Barry Law Review

Volume 28 | Issue 1 Article 2

5-2023

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AGE BEFORE FUNDAMENTAL RIGHT? RESOLVING THE CONTRADICTION PRESENTED BY AN AGE RESTRICTION ON RUNNING FOR EXECUTIVE OFFICES IN MONTANA'S CONSTITUTION

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Abstract

The Montana Constitution guarantees that "[t]he rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons." Adults receive similarly strong protections. According to Article II, Section 15, of the Montana Constitution, "[a] person 18 years of age or older is an adult for all purposes," except for legislated limits on the legal age to purchase alcohol.

It follows that all Montanans have a constitutional claim to the fundamental right that "[a]ll elections shall be free and open, and no power . . . shall at any time interfere to prevent the free exercise of the right of suffrage." Yet, that same Constitution denies all Montanans under the age of 25 the full exercise of that fundamental right because the Constitution bars them from legally voting for themselves as candidates for various state offices. No person under the age of 25 at the time of their election may run for "the office of the governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, or auditor."

This article argues that this contradiction cannot stand. The Montana Constitution cannot at once guarantee fundamental rights to all Montanans while also causing a significant percentage of the population an irreparable injury when it comes to exercising that right. It is far from unpredictable that a Montanan under the age of 25 will run for governor or one of the other executive offices with an age requirement. Given the likelihood of such a challenge, this article aims to provide the Montana Supreme Court with a rationale for eliminating the age requirement.

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Introduction

The Montana Constitution guarantees that "[t]he rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons."[1] Adults receive similarly strong protections.[2] According to Article II, Section 15, of the Montana Constitution, "[a] person 18 years of age or older is an adult for all purposes," except for legislated limits on the legal age to purchase alcohol.[3]

It follows that all Montanans have a constitutional claim to the fundamental right that "[a]ll elections shall be free and open, and no power . . . shall at any time interfere to prevent the free exercise of the right of suffrage."[4] Yet, that same Constitution denies all Montanans under the age of 25 the full exercise of that fundamental right because the Constitution bars them from legally voting for themselves as candidates for various state offices.[5] No person under the age of 25 at the time of their election may run for "the office of the governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, or auditor."[6]

This article argues that this contradiction cannot stand. The Age Before Fundamental Right (ABFR) contradiction is unacceptable because the Montana Constitution cannot at once guarantee fundamental rights to all Montanans while also causing a significant percentage of the population an irreparable injury when it comes to exercising that right. It is far from unpredictable that a Montanan under the age of 25 will run for governor or one of the other executive offices with an age requirement.[7] Given the likelihood of such a challenge, this article aims to provide the Montana Supreme Court with a rationale for eliminating the age requirement.

The first part of this article examines the drafting history from the 1972 Constitutional Convention (Convention) applicable to: Article II, Section 14 and Section 15—those sections affording minor and adult Montanans, respectively, the fundamental rights set forth in the constitution;[8] Article II, Section 13—providing for "free and open" elections;[9] and, Article VI, Section 3(1)—denying Montanans under the age of 25 the chance to exercise the aforementioned fundamental right by running for certain offices.[10] The second part of this article relies on the analysis in the first part to predict how the Montana Supreme Court would adjudicate a hypothetical challenge to the state's age requirement to run for executive office. The third part of

[1] MONT. CONST. art. II, § 14.
[2] *See generally* MONT. CONST. art. II, § 15.
[3] *Id.*; MONT. CODE ANN. § 16-6-305 (2023).
[4] MONT. CONST. art. II, § 13.
[5] MONT. CONST. art. VI, § 3, cl. 1.
[6] MONT. CONST. art. VI, § 3, cl. 1. This set of offices will hereinafter be referred to as the "executive offices."
[7] *See, e.g.*, Elena Moore, *Maxwell Frost, One of the First Gen Z Candidates for Congress, Has Won His Primary*, NPR (Aug. 23, 2022, 8:59 PM), https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/23/1119003972/maxwell-frost-first-gen-z-candidate-wins-primary (reporting on the electoral prospects of a Gen-Z candidate for U.S. Congress just over the age of 25 years old. If folks in their early twenties will run for Congress, they may have the inclination to run for various statewide offices).
[8] MONT. CONST. art. II, §§ 14–15.
[9] MONT. CONST. art. II, § 13.
[10] MONT. CONST. art. VI, § 3, cl. 1.

this article summarizes why the age requirement to run for executive office in Montana is unconstitutional and notes how this analysis may apply to similarly situated states.

I. The Formation of the Age Before Fundamental Right Contradiction

The resolution of the ABFR contradiction requires a thorough understanding of the intentions of the Framers of each of the relevant sections of the 1972 Montana Constitution. When interpreting constitutional provisions, the Montana Supreme Court has prioritized the intent of the Framers, even when that intent does not entirely match the unambiguous text of the provision.[11] Though the Court acknowledges the importance of the plain meaning of the text, it has held that, even in the context of clear and unambiguous language, the Court must consider the historical and surrounding circumstances under which the Framers drafted the Constitution, the nature of the subject matter under consideration, and the objectives of their actions.[12]

Though the Montana Supreme Court claims to prioritize the intent of the Framers over the plain meaning of the text,[13] it has at times relied on other means of deriving the scope of a constitutional right.[14] For instance, the Court may have to engage in a balancing act when a constitutional right has been infringed.[15] The Court in *State ex rel. Smith v. District Court* concluded that all constitutional rights "can be properly circumscribed when the right or interest against which it competes is weighty or compelling."[16] This section takes the Montana Supreme Court at its word by thoroughly investigating the intent of the Framers. Nevertheless, given that the Court will occasionally weigh competing interests, this section also highlights areas where rights may conflict and, thus, require some additional analysis by the Montana Supreme Court.

A. The Intent of the Framers with Respect to Article II, Section 14

The final version of Article II, Section 14, of the Montana Constitution, voted on during the Convention, declares that "[a] person 18 years of age or older is an adult for all purposes."[17] However, the Convention initially considered the following language: "Persons 18 years of age are declared to be adults for all purposes and shall have the right to hold public office in the state."[18] The debate that resulted in this evolution provides insight into the intent of the Framers with respect to how the Montana Supreme Court should interpret this provision.

Upon Section 14 coming up on the Convention's agenda, the Framers quickly realized that the initial version of the Section conflicted with the age requirements set in the section on executive offices.[19] Accordingly, Delegate Garlington moved to amend Section 14 by clarifying

[11] Nelson v. City of Billings, 412 P.3d 1058, 1064 (Mont. 2018) (citing Grossman v. Mont. Dep't of Nat. Res., 682 P.2d 1319, 1331 (Mont. 1984)).
[12] *Id.*
[13] *Id.*
[14] State *ex rel.* Smith v. District Court, 654 P.2d 982, 986 (Mont. 1982).
[15] *See id.*
[16] *Id.*
[17] 5 MONT. LEGISLATURE ET AL., 1972 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1748 (Margaret S. Warden et al. eds., 1972) [hereinafter CON CON].
[18] *Id.* at 1745.
[19] *Id.*

that the right to hold public office would not apply to all public offices.[20] The delegate who made the motion did so with hesitation.[21] He explained his hesitancy by quoting the AFL-CIO, which had informed the delegates that "[t]o say that an 18-year-old possesses the necessary capabilities to vote yet is not eligible for public office because of his age does violence to the concept of equal citizenship."[22] Nevertheless, the delegate felt that given that the age limit for executive offices had already been established, the Convention had no choice but to make sure this Section did not directly conflict with that limit.[23]

Another delegate noted that the potential for conflict between Section 14 and the requirements for various executive offices also emerged from some offices requiring specific professional credentials.[24] He moved to amend the Section to include an exception for those public offices "for which professional qualifications are required."[25] Other delegates modified this proposed amendment by seeking the Convention's support for allowing all adults to run for public office "except those for which professional qualifications are provided in this Constitution."[26] One delegate justified this amendment as aligning with the intention of the Bill of Rights Committee "that professional qualifications, such as a law degree for a County Attorney or a Judge, certainly are necessary."[27] Absent from that justification was any age-specific reasoning.[28]

