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Reframing the Framework: Direct Democracy, State Constitutional Interpretation, and the Legislative-Administrative Question in Montana

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COMMENT

REFRAMING THE FRAMEWORK: DIRECT DEMOCRACY, STATE CONSTITUTIONAL INTERPRETATION, AND THE LEGISLATIVE–ADMINISTRATIVE QUESTION IN MONTANA

Michelle Tafoya*

I. Introduction

Under the 1972 Montana Constitution, the people reserve to themselves the power to enact or repeal legislation through the initiative and referendum process, both at the state and local level.[1] In Montana and most other states, however, direct lawmaking power over local government actions is limited to those acts considered legislative in character.[2] Because local governments exercise both legislative and administrative power, this subject matter limitation, grounded in separation of powers principles, presents a difficult question for state courts.[3] Since "[n]o one act of a governing body is likely to be solely administrative or legislative,"[4] many states that constitutionally guarantee or statutorily allow local initiatives and refer-

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1. Mont. Const. art. V, § 1, art. III, § 5(1), art. XI, § 8; Mont. Code Ann. § 7–5–131 (2015).

2. Mont. Code Ann. § 7–5–131; Town of Whitehall v. Preece, 956 P.2d 743, 747 (Mont. 1998).

3. Phillips v. City of Whitefish, 330 P.3d 442, 450–451 (Mont. 2014); McAlister v. City of Fairway, 212 P.3d 184, 193 (Kan. 2009) (quoting Rauh v. City of Hutchinson, 575 P.2d 517, 523 (Kan. 1978)).

4. *Town of Whitehall*, 956 P.2d at 749 (quoting Wichita v. Kan. Taxpayers Network, Inc., 874 P.2d 667, 672 (Kan. 1994)).

enda have struggled to find a way to consistently answer the legislative–administrative question.

In *Phillips v. City of Whitefish*,[5] the Montana Supreme Court recently held that a resolution authorizing an amended interlocal agreement between the City of Whitefish and Flathead County was an administrative act, despite the legislative nature of the original interlocal agreement.[6] In doing so, the Court applied a set of guidelines it previously adopted from the Kansas Supreme Court.[7] However, unlike Montana, the Kansas Constitution affords no constitutional guarantee to legislative initiative and referendum at the state or local level.[8] Since the Montana Supreme Court is required to follow the "principle that initiative and referendum provisions of the Constitution should be broadly construed to maintain the maximum power in the people,"[9] it is time to dispense with the *Whitehall* factors and replace them with an approach more consistent with the intent and purpose of the Montana Constitution's initiative and referendum provisions.

This comment discusses the history and purpose of the legislative initiative and referendum guaranteed by the Montana Constitution and proposes a new test for the legislative–administrative question. Part II describes the historical and theoretical background of the legislative initiative and referendum in Montana, both at the state and local level, and explains the constitutional, statutory, and common law underpinnings of the current legislative–administrative test. Part III argues for a re-evaluation of the current test and proposes a new framework that encapsulates a more accurate interpretation of Montana's constitutional guarantee to initiative and referendum at the local government level.

II. Origins and History of the Legislative Initiative and Referendum

Direct citizen lawmaking in the United States dates back to the American colonial era, when New England citizens first created the process of collectively proposing and voting on ordinances and other measures at annual town meetings.[10] In the years following the Declaration of Indepen-

5. 330 P.3d 442 (Mont. 2014).

6. *Id.* at 445–446.

7. *Town of Whitehall*, 956 P.2d at 749 (quoting *Kan. Taxpayers Network, Inc.*, 874 P.2d at 671–672).

8. City of Topeka v. Imming, 344 P.3d 957, 967 (Kan. App. 2015); *see* Kan. Const. art. II, §§ 1, 21, art. XII, § 5.

9. Chouteau Co. v. Grossman, 563 P.2d 1125, 1128 (Mont. 1977).

10. Joseph F. Zimmerman, The Referendum: The People Decide Public Policy 3 (2001); David D. Schmidt, Citizen Lawmakers: The Ballot Initiative Revolution 3–4 (1991) ("Since the seventeenth century, voters in hundreds of New England towns have exercised their lawmaking powers in annual town meetings, using a method similar to the Initiative: citizens place proposed ordinances or

dence, constitutional drafters adopted this shared decision making concept and applied it to the first state constitutions.[11] Generally skeptical of an elected legislature's ability to govern competently and without corruption, Thomas Jefferson and others introduced provisions that required the states to submit their proposed constitutions to the people for ratification.[12] By 1900, every state except Delaware required such voter approval.[13] By this time, "other states had begun debating the expansion of voter powers to include [i]nitiative and [r]eferendum [sic]: the right not just to block constitutional amendments, but to propose and enact new laws, and block enactments of the legislature, by citizen petition and popular vote."[14]

Encapsulated in the commonly used constitutional preamble "We the People," popular sovereignty principles provide the basis for the direct citizen lawmaking power.[15] Early initiative and referendum advocates argued that, "if citizens are sovereign, they have the innate authority to draft, adopt, and amend constitutions, and enact, amend, and repeal statutes."[16] Supporters further maintained that empowering citizens acts as a check on government corruption, an argument Montanans found particularly compelling during the copper king era.[17] In his 1907 address to the Montana Legislature, presidential candidate William Jennings Bryan aptly summarized the influence direct popular sovereignty concepts had on the initiative-referendum movement: "Why is there a demand for the initiative and referendum? Because the people have found that there is more virtue in the citizen than there is in his representatives . . . because the legislator is subjected to a temptation that does not come to the citizen."[18] Today, the 1972 Montana Constitution expressly incorporates the "fundamental principles of popular

other questions on the agenda by petition, meet and discuss the proposals, and then vote to accept or reject them.").

11. ZIMMERMAN, *supra* note 10, at 3–4; JOSEPH F. ZIMMERMAN, THE NEW ENGLAND TOWN MEETING; DEMOCRACY IN ACTION 3 (1999) (explaining that, with regard to the New England town meeting, Jefferson lauded the "ability of citizens to manage directly public affairs"). **R**

12. SCHMIDT, *supra* note 10, at 4; ZIMMERMAN, *supra* note 10, at 3–4. **R**

13. SCHMIDT, *supra* note 10, at 5. **R**

14. *Id.*

15. ZIMMERMAN, *supra* note 10, at 1; Michelle Bryan, Professor of Law, Alexander Blewett III School of Law at the University of Montana, Montana Supreme Court Introduction, *Phillips v. City of Whitefish* 11, (Apr. 11, 2014) (transcript on file with author). **R**

16. ZIMMERMAN, *supra* note 10, at 1. **R**

17. JOSEPH F. ZIMMERMAN, THE INITIATIVE: CITIZEN LAW-MAKING 130–131 (2d ed. 2014); LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE 93 (G. Alan Tarr, ed., Ref. Guides to the State Constitutions of the U.S., 2001).

18. *Duty of Legislators is the Theme of Bryan*, THE HELENA INDEPENDENT, Jan. 12, 1907, at 2.

sovereignty and self-government"[19] in the primary provisions of its Declaration of Rights.[20]

Even when constitutionally or statutorily granted, the people's lawmaking power is limited by a state's fundamental and organic law. Citizens must not only share this power with their elected legislature but, like the assembled legislature, citizen lawmakers must stay within constitutionally defined boundaries.[21] The separation of powers doctrine dictates that while the people's initiative and referendum power parallels the legislature's lawmaking power,[22] it must also "be a valid exercise of legislative power, rather than executive or judicial power."[23] Unlike the Federal Constitution, which provides a structural "basis to imply the separation doctrine,"[24] Montana's 1889 and 1972 constitutions both explicitly declare this doctrine.[25] As this comment will discuss, these underlying principles are often difficult to apply to local initiatives and referenda because local governments often exercise both legislative and administrative power.

A. Constitutional and Statutory Foundations

1. The 1889 Constitution

The 1889 Montana Constitution provided for constitutional amendment by voter referendum,[26] but it did not give the electorate the power to

19. James C. Nelson, *Keeping Faith with the Vision: Interpreting a Constitution for This and Future Generations*, 71 MONT. L. REV. 299, 300 (2010).

20. MONT. CONST. art. II, § 1 ("All political power is vested in and derived from the people. All government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole."); MONT. CONST. art. II, § 2 ("The people have the exclusive right of governing themselves as a free, sovereign, and independent state. They may alter or abolish the constitution and form of government whenever they deem it necessary.).

21. *Phillips*, 330 P.3d at 450.

22. State v. Stewart, 187 P. 641, 643 (Mont. 1920) (finding that after the adoption of the statewide initiative and referendum amendment to the Montana Constitution "either the people or the Legislature may act at will–their power is coextensive; when an act is passed by either method, it becomes the law of the state, no more and no less.").

23. Vagneur v. City of Aspen, 295 P.3d 493, 504 (Colo. 2013).

24. NORMAN SINGER & SHAMBIE SINGER, *Constitutional Provisions*, *in* 1 SUTHERLAND STATUTORY CONSTRUCTION § 3:2 (7th ed. 2014).

25. MONT. CONST. OF 1889, art. IV, § 1 ("The powers of the government of this State are divided into three distinct departments: The Legislative, Executive, and Judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."); MONT. CONST. art. III, § 1 ("The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.").

