

January 2011

State Constitutional Design and State Constitutional Interpretation

G. Alan Tarr
tarr@camden.rutgers.edu

Follow this and additional works at: <https://scholarship.law.umt.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 Mont. L. Rev. (2011).
Available at: <https://scholarship.law.umt.edu/mlr/vol72/iss1/2>

This Article is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

ARTICLES

STATE CONSTITUTIONAL DESIGN AND STATE CONSTITUTIONAL INTERPRETATION

G. Alan Tarr*

There is a growing consensus that the interpretation of the federal Constitution should be rooted in the document's text and original meaning.¹ Even Ronald Dworkin, long identified with an interpretive approach based on moral philosophy rather than history and original meaning, has acknowledged there is much to be said for what he terms "semantic originalism."²

* Director, Center for State Constitutional Studies, and Distinguished Professor, Department of Political Science, Rutgers University (Camden). B.A., College of the Holy Cross, (1968); M.A., University of Chicago (1970); Ph.D., University of Chicago (1976). The author would like to thank Robert Williams for his many helpful comments on this research.

1. This is, of course, a controversial proposition, and there is a vast literature in constitutional theory debating it. For thoughtful arguments in favor of this proposition, see Leslie F. Goldstein, *In Defense of the Text: Democracy and Constitutional Theory* (Rowman & Littlefield 1991); Keith E. Wittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence 1999); Randy Barnett, *Restoring the Lost Constitution* (Princeton U. Press 2004). For discussions of constitutional theory in the context of state constitutional interpretation, see G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 Rutgers L.J. 841 (1991); David R. Keyser, *State Constitutions and Theories of Judicial Review: Some Variations on a Theme*, 63 Tex. L. Rev. 1051 (1985); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165 (1984); Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 Okla. City U. L. Rev. 189 (2002); Russell M. Nigro, *Foreword: The Importance of Interpretive Theory in State Constitutional Law*, 72 Temp. L. Rev. 905 (2000); Jeffrey L. Amestoy, *Foreword: State Constitutional Law Lecture: Pragmatic Constitutionalism—Reflections on State Constitutional Theory and Same-Sex Marriage Claims*, 35 Rutgers L.J. 1249 (2004); and James A. Gardner, *Interpreting State Constitutions: A Jurisprudence of Function in a Federal System* (U. Chi. Press 2005).

2. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 119–127 (Princeton U. Press 1997) (comment by Ronald Dworkin). For Dworkin's earlier advocacy of a marriage between philosophy and constitutional interpretation, see Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford U. Press 1996); Ronald Dworkin, *Law's Empire* (Harvard U. Press 1986); and Ronald Dworkin, *Taking Rights Seriously* (Harvard U. Press 1977).

This development at the federal level follows an earlier acceptance at the state level of constitutional interpretation based on text and original meaning. Scholars and jurists who have championed the independent interpretation of state constitutions have long argued for close attention to the specifics of the constitutional text and to its generating history.³ So too have advocates of the so-called supplemental approach to state constitutional interpretation, which justifies state court departures from United States Supreme Court interpretations of analogous federal constitutional provisions only when state provisions are distinctive textually or historically, i.e., when the wording of the state provision differs from that of its federal counterpart or when the history of the state provision shows that it was adopted for different reasons or arose from a different political context.⁴ Moreover, the very nature of state constitutions encourages a textualist or original meaning approach because, as William Swindler has noted, “[S]tate constitutions are all too detailed and explicit [and] there is a built-in orientation toward strict construction [i.e., textual analysis].”⁵

Even where federal and state courts have both adopted the same interpretive approach, interpretations of state constitutional provisions should not necessarily mirror the interpretation of analogous federal provisions. Fidelity to a text requires an understanding of the nature of the text being interpreted. State constitutions are not simply miniature versions of the United States Constitution;⁶ rather, they differ from their federal counterpart in their language, basic character, generating history, place in the state’s constitutional history, and underlying political philosophy. These distinctive elements affect how jurists, public officials, and citizens inter-

3. The argument here parallels that of G. Alan Tarr, *Understanding State Constitutions* 194–195 (Princeton U. Press 1998). “Independent interpretation” refers to interpretation based on the text and generating history of the state constitutional provision, uninfluenced by the interpretation of similar or analogous language in other constitutions, including the United States Constitution.

4. For an explanation and critique of the supplemental approach, see Robert F. Williams, *In the Supreme Court’s Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. Rev. 353 (1984); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 Notre Dame L. Rev. 1015 (1997); Robert F. Williams, *The Law of American State Constitutions* chs. 6–7 (Oxford U. Press 2009). Text and generating history are of course important even to state-constitution interpreters who do not subscribe to originalism. As Stephen Gottlieb has noted, “For those who reject a jurisprudence of original intent, constitutional history nevertheless helps us to preserve the lessons embodied in the drafting of the provisions at issue and to explore the consequences of the language chosen.” Stephen Gottlieb, *Foreword: Symposium on State Constitutional History: In Search of a Usable Past*, 53 Alb. L. Rev. 253, 258 (1989).

