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"Each Generation of a Free Society": The Relationship between Montana's Constitutional Convention, Individual Rights Protections, and State Constitutionalism

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by

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Abstract

In the mid-1970s, state courts began to interpret state constitutions independently of the federal constitution in a way that provided greater protection for individual rights at the state versus federal level. Scholars have generally attributed the rise of this movement, known as state constitutionalism, to the actions and scholarship of judges and point to the cause as a fear that the Burger court would rollback Warren court era protections for individual rights. In reality, the concept of state constitutionalism had been present throughout the 1950s-1970s period of state constitutional revision and was deeply influenced by concerns over the status of the federal system. Montana's 1972 Constitutional Convention illustrates the role that constitutional revision had in the subsequent adoption of state constitutionalism. In particular, the creation, adoption, and interpretation of two provisions—the privacy and dignity clauses—shows that the public was engaged in a conscious decision to go beyond the federal protections for individual rights. Montana's experience suggests that further research is needed in order for scholars to fully understand the rise and adoption of state constitutionalism.

Dedication

For Bob Campbell, who gave me my first copy of the Montana Constitution in 2001, which sparked my interest in constitutional law, and without whom Montana might not have such a strong recognition of individual rights.

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Chapter 1: Introduction

In 1972 Montana voters narrowly approved a new constitution to replace the state's original 1889 foundational document. This new constitution contained an expanded "Declaration of Rights," which many scholars argue provides greater protection for individual rights than any other constitution in the United States, including the federal document. Indeed, Montana's "Declaration of Rights" guarantees seventeen rights that are not explicitly protected by the U.S. Constitution.[1] Delegates to the Montana Constitutional Convention drafted this new document at the tail end of a two-decade-long period of state constitutional revision. Many of the other states that drafted new constitutions during this era also adopted expansive individual-rights protections. However, when discussing state constitutions and their level of protection of individual rights, few scholars look at constitutional revision as a factor in the tendency of states to go beyond the protections contained in the U.S. Constitution. Instead, scholars look to the decisions and scholarship of judges who encouraged states to develop their own body of constitutional law protecting individual rights.

In 1977 U.S. Supreme Court Justice William J. Brennan wrote an article for the *Harvard Law Review* that quickly became viewed as a seminal call to action: he encouraged states to embrace a new way of approaching constitutional law and the protection of individual rights from government action. In this article, Justice Brennan discussed the revolution that had taken place in American law in general, and

[1] Larry M. Elison and Fritz Snyder, *The Montana State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 2001), 1 – 23; Patricia A. Cain, "The Right to Privacy Under the Montana Constitution: Sex and Intimacy, " *Montana Law Review* 64 (2003): 99 – 132; Justice James C. Nelson, "Keynote Address: The Right to Privacy," *Montana Law Review* 68 (2007): 260; Jeanne M. Koester, "Equal Rights," *Montana Law Review* 39 (1978): 238.

constitutional law in particular since the 1920s. During this period lawyers and state courts moved from viewing "state common law principles or state statutes" as the primary body of law applicable to most legal disputes toward a growing reliance on federal administrative, statutory, or constitutional law.[2] Beginning in the 1920s and then increasingly during the New Deal and Warren Court eras,[3] the U.S. Supreme Court handed down decisions that expanded the scope of the protections and liberties in the federal Bill of Rights, including decisions that guaranteed these rights against state as well as federal governmental action.[4] These decisions revolutionized the relationship between the federal and state governments by finding that the actions of state and local governments were limited by the federal Bill of Rights via the Fourteenth Amendment. Utilizing this approach, the U.S. Supreme Court found school segregation unconstitutional and developed a whole host of criminal procedural protections to state police-suspect interactions such as the Miranda warning and protection from warrantless searches.[5]

Once the U.S. Supreme Court had ruled that provisions of the federal Bill of Rights constrained the actions of state governments as well as the federal government, many state courts began interpreting similar provisions in their state constitutions in the

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[2] Justice William J. Brennan, Jr., "State Constitutions and the Protection of Individual Rights," *Harvard Law Review* 90, no. 3 (1977): 489 – 504, quote p. 489.

[3] The New Deal era refers to the U.S. Supreme Court during the 1930s and 1940s and the Warren Court era refers to the time period during which Earl Warren served as Chief Justice, 1953 – 1969.

[4] For more on incorporation see, Henry J. Abraham and Barbara A. Perry, *Freedom and The Court: Civil Rights and Liberties in the United States*, 8th ed. (Lawrence: University of Kansas Press, 2003), Chapter 3, in particular their discussion of *Barron v. Baltimore* (1833), The Fourteenth Amendment, *The Slaughterhouse Cases* (1873), and *Gitlow v. New York* (1925); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press, 1998), Part II; Raoul Berger, *The Fourteenth Amendment and the Bill of Rights* (Norman: University of Oklahoma Press, 1989).

[5] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); Miranda v. Arizona, 384 U.S. 436 (1966).

same way that the U.S. Supreme Court had interpreted corresponding federal provisions. For example, once the U.S. Supreme Court ruled that the Fourth and Fourteenth Amendments prohibited the use in court of evidence obtained illegally by the police, state courts also began to interpret search and seizure clauses in their state constitutions as prohibiting this practice.[6]

Justice Brennan lauded the rise of a strong federal constitutional jurisprudence that guaranteed these protections and liberties "against encroachment by governmental action at any level of our federal system." However, he also expressed fear that states were limiting their guarantees of individual liberties to those contained in the federal Bill of Rights. "State constitutions, too," Justice Brennan reminded his readers, "are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." With these words, Brennan called upon states to develop their own interpretations of their constitutions' bills of rights. This concept is known as "state constitutionalism," the development of a system of interpreting and applying a state constitution that does not rely solely on the U.S. Supreme Court's interpretation of the federal Constitution.[7]

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[6] The U.S. Supreme Court first applied the "exclusionary rule" (prohibiting the use in court of evidence obtained in violation of the Fourth Amendment's search and seizure requirements) to federal courts in *Weeks v. United States*, 232 U.S. 383 (1914). In *Wolf v. Colorado*, 338 U.S. 25 (1949), the U.S. Supreme Court held that the exclusionary rule was not applied to the states via the Due Process Clause of the Fourteenth Amendment. However, in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court reversed this ruling and applied the exclusionary rule to both state and federal courts. For an analysis of the tendency for state courts to interpret their state constitutions as applying the same protections as the U.S. Constitution see, G. Alan Tarr and Mary Cornelia Porter, "State Constitutionalism and State Constitutional Law," in "New Developments in State Constitutional Law," special issue, *Publius* 17, no. 1 (1987): 1 – 12. For an overview of how Montana applied the exclusionary rule pre- and post-*Mapp* see, Melissa Harrison and Peter Mickelson, "The Evolution of Montana's Privacy-Enhanced Search and Seizure Analysis: A Return to First Principles," *Montana Law Review* 64 (2003): 245.

[7] Brennan, "State Constitutions," 490 – 491. Much of the literature, especially from the late 1970s through the 1980s, discussing the independent interpretation of state constitutions, refers to this concept as

Beginning in the late 1970s and early 1980s, state courts embraced this concept and many established independent grounds for interpreting their state constitutions and their bills of rights. Since most states have bills of rights which contain similar provisions to the federal protections, the adoption of state-specific interpretations of clauses guaranteeing individual rights was particularly notable. Almost universally, legal scholars point to Justice Brennan's call to action, or to similar articles written by a handful of state judges in the 1970s, as the source of the state constitutionalism movement.[8] What most of these scholars miss is that immediately prior to the rise of judicial support for state constitutionalism, the United States had experienced one of the most active periods of state constitutional revision in its history. At least twenty-three states, including

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"new judicial federalism." "New judicial federalism" specifically refers to state judges, often with a more civil libertarian approach, attempting to revive the federalist system by interpreting a state constitution's bill of rights as providing more protection than similar provisions in the federal Bill. This thesis will utilize the term "state constitutionalism," which is a broader term that can encompass not only independent interpretations of state bills of rights, but also other constitutional provisions which may have similar corresponding clauses for two reasons: first, it is the author's contention that this trend was not simply the invention of state judges, which is the implication of the term "new judicial federalism," and second, because more recent literature often refers to the concept with the broader term "state constitutionalism."

[8] See, Paul Finkelman and Stephen E. Gottlieb, "Introduction: State Constitutions and American Liberties" in *Toward a Usable Past: Liberty Under State Constitutions*, eds. Paul Finkelman and Stephen E. Gottlieb (Athens: University of Georgia Press, 2009), 1 – 16; Tarr and Porter, "State Constitutionalism"; Alan G. Tarr, "The Past and Future of the New Judicial Federalism," *Publius* 24, no. 2 (1994): 63 – 79; Lawrence Friedman, "The Constitutional Value of Dialogue and the New Judicial Federalism," *Hastings Constitutional Law Quarterly* 93, no. 28 (2000): 112 – 123; Michael G. Colantuono, "The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change," *California Law Review* 75, no. 4 (1987): 1473 – 1512, Colantuono uses the alternative phrase, "new judicial federalism," in reference to state constitutionalism; Robert M. Howard, Scott E. Graves, Julianne Flowers, "State Courts, the U.S. Supreme Court, and the Protection of Civil Liberties," *Law & Society Review* 40, no. 4 (2006): 845 – 870; Brennan, "State Constitutions." The scholars who point to this Brennan article, which grew out of an earlier speech, as the beginning of the new judicial federalism movement, include Friedman, Tarr, and Colantuono; Collins, Galie, and Kincaid, and Finkelman and Gottlieb attribute significant responsibility for the movement to Brennan but do not specifically pinpoint the beginning of the movement to his 1977 article. While scholars appear to universally embrace the assumption that state constitutionalism began in the mid-late 1970s because of judicial action, there is some disagreement about the extent of state constitutionalism. Some scholars believe that the successes and extent of state constitutionalism have been vastly over-hyped. For examples of these arguments see, Kermit L. Hall, "Mostly Anchor and Little Sail: The Evolution of American State Constitutions," in *Toward a Usable Past*, 388 – 417, and James A. Gardner, "The Failed Discourse of State Constitutionalism," *Michigan Law Review* 90 (February, 1992): 761 – 837.

Montana, concluded efforts to completely or significantly revise their state constitutions between 1955 and 1975; many others revised their constitutions piece-meal through constitutional amendments during the same period.[9]

Accompanying this period of state constitutional revision were numerous conversations about the purpose and scope of state constitutions and bills of rights and their relationship to the federal Constitution. Underlying these conversations were real concerns about the state of America's federalist system, the growing power and influence of federal law, and fears that the U.S. Supreme Court would not continue to protect individual rights at the level reflected in its decisions of the 1950s and 1960s. These concerns were noted by Justice Brennan and legal scholars as the motivation for state constitutionalism. However, these discussions took place much earlier than most scholars recognize, amidst the state constitutional revision of the 1950s through 1970s, and were not limited to judges, lawyers, and legal scholars, but rather included legislators and the general public. Indeed, the application of state constitutionalism grew directly out of this period of state constitutional revision and reflected the desires of the citizens of the states for a more balanced federalist system as well as period-specific values and beliefs about fundamental rights.

[9] On the major eras of state constitutional revision, see John J. Dinan, *The American State Constitutional Tradition* (Lawrence: University of Kansas Press, 2009), chapter one; John J. Dinan, "'The Earth Belongs Always to the Living Generation': The Development of State Constitutional Amendment and Revision Procedures," *The Review of Politics* 62, no. 4 (2000): 645 – 674; Albert L. Sturm, "The Development of American State Constitutions," in "State Constitutional Design in Federal Systems," special issue, *Publius* 12, no. 1 (1982): 57 – 98; Janice C. May, "Constitutional Amendment and Revision Revisited," in "New Developments in State Constitutional Law," special issue, *Publius* 17, no. 1 (1987): 153 – 179; and John J. Carroll and Arthur English, "Traditions of State Constitution Making," *State & Local Government Review* 23, no. 3 (1991): 103 – 109.

Since the 1970s Montana has been one of the states most active in the application of state constitutionalism, and its experience with the rise and adoption of the concept provides an opportunity for a more nuanced and deeper understanding of the state constitutionalism movement in America. In 1972 Montana revised its constitution through a public convention. The 1972 Montana Constitutional Convention and the "Declaration of Rights" it crafted (which legal scholars view as protecting individual rights more stringently than "any state in this country" [10]) show that state constitutionalism was the result of era-specific, citizen-driven constitutional revision. In Montana, state judges in the late 1970s and 1980s were able to interpret and apply the state constitution independent of the U.S. Supreme Court's interpretations of corresponding clauses in the federal Constitution because the citizen-driven constitutional convention had discussed and drafted a constitution on independent grounds. The fact that Montana's convention took place during an era of state constitutional revision and nation-wide conversations about the purpose of state constitutions suggests that state constitutionalism throughout the nation was a result of constitutional revision as much as the actions of state and federal judges.

In Montana a grassroots group of individuals consciously, and with the input of the public, drafted a constitution that was intended to provide strong protections for individual rights. These individuals were well-informed about and connected to the constitutional revision activity that was occurring across the country. The debates and adoption of two clauses in the 1972 Montana Constitution—the dignity clause and the privacy clause— in combination with the public discussions regarding the Declaration of

[10] Cain, "The Right to Privacy."

Rights in general, illustrate that the concept of state constitutionalism was widely understood among the public and the delegates, and supported across ideological lines. Further, the decision to embrace state constitutionalism reflected an awareness of ongoing discussions across the country and was used as a tactic for bolstering state power in the federal system as much as an attempt to maintain Warren Court-era protections for individual rights. Montana's constitutional convention and its embrace of state constitutionalism demonstrate that Justice Brennan's *Harvard Law Review* article was not the beginning of state constitutionalism, but a call for state courts to increase their participation in a movement that had already begun during the previous two decades of constitutional revision.

This thesis will first explore the legal and political developments that led to state constitutionalism as well as those that led to the Montana Constitutional Convention. It will then establish that the concept of state constitutionalism was an integral aspect of mid-century constitutional revision, that the delegates to the Montana Constitutional Convention were aware of the concept of state constitutionalism, and that the Montana public and media were familiar with the principle and urged the delegates to craft a constitution that would go beyond federal protections. Next, the thesis will explore the crafting and adoption of two provisions—the privacy clause and the dignity clause—in the Montana constitution. These two clauses are unique to Montana, and guarantee rights that are not explicitly included in the federal Constitution. The two provisions have been lauded as providing the legal basis for the most far-reaching Montana Supreme Court decisions that have been decided on independent state grounds. Finally, the thesis will

assess the role that the 1972 constitutional revision had on Montana's adoption of state constitutionalism and what this suggests for the history of state of constitutionalism across the nation.

Chapter 2: Background

As Justice Brennan pointed out in his *Harvard Law Review* article, American law, especially in the arena of constitutional law, underwent a radical transformation during the mid-twentieth century. This transformation began in the 1920s and reached its peak during the Warren Court era. However, the basis for these changes can be traced back to the post-Civil War era. Before the Civil War, the states and the federal government generally had separate spheres of power and legal jurisdiction. Power over individual liberties was almost solely in the hands of the states. Despite this well-settled division of power, for almost a century lawyers, judges, legal scholars, and historians had engaged in "lively disagreement" over whether the Bill of Rights served as a limitation on state governments as well as the federal government. The Bill of Rights, consisting of the first ten amendments to the Constitution, passed Congress in 1789 in order to fulfill the promises made to ensure ratification of the Constitution by the states. During the drafting and ratification process, James Madison—the bill's primary author—unsuccessfully attempted to include provisions that applied at least a portion of the bill to the states. In the 1833 case, *Barron v. Baltimore,* the U.S. Supreme Court held that the Bill of Rights only limited the actions of the federal government, not those of states. This opinion became "the law of the land" and, for the most part, left citizens unable to assert the protections of the federal Bill of Rights against the actions of a state. [1]

[1] Raoul Berger, *The Fourteenth Amendment and the Bill of Rights* (Norman: University of Oklahoma Press, 1989), 5 – 6; Chief Justice Marshall, Barron v. Mayor of Baltimore, 32 U.S. 243 (1833); Henry J. Abraham and Barbara A. Perry, *Freedom and The Court: Civil Rights and Liberties in the United States*, 8th ed. (Lawrence: University of Kansas Press, 2003), 36.

Following the Civil War, Republican plans for Reconstruction faced a number of challenges. The South was resistant, and it was unclear whether the Constitution and the laws of the country gave Congress the power to reconstruct the South. In part to bolster the legal authority for Reconstruction, Congress passed and the requisite number of states ratified the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. The Thirteenth Amendment prohibited slavery everywhere in the United States, and the Fifteenth Amendment prohibited denying a citizen the right to vote because of their race. The Fourteenth Amendment was more complex and addressed a number of issues related to the aftermath of the Civil War. The most significant provision, Section 1, guaranteed citizenship to all persons born in the United States, in effect overturning the 1857 *Dred Scott* Supreme Court decision, which ruled that black individuals born in America were not and could never be citizens of the United States. It also prohibited states from abridging "the privileges or immunities of citizens of the United States," from depriving "any person of life, liberty, or property, without due process of law," or from denying "to any person within its jurisdiction the equal protection of the laws." All three amendments empowered Congress to pass legislation for their enforcement and were intended, some later argued, to provide the legal basis for legislation that would remedy the results of slavery and persistent discrimination against African Americans.[2]

The exact intent of these amendments and the scope of their effects have been widely debated, but it is clear that over time their effect was to increase the power of the federal government. Legal historians have noted that the Reconstruction amendments

[2] U.S. Constitution, Thirteenth Amendment, Fourteenth Amendment, Fifteenth Amendment; Dred Scott v. Sandford, 60 U.S. 393 (1857).

changed the balance of power between the federal and state governments by providing a legal basis for federal oversight of the states' power in the areas of individual rights and liberties.[3] There are myriad ways in which the Civil War and Reconstruction altered the American legal landscape, but for the purposes of exploring the relative power of the federal government and the state governments in protecting individual rights, there are two primary topics of importance: the increase in federal power brought about by the Reconstruction amendments and the issue of whether the Fourteenth Amendment applied the federal Bill of Rights to the states.

Since the Fourteenth Amendment's adoption there has been increased debate over whether the framers of the Amendment intended it to be a vehicle for applying the federal Bill of Rights to state actions, a concept referred to as incorporation.[4] In part, this is due to the lack of in-depth discussion in Congress regarding the scope of Section 1 of the Amendment. According to legal scholar Jacobus tenBroek, the Fourteenth Amendment was adopted by Congress "at the very least, to make certain that that statutory plan [for reconstruction] was constitutional, to remove doubts about the adequacy of the Thirteenth Amendment to sustain it, and to place its substantive provisions in the Constitution itself."[5]

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[3] On the effect of the Civil War and the Reconstruction Amendments on the American political and legal system, see Jacobus tenBroek, "Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment," *California Law Review* 39, no. 2 (June, 1951): 171 – 180; Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven, CT: Yale University Press, 1998), Part II; Michael Kent Curtis, *No State Shall Abridge* (Durham, NC: Duke University Press, 1986). Some scholars argue that the Reconstruction Amendments were not intended to shift the balance of power as much as occurred during the twentieth century, see Charles Fairman, "The Original Understanding," *Stanford Law Review* 2, no. 1 (1949): 5 – 139; and Berger, *The Fourteenth Amendment*.

[4] Abraham & Perry, *Freedom and The Court*, 36.

[5] Jacobus tenBroek, "Thirteenth Amendment," 203.

As a result of this ambiguity regarding the framers' intentions, the Supreme Court ended up defining the extent of the due process and equal protection provisions and exactly which "privileges or immunities" this clause sought to guarantee. Historian Morton J. Horowitz has characterized this time period between the ratification of the Reconstruction amendments and the early 1900s as a battle between competing legal theories: "Classical Legal Thought" on the one hand, which "presumed that the existence of decentralized political and economic institutions was the primary reason why America had managed to preserve its freedom" and "Progressive Legal Thought" on the other, which argued that the law impacted the lives of people in real ways and was intimately connected to moral and political reasoning. The Reconstruction amendments could be seen as a challenge to the beliefs of those who embraced Classical Legal Thought because the framers of the amendments acknowledged a need for and provided a legal basis for centralized oversight of individual rights and liberties.[6]

Supporters of Classical Legal Thought on the U.S. Supreme Court prevailed during this era and rejected labor laws and other federal regulatory schemes. The Court's early decisions regarding the Reconstruction amendments followed this pattern of denying expansive centralized authority.[7] The Court's decision in the *Slaughterhouse Cases* (1873), the first case in which the Court had to determine the scope of Section 1 of the Fourteenth Amendment, resulted in a narrow interpretation of the clause in question. The Court rejected the idea that the Bill of Rights was applied to the states via the

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[6] Morton J. Horwitz, *The Transformation of American Law, 1870-1960* (New York: Oxford University Press, 1992), 4.

[7] Paul Kens, *Lochner v. New York: Economic Regulation on Trial* (Lawrence: University of Kansas, 1998); tenBroek, "Thirteenth Amendment," 209; Lawrence M. Friedman, *American Law in the Twentieth Century* (New Haven: Yale University Press, 2002), Part I: The Old Order.

privileges or immunities clause of Section 1 and put forth a very narrow definition of federal "privileges or immunities."[8]

During the late nineteenth and early twentieth centuries the Supreme Court handed down a number of decisions that further defined the "due process" clause and differentiated its requirements from those under the due process clause of the 5th Amendment. This reaffirmed the belief that the rights contained in the Bill of Rights could not be applied to the states via the Fourteenth Amendment.[9]

It was not until the 1920s, the case of *Gitlow v. New York*, that the Court began to use the Fourteenth Amendment to extend some of the protections contained in the Bill of Rights to individuals affected by state action.[10] In *Gitlow*, in which the Court held that the conviction of a Socialist for expounding potentially inciteful beliefs and materials was not a violation of the First Amendment, Justice Sanford stated, "We…assume that freedom of speech and of the press—which are protected by the First Amendment … are …protected by the due process clause of the Fourteenth Amendment from impairment by the States."[11]

Once the majority of the Court had advanced the possibility of applying protections contained within the Bill of Rights to the states, the Court as a whole and individual justices began to develop a variety of incorporation theories.[12] A major

[8] The Slaughterhouse Cases, 83 U.S. 36 (1873).

[9] Hurtado v. California, 110 U.S. 516 (1884); Maxwell v. Dow, 176 U.S. 581 (1900); Twining v. New Jersey, 211 U.S. 78 (1908).

[10] Abraham & Perry, *Freedom and The Court*, 58.

[11] Justice Sanford, Gitlow v. New York, 268 U.S. 652 (1925).

[12] Legal scholars have identified three to five primary judicial theories of incorporation. According to David O'Brien, justices of the Supreme Court have developed five recognized approaches to the concept of incorporation: total incorporation, selective incorporation, fundamental fairness, total incorporation plus, and selective incorporation plus. Henry Abraham and Barbara Perry recognize the first four as fully fleshed

change in the focus and philosophy of the U.S. Supreme Court further encouraged the process of incorporation. As legal scholar Paul Kens has established, prevailing legal theories prior to 1937 led the Court to embrace the protection of property and reject many attempts by the federal government to regulate the economy or society. In a sudden about-face in 1937, well into the Great Depression, the Court began to uphold New Deal programs, and the focus of the U.S. Supreme Court began to shift from protecting property interests to protecting individual liberties.[13] Political scientists Henry J. Abraham and Barbara A. Perry have noted that whereas during the 1935 – 1936 Supreme Court term two out of 160 decisions focused on individual liberties, "since 1937 the overwhelming majority of judicial vetoes imposed upon the several states and almost *all* of those against the national government have been invoked because they infringed personal liberties" protected by the Bill of Rights.[14]

Following this trend, the post-1937 New Deal Court and the Warren Court slowly continued to apply some of the protections of the Bill to the states. These protections included the freedoms of speech and press, the free exercise of religion, and the right to peaceable assembly. The Court applied these particular protections to the states because the Court determined them to be included within the meaning of the due process clause of

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out judicial theories, whereas Akhil Reed Amar argues, "three main approaches have dominated the twentieth century debate": fundamental fairness, total incorporation, and selective incorporation. For more on these theories and the justices who advocated for them see, David M. O'Brien, *Constitutional Law and Politics: Civil Rights and Civil Liberties*, 6th ed. (New York: W.W. Norton & Co, 2005), 2:309 – 318; Abraham & Perry, *Freedom and The Court*, 95 – 100; and Amar, *Bill of Rights*, 139.

[13] Kens, *Lochner*; Friedman, *American Law in the Twentieth Century*, see, in particular, chapter 6; Morton J. Horwitz, *The Warren Court and the Pursuit of Justice* (New York: Hill and Wang, 1998); see in particular the discussion of the infamous *Carolene Products* footnote by Justice Harlan Fiske Stone signaling the shift away from applying heightened judicial scrutiny in cases involving economic regulation and toward applying heightened scrutiny in cases involving individual rights, democratic processes, and discrimination, 76 – 80.

[14] Abraham & Perry, *Freedom and The Court*, 5.

the Fourteenth Amendment. As Morton J. Horwitz notes, the concept and scope of incorporation was hotly debated during the 1930s, 1940s, and 1950s at the same time that the Court incrementally increased the number of protections that were applied to the states. According to Justice Brennan, it was during "the years from 1962 to 1969 that the face of the law changed. Those years witnessed the extension to the states of nine of the specifics of the Bill of Rights; decisions which have had a profound impact on American life, requiring the deep involvement of state courts in the application of federal law." This new focus on individual liberties and a more expansive federal government led to the strong federal constitutional jurisprudence regarding individual rights and liberties that Justice Brennan argued state courts were applying to their own constitutions.[15]

The shift of the Supreme Court from its pre-Gitlow approach to its Warren Court era tendency to rule in favor of individual rights and liberties and against state and federal government actions restricting those liberties, resulted in expanded protections for individuals in the areas of criminal justice, freedom of speech, and establishment of religion. The increasing tendency of the U.S. Supreme Court to apply the provisions of the Bill of Rights to the states required state legislatures to make massive changes in their laws and procedures to ensure that state employees were applying federal protections. New York, for example, attempted to revise its constitution in 1966 – 1967, in part to align its bill of rights with the federal protections. According to political scientists G. Alan Tarr and Mary Cornelia Porter, incorporation led "state judges to focus their

[15] The freedoms of speech and press, free exercise of religion, and the right to peaceable assembly were applied to the states in the 1930s. Abraham & Perry, *Freedom and The Court*, 67; Horwitz, *The Warren Court*, 91 – 98; Justice William J. Brennan, Jr., "State Constitutions and the Protection of Individual Rights," *Harvard Law Review* 90, no. 3 (1977): 489 – 504, quote p. 493.

attention on the latest pronouncements from Washington, D.C." The tendency to use the U.S. Supreme Court's interpretation of the federal Bill of Rights in state courts was so widespread that it led Hans Linde, a former Oregon State Supreme Court Justice who was among the first state judges to embrace state constitutionalism, to chastise his fellow state judges for their wholesale application of federal protections.[16]

Scholars have not disputed the trend Judge Linde noticed: by the 1950s, during the Warren Court's increasing acceptance of incorporation and its generally expansive interpretation of the federal Bill of Rights, state courts began interpreting their own bills of rights in the same way as the U.S. Supreme Court had interpreted corresponding clauses in the federal Bill of Rights. As Paul Finkelman and Stephen E. Gottlieb have noted, it is also clear that many states began to retreat from this approach in the 1970s and adopted interpretations of their state bills of rights that differed from the federal interpretations, usually by protecting individual rights at a higher level. The question is: Why did this shift occur at the state level? Scholars generally attribute this movement to the actions of libertarian-minded state courts and state judges, often highlighting the

[16] Paul Finkelman and Stephen E. Gottlieb, "Introduction: State Constitutions and American Liberties" in *Toward a Usable Past: Liberty Under State Constitutions*, eds. Paul Finkelman and Stephen E. Gottlieb (Athens: University of Georgia Press, 2009), 1 – 16; Brennan, "State Constitutions," 492 – 494. Protections for individuals accused of crimes were extended in cases such as *Gideon v. Wainwright*, 372 U.S. 335 (1963), right to counsel; *Miranda v. Arizona*, 384 U.S. 436 (1966), right to warnings and statement of rights prior to police interrogation. Protections guaranteeing freedom of speech and expression were extended in cases such as *Brandenburg v. Ohio*, 395 U.S. 444 (1969), right to advocacy speech protected unless it is likely to incite imminent lawless action. Protections guaranteeing no state establishment of religion were extended in cases such as *Engel V. Vitale* 370 U.S. 421 (1962), prohibiting states from composing and introducing official prayers into schools. Rick Applegate, "Are States' Bills of Rights Necessary?" in *Bill of Rights,* report no. 10 prepared by the Montana Constitutional Convention Commission for the delegates to the Montana Constitutional Convention, (Helena, Montana, 1971): 47 – 63 (hereafter cited as Applegate, *Bill of Rights*); G. Alan Tarr and Mary Cornelia Porter, "State Constitutionalism and State Constitutional Law," in "New Developments in State Constitutional Law," special issue, *Publius* 17, no. 1 (1987): 1 – 12, quote p. 7; Hans A. Linde, "First Things First: Rediscovering the States' Bills of Rights," *University of Baltimore Law Review* 9, no. 3 (Spring, 1980): 380 – 381.

encouragement of U.S. Supreme Court Justice Brennan. These scholars usually point to the end of the Warren Court and the beginning of the Burger Court in 1969 and corresponding fears that an ostensibly more conservative Court was likely to roll back protections for individual rights.[17]

Tarr, a political scientist and prolific author on the topic of state constitutions, argues that perceptions about the Burger Court's intentions regarding civil liberties and the early indications that those fears would be realized, led civil libertarians to seek other avenues for expanding protections. There is some debate as to whether the Burger Court actually represented a significant shift in the type and scope of Supreme Court decisions. Legal scholars Larry M. Elison and Dennis NettikSimmons have presented an in-depth analysis of the myriad ways the Burger Court scaled back Warren Court precedents, as well as discussing the ways in which the Court attempted to limit the use of state constitutionalism to expand rights protections. Regardless of the extent of the Burger Court's efforts, legal scholar Michael Colantuono directly attributes the rise of state constitutionalism to state courts seeking to maintain the protections that existed under the Warren Court in the face of declining federal protections under the Burger Court. These scholars point to these actions as central to the growing interest in state constitutionalism