But Garlington realized that the language, excepting offices requiring professional degrees, would still not remedy the conflict between the age requirements for executive offices and the right of adults to hold public office.[29] After he flagged the still-existent conflict, a delegate suggested that they just include an exception that read "except as provided otherwise in this Constitution."[30]

This latest proposal gained the support of the others who had suggested amendments and appeared to be gaining support among delegates until Delegate Brown advocated for deleting the Section in its entirety because he regarded it as being "in direct conflict with the section we put in on Suffrage and Elections."[31] In particular, Brown was concerned that the current language of Section 14 would allow felons to hold office, a result in conflict with other constitutional provisions.[32] At a minimum, he thought that Section 14 did not need to address "this public office thing, because we've already covered it."[33]

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[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] CON CON, *supra* note 17, at 1746.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] CON CON, *supra* note 17, at 1746.
[30] *Id.* at 1746–47.
[31] *Id.* at 1747.
[32] *Id.*
[33] *Id.*

Brown's proposal and comments led to an informative debate. In support of Brown's motion, Delegate McDonough noted that they had yet to define "public office," so any reference to that phrase in Section 14 could result in some ambiguity.[34] Importantly, McDonough expressed concern that Section 14 could "tie[] up the Legislature so it couldn't set any qualifications for any type of public office."[35] This concern echoed Brown's attention to the importance of leaving space for the Legislature to dictate the requisite qualifications for public offices.[36] In opposition, Delegate Habedank made clear that including "persons 18 years of age are declared to be adults for all purposes" in the Bill of Rights was important and deserved to remain in the Constitution.[37]

Realizing that they were going in circles, Brown modified his proposal to simply restate the language offered by Habedank.[38] Delegate Campbell shared his support for the proposal, in part, because he thought "young people" would be satisfied with their designation as being adults for "all purposes."[39] Moreover, Campbell went so far as to say that the delegates "can be proud of" Section 14 because of its effects on young people.[40] These closing remarks indicate that the delegates were aware of the importance of listening to the needs and wants of younger Montanans.[41] Brown's proposal received 82 votes in support and just two votes in opposition.[42]

This summary provides a couple of insights into the intent of the Framers with respect to Section 14 and related provisions. First, delegates felt hamstrung by their previous actions to maintain an age restriction for certain offices.[43] It follows that the debate that led to those age requirements, discussed below, may carry more weight in evaluating the intent of the Framers with respect to young people running for office. Second, delegates wanted to make sure that the legislature had flexibility over instituting qualifications for various offices.[44] This concern offers little information on what, if any, concerns delegates had regarding young people actually running for office. Third, delegates felt an obligation to recognize the preferences and priorities of young people.[45] As demonstrated further below, the attention delegates paid to the actions taken by the Youth Constitutional Convention as well as the statements made by young people, generally suggest that the Framers thought that constitutional provisions pertaining to young people should result from a deliberate and thorough conversation with young people.

B. The Intent of the Framers with Respect to Article II, Section 15

Section 15 read, "The rights of persons under the age of majority shall include but not be limited to all the fundamental rights of this article, except where specifically precluded by laws

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[34] *Id.*
[35] CON CON, *supra* note 17, at 1747.
[36] *Id.* at 1746.
[37] *Id.* at 1747.
[38] *Id.* at 1748.
[39] *Id.*
[40] *Id.*
[41] CON CON, *supra* note 17, at 1748.
[42] *Id.* at 1749.
[43] *Id.* at 1745.
[44] *Id.* at 1747.
[45] 4 MONT. LEGISLATURE ET AL., 1972 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 887 (Margaret S. Warden et al. eds., 1972).

which enhance the protection for such persons," when it came up for a vote at the Convention.[46] Delegate Monroe, speaking for the committee responsible for the drafting of the Section, noted near unanimous committee support for the Section.[47] He specified that the Section would "explicitly recogniz[e] that persons under the age of the majority have all the fundamental rights of the Declaration of Rights."[48] The only exception to this broad grant of rights would be "in cases in which rights are infringed by laws designed and operating to *enhance the protection of such persons*."[49]

Monroe explained the committee's motives for advancing the sweeping Section.[50] The committee drafted the Section because the Supreme Court of the United States had yet to rule in favor of young people in Fourteenth Amendment cases involving the Due Process Clause and, consequently, out of concern that young people had inadequate protections of their "basic civil rights."[51] The "crux" of the committee proposal was to "recognize that persons under the age of majority have the same protections . . . from governmental and majoritarian abuses as do adults."[52] Here, it is worth pointing out that one essential means of protection from such abuse is running for public office.[53] This reality and the conflict it presented with other constitutional provisions were not discussed by Monroe.[54]

The committee intended for the rights of minors to be co-equal with the rights of adults except for where there was a "clear showing" that a limitation of such rights was demanded by the "special status of minors."[55] Monroe's remarks indicate that the committee intended to set a high bar for any limitation on the rights of minors and only where doing so would protect minors.[56] The transcripts do not include any debate as to whether limiting a young person's ability to run for office would (1) be out of the protection of their "special status" and (2), even if it were intended to protect minors, whether a "clear showing" of that protection existed to justify that limitation.[57]

Just as Campbell noted his consideration for the views of young Montanans,[58] Monroe felt it necessary to explain this Section based on his personal encounters with Montana's youth.[59] He described his involvement with the YMCA and Red Cross and how those experiences gave him insight into the "circumstances" of young people.[60] This Section was meant to address and

[46] CON CON, *supra* note 17, at 1749.
[47] *Id.* at 1750.
[48] *Id.*
[49] *Id.* (emphasis added).
[50] *Id.*
[51] *Id.*
[52] CON CON, *supra* note 17, at 1750.
[53] *Launching Global Campaign Promoting Right of Young People to Run for Public Office*, UNITED NATIONS, https://www.un.org/youthenvoy/2016/11/launching-global-campaign-promoting-rights-young-people-run-public-office/ (last visited Feb. 28, 2023).
[54] *See generally* CON CON, *supra* note 17, at 1750.
[55] *Id.*
[56] *Id.*
[57] *See generally id.*
[58] *Id.* at 1748.
[59] *Id.* at 1750.
[60] CON CON, *supra* note 17, at 1750.

improve those circumstances by "help[ing] young people . . . reach their full potential" through retaining whatever rights they currently enjoyed and protecting those rights they may receive in the future.[61] He explicitly stated that this Section was meant to stop young people from "los[ing] any rights that any other Montana citizen has."[62] Again, the extent to which this purpose conflicted with the ban on young people from running for office, let alone voting, was not discussed.[63]

Monroe was careful to note that the Section reflected the deliberate work of Montana's youth to solicit input from their peers concerning their goals for the Convention.[64] According to Monroe, the Montana Advisory Council on Children and Youth had conducted 200 community meetings in the years leading up to the Convention, through which the Council received input from more than 6,000 people.[65] He recognized that failing to protect the rights of young Montanans would have a huge negative effect on a sizable percentage of the population—at the time of the Convention, half of the state's population was under the age of 25.[66] In fact, Monroe went so far as to say that "if [delegates] are expecting these [young] people to respect us, I think we should respect them in some way."[67] To fulfill that obligation, Monroe challenged his fellow delegates to make Montana "the leader among all the states in recognizing the rights of people under the age of majority."[68]

However, when pressed by a fellow delegate about the scope of the Section, Monroe seemed to cabin it to a narrow set of rights.[69] Monroe responded to that inquiry by pointing out the need to make sure that youth were protected by "constitutional standards of fairness and due process of law, such as the right to counsel."[70] He further qualified that this Section meant to afford young Montanans "rights, except where specifically precluded by law" and cited the age requirement to get a driver's license as a sample preclusion.[71] Notably, Monroe made clear that this preclusion—limiting licenses to 16-year-olds—was on the books to "protect and enhance" youth.[72] He justified a restriction on the drinking age for the same reason.[73]

This qualification by Monroe indicates that he and the other delegates did not intend to have this Section conflict with other provisions of the Constitution. However, it is still true that, at least in the case of the responsible committee, many delegates intended for this grant of rights to be quite expansive and responsive to the needs of young Montanans.[74] After all, Monroe did describe the "crux" of the section as "recogniz[ing] that persons under the age of majority have

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[61] *Id.*
[62] *Id.*
[63] *See generally id.*
[64] *Id.*
[65] *Id.*
[66] CON CON, *supra* note 17, at 1750.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 1751.
[70] *Id.*
[71] *Id.*
[72] CON CON, *supra* note 17, at 1751.
[73] *Id.*
[74] *Id.*

the same protections . . . from governmental and majoritarian abuses as do adults."[75] Additionally, it is not clear how the Section's "protect and enhance" test for justifiable limitations would condone restrictions on the voting rights and electoral rights of youth, especially those above a certain age who have the capacity to identify and push back against governmental and majoritarian abuses.

