The Montana Constitution in the State Constitutional Tradition

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Cases and Commentary

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Carolina Academic Press
Durham, North Carolina

Library of Congress Cataloging-in-Publication Data

Names: Johnstone, Anthony, author.
Title: The Montana Constitution in the state constitutional tradition / by Anthony Johnstone.
Description: Durham, North Carolina : Carolina Academic Press, LLC, [2021]
Identifiers: LCCN 2021043791 (print) | LCCN 2021043792 (ebook) | ISBN 9781531022143 (paperback) | ISBN 9781531022150 (ebook)
Subjects: LCSH: Constitutional law--Montana. | Montana. Constitution (1972) | Constitutional law--United States--States. | LCGFT: Casebooks (Law)
Classification: LCC KFM9400 .J64 2021 (print) | LCC KFM9400 (ebook) | DDC 342.786/02--dc23/eng/20211005
LC record available at https://lccn.loc.gov/2021043791
LC ebook record available at https://lccn.loc.gov/2021043792

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
(919) 489-7486
www.cap-press.com

Printed in the United States of America

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Foreword

Why publish a casebook with an audience of one course at one law school — as I like to call it, "The Only Montana Constitutional Law Course in the Universe"? (To their credit, the Montana Board of Bar Examiners maintains a basic one-hour segment on state constitutional law, and the State Bar of Montana includes a similar segment in its occasional Law School for Legislators.) States, and their constitutional law, matter as much now as they ever have. This casebook offers a record of one state's distinctive constitutional culture, as well as a model for the law school classroom study of state constitutions generally. Its goal is to place the Montana Constitution in the state constitutional tradition to the benefit of both.

What State Constitutions can Teach

American democracy lives in the states. Throughout our history, states have served as forums for progress and resistance, deliberation and mass movements, consensus and dissent. These laboratories of democracy work within a structure of surprisingly diverse state constitutions. In these provincial expressions of popular sovereignty, we find a federal republic's DNA: stolid Yankee artifacts of the Founding Era, populist reflections of the Jacksonian Era, traces of Reconstruction and its failure, Progressive Era innovations in government power and direct democracy, and an optimistic Post-War mix of modern management and bold activism.

Each of the 50 state constitutional texts, debated, written, and ratified by ordinary Americans across two centuries, speaks eloquently to our common concerns, old and new. State constitutions deal in issues ranging from open government to privacy, from fair trials to victims' rights, from bearing arms to a healthy environment. They respond to citizens' alienation from the political class with extraordinary deliberations on shared commitments. And they speak in home-grown dialects as varied as the American landscape, from baroque Alabama (376,000 words) and rangy Texas (87,000 words) to reticent Iowa (11,100 words) and spartan Vermont (8,600 words). Each of these state's traditions is sustained by the constitutional law and culture of the states, a vast and underexplored repository of democratic practice.

The state constitutional tradition can renew our national political deliberations at a time when a hyper-partisan Congress, divided state governments, and deep polarization reaching sorted suburbs call for civic renewal. When so many national

discussions take place in self-selected media, among self-selected circles, with self-selected facts, state constitutions offer Americans a common civic vocabulary they can call their own. Increased engagement with home-grown constitutionalism offers opportunities to reinvigorate political reforms at the state level and reimagine our national politics.

The challenge is to rediscover a common civic vocabulary of American principles, and a common civic forum for democratic practices. State constitutions speak such a vocabulary; they structure such forums. Each state serves as an irreducible component of our federal political order, providing a platform for political mobilization to lead or restrain the progress of the nation. It is easy to conceive the states as laggards on the most important questions of slavery or gay rights, for example. Yet many states also challenged the federal government from the other side of these policies. Consider Pennsylvania's resistance to the Fugitive Slave Act, or Hawaii's early exploration of marriage equality. Little progress is accomplished at the national level that has not first been subject to deliberation and action at the state level.

