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THE 1972 MONTANA STATE CONSTITUTION DECLARATION OF RIGHTS AND THE OPPORTUNITIES ON THE BUMPY ROAD AHEAD

Rick Applegate

As the 1971 Montana State Legislature was winding down—where I had worked for Chairman Luke McKeon as staff at the Senate Executive Reorganization Committee—I was hired, age 21, to research civil liberties and political freedoms for the newly created Montana Constitutional Convention Commission. My scope included potential environmental quality provisions because they were at the time widely viewed as matters of rights and obligations, and the related ability of citizens to seek adjudication of them.

For all those hired by Executive Director Dale Harris, this was an unexpected opportunity and came with a clear sense of stern responsibilities. I settled in with a group of highly talented colleagues, including the likes of the scholarly Bruce Sievers, James Grady (then still pre-Condor[1] and before his investigative reporting days with Jack Anderson), Roger Barber, Rich Bechtel, Sandra Muckleston, and others.

We quickly found ourselves wondering if we had just accepted the best jobs we might have in our lifetimes; and whether anything that followed could possibly measure up. At the same time, we dreaded that we could fail spectacularly at this; that we might not be able to get the necessary work done on time and at sufficiently high quality.

In those days, now nearly 50 years ago, I was given a very large room up in what I called the Far North, right behind the House gallery in the Montana Capitol building. Cavernous, without hint of a window, it felt like it was my personal double-wide tomb. It housed two massive tables, and, in a far-off corner, I stowed my rawhide moccasins that did not lend an elegant ambience to the place.

I spread out separate piles, chapters, one to a table—sections of what became a rather bloated draft tome destined for the delegates—edited fortunately by the fine hand of Jerry Holloron, the acclaimed journalist who served as Assistant Director. Lord knows, my writing needed his help, as this entire exercise was research conducted and written at a young

1. Grady's popular novel, *Six Days of the Condor*, was published in 1974.

age, in what felt like a wind tunnel test. We had so much to do, and so little time to get it done.[2]

We were laboring under the watchful eyes of the Convention Commission—an esteemed group of Montana's senior overseers who reviewed and met regularly to discuss our emerging ideas and work products. Names like Alexander Blewett, Eugene Mahoney, Ty Robinson, Bruce Toole, William Sternhagen, Charles Harrington, Dr. Ellis Waldron, and more were spread across the Commission's letterhead.

They did not intrude in our work, but their presence was surely felt. They made certain we were on track and that the research fairly laid out the broad range of available issues for the soon-to-be-elected delegates to the Constitutional Convention. We were charged to dig up, synthesize, and flesh out any and all leading matters we could find that might be considered and perhaps adopted in some form in the draft Constitution—potentially to be tested in what was supposed to be one among the widespread experiments in state constitutions then sweeping the country.[3]

In addition to my office, I was able to take over a table in Katherine Orchard's state law library, then tucked down a narrow corridor behind the old Supreme Court chamber, where in my earlier days as a State Senate page in 1967, I frequently observed Justices Doyle and Adair more than briefly dozing off during the practiced and honed arguments of counsel vying for the Court's attention.

To help with my Constitutional Convention research, Ms. Orchard provided me with a key so I could show up in the wee hours and, if needed, stay after dark to plough through the materials that would help inform the Convention deliberations. She looked away when in the mornings I wolfed down a couple powdered sugar donuts, hard-boiled eggs, and cartons of milk from the basement cafeteria while I raked through mounds of legal and policy analyses. The rules were pack it in, pack it out, and leave no crumbs behind. Anywhere.

WHY EVEN HAVE A STATE CONSTITUTION DECLARATION OF RIGHTS? AND WHAT SORTS OF RIGHTS AND FREEDOMS MIGHT BELONG IN ONE?

First, to the why. This was one of the initial questions addressed at the beginning of my study, where I pointed out that in the 18th century, a number of colonies, later to become states, had declarations of rights

2. RICK APPLEGATE, *BILL OF RIGHTS, MONTANA CONSTITUTIONAL CONVENTION COMMISSION*, REP. NO. 10, 1972. After 422 pages, a dedicated reader would stagger into the Selected Bibliography.

3. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION (6th ed. 1963).

well before the United States Constitution was adopted and Congress met to add the ten amendments that eventually became the first federal Bill of Rights.[4]

In fact, several of those colonies made it clear that a bill of rights of some kind was important to their willingness to ratify the new Constitution. Above all, many were concerned that the newly strengthened federal government would need to be restrained by a federal bill of rights.

James Madison borrowed extensively from the various guarantees then in place—for example, from Maryland, Pennsylvania, and Delaware. And, recognizing that the federal bill of rights would not be a complete list of all-important rights, he included an explicit unenumerated rights provision as the federal Ninth Amendment. It provided: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."[5]

Beyond that, there was a general sense that all levels of government should be engaged in propounding additional rights—discovering and advancing the limits on governmental actions and also reining in the whims of majorities that might otherwise overrun the legitimate interests of vulnerable minorities.

Of course, later in the history of the Bill of Rights, it became clear that the federal government had to step in to set some minimum standards where the states had failed—for example, the 13th, 14th, and 15th Amendments were necessary to guarantee the end of slavery; enshrine due process of law; cement the privileges and immunities of citizenship; and provide for the equal protection of the laws as resistance and retrenchment continued for decades after the Civil War.

In spite of historical efforts to recast the Civil War as simply a matter of states generally asserting their rights against an overly intrusive federal government, it was a fundamental right—the right to be free from forced enslavement, family separation, and sale—that led to the tragic catastrophe of internal war. It was never to be an easy march away from that legacy; for as we know, the resistance to the abolition of slavery and to new civil rights was reinvigorated after the war. Indeed, it has persisted in various forms to the present day in a variety of creatively designed state and federal legislative efforts adversely affecting minorities, particularly but not only, in some of the states that once comprised the Confederacy.[6]

In addition, over time, given the overwhelming complexities, difficulties, and the daunting and time-consuming nature of the process for

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4. U.S. CONST. amend. I–X.
5. U.S. CONST. amend. IX.
6. HENRY LOUIS GATES, JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW (2019).

amending the United States Constitution, states have often been considered to be useful laboratories for experimentation with new rights that may be vetted before being offered for addition to the federal Bill of Rights or otherwise reflected in some way in federal law. Perhaps the best-known example of this testing ground can be seen in the fact that a number of territories and states had adopted full or partial women's suffrage prior to that change being added to the Constitution.[7]

In my study, I also discussed the frequently expressed view that state constitution provisions should, in contrast to statutes, be kept short in the interest of clarity and conciseness. However, I urged that "a sound declaration of rights is not necessarily short, nor should its provisions all be approximately the same number of words."[8] What I meant was that circumstances might indicate the need for more expansive expressions of an emerging right, as opposed to artificially abbreviated provisions.

Second, was the question of what kinds of rights and freedoms might need to be covered. It is frequently asserted that declarations of rights are primarily designed to protect individual citizens from intrusive governmental agencies and officials. And that is true. Those protections certainly are fundamental and important bulwarks, here and worldwide, as has been amply established over and over. And the protection of the individual from government excess is a key original purpose of declarations of rights in the U.S. experience. In my work on civil liberties and political freedoms, and in the work with the delegates, we recognized that was just one of the reasons a right or freedom might be declared in a bill of rights.

In my early briefings on my study for the Committee, and as we worked our way through the many issues in my report, there emerged a clear understanding that we should broaden the focus to three other categories of protections and opportunities meriting coverage—that is, if we could fashion relevant provisions. And the search for those, the discovery of some of them, is part of the reason that the Montana Declaration of Rights stands as more than an appealing novelty and has for so many years.

7. In 1872, Susan B. Anthony registered and voted in Rochester, New York. She was convicted without a jury trial and fined $100, which she never paid. In 1875, women in Michigan and Minnesota obtained the right to vote in school elections. Between 1869 and 1883, the territories of Wyoming, Utah and Washington granted women full voting rights; *see also* ELEANOR FLEXNER & ELLEN FITZPATRICK, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES (3rd revised ed. 1959); and, for a deeper dive into the lives of the leading activists, *see* ELIZABETH CADY STANTON, ET AL., WOMEN OF THE SUFFRAGE MOVEMENT: MEMOIRS AND BIOGRAPHIES OF THE MOST INFLUENTIAL SUFFRAGETTES (2018).

8. APPLEGATE, *supra* note 2, at 4.

The second critical feature of declarations of rights, beyond the important protection of citizens against governmental excesses, is the more difficult but equally critical matter of shielding vulnerable minorities and others from the sometimes-runaway intentions of unrestrained, even voracious majorities, which in our history have frequently pushed the legitimate grievances and claims of minorities, indigenous people, and many others—generally the least advantaged among us—to the curb. Protections of this kind are found, for example in the broader than usual anti-discrimination, equal protection, and individual dignity provisions of the Montana declaration.

Third, it is increasingly important to protect individuals and groups from the expanding and overwhelming power of the private sector, which can be even more damaging to civil liberties and political freedoms than the public sector. Private sector intrusion was also squarely addressed in the anti-discrimination, equal protection, and dignity provisions.

A fourth important aspect of civil liberties and political freedoms in a bill of rights is the matter of laying the foundations, better yet, establishing the fundamental prerequisites for effective citizenship—something that has received insufficient attention in our polity. These days, it shows.

The adopted Declaration of Rights did make some progress in each of the four areas above. However, as will be seen below, much work remains if there is the political will and if the opportunities arise.

WHAT MAKES THE MONTANA DECLARATION OF RIGHTS SO SPECIAL?

Let's just get the obvious and easy part out of the way: the 1972 Montana Constitution Declaration of Rights stands as a marvelous and surprising collection of innovative provisions—more novel and powerful than virtually anything that can be found in constitutions anywhere—even to this day. Going in, no one expected or could have predicted that kind of outcome. I wrote my study hoping to break a lot of new ground, but really had no idea we would end up with so much that was compelling, new, and in some cases unique. Or that it would become a lasting example of what we know in the national pastime as long ball.[9]

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9. *See*, *e.g.*, SAUL K. PADOVER, SOURCES OF DEMOCRACY: VOICES OF FREEDOM, HOPE, AND JUSTICE (1973) (identifying collected documents central to the history of democracy. He was teaching at the Graduate Faculty of the New School for Social Research in New York City when I returned to my studies in the fall of 1972 with Dr. Robert Heilbroner and Dr. Hannah Arendt after the Constitutional Convention. Not surprisingly, Padover's book concluded with the Montana Declaration of Rights as the latest in his sweeping compilation of the key documents in the history of democracy. He was very impressed with it.).

Take the highlights in order:

> 1. An inalienable right to a clean and healthful environment (laid out in the Bill of Rights study; and, while not found in the original Bill of Rights Committee proposal, fortunately added in a rather abrupt and surprising move by Delegate Burkhardt as a Convention floor amendment).
>
> 2. The inalienable right to pursue life's basic necessities, including a right to pursue, among other things, an individual's safety and health.[10]
>
> 3. Broad equal protection and anti-discrimination provisions that explicitly prohibit discrimination—not only by government, but by persons, firms, or institutions; in short, any discrimination that would limit the exercise of civil or political rights, whether based on race, color, sex, culture, social origin or condition, or political or religious views. And a guarantee of equal protection of the laws.
>
> 4. An individual dignity provision, at the time seemingly innocuous, but still holding the promise of yet-to-be-discovered potential.
>
> 5. The right of participation, which remains unique in state constitutions (with an important, somewhat experiment-undercutting qualifier adopted during floor consideration that unfortunately declares it a right "as may be provided by law").
>
> 6. The now-famous right to know—providing public access to documents and deliberations—constrained only when the demand of individual privacy clearly exceeds the merits of public disclosure.
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> 7. An explicit right of individual privacy (unlike the United States Constitution where that right was pulled by

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10. MONT. CONST., art. II, § 3.

the U.S. Supreme Court from the shadow, the "penumbra" of the existing federal Bill of Rights).[11]

8. A clear and direct statement of the right of suffrage, the right to vote, which is not to be impaired (again, unlike the United States Constitution which is more narrowly focused when it comes to its provisions on suffrage; and is in my view much less clear and ultimately nowhere near as helpful as it should be for voters in a democratic republic—especially when we see restrictions that historically have been and in contemporary times are still being employed to weaken that right by suppressing voting and turnout for what smack of largely partisan ends).

9. A provision guaranteeing to persons under the age of majority the same rights as those available to adults.[12]

10. A promising statement that the principles of the criminal justice system are to prevent crime, promote reformation, public safety, and restitution—and not simply to impose punishment or exact harsh retribution.

11. The restoration of full rights to convicted persons upon completion of their term of supervision (including the crucial restoration of the right to vote, a reform that Montana has had in place for decades but remains now and for the foreseeable future a matter of considerable controversy in many states).[13]

12. Originally, as adopted and ratified as part of the 1972 Constitution, the total elimination of the governmental defense against lawsuits, the claim-snuffing doctrine of

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11. Griswold v. Connecticut, 381 U.S. 479 (1965); *see also*, Larry Elison & Dennis Nettik Simmons, *Right of Privacy*, 48 MONT. L. REV. (1987).

