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# **State-Court Accountability in the Federal System: A Case Study of the Montana Supreme Court**

*By*

*William S. Consovoy, Michael E. Toner,  
& Samuel B. Gedge*

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- Our operational mission is to promote this vision at every level and branch of government and to educate and organize citizens to participate in this mission.
- We support efforts to ensure only highly-qualified individuals who share this vision comprise our state and federal courts and staff executive branch offices that administer and enforce the law.
- We support legislative and legal efforts which oppose attempts to undermine the rule of law; unconstitutionally expand the power of government; politicize the enforcement of the law; threaten American sovereignty; supplant American law with foreign or international law; or bias the legal system on behalf of politically-favored groups or individuals.

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In recent decades, some of the highest-profile refusals to follow the U.S. Supreme Court's decisions have come out of the Montana Supreme Court. In the most colorful instance, the U.S. Supreme Court had to grant certiorari *twice* to prevent the Montana Supreme Court from enforcing a federally preempted state law aimed at arbitration clauses. The Montana court embarked on a similar course of disobedience following the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*. Less than two years after *Citizens United* invalidated government bans on corporate political speech, the Montana Supreme Court took up the same issue and reached the opposite result. And, in 2010, the Montana Supreme Court blessed the state's retroactive claim of ownership over hundreds of miles of Montana riverbeds, again applying an analysis that ran directly counter to U.S. Supreme Court precedent.

The Montana Supreme Court's defiance of Supreme Court precedent regarding federal law is especially problematic because only the U.S. Supreme Court is empowered to directly review these wrongheaded decisions. But as an empirical matter, only a small fraction of the Supreme Court's docket comprises state-court decisions; in recent years, the percentage of state-court rulings accepted for review has never exceeded twenty percent. This means that of all the federal-law cases decided by the judiciaries of the fifty states, only between ten and fifteen decisions per Term prompt certiorari. And expecting the Supreme Court to dramatically increase its oversight of the Montana Supreme

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Court is probably unrealistic. Even if it had the resources to do so, the U.S. Supreme Court "is not, and has never been, primarily concerned with the correction of errors in lower court decisions." Alex Hemmer, Note, *Courts as Managers: American Tradition Partnership v. Bullock and Summary Disposition at the Roberts Court*, 122 Yale L.J. Online 209, 212 (2013), <http://yalelawjournal.org/2013/1/23/hemmer.html> (quoting Chief Justice Fred M. Vinson, Work in the Federal Courts, Address Before the American Bar Association (Sept. 7, 1949), *in* 69 S. Ct. v, vi (1949)). Perhaps the Montana Supreme Court thus subscribes to the view, attributed to Judge Stephen Reinhardt of the Ninth Circuit, that the Supreme Court simply "can't catch them all."<sup>1</sup>

But applying binding federal precedent should not be a game of cat and mouse between the U.S. Supreme Court and the Montana Supreme Court. Indeed, given this critical role in our federal system, the importance of state courts' respect for Supreme Court authority regarding federal law cannot be overstated.

The most obvious answer to state-court indifference to the U.S. Supreme Court's authority is to vote the offending jurists—in this case the elected judges of the Montana Supreme Court—out of office. Here too, however, Montana's experience suggests that ballot-box accountability can face serious obstacles. In 2011, legislators presented a referendum to the Montana voters that would have refined state judicial elections. As one proponent put it, the changes would "allow the people of the state of Montana to know their candidate better and make a better decision." Montanans never got a chance to consider the measure, though. In an extraordinary (and dubious) exercise of power, the sitting justices of the Montana Supreme Court preemptively struck the referendum from

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<sup>1</sup> Ed Whelan, *Summary Reversal of Ninth Circuit Judge Reinhardt*, NATIONAL REVIEW ONLINE, available at <http://www.nationalreview.com/bench-memos/49460/summary-reversal-ninth-circuit-judge-reinhardt/ed-whelan> (Nov. 16, 2009).

the ballot. In other words, the Montana Supreme Court has not only abandoned its solemn obligation to adhere to supreme federal law, it has resisted the effort by Montana's political branches to address the problem.

## I. THE MONTANA SUPREME COURT VERSUS THE SUPREME COURT OF THE UNITED STATES

### A. *The Montana Supreme Court and Federal Arbitration Law*

Montana's longest-standing refusal to follow Supreme Court precedent arises perhaps most prominently in the context of federal arbitration law and its objections to the Supreme Court's interpretation of the Federal Arbitration Act ("FAA" or "Act"). Montana is not alone in this; state-court arbitration rulings have prompted a disproportionate number of summary reversals by the U.S. Supreme Court in recent Terms. See Christopher R. Drahozal, *Error Correction and the Supreme Court's Arbitration Docket*, 29 Ohio St. J. on Disp. Resol. 1 (2014). Even among these objecting States, however, Montana stands out for its consistent defiance of the U.S. Supreme Court.

Over the past century, arbitration has emerged as an increasingly popular alternative to court litigation. In the main, it offers a cheaper, quicker means of resolving disputes. "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results[.]'" *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (citation and quotation marks omitted). Compared to adversarial litigation, its "relative informality . . . is one of the chief reasons that parties select arbitration." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009). More and more, disputants opt to "trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* (citation and quotation marks omitted).

