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Confusion over sovereign immunity: What is Article II, Section 18 about?

By Anthony Johnstone*

Article II, Section 18 of the Montana Constitution (“State subject to suit”) says “[t]he state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a two-thirds vote of each house of the legislature.” Lawyers commonly understand this provision to waive the state’s “sovereign immunity,” except when a supermajority of the legislature confers such immunity by statute. A case challenging the 2015 Montana Legislature’s ratification of a water rights compact with the Confederated Salish and Kootenai Tribes, *Flathead Joint Board of Control v. State*,¹ presents an opportunity to clarify the various meanings of sovereign immunity in Montana law, and to confirm which forms of immunity the state constitution does, and does not, address.

Introduction

Two provisions of the compact and its associated administrative ordinance are at issue in the recent case because they purportedly grant the state sovereign immunity without the supermajority vote required by Article II, Section 18. First, the compact waives the tribes’ and the state’s jurisdictional “immunit[y] from suit, including any defense the State shall have under the Eleventh Amendment of the Constitution of the United States . . . to permit the resolution of disputes under the Compact by the board.”² Second, the ordinance establishes a joint water management board and confers upon its members and staff personal immunity “from suit for damages arising from the lawful discharge of an official duty associated with the carrying out of powers and duties set forth in the Compact or this Ordinance. . . .”³ This latter provision is expressly severable from the rest of the law in case it is invalid.⁴

The *state jurisdictional* immunity in the compact, and the *personal liability* immunity in the ordinance, are each distinguishable from *state liability* “immunity from suit for injury to a person or property” addressed by Article II, Section 18. The compact waives the state’s constitutional jurisdictional immunity for enforcement

proceedings in state, federal, and tribal courts, and does not create any new tort liability immunity implicating Section 18. The ordinance does not establish state immunity, but recognizes pre-existing common law personal immunities. These varieties of “sovereign immunity” arise from separate sources of law and serve different purposes. To understand how each immunity works, and where they stand in relation to each other and the state constitution, it helps to trace their origins in federal constitutional and state common law.

Sovereign immunity and related doctrines grew from roots in the common law long before Montana statehood. There are two main strands of immunities at play in claims brought against a state and its officers. First, sovereign immunity protects a state from jurisdiction in a court without its consent, and from entity liability for damages in civil suits. It arises from principles of sovereignty in constitutional law, including popular sovereignty, under which the source of the law may not be subjected to the law. Second, personal immunity protects state officers from personal liability for damages in civil suits for actions taken as state officers. It arises from public policy concerns in tort law, under which a fear of civil suits may interfere with an officer’s faithful execution of his duties. Personal immunity can be absolute depending on an officer’s function, and can be qualified depending on whether the officer acted in good faith. The forms of sovereign immunity that come to Montana law through the Montana Constitution, the legislature, and judicial decisions draw on these various immunities.

I. Constitutional sovereign immunities can protect states from either jurisdiction, or liability, or both

The concept of sovereign immunity arrived in the United States from English law, under which “no suit or action can be brought against the king . . . because no court can have jurisdiction over him.”⁵ Such jurisdiction would imply a superior power of courts over the king, which is inconsistent with the supreme power of the king as sovereign.⁶ In the Federalist Papers, Alexander Hamilton assured the states that the ratification of the United States Constitution would not alter the sovereign immunity “now enjoyed by the government of every State in the Union,” because “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.”⁷ Sovereign immunity stands “on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.”⁸ The implications of sovereign immunity include both

1 No. DA 16-0516 (Mont.) (docketed Aug. 30, 2016).

2 Mont. Code Ann. § 85-20-1901(IV).8).

3 Mont. Code Ann. § 85-20-1902.1-2-111.

4 Mont. Code Ann. § 85-20-1902.1-1-113.

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5 1 W. Blackstone, Commentaries on the Laws of England 234-235 (1765).