26. MONT. CONST. OF 1889, art. XIX, § 9; Anthony Johnstone, *The Constitutional Initiative in Montana*, 71 MONT. L. REV. 325, 331–332 (2010).

amend the constitution by initiative or to enact, amend, or repeal statutes.[27] While the Industrial Revolution generally "led to increasing demands for social and political reforms in the late 1800s," the legislative initiative and referendum movement had not yet surfaced by the time Montana's original constitution was ratified.[28] It was not until the turn of the century that public concern began to grow over the increasing control large corporations and wealthy individuals had over the Montana Legislature.[29] Rampant corruption in the Montana State Capitol eventually led the Progressive Party to advocate for a constitutional amendment to allow citizens to bypass the legislature's lawmaking power.[30]

Although much of the 1889 Constitution was based on the 1876 Colorado Constitution,[31] the drafters of Montana's statewide initiative and referendum provision modeled it after the 1902 amendment to the 1857 Oregon Constitution.[32] Eventually endorsed by both Democrats and Republicans, the Montana Legislature passed the initiative and referendum amendment in 1905.[33] In the 1906 election, Montana voters ratified the amendment by a five-to-one margin.[34] The 1906 amendment became Article V, Section 1 of the 1889 Constitution, which states, in pertinent part:

> The legislative authority of the state shall be vested in a legislative assembly, consisting of a Senate and House of Representatives; *but the people reserve to themselves power to propose laws, and to enact or reject the same at the polls* except as to laws relating to appropriations of money, and except as to laws for the submission of constitutional amendments, and except as to local or special laws, as enumerated in article V, section 26, of this Constitution, independent of the legislative assembly; and *also reserve power at their own option to approve or reject at the polls, any act of the legislative assembly*, except as to laws necessary for the immediate preservation of the public peace, health or safety, and except as to laws relating to appropriations of money, and except as to laws for the submission of constitutional amendments, and except as to local or special laws, as enumerated in article V, section 26, of this Constitution.[35]

The 1907 Montana Legislature responded immediately to the new legislative initiative and referendum provision, passing "reforms that included

27. ELISON & SNYDER, *supra* note 17, at 93. **R**

28. SCHMIDT, *supra* note 10, at 5. **R**

29. ELISON & SNYDER, *supra* note 17, at 93. **R**

30. *Id.*

31. Johnstone, *supra* note 26, at 328. **R**

32. STEVEN L. PIOTT, GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA 57 (2003); Jeff Wiltse, *The Origins of Montana's Corrupt Practices Act: A More Complete History*, 73 MONT. L. REV. 299, 309 (2012).

33. Wiltse, *supra* note 32, at 309. **R**

34. SCHMIDT, *supra* note 10, at 8. **R**

35. MONT. CONST. OF 1889, art. V, §1 (emphasis added); *see generally, e.g.,* State v. Alderson, 142 P. 210, 211–212 (Mont. 1914).

the establishment of a railroad commission, an anti-gambling law, a stricter child labor law, pure-food legislation, and limitations on the hours of continuous employment worked by railroad workers."[36] However, Montanans were slow to exercise their new lawmaking power, and many early initiative attempts failed because proposed measures could not garner the support necessary to satisfy the provision's petition requirements.[37] Undeterred by these initial setbacks, labor, farming, and other interest groups eventually succeeded in implementing various reforms through direct citizen lawmaking.[38] Montanans continued to embrace and exercise this power well beyond the Progressive Era, consistently employing the legislative initiative and referendum through the rest of the 1889 Constitution's life.[39]

2. The 1907 Revised Codes of Montana

The 1907 Montana Legislature also gave local voters the power to enact or repeal municipal ordinances. The legislature authorized local initiatives in § 3266 of the Revised Codes of Montana:

> Ordinances may be proposed by the legal voters of any city or town in this state in the manner provided in this act. Eight per cent of the legal voters of any city or town may propose to the city or town council an ordinance *on the subject within the legislative jurisdiction and powers* of such city or town council or an ordinance amending or repealing any prior ordinance or ordinances.[40]

The 1907 Montana Legislature also provided for local referendum in § 3269 of the Revised Codes of Montana: "During the thirty days following the passage of any ordinance or resolution . . . the qualified electors of the city or town may. . . demand that such ordinance or resolution, or any part or parts thereof, shall be submitted to the electors of the city or town."[41] Thus, while the 1889 Constitution did not confer the right of initiative and referendum to local government actions, Montana's statutory law reflected the then present "public policy of this state to confide to the citizens of municipalities the right of local self-control . . . ."[42]

36. PIOTT, *supra* note 32, at 59. **R**

37. *Id.* at 59–60.

38. *Id.* (stating that between 1912 and 1916, Montana voters had passed seven statewide initiatives, including a "direct primary law, corrupt-practices act, a presidential preference primary, and the direct election of U.S. senators" as well as legislative amendments granting prohibition and women's suffrage. The first referendum measure, passed in 1912, vetoed a bill which had granted more power to the governor to call out the state militia.).

39. *See* Mont. Sec. of State, *Initiative and Referendum Issues Since Adoption of Constitutional Amendment, Article V, Section I, Permitting the Referendum and Initiative* (1906–Present) (2008) (available at http://perma.cc/3UJT-8V4M).

40. Rev. Codes of Mont. 1907 § 3266 (1907) (emphasis added).

41. *Id.* § 3269.

42. State v. Edwards, 111 P. 734, 738 (Mont. 1910).

B. The 1972 Constitution

The authors of the 1972 Montana Constitution chose not only to maintain the guarantees of Article V, Section 1 of the 1889 Constitution, but also decided to strengthen and expand the people's lawmaking power.[43] As Professors Larry Elison and Fritz Snyder explain, the 1972 Constitution "indicates the populist inclination of the delegates in its consistent enhancement of the powers of the voters and the encouragement of direct participation in governmental decision making; for example, relaxing the requirements necessary to place initiative and referenda on the ballot."[44] The documentary record attending the formation and ratification of the 1972 Constitution helps to explain the inclusion of Articles III and V, which set out the legislative initiative and referendum powers at the statewide level,[45] and Article XI, which extends these powers to local government voters.[46]

1. Constitutional Convention Research Reports

Before the 1972 Constitutional Convention, the 1971 Montana Legislature created the Constitutional Convention Commission, a body that produced a series of research reports to educate the convention delegates on, and offer revisions and improvements to, the 1889 Constitution.[47] One working paper the commission produced compared the 1889 Constitution with other recently ratified state constitutions.[48] Another paper contained proposed constitutional provisions prepared by various subcommittees of the commission.[49] This paper explains the source of the revised initiative and referendum language contained in Article V, Section 1 of the 1972 Constitution. In order to replace the 1889 Constitution's detailed initiative and referendum provision, the subcommittee suggested that Montana adopt

43. ELISON & SNYDER, *supra* note 17, at 93 (explaining that the 1889 Constitution "was more demanding in the numbers and geographical location of signatures required"). R

44. *Id.* at 11.

45. MONT. CONST. art. V, § 1, art. III, § 5(1).

46. *Id.* art. XI, § 8; *see generally* G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1186 (1992) (explaining that "the more recent the constitutional provision, the more likely that there is an extensive documentary record—pre-convention studies, constitutional convention records, voters' pamphlets, and the like—bearing on its meaning. The greater availability of these materials, of course, facilitates the discovery of the original intent.").

47. MONT. CONSTITUTIONAL CONVENTION, COMM'N, *Constitutional Convention Occasional Paper No. 7 in* Constitutional Provisions Proposed by Constitution Revision Commission Subcommittees iii (1969). [hereinafter PROPOSED PROVISION OCCASIONAL PAPER].

48. MONT. CONSTITUTIONAL CONVENTION, *Constitutional Convention Occasional Paper No. 5 in* COMPARISON OF THE MONTANA CONSTITUTION WITH THE CONSTITUTIONS OF SELECTED OTHER STATES 5 (1967) [hereinafter COMPARISON OCCASIONAL PAPER] (including the constitutions of "Alaska, Hawaii, Michigan, New Jersey, Puerto Rico, and the Model State Constitution of the National Municipal League").

49. PROPOSED PROVISION OCCASIONAL PAPER, *supra* note 47, at iii.

Article XI, Section 1 of the Alaska Constitution.[50] Unfortunately, the commission reports do not elucidate how the delegates came to include the initiative and referendum provisions in Articles III[51] and XI.[52] For example, the Subcommittee on Local Government declined to propose specific provisions for Article XI and the report's general recommendations did not offer or argue against a local initiative and referendum section.[53]

2. Committee Reports and Convention Debates

The 1972 Constitutional Convention committee reports and debate transcript also inform the development of Montana's initiative and referendum articles. Montana's expansive general government powers are set out in Article III of the constitution.[54] It begins with Article III, Section 1, which seeks to ensure the separation of powers among the three branches of government:

> The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.[55]

The General Government and Constitutional Amendment Committee determined that this was a vital section because it acts "as a check on an overly ambitious branch of government."[56] On the Convention Floor, Delegate Mark Etchart, chairman of the General Government and Constitutional Amendment Committee, reiterated these points, adding, "I think that that explanation should be enough, as this separation of powers is well understood and accepted."[57] The Convention adopted Article III, Section 1 by a vote of 85–5.[58]

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50. *Id.* at 59.

51. *See id.* at 2 (no report produced for the General Government article).

52. *Id.* at 141 (explaining that other local government provisions were "freely adapted from the Idaho Constitution (on definition); the Alaska Constitution (on purpose and construction); from the National Municipal League's Model State Constitution (for provisions for organization and powers of local government); and from a suggestion of the Advisory Commission on Intergovernmental Relations (for sanction of intergovernmental cooperation."); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 155 (1998) (explaining that in the "sixth edition of the Model State Constitution, the legislative initiative and referendum had altogether disappeared").

53. PROPOSED PROVISION OCCASIONAL PAPER, *supra* note 47, at 140–142.

54. 2 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 813 (1979) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT II].

55. MONT. CONST. art. III, § 1.

56. CONSTITUTIONAL CONVENTION TRANSCRIPT II, *supra* note 54, at 818.

57. 7 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 2690 (1981) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT VII].

58. *Id.* at 2843.

Article III, Sections 4 and 5 broadly authorize citizens to enact state laws through the initiative process and review legislation through the referendum process.[59] Section 4 states that "[t]he people may enact laws by initiative on all matters except appropriations of money and local or special laws."[60] Section 5 provides that "[t]he people may approve or reject by referendum any act of the legislature except an appropriation of money."[61] In addition to authorizing the citizen lawmaking power, the provisions exclude specific actions from the process and provide the procedural requirements citizens must follow in order to have their measure certified and placed on the ballot.[62]

The delegates to the 1972 Constitutional Convention "recognized the need to ensure that the state government was responsive to the populace."[63] The General Government and Legislative Committees initially worked on Article III, Sections 4 and 5 together and agreed that the statewide initiative and referendum power should be retained; the joint committee also lowered the requirements necessary to place such measures on the ballot, finding the new requirements "high enough to prevent frivolous legislative efforts by a small minority, yet low enough to allow serious, popular measures to be initiated by the people."[64] The positive tenor of the Convention floor debate was demonstrated by the comments of Delegate George Harper of the Legislative Committee: "Now, then, our Legislative Committee was dealing with this matter before it was passed on to General Government. We talked at length on this. We were very much in favor of the initiative and referendum; completely in favor of it."[65] The Convention adopted both sections unanimously.[66]

Article V, Section 1 vests the legislative power in a bicameral legislature and states that "[t]he people reserve to themselves the powers of initiative and referendum."[67] The Legislative Committee Report contained both unicameral and bicameral proposals, each advocating for a different legislative structure.[68] However, neither report argued against retaining the 1889 Constitution's guarantee to initiative and referendum at the statewide

59. ELISON & SNYDER, *supra* note 17, at 92, 96. **R**

60. MONT. CONST. art. III, § 4(1).

61. *Id.* art. III, § 5(1).

