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TOWARD THE END OF THE LAST WAVE: THE MONTANA STATE CONSTITUTION AT FIFTY

Robert F. Williams*

[S]tate legislatures have once again become relatively democratic and representative bodies as a result of the reapportionment revolution begun in 1962 by *Baker v. Carr*. Not accidentally, that decision spurred a wave of constitutional revision. No fewer than thirteen states revised their basic charters between 1963 and 1976, reviving at least in part, the tradition of activist popular sovereignty.

James Henretta¹

I. INTRODUCTION

The *Montana Law Review* should be commended for addressing seriously the Montana Constitution here and in prior years. Further, the Blewett School of Law offers a course called Montana Constitutional Law, taught by Professor Anthony Johnstone, who has written his own textbook.² In this way, the Blewett School of Law has certainly avoided Sandy Levinson's all-too-true criticism:

One of the dismaying realities of American legal education, particularly at its most elite level, is the abject ignorance displayed about the importance of state constitutions and even of state judiciaries, even though most of the common law cases that students read arise in state courts. Still, too many students may well graduate from three years of legal study with the perception that the only Constitution operating within the United States is the national document and that the only courts one need really focus on are federal courts, particularly, of course, the United States Supreme Court.³

2022 marks the fiftieth anniversary of Montana's well-regarded, innovative state constitution.⁴ Such anniversaries present excellent opportunities to look back at the features of the constitution and how it has operated and been interpreted over the years. Also, these anniversaries offer opportunities

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1. James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 839 (1991). This introduction is drawn from Robert F. Williams, *Michigan State Constitutionalism: On the Front of the First Wave*, 60 WAYNE L. REV. 1, 1–4 (2014).

2. See generally ANTHONY JOHNSTONE, *THE MONTANA CONSTITUTION IN THE STATE CONSTITUTIONAL TRADITION: CASES AND COMMENTARY* (2022).

3. Sanford V. Levinson, *Foreword to* MICHAEL L. BUENGER & PAUL J. DE MUNIZ., *AMERICAN JUDICIAL POWER: THE STATE COURT PERSPECTIVE*, at ix (2015); see also Jeffrey S. Sutton, *Why Teach—And Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 166–67 (2009).

4. See G. Alan Tarr, *The Montana Constitution: A National Perspective*, 64 MONT. L. REV. 1, 20–21 (2003).

to predict how state constitutions will operate and be interpreted or whether they will be amended or replaced in the future. We in New Jersey took this opportunity on our state constitution's fiftieth anniversary in 1997.⁵ We are currently celebrating our seventy-fifth.⁶

II. MONTANA CONSTITUTIONALISM

By 1960, the process of state constitutional revision had slowed after the earlier waves.⁷ This was partly due to the fear of reapportionment by dominant rural representatives who had resisted constitutional revision to protect rural-dominated state legislatures.⁸ The stimulus for state constitutional revision supplied by the United States Supreme Court's one-person-one-vote decisions is a good example of *federal* influence on state constitutions.⁹

The 1960 words of Robert Rankin—one of the last generation's commentators on state constitutions—remain true today:

The present complex social and economic structure of society, with its new concepts of social and economic democracy, the possible improper use of broadening governmental powers, and the bureaucratic character of the modern state have but increased the importance of and necessity for the inclusion of guarantees of individual rights in state constitutions.¹⁰

The flurry of state constitution-making after *Baker v. Carr*,¹¹ described above by Dr. Henretta, was the last wave of state constitutional revision in this country.¹² As Dr. Alan Tarr points out, there has been virtually no significant state constitutional revision or replacement in the last several generations.¹³ Revision—or “replacement,” as Professor Lawrence Friedman describes it¹⁴—means, as Dr. Tarr has explained:

Of course, it is possible to introduce significant constitutional reform without calling a convention or adopting a new constitution—amendments proposed by constitutional commissions, by initiative, or by state legislatures may also produce constitutional reform. But in thinking about constitutional reform, it is important to distinguish it from the ordinary constitutional change that is so prevalent in the states. Any alteration of a state constitu-

5. See generally Barry Moscovitz & Robert F. Williams, *The New Jersey Constitution: Fifty Years (Introduction)*, N.J. LAW., June 1997, at 4.

