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THE RISE AND FALL OF THE NEW JUDICIAL FEDERALISM UNDER THE MONTANA CONSTITUTION

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State constitutions have come into their own with respect to protecting individual constitutional rights. Professor Robert Williams has recently detailed the rise, if not prominence, of the New Judicial Federalism in the states' highest courts.[1] The New Judicial Federalism recognizes that the United States Constitution is the baseline or the starting point for many basic freedoms, and state courts now commonly turn to state constitutions to support broader protections for such freedoms.[2] Beginning in the mid-1980's, and until a few years ago, the Montana Supreme Court's interpretation of the Montana Constitution was no exception.[3] In recent years, however, the Montana Supreme Court appears reticent to recognize broader protections under the Montana Constitution, except when the express right of privacy in Article II, Section 10 comes into play.[4] The enthusiasm for the broader protections afforded under the Montana Constitution appears to have unfortunately reached its zenith in the 1990s. The Montana Supreme Court has gone out of its way recently to "march lock-step" with interpretations of the United States Constitution[5] or has resorted to strained statutory or common law interpretations in order to avoid constitutional interpretation when asked to clarify broader protections.[6]

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1. Robert F. Williams, *The Law of American State Constitutions*, 113–133 (Oxford U. Press 2009).

2. *Id.* at 113-114 (citing G. Alan Tarr, *Understanding State Constitutions* 161-170 (Princeton U. Press 1999)

3. *See* listing in *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445, 457 (Mont. 2004) (Nelson, J., specially concurring).

4. *See State v. Goetz*, 191 P.3d 489 (Mont. 2008) (recognizing the special protections afforded under the Montana Constitution with respect to privacy in communications and electronic surveillance in conversations).

5. *Buhman v. State*, 201 P.3d 70, 92–93 (Mont. 2008) (applying 5th Amendment analysis to the interpretation of Article II, section 29 of the Montana Constitution); *State v. Schneider*, 197 P.3d 1020, 1023–1029 (Mont. 2008) (applying 6th Amendment analysis to the interpretation of Article II, section 24 of the Montana Constitution).

6. *Sunburst School Dist. No. 2 v. Texaco Inc.*, 165 P. 3d 1079, 1093 (Mont. 2007) (avoiding discussion of whether the right to a clean and healthful environment in Article II, § 3 and Article IX is self-executing); *Baxter v. State*, 354 Mont. 234, ¶ 10, __ P.3d __ (Mont. 2009) (the court avoided constitutional discussion on death with dignity).

I. THE ORIGINS OF THE NEW JUDICIAL FEDERALISM IN THE DRAFTING OF THE MONTANA CONSTITUTION

When the constitutional convention delegates met for their first organization meeting on November 29, 1971, Governor Forrest Anderson urged the delegates to establish a strong state constitution that would be an effective balance to the growing authority of the federal government. Governor Anderson said to the delegates:

> In this century, the balance of power within the American federal system has been distorted. The states have failed to act—too often because of constitutional restrictions—and the Federal Government has been forced to exercise the needed authority.
>
> This has occurred in Montana and every other state in the Union. And if the decline of the states within the national system continues, they will become nothing more than federal subdivisions. We must not allow this to happen. . . .
>
> If this Convention does not revitalize our state government, and give it the authority to act and solve problems, it may be one step further in the decline of the federal system, and the destiny of Montana will be decided in Washington D.C.[7]

The delegates were charged with the duty to create a constitution that would not be a mere reflection of the United States Constitution, but rather something more, a strong state constitution that would counterbalance the broad reach of federal authority and reflect the values and special qualities of Montana.

In Study Paper No. 10 which provided Constitutional Convention delegates with a background on civil liberties, Rick Applegate outlined the tension between the state and federal constitutions, and noted that in this tension states are encouraged to provide more than the minimum safeguards in the federal constitution. Applegate wrote:

> Whatever the extent of federal dominance in civil liberties field, it is important to remember that the federally enunciated standards are only *minimum* safeguard. The states are free—and have been encouraged by the U.S. Supreme Court—to go beyond the federal standards at any point where it is believed that citizens might better be protected.[8]

Applegate went on to stress that the civil liberties in the state constitution were not restricted by merely rephrasing the rights in the federal constitution, but that "the states could function to test a number of potential new rights—a function quite difficult, if not impossible, at the federal level."[9] Challenged by Governor Anderson, and informed by Applegate's study pa-

7. 3 Montana Constitutional Convention 3 (1972).

