

A New Angle

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Justin Angle: This is A New Angle, a show about cool people doing awesome things in and around Montana. I'm your host, Justin Angle. This show is supported by First Security Bank, Blackfoot Communications and the University of Montana College of Business.

Justin Angle: Hey, folks, welcome back and thanks for tuning in. Today I'm speaking with Craig Cowie, professor at the University of Montana's Blewitt School of Law.

Craig Cowie: You know, we think about the Supreme Court as arbiters of the law, sort of saying what the law is at the highest level. We don't think about them as arbiters of fact.

Justin Angle: Craig is going to guide us through three of the most significant decisions in this recently concluded term of the United States Supreme Court. Craig, thanks for coming on the show.

Craig Cowie: Thanks, Justin. I'm glad to be here.

Justin Angle: Yes. Since you've been on the show before, we can dispense with the bio stuff and get right into it because we've got a lot to cover. Historic term at the Court this this year.

Craig Cowie: Absolutely. And, you know, so much happened that we can only really scratch the surface here. And so, let's get to it.

Justin Angle: Yeah. So, let's start with Dobbs. What happened in the Dobbs case? Because that was kind of the one that grabbed the most headlines.

Craig Cowie: Sure. So, before we talk about Dobbs, I think it makes sense to talk a little bit about sort of our federal state system, because not everybody understands exactly how the different, like what does it mean for a federal constitution versus a state constitution, so our U.S. Constitution is supreme and things that are in the U.S. Constitution. A state constitution or Congress or a state legislature, they can't pass laws or have rules that conflict with the U.S. Constitution. Below that, if Congress passes a law, that's going to trump a state law or a state constitution, okay, when you get to the states, a state constitution is going to trump a state law. But that's the sort

of basic framework. And so, with Dobbs, if we go back to the early seventies, when the Court issued Roe v Wade, which is the case everybody's heard about.

Justin Angle: 1973.

Craig Cowie: Yes. And so, in that case, what the Court said was that people had a right to choose an abortion that could be weighed against government interests. So, you didn't have an absolute right, but you had a right to it under certain circumstances. That right could not be infringed upon. Roe was modified over the years, but that basic rule still existed, was that you had to weigh the state's interest in limiting abortion, how much burden that was going to place on the person's right to choose the medical procedure.

Justin Angle: Okay.

Craig Cowie: So, with Dobbs, the Court revisited Roe and all of its subsequent cases and said that the U.S. Constitution, in fact, did not protect the right to an abortion under any circumstances. In that case, Mississippi had passed a law that limited abortion after 15 weeks.

Justin Angle: After 15 weeks.

Craig Cowie: Right. And so that was the limitation that would have to be weighed against the woman's constitutional right under the Roe and the successor cases there. But now after Dobbs, that right doesn't exist anymore. So, the states can now step in and actually regulate.

Justin Angle: Regulate as they see fit.

Craig Cowie: As they see fit. That's right. And so, this doesn't mean, to be clear, the Supreme Court's not saying that abortion, at least not in this case, not saying that abortion is unconstitutional. But rather it's a question of who gets to decide. For right now, the woman doesn't have that right and the state can decide if it wants.

Justin Angle: So, what does this mean for Montana? We've got a constitution and some case law that speaks specifically to not necessarily abortion, but medical autonomy. Is that, or bodily autonomy

Craig Cowie: That's right. Right. So, Montana's constitution has in Article II, Section 10, a fantastic, explicit protection of privacy for its citizens. And that's something, it's not

unique to Montana, but Montana has a really strong protection. There was a case in 1999 called *Armstrong v State* where the Montana Supreme Court said that that right to privacy in the Montana Constitution included a right to make medical choices for yourself, and specifically the right to what they called procreative autonomy. In other words, the right to choose when to have children.

Justin Angle: I mean, that seems as close to mentioning abortion in case law as it gets.

Craig Cowie: Yes. In the case it's explicit. So, we in Montana still have, that case is still good law. So now *Roe* has been stricken. And so, there's no longer a federal constitutional right to an abortion.

Justin Angle: So, the state is no longer subservient to some federal right to abortion, now we can do what we want here.

Craig Cowie: And what we've done so far is the state constitution protects a woman's right to choose in Montana. So that's because our Constitution says it and our courts have interpreted it that way.

Justin Angle: Sure. And our legislature meets once every other year, right, so.

Craig Cowie: Right. Well, although there are some laws, you know, that's the thing is, under our system, the state legislators can't pass a law that conflicts with the state constitution.

Justin Angle: Okay.