62. *Id.* art. III, §§ 4–5.

63. G. Alan Tarr, *The Montana Constitution: A National Perspective*, 64 MONT. L. REV. 1, 15 (2003).

64. CONSTITUTIONAL CONVENTION TRANSCRIPT II, *supra* note 54, at 820.

65. CONSTITUTIONAL CONVENTION TRANSCRIPT VII, *supra* note 57, at 2701.

66. *Id.* at 2846–2848.

67. MONT. CONST. art. V, § 1.

68. 1 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 369–410 (1979) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT I].

level.[69] The Convention debate also centered on the bicameral–unicameral question,[70] a fact reflected in the remarks of Delegate Arlyne Reichert of the Legislative Committee:

> Now before I get into the justification for unicameral, I would mention that in both the unicameral and bicameral proposals, the people reserved to themselves the power of initiative and referendum. And I feel that this is a needed check whether we have unicameral or bicameral . . . that this is a check that the people of Montana want.[71]

Although the delegates vigorously debated the merits of each legislative structure, the Convention eventually adopted Article V, Section 1 by a vote of 83–10.[72]

Finally, Article XI, Section 8 requires the legislature to "extend the initiative and referendum powers reserved to the people by the constitution to the qualified electors of each local government unit."[73] Once again, the delegates did not dispute the merits of the initiative and referendum power during the Article XI debate. Instead, other sections reducing the state's oversight over local governments and expanding local self-government powers were the focus of the delegates' discussion.[74] The Local Government Committee's brief comment on the initiative and referendum provision framed the importance of this issue: "The committee believes it is essential that local residents have the powers of initiative and referendum, particularly in view of the broad self-government powers offered in this proposal."[75] On the Convention floor, Delegate Clark Simon of the Local Government Committee reiterated this assessment:

> It is particularly important that [initiative and referendum] be provided, in view of the fact that local government units will be strengthened, in terms of power, under the committee proposal. The initiative and referendum offer another check on this power and are of such importance that they should receive constitutional guarantee.[76]

Delegate Simon's comments drew no discussion and the Convention eventually adopted this section nearly unanimously, with only one delegate voting in opposition.[77]

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69. *Id.*

70. 4 Montana Constitutional Convention Verbatim Transcript 775–779 (1981) [hereinafter Constitutional Convention Transcript IV].

71. *Id.* at 747.

72. 6 Montana Constitutional Convention Verbatim Transcript, 1891–1892 (1981) [hereinafter Constitutional Convention Transcript VI].

73. Mont. Const. art. XI, § 8 (section 8 was originally section 9 in the initial proposal).

74. Constitutional Convention Transcript II, *supra* note 54, at 785.

75. *Id.* at 799.

76. Constitutional Convention Transcript VII, *supra* note 57, at 2549 (1979).

77. *Id.* at 2840–2841 (Delegate Romney voted yes on Article III, sections 4 and 5).

3. Ratification

On March 22, 1972, the Montana Constitutional Convention delegates adopted the proposed constitution and referred it to the voters for ratification.[78] To help educate the electorate on the proposed constitution, the convention sent each voter an official information pamphlet.[79] Since the initiative and referendum provisions in Articles III and V were substantively identical to the 1889 Constitution, the guide simply described the revised petition requirements in Article III and the grammatical changes in Article V.[80] The pamphlet defined Article XI, Section 8 as a "[n]ew provision directing legislature to give residents the power initiate local ordinances by petition or to petition to vote on ordinances passed by local governments."[81] Like the convention debates, those challenging the proposed constitution through independent publications concentrated on other aspects of the new constitution and provided no notable opposition to the initiative and referendum provisions during the ratification process. Gerald J. Neely, a vocal critic of the proposed constitution, simply referred to Article XI as "a new feature."[82] Citizens for Constitutional Government, a group which called the convention delegates "Metrocrats," described the state ballot requirements as too restrictive on the people.[83] On June 6, 1972, Montana voters ratified the new constitution by a vote of 116,415–113,883.[84]

C. Montana Code Annotated

To carry out the mandate of the 1972 Montana Constitution, the 1977 Montana Legislature codified the people's right to initiative and referendum at the local government level.[85] The law, now codified at § 7–5–131 of the Montana Code Annotated, states in pertinent part:

> The powers of initiative and referendum are reserved to the electors of each local government. Resolutions and ordinances *within the legislative jurisdiction and power* of the governing body of the local government, except those

78. PROPOSED 1972 CONSTITUTION FOR THE STATE OF MONTANA: OFFICIAL TEXT WITH EXPLANATION 3 (1972) [hereinafter PROPOSED 1972 CONSTITUTION].

79. ELISON & SNYDER, *supra* note 17, at 15. **R**

80. PROPOSED 1972 CONSTITUTION, *supra* note 78, at 8–9.

81. *Id.* at 16. **R**

82. GERALD J. NEELY, THE NEW MONTANA CONSTITUTION: A CRITICAL LOOK 19 (1972), *available at* http://perma.cc/DN8A-ETPY.

83. CITIZENS FOR A CONSTITUTIONAL GOVERNMENT, GENERAL GOVERNMENT & CONSTITUTIONAL AMENDMENT (1972), *available at* http://perma.cc/Q7MX-VS4W (stating that "[t]he burdens of Referendum and Initiative should be equally burdensome on the Legislators as it is upon the people.").

84. ELISON & SNYDER, *supra* note 17, at 15. **R**

85. MONT. CODE ANN. § 47A–3–106 (1) (1977) (The language of Montana's original enactment is identical to the current statute).

> set out in [this section], may be proposed or amended and prior resolutions and ordinances may be repealed.[86]

While the law implements the directives of Articles III, V, and XI, at first glance, it may seem to narrow its application (beyond the delineated exceptions found in the proceeding subsection) by restricting the local electorate's ability to enact, amend, or repeal non-legislative acts. In *Greens at Fort Missoula v. City of Missoula*,[87] Justice Nelson authored a special concurrence challenging this aspect of the statute. He argued that since "no legislative act versus administrative or quasi-judicial act distinction appears in the language of the Constitution," the statute "restricts the constitutional right of the people to approve or reject by referendum any act of the governing body of the local government."[88] However, in *Town of Whitehall v. Preece*,[89] Justice Nelson reversed his position, agreeing that the word "act" was "clearly contemplated by the framers of Montana's Constitution to be synonymous with 'law' or with a bill which has been enacted into law."[90] The majority opinion in *Whitehall* additionally relied upon the jurisprudence of other states[91] and employed historical[92] and structural[93] arguments to reaffirm that, even absent § 7–5–131, "under Montana's Constitution, the people have retained the powers of initiative and referendum as to legislative acts only."[94]

D. Whitehall v. Preece

The Montana Supreme Court has long accepted the general view that legislative acts are subject to initiative and referendum, while administra-

86. MONT. CODE ANN. § 7–5–131 (2015) (emphasis added).

87. Greens at Fort Missoula v. City of Missoula, 897 P.2d 1078 (Mont. 1995).

88. *Id.* at 1083–1084 (Nelson, J., with & Gray, Leaphart JJ. concurrence).

89. *Town of Whitehall*, 956 P.2d at 743.

90. *Id. at* 751 (Nelson, J., concurring).

91. *Id.* at 747 (majority opinion) (stating that "Courts in other jurisdictions with constitutional provisions extending the power of referendum to "acts of the legislature" have recognized "act" as a term of art, meaning a bill passed by the legislature and enacted into law.") (citing Whittemore v. Terral, 215 S.W. 686, 687 (Ark. 1919); Weldon v. Bonner County Tax Coalition, 855 P.2d 868, 875 (Idaho 1993); Klosterman v. Marsh, 143 N.W.2d 744, 749 (Neb. 1966); Herbring v. Brown, 180 P. 328, 330 (Or. 1919)).

92. *Id.* at 748 (stating that "No case law under the 1889 Constitution suggests that the powers of initiative and referendum in Montana ever extended to anything other than legislative acts. Nor does anything in the transcript of the proceedings of the 1972 Constitution suggest an intent to expand the power of initiative and referendum to anything other than legislative power.").

93. *Id.* (stating that "the provision by which the people retain the right of initiative and referendum appears in the Constitutional Article on "The Legislature." No comparable provisions appear in the Articles concerning the Executive and the Judiciary.").

94. *Id.*

tive and quasi-judicial acts are not.[95] In *City of Billings v. Nore*,[96] the Court recognized that while this rule is easy to state, it is inherently difficult to apply in practice.[97] To address this issue, the Court looked to precedent from Oregon and Utah,[98] and adopted a rule that still exists today: legislative acts create new law, while administrative acts execute an already existing law.[99] In *Town of Whitehall v. Preece*, the Montana Supreme Court reconsidered the legislative–administrative test[100] and decided to further limit the referenda power in order to promote the "efficient administration of local government."[101] The Court's new framework, adopted from the Kansas Supreme Court, included and expanded upon the "new or existing law" test:

> 1. An ordinance that makes new law is legislative, while an ordinance that executes an existing law is administrative. Permanency and generality are key features of a legislative ordinance.
>
> 2. Acts that declare public purpose and provide ways and means to accomplish that purpose generally may be classified as legislative. Acts that deal with a small segment of an overall policy question generally are administrative.
>
> 3. Decisions which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice may properly be characterized as administrative, even though they may also be said to involve the establishment of a policy.
>
> 4. No one act of a governing body is likely to be solely administrative or legislative, and the operation of the initiative and referendum statute is restricted to measures which are quite clearly and fully legislative and not principally executive or administrative.[102]

In *Whitehall*, the Court was tasked with characterizing a municipal ordinance entitled "Regulation of Water Use," which required each user served by the Whitehall water system to connect to water meters and pay variable rates based on water use.[103] The first *Whitehall* factor essentially

95. H. A. Wood, Annotation, *Character or Subject Matter of Ordinance Within Operation of Initiative and Referendum*, 122 A.L.R. 769 (1939); *see e.g.* Carlson v. City of Helena, 102 P. 39, 49 (Mont. 1909) (finding referendum provisions "to apply only, to matters of general legislation.").

