Constitutions 101

April 29, 2024

Helena, Montana

This Presentation is made at the request of the Senate Select Committee on Judicial Oversight and Reform to provide an overview of:

1. Federal and state constitutional theory, structure, and content; and
2. Separation of Powers and Judicial Review.

It is not designed to express opinions on any specific issues which the Committee may address. It is divided into five Parts:

Part I	Constitutional Theory – Federal and State
Part II	The Federal Constitution
Part III	The Montana Constitution
Part IV	Separation of Powers Under the Montana Constitution
Part V	Standards Applicable to Judicial Review of Legislation

I. Constitutional Theory – Federal and State

1. Federal. The theories underlying the federal and state constitutions are very different. The federal constitution proposed by a convention of the states in 1787 transferred certain sovereign powers held by the states to a federal government. The theory then, as now, is that the federal government has only those powers "enumerated" in the federal constitution, along with whatever additional powers may be "necessary and proper" to the exercise of its enumerated powers. These affirmative powers are generally expressed in Article I, Section 8. Limitations on federal powers are expressed in Article I, Section 9.

2. State. The theory of state constitutions is that the states which proposed and ratified the federal constitution retained all sovereign powers except those which they transferred to the federal government. Accordingly, state governments may exercise any powers of a sovereign government except those prohibited by the federal constitution and their own constitutions.

3. Federal Bill of Rights. Because the federal government could exercise only those powers which the constitution conferred, its drafters did not think a bill of rights was necessary to further limit its powers. However, several state ratification resolutions proposed amendments similar to state bills of rights to assure that the federal government could not exercise powers which violated certain fundamental rights, and the first Congress adopted twelve amendments, eleven of which have been ratified. The first ten are generally called the "Bill of Rights."

4. State Bills of Rights. Because a state government may exercise all powers not prohibited by its constitution or the federal constitution, all state constitutions contain bills of rights limiting the powers of state government. Article II of the Montana constitution expresses rights that limit the powers of state government beyond the federal bill of rights.

II. The Federal Constitution

A. Article I – The Legislative Branch

1. Establishment of the Legislative Branch. Article I, Section 1 vests "all legislative powers herein granted" in a Congress consisting of a Senate and a House of Representatives. Sections 2 through 7 provide for the internal organization and operation of Congress. Section 7 requires presidential approval of bills passed by both houses of Congress before they become law and gives Congress the power to override a presidential refusal to approve a bill by a roll-call vote of two-thirds of the members of each house.

2. Lawmaking Powers of Congress. Section 8 confers legislative powers on Congress, including the power to "lay and collect taxes," "pay debts," and "provide for the common defense and general welfare of the United States." It goes on to list specific powers such as the power to borrow money and "to regulate commerce with foreign nations, and among the several states, and with Indian tribes." A final clause authorizes Congress to make all laws "necessary and proper" for the exercise of its specific legislative powers.

3. Restrictions on Congress' Lawmaking Powers. Section 9 prohibits the exercise of certain legislative powers such as "suspension" of *habeas corpus*, passage of bills of attainder or *ex post facto* laws.

4. Restrictions on State Lawmaking Powers. Section 10 prohibits states from exercising various powers such as entering into treaties, alliances, or confederations, granting private licenses to conduct warlike activities, coining money, enacting bills of attainder, *ex post facto laws*, or laws "impairing the obligation of contracts," granting titles of nobility, and taxing imports and exports.

B. Article II – The Executive Branch

1. Establishment of Executive Branch. Section 1 vests the "executive power" in a president elected by "electors" appointed by each state and establishes the qualifications and terms of office of the president.

2. Presidential Powers. Section 2 provides that the president is the commander in chief of the armed forces of the United States as well as of the state militias when called into the service of the United States. It authorizes the president to request written opinions of the principal officers of executive branch departments on any subject relating to the duties of their offices and to grant pardons for offenses against the United States, "except in cases of impeachments." It authorizes the president "by and with the advice and consent of the Senate" to make treaties, to appoint ambassadors, other public officers, judges of the Supreme Court, and "all other officers of the United States."

3. Presidential Duties. Section 3 requires the president to report to Congress from time to time on the "state of the union," to recommend measures to it, to "take care that the laws be faithfully executed," and to commission all officers of the United States.