Despite its evident benefits, arbitration has faced "centuries of judicial hostility." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974).

Anti-arbitration sentiment is commonly thought to derive from "the jealousy of the English courts for their own jurisdiction." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 n.6 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)). More recently, commentators have attributed state courts' continuing antipathy toward arbitration to "considerations of federalism and local control." Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1436 (2008).

In 1925, Congress enacted the FAA "in response to [this] widespread judicial hostility to arbitration." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308-09 (2013). The Act "reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). Section 2, in particular, "places arbitration agreements on an equal footing with other contracts," *id.*, by providing: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Put simply, Section 2 "requires courts to enforce [arbitration agreements] according to their terms." *Rent-A-Center, W., Inc.*, 561 U.S. at 67-68.

Like any other contract, an arbitration agreement may be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *AT&T Mobility LLC*, 131 S. Ct. at 1746 (quotation marks omitted). But Section 2 forecloses defenses "applicable *only* to arbitration provisions," *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (emphasis in original)—in other words, "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue," *AT&T Mobility LLC*, 131 S. Ct. at 1746 (quoting *Doctor's Assocs., Inc.*, 517 U.S. at 687). For "singling out arbitration provisions for

suspect status” is precisely the type of judicial hostility the FAA serves to curtail. *Doctor’s Assocs., Inc.*, 517 U.S. at 687. Three decades ago, the Supreme Court held that these principles apply equally to state courts and federal courts alike. *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984). In practice, moreover, “[s]tate courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act[.]” *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012) (per curiam). For this reason, the Supreme Court deems it “a matter of great importance . . . that state supreme courts adhere to a correct interpretation” of the Act. *Id.*

The Montana Supreme Court nevertheless has consistently—and at times openly—defied the Supreme Court’s interpretation of the FAA. *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994), is the most notorious example. *Casarotto* involved a dispute between the Subway restaurant franchise and one of its Montana franchisees. Subway is headquartered in Connecticut, and the parties’ contract provided that Connecticut law would govern their agreement. It further provided that any contract disputes would be resolved by arbitration. Notwithstanding these clear terms, the Montana Supreme Court held, first, that Montana law applied and, second, that the parties’ arbitration agreement could not be enforced. The court relied on a state statute that imposed an arbitration-specific notice requirement; under Montana law, arbitration clauses are invalid unless the contract bears a notice of arbitration “typed in underlined capital letters on the first page of the contract.” Mont. Code Ann. § 27-5-114(4) (1989). The contract in *Casarotto* did not contain this notice so, the court held, the parties’ dispute “[wa]s not subject to arbitration, according to the law of Montana.” 886 P.2d at 939.

*Casarotto*’s authoring justice also penned a remarkable special concurrence, offering his “personal observation[s]” on federal arbitration law. *Id.* (Trieweiler, J., specially concurring). Denouncing the FAA’s proponents for their

“arrogance,” “intellectual detachment from reality,” and “self-serving disregard for the purposes for which courts exist,” Justice Trieweiler expressed himself as “particularly offended by the attitude of federal judges.” *Id.* at 940. In his blunt assessment, “[n]othing in our jurisprudence appears more intellectually detached from reality and arrogant than the lament of federal judges who see this system of imposed arbitration as ‘therapy for their crowded dockets.’” *Id.* at 941.

The Supreme Court promptly vacated the Montana court’s judgment. *Doctor’s Assocs. Inc. v. Casarotto*, 515 U.S. 1129 (1995). In a summary order, the Court ordered the Montana Supreme Court to reconsider its decision in light of *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995). That recent decision had reaffirmed that “the basic purpose of the Federal Arbitration Act is to overcome courts’ refusals to enforce agreements to arbitrate.” *Id.* at 270. As if to remove any doubt about the direction the Montana court should take, Justice O’Connor’s concurring opinion in *Allied-Bruce Terminix* made clear that the FAA “displace[d]” state laws requiring that a notice of arbitration provision be prominently placed on the first page of a contract.” *Id.* at 282 (O’Connor, J., concurring).

The Montana Supreme Court did not take the hint. Not only did it decline to “modify[] or revers[e]” its earlier decision, *Casarotto v. Lombardi*, 901 P.2d 596, 599 (1995), the court did not allow the parties even to brief “the issues raised by the United States Supreme Court’s remand,” *id.* at 600 (Gray, J., dissenting); see also *id.* (voicing concern with “such an arrogant and cavalier approach to this important case on remand from the United States Supreme Court.”).