12. APPLEGATE, *supra* note 2, at 33; Rebecca Stursberg, *Still-In-Flux: Reinterpreting Montana's Rights-of-Minors Provision*, 79 MONT. L. REV. 259 (2018).

13. This is one of those instances when I find that Wikipedia has some of the most concise, accessible and informative material on the subject; *see* "Felony Disenfranchisement in the United States" https://en.wikipedia.org/wiki/Felony_disenfranchisement_in_the_United_States. The state of Florida has recently voted statewide to re-enfranchise convicted felons, but even passage of the measure by a substantial margin has not stopped efforts to continue at least some of the difficulties of re-instatement of this fundamental right.

> "sovereign immunity"—an anachronistic vestige of the old notion from royal Europe that "the King can do no wrong." The provision was of course subsequently amended by statewide referendum to allow exceptions—renewing immunities from suit if specifically adopted by a supermajority vote of the state legislature.
>
> 13. The repetition of the venerable, still helpful, and explicit recognition that there exist other unenumerated rights that are retained by citizens.

AS THE CONVENTION KICKED OFF . . .

At one point, fairly early on, long before any of the Constitution's provisions were hardening into a proposed Declaration of Rights or other articles in the document, several of us on the Convention staff felt that the delegates were focusing too much on only those matters that would almost certainly pass muster with the voters—based on a loosely developed intuition about what Montanans would willingly absorb or tolerate. So, in a fit of youthful exuberance, not to say recklessness, we had the unbridled audacity to say so; and we did it publicly. Live on air, of all things. Of course, some of our good friends in the media relished the dust-up that seemed certain to follow.

Waking to what we had just done, we basically hastened to duck and cover, waiting for an expected terminal blowback. In that, we were disappointed (happily I recall, as we suspected we had stepped into a pile that was far over the line). But, for the most part, we were greeted with relative silence and even a bit of encouraging agreement by close associates and among some of the delegates. And, fortunately, thanks to the equanimity of all delegates, and the harried seriousness of their deliberations, there were to my knowledge no significant recriminations of any kind—either discussed or threatened.

We and the delegates went back to work, and, over time, it appeared that they were, not because of our mini mutiny, in fact perfectly comfortable considering nearly every matter we lobbed their way. Some key items made it in; some did not. But all had their moment in the deliberations in the various committees and on the floor—and certainly in the work of the Bill of Rights Committee, which of course, I observed as closely as anyone could have hoped to.

In the course of all that, I developed an enduring admiration for the workings of the Committee members in their deliberations and in particular the skills of the Committee Chairman Wade Dahood, who, while

we did not always agree, was a master of his craft, and a formidable advocate for many civil liberties and political freedoms as he understood them at the time. I have described elsewhere his habit of gripping someone's arm as he was making a point on a matter of constitutional law. And as the conversation proceeded, that person soon enough realized that Wade's grip was becoming more intense, and that he was not likely to relax or release it until you agreed with him—or he was summoned by other duties. I recall most of those discussions I had with him fondly to this day, and the circulation in my arm is back in the normal range.

The Committee members decided at the outset to avoid diminishing any existing right or freedom in the Montana Constitution. They then moved through proposals to develop language and on to the Committee's overall report. Without a hint of partisanship, the Committee's votes on individual proposals were nearly all unanimous.[14]

The other Convention delegates likewise marched efficiently on through their committee work, floor deliberations, style and drafting reviews, numerous votes, and eventually to a signing ceremony in which the approved document was autographed by all the delegates—even if some held reservations that would lead them ultimately to oppose ratification of the Constitution.

THE FLOOR DEBATES

The floor debates on the proposed Declaration of Rights unleashed considerable anxiety on my part as the draft was about to be subjected to detailed scrutiny—and the will of the delegates would be the final word on what would be presented to the voters for ratification or rejection, at which point, as occurred in other states, it could all be for naught.[15]

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14. MONTANA CONSTITUTION BILL OF RIGHTS COMMITTEE, COMMITTEE REPORT, 1972.

15. State constitution ratification failed in New York in 1967, in Rhode Island in 1968, and, to the surprise of many, in Maryland, in that same troubled and disorienting year. Many of the delegates to the Montana Constitutional Convention were acutely aware of those failures to ratify, and feared Montana's document might easily suffer the same fate. But many told me directly that they were not deterred in any way by that record and intended to pull together and offer the best provisions they could find. Often they did just that. For broad overviews of the Declaration of Rights, *see* LARRY ELISON AND FRITZ SNYDER, THE MONTANA STATE CONSTITUTION (2011); *see also* INGA KATRIN NELSON, "EACH GENERATION OF A FREE SOCIETY": THE RELATIONSHIP BETWEEN MONTANA'S CONSTITUTIONAL CONVENTION, INDIVIDUAL RIGHTS PROTECTIONS, AND STATE CONSTITUTIONALISM (2011) (unpublished thesis, Portland State University), https://pdxscholar.library.pdx.edu/open_access_etds.

THE INALIENABLE RIGHTS SECTION

The floor consideration of the Declaration was generally a model of civil and careful discussion—even when, early on, an occasional controversial matter would surface. Delegate Monroe introduced the inalienable rights section, stating that it only made minor changes, and urged its adoption. However, that reassuring calm didn't last long.

Delegate Kelleher offered an amendment to the inalienable rights section to announce that "all persons are *conceived* . . . free and have certain inalienable rights . . . ." As opposed to the original language that specified, they were "*born* free." Of course, that generated quite a stir on the floor.[16]

Chairman Dahood rose quickly in opposition to the amendment, characterizing it as an effort to flatly prohibit abortion in the state. He urged that it did not belong in the Montana Constitution and should be left to the legislature.[17] Having taken what was, for him, an unusually concise position, he sat down; and you could feel the air going out of the place.

Recall that this debate was occurring well before the controversial *Roe v. Wade* decision was handed down by the U.S. Supreme Court. After Dahood made his straightforward point, the amendment failed by a wide margin, on a vote of 15-71. Interestingly, a number of the Convention's most progressive members were among those favoring the amendment, perhaps principally on religious grounds as the Catholic church had weighed in heavily to press for that sort of language in the document. The opposition to the amendment was broad-based.[18]

Of course, the debates over abortion and choice still resonate nationwide these days, as the United States Senate Majority Leader has had U.S. Senators vote on a number of abortion-constraining measures that could affect tens of thousands of women who face a choice that the majority of elected officials cannot, or choose not to, comprehend or respect.

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16. MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT, Vol. V, 1636-40 (1972) [hereinafter MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPT V].

17. *Id.* at 1640.

18. *Id*. at 1640-42 (Delegates Cate, Cross, Harrington, Roeder and VanBuskirk were among the amendment's supporters. Opponents included Bowman, Bugbee, Dahood, Eck, Felt, Habedank, Reichert, Speer, and a broad cross-section of other delegates).

And, there are now numerous cases working their way toward the U.S. Supreme Court—several of which are designed to test whether the currently more conservative, more ideologically rigid, and in some ways, even more activist Court, will weaken or perhaps even turn away from the 45-year-old established *Roe* precedent.[19]

Let's dig a bit deeper into the floor action on several of the most innovative provisions.

THE ANTI-DISCRIMINATION PROVISION (BILL OF RIGHTS, SECTION 4)

> [N]o 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.[20]

This provision was explicitly written and intended to prohibit discrimination by private individuals and entities as well as the public sector. On the floor, Delegate Mansfield introduced it:

> The committee unanimously adopted this section with the intent of providing a constitutional impetus for the eradication of public and private discrimination based on race, color, sex, culture, social origin or condition, or political or religious ideas. The provision, quite similar to that of the Puerto Rico declaration of rights, is aimed at prohibiting private as well as public discrimination in civil and political rights. Considerable testimony was heard concerning the need to include sex in any equal protection or freedom from discrimination provisions. The committee felt that such inclusion was eminently proper and saw no reason for the state to wait for the adoption of the federal equal rights amendment or any amendment which would not explicitly provide as much protection as this provision. The word "culture" was incorporated specifically to cover groups whose cultural base is distinct from mainstream Montana, especially the American Indians. Social origin or condition was included to cover discrimination

19. Roe v. Wade, 410 U.S. 113 (1973), a 7–2 decision that remains at the center of a political firestorm to this day and perhaps will for a long time.

20. MONT. CONST., art. II, § 4.

> based on status of income and standard of living. Some fears were expressed that the wording "political or religious ideas" would permit persons who supported the right to work in principle to avoid union membership. Such is not the intent of the committee. The wording was incorporated to prohibit public and private concerns discriminating against persons because of their political or religious beliefs . . . . The committee is well aware that any broad proposal on these subjects will require considerable statutory embellishment. It is hoped that the Legislature will enact statutes to promote effective eradication of the discriminations prohibited in this section.[21]

Immediately after Mansfield's opening remarks, Delegate Habedank tried directly to reduce the broader application of the provision solely to state and local entities—essentially to the public sphere—by moving to strike its prohibition against discrimination by persons, private firms and entities, and corporations. He worried specifically that the Committee's intentionally broader language might complicate the desire of an organization like the Sons of Norway to exclude persons who are not actually Norwegian.[22]

Chairman Dahood responded that the intent of the Committee recommendation was explicitly to prohibit a variety of forms of discrimination that were then too common—in employment, home and apartment rentals, accommodations, commercial services, and other matters that were quasi-public.

Delegate Holland expressed a concern that the Elks or Masons might be required to admit women, of all things, to their membership. Dahood responded that common sense should handle that concern. Later, Delegate Robinson/Ellingson inquired whether the language would need to be given full effect by legislative action to define its ultimate impact and perhaps even its overall boundaries. Dahood responded that constitutional provisions "are presumed to be self-executing, particularly within the Bill of Rights. If the language appears to be prohibitory and mandatory, as this particular section is intended to be, then in that event, the courts in interpreting the particular section are bound by that particular presumption and they must assume, in that situation, that it is self-execut-

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21. MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPT V, *supra* note 16, at 1642.
22. *Id.*

ing." Delegate Robinson/Ellingson indicated that was a satisfactory answer. Thereupon, the Habedank amendment was defeated by a wide margin, 13–76 and the provision was advanced intact.[23]

THE CRITICALLY IMPORTANT, SOMETIMES OVERLOOKED INDIVIDUAL DIGNITY PROVISION (SECTION 4)

The dignity of the human being is inviolable . . . .[24]

The provision on individual dignity clearly has not received as much attention as I expected once it became clear that there was interest in incorporating it in the Committee draft. Dignity can be a nebulous concept, hard to define or pin down in much detail in a constitutional setting. But when you think about it, other now commonplace constitutional matters once lacked clear definitions or details that have been and still are being fleshed out over centuries of interpretation (e.g., the bedrock due process of law being just one example).

The concept of dignity potentially opens an important window into a number of contemporary issues that the founders themselves would likely have struggled with, perhaps unsuccessfully, given the circumstances of their days when, for example, slavery was still very much a commonplace feature of the American economy; and major campaigns were already underway to displace Native Americans from lands desired and about to be overrun and claimed by European settlers.

Of both these fundamental indignities, there was apparently very little discussion by the founders over 200 years ago. More recently, history and literature have caught up on both topics.[25] In addition, University of Montana professors Clifford and Huff have written an extensive, well-reasoned and thorough analysis directly treating the Montana Constitution's dignity provision. It covers the sources of the concept of dignity in Western philosophy and law, as well as offering a compelling discussion of its potential future applications.[26]

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23. *Id*. at 1645-46.

24. MONT. CONST., art. II, § 4.

25. *E.g.*, VINE DELORIA, JR., BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST (1970); *see, e.g.,* ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES (2014); *see also*, with respect to African Americans, DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2012).

26. Matthew O. Clifford & Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity Clause" with Possible Applications*, 61 MONT. L. REV. 301 (2000); *see also*, Conor O'Mahony, *There is No*

The specific provision incorporated into the Montana Constitution had an antecedent that the Committee cited from the Constitution of Puerto Rico—ironically now a place where U.S. citizens are suffering from a lack of water and power and the indignity of neglect in the wake of a massive recent hurricane. The language of the Montana provision was much clearer in that it was not confined to breaches of dignity by the public sector. Puerto Rico's judiciary later reached the same conclusion, but it was the result of a surprising reversal of view by that nation's highest court.[27]

In addition, the Clifford and Huff analysis makes clear that for purposes of interpretation, the dignity provision stands on its own; and its ultimate effect is not, and should not be, solely related to or dependent on discriminatory acts or violations of equal protection of the law.[28]

THE RIGHT OF PARTICIPATION, AS SOMEWHAT EMASCULATED (SECTION 8)

> The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.[29]

In the late 1960s and early 1970s, there was much impassioned discussion about participatory democracy. In many cases, advocates across the nation expressed a strong desire to put in place institutions that would expand more direct forms of democracy. This was opposed to some extent by those who reached back to the founders, indicating that they clearly had a concern in their day about the runaway passions of an unfettered majority. That was of course a useful warning, but there was developing a widely held view on campuses and elsewhere that too many decisions excluded the public and that there were not enough institutionalized

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Such Thing as a Right to Dignity, 10 INT'L. J. CONST. L. 551, 574 (2012) (arguing, among other things, that constitutional provisions "should distinguish between the right to personal autonomy and self-determination and the underlying principle of human dignity from which it derives. Moreover, it should be accepted that if dignity is an inherent characteristic of every human being which calls for that human being to be afforded equal treatment and respect, then there can be no such thing as a right to dignity.").