[17] See, Finkelman and Gottlieb, "Introduction" in *Toward a Usable Past*; Tarr and Porter, "State Constitutionalism"; Alan G. Tarr, "The Past and Future of the New Judicial Federalism," *Publius* 24, no. 2 (1994): 63 – 79; Lawrence Friedman, "The Constitutional Value of Dialogue and the New Judicial Federalism," *Hastings Constitutional Law Quarterly* 93, no. 28 (2000): 112 – 123; Michael G. Colantuono, "The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change," *California Law Review* 75, no. 4 (1987): 1473 – 1512; Robert M. Howard, Scott E. Graves, Julianne Flowers, "State Courts, the U.S. Supreme Court, and the Protection of Civil Liberties," *Law & Society Review* 40, no. 4 (2006): 845 – 870. Brennan, "State Constitutions"; The scholars who point to this Brennan article, which grew out of an earlier speech, as the beginning of the new judicial federalism movement, include Friedman, Tarr, and Colantuono; Collins, Galie, and Kincaid, and Finkelman and Gottlieb attribute significant responsibility for the movement to Brennan but do not specifically pinpoint the beginning of the movement to his 1977 article.

during the 1970s and 1980s. Political scientists Robert M. Howard, Scott E. Graves, and Julianne Flowers attribute the origins of state constitutionalism in the U.S. to "an increasingly conservative U.S. Supreme Court" and the actions of Justice Brennan and leading state judges. In addition to attributing the birth of this movement to Justice Brennan, some of these scholars also recognize state judges, particularly Oregon Supreme Court Justice Linde, as playing a significant role in the articulation and advocacy of the state constitutionalism movement.[18]

Contemporary literature does attribute some of the support for state constitutionalism to the fears raised by the changing leadership on the U.S. Supreme Court. However, it also appears that many scholars, and some members of the public, saw some Warren Court decisions as transient long before the ascendance of Chief Justice Warren Burger. It is worth noting that a period of significant state constitutional revision paralleled the Warren Court expansion of civil liberties. At the same time the U.S. Supreme Court was applying the federal Bill of Rights to states, citizens in those states were discussing the purpose and scope of state constitutions; and many states were adopting bills of rights that went beyond the federal protections. Unfortunately, the very few scholars who have examined both state constitutionalism and state constitutional revision have rarely explored the relationship between the two movements. Political scientist Janice May does briefly acknowledge the role that voter-approved constitutional

[18] Tarr, "Past and Future"; Larry M. Elison and Dennis NettikSimmons, "Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds," *Montana Law Review* 45 (1984): 177 – 214; Friedman, "The Constitutional Value of Dialogue"; Colantuono, "The Revision of American State Constitutions"; Howard, Graves, Flowers, "State Courts, the U.S. Supreme Court, and the Protection of Civil Liberties." For a discussion of Hans A. Linde's role in the rise of state constitutionalism see, Jack L. Landau, "Of Lessons Learned and Lessons Nearly Lost: The Linde Legacy and Oregon Constitutional Law," *Willamette Law Review* 43 (2007): 251 – 279.

amendments played in states adopting state constitutionalism and Colantuono focuses on citizen-led backlash to particular rulings based on state constitutionalism. Montana's example suggests that it was a combination of state constitutional revision, the changing U.S. Supreme Court, and a desire for a more balanced federal system that led to the embrace of state constitutionalism.[19]

There is a woeful lack of historical research on state constitutions in the United States, in general. As Finkelman and Gottlieb have noted, "most scholars have focused their attentions on the history of the federal Constitution," a lament which has been echoed by the few historians, such as Christian Fritz, who have dedicated their research to the history of state constitutions. Whereas significant historical questions about state constitutions have not been researched (such as state-by-state histories of civil liberties and state constitutional law), one area regarding state constitutions that has been explored in some detail is the rich and varied history of state constitution-making in the United States. Fritz argues that incorporating the history of state constitution-making into our conception of American constitutionalism will result in a more complex and accurate understanding of American history and the role of constitutionalism in that history.[20]

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[19] Rick Applegate, *Bill of Rights*; Montana Constitutional Convention Studies, *A Collection of Readings on State Constitutions, Their Nature, and Purpose*, report no. 4 prepared by the Montana Constitutional Convention Commission for the delegates to the Montana Constitutional Convention, (Helena, Montana, 1971) (hereafter cited as, *Report No. 4*); Albert L. Sturm, "The Development of American State Constitutions," in "State Constitutional Design in Federal Systems," special issue, *Publius* 12, no. 1 (1982): 57 – 98. See Janice C. May, "Constitutional Amendment and Revision Revisited," in "New Developments in State Constitutional Law," special issue, *Publius* 17, no. 1 (1987): 153 – 179" and Colantuono, "The Revision of American State Constitutions," particularly Colantuono's discussion of the California backlash against state judges and rulings providing state protections to individuals accused of crimes.

20 Finkelman and Gottlieb, "Introduction" in *Toward a Usable Past*, 4; Christian G. Fritz, "Fallacies of American Constitutionalism," *Rutgers Law Journal* 35 (2004): 1327 – 1369.

Scholars have identified five major eras during which most state constitutional-revision activity took place: the late eighteenth century when the first state constitutions were drafted; the Jacksonian era when state constitutional-revision activity reflected a growing democratic sentiment; the Civil War and Reconstruction era, when states drafted constitutions to adapt to Civil War and Reconstruction politics and several new western states drafted their initial constitutions; the Progressive era of the twentieth century (1900 – 1920s), when numerous states first adopted processes for popular votes on constitutional amendments and initiatives; and finally the mid-1950s through early 1970s, when numerous states revised their nineteenth-century constitutions. Montana's 1972 Constitutional Convention falls squarely into this most recent era of state constitutional-revision and reflects a number of the trends and tendencies of this period. Other states which held constitutional conventions during this era included Alaska, Arkansas, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Michigan, New Hampshire, New Jersey, New Mexico, North Dakota, New York, Pennsylvania, Rhode Island, Tennessee, Texas, and Virginia. States which engaged in substantial attempts at constitutional revision through other forms, such as legislative committees or constitutional amendments, included Idaho, Washington, Oregon, California, and Florida.[21]

Christian Fritz and other historians such as Marsha L. Baum, Suzanna Sherry, Gordon M. Bakken, and David A. Johnson have explored the creation and interpretation

[21] On the major eras of state constitutional revision see, John J. Dinan, *The American State Constitutional Tradition* (Lawrence: University of Kansas Press, 2009), chapter one; John J. Dinan, "'The Earth Belongs Always to the Living Generation': The Development of State Constitutional Amendment and Revision Procedures," *The Review of Politics* 62, no. 4 (2000): 645 – 674; Sturm, "The Development of American State Constitutions"; May, "Constitutional Amendment and Revision Revisited"; and John J. Carroll and Arthur English, "Traditions of State Constitution Making," *State & Local Government Review* 23, no. 3 (1991): 103 – 109.

of eighteenth- and nineteenth-century state constitutions. Some of this scholarship is designed to counter critiques by twentieth-century legal scholars who have denigrated the form and content of nineteenth century state constitutions, or historians such as Gordon Wood, who have suggested that state constitution-makers unthinkingly borrowed provisions from other state constitutions. While attempting to counter these narratives, historians of state constitutions have focused on explaining why and how particular styles and provisions were adopted during the different eras of state constitution-making or in particular geographic regions. Few, if any, historians have studied the constitutional revision that took place during the mid-twentieth century. The literature on mid-twentieth century state constitutional revision is primarily scholarship by political scientists and legal scholars on the general trends of state constitutional revisions or state-specific reviews of mid-century constitutions. Exploring the history of the Montana Constitutional Convention shows that the constitutional revision that took place in the mid-twentieth century laid the groundwork for state constitutionalism and the move to provide more protection for individual rights at the state level than that afforded by the federal Bill of Rights.[22]

According to the political scientist Albert L. Sturm, pressure to reform state constitutions began to mount in the mid-1950s, as both national and state commissions

[22] Paul Finkelman and Stephen E. Gottlieb, "Introduction"in *Toward a Usable Past*, 4; Fritz, "Fallacies of American Constitutionalism,"; Christian G. Fritz and Marsha L. Baum, "American Constitution-Making: The Neglected State Constitutional Sources," *Hastings Constitutional Law Quarterly* 27 (2000): 199 – 242; Christian G. Fritz, "The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West," *Rutgers Law Journal* 25 (1994): 945 – 998; Gordon Morris Bakken, *Rocky Mountain Constitution Making, 1850-1912* (Westport, CT: Greenwood, 1987); Suzanna Sherry, "The Early Virginia Tradition of Extratextual Interpretation" in *Toward a Usable Past*, 157 – 188; David Alan Johnson, *Founding the Far West: California, Oregon, and Nevada, 1840 – 1890* (Berkeley: University of California Press, 1992).

assessed the ability of state governments to handle pressing issues of civil rights and a growing demand for state services.[23] In 1955 the Presidential Commission on Intergovernmental Relations, commonly referred to as the Kestnbaum Commission, released a report critiquing state constitutions for their many limitations on government activities. Increasingly during the 1960s, individuals and civic organizations criticized the length and detailed nature of state constitutions, characteristics of nineteenth-century constitutions, which Christian Fritz noted arose from a distrust of legislative power and the prevailing constitutional theory that legislatures held unlimited power unless limitations were explicitly placed on them. Those engaged in civic organizations began calling for "modern" constitutions to remedy these flaws. As Sturm characterized it in 1969, such a modern constitution would "eschew traditional limitations" and move "away from detail and toward simplification and flexibility, yet maintaining responsibility along with responsiveness."[24]

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[23] Albert L. Sturm was a political scientist who was actively engaged in the discussions and debates surrounding state constitutional revision during the 1950s through the 1970s, at times on the behalf of the National Municipal League that produced a much cited and utilized Model State Constitution. He continued to research and publish on the era's constitutional revision through the 1990s. Despite being a participant in these activities with a discernable point of view (he, like many contemporaries, criticized the content and structure of nineteenth century constitutions), Sturm is almost universally cited by scholars studying this era of constitutional revision and appears to be an accurate source, certainly as an example of contemporary perspectives on constitutional revision, but also on the general trends, timing, and purposes related to the era's constitutional revision activities. Sturm, "The Development of American State Constitutions"; John Marshall Butler, *Commission on Intergovernmental Relations: A Report to the President for Transmittal to the Congress* (Washington D. C.: Government Printing Office, 1955). A small sampling of contemporary criticisms of state constitutions which echo Sturm's analysis and which were provided to the Montana Constitutional Convention delegates include: David Fellman, "What Should State Constitutions Contain?," Chapter 8 in *Major Problems in State Constitutional Revision*, edited by W. Brooke Graves (Chicago: Public Administration Service, 1960); Frank P. Grad, "The State Constitution: Its Function and Form for Our Time," *Virginia Law Review* 54 (1968); and James Nathan Miller, "Dead Hand of the Past," *National Civic Review* 57 (1968), all reprinted in *Report No. 4*.

[24] Fritz, "The American Constitutional Tradition Revisited"; Albert L. Sturm, "The Complete Constitution" in "What Should a Model Constitution Contain," (presentation at the Constitutional Revision Symposium, West Virginia, 1969), Reprinted in *Report No. 4*, 229.

Advocates for constitutional revision and legal scholars critical of existing state constitutions echoed Sturm's comments, many focusing on the concept of "modernization" of state constitutions. This call for modernization reflected a number of concerns regarding changes in society and states' ability to keep up with these changes. Some of these concerns were purely functional. Numerous authors called for expanding taxing authority and the power of local governments or increasing states' responses to technological changes. A common thread running throughout the literature was a concern about the changing nature of the federal government and its impact on the balance of power between the federal and state governments. While calling for state constitutions that would allow stronger and more responsive state governments, Robert B. Dishman criticized "needlessly detailed" state constitutions:

> To the extent that a government is kept from doing harm by detailed restrictions on the exercise of its power, it is also kept from doing good. . . . If for this reason, the legislature is unable to cope effectively with the pressing problems of the day, the state has no one to blame but itself. Nor can it complain too loudly when the federal government takes over responsibilities which the state and local governments have not been allowed to meet effectively.[25]

The rhetoric surrounding calls for a new constitution in Montana closely tracked the national debates and trends regarding "modernizing" state constitutions. The existing 1889 constitution was in many ways a typical nineteenth-century Western constitution. It was the product of a six-week constitutional convention, the third in Montana's short history. Previous conventions had been held in 1866, just two years after Congress

[25] Robert B. Dishman, "The State Constitution as Fundamental Law," Chapter 2 in *State Constitutions: The Shape of the Document*, (New York: National Municipal League, 1968) reprinted in *Report No. 4*, 26. All of the twenty different selections contained in *Report No. 4* echo Sturm's call for modernizing state constitutions and across-the-board point to inability to raise sufficient taxes, need for restructuring, and a need for empowered local governments. Recognition of the changing relationship between states and the federal government is also universally present, with many calling for more powerful state constitutions to re-balance the U.S. federalist system.

established Montana Territory in the 1864 Organic Act; and in 1884, which was inspired by the recent completion of the Northern Pacific Railroad and the desire to levy taxes on the newest addition to Montana's transportation network. The 1866 convention was mired in Civil War politics, failed to keep any records, and resulted in a constitution that "was promptly lost." The 1884 convention produced a document that, according to one historian, "drew heavily from precedents found in existing state constitutions." The document drew widespread support among voters, likely due to the fact that voter passage and congressional acceptance of a constitution were prerequisites for achieving statehood. Despite support for the document and an intense desire for statehood among Montanans, Congress did not approve the 1884 constitution. The politics of western statehood were closely tied to the prevailing local political affiliations and political tensions in Congress. Montana was narrowly Democratic at this time and the Republican-controlled Senate was wary of admitting a state into the Union that could shift the balance of power in Congress. The 1889 constitution was written, approved by voters, and ultimately accepted by Congress due to an increase in Republican power in Congress that alleviated fears of admitting a nominally Democratic state into the Union. [26]

[26] Michael P. Malone, Richard B. Roeder, and William L. Lang, *Montana: a History of Two Centuries*, revised ed. (Seattle: University of Washington Press, 1991), 96 – 103 , 195 – 198 . Richard Roeder was a delegate to the constitutional convention which may have affected his approach towards analyzing the constitutional history of Montana; Ibid, 102; Ibid, 194; Margery H. Brown, "Metamorphosis and Revision: A Sketch of Constitution Writing in Montana," *Montana: The Magazine of Western History*, 20, no. 4 (1970): 2 – 17. Margery Brown, an historian and journalist, was a member of the Montana Constitution Revision Commission and an active supporter of the pro-constitutional convention campaign at the time she wrote this article. As a lauded professional whose emphasis was on local government and the press as well as Montana constitutional history, there is no reason to doubt the validity of her analysis. However, it must be noted that her active role in the constitutional revision discussions may have contributed to her contemporary analysis of the existing constitution. Malone, Roeder, and Lang, *Montana*, 194 – 195; Brown, "Metamorphosis and Revision," 2 – 17.

The partisan convention delegates, thirty-nine Democrats and thirty-six Republicans, produced a document in which "ninety percent of the wording of the earlier constitution [the unsuccessful 1884 constitution] was readopted." This document closely reflected the interests of the delegates. Mining interests received favorable taxation provisions, limiting the revenue-raising potential of the nascent state; and rural counties succeeded in winning a "little federal system" apportionment scheme, ensuring "over-representation of rural counties" in the state legislature. Controversial issues, such as suffrage for women, were rejected, purportedly because they could jeopardize the primary goal of statehood. Reflecting the attitude of scholars and reformers during the 1950s through 1970s, the 1889 Constitution was critiqued by Montana historian and constitutional revision advocate Margery Brown as very much a "product of its era—a prescriptive code of laws for the problems of the day."[27]

Almost immediately following its adoption, Montanans began to attempt to amend the 1889 constitution. According to Alexander Blewett, chairman of the Montana Constitutional Convention Commission, which was charged with compiling information for and providing assistance to the 1972 delegates, the frequency of and increase in amendments "led directly to the legislature's decision to place the question of calling a convention before the people." Between 1889 and 1969 over 500 amendments were proposed in the legislature, sixty-one placed in front of the voters, and thirty-seven successfully adopted. During the 1960s, there was a significant increase each legislative session in the number of proposed constitutional amendments. Encompassing roughly

[27] Brown, "Metamorphosis and Revision," 17; Harry Fritz, "The Origins of Twenty-First-Century Montana," *Montana: The Magazine of Western History* 42, no. 1 (1992): 77 – 81. Malone, Roeder, and Lang, *Montana*, 197; Brown, "Metamorphosis and Revision," 4, 17.

28,000 words, the 1889 Montana constitution was about four times longer than the U.S. Constitution. Critics in the 1950s and 1960s seized on this fact and, echoing the charges of legal scholars and reformers across the country, criticized the document as too long and too detailed and thus requiring frequent amendment. By 1967 there was a growing consensus that "major areas of the Montana Constitution need[ed] examination and modernization." Under the existing system this could only occur in a "piecemeal" manner. [28]

Despite growing concerns about the efficacy of state constitutions during the 1960s, state legislatures often stood in the way of reform due to investment in the existing power structures and representation schemes. Scholars universally point to the pivotal U.S. Supreme Court decision in *Baker v. Carr* (1962) as pushing open the gate to state constitutional revision in the 1960s and 1970s. Historically, elections and the drawing of legislative and other local election districts had been the responsibility of the states. Many states, particularly in the South, apportioned districts in ways that discriminated against, or even disenfranchised, ethnic or political groups. However, in the mid-twentieth century the U.S. Supreme Court began to face the question of whether the Constitution

[28] Alexander Blewett, *Constitutional Amendments Introduced in the Legislative Assembly, 1889 to 1969*, prepared by the Montana Constitutional Revision Commission in preparation for the Montana Constitutional Convention (Helena, MT, 1968) preface, available online at www.mtmemory.org/cdm4/document.php?CISOROOT=/p15018coll20&CISOPTR=1036 (Accessed December 4, 2009); Ibid, 4; Ibid, preface; Gerald J. Neely, "Constitution: Too Long?" *Con-Con Newsletter*, no 1 (1971): 1, available online at www.mtmemory.org/cdm4/document.php?CISOROOT=/p15018coll20&CISOPTR=16056, (Accessed on December 9, 2009). The Montana State Library date stamp for the *Con-Con Newsletter* (Con-Con was popular shorthand terminology for Constitutional-Convention and was used extensively by the press, delegates, and public) is 1974. However, the *Newsletters* themselves are dated 1971 or 1972 and, according to the Campbell Collection of the William J. Jameson Law Library at The University of Montana, were produced while Gerald Neely was working as a reporter prior to and during the Constitutional Convention of 1972. Brown, "Metamorphosis and Revision," 4; Blewett, *Constitutional Amendments*; Larry M. Elison and Fritz Snyder, *The Montana State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 2001), 6 – 8; Malone, Roeder, and Lang, *Montana*, 394 – 395; and Harry Fritz, "Origins," 77 – 79.

required proportional representation in state and federal offices. The Court was first asked whether Congressional districts had to include a roughly equal number of people in *Colegrove v. Green* (1946). The Court rejected the argument that the Equal Protection Clause of the Fourteenth Amendment required congressional districts to include approximately the same number of people. They ruled that issues of congressional apportionment were political in nature, best left to the legislatures and therefore outside of the realm of judicial oversight.[29]

In the early 1960s, however, the Court revisited this decision and issued a number of opinions on legislative apportionment. In *Baker v. Carr* (1962), the Court abandoned its opinion that reapportionment was a political question beyond the reach of the judicial branch. Once the Court had determined that apportionment was a judicially appropriate topic, a number of cases regarding apportionment came before the Court. Throughout these cases the Court articulated the concept of equal political power, or "one person, one vote." In *Reynolds v. Sims* (1964) the concept was clearly declared a constitutional principle; the Court ruled that an apportionment scheme that awarded one state senator per county—instead of apportioning representation in both chambers of the state legislature based on population—was a violation of the Equal Protection clause of the Fourteenth Amendment. The Court said that it violated the concepts of fairness required in a representative system to dilute the political power of individuals based on where they live. "Little federal" and county unit systems across the country faced extinction based on

[29]The Equal Protection clause is the shorthand reference for the following language in the Fourteenth Amendment: "Nor shall any State…deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution, Fourteenth Amendment, Section 1; Colegrove v. Green, 328 U.S. 549 (1946); Dinan, *American State Constitutional Tradition*, Chapter One.

the "one person, one vote" concept. As political scientist John Dinan has noted, "once the Court made it clear that malapportionment would no longer be tolerated, rural legislators were no longer able to prevent the calling of conventions." Reapportionment sparked significant political change in numerous state legislatures and broke down barriers to constitutional revision.[30]

As with many states, reapportionment was central to the steps leading up to Montana's constitutional convention. The 1889 constitution included an apportionment scheme very similar to the one the Court had struck down in *Reynolds v. Sims*. This scheme gave a drastically disproportionate amount of power to the rural counties; in fact, according to historian Harry Fritz, "senators representing just 16 percent of the people constituted a legislative majority." Even after the U.S. Supreme Court decisions regarding reapportionment, the powerful and entrenched set of rural legislators "refused to apportion themselves out of their jobs." As a result, a federal court took over reapportionment and created new districts for the 1966 legislative elections. [31]

The new districts resulted in a shift in legislative "representation from rural to urban counties" across Montana. According to Fritz, there was a "political revolution" in Montana that "began with federally-mandated legislative reapportionment." New, younger, more professional and more middle-class individuals were elected to the legislature. These legislators brought with them a focus on modernization, and in

[30]The cases leading up to *Reynolds v. Sims* were: *Grey v. Sanders* (1963), in which the Court held that Georgia's county unit system for statewide elections, which assigned a specific number of unit votes to each county to be awarded to the winner of the popular vote in that county, violated the Equal Protection clause of the Fourteenth Amendment and *Wesberry v. Sanders* (1964), in which the Court extended this reasoning to the county unit system being used for Congressional elections in Georgia. Baker v. Carr, 369 U.S. 186 (1962); Grey v. Sanders, 372 U.S. 368 (1963); Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Dinan, *American State Constitutional Tradition*, p. 10.

[31] Harry Fritz, "Origins," 77.

journalist Charles Johnson's view, they were "reluctant to stay shackled to the old constitution."[32]

Reapportionment converged with several other events in Montana that brought about a particular and new political culture. The Anaconda Company (often referred to as simply, "The Company"), a massive mining venture that was the largest corporation in Montana, had wielded vast political and economic power throughout the first half of the twentieth century. The Company was so synonymous with power that a common narrative developed in Montana of the "little guy" versus the Company. Many politicians and reformers set themselves up in this manner to gain the trust and support of the voters. Beginning in the mid-1950s, the Company began to loosen its grip on Montana politics; instead of legislators turning to Company staff for advice, the legislature formed the Legislative Council and hired its first staff in 1957. The long-standing interest in reforming government and removing the Company's influence ushered in a focus on updating, reforming, and professionalizing the legislature and government in Montana.[33]

Moreover, the Company's economic influence began to dwindle just as its role in politics had begun to wane. In the late 1950s, the long-serving head of the Company

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[32] Elison and Snyder, *The Montana State Constitution*, 8; Harry Fritz, "Origins," 77; Charles "Chuck" Johnson, interview in Gus Chambers and Paul Zalis, "For This and Future Generations: Montana's 1972 Constitutional Convention," (Montana PBS: KUFM-TV, University of Montana, 2002), DVD, 60 minutes.

[33] The extent of the Anaconda Company's grip on Montana politics is a topic of debate. The majority of the historiography, especially from the 1960s and 1970s, attributes significant power to the Company. Others, such as David Emmons have challenged that narrative and suggested that, while powerful, the Company was vulnerable to defeat in some arenas. David M. Emmons, "The Price of 'Freedom': Montana in the Late and Post-Anaconda Era," *Montana: The Magazine of Western History* 44, no. 4 (Autumn, 1994): 66 – 73; Malone, Roeder, and Lang, *Montana*; Ellenore M. Bridenstine, "My Years as Montana's First Woman State Senator," *Montana: The Magazine of Western History* 39, no. 1 (Winter, 1989): 54 – 58; Burton K. Wheeler, *Yankee From the West: The Candid Story of the Freewheeling U.S. Senator from Montana* (New York: Doubleday, 1962); Jules A. Karlin, *Joseph M. Dixon of Montana* (Missoula: University of Montana Press, 1974).

retired and the organization moved towards a more modern structure. The business began to shift its focus from Montana copper to Chilean copper. Around the same time, the Company sold its chain of newspapers. The firm had controlled the papers in all major cities except Great Falls. The Lee Newspaper chain out of the Midwest bought all of the Company's papers and, at least to some extent, the editorial focus shifted; and the papers hired young professional journalists with an interest in investigative and national journalism. In some areas, especially Missoula, these new journalists zeroed in on the burgeoning environmental movement, which was building strong grass roots presence and organizing to pass environmental legislation in 1967 in Montana. [34]

The end of the 1960s and the dawn of the 1970s saw a further reduction in the Company's economic and political investment in Montana. During 1969 and 1971, "the Marxist Allende government of Chile nationalized the great Anaconda mines there and drove that old, established corporation to the brink of bankruptcy." This sapped the Company's resources and drove its focus away from Montana, just as the state was preparing to craft a new constitution. At the same time, there was an active student movement protesting the Vietnam War, which succeeded in shutting down the dorms at Montana State University and hosting a well-attended student strike at the University of Montana in 1970. All of these forces—reapportionment, the declining power of the Company, a new focus on professionalism and modern government, a fresh and active

[34] Malone, Roeder, and Lang, *Montana*, 323 – 328, 366 – 378, 378 – 397; Michael P. Malone, "The Close of the Copper Century," *Montana: The Magazine of Western History* 35, no. 2 (Spring, 1985): 69 – 72; Emmons, "The Price of 'Freedom': Montana in the Late and Post-Anaconda Era"; Kenneth E. Melichar, "The Making of the 1967 Montana Clean Air Act: A Struggle over the Ownership of Definitions of Air Pollution," *Sociological Perspectives* 30, no. 1 (January, 1987): 49 – 70; Dennis Swibold, "Anaconda Sheds Its Press: The Story behind the Company's Decision to Sell Its Newspapers," *Montana: The Magazine of Western History* 56, no. 2 (Summer, 2006): 2 – 15.

news media, and an active liberal grassroots community—converged and created a sense of optimism, possibility, and dedication to reform and the future. It also resulted in a transition in political power away from older, rural, corporate-focused leaders and toward younger, more middle-class, reform-focused individuals.[35]

This shift in political power was a necessary step for the legislature to take action toward a constitutional convention. They did so by passing House Resolution No. 17 and Senate Resolution No. 22, identical documents, during the 1967 legislative session, which directed the Legislative Council to study and "determine whether or not the present constitution of Montana is adequately serving the needs of the people of the state." The Legislative Council study compared the Montana constitution, section by section, with similar sections in the constitutions recently enacted by Alaska, Hawaii, Michigan, New Jersey, Puerto Rico, and in the Model State Constitution of the National Municipal League. According to legal scholars Larry Elison and Fritz Snyder, these particular documents were chosen for comparison "because of either their recent adoption or their evaluation as excellent state constitutions." The result was an unfavorable report on the adequacy of the constitution. In stark words, the Legislative Council reported:

> This study has led to the general conclusion that there is need for substantial revision and improvement in the Montana constitution. Provisions which invite subterfuge, provisions which are archaic, provisions which are ambiguous, provisions which are statutory, and provisions which place serious limitations on effective state government were found throughout the

[35] Malone, "The Close of the Copper Century"; Malone, Roeder, and Lang, *Montana*, 393 – 397; Michael P. Malone and Dianne G. Dougherty, "Montana's Political Culture: A Century of Evolution," *Montana: The Magazine of Western History* 31, no. 1 (Winter, 1981): 44 – 58; Harry W. Fritz, "Republican Demise, Democratic Ascendancy? Montana Politics, 1968 – 1988," *Rendezvous* 24, no. 1 (1988): 25 – 33.

> Montana constitution. The changes needed in the Montana constitution cannot be accomplished adequately through the present amendment process. [36]

In particular, the Legislative Council urged a restructuring of "state government to meet modern needs." The Legislative Council asserted that Montana needed a constitution with a focus on basic guiding principles instead of topics that were better addressed in statutory law. In response to this report the 1969 legislature placed referendum 67 before the voters in 1970 and established the Montana Constitution Revision Commission. Referendum 67 asked the voters whether a constitutional convention should be called. Voters answered with a resounding yes; 133,482 voiced their support and only 71,643 objected. [37]

The resulting constitution, including its far-reaching Declaration of Rights, laid the groundwork for the later embrace of state constitutionalism by the Montana Supreme Court. This followed a regional trend: scholars agree that both attorneys and courts in western states have been more likely to embrace the concept of state constitutionalism. As Ronald K. L. Collins, Peter J. Galie, and John Kincaid reported from their survey and analysis of state constitutional-grounds decisions in the first half of the 1980s, unlike other regions, in cases before state courts in the West "state constitutional issues are raised with greater frequency than, or the same frequency as, federal constitutional issues

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[36] Montana House Resolution No. 17 and Senate Resolution No. 22, included in Montana Legislative Council, *The Montana constitution, 1889-1970; resource or burden?*, available online at http://www.mtmemory.org/cdm4/document.php?CISOROOT=/p15018coll20&CISOPTR=1817, (Accessed on December 9, 2009); Elison and Snyder, *The Montana State Constitution*, 8; Montana Legislative Council, *Resource or Burden*, preface.