The Supreme Court again granted certiorari and reversed the Montana Supreme Court’s decision. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996). Drawing on the settled rule that “[c]ourts may not . . . invalidate arbitration

agreements under state laws applicable *only* to arbitration provisions,” the Court held Montana’s arbitration-notice law preempted under the FAA. *Id.* at 687 (emphasis in original). As the Court explained, “the State’s law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally.” *Id.*

In a final act of defiance, Montana justices Trieweiler and Hunt refused to sign the routine remand order that followed. *See* Richard C. Reuben, *Western Showdown: Two Montana judges buck the U.S. Supreme Court*, 82 A.B.A. J., Oct. 1996. As explained in their dissent, the two justices objected to “be[ing] an instrument of a policy which is as legally unfounded, socially detrimental, and philosophically misguided as the United States Supreme Court’s decision in this and other cases which interpret and apply the Federal Arbitration Act.” *Casarotto v. Lombardi*, No. 93-488, at \*3 (Mont. July 16, 1996) (Trieweiler & Hunt, JJ., dissenting), *quoted in* Liaquat Ali Khan, *Taking Ownership of Legal Outcomes: An Argument Against Dissociation Paradigm and Analytical Gaming*, 55 St. Louis L.J. 887, 906 n.118 (2011). In other words, these justices simply refused to follow the law.

Not surprisingly, Montana courts in the two decades since *Casarotto* have carried on largely as if the Supreme Court had never intervened. Post-*Casarotto*, most of the state’s judges are cautious enough not to invoke arbitration-specific requirements directly.<sup>2</sup> Instead, the

<sup>2</sup> There are exceptions, however. Last year, for example, one justice expressed a preference for striking arbitration agreements under Mont. Code Ann. § 27-5-114(2), a statute that targets arbitration clauses for invalidation where parties contract for “real or personal property, services, or money or credit” worth \$5,000 or less. *Kelker v. Geneva-Roth Ventures, Inc.*, 303 P.3d 777, 784 (Mont. 2013) (Cotter, J., specially concurring); *contra Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 282 (1995) (O’Connor, J., concurring) (singling out Mont. Code Ann. § 27-5-114(2) as an example of a state law that has been “displace[d]”).

Montana Supreme Court has fashioned a “generally applicable” reasonable-expectations doctrine that just so happens to invalidate practically every arbitration agreement that ends up before the court. *See, e.g., Kelker v. Geneva-Roth Ventures, Inc.*, 303 P.3d 777, 784 (Mont. 2013); *Kortum-Managhan v. Herbergers NBGL*, 204 P.3d 693, 699 (Mont. 2009). Under a pliable, ten-factor test, the Montana Supreme Court “unabashedly applies general contract-law principles differently when interpreting arbitration provisions from other contract provisions.” Anna Conley, *The Montana Supreme Court’s Continued, Not-So-Subtle Assault on Arbitration*, 35 Mont. Law. 6 (Feb. 2010); *see also Mortensen v. Bresnan Commc’ns, LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013) (holding Montana’s “reasonable expectations/fundamental rights rule” preempted “because it disproportionately applies to arbitration agreements, invalidating them at a higher rate than other contract provisions.”).

### *B. The Montana Supreme Court in the Aftermath of Citizens United*

In a highly publicized ruling, the Supreme Court in *Citizens United v. Federal Election Commission* held that under the First Amendment the federal government cannot constitutionally prevent corporations from funding independent political speech. 558 U.S. 310, 361 (2010). The Court held that the sole governmental interest that could justify such a restriction is preventing *quid pro quo* corruption and its appearance. *Id.* at 359. And as a matter of First Amendment law, “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” *Id.* at 357; *see also id.* at 361 (“An outright ban on corporate political speech during the critical preelection period is not a permissible remedy.”).

Yet, somehow, the Montana Supreme Court reached the opposite result the following year. Like the federal statute at issue in *Citizens United*, Montana law prohibited corporations from funding independent political speech.

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Mont. Code Ann. § 13-35-227(1). Following *Citizens United*, a Montana trial court held the law unconstitutional, but the Montana Supreme Court reversed. In the supreme court’s view, “*Citizens United* was decided under its facts or lack of facts,” and “Montana law, Montana elections and . . . Montana history” combined to form “unique and compelling interests” in prohibiting corporate-funded speech. *W. Tradition P’ship, Inc. v. Att’y Gen.*, 271 P.3d 1, 6, 11 (Mont. 2011).

The Montana court openly parted ways with *Citizens United*—as both the dissenting justices and ultimately the Supreme Court concluded. Foremost, *Citizens United* closed the door on just the sort of fact-based analysis that the Montana court purported to undertake. Far from being “decided upon its facts,” *id.* at 5, *Citizens United* rejected *any* “possibility that corporate independent expenditures could be shown to cause corruption,” 558 U.S. at 357-58. Even on their own terms, moreover, the Montana court’s fact-specific distinctions were highly suspect. As one dissenting justice put it, “[t]he fact is that none of the interests identified by the Court are unique to Montana.” *Western Tradition P’ship, Inc.*, 271 P.3d at 17 (Nelson, J., dissenting). Rather, the court repackaged the same interests rejected in *Citizens United*, “slapped a ‘Made in Montana’ sticker on them, and held them up as grounds for sustaining a patently unconstitutional state statute.” *Id.* at 33 (Nelson, J., dissenting).<sup>3</sup>

Unsurprisingly, the Supreme Court fixed *Western Tradition Partnership* with a summary reversal. *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam). But the decision is symptomatic of a deeper problem: the Montana court’s readiness to wish away Supreme Court precedent. The court’s “Made in Montana”

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<sup>3</sup> On top of that, some commentators have argued, the Montana court actually misread the historical record on which it relied. See, e.g., Robert G. Natelson, *The Montana Supreme Court vs. the Rule of Law: A Barrier to Prosperity*, 10-11 (2012), <http://www.montanapolicy.org/wp-content/uploads/The-MT-Supreme-Court-VS-The-Rule-of-Law.pdf>.