Despite Monroe's thorough explanation of the Section, the delegates continued to debate the section.[76] Brown argued that the Section was duplicative because the "Bill of Rights covers all people," not just those over the age of majority.[77] Delegate Dahood countered that this Section addressed a widespread "constitutional controversy" as to whether youth received the protections of the Bill of Rights, specifically concerning "arrest, detention, and trial."[78] He interpreted the section as "focusing on the basic guarantees that citizens have with respect to their person, their property, and their liberty."[79] Dahood's comments, then, reinforced the notion that this Section may be more limited in its application than its plain text suggests—i.e., protecting due process rights of youth rather than ensuring youth can respond to governmental and majoritarian pressures.[80] Even with his limiting comments and suggestion that this Section was "not revolutionary by any means,"[81] Dahood still expressed a bold aspiration for the Section—that it would allow young Montanans to "be better trained to be more responsible citizens."[82] After Dahood's remarks, 76 voted in support of Section 15, with 11 voting no.[83]

The Framers passed Section 15 in response to specific concerns about youth receiving due process.[84] However, the committee responsible for the Section expressed much grander intentions for its scope and set forth a demanding test for any restrictions on the rights of youth in Montana.[85] Monroe's reference to age requirements to drive and drink suggests that he and his committee took the Section's language seriously—that only where a denial of rights was for the "protection and enhancement" of the youth would such a denial survive constitutional analysis.[86] And, though some delegates like Dahood voted for the Section with a very specific context in mind, Dahood nonetheless aspired for the bill to protect the "liberty" of youth as well as to assist them in their development as "responsible citizens."[87]

C. The Intent of the Framers with Respect to Article II, Section 13

The 1972 Convention passed Section 13, which read, "All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of

[75] *Id.* at 1750.
[76] *See generally id.*
[77] *Id.* at 1751.
[78] CON CON, *supra* note 17, at 1751.
[79] *Id.*
[80] *Id.* at 1752.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 1753.
[84] CON CON, *supra* note 17, at 1751.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 1752.

the right of suffrage."[88] Notably, this Section merely emulated the text of Article III, Section 5, of the 1889 Constitution.[89] The delegates had no issue copying and pasting this provision—no delegates even submitted proposals to change the text of the Section.[90] The delegates supported the Section in a unanimous vote.[91] The dearth of deliberations on this Section means that the Montana Supreme Court will have to look to other sources when trying to interpret its meaning and scope.

Case law from the early 20th century interpreting the 1889 Constitution provides the Court with some insights into how Montanans understood this provision. In *State ex rel. Holliday v. O'Leary*, the Montana Supreme Court assessed whether a city clerk properly denied a candidate for a judicial post.[92] The clerk refused to process the candidate's papers because he interpreted the Nonpartisan Judiciary Act as preventing a party-nominated candidate for a judicial post from being on the ballot.[93] The Montana Supreme Court reversed in favor of the clerk and noted that a "free and open" election secured not only the right to vote in an election but also the right to nominate candidates for public office.[94]

The decision in *O'Leary* revealed that the phrase "free and open" elections had a broader scope than the plain meaning of the phrase may suggest. In addition to explicitly stating that this right protected the public's participation in nomination procedures, the *O'Leary* Court also implicitly concluded that this right prohibited any "unwarranted restrictions and hindrances" on the public's selection of candidates for public office.[95] The *O'Leary* Court favorably cited *State ex rel. Adair v. Drexel*, a case in which the Nebraska Supreme Court interpreted similar language and concluded that the "right to freely choose candidates for public offices is as valuable as the right to vote for them after they are chosen. Both these rights are safeguarded by the constitutional guaranty of freedom in the exercise of the elective franchise."[96] A similar case in Illinois, *Rouse v. Thompson*, was also favorably cited by the *O'Leary* Court.[97] In that case, the court held that "[t]he power of the individual voter at the polls to cast his vote, untrammeled, for the candidate of his choice is no more sacred than the right of the individual member of a political party to express his choice for party candidates at a primary election . . . ."[98] Finally, it is worth noting that the counsel for O'Leary argued a similar point:

> It is well settled by abundant authority that the phrases "elections," "suffrage" or "right of suffrage," as used in this section of the Constitution, mean more than the simple right to go to the polls and cast a ballot for some candidate for office at the regular or general election, and that they include the right to participate freely in all the preliminary steps to the nomination, and in the nomination of candidates, as

[88] *Id.* at 1744.
[89] MONT. CONST. art. III, § 5 (1889).
[90] CON CON, *supra* note 17, at 1745.
[91] *Id.*
[92] 115 P. 204, 204 (Mont. 1911).
[93] *Id.*
[94] *Id.* at 205 (referring to Article III, Section 5 as Section 5 of the State's Bill of Rights).
[95] *Id.*
[96] State *ex rel*. Adair v. Drexel, 105 N.W. 174, 180 (Neb. 1905).
[97] *O'Leary*, 115 P. at 206.
[98] Rouse v. Thompson, 81 N.E. 1109, 1115 (Ill. 1907).

> well as to participate in their election after they have been nominated; and that any infringement of the electors' right to so participate, or any unjustifiable restriction upon that right, is an infringement of this provision of our Constitution.[99]

From these various sources, the intent of the Framers of the 1889 Constitution becomes much clearer. Constitutional protection of a "free and open" election was not intended to begin and end at the ballot box.[100] Instead, this language provided for a right of participation in all aspects of an election, including voting, nominating, and, impliedly, running for office—after all, none of the aforementioned sources suggest it would be constitutional to hinder a voter's ability to nominate themselves.[101] The Framers of the 1889 Montana Constitution did not intend to mitigate in any way the ability of a voter to select a candidate of their choice.[102] Although, the first generation of Framers seem to have failed to recognize that their own constitution contained a limit on that choice.

D. The Intent of the Framers with Respect to Article VI, Section 3(1)

Article VII, Section 3, of the 1889 Montana Constitution stated that "[n]o person shall be eligible to the office of Governor, Lieutenant Governor, or Superintendent of Public Instruction, unless he shall have attained the age of thirty years at the time of his election . . . ."[103] The delegates to the 1972 Constitutional Convention shaved five years off that age limit when they passed Article VI, Section 3(1), of the Montana Constitution.[104] Initially, however, there was a willingness to omit any age requirement.[105] The majority report on Section 3(1) set no age requirement for executive offices.[106] The following review of the Convention's proceedings helps explain why the delegates shifted course and maintained an age limit, albeit a lower one, for running for executive offices.