27. Clifford & Huff*, supra* note 26, at 321.
28. *Id.* at 323-24.
29. MONT. CONST., art. II, § 8.

opportunities for ordinary citizens to be directly engaged in deliberations and actions that affected their lives in critical ways.[30]

The Bill of Rights Committee took this political freedom issue seriously, as became clear when the convention took up the freedom of assembly. In introducing that provision, delegate Mansfield again spoke for the Committee:

> The basic right to assemble for redress of grievances by petition or remonstrance remains unchanged. The wording was tightened up a little and the phrase 'protest governmental action' was substituted for the phrase 'apply to those invested with the powers of government for redress of grievances by remonstrance.' In doing so, the Committee notes the paramount position of the right and the invaluable function its responsible exercise plays in a democratic society.[31]

That sentiment carried over to the right of participation, as Delegate Foster, a member of the Committee, was a strong supporter of this right. In several conversations, he had expressed to me his out-of-town perspective, as he put it, telling me about those who lived in an area where nearly everyone knew their neighbors; and who, as the light went down, parked their pickups at nearby country road intersections, switched on their headlights and turned up the radio music to dance into the night. More to the point, he said, folks there were comfortable in the daytime being engaged with their neighbors directly in public discussions and in decision-making. He was for that reason very sympathetic to and focused on the need for greater participation in public life.

On the floor, he was in the forefront of those who championed the strong, concise, and open-ended language on the right of participation that was included in the Committee proposal. He stated:

> It is hard to imagine how the inclusion in our Constitution

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30. *See, e.g.*, SHMUEL LEDERMAN, HANNAH ARENDT AND PARTICIPATORY DEMOCRACY: A PEOPLE'S UTOPIA (2019); ALBERT DZUR, DEMOCRACY INSIDE (2018); TOM HAYDEN, INSPIRING PARTICIPATORY DEMOCRACY (2012); *and* PARTICIPATORY DEMOCRACY (Dmitri Roussopoulos & C. George Benello, eds., 2004) (of course, there will always be a legitimate concern whether more direct democracy will in fact prove to be sufficiently deliberative).

31. MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPT V, *supra* note 16, at 1647.

> of a right to know and a right to participate could do anything but improve in some measure responsiveness . . . and improve in some measure citizens' confidence and satisfaction in government. The government will be the better for it; the people will be the better because of it. I resist the motion to delete . . . .[32]

Unfortunately, while the right was not deleted, it was not to survive in its lean and most promising original form.

At one point in the debate, Delegate Wilson noted that the lawyers were not in agreement and warned that "perhaps we're opening up a field for a wide range of litigation. If they can't decide among themselves now, we're in trouble." Delegate Robinson/Ellingson's response brought down the house: "[I]f we have to base our decisions on only those things that the lawyers can agree on, we'll never adopt any of the Constitution."[33]

It is no surprise that the provision, with virtually no analog in other state constitutions, generated a fair bit of uncertainty and proved quite controversial on the floor, resulting in extended debate, including a motion to strike it altogether. Thankfully, that motion to delete in its entirety was turned down on a vote of 37–54. But, as it turned out, that was not to be the end of the matter, and there were many sidebar conversations on and off the floor, and the discussions and debate continued as the Convention recessed for dinner until eight o'clock that night.[34]

When the Convention reconvened, Chairman Graybill noted that "there have been a lot of pencils out over the dinner hour."[35] Indeed, there were. Finally, after much wrangling and confusion, Delegate Davis moved to modify the right by adding the phrase "as provided by law." No one really saw this one coming. I shrank in my chair when Delegate Eck essentially responded that, while she was not sure, she thought all the rights provisions anticipated some form of legislative definition, that she believed "almost all of these sections inferred 'as provided by law.'" She deferred to Delegate Dahood, who interposed no objection to the amendment. He expressed his belief that the Legislature or a city council might need to set down guidelines, but did not directly comment on Delegate Eck's observation about the potential need for legislative action on many rights in the declaration. The amendment was adopted by voice vote.[36]

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32. MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPT V, *supra* note 16, at 1657-58.
33. *Id.* at 1661.
34. *Id.* at 1662.
35. *Id.* at 1663.
36. *Id.* at 1668.

The reason I found myself cringing at any suggestion that the rights in the declaration might generally be somehow dependent on legislative action is that constitutional rights in the American tradition are typically written expressly to stand on their own and with the intention that legal proceedings can be employed, and will from time to time be necessary, to permit judgments whether legislative and executive actions are consistent with a Constitutional provision—not the other way around.

I believe, and I think the historical record demonstrates, that the "as may be provided by law" language has been something of an obstacle to fuller-scale experimentation with various forms of citizen participation in Montana. Of course, there have been some important statutory provisions that help enhance conventional avenues to participation, and, as Mike Meloy recently reminded me, the right of participation itself has been read in ways that have significantly bolstered the companion right to know in various legal proceedings around the state. In particular, the absence of notice or an agenda can render attendance at a meeting useless. As the delegates knew when they considered the right to participation, it was intentionally drafted as a companion to the right to know, and it is reassuring to see that they are being read in a complementary fashion.

My overall point about the right is somewhat different. It is that we have not tested the benefits, for example, of such things as sanctioned town hall-style sessions or experiments with ad hoc citizen councils to try to make progress on difficult issues at state or local levels. These kinds of participatory institutions should be initiated and evaluated as a means to foster collaborative deliberations on some of the more contentious issues confronting state and local governments and their affected publics.[37]

I remain hopeful that, in the long run, this particular Convention debate and the adopted language are not necessarily dispositive on the question of whether the courts may ultimately have some more decisive role in helping to further define, or at least prod refinements and embellishments of, the right.

At the risk of oversimplification, I suspect that, under the right factual circumstances, the courts could hold that the reasonable expectations of citizens may not be fully realized or given effect by whatever statutes a state legislature may find itself able to adopt as a means of determining the fully-settled bounds of effective approaches to enhanced citizen participation.

Stepping back for a moment, what is certainly more generally and fundamentally important in my view, is that the civil liberties and political

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37. *Cf.* LEDERMAN and DZUR, *supra* note 30.

freedoms expressed in constitutions—federal and state—should not be unduly circumscribed or otherwise weakened or undermined by statute. Legislative and administrative actions can and should be challenged in an appropriate way whenever they seek to make, or do in fact accomplish, unreasonable or unwise constrictions on even a provision like the right of participation that may not be seen as fully self-executing.

As always, time will tell; and to date, I admit that recent history has not been overly friendly to a robustly expanded right of participation along the lines I had hoped for. Most opportunities for participation center on the more commonplace public notice and public hearings with testimony. These are not typically deliberative sessions that involve public participants in deliberations.

Down the road, in areas urban or rural, there may be a resurgence of interest in and respect for citizenship that will lead to more careful experiments in citizen participation in the U.S.—particularly given the dysfunctional, deeply divided, and battered condition of our public discourse. For now, the right is likely to remain an important component of greater access to decision-making.

THE RIGHT TO KNOW AND ITS UNEASY BEDFELLOW, THE RIGHT OF INDIVIDUAL PRIVACY (SECTIONS 9 AND 10)

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.[38]
>
> The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.[39]

The right to know appears to be more generally embraced and praised these days; but during the convention, it was a matter of sustained disgruntlement, extended disagreement and tense debate.

The original Bill of Rights proposal from the Committee stipulated that disclosure was required "except in cases in which the demand of individual privacy exceeds the merits of public disclosure." A key turning point in the deliberations occurred when the right was revised offline so

38. MONT. CONST., art. II, § 9.
39. *Id.* § 10.

that the demand of individual privacy had to "clearly" exceed the merits of public disclosure. Chairman Graybill reminded Clerk Smith to include that term in the initial reading of the provision on the floor. That made it more acceptable to many, but not to all advocates of full disclosure.[40]

Delegate Eck led the charge on the floor, noting the proposal was a companion to the right of participation. But, even with the change in language elevating the right to know, Delegate Cate remained strongly opposed to the provision. He urged that the provision granted a right to know, but then took it away with the right of privacy; and that it might even jeopardize the existing state statutes on openness. He had been joined in that view for weeks by staunch and insistent media opposition driven principally by understandable fears that the individual privacy language might be used by agencies to fatally undermine the public's right to know. It was clear at the time that the press might even oppose the ratification of the Constitution over this issue.

Delegate Cate moved to modify the individual privacy language, limiting it to instances in which the legislature determined that the "demand of individual privacy clearly exceeds the merits of public disclosure"—leaving the admittedly thorny interplay of these two rights up to the vagaries of each new session of the state legislature. Delegate Foster was aware that Dan Foley, a respected journalist of the day, had in fact endorsed the balancing of the right to know against the right of privacy in the way the Committee had originally proposed and quoted him to that effect on the floor.

Floor discussion ensued in the long shadow of the pointed editorials calling for the outright elimination of the entire right to know. Fortunately, a motion to delete the language was handily defeated on a vote of 14–76. Delegate Foster then strongly opposed the Cate Amendment by noting the Committee had specifically considered whether to leave the balance to the legislature and, expressing confidence in the judgment of the courts, had concluded it was not appropriate to leave it to the legislature.

The Cate amendment to circumscribe the right of privacy also went down on a vote of 30–56. But the debate was not over. At one point, Chairman Graybill declined to restate what he termed the "lingo" of a previous discussion. At the end, in an exchange between Delegate Heliker and Chairman Dahood, Heliker pressed for clarity on the question whether a corporation could be an individual. The Chairman clarified that the right of individual privacy was precisely that: a right of individuals, and therefore not claimable by corporations.[41]

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40. MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPT V, *supra* note 16, at 1669.

41. *Id.* at 1669-80.

At the beginning of the floor discussion of the right of privacy provision, itself the subject of comparatively little floor debate, Delegate Campbell made the point even more emphatically by adding the term "individual" to the provision. He indicated that this would clearly exclude agencies or corporations (as the latter may, in some circumstances be considered as persons) from claiming that the individual privacy protections apply to them. At that point, Delegate Harper, with the support of Chairman Dahood, successfully moved to strike the compelling state interest language from the proposal, but it was to be re-inserted later.

Subsequent to the Convention, the right to know and the right of individual privacy have attracted, and arguably necessitated a healthy rash of litigation. This should have surprised no one. There was a clear inability of state and local institutions to absorb them and to quickly and correctly implement the new openness requirement. Many no doubt earnestly believed that their documents and deliberations would result in better outcomes if they did not have to reveal everything to a sometimes-troublesome public. But some simply tried to circumvent or even ignore the language and the openness it required. Nonetheless, the provision was quite clear at the constitutional level of generality that the public had the right to know and could sue to enforce it; and, in many instances the right to know was honored, with or without resort to litigation.[42]

Eventually, the legislature recognized and eased some of the obvious financial burden on citizens, and even media companies, who when pressing for disclosure were often forced to retain and pay for legal assistance, without a realistic hope of recovering their costs.

THE INALIENABLE RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT

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42. The most commonly anticipated balancing in right to know cases is with the right of individual privacy. *See*, *e.g.*, In re Petition of Missoula County v. Bitterroot Star, 345 P.3d 1035 (Mont. 2015). However, another interesting conflict that can arise is between the right to know and the right to a fair trial. State ex rel. Smith v. District Court, 654 P.2d 982 (Mont. 1982). The more visible Krakauer case also raised and settled the question whether an out-of-state journalist has standing to compel the university to release disciplinary records. The answer is he does. Krakauer v. State by and through Christian, 381 P.3d 524 (Mont. 2016). The Court has also held that open meeting statutes are to be liberally construed in Assoc. Press v. Crofts, 89 P.3d 971 (Mont. 2004), and it has declared the litigation exception that had been used in the past to allow public entities to close meetings for discussions of litigation strategy unconstitutional. The holding is—for now—limited to discussions of litigation between public entities. Assoc. Press v. Bd. of Pub. Educ. 804 P.2d 376 (Mont. 1991).

> All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . . .[43]

As mentioned previously, I conducted the pre-Convention research on the environmental provisions.[44] However, these were taken up principally by the Convention's Natural Resource and Agriculture Committee, which had jurisdiction. That Committee was chaired by a persistent dynamo, Louise Cross. I did not staff that committee, but I was made available to them to explain my research in their area. And Chairman Dahood on behalf of the Bill of Rights Committee had asked in a letter to be kept fully informed of their work. That helped open lines of communication between the two committees and, as it happened, that had a profound impact on the deliberations of both committees and on the provisions ultimately adopted in the Constitution. What is clear is that Bill of Rights Committee members maintained a concerned and watchful eye on the Natural Resource Committee's deliberations then proceeding down the hall.

Without going into a lot of detail, given the work of other authors in this collection, I'll just note that while there was plenty of floor debate on environmental provisions, there were also many discussions about them on and off the Convention floor. As Delegate Robinson/Ellingson indicated in her session with Evan Barrett in his compelling televised Crucible of Change series, "a great many of us . . . did not believe (the Natural Resource Committee's proposal) was the strongest because we did have at our disposal several other state constitutions that had recently dealt with the environment—Puerto Rico and Illinois and actually even North Dakota, all had adopted environmental provisions in their Constitution . . . ."[45] She, Bob Campbell, and other delegates resolved to improve on the Natural Resources Committee's proposal, if they could.

