Montana Legislative Services Division

Legal Services Office

PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

To: Senate Select Committee on Judicial Oversight and Reform
From: Jameson Walker, Staff Attorney
Date: June 11, 2024
Re: Common Legal Terms and Concepts

Introduction

Members of the Senate Select Committee on Judicial Oversight and Reform have asked Legislative Services Division legal staff to provide some education on common legal terms. Specifically, Senator McGillvray asked staff to explain the following enumerated terms:

1. Standing
2. Notice
3. Justiciability
4. Impartiality, favoritism, and bias as related to judicial rules
5. Writs
6. Court orders or actions, such as stayed, injunction, blocked, etc.
7. Judicial review
8. Ex parte communication and orders
9. Stare decisis
10. Recusal
11. Other common legal terms

As a general principle, an in-depth study of any of these enumerated terms could result in hundreds of hours of examination. Most of these terms are directly rooted to provisions of the United States and Montana Constitutions and interpretations by the United States and Montana Supreme Court. This memo will provide underlying constitutional provisions, case citations, and additional avenues for study.

Furthermore, to efficiently achieve this goal, the memo will cite to Constitution Annotated, https://constitution.congress.gov/, which Congress has ordered the Librarian of Congress to compile and periodically update to provide essential information to Congress and the public at large. Constitution Annotated is made available online through the Congressional Research Service, a federal legislative branch agency located within the Library of Congress, which serves as shared staff exclusively to congressional committees and Members of Congress.[1]

Finally, to avoid duplication of topics, this memo will address the above-referenced concepts in a different order.

Legal Terms and Concepts

[1] Congressional Research Service, About Site & FAQs, https://crsreports.congress.gov/Home/About, (last visited June 10, 2024).

1. Justiciability

Justiciability is an overarching concept that generally relates to the types of cases a court may consider. The Montana Supreme Court stated that the concept of justiciability inherently provides limitations on a court's power:

> The judicial power of Montana's courts is limited to "justiciable controversies." […] A justiciable controversy is one that is "definite and concrete, touching legal relations of parties having adverse legal interests" and "admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts, or upon an abstract proposition." […] The constitutional component of the justiciability limitation derives primarily from the Montana Constitution, which has been interpreted to, like its federal counterpart, limit the courts to deciding only cases and controversies. […] However, justiciability is also derived from self-imposed "discretionary limitations on the exercise of judicial power" on the basis of "prudential reasons." […] While the constitutional case-or-controversy component must always be met, prudential rules may be subject to exceptions. […]

McDonald v. Jacobsen, 2022 MT 160, ¶ 8. [Citations Omitted].

Subcategories of justiciability include:

- Advisory opinions, which is a general prohibition on courts issuing nonbinding interpretations of legal questions;
- feigned and collusive cases, which is a prohibition on adjudicating feigned and collusive cases where the parties do not have genuine disputes;
- standing, which is the requirement that a party has the capacity to bring suit in court or otherwise participate in a lawsuit, which is generally based on whether a party has suffered actual harm that is redressable;
- ripeness, which is the requirement that the facts of a case have matured into an actual controversy;
- mootness, requiring that the relevant issues to a case have not already been resolved; and
- political question doctrine, in which a court will refuse to hear a case if the relevant issues are politically charged.

Constitution Annotated provides the following general treatment relating to justiciability[2]:

> Article III, Section 2, Clause 1:

[2] Cong. Rsch. Serv., *Overview of Rules of Justiciability and Cases or Controversies Requirement*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-3-1/ALDE_00001193/ (last visited June 10, 2024).

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The judicial power extends to nine classes of cases and controversies, which fall into two general groups. In the words of Chief Justice John Marshall in *Cohens v. Virginia*:[1] In the first, jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This cause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied, against the express words of the article. In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more states, between a state and citizens of another state,' and 'between a state and foreign states, citizens or subjects.' If these be the parties, it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.[2]

Judicial power is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.[3] The meaning attached to the terms cases and controversies[4] determines therefore the extent of the judicial power as well as the capacity of the federal courts to receive jurisdiction. According to Chief Justice Marshall, judicial power is capable of acting only when the subject is submitted in a case and a case arises only when a party asserts his rights in a form prescribed by law.[5] By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the Court for adjudication.[6]

Chief Justice Charles Evans Hughes once essayed a definition, which, however, presents a substantial problem of labels. A 'controversy' in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of

parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.[7] Of the case and controversy requirement, Chief Justice Earl Warren admitted that those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the Judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine.[8] Justice Felix Frankfurter perhaps best captured the flavor of the case and controversy requirement by noting that it takes the expert feel of lawyers often to note it.[9]

From these quotations may be isolated several factors which, in one degree or another, go to make up a case and controversy.

Almost inseparable from the requirements of adverse parties and substantial enough interests to confer standing is the requirement that a *real* issue be presented, as contrasted with speculative, abstract, hypothetical, or moot issues. It has long been the Court's considered practice not to decide abstract, hypothetical or contingent questions.[10] A party cannot maintain a suit for a mere declaration in the air.[11] In *Texas v. ICC*,[12] the State attempted to enjoin the enforcement of the Transportation Act of 1920 on the ground that it invaded the reserved rights of the State. The Court dismissed the complaint as presenting no case or controversy, declaring: It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power.[13] And in *Ashwander v. TVA*,[14] the Court refused to decide any issue save that of the validity of the contracts between the Authority and the Company. The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the person complaining.[15]

Concepts of real interest and abstract questions appeared prominently in *United Public Workers v. Mitchell*,[16] an omnibus attack on the constitutionality of the Hatch Act prohibitions on political activities by governmental employees. With one exception, none of the plaintiffs had violated the Act, though they stated they desired to engage in forbidden political actions. The Court found no justiciable controversy except in regard to

the one, calling for concrete legal issues, presented in actual cases, not abstractions, and seeing the suit as really an attack on the political expediency of the Act.[17]

2. Standing

As noted above, standing is the requirement that a party has the capacity to bring suit in court or otherwise participate in a lawsuit, which is generally based on whether a party has suffered actual harm that is redressable. The Montana Supreme Court noted that standing is a threshold jurisdictional requirement:

> Standing is a threshold jurisdictional requirement that limits Montana courts to deciding only cases or controversies (case-or-controversy standing) within judicially created prudential limitations (prudential standing). […] Standing thus embodies "two complimentary but somewhat different limitations." […] Case-or-controversy standing limits the courts to deciding actual, redressable controversy, while prudential standing confines the courts to a role consistent with the separation of powers.
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> […]
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> When case-or-controversy standing is at issue, the question is whether the complaining party is the proper party before the court, not whether the issue itself is justiciable. […] To have case-or-controversy standing, "the complaining party must clearly allege past, present, or threatened injury to a property or civil right." […] The alleged injury must be: concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; redressable; and distinguishable from injury to the public generally. […] Case-or-controversy standing imposed by the United States and Montana Constitutions must always be met. […].
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> The determination of a party's standing to maintain an action is a question of law subject to contest at any time by a party or sua sponte. […]

Bullock v. Fox, 2019 MT 50, ¶¶ 28, 31-32 [citations omitted].

Constitution Annotated provides the following general treatment relating to standing[3]:

[3] Cong. Rsch. Serv., *Overview of Standing*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-1/ALDE_00012992/ (last visited June 10, 2024). See Also: *Early Standing Doctrine*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-2/ALDE_00012993/; *Standing Doctrine from 1940s to 1970s*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-3/ALDE_00012994/; *Overview of Lujan Test*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-4-1/ALDE_00012995/; *Concrete Injury*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-4-2/ALDE_00012997/; *Particularized Injury*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-4-3/ALDE_00012998/; *Actual or Imminent Injury*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-4-4/ALDE_00012999/; *Causation*; https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-4-5/ALDE_00013000/; *Redressability*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-4-

Article III, Section 2, Clause 1:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The concept of standing broadly refers to a litigant's right to have a court rule upon the merits of particular claims for which he seeks judicial relief.[1] The Supreme Court has held that, as a threshold procedural matter,[2] a litigant must have standing in order to invoke the jurisdiction of a federal court so that the court may exercise its remedial powers on his behalf.[3] In general, for a party to establish Article III standing, he must allege (and ultimately prove) that he has a genuine stake in the outcome of the case because he has personally suffered (or will imminently suffer): (1) a concrete and particularized injury; (2) that is traceable to the allegedly unlawful actions of the opposing party; and (3) that is redressable by a favorable judicial decision.[4] These requirements seek to ensure that federal courts do not exceed their Article III power to decide actual cases or controversies.[5]