[37] Montana Legislative Council, *Resource or Burden*, 89; Brown, "Metamorphosis and Revision," 4; Montana Secretary of State, "Initiative and Referendum Issues Since Adoption of Constitutional Amendment, Article V, Section I, Permitting the Referendum and Initiative," 2008, available online at http://sos.mt.gov/elections/forms/history/initandref2008tbl.pdf. (Accessed on December 9, 2009).

in individual rights cases."[38] Montana, in particular, is recognized as one of the most active states in using independent state constitutional grounds. The Collins, Galie, and Kincaid survey found that the Montana Supreme Court was among the 9% of U.S. state courts where "state claims are raised more frequently than federal claims." Jeffrey S. Walz and Staci L. Beavers found in 1998 that during the 1970s and 1980s Montana was among the top four states where state supreme court decisions on criminal procedure issues had been based on state rather than federal constitutional grounds [39]

The active use of state constitutionalism in Montana is directly attributable to the unique provisions of the 1972 Constitution. As former Montana Supreme Court Justice, Frank B. Morrison, commented in the 1980s in the Collins, Galie, and Kincaid survey:

> During the years I have been a Montana Supreme Court Justice, I have become more interested in developing the area of law known as "independent state grounds." The new Montana Constitution adopted in 1972 is a rather unique document and provides a basis for considerable departure from federal precedent. This has been particularly true in the civil area where we have developed a new

[38] Scholars have not explored the reasons for this heightened utilization of state constitutionalism in the West. Further research should be done on the topic. However, a strong reliance on local or state power and a desire to minimize the power of the federal government comports with the narrative of many historians of the West. There are, however, historians who argue that the perception of Westerners resisting federal power is a myth. For a sampling of historians' perspectives on Westerner-federal government relations see, Richard White, *"It's Your Misfortune and None of My Own": A New History of the American West* (Norman: University of Oklahoma Press, 1991); Karen R Merrill, "In Search of the 'Federal Presence' in the American West," *The Western Historical Quarterly* 30, no. 4 (1999): 449 – 473; Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York: W.W. Norton & Company, 1987); and Richard Etulain, *Beyond the Missouri: The Story of the American West* (Albuquerque: University of New Mexico Press, 2006).

[39] Jeffrey S. Walz, and Staci L. Beavers, "Modeling Judicial Federalism: Predictors of State Court Protections of Defendants' Rights under State Constitutions, 1969 - 1989" *Publius* 28, no. 2 (1998): 43 – 59; May, "Constitutional Amendment and Revision Revisited"; Coltanuono, "The Revision of American State Constitutions"; Howard, Graves, and Flowers, "State Courts, the U.S. Supreme Court, and the Protection of Civil Liberties,"; Ronald K. L., Collins, Peter J. Galie, and John Kincaid, "State High Courts, State Constitutions, and Individual Rights Litigation since 1980: A Judicial Survey," in "The State of American Federalism, 1985," special issue, *Publius* 16, no. 3, (1986): 141 – 160, 147. For Montana's tendency to utilize state constitutional grounds see May, "Constitutional Amendment and Revision Revisited"; Collins, Galie, and Kincaid, "State High Courts, State Constitutions, and Individual Rights Litigation since 1980"; Howard, Graves, and Flowers, "State Courts, the U.S. Supreme Court, and the Protection of Civil Liberties,"; and Walz and Beavers, "Modeling Judicial Federalism."

> equal protection law relying upon the implication of fundamental rights declared in our State Constitution and requiring a showing of a compelling state interest to justify legislative discrimination.[40]

This modern, influential constitution was not produced by legal scholars or judges; it was written by citizen-delegates with public input. The delegates to the 1972 Montana Constitutional Convention represented a cross-section of the population. It was indeed a grassroots convention; this was in large part due to the decision of the Montana Supreme Court in *The Forty-Second Legislative Assembly of the State of Montana v. Joseph L. Lennon* (1971), which held that all state and local elected officials were ineligible to serve as delegates to the upcoming state constitutional convention. The court based its decision on a somewhat obscure provision in the 1889 constitution that prohibited public officials from holding more than one office. As a result of this decision the races for convention delegates were heavily contested: 532 people ran for the 100 delegate positions. Individuals who had never served in office, who had lost previous campaigns for the legislature, or who had little political experience won election as constitutional convention delegates.

Delegates were elected in November 1971 at the same election at which they were faced with a Republican-led referendum to institute a sales tax. Voters soundly rejected the sales tax proposal, two to one. It is highly likely that the Republican party advocacy for the sales tax referendum affected the outcome of the delegate elections, with anti-sales tax voters declining to vote for candidates who supported the sales tax proposal.

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40 Collins, Galie, and Kincaid, "State High Courts, State Constitutions, and Individual Rights Litigation since 1980," 145.

According to Charles Johnson, many of those elected were such political neophytes that they had never before been inside the capitol building where the convention was held. He argued that "people who could never have been elected to the legislature were elected to the constitutional convention." Among those who were unlikely to be elected to the legislature but were chosen for the convention were women. The 1971 legislature, for instance, included only one female member—Representative Dorothy Bradley of Bozeman—while nineteen women were elected to the convention. Many of these women were members of the League of Women Voters. As Bob Campbell, delegate from Missoula, noted, "The League of Women Voters found that they were not only well versed on why a new constitution was needed, but their role went from lobbyists to candidates." The presence of so many women activists, he contended, had a strong impact on the content of the constitution.[41]

Once convened, the unlikely delegates spent less than three months crafting a new constitution. According to Elison and Snyder, the record shows that despite their lack of knowledge and political experience, the delegates were driven, confident, and "relied on their own experience coupled with 2,300 pages of carefully researched reports prepared by a group of dedicated researchers." The delegates attacked the work of the convention by dividing into ten committees, each with the responsibility for crafting a section of the

[41] The Forty-Second Legislative Assembly of the State of Montana v. Joseph L. Lennon, 156 Mont. 416, 481 P.2d 330 (1971); Charles Hillinger, "Montanans Drafting New Constitution," *Los Angeles Times*, Part I, January 21, 1972, p. 28, Brown Collection, University of Montana William J. Jameson Law Library, accessed online at http://www.umt.edu/law/library/Research%20Tools/State%20Pages/MontanaConstitution/default.htm (hereafter cited as Brown Collection); Elison and Snyder, *The Montana State Constitution*, 10 – 12; Chuck Johnson, interview in Chambers and Zalis "For This and Future Generations"; Bob Campbell, excerpt from unpublished manuscript sent via email February 19, 2010, in author's possession. (Hereafter cited as, Campbell, *Manuscript*).

constitution. Four other committees monitored the procedural, stylistic, and administrative concerns of the convention.[42]

While the delegates were elected on a partisan basis there was, and is, overwhelming consensus that the delegates generally engaged with each other in a nonpartisan manner. As Elison and Snyder noted, "Democrats, Republicans, and Independents lined up against other Democrats, Republicans, and Independents on many issues." The convention broke with the legislature's tradition of seating arranged by party; instead, they were seated alphabetically. Betty Babcock, delegate and wife of the former Governor Tim Babcock, proudly claimed that the delegates "came together for good government" regardless of party. Leo Graybill, who was elected chair of the convention, told the Associated Press that he saw "no evidence of partisan politics." Instead, Graybill commented, the convention seemed to divide along liberal, moderate, and conservative ideological lines. The *Billings Gazette* attributed the phenomenon to "a truly bipartisan slate of leaders and committee chairmen, and most important, fundamental issues on which neither party has a traditional position." The ideological divide that Graybill witnessed was often categorized by the press more simplistically: sometimes it described the differences as a liberal-conservative split and sometimes as an ideological split. It never however, defined differences as a partisan divide. According to the *Gazette*, the ideological division in the convention could be best illustrated by the two sides, each of which contained members of all parties, of a debate between those who wanted "broad sweeping changes in the constitution versus those who would like it changed only slightly." These ideological divisions often reflected rural-urban and

[42] Elison and Snyder, *The Montana State Constitution*, 10 – 11.

eastern Montana-western Montana divisions as well, with the urban and western delegates generally more in favor of broad change.[43]

This analysis comports with Montana's political history. Partisan loyalty had never been a powerful factor in Montana politics. The Company had long had caucuses within each major party. Effective coalitions, such as the Progressive reformers of the early twentieth century, often organized across party lines with an emphasis on particular issues. In addition, it was common for politicians to enter politics easily and view themselves as reformers fighting centralized power, in the form of corporations or the government, on behalf of the people. The non-partisan emphasis of the convention on individual rights and issues such as open government is perfectly tied into the traditional narrative of politicians in Montana.[44]

These reform minded delegates consciously, and with the input of the public, drafted a constitution that was intended to provide strong protections for individual rights. As the following chapter will show, state constitutionalism was integral to the efforts and arguments of constitutional revision advocates from the 1950s to the 1970s and the Montana delegates were well-informed about and connected to the constitutional revision activity that was occurring across the country. In addition, the public was

[43] Dennis E. Curran, "Con-Con is Still Leary of Legislators," *Billings Gazette*, no date, Brown Collection, 93; John Kuglin, "Con Con and Legislature: Much Alike, Much Different," *Great Falls Tribune*, no date but likely mid-February, Brown Collection, 96; Hillinger, "New Constitution."; Elison and Snyder, *The Montana State Constitution*, 10 – 11; "Con-Con Misses Its Public," Associated Press, no newspaper identified, no date, Brown Collection, 56; Dennis E. Curran, "The Unbelievable Happened," *Billings Gazette*, February 17, 1972, Brown Collection, 84.

[44] Wheeler, *Yankee in the West*; Karlin, *Dixon*; K. Ross Toole, *An Uncommon Land* (Norman: University of Oklahoma Press, 1959); K. Ross Toole, *Twentieth Century Montana: A State of Extremes* (Norman: University of Oklahoma Press, 1972). K. Ross Toole was a well-known historian in Montana and was most active during the 1950s-1970s. He has been credited with intensifying the narrative of the people v. centralized power, often the Company. He was a professor at the University of Montana and likely taught many of the constitutional delegates, suggesting that they were very familiar with the concept of Montana history as being a fight of the people against those who wanted to exploit them.

familiar with the concept of state constitutionalism and encouraged the delegates to establish state protections for individual rights that were independent of those guaranteed by the federal Constitution.

Chapter 3: State Constitutional Revision and State Constitutionalism

While many scholars point to the genesis of the concept of state constitutionalism in judicial decisions or law review articles in the mid-1970s, the idea was actually an integral aspect of mid-century constitutional revision and was part of the many discussions regarding the scope and purpose of state constitutions that took place in the 1950s, 1960s, and early 1970s.[1] During this era, legal scholars, political scientists, legislators, and other political players crafted numerous documents on constitutional revision and the purpose and ideal components of state constitutions. This literature addressed concerns about the state of federalism and the changing balance of power between the state and federal governments. Additionally, it discussed ways for states to boost their power in relation to the federal government. Expanding constitutional protections for individual rights beyond the federal protections is one way scholars argued that states could limit federal involvement in areas traditionally under state authority.

People representing three groups produced the mid-century material on constitutional revision: civic organizations, state constitutional revision commissions, and scholars based in universities or law schools. These organizations and scholars identified a number of problems with existing state constitutions: the foundational documents limited the effectiveness of state and local governments and their ability to address issues related to changing technology, population growth, and societal changes; they contained outdated and irrelevant provisions; and they were lengthy and too detailed. The vast

[1] See Chapter One, note 8.

majority of those who asserted that state constitutions were inadequate and needed to be revised had a core concern: weak and inefficient state governments and constitutions had contributed to the shift in the balance of power from the states to the federal government. Those who held this view believed that the federal system was endangered because the states had become too weak in relation to the federal government. As an analysis of the literature on this topic will show, this viewpoint was not limited to conservatives or states' rights advocates, but shared by those in moderate and left-leaning organizations.[2]

The Council of State Governments (CSG) and the National Municipal League (NML) were two of the leading civic organizations that were particularly active during this era.[3] They produced extensive contemporary documentation on state constitutional

[2] John Marshall Butler, *Commission on Intergovernmental Relations: A Report to the President for Transmittal to the Congress* (Washington D. C.: Government Printing Office, 1955); David Fellman, "What Should State Constitutions Contain?," Chapter 8 in *Major Problems in State Constitutional Revision*, edited by W. Brooke Graves (Chicago: Public Administration Service, 1960), reprinted in Montana Constitutional Convention Studies, *A Collection of Readings on State Constitutions, Their Nature, and Purpose*, report no. 4 prepared by the Montana Constitutional Convention Commission for the delegates to the Montana Constitutional Convention, (Helena, Montana, 1971) (hereafter cited as, *Report No. 4*);Albert L. Sturm, "Effective State Governments Need Modern Constitutions," *National Civic Review* 60 (1971): 65 – 72; Robert B. Dishman, "The State Constitution as Fundamental Law," Chapter 2 in *State Constitutions: The Shape of the Document*, (New York: National Municipal League, 1968), reprinted in *Report No. 4*; Paul G. Kauper, "The State Constitution: Its Nature and Purpose" (Detroit: Citizens Research Council of Michigan, 1961), reprinted in Montana Constitutional Convention Studies, *Report No. 2: A Collection of Readings on Recent Constitutional Revision Activities in the Fifty States*, prepared by the Montana Constitutional Convention Commission for the delegates to the Montana Constitutional Convention, (Helena, Montana, 1971) (Hereafter cited as "*Report No. 2*"); Albert L. Sturm, "Nature of State Constitutions," Chapter 1 in *Major Constitutional Issues in West Virginia*, (Morgantown: Bureau of Government Research, West Virginia University, 1961): 1 – 5, 7 – 11; Roger H. Thompson, "The Theory of State Constitutions," *Utah Law Review*, no. 3 (1966): 542 – 562; John P. Wheeler, Jr, "The Ideal State Constitution," excerpted from *Salient Issues of Constitutional Revision* (New York: National Municipal League, 1961): xi – xvii; John E. Bebout, "The Central Issues: Constitutional Reform—What For?" Chapter 11 in *Salient Issues of Constitutional Revision*; James Nathan Miller, "Dead Hand of the Past," *National Civic Review* 57, no. 2 (1968): 183 – 188; all reprinted in *Report No. 4.*

[3] The Council of State Governments is a non-partisan, moderate to right-leaning organization that was founded during the Great Depression and since that time has served as a public policy resource to leaders within all three branches of state government. For more on the history of the Council of State Governments, see http://www.csg.org/about/default.aspx (accessed May 18, 2011); The National Municipal League is a non-partisan yet left-leaning, reform-minded organization that was founded in the late 1800s and served as a lobbying and policy-research entity for state and local governments. For more on the

revision trends. CSG, for instance, regularly published biennial reports on state constitutional revision activities. Some of these reports asserted that societal changes, such as the civil rights movement or advances in technology, and Warren court decisions presented states with new challenges and expectations that could not be met under existing state constitutions. CSG argued that it was necessary to revise state constitutions in order for states to have the legal authority to address these challenges because the existing constitutions sharply limited state government in various ways such as making it difficult to levy taxes, sharply limiting the length and scope of legislative sessions, or limiting the strength of executive officers. The organization expressed significant concern about the expansive decisions of the Warren Court and the growing tendency of the federal government to intervene in areas historically under state authority, such as apportionment of legislative districts. The Council of State Governments advocated for modernizing and enhancing state constitutions in order to prevent the U.S. Supreme Court from ruling that state laws or systems fell short of the protections required by the U.S. Constitution. Doing so, they argued, would allow states to "remain viable partners in the federal system."[4]

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history of the National Municipal League, see Clinton Rogers Woodruff, "The National Municipal League," *Proceedings of the American Political Science Association* 5 (1908): 131 – 148; and Frank Mann Stewart, "A Half Century of Municipal Reform," *The Western Political Quarterly* 4, no. 2 (June, 1951): 374 – 375. For more on twentieth century state and local government reorganization and the players involved, see Richard Chackerian, "Reorganization of State Governments: 1900-1985," *Journal of Public Administration Research and Theory: J-PART* 6, no. 1 (January, 1996): 25 – 47.

[4] The Council of State Governments also floated other proposals to limit the scope of the U.S. Supreme Court's power and enhance the power of the states. For example, they proposed that a panel of state supreme court judges should be allowed to overrule decisions of the U.S. Supreme Court. Council of State Governments, *Constitutional Revision Activities 1969 – 1970* (Lexington, Kentucky: privately printed, 1971), 4; Council of State Governments, *Constitutional Revision Activities 1968 – 1969*, (Lexington, Kentucky: privately printed, 1970), reprinted in *Report No. 2*, Chapters One and Two; Rick Applegate, *Bill of Rights,* report no. 10 prepared by the Montana Constitutional Convention Commission

In the middle of the twentieth century the National Municipal League (NML) engaged numerous scholars to examine the efficacy of existing state constitutions and make suggestions for reform. The NML had significant influence on discussions regarding constitutional revision and the content of revised state constitutions.[5] On behalf of the NML, Albert Sturm pointed to the Supreme Court's reapportionment decisions, population growth and urbanization, and the civil rights movement as emerging challenges to state authority which states were unable to adequately address because of the nature of their constitutions. State constitutions impaired states' ability to respond to these challenges, according to Sturm, because they were too detailed, limited the powers of the legislature and executive branches too severely, and simply lacked provisions regarding modern concerns such as technological advances. In another NML document, Robert Dishman directly linked the states' inability to address modern challenges with restrictive existing constitutions. As a result, he asserted, the federal government had to insert itself into problems that should be handled on a state level. This assertion was backed up by the Kestnbaum Commission's 1955 report, which partially blamed weak state governments and their inadequate constitutions for expanded federal authority.[6]

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for the delegates to the Montana Constitutional Convention, (Helena, Montana, 1971): 55 (hereafter cited as Applegate, *Bill of Rights*).

[5] Like many of the mid-century advocates for constitutional revision, the National Municipal League (NML) advocated for concise, streamlined documents. Additionally, NML was particularly interested in "good government" proposals focused on transparency, accountability, and citizen engagement (such as open records requirements). For a critique of the widely-accepted NML approach to constitutional revision, see Frank P. Grad, "The State Constitution: Its Function and Form for Our Time," *Virginia Law Review* 54 (June, 1968): 928 – 973. Frank Grad not only criticized the approach of the NML, he also disagreed with the assertion, which underlies most constitutional-revision advocates' arguments, that the state-federal government balance of power had shifted in favor of the federal government.

[6] Sturm, "Effective State Governments Need Modern Constitutions;"; Dishman, "State Constitution as Fundamental Law"; Butler, *Commission on Intergovernmental Relations Report*.

To address these challenges, the NML produced a Model State Constitution, which encouraged brevity and increased state legislative powers. The model constitution also included protections for individual rights that went beyond those found in the federal constitution. John P. Wheeler of the NML clarified that advocates of NML-style constitutional revision did not embrace stronger state constitutions and state governments to further a "states' rights" agenda. Instead, Wheeler asserted, strong and relevant state governments made for a stronger federal system, which would allow for greater citizen participation, offer the opportunity for more relevant and tailored government programs, and make it less likely that the centralized federal government would over-reach its sphere of authority.[7]

Scholars writing for government advisory commissions concurred with the assertions of the NML and the CSG. On behalf of the federal Public Administration Service, political scientist David Fellman pointed out that federal Supreme Court decisions or recent federal statutes had invalidated numerous state constitutional provisions or made them anachronistic. For example, the Kentucky constitution limited suffrage to male citizens, a provision that had been invalidated by the Nineteenth Amendment to the U.S. Constitution in 1920. In his report to the Michigan constitutional

[7] National Municipal League, *Model State Constitution* (New York: privately published, 1963 and 1968), see in particular Article I, Section 1.03, Search and Seizure which limits electronic monitoring and wiretapping; Article I, Section 1.06, Subsection (a), Trial and Right to Counsel; and Article I, Section 1.02, Equal Protection. Wheeler, "The Ideal State Constitution." According to Morton Horwitz, "states rights" advocates grew out of a backlash to growing federal authority and many of the Court's incorporation decisions, in particular many states rights advocates in the south became activists as a result of the school de-segregation cases such as *Brown v. Board of Education*. States' rights advocates seized on the issue of federalism to further their agenda and sought to bolster state authority and limit the ability of the federal government to intervene in states in order to resist challenges to existing racial power structures. Morton J. Horwitz, *The Warren Court and the Pursuit of Justice* (New York: Hill and Wang, 1998), Chapters 2 and 3. For a legal analysis of the civil rights cases which many argue led to this backlash as well as an analysis of the legal arguments of states' rights advocates, see W. Joseph Wagner, "The History and Role of a Supreme Court in a Federal System," *Montana Law Review* 20 (1958 – 1959): 189 – 190.

convention, law professor Paul G. Kauper lamented the increasing powers of the federal government, such as greater federal regulation of the economy as a result of the U. S. Supreme Court's expansive interpretation of the Commerce Clause of the U.S. Constitution, and the consequent increased federal intervention into state affairs. In particular, he pointed to the ways that the application of the Bill of Rights to the states, otherwise known as incorporation, had limited state authority. For example, decisions prohibiting school segregation had led to federal oversight of local school districts. He attributed much of this increased intervention and the judicial review of state practices and laws to the failure of states to function effectively or adequately protect the civil rights of their citizens.[8]

In his independent scholarship, legal scholar Roger H. Thompson asserted that since the late 1940s the federal government had exerted growing power over the states, particularly in economic affairs and with the rise of federal aid to the states—which came with specific guidelines and oversight—for housing, healthcare, and education programs. Indeed, he argued now "there is almost no area of traditional state activity from which Congress is excluded." He forcefully advocated for preserving the federal system, while—much like Wheeler of the NML—dismissing the calls of states' rights advocates to allow states to reject federal laws.[9]

Across the board, these scholars and advocates of constitutional revision argued that adopting new state constitutions or reforming old ones would give states the ability to maintain their relevance and preserve the federal system. For example, the New York

[8] Fellman, "What Should a State Constitution Contain?"; Kauper, "The State Constitution: Its Nature and Purpose."

[9] Thompson, "The Theory of State Constitutions," reprinted in *Report No. 4,* 242.

Committee for Economic Development pointed to the need to revitalize the federal system as a key reason for New York to revise its constitution. Because much of the federal government's intervention in areas of state authority was a result of states' failure to protect individual rights, advocates argued that strengthening states' bills of rights was one way to boost state authority and limit federal intervention.[10]

Groups and individuals writing about constitutional revision universally identified the bill of rights as one of the fundamental components of a state constitution. As early as 1955, the Alaska Statehood Committee addressed the importance of states' bills of rights and the possibility of including rights that were not protected at the federal level. The suggestion that states update their bills of rights and include new "modern" rights ran throughout the mid-century literature on constitutional revision. [11]

Writing in 1960, Fellman encouraged states to revise their bills of rights to reflect modern society and new understandings of fundamental rights, such as protection against discrimination, rights of women, due process rights in administrative proceedings, and prohibition against electronic monitoring. In 1961, Kauper strongly advocated for states to maintain or adopt stronger protections in their bills of rights than those that existed at the federal level, especially in the areas of equal protection and anti-discrimination. Doing so, he asserted, not only allowed for states to identify and protect newly accepted or identified rights, but would also result in "maximum state responsibility and autonomy

[10] Committee for Economic Development, "Introduction and Summary of Recommendations," and "Constitutional Revision," Part of Chapters 1 and 6 in *Modernizing State Government*, (New York: Committee for Economic Development, 1967): 9 – 22, 67 – 70, reprinted in *Report No. 4*, 285 – 303.

[11] Alaska Statehood Committee, "The State Constitution with the American Political System," Chapter 1, in *Constitutional Studies* (Alaska, November 8, 1955)1: 1 – 49, Prepared for the Alaska Constitutional Convention, reprinted in *Report No. 4*, 189 – 190.

in this area and a corresponding minimum of federal intervention." As Thompson noted in 1966, states had the legal authority to go beyond the protections contained in the federal Bill of Rights. Indeed, he suggested, it would make sense to do so because not all the federal protections had been applied to the states, because states could develop novel approaches to protecting individuals from new challenges to their rights, and because it would strengthen the relationship between individuals and their state government. In 1967, the New York Committee for Economic Development identified "private and civil rights" beyond those protected at the federal level as "crucial elements" to be examined and included in a new state constitution. Even at the end of the Warren Court era in 1968, Albert Sturm considered the federal protections to be "minimal" and "insufficient" and urged states to revise their constitutions to include rights that had recently been identified, such as broad anti-discrimination clauses. [12]

Because these discussions took place from the mid-1950s through the late 1960s, it is clear that they were not a result of anticipation that the Burger Court would be more conservative than the Warren Court. Instead, they explicitly linked the idea of providing stronger state protections for individual rights to strengthening the federal system. This interest in increasing state authority and diminishing the potential for federal intervention in the states comports with the discussions and political culture in Montana in 1972, and is apparent in the constitution adopted by the state that same year.

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[12] Fellman, "What Should a State Constitution Contain?," reprinted in *Report No. 4*, 60; Kauper, "The State Constitution: Its Nature and Purpose," reprinted in *Report No. 4*, 145 – 147; Thompson, "The Theory of State Constitutions," reprinted in *Report No. 4*, 244 – 246; New York Committee on Economic Development, *Modernizing State Government*, reprinted in *Report No. 4*, 300; Sturm, "What Should a Model Constitution Contain?," reprinted in *Report No. 4*, 226 – 227.

The delegates to Montana's constitutional convention were fully aware of the various positions and materials on constitutional revision produced by scholars and civic organizations. The Montana Constitutional Convention Commission ordered a series of research reports for the delegates. These reports included historical background on the Montana and U.S. Constitutions, documents analyzing recent constitutional revision activities in other states, comparisons of new or highly regarded state constitutions; topic- and section-specific analysis and suggestions; and the scholarship of attorneys, professors, researchers, civic organizations and governmental commissions on the role and content of state constitutions. Given their lack of political, and in most cases, legal experience, the delegates relied heavily on these reports and the research and assistance of the convention staff.[13] The delegates also received input from convention staff, the media, and the Montana public, which encouraged them to craft a constitution that protected individual rights at a uniquely high level.

All convention delegates received, and the members of the Bill of Rights Committee read and discussed, a 425-page report on the Bill of Rights, authored by Rick Applegate, the committee's research analyst. This document included histories of particular rights and their application at the federal and state levels and contemporary debates and discussions about emerging rights. Throughout the document, Applegate forcefully advocated for the committee to view the federal protections as minimums and

[13] Montana Constitutional Convention Studies, *Reports No. 1 – 16* and *Memorandums No. 1 – 10*, prepared by the Montana Constitutional Convention Commission for the delegates to the Montana Constitutional Convention, (Helena, Montana, 1971). All of the documents analyzed earlier in this chapter were included in *Report No. 4* and *Memorandum No. 3*.; Elison and Snyder, *The Montana State Constitution*, 10 – 11.

to draft a constitution that would result in "the vigorous enforcement and extension of safeguards of civil liberty."[14]

Applegate discussed the state of federalism in the United States and the reasons for a stronger state bill of rights, and he advanced suggestions for new rights that the convention could include in Montana's 1972 constitution. Like many scholars, Applegate attributed the federal government's ascendency in the role of civil liberties to the failure of states to rigorously protect individual rights and the U.S. Supreme Court's acceptance of the incorporation doctrine. He strenuously advocated for strong state bills of rights for three primary reasons. First, he argued, the federal protections were the bare minimum. If states went beyond those protections, they would be returning to their traditional role as the primary protector of civil liberties and would prevent further federal intervention into state affairs. Second, not all the federal protections had been extended to the states and, in a departure from the scholars of the 1960s and in language that anticipated Justice Brennan's analysis in his 1977 article, Applegate argued that the decisions of the Warren Court faced significant opposition and could be rolled-back by a more conservative Burger Court. Finally, he argued that modern society required more and different rights protections than those adopted in the eighteenth century and that the states had the unique

[14] Rick Applegate, *Bill of Rights*, 4. At the time of the constitutional convention Rick Applegate was a recent graduate of the University of Montana where he had been deeply involved in left-leaning student activism, including protesting the Vietnam War and advocating for student rights. See, George James, "Con-Con Comments By the Delegates From District 23," *Great Falls Tribune*, February 5, 1972, Brown Collection, 40; Frank Adams, "Or Maybe Its Not So Hot: Bill of Rights is Good, But it Could Have Been Better," *The Montana Standard*, March 13, 1972, Brown Collection, 173; James Grady, "Turn In Draft Cards: Students, Teachers Pledge Passive Draft Resistance," *Montana Kaimin* 71, no. 82, (April 23, 1969): 1, Record Group 22, Box 3, Folder 1, Constitutional Convention Collection, Montana Historical Soceity Archives and Library, Helena, MT (hereafter cited as RG 22, MHSL).

ability to be "little laboratories," experimenting with protecting emerging rights and setting the groundwork for protecting those rights at a national level.[15]

A large portion of Applegate's *Bill of Rights* was dedicated to discussing ways Montana's new constitution could protect individual rights at a higher level than the federal government in both emerging, yet accepted, realms as well as novel areas. Chapter X of Applegate's *Bill of Rights* was dedicated solely to new rights, such as equal protection, non-discrimination, extending constitutional individual rights protections to actions by private entities, and rights of minors. His final chapter, "Contemporary Concerns and The Bill of Rights," explored novel concepts such as preventing discrimination based on income, incorporating a right to life's basic necessities, and balancing rights to privacy with zero-population goals. Throughout the other sections of *Bill of Rights,* Applegate dedicated considerable space to more widely-accepted, emerging rights that were the topic of debate at the federal level such as the right to privacy, rights of prisoners, and environmental rights.[16]

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[15] On Rick Applegate's analysis of federalism and civil liberties issues, see Applegate, *Bill of Rights*, 3, all of Chapter 3, "Are States' Bills of Rights Necessary?," 47 – 63, and 129 – 130. For Applegate's discussion of the Warren Court- Burger Court transition see, Applegate, *Bill of Rights*, 53 – 54, and 55. This was a minor part of his argument but, since it differs from the scholars of the 1960s and sounds like those of the mid-1970s, it does suggest that a transition was beginning to take place in the arguments of those advocating for state constitutionalism. It also suggests that both an interest in federalism and fears about a loss of protections at the federal level could have contributed to Montana's acceptance of state constitutionalism. For his discussion on states as "little laboratories," see Applegate, *Bill of Rights*, 4, 11, 19, and 56. The term "little laboratories" was first used by Justice Brandeis in his dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), and refers to the concept of states as independent sovereign entities that could serve as laboratories for democratic reforms which could later be extended to the county as a whole.

