

SENATE JOINT RESOLUTION NO. 15

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

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA THAT IT IS THE EQUAL RESPONSIBILITY OF THE LEGISLATURE, GOVERNOR, AND JUDICIAL BRANCH TO INTERPRET AND MAINTAIN FIDELITY TO THE CONSTITUTION AND THAT NO SINGLE BRANCH HAS EXCLUSIVE POWER TO BIND ITS DECISIONS ON ANOTHER BRANCH OF GOVERNMENT AND THAT THE 1803 CASE OF MARBURY VERSUS 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.

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

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

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

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

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

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

1 488 P.3d 548, that "[s]ince Marbury, it has been accepted that determining the constitutionality of a statute is
2 the exclusive province of the judicial branch"; and

3 WHEREAS, the Montana Supreme Court in *McLaughlin v. Montana State Legislature*, 2021 MT 178,
4 405 Mont. 1, 493 P.3d 980, states that "the courts, as final interpreters of the Constitution, have the final
5 obligation to guard, enforce, and protect every right granted or secured by the Constitution" and observing that
6 "since the early 1800s, the idea that the Supreme Court has the power to pass upon constitutional questions
7 and that its decisions were final and binding upon the other two branches of government has been widely
8 accepted"; and

9 WHEREAS, the above quote, which has been historically stated by courts and law schools for decades,
10 is a myth and is not an accurate quote or a correct interpretation of *Marbury v. Madison*; and

11 WHEREAS, the decision of Chief Justice John Marshall in *Marbury v. Madison* never says that
12 determining the constitutionality of a statute is the "exclusive" province of the judicial branch; and

13 WHEREAS, *Marbury v. Madison* never says that decisions of the courts "were final and binding upon
14 the other two branches of government"; and

15 WHEREAS, Chief Justice Marshall stated that a law repugnant to the constitution is void; it is equally
16 valid that an opinion by the court that is repugnant to the constitution is equally void.

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18 NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF
19 THE STATE OF MONTANA:

20 (1) That the belief that the court has exclusive authority to interpret the constitution and that its
21 decisions are binding on the other two branches is a myth based on a faulty understanding of *Marbury v.*
22 *Madison*. The executive, legislative, and judicial branches of government have a co-equal responsibility under
23 oath to interpret and maintain fidelity to the constitution. It is repugnant to the constitutional doctrines of
24 separation of powers and checks and balances to grant exclusive responsibility and power in any of the three
25 branches of government to say what the law is, or to be the final arbiter of what the constitution means. That
26 while the legislative and executive branches should respect the opinions of the court, the legislature and the
27 executive have equal roles in determining the constitutionality of any statute or decision. Changes to the
28 constitution are not the prerogative of governors, courts, or legislators, but in the power of the people to accept

1 or reject amendments to the constitution.

2 (2) That the Secretary of State is hereby directed to send a copy of this resolution to the Montana
3 Supreme Court, THE CLERK OF THE MONTANA SUPREME COURT, the clerk of each district court in Montana, the
4 Water Court, the Governor of the State of Montana, THE ATTORNEY GENERAL OF THE STATE OF MONTANA, THE
5 COUNTY ATTORNEY OF EACH COUNTY IN MONTANA, the head of each administrative agency in the state, ~~and~~ the
6 presiding officers of each of the legislative houses in the several states, THE UNITED STATES SUPREME COURT,
7 THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, AND THE UNITED STATES
8 ATTORNEY FOR THE DISTRICT OF MONTANA.

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