The Court has held that the burden of establishing standing falls upon each party who seeks a distinct form of judicial relief,[6] including a party initiating a lawsuit,[7] intervening in a lawsuit,[8] or appealing a lower court decision.[9] Each of these parties must make an appropriate showing during each stage of the litigation[10] that the elements of injury, causation, and redressability existed at the outset of the lawsuit, and continue to exist,[11] for each claim[12] and for each form of relief sought.[13] A litigant's failure to establish

6/ALDE_00013001/; *Taxpayer Standing*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-5/ALDE_00013002/; *Overview of Representational Standing*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-6-1/ALDE_00013003/; *Associational Standing*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-6-2/ALDE_00013004/; *States and Parens Patriae*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-6-3/ALDE_00013005/; *Assignees of a Claim*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-6-4/ALDE_00013006/; *Agency and Standing*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-6-5/ALDE_00013007/; *Overbreadth Doctrine*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-6-6/ALDE_00013008/; *Federal and State Legislators and Standing*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-7/ALDE_00013009/; *Congressional Control of Standing*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-8/ALDE_00013010/; *Overview of Prudential Standing*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-9-1/ALDE_00013011/; *Zone of Interests Test*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-9-2/ALDE_00013012/; *Third Party Standing*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-9-3/ALDE_00013013/; and *Generalized Grievances*, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-9-4/ALDE_00013014/.

standing to sue may result in dismissal of his distinct claims for relief without a decision on the merits of those claims.[14]

Since the 1920s, the Supreme Court has offered various justifications for these somewhat amorphous[15] constitutional limitations on the categories of litigants who can maintain a claim for judicial relief in an Article III federal court.[16] Perhaps the most frequently cited rationale derives from the Constitution's separation of powers among the branches of government.[17] Issues of standing often arise when a private plaintiff sues the government, seeking to have it act in accordance with the Constitution or other law.[18] But, as the Court has frequently noted, the Constitution makes the political branches—and not the courts—responsible for vindicating the public interest.[19] As a result, unelected judges lack the authority to render advisory opinions as to whether Congress or the Executive has followed the law; they may only decide a specific case brought before the court by a party that has suffered a particularized injury as a result of the government's actions.[20] Such deference to the political branches, particularly in cases raising questions about the separation of powers,[21] reflects the Court's understanding of the limited . . . role of the courts in a democratic society,[22] as well as its determination that federal courts should hear only those types of cases that the English judicial system would historically have considered suitable for judicial resolution.[23] And separation of powers concerns have also motivated the Court's conclusion that Article III limits Congress's ability to confer standing on plaintiffs to sue the government by enacting statutes containing citizen-suit provisions.[24] Such case law has reasoned that permitting plaintiffs who do not have a personal and direct stake in the outcome of a case to sue under one of these provisions would effectively allow the Legislative Branch to intrude upon the Executive Branch's duty to enforce the law.[25]

Although standing doctrine is grounded primarily in constitutional separation of powers concerns, the Supreme Court has also cited other rationales for its existence that may not be constitutional in nature. Requiring the litigant to have a personal stake in the outcome of his lawsuit ensures that a court will decide complex legal and factual issues in the context of a specific factual situation involving adverse parties who can more clearly illuminate for judges the issues in dispute.[26] Even in cases in which adversity between the parties exists, standing doctrine seeks to ensure that federal courts will not exercise the judicial power, which can significantly affect the lives, liberty, and property of others, to resolve generalized grievances brought primarily for the benefit of concerned bystanders who seek to vindicate abstract ideological interests (for example, a general interest in the protection of the environment is insufficient to confer standing).[27] More practical reasons for the standing requirements include a need to reserve the limited resources of the federal courts for concrete disputes;[28] the sweeping precedential effects of the Court's holdings on the merits in constitutional litigation, which can be difficult, if not impossible, for Congress to alter without amending the Constitution;[29] and a need for the court to fashion relief no more broadly than the litigant's situation requires.[30]

> The Supreme Court has also previously recognized certain *prudential* limitations on the exercise of federal courts' jurisdiction, which, although lacking constitutional status, may nonetheless result in a court's refusal to hear a case: (1) when the litigant seeks to assert the rights of third parties not before the court; (2) when the litigant seeks redress for a generalized grievance widely shared by a large number of citizens; and (3) when the litigant challenges government action or inaction and its asserted interests do not fall within the zone of interests arguably protected or regulated by the statute or constitutional provision underlying its claims.[31] In recent years, however, the Court has questioned the basis of the doctrine of prudential standing.[32] The Court has suggested that the bar on generalized grievances is a constitutional (and not prudential) requirement.[33] Moreover, the Court likewise has determined that a court applying the zone of interests test should examine whether the plaintiff's claim falls within the scope of a statutory provision creating a cause of action.[34] Furthermore, Congress, through express legislation, may abrogate these prudential standing requirements, to the extent that they remain viable and are not mandated by the Constitution.[35]
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> […]

Relevant to the Montana Legislature and this committee, Constitution Analysis provides the following treatment relating to standing of federal and state legislators:

> Article III, Section 2, Clause 1:
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> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.*
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> The Supreme Court has also created specific standing rules for federal courts to apply when members of a legislative body seek to uphold the effectiveness of their votes or vindicate their institution's powers and prerogatives by suing (or defending) another unit of the same government in federal court.[1] The Court has held that legislators may have standing to sue in order to maintain the effectiveness of votes that they have cast in their capacity as legislators if their votes ultimately did not prevail. In *Coleman v. Miller*, twenty-four members of the Kansas state legislature sought a writ of mandamus compelling state officials to recognize that Kansas had not ratified an amendment to the Federal Constitution, the Child Labor Amendment,[2] challenging the way that the vote had been taken.[3] Twenty of the members, who were senators, had voted to reject the amendment, but the measure ratifying the amendment nevertheless passed the state

senate.[4] The plaintiffs alleged that an illegal tie-breaking vote for ratification by the Lieutenant Governor had deprived their votes of effectiveness.[5] Relying on several precedents, the Court held that the petitioners had claimed a right and privilege under the Constitution . . . to have their votes given effect and the state court has denied that right and privilege.[6] Because the state legislators alleged that their votes had been voided by the improper procedure that led to the approval of the amendment, and those votes would have been sufficient to defeat the proposal, the legislators had a sufficient stake in the outcome that supported their standing to sue.[7]

Decades later, the Supreme Court took a more narrow view of individual legislator standing in *Raines v. Byrd*.[8] In that 1997 case, six Members of Congress challenged the Line Item Veto Act of 1996 (LIVA), a statute that authorized the President to cancel certain spending and tax benefit measures after signing them into law, as contrary to the bicameralism and presentment requirements of the Constitution.[9] The Members argued that they had suffered injury because LIVA altered the effect of the votes they would cast in the future and divested them of their constitutional role in the repeal of legislation.[10]

The Supreme Court, in an opinion written by Chief Justice William Rehnquist, found that the Members lacked standing to challenge LIVA because they had not suffered an injury different from that suffered by Congress as a whole.[11] Citing separation of powers concerns about resolving a dispute implicating the constitutional authority of Congress and the Executive in a lawsuit brought by legislators, the Court, in refusing to proceed to the merits, noted that the Member-plaintiffs had not suffered the concrete deprivation of a private right, like the loss of their seats in Congress, but instead alleged a general diminution of their political power.[12] The Court thus distinguished *Raines* from its earlier decision in *Coleman* on the grounds that the latter case had involved legislators who alleged that their votes had been nullified, whereas the LIVA challenged in *Raines* did not significantly impact the power of the Members' votes because they could vote to exempt future appropriations bills from LIVA or repeal LIVA if necessary.[13] Although the Court determined that it lacked jurisdiction over the Members' claims, it left open the possibility that one or both houses of Congress—or perhaps a committee—would have standing to sue for redress of alleged institutional injuries to Congress if authorized by at least one of the Houses, provided that another legislative remedy was not available to them.[14]

