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The Montana Constitution: A National Perspective

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The creation of a political society's fundamental law is a defining moment in the history of that society. This is true whether one is speaking of the creation of a national constitution such as the United States Constitution or a subnational constitution such as the Montana Constitution. James Dealy, a prominent historian of the early twentieth century, once wrote, “one might almost say that the romance, the poetry, and even the drama of American politics are deeply embedded in state constitutions.” This article may not provide
romance, nor will it inflict poetry upon its reader. However, this article will convey the drama of which Montana's constitutional anniversary is an important part by placing the state's constitutional experience in a broader regional and national context.

THE CONSTITUTION OF 1889 AND THE PATH TO REFORM

The Regional Context

In order to comprehend what is distinctive in Montana's constitutional experience, it is useful to begin by comparing its experience with that of its immediate neighbors. Montana adopted its first constitution in 1889, as part of the process by which it was admitted to the Union. Five other states in the region—Idaho, North Dakota, South Dakota, Washington, and Wyoming—adopted their initial constitutions in that same year. Montana thus belongs to the illustrious "class of 1889," the largest group of states to adopt their first constitutions in a single year since 1776. 3

In the years following their adoption, the constitutions of all members of this class of 1889 underwent significant changes. The Federal Constitution has been amended only twenty-seven times in more than two centuries—about once every eight years. 4 In contrast, three of Montana's neighbors—Idaho, North Dakota, and South Dakota—have all amended their constitutions over one hundred times, averaging about one amendment per year. 5 Washington has amended its constitution over ninety times, and Wyoming over sixty times. 6 In contrast, from 1889-1972 Montana amended its initial constitution only thirty-seven times. 7 Restrictions on the amendment process in the 1889 Constitution might explain in


4. Even this "average" overestimates the frequency of amendment, because it can be argued that the adoption of the Bill of Rights was part of the initial founding. If one omits those ten amendments, the Federal Constitution has been amended less than once every twelve years.

5. 33 BOOK OF THE STATES, supra note 3, at 3, tab 1.1.

6. Id.

7. Id.
part this relative infrequency of amendment. The 1889 Constitution prohibited submission of more than three amendments at a single general election. However, this cannot be the full answer, because the Montana Legislature did not take full advantage of even the restricted opportunities available to it, proposing only sixty-one amendments in more than eighty years.8

Whatever the reason for the infrequency of amendment in Montana, what is clear is that it did not stem from a perception that the government created by the 1889 constitution had no faults that required correction. In their recent survey of Montana’s constitutional history, Larry Elison and Fritz Snyder described the 1889 constitution as “enacted more as a tool to achieve statehood than to provide a well-thought-out structure of governance for the new state.”9 Certainly the seventy-five delegates to the convention wasted little time in preparing the document. They convened on July 4, 1889, and by August 17 they had completed the constitution that they would submit for popular ratification.10

The document crafted by the 1889 convention was in some respects a progressive document for its time. It abrogated what was known as the “fellow-servant” rule, a legal doctrine that prevented workers from collecting for work-related injuries.11 It also attempted to reduce labor strife between miners and mine owners by forbidding bringing armed men into the state to preserve the peace,12 and it prohibited the enactment of retroactive laws favorable to railroads.13 But in other respects the 1889 Constitution was considerably less progressive. For example, after long debate, the delegates to the constitutional convention by a 34-29 margin rejected a proposal to extend to women the right to vote in all elections, and this remained the


9. ELISON & SNYDER, supra note 8, at 4. Lopach agrees: “Because the primary goal of the constitution writers of the 1880s was to achieve statehood, they did not struggle to hone a constitution.” LOPACH ET AL., supra note 8, at 5.

10. The proposed constitution won overwhelming approval by a vote of 26,950 to 2,274.

11. MONT. CONST. of 1889, art. XIX, § 16.


law in Montana until corrected by constitutional amendment a quarter century later.\textsuperscript{14}

What emerges with particular clarity from the records of Montana's 1889 constitutional convention is that the delegates perceived their most difficult problem to be striking a balance between promoting economic development and controlling the adverse effects of large corporations. The convention debates reveal real uncertainty about how to deal with this perplexing problem. To cite but one instance, a delegate proposed to make both corporate directors and stockholders liable for the debts of their corporation. But this proposal was defeated after another delegate contended that it would "not only drive all foreign capital invested in the state away but would prevent all future inquiries."\textsuperscript{15}

Whatever merits the 1889 Constitution may have possessed initially, the passage of time exposed serious defects. The executive article was particularly problematic. Although Article VII vested the executive power in the governor, the constitution in fact established a fragmented executive branch, providing for seven elected executive officials for concurrent four-year terms and creating twenty separate commissions, boards, and executive agencies.\textsuperscript{16} By 1920 the number of separate commissions, boards, and agencies within the executive branch had ballooned to 104.\textsuperscript{17} This constitutionalization of a fragmented executive was not unique to Montana but rather a common feature of late-nineteenth-century constitutions.\textsuperscript{18} Nevertheless, it frustrated efforts at forceful executive action, and study commissions during the twentieth century regularly called for modernization and reorganization of state executive branches. These calls, however, went unheeded in Montana until the adoption of the 1972 Constitution.