6 *Id.*

7 The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton) (emphasis in original).

8 *Nevada v. Hall*, 440 U.S. 410, 416 (1979) (quoting *Kawanakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (Holmes, J.)).

jurisdictional and liability immunities.⁹

A. Federal sovereign immunity protects states from both jurisdiction and liability.

The question of whether the states consented to suit in federal court under the new Constitution soon arose in a case brought by a citizen of North Carolina against the State of Georgia.¹⁰ A majority of justices in that case held that Georgia was subject to suit, relying on the text of Article III, Section 2 (“The judicial Power [of the United States] shall extend . . . to Controversies . . . between a State and Citizens of another State”),¹¹ as well as new American principles of popular sovereignty (the people not their governments are sovereign).¹² The states, apparently surprised at the Court’s conclusion, within two years ratified the Eleventh Amendment: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”¹³ Although the Constitution speaks only to suits against states by citizens of other states, the Supreme Court now recognizes general state sovereign immunity against federal jurisdiction¹⁴ and most federal law regardless of the plaintiffs’ state citizenship,¹⁵ except when expressly abrogated by Congress and the Constitution.¹⁶ The federal courts’ extension of sovereign immunity beyond the text of the Eleventh Amendment has drawn critics,¹⁷ but is well-established.

Sovereign immunity of states under federal law exists independent of state law and is motivated by both jurisdictional and liability concerns. With respect to jurisdiction, sovereign immunity “prevent[s] the indignity of subjecting a State to the coercive process of judicial tribunal at the instance of private parties.”¹⁸ With respect to liability, sovereign immunity prevents a state from “the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy

9 *Wood v. Montana Dept. of Revenue*, 826 F. Supp. 2d 1232 (D. Mont. 2011) (“There are two forms of sovereign immunity: (1) sovereign immunity under the Eleventh Amendment, which bars federal lawsuits against states and (2) sovereign immunity under the broader doctrine of state sovereign immunity, which shields a state from liability in both federal and state court, unless it has consented to be sued.”).

10 See, *Chisolm v. Georgia*, 2 Dall. 419 (1793).

11 See, e.g., *Chisolm*, 2 Dall. at 450-53 (opinion of Blair, J.).

12 See, e.g., *Chisolm*, 2 Dall. at 469-80 (opinion of Jay, C.J.), but see *id.* at 449 (Iredell, J., dissenting) (“there are no principles of the old law, to which we must have recourse, that in any manner authorise the present suit, either by precedent or by analogy”).

13 U.S. Const., Amend. XI.

14 See, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

15 See, *Alden v. Maine*, 527 U.S. 706 (1999).

16 See, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (“the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment”).

17 See, e.g., Erwin Chemerinsky, “Closing the Courthouse Doors,” 71 Mont. L. Rev. 285, 291 (arguing “the concept of sovereign immunity was inconsistent with the rule of law,” and the Eleventh Amendment only preserves narrow immunity for diversity jurisdiction); but see William Baude, Sovereign Immunity and the Constitutional Text, 103 Va. L. Rev. ___ (forthcoming 2017) (summarizing several defenses of state sovereign immunity, and offering a novel defense of it as a common-law rule protected as a “constitutional backdrop”).

18 *In re Ayers*, 123 U.S. 443, 505 (1887) (“It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests.”); see also, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996).

on its treasury or perhaps even government buildings or property which the State administers on the public’s behalf.”¹⁹ Consistent with these concerns, federal constitutional sovereign immunity has limits. States can consent to suit through powers originally delegated in the United States Constitution such as the federal judicial power of Article III and the congressional civil rights enforcement power of the Fourteenth Amendment, or through legislation or other official waiver of sovereign immunity from suit in state, federal, or tribal courts.²⁰ Furthermore, state officers acting on behalf of a state remain subject to suit in their official capacity for injunctive or declaratory relief, even when a judgment would have the effect of enjoining or declaring invalid the execution of state law.²¹ As described below, sovereign immunity under federal law also does not prevent some damages claims against state officers in their personal capacity, as long as the claim does not result in a judgment against the state treasury.²²