C. Article III – The Judicial Branch

1. Establishment of Judicial Branch. Section 1 vests the judicial power of the United States in a supreme court and in such inferior courts as Congress may establish. Judges hold their offices "during good behavior" rather than for specified terms.

2. Jurisdiction of Federal Courts. Section 2 provides that the judicial power extends, among other matters, to **"cases"** arising under the constitution, laws, and treaties of the United States, and to **"controversies"** to which the United States is a party, between two or more states, between a state and a citizen of another state, between citizens of different states, and between a state or its citizens and a foreign state or its

citizens or subjects. Under a 1938 Supreme Court decision, federal courts must apply state law to cases between citizens of different states.

3. Treason. Section 3 defines "treason against the United States," restricts the grounds for conviction, and restricts the terms of punishment for which Congress may provide.

D. Article IV – Coordinating the States

1. Full Faith and Credit. Section 1 requires states to give effect to the public "acts, records, and judicial proceedings" of other states. For example, the appointment of a personal representative in a Montana estate must be recognized by the court of another state upon appropriate proof of the appointment.

2. Privileges and Immunities. Each state must give to the citizens of other states the "privileges and immunities" it grants to its own citizens. Each state must honor the demand of the executive authority of another state to return persons to that other state for trial on felony and other criminal charges.

3. New States and Territories. Congress may admit new states to the United States and regulate "territories" and "other property" of the United States, for example, national forests and parks.

4. Republican Form of State Government, Protection from Invasion and Domestic Violence. The United States must "guarantee" every state a "Republican form of government." Section 4 doesn't define the term, nor does the Supreme Court, which deems it a "nonjusticiable" political question.

E. Article V – Constitutional Amendment

Two-thirds of both houses of Congress may propose amendments to the federal constitution, or two-thirds of the state legislatures may call a convention for proposing amendments. Proposed amendments must be ratified by three-fourths of the states before they become a part of the constitution.

F. Article VI – Contracts, Supremacy, and Oaths

Article VI ratifies debts and obligations incurred by the confederated states prior to adoption of the constitution. It binds "the judges in every state" to follow the constitution, and laws and treaties made "in pursuance thereof," declaring them to be **"the supreme law of the land."** It requires all members of Congress as well as all members of state legislatures, and all executive and judicial officers of the United States and the "several states" to be bound by an oath "to support this Constitution." It prohibits any "religious test" as a qualification to any office of public trust under the United States.

G. Selected Amendments Significant to State Legislation

1. The Bill of Rights. The first ten amendments were proposed by the first Congress in 1789. Ratification by the states was completed in 1791. The purpose of the Bill of Rights was to limit the powers of the federal government – it did not apply to states. *Barron v. Baltimore*, 32 U.S. 243 (1833). See, however, the discussion of the Fourteenth Amendment in Paragraph 3 below.

2. Slavery. The federal constitution acknowledged the existence and legality of slavery, but sought to limit its effects, for example, by limiting representation in the House of Representatives to the number of "free persons" and indentured servants in a state, but only three-fifths of its "other persons." Article I, Sec. 2. Congress sought to restrict slavery in some new states admitted to the union, but in *Dred Scott v. Sandford*, 60 US 393 (1856) the Supreme Court held that "a free Negro of the African race" was not a citizen so could not sue a citizen of another state in federal court under Article III, Section 2, and (exercising the court's power of judicial review to invalidate federal legislation for the first time since 1803) that the federal law prohibiting slavery in those states violated the due process clause of the Fifth Amendment. The Thirteenth Amendment, ratified a few months after the Civil War, prohibited slavery and "involuntary servitude" except as punishment for crime throughout the United States.

3. States and Civil Rights. The Fourteenth Amendment, ratified in 1868, provides that persons born or naturalized in the United States and subject to its jurisdiction "are citizens of the United States and of the State wherein they reside," thus superseding the Supreme Court's *Dred Scott* ruling. The Amendment's first clause also provides that

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Through a series of rulings, the Supreme Court has held that the **due process clause** of the Fourteenth Amendment has "selectively incorporated" those provisions of the Bill of Rights which have a "deeply rooted presence in national history and traditions," or an "inherent role in protecting liberty." When such a right is "incorporated" under the due process clause, the state and federal courts apply its terms to state laws and the actions of state and local officials. Incorporation of the Bill of Rights is the source of numerous state and federal rulings invalidating state laws and setting aside the judgments of state courts. The most recent Bill of Rights provision incorporated into the due process clause was the Second Amendment. *McDonald v. City of Chicago*, 564 US 742 (2010).

