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Cross v. VanDyke*:¹ Admitted Only Means Admitted*Tyler Stockton**

I. INTRODUCTION

Five delegates to the 1972 Montana Constitutional Convention sued to block Lawrence VanDyke's ("VanDyke") name from appearing on the ballot as a candidate for the Montana Supreme Court, arguing he did not meet the minimum eligibility requirements. The Court, in a 4–3 vote, found VanDyke eligible because Article VII, Section 9(1) of the Montana Constitution only requires one be "admitted" to the Montana Bar and not "admitted" and on "Active Status" per the Montana Bar By-Laws.

II. FACTUAL AND PROCEDURAL BACKGROUND

VanDyke was admitted to the Montana Bar in October of 2005. From 2007 to 2012, VanDyke voluntarily chose to be on "inactive" status with the Montana Bar. On December 8, 2012, VanDyke returned to "active" status and filed to run as a candidate for the Montana Supreme Court on March 10, 2014. On March 21, 2014, five members of the 1972 Montana Constitutional Convention filed suit to remove VanDyke's name from the ballot. The complaint alleged VanDyke did not meet the minimum requirements for judicial officers, which required that one be "admitted to the practice of law for five years."² On summary judgment, the district court found in favor of the plaintiffs. VanDyke immediately appealed to the Montana Supreme Court.³ On July 22, 2014, by a vote of 4–3, the Court reversed the district court and held VanDyke met the eligibility requirements.⁴

III. MAJORITY OPINION

Writing for the majority, Justice Baker relied on textual construction of Article VII, Section 9(1) and a historical examination of the 1972 Constitutional Convention's adoption of the provision.

¹ *Cross v. VanDyke*, 332 P.3d 215 (Mont. 2014).

² The full text of the provision reads: "A citizen of the United States who has resided in the state two years immediately before taking office is eligible to the office of supreme court justice or district court judge if admitted to the practice of law in Montana for at least five years prior to the date of appointment or election." Mont. Const. art. VII, § 9(1).

³ *Cross*, 332 P.3d at 215.

⁴ *Id.* at 216.

Constitutional provisions must be given their plain meaning, and every word and clause must be given effect.⁵ Prior case law held that “the qualifications for Supreme Court Justice are dictated solely by the Constitution and covered exclusively in Article VII, Section 9.”⁶ Since all members of the Montana Bar, regardless of their status, are “admitted,” and Article VII, Section 9(1) only states one must be “admitted,” that is the crucial requirement for eligibility. In addition, the eligibility requirements for Attorney General specifically require candidates have “active” practice, language noticeably absent from the judicial qualifications.⁷ The Court refused to read an “active” practice requirement into the judicial eligibility requirements because it would make the constitutional requirements for the Attorney General surplus language.⁸

The Court reinforced its conclusion with a historical argument. Citing precedent, even if the plain meaning construction is quite clear, if any ambiguity remains and the other possible interpretations are plausible, the Court looks to legislative history for clarification.⁹ During the Constitutional Convention, the Judiciary Committee developed two different proposals. One required candidates be “experienced with the law in Montana for at least five years.” The other simply required candidates be “admitted to the practice of law for five years.” After intense debate, the full convention adopted the current language. The Court concluded that the convention’s decision to reject the more stringent requirements in favor of a “more elastic and flexible” version was compelling.¹⁰ Therefore, the Constitution only requires the candidate be admitted to the Montana Bar for five years, not on “active” status.

⁵ *Id.* at 217, 219.

⁶ *Id.* at 217 (citing *Reichert v. State*, 278 P.3d 455, 476 (Mont. 2012) (Justice Nelson’s opinion noted in full that “Article VII, Section 9(1) contemplates that the qualifications for these offices are dictated solely by the Constitution.”)).

⁷ *Id.* at 219 (the full text of Article VI, Section 3(2) reads: “Any person with the foregoing qualifications is eligible to the office of attorney general if an attorney in good standing admitted to practice law in Montana who has engaged in the active practice thereof for at least five years before election.”).

⁸ *Id.* (citing *Friends of the Wild Swan v. Dept. of Nat. Resources & Conserv.*, 127 P.3d 394 (Mont. 2005); *Keene Corp. v. U.S.*, 508 U.S. 200, 208 (1993) (“Where Congress includes particular language in one section of a statute, but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”)).