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defense to *Citizens United*, for example, bears a striking resemblance to Justice Trieweiler’s open letter to the federal judiciary in *Casarotto*. *Casarotto*, 886 P.2d at 939 (Trieweiler, J., specially concurring) (“In Montana, we are reasonably civilized and have a sophisticated system of justice . . .”).

*C. More Than a Century Late, the Montana Supreme Court Approves the State’s Claim to Hundreds of Miles of Riverbeds*

Montana’s most recent clash with the Supreme Court arose from an esoteric area of federal law—navigability of rivers—that had profound implications for private property rights. The hydroelectric energy company PPL Montana LLC owns and operates numerous facilities along the Upper Missouri, Madison, and Clark Fork Rivers in Montana. The first of these facilities was constructed in 1891, two years after Montana joined the Union. And from 1891 to 2004, the state claimed no title to these occupied stretches. As the Supreme Court later summarized, “[t]he State was well aware of the facilities’ existence on the riverbeds—indeed, various Montana state agencies had participated in federal licensing proceedings for these hydroelectric projects. Yet the State did not seek, and accordingly PPL and its predecessor did not pay, compensation for use of the riverbeds.” *Montana PPL, LLC v. Montana*, 132 S. Ct. 1215, 1225 (2012) (citations omitted).

That all changed in 2004. After 115 years of silence, Montana claimed that hundreds of miles of waterways occupied by PPL Montana had been “navigable” at the time the state entered the Union. As a result, the state maintained, PPL Montana owed tens of millions in back rent and should be required to pay rent going forward as well. This belated theory drew on the Supreme Court’s “equal footing” doctrine. The original thirteen states, the Court has said, “hold title to the beds under navigable waters” within their borders. *Id.* at 1226. The same is true for territories, like Montana, that became states later; upon its entry into the Union, a new

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state “gains title within its borders to the beds of water” that are navigable at statehood. *Id.* at 1227-28. For those riverbeds underlying non-navigable stretches, “[t]he United States retains any title vested in it before statehood . . . , to be transferred or licensed if and as it chooses.” *Id.* at 1228.

The Montana courts embraced the state’s claim against PPL Montana. Notwithstanding hundreds of pages of evidence and a federal decree to the contrary, the state trial court held that the disputed waterways had been navigable in 1889 for purposes of determining riverbed title. The State had thus owned the property from day one, the court concluded, which entitled the government to nearly \$41 million in retroactive rent for the previous seven years alone.

The Montana Supreme Court agreed. Whereas the U.S. Supreme Court has used a section-by-section analysis to determine whether stretches of river are navigable, the Montana court abjured that approach. It “accepted that certain relevant stretches of the rivers were not navigable but declared them ‘merely short interruptions’ insufficient as a matter of law to find nonnavigability, since traffic had circumvented those stretches by overland portage.” *Id.* at 1226; *PPL Montana, LLC v. State*, 229 P.3d 421, 449 (Mont. 2010). In addition, the court also pointed to evidence of present-day recreational use as “sufficient” to establish the commercial navigability of the disputed reaches more than a century before. *PPL Montana, LLC*, 229 P.3d at 448.

The Supreme Court unanimously reversed. Calling on decades-old precedent, the Court reaffirmed that “[t]he segment-by-segment approach to navigability for title is well settled, and it should not be disregarded.” 132 S. Ct. at 1229. By relying on “land route portage” to find the disputed river stretches navigable, the Montana court upended the correct analysis. *Id.* at 1231. “[T]hat very portage reveals the problem with the Montana Supreme Court’s

analysis,” the Supreme Court reasoned, because overland portage “demonstrates the need to bypass the river segment, all because that part of the river is nonnavigable.” *Id.*

The Montana court also erred by giving uncritical weight to present-day use. To be sure, “[e]vidence of present-day use may be considered to the extent it informs the historical determination whether the river segment was susceptible of use for commercial navigation at the time of statehood.” *Id.* at 1233. But the Montana court enlisted evidence of present-day use without even considering whether current “watercraft are meaningfully similar to those in customary use for trade and travel” in 1889. Nor did the court determine whether the river’s present condition is “materially different from its physical condition at statehood.” *Id.* In fact, the Supreme Court continued, the Montana court had “altogether ignored” evidence “about the past condition of the river’s channels and the significance of that information for navigability.” *Id.* at 1234.