State constitutions grew with the nation, providing an archeological record of democratic practice. The record of American democracy is written in our state constitutions. In these provincial expressions of popular sovereignty, for example, we find access to justice descended directly from Magna Carta, declaring "open courts" and guaranteeing remedy "without denial or delay." (*See, e.g.,* Ohio Const. Art. I, § 16.) Most states catalog inalienable rights such as "life, liberty, and the pursuit of happiness," among others, recalling the natural rights principles of the Declaration of Independence. (*See, e.g.,* Mo. Const. Art. I, § 2.) The earliest state constitutions have survived since the Founding Era in New England, including the world's oldest written constitution in Massachusetts. (*See, e.g.,* Mass. Const. (1780); N.H. Const. (1793); Vt. Const. (1793).) These are not dusty artifacts; they are living law, contested in capitols and courtrooms, still governing.

States serve as laboratories of democracy across all policy domains, but none as important as democracy itself. Through the Jacksonian and Antebellum Eras, as suffrage expanded, states introduced new protections for legislative deliberation such as the single-subject rule (*see, e.g.*, Or. Const. Art. IV, § 20), public purpose requirements (*see, e.g.*, Wis. Const. Art. VIII, § 7), and prohibitions on special legislation (*see, e.g.*, Nev. Const. Art. IV, § 20). Of those that survived, Reconstruction Era constitutions strengthened the executive branch at the expense of legislatures, followed by Progressive Era reforms such as special regulatory agencies for oversight of industry and positive rights to education and welfare. After the turn of the twentieth century, state constitutions also established the American practice of direct democracy, including in the amendment of the constitutions themselves.

The dynamism of state politics, including the new avenue of popularly initiated state constitutional reforms, led to a flourishing of state constitutional revisions after World War II. Some of these new constitutions modernized government by cleaning up the accretion of legislative constraints and special-purpose agencies

that had ceased to serve their original purposes. In the wake of the Reapportionment Revolution launched by the one-person, one-vote rule of *Reynolds v. Sims* (1964), refreshed democratic energy spurred innovative guarantees such as open government and express rights to privacy, the right to a healthful environment, and even a cosmopolitan right to individual dignity descended from international law.

While this history of state constitutionalism merits scholarly attention from a political development perspective, its greatest value is that it is with us today. These documents, and their ambitious provisions, are the foundation for the law of the land in America. State constitutions structure our democratic practice from the bottom up, and sustain today's most pressing debates affecting education, welfare, public finance, liberty, equality, criminal justice, judicial independence and accountability, and politics itself. Yet these foundational texts' common heritage is unheralded, and links are missing between the origins and migration of provisions across the states.

The New State Constitutional Scholarship

Recent years have witnessed a renaissance of state constitutional scholarship that begins to draw some of these connections. More than four decades ago Justice Brennan wrote *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977), a post-Warren Court call for civil libertarians to seek refuge in the development of state constitutions, albeit according to Justice Brennan's increasingly frequent dissenting views on the federal Constitution. A cottage industry of state constitutional scholarship followed, framed by Professor Daniel J. Elazar's *The Principles and Traditions Underlying State Constitutions*, 12 Publius 11 (1982). Professor Alan Tarr in Understanding State Constitutions (Princeton University Press 2000), Professor John J. Dinan in The American State Constitutional Tradition (University Press of Kansas 2006), and Professor Robert F. Williams in The Law Of American State Constitutions (Oxford University Press 2009) began more comprehensive studies of state constitutions' legal content. Meanwhile, Oxford University Press's 50-State series of state constitution guides spotlights individual states in detail, usually at the expense of placing that detail in a broader context.

In the last few years, many more commentators have engaged state constitutions as a way to escape a kind of theoretical stalemate in federal constitutional law. In particular, Professor Sanford Levinson's Framed: America's 51 Constitutions and the Crisis of Governance (Oxford University Press 2012) and Sixth Circuit Judge Jeffrey Sutton's 51 Imperfect Solutions: States and the Making of American Constitutional Law (Oxford University Press 2018) offer a constructive critique of federal constitutional law rooted in the ingenuity of state constitutional structures and rights, respectively. In a series of articles beginning with *State Constitutional Theory and its Prospects*, 28 N.M. L. Rev. 271 (1998), Professor Daniel

Rodriguez establishes a separate discourse of state constitutional design and power, connected with but independent of federal constitutional discourse. Professor Emily Zackin's Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights (Princeton University Press 2013) pulls away from the federal frame to emphasize the distinctive features of state constitutional rights.

