YOU SWORE AN OATH…

INFORMATION EVERY MONTANA LEGISLATOR NEEDS TO KNOW…

ABOUT THE CONSTITUTION OF THE STATE OF MONTANA

A QUICK REVIEW OF
INFORMATION EVERY MONTANA LEGISLATOR
NEEDS TO KNOW ABOUT
THE CONSTITUTION OF THE STATE OF MONTANA

The Montana Supreme Court has been infringing on the territory of both the Legislature and the Executive branches for many years. They have been like a cattle ranch which has let their cattle range on two neighboring ranches, the Executive, and the Legislature. Over time many have come to believe this trespassing is normal and lawful. The Supreme Court has taken on the fantasy of the Wizard of Oz, but Toto has pulled back the curtain, exposing them as nothing more than seekers of more and more power and control over our "republican" form of government, “We the People.”

This has happened because the Executive and the Legislature Branches have not defended their borders. These two branches have not fortified themselves, with a clear understanding of the Montana and U.S. Constitutions, nor the dangers of the judicial branch taking a dominant role.

Thomas Jefferson warned about Judicial Tyranny: “The opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves, in their own sphere of action, but for the legislature and executive also in their spheres, would make the Judiciary a despotic branch.” (Letter to Abigail Adams, September 11, 1804).

James Madison in the Federalist No. 47 warned, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”

U.S. Supreme Court in 1958 fulfilled Jefferson and Madison’s fears. In *Cooper v. Aaron* (1958) they anointed themselves ‘the supreme law of the land’. This is when the U.S. Supreme Court appointed themselves "supreme" through the façade of "judicial supremacy." The Supreme Court, there, relegated “WE THE PEOPLE,” the real supreme power of America, to no consequence.

The Montana Supreme Court followed suit in *McLaughlin v. Montana State Legislature*, 2021 M.T. 178. Justice Beth Baker wrote for the court: Even when a constitutional provision is non-self-executing because it commits authority to the Legislature, "the courts, as **final** interpreters of the Constitution, have the **final** `obligation to guard, enforce, and protect every right granted or secured by the Constitution . . . .'" She continues, "since the early 1800s, `the idea that the

Supreme Court had the power to pass upon constitutional questions, and that its decisions were **final** and binding upon the other two departments of government ha[s] been . . . widely accepted.'"

Notice how she claims judicial superiority by using "final" three times to gain **final** power over the executive and legislative branches. Remarkably, she does not claim the power from the supreme law of the land, the Constitution.

The question we should ask is, can the Supreme Court give themselves power that does not exist in the Constitution? Also, she does not define the duty of the Executive and the Legislature. She is implying only the Supreme Court, has this fundamental power to say what the law is. This is patently untrue.

Justice Marshal, in *Marbury v. Madison* referenced the Blackstone Commentaries, the paramount authority on the common-law, in the eyes of the American Founders. Blackstone Commentaries at 1:149-51 describes the result of merging of the judicial power with the power to create laws, as "despotic." Despotism is also the result where a court rewrites a law to meet its views.

Article VI of the U.S. Constitution was written by Madison. He said it was a check to ensure **none of** the departments of government can have supreme power, by requiring each department to look only to the Constitution as the supreme power. **Article VI provides EQUAL power** to ALL departments to protect the U.S. Constitution from being illegally used or misinterpreted and from all threats, both foreign and domestic, by requiring each department to follow the Constitution. This means we, the elected officials of Montana, **have not sworn an oath to be ruled by the Supreme Court**, but rather by both the U.S. and Montana Constitutions.

If the Supreme Court of the State of Montana continues to have the last word on all matters as it alleges, it will not matter what laws are passed by the representatives of the people or what bills the Governor signs into law. The court will reinterpret the law and change or make the law void as they are now doing. Thankfully, this is America and our Constitutional Republic prohibits the accumulation of all powers by any one branch of the government.

One of the oldest TRUE statements is “knowledge is power.” The Legislature has been over powered by the Supreme Court of Montana for years. To honorably and lawfully represent the people of Montana, each legislator must understand their authority within the Constitution of The State of Montana, or we will fail. To more fully understand your responsibility and power under the Constitution of the State of Montana, please read *Every Montana Legislator Has Sworn to Support, Protect and Defend the Constitution of the State of Montana.*

Justice Sotomayor Admits The Truth!

"[T]here is not anything in the [U.S.] Constitution that says that the Court, the Supreme Court, is the last word on what the Constitution means," Justice Sotomayor admitted during the December 1, oral argument in the Mississippi abortion case.[1]

The Supreme Court for the State of Montana's false claim to "judicial supremacy" is exposed by this truth. In stating this truth out loud, Justice Sotomayor destroys the Montana state supreme court's claim to "judicial supremacy," as asserted in the recent *McLaughlin*[2] case.

Both Justice Sotomayor and the supreme court for the State of Montana make the claim of "judicial supremacy" based upon the 1803 U.S Supreme Court case of *Marbury v. Madison*[3]. These claims of "judicial supremacy" are based upon a misreading. In fact they are based upon a complete inversion of the words in the *Marbury* case.

The critical language in *Marbury*, quotes the Constitution:

> **This Constitution,** and the Laws of the United States which shall be made in Pursuance thereof; and …under the Authority of the United States, **shall be the supreme Law of the Land…**

When Justice Sotomayor and the supreme court for the State of Montana speak of "judicial supremacy" they misdirect their audience to the *Marbury* case, when in fact they are referring to *Cooper v. Aaron* (1958)[4] wherein the United States Supreme Court justices anointed themselves the supreme law of the land. They wrote, "Article VI of the Constitution makes the Constitution the "supreme Law of the Land." … It follows that the interpretation of the Fourteenth Amendment enunciated by **this Court …is the supreme law of the land.**" In this case the Supreme Court, magically, **substitutes its interpretation of the Constitution for**

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[1] *Dobbs v. Jackson Women's Health*, United States Supreme Court, Transcript Oral Argument, December 1, 2021; https://www.supremecourt.gov › oral_arguments › argument_transcripts › 2021 › 19-1392_442

[2] *McLaughlin v. The Montana State Legislature*, OP 21-0173, 2021 MT 178, at 11.

[3] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803); https://www.supremecourt.gov/search.aspx?Search=marbury+v.+madison

[4] *Cooper v. Aaron*, 358 U.S. 1 (1958); https://supreme.justia.com/cases/federal/us/358/1/

the Constitution itself, as the supreme law of the land. The court makes this claim without reference to any such words in the Constitution and by inverting the words in *Marbury*.

The Constitution is the supreme law of the land, not an opinion of a court, any court. There cannot be more than one supreme law of the land. The term "supreme law" is singular. The Constitution does not abide a co-Supreme.

What does this truth-- **"[T]here is not anything in the [U.S.] Constitution that says that the Court, the Supreme Court, is the last word on what the Constitution means,"**--now stated and admitted out loud, mean for Montana legislators?

This and the following questions are answered in: *Every Montana Legislator Has Sworn to Support, Protect and Defend The Constitution of the State of Montana,* by Senator David Howard and James Rigby, Attorney at Law, Retired. ("Tract"[5]).

What duties do the Constitutions of the State of Montana and the United States impose upon Montana legislators? Tract, pages 6-7.