## II. MONTANA SUPREME COURT AND STATE-LAW ISSUES

The Montana Supreme Court has approved invasions of property rights on other grounds as well. In two recent cases—*Bitterroot River Protective Ass’n v. Bitterroot Conservation Dist.*, 198 P.3d 219 (Mont. 2008) and *Public Lands Access Ass’n v. Madison County*, 321 P.3d 38 (Mont. 2014)—the Montana Supreme Court has aggressively read public-access laws to infringe the property rights of private citizens.

*Bitterroot River Protective Ass’n* involved Montana’s Stream Access Law, a statute providing that all “natural water bod[ies]” in the state be available for public recreational use. The Mitchell Slough was first created by settlers in the nineteenth century; since then, it has been maintained by its private owners, who “reconstructed the bed and banks . . . , narrowed its channel, increased water velocities, and improved aesthetics and the fish and wildlife habitats.” 321 P.3d at 224; *see also* Terry



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Anderson, *Access for All, Stewardship for None*, Helena Independent Record, Jan. 26, 2014. As one commentator has explained, “[b]efore the improvements paid for by the landowners, there were no fish in the slough except when floods caused water to flow through it.” Terry Anderson, *Peaceful Enjoyment of Your Property Except in Montana*, New West, Nov. 21, 2008.

In the 2000s, the Bitterroot River Protective Association sued for a judgment that the slough was a “natural water body” and thus subject to “the public’s right to recreate[.]” 198 P.3d at 242. The Montana Supreme Court obliged, deeming the issue “ultimately a conclusion of law” and reversing the trial court’s ruling to the contrary. *Id.* at 237-38. One of the leading commentators on Montana property-rights issues summarized the aftermath:

After the [Bitterroot River Protective Association] won its access challenge in the Montana Supreme Court, ditch owners stopped managing for fish and now manage primarily for irrigation. With the headgate shut in winter months, the upper portion has very little water and the lower portion is increasingly silted in. Yes, [Bitterroot River Protective Association] “won” the right to access the public’s water by walking on the privately owned beds and banks of the ditch, but the fish habitat that private owners created is disappearing.

Terry Anderson, *Guest opinion: Law can’t trample on private property rights*, Billings Gazette, Apr. 13, 2013.

In *Bitterroot River Protective Ass’n*, the court took pains to “emphasize[.]” that nothing in its decision should “be construed as granting the public the right to enter upon or cross over private property to reach the State-owned waters[.]” 198 P.3d at 242 (quotation marks and citation omitted).

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That right surfaced again more recently, in *Public Lands Access Ass’n v. Madison County*, earlier this year. *Public Lands Access Ass’n* involved a dispute over access to a stream. The stream was surrounded by privately owned land except for a public right-of-way road, which led to a bridge, which crossed the stream. After the landowner erected fences blocking access to the stream from the roadway, a public-access group sued. The trial court held that the public’s rights did not extend beyond the road itself, so the public had no right to cross the private adjoining land to access the stream. 321 P.3d at 41. Again, the Montana Supreme Court disagreed. “[T]he establishment of a public road by prescriptive use contemplates the general public’s use of the roadway as well as the land needed for construction, repairs and maintenance,” the court said. *Id.* at 44. And because county personnel used the land surrounding the bridge to maintain and repair the structure, the court concluded that the public at large could claim a right to enter that property in order to access the stream for recreation. *Id.*

In dissent, Judge McKinnon warned that this judgment “effectively grants a public prescriptive easement where the Legislature has determined none should exist.” *Id.* at 68 (McKinnon, J., dissenting in part and specially concurring in part).

### III. VOTER ACCOUNTABILITY? THE MONTANA SUPREME COURT REWRITES THE STATE CONSTITUTION TO FREEZE THE CURRENT SYSTEM FOR ELECTING MONTANA SUPREME COURT JUSTICES

As cases like *Casarotto*, *Western Tradition Partnership*, and *PPL Montana* show, the Montana Supreme Court’s unwillingness to respect the judicial hierarchy gives rise to serious structural concerns. Under the Supremacy Clause, “[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are.” *Claflin v. Houseman*, 93 U.S. 130, 136 (1876); U.S. Const.,

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art. VI, cl. 2. The Constitution “forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.” *Mims v. Arrow Fin. Seros., LLC*, 132 S. Ct. 740, 751 n.12 (2012) (quotation marks and citation omitted). That the Supreme Court may catch the worst offenders—or that acts of defiance like those in *Casarotto* may not have substantive legal effect—does not make these acts of defiance harmless. Under our system of dual sovereignty, state courts have “the coordinate authority and consequent responsibility to enforce the Supreme Law of the Land.” *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 369 n.16 (1990).

Infidelity to Supreme Court authority has serious practical consequences too. For one thing, “[j]udicial climates affect business location decisions and thus the overall health of state economies.” Andrew P. Morriss, *Opting for Change or Continuity? Thinking About ‘Reforming’ the Judicial Article of Montana’s Constitution*, 72 Mont. L. Rev. 27, 27-28 (2011). For another, results-oriented decisionmaking harms the judicial branch as an institution. “The power and the prerogative of a court . . . rest, in the end, upon the respect accorded to its judgments.” *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)).