5. William Swindler, *State Constitutions for the Twentieth Century*, 50 Neb. L. Rev. 577, 593 (1971).

6. For a detailed discussion of the distinctiveness of state constitutions, see G. Alan Tarr, *supra* n. 3, at ch. 1.

2011 STATE CONSTITUTIONAL DESIGN AND INTERPRETATION 9

pret—or should interpret—a state constitution.⁷ As Justice Hans A. Linde has noted, “[T]o make an independent argument under the state clause takes homework—in texts, in history, in alternative approaches of analysis.”⁸

This article details some of the important differences between state constitutions and their federal counterpart, analyzes the implications of these differences for state-constitutional interpretation on the basis of text and original meaning, and then highlights how the practice of interpretation based on text and original meaning should influence delegates to a possible constitutional convention in Montana.

I. THE DISTINCTIVENESS OF STATE CONSTITUTIONS

A. *Origins*

State constitutions are distinctive, first of all, in their origins. The United States Constitution is a product of the late eighteenth century and the political thought of that era. In contrast, only three current state constitutions—those of Massachusetts, New Hampshire, and Vermont—date from the eighteenth century. The majority of current state constitutions were adopted in the late nineteenth century, and nine—including Montana’s—were adopted after 1960.⁹ State constitutions thus have very different sets of founders. For example, Montana’s Constitutional Convention of 1889 included 16 delegates holding mining interests.¹⁰ Montana’s 1972 Constitutional Convention included 19 women, 13 educators, and 20 farmers and ranchers, not to mention a beekeeper, a retired FBI agent, and a Methodist minister who preached: “Praise the Lord and pass the Constitution.”¹¹

7. Although this article focuses on judicial interpretation, it is important to recognize that state constitutional interpretation is not dominated by judges in the way federal constitutional interpretation is. See G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition in Democracy: How Direct?: Views from the Founding Era and the Polling Era* (Elliott Abrams, ed., Rowman & Littlefield 2002); James A. Henretta, *The Rise and Decline of “Democratic Republicanism”: Political Rights in New York and the Several States*, 53 Alb. L. Rev. 357 (1989); James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 Rutgers L.J. 819 (1991); Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 Rutgers L.J. 871 (1999); John J. Dinan, *The American State Constitutional Tradition* (U. Press of Kan. 2006).

8. Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. Balt. L. Rev. 379, 392 (1980).

9. For information on the number of constitutions adopted by various states and the dates of their adoption, see *The Book of the States*, vol. 41, 12, tbl. 1.1 (Audrey S. Wall & Heather M. Perkins eds., Council of St. Govts. 2009).

10. Larry M. Elison & Fritz Snyder, *The Montana State Constitution: A Reference Guide* 4 (Greenwood Press 2001).

11. *Id.* at 11; Harry W. Fritz, *The 1972 Montana Constitution in a Contemporary Context*, 51 Mont. L. Rev. 270, 273 (1990).

Although some problems of popular government are endemic—for example, how to combine liberty with governmental strength and how to ensure that representatives remain faithful to the popular will and the public interest—others reflect the particularities of place and time. The architects of state constitutions have had to address a different set of problems than those that confronted their predecessors in Philadelphia. In part, these differences reflect changes in population, economy, and social circumstances. The differences also reflect the fact that the prevailing understanding of political life and of the problems of republican government was different in the antebellum era than in the late eighteenth century, different again in the late nineteenth century, and different yet again in the mid-twentieth century.¹²

Historical examples from Montana clarify the point. In the late nineteenth century, a major concern of state-constitution makers, particularly in the western states, was to circumscribe the power of large corporations, such as railroads and mining companies.¹³ These corporate giants were perceived as exercising excessive economic and political power, and these provisions were aimed at ensuring public policy reflected the popular will rather than corporate interests.¹⁴ The 1889 Montana Constitution reflects this concern with combatting “minority faction” rather than restraining “majority faction.”¹⁵ For example, the Constitution abrogated the “fellow-servant” rule, a common-law doctrine that prevented workers from collecting damages through litigation for work-related injuries.¹⁶ It also specifically forbade enactment of retroactive laws favorable to railroads, and it attempted to prevent state officials from being corrupted by corporate inter-

12. Tarr, *supra* n. 3, at chs. 3–5; see generally Dinan, *supra* n. 7. For an account of state constitutional thought in the first half of the nineteenth century, see Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War* (Cambridge U. Press 2008), and Laura Scalia, *America's Jeffersonian Experiment: Remaking State Constitutions, 1820–1850* (N. Ill. U. Press 1999). For an account of how the progressive understanding of constitutions and constitutionalism differed from that of the founding generation, see Bradley C. S. Watson, *Living Constitution, Dying Faith: Progressivism and the New Science of Jurisprudence* (ISI Books 2009). For a perceptive account of state constitutionalism during the Progressive Era, see John Dinan, *Framing a “People's Government”: State Constitution-Making in the Progressive Era*, 30 Rutgers L.J. 933 (1999).

