Poor Draftsmanship: The Regents

Among the constitution's drafting defects are some of the provisions governing the Montana University System (MUS).

The document recites that, "The government and control of the Montana university system is vested in a board of regents . . . which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the . . . system."³⁶ This seems to position the board as a fourth branch of government, with legislative, executive, and judicial power over the campuses.

But the constitution also says that there are only three branches of government—legislative, executive, and judicial³⁷—and it vests the legislative power only in "a legislature consisting of a senate and a house of representatives."³⁸ It vests judicial power only in the courts.³⁹

Still another section in the constitution reads, "The executive branch includes a governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, and auditor."⁴⁰ It does not mention the regents.

But how can the board have "full power"—or any power at all—if it has no legislative, executive, or judicial authority?

That is not all. The "full power" language is contradicted by the section that immediately precedes it. It gives the state board of education, not the regents, responsibility for educational long-range planning, program evaluation, and budget requests.⁴¹ So "full power" really cannot be "full power."

The courts might have minimized these contradictions by interpreting the constitution to mean: "The list of executive agencies⁴² 'includes' certain offices, but leaves open the possibility of others as well. The board of regents is an additional executive agency."

This interpretation would give the regents a constitutionally protected position. But its "full power" would be executive only. Like other executive agencies, the board would be subject to policies adopted by the people and their elected representatives and would have to comply with and enforce them.

However, the Montana Supreme Court has aggravated rather than mitigated the ambiguity. In 1975, it ruled that the legislature may not control university administrators' salaries.⁴³ It went on to say that sometimes the legislature may use the appropriation process to limit the regents and sometimes the legislature may

³⁶MONT. CONST., art. X, § 9(2)(a).

³⁷*Id.*, art. III, § 1.

³⁸*Id.*, art. V, § 1.

³⁹*Id.*, art. VI, § 1.

⁴⁰*Id.*, art. VI, § 1.

⁴¹*Id.*, art. X, § 9(1).

⁴²*Id.*, art. VI, § 1.

⁴³*Board of Regents of Higher Education v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975).

not. It left the line unclear.

The justices did add that the board should govern “academic, administrative and financial matters of substantial importance to” the university system. This suggests that the legislature still controls issues of general public policy. But in 2022, the court exempted the regents from a state law protecting the right to keep and bear arms.⁴⁴ Then, in 2024, the court allowed the regents to opt out of state laws on free speech and transgender sports.⁴⁵

The effect of these decisions was to give an appointed board unreviewable legislative authority over MUS campuses. This not only violates the best reading of the state constitution, but also may infringe the U.S. Constitution’s requirement that each state have a “republican Form of Government.”⁴⁶

By their poor choice of words, the drafters of the 1972 constitution created a problem that did not exist in the 1889 constitution.⁴⁷

Poor Draftsmanship: K-12 Education

Article X, Section 1(1) states:

“It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.”

The two sentences sound good, but they conflict with each other. “Equality of opportunity” might be fine for many students. But it takes more to meet the “full educational potential” of a gifted or special-needs student. For example, the only way to meet the “full educational potential” of many students may be to adopt a school choice program that includes both public and private providers.

Another problem is measuring “equality of opportunity.” The Montana Supreme Court has focused on equality of funding.⁴⁸ But in the real world, funding levels, above a certain level spent everywhere, are relatively unimportant to educational quality. Despite denial from special interests,⁴⁹ a massive amount of empirical evidence—including from liberal

⁴⁴Board of Regents of Higher Education v. Montana, 409 Mont. 96, 512 P.3d 738 (2022).

⁴⁵Barrett v. Montana, 416 Mont. 226, 547 P.3d 630 (2024).

⁴⁶U.S. CONST., art. IV, §4; see also Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807 (2001-02) (explaining that to qualify as “republican” for constitutional purposes, a government must be answerable to the citizenry).

⁴⁷Montana’s 1889 constitution specified that the state board of education would have general control over the university system—but as provided by law. In other words, universities were subject to general legislative policies. However, university funds were inviolate. MONT. CONST. (1889), art. XI, §§ 11 & 12.

⁴⁸Helena Elem. Sch. Dist. #1 v. Montana, 236 Mont. 44, 769 P.2d 684 (1989)

⁴⁹E.g., Kira Barrett, *The Evidence is Clear: More Money For Schools Means Better Student Outcomes*, NEA TODAY, Aug. 1, 2018, available at <https://www.nea.org/nea-today/all-news-articles/evidence-clear-more-money-schools-means-better-student-outcomes> (setting forth the argument of the nation’s largest teachers’ union).

researchers⁵⁰—confirms this. A recent Mountain States Policy Center study reached the same conclusion.⁵¹ Non-financial factors, such as leadership quality, goals, and teaching methods, seem to be far more important.

The constitution adds: “The legislature shall provide a basic system of free quality public elementary and secondary schools.”⁵² This sentence invites such questions as, “What does ‘basic’ mean?” “What does ‘quality’ mean?” Presumably, “quality” means good rather than bad quality—but how much good quality is constitutionally sufficient?

The courts have no way of objectively enforcing language like this, so it does not belong in a constitution. It would be sufficient to require the legislature to provide for educational opportunity, and give it the power to do so.

Additionally: the constitution creates three kinds of entities to oversee public schools, but is unclear as to which entity does what. It states, “The supervision and control of schools in each school district shall be vested in a board of trustees . . .”⁵³ This provokes the question of whether the school trustees may overrule legislative decisions as the state supreme court has declared that the regents may do.⁵⁴ The constitution provides no answer.

The constitution further assigns the state board of education responsibility for long-range planning and for coordinating and evaluating school policies and programs.⁵⁵ It also grants the state board of *public* education “general supervision over the public school system.”⁵⁶ Both of these clauses contradict somewhat the purported power of local trustees to supervise and control schools in their own districts.

Poor Draftsmanship: Water Rights

The constitution provides that “All . . . waters . . . are the property of the state. . . .”⁵⁷ It adds further that state ownership is “for the use of its people . . .”⁵⁸ The latter is traditional trust law language. It means that the state must allocate the water for the general welfare, irrespective of any private rights.

Yet the same section also protects existing and future private appropriations. To “appropriate” a water right is to use it for recognized purposes and stake a claim following certain legal procedures. In other words, once a legal appropriator complies with the procedures, the state

⁵⁰Sarah Reber & Gabriela Goodman, *A state-level perspective on school spending and educational outcomes*, BROOKINGS INST., Sept. 30, 2025, <https://www.brookings.edu/articles/a-state-level-perspective-on-school-spending-and-educational-outcomes/>.