Craig Cowie: So, they've passed laws, but they've been stricken or enjoined because they conflicted either in the past with the federal constitution. But also in Armstrong, we have our own right, under our own constitution, which is in independent ground.

Justin Angle: So, is that the only mechanism through which abortion could become illegal in the state of Montana is a constitutional amendment? Or I mean, there's some talk of throwing out the Constitution and having a new convention. Are those the mechanisms?

Craig Cowie: So those are some of the mechanisms. There are five ways, basically, that this could change. So, the first way is that the Montana Supreme Court itself could change its mind.

Justin Angle: Okay, so, a case comes up to the Montana Court.

Craig Cowie: That's right. And they decide that the Court itself was wrong in *Armstrong v State* and it changes its interpretation of the Montana Constitution. That's basically what happened in the federal Supreme Court.

Justin Angle: Sure. Yeah. Sounds familiar.

Craig Cowie: So, and that, you know, that's a question of who's on the court. And, you know, we have two justices running for reelection right now, both in challenged races. And this issue has already come up in the press. This is where people are like, well, if you want to change the rule on abortion, you know, vote this way or vote that way. And if the court changes or it could just decide without a personnel change, if you decide that it made a mistake, the amendment is the second way, which is what you said, which is that Montana itself could choose to amend its constitution to make clear that that right to procreative autonomy is not included. And there it would be either two thirds of the legislatures of legislators for both houses could propose something to be voted on by the people, or a very sort of complicated scheme, but like basically 10% of the electorate, including 10% of 2/5 of the legislative districts, right, could also

propose to put something. But the end result is that either way, the people of Montana would vote on whether or not to amend the Constitution.

Justin Angle: Okay. So interesting upcoming legislative session, these elections, a lot of consequential things in the next 12 months in the state of Montana.

Craig Cowie: So that's just two of the ways, though.

Justin Angle: Oh, right, right, right.

Justin Angle: Because so the other thing is, remember, in our scheme, if Congress passes a law that can trump state law, too. Now right now, Congress is you know, there's been discussion of whether or not Congress is going to pass a law that will protect the right to abortion. But Congress could also pass a law that eliminates it.

Justin Angle: Bans it.

Craig Cowie: Bans it. Exactly. And so, if that law were upheld, that law would trump.

Justin Angle: State law.

Craig Cowie: Our law in the states. Yeah. So that could happen. The other thing is that the US Supreme Court could decide in a new case that abortion is affirmatively unconstitutional. You see some of that in the Dobbs opinion because there's some discussion of, well, the fetus actually has a right not to be aborted. And if the Court said that that was a constitutional right, then that would eliminate, you know, abortion in every state, everywhere.

Justin Angle: And then that's the law of the entire nation.

Craig Cowie: And, you know, the fifth way is that Montana Supreme Court, although it doesn't seem likely currently, but like they could decide, they could also decide that.

Justin Angle: Sure. A case comes to them.

Craig Cowie: Right.

Justin Angle: Talk a little bit about this concurring opinion from Thomas, sort of inviting implications for other, you know, other rights, I guess, right to marry, right to contraception and so forth.

Craig Cowie: Absolutely. So really the two big overarching issues coming out of this case are like the effect on people's right to choose. But also, what does this mean for other rights and Justice, as you noted, Justice Thomas in his concurrence actually explicitly says, calls into question the legality of the right to conception from a case called Griswold, the right to be sort of not prosecuted for same sex sexual conduct, which was Lawrence V Texas, the right to marry under Obergefell. Each one of those cases is rooted in this same idea of privacy. Or, as I think Dahlia Lithwick, I think phrases this very nicely the post-slavery post-Civil War context when we enacted the 14th Amendment, this idea of bodily autonomy. Like slavery was a situation where you didn't have the right to control your body or your children or who you married. And that when we pass these statutes, what we're really doing is countering that, this right to bodily autonomy. So, all of these other rights are also rooted in the same things.

Justin Angle: They were reasoned in the same...yep.

Craig Cowie: Right and based on the same part of the Constitution that the Court just said was egregiously wrong. So, the Dobbs majority, to be clear, says very clearly that this is all about abortion. Abortion is different. But Justice Thomas is part of that

majority, and he's very clear that, at least for him, it's not different. So those other rights are also, we'll have to see what happens.

Justin Angle: Okay. So, let's move on to Castro Huerta, tell us about that case.