And error-correction by the U.S. Supreme Court is only a partial remedy. The Supreme Court is the only tribunal empowered to directly review the federal-law rulings of all fifty state high courts; in recent years, the average number of state-court decisions accepted for review has hovered at a little above ten per Term (around fifteen percent of all cases for which certiorari is granted).

The other option—at least in those states with judicial elections—is for the voters to hold state judges accountable when they disregard the judicial hierarchy. But even ballot-box

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accountability may not be as easy as it sounds. Montana, again, illustrates the potential for state judges to tilt the electoral playing field in their own favor. As its 2012 decision in *Reichert v. State ex rel. McCulloch* highlights, the Montana Supreme Court has gone to great lengths to prevent the legislature and the People from reshaping the current system for choosing its members.

#### A. *The Court’s decision in Reichert v. State ex rel. McCulloch*

In 2011, the Montana legislature submitted to the electorate a bill that would have changed the way the state’s supreme-court justices are chosen. Historically, supreme-court candidates have been elected on a statewide basis. The legislative referendum, LR-119, sought to change that. LR-119 proposed statutory amendments to replace the statewide framework with elections by district; it also proposed that judicial candidates be qualified voters in their new districts. As explained by one proponent, this reform aimed to “create more competition in Supreme Court elections, more recognition among the electorate of these judicial contests, and membership on the Court that brings together jurists from all around the state.” Press Release, *Montana Chamber Endorses LR 119 on Primary Ballot*, Feb. 3, 2012. “Localizing the races to districts” was thought to “encourage candidates to run from their area and allow voters to make more informed choices about these important positions.” *Id.* As the state senate majority leader put it, “[w]e feel that local elections, by splitting the state up into seven districts with equal populations, will allow the people of the state of Montana to know their candidate better and make a better decision. . . . They will know their district court judge, they will know their local lawyer and we will have an opportunity for every region of the state to have a voice on the Supreme Court.” Tim Leeds, *Sen. Essmann touts proposed change to Montana Supreme Court elections*, *Havre Daily News*, Jan. 20, 2012.

A group of voters challenged the

referendum more than six months before the June 2012 election, claiming that LR-119's statutory amendments, if enacted, would violate the Montana Constitution. According to the challengers, requiring judicial candidates to be registered voters in their electoral districts would impermissibly add to the qualifications set forth in the Montana Constitution. Replacing the statewide-election system with districtwide elections would likewise violate the constitutional structure, the plaintiffs claimed.

The Montana Supreme Court agreed. The court first held that the constitutionality of LR119 was ripe for adjudication.<sup>4</sup> Even though the proposed changes to the electoral system would go into effect only if the Montana electorate passed the referendum, the court said that the measure's constitutionality presented an "actual, present" controversy. *Reichert v. State ex rel. McCulloch*, 278 P.3d 455, 484 (Mont. 2012). "If passed," the court explained, "the statutory changes outlined in the referendum are effective immediately." *Id.* at 473. For this reason, the court ruled that the case offered a ripe, justiciable dispute.

Turning to the merits of the challenge, the court struck down the referendum as "facially unconstitutional." *Id.* at 478. The court first found that the requirement that judicial candidates be qualified electors in their districts amounted to an "attempt to create new qualifications" for public office. *Id.* Because "the Legislature may not add to or subtract from the constitutional qualifications to hold a particular office," the court held, the registered-voter requirement would be unconstitutional. *Id.* at 475.

The court advised that a districtwide

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<sup>4</sup> Legislators appearing as *amici curiae* separately argued that the non-retiring justices should recuse because "LR-119 directly affects the[m] in terms of their reelections." Amicus Br., *Reichert v. State*, No. DA 12-0187, 2012 WL 1431731, at \*17 (Mont. Apr. 10, 2012). While two members of the court withdrew, the remaining justices held that neither the U.S. Constitution nor the Code of Judicial Conduct mandated recusal. 278 P.3d at 463-71.

electoral system would be similarly invalid. As the court tacitly admitted, the Montana Constitution does not expressly prohibit supreme-court elections on a districtwide basis; nor does it require that judicial elections be held statewide. Instead, the constitution leaves the electoral process to be defined by statute, providing that "[s]upreme court justices and district court judges shall be elected by the qualified electors as provided by law." Mont. Const., art. VII, § 8(1). Yet the court nonetheless held that the constitution's "language and structure" demonstrated an intent that "Supreme Court justices be elected and serve on a statewide basis." 278 P.3d at 475. Based on the transcripts of the state's constitutional convention, the court also divined an "assumption" that supreme-court candidates would run in statewide elections. *Id.* at 476.

