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SOME COMMENTS ON OUR EXPERIENCE AS A CONSTITUTIONAL SOCIETY

Dale Harris*

I want to thank my good friend Judge Bennett for the opportunity to address this distinguished audience. His only instruction was to be provocative. I hope I do not exceed his expectations.

Twenty years ago this autumn, I opened a small office on this campus for the first Constitutional Revision Commission that had been created by the 1969 Legislature. I can clearly remember walking into the office with one file folder labeled "constitutional revision." Three years later, at the conclusion of the election to adopt the new constitution, the convention staff deposited over one hundred boxes of files with the state archivist. Those three years document three exciting years in Montana's history, in my life and in the lives of hundreds and thousands of Montanans who participated in the remarkable process that gave Montana a new constitution.

In the subsequent seventeen years, I have had the opportunity to observe the impact of the 1972 Constitution from at least six different perspectives. First, I directly worked with Governor Judge's administration on general constitutional implementation and then specifically with the implementation of the home rule and local government reform provisions of the constitution. Second, I served for two years on the staff of U.S. Advisory Commission on intergovernmental relations as a consultant to other states involved in similar reform efforts. Third, I spent four years with Governor Schwinden's administration as the principal architect of the development finance programs that now use coal tax trust funds for loans and investments in basic sector Montana businesses. Under these programs, over 40 million dollars has been invested in the Montana economy. Fourth, in 1985 I joined a small entrepreneurial firm in Portland, Oregon and steered the firm through the process of developing, patenting, and financing a unique video technology. Fifth, I returned to Montana and was retained by the Montana Ambassadors to develop their strategic plan for economic development in Montana and to represent them during the last legislature. Currently, I split my time between my

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business interests in Portland and the newly organized Montana Tax Reform Coalition that has been organized to design and implement a strategy that will result in the enactment of a comprehensive tax reform package.

Each of these experiences has broadened my perspective on the 1972 Constitution and the 1972 Constitutional Convention. Long ago I lost my fascination with the actual language of the constitution and became more interested in its real, practical impact on our society. The 1972 Constitution was a product of our society and has a dramatic impact on shaping our society during the last seventeen years. Hopefully my comments will illustrate this thesis.

To help you evaluate my specific comments, let me first advise you that in 1990, I personally will vote to call the constitutional convention, not because I feel the 1972 Constitution is deficient in any fundamental sense, in fact I feel that it is one of the outstanding political documents of the twentieth century. Rather, I will vote for the convention as an act of political confidence in the individual Montanans who would be elected to the convention and the wisdom of Montanans who would ratify or defeat the proposals of the convention.

I believe this generation of Montanans should be given the opportunity to shape and define both the governmental structure under which they are governed and the rights they possess as citizens. I believe that citizen respect and confidence in government will be enhanced if citizens exercise their fundamental right to approve or reject the convention's proposals and I am confident that citizens will reject any revisions that reduce or constrain the fundamental and innovative rights contained in the 1972 Constitution.

The 1972 Constitutional Convention not only renovated state government institutions and expanded citizen rights, it recruited a new generation of Montanans into the political process in the 1970s and transformed political behavior in the state. I believe that a new convention would again attract fresh participants to the political scene and again invigorate the political process in Montana. While I will vote for a convention, I am not seeking your vote for calling the convention nor forecasting how the public should or will vote. I am simply sharing my personal decision with you.

Second, I must advise you that I am not an attorney and I am offering a political, not a legal, analysis of our constitutional experience. I will leave the legal analysis to my legal friends. During this conference you will be exposed to many different perspectives: legal, political, economic, journalistic, partisan, historic, environmental, urban, rural, legislative, administrative, judicial and hope-

fully that of common citizens. I am sure that you will be given many standards for evaluating our or any constitution. I will only suggest one simple criteria: Please remember that a constitution is a document for *allocating* and *controlling* political power within a society.

Such a constitution is a political document, not simply a legal document. As you listen to presentations, ask yourself, what are the political power issues being discussed? How is political power being allocated and controlled? What are the sources of the constitutional principles that are being advocated? Are they classical political issues dealing with the allocation and controlling of political power or are they attempts to resolve short-term substantive issues at the constitutional rather than statutory level?

