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THE 1972 MONTANA CONSTITUTION IN A CONTEMPORARY CONTEXT

Harry W. Fritz*

On June 6, 1972, the sovereign people of the state of Montana replaced the fundamental law under which they had lived since 1889 with a new constitution, drafted by the people in convention assembled and ratified by popular vote. The 1972 Constitution passed by a razor-thin majority, survived several institutional efforts to overthrow it, and remains even today in some quarters a matter of contention. The new document represented a fundamental turning point, perhaps as symbolic as substantive, in the history of Montana—the centerpiece of an era of reform that began well before 1972 and continues, however attenuated, today.¹

The purpose of this presentation is to place the 1972 Montana Constitution in its historical context. My colleague, Richard Roeder, has already provided the deep background—the long-range or mediate causes—of constitutional reform. My task is more situational—to locate the constitution in its contemporary setting, as a powerful symbol of fundamental changes occurring in Montana politics and society. For the 1972 Constitution represented and encapsulated three profound upheavals in the way we were—radical alterations in our politics, our economy, and our ideology.

The 1972 Constitution was a monument to a new, urban Montana. Its ratification was approved in only twelve counties, but collectively they contained fifty-five percent of the state's total population, provided sixty-five percent of the favorable vote, and housed eight of Montana's ten largest cities.² The three largest counties in eastern Montana, containing Miles City, Glendive, and Billings, all favored the constitution, and it failed in Hill County (Havre) by the margin of a single vote.³ Only Gallatin County (Bozeman) and Silver Bow (Butte) were urban counties opposed to the constitution, in a close vote.⁴ In short, the 1972 Constitution

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1. Contemporary Montana, including the era of constitutional reform here reviewed, has not been the subject of extensive historical scrutiny. The best outline of the process, including all statewide votes, is contained in E. WALDRON & P. WILSON, *ATLAS OF MONTANA ELECTIONS, 1889-1976* (1978) [hereinafter *WALDRON & WILSON*]. I have dealt with the larger setting in Fritz, *Montana: 1965 to 1975*, *MONT. MAG.*, Mar/Apr. 1984 at 10-14, and FRITZ, *MONTANA: LAND OF CONTRAST* 112-28 (1984).

2. *WALDRON & WILSON*, *supra* note 1, at 259-62.

3. *Id.* at 262.

4. *Id.*

was a city triumph over an older, rural Montana.

The census of 1960 first determined that Montana was an urban state. More people lived in cities and towns than out on the land. Montana's cities are not very large by national standards, and there's an awful lot of space between them, but statistically we are another New Jersey. Yet Montana's constitutional system was designed in 1889 for a rural polity. By the 1960s it was hopelessly out of date. Long sections of boilerplate enshrined nineteenth-century trivia in fundamental law. The *little federal* system of representation had resulted in one of the most malapportioned states in the nation. At a time when half of the people lived in just seven urban counties, a population minority in the Montana Senate outvoted it forty-nine to seven.⁵ Senators representing just sixteen percent of the people could constitute a majority. City voters were lumped in at-large districts based on virtual representation—a concept that fell from grace during the American Revolution. Apportionment rested on the time-honored formula of “one cow, one vote.”⁶

The constitutional revolution of our time began with federally mandated legislative reapportionment. The U.S. Supreme Court cases of *Baker v. Carr*⁷ and *Reynolds v. Sims*⁸ impelled Governor Tim Babcock to inform the 1965 Legislature, under threat of U.S. District Court action, that “the theory of ‘one person, one vote’ simply does not fit Montana.”⁹ But the rotten-borough representatives refused to apportion themselves out of their jobs. So the court, citing “invidious discrimination” against the more populous counties, did it for them.¹⁰ Each county could retain one senator only if the Montana Senate itself were enlarged to 754 members! Judicial apportionment was more moderate: fifty-five senators, 104 representatives, from enlarged districts which did not yet break county lines. By the first reformed legislature, in 1967, with the proportion of ranchers, stockmen and farmers markedly diminished, members observed a new *feel* in the session, a new diversity and pluralism.¹¹

5. MONTANA DEPARTMENT OF COMMUNITY AFFAIRS, MONTANA POPULATION ESTIMATES 9 (1976).

6. See Scherf, *One Cow, One Vote—A Strenuous Session in the Montana Legislature*, HARPER'S MAG., Apr. 1966, at 103-09.

7. 369 U.S. 186 (1962).

8. 377 U.S. 533 (1964).

9. H.J., 39th Legis. 32-33 (1965).

10. *Herweg v. 39th Legislative Assembly*, 246 F. Supp. 454, 457 (D. Mont. 1965). See also *Roberts v. Babcock*, 246 F. Supp. 396, (D. Mont. 1965).

11. Changing legislative demography, new agendas of politics, and the powerful role of the reformed legislatures in bringing on constitutional reform may be traced in Waldron &

Reapportionment occurred again, in 1971, as part of ongoing constitutional reform. As in thirty-three other states, the process triggered "some form of official action directed toward general revision of their basis instruments of government."¹² Trees and acres didn't demand change, but people did. The new urban 1967 Legislature established a subcommittee of the legislative council to conduct an article-by-article review of the 1889 Constitution. Chaired by Bill Groff and Jean Turnage, the subcommittee reported that about half of the 262 sections were "adequate," twenty percent needed revision, and the rest should be repealed.¹³ But the 1969 Legislature, despairing of piecemeal reform, put the proposition, "For Calling a Constitutional Convention," to the voters.¹⁴ It passed in 1970 with a sixty-five percent majority, along with two proposals for executive reorganization.¹⁵ The 1971 Legislature, charged with setting up the convention, struggled with the 1889 provision that stated, "The number of members of the convention shall be the same as that of the House of Representatives, and they shall be elected in the same manner, at the same places, and in the same districts."¹⁶ Could delegates be elected from legislative districts based on the 1960 census, the legislature asked the Montana Supreme Court, or must they be elected from districts newly defined after the 1970 census? The court held that the 1970 census was an accomplished fact, so new districts must be established.¹⁷ Accordingly, after its first effort was shot down by the U.S. District Court, the legislature reapportioned itself, establishing 100 districts and for the first time breaking county lines. The court approved the new system just ten days before the filing deadline for the Constitutional Convention primary.

