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## Introduction

James C. Nelson

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## INTRODUCTION

James C. Nelson\*

This edition of the *Montana Law Review* (“Law Review”), like its predecessor summer issue, is devoted to Montana’s 1972 Constitution.<sup>1</sup> Both issues complement the remarks, presentations, and panel discussions of the Honorable James R. Browning Symposium on the Montana Constitution, sponsored by the Law Review on October 7 and 8, 2010.

While it is not my intention here to review the various articles and notes in this issue,<sup>2</sup> I do want to trace the important constitutional thread that weaves through them all. This thread—a braid of functionality, protection, and vision—is the common cord that binds together Montana law and informs the cases, controversies, and issues which implicate its provisions. Importantly, this thread, weaving throughout as it does, demonstrates that Montanans did not adopt a constitutional cookbook of disconnected and discrete rules or an unenforceable compendium of dreams and aspirations. Rather, the people adopted “a compact of overlapping and redundant rights and guarantees” committed to the “abstract ideal of just government.”<sup>3</sup>

This issue of the Law Review continues the snapshot of our Constitution at work, and as a work in progress—protecting rights, providing solutions, giving guidance, requiring more and better from the government and the governed, and being interpreted. Education is but one example of the issues addressed by the Constitution.

Every parent wants her child to be well-educated for the challenges of citizenship and for the tests and rewards of life and the workplace. In adopting our Constitution, the people guaranteed “[e]quality of educational opportunity” to each person of the State and set forth their goal of establishing a system of education which develops “the full educational potential” of each person.<sup>4</sup> Montanans also recognized the distinct and unique cultural heritage of Montana’s First Peoples, along with the necessity to preserve

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\* Montana Supreme Court Justice.

1. References herein to the “Constitution” are to the 1972 Constitution of Montana, unless otherwise indicated. Likewise, references to a particular “Article” and “Section” are to the articles and sections of the 1972 Constitution, unless otherwise indicated.

2. With the permission of the respective authors, I was provided with copies of drafts of the articles and notes in this issue of the Law Review. I read them all in preparation for writing this introduction.

3. See *Armstrong v. State*, 989 P.2d 364, 383 (Mont. 1999).

4. Mont. Const. art. X, § 1(1).

their cultural integrity.<sup>5</sup> But the devil is always in the details, and a big detail is always money. There is never enough, and there is often more apathy than commitment to the challenges and sacrifices necessary to fund the “full educational potential” of this State’s students.<sup>6</sup> Yet, the Constitution establishes a clear goal. Ponder a system in which every student is educated to her “full educational potential.” And consider the untapped wealth in the minds of this State’s children. Talk about a natural resource! If every child were educated to her full educational potential, Montana would be a beacon for knowledge, culture, literature, information, science, math, the arts, and all technical and professional pursuits. Education would take its rightful place as a fundamental right.<sup>7</sup> But the people’s goal of developing “the full educational potential” of each person has been difficult to achieve—especially for Native Americans. Education is a work in progress—a thread to be strengthened and more fully integrated into the warp and woof of 21st-century Montana.

Indeed, education is a key that opens many doors—doors that sometimes reveal the dangers of unhealthy or irresponsible conduct. Case in point: driving under the influence of alcohol or drugs. Educating Montanans to the health risks associated with tobacco has decreased its use and cleaned up the air in public places. Education has opened people’s eyes to the dangers of drugs, including the killer—methamphetamine. Education has increased the wearing of seatbelts, and it has started to cut into cell phone use and texting while driving. But alcohol abuse and driving under the influence remain a huge and, as yet, unresolved problem. Montana’s statistics are dismal. Montana is the First Worst Place for injury and death caused by impaired vehicle drivers.<sup>8</sup> We arrest perpetrators for fourth, sixth, ninth, and eleventh DUIs. There is carnage on our highways. Innocent citizens and law enforcement officers are killed or injured.<sup>9</sup>

So where is the constitutional thread? Article II, § 3 protects the inalienable rights to enjoy life and to seek safety, health, and happiness. But it also calls on “all persons” to recognize their corresponding responsibili-

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5. *Id.* at art. X, § 1(2) (“The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.”).