The 1889 Montana Constitution also imposed numerous

\textsuperscript{14} ELISON & SNYDER, supra note 8, at 5.
\textsuperscript{15} GORDON M. BAKKEN, ROCKY MOUNTAIN CONSTITUTION MAKING, 1850-1912 at 78 (1987).
\textsuperscript{16} LOPACH ET AL., supra note 8, at 5.
\textsuperscript{17} ELISON & SNYDER, supra note 8, at 6-7.
\textsuperscript{18} In New York, for example, there were only ten state agencies in 1800 but eighty-one by 1900. See LARRY SABATO, GOODBYE TO GOOD-TIME CHARLIE: THE AMERICAN GOVERNOR TRANSFORMED, 1950-1975 at 6 (1978). More generally, see ARTHUR E. BUCK, THE REORGANIZATION OF STATE GOVERNMENTS IN THE UNITED STATES (1938); JAMES GARNETT, REORGANIZING STATE GOVERNMENT: THE EXECUTIVE BRANCH (1980); THOMAS E. KYNERD, ADMINISTRATIVE REORGANIZATION IN MISSISSIPPI GOVERNMENT: A STUDY IN POLITICS (1978).
restrictions on the state legislature, some of which were substantive. For example, Article V, section 26 of the 1889 Constitution forbade the legislature from enacting special or local laws dealing with more than thirty matters, ranging from changing the names of persons or places to exempting property from taxation.\textsuperscript{19} Other limitations were procedural, affecting the operation of the legislature. For example, the Constitution severely limited the length and frequency of legislative sessions; the legislature could meet in regular session only every two years, and even then for only 60 days.\textsuperscript{20} This was not nearly enough time to confer with constituents, deliberate about the issues confronting the state, and transact the public business. A modest attempt to deal with this problem, by extending the legislature's term to eighty days, was proposed by the legislature in 1968, but even that amendment was defeated at the polls.\textsuperscript{21}

Let me reiterate that the constitutional problems I have described, as well as others I will not discuss, were not unique to Montana. Many other state constitutions of the period had provisions similar to Montana's—for example, by 1900 thirty-three state constitutions limited the length of legislative sessions, and only six state legislatures met annually\textsuperscript{22}—and these states experienced governmental problems similar to Montana's. In fact, many of the provisions of the 1889 Constitution that one might find problematic today were borrowed from the constitutions of other states and represented the prevailing wisdom regarding constitutional design during the late nineteenth century.\textsuperscript{23} What is extraordinary is not that those problems existed but that Montana responded so energetically to them in the early 1970s.

Montana is the only member of the "class of 1889" that has seen fit to reassess its constitutional foundations and revise its constitution. Indeed, of all the states in the Rocky Mountains and the Pacific Northwest, only Montana has adopted a second constitution. This was not for lack of effort. At about the same time that Montana was contemplating constitutional revision, other states in the region were doing so as well. In 1970, a new constitution was proposed in Idaho, but the voters in that state

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22. Dealey, \textit{supra} note 2, at 186-87.


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refused to ratify it. Two years later, the voters in North Dakota also rejected a proposed constitution. These efforts at constitutional reform confirm that by the late twentieth century, other states in the region had outgrown their nineteenth-century constitutions. Like Montana, they established study groups and constitutional commissions that documented the problems of state government and identified potential solutions. As in Montana, “good government groups” coalesced around the idea of constitutional reform and attempted to rally popular support. But only in Montana were the advocates of reform able to generate the political will necessary to replace an outmoded fundamental law.

Historians more knowledgeable about Montana politics than I can probably explain in detail why Montana succeeded while its neighbors failed. I would, however, offer three observations. First, one must remember that Montana’s reformers almost failed. More than 240,000 Montanans voted on the new constitution in 1972, and it was ratified by fewer than 3,000 votes. In fact the Farm Bureau Federation challenged the results in court, insisting that a majority of voters had not ratified the constitution, and the Montana Supreme Court affirmed the election outcome by only a 3-2 vote. Second, given the narrow margin of victory, it seems likely that ratification occurred because of the quality of the document proposed by the convention in 1972. Finally, despite the quality of the document, ratification would have failed without a spirited campaign in support of constitutional reform. I am reminded of the observation of Governor George Busbee, as he contemplated the revision of the Georgia Constitution in 1983: “Constitutional revision is not for the faint of heart. It is not a Sunday drive in the mountains. It is an incredibly difficult, sometimes tedious, sometimes exhilarating, always challenging undertaking.