What powers does the Constitution of the State of Montana grant to the legislature, to execute its duties regarding the judicial branch? Tract, pages 9-13.

What checks and balances does the Constitution of the State of Montana impose upon the judicial branch? Tract, pages 8-14.

Does the judicial branch have the constitutional power to amend the Constitution of the State of Montana? Tract, page 12-13.

When the judicial branch claims a power not granted to it by the Constitution of the State of Montana, what is the legal effect of this claim? Tract, pages 16-18.

What is the duty of the legislature when the judicial branch claims a power not granted to it by the Constitution of the State of Montana? Tract, pages 16-18.

Why does Ronald Reagan's Attorney General, Edwin Meese III, characterize this claim to supremacy as, waging war upon the Constitution? Tract, pages 23-28.

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5. To obtain a copy of the Tract send a request to: David Howard <sendavidhoward@gmail.com>.[6] To the extent that this paper is found to be logical and persuasive the authors are indebted to Michael Stokes Paulsen, *The Irrepressible Myth of Marbury,* Michigan Law Review Vol. 101, page 2709 (2003); presented by video: https://www.bitchute.com/video/DpfWpdCZUHeN/; of course, all failures of logic and persuasiveness are the sole responsibility of the authors.

EVERY MONTANA LEGISLATOR HAS SWORN TO SUPPORT, PROTECT AND DEFEND THE CONSTITUTION OF THE STATE OF MONTANA

Written by: Senator David Howard, and James Rigby, Attorney at Law, Retired
Constitutional research by Patrick G. Gould, Professor of Law

This paper will explore the responsibilities The Constitution of the State of Montana imposes upon each legislator. Every school boy and girl is familiar with the idea that our American model of government is comprised of three branches, the executive, the legislature, and the judiciary. As Montanans we have all observed this in practice: the legislature creates the laws, the executive executes those laws, and the judiciary applies those laws in specific cases and controversies. Each branch performs a different function thus providing a "check and balance" against the others.

This paper will explore the parameters of these "checks and balances" as they relate to the intersection of the legislative and judicial branches. You may ask, where do we look for the answers to this question? All of the answers to this question are found in The Constitution of the State of Montana. The Constitution of the State of Montana may, perhaps, look to judicial opinions—of both state and federal courts--and to the United States Constitution and to its history. While this is common and beneficial, no source has the power to change the plain meaning of the language comprising The Constitution of the State of Montana and that language may only be changed by amendment, pursuant to its terms.

A. CONSTITUTIONAL CHECKS AND BALANCES[6]

The Constitution of the State of Montana imposes upon the Legislature the duty to check and balance the judicial system by performing the following duties:

***Budget.** Appropriate a budget for the judicial system which will enable it to efficiently execute its duties, without an excess of funds which will entice and enable the judiciary to spend time, energy and funds on matters outside its domain. Article V, Sec. 11(4).

[6] To the extent that this paper is found to be logical and persuasive the authors are indebted to Michael Stokes Paulsen, *The Irrepressible Myth of Marbury,* Michigan Law Review Vol. 101, page 2709 (2003); presented by video: https://www.bitchute.com/video/DpfWpdCZUHeN/; of course, all failures of logic and persuasiveness are the sole responsibility of the authors.

***Legislate Strict Accountability of Money Spent by the State.** Article VIII, Section 12, places a specific duty upon the legislature to enact laws which will serve to "insure strict accountability of all … money spent" by the judicial system.

***Reduce the Number of Supreme Court Justices.** Article VII, Section 3 requires four supreme court justices, in addition to one chief justice, and it allows the legislature to increase the four justices to six. It is within the legislature's domain to determine that four rather than six justices would be in the best interest of Montanans thus reducing the expense of the court.

***Impeach Supreme Court Justices for Misfeasance.** Article V, Section 13(2) delegates to the legislature the determination of "manner, procedure, and causes for impeachment." For instance, a supreme court justice who had an interest in a case and refused to recuse himself from ruling on the case would be subject to impeachment.

***Investigate. Investigate. Investigate.** The legislature has the power to investigate matters concerning a valid legislative task, such as appropriations or judicial conduct which may lead to impeachment. *McLaughlin v. Montana State Legislature,* OP 21-0173, 2021 MT 178 at 7. The legislature has a duty to investigate all matters concerning which it is charged with acting, for otherwise it will have no knowledge of what action is required. Investigation forms the foundation of wise legislative action.

B. THE POWER AND DUTY OF THE MONTANA LEGISLATURE

1. What oath and duty does The Constitution of the State of Montana require and impose upon Legislators?

a. The Oath.

After being elected, prior to entering upon any duty as a legislator, prior to executing any power as a legislator, one must swear an oath to the Constitution of the State of Montana. **No oath, no power!**

> Members of the legislature and all executive, ministerial, and judicial officers, shall take and subscribe the following oath or affirmation, before they enter upon the duties of their offices…

The Constitution of the State of Montana, Article III, Section 3.

In our modern world, for any particular individual, “taking an oath” may or may not be a significant undertaking or promise. In fact, just like being required to “take an oath” prior to testifying in a court of law—which we all understand may or may not lead to truthful testimony—taking and subscribing the prescribed constitutional oath is required, prior to performing any duties as a legislator—which may or may not lead to the loyal performance of the duty. Should a duly elected legislator decline to swear the prescribed oath he or she may not be seated, perform any duty, nor exercise any power of a legislator.

The Constitution of the State of Montana, then, requires that as a condition and prior to entering upon the duties as a legislator, that a person solemnly—the opposite of casually—swear or affirm to act in a certain manner. The oath reads: "I do solemnly swear (or affirm) that I will support, protect and defend the constitution of the United States, and the constitution of the state of Montana, and that I will discharge the duties of my office with fidelity (so help me God)." The Constitution of the State of Montana, Article III, Section 3.

b. The Duty.

The oath of office requires each legislator to “support, protect and defend...” Each of these words have a different although overlapping meaning. Support means to promote the interest or cause of, to up hold or defend as valid or right, to argue or vote for.[7] Protect means to cover or shield from exposure, injury, damage or destruction.[8] Defend means to drive danger or attack away, to maintain or support in the face of argument or hostile criticism.[9]

The oath, then, requires of each legislator, the actions of supporting, protecting and defending the constitutions of the United States and Montana. This oath, to support, protect, and defend the Constitution of the State of Montana, describes the duty imposed upon each legislator by the Constitution of the State of Montana, as the condition to assuming the power of a legislator.

c. What does the duty require?

The question then arises: Is it possible to support, protect, or defend these constitutions without first reading and gaining an understanding of what each document says? I think all reasonable people would have to agree, it is not possible to support, protect and defend these constitutions without first reading and gaining an understanding what these constitutions mean. There is no way to perform a duty without first understanding what that duty entails. This is a key point in the seminal

[7] https://www.merriam-webster.com/dictionary/support
[8] https://www.merriam-webster.com/dictionary/protect
[9] https://www.merriam-webster.com/dictionary/defend

United States Constitutional case of *Marbury v. Madison*[10] which is discussed in detail below.