6. See e.g. *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989) (holding that spending disparities among Montana school districts resulted in unequal educational opportunities for students and finding the system unconstitutional); *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257 (Mont. 2005) (holding that Montana’s funding system for public education was constitutionally inadequate and deferring to the Legislature to define the requirements for a “quality” education).

7. See *Kaptein v. Conrad Sch. Dist.*, 931 P.2d 1311, 1318 (Mont. 1997) (Nelson and Leapart, JJ., specially concurring) (asserting that access to equal educational opportunity and to “a basic system of free quality public elementary and secondary education” are fundamental rights).

8. *Rohlfis v. Klemenhagen, LLC*, 227 P.3d 42, 54 n. 5 (Mont. 2009) (Nelson, J., dissenting).

9. See generally *id.* at 53–54.

ties.<sup>10</sup> Consider the individuals and families whose lives, safety, health, and happiness have been torn apart by the irresponsible conduct of drunken drivers and the bars and saloons that served them. Are these victims entitled to seek relief in the courts? Again, the Constitution provides the answer. It guarantees access to the courts, a speedy remedy for “every injury” of person and property, and “full legal redress.”<sup>11</sup> That said, however, may the Legislature effectively deprive some of these injured Montanans of their day in court by giving special breaks to alcohol purveyors who serve visibly intoxicated patrons? Article V, § 12 appears to say no.<sup>12</sup> Yet, Montana’s dram-shop laws<sup>13</sup> and the Supreme Court’s interpretation of them<sup>14</sup> stand for a different view. The problem thus remains. The constitutional thread is intact, but frayed; it has been stretched and weakened. It must be rewoven—hopefully by the Legislature, but if not, then by the courts.

There are parts of the constitutional fabric, though, where the thread is strong and vibrant. It is common knowledge that the United States Constitution contains a Bill of Rights which provides certain fundamental guarantees and protections, such as to practice one’s religion, to assemble, to speak, to publish, to keep and bear arms, and to be secure against unreasonable searches and seizures.<sup>15</sup> Montana’s Constitution contains similar rights, protections, and guarantees in Article II.<sup>16</sup> Less known to the public, however, is the fact that the Montana Constitution provides even more protections of fundamental rights than does its federal counterpart. For example, Montanans enjoy the right to a clean and healthful environment, the right to individual dignity, the right to participate in the operation of governmental agencies, the right to observe the deliberations of public bodies and state agencies and to examine public documents, the right of individual privacy, a right to bear arms that expands on the right guaranteed by the Second Amendment, and the right to sue the government, to name just a few.<sup>17</sup> Professors Elison and Snyder have pointed out that there are seventeen provisions in Montana’s Declaration of Rights that have no parallel in the federal Bill of Rights.<sup>18</sup>

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10. Mont. Const. art. II, § 3 (“In enjoying these rights, all persons recognize corresponding responsibilities.”).

11. *Id.* at art. II, § 16.

12. *Id.* at art. V, § 12 (“The legislature shall not pass a special or local act when a general act is, or can be made, applicable.”).

13. *See generally Rohfs*, 227 P.3d at 57–67 (Nelson, J., dissenting).

14. *See id.* at 45–50 (plurality opinion).

15. U.S. Const. amends. I, II, IV.

16. Mont. Const. art. II, §§ 5, 6, 7, 11, 12.

17. *Id.* at art. II, §§ 3, 4, 8, 9, 10, 12, 18.

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

Moreover, Montana's Constitution can and often does provide *greater* rights and *heightened* protections than parallel clauses in the federal constitution.<sup>19</sup> Again, case in point: Montanans are afforded greater protection against unreasonable searches and seizures under Article II, § 11, read together with their textual right of privacy under Article II, § 10, than they are under the Fourth Amendment.<sup>20</sup> For instance, in Montana a child may not waive his parent's right to be secure from unreasonable seizures in the parent's home, even if the child is a victim of the parent's alleged criminal conduct.<sup>21</sup> Our Constitution takes the warrant requirement seriously: if law enforcement officers want to gather evidence of criminal conduct, then, absent one of the well-recognized exceptions to the warrant requirement, they must obtain a warrant.<sup>22</sup> At least in cases involving searches and seizures, Montana's courts have woven the constitutional thread to form a tight and strong barrier against government intrusion.<sup>23</sup>