8. Rick Applegate, *Constitutional Convention Study No. 10, Bill of Rights* 3 (1972) (emphasis in original).

9. *Id.* at 4.

per, the delegates were handed the opportunity to be "little laboratories" and could "set examples for each other and for the federal government by testing these rights in their smaller jurisdictions without having to set in motion the somewhat unwieldy and awesome federal amendment procedures. In this way, the states could fulfill a function that they lost over time: the vigorous enforcement and extension of safeguards of civil liberty."[10]

In this spirit of recognizing that they were not bound by the parameters of the federal constitution in granting broader and even new civil liberties, the delegates adopted sweeping provisions that hold little resemblance to the Bill of Rights in the United States Constitution. There are seventeen express provisions in Article II, the Declaration of Rights, that have no express counterpart in the United States Constitution.[11] These sweeping provisions are not just reflective of broader protections individually, but also reflect an overall attitude of convention delegates that the Montana Constitution was not intended to mirror the United States Constitution when viewed as a whole.

Several cases from the Montana Supreme Court have recognized that the Montana Constitution stands for broader protections than those under the United States Constitution. Those cases are hallmarks of jurisprudence in Montana, which can be referred to collectively as the "Golden Age of the New Judicial Federalism" and should not be disregarded. They are valuable models of approach, construction and interpretation that accurately seize the original promise of the 1972 Constitution. Without using such models, the Montana Constitution is relegated to the stagnant backwater where it serves only as a reflection of the United States Constitution, and its promise cannot be realized.[12]

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10. *Id.* at 4, 56.

11. Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide* 20 (Greenwood Press 2001).

12. The preamble to the Montana Constitution states that the purpose of the new constitution is "to improve the quality of life, equality of opportunity and to secure the blessings of liberty *for this and future generations. . . .*" This focus was intended to guide future interpretations of the Constitution to meet the needs and requirements far beyond what the delegates themselves could foresee. There are numerous examples of such intent throughout the minutes of the Constitutional Convention. Constitutional Convention President Leo Graybill read some quotes from delegates at the beginning of the Constitutional Convention describing the purpose of the convention. At the outset of the convention, President Graybill quoted Delegate Thomas Joyce as saying: "It is my view that the Convention cannot and should not try to solve any contemporary governmental problems. Rather, its purpose is to facilitate the future solution of contemporary problems as well as problems not presently foreseeable." 3 Montana Constitutional Convention 111. When the right to clean and healthful environment was amended into the inalienable rights provision in Art. II, §3, Delegate Burkhardt stated that the reason he proposed the amendment was because "[the right to clean and healthful environment] is, for the time which we're living and for the foreseeable future, on of the inalieanable right that we hope to assure for posteriety." 5 Constitutional Convention 1637. The document was intended to be a living document interpreted as

II. THE "GOLDEN AGE" OF THE NEW JUDICIAL FEDERALISM IN MONTANA

In *Butte Community Union v. Lewis*,[13] the Montana Supreme Court recognized that constitutional interpretations by the United States Supreme Court did not control their decisions which granted heightened protections under the Montana Constitution. The *Butte Community* Court stated, "We will not be bound by decisions of the United States Supreme Court where independent state grounds exist for developing heightened and expanded rights under our state constitution."[14] The Court unequivocally recognized the principles of the New Judicial Federalism and emphasized that broader protections may be found under the state constitution even when the "state constitutional language is substantially similar to the language of the Federal Constitution."[15]

Using this expansive interpretation of Montana's own constitution, the Court in *Butte Community Union* defined "fundamental right" under the Montana Constitution. The Court stated that "In order to be fundamental, a

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necessary to preserve and expand upon the rights and liberties in the Constitution. For example, Delegate Burkhardt, in advocating for a broad statement to describe the right of public participation, Art. II, § 8, rather than the "hard language of the statute", stated "What [people are looking for] is the soul of a document, the living, growing reality" that would be a future "safety net" against government abuses. Delegate Campbell, in advocating for the express right of privacy in Art. II, § 10, paraphrased Delegate Dahood and noted that the right of privacy was a flexible concept designed to address government abuses as they arose. He stated, "As government functions and controls expand, it is necessary to expand the rights of the individual." 5 Constitutional Convention 1681.