Similarly, the state and federal courts have often applied the **equal protection clause** of the Fourteenth Amendment to invalidate state and local policies which are shown to have unequal effects on identified classes of people.

4. Voting Rights. The Fifteenth, Nineteenth, and Twenty-Sixth Amendments provide that neither the United States nor any state may deny or abridge the right of citizens of eighteen years old or older to vote on account of race, color, previous condition of servitude, sex, or age.

III. The Montana Constitution

The Montana Constitution is much longer and more complex than the federal constitution. The purpose of this section of the outline is to highlight only some of its significant features pertaining to legislative and judicial powers.

1. **Compact With the United States.** Article 1 references the February 22, 1889 enabling Act of Congress under which Montana was authorized to petition for statehood. Section 8 of the enabling Act provides that each of the new states which it authorized, including the Dakotas, Washington, and Montana, "which have adopted constitutions and formed state governments . . . shall be deemed admitted by virtue of this act "on an **equal footing with the original states** . . ." Thus the Montana state government holds all the sovereign powers of the original states, excepting only those powers limited by the federal and state constitutions. It specifically mentions the state's recognition of "absolute" federal

jurisdiction and control over land held by "any Indian or Indian tribes." See Section 4 of 25 Statutes at Large 676.

2. **Declaration of Rights.** Article II sets out 35 separate rights. See pp. 21-34 of the constitutional materials provided to the Committee. Although many of its provisions are familiar, one unique feature of the Montana Declaration of Rights is Section 4 - individual dignity. This Section applies a guaranty of protection from discrimination on the basis of race, color, sex, culture, social origin, or condition, or political or religious ideas not only to the state but also to "any person, firm, corporation, or institution."

   The Declaration of Rights also contains innovative but undefined rights including Section 3 (the right to a clean and healthful environment), Section 8 (the right to participate in the operation of government agencies prior to final decision "as may be provided by law"), Section 9 (the right examine documents or to observe the deliberations of all public bodies or agencies of state government except where "the demand of individual privacy clearly exceeds the merits of public disclosure), Section 10 (the right of individual privacy, except on a showing of compelling state interest), and Section 35 (the right of servicemen, servicewomen, and veterans to "special considerations" as determined by the legislature).

   The constitution establishes rights in other Articles as well. For example, Article IX, Section 1 separately requires "the state and each person" to "maintain and improve a clean and healthful environment in Montana for present and future generations."

   Article X, Section 1(3) creates an affirmative duty of the legislature to "provide a basic system of free quality public elementary and secondary schools."

   All legislation, policies, and administrative rules of state government must comply with the Declaration of Rights. See discussion of standards of judicial review in Part V of this outline.

3. **General Government.** Article III, Section 1 (starting at p. 24 of the Committee materials) divides Montana government into three distinct "branches" – legislative, executive, and judicial. Its second sentence provides that

   > No person or persons charged with the exercise of power properly belonging to one branch shall exercise any properly belonging to either of the others, except as in this constitution expressly directed or permitted.

   See Part IV of this outline for further discussion of separation of powers.

Article III, Sections 4 and 5 provide for direct initiation of laws by the people exercising a power of "initiative" and for the legislature to refer laws to the people for ratification or rejection through a power of "referendum."

4. **Suffrage and Elections.** Article IV, Section 2 provides that any citizen of the United States who is 18 or older and who meets "registration and residence requirements provided by law" is a "qualified elector" unless serving a sentence for a felony in a penal institution or is of unsound mind as determined by a court. Section 8 establishes term limits for state and federal offices, though the term limits of members of Congress it creates are not enforceable because they add requirements not listed in Article I, Sections 2 and 3 of the federal constitution. *US Term Limits v. Thornton,* 514 U.S. 749 (1995).