#### B. Where *Reichert* went wrong

The Montana Supreme Court erred by even addressing the constitutionality of LR-119. Montana's judicial branch derives its authority from the state constitution, which in turn confines the courts' power to "justiciable controversies." *Houden v. Todd*, --- P.3d ---, 2014 WL 1688079, at \*4 (Mont. Apr. 29, 2014). "Article VII, Section 4 of the Montana Constitution, in relevant part, confers original jurisdiction on district courts in 'all civil matters and cases at law and in equity.'" *Greater Missoula Area Fed. of Early Childhood Educators v. Child Start, Inc.*, 219 P.3d 881, 889 (Mont. 2009). As interpreted by the Montana Supreme Court, this provision "embod[ies] the same sorts of limitations as those imposed on federal courts by the 'case or controversy' provision of Article III, Section 2 of the United States Constitution." *Id.*

The ripeness doctrine is among the most critical of these limits. As in the federal courts, a case must be ripe before the Montana courts can intervene. *Havre Daily News, LLC v. City of Havre*, 142 P.3d 864, 870 (Mont. 2006). The prerequisite for "an actual, present controversy"

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operates as a limit on the judiciary's power. *Id.* By preventing courts from acting as "roving commissions," *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973), the ripeness doctrine stops them from passing judgment on "hypothetical," "speculative" issues, *Havre Daily News, LLC*, 142 P.3d at 870; *see also id.* ("The basic rationale behind the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." (quotation marks omitted)).

*Reichert* offers a textbook example of an unripe case. Setting the merits of the dispute aside, LR-119 did not give rise to an "actual, present controversy" in the Montana courts. Like a bill before the legislature, it would have changed the status quo only if and when enacted into law, not before. In the parlance of the Montana court's ripeness precedent, the legal force of LR-119 was entirely "hypothetical" and "speculative." *See State v. Whalen*, 295 P.3d 1055, 1062 (Mont. 2013). It is for this precise reason that "[m]ost courts will not entertain a challenge to a measure's substantive validity before the election." James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 *Notre Dame L. Rev.* 298, 304 (1989).

Forging ahead, the Montana Supreme Court confirmed its place in the minority camp of a lopsided split in authority. *See id.* at 304 nn.48-49; *see also* Carina Wilmot, Note, *Reichert v. State ex rel. McCulloch and the Open Door for Increased Pre-Election Substantive Judicial Review*, 74 *Mont. L. Rev.* 441, 445 (2013). Remarkably, the supreme court all but conceded *Reichert's* unripeness, accepting that the referendum would have concrete consequences only "if passed." 278 P.3d at 473. In other words, the *Reichert* plaintiffs invited just the sort of "anticipatory" judgment that Montana's constitution is designed to preclude. *See Whalen*, 295 P.3d at 1062 (citation omitted). Yet the court nonetheless exercised power to decide the case, largely by

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recasting the ripeness doctrine as a "prudential consideration[]" rather than a constitutional restraint. *Reichert*, 278 P.3d at 473. This was error, and one that arrogated power to the judiciary at the expense of both the legislature and Montana's voters.

Even if prudential considerations could overcome a jurisdictional bar, the court's reasons for deciding *Reichert* were less than compelling. First, the court saw itself as duty-bound to adjudicate the case because LR-119 was "facially defective." *Id.* at 474. As discussed below, this reasoning is almost certainly wrong. On top of that, it is entirely circular: The court adjudged LR-119 unconstitutional *en route* to deciding whether it had power to consider just that. As Justice Baker put it in dissent, the court "conflate[d] the merits of the constitutional issues with the timing of their consideration." *Id.* at 484 (Baker, J., dissenting).

The court's second justification dovetailed with its first and was just as unsound. Because LR-119 is "facially defective," the court announced, permitting the electorate even to consider the measure would "create[] a sham out of the voting process" and amount to "a waste of time and money for all involved." *Id.* at 474. Again, these reasons do not pass muster. While purporting to preserve the constitutional order, the court directly invaded both the reserved rights of Montana voters and the domain of its co-equal branches of government. "The court is not a super budget cutter authorized to prevent government officials from performing their mandatory constitutional duties simply because it concludes that the performance of those duties will waste the taxpayers' money." Gordon & Magleby, *supra* at 311; *see also Reichert*, 278 P.3d at 484 (Baker, J., dissenting). And voting on an ultimately unconstitutional measure does not make a "sham" out of the electoral process—any more than passing an ultimately unconstitutional bill makes a sham out of the legislative one. *See* Gordon & Magleby, *supra*, at 309.

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The court's exercise of jurisdiction in *Reichert* would be cause for concern in any setting. But the context in which *Reichert* arose—a pre-election challenge to direct democratic action—makes the court's judgment especially suspect. "Direct legislation often involves hotly contested political matters, and too frequent interference with the initiative process by courts" discredits the judiciary and reduces the electorate's involvement in the voting process. *See id.* at 306. Historically, the Montana Supreme Court respected these considerations. For decades, "[j]udicial intervention in referenda or initiatives prior to an election [wa]s not encouraged." *Cobb v. State*, 924 P.2d 268, 269 (Mont. 1996). When review was unavoidable, the court made clear "that initiative and referendum provisions of the Constitution should be broadly construed to maintain the maximum power in the people." *Chouteau Cnty. v. Grossman*, 563 P.2d 1125, 1128 (Mont. 1977), *overruled on other grounds*, *Town of Whitehall v. Preece*, 956 P.2d 743 (Mont. 1998). If *Reichert* is any indication, the court no longer views these principles as restraining its power. In fact, the court has not hesitated to exercise its new-found authority; less than four months after *Reichert*, it preemptively struck another referendum, a tax-credit measure, as "constitutionally defective on its face." *MEA-MFT v. McCulloch*, 291 P.3d 1075, 1079 (Mont. 2012); *see also id.* at 1081 (Baker, J., dissenting).