On the floor, delegate George James, a Bill of Rights Committee member and the postmaster from my hometown of Libby, took the first run at it. He urged early on that the environment provision should explicitly include the phrase "clean and healthful" to modify the term environment. In that, he was unsuccessful, and disappointed.[46] But, after considerable further discussions and jockeying, that qualifying language was

43. MONT. CONST., art. II, § 3.

44. APPLEGATE, *supra* note 2, at 249.

45. *In the Crucible of Change: For Future Generations: Preamble and Environmental Provisions of 1972 Montana Constitution* (Montana Tech video series broadcast May 15, 2015).

46. MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPT V, *supra* note 16, at 1202.

surprisingly adopted.[47] And, later in the Convention deliberations, it was even added to the inalienable rights section of the Declaration of Rights—in what turned out to be a step of substantial legal importance.[48]

One of the most intriguing floor debates on the environmental provisions occurred when the Convention considered Delegate Cate's proposal to incorporate the Public Trust Doctrine in the Montana Constitution—an old doctrine that I had researched in my study. It turned out that the doctrine was too much and, although it had been around in various forms in the common law for over a century, it was too uncertain and worrisome for the delegates to find it would be useful or acceptable to include in the proposed Constitution.[49]

After considerable discussion, including an accusation that the provision was socialistic, and with some expressing fears about its adverse effects on private property and the broader economy, the Cate amendment was defeated 34–58. A subsequent amendment by Delegate Robinson/Ellingson providing an explicit citizen right to sue on environmental matters was also more narrowly defeated 43–51.[50]

As noted by Meloy in this collection, it was on the floor that Delegate Burkhardt subsequently offered, during the debate on the Declaration of Rights, his amendment to include the right to a clean and healthful environment as an inalienable right in that declaration. After a brief discussion with Chairman Dahood about whether he was trying to further expand citizen standing to sue, on which Delegate Burkhardt was studiously a bit vague, the amendment was adopted. My view at the time was that the law of standing, of access to the courts was evolving rather rapidly and

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47. *Id*. at 1250.

48. *Id*. at 1637-40. On the floor, Delegate Burkhardt said, "it seems to me that we are providing here [. . .] a clear intent. It does present the right of every person. And we've already talked about the duties of persons, and it's nice to balance it with this right," whereupon the amendment was adopted 79–7.

49. The initial public trust language proposed by Delegate Cate was: "The State of Montana shall maintain and enhance a clean and healthful environment as a public trust. The sole beneficiary of the trust shall be the citizens of Montana, who shall have the duty to maintain and enhance the trust, and the right to protect and enforce it by appropriate legal proceedings against the trustee." The floor debate on the Cate public trust amendment commenced at MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPT V, *supra* note 16, at 1211.

50. For the vote on the Cate public trust amendment, *see* MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPT V, *supra* note 16, at 1227-28; and for the vote on the subsequent Robinson/Ellingson citizen suit proposal, taken after a lengthy floor debate, *see* MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPT V, *supra* note 16, at 1240-41.

the language would in the long run provide citizens under the right circumstances an enhanced opportunity to pursue the right to a clean and healthful environment in the courts.[51]

Meloy discusses this issue in his excellent overview of the Convention's environmental provisions, so I will leave it largely alone. Save to say he notes the seminal state Supreme Court holding that citizens indeed have standing to challenge environmentally degrading activity—specifically, mine water discharges to the Blackfoot River. The plaintiffs met the test and were able to litigate the right because they appropriately claimed fishing and other recreational interests and activities were at issue.

And there was a further promising development when the Court clearly stated the need to apply a "strict scrutiny" standard to actions that arguably violate the constitutional right. This makes it clear that the courts can delve deeply into the facts of a particular case where allegations are being made that the right is being violated.[52]

THE AFTERMATH OF THE CONVENTION AND SOME RECENT AMENDMENTS

While the deliberations and adoption of the Montana Declaration of Rights were not without controversy at the time, the document now appears pretty much embedded in Montana case law and practice and is largely agreeable if not always expansively implemented. Barring some renewed effort to re-open the Constitution, the meaning will continue to be refined by the courts and, to some extent by the state legislatures and administrative practice in the years ahead.

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51. There are numerous articles on environmental provisions in state constitutions. *See*, *e.g.*, Jack R. Tuholske, *U.S. State Constitutions and Environmental Protection: Diamonds in the Rough*, 21 WIDENER L. REV. 239 (2015); ART ENGLISH & JOHN J. CARROLL, STATE CONSTITUTIONS AND ENVIRONMENTAL BILLS OF RIGHTS, BOOK OF THE STATES (2015); C. B. McNeil, *A Clean and Healthful Environment and Original Intent*, 22 PUB. LAND & RESOURCES L. REV. 83 (2001). Deborah Beaumont Schmidt & Robert J. Thompson, *The Montana Constitution and the Right to a Clean and Healthful Environment*, 51 MONT. L. REV. 411 (1990).

52. Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 988 P.2d 1236, 1246 (Mont. 1999), holding that because the provision was a fundamental right in the Declaration of Rights, "any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." The law of standing has continued to evolve, but the withdrawn opinion of Justice Haswell remains an intriguing issue for future students of the state constitution's ability to advance accountability for environmental harm and damage. *See infra* Goetz, note 67, at 347.

There have of course been several significant amendments to the Declaration of Rights since its initial adoption as part of the ratified Constitution; among them the provision abolishing sovereign immunity generated a lot of concern and was amended to permit the state legislature to make exceptions by a supermajority vote.[53] Same sex marriage was prohibited by amendment in 2004, but that amendment is essentially inoperable given the United States Supreme Court's 2015 ruling that legalized same sex marriage in all 50 states.[54]

In 2016, a lengthy provision was added as Section 36 of the Bill of Rights covering the subject of victims' rights, including over a dozen specific protections: due process; freedom from any form of harassment; protection for the victim; and the victim's location; counsel; notification of release or escape by the accused; full and timely restitution; and more.

A SELECTION OF INTERESTING AND JUST PLAIN CURIOS HOLDINGS ON THE CONSTITUTION'S DECLARATION OF RIGHTS

Above, I have pointed to what I hope are some of the most significant developments in and implications for the more innovative provisions in the State Constitution up through roughly the end of last year. Not surprisingly, Montana courts have issued a number of other rulings over the years on the Constitution's provisions, generally giving them force and fuller meaning. Abstracts of the cases are compiled in 1,300 pages of case-related text in the most recent volume of the Montana Code Annotated that specifically deal with the Montana Constitution. Of these, over two-thirds—some 950 of those pages—are lawsuits involving the Declaration of Rights. The remaining 350 or so pages cover cases relevant to the legislative and executive functions of the government; revenue and finance; environment and natural resources (which as noted came to have a clear connection to the Declaration of Rights), local government and so on.

I point to a few of the more interesting and even curious cases below. I'll admit that a large part of me is glad I do not have more time to be more systematic in digging through this mass of case law and interpretation, as life and family are awaiting the completion of this essay.

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53. APPLEGATE, *supra* note 2, at 289. *See also* Barry L. Hjort, *The Passing of Sovereign Immunity in Montana: The King is Dead!* 34 MONT. L. REV. 283 (1973). *But see* John A. Kutzman, *The King's Resurrection: Sovereign Immunity Returns to Montana*, 51 MONT. L. REV. 529 (1990); *and* James E. Conwell, *Limitations on Legislative Immunity: A New Era for Montana's Sovereign Immunity Doctrine*, 54 MONT. L. REV. 127 (1993).

54. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

The Court has held that the opportunity to pursue employment is a fundamental right. One might not think that would become an issue, but it did.[55]

Unfortunately for those not sufficiently studious in class, the Court has found that extracurricular school activities are not a matter of fundamental rights, and as a result, a 2.0 GPA requirement to qualify for sports is constitutionally permissible.[56]

It is unconstitutional to restrict welfare benefits based on an age restriction applied to those under age 50; and the State is not deemed to be in so financially unsound a position that it might be permitted to abrogate those benefits.[57] Therefore, a state agency "no whining" rule seems to apply here.

Conversely, the "right to welfare" is not a fundamental constitutional right, citing language that I recognize all too well in the Bill of Rights Committee report which provides: "the intent . . . is not to create a substantive right for all the necessities of life to be provided by the public treasury."[58] Also, the Court examined Article XII, Section 3(3) of the Montana Constitution, which requires in seemingly straightforward language, that the legislature "shall provide such economic assistance and social and rehabilitative service as may be necessary for those inhabitants who, by reason of age, infirmities or misfortune may have need for aid of society."[59] The Court held that, since the provision was not placed in the Declaration of Rights, it could not be a fundamental right. Apparently, location matters. One is left to conclude that a right may not be a fundamental right unless it is found in the right place, in Article II of the Montana Constitution.

The Court has also held that preparation of an Environmental Impact Statement pursuant to the Montana Environmental Policy Act is not required by the Constitution's right to a clean and healthful environment provision.[60]

As mentioned above, the Court has reflected Convention intent by holding that the right of individual privacy is just that. It applies to human

55. Wadsworth v. State, 911 P.2d 1165, 1173 (Mont. 1996).

56. State ex rel. Bartmess v. Bd. of Tr. of Sch. Dist. No. 1, 726 P.2d 801 (Mont. 1986).

57. Butte Cmty. Union v. Lewis, 712 P.2d 1309, 1312 (Mont. 1986).

58. *Id.*

59. *Id.* at 1310; *see also* Scott C. Wurster, *Butte Community Credit Union v. Lewis: A New Constitutional Standard for Evaluating General Assistance Legislation*, 48 MONT. L. REV. 163, 176 (1987), in which it is concluded that the state legislation at issue "is merely an unconstitutional device to conserve state funds."

60. Kadillak v. Anaconda Co., 602 P.2d 147 (Mont. 1979).

beings, and not to corporations—those ubiquitous legal fictions that now dominate our national and international economic and political lives, though created principally for what seemed a rational purpose, to promote entrepreneurship and to assist investors by providing, among other things, liability limitations.[61]

Under the state Rights of the Terminally Ill Act, a physician is not liable for assisting in giving effect to the wishes of a patient.[62]

In a free speech case, the Court concluded that free speech does not include the right to cause "substantial emotional distress by harassment or intimidation."[63]

But the Court has also occasionally found itself well out in the frontier of the English language, as in an ear-popping free speech decision, where the Court held that the freedom of speech clause does not protect an unprovoked obscenity directed at a police officer (in this case, calling the officer a fornicating porcine). Not your typical language encountered in a law school class.[64]

In what seems an odd holding on openness in government, the Court has found an agency can reduce its legal jeopardy for what amounts to an illegally closed session by simply holding a subsequent open session. One may be forgiven for wondering how that ruling gives the requisite constitutionally-guaranteed access to deliberations and documents.[65]

These are just a selected few of the many cases as, by my estimate, the annotated discussions of the Declaration of Rights would require an

61. Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 82 P.3d 876 (Mont. 2003) (holding that the right of individual privacy exception to the right to know is limited to "natural human individuals and does not apply to nonhuman entities such as corporations." The Court also held that the right to know does not require disclosure of trade secrets or other proprietary information "when that data is protected from disclosure elsewhere in the state or federal constitution or by statute.") *See also* State ex rel. Smith v. District Court, 201 Mont. 376 (1982) (recognizing that the right to know may collide with the right of a defendant to a fair trial).

62. Baxter v. State, 224 P.3d 1211, 1219 (Mont. 2009); *see also* The Rights of Terminally Ill Act, Mont. Code Ann. § 50-9-101 (2019), which provides that terminally ill patients are entitled to autonomous end-of-life decisions even if a physician is involved in withholding treatment; and the physician will not be held criminally liable for honoring the patient's wishes. The lower court had held that the patient had a right to die with dignity founded on the constitutional rights to individual dignity and privacy; but the Supreme Court declined to rule on the constitutional issue, relying instead solely on statute.

63. *See* Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, 2010 CARDOZO L. REV. DE NOVO 300.

64. State v. Robinson, 82 P.3d 27, 31 (Mont. 2003).

65. Zunski v. Frenchtown Rural Fire Dep't Bd. of Trs., 309 P.3d 21, 26 (Mont. 2013).

entire year or two of law review space, perhaps even more, just to scratch the surface of the sometimes-intriguing issues that have come up.

THE UPSHOT

When you step away from the State Constitution and all that went into it, it is a fair question to ask how much the compelling words on paper in the Declaration of Rights, the subsequent legislative and administrative embellishments, and the mass of judicial rulings have really changed things on the ground—particularly as we watch legislative and electoral battles that remind us of the much less inspiring history of the state.