5. **The Legislature.** Article V vests legislative power in a legislature consisting of two houses. It does not define the "legislative power" but as a state admitted to the union on an "equal footing" with the original states, its legislature's power to legislate is complete except as limited by the state and federal constitutions. A limitation on the legislature's power to enact laws is expressed in Article VI, Section 10, conferring on the governor a power to veto bills passed by both houses of the legislature. The legislature may override a veto by a vote of two-thirds of the members of each house.

   Article V, Section 11 establishes specific requirements for bills, for example, a "single subject rule" expressed in subsection 3:

   > Each bill, except general appropriation bills and bills for the codification and general revision of the laws, shall contain only one subject, clearly expressed in its title. If any subject is embraced in any act and is not expressed in the title, only so much of the act not so expressed is void.

   The legislature's failure to follow the "single subject rule" has recently been held to constitute bad faith and justify an award of attorneys' fees to plaintiffs who successfully challenged the resulting legislation. *Forward Montana v. State,* 2024 MT 75 (April 9, 2024).

6. **The Judiciary.** Article VII, Section 1 vests the judicial power of the state in "one supreme court, district courts, justice courts, and such other courts as may be provided by law." Section 2 provides that the supreme court's jurisdiction includes both appellate jurisdiction and limited original jurisdiction, such as the power to hear and determine writs of *habeas corpus*. It has general supervisory control over all lower courts, and may make rules governing civil, criminal, and appellate procedure, subject to disapproval by the legislature.

The supreme court may make rules governing admission to the practice of law and the conduct of attorneys.

Decisions of the supreme court must be made by the majority of justices and must be in writing, although the supreme court's internal operating rules authorize non-citable decisions when a case presents only issues of settled law.

7. **Education.** Article X, Section 9(2)(a) confers a high level of autonomy to the Montana university system through its Board of Regents:

> The government and control of the Montana university system is vested in a board of regents of higher education which shall have full power, responsibility, and authority to supervise, coordinate, manage and control the Montana university system and shall supervise and coordinate other public educational institutions assigned by law.

Because the constitution specifically grants the Board of Regents "full power" to control the university system, the legislature has limited power to legislate with respect to the system. The legislature has the power to control expenditure of state funds allocated to the University system, including by line-item budget allocations, provided its exercise of the power isn't used to control it, for example, by controlling the salary of a university president. *Board of Regents v. Judge*, 168 Mont. 433, 543 P.2d 1323 (1975). But the legislature may not regulate other items concerning the university system such as policies concerning possession of firearms on campus, *Bd. of Regents of Higher Educ. of Mont. v. State*, 2022 MT 128, 409 Mont. 96, 512 P.3d 748, or regulating on-campus speech, participation in athletics, or conducting on-campus political activities, *Barrett v. State,* 2024 MT 86, decided April 26, 2024.

IV. Separation of Powers

Western political theorists whose work was available at the time of the federal constitutional convention in 1787 and likely influenced the federal constitution's structure included, among many others, Frances Hutcheson, Thomas Hobbes, John Locke, Baron de Montesquieu, John Jacques Rousseau, and David Hume. Classical theorists such as Aristotle, Augustine, Aquinas, and others were likewise available to the delegates and some showed deep familiarity with their works. The drafters of the federal constitution and

the Montana constitution, which likewise incorporates the separation of powers, were not merely inventing government from scratch.

Among the most vexing challenges to the designers of government, including the drafters of constitutions and legislation, is to properly balance liberty with the need for social order. A government strong enough to protect liberty is also strong enough to endanger it because, as Baron de Montesquieu had argued in 1748

> Constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. . . To prevent this abuse, it is necessary from the very nature of things that power should be a check to power.

Montesquieu, *Spirit of the Laws*, Book XI, Part 4 (1748). James Madison echoed the problem in Federalist 51:

> But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.

How then to design a government that protects the liberties of the people while simultaneously protecting them from one another and from outside threats?

> It may be a reflection on human nature that such devises should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angers were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

Madison, *Federalist 51*.

Neither Montesquieu nor the drafters of those constitutions made the separation complete. Rather they provided for formal "checks and balances" among the branches such as appointment of judges by the executive, confirmation of appointments by the legislative, veto of legislation by the executive, and impeachments of both judicial and executive officers by the legislative.

