CONSTITUTIONAL CRISIS UNDER THE BIG SKY: WHAT MONTANA'S SUPREME COURT SHOWDOWN CAN TEACH ABOUT JUDICIAL INDEPENDENCE, ACCOUNTABILITY, AND LEGITIMACY FOR STATE COURTS

Anders K. Newbury*

In 2021, a leaked internal Montana State Judicial Branch email illuminated the branch's long-standing practice of polling its judges on pending legislation affecting the judiciary and attempting to influence policy outcomes on that legislation.[1] The fallout was swift and startling: within days, Montana Republican legislative leadership had unilaterally accessed thousands of unredacted internal emails from judicial branch servers, defied a court order to desist, and subpoenaed all seven members of the supreme court before a newly created legislative investigative committee—subpoenas which the members of the court largely defied.[2] The opening salvo was followed by unusual litigation implicating separation of powers and *Marbury v. Madison*, a GOP public relations campaign against the judiciary, and a torrent of proposed legislation in the 2021 and 2023

---

* The author served as a judicial clerk at the Montana Supreme Court from 2020 to 2023. This Article relies entirely upon publicly available information and is not based on privileged or confidential information. Any opinions contained herein reflect the views of the author alone.

1. Eric Dietrich, *Republicans Target Alleged Bias in Supreme Court Crisis*, MONT. FREE PRESS, Apr. 16, 2021, https://montanafreepress.org/2021/04/16/republicans-target-alleged-bias-in-supreme-court-crisis/ [https://perma.cc/2FB5-QJA3].

2. *See infra* Part I.

legislative sessions intended to weaken the court's authority and independence.[3]

Outcry following recent revelations of United States Supreme Court Justice Clarence Thomas's failure to disclose a financial relationship with a billionaire political mega-donor and exposure of other Justices' mingling with donors and political actors indicate that questions regarding judicial ethics, transparency, accountability, and independence are not limited to any one political party.[4] Meanwhile, civil unrest in Israel attendant to the government's 2023 efforts to reshape the nation's high court demonstrates how much may be riding on the outcome of such debates. Amid rising tensions domestically and abroad, Montana's judicial showdown provides a useful case study and a cautionary tale on an issue of growing urgency.

This Article attempts to reconcile opposing interests in judicial independence and accountability and, drawing on lessons from Montana's experience, highlights appropriate reforms that could be proactively adopted by courts in other states. Part I recounts the unusual events occurring in Montana during the standoff between the state's legislature and supreme court. Part II examines the potentially troubling

---

3. *See infra* Part I.

4. *See* Letter from Sen. Richard J. Durbin, Chief, Sen. Judiciary Comm., to C.J. John Roberts, U.S. Sup. Ct. (Apr. 20, 2023) [hereinafter Senator Durbin Letter to C.J. John Roberts], https://www.judiciary.senate.gov/imo/media/doc/chair_durbin_invitation_to_chief_justice_roberts_to_testify_before_sjc.pdf [https://perma.cc/94W8-GAFY] (inviting Chief Justice Roberts to testify before the Senate Judiciary Committee "regarding the ethical rules that govern the Justices of the Supreme Court"); Justin Elliot et al., *Billionaire Harlan Crow Bought Property from Clarence Thomas. The Justice did not Disclose the Deal*, PROPUBLICA, Apr. 13, 2023, 2:20 PM, https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus [https://perma.cc/4Z5V-AZU3] (outlining revelations that Justice Thomas failed to disclose sale of home to Harlan Crow and failed to disclose luxury travel accepted from Crow); Justin Elliot et al., *Clarence Thomas and the Billionaire*, PROPUBLICA, Apr. 6, 2023, 5:00 AM, https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/2HLB-7GXL]; Brian Slodysko & Eric Tucker, *Supreme Court Justices and Donors Mingle at Campus Visits. These Documents Show the Ethical Dilemmas*, ASSOCIATED PRESS, July 15, 2023, 2:05 AM, https://apnews.com/article/supreme-court-ethics-donors-politics-4b6dc4ae23aac75d4fccb1bcff0b7e0b [https://perma.cc/4MBL-WQEN].

implications of such developments and the possibility that similar showdowns could occur in other states. Drawing on the debate in Montana, Part III turns to theoretical underpinnings of judicial independence while Part IV turns to the lessons of the legal realism movement and countervailing interests in accountability. This Part highlights court decision data relevant to assessing the balance between judicial independence and accountability. In Part V, this Article examines specific mechanisms of enforcing judicial accountability, using the framework developed here to determine whether proposed court reforms pose unacceptable threats to the core interests protected by judicial independence. Finally, in Part VI, the Article applies these conclusions to Montana's recent experience to draw lessons useful to those interested in improving and protecting their own judicial institutions in other states by maximizing the values guarded by both independence and accountability. The Part identifies salutary reforms that should be proactively adopted to improve judicial legitimacy and accountability, measures that unacceptably undermine judicial independence and should be resisted, and reforms that are more ambiguous and should be subject to a balancing of interests on a case-by-case basis.

Ultimately, this Article concludes that a thoughtful examination of the interests in judicial independence and accountability reveals ample opportunities to further both, and that proactively adopting the proposed reforms may be critical to maintaining legitimate judicial institutions in the face of an increasingly tense political environment.

I. MONTANA'S RECENT EXPERIENCE: *MCLAUGHLIN V. LEGISLATURE*

During the 2021 Legislative Session, Republican lawmakers introduced a number of bills flagged by

legislative staff as potentially unconstitutional.[5] Montana Republicans had already identified the state supreme court as a potential stumbling block: as early as 2012, Montana Republicans had been looking for a means to "chang[e] the face of the Montana Supreme Court" to be less of "a constitutional block" to conservative policies.[6] A number of bills introduced in the 2021 Legislative Session appeared poised to do just that, such as a bill to make supreme court elections district-based, rather than statewide, with the stated purpose of "get[ting] our Supreme Court a little more aligned with our electorate."[7]

Another such bill was Senate Bill (S.B.) 140, which abolished Montana's Judicial Nomination Commission, allowing the governor to make direct appointments to fill judicial vacancies without a prior vetting process.[8] Shortly after being signed into law, S.B. 140's constitutionality was challenged in a case brought before the Montana Supreme Court.[9] Montana State District Judge Kurt Krueger had been tapped to fill a vacancy and sit on the supreme court panel slated to hear the case.[10]

On April 1, 2021, Republican campaign strategist Jake Eaton contacted a Montana media outlet with an acquired copy of an internal Montana Judicial Branch email sent by Judge Krueger earlier in the 2021

---

5. Dietrich, *supra* note 1.

6. Anthony Johnstone, *A Past and Future of Judicial Elections: The Case of Montana*, 16 J. APP. PRAC. & PROCESS 47, 79 (2015) ("After the 2012 elections, several Republican legislative leaders discussed a plan to 'chang[e] the face of the Montana Supreme Court.'") (alteration in the original).

7. Dietrich, *supra* note 1.

8. *Id.*; S.B. 140, 67th Leg. (Mont. 2021) (enacted).

9. *See* Brown v. Gianforte, 2021 MT 149, 404 Mont. 269, 488 P.3d 548.

10. Chief Justice Mike McGrath related that he had lobbied Governor Greg Gianforte in opposition to S.B. 140 and subsequently recused himself pursuant to his personal practice of declining to rule on legal challenges to laws on which he had previously taken a public position. *See* Letter from C.J. Mike McGrath, Mont. Sup. Ct., to Sen. Mark Blasdel, President of the Sen., and Rep. Wylie Galt, Speaker of the H. (Apr. 16, 2021) [hereinafter *April 16 Chief Justice Letter*], https://montanafreepress.org/wp-content/uploads/2021/04/Ltr-Blasdel-and-Galt-response-to-subpoenas-041621.pdf [https://perma.cc/D7SH-TRSW].

Legislative Session.[11] The email was sent in response to an email poll facilitated by Court Administrator Beth McLaughlin.[12] The poll solicited judges' views regarding whether the Montana Judges Association (MJA), a lobbying and education organization working on behalf of Montana state judges, should support or oppose the then-pending S.B. 140 legislation.[13] Judge Krueger's email response had indicated that he had been opposed to the enactment of S.B. 140.

Though Judge Krueger promptly recused himself from the panel, the controversy was only beginning.[14] Claiming that the existence of judicial polling evidenced widespread malfeasance, Republican legislative leadership demanded that McLaughlin immediately produce prior emails containing any other such polls.[15] When McLaughlin replied that she had not retained most of these emails, Republican Senate Judiciary Chair Keith Regier issued a rare legislative subpoena on April 8, 2021, to the Department of Administration (DOA), an executive branch entity that maintains the judicial branch's email servers. The subpoena demanded a wholesale production—by the next day—of emails McLaughlin had sent or received since the beginning of the 2021 legislative session.[16] No judicial staff were notified of this development and the DOA, headed by a recently installed appointee of the new Republican

11. Mara Silvers, *Republican Operative Publicizes Ethics Complaints Against Supreme Court Incumbent*, MONT. FREE PRESS (Oct. 17, 2022) [hereinafter Silvers, *Republican Operative*], https://montanafreepress.org/2022/10/17/republican-operative-files-october-surprise-ethics-complaints-montana-supreme-court/ [https://perma.cc/B65C-DBAC].

12. *Id.*

13. Dietrich, *supra* note 1.

14. *Id.*; Order, Bradley v. Gianforte, No. OP 21-0125 (Apr. 7, 2021), 2021 Mont. LEXIS 336, at *1–2.

15. Dietrich, *supra* note 1.

16. *Id.*; Letter from Randy J. Cox, to Misty Ann Giles, Mont. Dept. Admin., and Todd Everts, Leg. Legal Servs. Div. (Apr. 10, 2021), https://fnds.mt.gov/JUD/document?params=U2FsdGVkX182TdswagzIZbg2qB%2BtN10M8FC6fclrwhlgCBkHyFyouEXSiyosJ2z3CFZuRx2A6nZdyiK%2F30%2Bb1cHdFT5kHkltTHud%2FJvkmQOs8vlUHFbnO645Ta%2B8uPpkval38w2SVE6kIhzbJAlJsQ%3D%3D&callback=? [https://perma.cc/593C-ELCZ].

governor, immediately responded and produced thousands of unredacted emails by the next day, Friday, when McLaughlin first received a courtesy notice of the subpoena.[17] Citing concern for the release of sensitive information, McLaughlin retained counsel and repeatedly requested that the DOA temporarily halt the release of emails until a more orderly process for protecting confidential information could be instituted.[18] When these entreaties were ignored by the legislature and DOA, McLaughlin filed a petition with the supreme court on Saturday, April 10, for an emergency stay pending full briefing on the issue.[19] By Sunday, a conservative news outlet had published numerous judicial branch emails obtained pursuant to the subpoena, apparently shared by legislative Republicans.[20] These emails contained state trial court judges' responses to MJA polls, sharing frank and predominantly negative views of recent GOP-introduced judicial reform bills, and demonstrated that Chief

17. Order, Brown v. Gianforte, Nos. OP 21-0125, OP 21-0173 (Apr. 16, 2021), 2021 Mont. LEXIS 356.

18. Order, McLaughlin v. Mont. State Legislature, No. 21-0173, at 4 (June 29, 2021), 2021 MT 178, 405 Mont. 1, 493 P.3d 980 (quoting Petitioner's Response to Respondent's Motion to Dismiss as Moot, Ex. A-1, at 2), *available at* https://perma.cc/7QDD-QCYL (outlining unsuccessful efforts by McLaughlin's attorney to request "an orderly process that protects existing privacy interests" amidst the wholesale release of judicial branch communications likely containing "private medical information, personnel matters including employee disciplinary issues, discussions with judges about ongoing litigation, information regarding Youth Court cases, judicial work product, ADA requests for disability accommodations, confidential matters before the Judicial Standards Commission, and information that could subject the State to liability were protected information exposed").

19. Intervenor Beth McLaughlin's Emergency Motion to Quash and Enjoin Legislative Subpoena Duces Tecum, Brown v. Gianforte, No. OP 21-0125 (Apr. 11, 2021), 2021 MT 149, 404 Mont. 269, 488 P.3d 548, *available at* https://perma.cc/QW8Y-N54Q.

20. *See* Aaron Flint, *Updated—Documents Obtained: Montana Judges Above the Law?*, KBUL NEWS TALK (Apr. 11, 2021), https://realnewsmontana.com/documents-obtained-montana-judges-above-the-law/ [https://perma.cc/LAX9-2VYH]; *see also* SPECIAL SELECT COMMITTEE ON JUDICIAL TRANSPARENCY AND ACCOUNTABILITY, INITIAL REPORT TO THE 67TH MONTANA LEGISLATURE 9 n.14 (2021), https://leg.mt.gov/committees/other-groups/special-select-committee-jat/ [https://perma.cc/84Y7-834N] (directing reader to view emails via a link to KBUL NewsTalk article, *supra*).

Justice McGrath and Court Administrator McLaughlin had coordinated efforts with district court judges and the MJA's lobbyist to thwart passage of the most aggressive judicial-reform bills.[21] On Sunday, as unredacted emails continued to be produced, the court granted the temporary stay, pending full briefing on the scope of the legislature's subpoena power in a new original proceeding before the supreme court, *McLaughlin v. Legislature*.[22]

The next day, however, an attorney for the office of the attorney general—himself a newly elected Republican who had campaigned on an aggressively conservative platform[23] and now representing the legislature in the matter—sent a startling letter to the court.[24] "The Legislature does not recognize this Court's Order as binding and will not abide it. The Legislature will not entertain the Court's interference in the Legislature's investigation of the serious and troubling conduct of members of the Judiciary," the letter stated.[25] The following day, Tuesday, April 13, 2021, the legislature sent another subpoena to the DOA demanding judicial emails by 3:00 p.m. that day.[26] The DOA, however, retained counsel and ceased producing emails.[27]

---

21. Dietrich, *supra* note 1.

22. *Id.*

23. Mara Silvers, *How Austin Knudsen Is Flipping the Script of Attorney General*, MONT. FREE PRESS, June 16, 2021, [hereinafter Silvers, *Flipping the Script*] https://montanafreepress.org/2021/06/15/austin-knudsen-flipping-the-script/ [https://perma.cc/YLB4-F2XA].

24. Letter from Kristin Hansen, Lt. Gen, Mont. Dep't of Just., to Acting C.J. Jim Rice (Apr. 12, 2021), *available at* https://perma.cc/2VST-QALB.

25. *Id.* Likewise, another Department of Justice attorney filed a motion to dismiss stating that the court's order "will not bind the Legislature and will not be followed." *See* Motion to Dismiss, McLaughlin v. Mont. State Legislature, No. 21-0173, at 7–8 (Apr. 14, 2021), 2021 MT 178, 405 Mont. 1, 493 P.3d 980, *available at* https://perma.cc/3APD-WK4F.

26. Emergency Motion to Quash Second Legislative Subpoena, McLaughlin v. Mont. State Legislature, No. 21-0173, at 3–4 (Apr. 15, 2021), 2021 MT 178, 405 Mont. 1, 493 P.3d 980, *available at* https://perma.cc/A8NF-HCNE.

27. *See* Notice of Appearance of Dale Schowengedt for Department of Administration, McLaughlin v. Mont. State Legislature, No. 21-0173 (Apr. 29, 2021), 2021 MT 178, 405 Mont. 1, 493 P.3d 980, *available at*

By Wednesday, Republican leadership launched a special investigative Judicial Transparency and Accountability Committee, asserting that the legislature had uncovered an improper practice of judicial lobbying amounting to anti-GOP bias and a misuse of state resources.[28] Also on Wednesday, in a nearly unprecedented move,[29] the legislature subpoenaed all seven Montana Supreme Court justices, demanding that they appear before a legislative hearing and produce emails, text messages, and phone logs from personal and work phones regarding legislation, the MJA, or communications with Court Administrator McLaughlin.[30] On Friday, April 16, the Montana Supreme Court ordered that any subpoenas regarding judicial branch communications, including those directed to both the DOA and to the individual justices, were stayed pending briefing and a final decision.[31] The individual justices did appear remotely at a legislative hearing to provide statements, but generally declined to comply with requests for email and phone data.[32]

---

https://perma.cc/8KU3-WF49; Dep't of Administration's Summary Response to Petition, McLaughlin v. Mont. State Legislature, No. 21-0173, at 2 (Apr. 29, 2021), 2021 MT 178, 405 Mont. 1, 493 P.3d 980, *available at* https://perma.cc/HKJ5-VFJT ("Department has made clear . . . [I]t will not respond to the subpoena until this Court either vacates the order suspending the subpoenas or the parties otherwise agree to production.").

28. Dietrich, *supra* note 1.

29. *See* Sullivan v. McDonald, No. CV064010696, 2006 Conn. Super. LEXIS 2073, at *9–10 (Super. Ct. June 30, 2006) (finding "only . . . two prior reported instances, in the history of the country, in which a legislative body has ever attempted to subpoena a judge," both during the McCarthy era and including a subpoena from the House Un-American Activities Committee, and both of which were rebuffed on separation of powers grounds).

30. S*ee* McLaughlin, v. Mont. State Legislature, 2021 MT 120, ¶ 4, 404 Mont. 166, 489 P.3d 482. The following day, Thursday, the Legislature sent another subpoena to McLaughlin demanding her to appear and produce documents. Dietrich, *supra* note 1.

31. Order, Brown v. Gianforte, Nos. OP 21-0125, OP 21-0173 (Apr. 16, 2021), 2021 Mont. LEXIS 356.

32. Mara Silvers & Eric Dietrich, *"A Highly Unusual Forum,"* MONT. FREE PRESS, Apr. 20, 2021, https://montanafreepress.org/2021/04/20/legislative-committee-investigates-montana-supreme-court/ [https://perma.cc/9PYX-6FLF]. One Justice, former GOP lawmaker Justice Jim Rice, did not appear at the hearing but instead sought and received an order in district court quashing

The legislature moved for all seven members of the court to recuse themselves from the upcoming *McLaughlin v. Legislature* case, alleging conflict of interest.[33] The court denied the recusal motion, concluding that the Rule of Necessity required the justices to rule on the case because the legislature's argument would, if entertained, allow the entire state adjudicatory system to be effectively sidelined through a manufactured conflict.[34]

After briefing,[35] the supreme court issued a decision which, citing *Marbury v. Madison*, rejected legislative arguments that the court lacked the authority to rule on the matter and permanently quashed the subpoena to the DOA.[36] Relying on a United States Supreme Court

---

his subpoena. He then recused himself from the subsequent *McLaughlin* decision. *Id.* Justice Dirk Sandefur supplied some electronic communications in response to the subpoena. *See* J. Dirk Sandefur, Response and Return on Legislative Subpoena (Apr. 19, 2019), https://leg.mt.gov/content/Committees/JointSlctJudical/FILE_1100.pdf [https://perma.cc/5ZS5-S3F2]. Chief Justice McGrath did draft multiple letters to the legislature responding to questions, explaining court policies and procedures, and denying allegations of misconduct. *April 16 Chief Justice Letter*, *supra* note 10; Letter from C.J. Mike McGrath, Mont. Sup. Ct., to Senator Greg Hertz and Representative Sue Vinton (Apr. 30, 2021) [hereinafter *April 30 Chief Justice Letter*], https://leg.mt.gov/content/Committees/JointSlctJudical/Hertz-Vinton-response-043021.pdf [https://perma.cc/Q972-7FW6].

33. *See* McLaughlin v. Mont. State Legislature, 2021 MT 120, ¶ 10, 404 Mont. 166, 489 P.3d 482.

34. *Id.* at ¶ 11. Moreover, the Order contained a strong rebuke to DOJ lawyers for filings in which they threatened to flaunt a court order and sought to force the recusal of the entire supreme court by issuing substantially similar subpoenas to each member of the court to that which was at issue in a pending case. This precipitated an "extraordinary" letter in which the attorney general himself advised the court to back down. Silvers, *Flipping the Script*, *supra* note 23.

35. Before the court decision was issued, the legislature withdrew its subpoenas and requested that the *McLaughlin* case be dismissed as moot. The court denied this motion pursuant to the public interest and voluntary cessation exceptions to the mootness doctrine and due to statements by the chair of the legislative investigatory committee indicating that the committee would continue to seek judicial documents even after withdrawing its subpoenas. Order, McLaughlin v. Mont. State Legislature, No. 21-0173 (June 29, 2021), 2021 MT 178, ¶ 1 n.1, 405 Mont. 1, 493 P.3d 980, *available at* https://perma.cc/7QDD-QCYL.

36. McLaughlin v. Mont. State Legislature, 2021 MT 178, ¶ 6, 405 Mont. 1, 493 P.3d 980 (citing Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020)).

Opinion protecting former President Trump's financial records from congressional subpoena, the court concluded that the legislative subpoenas were overly broad, violated separation of powers principles, and encroached upon the exclusive jurisdiction of the Judicial Standards Commission. The litigation finally concluded when the legislature's petition for certiorari to the United States Supreme Court[37] was denied.[38]

While the unusual legal maneuvering of the *McLaughlin* case played out, the Montana Republican Party also conducted a public relations battle against the supreme court. While Montana Democrats derided the investigation as an attempt to undermine appropriate checks and balances, the Montana GOP sent mailers to the general public alleging the judiciary was "hiding" something or engaged in improper lobbying activity, bias, public records violations, and conflicts of interest.[39]

Aggressive rhetoric[40] and efforts to undermine and reshape Montana's judiciary continued after the

---

37. The petition was supported by an amicus brief by the governor of Montana. *See* Brief of Amicus Curiae Governor Gianforte Supporting Petitioners, McLaughlin v. Mont. State Legislature, No. 21-859 (Jan. 10, 2022), 2021 MT 178, 405 Mont. 1, 493 P.3d 980, *cert. denied*, Mont. State Legis. v. McLaughlin, 142 S. Ct. 1362 (2022), https://www.supremecourt.gov/DocketPDF/21/21-859/207825/20220110145115461_Legislature%20v%20%20MacLaughlin%20Amicus%20Gianforte%20%20Brief.pdf [https://perma.cc/8PJW-P72W].

38. *See* Mont. State Legis. v. McLaughlin, 142 S. Ct. 1362 (2022).

39. Mike Dennison, *State GOP Attacks MT Supreme Court in Mailer*, KTVH, https://www.ktvh.com/news/montana-politics/state-gop-attacks-mt-supreme-court-in-mailer [https://perma.cc/PD2B-HKC4] (last updated May 3, 2021, 8:48 PM); Silvers & Dietrich, *supra* note 32 (reporting on Montana Democrats' response to the inquiry as a "witch hunt" intended to undermine the judiciary).