The modern lawyer's approach to the question "What is the legal meaning of a clause in the Constitution?" is generally to investigate legal precedent or caselaw, rather than to read and focus upon the words in the Constitution. President Regan's Attorney General of the United States, Edwin Meese III, showed this to be an erroneous approach[11], as there is a clear distinction between the Constitution of the United States of America and the opinions published by the United States Supreme Court. The Constitution of the United States of America states it is the "supreme law of the land," which means that the decisions of the Supreme Court may not be the "supreme law of the land," as there may not be two "Supremes." But I digress. This point will be expanded upon below.

A modern lawyer, who has been wrongly educated in law school, should be forgiven for assuming that legislators follow a similar course of researching case law and ignoring the actual words of a constitution. But, can a legislator "support, protect and defend" a constitution without reading and contemplating its meaning, independent from a judicial interpretation? What if upon reading and contemplating The Constitution of the State of Montana, a Montana legislator arrives at a different understanding of its meaning than does a court? What if a court is clearly incorrect in its holding regarding the meaning of a clause in The Constitution of the State of Montana, what is the proper course for a dutiful legislator?

In the event that a legislator disagrees with an action taken by the judicial authority, based upon The Constitution of the State of Montana, reference is made to that Constitution where it describes the limits of judicial authority, and the power and duty of the legislature to check and balance the judicial branch.

2. **What are the legislative powers to check and balance the judicial branch?**

The Constitution of the State of Montana not only imposes the duty, it also provides the legislature with extensive powers to "check and balance" the judicial branch.

a. **Structurally Divided Government.**

[10] *Marbury v. Madison*, 5 U.S. 137 (1803).
[11] Edwin Meese III, *Law of the Constitution,* Tulane Law Review, 61, 1986-1987, p. 979-990. HEINONLINE.

The very foundation of the legislature's power to "check and balance" the judicial branch rests upon the fact that The Constitution of the State of Montana divides the state government into three branches, the American form of government:

> The power of the government of this state is divided into three distinct branches-legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The Constitution of the State of Montana, Article III, Sec. 1.

The People of the State of Montana have divided the government into three distinct branches, the executive, the legislative, and judicial. The purpose of dividing the government into three branches is to impede the government's inevitable march toward tyranny. Furthermore, The People have exclusively reserved the powers of each branch to that branch and prohibited trespassing by the other branches, except as expressly directed or permitted by the Constitution. The Constitution of the State of Montana, by design divides the power of government, and sets each of the three branches against the other two, in order to check and balance the power of each. Each branch must use all of its constitutional power to jealously protect its domain from the other two branches, or its powers will be truncated; the Constitution will then have failed in its goal. **The Constitution of the State of Montana anticipates and requires that when one branch of government trespasses upon the exclusive domain of another branch, that the trespasser be checked and thus balanced.**

b. **Investigate. Investigate. Investigate.**

The legislature has the power and duty to investigate matters concerning a valid legislative task, such as appropriations or judicial impropriety. *McLaughlin v. Montana State Legislature*, OP 21-0173, 2021 MT 178 at 7. Indeed, it will be impossible for the legislature to performs its duties related to the judicial system, unless and until it performs an investigation adequate to make itself aware of current conditions.

The legislature must perform an investigation of current and historical conditions in and performance of the judicial system. For instance, has the judicial system spent the funds appropriated to it in a proper and effective manner? How

much money does the Supreme Court spend, for example, to travel to conferences outside of the State of Montana, and how does this expense of money and time serve the people of Montana?

The legislature has the power and duty to investigate matters concerning the effectiveness of current laws requiring accountability of the judicial branch. The most effective manner of doing this would be to conduct an audit of funds previously spent and determine whether they were spent for the budgeted judicial function. The Constitution of the State of Montana, Article VIII, Section 12.

The legislature has the power and duty to investigate the workload of the supreme court in order to make a determination of the optimal number of justices given current and anticipate budget constraints. For instance, if time spent in conferences and committees were redirected to the task to deciding cases and controversies, could the work of the court be completed with fewer justices for less money? Is the legislature aiding and abetting inefficiencies in the judicial system by appropriating excess funds?

The legislature has the power and duty to investigate potential malfeasance of the justices and has a sworn duty to do so upon information or probable cause. For instance, a supreme court justice(s) who had an interest in a case or controversy and refused to recuse himself from ruling on the case, would be subject to an investigation which may lead to impeachment.

Investigation will lead to a public understanding of government operations. Were the legislature to create a reputation, based upon action, for investigating and publicizing all government misfeasance and malfeasance, much if not most of such mischief would cease to occur in the first instance. Is this not a primary purpose of for the existence of the legislature?

c. **Appropriations are life.**

In addition to structurally dividing the powers of government into three branches, each with exclusive powers, The Constitution of the State of Montana, directs the legislature to check and balance the judicial branch, with a multitude of powers and responsibilities. The exclusive power of the legislature to appropriate[12] more or less money to the judicial system, is ever present and critical to the functioning of the judicial system. It goes without saying that the judicial system would cease to exist without the legislatively provided funds to pay its costs. By

[12] The Constitution of the State of Montana, Article V, Sec. 11(4).

way of analogy, the fact that it is obvious that we human beings must have air to breath in order to live, does not diminish the importance of air. No appropriation - no money- no judicial system.

d. **Strict Accountability.**

The Constitution of the State of Montana explicitly requires strict accountability of the money spent by the judicial branch:

> The legislature shall by law insure strict accountability of all revenue received and money spent by the state and counties, cities, towns, and all other local governmental entities.[13]

This responsibility to "insure strict accountability" entails the legislature's obligation to investigate all aspects of state expenditures. Contrary to recent self-serving pronouncements by the Supreme Court, the legislature cannot fulfil this responsibility to "insure strict accountability" without looking into the operations of every aspect of the judicial branch in detail.

By way of example, if appropriations to the judicial system exceed what is necessary for it to function efficiently, not only is that a waste of The Peoples life blood in the form of taxes, but it will encourage the judiciary to stray from its core duties. On the other hand, if the judiciary is inadequately funded it will result in a less efficient and effective judicial system. In such case, while the judicial system has no power to appropriate funds to itself, it can take the matter to the voters who can then decide, over time, how best to proceed.

e. **Impeachment.**

The penultimate yet seldom used legislative power to check and balance the judiciary, is the power of impeachment. The Constitution of the State of Montana Article V, Section 13, authorizes the legislature to impeach and remove judicial officers, among others. Unlike the Constitution of the United States of America which arguably limits the grounds of impeachment to "Treason, Bribery, or other high Crimes and Misdemeanors,"[14] **the Montana legislature unequivocally has the constitutionally designated responsibility to: provide for the manner, procedure, and causes for Impeachment…**[15]

This clause delegates to the legislature the task of determining the proper grounds for impeachment. The legislature is not limited to cases of treason or felonies, but is charged with the responsibility to impeach judicial officers for cause,

[13] The Constitution of the State of Montana, Article VIII, Sec. 12.
[14] Constitution of the United States of America, Article 2, Sec. 4.
[15] The Constitution of the State of Montana, Article V, Sec. 13(2)

which undoubtedly would include misfeasance and malfeasance. The failure to do so is a failure of the legislature to do its duty.