A. Montana’s sovereign immunity also protects the state from both jurisdiction and liability.

Like the Eleventh Amendment, Montana’s original 1889 Constitution addressed state sovereign immunity only indirectly. Prior to statehood, the territorial supreme court recognized sovereign immunity against a contract claim in 1868, holding, “unless permitted by some law of this Territory, or of the general government, no citizen of this Territory can sue it.”²³ The statehood constitution assumed rather than expressed sovereign immunity in state courts, providing for a Board of Examiners to consider “all claims against the state” before the legislature acted upon them.²⁴ As the Montana Supreme Court later put it, “the legislature found itself in the unpalatable position of acting as judge, jury, and responsible party in determining and settling such tort claims.”²⁵ In 1963, the legislature limited sovereign immunity by deeming the purchase of liability insurance for either state or local governments to waive immunity to the extent of the insurance coverage.²⁶ The Montana Supreme Court unanimously reaffirmed the doctrine on the eve of the 1972 Constitutional Convention, citing the legislature’s attempts to limit sovereign immunity as evidence of its continued existence.²⁷

I. Article II, § 18 concerns only state liability immunity from tort damages.

For a brief period, Montana abolished a form of sovereign

19 *Alden v. Maine*, 527 U.S. 706, 749 (1999); see also, *Hess v. Port Authority Trans-Hudson Corporation*, 513 US 30, 48-49 (1994).

20 See, U.S. Const. Art. III, § 2; U.S. Const. Amend. XIV, § 5. See also, *Alden*, 527 U.S. at 755; *Lapides v. Board of Regents of Univ. System of Ga.*, 535 US 613, 622 (2002) (“This Court consistently has found a waiver when a State’s attorney general, authorized (as here) to bring a case in federal court, has voluntarily invoked that court’s jurisdiction.”).

21 See, *Alden*, 527 U.S. at 756-57; see also, *Ex parte Young* (209 U.S. 123, 159 (1908)) (“the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity.”).

22 See, *Alden*, 527 U.S. at 757; see also, *Edelman v. Jordan*, 415 US 651, 663 (1974) (“a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.”).

23 *Langford v. King*, 1 Mont. 33, 38 (1868).

24 See, 1889 Mont. Const. Art. VII, § 20; cf. 1884 Mont. Const., Art. V, § 18.

25 *Pfost v. State*, 713 P.2d 495, 498 (Mont. 1985), overruled in part, *Meech v. Hillhaven West, Inc.*, 776 P. 2d 488, 491 (Mont. 1989).

26 See, An Act Prohibiting the Defense of Sovereign Immunity Where Public Bodies are Insured, ch. 240, 1963 Mont. Laws 748 (codified at § 40-4402, R.C.M. 1947).

27 See, *Kaldahl v. State Hwy. Comm’n*, 490 P.2d 220, 221 (1971) (“The legislature has spoken and we are bound by its enactments.”).

immunity through its new 1972 Constitution.²⁸ Several delegates introduced a proposed provision in the Declaration of Rights: “The State of Montana and its subdivisions shall be subject to the same liabilities as a natural person.”²⁹ The Judiciary Committee referred the proposal to the Bill of Rights Committee.³⁰ That committee proposed “Non-Immunity from Suit” as new Section 18 to the Declaration of Rights: “The state and its subdivisions shall have no special immunity from suit. This Provision shall apply only to causes of action arising after June 1, 1973.”³¹ The committee report noted trends in citizen concern, legal scholarship, and 16 state judiciaries that “the doctrine no longer has a rational justification in law.”³² The committee’s conclusions found support in the influential Bill of Rights study prepared for the delegates by Rick Applegate, who reviewed modern criticism of the ancient doctrine yet also noted the difficulties presented by abolition.³³ Indeed, the committee found sovereign immunity “repugnant to the fundamental premise of the American justice: all parties should receive fair and just redress whether the injuring party is a private citizen or a governmental agency.”³⁴