40. The Attorney General's Office responded to unfavorable court rulings by referring to them in the press as "absurd" or the "rubberstamping of Democrat[ic] Party policies with a thin veneer of poor, tortured judicial reasoning" and called one adjudicator "an ideological judge who bent over backward" for the plaintiffs in order to "earn herself a spot in [the plaintiffs'] next documentary." Nicole Girten, *Voting on Supreme Court Justices by District Won't Appear on November Ballot*, DAILY MONTANAN, Aug. 12, 2022, *available at* https://missoulacurrent.com/supreme-court-ballot-2/ [https://perma.cc/8HZY-BRW5]; Isabel Hicks, *"Watershed Moment": Judge Rules in Favor of Youth in Landmark* Held v. Montana *Climate Change Case*, BOZEMAN DAILY CHRON., Aug. 14, 2023, https://www.bozemandailychronicle.com/news/environment/watershed-moment-judge-rules-in-favor-of-youth-in-landmark-held-v-montana-

litigation ended. In an unusually high-profile judicial election—the most expensive in Montana's history—the Montana Public Service Commission's Republican president James Brown ran an ultimately unsuccessful campaign to unseat incumbent Justice Ingrid Gustafson.[41] While the race nominally complied with Montana's nonpartisan judicial election rules, Republican leaders publicly endorsed Brown, whose candidacy was widely understood as a Republican effort to reform the judiciary.[42] Shortly before the 2023 legislative session commenced, Republicans on the Judicial Transparency and Accountability Committee published a special report regarding the events surrounding the *McLaughlin* case, accusing the chief justice of lying and once again alleging judicial malfeasance.[43] During the 2023 Legislative Session,

---

climate-change/article_e3ad55bc-3acd-11ee-a924-c3f6301a199f.html [https://perma.cc/NK34-T97Q].

41. Mara Silvers, *State Supreme Court Race Draws $2.9 Million in Outside Spending in Last Month of Campaign*, MONT. FREE PRESS, Nov. 4, 2022, https://montanafreepress.Org/2022/11/04/Montana-Supreme-court-race-2-9-million-third-party-spending-last-month-of-campaign/ [https://perma.cc/EHG3-9DEQ].

42. Amy Beth Hanson, *Republicans Making Partisan Pitch in Supreme Court Race*, AP NEWS, Nov. 4, 2022, 5:18 PM, https://apnews.com/article/abortion-legislature-montana-steve-daines-e9cb65aef75067871a89f677f017fe1a [https://perma.cc/6YZU-6XB9]. Despite Gustafson's incumbency, Brown trailed Gustafson by only eight percentage points in the final tally. Mara Silvers, *Gustafson Retains Supreme Court Seat over Challenger Brown*, MONT. FREE PRESS, Nov. 9, 2022, https://montanafreepress.org/2022/11/09/incumbent-ingrid-gustafson-retains-montana-supreme-court-seat/ [https://perma.cc/6RHV-SD7G].

43. SPECIAL JOINT SELECT COMMITTEE ON JUDICIAL ACCOUNTABILITY AND TRANSPARENCY, FINAL REPORT TO THE 68TH MONTANA LEGISLATURE (2022) [hereinafter FINAL COMMITTEE REPORT], https://leg.mt.gov/content/Committees/JointSlctJudical/12-14-22/FinalSelectCommitteeReport.pdf [https://perma.cc/54XK-LK99]. The Report made similar allegations against McLaughlin's attorney. *Id.* When both McLaughlin's attorney and the chief justice responded that such claims were libelous, the committee struck the word "lie" from the final report. SPECIAL JOINT SELECT COMMITTEE ON JUDICIAL ACCOUNTABILITY AND TRANSPARENCY, FINAL REPORT TO THE 68TH MONTANA LEGISLATURE (2022) [hereinafter AMENDED FINAL COMMITTEE REPORT], https://leg.mt.gov/content/Committees/JointSlctJudical/12-14-22/FinalSelectCommitteeReport_Version3.pdf [https://perma.cc/72JB-8H5T]; Arren Kimbel-Sannit, *Committee Probing Montana Judiciary Adopts Amended Final Report*, MONT. FREE PRESS, Dec. 22, 2022, https://montanafreepress.org/

numerous bills were introduced seeking to hobble or redefine the judiciary, such as shrinking the size of the supreme court, allowing the legislature to force the recusal of members of the judiciary and allowing the attorney general to select a replacement for the chief justice in certain circumstances,[44] making it harder for courts to issue injunctive relief, giving the legislature and attorney general more control over the membership of the Judicial Standards Commission that reviews complaints of judicial misconduct, removing confidentiality standards for complaints against judges, removing the court's authority to govern lawyers, subjecting the judges to ethics laws provided by the legislature, and seeking to replace nonpartisan judicial elections with partisan races or governor's appointments.[45] A proposed joint resolution appeared to

---

2022/12/22/committee-probing-montana-judiciary-adopts-amended-final-report/ [https://perma.cc/QUG5-639H]. A minority report issued by committee Democrats challenged majority report's conclusions, decried legislative efforts as a power grab, and called for greater judicial independence. *See* SPECIAL JOINT SELECT COMMITTEE ON JUDICIAL ACCOUNTABILITY AND TRANSPARENCY, MINORITY REPORT TO THE 68TH MONTANA LEGISLATURE (2022) [hereinafter MINORITY REPORT], https://leg.mt.gov/content/Committees/JointSlctJudical/12-14-22/MinorityReport_FINAL.pdf [https://perma.cc/692V-AHAR].

44. *See* S.B. 311, 68th Mont. Leg., Reg. Sess. (2023), https://leg.mt.gov/bills/2023/billpdf/SB0311.pdf [https://perma.cc/Z83A-KCFA]; H.B. 772, 68th Mont. Leg., Reg. Sess. (2023), https://leg.mt.gov/bills/2023/billpdf/HB0772.pdf [https://perma.cc/8SFV-QJDG]*; see also* Legal Review Note, H.B. 772, Legis. Servs. Div., at 2–3 (Feb. 23, 2023) [hereinafter Legal Review Note], https://leg.mt.gov/bills/2023/LRC//HB0772.pdf [https://perma.cc/C6H7-2AWV] (legislative counsel advising constitutional infirmities with H.B. 772 which would allow the Legislature to make final determinations in disqualification of supreme court justices when the legislature alleges bias and to allow the attorney general to appoint a replacement for the chief justice).

45. *See* Mont. S.B. 311 ("reducing the number of associate justices on the Supreme Court"); H.B. 915, 68th Mont. Leg., Reg. Sess. (2023), https://leg.mt.gov/bills/2023/billpdf/HB0915.pdf [https://perma.cc/5KDP-ZE72] (proposing constitutional amendment to replace supreme court elections with appointments); H.B. 965, 68th Mont. Leg., Reg. Sess. (2023), https://leg.mt.gov/bills/2023/billpdf/HB0965.pdf [https://perma.cc/5YTG-4F7B] (proposed constitutional amendment to supreme court's authority to govern lawyers); S.B. 313, 68th Mont. Leg., Reg. Sess. (2023), https://leg.mt.gov/bills/2023/billpdf/SB0313.pdf [https://perma.cc/2VHQ-L28B] (removing confidentiality standards for complaints against judges brought before the Judicial Standards Commission); S.B. 252, 68th Mont. Leg., Reg. Sess. (2023),

throw the cornerstone of American constitutional law into doubt, declaring that "no single branch has exclusive power to bind its decisions on another branch of government and . . . the 1803 case of *Marbury v. Madison* does not state or assert that it is the exclusive role of the courts to say what the law is or that their decisions are final and binding on other branches of government."[46]

II. WHY MONTANA'S EXPERIENCE MATTERS

The *McLaughlin* case brought longstanding public and academic debates regarding judicial independence, accountability, and legitimacy to the fore in an unprecedented fashion. Though Montana politics are rarely central in the national sphere, the Montana judiciary may well serve as an important warning for judiciaries—and the public that depends upon them—elsewhere in the country.

A. The Dangers Posed by Standoffs Between Courts and Political Actors

While the Montana Supreme Court crisis may have been overshadowed in the eyes of the Montana public by the social hot-button issues dominating the legislative session,[47] the showdown may have put at stake

---

https://leg.mt.gov/bills/2023/billpdf/SB0252.pdf [https://perma.cc/57N3-B4NA] (subjecting judicial branch to state ethics laws).

46. S.J. 15, 68th Mont. Leg., Reg. Sess. (2023) https://leg.mt.gov/bills/2023/billpdf/SJ0015.pdf [https://perma.cc/5TK4-AL84]. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

47. *See* Arren Kimbel-Sannit & Keith Schubert, *Lawmakers Have Whirlwind Day at Capitol as Transmittal Deadline Nears*, DAILY MONTANAN, Mar. 1, 2021, 7:36 PM, https://dailymontanan.com/2021/03/01/lawmakers-have-whirlwind-day-at-capitol-as-transmittal-deadline-nears/ [https://perma.cc/V6WM-BGBQ] (describing controversial bills in 2021 legislative session relating to transgender rights, religious freedom, and wolf trapping); McLaughlin v. Mont. State Legislature, 2021 MT 178, ¶ 81, 405 Mont. 1, 493 P.3d 980 (Sandefur, J., concurring) (rejecting assertion that the *McLaughlin* case was a "petty and obscure turf war between government entities, with the public interest trailing far behind, if at all").

something far more fundamental.[48] First, while intragovernmental wrangling is hardly new, a judicial branch may be uniquely vulnerable to efforts by other branches to undermine its legitimacy and authority. Though executive and legislative branches of government regularly survive with remarkably low public support, it is unclear whether the same can be said of judicial branches.[49] And, as Alexander Hamilton famously observed, the judiciary, armed with neither the sword nor the purse, is a relatively weak institution and depends upon other actors to enforce its orders.[50] While troubling judicial decisions—like other government functions—are rightfully subjected to substantial

---

48. Many observers voiced serious concern during the crisis. *See* Seaborn Larson & Holly Michels, *Clash in the Capitol: Republican Email Probe Tests Separation of Powers*, BILLINGS GAZETTE, Apr. 18, 2021, at A1, A6, https://billingsgazette.com/news/state-regional/clash-in-the-capitol-republican-email-probe-tests-separation-of-powers/article_9a642796-8a7b-52c9-9645-71ea9399457d.html [https://perma.cc/5632-ZFTM] (quoting political analyst and professor at University of Montana as saying that "'troubling' isn't quite serious enough" of a word to describe the refusal to abide by the court's order—"that's anarchy"); *McLaughlin*, 2021 MT at ¶ 82, 493 P.3d at 1004 (Sandefur, J., concurring) (stating that "the continued survival and vitality of our constitutional democracy, and all of the personal and societal freedoms, protections, and other benefits it provides, depend on the preservation of and respect for the distinct functions of all three co-equal branches of government"); Carol Funk, *Public Confidence and the Courts: Pillars of the Rule of Law*, AM. BAR ASS'N, Feb. 17, 2023, https://www.americanbar.org/groups/judicial/publications/appellate_issues/2023/winter/public-confidence-and-the-courts/ [https://perma.cc/5CLL-XMKM] (discussing events surrounding McLaughlin case as a danger to constitutional democracy and rule of law); Silvers, *Flipping the Script*, *supra* note 23 (highlighting concerns of members of Montana legal community and former supreme court justices that unprecedented aggressive actions of attorney general were endangering key constitutional norms); Marc Racicot, *Opinion: Montanans Will Reap What GOP Sows*, MISSOULIAN, Mar. 12, 2023, https://missoulian.com/opinion/columnists/marc-racicot-montanans-will-reap-what-gop-sows/article_667c28b6-bd37-11ed-9a42-2f56ce98cf6e.html [https://perma.cc/R6FW-WYR8] (former Republican Governor of Montana Marc Racicot in an open letter to Montana legislative leadership, alleging that Republican legislators had engaged in an "unrelenting legislative encroachment of the judicial branch [that] violates Article III of the Constitution and mocks your solemn oath").

49. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 168 (2019) (questioning whether the rule of law and democracy can persist if the public loses faith in the legitimacy of the supreme court).

50. THE FEDERALIST NO. 78 (Alexander Hamilton) (McLean's Ed., New York 1788).

criticism, a certain reservoir of public faith in, and executive respect for, the institution are necessary for it to effectively serve its core functions.[51] The representation by the Montana Attorney General's office that a court order would not be abided by—raising comparisons to President Andrew Jackson's infamous defiance of a court order leading to the Trail of Tears—put the inherently fragile basis for judicial authority into sharp relief.[52]

Second, aggression toward a judicial branch may pose a much greater risk of political instability than typical political standoffs. Making the judiciary a party to what initially appears to be an unremarkable political spat[53] raises the stakes by closing a key off-ramp for parties speeding towards crisis—adjudication—[54] as

---

51. *See* Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting) ("It is the confidence in the men and women who administer the judicial system that is the true backbone of the rule of law."); Penny J. White, *Retention Elections in a Merit-Selection System: Balancing the Will of the Public with the Need for Judicial Independence and Accountability: Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 MO. L. REV. 635, 637 (2009) ("Research indicates, for example, that the perception of, and thus respect for, the judiciary is influenced . . . by the degree to which the system is perceived to be procedurally and substantively fair. . . . [I]mpartiality is the lifeblood of judicial legitimacy."). *See generally* STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS (2021).

52. *See* Brown v. Gianforte, 2021 MT 149, ¶ 61, 404 Mont. 269, 488 P.3d 548 (Rice, J., concurring) (condemning attorney general's actions as reminiscent of Andrew Jackson's Trail of Tears in which "tragic suffering was rooted in the arrogance of one man demanding to have his way, Constitution be damned"); *see also* Sanford Levinson & Jack M. Balkin, C*onstitutional Crises*, 157 U. PA. L. REV. 707, 718–19 (2009) (recounting State of Ohio's defiance of a U.S. Supreme Court ruling in *McCulloch v. Maryland*, breaking into a federal bank and seizing funds it had argued it was owed).

53. *See* Eric A. Posner & Adrian Vermeule*, Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1010 (describing "constitutional showdowns"—attempts to raise the stakes in political controversies until one side backs down).

54. Levinson & Balkin, *supra* note 52, at 739, 744 (describing "constitutional showdowns" or "constitutional struggles for power" that do not metastasize into a full-fledged crisis where parties accept a court resolution, noting that "Vice President Al Gore accepted the Court's decision, ending any possibility of a genuine [constitutional] crisis"); Yaniv Roznai, *Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy*, 29 WM. & MARY BILL OF RTS. J. 327, 334 (2020) (describing judiciary's role in

exemplified by the Montana Attorney General's startling statements and Israeli Prime Minister Benjamin Netanyahu's refusal to commit to abiding by a court ruling.[55] Civil unrest in Israel surrounding those efforts further emphasizes the magnitude of the political strain test involved.[56] Finally, of primary interest in this Article, efforts to undermine judicial independence are likely to accompany such showdowns,[57] as exemplified by the Montana legislature's unilateral appropriation of internal judicial branch communications, ordering of the members of the supreme court to present themselves for questioning before an investigatory committee, and numerous pieces of legislation widely-understood as intended to bring the judiciary to heel.[58] As discussed later in this Article, judicial independence is believed to provide critical public goods, the potential loss of which should be cause for great concern.

---

the United Kingdom in refereeing a dispute between the Parliament and the executive).

55. *Supra* notes 23–26 and accompanying text; Tara John & Mick Krever, *Netanyahu Won't Commit to Abiding by Ruling if Supreme Court Blocks Controversial Law*, CNN, July 28, 2023, https://www.cnn.com/2023/07/27/middleeast/israel-benjamin-netanyahu-judicial-intl/index.html [https://perma.cc/Z36J-UDDR]; *see also* Levinson & Balkin, *supra* note 52, at 714 ("[T]here is no crisis" when strong disagreements are "manage[d] . . . within acceptable boundaries" set by constitutional design. "[O]n the other hand, when . . . people abandon" the system of constitutional design, a constitutional crisis is precipitated).

56. *See generally* Sam McNeil & Moshe Edri, *Israeli Protestors Block Highways in 'Day of Disruption,'* ASSOCIATED PRESS (Jul. 18, 2023), https://apnews.com/video/tel-aviv-protests-and-demonstrations-benjamin-netanyahu-national-national-05ab12df0aa7400ba80bd500332169fb.

57. International examples demonstrate that efforts to undermine a judiciary's independence are often preceded by efforts to undermine its legitimacy, as occurred in Montana. James E. Moliterno & Peter Čuroš, *Recent Attacks on Judicial Independence: The Vulgar, the Systemic, and the Insidious*, 22 GERMAN L.J. 1159, 1166, 1173 (2021) (arguing that the Polish government's attacks on independent judiciary were premised on efforts to undermine faith in the judiciary, to "justify a wide array of legislative control over" the judiciary, while the Czech judiciary survived an attack on its independence due to the higher level of public trust it enjoyed); *see supra* notes 38–43 and accompanying text (recounting public relations attacks on the Montana State Supreme Court).

58. *See supra* notes 44–46 and accompanying text (outlining proposed judicial reform bills in 2023 legislative session).

B. Vulnerability of Other State Judiciaries

Those interested in the vitality of judicial institutions in other states[59] should consider whether a similar turn of events to that witnessed in Montana could occur elsewhere. The current hyperpartisanship of state politics nationwide may present a particularly perilous moment for judicial branches around the country, where newly dominant hardline political factions may find holdover judiciaries an intolerable obstacle to their political aims.[60] The legitimacy of many judiciaries may already be weaker[61] than a few decades ago: research suggests that the unseemly aspects of campaign fundraising and negative advertising—supercharged by United States Supreme Court decisions removing campaign finance restrictions and allowing

---

59. This Article does not directly consider the potential risks to the authority and independence of the federal judiciary.

60. *See* Epps & Sitaraman, *supra* note 49, at 168 (noting how the polarization of political parties at the national level has played a role in undermining the legitimacy of the United States Supreme Court); Charles Gardner Geyh*, Can The Rule Of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 214–15 (2012) (noting that political realignments cause "leaders of the new regime [to] criticize and threaten unpopular, holdover judges of the old regime, eliciting a counterstrike from court supporters"); Johnstone, *supra* note 6, at 48 ("One-party state legislatures and executive branches, encouraged by historically large legislative margins, test state courts with contentious laws and constitutional questions"; discussing how, when the environment of compromise has evaporated, the party out of power is more likely to resort to litigation on political matters, encouraging moneyed political interests to extend their influence over the courts).

61. Moreover, the norms that have thus far shielded judiciaries from most partisan incursions appear to be weakening. Geyh, *supra* note 60, at 234–35 (noting "concern . . . that the courts have been politicized to such an extent that the public is poised to lose faith in the rule of law and an impartial judiciary"). A North Carolina trial judge warned in 2005 that "'the very separation of powers that has kept our democracy alive and vigorous is in jeopardy' because 'the constant, degrading and sometimes personal attacks on judges and the judiciary by political and other leaders are slowly eroding the credibility of the judiciary and will ultimately, I fear, undermine the rule of law.'" *Id.* (quoting *Law Day Speech by N.C. Superior Court Judge Thomas W. Ross*, N.C. LAWS. WKLY., May 16, 2005, Gale Academic OneFile, Doc. No. GALE A134519374). *See, e.g.*, Michael Wines, *In North Carolina, a Pitched Battle Over Gerrymanders and Justices*, N.Y. TIMES (Jan. 29, 2022), https://www.nytimes.com/2022/01/29/us/north-carolina-voting-gerrymandering.html [https://perma.cc/VVH4-YKQC].

judicial candidates to take public positions on hot-button political and social issues[62]—are eroding public faith in elected judges.[63]

Moreover, while the events recounted here involved a dominant Republican faction taking aggressive measures against what it saw as a more liberal court, issues of judicial power, independence, and ethics are not limited to any one party affiliation. At the national level, Democratic leadership has attempted to reign in a more conservative United States Supreme Court and raised an outcry regarding Justice Clarence Thomas's failures to make financial disclosures regarding his relationship to a political megadonor.[64]

62. *Republican Party v. White*, 536 U.S. 765, 788 (2002), held that candidates for judicial office had a First Amendment right to announce their views on contested issues. "Before [*White*], it was not only judicial ethics requirements but also longstanding custom and tradition that produced banal state judicial campaigns." White, *supra* note 51, at 648. This allowed judges to carve out a "unique image" as a "special kind of public servant" outside of politics. *Id.* at 649. After *White*, "[t]he number of advertisements promoting a candidate's qualifications fell to 30%, while a majority came painfully close to stating promises" regarding contested issues. *Id.* at 650.

63. *See* White, *supra* note 51, at 645–46 ("Studies indicate that judicial elections, campaign fundraising, and negative campaign advertising result in diminished respect for the judiciary."). Judicial elections may "contribute to the erosion of public trust and confidence in the courts," particularly among "those with less knowledge of . . . the court system" and a corresponding "shortage of goodwill for the courts." *Id.*; *see also* Johnstone, *supra* note 6, at 47–48 (2015) (describing how the *Citizens United* and *White* decisions have played a role in heightened partisan efforts to influence state supreme courts, particularly in Montana); Funk, *supra* note 48 (describing eroding public faith in state and federal courts).

64. Evan Osnos, *Biden Inherits F.D.R.'s Supreme Court Problem*, THE NEW YORKER, Apr. 18, 2021, https://www.newyorker.com/magazine/2021/04/26/biden-inherits-fdrs-supreme-court-problem [https://perma.cc/E8B9-PJ28] (discussing 2021 commission created by President Biden to consider options to address a Supreme Court believed to be out of step with public sentiment, including court packing); Epps & Sitaraman, *supra* note 49, at 164–65 (2019) (discussing Democratic-proposed reforms to reign-in the United States Supreme Court); Sanford Levinson, *The Role of the Judge in the Twenty-First Century: Identifying "Independence,"* 86 B.U. L. REV. 1297, 1298 (2006) ("There is at least some correlation between one's level of political support for what courts in fact do and the degree to which one embraces a robust notion of judicial independence."). *See also* Senator Durbin Letter to C.J. John Roberts, *supra* note 4 (inviting Chief Justice to testify before the Senate Judiciary Committee regarding stated ethics concerns after revelation of Justice Clarence Thomas failing to disclose luxury travel accepted from billionaire donor Harlan Crow);

Finally, Montana's experience suggests that a state judiciary's typical lack of experience with intense public scrutiny represents a major vulnerability. Longstanding accepted judicial practice and custom may suddenly prove difficult to explain when brought to the public's attention for the first time by energized court detractors.[65] The fact that a given court has never been the subject of partisan controversy like the one described here should not be a source of comfort.