Arriving at the merits, the Montana Supreme Court's interpretation of the state constitution was equally flawed. Consider, first, LR-119's proposal that judicial candidates be electors in their district of choice. Again, the court saw this provision as an added "qualification" for judicial office and promptly struck it. As a matter of constitutional law, the court held, "the Legislature may not add to or subtract from the constitutional qualifications to hold a particular office." *Reichert*, 278 P.3d at 475.

In truth, the Montana Constitution says otherwise. While the default rule is that "[a]ny qualified elector is eligible to any

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public office except as otherwise provided in this constitution," the constitution also vests unreserved power in "[t]he legislature [to] provide additional qualifications." Mont. Const., art. IV, § 4. The text could not be plainer. Indeed, five years after the Montana voters ratified Article IV, Section 4, the state attorney general took for granted that "the Constitution does provide that the legislature may enact additional qualifications" for public offices. 37 Op. Att'y Gen. Mont. No. 15 (Mar. 15, 1977); *see also* Natelson, *supra* note 3, at 19 ("Of course, if the legislature alone may enact additional qualifications, the legislature-and-people, through a referendum, certainly can.").

Yet the Montana Supreme Court took a different view. In a footnote, it admitted that Article IV, Section 4, empowers the legislature to add qualifications, but *only* for those "public offices whose qualifications are [not] specified in the Constitution." *Reichert*, 278 P.3d at 479 n.11. Of course, the Montana Constitution makes no such distinction. Quite the opposite; Article IV, Section 4, addresses eligibility for "*any* public office." Equally troubling, the precedent the court enlisted was abrogated decades ago. Article IV, Section 4, did not appear in its current form until the Constitutional Convention of 1972, yet *Reichert* relied exclusively on decisions interpreting the constitution as it existed in 1889. *See id.* at 475 n.8; *compare* Mont. Const., art. IX, § 11 (1889), *with* Mont. Const., art. IV, § 4 (1972).

The court doubled down on its atextual tactics in rejecting districtwide elections more broadly. As noted, the Montana Constitution neither mandates statewide supreme-court elections nor forbids districtwide ones. Instead, the constitution's text vests the power to organize judicial elections in the legislature; Article VII, Section 8, provides that "[s]upreme court justices and district court judges shall be elected by the qualified electors as provided by law." Mont. Const., art. VII, § 8(1). In keeping with this grant of authority, the current requirement for statewide supreme-court elections are found

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not in the state constitution, but in statutory enactments. Mont. Code Ann. § 3-2-101 (“The supreme court consists of a chief justice and six associate justices who are elected by the qualified electors of the state at large at the general state elections . . .”).

That should have been the end of the matter. When the framers’ intent can be “determined from the plain meaning of the words used,” Montana courts “may not go further and apply any other means of interpretation.” *Judicial Standards Comm’n v. Leroy Not Afraid*, 245 P.3d 1116, 1121 (Mont. 2010). Only “when the framers’ intent cannot be determined from the Constitution’s plain words” may the courts look elsewhere. *Id.* Properly applied in *Reichert*, these principles would have yielded a simple result: The constitution empowers the legislature to “provide[] by law” for supreme-court elections; Legislative Referendum 119, if enacted, would have been a routine exercise of that power; LR-119 comports with the Montana Constitution.

To reach the opposite result, the court in *Reichert* turned these interpretive principles on their head. Relying exclusively on legislative history, the court asserted that the broad language in Article VII, Section 8, could not mean what it said. Rather than empowering the legislature to “provide[] by law” for supreme-court elections—the only sensible meaning—the court insisted that Article VII, Section 8, simply addressed a peculiar loophole in the judicial-election process. According to the court, the provision was added “for the specific purpose of ensuring that appointees would face election in a timely manner and that no appointee could serve past the expiration of his or her predecessor’s term without standing for election.” 278 P.3d at 480. Even though this reading found no support in the text itself, the court held that “nothing in the plain language” of Article VII, Section 8, empowered the legislature to restructure judicial elections. *Id.*

#### IV. CONCLUSION

State supreme courts play a vital role in

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adjudicating federal constitutional questions. By the same token, when state courts disobey Supreme Court authority they jeopardize our federal system at a foundational level. Regardless of the merits of a particular case, the Supreme Court’s interpretation of the Constitution is the supreme law of the land. State courts—no less than federal courts—are duty-bound to honor those rulings. And the absence of reliable systemic checks on state supreme courts makes their fidelity to precedent all the more important. The only court empowered to directly review state high courts, the U.S. Supreme Court, does not have the capacity to correct persistently recalcitrant state judges. Nor is error-correction the Court’s primary function. At base, it is the responsibility of those who choose state-court judges—be it voters or appointing authorities—to hold their judiciaries accountable.