[16]Applegate, *Bill of Rights*, Chapter X "New Provisions," 301 – 324, Chapter XI "Contemporary Concerns and the Bill of Rights," 325 – 356, Chapter VI "Procedural Rights and Issues," 129 – 213, Chapter VII "Privacy and Its Invasions," 215 – 248, and Chapter VIII "Environmental Protection," 249 – 285.

Applegate's *Bill of Rights* and the various writings on state constitutional revision that the delegates received identified changes to the federal system, resulting in greater federal intervention into areas traditionally under state control—particularly in the realm of civil liberties—as a serious problem. They also identified constitutional revision and the adoption of state bills of rights that went beyond the federal protections as the solution to this problem. Delegates were not only provided the written materials, but during the first week of the convention, study sessions were held during committee meetings with staff presenting and discussing these documents. Because these were the primary sources of scholarship and information on the topic for the delegates, it is clear that the delegates were familiar with the general debates on state constitutional revision, federalism, and the role of incorporation and states' bills of rights. They also received strong suggestions about why and how to go beyond federal protections in Montana's new bill of rights.[17]

The research and recommendations of convention staff and the work of scholars and civic organizations across the country would have been influential on their own. However, members of the public in Montana, both in the media and the voting public in general, shared these concerns about the status of federalism and the effects of the Supreme Court's incorporation decisions. These Montanans also urged the delegates to

[17] Elison and Snyder, *The Montana State Constitution*, 10 – 11; Minutes of the First Meeting of the Bill of Rights Committee, Montana Constitutional Convention, January 17, 1972, RG 22, Box 2, Folder 2-37, MHSL; Minutes of the Second Meeting of the Bill of Rights Committee, Montana Constitutional Convention, January 20, 1972, Folder 2-37, Box 2, RG22, MHSL; Minutes of the Third Meeting of the Bill of Rights Committee, Montana Constitutional Convention, January 21, 1972, RG22, Box 2, Folder 2-37, MHSL.

draft a constitution that went beyond the individual rights protections contained in the U.S. Constitution.

Media outlets in Montana that discussed the concept of state constitutionalism and encouraged greater state protections fell into two categories: legal media and local and statewide newspapers. Throughout the 1950s and 1960s the *Montana Law Review (MLR)*—the legal journal of the University of Montana School of Law—produced numerous articles that discussed the relationship between state and federal law and civil rights and liberties, encouraged strong state protections for individual rights, and presented analyses of how and why Montana should go beyond the protections contained in the federal Bill of Rights. As a majority of the twenty-four convention delegates who were attorneys had attended the University of Montana School of Law after WWII, it can be assumed that they had considerable familiarity with the articles published in the *MLR*.[18]

As early as 1950, *Montana Law Review* author David Williams had advocated for Montana courts to interpret state constitutional provisions as protecting individual rights at a higher level than federal interpretations of similar provisions. Williams presented an analysis of recent Supreme Court decisions, *Thornhill v. Alabama* (1940) and *American Federation of Labor v. Swing* (1940), which had found picketing to be protected speech under the First Amendment of the U.S. Constitution. Williams pointed out that Montana

[18] This analysis on the content and tenor of the *Montana Law Review* is based on the author's review of all of its publications from 1945 to 2010. See also, *Verbatim Transcript of Proceedings, 1972 Montana Constitutional Convention*, 7 vols., prepared by the Montana Legislature in cooperation with the Montana Legislative Council and the Constitutional Convention Editing and Publishing Committee (Helena, Montana, 1979): vol. 1, "Delegate Biographies and Delegate Proposals," available online at http://courts.mt.gov/library/montana_laws.mcpx (Accessed on June 3, 2010) (hereafter cited as *Verbatim Transcript*).

had held picketing to be protected speech and subject to very strong protection under the Montana Constitution since 1908, as a result of the Montana Supreme Court ruling in *Lindsay & Co., Ltd. v. Montana Federation of Labor* (1908). He argued that, despite recent federal rulings, Montana courts should continue to apply the more stringent state protections because Montana's free speech clause was intended to be stronger than the federal clause. Also in 1950, David R. Mason, anticipating potential incorporation decisions by the U.S. Supreme Court regarding the Fourth Amendment, encouraged Montana to provide more stringent requirements—either constitutionally or statutorily—for arrest warrants in order to avoid federal challenges or oversight.[19]

During the 1960s the *Montana Law Review* regularly published articles or notes discussing the concept of state constitutionalism. In 1964, in the wake of the Supreme Court's decision in *Gideon v. Wainwright* (1963), which held that the Sixth and Fourteenth Amendments required states to provide attorneys to indigent defendants, Larry Elison analyzed Montana's approach to assigning attorneys to indigent defendants. He pointed to local desires to avoid federal oversight of the state criminal justice system and the potential for the Court to extend the right to counsel to administrative hearings and appeals as reasons why either Montanans or the Montana Supreme Court could, and

[19] David Williams, "Peaceful Picketing as an Exercise of Free Speech," *Montana Law Review* 11, (1950): 68 – 81. This article presents an analysis of the long-standing absolute right to free speech in Montana (first established in 1908) and provides a very strong counter to the argument of scholars who assert that states did not have developed state-specific constitutional law on civil liberties prior to the Warren Court era and the subsequent application of state constitutionalism in the 1970s. For an example of this argument see, Alan G. Tarr, "The Past and Future of the New Judicial Federalism," *Publius* 24, no. 2 (1994): 63 – 79. On the general historical inadequacy of state constitutions see, Kermit L. Hall, "Mostly Anchor and Little Sail" in *Toward a Usable Past: Liberty Under State Constitutions*, eds. Paul Finkelman and Stephen E. Gottlieb (Athens: University of Georgia Press, 2009). David R. Mason, "Arrests Without a Warrant in Montana," *Montana Law Review* 11 (1950): 1 – 20.

should, establish a broader right to counsel at the state level than was required under the federal constitution.[20]

The right to privacy was a popular topic in the *MLR* and in a 1965 analysis of this evolving right, Gary L. Davis commented on the inadequacy of existing federal protections and, in particular, the absence of an explicit right to privacy in the federal Constitution. He also assessed the status of Montana privacy protections and, in light of the inadequate federal protections and his assertion that states were better positioned to protect the right to privacy, encouraged Montana to more stringently protect privacy by any means possible, including state supreme court interpretation, statute, common law, and new legislation. In a 1968 *MLR* article Elison advocated for strengthening the right of privacy. He suggested combining it with the right to free expression in order to provide constitutional protection for obscenity. This privacy-enhanced freedom of expression right did not need to be established at the federal level: Elison encouraged Montana and other states to further cement the right to privacy and to strengthen the freedom of expression independent of federal protections.[21]

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[20] Larry M. Elison, "Assigned Counsel in Montana: The Law and The Practice," *Montana Law Review* 26, (1964 – 1965): 1 – 30. Larry Elison was a professor of law at the University of Montana School of Law and taught a number of the attorneys who served as delegates to the convention as well as testified before the convention committees. He served as a resource to Bob Campbell, a member of the Bill of Rights Committee and the author of a number of proposals for new constitutional provisions guaranteeing individual rights, many of which went beyond the federal Bill of Rights either in degree or because they were not included in the federal Bill at all. His pre-convention writings show an interest in the topic of state constitutionalism; and in the late 1970s and early 1980s he wrote articles that reflect a strong dedication to the concept. Bob Campbell, excerpt from unpublished manuscript sent via email February 19, 2010, in author's possession. (Hereafter cited as, Campbell, *Manuscript*); Minutes of the Ninth Meeting of the Bill of Rights Committee, Montana Constitutional Convention, February 3, 1972, RG 22, Box 3, Folder 3-1, MHSL; Larry M. Elison and Dennis NettikSimmons, "Federalism and State Constitutions: The New Doctrine of Independent and Adequate State Grounds," *Montana Law Review* 45 (1984): 177 – 214.

[21] Gary L. Davis, "Electronic Surveillance and the Right to Privacy," *Montana Law Review* 27, (1965 – 1966): 173 – 192. At the time this article was written, the U.S. Supreme Court had only hinted at a federal right to privacy, which they found later that year in the "penumbras" of the First, Third, Fourth,

On the eve of its meeting in 1971, P. Bruce Harper encouraged the convention to adopt new constitutional provisions that would go beyond federal protections in his article on equal access to facilities and establishments, "vagrancy laws," and loitering statutes that denied services or access to homeless individuals and members of particular counter-cultures.[22] These various *MLR* articles represented decades of discussion among Montana's legal community on topics of federalism and civil rights and liberties. They and the legal culture they represent plausibly had an impact on, at a minimum, the twenty-four attorneys who were delegates to the convention. At least one of the advocates for this position in Montana, Professor Larry Elison, who authored several of these articles, testified before committees and provided assistance and feedback on proposals to the delegates, suggesting that even those delegates who were not members of the legal community were exposed to his theories regarding state constitutionalism.

It was not just members of the legal community in Montana who were aware of and advocated for state constitutionalism. Local newspapers ran editorials and articles discussing the concept during the constitutional convention and encouraged delegates to adopt a bill of rights that was strong, independent, and more protective of individuals than the federal Bill of Rights. The press reported extensively on the Bill of Rights Committee and consistently noted that the committee was considering or adopting provisions that went beyond the protections in the existing state constitution and the federal Constitution. For example, the *Great Falls Tribune* ran an article about the

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Fifth, Ninth, and Fourteenth Amendments in *Griswold v. Connecticut*, 381 U.S. 479 (1965). Larry M. Elison and Gary L. Graham, "Obscenity: A Compromise Proposal," *Montana Law Review* 30, (1968 – 1969): 123 – 140.

[22] P. Bruce Harper, "Locomotion, Liberty, and Legislation," *Montana Law Review* 32, (1971): 279 – 293; Minutes of the Ninth Meeting of the Bill of Rights Committee; Campbell, *Manuscript*.

committee's proposal, which was eventually adopted, to extend the rights of adults to minors that they entitled: "Montana Studies a National First: Basic Rights for Children, Youth."[23]

Additionally, the handful of editorials addressing the Bill of Rights encouraged the convention delegates to go beyond federal protections. An editorial in the *Billings Gazette* called for a "strong, broad bill of rights" that was "more strict and inclusive than the federal one." As part of a complex battle over a provision guaranteeing citizens open access to public meetings and records, several newspapers called for a strong, absolute "right to know" that was unlike anything at the federal level.[24]

While the legal media and local newspapers reported on and encouraged the delegates to adopt state constitutionalism, the many members of the Montana public strongly advocated for state protections that went beyond the federal Bill of Rights. [25] The public's familiarity with and strong advocacy for the concept is best documented in the correspondence between the public and convention delegates and public testimony before

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[23] A review of the newspaper clippings from around the state about the constitutional convention held in the Brown Collection at the University of Montana William J. Jameson Law Library shows at least 62 articles written about the Bill of Rights Committee and its proposals. The vast majority of these articles point out that many of the proposals advanced new rights or rights that were not recognized at the federal level. J.D. Holmes, "Montana Studies a National First: Basic Rights for Children, Youth," *Great Falls Tribune*, 11, February 1, 1972, Brown Collection, 25.

[24] Editorial, "Let's Have Bill of Rights," *Billings Gazette*, February 10, 1972, Brown Collection, 57; For more on the debate surrounding the Right to Know provision, see Chapter Four; Editorial, "A Freedom Abridged," *The Independent Record*, Helena, 4, March, 9, 1972, Brown Collection, 155; Editorial, "It's the Public's Right to Know," *Great Falls Tribune*, 22, March 10, 1972, Brown Collection, 167.

[25] The delegates did receive one letter from Frank Clift, a prolific letter-to-the-editor writer, who argued that a state bill of rights was unnecessary because of the incorporation of the federal Bill of Rights. He also, however, goes on to say that American citizens have more rights than are explicitly protected in the federal Constitution as a result of the Ninth Amendment. He also comments on the unconstitutionality of most federal legislation, especially education funding. Frank Clift to Lucile Speer, January 25, 1972, Lucille Speers Papers, Collection Number MSS 585, Box 6, Folder 1, Maureen and Mike Mansfield Library Archives and Special Collections, University of Montana—Missoula (hereafter cited as, "Speer Papers, MSS 585, UMML")

convention committees. There were multiple examples of Montanans championing new and unique constitutional protections, a brief exploration of three examples will illustrate the extent to which they understood the concept of state constitutionalism and their level of interest in establishing stronger protections at the state level. These examples include the debate surrounding the extent to which the new constitution would guarantee freedom of religion and prevent state support for religious institutions, the calls for an absolute right to bear arms, and the successful campaign to extend all constitutional rights to minors.[26]

Montana's 1889 constitution contained a provision that prohibited any form of direct or indirect public funding, aid, or support to any institution, educational or other, which had a relationship of any form with any religion. As a result, there were no legislative attempts to provide state aid to religious schools in Montana during the twentieth century. However, the topic of state aid to religious schools had been vigorously debated at the national level since the 1940s. Beginning in 1947, the Supreme Court ruled in a series of cases on the constitutionality of the type and extent of state aid to religious schools. The Court's position was constantly evolving and somewhat confusing, but by 1971 it had established that states could allow some forms of indirect aid so long as the statute authorizing the aid in question had a secular purpose, that it neither prohibited nor advanced religion, and that it did not promote "excessive

[26] Two delegates in particular, Dorothy Eck and Lucile Speer, meticulously preserved correspondence to them and their committees and made it available to the public by donating it to archives in the state of Montana. Eck and Speer also donated their personal collections to Montana libraries, which included varied documentation of the Montana Constitutional Convention. Dorothy Eck's papers are available at Dorothy Eck Papers, Record Group A-2, Boxes 1 – 5, Montana Historical Society Archives and Library, Helena, MT (hereafter cited as, "Eck Papers, RG A-2, MHSL"); for information on Lucile Speer's papers see note 25.

entanglement" between government and religion. This last criterion was introduced in *Lemon v. Kurtzman* (1971) and, combined with a Congressional proposal to provide federal aid for religious schools, resulted in heightened interest in and debate about public aid to religious schools.[27]

The 1972 constitutional convention provided religious-education advocates with an opportunity to change Montana's constitution to the more permissive federal standard. The resulting campaign sparked some of the most fervent debates of the convention and highlighted Montanans' understanding about the concept of state constitutionalism. Many Montanans wrote the convention delegates about the topic. The debate centered on whether to adopt the language of the First Amendment of the federal Constitution or to maintain the stricter prohibition of the Montana Constitution. Proponents of adopting the federal standard argued that since "excessive entanglement" between church and state was prohibited by the federal Bill of Rights, it was unnecessary and unwise to go beyond that standard. The Montana Catholic Conference advised the convention that "it is not necessary to establish a double standard, and it is sufficient to follow the concise provisions of the federal Constitution and its Amendments in this matter." A petition signed by twenty residents of a small southwestern Montana town urged the replacement of the 1889 provision with the text of the First Amendment to the U.S. Constitution.[28]

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[27] 1889 Montana Constitution, Article XI, Section 8; Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947); Lemon v. Kurtzman, 403 U.S. 602 (1971); Associated Press, "Dems Seek School Bill Credit," no newspaper identified, no date but from the content it appears to be from 1971, Box 6, Folder 1, Speer Papers, MSS 585, UMML. For more on the development of U.S. Constitutional law regarding state aid to religious institutions see, Henry J. Abraham and Barbara A. Perry, *Freedom and The Court: Civil Rights and Liberties in the United States*, 8th ed. (Lawrence: University of Kansas Press, 2003), Chapter 6.

[28] Reverend James H. Provost, Montana Catholic Conference, "Remarks to the Committee on the Bill of Rights," January 25, 1972, Box 2, Folder 10, Eck Papers, RG A-2, MHSL; "Petition To Adopt the

Opponents of state aid to religious institutions argued that the stronger Montana standard better ensured religious liberty and that the federal standard was too permissive. Floyd L. Rouse, a realtor from Great Falls, urged Dorothy Eck, the former statewide president of the League of Women Voters, to maintain an absolute ban on state aid because, unlike the First Amendment of the U.S. Constitution, the existing language of the 1889 provision was "so clear that it is extremely difficult to find a way of destroying its true intent." Norman D. Ostrander from Helena argued that the federal standards meant some involvement of church and state was acceptable and "this cannot be permitted if we are to provide the people with the security of freedom of religion." A petition signed by sixteen people, mostly from the small towns of Ovando and Helmville, argued that the strong language of the existing constitution was the reason Montana's religious freedom protections were stronger than other states. These petitioners asked the convention to maintain this level of protection and keep the absolute ban language in the new constitution. The correspondence of both the proponents and opponents showed a familiarity with the idea that states could go beyond federal protections, and the opponents clearly advocated for a constitution that did so. Ultimately, the convention and the voters agreed with the opponents regarding state funds and retained the 1889 provision mandating an absolute prohibition on state aid to religious institutions.

Language of the United States Constitution," Box 2, Folder 10, Eck Papers, RG A-2, MHSL. For further examples of the correspondence from proponents, see Mrs. Erwin Heschle to Delegate Dorothy Eck, February 3, 1972, Box 3, Folder 6, Eck Papers, RG A-2, MHSL; Reverend David W. Konecny, Sacred Heart Schools, to Dorothy Eck, February 2, 1972, Box 3, Folder 6, Eck Papers, RG A-2, MHSL.

However, they slightly amended the original language and included a provision allowing for the distribution of federal aid intended for non-public education.[29]

The right to bear arms was another topic that inspired numerous Montanans to call for stronger protections at the state level than existed at the federal level. The 1889 Constitution included a provision guaranteeing the right of individuals to bear arms. At the time, this was a more direct guarantee of an individual's right to own a gun than existed at the federal level because the Second Amendment had never been interpreted to guarantee an individual, as opposed to a collective, right to bear arms. The rise of state licensing laws caused distress among gun rights advocates who challenged these laws in federal court. However, in 1969 the U.S. Supreme Court declined to hear a challenge to New Jersey's gun licensing law. This led to continued uncertainty about the individual right to bear arms under the federal Constitution.[30]

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[29] Floyd L. Rouse to Dorothy Eck, January 31, 1972, Box 2, Folder 1, Eck Papers, RG A-2, MHSL; Norman D. Ostrander, Montana Conference of Seventh-Day Adventists, to Education Committee no date, RG 22, Box 2, Folder 2-28; Petition, no date, RG 22, Box 1, Folder 1-2, MHSL. For other examples of correspondence from opponents see, Chris F. Courtnage to Leo Graybill, March 10, 1972, RG 22, Box 1, Folder 1-3, MHSL; Lorelei Saxby to Delegate Dorothy Eck, January 2, 1972, RG A-2, Box 3, Folder 6, Eck Papers, MHSL; Alvin T. Westdal to Leo Graybill and all Constitutional Convention Delegates, March 9, 1972, RG 22, Box 1, Folder 1-2, MHSL; Floyd L. Rouse, Religious Liberty Association of Great Falls, to Leo Graybill and All Constitutional Convention Delegates, March 7, 1972, RG 22, Box 1, Folder 1-2, MHSL. A very small portion of the correspondence from the opponents contained strains of anti-Catholicism, which had been present in Montana since the early 1900s. Overall, the correspondence does not suggest that anti-Catholicism was the driving force behind wanting a more stringent standard of church-state separation in Montana, but especially for non-secularists it may have been a contributing factor. For more on Montana's history of anti-Catholicism see, Christine K. Erickson, "'Kluxer Blues': The Klan Confronts Catholics in Butte, Montana, 1923-1929," *Montana: The Magazine of Western History* 53, no. 1, (Spring, 2003): 44-57. 1972 Montana Constitution, Article X, Section 6 and Article II, Section 5.

[30] Burton v. Sills, 394 U.S. 812 (1969); 1889 Montana Constitution, Article III, Section 13. It was not until 2008 that the U.S. Supreme Court officially held that the Second Amendment protected an individual's right to bear arms, *District of Columbia v. Heller*, 554 U.S. 570 (2008), and not until 2010 did the Court apply the 2nd Amendment to the states via the Fourteenth Amendment, *McDonald v. Chicago*, 561 U.S. 130 S.Ct. 3020 (2010).

Gun rights advocates seized the opportunity of the constitutional convention to ensure that the new constitution ensured the individual right to bear arms. They also sought to prohibit firearms registration or licensing in the same provision. Proponents of this proposal argued that banning licensing was necessary to guarantee the freedom to own firearms and pointed out that the Montana Constitution was central to this freedom given the status of the federal Amendment. These guns rights advocates were vocal, attending numerous committee hearings. Despite their activism, ultimately the convention simply maintained the individual right to bear arms, but did not extend it further to prohibit licensing and registration. The adopted clause, Article III, Section 12 read:

> **The Right to Bear Arms**. The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.[31]

The proposal, which was ultimately adopted, to extend all constitutional rights to minors is another example of Montanans urging the convention to go beyond federal protections. Indeed, advocates for this position appeared thrilled at the possibility of Montana being the first state to adopt such a constitutional provision. In general, at the federal and state levels, minors did not have the same constitutional rights as adults. Juvenile courts operated under different rules than criminal courts for adults and did not

[31] "Gun Lobbyists take Potshots at 'Rights' Proposal," Associated Press, No date but most likely February 14, 1972, Brown Collection, 71; Elmer B. Bertram to Leo Graybill, no date, RG 22, Box 1, Folder 2, MHSL; Minutes of the Fourth Meeting of the Bill of Rights Committee, Montana Constitutional Convention, January 25, 1972, RG 22, Box 1, Folder 2, MHSL; Minutes of the Fifth Meeting of the Bill of Rights Committee, Montana Constitutional Convention, January 29, 1972, RG 22, Box 1, Folder 2, MHSL Minutes of the Eighth Meeting of the Bill of Rights Committee, Montana Constitutional Convention, February 9, 1972, RG 22, Box 1, Folder 2, MHSL; 1972 Montana Constitution, Article II, Section 12.

necessarily grant minors due process rights, such as the right to counsel, trial by jury, or other criminal procedural rights. The extent of minors' freedom of expression rights was also unclear. The 1960s and 1970s saw significant student activism involving both minor students and those above the age of majority. These politicized youth challenged restrictions on their expression and other provisions denying them the rights of adults. These challenges received varying levels of support and opposition from the courts and lawmakers, leading to a body of law that was somewhat inconsistent. Rick Applegate's *Bill of Rights* dedicated a significant portion of the "New Provisions" chapter to discussing the status of minor rights and potential new provisions to expand them. Child advocates joined the discussion and, both as individuals and organizations, lobbied the convention delegates to extend all constitutional rights to minors.[32]

On behalf of the Montana Advisory Council on Children and Youth and with the assistance of Applegate, on January 13, 1972 Gerry Fenn proposed a clause guaranteeing minors "all the fundamental rights of a Montana person." Child advocates saw this proposal as a way to protect minors from abuse. Student activists saw it as a way to guarantee their participation in the political system. The constitutional novelty of such a provision was widely remarked upon. Frank Sennett claimed that by adopting Fenn's proposed clause "Montana can serve as an example to the rest of this nation, and possibly to other countries of the world, in their leadership in recognition of basic human rights under Constitutional government." Advocates collected the opinions of state and national

[32] 1972 Montana Constitution, Article II, Section 15; *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), a breakthrough case on the rights of students; Applegate, *Bill of Rights*, Chapter X, 301 – 305; Gerry Fenn, "Statement on Rights of Those Under the Age of Majority," January 29, 1972, RG 22, Box 2, Folder 5, MHSL.

child advocacy leaders on the proposal and highlighted their responses about the unique nature of the proposal. The committee members were told that Isabella Jones of the National Committee for Children and Youth though the proposal would be "unusual in a state Constitution and certainly a breakthrough for children and youth." Diane Hedin of the University of Minnesota's Center for Youth Development and Research told the committee "no state constitution has anything specific relating to the rights of children and youth." The proponents of this proposal heavily emphasized the uniqueness of the proposal and how it went beyond existing state or federal protections. This focus suggests that Montanans were interested in having a constitution that contained new protections independent of the federal Constitution. The delegates responded to the public advocacy on this issue and included a provision, which read:

> The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons.[33]

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As this chapter has illustrated, the concept of state constitutionalism was deeply intertwined into the debates on state constitutional revision. This was true for the nationally disseminated scholarship on the topic. It was also true in Montana where the

[33] Gerry Fenn to Delegate Wade J. Dahood, January 13, 1972, RG 22, Box 2, Folder 2, MHSL; Frank R. Sennett, "Statement to the Montanan Constitutional Convention Bill of Rights Committee," no date, RG 22, Box 1, Folder 3, MHSL; Letters of Support On the Rights of Those Under the Age of Majority, no date, RG 22, Box 1, Folder 3, MHSL. For other examples of correspondence urging the committee to adopt a statement of minor rights see, John C. Vaughn to Dale Harris, Montana Constitutional Convention Commission, November 18, 1971, RG 22, Box 2, Folder 2-37, MHSL; Jan Brown to Dale Harris, Montana Constitutional Convention Commission, December 9, 1971, RG 22, Box 2, Folder 2-37, MHSL; James L. Pippard to Bill of Rights Committee, January 29, 1972, RG 22, Box 1, Folder 3, MHSL; Rick Davenport to Bill of Rights Committee, January 29, 1972, RG 22, Box 1, Folder 3, MHSL; 1972 Montana Constitution, Article II, Section 15.

legal media, popular media, and members of the public advocated for a constitution that protected individual rights much more stringently than the federal Constitution. Convention delegates responded to this advocacy and wrote a constitution that intentionally provided strong protections for individual rights. This new document, with its rights provisions, provided the legal basis for court decisions in the 1970s and beyond that established state-specific protections for individual rights that were stronger than those at the federal level. The rights proposals discussed in this chapter were just some of the many proposals for individual rights at the Montana Constitutional Convention. Two other additions to Montana's Declaration of Rights deserve a deeper investigation due to their subsequent important role in Montana's approach to state constitutionalism: the privacy clause and the dignity clause. Exploring the history of these two clauses and how they served as the basis for Montana's embrace of state constitutionalism further proves that citizen-driven constitutional revision was intimately connected to the birth of state constitutionalism.

Chapter 4: The Right of Privacy

The right to privacy is an excellent example of states adopting rights protections that do not explicitly exist at the federal level. In Montana, and other states, a limited right to privacy existed decades before the U.S. Supreme Court's groundbreaking *Griswold v. Connecticut* case (1965) established a federal right to privacy. The right to privacy was thoroughly discussed before and during the Montana Constitutional Convention. The public communicated strong support for the concept, and the convention intentionally adopted a privacy clause that went far beyond any contemporary constitutional right to privacy. Montana's privacy clause has, moreover, provided the legal basis for several groundbreaking decisions utilizing state constitutionalism principles. The history of the crafting, adoption, and interpretation of Montana's privacy clause shows the close connection between citizen-driven constitutional revision and the rise of state constitutionalism.

The challenge of how to define and determine the extent of privacy rights was first tackled by the convention's Bill of Rights committee (BOR committee).[1] Reflecting on his experience at the convention, BOR committee member Bob Campbell, one of the two lawyers on the committee, lamented the absence of a clearly worded right to privacy at the federal level. "Because privacy is the essence of freedom," he said, "it was my hope to place it in the Montana Bill of Rights, even before I was elected as a delegate."

[1] Dennis E. Curran, "The Unbelievable Happened," *Billings Gazette*, February 17, 1972, Brown Collection, 84, University of Montana William J. Jameson Law Library, accessed online at http://www.umt.edu/law/library/Research%20Tools/State%20Pages/MontanaConstitution/default.htm (hereafter cited as Brown Collection); Gary Langley, "Individual Rights Prime Concern of Delegates," *Missoulian*, February 9, 1972, Brown Collection, 53.

Campbell was eccentric and earnest; he was well liked by his fellow delegates because of his warmth and humor, often joking to relieve tension on the convention floor. His engaging nature may have contributed to his fellow committee members' and delegates' willingness to support his deeply engrained commitment to the concept of a right to privacy. The history of the right to privacy in Montana also shows that the concept of privacy was intimately connected with protections regarding search and seizure law.[2] As a result, in order to capture the intentions of the delegates regarding privacy it is essential to study the debates surrounding two sections of the Declaration of Rights: section eleven, the search and seizure clause, and section ten, the privacy clause.[3]

The first area in which this focus on privacy rights became evident was in the debate regarding the nature and scope of the new search and seizure clause. On January 21, 1972, Campbell submitted a proposal, Delegate Proposal (DP) # 14, to amend the existing search and seizure clause to prohibit electronic monitoring without a warrant. This proposal was supported by other members of the Bill of Rights Committee,

[2] In addition to the search and seizure clause and the privacy clause, the right to privacy was at the center of the debate on another unique provision of Montana's constitution: the right to know clause. This clause, both as proposed and adopted, guaranteed Montanans the right to access government records and meetings. However, it contained an exception to this right "in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." 1972 Montana Constitution, Article II, Section 9. The press and some members of the public strongly opposed this privacy exception and an intense debate raged on the topic, mostly driven by members of the press and the Montana Press Association. Unfortunately, space limitations prohibit a thorough examination of this additional aspect of the Montana Constitutional Convention's interest in a right to privacy.

[3] Gus Chambers and Paul Zalis, "For This and Future Generations: Montana's 1972 Constitutional Convention," (Montana PBS: KUFM-TV, University of Montana, 2002), DVD, 60 minutes; Larry M. Elison and Fritz Snyder, *The Montana State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 2001), 1 – 23; Charles Hillinger, "Montanans Drafting New Constitution," *Los Angeles Times*, Part I, January 21, 1972, Brown Collection, 28; Pat Murdo, "Campbell Contributes Reform, Poems, Humor to Convention," *Montana Kaiman*, no date but from the content it is clear that it was written post-constitutional convention and pre- June 6 ratification vote, Brown Collection.

including Dorothy Eck and Jerome Cate. The existing 1889 clause mirrored the federal Fourth Amendment and read:

> The people shall be secure in their persons, papers, homes, and effects, from unreasonable searches and seizures, and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, nor without probable cause, supported by oath or affirmation, reduced to writing.