In two state legislator standing cases that did not raise similar separation of powers concerns, the Supreme Court rested its standing analysis on the specific features of the state governments at issue. In the first case, *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, the Court considered a state ballot initiative that would vest the authority to draw legislative districts in an independent commission. The Arizona State Legislature, acting pursuant to an authorizing resolution, challenged that ballot initiative, claiming that it had suffered injured by a diminution in its legislative authority.[15] Noting that the case did not raise separation of powers concerns that might

arise if Congress sued the President, the Court held that the Arizona legislature was a proper party to sue because, like the plaintiffs in *Coleman*, it had lost the opportunity to adopt a redistricting plan (i.e., its members' votes were nullified).[16] Moreover, such an institutional injury to the legislature could serve as the basis for a lawsuit, at least when the legislature authorized suit by enacting a resolution in each chamber.[17]

By contrast, in *Virginia House of Delegates v. Bethune-Hill*, the Supreme Court held that a *single house* of the bicameral Virginia state legislature lacked standing to appeal a federal district court order requiring the redrawing of a 2011 legislative redistricting map.[18] The Virginia House of Delegates (House) had previously intervened to defend the constitutionality of the legislative redistricting plan against a voter-led Fourteenth Amendment Equal Protection Clause challenge, but the Virginia Attorney General, who was the primary defending party, had decided not to appeal an unfavorable ruling.[19] As discussed, in determining that the House lacked standing to appeal on behalf of the state, the Court noted that Virginia law assigned the Virginia Attorney General the task of representing the state in appeals like the one before the Court.[20] Moreover, the Attorney General had not delegated such litigation authority to the House of Delegates.[21] Unlike in *Arizona State Legislature*, the House lacked standing to appeal *in its own right* because it was a single component of the bicameral state legislature responsible for redistricting and could thus not assert the interests of the legislature as a whole.[22] Moreover, the House's alleged injury (i.e., invalidation of a state redistricting law) was not cognizable for standing purposes as it did not permanently deprive the House of its role in redistricting and the House did not suffer a cognizable injury merely because its composition (and, therefore, the content of legislation) could be altered by the electorate as a result of a redrawn redistricting map.[23] In this regard, the Court noted that the invalidation of the redistricting law did not infringe upon the unique legislative powers of the Virginia House by altering the manner in which it conducted its day-to-day-operation (e.g., by altering its committee structure).[24]

3. Notice

In the context of legal proceedings, notice generally means the constitutional requirement that parties to proceedings are properly informed of the controversy. The Montana Supreme Court has noted: "We have said that the hallmarks of due process are notice and opportunity to be heard." […] "Notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests." Labair v. Carey, 2017 MT 286, ¶ 20 [citations omitted].

Generally, the constitutional notice requirement is found in Article II, section 17, of the Montana Constitution, which provides:

> **Section 17. Due process of law.** No person shall be deprived of life, liberty, or property without due process of law.

Thus, in order for a person to be deprived of life, liberty, or property, adequate notice of the proceedings is a fundamental element of due process.

In addition to legal proceedings and relating to public hearings and the Legislature, two constitutional principles require the public receive notice of hearings and deliberations. Article II, sections 8 and 9, of the Montana Constitution provide:

> **Section 8. Right of participation.** The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.
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> **Section 9. Right to know.** No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Indeed, the Montana Supreme Court has commented that public notice is a fundamental component of Article II, sections 8 and 9, of the Montana Constitution:

> "The essential elements" required to meet Montana's constitutional and statutory guarantees of public participation are "notice and an opportunity to be heard." […] Public participation procedures "must include a method of affording interested persons reasonable opportunity to submit data, views, or arguments."

Carbon Cnty. Res. Council v. Mont. Bd. of Oil & Gas Conservation, 2016 MT 240, ¶ 21 [citations omitted].

Relative to civil proceedings, Constitution Annotated provides the following treatment relating to notice[4]:

> Fourteenth Amendment, Section 1:
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> *All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.*

[4] Cong. Rsch. Serv., *Overview of Procedural Due Process in Civil Cases*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-5-4-1/ALDE_00013750/ (last visited June 10, 2024).

If a state seeks to deprive a person of a protected life, liberty, or property interest, the Fourteenth Amendment's Due Process Clause requires that the state first provide certain procedural protections.[1] The Supreme Court has construed the Fourteenth Amendment's Due Process Clause to impose the same procedural due process limitations on the states as the Fifth Amendment does on the Federal Government.[2] Fifth Amendment due process case law is therefore relevant to the interpretation of the Fourteenth Amendment.[3]

The Court first addressed due process in the 1855 Fifth Amendment case *Murray's Lessee v. Hoboken Land and Improvement Co.*[4] In *Murray's Lessee*, the Court held that it would determine (independently from Congress) whether the government had provided due process by evaluating whether the statutory process conflicted with the Constitution and, if not, whether it comported with those settled usages and modes of proceedings existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[5] In the 1884 Fourteenth Amendment case *Hurtado v. California*, the Court held that a process could be judged based on whether it had attained the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law.[6] To hold that only historical, traditional procedures can constitute due process, the Court said, would render the law incapable of progress or improvement.[7] The Supreme Court articulated the modern test for what process is required before the government may invade a protected interest in the 1976 case *Mathews v. Eldridge*.[8]

As a general matter, the Supreme Court has held that the constitutional requirement of procedural due process allows for variances in procedure appropriate to the nature of the case.[9] Nonetheless, the Court's decisions have identified key goals and requirements of procedural due process that apply in many circumstances. The Court has explained that [p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.[10] Thus, the required elements of due process are those that minimize substantively unfair or mistaken deprivations by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests.[11]

The core requirements of procedural due process are notice[12] and a hearing[13] before an impartial tribunal,[14] though specific requirements in each case vary based on the particular interests at stake.[15] Due process may also require other procedural protections such as an opportunity for confrontation and cross-examination, discovery, a decision based on the record, or the opportunity to be represented by counsel.[16] As long as the states provide adequate procedural protections, they possess significant discretion to structure courts and regulate state judicial proceedings,[17] set statutes of limitations,[18] and specify burdens of proof or evidentiary presumptions.[19] Except as otherwise noted, the following essays focus on procedural due process requirements in civil and

administrative proceedings. Later essays discuss procedural due process requirements in criminal cases.[20]

Relative to criminal proceedings, Constitution Annotated provides the following treatment relating to notice[5]:

> Sixth Amendment:
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> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.*
>
> The Sixth Amendment right to be informed of the nature and cause of the accusation guarantees criminal defendants adequate notice of the charges against [them].[1] To satisfy the Sixth Amendment requirement, the notice that the government provides must be specific enough to enable the defendant to prepare a defense and to protect himself or herself after judgment against a subsequent prosecution on the same charge.[2] Thus, in the prosecution of a witness for the crime of refusing to answer the questions of a congressional subcommittee about a topic that the subcommittee was investigating, the government violated the Sixth Amendment right by failing to identify the topic of the investigation.[3] Because criminal liability could attach only if the questions that the witness refused to answer related to the topic of the congressional investigation, the Court reasoned that the prosecution's failure to identify the topic left the chief issue undefined and therefore violated the defendant's right to know the nature of the accusation against him.[4]
>
> The Court has cautioned, however, that its limited precedents interpreting this constitutional provision stand for nothing more than the general proposition that the government must notify the defendant of the nature of the charges.[5] The Court has not established specific rule[s] about how this notice requirement applies in practice.[6] For example, it has not resolved whether a prosecutorial decision to switch theories of liability towards the end of trial vitiates otherwise adequate notice provided in the pleadings.[7] Federal and state rules of criminal procedure contain more detailed notice requirements.[8] The Sixth Amendment right to notice of accusation applies to the states via the Due Process Clause of the Fourteenth Amendment.[9]

4. Judicial Impartiality, favoritism, recusal, and ex parte communication

[5] Cong. Rsch. Serv., *Notice of Accusation*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt6-4-7/ALDE_00013242/ (last visited June 10, 2024).

A fundamental constitutional principal is that citizens are afforded an independent and impartial tribunal. Article II, section 24, of the Montana Constitution provides:

> Section 24. Rights of the accused. In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, subject to the right of the state to have a change of venue for any of the causes for which the defendant may obtain the same.