(1) The Framers Engaged in Extensive Debates Over Whether to Eliminate an Age Requirement

When the issue of age restrictions came to the top of the Convention's agenda, Delegate Wilson (age 63)[107] moved to adopt the minority's approach, which maintained the age requirement of 30 years from the 1889 Constitution.[108] Wilson explained that though he was

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[99] *O'Leary*, 115 P. at 204.
[100] *Id.*
[101] *See generally id.*; *Rouse*, 81 N.E. at 1115; *Adair*, 105 N.W. at 180.
[102] *See* State *ex rel.* Mitchell v. District Court, 275 P.2d 642, 651 (Mont. 1954) (Freebourn, J., concurring) (interpreting "free and open election" to protect a voter's right to choose the candidate of their choice).
[103] MONT. CONST. art. VII, § 3 (1889).
[104] MONT. CONST. art. VI, § 3, cl. 1.
[105] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 884.
[106] *Id.*
[107] This Part contains the ages of delegates to assist readers with assessing the perspectives the delegates may have brought into the Convention with respect to the participation of young Montanans in politics. MONTANA CONSTITUTIONAL SOCIETY OF 1972, 100 DELEGATES: MONTANA CONSTITUTIONAL CONVENTION OF 1972 at 97–98 (1989) [hereinafter DELEGATE BIOS], https://digitalcommons.mtech.edu/cgi/viewcontent.cgi?article=1005&context=crucible_materials (sharing Wilson's age and the fact that he rode a horse to school).
[108] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 884.

"conscious of the increased intelligence and ability of our young people," he believed that voters would never elect an 18-year-old to an executive office and that the majority of Montanans would "want [delegates] to require such qualifications for *their* own protection, to insure the dignity of the office and to provide a goal for them to strive for."[109] Note how this language contrasts with Article II, Section 15, of the Montana Constitution, which only justifies limitations on the rights of minor Montanans where doing so protects the minors, not the majority.[110]

Wilson also justified his motion on the basis that the "Constitution must guarantee a certain maturity as qualification for office holders."[111] He cited age requirements for similar offices in other jurisdictions in support of Montana maintaining an age requirement.[112] Again, note how this willingness to follow other states directly conflicts with the intent of Monroe (age 27)[113] to make Montana "the leader among all the states in recognizing the rights of people under the age of majority."[114] Presumably, that intent would apply to people just over the age of majority as well.

Campbell (age 31)[115] pushed back on Wilson's reasoning. Campbell noted that the Convention had already limited eligibility to qualified voters and questioned whether "artificial age barriers" would really serve the purposes intended by Wilson.[116] He questioned whether someone at age 30 "shows any particular wisdom any more than the age 60 or 18."[117] Rather than "protect" the electorate from candidates, Campbell advocated for "hav[ing] faith in the electorate that they will elect by the majority vote the person they feel best qualified."[118]

Campbell specifically noted that the timing of the Convention and the process that led to it suggested that young Montanans should be able to run for public office.[119] He reminded the Convention that the Bill of Rights Committee had heard from young people who had demonstrated "responsibility [and] enthusiasm towards the prospect of political equality."[120] According to Campbell, of the 46 calls that the Committee received regarding allowing 18-year-olds full participation, 39 of them were in favor.[121] He then echoed Monroe's aspiration to make Montana a leader in promoting the rights of younger Montanans—Montana was one of two states to have had a constitutional convention following the ratification of the Twenty-Sixth Amendment.[122] And, whereas Wilson cited a random list of states as peers in having age requirements, Campbell noted that the other state that had held a convention since 1971—North Dakota—lowered their age requirement for the corresponding offices to 21 years old.[123]

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[109] *Id.* (emphasis added).
[110] MONT. CONST. art. II, § 15.
[111] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 884.
[112] *Id.*
[113] DELEGATE BIOS, *supra* note 107, at 78–79.
[114] CON CON, *supra* note 17, at 1750.
[115] DELEGATE BIOS, *supra* note 107, at 47.
[116] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 885.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 885.
[123] *Id.*

Habedank (age 55)[124] then stood to support the age requirements. Like Wilson, he was careful to note that he has "a very high regard for the ability and dedication of the young voter" but was nonetheless concerned about their lack of maturity.[125] Unlike Campbell, Habedank relied exclusively on personal experiences and beliefs to justify his opposition to eliminating the age requirement.[126] He hypothesized that "it's [not] going to hurt a person to wait the additional 3 years that result from lowering the voting age from 21 to 18," which seems unrelated to the mandate that the State only limit the rights of younger Montanans where doing so would be for their own protection and enhancement.[127] Under Habedank's logic, the State could limit the rights of younger Montanans so long as doing so causes them no harm.

Delegate Davis (age 50)[128] offered an apparent compromise—lowering the age requirement in the minority report to 25 years rather than 30 years.[129] This compromise was only offered after Davis had tried for "five weeks" to garner support for a higher age qualification.[130] His inability to receive that support suggests that delegates generally favored lowering the age requirement from the start of the Convention.

Delegates Martin (age 68),[131] Harper (age 49),[132] and Reichert[133] then spoke in favor of eliminating the age qualification. Martin queried whether older Montanans may eventually come to lack the requisite maturity to serve in office and, if that were possibly the case, wouldn't the logic employed by Habedank and others merit preventing those Montanans from running as well?[134] Harper repeated Campbell's doubts about age serving as a valid proxy for wisdom.[135] He also reasoned that if an 18-year-old were able to get through the various hoops to even be on the ballot for governor, then surely they would be a "remarkable person."[136] And, though he doubted that even such a remarkable person could ever win the race for governor, the mere possibility of doing so served as an important symbol of the State's respect for young people as valid democratic participants.[137] Delegate Reichert expressed her support after noting that one of their fellow delegates was under the age of 25 and "one of the most knowledgeable delegates we have at this Convention."[138]

Delegate Swanberg (age 56)[139] placed higher odds on an 18-year-old finding their way to the office of the governor—calling it a "very real" possibility—and, for that reason, voiced

[124] DELEGATE BIOS, *supra* note 107, at 60 (noting that he had completed one year of higher education).
[125] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 885.
[126] *Id.*
[127] *Id.*; MONT. CONST. art. II, § 15.
[128] DELEGATE BIOS, *supra* note 107, at 52.
[129] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 885.
[130] *Id.* at 886.
[131] DELEGATE BIOS, *supra* note 107, at 74–75.
[132] *Id.* at 64–65.
[133] *Id.* at 82–84 (age not provided).
[134] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 886.
[135] *Id.*
[136] *Id.*; *see id.* at 887 (Delegate James supporting the absence of age qualifications for similar reasons).
[137] *Id.* at 886.
[138] *Id.* at 887.
[139] DELEGATE BIOS, *supra* note 107, at 93.

support for the age requirements.[140] He feared the following situation: a candidate for governor seeks a younger candidate for lieutenant governor as his running mate so that the pair could turn out the youth vote; the pair wins; and, then, the governor dies, and the 18-year-old takes over as governor.[141] Delegate Berg (age 56)[142] elaborated on why delegates such as Swanberg may have feared this outcome by stating that "kids at that age simply have no background, no maturity, to handle the fundamental functions of government."[143] Nevertheless, he admitted that he preferred an age limit of 25 rather than 30 because, between the ages of 20 and 25, a sufficient amount of maturation occurs.[144] It is unclear how Berg reconciled this alleged complete absence of maturity with the Constitution's affordance of numerous other rights to younger Montanans.