⁵¹Luke Hill, *Does Higher Spending Lead to Better Educational Outcomes?*, MOUNTAIN STATES POLICY CENTER, Dec. 2026, https://33a3495a-a3f0-4137-8e52-15ed055dd371.filesusr.com/ugd/f1dfe7_486f20412c374119b188cff359b7f6e4.pdf.

⁵²MONT. CONST., art. X, § 1(2).

⁵³*Id.*, art. X, § 8.

⁵⁴*Supra* notes 45-47 and accompanying text.

⁵⁵*Id.*, art. X, § 9(1).

⁵⁶*Id.*, art. X, § 9(3).

⁵⁷*Id.*, art. IX, § 3.

⁵⁸*Id.*

constitution says he effectively owns the water—water that the constitution also says is owned by the state.

Montanans rely and invest heavily on water rights, so certainty in this area is highly desirable. The constitution’s ambiguity both discourages investment and interferes with the best use of valuable water.

A new constitution should clear up the ambiguity. It also should prevent the Montana Supreme Court from upsetting people’s water rights, as it has done in the past.⁵⁹

One additional point: As explained below, the U.S. Supreme Court has ruled that state water “ownership” is merely a fiction to mean that the state retains the power to regulate water. References to state ownership should, therefore, be removed from the document, and the document should empower the legislature to enact reasonable regulations.

Poor Draftsmanship: Weaknesses in the Bill of Rights

Few, if any, parts of a constitution are more important than its bill of rights. In the Montana constitution, the bill of rights consists of Article II.

Because of the importance of a bill of rights, careful drafting is crucial. However, while much of the Montana bill of rights is well-written, other portions suffer from defects in scope and clarity.

One way to ensure clarity is to define carefully the meaning of terms. The Montana Constitution generally does not do that. Another way is to employ words and phrases whose meaning has been worked out over time. Yet the constitution’s drafters often invented terms without settled meanings. Consider the following clause:

“All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. . . .”⁶⁰

It is safe to say that no one knows what this provision means by a right “of pursuing life’s basic necessities.” The delegates did not fully explain it, and no legal sources explain it either. As a result, the list of unresolved questions about this “right” is very long. For example: Is a car a “basic necessity” in rural Montana? Is it a “basic necessity” in Missoula, where mass transit and bicycle lanes are available? Does it depend on whether the transit routes

⁵⁹In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, 311 Mont. 327, 55 P.3d 396 (2002) (changing priority rules for certain water rights retroactively).

⁶⁰MONT. CONST., art. II, § 3.

align with a person's commuting route to his workplace? Does it depend on how physically fit the person is? If a car is a "basic necessity," how new or reliable must it be?

Similar questions plague the "right to a clean and healthful environment." Among those questions are "How clean?" "How healthful?" "How do you measure cleanliness and health?" and "Who measures them?"

Moreover, these rights often conflict. If a car is a "basic necessity" but driving one degrades the environment, a conflict arises between the basic necessity and environmental rights. Similarly, the right to property surely includes the right to develop property, but property development may degrade the environment.

If, as some people seem to think, the environment always wins, then why? The constitution doesn't privilege some rights over others. It treats them all equally.

There is also the uncomfortable fact that exercise of a right may improve and degrade "cleanliness" and "health" at the same time. Construction of a new factory may increase pollution, but it also may make Montanans more prosperous. And in the long run, prosperity promotes both the environment⁶¹ and public health.⁶²

The wording quoted above ends with the phrase "in all lawful ways. . . ." It is unclear whether that phrase qualifies all the rights listed or merely "seeking their safety, health and happiness." If it qualifies all the rights listed, then it negates the value of the entire provision, because the legislature can limit a right merely by passing a law curbing it.

These are not minor or inconsequential problems. One effect of such vague and contradictory language is to invite the courts to impose their own views of public policy, rather than leave such matters to the legislature.

Another provision in the bill of rights states:

"No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."⁶³

⁶¹Matthew Brown and Jane S. Shaw, *Prosperity and Environment*, Feb. 10, 1999, <https://www.perc.org/1999/02/10/prosperity-and-environment/>.

⁶²Xiao-Tong Niu, You-Cai Yang, & Yu-Cong Wang, *Does the Economic Growth Improve Public Health? A Cross-Regional Heterogeneous Study in China*, Jun 19, 2021, *Frontiers in Pub. Health*, <https://pmc.ncbi.nlm.nih.gov/articles/PMC8253366/>.

⁶³MONT. CONST. Art. II, § 9.

The intent behind this provision is honorable, and any new constitution should promote the value of transparency. But this provision bears the marks of 1970s judicial “balancing tests,” which left much discretion in the courts without always achieving their purpose.

In this balancing test, the values balanced are unclear. When the court puts the “demand of individual privacy” on the scale, does this mean only the individual’s demand for privacy? Or does it mean the societal value of respecting individual privacy? If so, then the privacy of what kind of individual? The particular person demanding privacy, even though he may be idiosyncratic in his demand? A political figure? Or the privacy interests of a hypothetical “reasonable person?”

And after you determine which “demand of individual privacy” you are balancing, then what does it really mean to balance it against “merits of public disclosure?” Neither the “demand of individual privacy” nor the “merits of public disclosure” have any physical weight to be balanced.

Two results of provisions like these are (1) a mass of litigation and (2) a lot of guesswork by judges who have no training or expertise in public policy.

Similar problems plague the following provision:

“The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”⁶⁴

The phrase “compelling state interest” is an incomplete version of a U.S. Supreme Court balancing test. The complete formula is that

- the state has the burden of proving
- that its enactment is necessary (or “narrowly tailored”)
- to further a compelling state interest (or compelling government purpose).

The Montana constitution doesn’t tell us whether the first two prongs of this formula are included. It also requires the “showing” of a compelling state interest, which is different from proof that that the challenged enactment “furthers” that interest.