While this constitutional provision applies to criminal cases, an impartial judge is required in all court cases. Thus, in order to ensure an impartial tribunal, judges must avoid conflicts of interest and even the appearance of impropriety. Rule 1.2 of the Code of Judicial Conduct provides:

> A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

To achieve a fair and impartial tribunal, judges are prohibited from presiding over cases in which the judge has a direct, personal, substantial, or pecuniary interest in a case. If any of these conditions exist, a judge must recuse themselves from presiding over the case. Indeed, the Montana Supreme Court has noted:

> The well-established common law rule is that recusal is required when a judge has a direct, personal, substantial, or pecuniary interest in a case. […] "In Montana, such matters are addressed and governed by the 2008 Montana Code of Judicial Conduct. And '[b]ecause the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard . . . will thus be confined to rare instances. '" […] Montana's Code of Judicial Conduct Rule 2.12 requires that a judge disqualify himself "in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding." A judge shall also disqualify himself if the judge "served as a lawyer in the matter in controversy." Mont. Code of Jud. Conduct 2.12(A)(5)(a).

Bullman v. State, 2014 MT 78, ¶ 14 [citations removed].

Rule 2.12 of the Judicial Code of Conduct provides for recusal of judges:

> Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis* interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary,* or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest* in the subject matter in controversy or in a party to the proceeding.

(4) The judge, while a judge or a judicial candidate,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(5) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose in writing or on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

In addition to requirements requiring judges to recuse themselves from cases in which impartiality may be compromised, judges are also prohibited from ex parte communications in judicial proceedings. The Code of Judicial Conduct defines ex parte communications as:

"Ex parte communication" is any oral communication to a judge concerning a pending or impending matter, outside the presence of all the parties to the proceeding or their attorneys or outside the confines of a duly noticed proceeding, or any written communication received by a judge that is not simultaneously provided to all parties or their attorneys.

While Rules 2.9 and 2.10 of the Code of Judicial Conduct govern ex parte communications, the Montana legislature has also codified the prohibition on ex parte communications in judicial proceedings:

2-4-613. Ex parte consultations. Unless required for disposition of ex parte matters authorized by law, the person or persons who are charged with the duty of rendering a decision or to make findings of fact and conclusions of law in a contested case, after issuance of notice of hearing, may not communicate with any party or a party's representative in connection with any issue of fact or law in the case except upon notice and opportunity for all parties to participate.

In addition to Montana Constitutional requirements, Section 1 of the 14th amendment of the Constitution governs fair trials. Constitution Annotated provides the following treatment[6]:

Fourteenth Amendment, Section 1:

[6] Cong. Rsch. Serv., *Impartial Decision Maker*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-5-4-5/ALDE_00013754/ (last visited June 10, 2024).

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

The Due Process Clause requires that the decision to deprive a person of a protected interest be entrusted to an impartial decision maker. This rule applies to both criminal and civil cases.[1] The Supreme Court has explained that the neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law and preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.[2]

There is a presumption of honesty and integrity in those serving as adjudicators, so the burden is on an objecting party to show a conflict of interest or some other reason for disqualification of a specific officer or for disapproval of an adjudicatory system as a whole. The Court has held that combining functions within an agency, such as by allowing members of a State Medical Examining Board to both investigate and adjudicate a physician's suspension, may raise substantial concerns, but does not by itself establish a violation of due process.[3] The Court has also held that the official or personal stake that school board members had in a decision to fire teachers who had engaged in a strike against the school system in violation of state law was not sufficient to disqualify them.[4]

Sometimes, to ensure an impartial tribunal, the Due Process Clause requires a judge to recuse himself from a case. In the 2009 case *Caperton v. A. T. Massey Coal Co.*, the Court noted that most matters relating to judicial disqualification [do] not rise to a constitutional level, and that matters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion.[5] The Court added, however, that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case.[6] In addition, although [p]ersonal bias or prejudice 'alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause,' there are circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable.'[7] Those circumstances include where a judge had a financial interest in the outcome of a case or a conflict arising from his participation in an earlier proceeding.[8]

> In judicial recusal cases, the Court has explained, [t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'[9] In *Caperton*, a company appealed a jury verdict of $50 million, and its chairman spent $3 million to elect a justice to the Supreme Court of Appeals of West Virginia at a time when [i]t was reasonably foreseeable . . . that the pending case would be before the newly elected justice.[10] The justice was elected, declined to recuse himself, and joined a 3-2 decision overturning the jury verdict. The Supreme Court, in a 5-4 opinion written by Justice Anthony Kennedy, concluded that there was a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.[11]
>
> Subsequently, in the 2016 case *Williams v. Pennsylvania*, the Court found that the right of due process was violated when a judge on the Pennsylvania Supreme Court who participated in a case denying post-conviction relief to a prisoner convicted of first-degree murder and sentenced to death had, in his former role as a district attorney, given approval to seek the death penalty in the prisoner's case.[12] Relying on *Caperton*, which the Court viewed as having set forth an objective standard that requires recusal when the likelihood of bias on the part of the judge is too high to be constitutionally tolerable,[13] the *Williams* Court held that there is an impermissible risk of actual bias when a judge had previously had a significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case.[14] The Court based its holding, in part, on earlier cases that had found impermissible bias occurs when the same person serves as both accuser and adjudicator in a case.[15] It reasoned that authorizing another person to seek the death penalty represents significant personal involvement in a case,[16] and took the view that the involvement of multiple actors in a case over many years only heightens—rather than mitigates—the need for objective rules preventing the operation of bias that otherwise might be obscured.[17] As a remedy, the Court remanded the case for reevaluation by the reconstituted Pennsylvania Supreme Court. Notwithstanding the fact that the judge in question did not cast the deciding vote, the *Williams* Court viewed the judge's participation in the multi-member panel's deliberations as sufficient to taint the public legitimacy of the underlying proceedings and constitute reversible error.[18]

Relative to impartial judges and juries, Constitution Annotated provides the following treatment[7]:

> Fourteenth Amendment, Section 1:

[7] Cong. Rsch. Serv., *Impartial Judge and Jury*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt14-S1-5-5-2/ALDE_00013760/ (last visited June 10, 2024).

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

Bias or prejudice either inherent in the structure of a trial system or imposed by external events can infringe a person's right to a fair trial. Thus, as in the civil context,[1] procedural due process requires criminal cases to be overseen by an unbiased judge and decided by an impartial jury.
For instance, in *Tumey v. Ohio*, the Supreme Court held that it violated due process for a judge to receive compensation out of fines imposed on convicted defendants, and no compensation (beyond his salary) if he does not convict those who are brought before him.[2] In other cases, the Court has found that contemptuous behavior in court may affect the impartiality of the presiding judge, so as to disqualify the judge from citing and sentencing the contemnors.[3]

The Court has also found due process violations when a biased or otherwise partial juror participated in a criminal trial, although there is no presumption that all jurors with a potential bias are in fact prejudiced.[4] Public hostility toward a defendant that intimidates a jury is a classic due process violation.[5] More recently, concern with the impact of prejudicial publicity upon jurors and potential jurors has caused the Court to instruct trial courts that they should be vigilant to guard against such prejudice and to curb both the publicity and the jury's exposure to it.[6] For instance, the Supreme Court has raised concerns about the impact on a jury of televising trials, though ultimately the Court has held that the Constitution does not altogether preclude televising state criminal trials.[7]

The way a criminal defendant appears in court may also raise due process concerns about jury impartiality. The Court has held that it violates due process when the accused is compelled to stand trial before a jury while dressed in identifiable prison clothes, because it may impair the presumption of innocence in the minds of the jurors.[8] Likewise, Court has held that the use of visible physical restraints, such as shackles, leg irons, or belly chains, in front of a jury, raises due process concerns. In *Deck v. Missouri*, the Court noted a rule dating back to British common law against bringing a defendant to trial in irons, and a modern day recognition that such measures should be used only in the presence of a special need.[9] The Court found that the use of visible restraints during the guilt phase of a trial undermines the presumption of innocence, limits the ability of a defendant to consult with counsel, and affronts the dignity and decorum of judicial proceedings.[10] The Court in *Deck* disapproved of the routine use of visible restraints when a defendant has already been found guilty and a jury is considering the application of the death penalty. The Court explained that such restraints can be used only in special

> circumstances, such as where a judge has made particularized findings that security or flight risk requires it.[11]

5. Stare Decisis

Stare decisis is the doctrine that courts will follow prior to court decisions. Generally, it means that if a court is asked to rule on a particular issue and a previous court has already ruled, then the court should make its decision align with the prior ruling.

Stare decisis has been divided into two categories: horizontal and vertical. Horizontal stare decisis is a court following its own precedent. Vertical stare decisis is a court following precedent from a higher court.

The term is closely related to the term "precedent," which is a court decision that is considered an authority for deciding subsequent cases. Precedent is generally developed over the course of many decisions on related topics.