13. *Butte Community Union v. Lewis*, 712 P.2d 1309, 1313 (Mont. 1986), *superseded*, Mont. Const. amend. 18.

14. *Id.* at 1313. A primary reason for following the principles of New Judicial Federalism is not only to provide more expansive protections under the state constitution, but also to provide an "adequate and independent" state ground for the decisions of the state's highest court. Only when a state's highest court relies upon such adequate and independent state grounds, such as those found in a state constitution, will the United States Supreme Court defer to the interpretation of the state's highest court. *Mich. v. Long*, 463 U.S. 1032, 1033 (1983).

15. *Butte Community Union*, 712 P.2d at 1313 (*citing Pfost v. State*, 713 P.2d 495, 500 (1985), *overruled on other grounds, Meech v. Hillhaven W. Inc.*, 776 P.2d 488 (Mont. 1989)). In *Pfost*, the Court stated:

> Art. II, § 4, of our State Constitution provides in part "no person shall be denied the equal protection of the laws. Mont. Const. art. II, § 4. That provision of our State Constitution, though similar in wording to the last clause of the Fourteenth Amendment of the Federal Constitution provides a separate ground on which rights of persons within this state may be founded, and under accepted principles of constitutional law such rights must be at least the same as and may be greater than rights founded on the federal clause. Thus, states may interpret their own constitutions to afford greater protections than the Supreme Court of the United States has recognized in its interpretations of the federal counterparts to state constitutions. . . . Federal rights are considered minimal and a state constitution may be more demanding than the equivalent federal constitutional provision. This is true even though our state constitutional language is substantially similar to the language of the Federal Constitution.

[Internal citations omitted.]

right must be found within Montana's Declaration of Rights [Article II] or be a right 'without which other constitutionally guaranteed rights would have little meaning.'"[16] By adopting such a definition of fundamental right, the Court recognized that federal constitutional precedent would have little sway over state constitutional interpretations.

For example, the Montana Supreme Court has recognized that the express right of privacy in Art. II, § 10[17] goes beyond any such personal autonomy or liberty interests in the United States Constitution. In *Gryczan v. State*,[18] the Court invalidated the Montana statute criminalizing homosexual conduct long before the United States Supreme Court did in *Lawrence v. Texas*.[19] Interestingly, in *Gryczan,* the Court used an analytical framework derived from the leading federal case on privacy in communications[20] to invalidate the statute, reasoning that people fully expect their consensual sexual activities will be private and that "while society may not approve," this is not to say that society would be unwilling to recognize that all adults, regardless of gender or marital state have a reasonable expectation that their sexual activities will remain private.[21] Although the Court adopted the language of the *Katz* test, it actually applied the test in a new way—not to informational privacy, but to personal autonomy privacy, and thereby expanded the personal autonomy liberty interest under the Montana Constitution.

In *Armstrong v. State*,[22] the Court clarified the nature of the liberty interest first enunciated in *Gryzcan* and upheld a woman's right to choose the healthcare provider who would perform an abortion. In *Armstrong*, Justice Nelson, writing for the majority, introduced another important construct of the Montana Constitution. The Court stated that "Montana's Constitution, and especially the Declaration of Rights [Art. II] encompasses a cohesive set of principles, carefully drafted and committed to an abstract ideal of a just government. It is a compact of overlapping and redundant rights."[23] While the Court relied primarily on the personal autonomy in the right of privacy in Article II § 10, the Court went on to list the many different provi-

16. *Butte Community Union*, 712 P.2d at 1113 (quoting *In the Matter of C.H.*, 683 P.2d 931, 940 (Mont. 1984)).

17. "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." Mont. Const. art. II, § 10.

18. *Gryczan v. State*, 942 P.2d 112 (Mont. 1997).

19. *See Lawrence v. Tex.*, 539 U.S 558 (2003).