6. See generally *The New Jersey Constitution: 75th Anniversary*, N.J. LAW., Oct. 2022.

7. See Henretta, *supra* note 1, at 839.

8. G. Alan Tarr, *Explaining State Constitutional Change*, 60 WAYNE L. REV. 9, 18 (2014).

9. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 45–46 (1998).

10. Robert S. Rankin, *The Bill of Rights*, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 159, 175 (W. Brooke Graves ed., 1960).

11. 369 U.S. 186 (1962).

12. Henretta, *supra* note 1, at 839.

13. See Tarr, *supra* note 8, at 12.

14. Lawrence Friedman, *The Endurance of State Constitutions: Preliminary Thoughts and Notes on the New Hampshire Constitution*, 60 WAYNE L. REV. 203, 207 (2014).

tion, no matter how technical or minor, qualifies as constitutional change. In contrast, constitutional reform involves a more fundamental reconsideration of constitutional foundations. It introduces changes of considerable breadth and impact, changes that substantially affect the operation of state government or the public policy of the state. The replacement of one constitution by another obviously qualifies as constitutional reform.¹⁵

Montana now has the advantage, or disadvantage, of providing in its constitution the Jeffersonian idea for a vote by the people every twenty years on whether to call a constitutional convention.¹⁶ This mechanism could have aided in moving the state toward constitutional revision, as did the extensive preparatory activities beginning in 1967.¹⁷ Interestingly, the 1972 Montana Constitutional Convention's product barely passed by referendum.¹⁸

This narrow margin of approval led to litigation over whether the draft constitution was actually approved, but the Montana Supreme Court upheld the approval.¹⁹ This is an illustration of Dr. Alan Tarr's observation: by contrast to federal courts and federal constitutional change, state courts are often deeply involved in the processes of state constitutional change.²⁰

Montana's 1972 Constitution, like all state constitutions, was a product of its times.²¹ Further, its progressive Declaration of Rights²² amply illustrates Jon Marshfield's important point that *state* constitutional rights are

15. G. Alan Tarr, *Introduction to 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM 1, 2* (G. Alan Tarr & Robert F. Williams eds., 2006) (citations omitted); see also Bruce E. Cain, *Constitutional Revision in California: The Triumph of Amendment over Revision*, in *id.* at 59, 64 ("In theory, constitutional revision should be more comprehensive and qualitatively more significant than a constitutional amendment. But what if revision occurs increasingly through amendment: What is gained and what is lost? The most important advantage should lie in the ability of a Revision Commission to consider how all the pieces fit together. Where the amendment process is piecemeal and sequential, the revision process affords the opportunity to logically relate proposals to goals, and to make the entire package of proposal[s] coherent.").

16. MONT. CONST. art. XIV, § 3. See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 363 (2009).

17. LARRY M. ELISON & FRITZ SNYDER, *THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE* 8–10 (2001).

18. *Id.* at 14–15.

19. *State ex rel. Cashmore v. Anderson*, 500 P.2d 921, 929 (Mont. 1972).

20. TARR, *supra* note 9, at 26–27.

21. As one of the most in-depth studies of state constitutional conventions concluded:

Doubtless one could take a cluster of constitutional conventions in any era—the Jacksonian period, the years of reconstruction or post-reconstruction, the turn-of-the-century progressive era—and find patterns of issue uniformity in each. In other words, there are broad areas of agreement in any one period as to what “modern,” “effective,” “democratic” state government consists of, but little such agreement over time. Conventions in one era meet to undo the careful reforms of an earlier generation.

ELMER E. CORNWELL, JR., JAY S. GOODMAN & WAYNE R. SWANSON, *STATE CONSTITUTIONAL CONVENTIONS: THE POLITICS OF THE REVISION PROCESS IN SEVEN STATES* 203 (1975). See also FRANK P. GRAD & ROBERT F. WILLIAMS, *2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, PROVISIONS, AND AMENDMENTS* 24–25 (2006).

intended to be evolving to meet changing times.²³ The 1972 addition of the right to privacy and to human dignity, interestingly, have led to the Montana Supreme Court's interpretation of the preexisting search and seizure and cruel and unusual punishment guarantees as being "enhanced" by each of the new provisions respectively.²⁴

The 1972 Montana Constitutional Convention met at a time when it could draw on several trends in state constitutionalism. First was the movement toward "managerial constitutionalism."²⁵ According to Dr. Alan Tarr:

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.²⁶

There was a second, more recent trend:

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." 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.²⁷

In 1972, Dr. Tarr concluded the Montana Constitution "reflects a judicious blending of the recommendations of both these reform movements."²⁸ But he also concluded that the 1972 Montana Constitutional Convention went beyond these two themes and included a number of important innovations, including concern for the cultural heritage of Native Americans, important expressions of the right to privacy, and rights against private entities with a significant concern for the environment.²⁹ One wonders how these topics would fare today, and what different topics might prevail.