If the constitution does incorporate the entire U.S. Supreme Court formula, then we still must ask if there is a better way to protect privacy. The Supreme Court’s formula often is arbitrary in application, because a judge’s political views can color whether he or she finds a particular policy “compelling.” In a notorious case decided in 1944, the majority of Supreme Court justices

⁶⁴*Id.*, art. II, § 10.

ruled that an official desire to herd tens of thousands of American citizens into concentration camps somehow qualified as a “compelling interest.”⁶⁵

Another example of a problematic provision in the bill of rights is this one:

“No armed person or persons or armed body of men shall be brought into this state for the preservation of the peace, or the suppression of domestic violence, except upon the application of the legislature, or of the governor when the legislature cannot be convened.”⁶⁶

This provision doesn’t specify to whom it applies. Does it ban importations only by units of government? Or does it ban importations by companies and other private parties? Or does it ban both public and private importations? This question has caused confusion, and continues unresolved.⁶⁷

Finally, in 2024 the voters added Article II, Section 36, an abortion measure, to the bill of rights. Although it passed handily, its drafting problems were many.⁶⁸ A convention could correct and clarify its language.⁶⁹

Legal Defects

The Montana Constitution contains at least three provisions that conflict with the U.S. Constitution or otherwise with U.S. Supreme Court cases. They are as follows:

- The constitution bans aid to “sectarian” institutions.⁷⁰ The term “sectarian” traditionally is a code word⁷¹ mandating religious discrimination.⁷² At the 1972 convention, the delegates were warned not to insert it. But they did so anyway, and the U.S. Supreme Court has since ruled that it violates the U.S. Constitution’s First Amendment.⁷³ The provision is now a nullity.
- The constitution purports to impose term limits on members of Congress.⁷⁴ State-imposed term limits on members of Congress were declared unconstitutional by the U.S. Supreme Court 31 years

⁶⁵Korematsu v. United States, 323 U.S. 214 (1944).

⁶⁶MONT. CONST., art. II, § 33.

⁶⁷Robert G. Natelson, “No Armed Bodies of Men”—Montanans’ Forgotten Constitutional Right, 63 MONT. L. REV. 1 (2002).

⁶⁸Robert G. Natelson, *Memorandum on CI-128*, Sept. 4, 2024, available at <https://www.montanafamily.org/wp-content/uploads/2024/09/2024-0905-Natelson-CI-128.pdf>.

⁶⁹A very recent Montana Supreme Court case highlighted problems with yet another undefined term in the state bill of rights: the purported right to “dignity.” Arguably, this provision is merely a recital introducing the state’s equal protection clause, but in *Kalarchik v. Montana*, 427 Mont. 333, 587 P.3d 784 (2026), the court seized upon it to justifying imposing new rules for state identification documents.

⁷⁰MONT. CONST., art. I, § 6.

⁷¹Robert G. Natelson, *Why Nineteenth Century Bans on “Sectarian” Aid Are Facially Unconstitutional: New Evidence on Plain Meaning*, 19 FED. SOC’Y REV. (2018).

⁷²David B. Kopel, *Brief of Amicus Curiae Independence Institute in Support of Petitioners, Espinoza v. Dept. Of Revenue*, 591 U.S. 464 (2020), available at https://www.supremecourt.gov/docketpdf/18/18-1195/116271/20190918160241100_tsac-18-1195-Independence-Institute-brief.pdf.

⁷³*Espinoza v. Montana Department of Revenue*, 591 U.S. 464 (2020).

⁷⁴MONT. CONST., art. IV, § 8.

ago.⁷⁵ That provision also is a nullity.

- Yet another section avers that, “All . . . waters . . . are the property of the state. . . .”⁷⁶ But the U.S. Supreme Court says that’s not true—that claiming the water is the property of the state is merely a legal fiction for saying that the state can regulate water.⁷⁷

Authoritarian Mandates

The Montana Constitution often is advertised as populist document that protects individual rights and ensures government by the people.⁷⁸ Yet it imposes mandates on individuals discordant with those values, and are potentially subject to grave abuse.

For example, the constitution imposes a duty on “each person” to “maintain and improve a clean and healthful environment.”⁷⁹ Does this mean state may impose *corvée* in the form of forced labor for environmental cleanup? Does it mean a person cannot develop his property unless the development serves “compelling” government interests—as the Montana Supreme Court has suggested?⁸⁰

Similarly, while purportedly protecting listed rights, the bill of rights qualifies those rights with vague language about “corresponding responsibilities.”⁸¹ The constitution sometimes limits the rights, but it does not limit the responsibilities. So presumably, the legislature may define the responsibilities. Could the legislature enact a law stating that the right of free speech is contingent on the responsibility of not criticizing the legislature? The U.S. Constitution protects us from a law like that. But it is not clear that the Montana constitution does.

Another provision in the bill of rights prohibits private parties (as well as the state) from discriminating, “against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”⁸² Does it violate the Montana constitution for religious denominations to limit membership to fellow believers? Must a political party admit opponents to voting membership? Is it unconstitutional for individuals to choose spouses and friends based partly on their “sex,” “culture” or “ideas?”

As noted above, one provision in the bill of rights prohibits hiring armed personnel from out-of-state,⁸³ but it remains unclear whether this clause

⁷⁵U.S. Term Limits v. Thornton, 514 U.S. 779 (1995).

⁷⁶MONT. CONST., art. IX, § 3.

⁷⁷Sporhase v. Nebraska, 458 U.S. 941 (1982).

⁷⁸E.g., LOPACH, *supra* note 8, at 10 (“Throughout the 1972 document were echoes of high-plains populism”).

⁷⁹MONT. CONST., art IX, § 1.

⁸⁰Cape-France Enterprises v. Estate of Peed, 305 Mont. 513, 29 P.3d 1011 (2001).

⁸¹MONT. CONST., art. II, § 3.

⁸²*Id.*, art. II, § 4.

⁸³MONT. CONST., art. II, § 33.

bans private importations. If it does bar private importations, it would be unconstitutional for a person or company subjected to death threats or crime to hire an out-of-state security firm for protection.

A constitutional convention could remove, or at least limit, the current constitution's authoritarian mandates.

Inadequate Safeguards

In one respect, government is like water: necessary for life, but too much can drown you. Thus, in addition to creating, structuring, and empowering government, a state constitution should limit it. Specifically, the constitution should protect the rights of the people, guard against corruption, and ensure that the entire system works fairly and efficiently.

The drafters of the 1972 constitution recognized the need for some limits—hence the protections of the bill of rights and the restriction on debt set forth in Article VIII, Section 8. But they were fundamentally pro-government and were repelled by the extensive limits imposed by the 1889 constitution. Perhaps they saw those limits as justified only by a 19th century need to guard against corporate corruption.⁸⁴

If so, then they made a serious mistake. For corruption, waste, and abuse can arise from many sources. If corporations are controlled by corrupt people, then corporations certainly will spread corruption. But corruption can arise from other special interests, including those supposedly dedicated only to the public good. Corruption also can fester within government itself. Today, government spending in the United States consumes nearly 38 percent of Gross Domestic Product—and that does not count the costs of complying with government regulations. If only for that reason, in modern times government actors probably are more likely to be the source of corruption, waste, and abuse than any other segment of the population.