96. 417 P.2d 458 (Mont. 1966).

97. *Id.* at 463.

98. While the Court cites to the Utah Supreme Court decision Keigley v. Bench, 89 P.2d 480, 484 (Utah 1939), it is important to note that the standard the Court adopted was originally taken from the Oregon Supreme Court decision Whitbeck v. Funk, 12 P.2d 1019, 1020 (Or. 1932).

99. *Nore*, 417 P.2d at 463; *see also Chouteau Co.*, 563 P.2d at 1127.

100. *Town of Whitehall*, 956 P.2d at 743.

101. *Id.* at 748 (quoting Wennerstrom v. City of Mesa , 821 P.2d 146, 149 (Ariz. 1991) (en banc)).

102. *Id.* at 749 (quoting *Kan. Taxpayers Network, Inc.*, 874 P.2d at 671–672).

103. *Id.* at 745.

restates the "new or existing law" rule, but adds that legislative acts are characterized by their "permanency and generality."[104] In *Whitehall*, the town council had previously voted on resolutions to secure funding to upgrade the town's water system, which collectively became Whitehall's water system improvement plan.[105] The Town of Whitehall argued that the act was administrative because the water system improvement plan was already in effect, included water meter provisions, and, as such, implemented an existing plan.[106] However, the Whitehall citizens challenging the ordinance argued that it was a new law because it was the first time the Whitehall Town Council had actually acted upon the improvement plan, which had only consisted of grant and loan applications up to that point.[107] Applying the first factor to this ordinance, the Court seemingly accepted the validity of both arguments because it found the guideline inconclusive.[108] The Court then turned to the remaining three factors to classify the ordinance.[109]

The second *Whitehall* factor states that a legislative act generally declares a broad public purpose or policy and provides specific methods, or "ways and means," to accomplish that purpose or policy.[110] On the other hand, an act is likely administrative if it addresses a "small segment of an overall policy question."[111] In *Whitehall*, the Court determined the water meter ordinance was an administrative act because it dealt with a portion of a broader policy question, "how to improve the town's water system to provide water to consumers."[112] The Court pointed to the multi-year, multi-step process of identifying and finding solutions to the town's water use problems as evidence of the Whitehall Town Council's broader policy objective and found that the water meter ordinance constituted only one way by which the council had proposed to address the town's water problems.[113]

The third *Whitehall* factor defers to the specialized knowledge and background of local government officials, even where policy is established, when an ordinance involves and requires a keen understanding of the "fiscal and other affairs" of the local government entity.[114] In *Whitehall*, the Court easily determined the ordinance in question met this standard since "the most effective means of operating and managing a city-wide water system" and for "billing for the use of water services" was with the expertise of the

104. *Id.* at 749.
105. *Id.* at 745, 749–750.
106. *Town of Whitehall*, 956 P.2d at 749–750.
107. *Id.* at 750.
108. *Id.*
109. *Id.*
110. 62 C.J.S. *Municipal Corporations* § 392 (2015).
111. *Id.*
112. *Town of Whitehall*, 956 P.2d at 750.
113. *Id.*
114. *Id.* at 749.

town's administrators.[115] Finally, the fourth *Whitehall* factor recognizes the difficulty of distinguishing administrative acts from legislative acts because a single local government act will often contain elements of both classifications.[116] In this situation, the factor utilizes a balancing test: if a measure is not "quite clearly and fully legislative" and is instead "principally" administrative, the act should be deemed administrative.[117] In *Whitehall*, the Court quickly dispensed with this factor, holding the water meter ordinance was non-legislative because it "was, at least to *some* extent, an administrative act to carry out previous plans to which the council had agreed."[118]

E. Phillips v. City of Whitefish

1. Factual and Procedural Background

The Montana Supreme Court's most recent decision concerning the legislative–administrative question, *Phillips v. City of Whitefish*, stems from a local control and land use dispute between the City of Whitefish and Flathead County over the extraterritorial area (ETA) surrounding Whitefish city limits.[119] In 1967, Flathead County and the City of Whitefish created a joint planning board whereby the county agreed to cede its planning authority to the city for the one-mile ETA surrounding Whitefish, otherwise known as the "donut."[120] In 2005, the two parties formalized this relationship with an interlocal agreement (2005 IA) and extended Whitefish's ETA to two miles.[121] Under the 2005 IA, the City of Whitefish implemented several regulatory policies in the ETA to protect its scenic highway corridors, natural resources, and other characteristics considered vital to the city's tourism and recreation-based economy.[122]

In 2008, the Whitefish City Council adopted the controversial Critical Areas Ordinance (CAO), "which imposed zoning restrictions in the donut to protect lakes, streams, wetlands, and drainage areas from development."[123] The county opposed the CAO and, upon its adoption by the city, voted to unilaterally withdraw from the 2005 IA.[124] Since the 2005 IA expressly

115. *Id.* at 750.

116. Robert W. Parnacott, *People Have the Power: The Power of the Petition*, 80 J. KAN. B. ASS'N 32, 38 (Mar. 2011) (citing *McAlister*, 212 P.3d at 193–194).

117. *Town of Whitehall*, 956 P.2d at 751.

118. *Id.* (emphasis added).

119. *Phillips*, 330 P.3d at 445.

120. *Id.* at 445–446.

121. *Id.* at 446.

122. Appellant's Opening Brief at 4–5, *Phillips v. City of Whitefish*, 330 P.3d 442 (Mont. 2014), http://perma.cc/Y4P3-AJ7U (No. DA 13–0472).

123. *Id.* at 11. **R**

124. *Id.*

stated that the agreement could only be terminated by mutual consent of the parties, the City of Whitefish filed a lawsuit to enforce the agreement.[125] The district court refused to do so, finding the 2005 IA unenforceable.[126] On appeal, the Montana Supreme Court reversed the district court's ruling, imposed a preliminary injunction to prevent Flathead County from exercising planning authority in the donut, and remanded the case for trial.[127]

The parties then entered into settlement negotiations to resolve the litigation.[128] A committee of city and county elected officials and residents drafted an amended interlocal agreement (2010 IA) that: (1) allowed for unilateral termination of the agreement by either party as long as the terminating party gave one year's notice and agreed to participate in alternative dispute resolution; and (2) provided a five-year term for the agreement, subject to renewal by mutual consent of both parties.[129] When the Whitefish City Council considered the proposed interlocal agreement, most Whitefish residents spoke in opposition to the 2010 IA during the public comment period.[130] However, despite the "substantial objection from almost all of the persons who spoke in public on the matter,"[131] the Whitefish City Council passed Resolution 10–46 and adopted the 2010 IA on November 15, 2010.[132] The council also adopted Resolution 10–47, which authorized the city to dismiss the 2008 lawsuit.[133] The county responded with a similar measure and the district court dismissed the lawsuit on July 11, 2011.[134]

Dissatisfied with the city's approval of Resolution 10–46, a group of Whitefish and donut residents decided to attempt to repeal the action.[135] In January 2011, a referendum petition was approved under state law form and compliance standards.[136] By April 2011, citizens had gathered the required signatures and the Flathead County Election Department certified the referendum for the November ballot.[137] On Election Day, Whitefish voters con-

125. City of Whitefish v. Bd. of Cnty. Comm'rs. of Flathead Cnty. ex rel. Brenneman, 199 P.3d 201, 203 (Mont. 2008).

126. *Id.* at 204 (refusing to uphold the district court's finding that "an agreement may facilitate a city's exercise of extra-territorial jurisdiction for only so long as the county has not adopted a growth policy and zoning or subdivision regulations for the area.").

127. *Id.* at 208.

128. *Phillips*, 330 P.3d at 446.

129. *Id.*; CITY OF WHITEFISH, MONT., RESOLUTION NO. 10–46 (Nov. 15, 2010).

130. Affidavit of Richard Hildner ¶ 6, *City of Whitefish v. Bd. of Cnty. Comm'rs of Flathead Cnty*. (Mont. Dist. Ct. July, 11, 2011) (No. DV 08–367A).

131. *Id.*

132. Appellant's Opening Brief, *supra* note 122, at ¶ 12.

133. CITY OF WHITEFISH, MONT., RESOLUTION NO. 10–47 (Nov. 15, 2010).

134. *Phillips*, 330 P.3d at 447.

135. Richard Hanners, *'Donut' Issue is No. 1 Story of 2010*, WHITEFISH PILOT, Dec. 29, 2010, *available at* http://perma.cc/47YS-C8E9

136. *Phillips*, 330 P.3d at 447.

137. *Id.*

sidered Referendum 01, which both described the provisions of Resolution 10–46 and the impact on Whitefish's jurisdictional authority in the ETA in the event of unilateral termination.[138] On November 8, 2011, Whitefish voters passed the referendum by a two-to-one margin.[139]

After the referendum failed at the ballot box, four citizens filed a lawsuit in Flathead County District Court to challenge the referendum's validity.[140] The plaintiffs argued the referendum sought to repeal an administrative action rather than a legislative action, thus exceeding the citizens' referenda power.[141] The district court also granted a motion to intervene for four other citizens and the "Let Whitefish Vote" ballot committee (Intervenors).[142] On cross-motions for summary judgment, the district court ruled in favor of the plaintiffs, holding that Resolution 10–46 was an administrative act and ineligible for repeal by referendum.[143] Both the City of Whitefish and Intervenors appealed.[144]

2. Majority Holding

In a 4–3 opinion authored by Justice Jim Rice, the Montana Supreme Court affirmed the district court's ruling, holding that Resolution 10–46 was an administrative act by the City of Whitefish and not subject to the referendum process.[145] Applying the *Whitehall* guidelines to the resolution, the majority acknowledged that the resolution had certain "legislative implications."[146] Nevertheless, the majority held that the factors weighed in favor of administrative action because "the decision to enter the 2010 IA and resolve the 2008 lawsuit, with limited assurances about the ultimate duration and outcome of the agreement, was a decision that required specialized knowledge and experience of the City's fiscal and other affairs."[147] The majority began by analyzing the last *Whitehall* guideline. After conced-

138. CITY OF WHITEFISH, MONT., REFERENDUM NO. 01 (Nov. 8, 2011) (stating that the "termination of the 2010 Interlocal Agreement would rescind the City of Whitefish's planning and zoning authority in the extraterritorial area").