The Montana constitution makes the judiciary more independent of the executive and legislative branches than the federal judiciary in that it is elected. On the other hand, unlike federal judges, Montana judges must stand for election at the end of eight-year terms.

But there is more involved in protecting the independence of each branch of government. By the nature of its power to initiate laws, the legislative branch holds the upper hand. A constitution is the safeguard against its encroachment on the liberties of the people, but who protects the interests of those who have no power in the legislature?

Hamilton argued in Federalist 78 that the judiciary, the branch "least dangerous" to the political rights of the constitution, provides that safeguard, and so "all possible care is requisite to enable it to defend itself" against attacks of the legislative and executive branches. Significantly, it must have power to declare all acts "contrary to the manifest tenor of the Constitution" void:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courst of justice, *whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.*

Hamilton's comments apply equally today, but today's constitutional environment is much different than 1787. While "bills of attainder" and "*ex post facto*" laws had reasonably fixed meanings developed over centuries of common-law practice, the protection of liberties under the due process clause, the "equal protection of the laws," and the declaration of such rights as a clean and healthful environment and privacy, and rights to know and to public participation do not have fixed meanings.

The modern constitutional crises typically arise out of a fundamental question – who decides what these rights mean? Legislators faced with the difficult choices of weighing the competing interests of society must come to some conclusions about how far a constitutional expression of right limits its powers. Judges faced with the same question

must decide whether the legislators have "gone too far." Neither is to be faulted for asking and answering these questions. They are all unavoidably "in the lane" of both the legislative and judicial branches.

The traditional answer of American courts is to give deference to the policy choices of the legislative branch. But particularly since the adoption of the Fourteenth Amendment's restrictions on state governments' powers to "deprive persons of life, liberty, or property without due process of law," courts have applied increased "scrutiny" to state legislative choices. The question, then, is how and when to apply the court's power to review the constitutionality of legislation. That is the subject of Part V of this Presentation.

V. Judicial Review

> "The law of political and civil rights is too important a matter to be left to the lawyers."

Applegate, R., *The Bill of Rights*, Montana Constitutional Convention Studies, Vol. 10 (1971), p. 357, quoting Emerson, Haber, and Dorsen, *Political and Civil Rights in the United States,* (Boston: Little, Brown and Co., 1967), p. v.

The right to representative self-government was so deeply embedded in early American culture that many legal theorists denied the existence of any judicial power to nullify laws unless explicitly expressed in a constitution. Typical of such sentiment is the opinion of the very capable Justice[1] John Bannister Gibson of the Pennsylvania Supreme Court in 1825:

> It has been said to be emphatically the business of the judiciary, to ascertain and pronounce what the law is; and that this necessarily involves a consideration of the constitution. It does so: but how far? If the judiciary will inquire into anything beside the form of enactment, where shall it stop? There must be some point of limitation to such an inquiry.[2]

Recently Professor Gordon Wood summarized the early doubts that the judiciary had any power to invalidate legislation:

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[1] Later Chief Justice

[2] *Eakin v. Raub*, 12 Serg. & Rawle 330, 349 (Pa. 1825) Gibson, J., dissenting.

> For judges to declare laws enacted by popularly elected legislatures as unconstitutional and invalid seemed flagrantly inconsistent with free popular government.
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> Most Americans . . . knew only too well from their colonial experience with arbitrary and uncertain judicial determinations the dangers of allowing the judges too much discretion. All this works against permitting judges to set aside laws made by the elected representatives of the people. "This," said a perplexed James Madison in 1788, "makes the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper."[3]

While few would question the existence of a judicial power to declare acts of an elected legislature invalid, judges have frequently expressed concerns lest their efforts go too far – a court which nullifies the products of the legislative process can also overstep its own constitutional bounds.