26. The vote for ratification was 116,415 in favor versus 113,883 opposed. This is far closer than the vote for a convention (133,492 to 71,643), suggesting that rural voters who may have supported a convention were not reconciled to its proposals—in counties that had less than 5,000 persons, the constitution was opposed by better than a 2-1 margin. See LOPACH ET AL., supra note 8, at 10.
requiring the cooperation of all...” Montanans thus owe a debt of gratitude not only to the delegates to the 1972 convention, who were indeed not “faint of heart,” but also to those citizens who worked tirelessly to create a new constitutional future for Montana.

The National Context

Montana’s 1972 Constitution is not the nation’s newest state constitution. Since Montana adopted its present constitution, Louisiana and Georgia have also seen fit to revise their constitutions. Currently, Alabama is contemplating whether to jettison its 1901 constitution and adopt a new one. Yet the more recent adoption of constitutions in other states in no way detracts from what Montana has accomplished. One has to realize that Louisiana and Georgia, the states that have devised new constitutions since 1972, are special cases. Each state tends to trade in its current constitution almost as frequently one would trade in a car. Louisiana’s 1974 constitution was the state’s eleventh, Georgia’s 1976 constitution was its ninth, and its 1982 constitution its tenth.

The examples of Louisiana and Georgia confirm that from a national perspective Montana’s decision to replace its original constitution in 1972 was hardly unusual. The other states in the region may have retained their original constitutions, but it is they, not Montana, who have bucked the national trend. The American states have regularly adopted new constitutions. Indeed, the history of American state constitutionalism is emphatically a history of constitutional change, through both constitutional amendment and constitutional revision (replacement). Figures sometimes lie, but in this context I believe they offer a real sense of constitutional development in the American states.

During the nineteenth century, twenty-nine states (including Montana) joined the Union. Every state seeking admission had to adopt a constitution as a step toward achieving statehood. However, many of these states as well as many of the

28. In fact, Georgia has adopted two constitutions, one in 1976 and another in 1982.
29. See TARR, supra note 24, chs. 3-5.
30. See TARR, supra note 24, at 95, fig.4.1.
sixteen that had joined the Union during the eighteenth century also revised their constitutions during the nineteenth century.\textsuperscript{31} Altogether, the American states adopted ninety-four constitutions during the nineteenth century. That is equivalent to almost one per year. In addition, several other proposed constitutions were rejected by voters during this period. Therefore, over the course of the nineteenth century, state constitutional conventions actually submitted more than one constitution per year.\textsuperscript{32}

In some periods, it seems, the passion for constitutional change reached a fever pitch. For example, of the twenty-four states that had joined the Union by 1830, fifteen revised their constitutions during the ensuing three decades, two of them doing so twice.\textsuperscript{33} In fact, during a single decade, from 1844-1853, more than half the existing states held constitutional conventions.\textsuperscript{34} During the last half of the nineteenth century, state constitution-making was epidemic. From 1861-1900, twenty states revised their constitutions, and some did so several times. Forty-five new constitutions were adopted in all during this short period.\textsuperscript{35} Of those states that joined the Union during the first half of the nineteenth century, only Maine and Wisconsin had not revised their constitutions by the century's end.

This frenzy of constitutional change makes clear that we Americans think about our state constitutions in a very different way than we think about the Federal Constitution. The contrast is really quite striking. During a century in which state constitutional change was continuous, the Federal Constitution changed hardly at all. It was amended only four times during the entire century, and three of those amendments constitutionalized the outcome of the Civil War. The idea of scrapping the Federal Constitution and devising a new one was

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\item \textsuperscript{31} \textit{See} Tarr, \textit{supra} note 24, at 96, tbl.4.1.
\item \textsuperscript{32} From 1877 to 1887, for example, voters rejected six proposed state constitutions. \textit{See} Morton Keller, \textit{Affairs of State: Public Life in Late Nineteenth Century America} 320 (1977).
\item \textsuperscript{33} \textit{See} Tarr, \textit{supra} note 24, at 96, tbl.4.1.
\item \textsuperscript{34} Daniel T. Rogers, \textit{Contested Truths: Keywords in American Politics Since Independence} 94 (1987).
\item \textsuperscript{35} \textit{See} Tarr, \textit{supra} note 24, at 96, tbl.4.1. Much of this constitution-making occurred in the South, as states during Reconstruction revised their antebellum constitutions and in the aftermath of Reconstruction repudiated the Reconstruction constitutions.
\end{itemize}
never seriously contemplated.\textsuperscript{36} Instead, the U.S. Constitution during the nineteenth century achieved an almost sacred status, revered as the crowning work of an extraordinary political generation. In large part that sense of reverence continues.\textsuperscript{37}