In 2010, the Conference of Chief Justices resolved to encourage all law schools to offer a course on state constitutional law. The resolution noted that "the overwhelming majority" of constitutional law courses "are taught from the perspective of the federal Constitution." Yet "state constitutions contain different structures of government, unique provisions, and substantive provisions or declarations of rights that are often greater than" federal rights, and "being a competent and effective lawyer requires an understanding of both the federal Constitution and state constitutional law." Two national state constitutional law casebooks have emerged from this and similar charges. Professor Williams's State Constitutional Law: Cases and Materials (LexisNexis, 5th ed. 2015, with Lawrence Friedman), originally supported by the U.S. Advisory Commission on Intergovernmental Associations, sweeps in a broad range of diverse commentaries and cases, paying particular attention to interpretive methodologies. Judge Sutton joins Former Delaware Justice Randy J. Holland, former Kansas Solicitor General (and former U.S. Attorney for the District of Kansas) Stephen R. McAllister, and Professor Jeffrey M. Shaman in State Constitutional Law: The Modern Experience (West Academic, 2d ed. 2016), a casebook focused more on the development over time and diversity of state constitutional doctrine in a smaller selection of subjects.

Notably, both of these books draw on some Montana law for principal cases. Holland et al. incorporate *Arneson v. State* (Mont. 1993) on equal protection, *Columbia Falls Elem. School Dist. No. 6 v. State* (Mont. 2005) on school funding, and *State v. Bullock* (Mont. 1995) on privacy and criminal procedure. Williams and Friedman include *Butte Community Union v. Lewis* (Mont. 1986) on welfare rights. Yet these selections, while demonstrative of the impact Montana has on state constitutional discourse nationwide, do not begin to capture the distinctiveness of Montana constitutional law. Depending on the count, Montana's 1972 Constitution (a successor to the 1889 Statehood Constitution) is the third or fourth newest constitution in the union, and the last thoroughly innovative text to come from the post-war modernization of state constitutions. Nearly half of states provide some form of constitutional environmental protection, but only a handful treat it as a judicially enforceable self-executing right. An enumerated right of individual privacy, while not unique to Montana, is shared by some ten states and meaningfully enforced by only a few. The right of individual dignity appeared first in Puerto Rico's 1952 Constitution, inspired by the Universal Declaration of Human Rights, and only Illinois, Louisiana, and Montana adopted it, all in the early 1970s.

This Casebook's Method

The proper study of Montana constitutional law, or any state's constitutional law, requires more than either a state-specific treatise or a general casebook. To be useful to students and practitioners, a state constitutional casebook demands a practical balance of depth and breadth. For depth, it should explore the origins, development, and (where it exists) "black letter" doctrine of key provisions in the Montana Constitution through the canonical constitutional modalities of text, structure, history, practice, policies, and principles. Here in Montana, we are fortunate that our law students are also prolific scholars of Montana Constitutional law. This casebook will incorporate this scholarship with a hope to inspire more. Even an exhaustive analysis of Montana's law in isolation, however, does not sufficiently serve the reader. This is especially true in Montana, where a new constitution, relatively low caseload of constitutional matters, and a single appellate court combine in sparse coverage of many important areas of constitutional doctrine.

Breadth comes from the study of similar provisions in other state constitutions, and how different courts facing different issues at different times develop different doctrines. Drawing on the methods of comparative constitutionalism at the international level, this approach looks for parent and sibling relationships among state constitutions. For example, much of Montana's 1889 Statehood Constitution derived from the 1876 Colorado Constitution, and the 1870 Illinois Constitution before that. Many provisions that are taken to be unique to Montana, such as the dignity right of Article II, section 4, have fascinating lineages and siblings in other states, and even other countries. Not only is Montana's dignity provision descended from Puerto Rico, and post-war Germany before that, but guarantees similar to Montana's clean and healthful environment have found their way into the constitutions of South Africa and other nations. Particularly where the Montana courts have not encountered an issue, those other states can provide useful precedent and context for Montana constitutional analysis. This casebook will not endeavor to draw all such connections, but it will provide a basic methodology and some leads to future students and practitioners.