In Helena on a recent trip last year, I sat with pages of newsprint, the kind that leaves ink stains on your hands, pages from the Helena Independent Record—which I know some have occasionally referred to as the "Independent Wretched" (an unjustified if tame tag these days, given what we hear about the press in these too frequently unhinged times). As was frequently the case, I enjoyed the Record as, on that day, it covered yet another improperly noticed legislative meeting—what I would have thought would be largely a thing of the past by now. The paper reported that an objectionable session closed to the public was recently cast by state legislative leadership as somehow a "working session," even though a full committee quorum was present in the room, and Legislative Council had said that, legally, it should have been publicly announced. I read the clear reaction of Mike Meloy, for decades the most prominent legal watchdog for open government in the state, urging that the practice not be repeated.[66]

In those same pages, it was reported that the proposed Medicaid extension legislation was still in limbo in the legislature, hobbling along, with an intriguing if, in my view, misdirected debate about adding work requirements that could in various versions of the bill take away the right to coverage for a few thousand or perhaps even tens of thousands of Montanans. Any one of those citizens, no longer protected, could turn out to be a family member or a close friend or acquaintance who, through no fault of their own might be left with their wellness and their ability to pursue life's basic necessities essentially out of reach.

In addition, some new legislation, commonly known as Hanna's Act, had been introduced with considerable fanfare as a direct way to address what was termed an epidemic of murdered and missing Native

66. Holly Michels, *Groups Complain Legislative Meetings Held Without Proper Public Notice*, HELENA INDEP. REC., Apr 8, 2019, https://helenair.com/news/state-and-regional/govt-and-politics/groups-complain-montana-legislative-meetings-held-without-proper-public-notice/article_67ba955d-5514-5dce-847a-67d112f4e2bb.html.

women.[67] The Montana legislation appeared at the time to be proceeding marginally well and was later signed into law.[68] It was spurred by 14-year-old freshman Henny Scott, who was found dead on the Northern Cheyenne Reservation in the winter of 2013.

A recent nationwide study has revealed that on or near some reservations, Native and indigenous women are ten times more likely to be murdered than their non-Native counterparts. Their deaths, ghastly by any standard, amount to a wrenching violation of the most fundamental of rights, the right to life.[69]

Up North, Canada is struggling to address this historical problem with, among other things, a broadly-based Reconciliation Commission, while the United States is lagging. It is hoped that the recent steps taken in Montana, with this law and related missing persons legislation, combined with essential funding, will spur action to reduce the frequency of these crimes dramatically and soon.[70]

On another issue in the legislature, it appeared that the minimum standards for private residential programs for troubled teens—under the age of majority—might become a thing of the past after a key legislator held a private session with unnamed owners of a number of the private facilities who apparently had an interest in shedding the prescriptions. After the meeting, the legislator came up with some new amendments that appeared to allow for reduced quality of care, changing the content of the bill from when it was originally introduced for consideration.[71]

The beleaguered Colstrip plants seemed never to be far from the headlines. They continue to bring up over and over the question of how much coal we should have been and should now be pulling from the ground—and for how much longer, given the increasing recognition that urgent action is needed to reduce carbon emissions. One wonders if there will ever be a connection between Colstrip and the right to a clean and

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67. *See* An Act Establishing "Hanna's Act", H.R. 21, 66th Leg. (Mont. 2019).

68. Mont. Code Ann. § 44-2-407 (2019).

69. Indian Law Resource Center, *Ending Violence Against Native Women*, https://indianlaw.org/issue/ending-violence-against-native-women.

70. The Truth and Reconciliation Commission of Canada, FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA (2015), http://nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf.

71. Seaborn Larson, *Troubled Youth Programs Have Long Steered State Policy in Montana*, HELENA INDEP. REC., May 4, 2019, http://helenair.com.

healthful environment provision. At some point, the full tab for the impacts of fossil fuel development will come due and it seems unlikely the past and current owners of the plants will be in a position to foot the bill.[72]

And just a while ago, the Record carried a related story about legislation that dealt further with the shutdown of the Colstrip coal plants and other operations. While the bill was apparently focused principally on the Colstrip plants, where settlements have already been reached for closure of two of the generators, the old issue of WR Grace and the tremolite asbestos tragedy re-surfaced. The cost of that federal Superfund cleanup in Libby Montana is now estimated at over $500 million; and the asbestos produced there and elsewhere has historically been shipped and used in construction all over the country, even around the world. When the World Trade Center towers came down on September 11, the dust from the collapse was littered with tremolite asbestos. Hundreds of people have succumbed to asbestosis and related diseases in Libby and the Kootenai Valley, the result of living in that beautiful but ultimately unclean and unhealthy environment.[73]

While these and more may cast some doubt on the benefits of the state's constitutional provisions, I believe Professors Clifford and Huff put it best in their previously cited article on the dignity provision:

> Montanans are extraordinarily lucky to have a constitution with a Declaration of Rights which so clearly and forcefully articulates the grand ideals of constitutional democracy, such as dignity, privacy, and the right to know.

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72. Coal companies are not demonstrating an ability to handle the debts they have accumulated and the external costs they have imposed. *See* Daniel Moritz-Rabson, *Eleven Coal Companies Have Filed for Bankruptcy Since Trump Took Office*, NEWSWEEK, https://www.newsweek.com/eight-coal-companies-have-filed-bankruptcy-since-trump-took-office-1468734, Oct. 30, 2019. Even with rollback in environmental rules governing fossil fuels, the number appears certain to grow in the months and years ahead. The so-called war on coal is being won by the superior economics of natural gas and the competitive pressures of increasingly affordable renewables, in some cases coupled with improving battery storage technologies.

73. Tim Povtak, *EPA Leaving Libby Asbestos Superfund Site to Montana*, Asbestos Exposure & Bans, http://www.asbestos.com/news/2019/11/11/asbestos-cleanup-libby-ending/. *See also*, Andrew Schneider & David McCumber, *An Air That Still Kills* (2016). More than 400 people in the Libby area have died from various asbestos-related disease and it is expected that there will continue to be victims in the years ahead. Once, while at a reception in Utah, I met a woman who, in the course of conversation indicated she was working to halt the frivolous anti-asbestos lawsuits flooding the country. I calmly informed her that I was born and raised in Libby and she turned a whiter shade of pale. True story.

> The burden of "making good" on the promise of this constitution now falls to attorneys . . . to raise the appropriate issues, and ultimately to the Montana Supreme Court to elaborate and institutionalize these quite glorious rights.[74]

And James Goetz captured it well when he wrote: "If we continue to have a judiciary with integrity, if we insist on principled decisions, and, most important, if we maintain fidelity to the spirit of the framers who came together in 1972 to give us this system, the charter should stand us in good stead for many years."[75] As it should.

SOME REFLECTIONS ON CURRENTLY RELEVANT RIGHTS ISSUES FOR THE YEARS AHEAD

Sometimes, when I turn from the fondly remembered experiences of the Montana Constitutional Convention, I find myself wondering what I might be exploring, researching, and writing about if I were once again seated in Katherine Orchard's law library—under deadline, on a short leash, and with that same requirement to look at the state of civil liberties and political freedoms, but this time for 2020 and beyond.

As I have thought about that, it has become clear to me that the list these days is a much longer one—not shortened even by the committed and excellent work of the delegates assembled in Helena 50 years ago.

So, as this set of historical reflections winds down for me, let's take a brief tour of a few of the issues that have arisen or re-emerged—all of which have relevance as they implicate important civil liberties or political freedoms, and some of which may be good candidates for further "little laboratory" experimentation in state constitutions.

The list below obviously reflects only my perspective, but here are a few to consider. First, a number of civil liberties issues.

THE RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT IN A WARMING WORLD

We revisit this one as the first and perhaps the most critical—even though, of course, Montana already has its own provisions on the environment, discussed previously and in other essays in this collection. Numerous other states have also addressed the environment, and several jurisdictions are being pressed to add similar language to their state constitutions.

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74. Clifford & Huff, supra note 26 at 336.

75. James H. Goetz, *Interpretations of the Montana Constitution: Sometimes Socratic, Sometimes Erratic*, 51 MONT. L. REV. 355 (1990).

Recently, for example, an article in the Bay Journal reported that citizens in Maryland are discussing the prospect of adding an environmental provision of some kind.[76] And there are stirrings in other states.

Illinois had environmental provisions in its 1970 Constitution; and Pennsylvania adopted its own in 1971; then Montana in 1972; and other states have since followed suit, including, as of 2015, Massachusetts, Hawaii, and Rhode Island. Some of these provisions have explicit language allowing citizen enforcement of the environmental right (e.g., Illinois). Some even include a version of the public trust applicable to certain resources—as does Montana, for state lands and, arguably to a certain extent for water resources (though over-appropriation and even complete dewatering of streams still occur in the state).[77]

What remains hard to discern is the effect of these constitutional provisions on the overall quality of the environment in the states that have adopted them. But perhaps what is most glaring of all is the failure to update them or interpret them, so they directly connect environmental quality with the alarming acceleration of global warming. For the sake of generations not yet born, it is imperative to undertake initiatives along the lines some states and local governments are aggressively pursuing as the federal government remains largely paralyzed if not actively resisting effective action. In addition to the statutory and regulatory activities currently underway at other levels of government, and funding and related private initiatives, there may be a way to provide further impetus for progress by adopting more detailed state constitutional provisions.[78]

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76. *See* Tamara Toles O'Laughlin, *Go Big: Constitutional Amendment Needed for Climate Change,* 29 BAY JOURNAL 32 (2019).

77. There are numerous articles available on the public trust doctrine. *See* Gregory S. Munro, *The Public Trust Doctrine and the Montana Constitution as Legal Bases for Climate Change Litigation in Montana*, 73 MONT. L. REV. 123 (2012), where an argument is made that, given Montana's decision to impose the doctrine on navigable waters, there is no reason not to extend it to atmosphere and the airwaves; *see also* Melissa Kwaterski Scanlan, *The Evolution of the Public Trust Doctrine and the Degradation of Trust Resources: Courts, Trustees and Political Power in Wisconsin*, 27 ECOLOGY L.Q. 135, 212 (2000), which is focused primarily on water issues in Wisconsin. (noting that "regardless of the natural or constitutional law supporting the public trust doctrine, those who administer the trust are not insulated from political pressure . . . . Impairment of public trust resources is felt by anyone in Wisconsin who fishes, swims, or boats on the navigable waters of the state, regardless of status as owner or non-owner of riparian lands.") I would think this logic could extend to a broad range of resources if we were to better balance the needs of a clean and healthful environment against the pressures of development and potential degradation.

78. ART ENGLISH & JOHN J. CARROLL, *State Constitutions and Environmental Bill of Rights, in The Book of the States*, 18 (2015). *See also* Tuholske, *supra* note 51; and generally, the University of Montana symposium on the subject at 51

THE UNFINISHED BUSINESS OF EQUAL RIGHTS AND THE UNEQUAL ECONOMIC AND POLITICAL STATUS OF WOMEN

The United States Constitution remains incomplete on gender equality, although there are promising stirrings with Virginia's recent approval of the federal Equal Rights Amendment—by that action becoming the 38th state to ratify, and thereby raising some interesting legal and political questions about whether the amendment can now be pasted into the United States Constitution.[79]

Of course, the Montana Constitution already contains equal rights and non-discrimination provisions, both of which squarely address gender inequality and discrimination. As we know, the Montana Constitution has had those provisions in place, going on five decades now.

But, here's the rub. Unfortunately, that language has not resulted in major advances toward equality, pay equity or systemic changes in the way we structure our economy to recognize once and for all the clear, but largely uncounted economic benefits of women at work—whether in the workplace, or working at home on the job, taking care of important family business, or more likely some combination of these.[80]

Mont. L. Rev. (1990). On the broader issue of products and activities that are harmful to humans and the environment, *see* NAOMI ORESKES & ERIK M. CONWAY, *Merchants of Doubt: How a Handful of Scientists Obscured the Truth on Issues from Tobacco Smoke to Global Warming* (2010).

79. Gregory S. Schneider & Laura Vozzella, *Virginia Finalizes Passage of Equal Rights Amendment, Setting Stage for Legal Fight*, WASH. POST, Jan. 27, 2020, https://www.washingtonpost.com/local/virginia-politics/virginia-expected-to-finalize-passage-of-era-monday-setting-stage-for-legal-fight/2020/01/27/b178265c-4121-11ea-b503-2b077c436617_story.html. Recent adopting states are now suing to have the amendment added to the United States Constitution. *See* Debra Cassens Weiss, *Last 3 States to Ratify Equal Rights Amendment Sue to Add it to Constitution*, 2020 ABA J., https://www.abajournal.com/news/article/last-3-states-to-ratify-equal-rights-amendment-sue-to-add-it-to-constitution.

80. There are many ways to value the currently unpaid efforts of similarly situated men and especially women toiling in the economy and in various family units. *See* UN Women, *Facts and Figures: Economic Empowerment*, https://www.unwomen.org/en/what-we-do/economic-empowerment/facts-and-figures; Jillian Berman, *Women's Unpaid Work is the Backbone of the American Economy*, MARKETWATCH, https://www.marketwatch.com/story/this-is-how-much-more-unpaid-work-women-do-than-men-2017-03-07 (Apr. 15, 2018); Kristalina Georgieva, et al., *The Economic Cost of Devaluing 'Women's Work,'* IMF BLOG, https://blogs.imf.org/2019/10/15/the-economic-cost-of-devaluing-womens-work/; and *see also* Alisha Haridasani Gupta, *Women, Burdened with Unpaid Labor, Bear Brunt of Global Inequality*, N.Y. TIMES, Jan. 23, 2020, https://www.nytimes.com/2020/01/23/us/unpaid-work-economy-davos.html.