That is as it should be. It is the solemn responsibility of the courts to lace the constitutional thread through the fabric of the law, and to repair the thread when it is tattered. Every judge and justice makes one and only one promise when taking his or her oath of office: to support, protect, and defend the federal constitution and the Constitution of Montana.<sup>24</sup>

In this regard, I note that this issue of the Law Review includes an article on the contributions of lawyer-delegates to the 1972 Constitutional Convention ("Con Con"). Among other things, this interesting and informative article, coauthored by Professor Fritz Snyder and Con Con delegate

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19. See e.g. *Butte Community Union v. Lewis*, 12 P.2d 1309, 1313 (Mont. 1986) (Mont. Const. art. II, § 4 vis-à-vis the Fourteenth Amendment), *superseded by constitutional amendment as stated in Zempel v. Uninsured Employers' Fund*, 938 P.2d 658, 661–62 (Mont. 1997); *Walker v. State*, 68 P.3d 872, 883 (Mont. Const. art. II, §§ 4 and 22 vis-à-vis the Eighth Amendment); *Gryczan v. State*, 942 P.2d 112, 121–22 (Mont. 1997) (Mont. Const. art. II, § 10 vis-à-vis the Fourteenth Amendment and the penumbral rights of privacy and repose contained in the Bill of Rights); *Armstrong*, 989 P.2d at 373–374 (Mont. Const. art. II, § 10 vis-à-vis the Fourteenth Amendment); *State v. Bullock*, 901 P.2d 61, 75–76 (Mont. 1995) (Mont. Const. art. II, §§ 10 and 11 vis-à-vis the Fourth Amendment); *State v. Siegal*, 934 P.2d 176, 183, 184 (Mont. 1997) (same), *rev'd in part on other grounds*, *State v. Kuneff*, 970 P.2d 556, 559 (Mont. 1998); *Deserly v. Dept. of Corrections*, 995 P.2d 972, 977 (Mont. 2000) (same); *State v. Martinez*, 67 P.3d 207, 220 (Mont. 2003) (same); *Vernon Kills On Top v. State*, 928 P.2d 182, 204 (Mont. 1996) (Mont. Const. art. II, § 22 vis-à-vis the Eighth Amendment); *Ranta v. State*, 958 P.2d 670, 673–677 (Mont. 1998) (Mont. Const. art. II, § 24 vis-à-vis the Sixth Amendment); *Woirhaye v. Dist. Ct.*, 972 P.2d 800, 801–803 (Mont. 1998) (Mont. Const. art. II, §§ 24 and 26 vis-à-vis the Sixth Amendment); *State v. Johnson*, 719 P.2d 1248, 1254–55 (Mont. 1986), *as clarified by State v. Buck*, 134 P.3d 53, 65–66 (Mont. 2006) (Mont. Const. art. II, § 25 vis-à-vis the Fifth Amendment); *State v. Guillaume*, 975 P.2d 312, 316 (Mont. 1999) (same).

20. *Bullock*, 901 P.2d at 75–76; *Siegal*, 934 P.2d at 183, 184.

21. *State v. Ellis*, 210 P.3d 144 (Mont. 2009).

22. See *id.* at 148–149, 151–152.

23. See e.g. *Bullock*, 901 P.2d 61; *Siegal*, 934 P.2d 176; *State v. Goetz*, 191 P.3d 489 (Mont. 2008); *State v. Allen*, 241 P.3d 1045 (Mont. 2010).

24. Mont. Const. art. III, § 3.

and lawyer Mae Nan Ellingson, attests to the vigorous debate among the delegates in crafting Article VII, the Judiciary Article, of the Constitution.<sup>25</sup> This debate continues today.

Of course, whether voters opt to call a new constitutional convention in the November 2010 election<sup>26</sup> will be a *fait accompli* by the time this issue of the Law Review is published. However, I have argued that Montana's judiciary does not need to be changed or "reformed"—it works just fine with elected, nonpartisan judges and justices.<sup>27</sup> It bears noting, though, that Professor Andrew P. Morriss's article provides thoughtful comment on factors which anyone interested in amending Article VII should consider before implementing changes.

