

## 1 SENATE JOINT RESOLUTION NO. 15

2 INTRODUCED BY T. MCGILLVRAY, K. REGIER, G. HERTZ, S. HINEBAUCH, B. USHER

3  
4 A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF  
5 MONTANA THAT IT IS THE EQUAL RESPONSIBILITY OF THE LEGISLATURE, GOVERNOR, AND  
6 JUDICIAL BRANCH TO INTERPRET AND MAINTAIN FIDELITY TO THE CONSTITUTION AND THAT NO  
7 SINGLE BRANCH HAS EXCLUSIVE POWER TO BIND ITS DECISIONS ON ANOTHER BRANCH OF  
8 GOVERNMENT AND THAT THE 1803 CASE OF MARBURY VERSUS MADISON DOES NOT STATE OR  
9 ASSERT THAT IT IS THE EXCLUSIVE ROLE OF THE COURTS TO SAY WHAT THE LAW IS OR THAT  
10 THEIR DECISIONS ARE FINAL AND BINDING ON OTHER BRANCHES OF GOVERNMENT.  
11

12 WHEREAS, Article VI of the United States Constitution states that "this Constitution . . . shall be the  
13 supreme Law of the Land" and that "State Legislatures, and all executive and judicial officers, both of the  
14 United States and of the several states shall be bound by Oath or Affirmation to support this constitution"; and

15 WHEREAS, the oath to "support, protect, and defend the constitution of the United States and the  
16 constitution of the State of Montana" gives each branch co-equal duty to interpret and maintain fidelity to the  
17 constitutions of the United States and Montana; and

18 WHEREAS, the 1803 case of Marbury v. Madison, 5 U.S. 137 (1803), states that "the powers of the  
19 legislature are defined and limited" and that "it is a proposition too plain to be contested, that the constitution  
20 controls any legislative act repugnant to it, or, that the legislature may alter the constitution by an ordinary act";  
21 and

22 WHEREAS, the logic of Marbury v. Madison equally applies to the executive and judicial branches, that  
23 the powers of the executive and judicial branches are defined and limited and "it is a proposition too plain to be  
24 contested, that the constitution controls any" judicial or executive "act repugnant to it"; and

25 WHEREAS, the 1803 case of Marbury v. Madison states that "it is apparent, that the framers of the  
26 constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature";

27 and

28 WHEREAS, the Montana Supreme Court stated in Brown v. Gianforte, 2021 MT 149, 404 Mont. 269,

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

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 each district court in Montana, the Water Court, the Governor of the State of  
4 Montana, the head of each administrative agency in the state, and the presiding officers of each of the  
5 legislative houses in the several states.

6 - END -