The Montana Supreme Court has stated of stare decisis:

> We are mindful of the fact that principles of law should be positively and definitively settled so that courts, lawyers, and, above all, citizens may have some assurance that important legal principles involving their highest interests shall not be changed from day to day. […] Stare decisis is a fundamental doctrine that reflects this Court's concerns for stability, predictability, and equal treatment. […] However, court decisions are not sacrosanct and stare decisis should not be used as a "mechanical formula of adherence to the latest decision." […].
>
> This Court has made clear that "[t]he rule of stare decisis will not prevail where it is demonstrably made to appear that the construction placed upon [a statute] in [a] former decision is manifestly wrong." […] "Principles of law should be definitively settled if that is possible." […]. Even so, just as Justice Brandeis suggested and Justice Weber reiterated, "the search for truth involves a slow progress of inclusion and exclusion, involving both trial and error." […] "Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ; the opposite is true in cases . . . involving procedural and evidentiary rules," […]. This Court in Mont. Horse Prods. Co. v. Great N. Ry. Co., […] (1932), best characterized the propriety of following a manifestly wrong decision:
>
> Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence on all future time, it becomes the duty, as well as the right of the court to consider them carefully and to allow no previous error to continue if it can be corrected. The foundation of the rule of stare decisis was promulgated on the ground of public policy, and it would be an egregious mistake to allow more harm than good from it.

[…]

State v. Wolf, 2020 MT 24, ¶¶ 21-22 [citations omitted].

Constitution Annotated provided the following treatment relating to stare decisis[8]:

> Article III, Section 1:
>
> *The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.*
>
> In the modern era, the Supreme Court has applied the doctrine of stare decisis by following the rules of its prior decisions unless there is a special justification—or, at least, strong grounds—to overrule precedent.[1] This justification must amount to more than a disagreement with a prior decision's reasoning.[2] In adopting this approach, the Court has rejected a strict view of stare decisis that would require it to adhere to its prior decisions regardless of those decisions' merits or the practical implications of retaining or discarding precedent.[3] Instead, while the Court has stated that its precedents are entitled to respect and deference,[4] the Court considers the principle of stare decisis to be a discretionary principle of policy to be weighed and balanced along with the Court's views about a prior decision's merits, along with several pragmatic considerations, when determining whether to retain precedent in interpreting the Constitution[5] or deciding whether to hear a case.[6] Notably, the Court may avoid having to decide whether to overrule precedent if it can distinguish the law or facts of a prior decision from the case before it, or limit the prior decision's holding so it is inapplicable to the instant case.[7]
>
> The Supreme Court has established special rules for applying stare decisis in constitutional cases. During the twentieth century,[8] the Court adopted a weaker form of stare decisis when deciding cases that implicated a prior constitutional interpretation, rather than a previous interpretation of a federal statute.[9] The Court has sought to justify this approach on the grounds that Congress may amend federal laws to address what it deems to be erroneous judicial statutory interpretations, whereas amending the Constitution to overturn a Supreme Court precedent is much more difficult.[10] In fact, in the history of the United States, only five Supreme Court precedents have been overturned through constitutional amendment.[11] Despite the Court's assertion that it applies a weaker form of stare decisis in constitutional cases, the Court still requires a special justification or at least strong grounds for overruling constitutional precedents.[12]

[8] Cong. Rsch. Serv., *Stare Decisis Doctrine Generally*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-7-2-2/ALDE_00013237/ (last visited June 10, 2024).

Additionally, Constitution Annotated provided the following treatment relating to stare decisis factors[9]:

> Article III, Section 1:
>
> *The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.*
>
> There are several factors the Supreme Court weighs when determining whether to reaffirm or overrule a prior decision interpreting the Constitution.[1] First, the Supreme Court may consider the quality of the decision's reasoning.[2] Another factor that the Supreme Court has considered when determining whether to overrule a precedent is whether a rule or standard that the prior case establishes for determining the constitutionality of a government action is too difficult for lower federal courts or other interpreters to apply and is thus unworkable.[3] A third factor the Supreme Court may consider is whether the precedent departs from the Court's other decisions on similar constitutional questions, either because the precedent's reasoning has been eroded by later decisions,[4] or because the precedent is a recent outlier when compared to other decisions.[5]
>
> The Supreme Court has also indicated that changes in how the Justices and society understand a decision's underlying facts may undermine a precedent's authoritativeness, leading the Court to overrule it.[6] Finally, the Supreme Court may consider whether it should *retain* a precedent, even if flawed, because overruling the decision would result in hardship to individuals, companies, or organizations;[7] society as a whole;[8] or Legislative,[9] Executive,[10] or Judicial Branch officers,[11] who relied on the decision's guidance as to which actions and practices comport with the Constitution.[12]
>
> It is difficult to predict when the Supreme Court will overrule precedent because the Court has not provided an exhaustive list of the factors it uses to determine whether a decision should be overruled, or explained how it weighs them. Although much about how the Supreme Court views precedent remains unclear, the Court's factors for determining whether to retain or overrule precedent provides the Justices with significant discretion.[13] If the Court is unable to distinguish a precedent from the case before it, the Justices generally attempt to strike a delicate balance between maintaining a stable

[9] Cong. Rsch. Serv., *Stare Decisis Factors*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-7-2-3/ALDE_00013238/ (last visited June 10, 2024).

jurisprudence on which parties can rely,[14] while preserving sufficient flexibility to correct errors.[15]

6. Writs and judicial review

A writ is an order issued by an entity with authority, which is typically an appellate court. Generally, types of writs include:

- Writ of supervisory control, an extraordinary remedy in Montana that allows the Montana Supreme Court to supervise another court proceeding;
- writ of certiorari, in which an appellate court determines to review a case, at its discretion;
- writ of error, generally, in which an appellate court requests the record from a lower court for review;
- writ of habeas corpus, in which a court uses to bring a prisoner or other detainee to the court to ascertain if the person's imprisonment or detainment is lawful; and
- writ of mandamus, which is an order from a court to an inferior government official ordering the government official to properly fulfill their official duties or correct an abuse of discretion.

The Montana Constitution specifically mentions one writ. Article II, section 19, of the Montana Constitution provides for the writ of habeas corpus:

> Section 19. Habeas corpus. The privilege of the writ of habeas corpus shall never be suspended.

The Montana Supreme Court has the power to issue writs of mandamus, certiorari, prohibition, injunction, and habeas corpus under sections 3-2-202 and 3-2-203, MCA.

> 3-2-202. Original jurisdiction — review of ballot statements. (1) In the exercise of its original jurisdiction, the supreme court has power to issue writs of mandamus, certiorari, prohibition, injunction, and habeas corpus.
>
> (2) The supreme court has the power to issue all other writs necessary and proper to the complete exercise of its appellate jurisdiction.
>
> (3) (a) The supreme court has original jurisdiction to review the petitioner's ballot statements for initiated measures and the attorney general's ballot statements for referred measures and the attorney general's legal sufficiency determination in an action brought pursuant to 13-27-605.
>
> (b) (i) In an original proceeding under subsection (3)(a), the petitioner and the attorney general shall certify the absence of factual issues or shall stipulate to and file any factual record necessary to the supreme court's consideration of the petitioner's ballot statements or the attorney general's legal sufficiency determination.
>
> (ii) If the parties to an original proceeding under subsection (3)(a) fail to make the certification or stipulation required by subsection (3)(b)(i), the supreme court shall refer

the proceeding to the district court in the county of residence of the lead petitioner for development of a factual record and an order that addresses the issues provided in 13-27-605(3). Any party may appeal the order of the district court to the supreme court by filing a notice of appeal within 5 days of the date of the order of the district court. If a lead petitioner has not been designated in accordance with this section or if the parties to the proceeding agree, the proceeding must be referred to the district court for Lewis and Clark County.

(4) As used in this section, "lead petitioner" means an individual designated by the petitioner or petitioners on a form provided by the secretary of state.

(5) Nothing in subsection (3) limits the right to challenge a ballot issue enacted by a vote of the people.

3-2-203. Appellate jurisdiction. The appellate jurisdiction of the supreme court extends to all cases at law and in equity.

In addition to habeas corpus, several writs are provided for in Rule 14, Montana Rules of Appellate Procedure:

Rule 14. Jurisdiction - extraordinary writs - supervisory control - original proceedings.