In the floor debate, the delegates focused on tort liability, despite expressing broader concerns about sovereign immunity. Delegate Marshall Murray introduced the proposal by explaining “the doctrine of sovereign immunity, which we are attempting to do away with by this particular provision, really means that the king can do whatever he wants but he doesn’t have to pay for it; and we’d like to do away with that doctrine.”³⁵ Delegate Wade Dahood explained how the Supreme Court and legislature both seemed to defer to the other in hesitating to abolish sovereign immunity, even if “it’s an inalienable right to have remedy when someone injures you through negligence and through a wrongdoing, regardless of whether he has the status of a governmental servant or not.”³⁶ As debate proceeded, Delegate Otto Habedank proposed, and the convention unanimously approved, a limit on the abolition’s scope to “suit for injury to a person or property,” which he understood to include tort actions, leaving the legislature “free to make [the immunity waiver] more open if they desire to in the future.”³⁷ Later, the Style and Drafting Committee retitled the provision “State subject to suit,” and clarified the scope of “The State of Montana and its subdivisions” to include “The state, counties, cities, towns, and all

other local governmental entities.”³⁸ In retrospect, this clarification of the provision’s application to tort liability was fateful. It sacrificed the broader principle originally suggested by the text “no special immunity to suit,” in favor of a narrower right to recover tort damages from the state treasury.³⁹

The People of Montana ratified the new Constitution, including the sovereign immunity provision, described as a “[n]ew provision abolishing the doctrine of sovereign immunity (‘the King can do no wrong’) and allowing any person to sue the state and local governments for injury caused by officers and employees thereof.”⁴⁰ The legislature responded to the abolition of sovereign immunity with the Montana Comprehensive State Insurance Plan and Tort Claims Act.⁴¹ At the same time, critics speculated about the fiscal and administrative impacts of governmental liability.⁴² In 1974, the Montana Legislature proposed, and the voters ratified, the power to invoke sovereign immunity to state tort liability by legislative supermajorities.⁴³ Professors Larry M. Elison and Fritz Snyder comment, “[t]he people accepted the proposed change” to sovereign immunity in the ratification of the 1972 Constitution, but “[e]ffective lobbying by tradition-bound politicians and frightened government employees quickly reversed the change.”⁴⁴ Still, they did so through ratification by 55 percent of voters at the 1974 general election.⁴⁵ The ballot language for the amendment explained, “[p]resently the Constitution of Montana provides that the state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to person or property. This amendment would allow specific exceptions to the waiver of sovereign immunity by a two-thirds vote of each house of the legislature.”⁴⁶ The provision now reads, as amended:

Section 18. State subject to suit. The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature. ~~[This provision shall apply only to causes of action arising after July 1, 1973.]~~

Thus, sovereign immunity, which once arose only in common-law judicial decisions, gained express constitutional status in a

28 See Barry L. Hjort, “The Passing of Sovereign Immunity in Montana: The King is Dead!”, 34 Mont. L. Rev. 283, 288 (1973) (Illinois abolished sovereign immunity in its 1970 Constitution, but allowed the legislature to create exceptions).

29 Del. Prop. 30, 1 Mont. Const. Conv. 124 (Introduced Jan. 26, 1972).

30 *Id.* at 531.

31 Bill of Rights Cmmt. Rpt., 11 Mont. Const. Conv. 637 (Reported Feb. 23, 1972).

32 *Id.* at 637.

33 See, Rick Applegate, “Bill of Rights,” Mont. Const. Conv. Study No. 10, 289 (1971-72).

34 11 Mont. Const. Conv. at 637.

35 V Mont. Const. Conv. at 1760 (Verb. Trans. Mar. 8, 1972).

36 *Id.* at 1764; *cf.* Mont. Const., Art. II, § 16 (“Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character.”)

37 *Id.* at 1761. In narrowing the scope to tort liability, Delegate Habedank noted the waiver would not extend to other forms of liability like contract. See *id.* (“I think there are many instances where there may be some governmental employees [who] do some things in connection with contractual fields that we try to stick the government for where there is a good reason to maintain our governmental immunity in those situations.”)

38 VII Mont. Const. Conv. at 2503 (Verb. Trans. Mar. 16, 1972).

39 As Delegate Habedank explained: “Limited as it is, for injury to a person or property, the Legislature is still free to make it more open if they desire to do so in the future. But we at least have assured the people of the State of Montana that they can sue for negligent injury.” V Mont. Const. Conv. at 1761 (Verb. Trans. Mar. 8, 1972).

40 Prop. 1972 Const. for the State of Montana: Official Text with Explanation (1972), available at http://sos.mt.gov/Elections/Archives/1970s/1972/1972_VIP.pdf.