The emphatic answer of most American courts for most of American history was to respect the validity of laws unless shown beyond all reasonable doubt that they were truly impossible to square with the constitution. Justice Thomas Cooley, probably the 19th century's most influential and respected constitutional scholar, published his encyclopedic "Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union" in 1871. Cooley's Treatise includes a detailed survey of American courts' approach to "judicial review" of state legislation. Unsurprisingly, it begins with a cautionary observation:

> It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility. The legislative and judicial are co-ordinate departments of the government, of equal dignity; each is alike supreme in the exercise of its proper functions, and cannot directly or indirectly, while acting within the limits of its authority, be subjected to the control or supervision of the other, without an unwarrantable assumption by that other of power which, by the constitution, is not conferred upon it.[4]

The courts generally considered that such a "solemn act" as declaring a law unconstitutional required them to assume that the legislature had "deliberately

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[3] Wood, Gordon S., Power and Liberty: Constitutionalism in the American Revolution. New York: Oxford Univ. Press, 2021. 130-31

[4] Cooley, at 159.

disregarded" its constitutional limitations, an assumption they made only reluctantly and with hesitation:

> In declaring a law unconstitutional, a court must necessarily cover the same ground which has already been covered by the legislative department in deciding upon the propriety of enacting the law, and they must indirectly overrule the decision of that co-ordinate department. The task is therefore a delicate one, and only to be entered upon with reluctance and hesitation.[5]

As described by Harvard's James Bradley Thayer, the "really momentous" question was not merely whether in the opinion of the judges a legislative act is not constitutional. Rather, a court's duty was to inquire only whether the act's framers have made a very clear mistake, that the legislators could not have held any rational argument in favor of constitutionality:

> Having ascertained all this, yet there remains a question – the really momentous question – whether, after all, the court can disregard the Act. It cannot do this as a mere matter of course, - merely because it is concluded that upon a just and true construction the law is unconstitutional. That is precisely the significance of the rule of administration that the courts lay down. It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one, - so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply, - not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it.[6]

The significance of this presumption, Thayer emphasized, was nothing less than the preservation, not only of the legislature's power to perform its constitutional role in a representative democracy, but equally the responsibility and vitality of government itself:

> Will anyone say, You are over-emphasizing this matter, and making too much turn upon the form of a phrase? No, I think not. I am aware of the danger of doing that.
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> No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. And moreover, even in the matter of

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[5] Cooley, at 160.

[6] Thayer, James B., The Origin and Scope of the American Doctrine of Constitutional Law, Boston: Little, Brown, and Co. 1893. 18. Thayer's approach to constitutional review of legislation left an unmistakable mark on the opinions of such notable justices of the United States Supreme Court as Oliver Wendell Holmes, Jr., Louis Brandeis, Benjamin Cardozo, and Felix Frankfurter, as well as on many other state and federal judges.

> legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it. Meantime they and the people they represent, not being thrown back on themselves, on the responsible exercise of their own prudence, moral sense, and honor, lose much of what is best in the political experience of any nation; and they are belittled, as well as demoralized. . . . The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent.[7]

As a matter of preserving the democratic character of an effective government, American constitutional theory gave to the legislative branch both the responsibility and the power to consider whether its laws conformed to the constitution.

While in early American history courts generally showed deference to legislative shaping of constitutionally protected rights, the late 19th and early 20th centuries witnessed a marked change in judicial practice. Professor Thayer's biography of Justice John Marshall, published in 1901, noted with some alarm "the tendency of a common and easy resort" to courts' powers to set aside legislation. "It is no light thing to do that."[8]

As American society became more urbanized and its industries more centralized, legislatures responded with new ways of protecting the health, safety, and morals of people in those settings. But laws regulating working hours, conditions, and wages necessarily restrict the liberty of both employers and employees to agree on the terms of employment.

As state legislatures responded to felt needs for increased protection of the health and safety of their citizens, the opponents of reform sought constitutional remedies in the courts. In an 1897 address at Boston University School of Law, Oliver Wendell Holmes, Jr. portrayed people who "no longer hope to control the legislature" as looking to the courts "as expounders of the Constitutions" to engage in "wholesale prohibition" of policies that a "tribunal of lawyers" did not think right.

The year 1897 also saw the beginning of a lengthy era of federal judicial intervention in the legislative determination of public policy. That year the Supreme Court invoked a "substantive due process" theory to invalidate a state law regulating the sale of insurance because it "deprives the defendants of their liberty without due process of law."[9] In the

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[7] Id., 18, 29-30.