In contrast, the states’ orgy of nineteenth-century state constitution-making attests to the lack of reverence for the founders of state constitutions and their handiwork. The veneration of the U. S. Constitution rested upon the belief that it embodied a political wisdom that future generations were bound to respect and preserve.\textsuperscript{38} State constitution-makers, in contrast, came to view constitution-making as a progressive enterprise.\textsuperscript{39} They maintained that it required a constant readjustment of past practices and past institutional arrangements in light of changes in circumstances and in political thought. They also insisted that the experience of self-government in America had expanded the fund of knowledge about constitutional design, so that later generations were better situated to frame constitutions than were their less experienced, and hence presumably less expert, predecessors. William Andrews Clark, the chairman of Montana’s 1889 convention, confirmed this notion when he stated, “As the generations come and go, developing rapidly successive changes and conditions, requiring new methods and additional powers and restraints, we may expect that the genius and wisdom of our successors will eliminate, supplement, and amend” the work of the 1889 convention.\textsuperscript{40}

This interest in “modern” constitutional design had implications for what was included in state constitutions. It discouraged state constitution-makers from borrowing from older constitutions, including the Federal Constitution, and instead encouraged them to appropriate provisions and ideas from the most recently revised state constitutions. The ready availability of compilations of constitutions by the middle of the nineteenth century enabled delegates to search nationwide for


\textsuperscript{38} See Sanford Levinson, Constitutional Faith, ch. 1 (1988).


\textsuperscript{40} Lopach, supra note 8, at 7.
pertinent provisions. In this fashion emerging ideas about constitutional design, rights, and democracy spread rapidly, and new perspectives on government superseded older views and found constitutional expression. The delegates to Montana's 1889 convention, like their counterparts in other states, had a wide range of constitutional models from other states from which to choose. And like their counterparts in other states, they borrowed selectively from the recent constitutions of a variety of other states. It appears that they drew their inspiration in particular from the Colorado Constitution of 1876, the Illinois Constitution of 1870, and the Pennsylvania Constitution of 1873.

During the twentieth century, the pace of state constitution-making slowed considerably. Only eleven states besides Montana revised their constitutions, although five others adopted their initial constitutions during the twentieth century. Long stretches of inactivity were common. From 1922-1944, no state revised its fundamental law, and over the last two-and-a-half decades, only Georgia has done so. State electorates have been reluctant even to contemplate constitutional revision. Whereas in the nineteenth century states held 144 constitutional conventions, during the twentieth century they held only sixty-four. The constitutions in fourteen states currently provide for a periodic vote on whether to call a convention, but voters have regularly rejected those and other proposals for calling conventions. When constitutional change

41. Fritz, supra note 40, at 975-977.
42. LOPACH, supra note 8, at 5.
43. The states that revised their constitutions during the twentieth century included: Alabama (1901), Connecticut (1965), Florida (1968), Georgia (1945, 1976, 1982), Illinois (1970), Louisiana (1913, 1921, 1974), Michigan (1908, 1963), Missouri (1945), Montana (1972), New Jersey (1947), North Carolina (1970), and Virginia (1902, 1970). States that adopted their initial constitutions during the twentieth century included: Alaska (1956), Arizona (1911), Hawaii (1950), New Mexico (1911), and Oklahoma (1907).
44. TARR, supra note 24, at 136. The Alabama Legislature in 2002 rejected a proposal to put the convention question on the ballot in that state. For information about the Alabama reform effort, see the web site of the Alabama Citizens for Constitutional Reform: http://www.constitutionalreform.org.
occurred in the twentieth century, it did so largely through constitutional amendment rather than through wholesale revision.\textsuperscript{46}

The main flurry of state constitution-making during the twentieth century occurred in the wake of the U.S. Supreme Court's 1964 decision in Reynolds \textit{v.} Sims, which required the apportionment of both houses of state legislatures on a "one person, one vote" basis.\textsuperscript{47} (Montana's 1889 Constitution guaranteed equal representation to each county in the state senate, and thus Montana was among those states that were obliged to reapportion their legislatures to comply with the Court's ruling.)\textsuperscript{48} It is not surprising that several states used the occasion offered by this judicial ruling to call conventions to consider broader reforms and to devise new constitutions.\textsuperscript{49} Prior to 1964, a concern that a new constitution might jeopardize the existing system of representation had led those who benefited from that system to oppose constitutional change.\textsuperscript{50} The Supreme Court's ruling in Reynolds, however, eliminated that source of opposition and allowed rural legislators to support constitutional reform.\textsuperscript{51} As a result, the path was open for states to undertake a long-overdue reassessment of their fundamental law, and seven states adopted new constitutions in the decade following Reynolds.\textsuperscript{52}

What should be emphasized is that although the Supreme Court's ruling in Reynolds may have provided the occasion for constitutional revision, the agenda for the conventions of the 1960s and 1970s was not limited to complying with its mandates. The changes introduced by the delegates in these

\textsuperscript{46} For data on the number of amendments to current state constitutions, see BOOK OF THE STATES, supra note 3, at 3. The trend toward amendment appeared to increase as the twentieth century progressed. See TARR, supra note 24, at 139-140.