41 Ch. 380, 1973 Mont. Laws, (codified at Mont. Code Ann. §§ 2-9-101, et seq).

42 See, Hjort, 34 Mont. L. Rev. at 297 (“If left unchanged, Article II, § 18 portends, at best, an uncomfortable uncertainty. At worst, the spectre of disaster.”)

43 See, Sen. J. Res. 64, 1974 Mont. Laws 1610, Const. Amend. No. 2 (approved Nov. 5, 1974).

44 Larry M. Elison & Fritz Snyder, The Montana State Constitution: A Reference Guide 64 (Greenwood Press 2001).

45 Mont. Sec’y of State, “Amendments to the 1972 Montana Constitution,” available at http://sos.mt.gov/Elections/Ballot_Issues/documents/Constitutional-Ballot-Issues-1972-Current.pdf.

46 Voters’ Info. Pamphlet on Prop. Amend. C-2 (1974), available at http://sos.mt.gov/Elections/Archives/1970s/1974/1974_VIP.pdf.

backlash against an attempt to abolish it.

2. Article II, § 18 does not affect other forms of liability immunity, or jurisdictional immunity.

Montana courts generally read Article II, Section 18 consistent with its text and history to focus on tort liability against the state itself.⁴⁷ The legislature recognizes an arguably broader waiver in statute, including both state tort liability and liability for torts “of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function except as specifically provided by the legislature under Article II, Section 18, of The Constitution of the State of Montana.”⁴⁸ The legislature also acted to provide immunity from exemplary and punitive damages,⁴⁹ and capped governmental liability for tort damages.⁵⁰

Alongside its assumption of liability for officers acting within the scope of their duties, the legislature enacted several forms of what might more accurately be termed personal immunities for legislative, judicial, and certain quasi-legislative executive decisions.⁵¹ These provisions immunize not just the state when sued as an entity, but also immunize state employees when sued in their personal capacities.⁵² Relatedly, the legislature “provide[s] for the immunization, defense, and indemnification of public officers and employees civilly sued for their actions taken within the course and scope of their employment.”⁵³ This immunization and indemnification of state officers in their personal capacities exceeds the traditional scope of sovereign immunity under federal law, at least to the extent the personal capacity claims do not clearly seek damages from the public treasury.⁵⁴

The remaining jurisdictional and liability immunity outside of tort claims is not diminished by the Montana Constitution, or subject to Article II, Section 18. Beyond the scope of that provision’s tort immunity waiver, the general rule of sovereign immunity applies: “a state cannot be sued in its own courts without its plain and specific consent to suit either by constitutional provision or

by statute.”⁵⁵ The state waives sovereign immunity and consents to suit on certain claims, including contract claims.⁵⁶ Where there is no consent to suit, or where the state affirmatively confirms immunity, however, the law recognizes the state’s sovereign immunity untouched by the state constitution’s limited abolition of tort immunity.

II. Common-law personal immunity, not sovereign immunity, provides liability immunity to state officials.

American courts adapted the doctrine of personal immunities from English common law. For example, the United States Supreme Court recognized judicial immunity as early as 1872 in a case arising from a trial of one of the alleged participants in President Abraham Lincoln’s assassination. In holding the trial judge immune from civil suit, the Court cited English law for the absolute immunity of a judge’s actions in his official capacity: “This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences.”⁵⁷ A related “qualified” immunity developed in the common law where “absolute” immunity is unavailable, yet officers act in good faith pursuit of the law. In these cases the Court recognizes that “the general costs of subjecting officers to the risks of trial — distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service,” outweigh the benefit of holding even careless public officials liable for abuse of power.⁵⁸

Personal immunities are distinct from sovereign immunity, because they arise from public policy embedded in tort law rather than sovereignty principles recognized in constitutional law. As the United States Court of Appeals for the Ninth Circuit recently summarized:

As a general matter, individual or “[p]ersonal-capacity suits seek to impose personal liability upon a government official for [wrongful] actions he takes under color of . . . law,” and that were taken in the course of his official duties. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). By contrast, official capacity suits ultimately seek to hold the entity of which the officer is an agent liable, rather than the official himself. . . . For this reason, an officer sued in his official capacity is entitled to “forms of sovereign immunity that the entity, qua entity, may possess.” *Id.* at 167. An officer sued

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47 *Peretti v. State*, 777 P.2d 329, 332 (Mont. 1989) (“the waiver found in Art. II, sec. 18 extends only to tort actions, and not contract actions, involving injuries to a person or property”).