⁹ *Cross*, 332 P.3d at 220 (citing *Racicot v. Dist. Ct.*, 794 P.2d 1180 (Mont. 1990); *State v. Gregori*, 328 P.3d 1128 (Mont. 2014)).

¹⁰ *Cross*, 332 P.3d at 220–222. This version was accompanied with notes stating that its strength was in its “its elasticity and flexibility” as well as its “force in its clarity.” *Id.* at 221.

IV. DISSENTING OPINION

The dissent argued that the majority's textual reading of Article VII, Section 9(1) lacks a proper understanding of Article VII, Section 2(3).¹¹ Article VII, Section 2(3) gives the Supreme Court the power to "make rules governing appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members."¹² The Court exercised this power by adopting the Montana Bar By-Laws. Therefore, the definition of "admitted to the practice of law" ought to be drawn from the By-Laws. VanDyke was prohibited from practicing law while he was on inactive status with the Montana Bar. Article VII, Section 9(1) requires that VanDyke be "admitted to the practice of law" for at least five years. Since he could not *practice* while on inactive status, he is therefore ineligible to serve on the Montana Supreme Court because he has not met the five-year requirement.¹³

V. ANALYSIS

This case attempts to resolve a *de novo* interpretation of a constitutional provision. Using Montana's clear guidelines for interpreting *de novo* provisions, the majority properly examines the plain language of the text, construes all sections of the document to have meaning, and after concluding that there could be *some* ambiguity in the textual construction because both interpretations are plausible, turns to the constitutional history for clarification. The majority concluded that one view of the history is compelling and uses it to reinforce its textual conclusion, but that view overlooks the general ambiguity of the history as a whole. This ambiguity could have been easily resolved by adopting the Democracy Canon.

To begin, when interpreting the Constitution, "if possible, effect must be given to every section and clause."¹⁴ Interpretation ought not

¹¹ *Id.* at 223 (Cotter, Sandefur, & McLean, JJ., dissenting).

¹² *Id.* (citing Mont. Const. art. VII, § 2(3) ("[The Court] may make rules governing appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members. Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation.")).

¹³ *Id.* at 223–224.

¹⁴ *Martien v. Porter*, 219 P. 817 (Mont. 1923). This rule has been in place in Montana since 1898. *Mont. Coal & Coke Co. v. Livingston*, 52 P. 780, 780 (Mont. 1898) ("The principle of construction, as applied to a written constitution, is that effect must be given, if possible, to the whole instrument and to every section and clause."); *Kottel v. State*, 60 P.3d 403, 413 (Mont. 2002); *City of Missoula v. Cox*, 196 P.3d 452, 454 (Mont. 2008).

“create surplus language”¹⁵ and the intent of the framers of the Constitution is “determined from the plain language of the words used.”¹⁶

The judicial requirements of Article VII, Section 9(1) are:

A citizen of the United States who has resided in the state two years immediately before taking office is eligible to the office of supreme court justice or district court judge if admitted to the practice of law in Montana for at least five years prior to the date of appointment or election.¹⁷

Article VII, Section 2(3) also clearly gives the Court the authority to make rules regarding “admission to the bar and the conduct of its members.”¹⁸ Further, the requirements for the Attorney General note:

Any person with the foregoing qualifications is eligible to the office of attorney general if an attorney in good standing admitted to practice law in Montana who has engaged in the active practice thereof for at least five years before election.¹⁹

First, an interpretation that gives effect to each cause without creating surplus language would find that there is no “active” requirement for judicial officers. The language in the Attorney General requirements is very similar to that for judicial officers, but it has several modifiers that add significant meaning not present in the court eligibility requirements. The Attorney General qualifications add “good standing” and “active” to the requirements. To construe both clauses to have meaning with no surplus language, one must conclude that there is no “active” requirement for judicial officers.

Second, the plain language of the provisions in question force Article VII, Section 9(1) to constrain how Article VII, Section 2(3) is applied to the eligibility requirements of judicial officers. In Section 2(3),

¹⁵ *Kottel*, 60 P.3d at 413; *Hawley v. Bd. of Oil & Gas Conserv.*, 993 P.2d 677, 679–680 (Mont. 2000). Montana applies the rules of statutory construction to constitutional construction as well. *Keller v. Smith*, 553 P.2d 1002, 1006 (Mont. 1976); *Willems v. State*, 325 P.3d 1204, 1208 (Mont. 2014) (“When resolving disputes of constitutional construction, we apply the rules of statutory construction and give a broad and liberal interpretation to the Constitution.”).