While the requirement that only the house may bring charges of impeachment with a vote of two-thirds or more of its members and then only the senate may convict with a vote of two-thirds or more of its members is a very high hurdle to meet, impeachment is nevertheless a potent power. For instance, a public investigation into significant wrongdoing by a judicial officer, will undoubtedly result in a significant public political eruption focusing upon the wrongdoing of the judicial officer. Even in a clear case of judicial officer wrongdoing the two-thirds requirement would be difficult to meet. In such case, if the voters are unable to convince one or more recalcitrant legislators to vote to impeach a judicial office for obvious wrongdoing, the voters will still have the last word. Not only the recalcitrant legislator, but also the publicly shamed judicial officer will have to stand for reelection; and, in such circumstance, many will not run for reelection.

f. **Legislative honing of the judicial system.**

The Constitution of the State of Montana grants the legislature a multitude of additional powers and responsibilities which serve to "check and balance" the power of the judicial branch. Among these is the power to create courts in addition to the supreme, district and justice courts.[16] The legislature has the authority to expand the supreme court's power to issue writs, in addition to writs of habeas corpus.[17] The legislature may disapprove rules for procedure, adopted by the courts, for the two secessions following promulgation.[18] The legislature has the power to increase the constitutionally mandated four supreme court justices to six justices (the chief justice is not included in these numbers, for a total of five, six or seven).[19] The legislature may provide for direct review by district courts of administrative agency decisions and create new courts to adjudicate misdemeanors.[20] The legislature determines the qualifications for and the jurisdiction of justices of the peace, and may authorize justices of the peace in addition to the required single justice per county.[21] The legislature is charged with dividing the state into judicial districts and setting the number of judges in each district.[22] Most importantly from the judiciaries perspective, the legislature

[16] The Constitution of the State of Montana, Article VII, Sec. 1.
[17] The Constitution of the State of Montana, Article VII, Sec. 2.
[18] The Constitution of the State of Montana, Article VII, Sec. 2.
[19] The Constitution of the State of Montana, Article VII, Sec. 3.
[20] The Constitution of the State of Montana, Article VII, Sec. 4.
[21] The Constitution of the State of Montana, Article VII, Sec. 5.
[22] The Constitution of the State of Montana, Article VII, Sec. 6.

determines the compensation paid to every justice and judge.[23] The legislature may confirm, or not, nominations for vacant judicial positions.[24] The qualifications and methods of selection of judges, except supreme court justices, are set by the legislature.[25] And, the legislature is charged with creating a judicial standards commission.[26]

Anyone who argues that the legislature is not intimately involved in the structuring and operation of the Montana judicial system is obviously not familiar with The Constitution of the State of Montana.

g. **Amendments to the Constitution**

The last, but hardly the least, power granted to the legislature by the Constitution which bears on the judicial system is the power to amend the Constitution.[27] The Constitution of the State of Montana, Article XIV, addresses the processes by which the Constitution may be revised or amended. The legislature has various powers in this regard, depending upon the path of the proposed change. This article, however, raises a big red flag in the face of the judicial system: the judicial system has no role, nor power regarding the revision of the constitution. That creates a responsibility on the part of the legislature, to "check and balance" any effort by the judicial system to amend or revise the Constitution in even the smallest, seemingly most insignificant manner.

h. **The legislature's powers and duties permeate the judicial system.**

The foregoing paragraphs clearly demonstrate the powers and duties of the legislature's reach into every aspect of the judicial system, except the judiciary's exclusive power to adjudicate cases or controversies. These legislative powers and duties are incorporated into The Constitution of the State of Montana, which is the creator the judicial system. The judicial system does not exist apart from the legislature, rather it is permeated by the legislature. If the legislature does not perform its duties regarding the judicial system, the judicial system will not properly function.

Before we consider the constitutionally designed interplay between the legislature and the judicial branch, we will consider the powers granted to the judicial branch by The Constitution of the State of Montana.

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[23] The Constitution of the State of Montana, Article VII, Sec. 7.
[24] The Constitution of the State of Montana, Article VII, Sec. 8.
[25] The Constitution of the State of Montana, Article VII, Sec. 9.
[26] The Constitution of the State of Montana, Article VII, Sec. 11.

C. THE POWER OF THE JUDICIAL BRANCH

Let's start at the beginning.

1. What is the source of power for the government of the State of Montana?

> All political power [in the State of Montana] is vested in and derived from the people [of the State of Montana]. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole.

The Constitution of the State of Montana, Article II, Section 1.

> "The people [of the State of Montana} have the exclusive right of governing themselves as a free, sovereign, and independent state. They may alter or abolish the constitution and form of government whenever they deem it necessary."

The Constitution of the State of Montana, Article II, Section 2.

2. What power have The People of the State of Montana granted to the Supreme Court?

> JUDICIAL POWER.
> The judicial power of the state is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law.

The Constitution of the State of Montana, Article VII, Section 1.

> SUPREME COURT JURISDICTION.
> (1) The supreme court has appellate jurisdiction and may issue, hear, and determine writs appropriate thereto. It has original jurisdiction to issue, hear, and determine writs of habeas corpus and such other writs as may be provided by law.
> (2) It has general supervisory control over all other courts.
> (3) It may make rules governing appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members. Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation.

(4) Supreme court process shall extend to all parts of the state.

The Constitution of the State of Montana, Article VII, Section 2.

3. Has the supreme court of the State of Montana acknowledged the source of its power?

The supreme court of the State of Montana does acknowledge that its power is derived exclusively from The People of Montana, as set forth in the Constitution of the State of Montana:

> We recognize that the power to exercise judicial functions comes **from the people**. Article II, Section 1, of the Montana Constitution so provides: "All political power is vested in and derived from the people." The Judicial Article in the Montana Constitution provides that the judicial power of the state is vested in one supreme court, district courts, justice courts and such other courts as may be provided by law. Article VII, Section 1, Mont. Const.

Emphasis added. *Wilcox v. District Court,* 208 Mont. 351, 678 P.2 209 (Mont. 1984).

4. What is the meaning and scope of the "judicial power" delegated to the courts of the State of Montana? Or, what matters and who falls within this judicial power?

In the recent case *Larson v. State*[28], the supreme court of the State of Montana correctly outlined the proper analysis to determine whether a matter is within its judicial power. The first step is to consider subject matter jurisdiction:[29]

> Subject matter jurisdiction is the threshold power of a court to consider and adjudicate particular types of cases and controversies.[30] The subject matter jurisdiction of Montana district courts derives exclusively from Article VII, Section 4, of

[28] *Larson v. State*, 2019 MT 28, 394 Mont. 167, 434 P.3d 241 (Mont. 2019).

[29] *Larson, supra* at 183.

[30] *Lorang v. Fortis Ins. Co*., 2008 MT 252, ¶ 62, 345 Mont. 12, 192 P.3d 186.

> the Montana Constitution (district court subject matter Jurisdiction over "all civil matters and cases" arising at law or in equity) and conforming statutes.[31]
>
> **Next, the court must consider the justiciability of a matter:[32]**
>
> Justiciability is a related, multi-faceted question of whether the exercise of preexisting subject matter jurisdiction is appropriate under the circumstances in a given case based on the constitutional "case" and separation of powers provisions of Article III, Section 1, and Article VII, Section 4, of the Montana Constitution...[33]

The Supreme Court of the State of Montana correctly recognizes that prior to ruling upon a matter a court must have authority under The Constitution of the State of Montana as set forth in Article VII, Section 4 and conforming statutes. The court also recognizes that there must be a "case" before it and that it is limited by the separation of powers. The court makes the analogy between the Montana "case" requirement and Article III, Section 2, the United States Constitution's "case or controversy" requirement.[34]

The supreme court of the State of Montana in the recent 2019 case of *Larson v. State* recognizes that its power is derived from The People of the State of Montana through the Constitution of the State of Montana. It recognizes that it must have a case or controversy before it and subject matter jurisdiction, all established by The Constitution of the State of Montana. It looks to the United States Constitution and case law for guidance for these determinations.