22. See generally Rick Applegate, *The 1972 Montana State Constitution Declaration of Rights and the Opportunities on the Bumpy Road Ahead*, 43 PUB. LAND & RESOURCES L. REV. 103 (2020). I wrote a brief discussion of state constitutional rights provisions, with some predictions for the then-future in 2006. See Robert F. Williams, *Rights in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 7* (G. Alan Tarr & Robert F. Williams eds., 2006).

23. Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 857–60 (2022).

24. Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Revisions Together*, 2021 WIS. L. REV. 1001, 1004–06 (2021).

25. Tarr, *supra* note 4, at 13.

26. *Id.*

27. *Id.* at 14.

28. *Id.* at 15.

29. *Id.* at 16–17.

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III. STATE CONSTITUTIONAL CHARACTERISTICS

Importantly, state constitutions are not just “little” federal constitutions but, rather, serve different legal and political functions.³⁰ Assessment of American constitutionalism is usually based on the United States Constitution and its interpretation by the Supreme Court, leading to the conclusion that America is “exceptional” when compared to those other national constitutions that are not static and do contain positive rights. Mila Versteeg and Emily Zackin point out the error of this conclusion:

Our analysis reveals three important features of state constitutions that should prompt reconsideration of US constitutional exceptionalism. First, like most of the world’s constitutions, state constitutions are rather long and elaborate, and they include detailed policy choices. The exceptional American taste for constitutional brevity, it turns out, is confined to the federal document alone. Second, like most of the world’s constitutions, state constitutions are frequently amended, overhauled, and replaced. Thus, the textual stability of the over-two-century-old federal Constitution is exceptional compared not only with other national constitutions but also with the constitutions of the American states, which are characterized, in part, by a commitment to progress and change. Third, like most of the world’s constitutions, state constitutions contain positive rights, such as a right to free education, labor rights, social welfare rights, and environmental rights. While the federal Constitution arguably omits explicit declarations of these rights, they are not foreign to the American *constitutional tradition*. On all these dimensions, it is at the federal level only that Americans’ constitutional practices appear exceptional. When we include the writing and revision of state constitutions in our assessment, it becomes clear that American constitutionalism is not nearly as distinctive as most comparative studies and political commentators have suggested.³¹

Versteeg and Zackin continued this important reinterpretation of American constitutionalism by evaluating the question of “entrenchment” in constitutions:

A dominant theme of the constitutional theory literature is that successful constitutions must not only constrain those in power, but must do so over long time horizons, establishing constraints durable enough to bind across generations. . . . By entrenching commitments, constitutions serve as a mechanism for overcoming the inconsistency of preferences over time.³²

30. WILLIAMS, *supra* note 16, at 20.

31. Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1644–45 (2014). *See also* EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* (2013); Marshfield, *supra* note 23, at 854; A.E. Dick Howard, *Who Belongs: The Constitution of Virginia and the Political Community*, 37 J.L. & POL. 99, 133–150 (2022) (discussing national political issues and distinctive characteristics of state constitutions).

32. Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657, 657 (2016).

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The authors recount the reasons scholars insist that entrenchment is necessary, including removing matters from the political agenda and allowing political parties to form new democracies with established rules.³³ Entrenched constitutions are “spare frameworks,” rigid, and characterized by “generality and abstraction.”³⁴ Again, the authors suggest this is too narrow a view of other nations’ constitutions and, more importantly here, the American state constitutions:

The model of an entrenched and spare document, which changes meaning primarily through judicial interpretation, successfully describes the U.S. Constitution. However, it does a poor job of depicting most other national democratic constitutions, or even U.S. state constitutions. As we will demonstrate, specific and unentrenched constitutions developed over the course of the nineteenth and twentieth centuries, and are now the dominant form of constitutionalism across the globe, and within the U.S. states. We argue that these polities’ flexible and detailed constitutional texts embody an alternative model of constitutionalism. Rather than entrenching constraints through spare and stable texts, these constitutions provide officeholders—judges, legislatures and executives—with specific and frequently modified instructions. Although these flexible constitutions do not entrench commitments over long time horizons, we argue that they are nonetheless attempts to constrain the exercise of political power by leaving empowered actors with fewer choices about which policies to pursue.³⁵

Versteeg and Zackin are beginning an important theoretical assessment of the differences between our federal and state constitutions, something Dr. Tarr called for years ago.³⁶ These scholarly conclusions demonstrate clearly that our state constitutions are not simply little versions of our federal constitution. Indeed, another way of characterizing state constitutions is as “hybrid” constitutions, containing “selective entrenchment.”³⁷

A recent case in Montana illustrates the fact that the details of state constitutional separation of powers can vary significantly among states. In *Board of Regents of Higher Education of Montana v. State*,³⁸ the Montana Supreme Court held that the constitutionally established Board of Regents had final authority, rather than the *legislature*, over whether firearms could be possessed on state university campuses!³⁹

33. *Id.* at 658.

34. *Id.*

35. *Id.* at 657. See also ROBINSON WOODWARD-BURNS, HIDDEN LAWS: HOW STATE CONSTITUTIONS STABILIZE AMERICAN POLITICS (2021) (in America, national issues and conflicts can be decentralized to the states and their easier-to-amend constitutions, thereby preserving our federal constitutional stability).

36. G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 842 (1991).

37. Cf. David Landau, *Selective Entrenchment in State Constitutional Law: Lessons from Comparative Experience*, 69 ARK. L. REV. 425, 427 (2016).

38. 512 P.3d 748 (Mont. 2022).

39. *Id.* at 755.

IV. CONCLUSION

The Montana voters overwhelmingly rejected the opportunity to call another constitutional convention in 1990,⁴⁰ and again in 2010.⁴¹ As noted above, there has not been a state constitutional convention in America since the end of the one-person-one-vote wave in 1976.⁴² There has developed a kind of “conventionphobia.”⁴³ I have previously concluded:

At the time many states’ original constitutions were drafted, the politicians and special interests were afraid of the *people* acting through constitutional conventions. Now, by contrast, the people are afraid of *politicians and special interests* acting through constitutional conventions.⁴⁴

The United States Supreme Court’s 2022 decision in *Dobbs v. Jackson Whole Woman’s Health Organization*,⁴⁵ sending the question of abortion “back to the states” will shine an intensive national light on state constitutional rights clauses and provisions for state constitutional amendment. The political and legal ramifications of *Dobbs* are already being felt in all aspects of state constitutionalism. Dr. John Dinan’s article explores this major change from our early perspective.⁴⁶

I hope that the *Montana Law Review* will keep its focus on, among other things, Montana constitutionalism.⁴⁷

40. Tarr, *supra* note 8, at 13–14; ELISON & SNYDER, *supra* note 17, at 16. *See generally* *The Honorable James R. Browning Symposium: The 1972 Montana Constitution: Thirty Years Later*, 64 MONT. L. REV. vii (2003). R

41. *Montana Constitutional Convention Question, CC-2 (2010)*, BALLOTPEdia, <https://perma.cc/VA6X-QRPS> (last visited Jan. 31, 2023).

42. *See* Henretta, *supra* note 1, at 839.

43. WILLIAMS, *supra* note 16, at 388. R

44. *Id.* (emphasis in original).

45. 142 S. Ct. 2228 (2022).

46. John Dinan, *The Constitutional Politics of Abortion Policy after Dobbs: State Courts, Constitutions, and Lawmaking*, 84 MONT. L. REV. (forthcoming 2023); *see also* Kate Zernike, *Both Sides of Abortion Battle Zero In on State Constitutions*, N.Y. TIMES, Jan. 29, 2023, at 1.

47. It looks like there are going to be significant proposals to change the Montana Constitution in the near future. *See* Abe Streeb, *The Fifth Season*, N.Y. TIMES MAGAZINE, Jan. 15, 2023, at 22 (Republican legislative supermajority proposing numerous conservative state constitutional amendments).