20. The Court relies upon *Katz v. U.S.*, 389 U.S. 347, 361 (1967), and its two-part analysis of (1) whether the individual has an actual or subjective expectation of privacy and (2) whether that expectation is one society is prepared to recognize as reasonable. *Gryzcan*, 914 P.2d at 121–122.

21. *Gryzcan*, 914 P.2d at 122.

22. 989 P.2d 365 (Mont. 1999).

23. *Armstrong*, 989 P.2d at 388–389 (referencing Ronald Dworkin, *Life's Dominion* 166 (Vintage 1994)).

sions under Article II that would support such a liberty interest. This concept—that there are many rights, not just the right of privacy, that could be used to support an individual right—established a new foundation for constitutional interpretation in Montana. It suggests that the Montana Constitution should be viewed holistically; there are intertwining and corollary rights that support the ideal of a just government. Constitutional interpretation should not be focused on the dissecting of each provision, but rather based upon a construct where the individual rights are viewed in relation to each other. This construct led the Court to yet another important construct where separate provisions in Article II would actually operate to enhance or augment each other.[24]

The notion that two provisions could be read together to create a new or broader protection than if the rights were read separately had occurred previously. In *State v. Bullock*,[25] the Court rejected application of the federal open fields doctrine, and looked to both the right of privacy in Art. II, § 10 and to the protection against unreasonable searches and seizures in Art. II, § 11. In *Bullock*, the question before the Court was whether a game warden illegally seized an elk which he found hanging in the curtilage of a mountain cabin. Focusing on the personal nature of the right of privacy rather than the property analysis previously associated with curtilage analysis, the Court relied on the *Katz* test again. The Court reasoned that such an approach was warranted because § 10 and § 11 of Article II, must be read together when search and seizure cases are analyzed.[26] This reading of one provision to support another provided justification for the Court not to march "lock-step" with the United States Supreme Court jurisprudence.

Under this analysis of § 10 and § 11, the Court was essentially using one right in Article II as a "building block" for another in order to create a right that was broader than that provided under the United States Constitution. The protection against unreasonable searches and seizures under the

24. This holistic approach is different from that examined by Professor Neuborne. Under Prof. Neuborne's proposal, the United States Constitution should be read "as a structural whole" and not reach each provision as a "self-contained command" in "splendid isolation." Burt Nueborne, *The House was Quiet and the World was Calm the Reader Became the Book*, 57 Vand. L. Rev. 2007, 2014 (2004). Professor Neuborne's thesis is that "an organizing principle undergirds the Bill of Rights—an organizing principle unique in our rights-bearing tradition that, once acknowledged, helps to give coherent meaning to the components that make up the whole." *Id.* at 2016. Professor Neuborne advocates for viewing the United States Constitution holistically rather than reading "our most precious legal document as though the Founders had thrown a pot of ink at the wall, with the formal order of the Bill of Rights shaped by the splatter." *Id.* at 2015. Justice Nelson's approach, in contrast, is that the rights in Article II's Declaration of Rights are overlapping, but different provisions could be used to support the same liberty or personal autonomy interest.

25. *State v. Bullock*, 901 P.2d 61 (Mont. 1995).

26. In *State v. Goetz*, 191 P.3d 489, 496 (Mont. 2008), the Court reinforced and acknowledged its reading of §§ 10 and 11 in search and seizure cases.

Montana Constitution would be analyzed by looking to not only §11, but also §10, and the combination of these two provisions offered a heightened protection against unreasonable searches and seizures.

The Court expanded on this "building block" approach later in *Walker v. State*,[27] where the Court used the right of human dignity in Article II, § 4 to enhance or augment the protection against cruel and unusual punishment in Article II, § 22. In *Walker*, the Court stated: "Just as we read the privacy provision in the Montana Constitution in conjunction with the provisions regarding search and seizure to provide Montanans with greater protections from government intrusion, so too do we read the dignity provision of the Montana Constitution together with Article II § 22 to provide Montana citizens greater protections from cruel and unusual punishment than does the federal constitution."[28]

The Court's holding and analysis in *Walker* was an important step in Montana jurisprudence for several reasons. First, it recognized that the presence of the right of human dignity in Article II, § 4 operated to "complement" a separate constitutional right.[29] Secondly, it picked up the holistic approach in *Armstrong* and incorporated that concept with this building block approach. Whereas in *Armstrong* the Court saw that a number of provisions in the Montana Constitution could support a liberty interest, in *Walker* the Court recognized that the right to individual dignity could similarly protect an incarcerated inmate. But the right to individual dignity would not operate in a vacuum—instead, it operates in concert with the protection against cruel and unusual punishment to provide a heightened or enhanced right.