[8] J.B. Thayer, *John Marshall* (Boston: Houghton Mifflin, 1901) 106-07.

[9] *Allgeyer v. Louisiana,* 165 U.S. 578 (1897). The court's rationale was confusing at best. While holding that a state legislature may regulate or even prohibit the conduct of business which conflicts with the policy of the state, the Court denied that power to the state when the contract was between its residents and an out-of-state insurer which was not licensed to sell insurance within that state. But the in-state, out-of-state

name of the Fourteenth Amendment's due process guaranty, the Court limited a state's prerogative to enact substantive business regulation.

Having opened the door to a due process doctrine of "liberty of contract" in *Allgeyer,* the Supreme Court found itself confronted by more and more claims that legislation violated individual liberties. On divided votes it invalidated outright a state law restricting hours of employment in bakeries[10], a law prohibiting employment contracts which barred union membership[11], a law establishing minimum wages[12], a law imposing price regulations[13] and a law creating restraints on competition to existing businesses[14]. In other cases the Court applied a substantive due process analysis to declare laws invalid because the means chosen by a state legislature to achieve an otherwise permissible objective were "not necessary" or "not calculated to effect" the legislature's purpose.[15] Similarly, it invalidated state laws restricting non-economic personal liberties such as teaching school in any language other than English[16] and making public school enrollment compulsory.[17]

Lochner v. New York, invalidating a state law limiting working hours in bakeries, has long assumed prominence as an example of judicial activism – of substituting the Court's preferred balance of liberty and other values for the legislature's choices.[18] Rather than

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distinction doesn't explain why the federal guaranty of due process of law applied in either case. Nor does it address the more basic issue of a state's ability to rationally determine its own public policy choices such as safeguarding its citizens from potentially insolvent insurers – in or out of state.

[10] *Lochner v. New York*, 198 U.S. 45 (1905)

[11] *Coppage v. Kansas*, 236 U.S. 1 (1915) The Court had previously invalidated similar federal legislation in *Adair v. United States*, 208 U.S. 161 (1908).

[12] *Adkins v. Children's Hospital*, 261 U.S. 525 (1923)

[13] *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) except when a business or property is "affected with a public interest." The prohibition on state regulation in *Williams* applied to gasoline prices. *See also, Tyson & Brother v. Banton*, 273 U.S. 418 (1927) (resale prices of theater tickets) and *Ribnik v. McBride,* 277 U.S. 350 (1928) (employment agency fees).

[14] *Adams v. Tanner,* 244 U.S. 590 (1917) (invalidating a law prohibiting employment agencies from collecting fees from workers); *Liggett Co. v. Baldridge,* 278 U.S. 105 (1928) (invalidating a state law requiring all shareholders of a pharmacy corporation to be pharmacists); and *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (invalidating a state law requiring certificates of convenience and necessity for ice-making).

[15] *Weaver v. Palmer,* 270 U.S. 402 (1926) (protection of public health did not require an "absolute prohibition" of cut up or torn fabric in the manufacture of quilts and mattresses) and *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924) (invalidating a law requiring standardized weights for loaves of bread because only wrapped bread could maintain its weight and there was strong consumer demand for unwrapped bread).

[16] *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[17] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[18] The authorities are far too numerous to catalogue here. For a relatively readable sampling of views on *Lochner*, I suggest Archibald Cox's *The Court and the Constitution* (Houghton Mifflin Harcourt 1987), especially chapter 6 discussing the Court's unwillingness to adapt to modern circumstances, Raoul Berger's *Government by Judiciary – The Transformation of the Fourteenth Amendment* (Harvard University Press 1977), especially chapter 14 critiquing the case's expansive reading of the term "liberty," and John Hart Ely's *Democracy and Distrust – A Theory of Judicial Review* (Harvard University Press 1980), especially pp 14-21 and 63 ff. critiquing its infusion of policy "substance" into a textually "procedural" guaranty. For an interesting

applying a presumption of constitutional validity to a state law – which the law's opponents must overcome by proof "beyond all reasonable doubt" – the *Lochner* opinion turned the table by requiring the state not only to demonstrate the validity of its law by "a more direct relation" to the protection of health, but also to demonstrate that the law's purpose is "legitimate and appropriate":