Some safeguards for a convention to consider are suggested in other portions of this Issue Paper. For example, the convention should propose corrective language to prevent government officials from invading individual rights.⁸⁵ The convention should recommend repeal of the authoritarian mandates.⁸⁶ It should limit abuses by the Montana Supreme Court by, for example, repealing all or most of its original (trial) jurisdiction and transferring some of its power—such as that over attorney discipline and education—to independent agencies.⁸⁷

⁸⁴*Cf.* LOPACH, *supra* note 8 at 2 (claiming that the protections in 19th century state constitutions were the result of “the corrupting influence that private corporations had gained over state governments . . .”).

⁸⁵See below.

⁸⁶See below.

⁸⁷The uniquely and over-powerful position occupied by the court in the Montana political system is reviewed in ROBERT G. NATELSON, *THE MONTANA SUPREME COURT V. THE RULE OF LAW 5* (Montana Policy Inst., 2012), *available at* <https://natelsonrob.com/wp-content/uploads/2025/07/The-MT-Supreme-Court-VS-The-Rule-of-Law.pdf>.

See also NATELSON, *FRONTIER*, *supra* note 1, at 80 (discussing the conflicts of interest in a prominent attorney discipline).

Perhaps most importantly, the convention should insert financial protections present in other state charters, but lacking in the Montana constitution.

Inadequate Safeguards: Lack of Fiscal Protections

Representative democracy has many advantages. But it also has some disadvantages. Experience has shown that, over time, legislative decision-making is inherently biased toward more debt, taxes, and spending. This is because the special interests that benefit tend to be better organized, and therefore more effective at lobbying, than the majority that pays the bills.

A dramatic illustration of this occurred during the 1840s. Severe overspending drove several states into bankruptcy or near-bankruptcy. As a result, states began to insert fiscal restrictions into their constitutions.⁸⁸ Today, Vermont is the only state whose constitution lacks them.

Fiscal restrictions take several forms.⁸⁹ Some impose fixed maximums on taxes, spending, or debt. Some ban particular kinds of fiscal measures. Some require special procedures for approving increases in debt, taxation, or spending. These procedures usually include a vote of the people or a legislative super-majority.

Some fiscal restrictions are durable, but others have loopholes or are otherwise poorly written. In addition, courts often are hostile to them. In Colorado, for example, the courts have greatly weakened that state's celebrated "Taxpayer's Bill of Rights" (TABOR).⁹⁰

Having learned from history, the delegates who wrote the 1889 Montana constitution included a variety of fiscal restrictions. Their constitution flatly prohibited certain kinds of spending. It granted the legislature no power to impose sales or personal income taxes.⁹¹ Above fixed amounts, the 1889 charter required voter approval of state tax rates and of state and local debt.

These restrictions frustrated pro-spending lobbies, which provided much of the force behind the movement to adopt the 1972 constitution. The historical record before and during the 1972 convention shows that, while the delegates meant well, few understood the history behind fiscal restrictions or the reasons for them.

⁸⁸Wallis, *supra* note 15.

⁸⁹Robert G. Natelson, *TAX AND SPENDING LIMITS FOR MONTANA?* (Independence Inst., 1994), available at <https://natelsonrob.com/wp-content/uploads/2025/07/tel-study.pdf>.

⁹⁰ROBERT G. NATELSON, *THE COLORADO TAXPAYER'S BILL OF RIGHTS* (Independence Inst., 2016), available at https://natelsonrob.com/wp-content/uploads/2018/04/Natelson_TABOR_book.jpg.

⁹¹In 1934, the constitution was amended to allow imposition of an income tax. MONT. CONST. (1889), art. XII, § 1(a) ("The Legislative Assembly may levy and collect taxes upon incomes of persons, firms and corporations for the purpose of replacing property taxes. These income taxes may be graduated and progressive and shall be distributed to the public schools and to the State Government."), available at <https://50constitutions.org/mt/constitution/section-id>

Even so, the 1972 delegates did not reject fiscal limits entirely. The current constitution requires a balanced state budget,⁹² and it requires either a public vote or a legislative super-majority to create state debt.⁹³ In 1994, the voters added C-27, which purportedly limited any future general sales tax to four percent.⁹⁴ However, C-27 was composed by sales tax advocates, and so was written to be easily evaded.⁹⁵ In sum, the present constitution's fiscal curbs are minimal—as Montanans learn anew whenever they receive their property tax bills.

In response to this lack of fiscal protection, in 1998 voters inserted Constitutional Initiative 75 into the constitution. CI-75 imposed no absolute limits, but it required voter approval of new taxes and tax increases.⁹⁶ It also required popular endorsement of tax hikes deriving solely from property valuation increases. As noted below, however, the state supreme court quickly voided it.

A popular convention could propose a new constitution that included CI-75 or something very much like it. One justification for doing so is that CI-75 already has been approved by the electorate. Another is that, at least as a matter of legal form, it is still part of the state constitution, because, as the U.S. Supreme Court has made clear,⁹⁷ it is unconstitutional for authorities (including judges) to impose new election rules on elections already held. Moreover, CI-75's populist approach (captured by the slogan "have a say in what you pay")⁹⁸ is more consistent with the Montana tradition than some other approaches to tax limitation.

Other options for the convention include requirements that certain tax or spending increases be approved by legislative super-majorities, a strengthened version of the current easily evadable four percent sales tax limit, and a rule that all or some local expenditures must be covered by local, rather than state, revenues.

⁹²MONT. CONST., art. VIII, § 9.

⁹³*Id.*, art. VIII, § 8.

⁹⁴*Montana Sales Tax Limit, C-27 (1994)*, BALLOTPEdia, [https://ballotpedia.org/Montana_Sales_Tax_Limit,_C-27_\(1994\)](https://ballotpedia.org/Montana_Sales_Tax_Limit,_C-27_(1994)). The measure became MONT. CONST., art. VIII, § 16 ("The rate of a general statewide sales tax or use tax may not exceed 4%.").