C. Do Courts Get What They Deserve?

As the inverted partisan responses to controversies surrounding the supreme courts of Montana and the United States demonstrate, for many, the degree of support for a court seems to have a lot to do with whether one's political causes are presently faring better before judicial or legislative branches of government. If the latter, one might wonder if a particular judiciary is worth saving, or if it should simply be dismantled and rebuilt in a configuration more friendly to one's aims.[66]

Elliot, et al., *supra* note 4 (outlining revelations that Justice Thomas failed to disclose sale of home to Harlan Crow and failed to disclose luxury travel accepted from Crow).

65. *E.g.*, FINAL COMMITTEE REPORT, *supra* note 43, at 12–13 (describing how it "came to light" that Montana district judges were polled on pending legislation and asserting such practice was highly improper); *April 16 Chief Justice Letter*, *supra* note 10 (chief justice defending supreme court practice from allegations of misconduct); *April 30 Chief Justice Letter*, *supra* note 32 (same).

66. *See* Epps & Sitaraman, *supra* note 49, at 166 (addressing concerns by those that would "welcome developments that would weaken the court's ability to stand up to the other branches of government" at the national level, but ultimately concluding that judicial legitimacy remains a crucial value). Limiting judicial independence in the name of addressing illegitimacy may be counter-productive, as reduced independence can lead to even greater skepticism of a court. *See* Anne Sanders & Luc von Danwitz, *The Rule of Law, Constitutionalism and the Judiciary: Selecting Judges in Poland and Germany: Challenges to the Rule of Law in Europe and Propositions for a New Approach to Judicial Legitimacy*, 19 GERMAN L.J. 769, 806 (2018) (noting that "apparent political influence on judicial appointments to the highest courts may decrease the legitimacy of the judiciary in the eyes of the citizens"); James E. Moliterno et al., *Independence Without Accountability: The Harmful Consequences of EU Policy Toward Central and Eastern European Entrants*, 42 FORDHAM INT'L L.J. 481, 487 (2018) ("[J]udicial independence gives people faith in justice and confidence

As discussed in detail below, there are good reasons to be concerned about excessive judicial independence.[67] However, judicial independence nonetheless allows courts to dispense essential public goods which should not be indiscriminately jettisoned during a crisis or for short-term political gain.[68] This Article posits that there are workable solutions to further the interests protected by both independence and accountability, if these solutions are approached in a good faith and thoughtful manner. Rather than watch judicial institutions burn, this Article seeks to illuminate a preferable path through increasingly volatile times: to assess and, where necessary, improve courts so that they unambiguously deserve—and have the tools to defend—their appropriately limited independence.

III. THE *WHY*, *WHAT*, AND *WHO* OF JUDICIAL INDEPENDENCE

The debate in Montana largely centered around whether respect for judicial independence required the legislature to leave the court alone, or was simply being used to cloak judicial misconduct or politicking.[69] Similarly, at the federal level, Chief Justice John Roberts recently cited to judicial independence—without further explanation—in refusing to provide testimony regarding ethics rules.[70] Without first elucidating which values

---

in judges. It allows people to know that the government will not decide disputes; the law will."). *See infra* Part III.A (describing purposes of judicial independence).

67. *See infra* Part IV (describing interests in judicial accountability).

68. *See infra* Part III.A (describing purposes of judicial independence).

69. *See* Dietrich, *supra* note 1; Silvers, *Flipping the Script*, *supra* note 23. Moliterno et al., *supra* note 66, at 484 (expressing concern that "[t]he phrase 'judicial independence' has gained such an aura that its mere invocation" forecloses "the possibility that there can be *too much* judicial independence").

70. Sen. Richard J. Durbin, Chief, Sen. Judiciary Comm., to C.J. John Roberts, U.S. Sup. Ct. Letter from Chief Justice John Roberts, U.S. Sup. Ct., to Sen. Richard J. Durbin, Sen. Judiciary Comm. (Apr. 25, 2023), *available at* https://int.nyt.com/data/documenttools/supreme-court-ethics-durbin/cf67ef8450ea024d/full.pdf [https://perma.cc/L3ZQ-CBWF] (declining to provide testimony before the United States Senate Judiciary Committee, stating that

judicial independence is intended to protect, and therefore which circumstances demand abstention from certain interventions, progress towards a consensus has been elusive.[71] This Part reviews the most commonly invoked justifications for judicial independence, then narrows the set of actors and actions that must be protected in service of those goals. This approach allows for more precision when determining in which areas courts must enjoy strong protections and, ultimately, to then distinguish between helpful and dangerous court reforms.[72]

A. Justifications for Independence

The strongest justifications for judicial independence can be broken down into two general categories: those concerned with the due process rights of individual litigants and those concerned with protecting the function and values of democratic governance.

1. Due Process Rights of an Individual Litigant: Impartial and Competent Adjudicator

The most powerful justification for judicial independence is that of protecting the due process rights of individual litigants.[73] The primary function of courts

---

such testimony would be "exceedingly rare, as one might expect in light of separation of powers concerns and the importance of preserving judicial independence").

71. *Compare* FINAL COMMITTEE REPORT, *supra* note 43, *with* MINORITY REPORT, *supra* note 43. *See also* Eric Sandberg-Zakian, *Rethinking "Bias": Judicial Elections and the Due Process Clause After* Caperton v. A.T. Massey Coal Co., 64 ARK. L. REV. 179, 187–90 (2011) (noting failure to define "bias" in the *Caperton v. Massey* case before the United States Supreme Court); Rebecca White Berch & Erin Norris Bass, *Judicial Performance Review in Arizona: A Critical Assessment*, 56 ARIZ. L. REV. 353, 354 (2014) ("Citizens are torn. They want judges to be independent, yet accountable; insulated from undue influence, yet aware of what is going on in the 'real world.'").

72. Moliterno et al., *supra* note 66, at 484 ("But there can indeed be too much judicial independence, and . . . the absence of sufficient accountability.").

73. *See generally* Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, *in* PHILOSOPHY OF LAW 12 (Feinberg et al. eds., 9th ed. 2014)

is to provide peaceful dispute resolution by directing the power of the state for and against adversarial parties.[74] By binding the outcome to the dictates of pre-established norms and deliberative process, courts can, ideally, provide the public with the peace of mind of knowing that the law will be applied in a manner that is predictable and fair to all parties.[75] Of course, examples of judicial failures to impartially and competently deliver just outcomes abound.[76] Nonetheless, a common argument for judicial independence is that, judicial independence—while perhaps insufficient alone to guarantee exemplary judicial outcomes—is a necessary precondition.[77]

a. Right to an Impartial Adjudicator

To ensure that the outcome remains dictated by the preconceived rules rather than the wishes of interested parties, the role of human adjudication is carried out by

---

(describing central role of procedural rights to the values furthered by the rule of law).

74. Oliver Wendell Holmes, Jr., *The Path of the Law*, *in* PHILOSOPHY OF LAW 141 (Joel Feinberg et al. eds., 9th ed. 2014) ("[T]he command of the public force is entrusted to the judges . . . and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees.").

75. *Id.* ("People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves.").

76. *E.g.*, Peter J. Galie & Christopher Bopst, *Great Political Trials of the Millennium*, 27 LITIG. 39, 45 (2001) (describing the Salem witch trials, noting that prosecutors and judges were not legally trained); Richard Delgado, *Rodrigo's Committee Assignment: A Skeptical Look at Judicial Independence*, 72 S. Cal. L. Rev. 425, 444 (1999) (exploring "cash value" of judicial independence and argument that "[f]ew judges stood up against McCarthyism or the Salem witch trials").

77. Frank B. Cross, *Perspectives on Judicial Independence: Thoughts on Goldilocks and Judicial Independence*, 64 OHIO ST. L.J. 195, 196–97 (2003) (judicial independence "[a]t a minimum . . . means that judges cannot be punished physically or economically for the content of the decisions they reach" and therefore need not fear deciding cases on their merits, even when "contrary to the interests or desires of the other branches of government"); CHARLES GARDNER GEYH ET AL., JUDICIAL CONDUCT AND ETHICS § 1.02 (6th ed. 2023) (judicial independence "promotes the rule of law by insulating judges from external sources of influence that could impair their independent judgment").

a disinterested third party, a judge, with no attachment to a particular outcome.[78]

While a judge is expected to be committed to neutrality,[79] other individuals are not. It is the former, not the latter, whose judgment should determine the outcome of the case. The essential fairness guarantee of the rule of law through a judicial process is breached when an individual judge is subject to improper[80] influence or coercion by external forces, such as parties, the government, or other interested actors.[81]

78. Waldron, *supra* note 73, at 14 (listing "a hearing by an impartial tribunal" as the first in a list of procedural requirements that should be met under the rule of law); White, *supra* note 51, at 637 ("The key to a perception of procedural fairness is impartiality.").

79. Former United States Supreme Court Justice Breyer addressed the concern that judicial independence might serve as a cover for a judge's own internal bias, arguing that "[i]ndependence doesn't mean you decide the way you want. Independence means you decide according to the law and the facts." *Justice For Sale, Interview: Justices Stephen Breyer & Anthony Kennedy (Excerpted)*, PBS: FRONTLINE, https://www.pbs.org/wgbh/pages/frontline/shows/justice/etc/justicest.html [https://perma.cc/ZN8J-5E7Z] (last visited Dec. 20, 2023). *See also* Geyh, *supra* note 60, at 214; Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 989 (1996) ("[J]udicial independence revolves around the theme of how to assure that judges decide according to law, rather than according to their own whims or to the will of the political branches of government."). In Montana, allegations of this sort formed the basis for the legislative complaints that the supreme court had acted improperly in deciding the *McLaughlin* case involving judicial branch members and communications. *See supra* text accompanying notes 28–33 (describing legislative allegations of judicial bias). Notably, the United State Supreme Court has distinguished between a pre-existing view on a particular *issue* and a pre-existing view regarding a particular *party*. Republican Party v. White, 536 U.S. 765, 776–77 (2002) ("To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose.").

80. Judges are not expected to be free from all influence; they are properly influenced by relevant legal and factual argument through briefing and other stages of the litigation process. *White*, 536 U.S. at 778 (noting that the quality of open-mindedness in a judge "demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case").

81. Moliterno et al., *supra* note 66, at 484 ("Independence is a subset of impartiality, isolating only those influences that come from the electorate or the political process or the other branches of government.").

Judicial independence in this context should mean that the powerful will be held accountable to the same extent as anyone else.[82] It encourages economic activity by assuring that contracts and property rights will be enforced.[83] It prevents so-called "telephone justice" whereby powerful interests direct the outcome of cases involving friends or enemies of the regime.[84]

Perhaps most importantly, judicial independence of this sort is necessary to prevent mob justice, whereby those accused of heinous crimes are denied their fundamental rights by an enraged populace.[85] A classic exemplary of such independence was Judge James

---

82. *See* Tom Ginsburg, *The Jurisprudence of Anti-Erosion*, 66 DRAKE L. REV. 823, 850–52 (2018) (relating critical role South Africa's high court played in allowing President Jacob Zuma to be held accountable for mass corruption while in office, despite weak political opposition).

83. Rachel Stopchinski, *Enforcement Mechanisms for International Standards of Judicial Independence: The Role of Government and Private Actors*, 26 IND. J. GLOB. LEG. STUD. 673, 688–89 (2019) ("Recent scholarship has noted the importance of judicial independence in a country's economic health," because an "independent judiciary is essential to maintaining private property rights and because private actors must rely on the judiciary to adjudicate their legal disputes").

84. Randall T. Shepard, *Telephone Justice, Pandering, and Judges Who Speak Out of School*, 29 FORDHAM URB. L.J. 811, 811 n.2 (2002) ("Justice Breyer defined telephone justice as when 'the party boss calls you up on the telephone and tells you how to decide the case.'" (citing *Frontline: Justice for Sale* (PBS television broadcast Nov. 23, 1999))); *see also* Moliterno & Čuroš, *supra* note 57, at 1171–72 (describing widespread judicial corruption in Slovakia where a number of judges were delivering decisions on-demand for a crime boss on the basis of bribes or threats). Montana is no stranger to this flavor of law, as the dueling industrialists battling for control over Montana's lucrative copper mines at the turn of the twentieth century unabashedly turned to bribery and corruption to obtain favorable court rulings during the so-called "War of the Copper Kings." *See* Johnstone, *supra* note 6, at 53–56 (describing the war of the copper kings).

85. Legislators questioned Chief Justice McGrath regarding emails he had sent expressing his disapproval of H.B. 685, which would have allowed for a citizen "inquiry commission" to remove sitting judges. *See* H.B. 685, 67th Mont. Leg., Reg. Sess. (2021), https://leg.mt.gov/bills/2021/billpdf/HB0685.pdf [https://perma.cc/K33B-P68A]. McGrath responded that the law was equivalent to killing democracy in that "a mob that was mad about something that a judge had decided could remove that judge from office even though the judge is elected by the people." Mara Silvers, *Lawmakers Question Judges About Ethics Standards*, MONT. FREE PRESS (Sept. 14, 2021) [hereinafter Silvers, *Lawmakers Question Judges*], https://montanafreepress.org/2021/09/14/montana-republicans-question-judges-about-ethics/ [https://perma.cc/FET6-HAY6].

Edwin Horton who, in the face of public outrage and threatened mob violence, set aside the (second) conviction and death sentence of an African-American teenager—a member of the "Scottsboro Boys"—accused without sufficient evidence of sexually assaulting two white women in Alabama in 1933.[86] Judge Horton lost his subsequent reelection bid.[87] A plaque installed in the courtroom after Horton's death carries the words from the judge's instructions to the jury: "So far as the law is concerned it knows neither native nor alien, Jew nor Gentile, black nor white. This case is no different from any other. We have only to do our duty without fear or favor."[88]

b. Right to a Competent Adjudicator

Not only should an adjudicator be committed to process over outcome, but the individual must also be sufficiently competent to be capable of actually doing so.[89] Courts often hear highly complex cases, some stemming from decades of litigation, and are required to employ rigorous information gathering, filtering, and processing methods. Getting to the bottom of these issues often requires a substantial amount of experience, expertise, time, and dedication to getting it right.[90] While judges assigned to a case are expected to be legal

86. Douglas O. Linder, *Without Fear or Favor: Judge James Edwin Horton and the Trial of the "Scottsboro Boys,"* 68 UMKC L. REV. 549, 549 (2000).

87. *Id.* at 580.

88. *Id.* at 583.

89. *See* Waldron, *supra* note 73, at 14 (listing "a legally trained judicial officer" sufficiently independent from other government actors, as the second procedural requirement for the rule of law).

90. In addition to individual litigants, society at large benefits from well-reasoned judicial opinions that allow attorneys to confidently advise their clients on how to proceed based upon accurate predictions of how a court would likely rule on a particular matter—obviating the need for actual litigation to resolve a question. *See* Jerome Frank, *Legal Realism*, *in* PHILOSOPHY OF LAW 149 (Joel Feinberg et al. eds., 9th ed. 2014) (describing how "law" from the point of view of an average person is an educated "guess" as to "what the courts will probably decide in the future"); Holmes, *supra* note 74, at 141 (describing study of prior cases as "the scattered prophecies of the past upon the cases in which the axe will fall").

experts and to immerse themselves in understanding a complex dispute before reaching a conclusion, the remainder of society is not.[91] Under this rationale, allowing non-experts to meddle with a judge's decision-making could have deleterious effects on the administration of justice.[92]

2. Democratic Function

Courts not only serve the interests of litigants in peaceful dispute resolution but may also play a crucial institutional role in preserving constitutional democracy. The role of courts in this realm is more controversial and raises difficult questions regarding the appropriate exercise of judicial power in a democracy.

a. Equal Protection and Fundamental Rights

American courts are empowered to protect entire groups of persons from being targeted by discriminatory law or policy, pursuant to the Equal Protection Clause of the Fourteenth Amendment.[93] The assurance that the law will be followed with regard to a single individual in a particular case[94] may be hollow comfort if the law in question unfairly targets you or the group to which you belong.[95] Majority oppression of minorities presents a

---

91. *See* MODEL CODE OF JUD. CONDUCT Canon 2 (AM. BAR ASS'N 2020) https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/ [https://perma.cc/3J38-K5SV] ("A judge shall perform the duties of judicial office . . . competently, and diligently.").

92. In one infamous example, the magistrates that conducted the investigation into alleged witchcraft in seventeenth-century Salem were untrained in the law, as the Puritans did not permit the professional practice of the law in the colony. Galie & Bopst, *supra* note 76, at 45.

93. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–36 (1980) (arguing courts have special role to play in protecting powerless minorities).

94. *See supra* Part III.A.I.

95. *E.g.*, Brown v. Bd. of Education, 347 U.S. 483 (1952) (striking down racial segregation in public schools); Loving v. Virginia, 388 U.S. 1 (1967) (striking down Virginia ban on interracial marriages); Church of the Lukumi Babalu Aye

persistent concern in a democracy.[96] A related concern is that, in the midst of a real or perceived crisis, the public may be willing to waive fundamental rights in order to facilitate a strong government response, frittering away key protections with each new storm cloud on the horizon.[97] To ensure that the public does not turn on powerless minorities or abandon cherished rights in moments of panic, the theory goes, courts must be sufficiently insulated from vindictive or terrified populations or governments to strike down entire laws and policies.[98]

---

v. City of Hialeah, 508 US 520, 546 (1993) (striking down local ordinance "target[ing]" practitioners of the Santeria religion in the community).

96. Erwin Chemerinsky, *Thinking About the Supreme Court's Successes and Failures*, 69 VAND. L. REV. 919, 930 (2016) ("By any measure, prisoners are among the most vulnerable in society. When is the last time that a legislature on its own provided more rights for prisoners?"); Roznai, *supra* note 54, at 332 ("Democracy cannot be reduced to two wolves and a lamb voting on what to have for lunch.").

97. Chemerinsky, *supra* note 96, at 922 ("I posit that the Supreme Court exists preeminently to enforce the Constitution, especially in times of crisis and particularly to benefit minorities."). Similarly, Alexander Hamilton argued that judicial independence was necessary to guard "the rights of individuals from the effects of . . . ill humors" which "sometimes disseminate," and "occasion dangerous innovations in the government, and serious oppressions of the minor party in the community" before "better information" and "deliberate reflection" can take hold. THE FEDERALIST NO. 78 (Alexander Hamilton) (McLean's Ed., New York 1788).

98. Chemerinsky, *supra* note 96, at 922. One counterargument is that courts have been middling at best in fulfilling this role. *See generally* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 5–6, 52–53, 88–89 (2015). *E.g.*, Schenk v. United States, 249 U.S. 47 (1919) (denying free speech rights during World War I); Korematzu v. United States, 323 U.S. 214 (1944) (upholding the forced removal of all individuals of Japanese ancestry from the West Coast during World War II). Perhaps even more frustratingly to some, it has arguably used these constitutional provisions to protect the powerful, rather than the weak, such as in *Lochner*-era decisions or unpopular rulings like *Citizens United*. *See* JAMES L. GIBSON & MICHAEL J. NELSON, JUDGING INEQUALITY: STATE SUPREME COURTS AND THE INEQUALITY CRISIS 5–6 (2021) ("[P]erhaps the Court has indeed protected minorities, but instead of protecting *underprivileged* minorities, it has protected *overprivileged* minorities." (emphasis in original)); *see* Lochner v. New York, 198 U.S. 45 (1905) (holding that worker-protection law capping employee hours at 60 hours per week violated Fourteenth Amendment); Bush v. Gore, 531 U.S. 98 (2000) (concluding that equal protection required the cessation of the Florida ballot recounts in 2000 presidential election); Citizens United v. FEC, 558 U.S. 310 (2010) (First Amendment prohibits limits on corporate political expenditures); Janus v.

b. Separation of Powers/Checks and Balances

American judiciaries form one of the three branches of a government that features a separation of powers often viewed as a form of "checks and balances" against excessive power consolidation.[99] Courts can call out

AFSCME, 138 S. Ct. 2448 (2018) (First Amendment prohibits collection of mandatory public union dues from non-union members benefiting from collective bargaining agreements). However, while such critics lament that the United States Supreme Court has not performed better, they often admit that the Court has succeeded to a certain extent in this role, and that the alternative of no independent Court would be far worse. Chemerinsky, *supra* note 96, at 930; Epps & Sitaraman, *supra* note 49, at 167 (expressing "deep reservations" about a less powerful United States Supreme Court, noting that many of the Court's most significant failures have been in declining to exercise judicial review, not an overaggressive use of it). Notably, beginning in the second half of the twentieth century, the United States Supreme Court handed down a number of high-profile opinions protecting the rights of minorities and held the line on wartime rights. *E.g.*, Tinker v. Des Moines, 393 U.S. 503 (1969) (upholding students' right of non-disruptive protest against the Vietnam War); Watts v. United States, 394 U.S. 705, 705 (1969) (Vietnam War draft protester's statement "if they ever make me carry a rifle the first man I want to get in my sights is L.B.J." was not a true threat and therefore protected speech); Obergefell v. Hodges, 576 U.S. 644 (2015) (fundamental right to marry is guaranteed to same-sex couples by the Fourteenth Amendment). Courts have quietly worked to stem the tide of less visible constitutional abuses cropping up in times of panic, perhaps preventing the worst of abuses and slowing the damage until cooler heads could prevail. *E.g.*, Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (striking down state law requiring employees of public colleges and universities to sign a certificate declaring that they were not members of the Communist Party); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (striking down contempt order of professor who refused to answer questioning posed pursuant to New Hampshire's Subversive Activities Act regarding whether he had taught about socialism in a humanities class); *see* Clay Calvert, *Free Speech and Public Schools in a Postcolumbine World: Check Your Speech Rights at the Schoolhouse Metal Detector*, 77 DENV. U.L. REV. 739, 739–43 (2000) (describing successful lawsuits by students against public schools that punished students for protected speech in the years following the Columbine shootings); Hamdi v. Rumsfeld, 542 U.S. 507, 536, 539 (2004) (enforcing due process rights of alleged enemy combatants during "war on terror," rejecting government's assertion that judicial branch could not be a check on the power of the executive when asserting a national security interest).