(1) Jurisdiction. The supreme court is an appellate court but is empowered by Article VII, Sections 1 and 2 of the Constitution to hear and determine such original and remedial writs as may be necessary or proper to the complete exercise of its jurisdiction.

(2) Extraordinary writs. Proceedings commenced in the supreme court originally to obtain writs of habeas corpus, injunction, review or certiorari, mandate, quo warranto, and other remedial writs or orders, shall be commenced and conducted in the manner prescribed by the applicable sections of the Montana Code Annotated for the conduct of such or analogous proceedings and by these rules.

(3) Supervisory control. The supreme court has supervisory control over all other courts and may, on a case-by-case basis, supervise another court by way of a writ of supervisory control. Supervisory control is an extraordinary remedy and is sometimes justified when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and when one or more of the following circumstances exist:

(a) The other court is proceeding under a mistake of law and is causing a gross injustice;

(b) Constitutional issues of state-wide importance are involved;

(c) The other court has granted or denied a motion for substitution of a judge in a criminal case.

(4) Original proceedings. An original proceeding in the form of a declaratory judgment action may be commenced in the supreme court when urgency or emergency factors exist making litigation in the trial courts and the normal appeal process inadequate and when the case involves purely legal questions of statutory or constitutional interpretation which are of state-wide importance.

(5) How commenced. The proceedings referred to in sections (2), (3), and (4) of this rule shall be commenced as follows:

(a) Where and when filed. A petition may be made to the supreme court at any time. The petitioner's petition and all supporting documents shall be filed with the clerk of the supreme court.

(b) What to contain. The petition must set forth:

(i) The facts which make it appropriate that the supreme court accept jurisdiction;

(ii) The particular legal questions and issues anticipated or expected to be raised in the proceeding;

(iii) In summary fashion, the arguments and authorities for accepting jurisdiction and pertaining to the merits of the particular questions and issues anticipated or expected to be raised. No separate memorandum of law or brief shall be filed with the application; and

(iv) To the extent they exist, as exhibits, without repetition of title of court and cause, a copy of each judgment, order, notice, pleading, document proceeding, or court minute referred to in the petition or which is necessary to make out a prima facie case or to substantiate the petition or conclusion or legal effect.

(v) In any proceeding regarding abused or neglected children under Title 41, Chapter 3 or in any proceeding under Title 40, Chapter 6, part 1 (Uniform Parentage Act); Title 41, Chapter 5 (Youth Court Act); Title 42 (Adoption); Title 52, Chapter 3, part 8 (Montana Elder and Persons With Developmental Disabilities Abuse Prevention Act); Title 53, Chapter 20 (Developmental Disabilities); Chapter 21 (Mentally Ill); or Chapter 24 (Alcoholism and Drug Dependence); or Title 72, Chapter 5, part 3 (Guardians of Incapacitated Persons), only the initials of the child, parent(s) or individual party(ies), as the case may be, may be used.

(6) Notice - writs. If a petition for an extraordinary writ or for a writ of supervisory control is filed with respect to any proceeding pending in the district court, the petition and any exhibits relating to a ruling of the district court must be served upon the district judge against whose ruling it is directed and upon all parties. Such petition shall include, in its title, the name of the district judge and the judicial district from which the ruling was issued.

(7) Procedure on filing.

(a) Upon the filing of a petition, the supreme court may order that a summary response be filed, or the supreme court may dismiss the petition without ordering a response. A summary response shall summarize the arguments and authorities for rejecting jurisdiction and shall otherwise comply with (5)(b)(ii) and (iii) and, to the extent necessary, (5)(b)(iv) of this rule. No separate memorandum of law or brief shall be filed with the summary response. No reply memorandum shall be filed to the summary response, except on order of the supreme court.

(b) In the event the supreme court orders a summary response, the supreme court also may order more extensive briefing, order oral argument, issue any other writ or order deemed appropriate in the circumstances, or dismiss the petition.

(c) The supreme court may order a stay of further proceedings in the other court, pending the supreme court's disposition of the petition.

(8) Oral argument. If oral argument is ordered it shall be conducted in the same manner as in the argument of appeals.

(9) Number of copies - format - word limitations.

(a) A signed original and 9 copies of any petition filed under this rule and any response thereto shall be filed with the clerk of the supreme court.

(b) All filings made pursuant to section (5)(a) of this rule shall conform to the requirements of rule 11, except that neither the text of the petition nor any response shall exceed 4,000 words if proportionately spaced or 12 pages if prepared in monospaced typeface or if typewritten.

(c) Exhibits shall be preceded by a table of contents and exhibits shall be separated by colored page separators.

(10) Briefs. In those cases in which the supreme court orders more extensive briefing, each party shall, unless otherwise ordered, prepare, file, and serve briefs in conformance with rule 12. All briefs shall be filed and served according to the time schedule set forth in the supreme court's order.

Constitution Annotated provides the following treatment on writs of habeas corpus[10].

Article III, Section 1:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Federal courts can hear challenges to state criminal convictions pursuant to petitions for a writ of habeas corpus. While early Supreme Court cases interpreted that authority narrowly, subsequent cases allowed for broader federal review of state court convictions. More recently, however, the Court has adopted a more limited approach to habeas review, and Congress has also enacted legislation limiting federal habeas review of state convictions.

At English common law, the writ of habeas corpus was available to attack pretrial detention and confinement by executive order; it could not be used to question the conviction of a person pursuant to the judgment of a court with jurisdiction over the person. In early cases, the Supreme Court applied the common law understanding of the writ.[1] After the Civil War, the Court adopted a broader view of when a court lacked

[10] Cong. Rsch. Serv., *Habeas Review*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S1-6-9/ALDE_00001186/ (last visited June 10, 2024).

jurisdiction over a petitioner. Thus, in the 1874 case, *Ex Parte Lange*, a person who had already completed one sentence on a conviction was released from custody on a second sentence on the ground that the court had lost jurisdiction upon completion of the first sentence.[2] In the 1880s, the Court held that the constitutionality of the statute upon which a charge was based could be examined on habeas, because an unconstitutional statute was said to deprive the trial court of its jurisdiction.[3] Other cases expanded the want-of-jurisdiction rationale.[4]

The Court started developing its modern approach to the writ of habeas corpus in the 1915 case *Frank v. Mangum*,[5] in which the Court reviewed on habeas a murder conviction in a trial in which there was substantial evidence of mob domination of the judicial process. This issue had been considered and rejected by the state appeals court. The Supreme Court indicated that, though it might initially have had jurisdiction, the trial court could have lost it if mob domination rendered the proceedings lacking in due process. The Court further held that, in order to determine if there had been a denial of due process, a habeas court should examine the totality of the process, including the appellate proceedings. Because the state appellate court had reviewed fully and rejected Frank's claim of mob domination, the Court held he had been afforded an adequate corrective process for any denial of rights, and his custody did not violate the Constitution.[6] Eight years later, in *Moore v. Dempsey*,[7] a case involving another conviction in a trial in which the court was alleged to have been influenced by a mob and in which the state appellate court had heard and rejected Moore's contentions, the Court directed that the federal district judge himself determine the merits of the petitioner's allegations.

In later cases, the Court abandoned its emphasis upon want of jurisdiction and held that the writ was available to consider constitutional claims as well as questions of jurisdiction.[8] The landmark case was *Brown v. Allen*,[9] in which the Court laid down several principles of statutory construction of the habeas statute. First, all federal constitutional questions raised by state prisoners are cognizable in federal habeas. Second, a federal court is not bound by state court judgments on federal questions, even though the state courts may have fully and fairly considered the issues. Third, a federal habeas court may inquire into issues of fact as well as of law, although the federal court may defer to the state court if the prisoner received an adequate hearing. Fourth, new evidentiary hearings must be held when there are unusual circumstances, when there is a vital flaw in the state proceedings, or when the state court record is incomplete or otherwise inadequate.