⁹⁵C-27 limits only a "general statewide sales tax or use tax." However, "general" is undefined. It could be merely a duplication of "statewide"—that is, not local. Or it could mean "on all goods and services," in which case any levy imposed on fewer than all goods and services would not be "general."

Even if "general" denotes any tax with a wide incidence, the limitation could be avoided by enacting separate impositions on different bases—such as a five percent tax on some goods and a six percent levy on others—in which case neither tax would be "general," so both would be exempt from the limit.

The hostility the shown by state judiciaries to tax and expenditure limitations, coupled by the Montana Supreme Court's course of decisions, indicate that such maneuvers would almost certainly survive judicial review. Indeed, one can argue that C-27 already is being evaded. The legislature has imposed a four percent lodging sales tax, MONT. CODE ANN. § 15-68-102, added to a four percent lodging facility use tax. *Id.*, § 15-65-111.

⁹⁶Montana Constitutional Initiative 75, available at <https://natelsonrob.com/wp-content/uploads/2025/12/CI-75.pdf>.

⁹⁷*Bush v. Gore*, 531 U.S. 98 (2000).

⁹⁸This slogan, deployed by CI-75's proponents, took the state by storm. It was the brainchild of the Clayton Fiscus of Billings (1936-2020), who was instrumental in the passage or defeat of several statewide ballot measures and later served two terms in the state legislature (2013-2017).

Sometimes the most influential Montanans are not those mentioned in the history books or honored with awards or statues in the Capitol. A similarly influential grass-roots figure was Walter Dupea (1929-2005), a Bigfork, Montana businessman, who also played a major role in ballot issues during the 1980s and 1990s.

Correcting the Montana Supreme Court

The Montana constitution contains some provisions that are more or less unobjectionable, but which the state supreme court has distorted badly. One task of the convention will be to revise them to correct judicial misinterpretations.. Among these provisions are the terms covering environmental rights, property rights, legislative powers, and the amendment process. This section of the paper addresses the first three. Discussion of the amendment process is deferred to the next section.

Restoring the Voters' Understanding of the Environmental Rights

During the 1972 public debates over the constitution, opponents raised the possibility that the courts would use the document's two environmental rights to dictate policy to the legislature. To reassure the voters, advocates told them that the rights were not "self-executing." This meant that only the legislature, not the courts, would define them.⁹⁹

Beginning in the late 1990s, however, the Montana Supreme Court disregarded those assurances and exploited the constitution's vagueness to impose its own environmental policies.¹⁰⁰ This was an abuse of the judicial function. In a democratic republic, policy is made by the people and their representatives, not by the courts. A new constitution could restore the voters' understanding of those provisions.

Protecting Property and Guarding Against Expropriation

A plethora of research has found that economic prosperity depends on secure property rights.¹⁰¹ The insecurity of property rights was one reason Montana lagged economically for so long. Moreover, property owners serve as a necessary counterbalance to government power. And protecting the benefits people earn is simple justice.

In general, the constitution handles property rights well. It declares that "All persons are born free and have certain inalienable rights. They include . . . acquiring, possessing and protecting property . . ."¹⁰² It also recognizes the right to keep and bear arms in defense of one's home, person, and property,¹⁰³ and declares that courts of justice shall be open to remedy injuries to property.¹⁰⁴

⁹⁹*Supra* note 30. This was still the understanding in 1983. LOPACH, *supra* note 8, at 12 (stating, of the environment rights, "This unique safeguard, however was heavily dependent on legislative implementation as provided in the environment and natural resources article").

¹⁰⁰The pivotal case was *Montana Environmental Information Center v. Dep't of Environmental Quality*, 296 Mont. 207, 988 P.2d 1236 (1999).

¹⁰¹The literature on this subject is massive. See, e.g., Bernhard Heitger, *Property Rights and their Impact on the Wealth of Nations—A Cross-Country Study*, 23 CATO J. 381 (2004), available at https://ciaotest.cc.columbia.edu/olj/cato/v23n3/cato_v23n3heb01.pdf; Timothy Besley & Maitreesh Ghatak, *Property Rights and Economic Development*, in *DEVELOPMENT ECONOMICS* (Dani Rodrick & Mark Rosenzweig, eds. 2010), available at <https://personal.lse.ac.uk/ghatak/handbook.pdf>.

¹⁰²MONT. CONST., art. II, § 3.

¹⁰³*Id.*, art. II, § 12.

¹⁰⁴*Id.*, art. II, § 16.

Further, it follows the U.S. Constitution’s Fifth and Fourteenth Amendments by stating that “No person shall be deprived of life, liberty, or property without due process of law.”¹⁰⁵ And like the Fifth Amendment, it ensures that when government seizes property the owner is compensated.¹⁰⁶ Indeed, it goes beyond the Fifth Amendment by requiring compensation when government merely *damages* property.

However, the Montana Supreme Court often has betrayed the state constitution’s commitment to property rights. The most notorious example is its subordination of property rights to the court’s erroneous reading of the constitution’s two environmental rights.¹⁰⁷ But there are many other examples.

First: The justices support other guarantees in the bill of rights by ruling that state law cannot impair them unless the law is “necessary to further a compelling state interest.” But for reasons they have never explained, the justices deny the same protection to property rights.

Second: The court grants regulations restricting property rights “great deference”¹⁰⁸—but when, in 2013 and 2015, it encountered rare, and long-standing government regulations actually *protecting* property, the court overruled both of them.¹⁰⁹ In 2016, the court upheld the City of Missoula’s seizure of a water company,¹¹⁰ although the city’s decision was supported by no real reason other than socialist ideology.¹¹¹

Third: The court has effectively deleted the constitution’s requirement that owners be compensated when property is damaged rather than seized. Despite the clear difference in wording between the Montana and U.S. Constitutions, the court applies the less protective federal standard.¹¹²

Fourth: When a state law deliberately destroyed Montana businesses that formerly had been fostered and licensed by the state, the court denied any compensation at all. Even Justice Jim Nelson, one of the most left-leaning justices to serve in modern times, called this decision both unjust and “legally indefensible.”¹¹³

As noted earlier, a convention could restore the ratifiers’ understanding of the constitution’s environmental rights. It could add language clarifying that property rights are entitled to the same degree of protection as other rights. It could reaffirm that state damage as well as seizure requires

¹⁰⁵*Id.*, art. II, § 17.

¹⁰⁶*Id.*, art. II, § 29.

¹⁰⁷See above.