99. Elizabeth A. Larkin, *Judicial Selection Methods: Judicial Independence and Popular Democracy*, 79 DENV. U. L. REV. 65, 65 (2001) (explaining that judicial independence enables courts to "serve as an institutional check on the legislative and executive branches"); Roznai, *supra* note 54, at 334 (noting judiciary's role in maintaining separation of powers between other branches of government); Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 691 (1980) (explaining that the Supreme Court's definition

dangerous executive overreach[100] and deter vindictive legislative bodies from weaponizing their lawmaking authority to target the disfavored.[101] To be capable of standing up to the other branches of government in such moments, the institution of the judiciary must necessarily be independent from those branches. The correlation between a loss of judicial independence and the rise of authoritarianism around the world suggests that checks and balances remains a legitimate interest of judicial independence.[102]

c. Anti-Entrenchment

As noted by late Justice Antonin Scalia, there are obvious incentives for elected politicians to manipulate the rules of the game so as to stay in power, both as individuals and as parties.[103] The unfortunate result could be that officials and parties remain in power long after they have ceased to effectuate public sentiment and

---

of judicial independence states that its purpose is keeping the judiciary "free from undue interference by the President or Congress").

100. Roznai, *supra* note 54, at 363 (courts' "role in saving democracy is . . . limited" to "providing high-quality information to publics and elites," thereby "allowing other actors to step up" (emphasis omitted)).

101. Alexander Hamilton argued that the dominant faction is disincentivized to enact vindictive legislation intended to target opponents, knowing that implementation and interpretation will occur in a court over which it has no control such that the law could plausibly be used against members of their own. THE FEDERALIST NO. 78 (Alexander Hamilton) (McLean's Ed., New York 1788) ("[N]o man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day."). *See also* Ginsburg, *supra* note 82, at 838 (asserting that democracy "depends on" norms of "reciprocity": "Knowing that a particular party may be out of power one day, one may decide not to push advantage too far").

102. *Compare* Ginsburg, *supra* note 82, at 829, 848 (describing Poland's Law and Justice Party's efforts to sideline the Polish Constitutional Tribunal and Hungary's Victor Orbán's efforts to control the Constitutional Court of Hungary during a consolidation of power), *with id.* at 842 (describing the high court of Colombia's role in protecting Colombian democracy when President Uribe sought to consolidate and entrench power).

103. McConnell v. FEC, 540 U.S. 93, 263–64 (2003) (Scalia, J., concurring in part, dissenting in part) (decrying legislation restricting campaign finance as an incumbent-protection plan, noting that "the first instinct of power is the retention of power").

their popularity has waned. Allowing the team on offense to rewrite the rules of the game so as to stay on offense indefinitely hardly sounds like a game worth playing.[104] Some suggest that a strong and independent judiciary might serve as a suitable referee.[105]

Courts have, to varying degrees, taken on this role in areas such as term limits, malapportionment, gerrymandering, the scope of the political community, ballot access restrictions, campaign finance, and vote dilution.[106] However, some have expressed concern that the sight of a judiciary picking winners and losers in hotly contested political fights might invite allegations of political partiality followed by political efforts to capture the court.[107] For the majority of state judges who themselves must run for election, making rulings on election machinery invites further allegations of self-dealing.[108] Nevertheless, in areas of voting rights and

---

104. Rule of the "majority is the basis for democracy. But for majority decision-making to exist . . . other values must exist . . . crucial for making sure there are no actions to undermine or defraud the system of competitive elections." Roznai, *supra* note 54, at 332–33 ("A majoritarian decision of five to eliminate the minority of four in a 'fair' and 'equal' vote, in order to ensure that, in future elections, the majority's chances of winning the elections would be guaranteed, is not a democratic decision."); *see also* Ginsburg, *supra* note 82, at 829 (describing Victor Orbán's efforts to entrench himself after coming into power in Hungary in 2011).

105. *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo. L.J. 491, 506–07 (1997); *see also* Roznai *supra* note 54, at 334 ("[C]ourts have a crucial role to play" in protecting as "genuine, fair, and equal" the "competitive electoral and majoritarian processes" because elected politicians "lack the necessary incentives to maintain democratic competition" (citing Aziz Z. Huq & Tom Ginsburg, *Democracy Without Democrats*, 6 CONST. STUD. 165, 167 (2020)).

106. *See* Klarman, *supra* note 105, at 506–26 (arguing that judiciary provides an important protection of majoritarian rule by preventing those in power from entrenching themselves against the will of the public; analyzing examples of term limits, malapportionment, gerrymandering, the scope of the political community, ballot access restrictions, campaign finance, and minority vote dilution).

107. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting).

108. See, e.g., McDonald v. Jacobsen, No. DA 22-0229, 2022 Mont. LEXIS 560, at *3 (June 14, 2022) (denying a motion that sought to disqualify all members of Supreme Court from ruling on constitutionality of ballot initiative to have Supreme Court justices run for election on a district-wide on the basis that the Justices were engaged in self-dealing in ruling on the matter). To the extent

constitutional questions implicating the electoral machinery, the court clearly has some role to play in preventing the fox from guarding the henhouse. To do so, the courts must be sufficiently independent from the influence of elected officials and their supporters.

B. Decisional versus Non-Decisional Acts

Having reviewed *why* one might want a judiciary to enjoy some level of independence, we can now ask exactly *what* sort of activities that independence should protect. Judges and judiciaries may take a number of actions that are not case-decisional in nature, such as adopting rules of procedure, managing budgets, overseeing the state bar, managing dockets, as well as making staffing decisions, interacting with court users, and undertaking educational roles, to name a few.[109]

The justifications for judicial independence laid out above center upon a court's ability to make *adjudicatory decisions* sufficiently free from external forces.[110] While the decisional actions that define the unique function of the judiciary directly implicate the full force of the purposes underlying the judiciary's claim to independence, non-decisional functions do not.[111]

C. Institutional versus Individual Independence

The justifications for judicial independence laid out above implicate two different forms of independence: the independence of *individual judges* and the independence of judicial *institutions*.[112] Perhaps the most fundamental justifications for judicial independence—the due process

---

that such oversight could be off-loaded to some other independent body analogous to the Federal Election Commission or Montana's Commissioner on Political Practices, the judiciary might be spared from some of the ordeal.

109. *See, e.g.*, MONT. CONST. art. VII, § 2.

110. *See supra* Part II.A (analyzing justifications for judicial independence).

111. *See supra*, Part III.

112. Moliterno et al., *supra* note 66, at 488 ("[W]e must distinguish between judicial independence on the level of decision making of individual cases and judicial independence on the level of the whole judiciary and court structure.").

rights of individual litigants—require that competent *individual* judges be unsusceptible to retaliation or remuneration by outside actors who are not committed to legal process over outcome.[113]

The democratic function interests, however, imply a certain degree of *institutional* independence in the form of the composition of the court itself.[114] A judicial branch populated with judges and justices whose world views are in complete lockstep with those of the reigning regime may be unlikely to pose much of a check on executive or legislative overreach or entrenchment.[115] Thus, the degree of political or public control over the *composition* of a court is relevant to the institutional variety of judicial independence.

These democratic justifications for judicial independence, though important, might be viewed as less fundamental to the rule of law than those focused on the due process rights of individual litigants.[116] Additionally, by counteracting public opinion or other branches of government at the level of law and policy, these manifestations of judicial independence come at a higher cost to democratic self-rule.[117] Therefore, while the independence of individual judges is paramount, this Article views the independence of the institution of a judiciary as something that should be appropriately balanced with countervailing interests.[118]

---

113. *See supra* Part III.A.1 (discussing value of ensuring impartiality and competence in an adjudicator, as furthered by judicial independence).

114. *See supra* Part III.A.2 (describing remaining justifications for judicial independence).

115. Particularly in legally indeterminate areas where a judicial ally to the new regime could easily find a legal justification to acquiesce to various abuses. *See infra* notes 129–32 (describing role of legal indeterminacy).

116. *See supra* Part III.A.I.

117. *See* Klarman, *supra* note 105, at 492 n.1 (describing "countermajoritarian difficulty" posed by the power of judicial review of popularly enacted legislation by less accountable judges).

118. *See* Geyh, *supra* note 60, at 247–48 (viewing "state judicial selection reform in terms of striking an optimal independence-accountability balance").

IV. COUNTERVAILING INTERESTS IN ACCOUNTABILITY

Appeals to the necessity of judicial independence are often met with counterarguments emphasizing the importance of accountability. This Part attempts to determine where, why, and to what degree judicial accountability is needed, before asking whether interests in accountability and independence can be reconciled.

A. Justifications for Accountability

1. Non-Decisional Acts

As with any other government function, the public has an obvious interest in discouraging incompetent performance of judicial administrative duties or abuses of power, such as bribe-taking or misuse of public funds, ethical violations, and unprofessional or disrespectful behavior.[119] Moreover, as noted above, accountability for non-adjudicative acts does little to endanger the core interests protected by judicial independence.[120]

---

119. Some examples provide support for Thomas Jefferson's rather pessimistic assertion that "[o]ur judges are as honest as other men, and not more so." Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 277 (Andrew A. Lipscomb & Albert Ellery Bergh eds., mem'l ed. 1904) [hereinafter Letter from Thomas Jefferson]. A number of justices on the West Virginia Supreme Court were impeached in recent years for gross misuse of public funds and the chief justice of the Vermont Supreme Court left his post in 1987 after he was subject to a number of charges of misconduct in advancing the interests of a lay judge, with whom he was alleged to have had an improper relationship. Funk, *supra* note 48; Christopher Graff, *Former Vermont Supreme Court Justice Found in Violation of Conduct Rules*, AP News (May 9, 1988), https://apnews.com/article/86dae7b860c514d0a58fc5547d2d0d78 [http://web.archive.org/web/20230213181908/https://apnews.com/article/86dae7b860c514d0a58fc5547d2d0d78]. In Slovakia, it was discovered that a number of judges were accepting bribes from a crime boss. *See* Moliterno & Čuroš, *supra* note 57, at 1171–72.

120. Critically, however, complaints ostensibly about non-decisional activity must not be used as a cover for efforts to undermine the court's decisional independence. Though the *McLaughlin* case ostensibly centered around non-adjudicatory actions—judicial monitoring and opposing of proposed judicial reforms—the legislature's aggressive response was largely understood to constitute retaliation against a judiciary deemed to have often ruled in a manner insufficiently accommodating to conservative policy goals. *See* J. Dirk M.

2. Decisional Acts: Judicial Lawmaking and Democratic Control

The calculus changes, however, when considering judicial accountability for adjudicatory decisions. Those who argue[121] that courts need more accountability and less independence with respect to the decisions they make challenge the traditionalist claim that judges do not make law, but only develop it pursuant to objective rules of logic.[122]

Starting with the legal realism movement of the early twentieth century, the traditionalist presupposition has been under sustained attack.[123] A local trial court issuing an order appointing a defense lawyer to vindicate the accused's right to counsel might be merely applying the law,[124] but most acknowledge that the United States Supreme Court legalizing gay marriage nationwide or withdrawing the right to an

---

Sandefur Response & Return on Legis. Subpoena, Mont. St. Leg. 13 (Apr. 15, 2021), https://leg.mt.gov/content/Committees/JointSlctJudical/FILE_1100.pdf [https://perma.cc/B2RQ-2SAE] (attached copy of legislative subpoena explicitly excluding case related communications); Seaborn Larson, *Clash in the Capital: Republican Email Probe Tests Separation of Powers*, INDEP. REC. (Apr. 18, 2021), https://helenair.com/news/state-regional/government-politics/clash-in-the-capitol-republican-email-probe-tests-separation-of-powers/article_9cff9ec5-7880-5299-bd11-367573561af0.html [https://perma.cc/LNN8-YPZZ] (describing GOP's frustration with bills being struck down by courts and its efforts to change the judiciary accordingly as the backdrop to the *McLaughlin* case).

121. *E.g.*, Chemerinsky, *supra* note 96, at 920.

122. Holmes, *supra* note 74, at 145 (referring to the argument that "the only force at work in the development of the law is logic"); Mark I. Harrison et al., *On the Validity and Vitality of Arizona's Judicial Merit Selection System: Past, Present, and Future*, 34 FORDHAM URB. L.J. 239, 263 (2007) (describing as "mistaken[]" the belief "that judges should be ideologically accountable rather than impartial and independent").

123. Roznai, *supra* note 54, at 357 (describing competing models for predicting judicial decision making); Holmes, *supra* note 74, at 146 (asserting that "certainty generally is illusion, and repose is not the destiny of man," and that legal questions are "not capable of founding exact logical conclusions").

124. *See* Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 6 (1995) (describing as the prevailing view among judges that "most of the work of trial and intermediate appellate courts, especially in state systems, consists of the mundane application of more-or-less well-established legal rules" with "[o]nly a small portion of the work of such courts involv[ing] what might fairly be called the development of new law").

abortion is surely "making" or changing law in any practical sense of the term.[125] The prevalence of dissenting opinions among well-trained jurists demonstrates that many legal questions are indeterminate and have a range of legally supportable answers upon which well-trained minds will diverge.[126]

---

125. *See, e.g.*, *id.* at 4 ("[O]ne might be hard-pressed to find among those in legal academia anyone seriously advocating that . . . [judging] involve[s] nothing more than searching the corpus juris for the correct legal rule. . . . [and] Blackstone's concept of judges as 'living oracles' of the law has long been out of vogue." (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *69)); Chemerinsky, *supra* note 96, at 920 ("Unlike umpires, Supreme Court justices make the rules."); K. N. Llewellyn, *Ships and Shoes and Sealing Wax*, *in* PHILOSOPHY OF LAW 156 (Joel Feinberg et al. eds., 9th ed. 2014) ("[C]ase law rules (though new) are applied *as if* they had always been the law; this derives from our convention that 'judges only declare and do not make the law.'").

The scandalous implication of an accusation of judicial lawmaking (often referred to in derisive terms such as "legislating from the bench" or "judicial activism") is generally unwarranted. *E.g.*, Seaborn Larson, *Supreme Court: Legislature Overstepped Authority with Subpoenas*, INDEP. REC. (July 14, 2021), https://helenair.com/news/state-regional/government-politics/supreme-court-legislature-overstepped-authority-with-subpoenas/article_220b98b6-06b9-5d80-bba4-a3a22a13a0b1.html [https://perma.cc/4BXY-UGZB] (Montana State Senator Greg Hertz, chair of judicial investigatory committee, deriding court opinion quashing legislative subpoenas as "judicial activism at its worst"). *See* Webster, *supra* note 124, at 6 (describing as "nothing new" the process of modifying or extending the common law and the efforts of judges to fill "voids" left in statutes when resolving disputes that require statutory interpretation). Judges are called upon to resolve disputes arising from the infinite variety of situations upon which statutes have not directly spoken and are expected to strive—pursuant to the much-vaunted doctrine of stare decisis—to resolve similar disputes arising in the future in a manner consistent with the prior decision. Stare decisis places a limit on a court's authority, demanding that it treat today's litigator the same way as the similarly situated litigators of the past. *See* Anastasoff v. United States, 223 F.3d 898, 904 (8th Cir.), *vacated as moot on other grounds*, 235 F.3d 1054 (8th Cir. 2000) (ruling that refusal to consider unpublished opinions as precedent was an unconstitutional aggrandizement of judicial power and an "alarming doctrine" allowing a court to "disregard all former rules and decisions" (internal quotation marks omitted) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 377 (1833))). It also, however, grants appellate courts the power to make law—the common law—that will bind future litigants according to the principles enunciated or relied upon. *See Webster*, *supra* note 124, at 6; *see also* Llewellyn, *supra* note 125, at 156–57. An appellate court's failure to regularly make new "law" in this manner would be a far-from-salutary indication of an inconsistent adjudicator.

126. *Cf.* Benjamin Bricker, *The (Very) Political Dissent: Dissenting Opinions and the Polish Constitutional Crisis*, 21 GERMAN L.J. 1586, 1590 (2020) (noting how European courts generally shun dissents as too damaging to the legitimacy

Here, the law "runs out."[127] More provocative still, critics and empiricists argue that the value judgments of the individuals on the bench are what fill the void of legal indeterminacy.[128] It is no secret that political factions go to great lengths to appoint or block particular individuals to the United States Supreme Court and that voting patterns among sitting justices appear to show strong correlations to the policy preferences of the party responsible for a given justice's appointment.[129]

The legal realism critique provides a strong argument for increased judicial accountability. If the judicial process involves choosing between competing political preferences in making law, shouldn't those preferences align with that of the public[130] rather than

---

of a court, and the role that breaking that norm played in undermining the Polish judiciary's legitimacy during an attack on its independence).

127. Geyh, *supra* note 60, at 234 (discussing how the *White* decision allowing judicial candidates "to announce their views on issues likely to come before them later as judges" implies that the "hot-button issues judges decide present questions of public policy that the electorate has a right to influence or control," and noting "the 2010 retention-election defeat of three Iowa Supreme Court justices" who had ruled in favor of gay marriage rights).

128. Holmes, *supra* note 74, at 146 ("Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment."); Chemerinsky, *supra* note 96, at 920–21 (asking "[w]hat is 'cruel and unusual punishment,'" what "does 'equal protection' require," and what "is an 'unreasonable' search or arrest," before concluding that "[n]o method of interpretation . . . can avoid the need for justices to make a value choice").

129. *See* DAVID A. KAPLAN, THE MOST DANGEROUS BRANCH: INSIDE THE SUPREME COURT'S ASSAULT ON THE CONSTITUTION 19 (2018) (noting predictability of U.S. Supreme Court Justices' votes in controversial cases as a function of the political party of the appointing president; asking "what's the point of having a Court?" if "constitutional law simply becomes partisan politics by another name"); Geyh, *supra* note 60, at 214 (describing "an emerging consensus that judges are subject to an array of factors," forsaking "antiquated notions of law as mathematical formulas" for a view of law "as elastic vessels that constrain available choices"); Epps & Sitaraman, *supra* note 49, at 153 (noting that Justice Kennedy was the last United States Supreme Court appointee to vote against the ideology of the president who named him to the Court in a significant number of cases (citing Lee Epstein & Eric Posner, Opinion, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html [https://perma.cc/A2JG-9D25])).

130. *See Webster, supra* note 124, at 11 (highlighting argument that "[i]f, in fact, judges routinely make policy decisions, a lack of electoral accountability

those of a few judges[131] or the political powers of yesteryear that put them on the bench?[132]An

These arguments provided the backdrop to legislative efforts to weaken or realign the Montana judiciary amidst the *McLaughlin* controversy, with one Republican legislator deriding the notion that Montana's judges ruled without regard to personal political ideology as equivalent to believing in the tooth fairy.[133] To some, the obtained judicial branch emails seemed to vindicate legislators' long-held suspicion that members of the court held political views at odds with GOP policy objectives and that the judges would, as a result, invariably take

runs counter to those democratic principles which we hold most dear"). Notably, however, policy determinations made by officials with varied term lengths is a staple of a political system that blends democratic responsiveness with stability. Christopher Terranova, *The Constitutional Life of Legislative Instructions in America*, 84 N.Y.U. L. REV. 1331, 1350–55 (2009) (describing creation of six-year term for United States Senators, which would, according to James Madison, avoid the effects of "sudden impulses" and "fickleness" (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 421–23 (Max Farrand rev. ed., 1937) (internal quotation marks omitted))).

131. Thomas Jefferson warned that the power of judicial review amounted to the "despotism of an oligarchy" as judges have the "same passions for party, for power" as others but are "not responsible," in the federal system, to "elective control." Letter from Thomas Jefferson, *supra* note 119, at 277.

132. The concern is amplified when courts exercise the power of constitutional review to override the will of the public or other elected officials on the basis of often vague and open-ended constitutional language. *See* Chemerinsky, *supra* note 96, at 920–21 (arguing that vague constitutional provisions and role of political ideology in interpreting them requires "hold[ing] [the Court] accountable for its decisions" (quoting CHEMERINSKY, *supra* note 98, at 342 (internal quotation marks omitted)); *see also* Michael Vitiello, *How Imperial Is the Supreme Court? An Analysis of Supreme Court Abortion Doctrine and Popular Will*, 34 U.S.F. L. REV. 49, 53–54 (1999) ("The portrayal of unelected, anti-majoritarian judges thwarting the will of the people is powerful political rhetoric."); Klarman, *supra* note 105, at 492 n.1 (describing "countermajoritarian difficulty" posed by the power of judicial review of popularly enacted legislation by less accountable judges).

133. Seaborn Larson, *Partisan Judicial Elections a Moot Issue After Failing to Reach Deadline*, INDEP. REC. (Mar. 3, 2023), https://helenair.com/news/state-regional/government-politics/partisan-judicial-elections-a-moot-issue-after-failing-to-reach-deadline/article_0ad8be00-8713-507c-8bf4-02ec5715fa23.html [https://perma.cc/VBW7-6YC4].

opportunities to strike down such laws as unconstitutional when challenged.[134]

B. Weighing Competing Interests in Judicial Accountability and Independence in a State Court

Acknowledging that the legal realism critique offers a valuable insight in judicial decision making, balancing these concerns with counter-posing interests in judicial independence requires a more precise understanding of the degree to which the critique is applicable to a given court. Legal realism provides a far from complete picture, and traditional legal methods remain a major factor accounting for the result in the great bulk of adjudications.[135] Unfortunately, much of the debate on the role of judicial ideology is informed by perceptions of what the United States Supreme Court does.[136] However, that Court functions in a way quite distinct from most other courts in the country, and may not

134. *See supra* Part I. This prediction turned out to be inaccurate when the Montana Supreme Court upheld S.B. 140, abolishing the judicial nominating commission, despite widespread disapproval of the bill among district court judges. *See* McLaughlin v. Mont. State Legislature, 2021 MT 178, ¶ 43 (noting that Brown v. Gianforte, 2021 MT 149, 404 Mont. 269, 488 P.3d 548 upheld the constitutionality of S.B. 140 despite district court judges' poll responses indicating that they viewed S.B. 140 as bad policy).

135. Geyh, *supra* note 60, at 239–40 ("Although academics dwell on hard cases, Judge Posner notes that 'most cases are routine . . . rather than residing in that uncomfortable open region in which judges are at large,' and that '[t]he routine case is dispatched with the least fuss by legalist methods.'" (quoting RICHARD A. POSNER, HOW JUDGES THINK 46 (2008)); Barack Obama, Sen., Remarks at the Confirmation of Judge John Roberts (Sept. 22, 2005) [hereinafter Obama Remarks on Roberts], http://obamaspeeches.com/031-Confirmation-of-Judge-John-Roberts-Obama-Speech.htm [https://perma.cc/GDR8-9DHA] (then-Senator Barack Obama in John Roberts Confirmation hearing concluding that "adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court").