The book begins with an introduction to state constitutional history and methodologies. Part I situates the Montana Constitution in the American system of dual sovereignty and the political and social factors that shaped the legal framework at both ratifications and in subsequent amendments. Within this context, the introduction concludes by exploring the bases of state constitutional distinctions (and potential distinctions from the federal Constitution), including variations in text, local history, and policy and principal determinants of open-ended provisions, as well as the courts' deliberate or incidental moves to "march in lock-step" with federal constitutional law. It also introduces some practical considerations in enforcing state constitutional law that frame its future development. Part II examines the structure of Montana law and government, with particular attention to distinctions between state and federal institutions such as legislative duties (beyond powers), the

divided (not unitary) executive, the elected (not appointed) judiciary, subsidiary (not sovereign) local governments, and express rights of popular governance and free suffrage not found at the federal level. Part III turns to the rights guarantees that open the Montana Constitution in Article II, their original and interpreted scopes, and the Montana Supreme Court's varied approaches to judicial scrutiny.

Each section begins with the provision(s) covered alongside the popular explanation of the provision in the official voter information guide at ratification (or, where applicable, amendment), *in italics*. The voter information guide is the most accessible, and arguably the most reliable, source of original meaning at the time of adoption. Where a provision's background is not otherwise addressed in the principal cases, each section introduces the provision's origins in the 1972 Constitutional Convention, the 1889 Constitution, and where available, other sibling or parent constitutions. Next, principal cases demonstrate the provision's application and, often, alternative approaches expressed in concurrences or dissents. Consistent with the casebook's broader methodology, where Montana law is underdeveloped, some principal cases come from other jurisdictions. Finally, each section concludes with notes considering commentary on the provision or its siblings elsewhere, contrasting views expressed in Montana or other jurisdictions, and some emerging issues. Many notes highlight past student scholarship and ask questions to encourage future student scholarship.

Acknowledgments

The University of Montana Blewett School of Law is one of the smallest law schools in the nation, and its Montana Constitutional Law course is just one elective of many valuable courses that (in the words of our mission) "[e]mphasize those areas of law significant to the Rocky Mountain West." More than many scholarly projects, this one is sustained by the mission and continuous support of the School of Law over the past decade. This includes the whole community of alumni, students, faculty, and staff. Deans Irma Russell, Greg Munro, and Paul Kirgis have encouraged and supported this and related work since Dean Russell allowed me to co-teach my first seminar on the Montana Constitution in 2012. That experience with the great (and then recently retired) Justice Jim Nelson, week after week of sitting with students wrestling with his sophisticated and principled approach to the law, catalyzed my dedication to this project. More than 200 students in the Montana Constitutional Law course sustained my interest and introduced me to new applications of the law through moot courts and research papers, many of which are cited in this book. Over this same time, it has been my privilege to serve as faculty advisor to the Montana Law Review, which plays an essential role in the criticism and development of Montana constitutional law, and provides a platform for student scholarship that has helped maintain a fresh outlook on our state Constitution. Several students went beyond their coursework and publications to serve as formal or informal research assistants on this book and related research, and I am grateful

for the tireless effort and attention to detail of Amber Henning, Joshua Van Swearingen, Haley Nelson, Zachary Rogala, Anne Sherwood, Samir Aarab, Constance Van Kley, Jesse Flickinger, Rebecca Stursberg, Qasim Abdul-Baki, Victoria Nickol, Elizabeth Webster, Kim Wein, and last but not least McKenna Ford, who has borne the burden of getting the book to press.