¹⁶ *Willems*, 325 P.3d at 1208; *See also In re Pet. of McCabe*, 544 P.2d 825, 828 (Mont. 1975); *Cashman v. Vickers*, 233 P.897, 899 (Mont. 1924).

¹⁷ Mont. Const. art. VII, § 9(1).

¹⁸ *Id.* at art. VII, § 2(3).

¹⁹ *Id.* at art. VI, § 3(2).

the Court is given the authority only over “admission” and “conduct” of the Montana Bar.²⁰ Section 9(1) requires one be “admitted to the practice of law.” “Admission” and “admitted” are both derived from “admit.” The Court has consistently found that “[a]ll of the provisions of the Constitution bearing upon the same subject matter are to receive appropriate attention and be construed together.”²¹ Therefore, similar words must be construed similarly. The plain meaning of “admit” is to “allow to join a organization” or “allow to share in a privilege.”²² Since Article VII, Section 9(1) only requires “admission,” the Court’s authority over “admission” is all that is implicated when reconciling the requirements. The Court has exercised this authority by prescribing how one is “admitted” to the Montana Bar: by passing the Montana Bar and the required character and fitness examinations. The majority, therefore, correctly concludes the text clearly indicates no “active” requirement.

Nevertheless, the majority concludes that there is potentially *some* ambiguity in its interpretation because the appellee’s construction is plausible.²³ As such, the majority then examines the 1972 Montana Constitutional Convention notes for clarification. Here, the majority concludes that the convention’s rejection of the more stringent proposal for the judiciary language is compelling enough to support their textual reading.²⁴ This, however, does not fully address the events of the constitutional convention.

Article VII’s enactment history reflects a somewhat mixed constitutional intent that could be construed to require some sort of “active” legal practice in Montana or not. Depending on the emphasis given to the source, three different arguments can be made regarding the meaning of Article VII, Section 9(1). Two resolve in favor of an “active” requirement and one does not.

First, the only full convention commentary regarding Article VII, Section 9(1)’s adoption implies “active” practice in Montana. Delegate Berg commented during the floor debate:

It was the belief of the committee . . . that it takes experience in the courtroom, it takes experience in the actual practice in Montana in order to understand the procedures that we use, and that it would be harmful to the carrying out of justice in our courts if we had people

²⁰ *Id.* at art. VII, § 2(3).

²¹ *Jones v. Judge*, 577 P.2d 846, 849 (Mont. 1978); *Hilger v. Moore*, 182 P. 477 (Mont. 1919).

²² *The New Oxford American Dictionary* 21 (Erin McKean ed., Oxford U. Press 2005).

²³ *Cross*, 332 P.3d at 220.

²⁴ *Id.* at 222.

on the bench who were not intimately familiar not only with Montana substantive law, but more especially with procedural law, and we felt very strongly that one of the most significant qualifications would be actual trial practice in court.²⁵

Using Delegate Berg's comments as a guide to read the text of the provision, the five year requirement becomes the practical outworking of the goal: intimate familiarity with Montana law developed by actual legal practice. If one can only practice law in Montana while on an "active" status with the Montana Bar, then that goal is only met in that manner.

Second, the official Voter Guide distributed to all Montanans prior to the ratification of the constitution implies there is an "active" practice requirement.²⁶ Some have argued that since Montana voters were the ones who actually placed the 1972 Constitution into law, not the delegates to the convention, the information they used to decide is what ought to be referenced for interpretation.²⁷ Regarding Article VII, Section 9(1), the Voter Guide specifically notes:

Revises 1889 constitution by making residency requirements for candidates for district court judgeship the same as for supreme court and deleting age requirements. Requirement for five years of law practice new.²⁸

The Voter Guide's statement, "Requirement for five years of law practice new," provides the intent for "admitted to the practice of law." "Law practice," therefore, is the interpretation of "admitted." This would imply that those practicing law are those allowed to do so per the Montana Bar. The Court has authority over the "conduct" of the Bar and enacted the rules for practice.²⁹ These rules would be the appropriate test for determining eligibility and, according to them, one must be on "active" status.