136. Geyh, *supra* note 60, at 214 (noting that state courts "adjudicate 98% of the nation's caseload" but remain "understudied" in the judicial politics debate (citing AM. BAR ASS'N, JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY, at viii (2003)); Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 387 (2007) (contending that academic discussion has seen a "failure to develop a more robust account of the law" because of "scholars' predominant emphasis on the Supreme Court, which operates in a unique institutional setting").

constitute a useful metric for assessing the level of ideological influence in state courts.[137]

Montana provides an apt example. While the United States Supreme Court grants certiorari to only a small percentage of cases brought before it, thereby enabling it to deliberately pick and choose cases as a vehicle to make or change law, the Montana Supreme Court takes all appeals properly brought before it. Legal indeterminacy plays a dominant role in the cases the United States Supreme Court selects, which often arise from circuit court splits and are ultimately resolved with a relatively high frequency of dissenting opinions.[138] In contrast, Montana Supreme Court Justices decide approximately 90% of their cases unanimously.[139] In United States Supreme Court cases, predictable 5–4 and 6–3 voting blocks aligned with the interests of the nominating president's party suggest that political ideology is filling the void left by legal indeterminacy. In contrast, when Montana State Supreme Court justices do reach divergent conclusions, their voting behavior appears to exhibit no discernible pattern, indicating that more nuanced differences of legal opinion are at work.[140]

---

137. *See* Kim, *supra* note 136, at 387.

138. *See infra* Appendix Figure 4 graphing percentages of United States Supreme Court cases that are unanimous as typically hovering somewhere below 50% for years between 2010 and 2020.

139. *See infra* Appendix Figure 4. The Montana Supreme Court typically reverses less than 20% of the lower court decisions brought before it, while the United States Supreme Court reverses well over half of the lower court decisions it reviews. *See infra* Appendix Figure 3.

140. *See infra* Appendix Figure 1; *see also* Dietrich, *supra* note 1 (quoting then-professor of constitutional law, and later federal ninth circuit judge Anthony Johnstone describing the Montana Supreme Court: "Even on the hard cases, the court is not dividing on ideological lines and it is relying on reasonable if contested readings of our Constitution").

When Montana Supreme Court justices make discretionary calls, it is typically on politically inert, fact-specific, issues such as whether a prosecutor's impertinent remarks about the defendant, or a defense attorney's miscalculations, went far enough beyond accepted norms to require a new trial, or whether a trial court abused its discretion in denying a motion for a continuance, rather than the ideologically charged *Dobbs*-like cases that capture public attention. *E.g.*, State v. Miller, 510 P.3d 17, 39 (Mont. 2022) (reviewing for prosecutorial misconduct); Whitlow v. State, 183 P.3d 861, 872 (Mont. 2008) (reviewing ineffective assistance of counsel claim); State v. Rossbach, 501 P.3d

Finally, while the United States Supreme Court is famous (or infamous) for blockbuster decisions wielding its constitutional might to strike down popularly enacted legislation—such as decisions invalidating restrictions on independent corporate political expenditures or legalizing gay marriages—the Montana Supreme Court appears reticent to flex its muscle of constitutional review, striking down legislation only three of the 27 times it was asked to do so in the two years preceding the 2021 legislative session that kicked off the *McLaughlin* dispute. [141]

Thus, the factor supporting the call for greater political control over judicial decision making—the prevalence of counter-majoritarian, ideologically driven, judicial lawmaking—appears to be far less predominant in a state court like the Montana Supreme Court than the United States Supreme Court.[142] Though it would be

---

914, 918 (Mont. 2022) (considering whether the trial court's refusal of a motion for a continuance prejudiced the defendant). At the trial level, the large volume of daily discretionary decisions is even more unremarkable to the general public, such as what constitutes a fair allocation of marital resources or child custody upon divorce. *E.g.*, *In re* Marriage of Watkins, 501 P.3d 932, 932 (Mont. 2022) (reviewing the trial court's apportionment of the marital estate in divorce pursuant to numerous equitable factors). In these cases, the justifications for judicial independence are high, while those for political accountability are at their lowest.

141. *See infra* Appendix Figure 5. Notably, a large number of the Montana Supreme Court's cases, like those of other state appellate courts, are determined to be so thoroughly controlled by settled law that they are published as non-cite memorandum opinions of no precedential value (and therefore cannot constitute judicial lawmaking). *See Summary of Major Statistical Categories Calendar Year 2022*, MONT. JUD. BRANCH, https://courts.mt.gov/external/clerk/stats/2022/statsum.pdf [https://perma.cc/ED9S-H2TP] (last visited Nov. 21, 2023) (noting that 141 supreme court opinions issued were non-cite memorandum opinions compared to 131 full published opinions). Frequent use of the "non-cite" opinion may not be a necessarily salutary development, as critics point out that, when facing factually analogous cases, the non-cite rule prevents litigants from relying on a prior favorable ruling in crafting their argument and allows courts to rule inconsistently without explanation. *See* Anastasoff v. United States, 223 F.3d 898, 904–05 (8th Cir.), *vacated as moot on other grounds*, 235 F.3d 1054 (8th Cir. 2000) (concluding failure to consider unpublished opinions for their precedential value violated constitutional limits on judicial power).

142. *See supra* text accompanying notes 138–141. As an additional consideration, the Montana Supreme Court hears far more cases (many involving unrepresented litigants) per year than the United States Supreme Court, thereby implicating the due process rights of far more individual

foolish to suggest that legal realism has no bearing on state court decisions—rulings on cases of first impression on vague state constitutional provisions abound—data such as this might be grounds to temper one's concerns of excessive ideological influence over a state supreme court like Montana's. Similar analyses of other state courts' decision-making patterns might further illuminate the role of ideologically driven judicial lawmaking in a given jurisdiction.

V. ENFORCING ACCOUNTABILITY: MEASURING COSTS TO JUDICIAL INDEPENDENCE OF VARIOUS MECHANISMS OF COURT CONTROL

Having considered the interests in judicial independence and accountability, this Part turns to methods of implementing accountability. Focusing on the levers of judicial selection and retention, this Part examines the specific mechanisms of accountability and their consequences for the values protected by judicial independence.[143]

A. Selection versus Retention

The most profound levers for exerting influence over judges and judiciaries are those of selection and

litigants. *Compare About the Supreme Court*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about#:~:text=The%20Supreme%20Court%20agrees%20to,asked%20to%20review%20each%20year [https://perma.cc/SKX8-6SSN] (last visited Nov. 21, 2023) (United States Supreme Court hears about 100 to 150 cases per year), *with* Historical Caseload Statistics 1972–2022, MONT. JUD. BRANCH, https://courts.mt.gov/external/clerk/stats/2022/historic.pdf [https://perma.cc/K6D7-FUVS] (last visited Nov. 21, 2023) (Montana Supreme Court hears between 500 and 800 cases per year).

143. *See* Funk, *supra* note 48 (discussing gross misuse of public funds by West Virginia high court).

retention of judges.[144] The distinction between these two forms of influence is worth examining here.[145]

Accepting the assumption that most judges like their jobs and would like to keep them, the promise of extending or the threat of cutting short a judge's term of office likely represents a significant lever over individual sitting judges. These removal and retention processes directly implicate individual judicial independence and the core due process interests it protects, as an individual judge may be hard pressed to make unpopular but legally appropriate rulings when threatened with removal.[146] Accountability mechanisms backed by a threat of removal or the promise of retention should therefore be viewed with extreme caution by those concerned with the core interests of judicial independence.

In contrast, judicial selection processes influence the composition of the court, rather than the ability of any one justice to rule as that justice best sees fit. Selection thus implicates the institutional independence of the judicial branch, as a whole, from the dominant political forces.[147] Selection processes have significantly less relevance to individual independence. Whatever promises or euphemistic hints may have been used to secure their office,[148] once on the bench, judges and justices are free to disregard the wishes of those who put them there.[149] Thus, processes for judicial selection

144. *See generally*, Cross, *supra* note 77, at 205–15 (discussing means of accountability over American courts, including the threat of impeachment, and examining the differing levels of independence corresponding to selection mechanisms, where "the choice of selection systems should have a material effect on the degree of judicial independence of the courts").

145. *See* Levinson, *supra* note 64, at 1301 ("[T]he process of maintaining one's office—as contrasted with the initial appointment or election—may very well threaten certain conceptions of judicial independence.").

146. *See supra* Part III.A (describing role of individual independence).

147. *See supra* Part III.A (describing role of institutional independence).

148. Johnstone, *supra* note 6, at 119 (describing how candidates in judicial elections "campaign in code" rather than make explicit declarations of ideological view).

149. Dwight D. Eisenhower is reported to have said, when asked whether he had ever made any mistakes: "Yes: two. And they are both sitting on the

should be viewed as less essential than those for removal/retention with respect to ensuring the basics of due process and the rule of law,[150] though still important with respect to social and political concerns of democratic function.

B. A Framework for Analyzing Mechanisms of Accountability

Before diving into the specifics of particular reforms, the material examined thus far can be synthesized into a helpful analytical framework. This Article has highlighted two categories of interests furthered by judicial independence: (1) protecting the due process rights of individual litigants and (2) protecting democratic function. The first set of interests is deemed indispensable to a flourishing and just society, while the second category of interests is less absolute. Protecting the first category of interests (individual due process) depends primarily upon the independence of *individual judges*, while the second category (democratic function) requires a certain level of *institutional* independence. Moving a step further, mechanisms of judicial *retention* are of primary importance for individual judicial independence (and, by extension, individual due process rights) while *selection* methods implicate institutional independence (and, by extension, interests in democratic function). In both instances, these interests only justify

Supreme Court," referring to Justices Earl Warren and William Brennan. Michael O'Donnell, *Commander v. Chief*, THE ATL. (Apr. 2018), https://www.theatlantic.com/magazine/archive/2018/04/commander-v-chief/554045/ [https://perma.cc/S2HL-UUVZ]. Justice Holmes is reported to have responded "Now, Mr. President, you can go straight to hell" when President Roosevelt criticized Holmes for a decision. Cross, *supra* note 77, at 205 (internal quotation marks omitted) (citing Roundtable Discussion, *Is There a Threat to Judicial Independence in the United States Today?*, 26 FORDHAM URB. L.J. 7, 26 (1998)).

150. *See Webster, supra* note 124, at 34–36 (noting evidence suggesting "that retention elections are subject to virtually all of the criticisms directed at partisan and nonpartisan judicial elections, and then some" and highlighting instances in which retention elections have been used to remove incumbents for unpopular rulings, particularly in criminal sentencing).

the judiciary's independence from outside influences with regard to adjudicatory acts.

Turning to interests in accountability, this Article noted the uncontroversial need for mechanisms to deter non-decisional instances of genuinely unacceptable judicial behavior. Considering the more controversial case-decisional context, the legal realist critique of ideologically driven judicial lawmaking supports an argument for greater political control over courts. However, collecting empirical data may suggest that the legal realist critique's relevance is less potent in a state court such as Montana's high court than perceptions driven by the high-profile United States Supreme Court would otherwise suggest.

The resulting analysis structure is as follows: First, measures that have no influence over case-decisional adjudicatory functions likely do not cognizably impinge upon the interests justifying judicial independence. Second, of those measures that do involve case-decisional functions, those using removal or retention mechanisms are of the greatest concern, as such measures may threaten the independence of individual judges and, by extension, the due process rights of individual litigants. Third and finally, judicial selection mechanisms occupy an intermediate zone, as they implicate the independence of judicial institutions and democratic function—appropriate for a certain level of balancing against legal realist arguments for political accountability.

C. Mechanisms of Accountability

With this framework in hand, one can now examine specific mechanisms for accountability. Defenders of judicial independence should be open to discussions regarding enhancing some forms of accountability, while

remaining vigilant for when, as Professor Ginsburg puts it, "accountability becomes a synonym for capture."[151]

1. Judicial Oversight Board

A judicial oversight board should constitute the first line of defense for non-decisional complaints such as allegations of violations of judicial codes of conduct.[152] Montana's constitutionally provided-for Judicial Standards Commission is empowered to recommend sanctions to the supreme court, including removal from office, for violations of Montana's Code of Judicial Conduct, willful misconduct, intemperance, consistent failure to make decisions in a timely manner, disability, or other similar concerns.[153]

With removal as a potential consequence, it is critical that the composition and substantive standards of any judicial oversight board minimize the risk that sanctions be imposed upon a judge in retaliation for a disfavored ruling.[154] Montana statute requires that

---

151. Ginsburg, *supra* note 82, at 849 ("Finding the right balance between judicial independence and accountability is, in the best of times, a difficult project.").

152. Funk, *supra* note 48 (recounting allegations of misuse of public funds by West Virginia high court).

153. MONT. CONST. art. VII, § 11; Montana Judicial Standards Commission Rules, MONT. JUD. BRANCH (July 20, 2015), https://courts.mt.gov/external/supreme/boards/jud_standards/14-0356rules.pdf [https://perma.cc/4GSZ-7PLD]. At the 1972 constitutional convention, proponents of the provision stated that it was intended to "quietly" usher from office judges who are "too old and . . . possibly become senile—once in a while we have one who's alcoholic" without having to resort to impeachment. MONTANA CONSTITUTIONAL CONVENTION PROCEEDINGS, 1971–1972, VOLUME 4, THE MONTANA CONSTITUTION COLLECTION 1123–24 (1981) [hereinafter MONT. CONST. COLLECTION].

154. A litigant's remedy for a bad decision is in the appeal process, not a judicial ethics oversight process. *See* Waldron, *supra* note 73, at 14 (listing "right of appeal to a higher tribunal of a similar character" as an essential procedural element to the rule of law). *See also, e.g.*, Memorandum from Shelly Smith, Executive Secretary of the Jud. Standards Comm'n of the Sup. Ct. of the St. of Mont. (May 27, 2020), https://courts.mt.gov/external/supreme/boards/jud_standards/JSC%20Complaint%20Cover%20Letter.pdf [https://perma.cc/4DFN-QM58] ("If you are unhappy with a decision that was rendered by a [lower court], . . . your remedy is by appeal to a higher court," not to pursue an ethics complaint.).

members of the state's Judicial Standards Commission serve staggered four-year terms and consist of two trial court judges elected by Montana's trial judges; one supreme court appointee, an attorney having practiced in Montana for ten years; and two governor appointees who are neither attorneys nor judges.[155] The laypersons on the Commission might provide a fresh voice from outside the profession but, notably, do not form a majority that would allow the executive branch to influence removal proceedings.[156]

2. *Impeachment*

During the 2023 legislative session, only shortly after a GOP-authored draft report on the *McLaughlin* case called Montana's chief justice a liar, Rep. Steve Gunderson introduced a draft bill to gather articles of impeachment.[157] Because impeachment not only constitutes a method of removal, but also puts the decision in the hands of another branch of

---

155. MONT. CONST. art. VII, § 11(1); MONT. CODE ANN. § 3-1-1101(1)–(2) (2023). The initial proposal at the 1972 Constitutional Convention was for three district court judges, one governor-appointed layperson, and one attorney. MONT. CONST. COLLECTION, *supra* note 153, at 1122. After delegates voiced concerns that practicing attorneys might be biased against a particular judge for making a ruling unfavorable to a client or, alternatively, unwilling to criticize a judge in front of whom the lawyer regularly practices, they voted to replace one district judge with another layperson. *Id.* at 1126.

156. *See* § 3-1-1101(1)–(2).

157. Seaborn Larson, *Impeachment Process Bill Revived, Advances in Montana Legislature*, INDEP. REC. (May 31, 2023), https://helenair.com/news/state-regional/government-politics/impeachment-process-bill-revived-advances-in-montana-legislature/article_7cf16a3a-d339-11ed-bb00-ab95cc4248cb.html [https://perma.cc/BWF4-FUTN] (describing bill initially introduced to gather articles of impeachment, later amended to change process for impeachment). The bill was later amended to create a study group to consider legislative amendments to the impeachment process. *Id.*; *see also The MT GOP Plans to Impeach a Montana Supreme Court Justice*, N. 40 POLS. (Jan. 19, 2023), https://north40.substack.com/p/the-mt-gop-plans-to-impeach-a-montana?r=1s4fvf [https://perma.cc/JGY9-57AU] (speculating that the target of the impeachment bill was Chief Justice McGrath, one of only a small number of non-Republican appointed officials in the state).

government,[158] with incentives to coerce judges into making favorable rulings, impeachment constitutes an even greater risk of being used in intolerable case-decisional contexts.[159]

At the federal level, strong norms exist against using the impeachment power to coerce members of the judiciary into ruling more favorably to congressional interests.[160] Similar norms seem to have long existed in Montana;[161] however, a bill introduced in 2021 to allow for impeachment of judicial officers for "adding to the law, omitting the law, making new law, ignoring the law, changing the law, misinterpreting the law, subverting the law, distorting the law, or similar actions"—all phrases synonymous with disagreement with a disputed but reasonable legal interpretation[162]—is reminiscent of a recent effort in Romania[163] to allow the government to

---

158. *See* MONT. CONST. art. V, § 13(1)–(3) (allowing for impeachment of members of the judiciary, with a two-thirds vote of both houses of the legislature).

159. In fact, one Montana legislator cited the impeachment power in support of her argument that allowing the legislature to force the recusal of justices and the attorney general to appoint the chief justice's replacement did not violate separation of powers principles. *See* Legal Review Note, *supra* note 44, at 2–3 (H.B. 772 sponsor Representative Lyn Hellegaard (I, HD 97) disagreeing with Legislative Counsel's Legal Review Note concluding that bill would potentially violate separation of powers).

160. *See* Todd David Peterson, *Congressional Investigations of Federal Judges*, 90 IOWA L. REV. 1, 43, 62 (2004) ("Although Congress might have utilized the impeachment process to remove federal judges because of its disapproval of the judges' politics or decisions on the bench," Congress has refrained from doing so since the early days of the Republic, helping to cement the independence of the federal judiciary); *see also* Powell v. McCormack, 395 U.S. 486, 549 (1969) ("Our system of government requires that . . . courts on occasion interpret the Constitution in a manner at variance with" other branches and the "alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.").

161. The Montana Constitution does not specify what are appropriate grounds for impeachment; however, its provision for liability to additional "prosecution according to law" might be read to imply egregious violations of applicable law. MONT. CONST. art. V, § 13(4).

162. *See supra* note 125 (describing how the process of interpreting law necessarily results in the creation of new law); *supra* text accompanying notes 126–129 (describing how legal indeterminacy often means there are multiple legally acceptable answers upon which reasonable minds may disagree).

163. *See* Ginsburg, *supra* note 82, at 848 (recounting Romanian government's effort to discipline judges for "a judicial error emanating from bad faith or

discipline judges for "judicial error" and demonstrates that such self-restraint may be waning.[164]

Where sufficient recourse is available through a functioning judicial oversight board, impeachment should be viewed as rarely—if ever—an appropriate response to allegations of judicial misconduct.[165] Exercise of the impeachment power against judges should raise serious concerns for judicial independence if it appears that retaliation for case decisions is at play.

3. Retention of Judges/Justices

Judges and justices do not serve forever. For those whose terms are less than lifetime, the opportunity to replace members of the judiciary presents itself far more frequently than at the federal level.[166]

Judicial retention elections are multifaceted under the analysis developed here. To the extent an election is forward looking, in determining a court's composition in the future, it may be viewed as a judicial *selection* measure implicating *institutional* judicial independence.[167] However, when the sitting judge or justice intends to run for reelection or retention, the vote can essentially serve as a tool of judicial *removal*, thereby

---

serious negligence" prompting a response from the European Commission, warning the government against the reform (internal quotation marks omitted) (quoting *Government's Legal Reforms Are Unconstitutional, Rules Romania's Top Court*, EURACTIV (Jan. 30, 2018), https://www.euractiv.com/section/justice-home-affairs/news/governments-legal-reforms-are-unconstitutional-rules-romanias-top-court/ [https://perma.cc/69JP-V5C2])).

164. S.B. 252, 8th Mont. Leg., Reg. Sess. (2021), a*vailable at* https://leg.mt.gov/bills/2021/Minutes/Senate/Exhibits/jus38a09.pdf [https://perma.cc/H59R-UHUU]*; see supra* Part II.B (noting potential growing vulnerability of state courts).

165. *Cf*. Funk, *supra* note 48 (recounting impeachment and related fallout of allegations of misuse of public funds by West Virginia high court).

166. For example, Montana judges and justices serve six- and eight-year terms, respectively, and are eligible to run for reelection an indefinite number of times. MONT. CONST. art. VII, §§ 7–8.

167. *See supra* Part V.A (describing role of selection as relevant to institutional independence).

implicating the far more crucial elements of individual judicial independence.[168]

At the individual level, judicial reelection is another legitimate means to hold judges accountable for non-decisional failings such as unprofessional behavior, ethical violations, or docket mismanagement.[169] At the

168. *See supra* Part V.A (describing role of removal in determining individual independence).

169. *See supra* Part IV.A.I (describing non-decisional accountability). Of course, the public needs to be sufficiently informed about a judge's performance to effectively serve this accountability function. *See Webster, supra* note 124, at 34 (noting that "the organized bar has generally been unsuccessful in providing voters with meaningful guidance" to assist in voting in retention elections, and "virtually all judges have routinely been retained, regardless of qualifications and past performance" (citing William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 342–44 (1987)).