Campbell's DP # 14 would have amended the section to read:

> The people shall be secure in their persons,
> papers, homes, and effects, from unreasonable searches and
> seizures, *invasions of privacy*, and no warrant to search any place, *utilize electronic or other means to intercept oral or other communications*, or seize any
> person or thing shall issue without describing the place to be searched, or the
> person or thing to be seized, nor without probable cause, supported by oath
> or affirmation, reduced to writing.[4]

On February 8, 1972 the BOR committee met to review and discuss the existing bill of rights and the proposals that committee members and other delegates had for a new bill. Campbell proposed adding the following statement to DP # 14 to further clarify his intended restrictions on electronic surveillance: "Any interception of communications must be authorized by a court of record." The committee supported the proposal and Campbell's amendment and quickly agreed to incorporate them as the new search and seizure clause. This proposal and its subsequent treatment by the convention delegates

[4] Bob Campbell, excerpt from unpublished manuscript sent via email February 19, 2010, in author's possession. (Hereafter cited as, Campbell, *Manuscript*); 1889 Montana Constitution, Article III, Section 7; *Verbatim Transcript of Proceedings, 1972 Montana Constitutional Convention*, 7 vols., prepared by the Montana Legislature in cooperation with the Montana Legislative Council and the Constitutional Convention Editing and Publishing Committee (Helena, Montana, 1979): vol. 1, "Delegate Biographies and Delegate Proposals," Delegate Proposal 14, 1:98, emphasis mine, available online at http://courts.mt.gov/library/montana_laws.mcpx (Accessed on June 3, 2010) (hereafter cited as *Verbatim Transcript*).

reflected what appears to have been a real concern among Montanans regarding wiretapping and electronic surveillance.[5]

This concern was not sudden, nor was it limited to the few Montanans serving on the Bill of Rights committee. Bob Campbell and the BOR committee were responding, as citizens of a state that had long sought to protect privacy and limit governmental search and seizure powers, to high-profile developments at the federal and state level regarding wiretapping, electronic surveillance, and search warrants.[6]

At the federal level, electronic surveillance and its relationship to search and seizure protections had been an issue since the 1920s. The matter first came before the U.S. Supreme Court during Prohibition in *Olmstead v. United States* (1928). In 1919, the United States ratified the Eighteenth Amendment to the U.S. Constitution, which prohibited the "manufacture, sale, or transportation of intoxicating liquors" and gave both Congress and the states the power to enforce prohibition through legislation. Congress followed up by passing the Volstead Act, which provided for mechanisms to enforce the Eighteenth Amendment. There was widespread resistance to Prohibition, and, as a result, both the federal government and the states sought new ways to gather evidence against

[5] Campbell's proposal would have required a warrant for electronic surveillance. Other delegates wanted an explicit ban on electronic surveillance written into the constitution. Delegate Dorothy Eck commented to a constituent who wrote to urge Eck to support the ban that she supported an outright ban, but that some of the Bill of Rights Committee members were opposed to an absolute ban on electronic surveillance. There is no other mention of such opposition in the committee minutes, in the verbatim transcript, in any other communication to or from delegates, or in the press and the ultimate outcome of this proposal, discussed in detail below, does not suggest significant opposition to an absolute ban. Mrs. Catherine R. Moffet to Dorothy Eck, January 18, 1972, Box 3, Folder 3-6, Dorothy Eck Papers, Record Group A-2, Boxes 1 – 5, Montana Historical Society Archives and Library, Helena, MT (hereafter cited as, "Eck Papers, RG A-2, MHSL").

[6] Minutes of the Seventh Meeting of the Bill of Rights Committee, Montana Constitutional Convention, February 8, 1972, Record Group 22, Box 2, Folder 2-37, Constitutional Convention Collection, Montana Historical Society Archives and Library, Helena, MT (hereafter cited as RG 22, MHSL); Constitution of the State of Montana (1889), Article III, Section 7; U.S. Constitution, Amendment IV.

bootleggers who refused to comply with restrictions on the manufacturing and sale of alcohol. The *Olmstead* case presented the question of whether wiretapping without a warrant was a constitutionally valid way for prosecutors to gather evidence, and, if it was not, whether the evidence could be used against the defendant. In a narrow reading of the Fourth Amendment, the Court held that wiretaps constituted neither a search nor a seizure. This was because a wiretap did not involve physically searching or entering one's home, office, or other location or physically seizing documents or physical evidence. Moreover, because the Court did not define wiretapping as a search or seizure, the Fourth Amendment protections requiring a warrant based on probable cause did not apply.[7]

Justice Brandeis dissented vigorously in the *Olmstead* case. He argued that the Court's reading of the Fourth and Fifth Amendments was too narrow and called for a broad application of the underlying principles of the Amendments. In what is widely contended to be the first Supreme Court dissent to promote the idea of a right to privacy, Justice Brandeis argued that the authors of the Constitution "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations." "They conferred, as against the Government," Brandeis added, "the right to be let alone—the most comprehensive of rights, and the right most valued by civilized men." Justice Brandeis

[7]Olmstead v. United States, 277 U.S. 438 (1928); Weeks v. United States, 232 U.S. 383 (1914). The *Weeks* case introduced the "exclusionary rule" into federal criminal law. The exclusionary rule requires evidence that was gathered unconstitutionally, for example evidence gathered without a search warrant, to be excluded from the evidence presented at trial. In *Olmstead*, the defendant argued that evidence against him gathered via a wiretap without a warrant was akin to the gathering of physical evidence without a warrant and therefore must be excluded from his trial under the exclusionary rule announced in *Weeks*; U.S. Constitution, Eighteenth Amendment; Volstead Act of 1919, Pub. L. No. 305 – 323, 41 Stat. 305 (1919), available online at http://arcweb.archives.gov/arc/action/ExternalIdSearch?id=299827, (Accessed February 9, 2010).

added that, "To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." His argument that wiretapping violated an individual's right to privacy was quickly embraced by civil libertarians, and some federal law makers, among them Montana's junior U.S. Senator, Burton K. Wheeler.[8]

In the early 1930s there were various measures regarding wiretapping—some seeking to authorize the practice and others to prohibit it—proposed in Congress. The flurry of legislative activity regarding wiretapping reflected, in part, reactions to the *Olmstead* decision, the growth of organized crime, and advances in technology. A number of proposals to explicitly authorize wiretapping in certain situations passed the House but failed in the Senate. Senator Wheeler, informed by his experiences in Montana as U.S. Attorney during World War I, the opinions of his constituents, and his personal commitment to civil liberties, went out of his way to get legislation authorizing wiretapping assigned to his committee in order to ensure it would fail to pass the Senate.[9] After years of contention on the matter, Congress passed the Electronic Communications Act of 1934, which, in Section 605, ostensibly prohibited unauthorized wiretapping of

[8] Justice Louis Brandeis, dissenting opinion in Olmstead v. United States, 277 U.S. 438 (1928). Richard T. Ruetten, "Burton K. Wheeler and the Montana Connection," *Montana: The Magazine of Western History* 27, no. 3 (1977): 7.

[9] Burton Wheeler served as the U.S. Attorney for Montana 1913 – 1918 and during that time witnessed a number of events which shaped his understanding of and commitment to civil liberties. He described wartime hysteria with some citizens accusing others of not being patriotic and demanding investigations and prosecutions. He viewed the Espionage and Sedition Acts and the vigorous prosecution of war dissenters to be a misuse of the justice system. As U.S. Attorney, he also oversaw the prosecution of bootleggers, witnessed significant violence between labor and management, and at various times was encouraged to use his office for the gains of one or the other side. In his biography, he attributed these experiences with strengthening his commitment to civil liberties and his subsequent work as a U.S. Senator to resist attempts to weaken constitutional protections for individual rights. See, Burton K. Wheeler, *Yankee From the West: The Candid Story of the Freewheeling U.S. Senator from Montana* (New York: Doubleday, 1962), chapters five, six, seven, ten, and fifteen.

phone lines. Over the next thirty-five years, federal law, policy, and practice regarding wiretapping were far from consistent. In *Nardone v. United States* (1937) the Supreme Court held that evidence obtained through wiretapping in violation of Section 605 of the Electronic Communications Act could not be used as evidence against a defendant. Despite this ruling, the federal government continued to use wiretapping in their investigations, leading to continual disagreement over how evidence against defendants had been obtained and whether it was admissible in court. Additionally, the Supreme Court allowed the use of other means of electronic surveillance, such as wired informants and detectaphones—devices which enhanced hearing but did not physically invade the suspect's home or office.[10]

A pair of U.S. Supreme Court cases in 1967 sought to streamline previous interpretations of the constitutionality of various electronic surveillance devices and to definitively determine whether a warrant was needed in order to use evidence gathered by such devices. In doing so, the Court reaffirmed the concept of a right to privacy protected by the Fourth Amendment and defined the issue of constitutionality and electronic surveillance for contemporaries of the Montana Constitutional Convention delegates. In *Berger v. New York* (1967) the Court invalidated a New York state law allowing electronic surveillance without meeting the warrant requirements of the Fourth Amendment. The case involved the placing of a recording device inside of a bar owner's

[10] Ruetten, "Wheeler," 7; "Congressional Wiretapping Policy Overdue," *Stanford Law Review* 2, no. 4 (1950): 744 – 762; Alan F. Westin, "Science, Privacy, and Freedom: Issues and Proposals for the 1970's. Part II: Balancing the Conflicting Demands of Privacy, Disclosure, and Surveillance," *Columbia Law Review* 66, no. 7 (1966): 1205 – 1253; Nardone v. United States, 308 U.S. 338 (1939); Rick Applegate, *Bill of Rights, report* no. 10 prepared by the Montana Constitutional Convention Commission for the delegates to the Montana Constitutional Convention, (Helena, Montana, 1971): 226 – 232 (hereafter cited as Applegate, *Bill of Rights*).

office in order to gather evidence of a conspiracy to bribe the Chairman of the New York State Liquor Authority. The Court held that the electronic surveillance invaded an individual's right to privacy and that the Fourth and Fourteenth Amendments required certain criteria be met in order to justify governmental invasions of privacy. The Court set forth three criteria that the government must meet in order to use evidence gained through electronic surveillance against a defendant: 1) court authorization, 2) probable cause, and 3) immediate need.[11]

The second case, *Katz v. United States* (1967), involved a wiretap which had been placed by the FBI on a public pay phone in order to gather evidence against an individual who was suspected of illegal gambling. In the *Katz* decision, the Court overturned the 1928 *Olmstead* decision by rejecting the idea that the Fourth Amendment required invasion of a particular space:

> The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth, and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance. [12]

[11] The U.S. Supreme Court had announced a general right to privacy, which protected individuals from state as well as federal actions, two years earlier in *Griswold v. Connecticut*, a case that will be thoroughly discussed later. This right to privacy was based, in part, on the Fourth Amendment; Berger v. New York, 388 U.S. 41 (1967). The Court in *Berger* was able to hold that evidence gathered under the existing New York law must be excluded from the defendant's trial because it had earlier held in *Mapp v. Ohio* (1961) that the exclusionary rule announced in *Weeks v. United States* (1914) applied to the states as well as the federal government. This was based on the finding that the Fourteenth Amendment applied the protections of the Fourth Amendment against state, as well as federal, actions as part of the general right to privacy announced in the *Griswold v. Connecticut* case. The court did not specifically identify the meaning of "immediate need" but was rejecting the long-term gathering of information and the ability to extend the wiretaps for a period of two months or more.

[12] Katz v. United States, 389 U.S. 347 (1967).

Because these two decisions created new expectations of law enforcement and altered the manner in which Section 605 of the 1934 Electronic Communications Act could be applied, Congress responded with legislation addressing the issue: Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Title III required detailed procedures be developed and adopted prior to law enforcement embarking on electronic surveillance. Most notably, it also defined who could engage in electronic surveillance, a list that included certain state officials—with state legislative approval—such as the Attorney General, and County and City Attorneys.[13]

This federal recognition of the potential wiretap authority of state officials in the Omnibus Crime Bill is where the federal background on wiretapping, search and seizure, and the right to privacy intersects with Montana's history. Article III, Section 7 of Montana's existing 1889 constitution mirrored the Fourth Amendment to the U.S. Constitution.[14] Montana court cases interpreting this clause, and applying the Fourth Amendment, resulted in many similar conclusions to those announced by the U.S. Supreme Court. For example, in a decision reminiscent of the U.S. Supreme Court decision in *Weeks v. United States* (1914), the Montana Supreme Court in *State ex rel. King v. District Court* (1924) held that evidence obtained without a valid search warrant

[13] "Fourth Amendment Electronic Surveillance," *The Journal of Criminal Law and Criminology* 69, no. 4 (1978): 493 – 504; Applegate, *Bill of Rights*, 232 – 234.

[14] The 1889 Montana Constitution, Article III, Section 7 read: "The people shall be secure in their persons, papers, homes, and effects, from unreasonable searches and seizures, and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, nor without probable cause, supported by oath or affirmation, reduced to writing." The Fourth Amendment of the U.S. Constitution reads, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

had to be excluded from a defendant's trial. This case also involved a search without a warrant for evidence of bootlegging.[15]

Despite some similar applications of constitutional search and seizure protections, there were a number of ways in which, even before the 1972 constitution, Montana required a higher level of protection from police searches and seizures than did federal law. This bias toward individual privacy, when juxtaposed with governmental investigation into one's home or personal affairs, reflected the cultural importance of privacy in Montana. A pair of cases decided by the Montana Supreme Court in 1968 encapsulates both Montana's historical protection of privacy and the legal and the political mood that was prevalent in Montana leading up to the constitutional convention. The two cases, *State v. Langan* and *State v. Kurland*, involved the search of Mary Langan's home in Bozeman, where Sandra Kurland lived as Langan's roommate, and the seizure of marijuana, which resulted in the police arresting the two women. The search was authorized by a warrant issued by a justice of the peace and was based on information from an undercover informant that there was marijuana present in Langan and Kurland's residence. The women were convicted of violating the state's Uniform Drug Act, based in large part on the court's admission of the seized marijuana as evidence against them in their trial. The Montana Supreme Court overturned their convictions for two reasons. First, it said that the search violated the Uniform Drug Act because it "absolutely prohibits the issuance of a search warrant to search a private residence for narcotics." This prohibition, which was enacted along with the general laws

[15] State ex rel. King, v. District Court et al., 70 Mont. 191, 224 P. 862, (1924); Applegate, *Bill of Rights*, 232 – 236.

governing narcotics in Montana in 1937, reflected a reverence for privacy. The strong ban on searching a home for narcotics, even with a warrant, suggests that the legislators who passed the Act prioritized the sanctity of an individual's home and, arguably, even considered the decision to possess and use narcotics in one's home a private decision. The second reason the Court gave for overturning the convictions was the long-standing exclusionary rule, which prohibited evidence gained through an illegal search from being used at trial. The Court reaffirmed Montana's commitment to this principle and pointed to the recent decision in *Mapp v. Ohio*, in which the U.S. Supreme Court had extended the federal exclusionary rule to states. These two cases reflected a contemporary legal community that prioritized individual privacy over "law and order," as well as the endurance of high legal standards favoring individual privacy in Montana.[16]

The debate over state and federal wiretap authority overlapped with Montana's concern for privacy and the expectation of limited governmental search and seizure authority that the *Langan* and *Kurland* cases illustrated. The legal community in Montana had engaged in discussions on electronic surveillance throughout the 1960s and encouraged lawmakers to adopt statutes banning the practice. Local newspapers published articles and editorials supporting moves to limit wiretapping and other forms of electronic surveillance in Montana. Legislators responded to these calls, and by 1971 Montana had adopted a number of statutes prohibiting the government from engaging in electronic surveillance and disclosure of information obtained through electronic

[16] Marijuana was considered a narcotic under Montana's Uniform Drug Act of 1937. State v. Langan, 151 Mont. 558; 445 P.2d 565 (1968); State v. Kurland, 151 Mont. 569; 445 P.2d 570 (1968).

surveillance. This meant state officials could not obtain a warrant for any form of electronic surveillance.[17]

The courts also limited the use of any form of electronic surveillance. In 1971 the Montana Supreme Court ruled that information obtained by a third party through electronic surveillance, without the defendant's consent, violated the search and seizure clause of the state constitution and the defendant's right to privacy inherent in that provision. In this case, *State v. Brecht*, the third party electronic surveillance consisted of the sister of a murder victim testifying about a telephone conversation she had listened in on, on another line, between the victim and the defendant, in which the defendant threatened to shoot the victim. Within hours of the telephone call in question, the victim had been shot by the defendant in the bar in which she worked; the defendant claimed the shooting was accidental. The combination of the Montana Supreme Court rulings in *Brecht* and *State ex rel. King*, and the various state statutes regarding electronic surveillance, resulted in a firm prohibition against state and local law enforcement officials gathering information, or using information gathered, through any form of electronic surveillance. [18]

The 1968 Omnibus Crime Bill's provisions allowing state and local officials, if authorized by the state legislature, to engage in electronic surveillance with a warrant were in stark contrast to the values reflected in Montana's engrained practice of protecting individual privacy rights against unlawful searches and seizures and resistance

[17] State ex rel. King (1924); Davis, "Electronic Surveillance and the Right to Privacy"; John B. Dudis, Jr., "Electronic Surveillance: New Law For an Expanding Problem," *Montana Law Review* 32 (1971): 265 – 278; Editorial, "Let's Have Bill of Rights," *Billings Gazette*, February 10, 1972, Brown Collection, 57; Tom Wicker, "Snoops Undercut Individual Rights," *Missoulian*, January 14, 1970.

[18] State v. Brecht, 157 Mont. 264, 485 P.2d 47 (1971).

to any electronic surveillance measures. During the 1971 Legislative Session, a proposal was introduced to authorize state and local officials, in line with the Omnibus Crime Bill, to engage in electronic surveillance with a warrant. The measure failed, but the debate surrounding it raised the profile of the issue and inspired a strong backlash among many Montanans.[19]

At the beginning of February 1972, when the BOR Committee quickly agreed to Bob Campbell's DP # 14 on electronic surveillance, this history regarding search and seizure law, electronic surveillance, and its relationship to a right to privacy was well known to Campbell and the other delegates. A lawyer practicing civil rights and constitutional law, Campbell was intricately aware of the legal issues surrounding electronic surveillance. Wade Dahood, the committee chair and an attorney who was widely expected to run for governor following the convention, regularly argued before the Montana Supreme Court and was thoroughly aware of this context. The rest of the committee had varying backgrounds and familiarity with privacy law. Moreover, the *Bill of Rights* report prepared by Rick Applegate, the young research analyst assigned to the BOR committee, provided them with extensive background on relevant issues regarding civil liberties, constitutional law, history, and recent constitution-making. It summarized the above discussion in some detail, laid out contemporary areas of concern, and provided examples of other states' constitutional provisions regarding search and seizure and electronic surveillance. The earliest meetings of the BOR Committee involved reviewing this document and discussing the issues and suggestions it contained. By the

[19] Applegate, *Bill of Rights*, 232 – 236; W. Bjarne Johnson, "State v. Brecht: Evolution or Offshoot of the Fourth Amendment Exclusionary Law?," *Montana Law Review* 34 (1973): 187 – 198.

seventh meeting of the BOR Committee, when Campbell made his proposal, the committee members were very familiar with the legal, philosophical, and constitutional issues Applegate's report addressed.[20]

The committee held a number of hearings to solicit the opinions of the public on the BOR proposals, and news of the convention was prominent in newspapers across the state. This provided ample opportunity for public reaction to the convention's proposals. The public discussion regarding Campbell's DP # 14 reflected the importance—to the Montana public and the constitutional convention delegates—of protecting an individual's right to privacy. Dorothy Eck, a BOR Committee member and delegate from Bozeman commented that all the delegates to the convention, including Republicans and Democrats, "liked being recognized as populists." Given the public reception to proposals protecting an individual right to privacy, such as the proposed restriction on electronic surveillance, and the outcome of those proposals, the delegates were indeed populists. Testimony at public hearings was overwhelmingly in opposition to electronic surveillance and often urged the BOR Committee to adopt even stronger protections, such as an absolute ban on electronic surveillance.[21]

Testimony on the topic included the views of organized groups, individual citizens, and elected officials. There was no organized support for electronic surveillance. The Montana Sheriffs and Peace Officers' Association (MSPO) did not take a position,

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[20] Dahood's gubernatorial ambitions were derailed, as many would argue, because of the nasty fight between the Press and the Bill of Rights Committee over the privacy exception in the right-to-know clause. See, Chapter 4, note 2 for more information on that battle. "A Republican from Anaconda: Wade Dahood Seen As Political Rarity," *Great Falls Tribune*, no date but most likely March 19, 1972, Brown Collection; Campbell, *Manuscript*; Murdo, "Campbell Contributes Reform, Poems, Humor to Convention,"; Applegate, *Bill of Rights*; Minutes of the Second Meeting of the Bill of Rights Committee, Montana Constitutional Convention, January 20, 1972, Folder 2-37, Box 2, RG22, MHSL.

[21] Dorothy Eck, quoted in Chambers and Zalis, "For This and Future Generations."

and individual members of law enforcement did not testify. A fellow delegate, J. Mason Melvin reported to the Bill of Rights committee that he had attended an MSPO meeting, and some of the attendees conveyed an interest in being allowed to utilize electronic surveillance in major crimes investigations, but all supported being required to get a warrant. Everyone else who testified or communicated with the committee expressed discomfort with electronic surveillance. Some supported Campbell's DP # 14, but most people who testified or wrote their delegates urged them to go further and include an absolute ban on electronic surveillance in the constitution. Mrs. Irving Boettger, a homeowner in East Helena, appeared before the committee as "a private citizen expressing a personal opinion, not as a representative of any group" to share her belief that: "We can hardly feel like free citizens in a free state if we can never know when we are being intruded upon." She urged the committee to limit all forms of electronic surveillance to law enforcement and then "only under extremely rigid legal and judicial controls." On February 15, the Montana AFL-CIO voiced their support for the intent behind the proposal. However, they wanted the committee to go further and suggested inserting "an absolute ban on 'any interception of private communication'. . . into the section." Delegate Dorothy Eck received several letters from a constituent urging her to support a prohibition on wiretapping and electronic surveillance. Responding to the practice of the FBI monitoring activist groups, a group of citizens from Missoula submitted a signed petition that asserted: "Unfettered government surveillance is a powerful threat to the existence of democratic institutions." This petition specifically

called for "stronger guarantees" regarding surveillance than were present in the federal Bill of Rights.[22]

Tom Towe, a Democratic representative from Billings, testified extensively throughout February and March on the right to privacy and the search and seizure proposal. He suggested an absolute bar on intercepting communications, while acknowledging that under national law federal officials could engage in electronic surveillance within Montana. Kayle Jackson of Browning agreed with Towe and urged the committee to adopt an absolute ban on electronic surveillance because, "If people believe that their government may be listening to everything they say, it would seem certain to keep them from saying anything, which is not what a democracy is all about." The consistency of support for prohibiting electronic surveillance among a diverse representation of the public, and the absence of public testimony in favor of electronic surveillance, reflected the strong public support for constitutional provisions protecting an individual right to privacy.[23]

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[22] J. Mason Melvin to Wade Dahood, Chair of Bill of Rights Committee, December 13, 1971, RG 22, Box 2, Folder 2-4, MHSL; Montana State AFL-CIO to Montana Constitutional Convention, Bill of Rights Committee, Bill of Rights Committee Meeting Minutes, February 15, 1972, RG22, Box 3, Folder 3-2, MHSL; Mrs. Irving Boettger, "Testimony before the Bill of Rights Committee on Protection of Private Communications," January 26, 1972, RG22, Box 2, Folder 2-37, MHSL; Catherine R. Moffet to Dorothy Eck, February 4, 1972, Box 3, Folder 3-6, Dorothy Eck Papers, MHSL; Catherine R. Moffet to Dorothy Eck, February 19, 1972, Box 3, Folder 3-6, Dorothy Eck Papers, MHSL; Petition, "Support the Right of Individual Dignity, Privacy, and Free Expression," no date, but clearly toward the beginning of the convention, 1972, Box 6, Folder 2, Lucille Speers Papers, Collection Number MSS 585, Maureen and Mike Mansfield Library Archives and Special Collections, University of Montana—Missoula (hereafter cited as, "Speer Papers, MSS 585, UMML"). For more on the history of federal surveillance of activists during the mid-twentieth century see, Richard Morgan, *Domestic Intelligence: Monitoring Dissent in America* (Austin: University of Texas, 1980); Kenneth O'Reilly, *"Racial Matters": The FBI's Secret File on Black America, 1960 – 1972* (New York: Free Press, 1989); Gerald D. McKnight, *The Last Crusade: Martin Luther King, Jr., the FBI, and the Poor People's Campaign* (Boulder: Westview, 1998).

[23] Tom Towe, "Proposal to Bill of Rights Committee on Wiretapping and Privacy," February 12, 1972, RG22, Box 3, Folder 3-2, MHSL; Tom Towe, "Proposals for Right to Privacy and Explanation of Components of Privacy," February 4, 1972, RG22, Box 3, Folder 3-2, MHSL; Tom Towe to Dorothy Eck, March 6, 1972, RG A-2, Box 2, Folder 2-10, Eck Papers, MHSL; Kayle Jackson, Testimony, February 12,

The Bill of Rights committee stripped the provision addressing electronic surveillance from its final proposal on the search and seizure clause before it was submitted to the full convention on February 19, 1972. This directly reflected public pressure on the BOR committee to strengthen the provision or to ban electronic surveillance outright. Reporting on the last public hearing before the communication interception proposal was withdrawn, the *Great Falls Tribune* noted that multiple attorneys testified that they feared "the section would have the effect of authorizing wiretapping and bugging," which conflicted with existing Montana law. In addition to the attorneys, the paper reported that multiple witnesses "pressed for a stronger section banning illegal wiretapping during the four-hour hearing." Many of those who testified argued that, since electronic surveillance was currently illegal in Montana, DP #14 could have the effect of legalizing the practice because it stated that a warrant was required to engage in electronic surveillance. In response, the committee removed the language regarding electronic surveillance from the proposal in order not to inadvertently authorize it. By withdrawing the proposal, the Committee believed it was acting in the interest of individual privacy and, certainly, responding to overwhelming public sentiment. [24]

This decision was debated and rehashed in some detail once the proposal reached the full convention on March 7, 1972. The debate highlights just how crucial the concept of a right to privacy was to the delegates and how resistant Montanans were to electronic

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1972, RG22, Box 3, Folder 3-2, MHSL; Public Petition, "Support Inclusion of Rights of Individual Dignity, Privacy and Free Expression in the Constitution of the State of Montana," February 3, 1972, RG22, Box 3, Folder 3-2, MHSL.

[24] "Gun Lobbyists take Potshots at 'Rights' Proposal," Associated Press, no date but most likely February 14, 1972, Brown Collection, 71; "Right to Privacy Gains Convention Assurances," Associated Press, no date but most likely early March, Brown Collection, 160; *Verbatim Transcript*, 5:1682 – 1689.

surveillance. In an attempt to explain why they had removed the earlier language Campbell told the convention delegates: "We at the committee felt very strongly that the people of Montana should be protected as much as possible against eavesdropping, electronic surveillance, and such type of activity." Despite this assurance about the meaning of the search and seizure clause, a number of delegates had concerns that electronic surveillance would be allowed.[25]

Mae Nan Robinson, the youngest delegate to the convention and a graduate student at the University of Montana, attacked the committee's decision to omit language explicitly dealing with electronic surveillance. She proposed amending the clause to prohibit the interception of *any* communications. In support for her amendment, she referred to extensive statistics regarding the cost and futility of electronic surveillance, the analysis of contemporary legal scholars on privacy and communications, and Justice Brandeis's impassioned defense of a right to privacy in his *Olmstead* dissent. She ended her plea with the strong assertion that "no case has been or can be made for wiretapping in the state of Montana" and further stated that wiretapping reflected "a blatant disregard for the privacy of individuals." No one stood to oppose the concept of prohibiting wiretapping and no one rejected an individual's right to privacy. However, there was opposition to her amendment, which centered on concerns about the broadness of its language. Some delegates expressed concern that a ban on intercepting any communication would go beyond prohibiting wiretapping and also prohibit investigations into obscene calls and other phone-based harassment and prohibit prison officials from monitoring non-privileged communications to and from incarcerated individuals. In the

[25] *Verbatim Transcript*, 5:1682 – 1689.

end, the language of the clause was slightly revised and collective assurances were made that neither the committee nor the convention as a whole intended to authorize or allow electronic surveillance.[26]

The evolution of the committee's search and seizure proposal is a clear example of the public demanding stronger protections for individual rights than existed at the federal level. This public demand resulted in a constitutional clause with the clear intent of protecting individual privacy. This clause, in combination with the right to privacy, has resulted in strong protections for individual rights in Montana's criminal law.[27]

The concept of a right to privacy was not limited to notions regarding government intrusion through searches or electronic surveillance. The delegates, and the people of Montana, held a broader conception of privacy, which was reflected in the parallel proposal for a stand-alone right to privacy. Bob Campbell submitted his initial proposal, Delegate Proposal # 33, guaranteeing a right to privacy almost upon arrival at the convention on January 26, 1972. It initially read:

> The rights of individual dignity, privacy, and free expression being essential to the well-being of a free society, the state shall not infringe upon these rights without the showing of a compelling state interest.

This broad concept of privacy, related to concepts of freedom and quality of life, reflected legal developments at both the national and state level.[28]

In 1890, Louis D. Brandeis, future U.S. Supreme Court Justice, and Samuel D. Warren wrote a *Harvard Law Review* article that was widely considered to be one of the

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[26] Hillinger, "New Constitution"; *Verbatim Transcript*, 5:1682 – 1689.

[27] Melissa Harrison and Peter Mickelson, "The Evolution of Montana's Privacy-Enhanced Search and Seizure Analysis: A Return to First Principles," *Montana Law Review* 64 (2003): 245.