Two key factors thus influenced the selection of 100 Constitutional Convention delegates on November 2, 1971. The first was the cumulative impact of double reapportionment—a massive shift of political power and voting strength from rural areas to urban,

Loring, *The 1967 Montana Legislative Assembly*, 1 MONT. PUB. AFF. REP., Nov. 1967; Loring, *The 1969 Montana Legislative Assembly*, 6 MONT. PUB. AFF. REP., May 1969; and Eastman, *The 1971 Montana Legislative Assembly*, 8 MONT. PUB. AFF. REP., June 1971 (available in archives division of the University of Montana Mansfield Library).

12. WALDRON & WILSON, *supra* note 1, at 249.

13. *Id.* at 241; MONTANA LEGISLATIVE COUNCIL, *THE MONTANA CONSTITUTION: A REPORT TO THE 41ST LEGISLATIVE ASSEMBLY* 89 (1968).

14. WALDRON & WILSON, *supra* note 1, at 249; 1969 Mont. Laws ch. 65.

15. WALDRON & WILSON, *supra* note 1, at 249-54.

16. MONT. CONST. of 1889, art. XIX, § 8.

17. 42nd Legislative Assembly v. Lennon, 156 Mont. 416, 481 P.2d 330 (1971); Waldron, *The Role of the Montana Supreme Court in Constitutional Revision*, 35 MONT. L. REV. 227 (1974).

from farms to cities, from cows to people. The second was the simultaneous vote on a sales tax referendum, which went down with seventy percent opposed, and redounded against its republican and corporate sponsors. The combined impact helps explain the fifty-eight democrats and six independents elected to the Constitutional Convention, the nineteen women, the twenty-four lawyers, the forty-one professionals, including thirteen educators.¹⁸ There were just twenty farmers and ranchers.¹⁹

The 1972 Constitutional Convention also fell upon a rising tide of economic expectations in Montana. As with the 1889 Constitution, good times, and the hope for continued prosperity, greased the wheels of change. Although struggles lay immediately ahead for both logging and mining, both industries looked strong in the early 70's. Timber was coming off a record year—1.5 billion board feet in 1968—and had enjoyed a remarkable generation of expansion and diversification, which had added a pulp mill, and plywood, particle board, and formaldehyde plants to the wood products repertoire. Anaconda Copper had weathered the longest and costliest strike (250 days, \$34 million) in its history, and still looked as dominant as ever. And on the plains of eastern Montana, business was booming. Thanks to ample rainfall and Richard Nixon's Russian wheat deals, farmers were soon to set all-time records for the yield per acre and the price per bushel of wheat. OPEC—the Organization of Petroleum Exporting Countries—was about to launch the 70's energy boom. Already the production of coal had increased twenty-three times, from 364,509 to 8,264,405 tons, between 1967 and 1972.²⁰ The future paid well. Per capita income, steadily falling with respect to national levels ever since the Second World War, reached its nadir in 1969 and rebounded to a respectable ninety-six percent, highest in twenty-four years, by 1973.²¹ Unemployment bottomed out at 4.3 percent, lowest since 1957, in 1970.²² Constitutional reform, it seemed, was good for business.

Ideologically, a new spirit of appreciation spread across the land, closely connected with a rising environmental movement. Governor Babcock launched the drive for preservation when he vetoed a Clean Air bill in 1965. Soon irate housewives and angry

18. WALDRON & WILSON, *supra* note 1, at 256.

19. *Id.*

20. MONTANA DEPARTMENT OF REVENUE, 1974 ANN. REPORT 19 (1974).

21. MONTANA DEPARTMENT OF COMMERCE, MONTANA STATISTICAL ABSTRACT: 1984, 91 (1985).

22. *Id.* at 59.

landowners were protesting local pollution and specific construction proposals across the state. The national Environmental Protection Agency and local Earth Day celebrations greeted the 70's. Rampant strip-mining threatened agricultural values in the east, and a network of high-voltage transmission lines brought the problem west. The North Central Power study of 1971, with its terrifying forecast of twenty-one mine-mouth, coal-fired electrical generating plants, producing 69,000 megawatts and diverting half of the Yellowstone River,²³ single-handedly inspired the constitutional provisions for "a clean and healthful environment."²⁴

The 1972 Constitutional Convention thus symbolized and encouraged the forces of change in Montana. It fell upon a cresting tide of reform, progress, and growth. "Montanans," wrote Mike Malone and Richard Roeder, "seemed to be changing their minds about their state and about themselves This attitude expressed itself in a new concern for preserving the environment, a renewed pride in the community, and a new interest in reforming and improving society and government."²⁵ Power to the people, prosperity, and protection of the environment are the legacies of 1972—and the centennial challenge of 1989.

23. See North Central Power Study, *Report of Phase I* (Oct. 1971).

24. MONT. CONST. art. II, § 3.

25. M. MALONE & R. ROEDER, *MONTANA: A HISTORY OF TWO CENTURIES* 301 (1976).