So far, so good. The supreme court in *Larson v. State* upheld an injunction issued against the Secretary of State, Corey Stapleton. What the court, however, did not address was, what was the legal effect of the injunction against the SOS? What power does the state supreme court have, which could possibly force the SOS to heed its order? **The answer to this question is contained within The Constitution**

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[31] *Harrington v. Energy W. Inc.* , 2015 MT 233, ¶ 13, 380 Mont. 298, 356 P.3d 441 ; *LaPlante v. Town Pump, Inc.* , 2012 MT 63, ¶ 15, 364 Mont. 323, 274 P.3d 724. See also §§ 3-5-301(1), -302, MCA (general statutory jurisdiction of district courts).

[32] *Larson, supra* at 183.

[33] *See Baker v. Carr* , 369 U.S. 186, 217-36, 82 S.Ct. 691, 710-20, 7 L.Ed.2d 663 (1962) ; Reichert, ¶ 53 ; *Heffernan v. Missoula City Council* , 2011 MT 91, ¶¶ 31-34, 360 Mont. 207, 255 P.3d 80 ; *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.* , 2010 MT 26, ¶¶ 6-8, 355 Mont. 142, 226 P.3d 567. *Larson, supra 183.*

[34] *See, Clark v. Roosevelt Cty.* , 2007 MT 44, ¶ 11, 336 Mont. 118, 154 P.3d 48 (citing *Seubert v. Seubert* , 2000 MT 241, ¶ 20, 301 Mont. 382, 13 P.3d 365)." *Larson v. State, supra.*

of the State of Montana, where the judiciary is given precisely zero power to enforce its orders.

The judiciary cannot issue an unconstitutional injunction, which is automatically enforced, because the power of enforcement does not reside with the court.

D. CONSTITUTIONAL INTERPLAY: THE LEGISLATURE vs. THE JUDICIAL SYSTEM

While the constitutional interplay between the legislature and the judicial system will be different in detail, a recent example of the constitutional interplay between the executive, the governor, and the judicial system will initially illustrate the idea.

Recently the supreme court in *Larson v. State* upheld an injunction issued against the Secretary of State. What the court, however, did not address was, what was the legal effect of the injunction against the SOS? What power does the state supreme court have which could possibly force the SOS to heed its order? **The answer to this question is contained within The Constitution of the State of Montana, where the judiciary is given precisely zero power to enforce its orders.**[35]

The power to enforce an order of the judiciary rests solely with the executive in the form of the police power. Prior to exercising the police power to enforce an order of the court, the executive, in the person of the governor, must determine based upon his reading and his understanding of the Constitution of the State of Montana, whether or not an order is constitutional. And if he determines that the order is not in accord with the Constitution, he has no authority to enforce it, no matter how much the court protests.

Let's take the example a step further. What if the *Larson* court, in addition to the injunction, and in a delusional rage, ordered the execution of the SOS at "high noon?". Would any sane person expect such an order to be executed? No sane person would expect the governor to execute the SOS, without due process, because we all know that such an order is unconstitutional. But, if the Supreme Court of the State of Montana is the SUPREME LAW OF MONTANA, why not? Never mind we all know such an order violates the Constitution of the State of Montana, **if the supreme court of the State of Montana has in fact the last word on all matters,**

35 See, *Brown v. GIANFORTE*, 2021 MT 149, Para. 56, 404 Mont. 269, 488 P.3rd 548 (Mont. 2021). Justice Rice's agrees, in his concurring opinion, that if the Executive Branch declines to enforce an order of the Supreme Court, that there is nothing the court can do about it.

it would not matter what the governor thinks—but this is America and our Constitutional Republic does not work that way.

The governor of the State of Montana has sworn an oath to uphold the Constitution of the State of Montana and his every action must be in accord with the Constitution. Neither the governor (nor the legislature) may take any action in violation of the Constitution of the State of Montana and hide behind the fig leaf of an excuse that **"the supreme court made me do it."**

The constitutional interplay between the legislature and the judicial branch will play out in a similar manner. Here are a couple of examples. If for instance, after an extensive investigation, the legislature determines that the work load of the supreme court does not reasonably require the services of six supreme court justices it can adopt legislation reducing the number. Undoubtedly, such legislation would be challenged as unconstitutional and the supreme court will find it unconstitutional and issue injunctions accordingly. What would happen next, even if the SOS were to place the eliminated seat on the ballot? The legislature can cut off the salary and all funding for the judicial seat in question. The legislature can eliminate funds for support staff and services for the justice in question. Perhaps the "justice" will sit with the court, but he will not have an office, staff nor a salary. How legitimate would such a justice appear?

Here is another example. Imagine if the legislature were to open an investigation into possible illegal judicial activity, such as the use of state funds to pursue lobbying activity. In this example the legislature issues a subpoena to the administrator of the supreme court for electronic records and the supreme court issues an order holding that the subpoena is invalid. Under The Constitution of the State of Montana, what power does the judicial branch have to determine the validity of a legislative subpoena? Under The Constitution of the State of Montana the judicial branch, including the supreme court, has no jurisdiction to adjudicate the validity of a subpoena from the legislature. And, if the judicial branch ignores this fact, it has no power under The Constitution of the State of Montana enforce any order it may issue.

What is the legislature to do, pursuant to The Constitution of the State of Montana, in such instance? When the supreme court violates The Constitution of the State of Montana the legislature is duty bound to check and balance the supreme court. In this case the legislature is duty bound to enforce the subpoena in the same way if would if a private citizen were to ignore such a subpoena: send the sergeant at arm to the location of the records and physically seize the records. What precisely is the supreme court constitutionally authorized to do in such instance? Absolutely nothing.

Take the example a step further. Assume that judicial wrong doing is proved by the subpoenaed records and an action is brought in the house to impeach the judge. Hearings are held, evidence is introduced, wrong doing is clear, but an insufficient number of house members vote to impeach. What is the benefit of such a course of action? Significantly, the legislature as a body would have fulfilled its duty under The Constitution of the State of Montana. The responsibility will then rest with The People of the State of Montana. They may or may not reelect the supreme court justice and the recalcitrant legislators. At least The People would be able to make an informed choice based upon the facts made public by the legislature, which is infinitely better than making decisions based upon lies, illusions and delusions.

The Constitution of the State of Montana will not long stand if the truth does not find a voice in our political system. The legislature's most important duty under The Constitution of the State of Montana is to educate The People of the truth regarding the operation of the state government. The People are the ultimate power under the Constitution and with ultimate power rests ultimate responsibility, which they cannot responsibly exercise without knowledge of the truth.

E. THE SUPREME COURT OF THE STATE OF MONTANA'S CLAIM TO JUDICIAL SUPREMECY IS BASED UPON A MISREPRESENTATION OF MARBURY V. MADISON.