In response to Berg's broad claims, Delegates Lorello (age 42),[145] Dahood,[146] and Rollins (age 56)[147] dove further into this idea of "maturity" as a requirement to running for office and pointed out that maturity is too variable to allow age to serve as its proxy.[148] Lorello noted that many of the older patrons at his bar certainly lacked the maturity that Berg desired from candidates for executive offices.[149] Dahood stated that he initially planned to support an age qualification but changed his mind after he researched the question in his role as Chairman of the Bill of Rights Committee.[150] Through witness testimony and consultation of literature on the topic, Dahood realized "that the age limit is an artificial barrier that in many respects insults the intelligence of the adult voter of the State of Montana."[151] Unlike Swanberg, Dahood declared that the odds of anyone under 25 years old ever becoming governor were very low but was adamant that Montanans deserve the chance to consider every candidate capable of convincing the electorate that they warrant their support.[152] Rollins repeated the fact that maturity is variable and that age is not a reliable indicator of someone's maturation.[153]

After all of these remarks, many of which argued against any age requirement at all, the Chairman of the Convention at that time reminded the delegates that they were considering a motion to amend the age limit in the minority report from 30 to 25.[154] Davis's compromise motion was on the table, though it appeared as though the delegates thought they were discussing the majority's proposal to eliminate age requirements.[155] Nevertheless, a majority of the delegates supported the compromise—the motion passed 48 to 37—and the minority report was amended.[156]

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[140] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 887.
[141] *Id.*
[142] DELEGATE BIOS, *supra* note 107, at 41.
[143] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 887.
[144] *Id.*
[145] DELEGATE BIOS, *supra* note 107, at 73.
[146] *Id.* at 51–52 (no age provided).
[147] *Id.* at 85.
[148] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 888.
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.* at 889.
[154] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 889.
[155] *Id.* at 885–89.
[156] *Id.* at 891.

The delegates then voted on whether to adopt the amended minority report—setting an age of 25 years old as the minimum to run for executive offices.[157] Only 31 delegates voted in favor, whereas 59 voted in opposition.[158] Next, the delegates voted on the majority report, which contained no age restrictions, and passed the motion without opposition.[159] At that point, it appeared as though the intent of the delegates was to ensure the Constitution was free of arbitrary age restrictions.

The next day, Davis took the floor to again advocate for an age requirement of 25.[160] Davis again raised concerns that even the possibility of an 18-year-old serving as governor diminished the dignity of that office.[161] He warned delegates that the Montana public might regard this possibility as irresponsible and, therefore, jeopardize much of the other work of the Convention.[162] Delegate Jacobsen (age 59)[163] then stood to rally more support for Davis. Like many before him, Jacobsen cited a conversation he had with a few youths who could not imagine running for governor as proof that all youth should be foreclosed from pursuing that office.[164] Habedank added fuel to concerns about the public regarding this effort as rash—he claimed to have talked with citizen groups who expressed grave concerns about the possibility of an 18-year-old serving as governor.[165] He worried that those who regarded this possibility as untenable would use it as a reason to vote against the entirety of the Constitution.[166]

Delegates Harper and Heliker tried to contest these speculative worries. Harper argued that if any age-related worries were valid, it would be that a 99-year-old could serve as governor.[167] According to Harper, voters had much more to fear "from a man being too old and decrepit . . . and not able really to handle this office than [they did] from a person 18."[168] Delegate Heliker (approximately 52)[169] expressed dismay that in the span of a night, some delegates had come to believe that the voters of Montana are "so stupid" that they cannot be trusted to not elect an immature governor.[170]

Harper and Heliker were not able to stop a change in momentum. Delegate Ask had issues with the fact that the Convention had just granted the governor more power—power he did not think young people were mature enough to handle.[171] Delegate Erdmann (age 60)[172]

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[157] *Id.*
[158] *Id.* at 892.
[159] *Id.* at 893.
[160] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 979.
[161] *Id.*
[162] *Id.*
[163] DELEGATE BIOS, *supra* note 107, at 67–68.
[164] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 979.
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.* at 980.
[169] DELEGATE BIOS, *supra* note 107, at 66–67 (Heliker graduated from high school in 1937).
[170] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 980.
[171] *Id.*
[172] DELEGATE BIOS, *supra* note 107, at 55.

reiterated that the absence of an age limit would "cheapen" the top offices and likely be seen as yet another instance of excessive "youth worship."[173]

Campbell tried to stop the fear of voter disapproval from spreading. He admonished the delegates for acting as delegates did during the 1889 Constitutional Convention when deciding whether to extend the right to vote to women.[174] Then, just as now, delegates came up with all sorts of excuses for why denying the expansion of political rights would actually benefit those being denied such rights.[175] He challenged his fellow delegates to learn from history—"[t]here is no basis for the doubts of the past, nor is there any basis for the doubts of today."[176]

Delegate Robinson (age 24)[177] then moved to set an age cap of 55 years.[178] As someone under the age of 25 years, Robinson argued that "[t]here must be a time . . . that a person loses his effectiveness or loses touch with reality," and thought 55 years could mark that point.[179] Robinson noted that this whole exercise of setting age requirements was "ridiculous" because it prevented voters from acknowledging that no two candidates are alike and that their age may have nothing to do with their qualifications.[180] The Chair put this up for a vote, but the motion failed, and the conversation turned back to Davis's motion to set the age at 25 years old.[181]

A debate along the same lines ensued. Delegate Harbaugh (age 36)[182] amplified Campbell's call for the delegates to be bold and not let the potential opposition of a small slice of Montanans stop them from taking this important step.[183] In response, Delegate Belcher (age 53)[184] brought up a point with limited relevance—that individuals under the age of 25 cannot rent a car; he regarded this as an indicator of widespread recognition that youth lack responsibility.[185] Delegate Babcock (age 50)[186] repeated the concerns about the dignity of the offices if an age limit was not imposed.[187] Delegate Foster (age 35)[188] reminded the delegates that the Bill of Rights Committee had been studying this issue for much longer than the rest of the delegates and reached the reasoned conclusion that age should not be the "primary qualification" for holding executive office.[189] Ultimately, the fear that voters would oppose allowing an 18-year-old to run for governor spread among too many delegates, and they voted by a margin of 56 to 38 to adopt 25 years as the age limit.[190]

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[173] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 980.
[174] *Id.*
[175] *Id.* at 980–81.
[176] *Id.* at 981.
[177] DELEGATE BIOS, *supra* note 107, at 84.
[178] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 981.
[179] *Id.*
[180] *Id.*
[181] *Id.* at 982.
[182] DELEGATE BIOS, *supra* note 107, at 63.
[183] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 982.
[184] DELEGATE BIOS, *supra* note 107, at 40–41.
[185] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 982.
[186] DELEGATE BIOS, *supra* note 107, at 37–38 (noting her previous role as First Lady of Montana).
[187] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 982.
[188] DELEGATE BIOS, *supra* note 107, at 57–58.
[189] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 982–83.
[190] *Id.* at 983–86.

(2) Two Interpretations of Article VI, Section 3(1) Emerge from the Convention Transcripts and Both Center on the Perception of the Public

The Montana Supreme Court pays specific attention to details that inform the intentions of the delegates when interpreting constitutional provisions, such as the age requirement to serve in executive offices.[191] The Court weighs the "historical and surrounding circumstances," the "nature of the subject matter under consideration," and the objectives of the delegates.[192] The debates around the age requirement reveal a unifying objective of the delegates: lower the age requirement to the lowest number that will not endanger the public's support for the rest of the Constitution.[193]

The transcripts of the age requirement debates support two different objectives. It is possible to review the debates and conclude that the objective of the majority of the delegates was to pass the lowest age qualifications that they thought the people of Montana could tolerate.[194] One could also find support for the conclusion that the majority of the delegates intended to eliminate age qualifications based on their perception of Montana voters as capable of distinguishing between qualified and unqualified candidates.[195] The first objective would result from lending substantial weight to the final vote on the matter.[196] The second objective would result from a close read of the debate on the issue as well as the first vote on the matter.[197] Other objectives, such as preserving the dignity of the office of the governor and respecting the wishes of random and unrepresentative samples of young Montanans, were only openly expressed and supported by a handful of delegates.[198]

A common thread unites the two most supported objectives: the public's perception of a young person running for executive office. This thread emerges from an analysis of the "historical and surrounding circumstances" in existence at the time of the Convention. The common underlying objective carries significant interpretative weight because it suggests that the Framers intended for the age requirement to continue to decrease as Montanans became more comfortable with the idea of young people running for executive offices.