That said, the elephant in the courtroom is a United States Supreme Court decision: *Citizens United v. Federal Election Commission*.<sup>28</sup> I have previously offered my thoughts on this case.<sup>29</sup> Suffice it to say that Justice Stevens's dissent may prove sadly prescient.<sup>30</sup> If the *Citizens United* decision is made applicable to elected state judiciaries, Montana's voters may—and, I believe, probably should—amend the Constitution to implement a merit system for selecting judges. The system must be one that will negate, to the extent possible, the corrupting influences of politics, religion, and big institutional and corporate money on the selection of judges. At least in my view, judges and justices must not become what *Citizens United* clearly presages: lapdogs for big business and special, partisan, or sectarian interests. Indeed, Montanans have already experienced a judiciary heavily influenced by corporations in times past, and they ought not to be condemned to repeat that sordid chapter of this State's history. The constitutional thread in Montana—especially the guarantees of Article II—will not countenance

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25. Article VII sets out the powers and organization of the Judiciary, as well as the provisions relating to pay, qualifications, selection, and removal of justices and judges.

26. Mont. Const. art. XIV, § 3 ("If the question of holding a convention is not otherwise submitted during any period of 20 years, it shall be submitted as provided by law at the general election in the twentieth year following the last submission.").

27. See James C. Nelson, *Keeping Faith with the Vision: Interpreting a Constitution for this and Future Generations*, 71 Mont. L. Rev. 299, 310–13 (2010).

28. *Citizens United v. Fed. Election Comm.*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 876 (2010).

29. See Nelson, *supra* n. 27, at 311.

30. See *Citizens United*, 130 S. Ct. at 968 (Stevens, Ginsburg, Breyer, & Sotomayor, JJ., concurring in part and dissenting in part) ("[T]he consequences of today's holding will not be limited to the legislative or executive context. The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch, see, e.g., O'Connor, Justice for Sale, Wall St. Journal, Nov. 15, 2007, p. A25; Brief for Justice at Stake et al. as *Amici Curiae* 2, the Court today unleashes the floodgates of corporate and union general treasury spending in these races. Perhaps 'Caperton motions' will catch some of the worst abuses. This will be small comfort to those States that, after today, may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems.").

judges who make decisions based on ideology instead of the Constitution and the law. Judicial campaigns must not be financed by unlimited corporate and special-interest contributions. Judges must serve out of the courtroom, not out of some corporate or special-interest pocket.

In conclusion, the constitutional thread provides the anchors that keep the government in its place and within its proper bounds. This issue of the Law Review describes Montana's Constitution as a living document—one written by people with a vision and amazing prescience. To be sure, our Constitution—at least parts of it—has been challenged, interpreted, prodded, and, in some cases, amended. But it is as viable and defining today of the functions of government and the protections of Montanans' rights and fundamental values as it was when it was adopted nearly 40 years ago.

We inherit the past but borrow the future from our children. With some foresight, this generation will pass on to the next a constitution that is as utilitarian as it is idealistic, as dynamic as it is pragmatic, and as protective of individual rights and liberties as it is demanding of greater responsibility, transparency, and accountability from government.<sup>31</sup>

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I stepped out of my car on a late-September morning intending to walk to my office and finish this piece. As I did, I turned directly into one of those Charlie Russell sunrises. The sky was filled with bumpy gray fall clouds. The sun rising over the tree line in the parking lot played off the gray and charcoal rubble. Light pink; a patch of magenta; streaky thin threads of color that didn't know quite what part of the sky to hang on to. Imperceptibly, it grew—pinks into reds; broad swatches of intense orange; the cloud puffs glowing as if backlit by stage lights with revolving gels of different reds. I stood there, briefcase in hand, transfixed. The words of the Preamble to our Constitution came to me in a new and very personal way. "We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution." And there it was: Montana laid out in the sky right in front of me. Damn, I thought. Those folks really knew what they were doing.

Good reading.

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31. See Nelson, *supra* n. 27, at 299–323.