The supreme court for the State of Montana, in the recent case of *McLaughlin v. The Montana State Legislature*, OP 21-0173, 2021 MT 178, at 11 makes the claim "that since the early 1800s, 'the idea that the [United States] Supreme Court had the power to pass upon constitutional questions and that its decisions were final and binding upon the other two departments of government ha[s] been … widely accepted'" And, since the United States Supreme Court allegedly has such powers, so does the supreme court for the State of Montana, it claims. **The problem is, the opinion relies upon a misrepresentation *Marbury v. Madison*, and perversion of the constitutions both of Montana and the United States.**

Whether or not a concept has been widely accepted for a period of time begs the question of whether or not it is a proper understanding of the Constitution. And since courts do not have the authority to amend or otherwise change the Constitution, to the extent that an opinion is constitutionally incorrect, it is constitutionally irrelevant.

What, then, does the Constitution say?

> **This Constitution,** and the Laws of the United States which shall be made in Pursuance thereof; and …under the Authority of the United States, **shall be the supreme Law of the Land…**

Constitution for the United States of America, Article VI. Emphasis added.

The Supreme Court for the State of Montana, and the United States Supreme Court's assertion of judicial supremacy begins with a perversion of Justice Marshall's words in *Marbury v. Madison*. Here is Marshall's critical passage describing the "the supreme law of the land" as set forth in the Constitution:

> … in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.
>
> Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts**, as well as other departments** [branches][36], are bound by that instrument.[37]

In *Marbury v. Madison*[38], unsurprisingly, Justice Marshall quotes the language in the Constitution when he is referring to "the supreme law of the land." He most emphatically does not claim that the Supreme Court itself, nor its opinions, are the supreme law of the land. Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void.

Article VI, quoted above in part, require that the President, every United States senator, representative and judicial officer, and every governor, state representative and judicial officer "shall be bound by Oath or Affirmation, to support this Constitution." The purpose of this oath is to ensure that every one of our elected officials and judicial officers is bound to follow the Constitution. Further, Marshall

[36] Federalist No. 48- "Departments" is used describing the different branches of government.
[37] James Madison wrote that the "legitimate meaning" of the Constitution must be "derived from the Instrument itself." https://archive.org/details/recordsfederalc00farrgoog/page/n458/mode/2up
[38] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803) (emphasis added).

specifically quotes the Constitution where "departments" or branches are also bound by the Constitution.

Article VI was written as a check to ensure none of the departments of government can have supreme power by requiring each department to look only to the Constitution. "Departments," here refers not only to the United States executive, legislature and judicial branches, but also to the States themselves and the executive, legislature and judicial branches of each State. Article VI provides EQUAL power to ALL departments to protect the U.S. Constitution from being illegally used or misinterpreted and from all threats, both foreign and domestic, by requiring each department to follow the Constitution. This means our elected officials have not sworn to be ruled by the Supreme Court, but rather by the Constitution.

Justice Marshal, in *Marbury v. Madison*, referenced the Blackstone Commentaries, the paramount authority on the common-law, in the eyes of the American Founders, and unsurprisingly not taught in law schools today. Blackstone Commentaries at 1:149-51 describes the need for the separation of the branches of government and the check of one upon the other:

> Were it [the judicial function] joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it [the judicial function] joined with the executive, this union might soon be an over balance for the legislative.

Blackstone labelled this result, the merging of the judicial power with the power to create laws, despotic. **Despotism is the result of courts rewriting laws to meet their views. How prescient!**

Justice Marshall also referenced the Federalist Papers in Marbury v. Madison. The Federalist Papers is a collection of papers written to promote the ratification of our Constitution. James Madison in the Federalist No. 47 warned, **"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."**

The Blackstone Commentaries and the Federalist Papers, which Marshall referenced, establish that when the legislative function is combined with the judicial function that despotism, also known as judicial tyranny, would result.

In *Cooper v. Aaron* (1958)[39] the United States Supreme Court justices anointed themselves 'the supreme law of the land' as they wrote, "Article VI of the Constitution makes the Constitution the "supreme Law of the Land." … It follows that the interpretation of the Fourteenth Amendment enunciated by this Court …is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States." In this case the Supreme Court, magically, **substitutes its interpretation of the Constitution for the Constitution itself,** as the supreme law of the land.

Thomas Jefferson on Judicial Tyranny wrote:

"[N]othing in the Constitution has given them [the federal judges] a right to decide for the Executive, more than to the Executive to decide for them. . . . [T]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves, in their own sphere of action, but for the legislature & executive also in their spheres, would make the Judiciary a despotic branch." (Letter to Abigail Adams, September 11, 1804)[40]

"You seem . . . to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an Oligarchy. Our judges are as honest as other men, and not more so . . . and their power [is] the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with corruptions of time & party its members would become despots." (Letter to William Jarvis, Sept. 28, 1820)[41]

What the Supreme Court did in 1958 fulfilled Jefferson's fears, and was a true usurpation of constitutional power by a tyrannical Supreme Court. This is when the Supreme Court self-created themselves supreme through the façade of judicial supremacy. "WE THE PEOPLE," the real supreme power of America, the Supreme Court relegated to no consequence. Thomas Jefferson and James Madison described this as tyranny.

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[39] *Cooper v. Aaron*, 358 U.S. 1 (1958); https://supreme.justia.com/cases/federal/us/358/1/

[40] https://founders.archives.gov/documents/Adams/99-03-02-1317

[41] https://founders.archives.gov/documents/Jefferson/98-01-02-1540

Then worse, Congress and the Executive branches of America, and the States and the officers of the states, for the past many years, violating their oaths of office, did little or nothing.

The Supreme Court has pushed this fraud by altering the Constitution for years. They have done this by refusing to act or changing laws to restrict results. One example is the Affordable Care Act, when Justice Roberts changed the fine written in the law, to a tax. This was an unconstitutional act by the Supreme Court and they knew they were violating their oath of office. Thus, Justice Roberts and four other Justices changed the law and made a new law. Other clearly extreme examples of the Supreme Court changing the Constitution without the consent of the people, or Congress are abortion and homosexual marriage, to name a few. There are hundreds of examples today where the Supreme Court and other justices have made themselves the Supreme Law of the land usurping both federal and state Constitutions created by, "We the People."

If you question this, ask this simple question? Can the Supreme Court unilaterally bind the people of the United States to its view, rather than to the Constitution? Also, if only Congress can make law, how did abortion and homosexual marriage become law, when Congress never created such law? Judicial Supremacy is the Supreme Lie, sponsored by the Supreme Court!

To show how federal judges have become self-appointed dictators, look to the recent decision where a federal judge ordered the Oklahoma State Governor to restore weekly unemployment benefits. Where does this federal judge get this power over a State Governor, legislature, and judicial officers? Such power is not to be found in the Constitution!

The Supreme Court after *Marbury v. Madison* in 1803 has been successful through subterfuge in making themselves the final arbitrator of not only the Constitution, but fraudulently expanding their power to directing policy in the 50 states.

Justice Marshall in *Marbury v. Madison* provides us with the answer, when he wrote, the framers of the Constitution contemplated it would rule the courts as well as the legislature. If not, he wrote rhetorically, what was the purpose in requiring judges to swear to support the Constitution? It would be immoral to require judges swear to support the Constitution and then force them to enforce a law which they believe to be a violation of the Constitution. And, for a judge to determine whether or not a law was constitutional, **it would be necessary for the judge to *read* the Constitution.** He concluded it would be a *crime* to force a judge to enforce a law which he believed to be in violation of his oath to support the Constitution.