The surrounding circumstances of the Convention make it understandable why some delegates were concerned about the public's belief that young people were mature enough to hold executive office and the public's willingness to consider those candidates in the first place. As several delegates noted, the 1972 Convention took place shortly after the ratification of the

[191] Nelson v. City of Billings, 412 P.3d 1058, 1064 (Mont. 2018).
[192] *Id*.
[193] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 979.
[194] CON CON, *supra* note 17, at 1745–49.
[195] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 893.
[196] *See id*. at 893–96.
[197] *See id*. at 893.
[198] *Id*. at 982.

Twenty-Sixth Amendment[199]—the public had little experience with young people taking a more active and legally-recognized role in politics.[200]

However, circumstances have since changed. Since the Convention, the Montanan public has demonstrated an uncanny willingness to elect young officials.[201] For instance, as of January 2021, only Alaskans and Montanans had elected a member of Gen Z to their state legislature.[202] In fact, the 2021 legislative session in Montana included three officials under the age of 25 and a total of ten under the age of 35.[203] Notably, this was not the first time Montanans had elected a number of officials under the age of 25 to the legislature.[204]

As widespread as the public's embrace of young legislators have been, delegates expressed less concern about young people running to join the legislature when compared to their worries about a young person occupying executive office.[205] But it is likely that the public's perception has changed in this regard as well.[206] For one, voters have had a chance to see young people act in a competent and *mature* fashion in their own legislature.[207] Additionally, they have been exposed to news of people in their 20s and early 30s running for and occasionally winning statewide elected office.[208] Likewise, they have seen young people serve in executive offices at the local and regional levels and do so without jeopardizing the dignity of the office.[209] And, to the extent that Montanans were ever concerned about the "dignity" of any elected office, decades of growing disappointment and distrust in government have likely eroded that as a valid concern.[210]

A common objective and a change in circumstances both support an interpretation that the age requirement to run for executive office in Montana should, at a minimum, be lowered. A review of the nature of the subject matter also supports this conclusion. Fear of the voting public,

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[199] U.S. CONST. amend. XXVI.
[200] *Voting Rights: A Short History*, CARNEGIE CORP. N.Y. (Nov. 18, 2019), https://www.carnegie.org/our-work/article/voting-rights-timeline/ ("For much of the nation's history, states generally restricted voting to people age 21 and older.").
[201] Austin Amestoy, *Montana's Youngest Legislators: Under 25, Diverse, Republican with 'A Libertarian Streak'*, MISSOULA CURRENT (Jan. 25, 2021), https://missoulacurrent.com/youngest-legislators/.
[202] *Id*.
[203] *Id*.
[204] *Id*.
[205] *Id*.
[206] *See infra* notes 207–211 and accompanying text.
[207] *See, e.g., In the Crucible of Change: High Wide and Handsome* (Evan Barrett & John Garic) (transcript on file with Montana Tech Library), https://digitalcommons.mtech.edu/cgi/viewcontent.cgi?article=1029&context=crucible_transcripts (describing two state legislators as transitioning from "new kids on the block to prominent State leaders.").
[208] *See, e.g.*, John Celock, *Who Is America's Youngest Statewide Elected Official*, THE CELOCK REPORT (Nov. 16, 2016, 3:14 PM), https://johncelock.com/youngest-statewide-elected-official.
[209] *See, e.g.*, Ryann Blackshere Vargas, *Young Baldwin Park Mayor Elect Shares His Vision for City*, SPECTRUM NEWS 1 (Nov. 23, 2020, 7:43 AM), https://spectrumnews1.com/ca/la-east/politics/2020/11/23/young-baldwin-park-mayor-elect-shares-his-vision-for-city (outlining the success of Mayor Emmanuel Estrada of Baldwin Park, California. He was elected at age 26).
[210] Carroll Doherty et al., *Americans' Views of Government: Decades of Distrust, Enduring Support for Its Role*, PEW RSCH. CTR. (June 6, 2022), https://www.pewresearch.org/politics/2022/06/06/americans-views-of-government-decades-of-distrust-enduring-support-for-its-role/ (summarizing polls results showing broad distrust in government, including state government).

more so than any constitutional principle, motivated a shift in how the delegates voted on this issue.[211] The fact that the delegates flip-flopped on this issue because of a perceived change in political wind provides little assurance that the delegates strongly supported the ultimate outcome.

A substantial number of the delegates who spoke on this issue made clear that they regarded age as just a number, so their somewhat forced choice of 25 years to appease fearful delegates renders the selected age itself a somewhat arbitrary selection and less useful in zeroing in on the intent of the Framers. This subject matter, unlike the due process concerns that influenced the debate over Article II, Section 15, of the Montana Constitution, had little grounding in case law, empirical research, or practical concerns.[212] Here, the delegates debated hypothetical situations, such as whether eliminating an age requirement would result in young Montanans treating the election for governor as they did the election for homecoming king and queen.[213] And, even where delegates tried to bring up better sources of information, such as input from a paid representative of young people across Montana, the anecdotal evidence of concerns among young people and voters as a whole kept coming in.[214] Unfortunately for young Montanans up until this point, public perception steered the delegates in retaining an age limit for running for executive offices. Fortunately for future generations of Montanans, public perception changes and likely already has changed.

II. Evaluation of Hypothetical Challenge to Montana's Age Restrictions

Picture Jane Doe. She is 17 years old but will turn 18 on Election Day. Born and raised in Red Lodge, Montana, she considers herself ready to serve as governor after demonstrating impressive leadership skills in response to floods that tore through her hometown. Doe went to the Carbon County offices to register to vote and declare her candidacy for governor. The Clerk, after calling the Secretary of State's office, informs Doe that she cannot run for governor until she turns 25 and, for that reason, refuses to process Doe's forms. Doe sues. The people of Red Lodge rally to her defense, which results in statewide news coverage.

Suddenly, "I'd Doe Anything to Vote Doe" bumper stickers and lawn signs spread across the State. Recognizing the importance of litigating the issue, a district court quickly hears Doe's claims but denies them based on the plain text meaning of Article VI, Section 3(1)—the court's order states, "18 is not 25." Doe appeals, and the case reaches the Montana Supreme Court. Suddenly, the Montana Supreme Court finds itself with a legal puzzle: which interpretative approach to use to determine the respective scopes of the rights afforded by Article II, Sections 13, 14, 15, of the Montana Constitution, and Article VI, Section 3(1), of the Montana Constitution—all raised in Doe's brief.

[211] *See* 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 888.
[212] *See* discussion *supra* Section I.B.
[213] *See* 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 984.
[214] *See id.* at 982–85.

A. Article II, Section 13 Claim

Doe could mount a persuasive argument by tethering her position to a number of constitutional provisions. She would likely first argue that Article II, Section 13 guarantees a free and open election, which should be interpreted as being open to all citizens, both as voters and candidates. The Montana Supreme Court will first look at the intent of the Framers to see if they regarded the provision as applying to not only voting in an election[215] but also participating as a candidate in one. As discussed in Section C of Part II, the 1972 Convention delegates had nothing to say concerning their objectives in copying the 1889 provision into the new constitution. However, case law from the period makes clear that the Framers of the Montana Constitution (and of state constitutions with similar language) intended for "free and open" elections to protect a voter's right to select a candidate of their choice.[216]

This article will assume that the Montana Supreme Court will follow its precedent and regard Article II, Section 13, of the Montana Constitution as affording voters the right to vote for candidates of their choice. The question then becomes whether any competing interest, such as the maturity of candidates, merits restricting this right.[217] On paper, because the Court has regarded this right as a fundamental right, the Court must decide if any infringement of this right survives strict scrutiny review.[218] In practice, the Court's case law indicates that few interests justify infringing on what may be "the most foundational of our Article II rights."[219]