As a result, women, especially minority women, but also women of all ages and races, are still paid far less than men for similar work; thus, they remain in many instances relegated to second class status in our mixed economy, and they continue to face hard-to-surmount obstacles when they attempt to participate more fully in the public realm. I have even occasionally joked to friends of mine that the best way to address all of this is to provide that men could perhaps be denied the right to vote for roughly the same amount of time that women faced that prohibition—and then we could just see how that works out. Who knows, in that case, we might end up living in a much better world. Of course, some might point—rightly—to the increasing number of women recently elected at all levels of government. It remains an unnecessarily uphill struggle for them, reflecting, among other things, the financial and other obstacles they face.[81]

Many of the recent campaigns where women are trying to break through are not as well-reported, and therefore, are not as well-known as they might be. Nonetheless, we can easily see the impact that those who win office are having at the national level on a host of issues. Even so, we have to be struck by the unwillingness of Congress to bolster the Equal Pay Act of 1963, the gender-related provisions of the Civil Rights Act of 1964, and the Lilly Ledbetter Fair Pay Act of 2009—the first legislation to be enacted in the Obama Administration—by failing to adopt some version of paycheck fairness legislation that has been on and off the congressional agenda for years. In the U.S. Senate, there are frequently expressed concerns that such legislation might be unduly burdensome or lead to unwarranted litigation—concerns that have not materialized to an excessive degree in states with state-level versions of the Equal Rights Amendment or related statutes.[82] We are left to wonder whether there is a way to embed even more specific state constitutional provisions on this and other gender-related discrimination issues, so that real progress might be spurred.

IS HEALTHCARE A RIGHT? IF NOT, SHOULD IT BE? IF IT IS A RIGHT, WHAT DOES THAT MEAN?

The United States continues to have baffling fits of agitation and controversy while trying to figure this one out. Indeed, healthcare is complicated, but there are many models for healthcare that have been in place

81. An excellent new treatment of the activities of newly elected women in Congress is JENNIFER STEINHAUER, THE FIRSTS: THE INSIDE STORY OF THE WOMEN RESHAPING CONGRESS (2020).

82. In Montana, the number of lawsuits brought under the state version of the equal rights amendment appears to be quite modest. Mont. Const., art. II, § 4 (2019).

around the world for some time now. And there is much that can be learned from those experiences.[83]

As things stand, we spend much more money, nearly double the amount of some other developed nations, for health services; and our health care outcomes, depending on the metric chosen, hover consistently in the lower, to mid to upper 20s when ranked against all other nations.[84] We can pinpoint and certainly celebrate some clear successes, but there is much to improve in the coverage and cost of our health care system.

Even after passage of what has been enthusiastically and sometimes derisively called Obamacare, tens of millions of Americans still cannot afford their next illness, or preventive care that might help them avoid it, maybe even save their lives.[85]

If health care is a fundamental right, and I believe it is, everyone, regardless of wealth or income should have a decent chance to obtain affordable care without fear of bankruptcy or life-threatening delay. People should not have to fear being denied coverage for any one of a laundry list of pre-existing health conditions that afflict tens of millions of their fellow citizens. Administrative costs should be held in check. Life-time caps on coverage should be eliminated. Prescriptions should be available at lower

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83. *See* Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 J. CONST. L. 1325 (2010), which reviews various state provisions and trends in state constitutional health law, including vulnerable groups and types of guaranteed services and concludes that "[S]tate constitutional recognition of health, as well as proposed state constitutional amendments that would expressly recognize health rights, serve as important catalysts for federal and state legislation."

84. On the costs of health care, *see* Rabah Kamal and Cynthia Cox, *How Do Healthcare Prices and Use in the U.S. Compare to Other Countries?* Peterson-KFF (May 8, 2018), https://www.healthsystemtracker.org/chart-collection/how-do-healthcare-prices-and-use-in-the-u-s-compare-to-other-countries/; *see also* Roosa Tikkanen and Melinda K. Abrams, *U.S. Health Care from a Global Perspective, 2019: Higher Spending, Worse Outcomes?* (January 30, 2020), https://www.commonwealthfund.org/publications/issue-briefs/2020/jan/us-health-care-global-perspective-2019. On overall rankings for health care, *see e.g.* Aria Bendix, *The US was once a leader for healthcare and education—now it ranks 27th in the world*, Business Insider, (September 27, 2018), https://www.businessinsider.com/us-ranks-27th-for-healthcare-and-education-2018-9; *see also* Sophie Ireland, *Revealed: Countries With The Bests Health Care Systems, 2019*, CEO World (August 5, 2019), https://ceoworld.biz/2019/08/05/revealed-countries-with-the-best-health-care-systems-2019/, which ranks the U.S. 30th overall.

85. T. R. REID, THE HEALING OF AMERICA: A GLOBAL QUEST FOR BETTER, CHEAPER, AND FAIRER HEALTH CARE (2009); STEVEN BRILL, AMERICA'S BITTER PILL: MONEY, POLITICS, BACKROOM DEALS, AND THE FIGHT TO FIX OUR BROKEN HEALTHCARE SYSTEM (2015); and ELISABETH ROSENTHAL, AN AMERICAN SICKNESS: HOW HEALTHCARE BECAME BIG BUSINESS AND HOW IT CAN TAKE IT BACK (2017).

cost in a more competitive environment. Insurance plans should be required to meet minimum standards of coverage. And, of course, coverage they can afford should be available to everyone.

There may be a way to enshrine a fairly detailed right to health care in a state constitution, thereby triggering the experiments that could flesh it out further. If so, it is unlikely to be a brief provision. And there will always be important and beneficial statutory approaches as well, and good for them; but this is a right that would likely benefit from being elevated to constitutional status in states that believe in it.

THE INCOMPLETE JOURNEY ON THE ROAD TO A FAIRER CRIMINAL JUSTICE SYSTEM

It is finally becoming much more commonly recognized—even to a reassuring extent across party lines—that the criminal justice system has favored and continues to be biased in favor of the wealthy while systematically disadvantaging minorities and people with low incomes.[86]

While there have been encouraging bipartisan steps taken in the recent past, and we can hope they will be built upon, as they stand, they fall short of what is needed to level the field and restore fairness to law enforcement in the states and in the nation.

Over the past 40 years or so, for a variety of reasons, the United States has seen a massive increase in incarcerations—estimated by various sources to be between a 500% and 700% increase.[87] As a result, the United States has the highest level of incarcerations among developed

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86. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); and JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION (2017). *See also* Amanda K. Eklund, *The Death Penalty in Montana: A Violation of the Constitutional Right to Individual Dignity*, 65 MONT. L. REV. 140 (2004) (citing the study published by the Center for Native American Studies at Montana State University, which found that Native Americans were sentenced more harshly than whites for similar crimes).

87. American Civil Liberties Union, *Mass Incarceration*, https://www.aclu.org/issues/smart-justice/mass-incarceration, (pointing to a 700% increase since 1970. The Sentencing Project sets the increase at 500% over the last 40 years, *Mass Incarceration Fact Sheet:Trends in U.S. Corrections*, at https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf). *See also* Alexander, *supra* note 86 at 6, which indicates that since 1972, the U.S. population held in prisons and jails jumped from fewer than 350,000 to over two million; a similar increase in the penal populations occurred as a result of the war on drugs launched in the 1980s.

countries. And those behind bars are disproportionately minorities and the less well off—quite often for drug-related and non-violent crimes.[88]

Meanwhile, white collar crime prosecutions, money laundering investigations, even tax audits of high-income taxpayers are clearly being de-emphasized and too often not pursued to the full extent of the law.[89] State constitutions may be a place to address these institutional biases and promote a fairer system of justice.

CAPITAL PUNISHMENT AND THE PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT

In my Bill of Rights study, I reviewed the available literature on capital punishment.[90] The main points I had examined prior to the Convention are under even more intense discussions today. Capital punishment is not a deterrent in the states that still have it, with a total of some 2,700 people currently on death row (the South having the highest murder rate and by far the greatest number of executions). It is far less costly to imprison someone for life than it is to proceed to execution, with Texas leading the way with over 550 executions since 1976. Capital punishment continues to fall more heavily on minorities, particularly, but not exclusively, in the South. Hundreds of what turned out to be innocent people have been erroneously incarcerated and even put to death.[91]

Some states have suspended or banned capital punishment as a result, but it is still practiced in some parts of the country; and a sharply-divided 5–4 United States Supreme Court recently upheld its use in a case

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88. *See* National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, https://doi.org/10.17226/18613. The report notes that the U.S., with 5% of the world's population, has the largest number of incarcerated people; that 25% of all those incarcerated in the world are in the United States; and that the U.S. rate of incarceration is 5 to 10 times higher than rates in other democracies—all of which make the growth "historically unprecedented and internationally unique."

89. BRIAN K. PAYNE, WHITE-COLLAR CRIME: THE ESSENTIALS (2d ed. 2013).

90. Applegate, *supra* note 2, at 181.

91. *See* Death Penalty Information Center, *Facts About the Death Penalty*, https://files.deathpenaltyinfo.org/legacy/documents/FactSheet.pdf, which compiles statistics on the number of executions and numbers of death row prisoners by state; death sentencing by year; studies on the deterrence effect of capital punishment; references to recent studies on race and capital punishment; death row exonerations; public opinion on the death penalty; and more.

that some say amounts to sanctioning a form of torture—whereby a convicted man in Missouri can be administered a lethal injection that results in suffocation in his own blood over an agonizingly long period of time.[92]

The Bill of Rights Committee carefully considered a provision abolishing it, and the Convention even placed a prohibition on the statewide ratification ballot, to be voted on—like gambling—as an item separate from the body of the document. In that election, the provision eliminating capital punishment was trounced by roughly a 2:1 margin.[93]

Montana has a Declaration of Rights provision banning cruel and unusual punishment, as do many other states and the United States Constitution. As of 1994, hanging is no longer authorized in the state. Otherwise, the State Constitution has not resulted in much clarity on whether capital punishment is useful or acceptable. On the plus side, of the states where capital punishment remains legal, Montana is the only state that has not handed down a death sentence in this century. [94]

THE RIGHT OF PRIVACY POST 9/11 AND IN THE INTERNET AGE

It is easy to conclude that there remains very little privacy in this new century—and not just because of increased government surveillance of U.S. and international citizens after the horrific events of September 11, 2001. These days, the digital technology that is such a central part of our lives tracks our web browsing habits, our locations, and even sifts through emails, documents and attachments produced or stored on our devices, some of which contain sensitive financial, medical or health information; and then uses them at least for targeted commercial marketing purposes.[95]

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92. *See* Adam Liptak, *Rancor and Raw Emotion Surface in Supreme Court Death Penalty Ruling*, N.Y. TIMES, Apr. 1, 2019, *available at* https://www.nytimes.com/2019/04/01/us/politics/supreme-court-death-penalty.html. Capital punishment executions have risen after a precipitous drop in the early to mid-20th century. Some 29 states, the federal government, and the military still use capital punishment, with over 2,500 inmates on death row. Attorney General William Barr has recently reinstated the death penalty for federal crimes after 16 years. Montana is currently the only state in which judges alone can decide whether to impose the death sentence.

93. *See* Amanda K. Eklund, *The Death Penalty in Montana: A Violation of the Constitutional Right to Individual Dignity*, 65 MONT. L. REV. (2004).

94. *State by State,* DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.

95. *See* Tony Room, *Tech Titans' Response on Data Mining*, POLITICO (Oct. 16, 2013), https://www.politico.com/story/2013/10/tech-titans-muted-response-on-nsa-data-mining-098373, concerning public and private sector data mining. Of course, data mining is not the only concern being raised about the impact of large private sector technology companies in the new economy. *See, e.g.*, Stacy Mitchell & Olivia Lavecchia, *Amazon's Stranglehold: How the Company's Tightening Grip on*

There are also privacy concerns about various devices that can record voices and take photos and video in-home. Increasingly sophisticated phishing, malware and other intrusions are capable of even more nefarious invasions of privacy. The data collected can even be and has been used in microtargeting for election campaigns and to swamp citizens with disinformation. It appears that some pass those messages along because they believe them; others because they know they will be damaging to political adversaries.

What is tragic about all this is that there is little serious effort outside the European Union to get at the abuses. Very few in the Congress seem concerned about it and, while it is hard to fashion state level remedies, it is at least worth a try to see if a state or a group of states might develop a more detailed, sustainable version of the right of privacy.

In the Montana State Constitution, the right of privacy is not to be infringed without the showing of a compelling state interest.[96] However, beyond whatever government agencies can do, the demolition of the right of privacy by private entities is occurring without any showing beyond the desire for increased profits from data mining.

There is a question whether the individual right of privacy could also prohibit intrusions by private parties, since the explicitly stated right is to be abridged only on the showing of a compelling state interest—not presumably to be freely violated for private commercial gain, such as making money off mining and selling or trading personal data. While this was not directly contemplated in the language or intent of the provision—as there were at the time no ubiquitous internet or other technological means to easily and perpetually access the most sensitive data and information, it is worth considering given the magnitude of the private sector intrusiveness that has developed over at least the past several decades. Even with the clear interstate commerce legal problems that would be encountered, the potential for useful state constitutional provisions should be explored.