48 Mont. Code Ann. § 2-9-102.

49 See, Mont. Code Ann. § 2-9-105.

50 See, Mont. Code Ann. § 2-9-108.

51 See, Mont. Code Ann. §§ 2-9-111 (Immunity from suit for legislative acts and omissions), -112 (Immunity from suit for judicial acts and omissions), -113 (Immunity from suit for certain gubernatorial actions), & -114 (Immunity from suit for certain actions by local elected executives).

52 See, e.g., Mont. Code Ann. § 2-9-112 (“A member, officer, or agent of the judiciary is immune from suit for damages arising from the lawful discharge of an official duty associated with judicial actions of the court.”).

53 Mont. Code Ann. § 2-9-305(1).

54 See, *Blaylock v. Schwinden*, 862 F.2d 1352, 1354 (9th Cir. 1988) (in claims seeking indemnification under Mont. Code Ann. § 2-9-305, holding “The eleventh amendment does not wholly bar plaintiffs from federal court, however, because the complaint can be amended to claim only damages from the defendants in their individual capacities. A state indemnification statute does not automatically extend immunity to state officials. Thus, the eleventh amendment does not bar plaintiffs’ claim for damages against the defendants in their individual capacities.”) (citations and footnotes omitted); see, *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 317 n. 10 (1990) (“It may be that a simple indemnification clause, without more, does not trigger the doctrine [of sovereign immunity]. Lower courts have uniformly held that states may not cloak their officers with a personal Eleventh Amendment defense, by promising, by statute, to indemnify them for damages awards imposed on them for actions taken in the course of their employment.”).

55 *Peretti*, 777 P.2d at 332; see also, *Wood v. Montana Dept. of Revenue*, 826 F. Supp. 2d 1232 (D. Mont. 2011) (holding a state agency is immune to a federal Family and Medical Leave Act claim in federal court “because the State of Montana has not consented to be sued in state court under like circumstances,” outside of the scope of Article II, § 18).

56 Mont. Code Ann. § 18-1-404.

57 *Bradley v. Fisher*, 80 U.S. 335, 349 n. 11 (1872); see also, *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) (“Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction”).

58 *Harlow v. Fitzgerald*, 457 US 800, 816 (1982). Like sovereign immunity, qualified immunity is well established but criticized. See, e.g., William Baude, “Is Qualified Immunity Unlawful?,” U. Chi. Pub. L. Working Paper No. 609 (Jan. 9, 2017), available at <https://ssrn.com/abstract=2896508>.

in his individual capacity, in contrast, although entitled to certain “personal immunity defenses, such as objectively reasonable reliance on existing law,” *id.* at 166-67, cannot claim sovereign immunity from suit, “so long as the relief is sought not from the [government] treasury but from the officer personally.” *Alden v. Maine*, 527 U.S. 706, 757 (1999).⁵⁹

Thus, damages claims against the state as an entity are subject to sovereign immunity, conditional on compliance with Article II, Section 18 for tort liability. Damages claims against officers may be subject to personal immunities, either absolute or qualified.

Montana has adopted both forms of personal immunity, absolute and qualified, with its inheritance of the common law.⁶⁰ State agencies and their officers enjoy absolute quasi-judicial immunity from damages suits in their discretionary decisions to initiate and adjudicate administrative proceedings.⁶¹ Reiterating the English common law principle, the Montana Supreme Court has explained, “[l]ike judicial immunity, quasi-judicial immunity benefits the public—not the person being sued—by ensuring that quasi-judicial officers exercise their functions unfettered by fear of legal consequences; also like judicial immunity, quasi-judicial immunity extends only to acts within the scope of the actor’s jurisdiction and with the authorization of law.”⁶² Where this quasi-judicial immunity does not apply, an additional layer of common law immunity is provided by qualified immunity, which “operates to shield government officers performing discretionary functions from liability for civil damages when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁶³