139. *Phillips*, 330 P.3d at 447.

140. Answer Brief of Appellees/Plaintiffs, *Phillips v. City of Whitefish*, 2013 WL 6922518 at 5 (Mont. Dec. 27, 2013) (No. DA 13–0472).

141. *Phillips*, 330 P.3d at 447.

142. Brief of Appellants/Intervenors, *Phillips v. City of Whitefish*, 2013 WL 6048706 at 3 (Mont. Oct. 28, 2013) (No. DA 13–0472) (arguing that the plaintiff's suit should be dismissed because the claim was untimely under MCA 7–5–135(1) and the doctrine of laches. This comment will not discuss the timeliness issues argued in this case by the Intervenors. Both the district court and Montana Supreme Court held the suit timely under Montana law).

143. *Phillips*, 330 P.3d at 447–448.

144. *Id.* at 448.

145. *Id.* at 456.

146. *Id.* at 455.

147. *Id.* at 455–456. The Court did not address whether either interlocal agreement was valid under MONT. CODE ANN. §§ 76–2–310(1) through 76–2–311(1) and this comment does not discuss this issue.

ing that local government acts are rarely "solely" legislative or administrative, the majority determined that Resolution 10–46 was administrative because its "substance and effect" was not just to enter into the 2010 IA; it was also "substantially related" to Resolution 10–47, the agreement which technically dismissed the lawsuit over the 2005 IA.[148] Specifically, the majority found the two resolutions "inextricably tied" because "if the lawsuit was not dismissed, the 2010 IA would lack consideration and the litigation over the 2005 IA would continue."[149]

The majority then turned to the first *Whitehall* factor, dismissing the appellant's argument that the 2010 IA was a new legislative act that effectively changed zoning and planning in the donut because it created uncertainty with respect to the area's jurisdictional authority.[150] The majority conceded that the agreement "held legislative implications, including the addition of unspecified County oversight over the City's authority and the possibility that the City's authority, though contingent in nature, could be impacted in the future."[151] However, the majority found dispositive that Resolution 10–46 was an amendment to an interlocal agreement, rather than a zoning ordinance, and that the unilateral termination and renewal provisions provided for only potential, future changes to the City's zoning authority in the donut.[152]

Applying the second *Whitehall* guideline, the majority likewise reasoned that since the 2010 IA comprised only a "few" conditional amendments to the 2005 IA, the amended agreement could only potentially lead to future policy changes with respect to zoning in the ETA.[153] Thus, rather than accepting the appellant's argument that the 2010 IA termination provisions constituted an overall change in the city's land-use policy in the donut, the majority focused on the hypothetical, multi-step process the county would have to undergo to strip the city of its authority.[154] The majority finally considered the third *Whitehall* guideline and, after restating its conclusion that Resolution 10–46 was essentially a decision to settle the 2008 lawsuit, the majority held that the 2010 IA's administrative nature prevailed

148. *Id.* at 451–452.

149. *Phillips*, 330 P.3d at 452.

150. *Id.* at 452–453.

151. *Id.* at 455–456.

152. *Id.* at 453.

153. *Id.* at 454.

154. *Id.* at 453–454 (finding that "there would be a change in zoning policies in the donut only *if* the County gave notice to terminate, *if* the ADR process failed, *if* the County initiated planning and adopted new regulations for the donut, and, ultimately, *if* those regulations were inconsistent with the regulations the City had enacted").

because city officials employed their specialized knowledge to draft the settlement agreement.[155]

3. *Chief Justice McGrath's Dissent*

Chief Justice Mike McGrath, joined by Justices Patricia Cotter and Michael Wheat, dissented regarding the nature of Resolution 10–46.[156] Concluding that "the facts here admit to one conclusion, that Resolution 10–46 was a legislative measure," the dissent found the action eligible for referendum under the Montana Constitution.[157] After restating the Court's original "new or existing law" test for determining the character of local government actions, the dissent then criticized the majority's continued use of the "vague, confusing, and awkward to apply" *Whitehall* factors.[158] The dissent began by dismissing the fourth *Whitehall* factor in its entirety, citing a recent Kansas Supreme Court decision which reevaluated and ultimately abandoned the guideline.[159]

Giving little credence to the remaining *Whitehall* factors, the dissent instead described them as "confusing" and prone to "unreasonably restrict the voters' right to participate in the referendum process."[160] The dissent briefly touched on the first *Whitehall* factor, at first accepting the guideline's premise that legislative acts are often permanent and general.[161] However, the dissent also found the opposite to be true since the Montana Legislature occasionally enacts short-term measures with expiration dates and provisional measures which only become effective under certain circumstances.[162] The dissent then formulated an analogical argument that continued throughout the opinion, contending that when the people exercise the legislative power through the initiative or referendum process, "that power should not be more limited than the power exercised by the [Montana] Legislature."[163]

155. *Phillips*, 330 P.3d at 454–455 (finding that the "factors that made the decision to enter the agreement a technical one" included "[t]he potential costs of the City of continuing the 2008 lawsuit, the assessment of the outcome of that litigation, including the potential that the County's primary statutory authority to zone in the donut would prevail, the cost/benefit analysis of seeking a cooperative relationship with the County, and the posture the City would maintain under the 2010 IA in order to pursue its future goals").

156. *Id.* at 456, 458 (McGrath, C.J., with Cotter & Wheat, JJ., dissenting).

157. *Id.*

158. *Id.* at 456.

159. *Id.* (citing *McAlister*, 212 P.3d at 195) (finding the fourth guideline "more useful as a recitation of the strict construction doctrine . . . and less helpful as a guideline for determining under the facts in each case whether a proposed ordinance is legislative or administrative").

160. *Id.*

161. *Phillips*, 330 P.3d at 456 (McGrath, C.J., with Cotter & Wheat, JJ., dissenting).

162. *Id.* (citing MONT. CODE ANN. § 27–1–703 (2015)).

163. *Id.*

The dissenting opinion applied this argument to the second *Whitehall* factor, both questioning the veracity of the factor and explaining that the Montana Legislature frequently enacts legislation that addresses a smaller portion of a larger policy question.[164] Unlike the majority, the dissent did not find the amendatory nature of Resolution 10–46 relevant since the Montana Legislature often amends statutes "in ways large or small" and, accordingly, "amendatory actions are no less legislative than the ones that enacted the original entire statute."[165] The dissent finally addressed the third *Whitehall* factor, seeming to accept the position that the settlement of a lawsuit could require the specialized knowledge, training, and experience of city officials.[166] However, the dissent then reminded the Court that, "[w]hile the decision to settle the lawsuit per se may be administrative, it was undertaken in the separate Resolution 10–47."[167] The dissent also pointed out that the Montana Legislature enacts legislation as consideration for lawsuit settlement agreements.[168]

After dismantling the *Whitehall* factors, the dissent advocated for a new analytical approach "guided by underlying principles of separation of powers and historical examples of legislative powers" to guide future legislative–administrative decisions.[169] Using these standards, the dissent determined that Resolution 10–46 was plainly legislative because the 2010 IA vested the city with zoning authority, creating new law.[170] Further, the dissent reasoned that "since adoption of a zoning ordinance would be a legislative act, it follows that an act granting such authority must also be a legislative act."[171]

III. Analysis

A. We Should Not be in Kansas Anymore: Whitehall, Meet the Montana Constitution

In *Phillips*, the majority and dissenting opinions demonstrate one of the inherent problems underlying the *Whitehall* factors: both opinions analyzed each of the four factors separately and, on each factor, were able to reach conflicting conclusions. This result highlights the inconsistent results that follow from the application of these imprecise guidelines. Even after decades of applying these factors, the Kansas Supreme Court itself recently

164. *Id.* (citing Mont. Code Ann. § 39–71–117(d) (2015)).
165. *Id.* at 454 (majority opinion), 457 (McGrath, C.J., with Cotter & Wheat, JJ., dissenting).
166. *See id.* at 457.
167. *Phillips*, 330 P.3d at 457.
168. *Id.* (citing Mont. Code Ann. §§ 47–1–101 to 47–1–216 (2015)).
169. *Id.*
170. *Id.* at 458.
171. *Id.*

agreed with this assessment, stating that the "determination of whether a municipality has acted in its legislative or administrative capacity is indeed difficult and *by no means consistent*" and even when a case is "determined on its particular facts . . . there is *no unanimity of opinion*."[172]

Indicative of the unworkability of this framework, Kansas's highest court recently decided to discard the last factor, finding it be "less a fourth measuring stick than a statement of State judicial policy."[173] The Alaska Supreme Court's assessment of the four factors is also revealing because, like Kansas, Alaska's statutory law permits initiative and referenda at the local level.[174] When deciding whether or not to adopt Kansas's framework to interpret its own statute, Alaska chose to subvert the importance of the third guideline[175] and reject the fourth guideline altogether:

> In our view the "quite clearly and fully legislative" language of this guideline may give too much weight to the administrative aspects of an initiative containing both legislative and administrative matters. As such, this guideline could run counter to our rule of construction that proposed initiatives should be construed liberally, where reasonably possible, to support the electorate's right to participate in direct law–making.[176]

In *Phillips*, the Montana Supreme Court missed an opportunity to reevaluate and eliminate those *Whitehall* factors which are inconsistent with the intent and purpose of the Montana Constitution's initiative and referendum provisions.[177] While the rules of constitutional construction are beyond the topic of this comment, they generally direct courts to first interpret the plain language of a provision and "broadly and liberally" construe the text in the context of the provision's "history and purpose."[178] Additionally, when dealing with multiple provisions, every constitutional provision "dealing with the same subject matter must be considered in determining the meaning of any expression whose meaning is in doubt."[179] After employing these and other applicable rules of construction, extrinsic aids may also help courts to construe ambiguous provisions.[180] Specifically, in constructing the proper test for the legislative–administrative question, a matter which inherently arises from the ambiguities of Articles III, IV, and XI, helpful extrin-

172. *McAlister*, 212 P.3d at 193 (emphasis added) (citing *Rauh*, 575 P.2d at 522).

173. *Id.* at 195.

174. ALASKA STAT. ANN. § 29.26.100 (2015) (In Alaska, the constitutional guarantee to initiative and referendum only applies to statewide legislation).