[28] Campbell, *Manuscript*; *Verbatim Transcript*, Delegate Proposal 33, 1: 127.

earliest articulations of the concept of a right to privacy. In this article, Brandeis and Warren argued that a right to privacy had always existed within the common law; it was, they maintained, generally submerged within an individual's property rights. The changing nature of society and the growth of technology, Brandeis and Warren asserted, had changed the ways that privacy was being invaded. For example, technology allowed for photographs of an individual to be easily reproduced and circulated without permission, a harm that was not adequately addressed under existing property rights in the common law. Brandeis and Warren called for the law to evolve and for the courts to apply the principle underlying common law property protections—that individuals had "a right to be let alone"—to a variety of non-property based violations of privacy. To ensure this right, Brandeis and Warren proposed "a general right to privacy for thoughts, emotions, and sensations expressed by an individual."[29]

The Fourth Amendment concepts of search and seizure, addressing the invasion of government into an individual's private space, were the first areas of constitutional law to gravitate towards a right to privacy. Despite the far-reaching implications of the Brandeis and Warren article, the concept of a more general constitutional right to privacy was somewhat slow to be adopted. The early cases regarding a right to privacy reflected Brandeis and Warren's argument for a right to privacy within the common law and, except for the search and seizure/wiretap issue, were mostly civil cases involving tort

[29] Louis D. Brandeis and Samuel D. Warren, "The Right to Privacy" in *Privacy and the Constitution: Privacy Rights and the Body*, ed. Paul Finkleman and Madeline Mercedes Plasencia (New York: Garland Publishing, 1999), 3: 303 – 330, originally published as Louis D. Brandeis and Samuel D. Warren, "The Right to Privacy," *Harvard Law Review* IV, no. 5 (1890): 193 – 220.

law. Based on the interpretations of the prominent Judge Thomas M. Cooley, privacy rights came to be reflected in four torts:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

States embraced the concept of a right to privacy much earlier than the federal government; between the 1930s and the 1960s most states in the country recognized some form of a right to privacy in tort law. [30]

The 1950s and 1960s saw an explosion of scholarship on the concept of a right to privacy and the debate regarding its breadth. During this time, legal scholars such as Alan Westin lamented growing intrusions into individuals' private lives. Westin believed that invasions of privacy were increasing in frequency and scope in part because of advances in technology, but also because of a growing culture of surveillance and information gathering, driven by both private and governmental interests. Legal scholars' increased focus on and recognition of a broad right to privacy challenged the status quo in federal

[30] Brandeis and Warren, "Right to Privacy," 303, 316; Alan F. Westin, "Science, Privacy, and Freedom: Issues and Proposals for the 1970's. Part II: Balancing the Conflicting Demands of Privacy, Disclosure, and Surveillance," *Columbia Law Review* 66, no. 7 (1966): 1205 – 1253;Applegate, *Bill of Rights*, 237 – 242, 341 – 355; Patricia A. Cain, "The Right to Privacy Under the Montana Constitution: Sex and Intimacy, " *Montana Law Review* 64 (2003): 99 – 132; William L. Prosser, "Privacy," *California Law Review* 48, no. 3 (1960), in *Privacy and the Constitution: Privacy Rights and the Body*. The definition of a tort according to *Black's Law Dictionary* is "a civil wrong, for which the remedy is a common-law action for . . . damages," *Black's Law Dictionary*, Bryan A. Garner, ed., 8th ed, "tort." Judge Thomas M. Cooley was a leading jurist and legal scholar from Michigan in the second half of the nineteenth century. For more information on Judge Cooley see, Paul D Carrington, "The Constitutional Law Scholarship of Thomas McIntyre Cooley," *The American Journal of Legal History* 41, no. 3 (July, 1997): 368 – 399.

constitutional and statutory law, which continued to limit the right to privacy to search and seizure-type matters until 1965.[31]

That year federal constitutional law underwent a massive change with the finding of a right to privacy in *Griswold v. Connecticut*. The *Griswold* case involved a Connecticut statute which prohibited the dissemination of contraceptives, or information about them. Two prominent doctors challenged the law on behalf of their married patients who were seeking birth control. The Court held that access to information about contraceptives and decisions between married couples regarding contraceptive use fell within a protected marital right to privacy. A right to privacy, marital or otherwise, is not explicitly stated in the U.S. Constitution. Writing for a majority of the U.S. Supreme Court, Justice William Douglas asserted that this right was contained in the "penumbras," or shadows, of the First, Third, Fourth, Fifth, and Ninth Amendments. Basing their reasoning on precedent and the underlying principles behind the aforementioned Amendments, the Court stated that the Bill of Rights recognized a "zone of privacy created by several fundamental constitutional guarantees." This zone of privacy included a right to privacy in association, of which, the Court said, marriage was the most fundamental. The Court's recognition of this zone of marital privacy was reminiscent of the first of the four privacy torts described by Judge Cooley. Additionally, the Court said the Fourteenth Amendment's Due Process Clause protected this right from state as well as federal action. Significantly, while many disagreed with it, this decision elevated the right to privacy to the level of the most fundamental rights in the United States. This

[31] Brandeis and Warren, "Right to Privacy"; Westin, "Privacy"; Applegate, *Bill of Rights*, 237 – 242, 341 – 355; Cain, "The Right to Privacy."

decision, and the announcement of a federal constitutional right to privacy, led to a series of cases in which attorneys argued that state laws or actions violated individuals' right to privacy. For example, at the time of the Montana Constitutional Convention a number of cases, including *Doe v. Bolton* and *Roe v. Wade*, were working their way up to the Supreme Court, arguing that the newly announced right to privacy encompassed a woman's right to decide to terminate her pregnancy.[32]

The debate surrounding a right to privacy was neither limited to the federal level, nor was it new to Montana. In 1972 the majority of states embraced the concept of a right to privacy through their courts, though generally it was limited in scope. Two states, Arizona and Washington, had limited privacy rights protected by their constitution. The year of Montana's constitutional convention, Alaska amended its constitution to include a fairly broad right to privacy. Prior to the convention, Montana embraced the concept of a constitutional right to privacy largely through search and seizure cases, as discussed above. However, like many states, the Montana Supreme Court had been faced with the question of whether a right to privacy existed in tort law. The first time this question arose was in *Bennett v. Gusdorf* (1935), where a young woman sued a photographer for publically displaying her photograph without her consent; she argued this was a violation of her right to privacy. The court acknowledged that some jurisdictions had

[32] Griswold v. Connecticut, 381 U.S. 479 (1965); Cain, "The Right to Privacy." The delegates had access to information regarding how a right to privacy might prohibit restrictions on abortions, an issue which would become controversial in the near future. Applegate's *Bill of Rights* discussed the major cases (*Roe* and *Doe*) working their way through the federal courts as well as the general legal theories behind the issue. He went so far as to discuss Montana's existing restrictions on abortion and state that these restrictions would most likely be unconstitutional when analyzed against a right to privacy. The delegates themselves however, did not explicitly discuss abortion and the right to privacy clause. The convention as a whole rejected a proposal to ban abortion by a vote of 71 – 15, with some delegates saying it was a legislative issue. See, Applegate, *Bill of Rights*, 237 – 242, 341 – 355, and Associated Press, "Abortion Issue Flares, Fails in Con Con," no date but most likely mid-March, Brown Collection, 148.

acknowledged the existence of a common-law right to privacy but passed on the question of whether this right existed under Montana law. Instead, the court held that the actions of the photographer violated the contract he had with the young woman. [33]

In 1952 the Montana Supreme Court firmly embraced the concept of a right to privacy in tort cases in *Welsh v. Roehm et al*. The case involved a landlord who moved into his tenant's apartment without permission, refused to leave, and harassed and generally interrupted the family's normal life. The decision was notable because of the strong language the court used in upholding a right to privacy that could be protected from intrusions. This case, in combination with the tenor of Montana's search and seizure protections, resulted in a right to privacy that was protected to some extent from both private and governmental intrusions. The language used by the state supreme court in *State v. Brecht* (1971), the case which excluded testimony regarding an overheard telephone conversation, reaffirmed the ruling in *Welsh v. Roehm* and hinted at the existence of a broad privacy right. While the Montana courts had embraced the concept in tort law and search and seizure law, in 1972 there was no explicit right to privacy in Montana's statutes or constitution. [34]

The tenuous nature of both the federal and state right to privacy was very clear to the staff and delegates at the convention. The background materials provided to BOR committee members on the right to privacy included an overview of the philosophical and legal writings on the topic, the few applicable court cases, and an overview of Montana's privacy law. The materials discussed the controversy surrounding the right to

[33] Applegate, *Bill of Rights*, 237 – 242; Cain, "The Right to Privacy"; Bennett v. Gusdorf, 101 Mont. 39; 53 P.2d 91 (1935).

[34] Welsh v Roehm 125 Mont. 517, 241 P.2d 816, (1952); State v. Brecht (1971).

privacy at the federal level and its potential impermanence. In his *Bill of Rights* document, Rick Applegate warned:

> There is considerable dissension over the recent period of judicial activism on the part of the Warren Court and its alleged circumvention of the principles of federalism in its extension of federal civil liberties protections to bind the states. Of course, this means that the federal Court's status as primary guardian of civil liberties may be only temporary—or at least that it may not be definitive.

Borrowing heavily from Westin, a leading advocate for establishing a broad right to privacy, Applegate urged the Committee to protect associational, communicative, and personal privacy. He also presented extensive information on the reasons state constitutions should go beyond federal protections. Two of these reasons in particular were consistent with state constitutionalism advocates. First, he argued that leaving the protection of civil liberties to the federal government encouraged more intrusion into the states by the national government. Second, he asserted that, given the conservative opposition to newly upheld rights such as the right to privacy, the likelihood of continued protection of these rights was tenuous.[35]

The BOR Committee also received correspondence that expressed concern about a shift in the Supreme Court's philosophy on constitutional interpretation and argued that it was now the role of "state constitutions to make certain individual rights are safeguarded." The constitutional convention delegates were urged, both by staff and by many in the public, to adopt stronger protections for civil liberties, and explicitly the right to privacy, than existed at the federal level. The Butte newspaper, *The Montana Standard*, editorialized that a right to privacy was necessary because times had changed

[35] Applegate, *Bill of Rights*, 54. Applegate's reference to the potential for future courts to reverse the decisions of the Warren court was reminiscent of the language used by state constitutionalism advocates in the mid-to-late 1970s.

as a result of technology, because government had expanded its reach, and because corporations had increased their intervention in individuals' lives. *The Standard* noted that the federal Constitution and the existing 1889 Montana constitution provided inadequate protections against intrusions into one's privacy, but that the convention could remedy this by adopting a strong privacy clause.[36]

The BOR committee accepted this challenge and eventually put forth a proposal that sought to cement the tenuous right to privacy in a way that reflected contemporary thinking on the topic. The legal and philosophical background behind the movement to grant broad privacy rights was evident in Bob Campbell's initial proposal # 33 regarding "the right of individual dignity, privacy, and expression." Numerous newspaper articles applauded this proposal for expanding individuals' protection against government interference. Additionally, delegates communicated to their constituents regarding the proposal in a supportive manner.[37]

The proposal, however, did not last long in its original form. The Style and Drafting Committee argued that it contained too many distinct and different rights and needed to be broken up into separate proposals for each distinct right. Campbell responded by breaking up his proposal into two different proposals; he felt that a pre-

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[36] Don (D.A.) Scanlin, ACLU, to the Bill of Rights Committee, January 21, 1972, RG22, Box 2, Folder 2-37, MHSL; Public Petition, "Dignity, Privacy and Free Expression"; Editorial, "Let's have bill of rights"; Editorial, "The Right of Privacy," *The Montana Standard*, February 3, 1972.

[37] John Kuglin, "Con Con and Legislature: Much Alike, Much Different," *Great Falls Tribune*, no date but likely mid-February, Brown Collection, 96; Gary Langley, "Individual Rights Prime Concern of Delegates," *Missoulian*, February 9, 1972, Brown Collection, 53; Dennis E. Curran, "Convention May Give Individuals More Rights," *Helena Independent Record*, January 31, 1972, Brown Collection, 37; Editorial, "The Right of Privacy"; George James, "Con-Con Comments by the Delegates from District 23," no date most likely early February, possibly Feb 5th, no newspaper identified, Brown Collection, 40; Bob Gilluly, "Now At Hand, Dr. Ward Reports Serious Business of Convention," *Hamilton Newspaper*, February 16, 1972, Brown Collection, 87.

existing proposal (DP # 61) guaranteeing equal rights and individual dignity addressed the portion of his original proposal guaranteeing a right to dignity. He amended the free speech clause to include a right of expression. Finally, he drafted the proposal for a right to privacy that would ultimately be adopted by the Convention. Campbell subsequently said he "wanted to state it as absolute as possible but still have room for recognizing situations where the state could enter a private home for such emergencies as fighting a fire or a call to stop violence toward an adult or child needing immediate protection." As there were only a few examples of privacy clauses in other state constitutions, all of which Campbell found too permissive, he had to turn to other sources for inspiration. Campbell has said that he "used the pattern in the right to bear arms in the Second Amendment by making a statement that could not be questioned and then state the right with the highest possible standard for court review." As of February 3, 1972 the final product read: "The right of privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."[38]

Direct public response to any of the specific proposals was minimal. Support for the general concept of a right to privacy, however, was fairly extensive. Concerns regarding individual privacy were pervasive throughout the testimony before the BOR Committee. H.R. Williams wrote the Missoula delegation to share his belief that "We need a strong bill of rights, especially concerning the rights of individual dignity, privacy,

[38] Bob Campbell's original proposal on privacy, DP # 33, read: "The rights of individual dignity, privacy, and free expression being essential to the well-being of a free society, the state shall not infringe upon these rights without the showing of a compelling state interest." Campbell, *Manuscript*; Campbell, Introduction; Minutes of the Seventh Meeting of the Bill of Rights Committee, Montana Constitutional Convention, February 8, 1972, Box 2, Folder 2-37, RG 22, MHSL. Campbell's interpretation that the Second Amendment provided a model for a clear and unquestioned right has not been shared by many scholars who have studied the Second Amendment. See, Chapter 3, note 30.

freedom of expression, and a clean environment." Much of the testimony and correspondence reflected the type of concerns about growing technology, private and governmental, expressed by Alan Westin and Rick Applegate. Testifying before the BOR Committee on January 26, 1972, Journalist Daniel Foley commented about the right to privacy:

> The Committee is very concerned about the right of privacy, and well that you should be in this era of credit checks and computer banks, wiretaps and bugging devices, and military spying on those exercising their rights of free speech and assembly.[39]

Tom Towe, a representative from Billings, was as close to an opponent of Campbell's proposal as existed. He submitted multiple alternative proposals for a right to privacy, all which sought to define in significantly more detail exactly what a right to privacy would protect. Towe's proposals sought to define three areas where privacy would be protected: "home and other physical areas," "communications," and "the mind." Towe's proposals, while asserting that since the *Griswold* decision "everyone has assumed that privacy is essential and must be protected," would leave out:

> [P]eripheral claims which, in my opinion, are more properly described as freedom to control one's body, freedom to act in any manner that does not interfere with another and freedom from bureaucratic harassment—quite separate notions. [40]

The "peripheral claims" which Towe's proposal would leave out were of particular importance to scholars such as Westin, and, more importantly, to Bob Campbell, the clause's author. Campbell's February 3, 1972, speech introducing his right

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[39] H.R. Williams to the Missoula County Delegates, February 9, 1972, MSS 585, Box 6, Folder 2, Speer Papers, UMML; Daniel J. Foley, "Testimony before the Bill of Rights Committee on Public Access to State Records," January 26, 1972, RG22, Box 2, Folder 2-38, MHSL; Public Petition, "Dignity, Privacy and Free Expression"; Boettger, "Testimony."

[40] Towe, "Privacy"; Towe to Dorothy Eck, March 6, 1972.

to privacy proposal was clearly influenced by Brandeis and Warren's early advocacy of a "right to be let alone," Westin's advocacy for a broad privacy right that encompassed a variety of personal interactions and information, and the U.S. Supreme Court's embrace of a right to access and use birth control, as well as other forms of controlling one's body. Campbell wanted the broadest and most absolute privacy right possible but one that would still acknowledge that "there are areas of legitimate state interest and these areas may affect an individual's right to privacy." Campbell was not alone in his support for the broadest privacy clause that could be applied in a practical manner, and no one on the BOR committee made an attempt to substitute Towe's more limited right to privacy for Campbell's broad proposal. Indeed, the committee wholeheartedly endorsed Campbell's proposal, adopting it on February 8, 1972. [41]

The press reported that the BOR committee's proposed Bill of Rights generally expanded individual rights. The right to privacy was almost universally commented on in these newspaper articles, with varying levels of explanation regarding its extent and potential effects. It was portrayed to the public in the *Helena Independent Record* as protecting "individuals from harassment by the state in so-called 'victimless crimes' where nobody is hurt." The *Missoulian* reported that the right to privacy could guarantee that "welfare recipients would not, for example, be required to answer 'embarrassing' personal questions when applying for welfare." Despite these potentially radical interpretations of the right to privacy, visible opposition was limited to Tom Towe, who simply wanted a slightly less extensive right to privacy, albeit one that would not extend

[41] Campbell, *Manuscript*; Campbell, *Introduction*; Minutes, Bill of Rights Committee Meetings January 21-March 1, 1972, RG 22, Boxes 2 and 3, Folders 2-37, 2-38, 3-1, and 3-2, MHSL.

to the soon-to-be more controversial aspects of a right to privacy reflected in *Roe v. Wade* or *Griswold*. Delegates reported to their constituents that privacy concerns had dominated the BOR committee hearings, yet there is no evidence of constituents or the public expressing dissatisfaction with this focus. [42]

The embrace of a broad right to privacy followed the proposal from the BOR Committee to the convention floor. Bob Campbell recalls that when the proposed Declaration of Rights article was introduced on March 7, 1972 to the full convention, the section on the right to privacy "received the strongest support of any in the Declaration of Rights article." Regardless of party membership or liberal or conservative philosophical ideology, the delegates supported the concept of a right to privacy: Campbell noted that "No one rose to speak against it." This apparently unanimous support for a right to privacy was an example of the phenomenon of the political right and left agreeing on an outcome for somewhat different reasons. While conservatives and liberals in the convention embraced the idea of a "right to be let alone," it seems that they had different ideas about what constituted intrusions on this right. The more liberal delegates and staff expressed particular concerns regarding police misconduct, and the potential for state laws prohibiting abortion and contraception. Conservative delegates and citizens expressed concerns regarding big government and the increasing scope of governmental powers. There were shared concerns, however; individuals from both political ideologies expressed fear of technological developments and government intrusion, such as

42 Associated Press, "Gun Lobbyists"; John Kuglin, "Committee Sets Forth Proposal for 'Rights of Individuals," *Great Falls Tribune*, February 4, 1972, Brown Collection, 60; Langley, "Individual Rights"; Curran, "Convention May Give Individuals More Rights"; James, "Con-Con Comments"; Gilluly, "Now At Hand."

wiretapping. Additionally, no one argued with the interpretations of the other delegates. For example, when Bob Campbell, on the convention floor, discussed the *Griswold* case and how the right to privacy was used to allow access to birth control as a reason why the clause should be adopted, none of the more conservative delegates voiced opposition to such applications of Montana's right to privacy clause. [43]

Surprisingly, once the clause had been introduced on the floor of the convention, Helena delegate George Harper, an Independent and an ordained Minister, proposed striking the provision allowing for invasion of privacy with a compelling interest. He wanted an absolute right to privacy. He appeared to believe the search and seizure clause should, and did, provide the only acceptable purpose for invading individual privacy. Surprised, Bob Campbell agreed and the convention passed the proposed amendment. Later on, Tom Ask, a delegate and former county attorney, approached Campbell and said he intended to propose an amendment reinserting "without the showing of a compelling state interest." Law enforcement officials and organizations had expressed concerns that an absolute right to privacy would conflict with the search and seizure clause and prohibit any and all search warrants. Campbell communicated with the professor of constitutional law at the University of Montana, Larry Elison, regarding the absolute right to privacy. Elison believed that even though the convention had stripped out the compelling interest provision the courts would balk at applying an absolute right.

[43]Campbell, *Manuscript*. To explore the subtle differences in rationale for a right to privacy see, Applegate, *Bill of Rights*, 213 – 241, 288 – 289, 345 – 348; *Verbatim Transcript*, 5: 1680 – 1682; Campbell, *Introduction*; Citizens for Constitutional Government to Bill of Rights Committee, January 25, 1972, RG 22, Box 2, Folder 2-37, MHSL. Citizens for Constitutional Government did not speak directly to the concept of a right to privacy but did provide extensive comments illustrating the far-right's fear of big government and desire to be protected from governmental intrusion.

Based on this discussion and Tom Ask's discussions with law enforcement, the next day Campbell supported the reinsertion of the compelling interest provision. Ask and Campbell informed the convention that Harper's amendment had been adopted hastily because the concept of an absolute right to privacy was so appealing to the delegates. They shared the concerns of law enforcement and Professor Elison's analysis with the convention. The proposed amendment easily passed the convention on March 8, 1972 after Campbell and Ask explained their reasoning.[44]

The proposed Montana constitution now had an explicit and far-reaching right to privacy, which offered a strong guarantee of protection for a right that had just recently been recognized at the federal level. Indeed, Montana's provision was designed to go beyond the federal privacy right and to establish the most protection for privacy of any state in the country. Members of the Montana public had encouraged the delegates to guarantee strong protections for privacy. Their advocacy and the actions of the convention are clear examples of the role that constitutional revision played in establishing the legal basis for state constitutionalism.

According to legal scholar Patricia Cain, "the state of Montana created the strongest protection for privacy rights of any state in this country." Without the efforts of the Montanans and delegates responsible for this clause, it would have been very difficult for future judges to argue that Montana's constitution protected privacy at a higher level than the federal Constitution. In reality however, this clause, often in combination with the

[44] Campbell, *Manuscript*; Cain, "The Right to Privacy"; Elison and Snyder, *The Montana State Constitution*, 49 – 53; *Verbatim Transcript*, 6: 1850 – 1853.

dignity clause, would be used by attorneys and the courts to protect individual rights in Montana at a level that went well beyond the federal Bill of Rights.[45]

[45] Elison and Snyder, *Montana State Constitution*, foreward; Cain, "The Right to Privacy."

Chapter 5: Individual Dignity

The Montana Constitutional Convention delegates' interest in creating a foundational document that protected individual rights at an unprecedented level resulted in numerous provisions that went beyond the protections in the federal Bill of Rights. In addition to the far-reaching privacy clause, the convention adopted a section that included both a broad anti-discrimination provision and an equal protection clause. This section of the Montana Declaration of Rights, entitled "Individual Dignity," has been lauded by legal scholars as "novel" and as a unique "approach to 'equal protection' and non-discrimination law." It is an excellent example of how the values and mores of the mid-twentieth century influenced the advocates for state constitutional revision and state constitutionalism. The individual dignity clause is complex and packs a number of related rights concepts into three short sentences. Exploring the history of these concepts and how they came to be expressed in the Montana constitution greatly contributes to our understanding of state constitutionalism.[1]

The clause itself—section 4, Article II of the 1972 Montana Constitution—reads:

> **Individual Dignity.** The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.[2]

This brief paragraph reflects three intricate concepts about individual rights and the role of government: a notion of human dignity that cannot be violated; a

[1] Larry M. Elison and Fritz Snyder, *The Montana State Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 2001), 10.

[2] 1972 Montana Constitution, Article II, Section 4.

guarantee of equal protection under the law; and a protection from discrimination based on a variety of characteristics, which is extended to discrimination by both governmental and private actors. These concepts reflect several of the emerging rights that scholars of constitutional revision had identified as areas where new state constitutions could offer stronger guarantees than the federal Constitution. This chapter explores the history of these concepts at the federal and state level and then recounts the process by which they became incorporated into the Montana constitution.[3]

In many respects the Montana dignity clause encapsulates the decades of legal developments brought on by two major social and political movements: the civil rights movement and the women's movement. These movements sparked interconnected legal changes based largely on the Fourteenth Amendment's equal protection clause as well as new laws and interpretations based on the concept of non-discrimination. These developments first took place in response to the civil rights movement, which forced a radical change in the interpretation and application of the Fourteenth Amendment's equal protection clause.[4]

As discussed in chapter one, the interpretation of the Fourteenth Amendment was severely limited following the Civil War. In addition to the attempts to use the privileges and immunities clause to apply the protections contained in the Bill of Rights to the

[3] See Chapter two, notes 8 – 12.

[4] For more information on the history of the women's movement and the civil rights movement and their influence on America's legal system see, Morton J. Horwitz, *The Warren Court and the Pursuit of Justice* (New York: Hill and Wang, 1998), Chapter three; Kathleen C Berkeley, *The Women's Liberation Movement in America* (Westport, CT: Greenwood Press, 1999); David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (Berkeley: University of California Press, 1998); and Lawrence M. Friedman, *American Law in the Twentieth Century* (New Haven: Yale University Press, 2002), Chapters 10, 14, and 17.

states, activists seeking to address both racial and gender discrimination challenged discriminatory laws and practices under the equal protection clause of the Fourteenth Amendment. [5] However, the U.S. Supreme Court's early interpretations of the equal protection clause limited its use in two ways. The first was the acceptance of the "separate yet equal" doctrine in *Plessy v. Ferguson* (1896). In this notorious nineteenth century decision, the Court upheld a Louisiana law requiring black and white rail passengers to ride in separate cars, thus paving the way for unfettered racial segregation laws and practices throughout much of the United States. This interpretation greatly limited the equal protection clause as a tool to end discriminatory practices.[6]

The second way the Court limited the equal protection clause's scope was through its definition of state action. The phrase "no state" precedes the language of the equal protection clause: "shall deny to any person within its jurisdiction the equal protection of the laws." In the late nineteenth century, the Supreme Court ruled that the clause only protected individuals from state, as opposed to private, discrimination; this is known as the "state action" doctrine, which is the first step in determining whether the equal protection clause has been violated. In the Supreme Court's first ruling defining "state action," it held in the *Civil Rights Cases* (1883) that state action meant only acts by

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[5] Jacobus tenBroek, "Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment," *California Law Review* 39, no. 2 (June, 1951): 203; U.S. Constitution, Fourteenth Amendment, Section 1.

[6] Plessy v. Ferguson, 163 U.S. 537 (1896); Friedman, *American Law in the Twentieth Century*, 111, 293, 604; Henry J. Abraham and Barbara A. Perry, *Freedom and The Court: Civil Rights and Liberties in the United States*, 8th ed. (Lawrence: University of Kansas Press, 2003), Chapter 7; Lawrence Goldstone, *Inherently Unequal: The Betrayal of Equal Rights by the Supreme Court, 1865-1903* (New York: Walker & Co., 2011). The term "Jim Crow" was a slang term used to describe African-Americans and was derived from a nineteenth century minstrel song. It now refers to the system of laws and practices that were instituted in the postbellum South for the purpose of segregating and discriminating against former slaves and other African-Americans. For more information on the "Jim Crow" era, see Jerrold M Packard, *American Nightmare: The History of Jim Crow* (New York: St. Martin's Press, 2002).

a state's legislature, its executive branch, or its upper-level courts. Applying this narrow concept of state action in the *Civil Rights Cases,* the Court overturned the first civil rights law, the Civil Rights Act of 1866, which prohibited discrimination in public accommodations. The Court struck down the law on the premise that discrimination in public accommodations (for example, denying service in a restaurant or inn) was private rather than state action and therefore beyond the scope of Congress' power to ameliorate under the Fourteenth Amendment.[7]

The combination of this narrow definition of state action and the overturning of the major civil rights legislation of the period severely limited the ability of individuals to use the equal protection clause to challenge discrimination by lower-level state employees, private actors, or other agents. In addition, with the end of Reconstruction and the absence of a legislative will to address civil rights, laws and practices segregating and discriminating against African-Americans flourished. Discriminatory practices by the states even received the approval of the U.S. Supreme Court on several occasions. Those seeking to combat racial segregation and discrimination following the *Civil Rights Cases* and *Plessy* were left with little or no legal recourse.[8]

During this same era, the Court also heard challenges from women's rights activists alleging violations of the Fourteenth Amendment, and some of the women made claims under the equal protection clause. Women had been treated differently than men

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[7] Abraham & Perry, *Freedom and The Court*, chapter 7; Civil Rights Cases, 109 U.S. 3, (1883). Other early state action cases include, Strauder v. West Virginia, 100 U.S. 303, (1880), Virginia v. Rives, 100 U.S. 313, (1880), Buchanan v. Worley, 245 U.S. 60, (1917).

[8] Berea College v. Kentucky, 211 U.S. 45 (1908); Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action," *Stanford Law Review* 49, no. 5 (1997): 1111 – 1148; Michael Klarman, "An Interpretive History of Modern Equal Protection," *Michigan Law Review* 90, no. 2 (1991): 213 – 318.

under the law in the United States since its inception as a country. This unequal treatment of women and men in the law included such practices as the legal doctrine of coverture, which posited that women were not independent legal entities from their husbands, or in some cases, fathers. As a result married, and some single, women were prohibited from making contracts, entering into business arrangements, or maintaining legal control of their financial assets. Additionally, women were often treated differently in criminal cases, prohibited from voting, denied the right to hold elected office, not allowed to serve on juries, and in many cases barred from entering specific professions. Women's rights activists, many of whom had been intimately involved with the abolitionist movement, unsuccessfully attempted to convince Congress to explicitly include women in the protections guaranteed by the Fourteenth and Fifteenth amendments. Refusing to admit failure, they subsequently challenged discriminatory laws hoping that the courts would apply the amendments' protections to women.[9]

In the case of *Bradwell v. Illinois* (1873), Myra Bradwell challenged the denial of her admission to the Illinois state bar as a violation of the privileges and immunities clause of the Fourteenth Amendment. Bradwell had been denied admission simply because she was a woman, despite the fact that she passed the bar exam and edited and published a highly respected legal journal. In what would appear to the modern reader as highly inflammatory and stereotypically gendered language, the Court summarily

[9] Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000), chapter two; David E. Kyvig, "Historical Misunderstandings and the Defeat of the Equal Rights Amendment," *The Public Historian* 18, no. 1 (1996): 45 – 63.

dismissed her claims and reaffirmed the narrow reading of the privileges and immunities clause that had recently been announced in the *Slaughterhouse Case*.[10]

The Court also rejected a claim in *Minor v. Happersett* (1875), brought by leaders active in the Seneca Falls convention, that the Fourteenth Amendment's guarantee that all persons born or naturalized in the United States were citizens meant that American women were citizens and thus guaranteed the right to vote. The Court held that suffrage was not an automatic right of citizenship and that the framers of the Amendment would have explicitly stated their intention to extend suffrage to women if they had intended to do so. As a result of the Court's refusal to apply the Fourteenth Amendment to women and women's lack of political power, the women's movement focused almost solely on the campaign for suffrage until the 1920s.[11]

These cases limited the scope of the Fourteenth Amendment for decades. It took concerted legal campaigns, linked directly to the civil rights and women's rights movements, to change the interpretation of the Fourteenth Amendment. In particular, given the evisceration of the privileges and immunities clause in the *Slaughterhouse Cases*, activists in the twentieth century focused their efforts on the equal protection clause. The civil rights movement began to see small successes in the 1930s, but significant change in equal protection and non-discrimination law was largely ushered in during the Warren court era. The decisions of that court radically changed legal concepts of equal protection and discrimination and had an immense impact on American political

[10] Bradwell v. Illinois, 83 U.S. 130, (1873).