Montana courts consistently distinguish these common-law personal immunities of individuals from constitutional state sovereign immunity, including the state’s immunity from tort liability

addressed by Article II, Section 18. These “are different concepts and are supported by different considerations of public policy,” the latter arising from ancient principles of sovereignty, the former arising from modern tort doctrine’s common-law adaptation to the ebb of those ancient principles as applied to public officers.⁶⁴ Thus, the “1972 Montana Constitution did not abolish prosecutorial immunity,”⁶⁵ or the related quasi-judicial immunity, as these immunities are “separate and distinct from sovereign immunity,” and therefore are “unaffected by the language of Art. II, Sec. 18.”⁶⁶ Because of this distinction, and because “quasi-judicial immunity is not a subject of Montana statutory law,”⁶⁷ there is no requirement for the legislature to act under the supermajority requirement of Article II, Section 18 for quasi-judicial immunity to protect state officers otherwise subject to these common-law personal immunities.

Conclusion

Sovereign and personal immunities are a complex inheritance of both constitutional and common law. Article II, Section 18 of the Montana Constitution concerns only one strand of sovereign immunity doctrine, the tort liability of the state. Although there may be good arguments in law and justice for abolition, federal and state courts have long established the sovereign and personal immunities that were untouched by the state constitutional waiver of tort liability immunity. These include the state’s jurisdictional immunity from suit without its consent, the state’s liability immunity from suit for damages outside tort, and state officers’ liability immunity from suit for damages arising from their performance of official duties. Under established law, the state may confirm or waive these other judicially recognized immunities without consideration of Article II, Section 18 or its supermajority rule. In the water rights compact with the Confederated Salish and Kootenai Tribes, for example, the state waives its constitutional sovereign immunity from jurisdiction in federal or tribal court, and confirms certain officers’ common-law personal immunity from suit for damages. Recognition of these various sovereign and personal immunities, and their distinct sources and purposes, may help to clarify the resolution of legal problems that arise when a state and its officers land in court.

59 *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015).

60 *See*, Mont. Code Ann. § 1-1-108 (“In this state there is no common law in any case where the law is declared by statute. But where not so declared, if the same is applicable and of a general nature and not in conflict with the statutes, the common law shall be the law and rule of decision.”).

61 *See*, *Koppen v. Board of Medical Examiners*, 759 P.2d 173, 175-76 (Mont. 1988); *but see*, *Nelson v. State*, 195 P.3d 293, 296-297 (Mont. 2008) (“Where the administrative function is mandated by statute and, thus, purely ministerial in nature, the administrative entity is not acting in a quasi-judicial manner and is not entitled to quasi-judicial immunity.”).

62 *Steele v. McGregor*, 956 P.2d 1364, 1369 (Mont. 1998).

63 *Rosenthal v. County of Madison*, 170 P.3d 493, 500 (Mont. 2007).

64 *State ex rel. Dept. of Justice v. District Court of Eighth Judicial Dist. In and For Cascade County*, 560 P.2d 1328, 1330 (Mont. 1977).

65 *Id.*

66 *Koppen*, 759 P.2d at 175; *compare*, *Rahrer v. Board of Psychologists*, 993 P.2d 680, 684-685 (J. Nelson, specially concurring) (“In my view our creation of the doctrine of quasi-judicial immunity is in direct violation of Article II, Section 18 of the Montana Constitution which abolished governmental immunity from suit absent a 2/3 vote of the legislature.”).

67 *See*, *Koppen*, 759 P.2d at 175; *see also*, *Rosenthal*, 170 P.3d at 498 (“Although Article II, Section 18, of the 1972 Montana Constitution abolished the concept of ‘sovereign immunity’; we have stated that neither the Constitution nor the Montana Tort Claims Act abolished prosecutorial immunity” for quasi-judicial officers).

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in his individual capacity, in contrast, although entitled to certain “personal immunity defenses, such as objectively reasonable reliance on existing law,” *id.* at 166-67, cannot claim sovereign immunity from suit, “so long as the relief is sought not from the [government] treasury but from the officer personally.” *Alden v. Maine*, 527 U.S. 706, 757 (1999).⁵⁹

Thus, damages claims against the state as an entity are subject to sovereign immunity, conditional on compliance with Article II, Section 18 for tort liability. Damages claims against officers may be subject to personal immunities, either absolute or qualified.