The building block analysis in the search and seizure cases and in *Walker* serve an important function in three ways. First, they provide a rational and logical basis for the Montana Supreme Court to follow the precepts of New Judicial Federalism. The expansive structure of the Montana Constitution and the listing of new rights focusing on the dignity, privacy and integrity of an individual should be taken into account each time a provision in the Montana Constitution is considered. The Montana Constitution is not a mirror of the United States Constitution and should not be treated as such. Secondly, this building block approach provides an adequate and independent state ground for the decisions of the Montana Supreme Court, thereby insulating it from federal scrutiny. Lastly, the build-

27. *Walker v. State*, 68 P.3d 872 (Mont. 2003).

28. *Id.* at 883.

29. *See* Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause with Possible Applications*, 61 Mont. L. Rev. 301, 328 (2000).

ing block construct provides the framework for a vibrant laboratory in the preservation of civil liberties.

III. Retreating from Heightened Protections under the Montana Constitution

Despite this earlier willingness to test and implement the new language in the Montana Constitution, the Montana Supreme Court has retreated in recent years to a reliance upon federal precedent. Two examples of the Court relying upon federal precedent rather than employing an analysis that fits the language and intent of the Montana Constitution are *Buhman v. State*,[30] and *State v. Schnieder*.[31]

In *Buhman*, the Court debated the takings clause in Article II, § 29 and rejected granting broader protections under the Montana provision than under the Fifth Amendment, despite a difference in language. The Court stated that the "taking" of private property under Article II, § 29 is "coextensive" with the protection under the Fifth Amendment and that the controlling federal precedent was to be used in applying a takings claim under either the Montana Constitution or the United States Constitution.[32]

Justice Nelson in his dissent in *Buhman* appealed to the Court to read the Constitutional Convention transcript "as a whole" and not dissect each separate provision. He argued that the delegates passing reference to the United States Constitution does not restrict the Court to strict reliance on federal precedent.[33] Justice Nelson went on to list those special protections of the Montana Constitution, showing how and why reliance upon federal precedent is not warranted by the either text or the intent of the framers. He stated, "One cannot read the transcripts of the debates without recognizing that Montana's Constitution is a progressive constitution."[34] The Court nonetheless rejected Justice Nelson's approach and decided to march lockstep with the United States Supreme Court in takings cases.

Similar to the Court's decision in *Buhman,* the Court in *State v. Schnieder* appeared to go out of its way to reject the granting of heightened protections under the Montana Constitution and turn away from the principles of New Judicial Federalism. In *Schneider*, the Court reviewed an individual's right to counsel under Article II, § 24 and stated that it would look to federal precedent unless the minutes of the Constitutional Convention expressly indicated the courts should not follow such precedent.

30. *Buhman*, 201 P.3d 70.
31. *Schneider*, 197 P.3d 1020.
32. *Buhman*, 201 P.3d at 85–86.
33. *Id.* at 108.
34. *Id.*

This interpretation in *Schneider* was a distinct break from the previous approach of the Court. Since 1986, the Court, relying upon the reasoning in *Butte Community Union*, had recognized that even when language in the Montana Constitution was identical or nearly so to its counterpart in the federal constitution, the Montana Constitution still provided a separate and enforceable provision and that the state constitutional right should be analyzed before the federal claim.[35] In *Schneider*, however, the Court went out of its way to "march lock-step" with the United States Supreme Court. Justice Nelson pointed out in his concurrence in *Schneider* that the parties had not really raised or briefed the right to counsel under the Montana Constitution.[36] There was no need to address the application of the Montana Constitution at all. The majority of the Court nonetheless raised the issue of whether broader protections should be afforded under the Montana Constitution and then rejected it, signaling perhaps that the Golden Age of New Judicial Federalism is over in Montana.