\textsuperscript{47} 377 U.S. 533, 562-64 (1964).

\textsuperscript{48} MONT. CONST. of 1889, art. VI, §§ 4-5. For a discussion of reapportionment in Montana, see ROBERT G. DIXON, DEMOCRATIC REPRESENTATION 611-12 (1968).

\textsuperscript{49} A listing of constitutional conventions in the immediate aftermath of Reynolds \textit{v.} Sims is provided in ALBERT L. STURM, THIRTY YEARS OF STATE CONSTITUTION-MAKING: 1938-1968, 56-60, tbl. 11, and 113, tbl. 16. (1970).

\textsuperscript{50} In New Jersey, for example, constitutional reform was blocked for decades, until a deal was negotiated whereby reapportionment of the State Senate would not be considered by convention delegates. This deal led to the 1947 constitutional convention, which drafted New Jersey's current constitution. See RICHARD J. CONNORS, THE PROCESS OF CONSTITUTIONAL REVISION IN NEW JERSEY: 1940-1947 (1970).

\textsuperscript{51} See Reynolds \textit{v.} Sims, 377 U.S. 533 (1964).

conventions typically went far beyond reapportioning the state legislature.\textsuperscript{53} Certainly this was true in Montana.

THE CREATION OF THE 1972 CONSTITUTION

When the 100 delegates assembled in Helena in 1972, they met in very different circumstances than did their predecessors who devised the 1889 constitution. Most obviously, they began their deliberations with something to build on, namely, the state’s existing constitution. No state when it revises its constitution jettisons all provisions of its prior constitution. Typically, it is a few persistent problems that promote campaigns for constitutional change, not dissatisfaction with the entire document. Moreover, virtually every constitutional change will have its opponents as well as its supporters. Thus, the more changes that constitution-makers introduce, the greater the number of potential opponents, and the greater the possibility that these opponents will coalesce and defeat the proposed constitution. Constitution-makers in several states have attempted to deal with this problem by submitting controversial proposals separately, so that dissatisfaction with one or a few elements does not doom the entire document. The Montana delegates in 1972 likewise followed this strategy, submitting separate referenda on a unicameral legislature, on the abolition of the death penalty, and on liberalization of the state’s gambling laws. Voters rejected the first two referenda but approved the gambling referendum.\textsuperscript{54}

Another difference from 1889 was that unlike their predecessors, the delegates in 1972 did not have to speculate about the likely effects of those provisions found in the 1889 Constitution—they had first-hand experience with how the provisions had worked, or failed to work. There were practical reasons for building on the existing constitution, and like constitutional reformers in other states, the Montana convention delegates in 1972 built upon the foundation of the state’s existing constitution.

In introducing changes to that document, the 1972 delegates were able to draw upon the political thought animating the two major movements for state constitutional

\textsuperscript{53} For a discussion of several of these conventions and the changes they introduced, see Elmer E. Cornwell, Jr. et. al., State Constitutional Conventions: The Politics of Constitutional Revision in Seven States (1975).

\textsuperscript{54} Elison & Snyder, supra note 8, at 14-15.
reform during the twentieth century. Both of these movements are reflected in the 1972 Constitution. The first movement was toward what has been called managerial constitutionalism. Most state constitutions adopted during the twentieth century owe their vision of government and politics to the movement for state constitutional reform spearheaded by the National Municipal League and reflected in its various editions of the Model State Constitution. These managerial reformers believed that state government had to be restructured to facilitate vigorous action. Failure to create such proactive state governments, they argued, would result in the erosion of state power, as citizens increasingly looked to the national government to address their concerns. To establish an effective state government, they insisted, required a constitution that was flexible and adaptable, that placed few restrictions on how the state government addressed current and future problems.

These constitutional reformers sought to achieve this flexibility and adaptability by strengthening the executive and by removing impediments to legislative action—in effect, a reversal of the nineteenth-century view on state constitutional design. In order to promote effective action by state executives, reformers favored concentrating political authority in the hands


56. The original version of the Model State Constitution was published in 1924, and the last was published in 1968. Over the course of the four decades, the recommended provisions changed considerably. See TARR, supra note 24, at 152-153. For a detailed discussion of the origins and development of the Model State Constitution in the context of its sponsoring organization, see Frank Mann Stewart, A Half Century of Municipal Reform: A History of the National Municipal League (1950). Parallels between the Model State Constitution and recent state constitutions, of course, do not prove that the delegates who drafted those constitutions consulted the Model—correlation is not causation. It is more likely that delegates sought to avail themselves of the best understanding of state constitutional design as reflected in reform constitutions, and this understanding had been decisively influenced over time by the Model State Constitution.