¹⁰⁸*Park County Environmental Council v. Montana Dep’t of Environmental Quality*, 402 Mont. 168, 477 P.3d 288 (2020).

¹⁰⁹*MC, Inc. v. Cascade City-County Board of Health v.* 378 Mont. 267, 343 P.3d 1208 (2015); *Williams v. Board of Comm’rs of Missoula County*, 371 Mont. 356, 308 P.3d 88 (2013).

¹¹⁰*City of Missoula v. Mountain Water Co.*, 384 Mont. 193, 378 P.3d 1113 (2016).

¹¹¹*NATELSON, FRONTIER*, *supra* note 1, at 39.

¹¹²*Letica Land Co. v. Anaconda-Deer Lodge County*, 394 Mont. 218, 435 P.3d 634 (2019).

¹¹³*Kafka v. Montana*, 348 Mont. 80, 201 P.3d 8, 33 (2008) (Nelson, J., dissenting).

compensation. And it could guard against state or local expropriations except in closely defined circumstances.

Restoring Rightful Power to the Legislature

Despite Article II, Section 1’s statement about political power being derived from the people, the Montana Supreme Court has repeatedly claimed that the constitution is *not* a grant of power to the state from the people—that it is merely a limitation on an otherwise omnipotent state government.¹¹⁴ This is an incredible statement for an American court to make.

The convention should insert a statement that affirms, in no uncertain terms, that the state has no power other than that granted by the people.

An irony in Montana constitutional law is that advocates drafted and promoted the 1972 constitution largely to increase the power and flexibility of the legislature, but the courts repeatedly have twisted the constitution’s provisions to circumscribe legislative policy decisions. One example is the Montana Supreme Court’s decision ruling that a law backing up the voter registration deadline by a single day somehow violated the constitution.¹¹⁵

Another example consists of two cases overruling measures to allow people to vote for supreme court justices in particular districts. The earlier case held that the legislature could not add qualifications for judges, even though the constitution says it can.¹¹⁶ Both cases held that district election of state supreme court justices would be “inimicable to the judicial function,”¹¹⁷ even though district election of state supreme court justices is well established throughout the United States.¹¹⁸

The willingness of the courts to strike down democratically enacted legislation on dubious grounds has given rise to a phenomenon that may be unprecedented in American history: the filing, within only five years, of more than 70 lawsuits to overturn enacted legislation on constitutional grounds.¹¹⁹

The convention should consider reforms that curb judicial overreaching. These reforms include heightened rules for judicial standing, limits on the state supreme court’s original jurisdiction, and other procedural changes. They also should include language clarifying some of the constitution’s most frequently abused terms.

¹¹⁴*E.g.*, Board of Regents v. Montana, 409 Mont. 96, 512 P.3d 748, 751(2022) (also citing earlier example).

¹¹⁵Montana Democratic Party v. Jacobsen, 416 Mont. 44, 545 P.3d 1074 (2024). A still more recent example is All Families Healthcare v. Montana, 427 Mont. 238, 586 P.3d 803 (2026) (striking down healthcare provider regulations).

¹¹⁶MONT. CONST., art. IV, § 4 (“Any qualified elector is eligible to any public office except as otherwise provided in this constitution. The legislature may provide additional qualifications . . .”).

¹¹⁷Reichert v. State ex rel. McCulloch, 365 Mont. 92, 278 P.3d 455 (2012); McDonald v. Jacobsen, 409 Mont. 405, 515 P.3d 777 (2022).

¹¹⁸At least four states currently elect their supreme court justices by district: Kentucky, Oklahoma, Oregon, and South Dakota. Historically, many other states have done so. In the territory of Montana, each of the three supreme court justices was required to reside in a different district.

¹¹⁹Kyle Schmauch, 2025 *Litigation Tracker* (Montana State Legislature), available at <https://natelsonrob.com/wp-content/uploads/2026/03/2025-MT-Litigation-tracker.xlsx>.

Restoring Rightful Power to the People: Ending the Supreme Court's Veto on Constitutional Amendments

The most serious aspect of the Montana Supreme Court's conduct has been its misuse of a single administrative section in the constitution to award itself an absolute veto over the amendment process. I outlined this process in a 2012 paper¹²⁰ and in a 2024 update,¹²¹ but since that time the court's undemocratic and abusive amendment practices have only accelerated. This part of the paper brings the story up to date.

Under the 1889 Montana constitution,¹²² only the legislature could propose amendments to the voters. Legislative amendments, like most other bills, had to comply with a "single subject rule."¹²³ This rule required that all parts of a proposed amendment serve a common purpose. Although the single subject rule potentially gave the courts a qualified veto over amendments, the courts rarely applied it. Rather, its practice was to defer to the people's judgment on whether to approve amendments.

During the 1972 ratification campaign, a major selling point for the new constitution was that it would be easier to amend. This was so because the new document allowed the people to adopt amendments through the voter initiative process, which was not limited by the single-subject rule.¹²⁴

In 1998, Montanans approved Constitutional Initiative 75.¹²⁵ CI-75 was a state constitutional amendment allowing the people to vote on most tax increases. It was designed to fill a gap in the 1972 constitution, which lacked the comprehensive fiscal protections that had been in the 1889 constitution and that prevail in the constitutions of many other states.

Pro-spending interests loathed CI-75. After campaigning unsuccessfully against it in the election, several groups benefiting from government spending asked the Montana Supreme Court to reverse the election results. The case was *Marshall v. Montana*.¹²⁶

Almost any other court would have dismissed the case summarily. Imposing new election standards on an election already held violates the U.S.

¹²⁰*Supra* note 87.

¹²¹NATELSON, FRONTIER, *supra* note 1.

¹²²Available at <https://natelsonrob.com/wp-content/uploads/2025/12/1889-MT-Const.pdf>.

¹²³*E.g.*, State ex rel. Corry v. Cooney, 70 Mont. 355, 225 P. 1007 (1924).

¹²⁴The 1972 constitution, although adopted after "single subject" case law, contained no single subject rule limitation. See State of Montana ex rel. Mont. Citizens for the Pres. Of Citizens' Rts. V. Waltermire, 224 Mont. 273, 729 P.2d 1283 (1986) and State of Montana ex rel. Mont. Sch. Boards Ass'n. V. Waltermire, 224 Mont. 296, 729 P.2d 1297 (1986) (holding that a constitutional challenge to a ballot measure could not proceed prior to the election unless the measure was "facially invalid" while acknowledging that multiple subjects did not render a measure facially invalid); Mont. Ass'n of Counties v. Montana, 389 Mont. 183, 404 P.3d 733 (2017) (ruling that the single subject rule does not apply to constitutional initiatives).