Craig Cowie: So, this is an Indian law case and federal Indian law is extremely complicated. Including about the issue about who has the right to prosecute crimes within what's called Indian Country. And that can depend on the people involved, the type of crime, the exact nature of the property in which the crime happened. So, we're going to just touch on this at a high level. And I think it's important for people to understand just as a basic, you know, tribes are unique in our structure. They're not states. Sometimes people confuse them and think that they're like states. They're independent sovereigns that worked with the federal government, went to war against the federal government, negotiated treaties. This was basically all at the federal tribal level. And the U.S. Constitution allows Congress to pass laws that affect tribes and their members, even on their own land. But states generally, like so the state of Montana or the state of Oklahoma, they can't do that. They're not allowed generally to exert authority, or at least they weren't over tribes and tribal members within the confines of the reservations. And this case really starts almost 200 years ago in a case called Worcester v Georgia, which was from 1832. So, in I think the 1820s, gold was

discovered in Cherokee Country. Georgia, which at the time was within sort of in part of Georgia, they weren't part of it, but, you know, it was in the same geographic area.

Justin Angle: Different state boundaries.

Craig Cowie: Yeah. So, Georgia then passed a law that basically seized all of Cherokee Country.

Justin Angle: To get the gold.

Right. Oh, I'm not see why they did it, but yeah, they see, what the law did was sort of basically just seized the whole thing and asserted that Georgia's criminal laws applied throughout Cherokee territory.

Justin Angle: Yeah.

Craig Cowie: And the Supreme Court at the time squarely rebuffed Georgia. And I just want to read a quote, because I think it's important. And this is in 1832. The Court says, "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights as the undisputed possessors of the

soil from time immemorial." Right. So, this is a very strong statement of tribal sovereignty and tribal sovereign authority. And so, the rule for about the past 200 years, since that case was, for purposes of *Castro Huerta*, the case we want to talk about today was that states could not prosecute crimes involving tribal members that occurred within Indian Country unless they were allowed to do so under federal law, which usually meant that Congress had passed a law to allow them to do that. In 2020, when Justice Ginsburg was still on the Court, the Court heard a case called *McGirt*. And in that case, the Court held that only Congress could, the technical term is disestablished a reservation, but that means to narrow it or eliminate it, and that it hadn't in this case, with respect to the Muscogee Creek Nation Reservation. And so, as a practical result, portions of Oklahoma, including much of Tulsa, were now part of Indian Country. And the Court, specifically in *McGirt* discussed this issue, the fact that this could change who has the right to prosecute crimes in this territory and that maybe they would have to adjust staffing for it. And this is a 5 to 4 decision. So, five Justices voted for it, including Justice Ginsburg.

Justin Angle: This was back in 2020?

Craig Cowie: Right, in 2020. Authored in the opinions authored by Justice Gorsuch. So, as I'm sure you and your listeners know, Justice Ginsburg since passed away, was

replaced by Justice Barrett. And this term we get Oklahoma v Castro Huerta this is also a 5-4 decision, but this time the majority from McGirt, they're now in the dissent. So, they're in the minority, so they've lost. And here, Oklahoma wanted to prosecute Castro Huerta, who is not an Indian for alleged crimes against his stepdaughter, who was a tribal member. In the case the Court is actually asked to overturn McGirt and says, no, we're not doing that. But it does hold that Castro Huerta can be prosecuted by the state because this Congress had not taken away what the Court calls the state's inherent authority to prosecute crimes, quote, within its territory, unquote. So, this is a complete flip on the presumptions that I was just talking about.

Justin Angle: That date back 200 years.

Craig Cowie: Exactly. So right there. So, prior to Castro Huerta the rule was states do not have authority unless granted it specifically by Congress. Now, the rule is states have authority unless it is preempted by either a Congress or preempted by a threat to tribal self-governance. And in this case, the Court says neither of those things prevents Oklahoma from prosecuting Mr. Castro Huerta.

Justin Angle: So, this, practically speaking, kind of really threatens the concept of tribal sovereignty.

Craig Cowie: I think that's right. Now, the case itself is limited to the facts that we've talked about, right, so it's about whether or not you can prosecute. But I think the implications are quite broad and possibly devastating to tribal, sovereign authority. Justice Kavanaugh wrote the majority in *Castro Huerta*. He basically gives, his analysis gives no weight to concepts of tribal sovereignty, basically dispenses with their concerns in two paragraphs and says that, you know, well, it's not taking anything away from the tribe by allowing the state to prosecute, too, because the tribe itself could prosecute. And importantly, you know, there's a long history of states trying to exert their influence into reservations and so forth. And this sort of structuring, especially that use of the phrase within its territories to describe the state, suggests that the state sort of overlaps the Indian country and the reservation, so now that the reservation is somehow subject to. And so, I think there's a lot of concern about what not necessarily will happen after this case, but what will happen in other areas related. Will the state try to exert its influence in other ways, pass laws that claim to govern what tribal members do on tribal land, or whether or not you can, you know, allow tribal members to be sued in state courts instead of in tribal courts, which is the rule that exists right now. What's interesting, because ordinarily we think about cases as applying on their facts, right, you've got a set factual scenario and that's what you're answering that question. But Justice Kavanaugh rebuffs that in his majority and says,

no, this applies across the country, in other words, that's all states, all tribes, with no consideration for the fact that every tribe has a unique relationship with a unique history, sets of treaties.