Finally, the procedural history of Article VII, Section 9(1), which the majority finds conclusive, concludes that there is no requirement for "active" practice. During the Convention, the Judiciary

²⁵ 1971–1972 *Montana Constitutional Convention Verbatim Transcript* vol. V, 1119–1120 (1981) (hereinafter *Montana Constitutional Convention*).

²⁶ *Proposed 1972 Constitution for the State of Montana: Official Text with Explanation* 13 (1972) (hereinafter *Voter Guide*).

²⁷ Fritz Snyder, *The Right to Know and the Right to Participate in Montana*, 66 *Mont. L. Rev.* 297, 300–301 (2005); Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide* 15 (Greenwood Press 2001).

²⁸ *Voter Guide*, *supra* n. 26, at 13.

²⁹ *Mont. Const. art. VII, § 2(3)*.

Committee submitted two proposals for the language of Article VII.³⁰ The majority proposal passed out of committee on a five-to-four vote, but the minority proposal was the version actually enacted in the constitution.³¹ The majority proposal had much more specific eligibility requirements for judicial officers.³² It required they be “admitted to practice law in Montana and experienced with the law in Montana for at least five years immediately prior to filing for or being appointed to the position of justice.”³³ The majority proposal was rejected for the more elastic and flexible minority proposal.³⁴ This clear rejection of the *very* specific requirements demonstrates intent to not have those specific requirements. As such, if one weighs the procedural history as providing the overall intent of the convention, there is no “active” practice requirement in Article VII, Section 9(1).

Depending on the weight given to the source of intent, the outcome varies. The majority finds one of the readings compelling and uses it to enforce its very strong textual argument. There is, however, no fully clean answer from the history. At minimum, this injects some ambiguity to the historical argument, which could have been resolved with the Democracy Canon.

VI. THE DEMOCRACY CANON: A MISSED OPPORTUNITY

The court reached a sound textual construction, but admitted there could be some ambiguity and turned to Article VII’s rancorous history for clarification. As noted above, there is not much historical clarity: both sides have valid interpretations. As briefed by VanDyke, the Democracy Canon would have been an excellent resolution to this ambiguity.³⁵ The Democracy Canon, as articulated by Richard Hasen, is an interpretative canon that has been used in state courts since 1885 to resolve questions of either voter or candidate eligibility issues during an election.³⁶ Although never adopted in Montana, use of the Democracy Canon has been widespread throughout the nation.³⁷ Since *Cross v.*

³⁰ *Montana Constitutional Convention*, *supra* n. 25, at vol. I, 537–539.

³¹ *Id.* at vol. I, 537–539.

³² *Id.* at vol. I, 495.

³³ *Id.*

³⁴ *Id.* at vol. I, 514 (“This minority proposed Judicial Article is truly a viable cornerstone for the establishment and operation of the courts of Montana. Its elasticity and flexibility are its strength; its clarity lends it force.”).

³⁵ The Democracy Canon was fully briefed by VanDyke in this case and presented a ripe opportunity for the Court to adopt the one aspect of the canon.

³⁶ Richard L. Hasen, *The Democracy Canon*, 62 *Stan. L. Rev.* 69, 76–77 (2009).

³⁷ *Id.* Notably, Hasen cites only one Montana case: *Stackpole v. Hallahan*, 40 P. 80 (Mont. 1895). In *Stackpole*, a political party made a technical error in

VanDyke involves only a candidate eligibility question, analysis of the Democracy Canon and its applicability will be limited to that area.

The canon has typically been used when election statutes are ambiguous.³⁸ The general principle is that “[a]ll statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor.”³⁹ The purpose of the canon is: (1) to expand opportunities for registered voters to vote and have their votes counted (voter access and enfranchisement); and, to a lesser extent, (2) to promote competitive elections by including more candidates or parties on the ballot (electoral competitiveness).⁴⁰ “Liberal construction of election laws serves ‘to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow voters a choice on Election Day.’”⁴¹

The 2008 Alaska case of *Municipality of Anchorage v. Mjos*⁴² is a good example of the Democracy Canon’s application to candidate eligibility issues. Municipal statutes only allowed three consecutive terms on the Anchorage Assembly. Dick Traini was elected mid-term as an assemblyman, serving the last year of a full, three-year cycle and then was elected to two more full terms. Traini then declared his candidacy to run for another term. A local doctor filed for injunctive relief to declare that Traini’s “partial-term” was considered a term for counting the number of consecutive terms he could serve and therefore was ineligible to run again. The trial court found the “partial-term” counted as a term

appointment of a replacement nomination. The Court found that the error was not substantial and ruled the nomination valid. *Id.* Further examination of Montana cases demonstrates no specific adoption of the Democracy Canon. Some courts have found the Democracy Canon to be a “rule of thumb” and others have required their state legislatures to clearly intend to disregard the canon to remove its use. *Id.* at 88.