57. See, e.g., The Commission on Intergovernmental Relations: A Report to the President for Transmittal to the Congress 37 (1955), STURM, supra note 50, at 2-4.

of the governor.\textsuperscript{59} They proposed eliminating the independent election of other executive-branch officers, collecting the myriad independent boards and agencies into a manageable number of executive departments, and enhancing the governor's power over budgetary matters through the executive budget, the item veto, and other devices. In order to promote effective legislative action, these reformers proposed abolishing virtually all procedural and substantive limits on legislative action, other than those enshrined in the state bill of rights.\textsuperscript{60} The introduction to the sixth edition of the Model State Constitution confirms this by stating, "The limitations on state and local government action were devised for the most part during an age when less was demanded of government than is the case today."\textsuperscript{61} In the aftermath of World War II, many political commentators and official bodies endorsed this reform view.\textsuperscript{62} One commentator denounced the nineteenth-century constitutions as the states' "disgrace" and argued that they bore "no more resemblance to a constitution than a garbage dump does to a park."\textsuperscript{63}

Yet in recent decades a quite different view of the states and their constitutional problems has emerged.\textsuperscript{64} The adherents of this newer view, which I call constitutional populism, distrust activist government. They are skeptical about their state legislature becoming a "little Congress," their governor a "little president," or their supreme court a "little Warren Court."\textsuperscript{65} They want not a resurgence of state government but greater control over what they perceive as overly expensive and powerful state governments that are insulated from popular concerns and popular control. In the nineteenth century, constitutional reformers had typically sought to control state government. Furthering the goal of making government more responsive, they sought to expand the electorate, change the

\textsuperscript{59} See Louis E. Lambert, The Executive Article, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION supra note 58, 185.

\textsuperscript{60} See Charles W. Shull, The Legislative Article, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION, supra note 58, 185.

\textsuperscript{61} MODEL STATE CONSTITUTION ix. (6th ed. 1968).

\textsuperscript{62} See, e.g., Grad, supra note 58; MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION, supra note 58; and COMMISSION ON INTERGOVERNMENTAL RELATIONS, supra note 57.

\textsuperscript{63} ROBERT S. ALLEN, OUR SOVEREIGN STATES xv, xvi (1949).

\textsuperscript{64} For elaboration of this perspective, see TARR, supra note 24, at 157-161.

intrastate distribution of political power, and restructure government. But by the 1970s, with the full extension of the franchise, the reapportionment of state legislatures, and the modernization of state executive branches, it became clear that such reforms could not dispel concerns about unresponsive government. This convinced the constitutional populists that ensuring effective representation did not fully solve the problem of ensuring popular control over government. The constitutional populists thus sought to lodge policy-making authority directly in the people through the constitutional initiative and the referendum, so that they could reverse policies enacted by their elected representatives, and to limit the powers and tenure of government officials.

The Montana Constitution of 1972 reflects a judicious blending of the recommendations of both these reform movements.66 The 1972 convention acknowledged the need to streamline the state government so that it could undertake vigorous action for the public good. The delegates thus eliminated various constitutionally mandated offices, such as the State Examiner, and boards, such as the Board of Prison Commissioners.67 They removed outdated restrictions on the legislature and transformed it into a continuous body, meeting in regular annual sessions.68 The delegates also reformed the state judiciary.69

At the same time, the delegates recognized the need to ensure that the state government was responsive to the populace. Montanans had already done that to a considerable extent in its 1889 constitution with the initiative and referendum.70 However, the delegates of 1972 did more than merely retain the initiative and referendum; they also introduced provisions that made changing the constitution

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66. Lopach emphasizes the populist character of the 1972 Constitution, see LOPACH, supra note 8, at 10-11, as do Elison and Snyder, see ELISON & SNYDER, supra note 8, at 20.


68. MONT. CONST. art. V, § 6. Initiative Number 1 in 1974 amended this section, eliminating annual sessions and deleting language that "[t]he Legislature shall be a continuous body for a two-year period." ELISON & SNYDER, supra note 8, at 111. The amendment also increased the length of the regular legislative session to ninety days in each biennium. Id.


70. See MONT. CONST. of 1889, art. XIX, §9.
easier, authorizing amendments and constitutional conventions to be proposed by initiative petitions and providing for a convention call to be automatically be submitted to the voters every twenty years.\textsuperscript{71} In addition, they introduced a distinctive right-to-know provision to ensure greater transparency in the operations of state government and thereby promote greater accountability, and they guaranteed citizens a right to participate in government, imposing a responsibility on governmental officials to afford opportunities for participation.\textsuperscript{72} The adoption in 1992 of Constitutional Initiative 64, instituting term limits for state legislators, reflects the continuing influence of constitutional populism on the Montana Constitution.\textsuperscript{73}

What is most striking about Montana's 1972 Constitution is the fact that it does not limit itself to the changes suggested by either of the twentieth-century movements for constitutional reform. Instead, it includes several distinctive provisions that testify to the seriousness with which the delegates undertook their responsibilities and to the quality of their deliberations. It is not within the scope of this article to discuss these provisions at length, but instead to highlight these innovations and place them in context.