Constitutional revision, like all human experience, has its own "Murphy's Laws." I call these rules unconventional wisdom to distinguish them from the excellent conventional wisdom demonstrated by all delegates and staff of the 1972 Constitutional Convention. To illustrate these rules, I would like to draw your attention to five examples of our society's experience with the 1972 Constitution. In each instance, the 1972 Constitution contains the classical good government or good constitutional style provisions advocated by political theorists, academics and legal scholars. However, I would suggest that the practical results have been less than admirable. Each example demonstrates that good constitutional draftsmanship is no guarantee of good government. Collectively, these five issues demonstrate that the goals of constitutional reformers are frequently not achieved. In my opinion, each example also suggests that we as a society may have a fundamental problem with the legislature's ability to deal with difficult issues.

The 1972 Constitution gave the legislature almost total discretion over public finance (more discretion than almost any of the other 49 state legislatures). Since 1972 the legislature has used or not used this discretion to create a public finance system that has been rated fourth from the bottom among the fifty states by the most objective non-partisan organization that systematically evaluates such issues: the U.S. Advisory Commission on Intergovernmental Relations (ACIR). In case you suspect a conservative bias to the ACIR, you will be surprised to learn that the Corporation for Enterprise Development, funded by the AFL-CIO also gives Montana an "F" for "Tax and Fiscal Environment." Somehow the constitutional discretion granted the legislature to shape public finance has not been translated into meaningful results.

Perhaps we need to look to the bicameral structure of the leg-

islature itself and question whether it is really appropriate for a state with a history of strong partisan competitiveness that regularly results in partisan splits in majority control of the two houses. Legislative stalemate and deadlock on fiscal policy appears to be the natural result of our bicameral system, no matter how much discretion the constitution gives the legislature to deal with public finance or other critical issues. Our state and local revenue system created by the legislature is not only structurally deficient, it no longer produces sufficient revenue to fund essential public services. Annual state expenditures have exceeded annual revenues since the early 1980s. The Legislative Fiscal Analyst Office has estimated the revenue short fall for the next biennium will be at least 120 million dollars. Is a constitutional amendment that prohibits the state from receiving more than thirty percent of its general revenue from a single tax source an appropriate device to force legislative reform of our tax system?

When the 1972 Convention shifted responsibility for assessment of property from counties to the state, the primary objective was to equalize appraisal levels between counties in order to eliminate the inequities between appraisal practices in different counties. The most recent ACIR study indicates this objective has not been achieved in spite of two major reprisals cycles. In fact, legislative implementation of the reprisal process has resulted in situations where Montana now has the highest mill levies in the nation and the lowest proportion of the market value of property classified as taxable value. This is just the opposite of a rational system where the taxable value should be as close to market value as possible.

A second serious consequence of legislative implementation of reprisal has been the escalation since 1979 of the taxes on business machinery and equipment to a level where they are three to four times higher than any other state. This high rate of taxation is a very serious obstacle to attracting business investment to Montana and has driven at least 310 million dollars in taxable value from this state. This is the largest loss of taxable value since 1931-1936. Is a constitutional amendment prohibiting classification of property for taxation an appropriate solution for forcing legislative action to rectify this serious problem?

In another financial matter, the 1972 Constitution eliminated a provision from the 1889 Constitution that the courts had interpreted as a prohibition on state aid to local government. In 1972, Montana was one of three states without a significant program for sharing state revenue with municipal and county governments. In

1989, there is still no significant state program for sharing state revenue with local governments in spite of the passage by the voters of I-105 which called for the legislature to provide local governments an alternative source of revenue. (Some claim that gambling revenue will grow into a significant state revenue source.) Again, constitutional discretion has not generated legislative action, in spite of a citizen initiative. Is a constitutional mandate requiring a certain level of state aid to local governments now an appropriate constitutional option?

During the 1980s, thirty-six of fifty-six Montana counties have lost population. Therefore, in most Montana counties, fewer and fewer people are supporting the superstructure of fifty-six county governments and over 500 school districts. There is no reason to believe that the depopulation of large areas of Montana will not continue into the next decade. The 1972 Constitution gave local voters significant discretion to reform and reorganize county and municipal governments. While a significant number of municipalities have adopted the manager form of government and self-government power, with two significant exceptions in Butte-Silver Bow and Anaconda-Deer Lodge, local voters have not used this discretion to reorganize county governments. There may be simply too many vested local interests in maintaining current county government structures to permit local reforms that require local voter approval. Has the time come for Montanans to consider seriously mandatory reorganization of outmoded and expensive local government structures? The constitutional question becomes: Is the discretion of the 1972 Constitution sufficient or is mandating reform now appropriate and perhaps economically and fiscally necessary?