Justin Angle: Set of treaties, history.

Craig Cowie: Exactly, yeah, all of that. And he just sort of dispenses with all of that. And he does this sort of, you know, sleight of hand where he's like, well, we moved away from that idea of Worcester v Georgia long ago, so we don't need to follow it now. So, I think that's going to be one that's really important to watch and see how it develops.

Justin Angle: Yeah, and a lot of implications for Montana, too.

Craig Cowie: Absolutely.

Justin Angle: Plenty of Indian Country here.

Justin Angle: We'll be back to our conversation with Craig Cowie after this short break.

Justin Angle: Welcome back to A New Angle. I'm speaking with Craig Cowie about the U.S. Supreme Court.

Justin Angle: We've got time for one more.

Craig Cowie: One more. All right.

Justin Angle: Let's talk about West Virginia v EPA, because that's a big one with also implications for Montana.

Craig Cowie: So, Congress enacted the Clean Air Act back in the seventies, which directed, among other things, directed the EPA to regulate emissions of pollutants. Right. And in this case, the pollutant question is carbon dioxide. And the EPA is generally supposed to look at all polluting sources, in this case its existing coal and natural gas power plants. And so, what the EPA does is it sets a limit of emissions. So how much carbon dioxide can be emitted.

Justin Angle: Sure.

Craig Cowie: And it does so based on the best system.

Justin Angle: Let's just be clear that the Act does not set that limit, the agency.

Craig Cowie: That's right.

Justin Angle: Which is derived from that act, sets the limit. And that the Act gives the agency that authority.

Craig Cowie: That's right. And so that here the goal is regulate emissions. So, we have cleaner air. And in this case, the rule was we're going to, in fact, this statute actually says set a limit. And so, then the agency goes through a process that you noted, an administrative process, to determine what that limit should be. And in this case, they decided the limit in part by assuming that companies could shift the way in which they produce power in order to lower their emissions. So, one thing you could do is like you could just say, oh, I'm going to clean the emissions as they come out of the plant. You could put a device on the plant that stops CO₂ from going in the air.

Justin Angle: Keep doing the same thing but make it cleaner.

Craig Cowie: Exactly. Or you could maybe do something different and use the energy a different way that produced fewer pollutants and thereby meet your goal. So that was a rule that was propounded by the Obama Administration EPA. The Supreme Court stopped it immediately. Then when Trump comes into power, his EPA rescinds that rule.

Justin Angle: Which had already been stopped.

Craig Cowie: It had already been stopped

Justin Angle: As you said.

Craig Cowie: And then issues a new rule.

Justin Angle: Okay.

Craig Cowie: That rule is then challenged.

Justin Angle: Okay.

Craig Cowie: The D.C. Circuit, which is a federal court of appeals in the District of Columbia, that deals a lot with administrative issues, they vacate both actions by the Trump EPA. So, they say you were wrong when you rescinded the rule. You didn't follow the right procedures and you were wrong when you promulgated your rule. You didn't follow the right procedures. Send it back. Think again. So right now, when West Virginia v EPA starts, there is no rule in effect.

Justin Angle: Right, because those two actions had been vacated.

Craig Cowie: Right. And the first one never went into effect. In fact, President Biden says we're not going to do that. The argument that the Court makes is that because we think that there's nothing to stop the Biden administration from, go ahead and setting its new limits using the same idea that you can change the way you produce energy. And because they might do that, we're just going to go ahead and rule on it and in fact, say that they can't, the EPA does not have that.

Justin Angle: So that West Virginia and whatever adjoining states sued the EPA saying like, we're worried that you might regulate us.

Craig Cowie: Yes, you might do the same thing that the Biden EPA did, so we want to stop it.

Justin Angle: So, there was no action that they were contesting. It was just like we're scared of this threat so we're going to sue.