First, the 1972 constitution gave constitutional recognition to the cultural diversity of the state by acknowledging the "distinct and unique cultural heritage of the American Indians" and committing the state in its educational endeavors to the preservation of Indians' cultural integrity.\textsuperscript{74} This provision was, to my knowledge, unique at the time it was adopted. It remains—together with New Mexico's recognition of the Spanish heritage of some of its citizens and Hawaii's protection of the

\textsuperscript{71} Article XIV, section 8 of the Montana Constitution allows the legislature to propose amendments by a vote of two-thirds of its total membership (rather than two-thirds of each house, as required by the 1889 Constitution). Article XIV, section 9 allows amendments to be proposed by initiative, whereas the 1889 Constitution did not provide this option. Finally, whereas the 1889 Constitution permitted only three proposed amendments to be on the ballot at any election, this limitation is absent from the current constitution. Article XIV, section 3 of the Montana Constitution requires that every twenty years the question of whether to hold a constitutional convention be submitted to the voters.

\textsuperscript{72} \textit{Mont. Const.} art. II, §§ 8, 9. The former provision is relatively unusual—only four state constitutions have such right-to-know provisions—and the latter provision is altogether idiosyncratic to Montana. \textit{Elison \& Snyder, supra} note 8, at 48. For discussion of how these provisions have operated and of how they have been interpreted by the courts, see id.

\textsuperscript{73} \textit{Mont. Const.} art. IV, § 8.

\textsuperscript{74} \textit{Mont. Const.}, art. X § 1, ¶ 2.
customary rights of its native population—one of the only attempts by state constitution-makers to acknowledge the diversity of their state's population.75

Second, the 1972 constitution recognized a number of rights not mentioned in the 1889 constitution and not usually accorded state constitutional protection. These include rights against government, such as the right to privacy (the Montana constitution is one of only four state constitutions to recognize an independent right to privacy).76 They also include rights against private entities, a major innovation, reflected in the constitutional ban on discrimination not only by government but also by "any person, firm, corporation, or institution."77 The Montana constitution's distinctive rights guarantees include not only freedoms from restraint but also positive rights, such as a right to health, a right to pursue basic necessities of life, and a right to a clean and healthful environment.78 As previously noted, the 1972 constitution also expands crucial political rights, such as the right to know and the right to citizen participation in the decision-making of government agencies.79

A final unique feature of the 1972 constitution is its recognition of a distinctive state concern for the environment.80 This concern pervades the document. One sees it in the new preamble to the 1972 constitution, which gives thanks for "the quiet beauty of our state, the grandeur of our mountains, [and] the vastness of our rolling plains."81 One sees it as well in the


77. MONT. CONST. art. II, § 4.

78. Id. § 3; MONT. CONST. art. IX, § 1. One commentator has noted that Montana's Declaration of Rights (Article II) includes seventeen provisions with no analogue in the Federal Bill of Rights. See Ronald K. L. Collins, Reliance on State Constitutions—The Montana Disaster, 63 TEX. L. REV. 1122 (1985).

79. MONT. CONST. art. II, §§ 8-9. One delegate to the 1972 convention, James Garlington, referred to this emphasis on transparency in government as "our consistent opening of all the doors and desks of government to the eyes and ears of the governed." ELISON & SNYDER, supra note 8, at 23.

80. It is true that other states also recognize a right to a clean environment, see Barton H. Thompson, Jr., Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance, 27 RUTGERS L.J. 563 (1996). However, no other state constitution gives such extensive attention to environmental concerns.

81. MONT. CONST. pmb. Consider the comment of Deborah Beaumont Schmidt &
entirely new Article IX, which commits the state and every citizen to "maintain and improve a clean and healthful environment" and directs the reclamation of land disturbed by the taking of natural resources.\textsuperscript{82} Recent judicial rulings confirm that these provisions are neither hortatory nor decorative and that they can fundamentally affect public policy in the state.\textsuperscript{83}

Of course, constitutional development did not cease in 1972, either in Montana or beyond its borders. Let me highlight some trends that are likely to be important in Montana and in other states in the first half of the twenty-first century. The first trend is, in a sense, a negative one. States have in recent years virtually ceased calling conventions and replacing their constitutions, preferring piecemeal change to constitutional revision.\textsuperscript{84} From a Montana perspective, this is a disappointing development, because the Montana Constitution is a model that would be relied on and emulated by other states if they were revising their constitutions. There is no evidence that this skepticism about fundamental constitution reform is abating—just as the twentieth century witnessed less state constitution-making than the nineteenth, so the twenty-first will likely witness even less than the twentieth.