The Supreme Court authorized almost plenary federal habeas review of state court convictions in its famous 1963 trilogy.[10] First, in *Townsend v. Sain*, the Court dealt with the established principle that a federal habeas court is empowered, where a prisoner alleges facts which if proved would entitle him to relief, to relitigate facts, to receive evidence and try the facts anew, and sought to lay down broad guidelines as to when

district courts must hold a hearing and find facts.[11] The Court stated: Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding.[12] To particularize this general test, the Court further held that an evidentiary hearing must take place when (1) the state hearing did not resolve the merits of the factual dispute; (2) the record as a whole does not fairly support the state factual determination; (3) the state court's fact finding procedure did not afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state hearing; or (6) the state trier of fact did not appear to afford the habeas applicant a full and fair fact hearing.[13]

Second, *Sanders v. United States*[14] dealt with two interrelated questions: how to address successive petitions for the writ, when the second or subsequent application presented grounds previously asserted or not previously raised. Emphasizing that [c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged,[15] the Court established generous standards for considering successive claims. As to previously asserted grounds, the Court held that courts may give controlling weight to a prior denial of relief if (1) the court had previously found against the applicant on the applicant's ground for relief, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by revisiting the determination,[16] so that the habeas court might but was not obligated to deny relief without considering the claim on the merits.[17] With respect to grounds not previously asserted, a federal court considering a successive petition could refuse to hear the new claim if it decided the petitioner had deliberately not raised it in the prior proceeding; if not, the Court noted, [n]o matter how many prior applications for federal collateral relief a prisoner has made, the court must consider the merits of the new claim.[18]

Third, in *Fay v. Noia*,[19] the Court considered the issue of state defaults—that is, the effect on habeas when a defendant in a state criminal trial has failed to raise, in accordance with state procedure, a claim that he subsequently wants to raise on habeas. If, for example, a defendant fails to object to the admission of certain evidence on federal constitutional grounds in accordance with state procedure and within state time constraints, the state courts may therefore simply refuse to address the merits of the claim, and the state's independent and adequate state ground bars direct federal review of the claim.[20] Whether a similar result was required in habeas proceedings divided the Court in *Brown v. Allen*,[21] in which the majority held that a prisoner, whose appeal a state court had refused to hear because his papers had been filed a day late, could not be heard on habeas because of his state procedural default. The Court reached a different result in *Fay v. Noia*, holding that the adequate and independent state ground doctrine limited the Court's appellate review, but not its habeas review. A federal court has power to consider any claim that has been procedurally defaulted in state courts.[22] Still, the Court recognized that the states had

legitimate interests that were served by their procedural rules, and that it was important that state courts have the opportunity to afford a claimant relief to which he might be entitled. Thus, a federal court had discretion to deny a habeas petitioner relief if it found that he had deliberately bypassed state procedure and intentionally waived his right to pursue his state remedy.[23]

Liberalization of the writ thus made it possible for convicted persons who had fully litigated their claims at state trials and on appeal, who had lacked the opportunity to have their claims reviewed due to procedural default, or who had been heard at least once on federal habeas, to have the chance to present their grounds for relief to a federal habeas judge. In addition to opportunities to relitigate the facts and the law relating to their convictions, prisoners could also take advantage of new constitutional decisions that were retroactive. The filings in federal courts increased year by year, but the numbers of prisoners who in fact obtained either release or retrial remained quite small. However, expansion of the writ generated opposition from state judges and state law enforcement officials and stimulated many efforts in Congress to enact restrictive habeas amendments.[24] The efforts were unsuccessful and, following changes in the composition of the Supreme Court, the Court adopted a more limited view of when habeas relief should be available.

In the 1977 case *Wainwright v. Sykes*, then-Justice William Rehnquist emphasized that the Court has significant discretion whether to award habeas relief.[25] After reviewing the case law on the 1867 statute, Justice Rehnquist remarked that the history illustrates this Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged.[26] From early on, the Court has emphasized the equitable nature of the habeas remedy and the Judiciary's responsibility to guide the exercise of that remedy in accordance with equitable principles; thus, time and again, the Court has underscored that the federal courts have plenary *power* under the statute to implement it to the fullest while the Court's decisions may deny them discretion to exercise the power.[27]

Supreme Court cases since the 1970s have made several changes to the law related to habeas corpus relief. These cases generally reflect a departure from the 1963 trilogy and a narrowing view of when federal courts should undertake habeas review of state law criminal convictions.

First, the Court in search and seizure cases has returned to the standard of *Frank v. Mangum*, holding that where the state courts afford a criminal defendant the opportunity for a full and adequate hearing on his Fourth Amendment claim, his only avenue of relief in the federal courts is to petition the Supreme Court for review and that he cannot raise those claims again in a habeas petition.[28] Grounded as it is in the Court's dissatisfaction with the exclusionary rule, the case has not been extended to other constitutional

grounds,[29] but the rationale of the opinion suggests the likelihood of reaching other exclusion questions.[30]

Second, the Court has formulated a new rule exception to habeas cognizance. That is, subject to two exceptions,[31] a case decided after a petitioner's conviction and sentence became final may not be the predicate for federal habeas relief if the case announces or applies a new rule.[32] A decision announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.[33] Explaining this the court noted that if a rule was susceptible to debate among reasonable minds, it could not have been dictated by precedent, and therefore it must be classified as a new rule.[34]

Third, the Court has largely maintained the standards of *Townsend v. Sain*, as embodied in somewhat modified form in statute, with respect to when federal judges must conduct an evidentiary hearing. However, the Court has overturned one *Townsend* factor, not expressly set out in the statute, in order to bring the case law into line with other decisions. *Townsend* had held that a hearing was required if the material facts were not adequately developed at the state-court hearing. If the defendant had failed to develop the material facts in the state court, however, the Court held that, unless he had deliberately bypass[ed] that procedural outlet, he was still entitled to the hearing.[35] In *Keeney v. Tamayo-Reyes*, the Court overruled that point and substituted a much stricter cause-and-prejudice standard.[36]

Fourth, the Court has significantly stiffened the standards governing when a federal habeas court should entertain a second or successive petition filed by a state prisoner—a question at issue in *Sanders v. United States*.[37] A successive petition may be dismissed if the same ground was determined adversely to petitioner previously, the prior determination was on the merits, and the ends of justice would not be served by reconsideration. It is with the latter element that the Court has become more restrictive. A plurality in *Kuhlmann v. Wilson*[38] argued that the ends of justice standard would be met only if a petitioner supplemented her constitutional claim with a colorable showing of factual innocence. While the Court has not expressly adopted this standard, a later capital case utilized it, holding that a petitioner sentenced to death could escape the bar on successive petitions by demonstrating actual innocence of the death penalty by showing by clear and convincing evidence that no reasonable juror would have found the prisoner eligible for the death penalty under applicable state law.[39]

Even if the subsequent petition alleges new and different grounds, a habeas court may dismiss the petition if the prisoner's failure to assert those grounds in the prior, or first, petition constitutes an abuse of the writ.[40] Following the 1963 trilogy and especially *Sanders*, the federal courts had generally followed a rule excusing the failure to raise claims in earlier petitions unless the failure was a result of inexcusable neglect or of deliberate relinquishment. In *McClesky v. Zant*,[41] the Court construed the abuse of the writ language to require a showing of both cause and prejudice before a petitioner may

allege in a second or later petition a ground or grounds not alleged in the first. In other words, to avoid subsequent dismissal, a petitioner must allege in his first application all the grounds he may have, unless he can show cause, some external impediment, for his failure and some actual prejudice from the error alleged. If he cannot show cause and prejudice, the petitioner may be heard only if she shows that a fundamental miscarriage of justice will occur, which means she must make a colorable showing of factual innocence.[42]

Fifth, the Court abandoned the rules of *Fay v. Noia*, although it was not until 1991 that it expressly overruled the case.[43] *Fay* raised the question of when a petitioner may present a claim in federal habeas proceedings that was not properly raised during state proceedings. The answer in *Fay* was that the federal court always had power to review the claim but that it had discretion to deny relief to a habeas claimant if it found that the prisoner had intentionally waived his right to pursue his state remedy through a deliberate bypass of state procedure.