> *The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.*[19]

Over the *Lochner* opinion's denial that it was an exercise in substituting the Court's judgment for that of the legislature on a matter of public policy,[20] the four dissenting judges took pains to show that it was precisely that. Among those dissents, Oliver Wendell Holmes' separate opinion expresses the latitude which the United States Constitution permitted for the enactment of laws with which judges may personally disagree:

> *Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution.*

Holmes' view of the court's role in evaluating the constitutionality of laws eventually prevailed, in part due to a separate crisis involving the Supreme Court's regular rejection of New Deal legislation as exceeding the legislative authority of Congress under Article I, Section 8. By the time President Roosevelt proposed to increase the number of judges on the Court, a discernable change in attitude had already begun.

In *West Coast Hotel v. Parrish,* 300 US 379 (1937) the Supreme Court completely broke with its substantive due process approach, holding that a Washington minimum wage law

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revisionist view of modern criticism of *Lochner* see Cass R. Sunstein, "Lochner's Legacy," 87 Columbia Law Review 873 (1987) (Arguing that *Lochner's* real legacy is not judicial "activism" but the judicial preservation of the "existing distribution of wealth and entitlements" taken as a "natural" reality rather than as a legal construct itself.) For the unconventional view that *Lochner* was correct, see Randy E. Barnett, *After All These Years, Locher Was Not Crazy – It Was Good,* 16 Geo. J.L. & Pub. Pol'y 437 (2018).

[19] *Id. at 57-58.*

[20] *Id.* at 56-57.

did not offend the federal due process clause because it bore a reasonable relationship to the state's legitimate interest in protecting the well-being of its working citizens. The Court's deference to the judgment of legislators looked strikingly like the deference applied in earlier American practice described by Cooley and Thayer.

Yet the Supreme Court was not ready to fully abandon judicial scrutiny of legislation. In *United States v. Carolene Products*, 304 US 144 (1938) the Court applied a presumption of constitutionality and a "rational basis" test while upholding a federal regulation of milk-based products against due process and equal protection challenges. However, in a now-famous footnote 4, the Court reserved the power to more strictly evaluate claims of unconstitutionality:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> [W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Carolene Products thus laid the groundwork for a distinction between "economic substantive due process" claims which the courts would review under a presumption of constitutionality requiring the legislation's challenger to demonstrate the lack of any rational basis for the legislation, and other cases in which specific Bill of Rights provisions, or specific liberty interests designed for the protection of "discrete and insular" minorities might exist. In those cases the courts apply a much more "searching" inquiry, generally requiring the state to demonstrate the existence of a compelling interest in the legislation.

Courts have also identified a class of claims which are neither "economic" nor involving a specific Bill of Rights provision, or a "protected class." For example in *Reed v. Reed*, 404 US 71 (1971) the Court applied a somewhat stricter level of review to Idaho legislation that discriminated on the basis of sex in the choice of personal representatives of an estate. The "middle tier" scrutiny became a feature of federal and state judicial review across a broad variety of cases which fit neither the "rational basis" category of review nor the "strict scrutiny" category.

Montana courts apply a similar matrix of review. In *Montana Democratic Party v. Jacobsen*, 2024 MT 66 (decided March 27, 2024) the Montana Supreme Court laid out a lengthy, detailed analysis of its approach to strict, intermediate, and rational basis levels of scrutiny

when declaring various voting laws enacted by the 2021 legislature invalid. See Paragraphs 34-46 of the Court's opinion. Whatever their views on the Court's ruling, legislators should read it to better understand the playing field of constitutional adjudication in Montana.

CONCLUSION

I saved *Montana Democratic Party* for last, not because it is best, but because as much or more than any of the cases cited in this outline, a reading of the court's opinion makes clear that the expression of rights in the Montana Constitution presents a special challenge to both the legislature and the courts. It will be an ongoing challenge as these two branches work to determine the extent to which these rights restrict legislative prerogative. It is clear however, that the legislature has limited power to interfere with the courts' application of review through legislation.

Ultimately, both branches will best serve the interests of Montanans by a combination of persuasion and self-discipline. Coercion of the coordinate branches is seldom if ever productive of good public policy.