While the Montana Supreme Court does provide caseload statistics and conduct regular polls of court users to determine a supreme court approval rating, other states, such as Arizona, have gone much further in providing the public with relevant information regarding the performance of its judges. *See Montana Performance Measures/ Statistics*, MONT. JUD. BRANCH, https://www.courts.mt.gov/Courts/Statistics/ [https://perma.cc/5JAH-HWZA] (last visited Nov. 22, 2023). In these states, an independent commission polls court users (jurors, attorneys, litigants) and other judges to determine how well judges are performing on objective metrics essential to good judging and then votes on whether it believes the judge is meeting the standards of the office. *See, e.g.*, Berch & Bass, *supra* note 71, at 354; *see generally* A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643 (1998); Harrison et al., *supra* note 122. Importantly, this information is provided on the ballot to voters in retention elections. White, *supra* note 51, at 653–54. This information can provide needed accountability for unqualified judges, without endangering core judicial independence interests. To the contrary, by providing the public with information most relevant to good judging, such efforts might safeguard judicial independence by counteracting efforts to unseat an incumbent because of an unpopular decision. *Id.* at 665 ("[A] recent study confirms that '[w]idespread use of JPE programs can . . . shift[] public focus away from political positions or particular case outcomes and toward the process of adjudication.'" (citation omitted)); Berch & Bass, *supra* note 71, at 380 ("[E]vidence suggests that the [Judicial Performance Review] system works effectively."). Legislation was enacted, with near-unanimous support, in the 2023 Montana Legislative session to create a similar judicial scorecard on case metrics. H.B. 709, 68th Mont. Leg., Reg. Sess. § 1 (2023) (providing for publication of district court judge performance measures such as case processing times, rates of decisions overturned on appeal, and providing for research on further measures in the future). Non-case related administrative court meetings should, as they are in Montana, be subject to the same open meeting laws as meetings of other government bodies. *See* MONT. CODE ANN. § 2-3-203(1), (5) (2023). Other states, such as Vermont, inexplicably

institutional level, judicial elections provide voters an opportunity to mold the ideology of the court as a whole closer to that of the public,[170] implicating the appropriate balance between institutional independence and democratic self-rule.[171] Both of these forms of accountability are legitimate.[172]

In contrast, judicial reelection, when used simply to remove an incumbent for an unpopular decision, runs a serious risk of compromising an individual judge or justice's ability to protect the due process rights of unpopular litigants.[173] Empirical research linking the severity of sentencing decisions to the approach of a judge's reelection indicates that there is reason to be concerned that judicial reelection undermines the due process rights of criminal defendants.[174] Opportunities

---

exempt their judicial branch from public meeting laws, regardless of whether case-related or confidential matters are involved. VT. STAT. ANN. tit. 1, § 312(e) (2023).

170. *See* Brown v. Gianforte, 2021 MT 149, ¶ 62, 488 P.3d 548, 564 (Rice, J., concurring) (describing "selection of different judges during elections" as a legitimate response to court decisions the public disagrees with).

171. *See supra* Part IV.B (describing balance of institutional independence and accountability).

172. This view is disputed by the legal establishment that has long sought to discourage candidates for judicial office from sharing their views on issues of political importance during the selection process as improperly bringing politics into the law. *See* Republican Party v. White, 536 U.S. 765, 778–79 (2002) (addressing proffered interest in promoting the appearance and actuality of judicial open-mindedness supporting challenged professional ethics prohibition on candidates for judicial office announcing their position on legal or political issues during campaign). Legal realists counter that a judge's politics are exactly what the public should know before selecting the individual for the bench. *E.g.*, CHEMERINSKY, *supra* note 98, at 302–10 (criticizing accepted practice of United States Supreme Court nominees declining to share their ideological leanings during Senate confirmation hearings). In practice, meanwhile, many judges seem to attempt to keep both camps happy, declining to explicitly take positions on issues but relying on third-party proxies to telegraph information about judicial ideology to supporters. Johnstone, *supra* note 6, at 119 (describing how candidates in judicial elections protect their image as fair and impartial, but "campaign in code . . . counting on proxies" such as "independent expenditure groups" to "recognize and advertise on the issues that win voters").

173. Though less common than reelection, reappointment, or any other mechanism through which a judge seeks multiple terms, would raise similar concerns.

174. Sandberg-Zakian, *supra* note 71, at 200 (reviewing research describing an increase in sentence severity with approach of a judge's reelection). *See*

for this sort of leverage over sitting judges might be minimized by lengthening terms or by imposing strict term limits.[175]

4. Court Packing / Unpacking

Efforts at court packing—increasing the size of the court to be able to select more new members on the court than the number of vacancies that would have naturally arisen—gives the reigning faction the ability to significantly alter the composition of the court. This thereby undermines the institutional independence of a court and efforts to do so have been generally viewed as an illegitimate power grab (even if threats to judicial independence writ large are overstated).[176]

In contrast, threats to *shrink* the size of the court, as was recently proposed in Montana,[177] also undermines

---

generally Linder, *supra* note 86, at 549 (describing the story of Judge James Edwin Horton who lost his reelection bid after reversing a conviction and death sentence of an African-American individual accused of sexually assaulting two white women in Alabama in 1931).

Thoughtful efforts by legal academics and journalists to highlight and bring to the public's attention instances of objectively poor and inconsistent legal reasoning—particularly for underscrutinized state courts receiving relatively little scholarly attention—might allow for a more acceptable form of accountability in a case decisional context. *See generally, e.g.*, Harrison et al., *supra* note 122, at 239 (describing Arizona's system of reporting results of polls of other judges and lawyers reviewing a judge's performance on a number of metrics, including legal reasoning); Dietrich, *supra* note 1 (quoting then-professor of constitutional law, and later Ninth Circuit judge, Anthony Johnstone concluding that the Montana Supreme Court was not "getting the Constitution wrong" or "reliably splitting on ideological grounds" and that "[e]ven on the hard cases, the court is not dividing on ideological lines and it is relying on reasonable if contested readings of our Constitution").

175. Judicial term limits might come with their own problems: some commentators have posited that "[a] term-limited Justice might see the [United States Supreme] Court as the perfect jumping-off point for a presidential run, decide cases in hopes of retiring into a lucrative lobbying gig, or play to the public to secure a future on Fox News or MSNBC." Epps & Sitaraman, *supra* note 49, at 174.

176. *See* Osnos, *supra* note 64 (discussing 2021 commission created by President Biden to consider options to address a Supreme Court believed to be out of step with democratic will, including court packing).

177. S.B. 311, 68th Mont. Leg., Reg. Sess. (2023), https://leg.mt.gov/bills/2023/billpdf/SB0311.pdf [https://perma.cc/9V6E-89M8].

the individual independence of the justices whose seats will be removed by denying them the chance to run for reelection. For incumbents planning to seek reelection for a relatively safe seat, such efforts may be tantamount to removal.

5. Legislative Investigations and Subpoenas

The Montana Legislature's 2021 efforts to investigate the state's judiciary were essentially unprecedented.[178] Non-privileged/confidential communications should be available for inspection pursuant to proper public records requests, while subpoenas and investigations into allegations against individual judges should be issued and conducted by an independent oversight board addressing allegations of serious (non-decisional) misconduct as discussed above.[179] Another branch of government's efforts to bypass an independent oversight board specifically designed to avoid partisan retaliation against a sitting judge, and instead directly compel testimony or production of documents, should raise serious concerns that judicial independence is under attack.[180]

---

178. A Connecticut Court in 2006 could find only two prior instances of legislative subpoenaing of sitting judges, both part of McCarthy-era communist hysteria and both rebuffed. Sullivan v. McDonald, No. CV064010696, 2006 Conn. Super. LEXIS 2073, at *9–10 (Super. Ct. June 30, 2006) (finding "only . . . two prior reported instances, in the history of the country, in which a legislative body has ever attempted to subpoena a judge," both of which emanated from the House Un-American Activities Committee during the McCarthy era, and both of which were rebuffed on separation of powers grounds). Even then, the subpoenas were directed only to individual judges, not an entire supreme court, as in Montana. *Id.* at *9. *See also* Peterson, *supra* note 160, at 13, 62 (finding "paucity of investigations of individual judges, and the accompanying demands for testimony or documents" unsurprising in light of the absence of constitutional authority for such demands and contending that congressional investigations of federal judges and efforts to demand information and testimony give rise to "fear [of] political retaliation" and "have an inappropriate chilling effect on the independence" of judges).

179. *See supra* Part V.C.1.

180. Peterson, *supra* note 160, at 62, 65 (arguing that "the internal judicial-branch investigative process" appropriately addresses allegations of judicial misconduct without threatening judicial independence at the federal level and urging judiciary to "resist[] inquiries from Congress but cooperate[] fully with

D. Conclusion

Effective mechanisms for holding accountable judges and justices who objectively perform poorly, violate ethical standards, or commit major acts of malfeasance must exist and command the public's trust.[181] However, these tools must be carefully designed and implemented to avoid giving outside actors the ability to twist the arms of individual sitting judges or justices when deciding cases.[182] Judges should never be investigated or removed as retaliation for rulings in particular cases.[183] Efforts to change perceived political leanings—referred to as "bias" by the Montana legislature—on the court should be limited to the selection of more aligned (yet still competent) judges when openings arise.[184] Meanwhile, efforts to improve judicial accountability through mechanisms that do not risk undermining judicial independence—such as through independent judicial oversight boards and greater scrutiny of the court's public records and performance metrics—should be applauded. However, calls for accountability that bypass established judicial oversight mechanisms should be cause for alarm.

the internal judicial branch investigative process"). Professor Peterson asserts that "allegations that a judge has engaged in misconduct in the administration of judicial business do not justify" congressional investigation when issues can be "adequately addressed within the judicial branch without threatening the independence of the federal courts." *Id.* at 66. As the United States Supreme Court noted while holding that certain documents of former President Donald J. Trump were protected from congressional subpoena, "a rival political branch" compelling production of information from another branch raises serious separation of powers questions, as there are obvious "incentives to use subpoenas" for what the Court referred to as "institutional," (i.e., partisan), "advantage." Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2036 (2020).

181. *See supra* Part IV.A.1 (describing the need for judicial accountability in the non-decisional context).

182. *See supra* Part V.C.

183. *See, e.g.*, Peterson, *supra* note 160, at 61–62.

184. *See supra* text accompanying notes 170–172.

VI. LESSONS FROM MONTANA

As hyperpartisanship from all sides continues to ratchet the tension in American politics, Montana's judiciary is unlikely to be the last to find itself the center of controversy.[185] Judiciaries constituting a tempting target for a newly dominant faction should not expect to be left to their own devices by the political self-restraint of yesteryear. There is work to be done in ensuring that judiciaries remain capable of carrying out their function in the new political climate.[186]

Using the framework developed thus far, this Part recommends court reforms to shore up latent vulnerabilities that might invite or exacerbate a crisis like that surrounding the *McLaughlin* case, provide for appropriate forms of judicial accountability, and safeguard the critical elements of judicial independence.[187] It also distinguishes such reforms from those that must be categorically resisted as unacceptable assaults on the key underpinnings of judicial independence.[188] The Part sets forth a third category of

---

185. *See supra* Part II.B.

186. Some might wonder if the independence of a judiciary is a lost cause, in any event, such as when Judge Learned Hand famously contended that a "society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish." Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 155, 164 (3d ed., 1963) (emphasis omitted); *see also* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 156 (1893) ("[U]nder no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere."). Nonetheless, judiciaries have successfully weathered political storms, softened the worst constitutional abuses, and subsequently emerged intact. *See* Roznai, *supra* note 54, at 340–48 (describing role of judiciaries in protecting democracy as they can serve as an important "speedbump" to authoritarian movements and "slow down—even if not completely stop—authoritarian initiatives until different political actors gain power" (citing Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT'L J. CONST. L. 606 (2015)).

187. *See infra* Part VI.A.

188. *See infra* Part VI.B.

reform efforts that occupy an intermediate zone of discretionary tradeoffs between institutional independence and democratic responsiveness.[189] Finally, this Part highlights lessons learned from the *McLaughlin* crisis that might be useful to other courts unfortunate enough to find themselves in the midst of a similar unraveling.[190]

A. Reforms that Should Be Adopted

The judiciary's best defense is thought to be its legitimacy in the eyes of the public.[191] Increasing judicial accountability and transparency in a thoughtful fashion might serve dual purposes of safeguarding that reservoir of public good will while also ensuring such public faith is well deserved by addressing legitimate concerns of court reformers.[192] Drawing from the lessons of the *McLaughlin* case, the following proposed court reforms may enable other states to better safeguard core court functions and modify obsolete practices that leave a court vulnerable to criticism.

1. Independent Information Systems

Unlike the legislative and executive branches of Montana's government,[193] Montana's judicial branch does not maintain its own email server.[194] The court's

189. *See infra* Part VI.C.

190. *See infra* Part VI.D.

191. Moliterno & Čuroš, *supra* note 57, at 1166 (arguing that Czech judiciary has been more successful in surviving democratic backsliding compared to courts of other nations in the region because it enjoys greater public trust, noting that the less-trusted Polish judiciary was more vulnerable to government attacks and that government attacks on the judiciary in both Poland and Hungary were preceded by public relations attacks).

192. *See* Geyh, *supra* note 60, at 249–50 (describing how incendiary judicial reform proposals in Congress were not enacted but led to the judicial branch enacting its own version of those reforms in a way that, unlike the congressional proposals, did not undermine judicial independence).

193. MINORITY REPORT, *supra* note 43, at 17 (advocating for independent judicial branch email servers).

194. *See supra* text accompanying notes 16–20.

inability to control its own email servers endangered sensitive and confidential information, allowed what should have been a routine public records request to rapidly snowball into a crisis, facilitated court attackers' allegations of scandal and coverup amidst the resulting chaos, and enabled another branch of government to put the court's ultimate authority into question.[195] If the Montana Judiciary's email servers were maintained in-house, legislative demands for emails could likely have been voluntarily granted by a judicial branch employee pursuant to an established process. While judicial branch documents that are neither confidential nor protected by judicial privilege should be available for inspection pursuant to proper public records requests or the investigatory power of a judicial oversight board, the *McLaughlin* case demonstrates that housing internal communications information in another branch of government constitutes an easily exploited vulnerability for institutional legitimacy. Informational self-sufficiency may be an easy and effective first step in guarding judicial institutions.

2. Public Visibility and Education

Members of the public generally know very little about their state supreme courts.[196] This knowledge

195. *See* FINAL COMMITTEE REPORT, *supra* note 43, at 6–7 (accusing supreme court of issuing a "surprise Sunday ex parte order quashing" the subpoenas and halting the weekend email dump); *see also supra* Part I (describing the weekend fulfillment of a legislative subpoena providing thousands of unredacted judicial branch emails, recounting subsequent representations by attorneys at the Department of Justice that the court's emergency stay would not be abided by).

196. *See* White, *supra* note 51, at 639 ("[T]he general public has an absence of knowledge about and lack of understanding of the justice system" and a "low level of knowledge about state courts." (citing Yankelovich, Skelly & White, Inc., *Highlights of a National Survey of the General Public, Judges, and Community Leaders*, *in* STATE COURTS: A BLUEPRINT FOR THE FUTURE 5, 21 (1980)); *see also* Herbert M. Kritzer & John Voelker, *Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts*, 82 JUDICATURE 58, 59 (1998)); Jill Rosen, *Americans Don't Know Much About State Government, Survey Find*s, JOHN HOPKINS UNIV. (Dec. 14, 2018) https://hub.jhu.edu/2018/12/14/americans-dont-understand-state-government/ [https://perma.cc/U4W7-H3X5] (most survey respondents did

vacuum may be ripe for exploitation by court detractors making unfounded or exaggerated allegations of malfeasance.[197] And to the extent that the public is aware of the existence of their state supreme court, perceptions of that court may be colored by coverage of the United States Supreme Court, which is increasingly viewed as an entirely partisan enterprise.[198] Better informing the public on what its state judiciary is actually doing, perhaps by compiling publicly available data on state court rulings such as those discussed here, might well serve the interests of the public and state courts.[199]

Moreover, some have argued that it is time for the legal establishment to be more nuanced in its public explanations of the process of judging. When faced with accusations that a court is too political to deserve independence, court defenders reflexively recite the old refrain that judges "set aside [their] personal views and render decisions based solely on the law and facts of a particular case," as Montana's chief justice wrote in response to the 2021 legislative subpoenas.[200] Claims of

---

not know if the chief judge of the state's highest court was elected or appointed, or if their state had a constitution).

197. *See* White, *supra* note 51, at 644–46 (noting that low levels of knowledge about state courts is generally correlated with lower confidence in courts and that "[t]he resulting vacuum is easily filled with images from the negative aspects of election activity" (citing M. Cann & Jeff Yates, *Homegrown Institutional Legitimacy: Assessing Citizens' Diffuse Support for State Courts*, 36 AM. POL. RES. 297, 314–15 (2008))).

198. *See infra* text accompanying Appendices 1–2 (discussing United States Supreme Court voting blocks).

199. *See supra* Part IV.B; Appendices; William P. McLauchlan, *An Empirical Examination of the Business of the Montana Supreme Court*, OR. ST. UNIV.: OPEN JUD. POLS. (2021), https://open.oregonstate.education/open-judicial-politics/chapter/an-empirical-examination/ [https://perma.cc/QT9B-S6S4]; *see also* Geyh, *supra* note 60, at 239–40 (noting the routine nature of most cases). United States Supreme Court statistics are readily available for public consumption. *See Stat Pack Archive*, SCOTUSBLOG, https://www.scotusblog.com/reference/stat-pack/ [https://perma.cc/6RGR-2TJ4] (last visited Nov. 21, 2023).

200. *April 16 Chief Justice Letter*, *supra* note 10, at 2; *see* Geyh, *supra* note 60, at 228 (noting that the legal establishment "reflexively defends against challenge" the idea that any extralegal influences are at work in a judge's decision-making, despite substantial supporting evidence).

this sort have been the subject of ridicule from both the political left and the right, derided as an "emperor has no clothes"[201] situation or, according to Republican Montana State Representative Ed Butcher, equivalent to "believ[ing] in the tooth fairy."[202]

Despite the public's skepticism of the law-and-facts-alone defense, it generally continues to support judicial independence and demonstrate relatively substantial respect for courts as compared to other public institutions.[203] This indicates that the public's views are generally aligned with the thesis set forth here: that the judiciary still has a substantial claim to independence notwithstanding the necessity of a certain amount of ideological influence in areas of legal indeterminacy.[204] Court defenders might maintain more credibility with the public during (or before) debates with court reformers by educating the public on a more nuanced understanding of judicial function.

Finally, courts, bar associations, civic organizations, and educators must take more opportunities to educate the public about their courts.[205] Courts can no longer take for granted the public's faith in an institution it

---

201. Chemerinsky, *supra* note 96, at 921 ("Let's admit that this emperor has no clothes. The justices made a value choice to favor" one set of interests over others: "If we see the Court in this way, then we can begin to hold it accountable for its decisions." (quoting CHEMERINSKY, *supra* note 98, at 342)).

202. Larson, *supra* note 135 (internal quotation marks omitted) (reporting failed legislative efforts to render judicial elections in Montana partisan); *see* Geyh, *supra* note 60, at 236 (predicting that the public "will gradually grow more skeptical" of traditionalist claims and "become more receptive to arguments that judges should be subject to greater popular control").

203. Geyh, *supra* note 60, at 222 (concluding that the public is aware that "judges are subject to legal and political influences—but the public nonetheless continues to express considerable confidence in the courts" such that "the pretense of the legal establishment's argument in the public policy debate, that judges are moved by law and facts alone, seems otherworldly, unnecessary, and a bit silly").

204. *See* Geyh, *supra* note 60, at 227–28 (concluding that the law, while not the sum total of influences on a judge's decision-making, remains a major factor and builds an institutional culture of respect for the law); *see also supra* Parts III–IV (describing interests in judicial independence and accountability).

205. White, *supra* note 51, at 643 (describing "model curricula" created by organizations such as the American Judicature Society and the American Bar Association as well as "various judicial-outreach projects").

rarely observes. Judges and justices should take seriously their duty to engage with and educate the public, such as by providing more educational opportunities for student groups to meet with and learn about members of the judiciary,[206] or increasing the number of oral arguments and efforts to encourage public attendance at these arguments.[207] Those who witness a supreme court oral argument should be pleasantly surprised by what they observe and might then hold a more informed understanding of how their court functions.[208]

3. Political and Legislative Activity

The *McLaughlin* debacle began with a single leaked email of a judge responding to a poll on whether or not to support a bill affecting the judiciary.[209] Though the judge quickly recused himself, the situation snowballed rapidly, as the Montana GOP alleged that it had exposed major judicial impropriety in the form of "pre-judging," illicit political "lobbying," and anti-Republican "bias" that justified the subsequent reprisals.[210] Weren't judges supposed to be above politics? How could the judiciary claim to be beyond the reach of legislative intrusions when the judiciary had itself sought to influence the legislative process?[211] And didn't the subsequent rulings

206. *See id.* (discussing efforts to increase educational opportunities for students to engage with courts).

207. Unlike courts of some states, the Montana Supreme Court currently hears oral arguments on only a handful of cases per year. *See* MONT. SUP. CT. INTERNAL OPERATING RULES § I.3.(a) (2015).

208. CHEMERINSKY, *supra* note 98, at 319–20 ("Anyone who watches a [United States] Supreme Court argument will see nine highly intelligent, superbly prepared individuals grappling with some of the nation's hardest questions."); White, *supra* note 51, at 640–44 (concluding that "those with a greater understanding of and experience with the justice system are more confident in" and have a "higher level of goodwill" towards it, while those with less "are also more readily influenced by the least reliable information sources" and have less goodwill towards it (citations omitted)).

209. *See supra* Part I.

210. *See supra* Part I.

211. *See* J. Jonas Anderson, *Judicial Lobbying*, 91 WASH. L. REV. 401, 443 (2016) (asserting that "[j]udges who lobby against particular laws . . . are likely

to halt the release of these communications constitute an attempted coverup that was further damning evidence of judicial misconduct?[212]

Amidst the buzzing allegations of scandal, it seemingly made little difference that (1) lobbying by members of the judiciary—like that by police associations or any other organization of government officials—was neither uncommon,[213] nor prohibited by the judicial code of conduct[214] or any other law or policy and as such had long been conducted openly, (2) the lobbying was limited to bills affecting judicial administration,[215] (3) a judge's policy view on a particular bill was not necessarily the same as the judge's legal view on a statute's constitutionality or interpretation, or (4) judges are not required to lack any preconceived legal views before hearing a case, in any

---

to be viewed skeptically when required to interpret those laws in court," and pointing to criticism of Chief Justice Rehnquist when he chaired the Court that struck down the Violence Against Women Act that he had previously lobbied against); *see also* Peterson, *supra* note 160, at 3–4 (noting congressional responses to federal judges' open criticisms of the Sentencing Reform Act).