¹²⁵Montana Constitutional Initiative 75, available at <https://natelsonrob.com/wp-content/uploads/2025/12/CI-75.pdf>.

¹²⁶293 Mont. 274, 975 P.2d 325 (1999).

Constitution.¹²⁷ Further, the plaintiffs had no standing to sue because no tax increase for their benefit had yet been proposed, much less voted down. Additionally, the plaintiffs alleged the presence of an “emergency” based on unproven factual claims.

CI-75’s drafters—of which your author was one—had anticipated some judicial hostility, and over a six-month drafting period had been careful to comply with all existing rules. In fact, even though the single subject rule was inapplicable to constitutional initiatives, the authors complied with that as well: They ensured that the initiative was tightly integrated and every part focused on the single purpose of ensuring that proposed tax hikes were subject to fair referenda. In keeping with good drafting practice, the authors listed three sections of the existing constitution affected by the amendment.

Still, the Montana Supreme Court reversed the election results. The court’s opinion addressed neither the standing issues nor the factual disputes. Instead, it held that CI-75 violated Article XIV, Section 11 of the state constitution, which reads as follows:

“If more than one amendment is submitted at the same election, each shall be so prepared and distinguished that it can be voted upon separately.”

The court claimed that because CI-75 expressly changed three sections of the constitution, it comprised three separate amendments and should have been presented to the voters in three disconnected parts. As its principal authority, the court relied on and extended an Oregon case¹²⁸ that had not been decided when state officials approved CI-75 for petition circulation. The court retroactively overruled five of its own case precedents—three expressly,¹²⁹ and two by implication.¹³⁰

The court’s claim that each “change” to the constitution is a separate amendment is utterly unsupported by traditional legal and linguistic usage. Rather, the content of an amendment is determined, first, by its proposers and, ultimately, by its ratifiers. One need go no further than the U.S. Constitution to see this. The Fifth Amendment addresses the separate issues of jury trials, double jeopardy, self-incrimination, due process in general, and takings of property.¹³¹ It thereby makes substantial changes to the Article I powers of Congress and the Article III judiciary powers. The Fourteenth Amendment is even more extensive: It affects citizenship, representation in Congress, public debt, due process, qualifications for office, and how state laws are applied.¹³² Moreover, even where an

¹²⁷Bush v. Gore, 531 U.S. 98 (2000).

¹²⁸Armatta v. Kitzhaber, 327 Or. 250, 959 P.2d 49 (1998).

¹²⁹State v. Board of Commissioners, 34 Mont. 426, 87 P. 450 (1906); State v. Alderson, 49 Mont. 387, 142 P. 210 (1914), and State v. Cooney, 70 Mont. 355, 225 P. 1007 (1924).

¹³⁰State of Montana ex rel. Montana Citizens for the Preservation of Citizens’ Rights v. Waltermire, 224 Mont. 273, 729 P.2d 1283 (1986) and State of Montana ex rel. Montana School Boards Assn. v. Waltermire, 224 Mont. 296, 729 P.2d 1297 (1986).

¹³¹U.S. CONST., amend. V.

¹³²*Id.*, amend. XIV.

amendment does have a single purpose, several changes may be necessary to effectuate that purpose.

The *Marshall* opinion handled these facts by disregarding them.

The history of Article XIV, Section 11 demonstrates that it is a mere direction to the secretary of state not to bundle proposals coming from different sources—in other words, to allow the electorate to vote separately on CI-75, CI-76, and CI-77.¹³³ But the court’s opinion disregarded the provision’s history.

Because of the retroactive nature of the *Marshall* decision, a challenge in federal court likely would have resulted in it being overturned as a violation of the U.S. Constitution’s Fourteenth Amendment. Indeed, a prominent lawyer with experience litigating such matters actually agreed to handle a federal court challenge on a pro bono basis.¹³⁴ Unfortunately, the *Marshall* decision left supporters so discouraged that they could not raise the funds necessary to meet the prospective lawsuit’s out-of-pocket expenses.

Further Developments

When the Montana Supreme Court handed down the *Marshall* decision, observers (including your author) warned that a failure to challenge it would encourage the court to expand its power further. This is precisely what happened.

In *Montana Association of Counties v. Fox*¹³⁵ (referred to hereinafter as the “MACO case”), the court addressed the constitutionality of CI-116, a victim’s rights measure that added a single section to the constitution. Unlike CI-75, this initiative did not list changes to existing sections. Nevertheless, the court struck it down.

The MACO case altered the *Marshall* rule. The court stated as follows:

- An implied (as opposed to express) alteration in any part of the constitution constituted a change.

¹³³The language apparently originated in the 1845 New Jersey Constitution. That state’s high court construed it to regulate only how an amendment was presented to the voters, not its content. *New Jersey v. Sec’y of State*, 62 N.J.L. 107, 40 A. 740, 746 (1898). Additionally, Article XVI, Section 13 of the abortive 1884 constitution read in part: “Any amendments to this Constitution may be proposed in either house of the Legislative Assembly. . . And the *Secretary of State* shall cause the said amendment or amendments to be published . . . Should more amendments than one be submitted at the same election, they shall be so prepared and *distinguished by number or otherwise* that each call be voted upon separately.” (Italics added.) Similarly, MONT. CONST. (1889), art. XIX, §9 provided: “Should more amendments than one be submitted at the same election, they shall be so prepared and distinguished by numbers or otherwise that each can be voted upon separately; provided, however, that not more than three amendments to this constitution shall be submitted at the same election.” (Italics added.)

¹³⁴ He was Paul K. Grant of Parker, Colorado, who previously had litigated and won *Meyer v. Grant*, 486 U.S. 414 (1988), in which the U.S. Supreme Court voided state legislative restrictions on the amendment process. See <https://natelsonrob.com/wp-content/uploads/2026/03/Paul-K.-Grant.pdf>.

¹³⁵389 Mont. 183, 404 P.3d 733 (2017).

- In counting the number of changes, the added wording was one change and each of its effects constituted additional changes. Thus, if a proposal removed a single word in the constitution, the proposal was one amendment and the removal was another.
- All these changes must be “closely related.”