Marshall here wrote that the Constitution itself rules the courts just as it rules the legislature, and the other departments such as the President and state governors as well. Marshall said that judges have sworn an oath to support the Constitution, just like our representatives both state and federal. Marshall states that having sworn an oath to support the Constitution, the judge must read the Constitution for himself and determine for himself how to discharge his duties in conformance with the Constitution.

The same holds true for legislators: they must read the Constitution and then act based upon their personal understanding of the words in the Constitution.

F. THE SUPREME COURT FOR THE STATE OF MONTANA HAS BECOME A TYRANT.

The Montana supreme court has followed the U.S. supreme court's method of operation for many years. For instance, our judiciary was recently involved in an apparent wrongdoing. They used a paid **state** employee to poll judges statewide, and then refused to supply to the Legislature all of the emails, which The Constitution for the State of Montana confirms are public[42]. This creates doubt and indicates they may be covering up other wrong doing, otherwise they would supply the emails, and this matter would have been closed.

In another instance of expanding perceived judicial power, Justice Beth Baker delivered the opinion and order of the court *In McLaughlin v. Montana State Legislature*[43], decided July 14, 2021. No other justices dissented meaning they all agreed. In the back half of paragraph 18, she wrote:

> Even when a constitutional provision is non-self-executing because it commits authority to the Legislature, "the courts, **as final** interpreters of the Constitution, have **the final** `obligation to guard, enforce, and protect every right granted or secured by the Constitution . . . .
>
> "[S]ince the early 1800s, `the idea that the Supreme Court had the power to pass upon constitutional questions and **that its decisions were final** and binding upon the other two departments of government ha[s] been . . . widely accepted'") (citation omitted); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60, 73 (1803**)** ("It is emphatically the province and **the duty** of the judicial department to say what the law is."

[42] The Constitution of the State of Montana, Article 2, Sec. 9.
[43] *In McLaughlin v. Montana State Legislature,* 21 M.T. 178

Justice Baker ends the above with a misrepresentation of the *Marbury v. Madison*! She quotes, "the duty of the judicial department to say what the law is." Duty is an obligatory task, conduct, or service. She is implying this is a fundamental right, power, or doctrine of the U.S. Constitution, which is untrue. “To say what the law is” is the duty of every Governmental official, in all three branches of government, as written in Article VI, Section III of the U.S. Constitution.

Justice Baker wrote "the courts, as **final** interpreters of the Constitution, have the **final** `obligation to guard, enforce, and protect every right granted or secured by the Constitution . . . .'" Initially, this statement seems fine and it almost sounds logical, but, it is not true. When something is **final,** then nothing can occur after it.

Remarkably, Justice Baker did not originally develop this sentence. This sentence fragment, “the courts, as final interpreters of the Constitution, have the **final,”** was written by Montana Justice W. William Leaphart in 2005[44].

Yes, the Montana supreme court is quoting themselves, and calling it **final**, which is improper to say the least. This is alleging they can write it in an opinion, and later quote themselves, and this is the final word on the matter. NO, only a dictator has the final say. America is a Republic, a nation built upon the rule of law, not the simply rule of a court!

Back to Baker’s opinion, after quoting Columbia Falls, (which had 3 ‘Final(s)’ in it), she then quoted current sitting Justice Jim Rice, who wrote a concurring opinion in *Brown v. GIANFORTE*[45], decided on June 10, 2021.

Justice Baker’s, Rice quote reads, “the idea that the Supreme Court had the power to pass upon constitutional questions and that its decisions were **final** and binding upon the other two departments of government ha[s] been . . . widely accepted.” Here, she is quoting another Montana Justice who wrote a concurring opinion, in which no other justice joined, only thirty-four days before the current decision. Yes, in order to deceptively assert the actions of the Montana supreme court were justifiable in a Constitutional sense, Justice Baker quotes her co-justice, **not the Constitution,** which is “the supreme law of the land.” Then she claims the reason they have the **final, final** authority is because it is widely accepted? This is ridicules.

This quote was not even originally written by Justice Rice. Rather, it is a statement from book written in 1976 by Alfred H. Kelly & Winfred A. Harbison,

[44] *Columbia Falls Elementary School v. State,* 109 P.3d 257, 2005 M.T. 69, 326 Mont. 304, in paragraph 18.
[45] *Brown v. GIANFORTE*, 2021 M.T. 149 (Mont. 2021).

The American Constitution: Its Origins and Development. Thus, Jim Rice's quote used by Baker is not from a constitution nor even a court.

However, Baker is using these opinions to prevent the legislature and the executive branches from executing their constitutional duty by preventing them from seeing the rest of the supreme court's emails. Could the supreme court by creating this façade, be trying to cover-up additional wrong doings? This seems to be an unbelievable attempt by Montana's supreme court to obstruct justice. Or, do they simply believe they are above the law?

This judicial fraud from the United States and the Montana supreme court's upon the American people has to stop and the Legislators across this great Nation, have the responsibility under the United States Constitution to stop obeying judicial decisions that are unconstitutional!

The following is a synopsis using Edwin Meese III's words confirming that constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government. Senator David Howard

F. UNITED STATES ATTORNEY GENERAL EDWIN MEESE III VIEWS THE CLAIM OF JUDICIAL SUPREMECY AS TANTAMOUNT TO TREASON

THE LAW OF THE CONSTITUTION

Judicial Review v. Equal Powers

By EDWIN MEESE III[46]

Hamilton, Jefferson, and all the Founding Fathers recognized that the Constitution is the supreme and ultimate expression of the will of the American people. They saw that no one in office could remain above it, if freedom were to survive through the ages.[47] In fact Daniel Webster warned more than a century ago:

> Miracles do not cluster …Hold on to the Constitution of the United States of America and to the Republic for which it stands-what has happened once in 6,000 years may never happen again. Hold on to your Constitution, for

[46] Bluebook 21st ed. Edwin Meese II., Law of the Constitution, 61 TUL. L. REV. 979 (1986-1987)
[47] THE FEDERALIST SOCIETY: THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 55 (1986) (quoting James Madison's Letter to Henry Lee (June 25, 1824).

> if the American Constitution shall fall there will be anarchy throughout the world.[48]

The Constitution is-to put it simply but one hopes not simplistically-the Constitution. It is a document of our most fundamental law. It begins "We the People of the United States, in Order to form a more perfect Union. . ." and ends up, some 6,000 words later, with the twenty-sixth amendment. It creates the institutions of our government, it enumerates the powers those institutions may wield, and it cordons off certain areas into which government may not enter. It prohibits the national authority, for example, from passing **ex post facto laws** (a law that retroactively alters a defendant's rights) while it prohibits the states from violating the obligations of contracts.' The Constitution is, in brief, the instrument by which the consent of the governed-the fundamental requirement of any legitimate government-is transformed into a government complete with the powers to act and a structure designed to make it act wisely or responsibly. Among its various internal contrivances (as James Madison called them)[49] we find federalism, separation of powers, bicameralism, representation, an extended commercial republic, an energetic executive, and an independent judiciary. Together, these devices form the machinery of our popular form of government and secure the rights of the people.