Many of my introductions to the issues in this book came from the practice of law. Jim Goetz gave me my first taste of practice in Montana as a law student. Judge Sidney Thomas offered me two formative opportunities of a lifetime—to clerk in Montana and work in the Ninth Circuit under a mentorship marked by his humane wit. Julie North, Vincent Warren, and Beth Brenneman gave me the opportunity to encounter Montana Constitutional Law for the first time as a lawyer in the unlikely setting of a New York City litigation practice. Chief Justice Mike McGrath, then Attorney General, and Chief Judge Brian Morris, then State Solicitor, brought me out to Montana for good and fed me a rich diet of constitutional litigation in what is and should remain the best law firm in Montana. Attorney General and later Governor Steve Bullock allowed me to continue to support and defend the Montana Constitution with mixed success. Throughout my training as a state lawyer, innumerable colleagues patiently and generously let me interrupt their brief writing to work through state constitutional questions, and sometimes even let me join them in court. They include Chris Tweeten, Pam Bucy, Ali Bovingdon, Jim Wheelis, Jennifer Anders, Mark Mattioli, Tammy Hinderman, Stuart Segrest, Jon Ellingson, Jim Molloy, Jennifer Hurley, and especially Peter Bovingdon, who taught me how to teach even as we learned the law together. After I left state government and they joined it, Dale Schowengerdt and Raph Graybill each led me to and followed me down countless constitutional rabbit holes, apparently in our spare time. Caitlin Borgmann regularly prompted me toward deeper understandings of how constitutional rights function in Montana. When I started teaching the Montana Constitution, Betsy Griffing and Jack Tuholske gave me a head start with their materials and insight about what issues mattered most in the classroom. Martha Sheehy reminded me and my students that the Right of Participation and the Right to Know come before the Right of Privacy in the Declaration of Rights, as well as how funny—and sometimes ridiculous—it can be to practice under the Montana Constitution.

Then there are the delegates. Few constitutional law professors get to know the authors of the constitution they study. I knew the good civic sense of Mae Nan Ellingson, an old family friend, before I could write. Only later could I appreciate the greatness of her contributions to the Montana Constitution as its youngest framer, a skilled practitioner of its most technical aspects, and its champion for five decades and counting. Once in a while, Mae Nan would ask me a question about the constitution she helped write, in the way she would question her fellow delegates at the convention: politely, with a deceptive simplicity, and often leading to a revelation for the respondent even though she knew the answer the whole time. Bob Campbell and I met in a classroom convened in a truck trailer near Boulder, Montana. It was my first Law Day, with the Equal Protection Clause as our subject, and I

did not know he would be my co-teacher until he showed up and started passing out signed copies of the Montana Constitution. There was little for me to do but to sit back and hear Bob's stories bring the convention to life for the students, the teacher, and me. Many times since, Bob has done the same in my classroom, and just like those Jefferson County High School students, the law students became quick fans of this unlikely constitutional superstar, lining up for autographs after class. Over the years, I have been privileged to meet, learn from, practice before, and even get served a complaint by several more delegates, including Jean Bowman, Wade Dahood, Gene Harbaugh, Bob Kelleher, Jerome Loendorf, Michael McKeon, C.B. McNeil, and Arlyne Reichert. I hope this work is worthy of their legacy.

Finally, I am indebted to my family's enduring support. To my grandparents and their grandparents for a heritage of quiet beauty, grand mountains, and vast plains; my parents for providing me innumerable opportunities through their moral, intellectual, and general sustenance; my wife for a quality of life filled with her constant love, encouragement, patience, as well as occasional line-edits; and our children for every hour I spent with this book and not with them. May this book do its part to improve the quality of life, equality of opportunity, and secure the blessings of liberty for them and future generations.

A Note on Editing

For ease in reading, the text abridges most cases and commentary. Ellipses (. . .) denote omissions within a paragraph, and asterisks (***) denote omissions of entire paragraphs or across paragraphs. The text also omits most citations and footnotes, including citations to the records of the Constitutional Convention. Citations, when they occur, typically include only the court and date except when the Montana Supreme Court uses its public domain citation format (introduced in 1998). Except for United States Supreme Court case citations, the cited court is inserted into the parenthetical following the case name even where the citing case or commentary has excluded it.

Disclosures

The author served as counsel for the state at some stage in the proceedings in the following cases featured in this casebook: *Baxter v. State* (Mont. 2009); *Big Sky Colony, Inc. v. Montana Department of Labor and Industry* (Mont. 2012); *Columbia Falls Elementary School District No. 6 v. State* (Mont. 2005); *Donaldson v. State* (Mont. 2012); *Espinoza v. Montana Department of Revenue* (Mont. 2018); and *Western Tradition Partnership, Inc. v. Attorney General* (Mont. 2012). *Immunity Confusion: What Is Article II, Section 18 About?* (Chapter 2) is a condensed version of a paper prepared for Farmers and Ranchers for Montana (FARM), an organization supporting the water rights compact between Montana and the Confederated Salish and Kootenai Tribes, and the views expressed in it are the author's.