175. Swetzof v. Philemonoff, 203 P.3d 471, 480–481 (Alaska 2009) (finding that the "third guideline must have a subordinate role to the first two when applied to broad policy decisions").

176. *Id.* at 479.

177. *See generally* 16 C.J.S. *Constitutional Law* § 83 ("In construing a constitutional provision, the function of the court is to ascertain and give effect to the intent and purpose of the framers and the people who adopted it.").

178. *Id.* §§ 79–80.

179. Powder River Cnty. v. State, 60 P.3d 357, 372 (Mont. 2002).

180. 16 C.J.S. *Constitutional Law* § 103.

sic aids to construction include Montana common law interpreting the provisions, the historical circumstances attending the formation of the constitution, the constitutional convention proceedings and ratification process, and those provisions adopted from or related to other state constitutions.[181]

As a preliminary matter, it is important to note that the subject matter restriction on the local government initiative and referenda power is a proper interpretation of the Montana Constitution. Applying a plain language interpretation of Article III, Section 5, the Court previously concluded that the provision's language "act of the Legislature" clearly confines the direct citizen lawmaking power to legislative acts.[182] While Article III, Section 4 lacks this language, it is proper to infer that the initiative power is likewise restricted when this section is read alongside Article V, Section 1 and Article XI, Section 8 because both sections pair the "initiative and referendum" powers together. It is also appropriate to separate legislative and administrative acts when Articles III, V, and XI are considered in the separation of powers context of Article III, section 1. Finally, the legislative–administrative distinction also finds support in the Court's precedent and the Constitutional Convention delegates' original intent, as explained by the *Whitehall* court:

> No case law under the 1889 Constitution suggests that the powers of initiative and referendum in Montana ever extended to anything other than legislative acts. Nor does anything in the transcript of the proceedings of the 1972 Constitution suggest an intent to expand the power of initiative and referendum to anything other than legislative power. In fact, in recommending the adoption at the 1972 Montana Constitutional Convention of the referendum provision . . . Delegate Mark Etchart stated, 'This provision is parallel to the present referendum provisions as contained in Article V, Section 1, of the present Constitution.' In short, Montana's 1972 Constitution does not contain a 'very clear declaration to the contrary'. . . to the general rule that the power of referendum is intended to apply solely to legislative powers.[183]

However, formulating a proper test for the legislative–administrative question is an altogether different, and much more complex, question. In this regard, the origins and an understanding of Montana's initiative and referendum provisions can be reconstructed by reviewing the historical underpinnings of the constitution as well as the drafters' original intent and the "objective public meaning of the document to a reasonable person at the time of ratification."[184] Additionally, it is important to review Montana Su-

181. *Id.* §§ 103–111.

182. *Town of Whitehall*, 956 P.2d at 747 (citing BLACK'S LAW DICTIONARY 25 (Bryan A. Garner ed., 6th ed. 1990)) (explaining that Black's Law Dictionary defines "act" as a "legislative act" and as "[a]n alternative name for statutory law").

183. *Id.* at 748.

184. Rob Natelson, *Documentary History of the Ratification of the Montana Constitution*, WILLIAM J. JAMESON LAW LIBRARY, http://perma.cc/MB9S-KZYM (last visited Dec. 1, 2015).

preme Court precedent if, when interpreting the Montana Constitution, the Court previously adopted the persuasive foreign authority of another state. While relying upon the jurisprudence of other states is a standard method of analysis commonly employed by state courts, Professor G. Alan Tarr cautions that "in interpreting a state constitution, a state court is interpreting a unique collection of provisions with a distinctive generating history."[185] In this respect, borrowing from the opinions of other states can be problematic because, even when sister states share *similar* constitutional provisions, "counterpart provisions from other states may differ in their language, the historical circumstances out of which they rose, or both."[186] Logically, this problem becomes amplified when the constitutions of two states have different historical foundations *and* contrasting provisions. Unfortunately, this is the case when one compares the right to initiative and referendum under Montana and Kansas law.

The *Phillips* majority's continued reliance on the Kansas-adopted *Whitehall* factors is ultimately misplaced because, unlike Montanan voters, the Kansas electorate has no constitutional guarantee to initiative and referendum at the state or local government level.[187] Instead, the Kansas Legislature must delegate and define this authority for Kansas voters.[188] Unlike Montana, the legislative initiative and referendum movement in Kansas was short-lived and largely unsuccessful.[189] While populist, democratic, and progressive leaders attempted to amend the Kansas Constitution to include the right to initiative and referendum, a guarantee to direct citizen lawmaking never materialized.[190] The 1909 Kansas Legislature eventually passed a bill establishing initiative and referendum in all the state's cities.[191] However, the Kansas Supreme Court has a long history of strictly confining the operation of the this statute, which sets out the requirements for local initiative and referendum ordinance proposals "on a narrow range of subjects."[192] As a result, "[i]n Kansas, the initiative and referendum process . . . has long been judged on a *more demanding basis* than in some other locales."[193]

Unlike Kansas, the right to initiative and referendum in Montana is reflected, but not created, in statute. Under the Montana Constitution, "[t]he

185. TARR, *supra* note 52, at 200. **R**

186. *Id.*

187. *Imming*, 344 P.3d at 967; *see* KAN. CONST. art. V, § 1, art. XII, § 5.

188. *Imming*, 344 P.3d at 967; *see* KAN. CONST. art. V, § 1, art. XII, § 5.

189. SCHMIDT, *supra* note 10, at 236 (explaining the failure of the proposed statewide initiative and referendum amendments in 1909 and 1913). **R**

190. *Id.*

191. *Id.*

192. KAN. STAT. ANN. § 12–3013 (2014); *McAlister*, 212 P.3d at 193–194 (citing State ex rel. Wunsch v. City of Kingman, 254 P. 397 (Kan. 1927)); SCHMIDT, *supra* note 10, at 301.

193. *McAlister*, 212 P.3d at 193 (emphasis added).

people reserve to themselves the powers of initiative and referendum."[194] The root of this power dates back to the turn of the last century when a bipartisan legislature and the Montana electorate joined together to amend the 1889 Constitution and engender direct citizen participation in state governmental decision-making. The drafters of the 1972 Montana Constitution not only intended to retain this guarantee, but expressly extended the people's lawmaking power, previously authorized only in statute, "to the qualified electors of each local government unit."[195] A review of Montana's constitutional convention and ratification process also reveals the uncontroversial nature and clear meaning of the initiative and referendum provisions contained in Articles III, V, and XI. In the end, the initiative and referendum power in the constitution reflects the delegates' desire to entrust the people with this power and provide the electorate with a "check that the people of Montana want."[196]

The long history and acceptance of the express initiative and referendum provisions in Montana's fundamental and organic law demand that this power reserved to the people be liberally interpreted. If Montana is to adhere to the "principle that initiative and referendum provisions of the Constitution should be broadly construed to maintain the maximum power in the people,"[197] the Montana Supreme Court should no longer adhere to Kansas's stricter doctrine that has admittedly "never adopted a 'liberal' view of the matters which should be subject to initiative and referendum, but quite the contrary."[198] The fundamental flaw in the *Whitehall* and *Phillips* decisions is not in the Court's use of extrinsic jurisprudence to help it interpret Montana's initiative and referendum provisions. Rather, when the Court considered whether to adopt the persuasive precedent of other courts, it erred by not turning to decisions with "well–reasoned and meaningful" analysis "made by courts of last resort in sister states with *similar* constitutional provisions."[199] In failing to do so, the *Whitehall* and *Phillips* decisions also failed to follow the Court's own precedent that holds extra-jurisdictional cases "practically without value" when "[t]hey construe constitutional provisions altogether unlike our own."[200]

194. MONT. CONST. art. V, § 1.

195. *Id.* art. III, §§ 4(1), 5(1), art. XI, § 8.

196. CONSTITUTIONAL CONVENTION TRANSCRIPT IV, *supra* note 70, at 747.

197. *Chouteau Co.*, 563 P.2d at 1128.

198. City of Lawrence v. McArdle, 522 P.2d 420, 427 (Kan. 1974).

199. 16 AM. JUR. 2d *Constitutional Law* § 84 (2015) (emphasis added).

200. Yellowstone Pipe Line Co. v. State Bd. of Equalization, 358 P.2d 55, 64 (Mont. 1960) (quoting Hilger v. Moore, 182 P. 477, 482 (Mont. 1919)).

B. There's No Place Like Montana, Oregon, and Colorado

While the legislative–administrative rule stems from a logical interpretation of the Montana Constitution, developing an appropriate analytical framework for determining whether a subject is eligible for initiative and referendum is a notoriously difficult proposition. At the same time, interests of judicial restraint and legitimacy require the Montana Supreme Court to adopt guidelines that are truer to the constitution's original force and purpose. This comment proposes a new test that integrates: (1) the distinctive character and development of Montana's unique constitution; (2) the Court's pre-*Whitehall* precedent; and (3) how states with similar initiative and referendum provisions distinguish legislative and administrative acts.