[11] Bradwell v. Illinois (1873); Minor v. Happersett, 88 U.S. 162, (1875); Kryvig, "Historical Misunderstandings."

culture and, to our interest here, on specific individual delegates to the Montana Constitutional Convention.[12]

Two major shifts in interpretation resulted in a more expansive application of the equal protection clause: the Supreme Court's abandonment of the separate-but-equal doctrine and its broadening of the definition of state action. These changes were directly related to the efforts of the civil rights movement. The abandonment of the separate-but-equal doctrine was the result of a legal strategy designed to combat the racial discrimination and segregation that was rampant in the Jim Crow South and common throughout the United States. This strategy was originally developed by the lead attorney for the National Association for the Advancement of Colored People (NAACP), Charles Hamilton Houston, and carried on to fruition by Thurgood Marshall, a future member of the Warren court. The NAACP strategy focused primarily on educational facilities and began not by attacking the reigning legal interpretation of separate-but-equal, but by arguing that specific separate educational opportunities for African Americans were not equal to those for whites. The success of this strategy led to U.S. Supreme Court decisions ruling that a state's offer to send an African American student to law school out-of-state was not equal to the educational opportunity provided white law students in-state; that a separate law school created specifically for African Americans in Texas was not an equal educational opportunity because its prestige, library, and faculty were

[12] Abraham & Perry, *Freedom and The Court*, chapters 7 and 8; Bob Campbell, excerpt from unpublished manuscript sent via email February 19, 2010, in author's possession. (Hereafter cited as, Campbell, *Manuscript*); Rick Applegate, *Bill of Rights,* report no. 10 prepared by the Montana Constitutional Convention Commission for the delegates to the Montana Constitutional Convention, (Helena, Montana, 1971): 306 – 313 (hereafter cited as Applegate, *Bill of Rights*); On the era of political and social activism in the 1960s and 1970s see, Rodney P Carlisle and J Geoffrey Golson, *America in Revolt During the 1960s and 1970s* (Santa Barbara: ABC-CLIO, 2007).

substantially inferior to those provided white students at the University of Texas Law School; and that admitting an African American to the same graduate program as white students, but forcing him to be partitioned off from the rest of the class, was not equal treatment.[13]

This gradual attack on segregation in higher education led to the landmark case of *Brown v. Board of Education* (1954), which prohibited racial segregation in elementary and secondary schools. The Court found that segregated educational facilities were "inherently" unequal and thus a violation of the equal protection clause. This case, and the Court's decision to assign oversight of the implementation of school desegregation to federal district courts in *Brown II* (1955), initiated battles across the country over desegregation, most famously in the heavily segregated South. In a series of cases throughout the 1950s and 1960s the Warren Court consistently, and unanimously, rejected attempts by states to avoid desegregation and definitively rejected the separate-but-equal doctrine that had marked equal protection law for nearly sixty years. Despite the Court's consistent position, school desegregation took decades to be implemented; by the 1970s, the focus had shifted to northern schools and the role of busing to accomplish desegregation, making school desegregation still an important and controversial issue at the time of the Montana Constitutional Convention.[14]

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[13] David W. Blight, "Charles Hamilton Houston: The Legal Scholar Who Laid the Foundation for Integrated Higher Education in the United States," *The Journal of Blacks in Higher Education*, no. 34 (2001 – 2002):107; Missouri Ex Rel Gaines v Canada, 305 U.S. 337, (1938); Sweatt v. Painter, 339 U.S. 629, (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637, (1950).

[14] Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483, (1954); Brown v. Board of Education, 349 U.S. 294 (1955); Browder v. Gayle, 352 U.S. 903 (1956); Cooper v. Aaron, 358 U.S. 1, (1958); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, (1971); Abraham & Perry, *Freedom and The Court*, chapters 7 and 8.

The second major change to the way the U.S. Supreme Court interpreted the equal protection clause was that it adopted a broader view of state action. Whereas the Court had ruled in 1883 that state action was limited to laws and the actions of the state legislature, judiciary, and executive, beginning in the 1940s the Court expanded the actions which could trigger the guarantees of the equal protection clause. By the 1960s the Court had determined that state discriminatory action included political parties when their primaries were closed to African Americans and neighborhood associations that created covenants prohibiting the sale of homes to African Americans (because the enforcement of these covenants relied on state judicial action). In a major case that demonstrated how broadly it now viewed the equal protection clause, the Supreme Court held that the refusal of a privately owned coffee shop to serve African Americans was state action, because it leased space owned by the city. These cases reflected a willingness of the Court to apply the equal protection clause in instances where the state was not the primary discriminator, but merely related to the enforcement of the discrimination. Consequently, many attorneys and much of the general public began to view multiple forms of quasi-public discrimination as violating the concept of equal protection. At least some of the delegates to the Montana Constitutional Convention, many of whom were attorneys educated in the 1950s and 1960s, certainly shared these conceptions.[15]

[15] Smith v. Allwright, 321 U.S. 649, (1944); Shelley v. Kraemer, 334 U.S. 1, (1948); Burton v. Wilmington Parking Authority, 365 US 715 (1961); *Verbatim Transcript of Proceedings, 1972 Montana Constitutional Convention*, 7 vols., prepared by the Montana Legislature in cooperation with the Montana Legislative Council and the Constitutional Convention Editing and Publishing Committee (Helena, Montana, 1979): vol. 1, "Delegate Biographies and Delegate Proposals," 1: 650-661, available online at http://courts.mt.gov/library/montana_laws.mcpx (Accessed on June 3, 2010) (hereafter cited as *Verbatim Transcript*).

Racial discrimination was not, of course, limited to the actions of the government or private party actions that could be enforced by the government. Perhaps the most intractable forms of discrimination were those practiced by private individuals or organizations. Because the Fourteenth Amendment only protected individuals from "state" action, the Supreme Court could not prohibit these forms of discrimination under the equal protection clause. The civil rights movement and Congress therefore looked elsewhere for the authority to prohibit private discrimination. Their actions highlighted the pervasiveness of private discrimination and the importance of ending it, and bred popular familiarity with laws and legal concepts that sought to do so. Congress progressively became more willing to limit discrimination, and following the assassination of President John F. Kennedy, passed the groundbreaking Civil Rights Act of 1964. The Civil Rights Act prohibited discrimination on the basis of race or sex in employment and in public accommodations, such as hotels or restaurants. Fortunately for those who sought to end racial discrimination, the Supreme Court had, during the New Deal era, broadly expanded the meaning of the Commerce Clause of the Constitution. Consequently, instead of legislating under the Fourteenth Amendment, Congress relied on their power to regulate interstate commerce to pass this act. Continuing its broad reading of the clause, the Court upheld the law in two key cases: *Heart of Atlanta Motel v. U.S.* (1964) and *Katzenbach v. McClung* (1964). Emboldened by the Court's affirmation of the act, Congress passed a series of laws addressing discrimination, including the Equal Pay Act, the Voting Rights Act, and the Housing Rights Act. Collectively, these laws severely limited the legality of private discrimination.[16]

[16] Don Oberdorfer, *Senator Mansfield: The Extraordinary Life of a Great American Statesman*

This national focus on discrimination and the civil rights movement was transmitted to Montana through television, newspapers, and local connections to national organizations and key individuals. Indeed, for a state lacking in racial diversity, Montana played a significant role in the adoption of the Civil Rights Act and other civil rights legislation through their wildly-popular senior senator and U. S. Senate Majority Leader, Mike Mansfield. Senator Mansfield was central to developing the legislative strategy that led to the Civil Rights Act's adoption; despite his willingness to give others credit, he was considered by numerous senators to be key to its passage. This involvement with civil rights legislation appeared to be embraced by Montanans: Mansfield "coasted to re-election" in 1964 with 65% of the vote. The important role of this popular Montanan in the adoption of the civil rights act likely made the issue more prominent and important than it might have been otherwise in such a predominantly white northwestern state. [17]

Because Congress included sex as a prohibited category for discrimination in the Civil Rights Act, in the 1960s the courts began to apply equal protection and non-discrimination guarantees to women. While the Supreme Court had stalled the attempts of women's rights organizations to apply any part of the Fourteenth Amendment to women in the late 1800s, these activists had not given up on achieving equal legal status

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and Diplomat (Washington, D.C.: Smithsonian Books, 2003): 226 – 236; Heart of Atlanta Motel, Inc. v. U.S., 379 U.S. 241, (1964); Katzenbach v. McClung, 379 U.S. 294, (1964); Applegate, *Bill of Rights,* 306 – 313; Abraham & Perry, *Freedom and The Court*, chapters 7 and 8. The Voting Rights Act was passed under Congress's authority per section 2 of the Fifteenth Amendment.

[17] The 1970 Census identified Montana's total population as 694,000. Of those 663,043 (or 95.5%) were identified as White, 1,995 identified as Black, 27,130 identified as American Indian, 1,301 identified as Asian, and 940 identified as Other. Campbell Gibson and Kay Jung, *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For The United States, Regions, Divisions, and States*, prepared by the Population Division, Bureau of the Census (Washington, DC, 2002). Oberdorfer, *Mansfield*, 226 – 236; Jon Bennion, *Big Sky Politics: Campaigns and Elections in Modern Montana* (Missoula, MT: Five Valleys Publishing, 2004): 53 – 54.

for women. The movement's focus at the turn of the twentieth century was on gaining the right to vote, which was accomplished in many states during the first two decades of the 1900s and nationally through the Nineteenth Amendment to the U.S. Constitution in 1920. Other forms of legal equality—serving on juries, equal employment opportunities, equal inheritance rights, access to public benefits, and others—were still elusive. Despite the continual efforts of women's rights activists, the concept of treating women equally under the law was controversial well into the 1960s. For example, opponents of the Civil Rights Act of 1964 added protection against sex discrimination because they thought extending protections against discrimination based on sex would guarantee the bill's failure.[18]

Whereas the major *statutory* protections against discrimination based on race came after the major *constitutional rulings,* such as *Brown v. Board of Education*, discrimination based on gender was first prohibited by many of the same statutory protections—the Civil Rights Act and the Equal Pay Act—prior to being perceived as a constitutional right. Women's rights activists had long sought a constitutional prohibition of discrimination based on sex by advocating for the Equal Rights Amendment (ERA). The ERA was initially introduced in Congress in 1923 and a reintroduced each session until its passage. Passage of the ERA would have added an amendment to the U.S. Constitution, which read: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." As the delegates to the

[18] Kyvig, "Historical Misunderstandings,"49; Abraham & Perry, *Freedom and The Court*, chapter 8; Friedman, *American Law in the Twentieth Century*, chapter 17; Ronald Bender, "Title VII Seven Years After: A Glance at the Basic Statutory Scheme and Content of Title VII of the Civil Rights Act of 1964 and the Judicial Glass Placed Upon it by Recent Developments," *Montana Law Review* 32 (1971): 229 – 247.

Montana Constitutional Convention prepared to draft a new constitution, the ERA was working its way through Congress; however, it was not voted on by Congress until after Montana had drafted its new constitution in 1972.[19] Parallel to the campaign for the ERA were changes in the way the U.S. Supreme Court applied equal protection concepts to discrimination based on gender. The first U.S. Supreme Court decision to extend equal protection to women was decided in November of 1971, just months before the ERA passed Congress and before the Montana Constitutional Convention convened. This case, *Reed v. Reed*, involved an Idaho law that gave preference to males over females in the administration of estates. The Reed's son had passed away, the couple had separated and both sought to be named the executor of their son's estate. The Idaho law stated that men were automatically given preference when it came to appointing an executor to an estate; therefore the probate court appointed Mr. Reed. Mrs. Reed challenged the law and argued that it was a violation of the equal protection clause of the Fourteenth Amendment. Since this was a case of sex discrimination, the state simply had to prove the discriminatory law served a "rational purpose."[20] Even under this permissive test, the Supreme Court

[19] The Montana campaign on the Equal Rights Amendment began in 1973. There appears to have some organized opposition to the ratification of the federal amendment. Scholars have not explored the reasons why opposition arose to the ERA in Montana in general, nor have they explored why those same people did not raise similar concerns to the Montana constitution's dignity clause. Montana ratified the Equal Rights Amendment in 1974. For more information on the history of the ERA campaign in Montana, see Montana Era Ratification Council / Montana Equal Rights Council records, Collection Number MC 185, held at the Montana Historical Society Archives and Library, Helena, MT.

[20] The Supreme Court has established three tests for determining whether the state has violated constitutional protections: rational basis, which requires the state to prove they had a rational basis for drawing the discriminatory distinction and that their objective was permissible; heightened scrutiny, which did not arise as a test until the 1973 *Frontiero v. Richardson* decision and wasn't solidified until the 1976 decision in *Craig v. Boren*, requires the state to show that their discriminatory distinction had a substantial relationship to an important government objective; and strict scrutiny, which is the standard for racial discrimination and denials of fundamental rights, requires the state to show a compelling state interest and prove that the discriminatory action was narrowly tailored to meet this interest. Frontiero v. Richardson,

determined that the law violated the equal protection clause of the Fourteenth Amendment. For the first time, women were protected against discrimination by the U.S. Constitution. Combined with the drastic changes in the application of the Fourteenth Amendment to racial discrimination, the extension of equal protection guarantees to women greatly expanded the scope of the Fourteenth Amendment. This expansion of the Fourteenth Amendment was very recent when the Montana Constitutional Convention met, and like many states, Montana had not yet replicated these advances in federal law.[21]

The short history of equal protection and non-discrimination law in Montana highlights the extent to which these were emerging rights at the time of the constitutional convention. Before the new constitution, Montana did have some equal protection and non-discrimination guarantees; however, these were mostly statutory provisions. The constitutional protections that did exist mostly reflect the concerns of the late 1880s and had rarely, if ever, been enforced in court. The 1889 Constitution contained four provisions addressing issues related to equal protection and non-discrimination:

> Article III, Section 3:
>
> All people are born equally free and have certain natural, essential, and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties, of acquiring, possessing, and protecting property, and of seeking and obtaining their safety and happiness in all lawful ways.
>
> Article III, Section 25:
>
> Aliens and denizens shall have the same right as citizens to acquire, purchase, possess, enjoy, convey, transmit, and inherit mines and mining property, and

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411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190 (1976); Abraham & Perry, *Freedom and The Court,* chapter 8.

[21]Reed v. Reed, 404 U.S. 71, (1971); Kyvig, "Historical Misunderstandings"; Abraham & Perry, *Freedom and The Court,* chapter 8; Bender, "Title VII."

> milling, reduction, concentrating, and other works, and real property treating ores and minerals: provided that nothing herein contained shall be construed to infringe upon the authority of the United States to provide for the sale or disposition of its mineral and other public lands.[22]
>
> Article III, Section 28:
>
> There shall never be in this state either slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted.
>
> Article VII, Section 9:
>
> No religious or partisan test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as teacher or student; nor shall attendance be required at any religious service whatever, nor shall any sectarian tenets be taught in any public educational institution of the state; *nor shall any person be debarred admission to any of the collegiate departments of the university on account of sex.*[23]

In addition to these constitutional guarantees, in 1965 Montana had adopted a public accommodations law, based on the federal Civil Rights Act of 1964, which made it illegal if "any place of public accommodation or amusement shall discriminate against any person or group of persons solely on the ground of race, color or creed." The same

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[22] 1889 Montana Constitution, Article III, Section 25. This section reflects a debate that took place in the West during the mid-late 1880s regarding Chinese immigration and labor. Numerous Americans were engaged in efforts to exclude Chinese individuals from immigrating to the U.S. and from working in particular fields. These efforts also extended to laws and constitutional provisions prohibiting Chinese immigrants, and other non-citizens, from holding property or working mining claims. For example, Oregon's constitution prohibited future Chinese immigrants from owning property or working a mining claim. See, David Alan Johnson, *Founding the Far West: California, Oregon, and Nevada, 1840 – 1890* (Berkeley: University of California Press, 1992), 180 – 181, chapters 7, 8, and 9; Paul Kens, "Civil Liberties, Chinese Laborers, and Corporations," in *Law in the Western United States*, edited by Gordon Morris Bakken (Norman: University of Oklahoma Press, 2000): 499 – 502; Lucy Salyer, "American Citizenship and Asian Immigration," in *Law in Western United States*, 503 – 505; and Marie Rose Wong, *Sweet Cakes, Long Journey: The Chinatowns of Portland, Oregon* (Seattle: University of Washington Press, 2004). On the history of the Chinese in Montana see, John R. Wunder, "Law and Chinese in Frontier Montana," *Montana: The Magazine of Western History* 30, no. 3 (Summer, 1980): 18 – 31; and Robert R. Swartout, Jr., "Kwangtung to Big Sky: The Chinese in Montana, 1864-1900," *Montana: The Magazine of Western History* 38, no. 1 (Winter, 1988): 42 – 53.

[23] 1889 Montana Constitution. Article VII, Section 9, emphasis mine. Montana's 1889 Bill of Rights was adopted, almost word-for-word, from the Colorado constitution. For more on the debates surrounding issues of discrimination, race, and gender see, Gordon Morris Bakken, Rocky *Mountain Constitution Making, 1850-1912* (Westport, CT: Greenwood, 1987), chapters 3 and 8.

year Montana also adopted a law prohibiting discrimination on the basis of "race, creed, color, sex and national origin" in the exercise of one's civil rights. This was not, however, a particularly active area for litigation in Montana.[24]

Despite the minimal history of equal protection and non-discrimination law in Montana, the delegates to the convention were fully cognizant of the recent federal changes. Many were also influenced by, or participated in, the women's rights and civil rights movements. Indeed, the civil rights legislation and the Supreme Court decisions regarding race issued throughout the 1950s, 1960s, and early 1970s had an immense impact on the Montana convention. This is evident in the fact that nineteen women had been elected to the convention, many of whom had long been active in women's political organizations such as the League of Women Voters. At a minimum, the twenty-four attorneys who served as delegates to the convention were well-versed in recent legal developments regarding equal protection and non-discrimination. The rest of the convention had access to and were familiar with Applegate's *Bill of Rights* report. His work summarized the above discussion in some detail, laid out contemporary areas of concern, and provided examples of other states' constitutional provisions regarding equal protection and non-discrimination. The earliest meetings of the BOR Committee where

[24] Applegate, *BOR*, 306 – 313; Montana Rev. Code Ann. Section 64-211 (1970); Montana Rev. Code Ann. Sections 64-301 to 64-303 (1970); James P. Murphy, "Public Accommodations: What is a Private Club," *Montana Law Review* 30 (1968 – 1969): 47 – 60; Phil Grainey, "The New Montana Anti-Discrimination Law," *Montana Law Review* 36 (1975): 155; Bender, "Title VII." A search of discrimination and equal protection cases in Montana prior to 1972 turned up only a small handful of cases overall and no cases utilizing these statutes. Search of Lexis-Nexus database, June 3, 2010.

they reviewed this report included discussion of equal protection and non-discrimination issues.[25]

Applegate's report included information on the history of equal protection and non-discrimination laws, the sea-changes in the Supreme Court's interpretation of the Constitution, and possible ways to expand these protections in Montana. Perhaps more than in any other area of Applegate's *Bill of Rights,* the changing philosophy of the Supreme Court and the political shift evidenced by Richard Nixon's administration were used as reasons to adopt strong equal protection and non-discrimination clauses in the Montana constitution. Applegate criticized the federal enforcement of non-discrimination statutes as ineffective. He placed the "principal blame" for failure to eradicate discrimination "at the doorstep of the Nixon Administration." Applegate also identified other state provisions—particularly those from New York, Michigan, Illinois, as well as Puerto Rico—as potential models for stronger equal protection and non-discrimination guarantees. Illinois's clause was highlighted in particular for its breadth; the clause prohibited discrimination on the basis of race, creed, color, or sex in both civil rights and housing and other public accommodations. Applegate ended the section with an explanation for why Montana should adopt such protections:

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[25] Gus Chambers and Paul Zalis, "For This and Future Generations: Montana's 1972 Constitutional Convention," (Montana PBS: KUFM-TV, University of Montana, 2002), DVD, 60 minutes; Daniel J. Foley, "Con-Con sets an Example," *Billings Gazette*, Brown Collection, 47, University of Montana William J. Jameson Law Library, accessed online at http://www.umt.edu/law/library/Research%20Tools/State%20Pages/MontanaConstitution/default.htm (hereafter cited as Brown Collection); Elison and Snyder, *The Montana State Constitution,* 1 – 23; Charles Hillinger, "Montanans Drafting New Constitution," *Los Angeles Times*, Part I, January 21, 1972, Brown Collection, 28; Elison and Snyder, *The Montana State Constitution,* 34 – 39; Applegate, *Bill of Rights*; Minutes of the Second Meeting of the Bill of Rights Committee, Montana Constitutional Convention, January 20, 1972, Folder 2-37, Box 2, Record Group 22, Box 2, Folder 2-37, Constitutional Convention Collection, Montana Historical Society Archives and Library, Helena, MT (hereafter cited as RG 22, MHSL).

> Montana, with a significant and, culturally speaking, priceless minority population, is especially suited to the adoption of strong anti-discrimination provisions enforceable by those affected. This is even more the case given the increasing cultural awareness and pride of minorities within the state, as well as the legitimate concerns of emerging women's rights groups.[26]

The BOR committee apparently agreed. They placed a heavy emphasis on the concepts of equal protection, human dignity, and protection from discrimination from the beginning. Moreover, this interest was not driven by one or two delegates. While most of the clauses in the declaration of rights grew out of one or two proposals, six separate proposals were introduced by convention delegates and considered by the BOR Committee that addressed the principles of human dignity, equal protection, and non-discrimination. All six of the proposals were introduced in the first few days of the convention, the BOR committee received extensive public testimony and support for such a provision, and there was an absence of controversy among the delegates over the adoption of such a clause.

A number of delegates—some of them members of the BOR committee—along with the committee staff person, were largely responsible for the creation, passage, and defense of the right to individual dignity: Bob Campbell, who had been so instrumental in the privacy fight; Wade Dahood, BOR committee chair and delegate from Anaconda; Dorothy Eck, BOR committee member delegate from Bozeman; Richard Champoux, delegate from Kalispell; Mae Nan Robinson, delegate from Missoula; Virginia Blend,

[26] Applegate, *Bill of Rights*, 312; Ibid, 310. While Applegate identified the Illinois equal protection clause as particularly attractive, Montana's Individual Dignity clause is most closely based on the Puerto Rico constitution, which was written in 1952 and used as a model throughout the drafting process at the Montana Constitutional Convention. See, Constitution of the Commonwealth of Puerto Rico, Article II, Section 1.

delegate from Great Falls; and Applegate, the research analyst and author of the background material for the delegates on the bill of rights.[27]

Equal protection, non-discrimination, and dignity proposals came pouring in as soon as the convention convened in January of 1972. Campbell, who pointed to his "love of constitutional law and the social changes created by the new Warren Court" as the impetus for his becoming a lawyer, was just as interested in the issues of equal rights as he was in securing individual privacy rights. His initial proposal on privacy, DP #14, included a right to privacy, expression, and individual dignity. When it was divided into three concepts by the style and drafting committee (privacy, expression, and dignity), the first two eventually became distinct proposals. Campbell has stated that felt his dignity proposal was already addressed by a proposal submitted January 21, 1972 by Virginia Blend, a delegate from Great Falls, an active member of the Catholic Church, and a leader in the League of Women Voters. As a result, he said that he did not write another proposal for individual dignity.[28]

Blend's proposal, DP #10, consisted of a straightforward statement: "Equality of rights under the law shall not be denied or abridged by the state of Montana on account of sex." This statement mirrored the national Equal Rights Amendment, which was under consideration by Congress at the time of the Convention. Indeed, Blend's introduction of

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[27] Curran, "The Unbelievable Happened,"; Gary Langley, "Individual Rights Prime Concern of Delegates," *Missoulian*, February 9, 1972, Brown Collection, 53; *Verbatim Transcript*, Vol. 1., "Delegate Biographies and Delegate Proposals."

[28] Bob Campbell, *Manuscript*; *Verbatim Transcript*, Vols. 1 and 5; Virginia Blend, "Testimony to BOR Committee on Proposal 10," February 2, 1972, Folder 3-2, Box 3, RG22, MHSL. Campbell's willingness to support Blend's proposal on equal rights in place of his proposal on individual dignity suggests that he saw the concept of individual dignity, a somewhat slippery and nebulous legal concept, as intimately related to the concept of non-discrimination. However, the fact that he wrote additional proposals addressing equal protection suggests that he did not view Blend's proposal as sufficient.

the proposal and testimony in support of it before the BOR Committee was, in effect, testimony in support of the ERA. She posited that its adoption would "eliminate time spent by our state legislature on the subject when the amendment is passed by the Senate and presented for ratification." Her argument centered on the role the federal ERA would have in "creating a new basis for the U.S. Supreme Court" to rule on discrimination and equal protection cases. Despite widespread support for this simple proposal, it would not be the format by which these concepts were incorporated into the Montana Constitution. Competing proposals and public support for more extensive protections and guarantees ultimately doomed Blend's simple proposal.[29]

At least three other delegates proposed alternative forms of equal protection and non-discrimination clauses. On January 28, 1972, Campbell submitted a proposal, DP #50, that closely mirrored the Fourteenth Amendment's equal protection clause: "The equal protection of the laws shall not be denied or abridged by the state or its units of local government on account of race, color, creed, national ancestry or sex." This language closely reflected that proposed in a petition that numerous Missoulians sent to Campbell and the BOR Committee. However, there was one key change. The petition included a statement that said, "We do not want the words 'by the government' inserted in this statement because such a phrase would limit the prohibition to the government and its bodies and agencies and may serve to exclude from the prohibition such private agencies as businesses and educational institutions." The petitioners were advocating for a constitutional provision that would protect individuals from private discrimination. This concept had been discussed among constitutional revision advocates in other states,

[29] *Verbatim Transcript*, Proposal # 10, 1: 94; Blend, "Testimony"; Applegate, *Bill of Rights.*

but was not commonly included in other state constitutions. For example, the New York Committee for Economic Development had floated the idea of protecting rights against private parties in a proposal for the 1967 New York constitution.[30]

This petition was not the only public input Campbell received regarding equal rights. In fact, at a public meeting before the convention chaired by Campbell, the Missoula delegates accepted proposals for various equal protection/non-discrimination provisions from the American Association of University Women, the Montana Federation of Women's Clubs, the Women's Club of Missoula, the Missoula Business and Professional Women's Club, the Missoula Soroptomist Club, and individual citizens. Campbell responded to public calls for a non-discrimination provision and wrote a proposal that reflected their support for a clause including sex as a protected class. He combined this concept with his knowledge of the existing Warren court standards for protecting individuals from discrimination based on race, color, national ancestry, or religious belief. However, his proposal did not offer the far-reaching protections some citizens had called for. To address these concerns regarding private discrimination, on January 28, 1972, Campbell proposed a clause, DP #51, prohibiting discrimination in housing and employment, in effect elevating the existing public accommodations statute to a constitutional protection. This proposal stated:

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[30] Bob Campbell, *Manuscript*; *Verbatim Transcript*, Delegate Proposal # 50, 1:148; "Citizen Petition," January 20, 1972, Folder 2-37, Box 2, RG 22, MHSL; Committee for Economic Development, "Introduction and Summary of Recommendations," and "Constitutional Revision," Part of Chapters 1 and 6 in *Modernizing State Government*, (New York: Committee for Economic Development, 1967), reprinted in Montana Constitutional Convention Studies, *A Collection of Readings on State Constitutions, Their Nature, and Purpose*, report no. 4 prepared by the Montana Constitutional Convention Commission for the delegates to the Montana Constitutional Convention, (Helena, Montana, 1971), 300 (hereafter cited as, *Report No. 4*).

> All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry or sex in the hiring and promotion practices of any employer or in the sale or rental of property. These rights are enforceable without action by the legislature but the legislature may provide additional remedies for their violation.[31]

Other delegates offered similar ideas. However, their proposals combined equal protection guarantees with protections from private *and* public discrimination; their provisions, in other words, went far beyond those offered by Blend and Campbell. The youngest and the oldest delegates, Mae Nan Robinson, a young graduate student who had recently lost her husband in Vietnam, and Lucile Speer, a retired librarian who had been active in the 1968 Eugene McCarthy presidential campaign, paired up to submit proposal DP #32, which provided that:

> No person shall, because of race, color, national origin, creed, religion, or sex be subjected to any public or private discrimination in political and civil rights, in the hiring and promotion practices of any employer, or in the sale or rental of property. These rights shall be enforceable without action by the legislative assembly. Persons aggrieved shall have access to the Courts to enjoin discrimination prohibited by this section.