A second trend is a devolution of power and responsibility for domestic policy from the Federal Government to the states. This movement had its roots in the financial exigencies of the Federal Government, but it also reflected a growing belief that officials in states and communities could address the problems that confronted them better than can their counterparts in Washington, D.C.\textsuperscript{85} In the short term, it may be that revenue

\begin{footnotesize}
Robert J. Thompson:

The values and the history of Montanans inextricably form the framework for the central references to the environment in the Montana Constitution. . . . [T]he preamble demonstrates the preeminent concern for the environment, as represented by statements concerning the quality of life. . . . [T]he preamble emphasizes these goals even over such fundamental tenants as liberty and equality of opportunity.


\textsuperscript{82} MONT. CONST. art. IX.

\textsuperscript{83} The importance of these provisions is confirmed by the Montana Supreme Court's ruling in \textit{Mont. Envtl. Info. Center v. Dep't of Envtl. Quality}, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236.

\textsuperscript{84} See TARB, supra note 24, at ch. 5; see Benjamin & Gais, supra note 45.


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shortfalls in the states rooted in the nation’s economic downturn will limit initiatives in the states. But in the long run the devolution of power is likely to mean that state governments will undertake new tasks, and an important factor in determining their capacity to do so is the quality of the state constitutions under which they operate.

A third trend is the emergence of what is known as the new judicial federalism: increased reliance by state courts on state declarations of rights to provide greater protections than are available under the Federal Constitution. This new judicial federalism began during the 1970s, so it is actually rather middle-aged, but it shows no sign of slowing down. The Montana Supreme Court’s rulings in *Helena Elementary School District No. 1 v. State, Gryczan v. State, and Armstrong v. State* all reveal the potential impact of the new judicial federalism. The distinctive protections afforded rights by the Montana constitution and by other state constitutions are likely to be a source of contention throughout the twenty-first century.

**CONCLUSION**

In 1972 Montana embarked on a new constitutional course. Did it begin that journey, in the words of delegate James Garlington, “on a ship of state that is far more manageable and sensitive than the old one?” And how well has this ship weathered the storms and shoals of the last three decades?

Subsequent articles within this issue will address these questions with regard to specific aspects of the Montana Constitution. However, it may be observed that the citizens of Montana have already rendered their verdict on the Constitution. As noted, the delegates to the 1972 convention

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*86. On the origins and development of the new judicial federalism, see G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997).*

*87. For a comprehensive survey of rulings interpreting state declarations of rights, see Jennifer Friesen, *State Constitutional Law: Litigating Individual Rights* (2d ed. 1996). The continuing development of this new judicial federalism is confirmed by the annual surveys of new cases in state constitutional law, found in the annual *Issue on State Constitutional Law* in Rutgers Law Journal.*


*89. See ELISON & SNYDER, supra note 8, at 23.*
made the constitution they were drafting easier to amend than its predecessor by adding the option of proposing amendments by constitutional initiative and by removing restrictions on the number of amendments that could be proposed at a single election.\textsuperscript{90} Montanans have availed themselves of this expanded amendment power. Indeed, they directly repudiated one aspect of the convention's work by mandating a return to biennial sessions of the legislature via constitutional initiative only two years after the Constitution was ratified.\textsuperscript{91} This, however, was an isolated occurrence.

It is striking is how little Montanans have found it necessary to change in the Constitution. The Montana Constitution is currently the second least amended state constitution, and even if one considers the rate of amendment (the number of amendments divided by the number of years the constitution has been in operation), the Montana Constitution has been infrequently amended in comparison with other state constitutions.\textsuperscript{92}

The Montana Constitution received an even clearer endorsement in 1990. Thomas Jefferson urged that each political generation be permitted to decide for itself its form of government, lest future generations find themselves foreclosed by the actions of previous ones.\textsuperscript{93} Montana, like several other states, has taken Jefferson's advice to heart, requiring that the question of whether to call a new convention be periodically submitted to the voters.\textsuperscript{94} Thus in 1990 Montana's citizens addressed the question of whether they were satisfied with the 1972 Constitution or whether they believed a convention should be called to devise a constitution that better served their needs. In 1972 the Constitution may have won a narrow victory, but in 1990 it received a rousing endorsement, as eighty-four percent of those voting indicated that no convention should be called, that

\textsuperscript{90} See Mont. Const. art. XIV, §§ 9, 11.

\textsuperscript{91} Id. art. V, § 6.

\textsuperscript{92} The Montana Constitution has been amended 23 times during its thirty-year existence, for an amendment rate of 0.77. Most current state constitutions have an amendment rate greater than 1.0. The data for computing state amendment rates is available at Council of State Governments, Book of the States 3 tbl. 1.1 (2000-2001 ed.).


\textsuperscript{94} Mont. Const. art. XIV, § 3.
they were happy with the work of the 1972 convention.95

Speaking at the outset of New Jersey's constitutional convention of 1947, Governor Alfred Driscoll told the assembled delegates that they had "the opportunity of a century."96 The same was true for Montana's one hundred delegates, and it is fair to say that they seized that opportunity, crafting a document that was, in the words of James Garlington, "the finest gift to the young people of Montana that is within our power to give."97