212. S*ee supra* Part I.

213. *See* Anderson, *supra* note 211, at 419 ("Judges frequently promote or challenge legislative proposals—they lobby." (citing John W. Winkle III, *Judges as Lobbyists: Habeas Corpus Reform in the 1940s*, 68 JUDICATURE 263, 264–72 (1985))). *See, e.g.*, *Conference of Chief Justices*, NAT'L CTR. FOR ST. CTS., https://ccj.ncsc.org/ [https://perma.cc/Z9QM-JMW3] (last visited Nov. 22, 2023) (conference of chief justices directly active on multiple court-related issues); WASH. ST. SUPERIOR CT. JUDGE'S ASS'N, https://www.wascja.com/ [https://perma.cc/7TE9-UD2L] (last visited Nov. 22, 2023); TEX. ASS'N OF DIST. JUDGES, https://texasdistrictjudges.org/ [https://perma.cc/ECJ9-93TN] (last visited Nov. 22, 2023); *About the NAIJ*, NAT'L ASS'N OF IMMIGR. JUDGES, https://www.naij-usa.org/about [https://perma.cc/8LDF-BA2B] (last visited Nov. 22, 2023) (describing National Association of Immigration Judges' congressional lobbying efforts); *see also* Peterson, *supra* note 160, at 3–4, 8 (recounting federal judges publicly calling for repeal of Sentence Reform Act in accordance with the American Bar Association's Code of Judicial Conduct and noting that "judges have frequently testified before congressional appropriations committees" since 1923).

214. *See* MONT. CODE OF JUD. CONDUCT r. 3.2(A) cmt. 1 (recognizing judges' "special expertise" in matters concerning the "law, the legal system, and the administration of justice" and expressly allowing judges to "share that expertise with governmental bodies and executive or legislative branch officials").

215. Anderson, *supra* note 211, at 409 ("[J]udges appropriately lobby[] about judicial administration while refraining from commenting on more general legislative policy.").

event.[216] To the public, it sounded plausible that the legislature had uncovered a scandal, particularly as described by conservative news outlets.[217] The situation quickly snowballed, as accusations of bias were used to justify unprecedented actions resulting in procedurally unusual litigation which, in turn, fueled further allegations of judicial irregularities.[218]

This cautionary tale should raise serious questions by courts elsewhere regarding whether such practices are worth the risks. While the existence of judicial policy opinions is far from revelatory and does not substantially undermine the justifications for judicial independence outlined here, the sight of the chief justice participating in coordinated efforts with other judges in attempting to flip votes and kill judicial reform bills presented an unseemly spectacle the public cannot be expected to easily stomach.[219] State judiciaries should think carefully before conducting such activities.[220]

If such practices are indeed considered to be worth the hazards, courts should at least consider more

216. *See* Republican Party v. White, 536 U.S. 765, 778 (2002) ("A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice" as it would be "evidence of lack of qualification, not lack of bias" (internal quotation marks omitted) (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972))).

217. *E.g.*, Megan Fox, *Montana Judiciary Caught Lobbying Against Judicial Accountability in Email Scandal*, PJMEDIA (Jan. 4, 2022, 4:34 PM), https://pjmedia.com/news-and-politics/megan-fox/2022/01/04/montana-judiciary-caught-lobbying-against-judicial-accountability-in-email-scandal-n1546435 [https://perma.cc/7D87-V2YH]; *see also* Flint, *supra* note 20.

218. *See* SPECIAL JOINT SELECT COMMITTEE ON JUDICIAL TRANSPARENCY AND ACCOUNTABILITY, INITIAL REPORT TO THE 67TH MONTANA LEGISLATURE 19 (2021) [hereinafter INITIAL COMMITTEE REPORT] (alleging a "number of procedural irregularities . . . appear[ing] to stem from the potential conflict of interest"). Even mainstream conservative voices came to see these irregularities as a sign of judicial impropriety. *See, e.g.*, *Conflicts of Supreme Judicial Interest*, WALL ST. J. (Dec. 27, 2021, 6:36 PM), https://www.wsj.com/articles/conflicts-of-supreme-judicial-interest-11640648182 [https://perma.cc/96YM-6CFD].

219. *See supra* Part I.

220. *See supra* note 128 and accompanying text (describing the inevitability of a certain amount of ideology in the exercise of judicial discretion); *see also supra* Part III (describing crucial interests protected by judicial independence).

prudent ways to achieve these ends.[221] For one, judges should channel their lobbying activity through a formal intermediary pursuant to official procedures.[222] In theory, the Montana Judges Association (MJA) serves that role, by soliciting judges' views to provide to its lobbyist representing the judicial viewpoint before the Montana legislature. Nevertheless, this practice aroused suspicion, at least in part because it was highly informal.[223] If publicly available court or MJA policies had outlined proper process for lobbying activity, the scandalous nature of the legislature's allegations—and the resulting escalations—might have been defused.[224] Similarly, GOP legislative members seemed to find the absence of clear and formal lines between the MJA's lobbying activity and judicial branch operations indicative of malfeasance of some sort.[225] Though such reasoning was not entirely easy to trace,[226] formalizing

221. One example might be the chief justice of the Montana Supreme Court's opposition to proposed bill H.B. 685, which would have allowed for removal of sitting judges by a citizens inquiry commission on the basis of vague standards. *See* sources cited *supra* note 85.

222. Funk, *supra* note 48 (West Virginia Justice Walker emphasizing the importance of policies that provide transparency and accountability). Ideally, other unaffiliated organizations—such as bar associations, other legal associations, or civic and business groups—would rise to the occasion and advise legislators against bills that would undermine judicial function and independence. *See* Stopchinski, *supra* note 83, at 689 (discussing the importance of judicial independence to economic prosperity).

223. *See* FINAL COMMITTEE REPORT, *supra* note 43, at 14.

224. *E.g.*, Fox, *supra* note 217 (alleging that the judiciary had been "caught red-handed" in lobbying "scandal"); *see also* Flint, *supra* note 20 (asking of the members of the court: "what else are they hiding?").

225. *See* FINAL COMMITTEE REPORT, *supra* note 43, at 14 (alleging that "Montana judges seem to conflate the private MJA and the public judicial branch of government as one and the same" and that "there appears to be no distinction between the MJA and" the judiciary (citation omitted)). In contrast, Republican legislators indicated that, for unspecified reasons, they would not object to lobbying without an MJA intermediary, or with an MJA intermediary that was more formally distinct from Judiciary. *See* AMENDED FINAL COMMITTEE REPORT, *supra* note 43, at 15 ("The judicial branch could lobby on its own behalf as many executive branch agencies do, or the judicial branch could refrain from lobbying and leave it to the MJA using only MJA funds.").

226. *See April 16 Chief Justice Letter*, *supra* note 10, at 1–2; *April 30 Chief Justice Letter*, *supra* note 32, at 1 (asserting that informing other branches of

existing informal practice would be an easy way to head off unjustified allegations of scandal. Judicial branches should take the opportunity to create clear guidelines for how and when lobbying activity will be conducted in a way that will not jeopardize the public's faith in those courts.

Moreover, individual judge's colorful commentary about legislation—fueling much of the legislature's initial outrage and public relations campaign against the court—could be easily avoided.[227] Judges should be reminded of the importance of keeping communications professional. Written responses in the body of an email could easily be replaced by a generic "yes/no" online polling response. Further, anonymous polling could obscure the individual identity of the responding judges—the revelation of which legislators alleged created ethical and due process problems[228]—and simply provide an anonymous vote tally to inform MJA's policy stance. Finally, individual judges could be even further removed from the legislative process by selecting a small number of judges and former judges to form an MJA lobbying committee entrusted with determining how to respond to proposed legislation, while leaving the majority of judges free from any involvement in the legislative process.[229]

4. Recusal Rules

Montana judges and justices, like members of the federal judiciary, are expected to recuse themselves if

---

government how proposed policies will affect judicial function forms a key part of official judicial branch duties).

227. *See* INITIAL COMMITTEE REPORT, *supra* note 218, at 11–12. The legislature pointed to Montana Rule of Judicial Conduct 2.11, prohibiting judges from "mak[ing] any public statements that might . . . impair the fairness" of a proceeding, as evidence that such comments were improper. *See id.* at 15.

228. *See id.* at 15–16.

229. Those who do participate could easily be recused from cases addressing the constitutionality or interpretation of the statutes, if enacted. *See* FINAL COMMITTEE REPORT, *supra* note 43, at 13 (recommending comparable reforms and noting chief justice had already suggested that similar reforms might be adopted).

they doubt their ability to rule on a particular case in an impartial manner.[230] These archaic rules have been denounced from all sides as inadequate to assure the public that cases will be decided by fair and impartial adjudicators.[231] In *Caperton v. Massey*, a West Virginia Supreme Court justice refused to recuse himself from a case involving a corporation seeking a review of a $50 million judgment against it, after that corporation had spent $3 million supporting his recently successful campaign to oust the incumbent during the pendency of the case.[232] The United States Supreme Court ruled that a failure to recuse in such circumstances could give rise to such a strong doubt of impartiality as to constitute a due process violation.[233]

Disputes over whether the members of the Montana Supreme Court should have recused themselves from *Brown v. Gianforte, McLaughlin,* and subsequent cases due to alleged conflicts of interest figured heavily in public allegations against the judiciary.[234] Moreover, Republican legislators also alleged that the chief justice had acted inappropriately in selecting his own replacement, Judge Krueger, to fill his seat after recusing himself.[235] Notwithstanding their venerable nature, the quaint rules of self-imposed recusal may not be up to the task of protecting the public's trust in the modern era.

Just as ethical complaints against a judge can be brought before an independent Judicial Standards Commission in Montana, motions to recuse could also be

---

230. Geyh*, supra* note 60, at 251–52 (describing the "norm in the federal courts and most states is that judges decide their own disqualification motions," which "sit[s] badly with reformers"); RUSSELL WHEELER & MALIA REDDICK, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., JUDICIAL RECUSAL PROCEDURES 6, 8 (2017), https://iaals.du.edu/sites/default/files/documents/publications/judicial_recusal_procedures.pdf [https://perma.cc/G5QU-EWX7].

231. *See, e.g.*, CHEMERINSKY, *supra* note 98, at 326–29 (criticizing the United States Supreme Court practice of discretionary self-recusal).

232. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 872–76 (2009).

233. *Id.* at 886–87.

234. *See supra* notes 33, 39, 43 and accompanying text.

235. AMENDED FINAL COMMITTEE REPORT, *supra* note 43, at 29.

brought before other judges or a judicial commission. Replacements could be selected from a predetermined rotating roster such that the selection itself cannot be an effort to indirectly influence the outcome of the case.[236]

Updating court recusal rules is low-hanging fruit for courts wishing to protect and improve public faith in a judiciary. Failure to create clear recusal rules *before* a crisis emerges may lead to much less thoughtful efforts after one: Montana legislators introduced a bill in 2023 that would require recusal in certain cases where the legislature was a party and empower the attorney general to select the chief justice's replacement.[237]

5. Public Information

a. Records Retention

The Montana legislature implied that the Montana Supreme Court was hiding something when its court administrator failed to archive email communications and when the court then ruled to temporarily stay, and later to permanently quash, legislative subpoenas to retrieve these emails from DOA servers.[238] The supreme court responded by concluding that the emails were technically not captured under the relevant public records law because statute allowed government bodies to create their own retention policies and judicial branch policy had not designated emails for retention.[239] It later amended its policy to require email retention.[240]

---

236. *See* WHEELER & REDDICK, *supra* note 230, at 12–13.

237. H.B. 772, 68th Mont. Leg., Reg. Sess. (2023), https://leg.mt.gov/bills/2023/billpdf/HB0772.pdf [https://perma.cc/X4FX-Z8TA].

238. *See* AMENDED FINAL COMMITTEE REPORT, *supra* note 43, at 13 ("Because of deleted records and quashed subpoenas, the committee is forced to take the justices other than McGrath at their word.").

239. McLaughlin, v. Mont. State Legislature, 2021 MT 178, ¶ 26–31, 405 Mont. 1, 493 P.3d 980.

240. Shaylee Ragar, *State Lawmakers Say Record Retention Policies Need Improvement*, MONT. PUB. RADIO (Apr. 15, 2022, 7:32 AM), https://www.mtpr.org/montana-news/2022-04-15/state-lawmakers-say-record-retention-policies-need-improvement [https://perma.cc/DP4E-C854]. This put the judiciary's email policy ahead of the executive branch's own outdated email

Though internal, unprivileged, judicial branch emails might not typically be of much public interest, courts that do not have a technologically up-to-date public records management plan are vulnerable to allegations of a similar sort. Judicial independence does not justify subjecting unprivileged, non-confidential judicial communications or other administrative functions to any less scrutiny than would be justified for other government officials.[241] Assessing and updating public records retention policies is critical for state judiciaries hoping to avoid repeating Montana's experience.

b. Publication of Performance Metrics

In the absence of objective data, the public is left to rely on anecdote over supported argument, with unsubstantiated rhetoric between court attackers and defenders dominating the resulting public relations battle. In such circumstances, the public might be forgiven for concluding that the argument constitutes just one more cynical partisan fight for power.[242] Publicly available metrics might better tether the debate to reality and give members of the public the tools to verify for themselves how their judiciary is performing.

As noted above, easily compiled vote statistics, like those provided in the Appendices here, can provide valuable indicators, not only regarding court efficiency, but also of court politicization or its absence.[243] State bar associations, academic institutions, other organizations, or even courts themselves should consider publishing yearly tallies of this sort to better inform debates

---

policy. *See* MINORITY REPORT, *supra* note 43, at 10 (noting executive records retention policy document that starts with a section entitled "What is Email").

241. *See supra* Parts III.B, IV.A.1 (discussing non-decisional judicial activities as not protected by interests underlying judicial independence).

242. *See, e.g.*, McLaughlin, v. Mont. State Legislature, 2021 MT 178, ¶ 81, 405 Mont. 1, 493 P.3d 980 (Sandefur, J., concurring) (rejecting narrative that the *McLaughlin* case was a "petty and obscure turf war between government entities, with the public interest trailing far behind, if at all").

243. *See infra* Appendices 1–2.

regarding what a court is actually doing. Similarly, publication of performance metrics of individual judges, as is done in states like Arizona, could provide even more public insight into the most essential elements of good judging.[244] Allowing those who use courts—litigants, attorneys, jurors, other judges—to provide the public with objective evaluations of judicial performance in areas like professionalism, temperament, competence, timeliness, etc., would provide a valuable source of information for the public to consider, particularly when reacting to allegations of the sort leveled by the Montana legislature. Recently proposed legislation in Montana[245] to create a sort of judicial report card of this nature could be helpful.

6. Internal Judicial Ethics Enforcement

The Montana legislature's sustained allegations and judicial reform efforts have relied heavily upon its ancillary assertion that the constitutionally provided-for Judicial Standards Commission housed within the judicial branch cannot be trusted to investigate and rectify judicial misconduct.[246] According to Republican legislators, the presence of two district court judges (selected by other judges) and one attorney (selected by the supreme court) on the five-person judicial standards

---

244. *See supra* note 169 (discussing publication of judicial performance metrics in states like Arizona).

245. *See* H.B. 709, 68th Mont. Leg., Reg. Sess. § 1 (2023) (providing for publication of district court judge performance measures such as case-processing times, rates of decisions overturned on appeal, and providing for research on further measures).

246. *See* Seaborn Larson, *Bill Would Remove Judge Appointment Power in Judicial Complaint Panel*, INDEP. REC. (Jan. 31, 2023), https://helenair.com/news/state-and-regional/govt-and-politics/bill-would-remove-judge-appointment-power-in-judicial-complaint-panel/article_77ae78a0-2f89-58f4-933a-a30bdd485df0.html [https://perma.cc/2ZQW-Z8XF]; *see also* Arren Kimbel-Sannit, *Legislative Efforts to Reshape Judicial Procedures Are Gaining Steam*, MONT. FREE PRESS (Feb. 1, 2023), https://montanafreepress.org/2023/02/01/legislative-efforts-to-reshape-judicial-procedures-are-gaining-steam/ [https://perma.cc/WZS3-NTC7] (quoting bill sponsor Seekins-Crowe (R-Billings) as complaining that the Judicial Standards Commission involves "judges judging judges" (internal quotation marks omitted)).

commission suggests that the extremely high rate of complaint dismissals evidences judicial coverup, not professionalism. While the Commission's defenders respond that the vast majority of complaints are not actual ethical complaints addressable by the Commission, but instead are substantive challenges properly addressed through the appeal process, GOP members have remained skeptical, pointing to the confidential nature of the dismissed complaints.[247]

A mechanism to address legitimate, non-decisional, ethical complaints against members of the judiciary that earns the public's faith without undermining judicial independence is critical to remedying actual misconduct and preventing other branches of government from taking matters into their own hands. Those interested in the health of their own state judiciaries should take the opportunity to assess the sufficiency of existing mechanisms for investigating allegations of misconduct in a manner that the public can trust. Keeping disciplinary decisions largely out of the hands of partisan-appointee lay persons and instead predominantly in the hands of professionals—dismissively described as "judges judging judges" by one GOP legislator[248]—is indispensable to ensuring that ethics proceedings are not used to retaliate for disfavored rulings.

Absolute confidentiality, however, is not. The Montana Constitution's framers saw the confidentiality of the initial investigatory phase as a way to "quietly"

247. Silvers, *Lawmakers Question Judges*, *supra* note 85.

248. Kimbel-Sannit, *supra* note 246 (internal quotation marks omitted). The Montana Constitution's framers addressed this same concern in 1972. MONT. CONST. COLLECTION, *supra* note 153, at 1124–26. The provision's proponents noted the possibility that non-judges on the Commission (in particular, practicing attorneys) might be improperly motivated to retaliate against a judge for an unfavorable ruling, leading the delegates to conclude that they would "rather avoid that and let the judges do their own judging of each other." *Id.* at 1126. (Others noted that the process was analogous to a teacher or other professional going before a licensing board in a disciplinary proceeding. *Id.*) Eventually, the delegates responded to the criticism by voting to balance the number of judges on the commission with the number of laypersons—two each—with the final seat going to an attorney selected by the supreme court. *Id.*

usher out of office judges who were "over the hill" or, as one delegate put it, "los[ing] . . . [their] marbles" without publicity unnecessarily tainting an otherwise honorable career.[249] Notwithstanding the laudable nature of such a goal, the current confidentiality requirements[250] represent a serious vulnerability for a judicial branch facing allegations of widespread malfeasance, as it may give the impression—valid or otherwise—that court insiders are covering for one another.[251] Workable compromises between transparency and confidentiality have been struck in other contexts, such as in published court opinions that obscure the real names of abused children,[252] or congressional oversight committees that hear classified national security information in a confidential setting. Publishing written orders describing the reason for a complaint's dismissal without identifying the judge, or briefing a legislative oversight committee on such decisions in a confidential manner, could provide welcome sunlight to the process and assure skeptics that the process is up to the task of policing judicial behavior. Whatever the chosen solution, Montana's experience demonstrates the danger of waiting until the midst of a crisis to consider potential reforms; the changes proposed by Montana's legislature included a plan to empanel a number of executive branch

249. MONT. CONST. COLLECTION, *supra* note 153, at 1123–26. Moreover, initial confidentiality might protect an individual judge from the publication of a flood of baseless defamatory allegations, a potentially relevant consideration when attempting to recruit qualified and respected members of the legal profession to serve as judges, or to prevent "October surprise" electioneering activity like that witnessed shortly before voters headed to the polls on Justice Gustafson's 2022 reelection bid. *See* Silvers, *Republican Operative*, *supra* note 11 (describing Republican strategist's publication of ethics complaints he had filed against incumbent Justice Gustafson—alleging improper failures to recuse—in violation of confidentiality rules).

250. MONT. CODE ANN. § 3-1-1105(1) (2023) (complaints to the Commission must currently be kept confidential during the initial investigatory phase); § 3-1-1121(1)(a)–(c) (only those complaints deemed to have sufficient merit by a majority of the Commission to result in a formal inquiry become public record).

251. *See* AMENDED FINAL COMMITTEE REPORT, *supra* note 43, at 20 (referring to Judicial Standards Commission's confidentiality requirements as "opaque" and insufficient).

252. MONT. R. APP. PROC. 10(6)–(7).

appointees empowered to remove sitting judges on the basis of vague standards—a reform that, if adopted, may have served as a death knell to judicial independence in Montana.[253]

B. Reforms that Should Be Opposed

As noted above, an attack on a judiciary's legitimacy may be followed by efforts to undermine its independence.[254] Those motivated to preserve the independence of their own state judiciaries should be prepared to push back in appropriate circumstances, even amid allegations of judicial malfeasance. As discussed above, attempts to remove individual judges and justices, particularly in retaliation for disfavored rulings, pose serious risks to the foremost interests served by judicial independence, such as the due process rights of individual litigants.[255] Courts, attorneys, business interests, and the wider public should all have an interest in defeating such efforts.

Reforms allowing other branches of government to force judicial recusals seriously undermines the legitimacy of judicial operations.[256] Similarly, as discussed previously, threats of impeachment or court

253. *See* Silvers, *Lawmakers Question Judges*, *supra* note 85 (describing Chief Justice McGrath's response to H.B. 685, which would have allowed for a citizen "inquiry commission" to remove sitting judges, deeming the measure equivalent to killing democracy in that if "a mob . . . was mad about something that a judge had decided they could remove that [duly-elected] judge from office"); *see also* S.B. 313, 68th Mont. Leg., Reg. Sess. §§ 1, 6 (2023) (removing confidentiality standards). Legislation actually signed into law during the 2023 session relaxed confidentiality standards in ways largely compatible with the approach outlined here. *See id.*

254. *See supra* text accompanying notes 39–46, 57–58 (describing proposed legislation in Montana affecting the judiciary and connection between delegitimization and reduced judicial independence internationally).

255. *See supra* Part III.A.1; Part III.B–C (describing individual, decision-based judicial independence as essential for the rule of law).

256. *See* H.B. 772, 68th Mont. Leg., Reg. Sess. (2023), https://leg.mt.gov/bills/2023/billpdf/HB0772.pdf [https://perma.cc/5LZ4-LQQT] (proposed legislation to allow political branches to force judicial recusals in particular cases and allowing the attorney general to choose the chief justice's replacement in certain circumstances).

shrinking, use of investigatory subpoenas outside a proper judicial oversight board process,[257] and efforts to populate a judicial oversight board with political appointees[258] authorized to remove a judge on the basis of vague standards,[259] as occurred in Montana, all pose serious risks of undermining core interests of judicial independence. Moreover, campaigns against incumbents on the basis of unpopular decisions, particularly those in favor of criminal defendants, do pose a danger to the due process rights of unpopular litigants and should be discouraged.[260]

C. Ambiguous Reforms: Selection Methods

As noted above, selection processes implicate institutional independence, but unlike removal processes, may have little bearing on the independence of individual judges.[261] Because selection methods therefore raise comparatively fewer concerns with regard to individual litigants' due process rights (so long as the chosen method selects adjudicators with sufficient competence and integrity) and implicate more

---

257. *See supra* Part V.C.5. (describing legislative investigations of judges as potential threat to independence).