Craig Cowie: And that's what the Court says is that, in fact, the Biden EPA was wrong. EPA doesn't have that power. And this is a real interesting rationale because it uses, for the first time by name, a doctrine called the major questions doctrine. Right. And this idea is that some things are too big and too new. So, if Congress wants an agency to do them, we're going to make Congress spell that out explicitly. And the dissent is pretty strong that they feel, or that Justice Kagan wrote the dissent is joined by several other justices, but she's like, this is the EPA's wheelhouse. They regulate emissions. This creates a lot of uncertainty. And so interestingly, you know, one of the things that I didn't mention was that through the market forces, right, while all this fighting was going on, companies just went ahead and changed their generation of power in a way that actually met all the goals that the Obama rule had laid out. This already happened. It just it creates a lot of inefficiency and concern. And that's a real concern long term, especially given that the same rule applies. It's not just the EPA, but really any agency needs to look at this case and be you know, I think every agency's general

counsel's office is going to have read this case, really digest it and be like, how does this affect what we do? Is there anything that we've done that could be considered a major question? And do we need to think twice about that? So, lots of uncertainty across the board for all, so the agencies that govern banking, that cover consumer protection.

Justin Angle: Communications.

Craig Cowie: Communications. All of it. Yeah.

Justin Angle: Well, Craig, a lot to digest here. Thank you for sharing your expertise. Any kind of broad commentary on the Court in general, where it's going, etc., or thoughts there?

Craig Cowie: Sure. So, where it's going is always a bit of the tea leaves. So, I'll stay away from that because I'm not sure. But I will note that something that I saw, and I'm not the only one, there's been a lot of discussion about this, but throughout this term was that the Court's really using a lot of historical analysis in its opinions and baking that historical analysis into the reasoning. And that seems like, okay, well, what's the big deal? But I'll just note, in deference to my historian colleagues here at the campus,

is that history is its own profession. And those people who are historians, they spent their lives grappling with those methods and understanding the how do we interpret things, how do we read contested facts and histories and so forth? They're experts at history, and the Supreme Court just isn't. They're not historians. They don't have that training and nor do most lawyers. So, a little bit of history, sure, we can look at that. We can look at what happened in prior cases, but really delving into complicated questions about what the country was, issues the country was engaged with, at a long-ago time, that's something that we need to rely on other experts for. And that's something that I'm seeing a little bit, I think the Court sort of straying outside of its lane in a way that it doesn't have the skills to do this. You know, they can make, have a false understanding of the history that can then affect their legal analysis and lead to maybe not the best result. We saw a lot of that in Dobbs but also in Bruen the case, the second amendment, historians have actually spoken out publicly against the reasoning in both cases so far. The other thing I'd just note is that, you know, we think about the Supreme Court as arbiters of the law, sort of saying what the law is at the highest level. We don't think about them as arbiters of fact. In other words, what are the facts? And when we think about it, you know, courts exist in a sort of a like a food pyramid, hierarchy sort of thing. Everybody can remember from grade school with the Supreme Court on top, farthest away from the factual record and trial courts and juries at the bottom. They're the ones who are really in the weeds on what's happening in

this case. So, when a court that's higher up looks down and it doesn't have all the facts, especially if there's a disputed fact, typically our rules, say those disputed fact questions, if they're material to the legal question, they go to the jury. And when we've got that, then we can apply our legal analysis to those facts as we now.

Justin Angle: Sure, as they're stipulated.

Craig Cowie: Exactly. But we sort of see the Court either stepping in and taking cases when there's no factual record at all, in which case they might, you know, hypothesize about what the facts might be, but they don't have an actual record of what the facts are. And there's been a history of that over the past few years increasing. Or they decide they go and they say, well, I'm going to decide that the fact is, X, while the dissent is saying, well, the facts is not X, and that's just not a situation I don't think we want the courts to be in as a society.

Justin Angle: Yeah, that seems like a problem. Craig, we covered a lot of ground today and it sounds like you've got a lot of fodder for some interesting classes with your students this fall semester.

Craig Cowie: Yes, I'm looking forward to it.

Justin Angle: Indeed. Thank you for spending your time with us, sharing your expertise and we'll see you down the road.

Craig Cowie: Great. Thank you for having me, Justin. It's always a pleasure.

Justin Angle: Thanks for listening to A New Angle. We really appreciate it. And we're coming to you from Studio 49, a generous gift from UM alums, Michele and Loren Hansen. A New Angle is presented by First Security Bank, Blackfoot Communications and the University of Montana College of Business, with additional support from Consolidated Electrical Distributors, Drum Coffee and Montana Public Radio. Keely Larson is our producer. VTO, Jeff Ament and John Wicks made our music. Editing by Nick Mott, Social Media by Aj Williams and Jeff Meese is our master of all things sound. Thanks a lot and see you next time.