The Constitution, then, is the Constitution, and as such it is, in its own words, **"the supreme Law of the Land."**[50] Constitutional historian Charles Warren once noted, what's most important to remember is that "however the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court."' By this, of course, Charles Warren did not mean that a constitutional decision by the Supreme Court lacks the character of law. Obviously it does have binding quality. **But such a decision does not establish a supreme law of the land** that is binding on all persons and parts of government henceforth and forevermore.

This point should seem so obvious as not to need elaboration. Consider its necessity in particular reference to the Court's own work. The Supreme Court would face quite a dilemma if its own constitutional decisions really were the supreme law of the land, binding on all persons and governmental entities, including the Court

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[48] Id. at 56 (quoting Daniel Webster); see generally 15 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 520 (1903).

[49] THE FEDERALIST No. 51, at 336 (J. Madison or A. Hamilton) (Modern Library ed. 1941) The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.

[50] U.S. CONST. art. VI, para. 2.

itself, for then the Court would not be able to change its mind. It could not overrule itself in a constitutional case. Yet we know that the Court has done so on numerous occasions.

Perhaps the most well-known instance of this denial occurred during the most important crisis in our political history.

In 1857, in the Dred Scott case,"' the Supreme Court struck down the Missouri Compromise by declaring that Congress could not prevent the extension of slavery into the territories and that blacks could not be citizens and thus eligible to enjoy the constitutional privileges of citizenship. **This was a constitutional decision, for the Court said that the right of whites to possess slaves was a property right affirmed in the Constitution.** This decision sparked the greatest political debate in our history. In the 1858 Senate campaign in Illinois, Stephen Douglas went so far in his defense of Dred Scott as to equate the decision with the Constitution. In his third debate with his opponent, but Lincoln went on to say:

> We nevertheless do oppose [Dred Scott] ... as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision.[51]

Furthermore, he later said, "The Constitution has created that Court to decide all Constitutional questions in the last resort…" It plainly was Douglas's view that constitutional decisions by the Court were authoritative, controlling, and final, binding on all persons and parts of government the instant they are made-from then on.

Lincoln, of course, knew the truth and disagreed because the Constitution is the supreme law and not a court decision.

I have provided this example, not only because it comes from a well-known episode in our history, but also because it helps us understand the implications of this important distinction. If a constitutional decision is not the same as the Constitution itself, if it is not binding in the same way that the Constitution is, we as citizens may respond to a decision with which we disagree. As Lincoln in effect pointed out, we can make our responses through the presidents, the senators, and the representatives we elect at the national level. We can also make them through those

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[51] THE COLLECTED WORKS OF ABRAHAM LINCOLN 142-43 (R. Basler ed. 1953) (Douglas's Reply to Lincoln, Third Debate at Jonesboro (Sept. 15, 1858)).

we elect at the state and local levels. Thus, **not only can the Supreme Court respond to its previous constitutional decisions and change them, as it did in Brown and has done on many other occasions, but so can the other branches of government, and through them, the American people. As we know, Lincoln himself worked to overturn Dred Scott through the executive branch. The Congress joined him in this effort. Fortunately, Dred Scott -the case- lived a very short life.**

Once we understand the distinction between constitutional law and the Constitution, once we see that constitutional decisions need not be seen as the last words in constitutional construction, once we comprehend that these decisions do not necessarily determine future public policy, once we see all of this, we can grasp a correlative point: **constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government. The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution-the executive and legislative no less than the judicial-has a duty to interpret the Constitution in the performance of its official functions.** In fact, every official takes an oath precisely to that effect. For the same reason that the Constitution cannot be reduced to constitutional law, the Constitution cannot simply be reduced to what Congress or the President says it is either. Quite the contrary is true! The Constitution, the original document of 1787 plus its amendments, is and must be understood to be the standard against which all laws, policies, and interpretations must be measured. **The actions of the governors must be squared with the consent of the governed. And this applies to the power of judicial review.** For as Felix Frankfurter once said, "[t]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." Judicial review of congressional and executive actions for their constitutionality has played a major role throughout our political history. The exercise of this power produces constitutional law. In this task even the courts themselves have on occasion been tempted to think that the law of their decisions is on a par with the Constitution. (But it is not!) Some thirty years ago, in the midst of great racial turmoil, our highest Court seemed to succumb to this very temptation. **By a flawed reading of our Constitution and Marbury v. Madison, and an even more faulty syllogism of legal reasoning, the Court in a 1958 case called Cooper v. Aaron appeared to arrive at conclusions about its own power that would have shocked men like John Marshall the writer of Marbury v. Madison.**

In this case, in dictum, the Court characterized one of its constitutional decisions as nothing less than "the supreme law of the land. Obviously constitutional decisions are binding on the parties to a case; but the implication of the dictum that everyone should accept constitutional decisions uncritically, that they are judgments

from which there is no appeal, was astonishing; the language recalled what Stephen Douglas said about Dred Scott. **In one fell swoop, the Court seemed to reduce the Constitution to the status of ordinary constitutional law, and to equate the judge with the lawgiver.** Such logic assumes, as Charles Evans Hughes once quipped, that the Constitution is "What the judges say it is.'" **The logic of the dictum in Cooper v. Aaron was, and is, at war with the Constitution,** at war with the basic principles of democratic government, and **at war with the very meaning of the rule of law.**

To understand the distinction between the Constitution and constitutional law is to grasp, as John Marshall observed in Marbury, "that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature."[52] This was the reason, in Marshall's view, that a written Constitution is "the greatest improvement on political institutions.'[53]

Likewise, James Madison, expressing his mature view of the subject, wrote that as the three branches of government are coordinate and equally bound to support the Constitution, "each must in the exercise of its functions be guided by the text of the Constitution according to its own interpretation of it."'[54]

Once again, we must understand that the Constitution is and must be understood to be superior to ordinary constitutional law. This distinction must be respected. To confuse the Constitution with judicial pronouncements allows no standard by which to criticize and to seek the overruling of what University of Chicago Law Professor Philip Kurland once called the "derelicts of constitutional law,"[55] -cases such as Dred Scott and Plessy v. Ferguson. To do otherwise, as Lincoln said, is to submit to government by judiciary. But such a state could never be consistent with the principles of our Constitution. Indeed, it would be utterly inconsistent with the very idea of the rule of law to which we, as a people, have always subscribed.

Thomas Paine once said, if law is to remain "King" in America, we must insist that every department of our government, every official, and every citizen be bound

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[52] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803) (emphasis added).
[53] Id. at 178.
[54] See generally E. BURNS, JAMES MADISON, PHILOSOPHER OF THE CONSTITUTION 159 (1938).
[55] P. KURLAND, supra note 28, at 186.

by the Constitution. That is what it means to be "a nation of laws, not of men."[56] As Jefferson once said:

> It is jealousy and not confidence which prescribes limited constitutions to bind down those whom we are obliged to trust with power. . . . In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution.[57]

Finally consider Daniel -Webster's words: "Hold on to the Constitution …and the Republic for which it stands-what has happened once in 6,000 years may never happen again. **Hold on to your Constitution.**"[58]

About the Authors:

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[56] THE DEBATES supra note 4, at 543. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").
[57] THE DEBATES, supra note 4, at 543.
[58] Id. at 56 (quoting Daniel Webster); see generally 15 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 520 (1903).