This proposal introduced the concept of prohibiting private discrimination, in much the same way as the federal Civil Rights Act, the Equal Pay Act, and the Housing Act, and state public accommodations law had done. In addition, it satisfied the Missoula petitioners' call for an equal protection provision that prohibited both private and public discrimination. The last two lines of the proposal reflected a fear, later expressed by Robinson on the floor of the convention during the debate on the dignity clause, that the legislature could not be trusted with the power of implementing and enforcing provisions

[31] Minutes of the First Meeting of the Bill of Rights Committee, Montana Constitutional Convention, January 17, 1972, RG 22, Box 2, Folder 2-37, MHSL; Minutes of the Missoula Delegate Public Meeting, January 12, 1972, Folder 2-37, Box 2, RG 22, MHSL; *Verbatim Transcript*, Delegate Proposal # 51, 1:149.

in the declaration of rights. This fear, along with the view of the courts as the appropriate avenue for protection of one's rights, reflected the recent national history of the civil rights movement as well as a long-standing belief among the political left in Montana that the legislature was not an independent body but one that was controlled by and acted in furtherance of special interests. As attorney Wade Dahood, chair of the BOR Committee, explained on the floor of the convention, individuals would, of course, have access to the courts to enforce the rights guaranteed in the constitution without a specific statement on the matter.[32]

The last delegate proposal on the topic, DP #61, happened to combine the various different components. It read:

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the law, nor be discriminated against in the exercise of his civil or political rights or in the choice of housing or conditions of employment on account of race, color, sex, birth, social origin or condition, or political or religious ideas, by any person, firm, corporation, or institution; or by the state or any agency or subdivision of the state.

This language is very close to that which was finally adopted by the committee and the full convention. The proposal was introduced by five delegates: Richard Champoux, a Democrat from Kalispell and a professor; William Burkhardt, a Republican from Helena and a minister; Marshall Murray, a Republican from Kalispell, a member of the BOR

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[32] *Verbatim Transcript*, Delegate Proposal #32, 1:126; Verbatim Transcript, Vol. 1, Delegate Biographies; Mae Nan Robinson to J.C. and Mrs. Garlington, September 2, 1971, Box 1, Folder 5, MSS 99, James C. Garlington Papers, Mike and Maureen Mansfield Library, University of Montana-Missoula (hereafter, MSS 99, James C. Garlington Papers, UMML); Robert Vance to Lucile Speer, July 31, 1968, Box 4, Folder 2, MSS 585, Speer Papers, UMML; *Verbatim Transcript*, 5: 1642 – 1646; Michael P. Malone, Richard B. Roeder, and William L. Lang, *Montana: a History of Two Centuries*, revised ed. (Seattle: University of Washington Press, 1991); Michael P. Malone, "The Close of the Copper Century," *Montana: The Magazine of Western History* 35, no. 2 (Spring, 1985): 69 – 72; David M. Emmons, "The Price of 'Freedom': Montana in the Late and Post-Anaconda Era," *Montana: The Magazine of Western History* 44, no. 4 (Autumn, 1994): 66 – 73; Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action," *Stanford Law Review* 49, no. 5 (1997): 1111 – 1148.

Committee, and an attorney; J. Mason Melvin, a Democrat from Bozeman and a retired FBI agent; and Jerome Cate, a Democrat delegate from Billings and an attorney. This diverse group of sponsors hints at why the proposal was supported so widely. The group represented significant diversity in geographical representation, partisan affiliation, and employment and experience. Combined with the proposals of Blend, Campbell, Robinson, and Speer, the Champoux proposal also reflected widespread support from delegates from all the major urban centers in the state. Additionally, the non-partisan nature of the convention is clearly exhibited in their joint proposal, which brought together both delegates of different parties and delegates that represent communities with differing bases of political party power.[33]

The BOR Committee unanimously approved the Champoux proposal on February 9, 1972. This proposal went far beyond any existing federal protections on equal protection and non-discrimination. While there was federal law prohibiting private discrimination, given the state action doctrine, these protections were certainly not constitutionally guaranteed. Additionally, the Court had barely begun to apply the equal protection clause to women, with the first such case having been decided mere months before the convention. The prevalence of proposals that pushed these legal boundaries

[33] *Verbatim Transcript*, Delegate Proposal # 61, 1:161; *Verbatim Transcript*, Delegate Biographies, Vol. 1; Major urban centers may be a very generous way to refer to Montana's urban areas. There are not now, and were not at the time of the convention, any cities larger than roughly 100,000 people in Montana (Billings is the largest city in Montana and has a population of roughly 125,000). The "urban" areas of Missoula, Kalispell, Bozeman, Helena, Great Falls, and Billings represent the six largest towns in Montana and the majority of the population in Montana. Butte is often included in the largest seven towns and is the only town of "size" that is not represented among the various delegate sponsors of equal protection/non-discrimination proposals. The one criticism of the proposal on the convention floor came from a rural delegate, Otto Habendank from Sidney, in eastern Montana. There is no direct evidence of whether rural citizens opposed this provision, but in general, the constitution garnered support from urban areas and failed in rural areas.

and the diverse interest in equal rights guarantees illustrate the strong interest of the convention in writing a constitution that went beyond the federal Constitution's protections for individual rights. It also illustrates the great influence of era-specific concepts of fundamental rights.[34]

The committee received a significant amount of correspondence and testimony regarding equal protection and non-discrimination. For the most part, the public's input was aimed at the general concepts and not at various specific proposals. This testimony fell into three major categories: testimony on the concept of an equal rights amendment prohibiting public discrimination based on numerous categories such as sex, race, color, and religion; testimony about private discrimination; and American Indian rights. Most of the public's testimony fell into the first category and many of those who testified or wrote their delegates had some connection to the League of Women Voters, the American Association of University Women (AAUW), or some other organization working on women's rights issues. On January 24, 1972 the Missoula branch of the AAUW wrote the committee to voice their support for an ERA-style proposal. Bonnie Wallem of the League of Women Voters testified on January 27 1972 that her organization also supported such a proposal. Testifying on her own behalf, Evelyn Schallaire addressed the disparity between men and women in inheritance laws in Montana and asked for a constitutional remedy. Writing on behalf of the Bozeman branch of the AAUW, Margaret Hauser wrote Dorothy Eck calling for a proposal which stated that "equal rights shall not be denied on account of race, color, creed, sex, or national origin." Hauser said that she recognized that adopting such a clause would place Montana

[34] See Chapter 1, note 7 and Chapter 2, note 10.

ahead of the federal and many state governments. The constitutional convention, Hauser added, gave Montana "the opportunity to provide enlightened leadership in an area that is very important to women as well as to minorities." At least five women testified on January 29, 1972 in support of an equal rights proposal. One of them, Bess Reed, noted the importance of having equal protection clauses in state constitutions regardless of the protections contained in the federal Constitution.[35]

In addition to the Missoula petition calling for protection against private discrimination, the committee received testimony requesting inclusion of such protections in the constitution. On January 29, 1972 Sidney Smith, the Commissioner of the Department of Labor and Industry, called for the convention to elevate the existing employment discrimination laws to the level of a constitutional guarantee. In particular, he recommended prohibiting discrimination based on sex. On February 15, the committee received a statement from the Resolution Committee of the Montana Association of Social Workers that addressed the dangers of housing and employment discrimination. Such actions and other forms of human rights violations, the Resolution Committee stated, "infringe on the basic human right to a life with dignity." They urged the

[35] Elaine White to Wade Dahood and the Bill of Rights Committee, January 24, 1972, RG 22, Box 2, Folder 2-37, MHSL; Bonnie Wallem, "Testimony Before the Bill of Rights Committee," January 27, 1972, RG 22, Box 2, Folder 2-37, MHSL; Evelyn Schallaire, "Testimony Before the Bill of Rights Committee," January 28, 1972, RG 22, Box 2, Folder 2-38, MHSL; Margaret Hauser to Dorothy Eck, January 28, 1972, RG A-2, Box 3, Folder 3-6, MHSL; Marjorie Jennings to Dorothy Eck, January 26, 1972, RG A-2, Box 3, Folder 3-6, MHSL; Eva Lachenmaier to Dorothy Eck, January 25, 1972, RG A-2, Box 3, Folder 3-6, MHSL; Bess Reed, "Testimony to Bill of Rights Committee," January 29, 1972, RG 22, Box 2, Folder 2-38, MHSL; Montana Constitutional Convention, "Minutes of the Fifth Hearing of the Bill of Rights Committee," RG 22, Box 2, Folder 2-38, MHSL.

committee to, at a minimum, include a provision against private discrimination in the constitution.[36]

Indian rights also garnered significant testimony; roughly one-tenth of the witnesses testifying before the Committee spoke to the need for Indian rights to be protected. The committee formed a subcommittee to discuss Indian rights, likely because most of the testimony was actually focused on Indian education and access to education. In the subcommittee's report, Leo Graybill commented that including culture in the equal protection clause could be "reverse discrimination." This suggests that the concept of equal protection was embraced in the abstract, but in practice, there was lingering racism. After receiving testimony and the subcommittee's report the committee amended the Champoux proposal to address the concerns raised by the testimony from Indian rights advocates. Graybill was in the minority and as a result, the committee inserted the word "culture" as one of the characteristics for which people would be protected from discrimination. The Committee report states that the "word culture was incorporated specifically to cover groups whose cultural base is distinct from mainstream Montana, especially the American Indians." The final language of the dignity clause demonstrated that the committee was willing to respond to the concerns of the members of the public, who went out of their way to testify or contact the Committee. This incorporation reflected the ways in which the national civil rights movement was specifically applied

[36]Minutes of the Fifth Hearing of the Bill of Rights Committee, Montana Constitutional Convention, February 8, 1972, RG 22, Box 2, Folder 2-37, MHSL; Sidney T. Smith, "Testimony to the Bill of Rights Committee," no date, RG 22, Box 2, Folder 2-4, MHSL; Montana Association of Social Workers, "Proposed Human Rights Act for Montana," no date, RG 22, Box 2, Folder 2-37, MHSL. This statement also called for the convention to adopt a constitutional provision guaranteeing the availability of social services to all groups and individuals in Montana.

and viewed in Montana. The concepts of discrimination were most relevant when applied to Native Americans in a state with a very small minority population.[37]

The final difference in the language between the Champoux proposal and the one that was forwarded out of the BOR Committee (which is identical to the adopted clause) is the phrase "conditions of employment." The deletion of that phrase reflected the testimony of the Montana State AFL-CIO in front of the BOR Committee on February 16, 1972. The AFL-CIO stated that they were concerned that this phrase could be used to prohibit closed-shop unions, places of employment where membership in a union is required for continued employment. Throughout the convention there were proposals, led in part by the Montana Chamber of Commerce, to include a right-to-work provision in the constitution, which would have prohibited closed-shop unions. All right-to-work provisions failed, and following the suggestion of the AFL-CIO, the BOR Committee stripped the phrase "conditions of employment" from the Champoux proposal.[38]

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[37] *Verbatim Transcript*, Bill of Rights Committee Report, 2:615 – 660; Minutes of the Seventh Meeting of the Bill of Rights Committee; Minutes of the Eighth Meeting of the Bill of Rights Committee; Minutes of the Fifth Meeting of the Bill of Rights Committee, List of Individuals Testifying, January 26, 1972. While the amendment of the dignity clause shows some focus on American Indian rights, the vast majority of the Indian testimony and activism during the convention was focused on promoting provisions regarding Indian education and cultural competency. This is in large part due to the leadership of Earl Barlow, the state supervisor of Indian education. His focus on education drove much of the Indian activism toward those goals. His papers are held at the Mike and Maureen Mansfield Library at the University of Montana and provide extensive documentation on Indian activism in regards to education during the 1960s and 1970s. Earl Barlow Papers, MSS 709, Mike and Maureen Mansfield Library, University of Montana.

[38] Montana Constitutional Convention, "Minutes of the Eleventh Meeting of the Bill of Rights Committee," AFL-CIO Testimony, February 16, 1972, Folder 2-37, Box 2, RG 22, MHSL; *Verbatim Transcript*, Bill of Rights Committee Report, 2:615 – 660. Scholars have not yet explored the history of the constitutional convention's battle over the right-to-work issue. For more on the convention's debate on the right-to-work proposal see, John Kuglin, "Billings Man to Introduce Right-to-Work Provision," *Missoulian*, January 29, 1972, Brown Collection, 16; John Kuglin, "Con Con Flexes Subpoena Powers," *Great Falls Tribune*, February 4, 1972, Brown Collection, 44; Associated Press, "Con Con Debates Right-to-Work Plan," *Helena Independent Record*, February 4, 1972, Brown Collection, 45; Editorial, "Constitution Should Not Be Against or For Labor," Billings Gazette, February 10, 1972, Brown Collection, 58; Associated Press, "Right-to-Work Stand by C of C [Chamber of Commerce] Taken to

The full convention began discussion on the dignity clause on March 9, 1972. The proposal was the subject of remarkably little debate. Mae Nan Robinson, unfamiliar with the legal system and the basics of constitutional interpretation, restated her concerns that the clause lacked a statement specifically authorizing individuals to seek redress from the courts in case of discrimination. Her concerns were addressed by the BOR Committee chair and attorney, Wade Dahood. The only other concern regarded the phrase protecting individuals from private discrimination. Otto Habendank of Sidney worried that the provision would apply to membership requirements for private organizations, such as a group he belonged to, the Sons of Norway. He made a motion to strike the language extending protection to private entities. Echoing the reasoning in a recent U.S. Supreme Court decision, *Moose Lodge v. Irvis* (1971), Dahood stated that it was not the intent of the committee to forbid membership requirements for entirely private groups. The intent, he argued, was to proscribe powerful private interests from preventing access to employment, housing, and other public accommodations. Perhaps given Montana's long-standing distrust of corporations and the intimate knowledge of the power of large private interests such as the Anaconda Company, this argument resonated with the convention delegates. The proposed amendment failed 13 to 76, and the clause passed on a voice vote with no discernable opposition.[39]

Task," No date and no newspaper identified, most likely the *Helena Independent Record* on or about February 22, 1972, Brown Collection, 118.

[39] *Verbatim Transcript*, Bill of Rights Committee Report, 2:615 – 660; *Verbatim Transcript*, Bill of Rights Floor Debate, 5:1642 – 1646; A prevalent theme in Montana historiography is that of the people versus the Company. The Company refers to the Anaconda Company, which ran the major mining operations, owned most of the lumber and timber interests, had interconnected business relationships with the state power company in Montana from the beginning of the twentieth century until roughly five years after the Constitutional Convention and owned all but one of the major newspapers and played a very significant role in determining control of the state government until the late 1950s. This theme in Montana

With the adoption of the dignity clause, Montana embraced the "most inclusive scheme of 'equal rights' of any known constitution." The fact that federal equal protection and non-discrimination law was so fresh suggests that Montanans were not satisfied to follow federal standards; they were willing to go beyond them and set higher ones for individual rights. With the inclusion of new protected classes and protection against private interests, this was indeed a radical provision. This clause alone provided a strong legal basis for the development of state-specific approaches to equal protection and discrimination law. Because of its great potential and its clear difference from federal law, this clause is an important key to understanding how those engaged in state constitutional revision set the stage for the future state constitutionalism movement. The dignity clause illustrates that many citizens, attorneys, and lawmakers were thinking about ways to protect individual rights at the state level long before state courts determined to take their own steps toward the expansion of individual rights. [40]

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historiography is also clearly present in the political discourse in Montana and it is highly likely that it played a significant role in shaping the perception of the delegates to the Montana Constitutional Convention about corporate power. See, K. Ross Toole, *An Uncommon Land* (Norman: University of Oklahoma Press, 1959); K. Ross Toole, *Twentieth Century Montana: A State of Extremes* (Norman: University of Oklahoma Press, 1972); Joseph Kinsey Howard, *Montana: High, Wide, and Handsome*, Revised Ed. (Lincoln: University of Nebraska Press, 2003); and Malone, Roeder, and Lang, *Montana*; Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1971).

[40] Elison and Snyder, *The Montana State Constitution,* 15, 34 – 39.

Conclusion

The Montana Constitutional Convention occurred during an extraordinary period of time for the state and the nation. As historian Oliver Zunz has argued, at the dawn of the 1970s America had recently completed massive societal overalls of two major areas. First, the country had created a national, mass-market based economy; and second, Americans had acquired expanded access to their democratic institutions in a pluralistic fashion. A massive conservative backlash to these changes was brewing, but in 1972 in Montana citizens came together to craft a constitution that embodied many of the principles and institutional shifts of the mid-twentieth century. Despite its progressivism, the constitution cannot be dismissed as solely a liberal document. The wife of the former Republican governor, a Republican herself, Betty Babcock, was widely recognized as one of the leaders of the convention and one of the most vocal proponents of the constitution's passage. Republican J.C. Garlington stated that he believed Republican delegates had made "the larger contributions of personal interest and effectiveness in the whole effort." He viewed the new document as an opportunity for Republicans to lead Montana into the future.[1]

When the convention delegates signed the constitution on March 24, 1972, they offered up to the Montana people a document that reflected this optimism and the recent

[1] Oliver Zunz, *Why the American Century?* (Chicago: University of Chicago Press, 1998); J.C. Garlington to Betty Babcock, August 23, 1972, MSS 99, Box 1, Folder 6, James C. Garlington Papers, Mike and Maureen Mansfield Library, University of Montana-Missoula (hereafter, MSS 99, James C. Garlington Papers, UMML); *Verbatim Transcript of Proceedings, 1972 Montana Constitutional Convention*, 7 vols., prepared by the Montana Legislature in cooperation with the Montana Legislative Council and the Constitutional Convention Editing and Publishing Committee (Helena, Montana, 1979): Committee Reports, Volume 2, available online at http://courts.mt.gov/library/montana_laws.mcpx (Accessed on June 3, 2010) (hereafter cited as *Verbatim Transcript*).

social and cultural changes. It radically altered the system of governance in Montana in numerous ways, many of which were controversial. The 1972 constitution changed the structure of local government by allowing for home-rule charters, revamped the judicial system by ending the existing office of Justice of the Peace, strengthened the power of the executive and legislative branches by giving them more flexibility in budget making and execution, and greatly expanded the role of the state in protecting the environment. The newly expanded Declaration of Rights was just one small part of these immense changes. Faced with the potential for an entirely new and different system of government, many Montanans balked. This discomfort with the vast changes contained in the constitution was expressed in Mrs. Joe Field's admonition to the delegates: "When we voted [for the constitutional convention] it was not to tear it all apart, just update a few things." This statement reflected the analysis of some in the news media who described the convention as divided between those who wanted moderate change and those who wanted radical change.[2]

[2] In particular, the constitutional provisions regarding the environment, strengthening the executive and legislative branches, revamping the judicial system, and allowing eighteen year olds to run for office were controversial. See, Letter to Dorothy Eck, February 15, 1971, Box 3, Folder 3-6, Dorothy Eck Papers, Record Group A-2, Boxes 1 – 5, Montana Historical Society Archives and Library, Helena, MT (hereafter cited as, "Eck Papers, RG A-2, MHSL"); John Parker to Dorothy Eck, March 10, 1972, RG A-2, Box 3, Folder 3-6, MHSL; Robert Brown and Dorothy Bradley to Constitutional Convention Delegate Candidates, October 14, 1971, Lucille Speers Papers, Collection Number MSS 585, Box 6, Folder 1, Maureen and Mike Mansfield Library Archives and Special Collections, University of Montana—Missoula (hereafter cited as, "Speer Papers, MSS 585, UMML"); Robert E. Sullivan to Lucile Speer, January 24, 1972, MSS 585, Box 6, Folder 1, UMML; Mrs. Joe Field to Lucile Speer and All Convention Delegates, no date, MSS 585, Box 6, Folder 2, UMML; Dennis E. Curran, "The Unbelievable Happened," *Billings Gazette*, February 17, 1972, Brown Collection, 84, University of Montana William J. Jameson Law Library, accessed online at http://www.umt.edu/law/library/Research%20Tools/State%20Pages/MontanaConstitution/default.htm (hereafter cited as Brown Collection).

The two-month campaign leading up to the ratification vote was hard-fought. The Farm Bureau and a handful of individuals led the opposition to the constitution. Supporters of the document included the Montana Sheriffs and Peace Officers Association, Montana Common Cause, the Montana League of Women Voters, the Montana American Civil Liberties Union, the Anaconda and Great Falls Chamber of Commerce, and the Montana AFL-CIO. Delegates reported that the most commonly asserted concerns from the public had to do with school financing and taxation. Indeed, an anonymous opposition pamphlet highlighted new taxation powers, expanded legislative and executive powers, and water rights as some of its biggest concerns with the proposed document. The only mention of the Declaration of Rights the author has identified in opposition materials was a clearly erroneous statement that there was no bill of rights included in the constitution. Some of the most controversial aspects of the document were separated out to be voted on alone, including a proposal to abolish the death penalty and move to a unicameral legislature; both proposals were rejected by voters. In the end, the advocates for change won and the proposed constitution was ratified by Montana voters on June 6, 1972 by a narrow margin of just 2,532 votes, potentially attributable to public discomfort with such whole-scale change.[3]

The Montana constitution has been re-affirmed by voters twice, in 1990 and 2010. Contained within this document is a strong statement of protection for individual rights

[3] Michael P. Malone, Richard B. Roeder, and William L. Lang, *Montana: a History of Two Centuries*, revised ed. (Seattle: University of Washington Press, 1991), 394 – 395;Voter Education Committee to Delegates, April 24, 1972, Roeder Collection, Jameson Law Library, University of Montana-Missoula; "Organizations Which Have Endorsed the Proposed Constitution," May 17, 1972, Roeder Collection,; "Concerning the Constitutional Convention: Did You Know?" no date but prior to June 6, 1972, Roeder Collection; J.C. Garlington Response to Anonymous Pamphlet, May 12, 1972, Roeder Collection; Jon Bennion, *Big Sky Politics: Campaigns and Elections in Modern Montana* (Missoula, MT: Five Valleys Publishing, 2004): 72.

that appeared to receive near unanimous support from the convention delegates and a majority of the public. The controversies that did develop at the convention rarely touched the Bill of Rights Committee. Unlike other committees, they submitted one majority report. Other committees had at least one, if not multiple, minority reports expressing disagreement with the majority proposal. This suggests that delegates of many political persuasions were interested in a strong bill of rights. The protections contained in the Declaration of Rights have provided civil rights and liberties advocates, attorneys, and judges in Montana with the legal basis for developing an approach to state constitutionalism and a body of law regarding individual rights that is independent of the federal Constitution and often goes beyond its protections. There are multiple areas of the law where advocates have argued for the courts to apply the Montana constitution, especially the privacy and dignity clauses, in ways that protect individual rights at a higher level than the federal Constitution.[4]

For example, Melissa Harrison and Peter Mickelson have argued that the Montana Supreme Court's interpretation of the search and seizure clause has been greatly affected by the privacy clause. In many ways, the court has ruled that an individual's privacy must be given more weight when determining the scope of legal searches and seizures than is required at the federal level because of the language of the privacy clause. According to the court: "Montana's unique constitutional language affords citizens a greater right to

[4] A provision in the 1972 constitution requires a periodic vote, every twenty years, on whether to retain the existing constitution or hold a constitutional convention to revise it. 1972 Montana Constitution, Article XIV, Section 3. The most controversial topics in the Bill of Rights committee were the debate regarding whether there would be a privacy exemption to the right to know; Wade Dahood's insertion of a clause which would, in effect, overturn a decision in a case he had argued and lost in the state supreme court on worker's comp; the failure of the committee to prohibit gun licensing and registration; and the adoption of a clause guaranteeing Montanans the right to a clean and healthful environment. See, chapter Three, note 2.

privacy and therefore broader protection than the Fourth Amendment." This has resulted in numerous differences between federal and state search and seizure law, all in favor of the individual, in areas such as electronic surveillance, the searching of a vehicle, and the searching of an open field. These protections are directly linked to the intent of the constitutional convention when it wrote and debated the privacy clause and the search and seizure clause.[5]

Another area of law in which Montana has departed from the federal standards includes regulations affecting same-sex couples. In the 1997 case of *Gryczan v. State of Montana*, which challenged the state's ban on same-sex sexual relations, attorneys for Linda Gryzcan and her partner, Anne Gehr, called for the law to be overturned as unconstitutional under both the dignity clause and the privacy clause. The Montana Supreme Court overturned the law as a violation of the privacy clause. The federal law at the time was based on the U.S. Supreme Court's 1986 decision in *Bowers v. Hardwick* in which the Court upheld a similar Georgia law despite claims that it violated the individual's right to privacy. It was not until 2003 that the U.S. Supreme Court reversed course and struck down so-called sodomy laws across the nation in *Lawrence v. Texas.* Writing for the majority, Justice Kennedy stated that such laws violated privacy and the concept of liberty in the due process clause of the Fourteenth Amendment. In another

[5] Under federal interpretations of the Fourth Amendment, police do not need to meet the search and seizure standards applicable to a home in order to perform a search of an open field on private property that can be viewed from a road or the air, even if it is enclosed by a fence. This is known as the "open fields" doctrine. In reaching this decision, the Court's rationale was that individuals do not have an expectation of privacy on their land, unless they have taken extraordinary measures to block it from aerial view. The Montana Supreme Court has ruled differently, saying that Montana's privacy clause provides for a heightened expectation of privacy that requires police to meet all search and seizure criteria in order to search fields or open lands that are within view of a road or the air. Melissa Harrison and Peter Mickelson, "The Evolution of Montana's Privacy-Enhanced Search and Seizure Analysis: A Return to First Principles," *Montana Law Review* 64 (2003): 245; State v. Ellison, 288 MT 46 (2000).

case addressing same-sex rights, in 2004 the court ruled in *Snetsinger v. Montana University System* that the state violated the equal protection guarantees of the dignity clause when it refused to extend health insurance and other benefits to the same-sex domestic partners of university system employees. More recently, in *Baxter v. State of Montana* (2009) the Montana Supreme court ruled that the two clauses regarding dignity and privacy are interrelated and guarantee individuals the right to choose physician assisted death. In another medical-related case, some have recently argued that reducing access to medical marijuana violates both the dignity and privacy clauses.[6]

Scholars have not yet examined the ways Montana's state constitutionalism cases have influenced other states. Research on this topic is warranted and would contribute to both a deeper understanding of state constitutionalism and state constitutional history. It appears that state constitutionalism has been embraced by state courts across the country in recent years. Most the cases regarding same-sex marriage have been decided on independent state grounds. This is an emerging area of law that will contribute to the scholarship on the topic; Montana currently has a case working its way toward the state supreme court that asserts that the dignity and privacy clauses demand recognition of same-sex partnerships. The outcome of this case and its influence on other state judiciaries will make for an interesting study on the effects of state constitutionalism. [7]

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[6] Baxter v. State of Montana, 2009 MT 449; Charles Johnson, "Montana Says Medical Marijuana Law is not Unconstitutional," *Missoulian*, June 3, 2011; Gryczan v. State of Montana, 942 P.2d 112 (1997); Bowers v. Hardwick, 478 U.S. 186 (1986); Lawrence v Texas, 539 U.S. 558 (2003); Snetsinger v. Montana University System, 104 P.3d 445 (2004); Cassie Coleman, "Love or Confusion: Common Law Marriage, Homosexuality, and the Montana Supreme Court in Snetsinger v. Montana University System," Montana Law Review 66 (2005): 445 – 474.

[7] Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); In re Marriage Cases 43 Cal.4th 757 (2008); Donaldson v. State of Montana, Cause No. BDV-2010-702 (April 19, 2011).

Whether the cases utilizing the dignity and privacy clauses reflected the specific intentions of the delegates is up for debate. However, they do illustrate the role that state constitutional revision played in establishing a basis for state constitutionalism in Montana. While many scholars point to the mid-1970s decisions of judges or articles in law reviews as the genesis of state constitutionalism, the history of Montana's constitutional convention shows that the concept of state constitutionalism was prevalent much earlier. The delegates read numerous documents, produced as far back as the mid-1950s, discussing the concept and proposed multiple provisions for new rights. In addition, as the gun rights testimony shows, the public was comfortable pushing the delegates to go further in their protections for individual rights. The literature on state constitutional revision reflects a strong concern about the state of federalism. That theme was picked up throughout Applegate's *Bill of Rights* document and may explain why there was a lack of opposition to the Declaration of Rights, even though it contained new and even radical provisions. Those most vocal in expressing their concerns about the constitution interlaced problems with the content with worries about strong centralized government (in particular the federal government) inserting itself into state issues. In a letter to the editor, Frank Clift expressed worry over rumored federal funding of the constitutional convention saying the federal government would then "expect to influence what goes into the new constitution—and that is entirely wrong!" The Citizens for Constitutional Government, a firmly libertarian-conservative organization, put out a number of statements, few of which clearly addressed the proposals in front of the committee. However, the general tenor of their statements expressed a fear of

government, especially national and international government, and a strong belief in an inalienable right to liberty. A belief that a strong bill of rights might minimize federal involvement in the state, could have led individuals like these to accept protections that may be viewed as "liberal."[8]

The concept of adopting rights that went beyond the federal protections was front and center in the Bill of Rights committee of the Montana Constitutional Convention. The delegates embraced the legal developments of the day and guaranteed Montanans the freedom to pursue their life decisions without interference from governmental or powerful private interests. The resulting constitution and its use to justify state constitutionalism suggests that more research is needed for scholars to have an accurate understanding of how and why different states across the nation began to interpret their constitutions independently of the federal Constitution. In Montana, it is clear that this phenomenon was directly related to the writing and adoption of a new constitution. The literature from other states and experts on constitutional revision suggests this may have been the case nationwide. Montana's convention suggests that many Americans were already well aware of Justice Brennan's 1977 reminder that "State constitutions, too are a font of individual liberties." [9]

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[8] Rick Applegate, *Bill of Rights,* report no. 10 prepared by the Montana Constitutional Convention Commission for the delegates to the Montana Constitutional Convention, (Helena, Montana, 1971) (hereafter cited as Applegate, *Bill of Rights*); Frank Clift, "Letter to the Editor," no newspaper noted, no date but clearly post-December 15, 1971 and before the convention began in January, 1972, MSS 585, Box 6, Folder 1, Speer Papers, UMML; Citizens for Constitutional Government "Rights of the Accused," Record Group 22, Box 2, Folder 2-4, Constitutional Convention Collection, Montana Historical Society Archives and Library, Helena, MT (hereafter cited as RG 22, MHSL); Citizens for Constitutional Government, "Thesis on the Bill of Rights," RG 22, Box 2, Folder 2-4, MHSL.

[9] Justice William J. Brennan, Jr., "State Constitutions and the Protection of Individual Rights," *Harvard Law Review* 90, no. 3 (1977): 489 – 504.

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