³⁸ *Id.* at 87–88.

³⁹ *Id.* at 76 (citing *Owens v. State ex rel. Jennett*, 64 Tex. 500, 509 (1885)).

⁴⁰ *Id.* at 84.

⁴¹ *Id.* at 77 (citing *Catania v. Haberle*, 588 A.2d 374, 379 (N.J. 1991)).

Some have criticized the use of substantive canons because they “load the dice” towards a particular outcome. However, Hasen defends the use of the Democracy Canon on several grounds. First, it enforces an under enforced constitutional right. Enforcing the right to vote under equal rights protections can be difficult and unwieldy, but the Democracy Canon serves in that stead by enforcing statutory provisions in favor of voting rights. Second, the Democracy Canon serves as a preference-eliciting mechanism for the legislature. Legislatures will respond if they don’t like it and not respond if they approve. Finally, it serves as a guiding principle that creates stability when election supervisors are partisan officials. *Id.* at 77–105.

⁴² *Municipality of Anchorage v. Mjos*, 179 P.3d 941 (Alaska 2008).

and that he was ineligible to run. The case was appealed to the Alaska Supreme Court,⁴³ where the court concluded:

In our view there is a presumption in favor of candidate eligibility. In cases where there is a statutory ambiguity as to whether or not a candidate is eligible to run for office, the statute should be construed in favor of eligibility, so long as it may be reasonably so read.⁴⁴

The court reasoned that both parties' views of the statute were reasonable interpretations and therefore, since the statute was ambiguous, it ought to be construed to allow eligibility.⁴⁵

Applied to the instant case, the Democracy Canon would clearly find VanDyke eligible to run. Article VII, Section 9(1) could be considered ambiguous for several reasons: (1) a lower court concluded one way and the Supreme Court another way on the text and history; and (2) the mixed constitutional history. Per the Democracy Canon, ambiguous statutes are construed in favor of eligibility and, like *Mjos*, VanDyke would be allowed to run.

The Democracy Canon would benefit Montanans in several ways. First, it would decrease the negative effect of lawsuits over candidate eligibility. The Secretary of State screens to determine if a candidate is eligible to run.⁴⁶ VanDyke began to campaign after receiving the Secretary of State's certification, only to be stopped by litigation. The question surrounding his candidacy was legitimate, but it also cost a candidate, in a time sensitive race, months of campaign time and press regarding his possible ineligibility while the issue was litigated. The courts moved as fast as possible, indeed incredibly fast, but the litigation surely had a negative effect on his campaign. The Democracy Canon would have minimized the interference.

Second, the Democracy Canon would serve to remove some partisan election fights from judiciary. Elections have always been cantankerous, but the judiciary has become increasingly involved in recent years. The 2000 Presidential election is a perfect example. Candidates and advocates rush to the courts for injunctions, invalidations, and other legal remedies. Sometimes the resulting decisions change the outcome of an election. The instant case marks the Montana judiciary's entry into candidate eligibility questions. Whether right or wrong, these injections seem to cast a pall over the elections themselves. Those who lose in court and their supporters always believe

⁴³ *Id.* at 942.

⁴⁴ *Id.* at 943.

⁴⁵ *Id.*

⁴⁶ Mont. Code Ann. § 31-1-201 (2013).

the court was partisan and politicized. This is no less true for the instant case. The plaintiffs are supporters of VanDyke's opponent, Justice Mike Wheat, and VanDyke's removal would remove Justice Wheat's only challenger. Regardless of the outcome, one side would have viewed the court as partisan.

Implementation of the Democracy Canon, with a hefty explanation of its purpose and reasoning, could have resolved the current issue in a manner that favors electoral competition and would have set the stage for full adoption of the Democracy Canon in Montana. Such a decision would have helped reduce future judicial involvement in elections. Under such precedent, candidates and advocates would realize the Montana Supreme Court will construe ambiguous texts in favor of the candidate, the voter, and the ballot and it would keep elections where they belong: in the hands of the electorate.