In *Mont. Dem. Party v. Jacobsen*, the Secretary of State expressed an interest in "safeguarding voter confidence" in elections[220]—a concern related to 1972 Convention delegates concerned about the public taking elections seriously if executive offices had their stature diminished[221]—as justification for several policy interventions meant to make voter registration more accurate.[222] The Court expressed doubts about the validity of this interest given that the Secretary could only point to "isolated instances of voter fraud" and that experts testifying for each party offered conflicting accounts of whether the policies under consideration had a positive or negative effect on voter confidence.[223]

The 1972 Convention delegates flipped their vote and enforced age requirements based on evidence even weaker than that offered by the Secretary in *Jacobsen*. The day after supporting the elimination of an age requirement, a few delegates reported that certain voting groups had expressed concerns, and another smattering of delegates feared that voters might find an 18-year-old running for governor to be demeaning of the office.[224] Whether these concerns

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[215] *See* Nelson v. City of Billings, 412 P.3d 1058, 1064 (Mont. 2018).
[216] *See* State *ex rel.* Holliday v. O'Leary, 115 P. 204, 204 (Mont. 1911).
[217] *See* State *ex rel.* Smith v. District Court, 654 P.2d 982, 986; *see also* Mont. Democratic Party v. Jacobsen, 518 P.3d 58, 65 (Mont. 2022) (internal citation omitted) (referencing that the Court may have to balance fundamental rights against other provisions and statutes).
[218] *See Jacobsen*, 518 P.3d at 65–66.
[219] *See id.*
[220] *Id.*
[221] *See infra* Part II.C.
[222] *Jacobsen*, 518 P.3d at 66.
[223] *Id.* at 68.
[224] *See infra* Part II.C.

even qualify as valid interests is questionable given the high bar the Court has set when evaluating infringements on the right to "free and open" elections.[225] Even if the Court did regard them as valid interests, it could not conclude that those interests received sufficient evidentiary support—anecdotes and hypotheticals will likely not sway the Court on this issue.

It follows that Doe has a strong claim that the age restrictions in Article VI, Section 3(1) are unconstitutional based solely on the fundamental right afforded in Article II, Section 13.

B. Article II, Section 14 Claim

Doe can try to argue that Article II, Section 14, as soon as she turns 18, affords her the rights of all adults for all purposes, which must include running for any office.[226] However, Doe will likely not win on this issue. When the Montana Supreme Court reviews the 1972 Convention transcripts, they will easily detect that the delegates did not intend for this right to afford any adult to run for any public office.[227] This clear intention will mitigate the support the plain language of the statute would afford to Doe.[228] Doe, though, can derive some support for her other claims from the debate over Section 14.[229] The delegates expressed a clear desire not to inhibit the legislature's ability to refine the qualifications necessary for certain offices.[230] Though the delegates were referring to professional qualifications such as a law degree for candidates for attorney general,[231] the intentionality of delegates with respect to allowing qualifications to change over time adds another point to Doe's total as she tries to beat out an ageist constitutional provision.

C. Article II, Section 15 Claim

Doe, just 17, can bring up Article II, Section 15, of the Montana Constitution as a reminder the Framers only intended to limit the rights of young people where doing so was for their own protection and enhancement.[232] The committee responsible for the Section intended for the rights of minors to be co-equal with the rights of adults except for where there was a "clear showing" that a limitation of such rights was demanded by the "special status of minors."[233] The Framers helped clarify this intent by providing examples of laws that protected and enhanced Montana's youth—age requirements to drive and drink alcohol.[234] It is true that a few of the

[225] *Jacobsen*, 518 P.3d at 65 (stating that strict scrutiny, the most stringent level of scrutiny, is applied when a statute interferes with a fundamental right. Because the right to vote is included in the Montana Constitution's Declaration of Rights, it is fundamental).
[226] *See* discussion *supra* Section I.A.
[227] *See supra* Part II.A.
[228] *See* Nelson v. City of Billings, 412 P.3d 1058, 1064 (Mont. 2018).
[229] *See supra* Part II.A.
[230] *See id.*
[231] *See* CON CON, *supra* note 17, at 1745–48.
[232] *See id.* at 1749–50.
[233] *See id.* at 1750.
[234] *See id.* at 1751. This language could be used to support an argument for lowering the voting age given, if anything, the special status of minors—as the individuals who will be forced to live in a world with a much more hostile environment—if anything demands that they have more of a voice in our democratic processes. That is obviously a harder argument to make and lies outside the scope of this paper.

delegates to the 1972 Convention guessed that saddling youth with the possibility of running for office would effectively stunt their personal growth—in the words of Delegate Wilson:

> [W]e also feel that the young people themselves would feel that we were doing them a disservice if we allowed this office to be eligible to an 18-year-old vote. We feel that we are providing a goal for these young people to shoot at. . . . We are also saying that you have everything on a golden platter. What is there left? What goals are left for these young people to shoot at. I feel quite confident that my grandchildren would support me in the position I have taken on this, that they will look back when they become 30 years of age, 25 years of age, and they will say. "I wonder why you didn't leave some goals for us as young people to strive for to attain."[235]

The apparent need to preserve goals for young people, however, would likely not survive constitutional review. The limit on the ability of a 17-year-old to initiate a campaign for governor is not based on a clear showing related to the special status of minors. A candidate eligible to vote for an office in an upcoming election should be able to exercise the same rights as other Montanans. The State will struggle to explain how this limitation protects a class of Montanans that have substantial and growing interests in retaining power as quickly as possible in light of existential crises such as climate change.

D. Article VI, Section 3(1) Claim

As expressed in Part III, Section A, the interests that led to the age requirement in Article VI, Section 3(1), of the Montana Constitution lack the weight necessary to infringe the fundamental right expressed in Article II, Section 15, of the Montana Constitution.[236] Doe can also attack Article VI, Section 3(1) from two other angles: first, that the intent of the Framers means that the Montana Supreme Court should interpret the age requirement as being fixed to the public's perception of young people rather than being fixed to an arbitrary number; and, second, that enforcement of Article VI, Section 3(1) violates the equal protection rights of Montanans by treating similarly situated people differently.

The first attack strategy is based on the fact that the delegates were so heavily swayed by perceived public opinion in their decision to retain an age requirement.[237] The common objective among the majority of delegates was to set the age requirement at the lowest age that the public would accept.[238] At that time, few delegates could comprehend the level of political engagement and competency demonstrated by the young Montanans of today.[239] Even supporters of eliminating the age requirement, such as Delegate Dahood, lacked the political imagination that voters in their 20s could mount a real campaign for high office.[240] Delegate Harper, another supporter of eliminating the age requirement, unequivocally declared that "there will not be any

[235] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 891.
[236] *See* discussion *supra* Section III.A.
[237] *See supra* Part II.D.
[238] *See id.*
[239] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 885–91.
[240] *Id.* at 888 ("I daresay that, within our lifetime, it is highly unlikely that we will see anyone of a tender age under 25 that will ever succeed in gaining high state office.").

young person in his early 20's elected Governor."[241] As detailed above, those strong predictions have, at a minimum, been challenged by Montanans earning big wins in the state legislature in their teens and people in other states serving in executive offices in their twenties.[242] Delegate Berg, opposed to eliminating the age requirement, likewise tied his stance to the perception that the people of Montana were not ready to trust young people with the responsibilities tied to an executive office.[243]

After Doe has explained the objective of the delegates and the historical and surrounding circumstances that influenced their flip-flop, she can begin to make the case that public perception has changed. Unlike the Secretary in *Jacobsen*, though, Doe must do a thorough job of introducing a variety of information from a litany of experts. She should be able to make the case that the public, including youthful members of the public, has become much more tolerant of young people in positions of power.[244] She should also be able to show that the concerns of delegates about the "dignity" of executive offices, to the extent they were ever real, do not exist among Montana voters today.[245] Assuming Doe succeeds in identifying and sharing this evidence, the Court will have to seriously consider that 25 was never intended to be a fixed number and that the delegates would have supported and voted for a lower number if the public then shared the beliefs, opinions, and perspectives of the public today.