THE RIGHTS OF IMMIGRANTS, REFUGEES AND DEPORTEES

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the Economy is Stifling Competition, Eroding Jobs, and Threatening Communities, INSTITUTE FOR LOCAL SELF-RELIANCE (Nov. 29, 2016), https://ilsr.org/amazon-stranglehold/.

96. MONT. CONST., art. II, § 10. Some 11 states now have explicit provisions on the right of privacy, according to the National Conference of State Legislatures. *See* Pam Greenberg, *Privacy Protections in State Constitutions,* NAT'L CONFERENCE OF STATE LEGISLATURES (Nov. 7, 2018), https://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx.

There is little question that border and immigration issues have taken on heightened importance in the minds of the public here and abroad and, given the likelihood of a burgeoning climate and terrorism-driven refugee crises, the difficulties are unlikely to subside.[97] As a result, the rights of those seeking to immigrate, whether temporarily or for the longer-term; the status of the millions who are not properly documented living in the country; the future of the Dreamers who ended up in the U.S. through no fault of their own and have become productive participants in the economic and social life of the nation; the horrors of those families now tragically separated at the border, some perhaps permanently, whether they were trying to cross illegally or legitimately seeking refugee status under U.S. and international law—these will continue to dominate the civil rights controversies of the nation.

Here again, there are some aspects of these issues that might be resolved by state constitutional action, particularly in border states, and in ways that could also influence and inform the national debate.

THE RIGHTS OF INDIGENOUS PEOPLE AND MINORITIES: AND THE RELATED ISSUES OF RECONCILIATION AND REPARATIONS

Take a look at Nevada these days and get a glimpse of what may be the future of the nation in pockets of transition all across the country: a strong and strengthening Hispanic community that is a large part of the economic, political and social fabric of the state; two female United States Senators; a majority female state legislature; a majority female state Supreme Court; the first African American Attorney General in the history of the state; and more signs of a broadening diversity that is spreading in the Southwest, not just in that state.[98]

Meanwhile, as we glance over the political landscape of the nation at large these days, we can still see staggering levels of inequality; the continuing scourge of poverty; the lack of adequate nutrition and educational opportunities; and more. All, now reinforced by the seismic impact of the coronavirus, are forcing a renewed examination of reforms that

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97. *See Climate Change and Disaster Displacement*, UNITED NATIONS REFUGEE AGENCY (2017), https://www.unhcr.org/en-us/protection/environment/5975e6cf7/climate-change-disaster-displacement-overview-unhcrs-role.html.

98. *See* Emily Wax-Thibodeaux, *Where Women Call the Shots*, WASH. POST, May 17, 2019; and Colton Lochhead & Bill Dentzer, *Nevada's First Female Majority Legislature Got a Lot Done*, LAS VEGAS REVIEW-JOURNAL, June 23, 2019.

might be implemented to address more successfully the problems of indigenous people, minorities, and those with low incomes and wealth.[99]

Recently, the issue of reconciliation and even reparations surfaced, albeit briefly, in the upcoming U.S. Presidential election. Perhaps we can find a way to have a public discussion of these issues. Up North, Canada has undertaken a large-scale reconciliation process that covers additional issues beyond murdered and missing indigenous women. That effort may be a useful guide for similar work here in the U.S.[100] And any reasoned approach to these matters will likely raise rights and freedoms issues that may benefit from state constitutional consideration.

ADDRESSING POVERTY, THE RIGHT TO A LIVING WAGE AND THE EMERGING PROBLEM OF INSUFFICIENT EMPLOYMENT AND DETERIORATING INCOME IN THE AUTOMATED, INCREASINGLY SERVICE-ORIENTED, GLOBAL ECONOMY OF THE FUTURE

While a few delegates—Chet Blaylock, George James, Bob Campbell and Lyle Monroe—and I had discussions where we tried to figure out how some of these kinds of issues might be addressed in the Montana Constitutional Convention, ultimately, we were unable to find traction on them. As a result, the Montana Constitution has no provisions on such matters as living wages or collective bargaining.

The U.S. currently has moved to a level of wealth and income inequality on a scale comparable to that of the late 19th century's Gilded Age. Three people in the U.S. now control as much wealth as the bottom 50 percent or so of the entire U.S. population—thus, holding the same amount of wealth as some 165 million people.[101]

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99. *See* MICHAEL HARRINGTON, THE OTHER AMERICA: POVERTY IN THE UNITED STATES (1997). Since the Kerner Commission, we have known that poverty and racism were the key drivers of inner-city violence and a lot more. It is not clear when, if ever this issue will once again be a matter of high priority at a state constitutional level or anywhere else. *See also,* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

100. *See Honoring the Truth, Reconciling for the Future, Final Report of the Truth and Reconciliation Commission of Canada* (2015), http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf.

101. *See* Noah Kirsch, *The Three Richest Americans Hold More Wealth Than Bottom 50% Of The Country, Study Finds*, FORBES, Nov. 11, 2017; *See also 20 Facts About U.S. Inequality that Everyone Should Know* Stanford Center on Poverty & Inequality (2011), https://inequality.stanford.edu/publications/20-facts-about-us-inequality-everyone-should-know. *See also*, Kimberly Amadeo, *Income Inequality in America*, THE BALANCE (Dec. 16, 2019), https://www.thebalance.com/income-inequality-in-america-3306190.

Meanwhile, roughly half of the U.S. population basically lives paycheck to paycheck and is unable to dig up enough cash or credit for even a few hundred-dollar economic emergency or a repair bill of any significant magnitude—let alone handle a serious illness or other large-scale catastrophe. A good bit of this widening wealth and income gap is due to the operation of the federal tax code over a long period of time but is also increased by the added impact of state tax laws.[102] At least the state side of this could be to some extent made more equitable by state constitutional provisions on taxation, including potential provisions to help ensure that tax compliance is more vigorously pursued.

In the past, predictions of an automation-driven evaporation of jobs did not materialize, at least not in the way prognosticators expected. However, in the foreseeable future, a changing and disrupted economy appears likely to challenge economies worldwide in meeting the employment and income needs of increasing numbers of citizens. The fear of disappearing well-paying jobs is likely to be very real this time around.[103]

Consider what driverless trucks and cars, combined with better integrated and more efficient transportation, might entail in the employment of truck drivers, auto sales personnel, the parts economy, and even overall levels of vehicle production and ownership. The same may occur with dramatic reforms in the health insurance industry; continued declines in the labor requirements of the manufacturing sector; and many more. These and other trends are likely to raise serious questions about the education system; the ability of a substantial portion of residents to gain access to adequate jobs and income; eventually affecting the ability of consumers to afford the products of the economy.

McKinsey recently projected that as much as one-third of the workforce could be displaced from their jobs by 2030—a scant 11 years from now.[104] An important rights issue that is materializing is the question whether there should be a right to a living wage job and/or basic income

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102. Robert Samuelson, *Trump's Tax 'Reform' Might Have Backfired*, WASH. POST, Nov. 19, 2019, *available at* https://www.washingtonpost.com/opinions/trumps-tax-cut-didnt-just-disappoint-it-flopped/2019/11/19/09a59eba-0b10-11ea-bd9d-c628fd48b3a0_story.html.

103. Concerning automation and other reasons for universal basic income or something else that will virtually eliminate poverty, *see* Avi Reichental, *The Future of Joblessness No One in Silicon Valley Wants to Talk About*, FORBES, Aug. 2, 2018, *available at* https://www.forbes.com/sites/forbestechcouncil/2018/08/02/the-future-of-joblessness-no-one-in-silicon-valley-wants-to-talk-about/#b499e9522911.

104. James Manyika et al., *Jobs Lost, Jobs Gained: What the Future of Work Will Mean for Jobs, Skills, and Wages*, MCKINSEY GLOBAL INSTITUTE (Dec. 2017), https://www.mckinsey.com/featured-insights/future-of-work/jobs-lost-jobs-gained-what-the-future-of-work-will-mean-for-jobs-skills-and-wages.

in order for people to survive at some reasonable standard of living. Andrew Stern, former President of the Service Employees International Union, and others on both the left and right have written tellingly about the coming crisis and ways to attempt to deal with it using a basic income of some kind. And there may be other alternatives that could be pursued, perhaps some at the constitutional level.[105]

LGBTQ RIGHTS

It has been little short of stunning to see the changes in public attitudes and the recent Supreme Court ruling and other initiatives recognizing the rights of lesbian, gay, bisexual, and transgender individuals—still among the most discriminated against and harassed people in our society. There is much left to be done on these issues, work that will also have significant constitutional implications.[106]

THE RIGHT TO CONTROL ONE'S OWN END OF LIFE DECISIONS

During the course of the Montana Constitutional Convention, what was then termed the right to die with dignity came up. It was the subject of some of the most heated discussions in and around the Committee. Ultimately, a provision on the subject was not included in the Declaration of Rights, as it was deemed so divisive that, as was determined to be the case with capital punishment, it had the potential to sink ratification of the entire document.

It is intriguing to see how this issue has progressed in more recent times—in Montana and in a number of other states (California, Colorado, Hawaii, New Jersey, Oregon, Washington and Vermont) that have struggled with some success on it. Montana, not without controversy, now has a path forward for those who, because of terminal illness, elect to end their lives without the indignity or pain of prolonged illness, choosing to avoid what is in their view a degraded, incomplete and often painful state of living. Part of the lower court holding in this case was focused squarely on the Declaration of Rights provision that expressed an inalienable right to

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105. *See* ANDY STERN & LEE KRAVITZ, RAISING THE FLOOR: HOW A UNIVERSAL BASIC INCOME CAN RENEW OUR ECONOMY AND REBUILD THE AMERICAN DREAM (2017)*; See also* Robert Greenstein, *Universal Basic Income May Sound Attractive But, If It Occurred, Would Likelier Increase Poverty Than Reduce It*, CENTER FOR BUDGET AND POLICY PRIORITIES (June, 19, 2019), https://www.cbpp.org/poverty-and-opportunity/commentary-universal-basic-income-may-sound-attractive-but-if-it-occurred.

106. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

dignity and the right to pursue life's basic necessities, among other things.[107] The high court was able to reach its decision relying on the statute and chose not to decide based on the constitutional provisions addressed compellingly by the lower court.

POLITICAL FREEDOMS

We can for now leave the field of civil liberties issues and turn to a couple of related rights that are not so much protections as they are opportunities—the most fundamental of constitutional matters that are relevant to the exercise of political freedoms as citizens. These are critical if we are to give substance and meaning to such other freedoms as speech and assembly, the right to petition and even protest—to the capacity for citizens to take action and have a meaningful role as citizens in important public deliberations. Two of the most important of these are the right to vote and we come again to the broader right of participation.

VOTING RIGHTS, VOTER SUPPRESSION, AND WHAT SHOULD BE THE EASY ONE: POST-FELONY INCARCERATION RIGHTS

There is so much to be said about the chronic, deepening disrepair in our federal, state and local voting systems, one hardly knows where to begin. They are creaky, hackable, in many jurisdictions untraceable, disjointed, inconsistent—the list of unflattering adjectives only seems to grow by the day.[108]

A few things are especially notable: First, efforts to restrict the turnout of minorities have accelerated in recent years, particularly after the Supreme Court ruling that undermined the pre-clearance provisions of the Voting Rights Act.[109] A number of states have attempted, with some success in the face of a flood of lawsuits, to further restrict the vote, ostensibly to prevent voter fraud. However, the most recent example of voter fraud

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107. Baxter v. State, 224 P.3d 1211 (Mont. 2009). *See also* the lower court holding, referenced therein, that relied directly on the Montana Constitution's right to pursue life's basic necessities. While the State Supreme Court declined to reach the constitutional issue, the lower court ruling makes a persuasive argument that the right can be relied on in future holdings.

108. For a comprehensive and regularly updated overview of election law, *see* Richard Hasen, *Election Law Blog,* www.electionlawblog.org; *see also* RICHARD HASEN, ELECTION MELTDOWN (2020).

109. The use of the coverage formula in Section 4(b) of the Voting Rights Act was struck down in Shelby Cnty. v. Holder, 570 U.S. 529 (2013), effectively freeing jurisdictions from the pre-clearance strictures of Section 5 of that act.

was not related to a Voter ID card of some sort but occurred where experts have repeatedly said it is most likely, in the handling of absentee ballots.

The Congressional election in North Carolina's Ninth Congressional District was invalidated by the State Board of Elections and had to be redone because a political operative shepherded a coordinated effort to round up absentee ballots which may have been unmarked or altered, leading to a race "won"—by a margin of about 900 votes out of some 280,000 cast—by the candidate who allegedly hired him. There was a new election, and the result is beside the point.[110]

Voter suppression efforts typically focus on making it harder to register with: requirements for sometimes odd voter identification documents; some rather astonishing purges of voter rolls due to supposed mismatched names, addresses or other information (resulting in tens of thousands of voters being removed from the rolls, and with the widely used Crosscheck system allegedly reporting 200 false positives for each legitimate instance of duplicate registration); additional restrictions on early and absentee voting; felony disenfranchisement, amounting to over 5 million Americans being ineligible to vote because of previous convictions; disinformation about voting procedures (with the conservative American for Prosperity mailing Democrats in the Wisconsin recall election incorrect dates for the return of absentee ballots); inadequate resources available on election days, leading to five, six, eight hours standing in lines for voters who have job demands, family conflicts, infirmities, and more.[111]

Whether there can be meaningful reform that makes it easier for people to vote is unclear, as the issue seems to have become an unfortunately hardened partisan battle nationwide. The courts are increasingly required to review vote-related irregularities and allegations, often on short notice and right before elections. And we are finding they might not be in a position to handle them—to address many of the potential denials of the bedrock right of suffrage.