IV. Avoiding Constitutional Interpretation if Possible

In two recent cases where the Court was asked by the parties to find heightened protections under the Montana Constitution, the Montana Supreme Court avoided addressing the application of the Montana Constitution by relying upon either common law principles or statutory interpretation. In *Sunburst School District v. Texaco, Inc.*,[37] the parties were asked to brief and present oral argument on the issue of whether or not the right to a clean and healthful environment under the Montana Constitution was self-executing.[38] If it was self-executing, then the parties could look to that provision as a basis for damages in constitutional tort. Despite lengthy briefing and oral argument, the Court ultimately avoided the issue by adopting a *Restatement on Torts* position that would allow damages.[39] The Court had a perfect opportunity, however, to recognize the unique and expansive nature of the right to a clean and healthful environment, and chose not to do so.

35. *State v. Johnson*, 719 P.2d 1248 (Mont. 1986). Although the *Johnson* Court described the right to counsel, the Montana Supreme Court later recognized that it was actually the privilege against self-incrimination, as protected by the right to counsel in Article II, § 25. Despite this discrepancy, the overall approach of the Court in *Johnson* to the Montana Constitution was later acknowledged as correct. *See State v. Buck*, 134 P.3d 53 (Mont. 2006).

36. *Schneider*, 197 P.3d 1020, 1030 (J. Nelson, specially concurring).

37. *Sunburst Sch. Dist.*, 165 P.3d 1079.

38. *See* Article II, § 3 and Article IX.

39. *Sunburst Sch. Dist.*, 165 P.3d at 1092–1093. The Court notes specifically that because it had adopted *Restatement (Second) of Torts* § 929 to allow for recovery of restoration of damages it was not necessary to address the issue of whether there was a constitutional tort.

Similarly, in *Baxter v. State*,[40] the parties briefed and presented oral arguments to the Court on whether or not there was a right to death with dignity under the Montana Constitution. Extensive briefing was provided by *amici* on both sides of the issue, and oral argument focused on the meaning of the right to human dignity in Article II, § 4, and the personal autonomy rights in Article II, § 10. The issue in *Baxter* was whether or not Montana's homicide statute was constitutional as it applied to physicians who provided to competent, terminally ill patients a prescription that would cause death and which the patients would self-administer.

The district court had held in *Baxter* that the homicide statute was unconstitutional. The district court looked to the Montana Supreme Court's analysis in *Armstrong* and in *Walker,* and applied the holistic approach and building block analysis contained in those decisions. The district court read the right of human dignity in Article II, § 4 together with the right of privacy in Article II, § 10, and concluded that there was a right to death with dignity under the Montana Constitution. Holding a physician criminally liable for a patient's choice to terminate his or her life with medication provided by the physician violated that death with dignity. The district court's decision reflected the application of New Judicial Federalism during its Golden Age in Montana.

The Montana Supreme Court in *Baxter* refused, however, to apply the Montana Constitution. The Court instead analyzed the consent defense to homicide and stated that it was not a violation of public policy for physicians to use that defense if they prescribed medication to terminally ill, competent patients. The Court also upheld the constitutionality of Montana's Terminally Ill Act, although its constitutionality had not been challenged by the parties.

Baxter and *Sunburst School District* signal a potentially disturbing trend. While these cases do not reject outright the potential for recognition of fundamental rights under the Montana Constitution, they simply avoid the issue and leave it for another day. Presumably, this is the result of compromise on the Court, but it certainly suggests that a current majority is neither willing nor able to apply the heightened protections under the Montana Constitution.

V. CONCLUSION

The Montana Constitution was intended as a living document to protect future generations. It was designed to broadly meet those government intrusions that infringe upon our individual liberties and allow for full relief for violation of our constitutional rights. It is an expansive, not a restric-

40. 224 P.3d 1211.

tive, document. During the Golden Age of New Judicial Federalism in Montana, individual rights were recognized and protected. Recent trends suggest, however, that this Golden Age is over. The delegates to the 1972 Montana Constitutional Convention were a courageous and forward-looking group. Hopefully, the Montana judiciary will recognize, as it has in the past, the unique protections for individual liberties that the delegates envisioned.