Since Montana has adopted two constitutions, the interpretation of the legislative–administrative question inherently presented in Articles III, V, and XI of the 1972 Constitution necessarily depends on an interpretation of the 1906 amendment, originally embodied in Article V, Section 1 of the 1889 Constitution.[201] In comparing the 1889 Constitution with the 1972 Constitution, the historical circumstances of the 1906 amendment help to reveal the intent of Montana's initiative and referendum provisions. Montanans' express desire to root out corruption and participate in the lawmaking function of their government accounts for the success of the statewide initiative and referendum amendment at the turn of the last century.[202] While the Progressive Party initiated the initiative and referendum movement in Montana, both Democrats and Republicans in the Montana Legislature eventually embraced the amendment because "both parties recognized that they had to be, or at least appear to be, more responsive to the will of voters."[203]

Montana, like most states, borrowed its constitutional provisions from other states.[204] While the Colorado Constitution supplied most of the language in Article V, Section 1 of the 1889 Constitution,[205] the Oregon Constitution acted as the model for the 1906 Amendment.[206] Thus, when interpreting Montana's borrowed initiative and referendum provision, it is important to consider its origins in the Oregon Constitution and the Oregon Supreme Court's interpretation of the provision.[207] Oregon, like Montana and many other states in the early 1900s, amended its original constitution

201. TARR, *supra* note 52, at 200–201.
202. ELISON & SNYDER, *supra* note 17, at 93. **R**
203. Wiltse, *supra* note 32, at 309. **R**
204. TARR, *supra* note 52, at 201. **R**
205. ELBERT F. ALLEN, SOURCES OF THE MONTANA STATE CONSTITUTION 2 (Mont. Constitutional Convention Comm'n, Constitutional Convention Memo. No. 4, 1972).
206. PIOTT, *supra* note 32, at 57–58. **R**
207. TARR, *supra* note 52, at 201.

to include the right to direct citizen lawmaking in an effort to take back the state from the moneyed interests and corrupt lawmakers dominating their state legislature.[208] Professor Steven L. Piott recounts the historical origins of the amendment in Oregon:

> The actual beginning of the movement to establish the initiative and referendum in Oregon, however, dates from the reading and discussion of a chapter of J.W. Sullivan's *Direct Legislation* at a Farmers' Alliance meeting in Milwaukie, Oregon, in the fall of 1892. The meeting took place in the home of Seth Lewelling, fruit grower, political activist, and one of the leaders of the Farmers' Alliance in Clackamas County. The meetings and discussions at the Lewelling home were regular occurrences, and the topics were those under discussion by farmers everywhere: exorbitant railroad rates, the tight money supply, and control of the legislature by the plutocracy. The Lewelling group had a firm sense of grievance, but had yet to discover a method for solving the problems plaguing U.S. society. Sullivan's book offered them a means to bring about change. By using the initiative and referendum as tools of democracy, citizens could regain the legislative and fiscal powers they had delegated to legislative bodies that either seemed committed to avoiding controversial issues or were actually determine to abuse the public trust. Adoption of the initiative and referendum would give hope to those who had given up on reform on the political economy.[209]

Almost a decade after this first meeting, the Oregon Legislature finally approved its initiative and referendum constitutional amendment in 1901.[210] Every political party except the Prohibitionists and approximately two-thirds of the newspapers in Oregon lined up to support the amendment.[211] In the 1902 election, Oregonians overwhelmingly voted in favor of the amendment by an 11-to-1 margin.[212] In 1906, the Oregon Constitution was amended once again to extend "the provision of the [i]nitiative and the [r]eferendum to all local, special, and municipal laws."[213] Like Montana, Oregon quickly limited the local initiative and referendum power to those matters considered "municipal legislation."[214]

The populist spirit underlying Oregon's 1902 Amendment and Montana's 1906 Amendment also permeated Montana's 1972 Constitutional Convention,[215] a fact demonstrated by the pre-constitution convention reports, constitutional convention transcripts, and official voter information pamphlet. This documentary record demonstrates that, while the Alaska

208. PIOTT, *supra* note 32, at 32–33. R
209. *Id.* at 33–34.
210. *Id.* at 40.
211. *Id.*
212. SCHMIDT, *supra* note 10, at 8. R
213. ALLEN H. EATON, THE OREGON SYSTEM: THE STORY OF DIRECT LEGISLATION IN OREGON 125 (1912).
214. Campbell v. City of Eugene, 240 P. 418, 421 (Or. 1925) (citing Long v. City of Portland, 98 P. 1111, 1112 (Or. 1909)).
215. ELISON & SNYDER, *supra* note 17, at 93. R

Constitution provided the needed grammatical, "constitutional housekeeping" changes for Article V,[216] Articles III and XI were designed to enhance the direct lawmaking power and extend the initiative and referenda power to Montana's city, town, and county voters.[217] The broad acceptance of initiative and referendum, both during the adoption of the 1906 amendment and throughout the 1972 convention and ratification process, requires a liberal construction of Articles III, V, and XI. Thus, when presented with the legislative–administrative question, the Court should make every effort to validate voter challenges to local government actions and uphold the power of the people.

Montana case law after the adoption of Article XI, Section 8 in the 1972 Constitution and before the adoption of the *Whitehall* factors provides the first and most important guidepost in formulating a more appropriate framework for the legislative–administrative question. Also persuasive is Oregon case law interpreting what is now Article IV, Section 1 of the 1857 Oregon Constitution.[218] Oregon's precedent is somewhat limited on this subject. However, the Colorado Supreme Court's interpretation of the legislative–administrative question is additionally useful here because Montana, Oregon, and Colorado have similar historical backgrounds on this subject.[219] Like Montana, Colorado modeled its provision after Oregon's constitutional amendment,[220] and today both states share almost identical local government initiative and referendum provisions.[221] Finally, like the Montana Supreme Court, the highest courts in Oregon and Colorado have long held the view that the constitutional guarantee to initiative and referendum at the local level should be liberally construed.[222]

Before *Whitehall* and after the adoption of Article XI, Section 8, the Montana Supreme Court consistently applied the "new or existing law" test when a party challenged the subject matter of a local initiative or referen-

216. TARR, *supra* note 52, at 201.

217. ELISON & SNYDER, *supra* note 17, at 93, 194.

218. OR. CONST. art. XI, § 1(a) (amended 1906), *superseded by* OR. CONST. art. IV, § 1(5).

219. PIOTT, *supra* note 32, at 109 (explaining that "[t]he campaign to obtain direct legislation in Colorado involved the together of disparate elements—urban consumers and taxpayers, organized labor, progressive–minded reformers—driven to seek common ground by the refusal of the dominant political culture to respond to their demands."). R

220. *Id.* at 121–123 (The 1910 amendment to the Colorado Constitution also provided for initiative and referendum at the local government level).

221. *See* CO. CONST. art. V, § 1(9); OR. CONST. art. IV, § 1(5). Since Alaska lacks these constitutional guarantees, cases interpreting the Alaska Constitution are not the proper sources to use as persuasive authority.

222. *See, e.g.* State ex rel. McHenry v. Mack, 292 P.306, 307 (Or. 1930) (stating that "we shall keep in mind that the language of the Constitution, and the statutes enacted for the purpose of carrying out the provisions thereof, should have a liberal construction"); City of Idaho Springs v. Blackwell, 731 P.2d 1250, 1253 (Colo. 1987) ("[t]he powers of initiative and referendum are liberally construed").

dum.[223] Essentially the same as the first *Whitehall* factor's beginning sentence, the rule states that if an ordinance creates new law, it is a legislative act, but it is an administrative act if it executes an already existing law. When the *Nore* Court adopted this standard in 1966, it referenced the Utah Supreme Court case *Keigley v. Bench*[224] as persuasive authority.[225] However, the *Keigley* court actually relied upon Oregon case law when it adopted the "new or existing law" test.[226]

The Oregon Supreme Court has applied this test since 1925,[227] and, in 1931, added a familiar dimension to its legislative–administrative framework:

> In determining whether the ordinance in question was legislative or administrative, we notice that the authorities in the books are in accord that actions which relate to subjects of a permanent or general character are considered to be legislative, while those which are temporary in operation and effect are not.[228]

Thus, with this addition of the "permanency and generality" language, Oregon's framework mirrors the first *Whitehall* factor. Stated differently, the guideline defines a legislative act as a permanent, general act that sets out a new policy and an administrative act as one which implements or merely carries out general policies or purposes already declared.[229]

Like Montana and Oregon, the Colorado Supreme Court's legislative–administrative test begins by determining if an act is new, permanent, and general, or temporary "in operation and effect" and "necessary to carry out existing legislative policies and purposes."[230] Over the years, however, Colorado has also added some useful guidance in this regard. First, Colorado's precedent effectively highlights the interchangeability of the word "permanent" with the term "general:"

> However, the duration of legislation or the anticipated useful life of a municipal improvement does not completely determine the meaning of permanence when determining whether an ordinance is legislative or administrative . . . .The term "permanent" is used to signify a declaration of public policy of

223. *See, e.g. Chouteau Co.*, 563 P.2d at 1127; Dieruf v. City of Bozeman, 568 P.2d 127, 129 (Mont. 1977).

224. 89 P.2d 480, 484 (Utah 1939).

225. *Nore*, 417 P.2d at 463 (Mont. 1966) (citing *Keigley*, 89 P.2d at 484).

226. *Keigley*, 89 P.2d at 484 (Utah 1939) (citing *Whitbeck*, 12 P.2d at 1020).

227. *See, e.g.* Lane Transit Dist. v. Lane Cnty., 957 P.2d 1217, 1220 (Or. 1998) (quoting Monahan v. Funk, 3. P.2d 778, 780 (Or. 1931); *see also Monahan*, 3 P.2d at 780 (citing *Campbell*, 240 P. at 422).

228. *Monahan*, 3 P.2d at 779; *see, e.g.* State ex rel. Dahlen v. Ervin, 974 P.2d 264, 266 (Or. 1999) (finding that "[i]t has long been Oregon law that a local initiative may deal only with legislative decisions—laws of general applicability and permanent nature—not with administrative decisions, which involve the details of implementing established policy.").

229. Foster v. Clark, 790 P.2d 1, 6 (Or. 1990); *Lane Transit Dist.*, 957 P.2d at 1220.

230. City of Aurora v. Zwerdingler, 571 P.2d 1074, 1077 (Colo. 1977).

general applicability because a permanent enactment is more likely to involve policy considerations.[231]

Second, the Colorado Supreme Court has expanded on the "new or existing law" test to "include a presumption that where an original act is legislative, an amendment to that act is likewise legislative."[232] Additionally, in 2013, the Colorado Supreme Court adopted a rule modeled after the third *Whitehall* factor, finding that "decisions that require careful study and specialized expertise, as well as discretionary judgment, generally are administrative in nature."[233] It is interesting to note, however, that in the two cases where the Colorado Supreme Court applied this factor, the court was able to reach the same conclusion by simply implementing the "new or existing law" test.[234] Thus, the court both adopted and seemed to negate the need for the third *Whitehall* factor. Finally, in the view of Colorado's highest court, a court should consult applicable historical examples of legislative power to decide close questions: specifically, "[a]n initiative that finds longstanding parallels in statutes enacted by legislative bodies, for example, may be deemed legislative on that basis, while initiatives that seem more like traditional executive acts may be deemed to fall on that side of the line."[235]

C. A "New" Approach to the Legislative–Administrative Question

By combining Montana, Oregon, and Colorado jurisprudence, a more streamlined approach emerges which allows for a broader interpretation of Article XI, Section 8 of the Montana Constitution. To determine if the subject matter of an ordinance is legislative or administrative in nature—and thus eligible for initiative and referendum—the Montana Supreme Court should adopt the following framework:

1. An ordinance that enacts a new law of general applicability is legislative, while an ordinance that executes or implements an existing, general law is administrative. Where an original act is legislative, an amendment to that act is likewise legislative.