That is no longer the law. Instead the Court has now held:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules.[44]

The miscarriage-of-justice element is probably limited to cases in which actual innocence or actual impairment of a guilty verdict can be shown.[45] The concept of cause excusing failure to observe a state rule is extremely narrow; the existence of cause for procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.[46] As for the prejudice factor, it is an undeveloped concept, but the Court's only case establishes a high barrier.[47]

The Court continues, with some modest exceptions, to construe habeas jurisdiction restrictively; Congress has also enacted legislation restricting the availability of habeas relief. In *Herrera v. Collins*,[48] the Court appeared to take the position that, although a showing of actual innocence is required to permit a claimant to bring a successive or abusive petition, a claim of innocence alone is not sufficient to enable a claimant to obtain review of his conviction on habeas. Petitioners are entitled in federal habeas courts to show that they are imprisoned in violation of the Constitution, not to seek to correct errors of fact. But a claim of innocence does not bear on the constitutionality of a person's conviction or detention, and the execution of a person claiming actual innocence

would not, by this reasoning, violate the Constitution.[49] In a subsequent part of the opinion, however, the Court assumed for the sake of argument that a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and it imposed a high standard for making this showing.[50]

In *Schlup v. Delo*,[51] the Court adopted the plurality opinion of *Kuhlmann v. Wilson* and held that, absent a sufficient showing of cause and prejudice, a claimant filing a successive or abusive petition must, as an initial matter, make a showing of actual innocence so as to fall within the narrow class of cases implicating a fundamental miscarriage of justice. The Court divided, however, with respect to the showing a claimant must make. The dissenters argued for one standard, which would require that to show 'actual innocence' one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty.[52] The Court adopted a second standard, under which the petitioner must demonstrate that a constitutional violation has probably resulted in the conviction of one who is actually innocent. To meet this burden, a claimant must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.[53]

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[54] Congress imposed tight new restrictions on successive or abusive petitions, including making the circuit courts gate keepers in permitting or denying the filing of such petitions, with bars to appellate review of these decisions. The Supreme Court rejected a constitutional challenge to portions of AEDPA in *Felker v. Turpin*.[55] One important restriction in AEDPA bars a federal habeas court from granting a writ to any person in custody under a judgment of a state court with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, *clearly established Federal law, as determined by the Supreme Court of the United States*.[56] The Court has made the significance of this restriction plain: Instead of assessing whether federal law was correctly applied de novo, as would be the course under direct review of a federal district court decision, the proper approach for federal habeas relief under AEDPA is the more deferential one of determining whether the Court has established clear precedent on the issue contested and, if so, whether the state's application of the precedent was reasonable, i.e., whether a fairminded jurist could find that the state acted in accord with the Court's established precedent.[57]

7. Stayed, enjoined, and blocked

Relating to a legal proceeding, the term "stay" is an action by a court to stop a legal proceeding. Rule 22 of the Montana Rules of Appellate Procedure provides for a stay of an order pending appeal:

Rule 22. Stay of judgment or order pending appeal.

(1) Motion for stay in the district court.

(a) A party shall file a motion in the district court for any of the following relief:

(i) To stay a judgment or order of the district court pending appeal;

(ii) For approval of a supersedeas bond; or

(iii) For an order suspending, modifying, restoring, or granting an injunction pending appeal.

(b) If the appellant desires a stay of execution, the appellant must, unless the requirement is waived by the opposing party, obtain the district court's approval of a supersedeas bond which shall have 2 sureties or a corporate surety as may be authorized by law. The bond shall be conditioned for the satisfaction of the judgment or order in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment or order is affirmed, and to satisfy in full such modification of the judgment or order and such costs, interest, and damages as the supreme court may adjudge and award. When the judgment or order is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment or order remaining unsatisfied, costs on appeal, interest, and damages for delay, unless the district court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment or order determines the disposition of property in controversy as in real actions, replevin, and actions to foreclose mortgages, or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the district court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

(c) The district court retains the power to entertain and rule upon a motion filed pursuant to this rule despite the filing of a notice of appeal or the pendency of an appeal.

(d) The district court must promptly enter a written order on a motion filed under this rule and include in findings of fact and conclusions of law, or in a supporting rationale, the relevant facts and legal authority on which the district court's order is based. A copy of any order made after the filing of a notice of appeal must be promptly filed with the clerk of the supreme court.

(2) Motion in the supreme court.

(a) On the grant or denial of a motion for relief under section (1)(a) of this rule, a motion for relief from the district court order may be filed in the supreme court within 11 days of the date of entry of the district court order. The motion must:

(i) Demonstrate good cause for the relief requested, supported by affidavit;

(ii) Include copies of relevant documents from the record;

(iii) Include a copy of the district court's order issued pursuant to section (1)(d) of this rule; and

(iv) Not exceed 10 pages of text including the affidavit, but exclusive of the documents described in section (2)(a)(ii) and (iii) of this rule.

(b) Response or objection to motion.

(i) A response or objection to a motion filed under section (2) of this rule may be filed within 11 days of the filing of the motion.

(ii) The response or objection shall comply with section (2)(a)(i), (ii), and (iv) of this rule.

(3) In the interests of justice, the supreme court may grant, modify, or deny the relief requested under section (2) of this rule.

(4) Except in extraordinary circumstances supported by affidavit, motions under this rule which have not been filed in accordance with sections (1) and (2)(a) of this rule, and motions filed without prior notice to the opposing party, will be denied summarily.

(5) Security other than bond - stipulation of the parties.

(a) In all cases under this rule where supersedeas bond or other terms that secure the opposing party's rights are required, the court, in its discretion, may allow alternative forms of security other than a bond, when adequate equivalent security is provided and the appealing party can show that the judgment creditor's recovery is not in jeopardy.

(b) In all cases, the parties may by written stipulation waive the filing of security.

(6) Stay in a criminal case. Sections 46-20-204 and -205 govern stays in criminal cases.

Similarly, Rule 62 of the Montana Rules of Civil Procedure applies to a court's stay of proceedings:

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) Automatic Stay; Injunction; Exceptions. Except as stated in this rule, no execution may issue on a judgment, nor may proceedings be taken to enforce it, until 14 days have passed after its entry. During this 14-day period, there is imposed, automatically, an order enjoining the judgment debtor(s) from transferring, encumbering, or in any way making unavailable to execution any or all real or personal property, whether tangible or intangible, including, without limitation, cash, accounts, choses in action, leases, contract rights, or other property or any interest therein of the judgment debtor(s). For good cause shown and on terms that protect the respective interests of the parties, the court may enter an order modifying the automatic stay and injunction imposed by this rule. But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction; or

(2) receivership.

(b) Stay Pending the Disposition of a Motion. On appropriate terms for the opposing party's security, the court may stay the execution of a judgment — or any proceedings to enforce it — pending disposition of any of the following motions:

(1) under Rule 50, for judgment as a matter of law;

(2) under Rule 52(b), to amend the findings or for additional findings;

(3) under Rule 59, for a new trial or to alter or amend a judgment; or

(4) under Rule 60, for relief from a judgment or order.

(c) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.

(d) Stay with Bond on Appeal. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.

(e) Stay without Bond on an Appeal by the State of Montana, Its Officers, or Its Agencies. The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the State of Montana, its officer, or its agencies or on an appeal directed by a department of the State of Montana.

(f) Security Other Than Bond — Stipulation of Parties.

(1) In all cases under this rule where supersedeas bond or other terms that secure the opposing party's rights are required, the court, in its discretion, may allow alternate forms of security other than a bond, when adequate equivalent security is provided and the appealing party can show that the judgment creditor's recovery is not in jeopardy.

(2) In all cases, the parties may by written stipulation waive the filing of security.

(g) Appellate Court's Power Not Limited. This rule does not limit the power of the appellate court or one of its judges or justices:

(1) to stay proceedings — or suspend, modify, restore, or grant an injunction — while an appeal is pending; or

(2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

(h) Stay with Multiple Claims or Parties. A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

In comparison to the term "stay" which generally means the suspension of a legal proceeding, the term "enjoin" generally applies when a court prohibits someone from doing something. The term "enjoin" is the verb form to the term "injunction."

Section 3-2-205, MCA, provides for injunctions issued by the Montana Supreme Court:

3-2-205. Injunctions. (1) Upon such terms and under such rules as the supreme court may establish, the supreme court may continue in force an injunction order made by a district court or judge or grant an injunction order and writ pending an appeal to the supreme court from an order of a district court or judge refusing or dissolving an injunction.

(2) No action to obtain an injunction may be commenced in the supreme court except in cases where the state is a party, the public is interested, or the rights of the public are involved. The proper district court has jurisdiction of all injunctions and the commencement of all actions therefor, except as provided in this section.

(3) The supreme court may provide rules for the commencement and trial of actions for injunctions in that court.

Finally, the term "injunction" appears in 226 statutes in the Montana Code Annotated, applying to injunctions issued by the Montana Supreme Court to injunctions issued by District Courts on issues like family law.

Conclusion

Many of the concepts that are explored in this memo are complex issues that have been developed over centuries of legal precedent. This memo should serve as an introductory primer – but it is not an exhaustive treatise.