Montana has faced a serious economic crisis during the 1980s. When adjusted for inflation, we have lost at least one-fourth of our industrial base when measured by gross receipts and even though unemployment levels have now returned to 1979 levels, we are operating on a basic sector economy that is approximately one-fourth the size it was in 1979. As a result, at least 30,000 Montanans have left the state. Why is our economic condition a constitutional issue? Perhaps it's not. However, the response of the executive and legislative branches to this crisis is an interesting example of the capabilities of these two branches of government.

In my opinion, when compared to other states and provinces in North America, a serious, competitive economic development strategy has not emerged from either the executive or legislative branches during the 1980s. Within the executive branch, the development of a meaningful strategy has been seriously inhibited by

the fragmentation of financial, business and security regulatory, technical assistance and research functions between the constitutional and therefore proprietary auditor's office, the constitutional and therefore proprietary secretary of state's office, the constitutional Department of Labor and Industry and the statutory Department of Commerce. Perhaps the constitutional status for traditional elected officials such as the auditor or secretary of state are not innocent political tradition. Perhaps we should question whether their constitutional status has a real impact on the state's ability to deal with its serious problems. No one even noticed the elimination of the elected treasurer's office, once it was done by the 1972 Constitution. No one will notice the elimination of the elected secretary of state or auditor once it is done. Getting it done is an entirely different matter. It will be extremely difficult because of partisan considerations.

My final example of the inherent irony in constitutional provisions is the constitutional coal tax trust that was added as an amendment to the 1972 Constitution. The merit of constitutional protection for a financial trust is obvious when the current integrity of the constitutional coal tax trust is compared with the fate of the statutory educational trust that was created at the same time. When the hard times came, the statutory educational trust was appropriated by the legislature and no longer exists.

However, there are two interesting aspects of the constitutional coal tax trust. First, another constitutional provision prevents its investment in common stocks even though the constitution permits retirement funds to be invested in common stock. The board of investment's return on common stock over the past decade has averaged 18.3 percent while its return on bonds has averaged twelve percent. Therefore, the state has foregone a significant amount of revenue (and general taxation has been therefore higher) because the constitutional provisions regulating investment of the coal tax trust fund are more restrictive than the provisions regulating investment of public pensions funds. This distinction is difficult to justify economically, but Montana voters have refused to amend the provision as recently as 1988.

Second, there is no doubt that, within the constitutional provisions, the coal tax trust fund has been invested responsibly by the Board of Investment created under the constitutional provision mandating a "unified investment program." However, at least two serious government reports have questioned the loss of purchasing power of the trust because of inflation and have questioned whether the trust is being actively managed on behalf of its benefi-

ciaries—future generations. The reports question whether the constitutional emphasis on a “unified government” program has emphasized the investment function and obscured the potential active management of the trust to benefit future generations. Such active management can be achieved without “busting” the trust. Perhaps following Texas’ example, the allocation of a portion of the trust to the University System for its active management and investment in research and development might result in significant long-term benefit to the state’s economy. Perhaps the emphasis of a “unified investment program” specified in the 1972 Constitution has obscured and blocked consideration of creative and responsible alternatives for managing the trust.

In 1969, when I first started interviewing state officials about the impact of various provisions in the constitution, I found to everyone’s surprise that legislators and money managers in state government were either ignorant of these constitutional provisions of, if they were aware of them, they chose to ignore them because they were considered fiscally irresponsible.

I learned at least five lessons from those interviews and my years of observing our constitutional society. They are my rules for unconventional wisdom. I think these lessons can be generally applied to most constitutional issues:

1. Constitutional provisions are not self enforcing, they have only the prestige and authority given them by the government officials that operate under them and that, without judicial enforcement, any, I repeat any, constitutional provision can be ignored and typically is ignored. And judicial enforcement can be very expensive (ask the plaintiffs in the school equalization case).

2. Convincing the voters of the merits of technical amendments to the constitution is extremely difficult.

3. Constitutional status for a function or activity often preempts or at least frustrates creative and contemporary management of a function or activity.

4. Be cautious. One generation’s constitutional reform is often the next generation’s constitutional problem.

5. And my final comment: *Good* constitutional draftsmanship is no guarantee of *good* government.