231. *City of Idaho Springs*, 731 P.2d at 1254 (emphasis added).

232. *Vagneur*, 295 P.3d at 505 (citing Margolis v. Dist. Court, 638 P.2d 297, 304 (Colo. 1981)).

233. *Id.* at 507 (citing *McAlister*, 212 P.3d at 194; *Town of Whitehall*, 956 P.2d at 749–750).

234. *Id.* (finding that in addition to requiring specialized knowledge "government decisions to enter into a contract with a specific entity are not legislative decisions because they do not involve the adoption of generally applicable rules in the implementation of public policy. Instead, such decisions are executive acts involving specific individual parties and, accordingly, lie beyond the bounds of legislative power.); *City of Aurora*, 571 P.2d at 1077 (finding that a referendum petition attempting to repeal a municipal utility rate ordinance was invalid because the ordinance did "not propose to make a new law; it is one executing a law already in existence, merely changing an expense factor in the maintenance of a public utility. It pursues no new policy. It pursues a plan already adopted by the city council.").

235. *Id.*hi City, 269 P.3d 141, 155 (Utah 2012)).

2. A court's decision may be informed by historical examples of recognized legislative power. If a local government act is sufficiently analogous and finds longstanding parallels in statutes enacted by the Montana Legislature, it should be deemed a legislative act. If, on the other hand, the act is analogous to an act the legislature typically delegates to an executive body, it should be deemed an administrative act.

1. Application: Zoning Ordinances and Interlocal Agreements

In *Greens at Fort Missoula v. City of Missoula*,[236] the Montana Supreme Court held that both zoning and rezoning ordinances are legislative acts. While the Court did not apply the "new or existing law" test in that case, it squarely fits within the legislative definition of the first proposed guideline. Both zoning and rezoning ordinances prescribe new land use policies for land within a local government unit that are generally applicable to all property owners within a designated zoning boundary. Rezoning ordinances also fit within the second part of the first proposed factor because such actions constitute an amendment to or change in an original zoning ordinance. On the other hand, a local government acts within its administrative power when it applies zoning ordinances to individual land use decisions.[237]

While distinctly separate from zoning and rezoning actions, ordinances authorizing amended intergovernmental interlocal agreements are likewise legislative. Indeed, such actions are even broader than zoning ordinances because they authorize local governments to cede their power to, or receive the power of, another local government unit. As the *Phillips* dissenting opinion aptly stated, because the 2010 IA created zoning authority and "since adoption of a zoning ordinance would be a legislative act, it follows that an act granting such authority must also be a legislative act."[238] Thus, if there is a legislative presumption in favor of a zoning amendment, the same presumption should apply and arguably be stronger in the case of an amended interlocal agreement.

In *Phillips*, Resolution 10–46 authorized the 2010 IA, an agreement which re-adopted and amended the 2005 IA.[239] Both the 2005 IA and 2010 IA created a change in the broad planning authority of two local government units because it transferred the county's planning jurisdiction in the extraterritorial area outside of Whitefish to the city. While the termination and duration provisions of the amended agreement also constituted a signif-

236. 897 P.2d 1078 (Mont. 1995).

237. *See Carter*, 269 P.3d at 159 (stating that a "a broad zoning ordinance is a legislative act and that application of a zoning ordinance to individual property owners, such as by 'variance'" and 'conditional use' permits, is an executive act").

238. *Phillips*, 330 P.3d at 458 (McGrath, C.J., with Cotter and Wheat, JJ., dissenting).

239. *Id.* at 446 (majority opinion).

icant policy change from the 2005 IA, these changes are irrelevant because, as the dissent stated, "even if Resolution 10–46 simply adopted the agreement again, it would not lose its legislative nature."[240] As such, the second part of the first proposed factor also applies to the amended interlocal agreement in *Phillips* because the 2010 IA re-instituted and amended the 2005 IA, a plainly legislative act.

2. Application: Location of Public Buildings

The Montana Supreme Court has not decided if the people can challenge ordinances that determine the location of county or municipal buildings. However, the subject matter designation of such measures can again be resolved by relying on the proposed first factor, specifically by characterizing the planning process a city or county undergoes before it decides the location of a public building. A review of the facts in *Whitehall* are illustrative in this regard. In *Whitehall*, the Whitehall Town Council passed two separate ordinances to secure funding for a water system improvement project, a project which specified and included water meters as part of the overall plan.[241] The council subsequently acted upon this plan when it passed a third ordinance requiring Whitehall residents to connect to water meters and pay variable rates based on water use.[242] While the *Whitehall* court found these facts inconclusive under the first factor, the Town of Whitehall correctly reasoned that the third ordinance implemented the water system improvement project already authorized in the first two ordinances.[243] Similarly, the Colorado Supreme Court held a voter initiative challenging the location and structure of a new city hall invalid when, ten years earlier, the voters approved a tax increase to fund, in part, a new city hall.[244]

Thus, if a city or county produces and approves a general plan to construct or restore a public building, and the voters do not challenge the original action authorizing the plan, any act in furtherance of that policy decision is an administrative act. The policy rationale for this rule has long been accepted by the Montana Supreme Court and several other jurisdictions: to allow the referendum in such instances would "hamper the efficient administration of local government"[245] and "destroy the efficiency necessary to the successful administration of the business affairs of the city."[246]

240. *Id.* at 458 (McGrath, C.J., with Cotter and Wheat, JJ., dissenting).
241. *Town of Whitehall*, 956 P.2d at 745.
242. *Id.*
243. *Id.* at 749.
244. *City of Idaho Springs*, 731 P.2d at 1251–1252.
245. *Town of Whitehall*, 956 P.2d at 748 (quoting *Wennerstrom*, 821 P.2d at 149).
246. *Id.* (quoting Read v. City of Scottsbluff, 297 N.W. 669, 671 (Neb. 1941)).

If a close case exists, perhaps because there is a question of whether a cognizable general plan exists, an application of the second proposed factor yields the same result as the first because the act of determining the location of a local government building is analogous to how the Montana Legislature refers such specific decision-making authority to the executive branch. Under longstanding state statute, the legislature delegates certain decisions relating to the state's long-range building program to the Montana Department of Administration.[247] For example, § 2–17–805 of the Montana Code Annotated requires the department to "establish and maintain a long-range master plan for the orderly development of the capitol complex . . . with consideration given to . . . the needs of the state relative to the location and design of buildings to be constructed."[248] In 2007, the department completed the Capitol Complex Master Plan, which included a location recommendation for the Montana Historical Society's new museum.[249] A legislative report prepared for Montana's Legislative Finance Committee describes the role the committee and executive agencies played in determining the museum's location:

> Testimony for Historical Society Building project, during the Long-Range Planning Subcommittee (LRP) hearings of the 59th Legislature, became highly publicized when representatives of the Montana Historical Society announced that an opportunity existed to enter into negotiations for the purchase of the Helena Capital Hill[ ] Mall for the location of the new museum. The 59th Legislature provided $7.5 million of bond proceeds, or state funding, for the new Historical Society Building. Implicitly, the funds were provided to allow negotiations for the mall to proceed in earnest, yet formally, *the bond proceeds were simply made available for the new museum building*. Consequently, *there is no requirement* for the Historical Society Museum Building to be constructed at the Capital Hill[ ] Mall location.
>
> . . .
>
> At this time, both [the Department of Administration, Division of Architecture and Engineering (A&E)] and the consultants who designed the Capitol Complex Master Plan believe the best location for the Heritage Center is at the corner of 6th Street and Roberts, in the Helena Capitol Complex. The new building project could be constructed at the location at a cost that is within the current budget, as established by the 59th Legislature.[250]

Subsequent bills introduced during the 2011, 2013, and 2015 legislative sessions sought final legislative consent and funding from both the Montana Senate and House of Representatives, but did not contain any lan-

247. MONT. CODE ANN. § 17–7–202.

248. *Id.* § 2–17–805 (1)(a).

249. LEGIS. FISCAL DIVISION, CATHERINE DUNCAN, CAPITOL COMPLEX MASTER PLAN AND HISTORICAL SOCIETY MUSEUM BUILDING UPDATES, LEGIS. FINANCE COMM. REP., at 1 (Mont. 2007), *available at* http://perma.cc/S6V3–HVHC.

250. *Id.*

guage prescribing the proposed building's location.[251] Instead, the legislature delegated this decision to the state's executive branch, demonstrating the administrative nature of such decisions requiring "years of painstaking planning."[252]

IV. CONCLUSION

The Montana Constitution provides voters with an expansive right to enact or repeal statewide and local legislation by petition and majority vote. The power to initiate or repeal local government actions finds its historical roots in the people's reaction to the unresponsive, inept, and corrupt state government present in Montana at the turn of the last century. The populist spirit present in Montana during that time also permeated the proceedings of the 1972 Constitutional Convention. The convention delegates' unquestioning acceptance of the legislative initiative and referendum, and their decision to expand this power to voters at the local government level, reflects the state's long-standing public policy to "keep government [within] reach of the people."[253]

The wide acceptance of the direct lawmaking power in Montana demands a broad interpretation of the initiative and referendum power reserved to the people. In determining whether a local government act is legislative or administrative, and thus subject to the initiative and referendum power, the Montana Supreme Court must broadly construe this provision to ensure that maximum power is truly retained in the people. The Kansas-adopted *Whitehall* factors provide no such guarantee and must be replaced with a new test used in other jurisdictions with constitutional provisions similar to those found in Montana. Only then will the Court be able to more accurately identify and separate legislative acts from administrative acts, and more broadly, ensure Montana's constitutional guarantee to initiative and referendum is secure and available for citizens to challenge their government.

251. H.B. 439, 62nd Leg., Reg. Sess. § 3 (Mont. 2011); H.B. 267, 63rd Leg., Reg. Sess. § 2 (Mont. 2013); S.B. 420, 64th Leg., Reg. Sess. § 1 (Mont. 2015).

252. State of Mont., THE NEW MONTANA HERITAGE CENTER, http://perma.cc/938E–ZP25 (last accessed Dec. 1, 2016).

253. –ELISON & SNYDER, *supra* note 17, at 194. **R**

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