Doe can also attack Article VI, Section 3(1), as violative of the "basic rule" of equal protection that "persons similarly situated with respect to a legitimate governmental purpose of the law must receive like treatment."[246] Here, Doe and the remainder of eligible voters in Montana are similarly situated in all regards, with the exception of her age barring her from running for certain offices. The Court found in *Satterlee v. Lumberman's Mut. Cas. Co*. that where age alone delineates the rights and benefits of two otherwise similarly situated groups, then the Equal Protection Clause has been triggered.[247] In that case, the Court concluded that "the claimant's age, as defined by the eligibility requirements of receiving [certain government] benefits, [was] the only identifiable differentiating factor between the two classes."[248] Here, as in *Satterlee*, no other differentiating factor besides age separates the classes of Montana voters who can run for executive office—as the delegates noted, no identifiable measure of wisdom or maturity can definitively be tied to age.[249]

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[241] *Id.* at 886.
[242] *See supra* Part II.D.
[243] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 887.
[244] Amestoy, *supra* note 201.
[245] Merrit Kennedy, *Montana's Gianforte Pleads Guilty, Won't Serve Jail Time in Assault on Journalist,* NPR (June 12, 2017, 2:35 PM), https://www.npr.org/sections/thetwo-way/2017/06/12/532613316/montanas-gianforte-pleads-guilty-wont-serve-jail-time-in-assault-on-journalist.
[246] Satterlee v. Lumberman's Mut. Cas. Co., 222 P.3d 566, 570–71 (Mont. 2009) (citing MONT. CONST. art. II, § 4).
[247] *Id.* at 571.
[248] *Id.*
[249] *See, e.g.*, 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 888 (Delegate Rollins discussing that 18-year-old twins may have different levels of maturity).

Next, with the Equal Protection Clause triggered, the Court will have to determine which level of scrutiny to apply to the constitutionality of an age requirement.[250] As summarized by the Court in *Jaksha v. Butte-Silver Bow County:*

> The [supreme court] applies strict scrutiny, the most stringent level of review, when a law affects a suspect class or threatens a fundamental right. Under this standard, the State has the burden of showing the law is narrowly tailored to serve a compelling government interest. [The supreme court] appl[ies] middle-tier scrutiny when the law affects a right conferred by the Montana Constitution, but is not found in the Constitution's Declaration of Rights. Middle-tier scrutiny requires the State to demonstrate the law in question is reasonable and its interest in the resulting classification outweighs the value of the right to an individual. [The supreme court] appl[ies] the rational basis test when neither strict nor middle-tier scrutiny applies. Under this standard, the government must illustrate that the objective of the statute is legitimate and such objective is rationally related to the classification used by the Legislature.[251]

The State will try to argue that age is typically not a suspect class nor a quasi-suspect class, and thus infringements related to age undergo the rational basis test.[252] However, Doe can forcefully argue that strict scrutiny applies here because the age requirements infringe on her fundamental right not only to vote in an election but also to decide which candidate to support (including herself),[253] as guaranteed by Article II, Section 13.[254]

Fortunately for Doe, though, even if the Court applies the rational basis test, it should rule in her favor. "The rational basis test requires that (1) the statute's objective was legitimate, and (2) that the statute's objective bears a rational relationship to the classification used by the legislature."[255] In *Satterlee*, the Court found that a statute limiting certain benefits to workers over a certain age passed this test because "assisting the worker at a reasonable cost to the employer" so that the wage-loss benefit bore "a reasonable relationship to actual wages lost."[256] Here, Doe can cast doubt on the significance of the interests asserted by proponents of an age requirement as well as whether an age limit has a reasonable relationship to those interests.

In the interest of preserving goals for young people, Doe can demonstrate that this is not a legitimate interest. The State need not concern itself with whether young people feel as though they have sufficient goals to strive for in their adulthood. For the Court to recognize this interest, it would have to embrace an ageist and paternalistic stance that is out of touch with Montanan's appreciation for individual autonomy.[257]

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[250] *See Satterlee*, 222 P.3d at 571.
[251] Jaksha v. Butte-Silver Bow Cnty., 214 P.3d 1248, 1253 (Mont. 2009).
[252] *Id.*
[253] *See* Mont. Democratic Party v. Jacobsen, 518 P.3d 58, 65 (Mont. 2022).
[254] *See* State *ex rel.* Holliday v. O'Leary, 115 P. 204, 204 (Mont. 1911).
[255] *See Satterlee*, 222 P.3d at 572.
[256] *Id.* at 575.
[257] *See, e.g.*, MONT. CONST. art. II, § 10 (detailing Montanan's "Right to Privacy").

In the interest of maintaining the "dignity" of executive offices, Doe can again delegitimize this as a valid interest of the State. The State has an obligation to run "free and open" elections[258] but is not in the position to alter unsubstantiated concerns about the public's perception of various political offices. If the Court recognized this as a valid interest, it would effectively recognize the State's ability to go beyond the drafting, execution, and adjudication of laws and into the political realm. This again would cut contrary to Montanan's expectations of a government that recognizes its limited role.[259]

In the interest of ensuring only "mature" candidates serve as executive officials, Doe will have no problem painting this as an ageist argument that, if recognized, would have severe unintended consequences. Namely, like several delegates,[260] she can argue that tests for the "effectiveness" of a candidate would warrant a cap on the age at which someone can run for executive office. Furthermore, she can question whether the State has demonstrated that its regulation on age bears a reasonable relationship to concerns about maturity. This would force the State to present evidence that paints youth in a very negative light and would undermine the State's other efforts to empower youth to participate in public life. Given that Doe should win under rational basis review, she would certainly succeed if the Court applied a strict scrutiny review to this case.

III. Age Requirements Violate the Fundamental Right to Suffrage

The framers of state constitutions during the late 19th and early 20th centuries had grown weary of political parties exercising too much control over electoral processes.[261] In Montana, the Framers of the 1889 Constitution took pains to clearly establish a fundamental right to not only vote in elections but also to participate in the nomination and selection of candidates.[262] The Framers of the 1972 Montana Constitution recognized the importance of such explicit and significant political rights, which explains why they quickly and unanimously voted to advance those same rights in the updated Constitution.[263] However, the delegates to the 1972 Constitutional Convention erred in one provision by setting forth a fundamental right to participate in the democratic process and in another by restricting that right based on ageist and arbitrary reasoning. This article has made clear that the ABFR contradiction in the Montana Constitution cannot stand, nor will it stand, when it is inevitably challenged in court.

Montana is not the only state with an "Age Before Fundamental Rights" contradiction in its constitution. In Nebraska, "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."[264] Yet, Nebraskans must be at least 21 years old to serve in the state legislature[265] and at least 30 to run for governor or lieutenant governor.[266] Nebraskans seeking to challenge these outdated age

[258] *Id.* § 13.
[259] *Id.* § 10.
[260] 4 MONT. LEGISLATURE ET AL., *supra* note 45, at 981–82.
[261] *See generally* State *ex rel.* Holliday v. O'Leary, 115 P. 204, 204 (Mont. 1911).
[262] *See id.*
[263] *See supra* Part II.C.
[264] NEB. CONST. art. I, § 22 (2020).
[265] NEB. CONST. art. III, § 8 (2020).
[266] NEB. CONST. art. IV, § 2 (2020).

requirements do not have the benefit of full transcripts from the most recent constitution convention; however, many of the same arguments that Jane Doe could make in Montana may apply to Nebraska and other states with similar contradictions.

Voters should be trusted to decide who has the capacity, qualifications, and experience necessary to serve in any political office. For a state to rob voters of their choice of candidate is an affront to the principles of self-determination and full political participation. Young Americans today are not angry about having too many political opportunities; they are rightfully demanding more seats at the table and more time at the microphone. Ageist sentiments should never have been constitutionalized. Eventually, a young Montanan will exercise their fundamental right to suffrage and run for an executive office; when they do, the Montana Supreme Court should resolve the ABFR contradiction in favor of the competency of Montana voters and young people in the state.