258. Larson, *supra* note 246; Kimbel-Sannit, *supra* note 246 (quoting bill sponsor Seekins-Crowe, (R-Billings) as complaining that the Judicial Standards Commission constitutes "judges judging judges" (internal quotation marks omitted)); H.B. 326, 68th Mont. Leg., Reg. Sess. (2023).

259. Mike Dennison, *GOP Lawmakers Grill Supreme Court Chief over Judicial Ethics—Again*, KTVH (Sep. 15, 2021, 3:23 PM), https://www.ktvh.com/news/montana-politics/gop-lawmakers-grill-supreme-court-chief-over-judicial-ethics-again [https://perma.cc/MTQ6-6G53]; H.B. 685, 67th Mont. Leg., Reg. Sess. (2021), https://leg.mt.gov/bills/2021/billpdf/HB0685.pdf [https://perma.cc/X32D-LEBM]. *See also supra* Part III.C (discussing importance of individual judicial independence to core tenants of rule of law); Kimbel-Sannit, *supra* note 246 (quoting representative of Montana State Bar as contending that H.B. 326 "politicizes the court and endangers its independence" (internal quotation marks omitted)).

260. *See* Linder, *supra* note 86, at 578–80 (describing how Judge Horton lost a reelection bid after failing to be swayed by public outrage and threats of violence in the trial of one of the "Scottsboro boys"); *see* Sandberg-Zakian, *supra* note 71, at 200 (reviewing research describing an increase in sentence severity with approach of a judge's reelection).

261. *See supra* Part V.A.

countervailing interests in democratic control, selection methods exist in a realm of competing interests appropriate for balancing.[262] Efforts to remove a pre-appointment judicial nominating commission screening, or move to partisan[263] or district-based races, or governor's appointments, have all been attempted or implemented in Montana in recent years in an apparent effort to bring the perceived ideology of judicial institutions closer to that of the other branches of government.[264] Each of these efforts might raise their own set of concerns that should be carefully considered and debated. However, courts or others who care about judicial independence should ask themselves which of these reforms are worth fighting, particularly when faced with the far more problematic reforms discussed above.[265]

---

262. *See* Geyh, *supra* note 60, at 247–48 (viewing "state judicial selection reform in terms of striking an optimal independence-accountability balance").

263. Recent years have seen increasingly politicized, if nominally non-partisan, judicial elections, particularly around hot-button issues such as abortion. *E.g.*, Mara Silvers, *Abortion-Rights Advocates Rally Support for Gustafson in Montana Supreme Court Race*, MONT. FREE PRESS (Oct. 11, 2022), https://montanafreepress.org/2022/10/11/abortion-rights-advocates-rally-gustafson-supreme-court-race/ [https://perma.cc/B6CS-QD7F] (highlighting the support from pro-abortion rights groups for incumbent Justice Gustafson against challenger James Brown, who outwardly aligned himself with GOP interests); Alexander Shur, *Outcomes in Wisconsin Supreme Court Race, Challenge to Abortion Law Seen as Inextricably Linked*, WIS. ST. J. (Feb. 24, 2023), https://madison.com/news/local/govt-and-politics/outcomes-in-wisconsin-supreme-court-race-challenge-to-abortion-law-seen-as-inextricably-linked/article_cabffebe-b024-55f4-a749-704dcf050c4b.html#tracking-source=in-article [https://perma.cc/UN8P-7M5U]. While these developments may present serious challenges to the prestige of the judiciary, the quality and collegiality of those on the bench, and some of the democratic-function institutional justifications for judicial independence, such developments, alone, need not directly harm the due process rights of individual litigants.

264. *See supra* Part I (describing judicial reform efforts in Montana). Then-Senator Barack Obama voted against the confirmation of then-nominee John Roberts, contending that the ideology of a nominee to the United States Supreme Court was an appropriate consideration in the Senate confirmation process because "[l]egal process alone will not lead you to a rule of decision" in the hardest cases, which can only be determined "on the basis of one's deepest values." *See* Obama Remarks on Roberts, *supra* note 135.

265. Court-packing efforts similarly undermine institutional independence, and further carry the connotation that the party in power is breaking the accepted rules of the game to get what it wants, potentially damaging the

D. Court Responses to a Crisis

If the preventative reforms outlined above fail to protect a court from an attack like that witnessed in *McLaughlin*, a court's options going forward are limited. In *McLaughlin*, the court was forced to choose between ruling on a case in which it was perceived to have a substantial conflict of interest or cede its constitutional authority to the legislature altogether.[266] In such circumstances, reputational damage may be inevitable. However, the *McLaughlin* case provides several lessons that might prove useful to mitigate the harm.

1. Procedural Regularity

Unprecedented actions by the Montana legislature led to an awkward procedural posture in the courts that fueled further allegations of impropriety and bias.[267] Nevertheless, the court's responses were measured, hewing to and carefully explaining established law such as emergency temporary stays, the Rule of Necessity, and *Marbury v. Madison* in its orders.[268] The court generally declined to enter into a name-calling match with its detractors and did not respond to the attorney general's unusual tactic of sending aggressive letters to the court he was litigating before. To the extent possible, closely following and carefully explaining established procedures while refusing to respond in kind may help avoid worsening the damage if a court is backed into a corner.

---

political climate and undermining the legitimacy of the court. *See* Neil S. Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. 71, 73–74 (2022) (describing court packing as a "threat to judicial legitimacy and independence," undermining its ability to perform desirable functions).

266. *See supra* Part I (describing events surrounding *McLaughlin* case).

267. *See supra* note 218 (describing allegations of procedural irregularity as evidence of impropriety); *see also* INITIAL COMMITTEE REPORT, *supra* note 218, at 19.

268. *See* Funk, *supra* note 48 (Montana Supreme Court Justice McKinnon describing the importance of writing clear opinions that demonstrate reliance on legal principles); *see also April 16 Chief Justice Letter*, *supra* note 10, at 1–2; *April 30 Chief Justice Letter*, *supra* note 32, at 1–2.

2. *Third-Party Court Defenders*

A court's ability to defend itself is limited.[269] For a court whose legitimacy and impartiality are challenged, pointing out the bad faith of the attackers may do more harm than good. Here, supporters of an independent judiciary must come to the court's aid.[270] In Montana, the most vocal defenders of the court were Democratic legislators,[271] who could do little to lessen the allegation that the court was improperly biased against dominant Republicans. Other organizations could bring in more neutral respected voices to diffuse a mounting attack.[272] Business groups, in particular, should be made to understand that their long-term economic prosperity in the state depends upon a sufficiently legitimate and independent judiciary.[273]

3. *Unanimity*

When facing unusual procedural posturing and allegations like those directed toward the Montana Supreme Court, a court's legitimacy might be better protected if its members can remain unanimous in its responses. In Montana, the orders rebuffing the legislature's various efforts during the *McLaughlin* case were largely unanimous.[274] Several were authored by

---

269. *See* Ginsburg, *supra* note 82, at 849 (noting "limits to [a court's] ability" to protect itself from an external attack and how Polish and Hungarian courts' efforts to protect themselves from assertive government "provoked backlash" such that the courts "were ultimately transformed by illiberal forces").

270. Funk, *supra* note 48 (Justices Walker and McKinnon discussing the importance of lawyers and others in explaining judicial opinions to the public).

271. *See, e.g.*, MINORITY REPORT, *supra* note 43 (Democrat-authored report rebutting GOP allegations against court).

272. *See* Funk, *supra* note 48 (noting discussion led by Montana Justice McKinnon and West Virginia Justice Walker regarding "how judges may develop appropriate relationships with members of other branches of government, which relationships may be critical in maintaining understanding of and respect for the judiciary's role").

273. *See* Stopchinski, *supra* note 83, at 689 (describing the economic impacts of judicial independence).

274. *See* Order, Brown v. Gianforte, Nos. OP 21-0125, OP 21-0173 (Apr. 16, 2021), 2021 Mont. LEXIS 356; *see also* McLaughlin v. Mont. State Legislature,

justices often viewed as more aligned with conservative ideology[275] and others were issued per curiam.[276] This unanimity may have countered the legislature's narrative that the judiciary's actions were nothing more than liberal efforts to undermine GOP policies and instead helped expose the unprecedented and flagrant nature of the legislature's actions.[277]

Poland's recent experience provides an interesting counterfactual. One commentator has argued that the Polish judiciary's efforts to resist incursions by an ascendant populist party were unsuccessful in part due to the dissenting opinions authored by newly installed allies of the dominant regime.[278] This publicly visible internal disagreement may have undermined the court's ability to expose the new government's efforts as an illegitimate power grab, instead painting the court as an

---

2021 MT 120, ¶ 4, 404 Mont. 166, 489 P.3d 482; Order, McLaughlin v. Mont. State Legislature, No. 21-0173 (June 29, 2021), 2021 MT 178, ¶ 1 n.1, 405 Mont. 1, 493 P.3d 980, *available at* https://perma.cc/7QDD-QCYL; McLaughlin v. Mont. State Legislature, 2021 MT 178, 405 Mont. 1, 493 P.3d 980 (featuring one concurring opinion by Justice McKinnon agreeing with the court that the legislature had exceeded its constitutional authority in violation of separation of powers principles, but contending that it was unnecessary for the court to further consider the particulars of the legislature's allegations of misconduct as part of its analysis).

275. *See* Mike Dennison, *MT SupCo Justice McKinnon Changes Mind; Will Run for Re-Election*, KBZK (Nov. 18, 2019, 5:59 PM), https://www.kbzk.com/news/montana-news/mt-supco-justice-mckinnon-changes-mind-will-run-for-re-election [https://perma.cc/YF9W-ZNRR] (describing Justice McKinnon as "usually seen as part of the conservative wing of the . . . Montana Supreme Court").

276. Order, McLaughlin v. Mont. State Legislature, No. 21-0173 (June 29, 2021), 2021 MT 178, ¶ 1 n.1, 405 Mont. 1, 493 P.3d 980, *available at* https://perma.cc/7QDD-QCYL.

277. *See, e.g.*, Seaborn Larson, *MT Supreme Court Denies AG's Request for Justices to Disqualify Themselves*, INDEP. REC. (May 12, 2021), https://helenair.com/news/state-regional/government-politics/mt-supreme-court-denies-ags-request-for-justices-to-disqualify-themselves/article_6d981321-46e0-53c3-94a2-159dd08cb82d.html [https://perma.cc/4JYH-A4GD] (quoting then-professor of constitutional law and later Ninth Circuit Court of Appeals judge as stating that "the Court's unanimous opinion is a reminder that this is law, not politics at work" in contrast to legislative allegations that the court "can't keep its story straight" and is "twisting itself in knots").

278. Bricker, *supra* note 126, at 1590–91.

entirely partisan institution that was fair game in a political football match.[279]

Dissents are common in the United States and may serve important interests in airing competing arguments, leading to more restrained and refined majority opinions, and sometimes experiencing rebirth in future majority opinions. While, in normal circumstances, the benefits of publishing a well-reasoned dissent likely outweigh any marginal risk it may pose to institutional legitimacy,[280] existential threats to a judiciary may present an apt time to put aside minor differences of doctrinal opinion and present a unified front to better expose the unjustified nature of the attacks.[281]

VII. CONCLUSION

With the temperature on partisan politics continuing to rise in state governments around the nation, long-obscure state judiciaries are increasingly finding themselves in the political crosshairs. Regardless of one's political persuasion, the potential loss of an independent judiciary, even one that constitutes an obstacle to immediate policy goals, should give one pause before cheering for such efforts.[282] Nonetheless, there is

---

279. *Id.*

280. *Id.* at 1590 ("[D]issenting opinions from those judges could begin to be seen not as reasoned and principled differences on law's reach, but simply as part of a less principled political battlefield."). In contrast, unanimous opinions appear to receive more public support, are more likely to be complied with, and can reduce court politicization. *Id.* at 1589 (noting research finding that the presence of dissenting opinions can reduce the probability that other actors will comply with court decisions, that in the United States public reactions to Supreme Court opinions are generally more positive if the decision is unanimous, and "that the inability of many European constitutional judges to create separate opinions" has arguably reduced politicization of those courts (citations omitted)).

281. *Id.* (dissents have a cost "to judicial reputation and the legitimacy of the court" where they create "the perception that judges place personal interests, notably their own policy interests, above the collective good" (citation omitted)).

282. *See* Epps & Sitaraman, *supra* note 49, at 169 (noting that, while Republicans might feel no urgency to address potential problems with the United States Supreme Court that is currently friendly to conservative aims,

a place for judicial accountability and a thoughtful conversation regarding the role of ideology in courts. Courts accustomed to operating under minimal public scrutiny are in a vulnerable position that may be exploited when suddenly thrown into the spotlight by opportunistic political actors. Moreover, as Montana's experience demonstrates, externally imposed reforms stemming from such a crisis are unlikely to be particularly mindful of the crucial interests at stake. Instead, judicial legitimacy, independence, and all that they enable can be expected to suffer indiscriminately.

The extent of the damage Montana's judiciary, democracy, and legal system incurred over the course of the conflict outlined here is as yet unclear. Other states should not need to await the full damage account to take stock of shortcomings and vulnerabilities in their own judiciaries. Independent judiciaries are worth saving, and the present moment is an appropriate one in which to do so.

---

proper reforms are "ultimately in both sides' long-term interests" and "more important than winning on policy issues in the short term").

APPENDIX

2021 Vote Alignment

4-3 Cases

Case Name	Issue	Baker	Gustafson	McGrath	McKinnon	Rice	Sandefur
State v. Keefe	Criminal Sentencing			D	D	D	D
Boyne v. DOR	Tax law		D	D			
State v. Martell	Criminal Procedure		D		D		
State v. Corriher	Criminal Sentencing		D		D		D
Shepherd v. State	Employment	D				D	D
State v. Strizich	Criminal Procedure		D		D		D
Watchtower v. 20 Jud.	Civil Procedure	D			N/A	D	D
State v. Murphy	Criminal Procedure		D		D		D
State v. Byrne	Criminal Procedure	D		D		D	
In re N.A.	involuntary commitment			D		D	D
State v. Laster	Search and Seizure			D	D	D	
State v. 18 Jud. Dist.	Criminal Procedure				D	D	D

5-2 Cases

Case Name	Issue	Baker	Gustafson	McGrath	McKinnon	Rice	Sandefur
Clark Fork Coal.	Environmental Law		D		D		
Ibsen v. Bd. of Med.	Civil Procedure		D				
State v. Lodahl	Criminal sentencing	D				D	
State v. Valenzuela	Criminal Procedure		D				D
State v. Thibeault	Criminal Sentencing		D				

Figure 1. 2021 closely divided Montana Supreme Court cases show no discernible voting block patterns indicative of ideological sorting. "D" represents signing the dissenting opinion. Plurality Opinions in highlighted in grey under "Case Name." *Cf*. STAT PACK FOR THE SUPREME COURT'S 2021–22 TERM, JULY 1, 2022, SCOTUSBLOG 11–12 (2022), https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf [https://perma.cc/M54K-DMS6] (evidencing strong 5–4 and 6–3 voting blocks in United States Supreme Court).

2020 cases with dissents (31 out of 432 total cases)								
Case Name	Issue	Justice						
		Baker	Gustafson	McGrath	McKinnon	Rice	Sandefur	Shea
Hensley v. MSF	Employment		D		NA		D	
State v. Dineen	Criminal		D		D		D	
Garding v. State	Criminal		D		D			
State v. Newbary	Criminal				D		D	
State v. Wolf	Criminal	D				D		D
Buckles v. Cont'l Res.	Contract				D			
State v. Hotchkiss	Criminal		D		D		D	
State v. Sedler	Criminal					D	D	D
State v. Christensen	Criminal		D		D		D	
Buckles v. BH Flowtest	Conflict of Law	D			D	D		
State v. Marquart	Criminal		D		D		D	
Murray v. BEJ	Mineral Law	D	D					
Spillers v. 3d jud. Dist.	Anti-Discrim.				D	D		
State v. Morales	Criminal		D				D	
In re W.K.	Invol. Commit		D		D			D
Mont. Dem Pty v. State	Election Law	D				D		
Disability Rights	Prison rights					D	D	
Plakorus v. U of M	Privacy Torts				D			
In re D.D.	Family/Neglect	D		NA		NA		
Vote Solar	Environment	D			D	D		
State v. Ingram	Criminal		D	D	D			
Driscoll v. Stapleton	Constitution					D	D	
MEIC v. DEQ	Environmental				NA	D		NA
State v. Scott	Criminal			D		D		
Mt. Water Co. v. DOR	Tax	D			D	D		
State v. Brandt	Criminal		D		D			
Reisbeck v. Farmers Ins	Insurace	D			D	D		
State v. Pelletier	Criminal			NA		D		NA
Twin Creeks v. Petrolia	Water		NA	NA	D			
Brenden v. Billings	Tort	D		D	D			
In re Solem	Family	D			D			

Figure 2. 2020 Closely Divided Montana Supreme Court Cases show no discernible voting block patterns indicative of ideological sorting. *Cf.* STAT PACK FOR THE SUPREME COURT'S 2020–21 TERM, JULY 2, 2021, SCOTUSBLOG 11 (2021), https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-7.6.21.pdf [https://perma.cc/Z2CD-PJC9] (evidencing strong 5–4 and 6–3 voting blocks in United States Supreme Court).

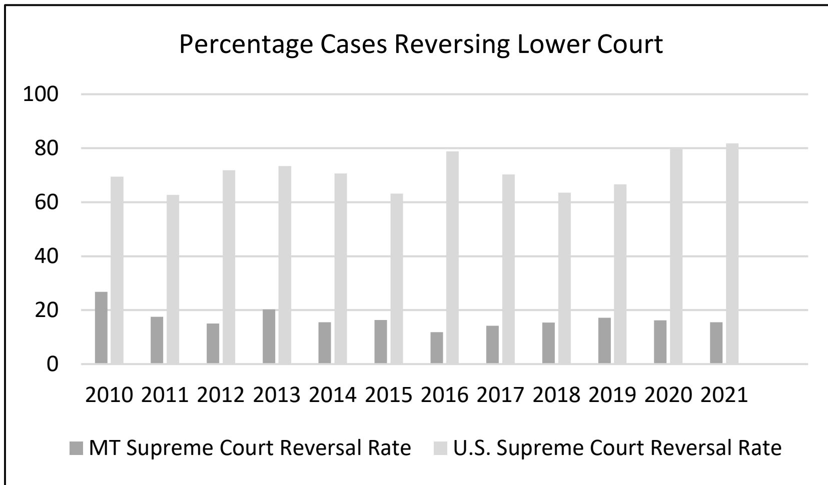

Figure 3. Rate of reversing lower court by Montana Supreme Court and United States Supreme Court. *See* STAT PACK FOR THE SUPREME COURT'S 2021–22 TERM, JULY 1, 2022, SCOTUSBLOG 24 (2022), https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf [https://perma.cc/M54K-DMS6] (reversing lower courts).

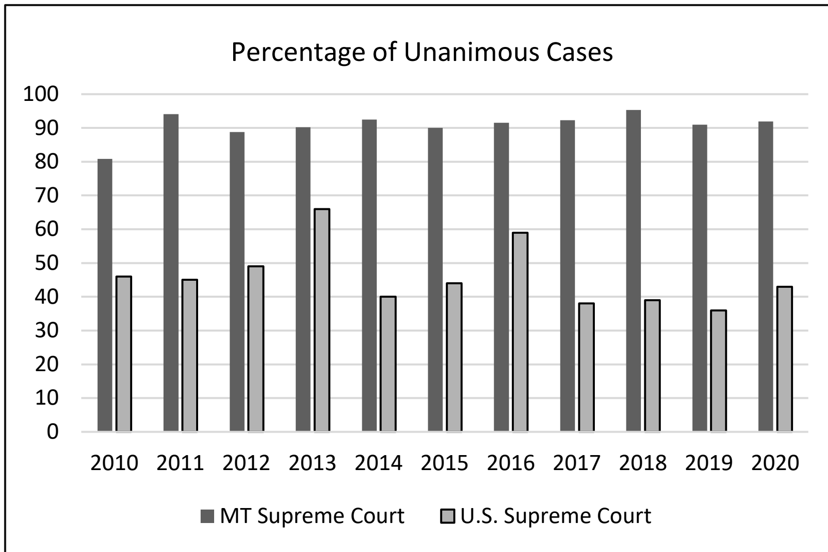

Figure 4. Rate of unanimous decisions at Montana Supreme Court and United States Supreme Court. *See* STAT PACK FOR THE SUPREME COURT'S 2021–22 TERM, JULY 1, 2022, SCOTUSBLOG 14 (2022), https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf [https://perma.cc/M54K-DMS6] (unanimous over time).

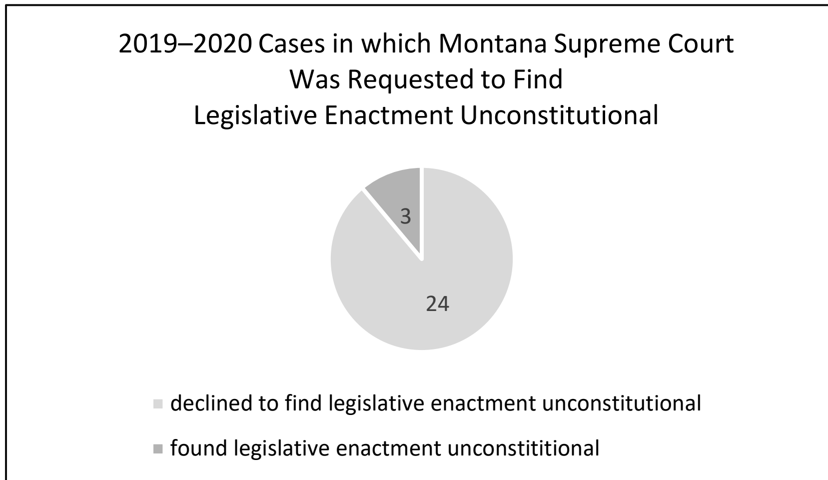

Figure 5: Montana Supreme Court's rate of declaring legislation unconstitutional.