Montana has adopted both forms of personal immunity, absolute and qualified, with its inheritance of the common law.⁶⁰ State agencies and their officers enjoy absolute quasi-judicial immunity from damages suits in their discretionary decisions to initiate and adjudicate administrative proceedings.⁶¹ Reiterating the English common law principle, the Montana Supreme Court has explained, “[l]ike judicial immunity, quasi-judicial immunity benefits the public—not the person being sued—by ensuring that quasi-judicial officers exercise their functions unfettered by fear of legal consequences; also like judicial immunity, quasi-judicial immunity extends only to acts within the scope of the actor’s jurisdiction and with the authorization of law.”⁶² Where this quasi-judicial immunity does not apply, an additional layer of common law immunity is provided by qualified immunity, which “operates to shield government officers performing discretionary functions from liability for civil damages when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁶³

Montana courts consistently distinguish these common-law personal immunities of individuals from constitutional state sovereign immunity, including the state’s immunity from tort liability

addressed by Article II, Section 18. These “are different concepts and are supported by different considerations of public policy,” the latter arising from ancient principles of sovereignty, the former arising from modern tort doctrine’s common-law adaptation to the ebb of those ancient principles as applied to public officers.⁶⁴ Thus, the “1972 Montana Constitution did not abolish prosecutorial immunity,”⁶⁵ or the related quasi-judicial immunity, as these immunities are “separate and distinct from sovereign immunity,” and therefore are “unaffected by the language of Art. II, Sec. 18.”⁶⁶ Because of this distinction, and because “quasi-judicial immunity is not a subject of Montana statutory law,”⁶⁷ there is no requirement for the legislature to act under the supermajority requirement of Article II, Section 18 for quasi-judicial immunity to protect state officers otherwise subject to these common-law personal immunities.

Conclusion

Sovereign and personal immunities are a complex inheritance of both constitutional and common law. Article II, Section 18 of the Montana Constitution concerns only one strand of sovereign immunity doctrine, the tort liability of the state. Although there may be good arguments in law and justice for abolition, federal and state courts have long established the sovereign and personal immunities that were untouched by the state constitutional waiver of tort liability immunity. These include the state’s jurisdictional immunity from suit without its consent, the state’s liability immunity from suit for damages outside tort, and state officers’ liability immunity from suit for damages arising from their performance of official duties. Under established law, the state may confirm or waive these other judicially recognized immunities without consideration of Article II, Section 18 or its supermajority rule. In the water rights compact with the Confederated Salish and Kootenai Tribes, for example, the state waives its constitutional sovereign immunity from jurisdiction in federal or tribal court, and confirms certain officers’ common-law personal immunity from suit for damages. Recognition of these various sovereign and personal immunities, and their distinct sources and purposes, may help to clarify the resolution of legal problems that arise when a state and its officers land in court.

59 *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015).

60 *See*, Mont. Code Ann. § 1-1-108 (“In this state there is no common law in any case where the law is declared by statute. But where not so declared, if the same is applicable and of a general nature and not in conflict with the statutes, the common law shall be the law and rule of decision.”).

61 *See*, *Koppen v. Board of Medical Examiners*, 759 P.2d 173, 175-76 (Mont. 1988); *but see*, *Nelson v. State*, 195 P.3d 293, 296-297 (Mont. 2008) (“Where the administrative function is mandated by statute and, thus, purely ministerial in nature, the administrative entity is not acting in a quasi-judicial manner and is not entitled to quasi-judicial immunity.”).

62 *Steele v. McGregor*, 956 P.2d 1364, 1369 (Mont. 1998).

63 *Rosenthal v. County of Madison*, 170 P.3d 493, 500 (Mont. 2007).

64 *State ex rel. Dept. of Justice v. District Court of Eighth Judicial Dist. In and For Cascade County*, 560 P.2d 1328, 1330 (Mont. 1977).

65 *Id.*

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