

Amendment - 2nd Reading-yellow - Requested by: Barry Usher - (S) Committee of Whole

68th Legislature - 2023

Drafter: Madelyn Krezowski, (406) 444-6857

SJ0015.001.001

1 488 P.3d 548, that "[s]ince Marbury, it has been accepted that determining the constitutionality of a statute is
2 the exclusive province of the judicial branch"; and

3 WHEREAS, the Montana Supreme Court in *McLaughlin v. Montana State Legislature*, 2021 MT 178,
4 405 Mont. 1, 493 P.3d 980, states that "the courts, as final interpreters of the Constitution, have the final
5 obligation to guard, enforce, and protect every right granted or secured by the Constitution" and observing that
6 "since the early 1800s, the idea that the Supreme Court has the power to pass upon constitutional questions
7 and that its decisions were final and binding upon the other two branches of government has been widely
8 accepted"; and

9 WHEREAS, the above quote, which has been historically stated by courts and law schools for decades,
10 is a myth and is not an accurate quote or a correct interpretation of *Marbury v. Madison*; and

11 WHEREAS, the decision of Chief Justice John Marshall in *Marbury v. Madison* never says that
12 determining the constitutionality of a statute is the "exclusive" province of the judicial branch; and

13 WHEREAS, *Marbury v. Madison* never says that decisions of the courts "were final and binding upon
14 the other two branches of government"; and

15 WHEREAS, Chief Justice Marshall stated that a law repugnant to the constitution is void; it is equally
16 valid that an opinion by the court that is repugnant to the constitution is equally void.

17
18 NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF
19 THE STATE OF MONTANA:

20 (1) That the belief that the court has exclusive authority to interpret the constitution and that its
21 decisions are binding on the other two branches is a myth based on a faulty understanding of *Marbury v.*
22 *Madison*. The executive, legislative, and judicial branches of government have a co-equal responsibility under
23 oath to interpret and maintain fidelity to the constitution. It is repugnant to the constitutional doctrines of
24 separation of powers and checks and balances to grant exclusive responsibility and power in any of the three
25 branches of government to say what the law is, or to be the final arbiter of what the constitution means. That
26 while the legislative and executive branches should respect the opinions of the court, the legislature and the
27 executive have equal roles in determining the constitutionality of any statute or decision. Changes to the
28 constitution are not the prerogative of governors, courts, or legislators, but in the power of the people to accept

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1 or reject amendments to the constitution.

2 (2) That the Secretary of State is hereby directed to send a copy of this resolution to the Montana
3 Supreme Court, the Clerk of the Montana Supreme Court, the clerk of each district court in Montana, the Water
4 Court, the Governor of the State of Montana, the Attorney General of the State of Montana, the county attorney
5 of each county in Montana, the head of each administrative agency in the state, ~~and~~ the presiding officers of
6 each of the legislative houses in the several states, the United States Supreme Court, the clerk of the United
7 States District Court for the District of Montana, and the United States Attorney for the District of Montana.

8 - END -