As for what was, and was not, “closely related,” the court added:

“[N]umerous factors may be considered in determining whether the provisions of a proposed constitutional amendment are ‘closely related.’ These factors may include whether various provisions are facially related, whether all the matters addressed concern a single section of the constitution, whether the voters or the legislature historically has treated the matters addressed as one subject, and whether the various provisions are qualitatively similar in their effect on either procedural or substantive law.”¹³⁶

As a practical matter, the *MACO* holding gave the court an absolute veto over any amendment. Because the court double-counts an amendment’s wording as one change and its effect as another, it *always* can find that a proposal consists of at least two amendments. Further, the court’s open-ended list of “numerous factors” with enables it to find that any proposed amendment’s changes are not “closely related.”

The court calls this the “separate vote” rule, but it is not a “rule” in any real sense, because it has no boundaries.

In the 2023 case of *Montforton v. Knudsen*,¹³⁷ the proposed initiative was a single-section, tightly worded proposal for controlling property taxes. Even the court admitted that all of the subjects addressed were “conjoined.” But the court voided the initiative as causing changes that were not closely related because they affected property tax decisions made by different parts of the state bureaucracy.

On the other hand, when the justices like an amendment, it survives. Less than two months after voiding the proposal in *Montforton*, the court upheld a proposed amendment in *Montanans for Election Reform Action Fund v. Knudsen*.¹³⁸ This proposal (subsequently defeated by the voters) would have enacted a sweeping revision of the state’s election rules. It also would have limited the power of the legislature and altered multiple administrative functions at different levels of government. The court disregarded the *MACO*

¹³⁶404 P.3d at 742 (cleaned up).

¹³⁷413 Mont. 367, 539 P.3d 1078 (2023).

¹³⁸414 Mont. 135, 545 P.3d 618 (2023).

“double-counting” rule and claimed—falsely—that the measure would not affect the legislature’s authority to regulate elections.

The following year, the court decided *Montanans Securing Reproductive Rights v. Knudsen*.¹³⁹ This case upheld a proposed amendment expanding the right to abortion, even though it clearly altered both the scope of the legislative power and the constitution’s privacy right.¹⁴⁰ Like the proposal in *Montforton*, it also changed the decision-making process in different branches of government—altering rules of criminal law, health law standards, and standards of judicial review. Yet the court concluded that the measure represented “a single change to the Montana Constitution on a single subject.”

In 2025, the court veered back to hyper-strict review. *Montanans for Nonpartisan Courts v. Knudsen*¹⁴¹ voided a proposal to require non-partisan elections of judges. The proposed amendment was very short, and the court did not specify what sections of the constitution it altered. But the justices alleged that it would affect future, unelected judgeships and that “the Legislature has historically treated the issue of nonpartisan judicial elections separately from the issue of whether judges are elected or appointed.”

In *Transparent Election Initiative v. Knudsen* (2026),¹⁴² the court resuscitated *MACO* double-counting to void a proposed amendment defining the powers of “artificial persons” (i.e., corporations and certain other entities). The court claimed that the measure constituted two changes: (1) revoking all powers and (2) regranting some. The court did not identify any constitutional provisions altered by the measure.

On the other hand, *Kendrick v. Knudsen*,¹⁴³ issued the following month, the court approved a sprawling revision of Montana’s citizen initiative laws. In defiance of such cases as *MACO* and *Montforton*, the court claimed that a measure that “interacted” with existing constitutional provisions was not necessarily a change.

There is no way to reconcile these disparate holdings. What the justices seem to be doing is employing severe standards for proposals they dislike, while assessing those they like with a deferential “single subject” or “common purpose” standard.

As the timing of these decisions indicate, the court’s political “picking and choosing” among proposed amendments is accelerating quickly.

¹³⁹415 Mont. 416, 545 P.3d 45 (2024).

¹⁴⁰MONT. CONST., art. II, § 10.

¹⁴¹425 Mont. 51, 579 P.3d 536 (2025).

¹⁴²426 Mont. 10, 581 P.3d 1285 (2026).

¹⁴³426 Mont. 367, ___ P.3d ___ (2026) (blank page numbers indicate that the case reporter has not yet assigned them).

If no other factor justified a new convention, the court’s anti-democratic behavior certainly would: Because of its arbitrary veto over the amendment process, Montanans are no longer in charge of their own political destiny. If they wish to recover their own government, they have no choice but to bypass the amendment process and call a convention.

Conclusion

A new constitutional convention will offer “We the people of Montana” an historic opportunity to restore responsible government and popular control within their own state. Further, a convention will enable Montanans to clarify state constitutional law—and to enact crucial safeguards to protect their freedom and their prosperity.

But Montanans will benefit from that opportunity only if they vote for a constitutional convention when the question is next on the ballot in 2030. In view of the importance of the decision, Montanans should begin to consider it now.

Nothing in this publication shall be construed as an attempt to aid or hinder the passage of any legislation.

SUMMARY & KEY FACTS

This paper argues that while Montana’s 1972 Constitution contains many strengths, it also includes significant flaws, which have been compounded by decades of Montana Supreme Court decisions. A constitutional convention vote presents an opportunity to modernize the document, clarify ambiguous provisions, restore legislative accountability, and allow Montana voters to reconsider the state’s foundational governing document.

- Montanans will vote in 2030 on whether to hold a constitutional convention.
- The 1972 Constitution has been amended 38 times, suggesting it deserves a comprehensive review.
- There are four kinds of major flaws: poor drafting, legal conflicts, vague mandates, and weak limits on government.
- The Montana Supreme Court has invaded the rights of the people and legislature by interpreting the Constitution in unjustified ways.
- A convention could propose revisions that preserve the Constitution’s strengths while correcting its weaknesses.
- Any proposed revisions would have to be approved by the voters to become effective.

ABOUT THE AUTHOR

After many years in law practice, Robert G. (“Rob”) Natelson served as a law professor at the University of Montana from 1987 to 2010. He is Senior Fellow in Constitutional Jurisprudence at Mountain States Policy Center, where he focuses on Montana issues, and holds the same title at the Independence Institute and the Centennial Institute, both in Colorado.



Professor Natelson’s research studies have been cited by U.S. Supreme Court justices 41 times—one of the highest tallies of any currently-active constitutional scholar. His work also has been cited by many federal appeals courts, and by the supreme courts of 18 states, including Montana. On several occasions, he has served as a designated advisor for the Montana legislature.

He is an active hiker and skier and an enthusiastic explorer of Montana’s mountain ranges. He divides his time between Montana and Colorado, but most of his family lives in Montana.