Of course, people may be rightly concerned about voter fraud. Fair enough, as there is a history of stuffed and floated ballot boxes and other voter fraud actions that should not be ignored. I recall during my

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110. *See* David A. Graham, *North Carolina Had No Choice*, THE ATLANTIC, Feb. 22, 2019.

111. *See* Dale Eisman, *'Crosscheck' System Shuttered After Wrongly Tagging Legal Voters*, COMMON CAUSE (JUNE 22, 2018), https://www.commoncause.org/democracy-wire/crosscheck-system-shuttered-after-wrongly-tagging-legal-voters/; *see also* Christopher Ingraham, *This Anti-Voter-Fraud Program Gets it Wrong Over 99 Percent of the Time*, WASH. POST, Jul. 20, 2017; *see also* MICHAEL WALDMAN, THE FIGHT TO VOTE (2016).

time working in the U.S. Senate and House of Representatives in Washington DC, a prominent leader in Congress was asked post-election, "just how did you dry out all those ballots?" He reportedly replied, "you should have seen how we got them wet."

Seriously, what is needed is an honest non-partisan examination of these issues and it may be, given the strong role of the states in the election process, that state constitutional provisions could set the bar for the exercise of the solemn but beleaguered right to vote.

THE RIGHT OF PARTICIPATION AND THE FOUNDATION FOR EFFECTIVE CITIZENSHIP

In the old days, there were several merit badges in the Boy Scout system. If recollection serves, they were citizenship in the home, in the community, and in the nation. I have them; but have not gone back to see if they are still in play, or what the requirements are to wear them.

In many ways, as noted previously, this business of citizenship, of citizen participation was my biggest disappointment with the results of the Montana Constitutional Convention. But with or without that particular constitutional provision, it is hard to think clearly about effective citizen participation in our current political environment. The floodtide of money, from sources known and unknown, appears to have overwhelmed the electoral system and clearly affects the quality of subsequent deliberations and the impact and role of ordinary citizens.[112]

In the New Hampshire U.S. Senate race in 2016, decided by about 1,000 votes out of just over 700,000 cast, the total expenditures estimated for the race tallied on the order of $130 million. By 2018, estimates for the Florida Senate race topped $210 million; the Texas Senate race was pegged at some $140 million; Missouri, about $130 million; and Arizona came in just under $120 million.[113]

112. It is not surprising to learn that elected officials in Washington D.C., and elsewhere, do not vote and otherwise act in accord with many of the strongly held views of their constituents. They have learned that they do not have to, in order to get re-elected, and that appears to be good enough. *See, e.g.*, Anne Baker, *The More Outside Money Politicians Take, the Less Well They Represent Their Constituents*, WASH. POST, Aug. 17, 2016*; see also* Asher Schechter, *Study: Politicians Vote Against the Will of Their Constituents 35 Percent of the Time*, PRO-MARKET, (Jun. 16, 2017), https://promarket.org/study-politicians-vote-will-constituents-35-percent-time/.

113. *See Most Expensive Races*, THE CENTER FOR RESPONSIVE POLITICS (Mar. 6, 2019), https://www.opensecrets.org/overview/topraces.php?cycle=2018&display=allcandsout.

One is left to wonder what makes a U.S. Senate seat worth that kind of money. The answer is not that hard to figure out, and that answer is part of the reason that the odds of effective citizen engagements in public affairs are so diminished.

More broadly, the question is whether there are additional experiments in citizen participation—town halls, ad hoc citizen councils, additional consensus-building formats—that can be tried in a reasonable set of experiments in an effort to break through the current divisions that plague even the attempt at deliberative participation in public matters.

FINALLY, ONE OF THE MOST IMPORTANT RIGHTS OF ALL: THE RIGHT TO EXPECT A MEASURE OF CIVILITY AND A COMMITMENT TO SOME LEVEL OF TRUTH IN OUR PUBLIC DISCOURSE: AT LEAST NOW AND THEN

In any discussion of the quality of public life, we come early to the matter of civility—not because it has always been the dominant characteristic of American political culture; far from it. But it may have been on the minds of the Constitutional Convention delegates who worked closely on such provisions as the right to know and the right of participation. Even if not, it can nonetheless be seen clearly in how they conducted themselves in their own deliberations. There were no temper tantrums or vile personal attacks, on the floor or off. That just wasn't how things were handled in those days.

In more recent times, we have witnessed an escalation of incivility and it is hard to figure out why it has occurred, or what can now be done about it. We are left to wonder if civility and even the foundational respect for such long-held values as the inquisitive role of an independent press—generally honored even before the drafting of the Bill of Rights—are becoming relics of the past, no longer to be respected or defended, but to be trampled in the heat of electoral discourse.[114]

For all the issues we have been discussing, our ability to reason our way through them is key and always will be. At the heart of reason in public life can be found two things: speech and action. Accurate speech

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114. Montanans need not look far for this kind of behavior. The state, no stranger to the bar room brawls of American politics, has once again witnessed the spectacle of elected officials committing acts of political assault condoned at the highest levels of government, and cheered even by Montanans, men and women, young and old. In stark contrast is the behavior and standard of composure exhibited in the Montana Constitutional Convention. It is clearly the better model—even for campaign rallies.

and appropriate action both depend on a reasonable understanding and appreciation of the available facts, and at least a modicum of assurance that we are all trying to deal with things that are relatively true; that is to say, at least not demonstrably false.

Of course, this concern is not so easily boiled down into a constitutional provision that has a clear impact. In fact, it may be a more or less hortatory matter, one that we can sometimes find in our founding documents—words to inspire, to encourage, or if necessary, even to repudiate.

Obviously, we can't force people to seek or even respect facts. We can't even compel them to try to speak the truth. The First Amendment protects speech of nearly all kinds, requiring that no laws restrict it—with a few exceptions, including the famous commonplace: "you can't shout fire in a crowded theater."

As Hannah Arendt observed in her illuminating writings, at best, truth and politics have and perhaps always will have an uneasy relationship. But, she also warned that the utter absence of a concern for truth, or a willingness to allow it to be muddled or gainsaid nearly full time will produce a dangerous situation where people end up having no clear way of knowing what may be right, not being able to distinguish what is relatively true from what is patently false. That inability can make effective citizenship nearly impossible.[115]

For that reason, we can be forgiven if we wish for, even expect and try to demand, a much more consistent effort on the part of those participating in public life to demonstrate a greater measure of civility; some modicum of interest in and adherence to facts as we can discern them; and some reasonable commitment and effort to rest any asserted case on a colorable version of the truth.

We have already suffered mightily as a nation through a harmful, ultimately debilitating credibility gap with the official untruths about the Vietnam War, where the intelligence assessments diverged sharply from the policy utterances emanating from the highest levels of the government—all revealed starkly with the courageous, at the time extralegal release of the Pentagon Papers.[116] It hasn't been the only instance where credibility has vanished in our public sphere.

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115. *See* HANNAH ARENDT, CRISES OF THE REPUBLIC (1972) and HANNAH ARENDT, ORIGINS OF TOTALITARIANISM (1958), generally for her views on the perils of a wanton lack of respect for forthrightness and its relationship to the destruction of public life.

116. *See* Robert McNamara et al., *Pentagon Papers,* NATIONAL ARCHIVES (JUNE 13, 2011), https://www.archives.gov/research/pentagon-papers, to visit the full weight of the compilation that painstakingly told the revealing story of the credibility

Indeed, for now, having apparently learned so little from those times, we are overwhelmed daily by a deluge of ignorance, willful or not; by distortions crafted in the business of what we call public relations; by manipulations; and too often, by outright lies. These degrade our public discourse here at home and before the stunned eyes of the world.

If civil liberties and political freedoms are to mean much, and if we are to have any chance of expanding them to address the issues of the present and the future—to function effectively in a more democratic arena that promotes genuine participation and citizenship—we need to have this rash of dissembling rhetoric and untruthfulness come to its well-deserved end. Somehow. Or, if that is impossible, as it may well be by now, at least it must get whittled down to a more manageable level.

THE WRAP

I could go on, and I see I have. So, enough for now. The issues discussed above are just a sampling of some relevant opportunities to advance the frontiers of civil liberties and political freedoms. It should be clear and thoroughly obvious to those who pause to reflect, to contemplate, that there is potential, enormous potential, in all of this.

The question for the years ahead, once reduced: can any of what we know must be undertaken; can any of it be realized—whether in state constitutions or otherwise? I think the best answer is just a perhaps. But, if not, what will have been missed—for real people, for men, especially for women and minorities, who do not have the deepening pile of money that will enable them to be heard and to exert a fair measure of influence; who do not choose to live in a world of false "facts" and outright lies, but who cannot seem to escape it; and who do not ask at bottom for much more than the full right to live out their lives with some level of guaranteed dignity? What will have been lost, yet again?

Whether one agrees with my perspective and my selection of issues and insights or not—on the topics discussed here, and those I did not get around to—it seems to me that some of them are the kinds of rights and freedom issues that somewhere, some leaders with a progressive impulse might one day want to advance, perhaps as I say, in a state constitution. To at least try to make some progress on some of them. We can hope they will have a chance to do that to good effect in a public arena that is far and away better than the one we have to deal with now. An arena that

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gap, the official lies that misdirected public understanding of the great tragedy in Vietnam.

perhaps might even resemble the 1972 Montana Constitutional Convention and the delegates who in those days mastered their craft.

At the end of that convention, Delegate J. C. Garlington uttered what have turned out to be profoundly prophetic words for the days ahead:

> In one sense, we have finished our labors, but in a larger sense we have just begun. Ahead, I see not only the imminent task of ratification, but beyond that the more important task of leading our fellow Montanans into the reality of better government for a better society. That remains the task, and I believe the jury will always be out on that score.[117]

Indeed, the jury is still out. We are entitled, given recent history, to be worried about the ultimate verdict.

Just now, I feel like I am looking up from my desk in Katherine Orchard's law library, knowing that it is past time to check out.

To wrap this up then, I think we should take a last look back—to a time well before the Constitutional Convention. To one of the finest writers of the West; a man whose well-worn books have followed me throughout much of my adult life; and in whose historical archives I have been prowling off and on over the past several years.

He is the one I have more than once wished could have been still among the living in 1972—at what would have been the ripe old age of 67—in order to participate in the deliberations of the Convention. His presence might have helped us break more trail on the path of change.

In the 1940s, Joseph Kinsey Howard insisted on seeing Montana plainly, on telling the truth about the place as he understood it. Beyond that, his words have made us cast more than one glance at a gorgeous landscape that we can hope might now and then bring out the elemental goodness of citizens pulled up short by the sheer beauty and the promise of the place where we all get to live for a time.

I can see him sitting on the porch of his cottage near Choteau, gazing wearily at the end of another long day, probably with a generous pour of whiskey or some such. And at peace with himself alone, knowing full well why he wrote what he did.

His words are for all of us who think there are other progressive populist moments—perhaps to be experienced soon, perhaps somewhat

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117. MONTANA CONSTITUTIONAL CONVENTION TRANSCRIPT, Vol. VII, 3026-27 (Mar. 23, 1972).

later—in what we hope might be a gentler and, if not, at least a more truthful time in which to meet the tests of the challenges ahead. Let's end up with him. In his days, in words that still resonate for ours, Howard wrote:

> There will be room for adventurers here . . . [E]veryone has a quarter of a square mile . . . in which to stomp about and shout, or just to lie and look up at the vibrant blue-green sky . . . The sunset holds infinite promise. Fire sweeps up from behind the Rockies to consume the universe, kindles the whole horizon, and all the great sky is flame; then suddenly it falters and fades atop the distant peaks and the lonely buttes, ebbs and is lost in secret coulees. The Montanan is both humbled and exalted by this blazing glory filling his world, yet so quickly dead; he cannot but marvel that such a puny creature as he should be privileged to stand here unharmed, and watch. It is as if every day were the last of days . . . But the sun's fierce ecstasy will return tomorrow night. And next year . . .[118]

As it will. And in their outward mornings, especially in their time in whatever public arena they may find available to them, may Montanans and citizens elsewhere find a way to step up, to make the tough decisions that will have to be made, to meet those challenges that even now can be seen, closely lined up together, right there on our horizon. [119]

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118. JOSEPH KINSEY HOWARD, MONTANA HIGH WIDE AND HANDSOME 328-29 (1943).

119. Outward morning is my nod to the work of Dr. Henry Bugbee, who toiled in a contemplative life and came up with impressive philosophical insights. His seminal work, THE INWARD MORNING (1958), is a disciplined journal/diary of his reflections. He also appeared occasionally in the public realm and his views were a welcome inspiration whenever he did.