13. This concern about corporate power surfaced even prior to the Civil War. For an account of the debate over corporate power in the California convention of 1849, see David Alan Johnson, *Founding the Far West: California, Oregon, and Nevada, 1840–1890* 223–268 (U. Cal. Press 1992). For an overview of late-nineteenth-century debates, see Gordon Morris Bakken, *Rocky Mountain Constitution Making, 1850–1912* (Greenwood Press 1987).

14. Tarr, *supra* n. 3, at 115–117; Bakken, *supra* n. 13, at ch. 7.

15. The Montana delegates of the late nineteenth century thus differed from their predecessors in Philadelphia a century earlier in their assessment of the most serious threat to good republican government. For the eighteenth-century view that the major threat to republican government was majority faction, see James Madison, *The Federalist No. 10* (Henry Cabot Lodge ed., The Knickerbocker Press 1888).

16. Mont. Const. art. XV, § 16 (1889) (superseded 1972 by Mont. Const.).

2011 STATE CONSTITUTIONAL DESIGN AND INTERPRETATION 11

ests by establishing limits on the gifts and other benefits public officials could accept.¹⁷ Furthermore, the 1889 Montana Constitution prohibited bringing armed men into the State, thereby restricting mine owners' use of force in their conflicts with labor unions.¹⁸

At the same time, the Montana delegates were reluctant to impose overly stringent restrictions on corporations; they recognized the corporations' importance as a source of capital for economic development. For example, the Montana delegates exempted minerals from taxation to placate the mining industry.¹⁹ In addition, they voted down a proposal to make corporate directors and stockholders jointly liable for corporate debts, heeding one delegate's warning that it would "not only drive all foreign capital invested in the state away . . . but would prevent all future inquiries."²⁰ Finally, the delegates sought to "protect the new state from the corruption of the east by attempting to ensure frugality and honesty in government."²¹

Many decades later, drafting Montana's current Constitution, the delegates to Montana's 1972 Constitutional Convention again responded to the events and controversies of their era. In the wake of the Vietnam War and the turbulence of the 1960s, many Americans were skeptical of government. Montana's delegates responded by enhancing direct popular participation in government. They relaxed the requirements for placing initiatives and referenda on the ballot, required periodic popular consideration of whether to hold a constitutional convention, inserted a "right-to-know" provision to ensure greater transparency and accountability, and established a right of public participation in the operations of governmental agencies.²² Acting in the aftermath of the civil-rights movement, delegates expressly protected human dignity and barred discrimination on the basis of race, color, sex, culture, social origin or condition, or political or religious ideas.²³ Familiar with the efforts to bar private discrimination in the federal Civil Rights Act of 1964 and the Fair Housing Act of 1968, the Montana delegates extended these guarantees to address private and official discrimination.²⁴ Finally, reflecting the renewed interest during the late 1960s and early 1970s in protecting and preserving the environment, the Montana del-

17. *Id.* at art. XV, § 13 (retroactive laws) and art. V, §§ 42–43 (bribery). For a discussion of these provisions in Montana and other states, see John D. Hicks, *The Constitutions of the Northwest States* 56–63 (U. Neb. 1923).

18. Mont. Const. art. III, § 31 (1889) (superseded 1972 by Mont. Const.).

19. *Id.* at art. XII, § 3.

20. Bakken, *supra* n. 13, at 78.

21. Richard Roeder, *The 1972 Montana Constitution in Historical Context*, 51 Mont. L. Rev. 260, 262–263 (1990). See generally G. Alan Tarr, *The Montana Constitution: A National Perspective*, 64 Mont. L. Rev. 1 (2003).

22. Mont. Const. art. III, §§ 4–5; art. XIV, § 3; art. II, § 9; art. II, § 8.

23. *Id.* at art. II, § 4.

24. *Id.*

egates announced a constitutional commitment to environmental quality in the Preamble and devoted an entire article of the Constitution to “Environment and Natural Resources.”²⁵

What Montana’s experience shows is that the problems that confront state-constitution makers are often unique, and the solutions they choose reflect political circumstances in the state, the experience of sister states, and the prevailing political views of the era. The distinctiveness of state constitutions is apparent even in the founding era, as a comparison of the federal Constitution and early state constitutions reveals.²⁶ With the passage of time, new political understandings have been reflected in state constitutions. To choose one example from many, eighteenth-century constitutions—whether state or federal—only guaranteed “negative” rights against government, whereas many twentieth-century constitutions have incorporated guarantees of positive rights as well.²⁷

B. Legal Premises

State constitutions are likewise distinctive in their legal premises. The federal Constitution is understood as a grant of power, and the government is limited to those powers delegated to it by the Constitution.²⁸ In contrast, state governments have generally been understood as possessing plenary legislative power.²⁹ Accordingly, state constitutions operate primarily as documents of limitation, placing limits on state governments rather than

25. *Id.* at preamble, art. IX.

26. Accounts revealing the distinctive political understandings of the initial state constitutions include: Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (U.N.C. Press 1980); Gordon S. Wood, *The Creation of the American Republic 1776–1787* (U.N.C. Press 1969); Marc W. Kruman, *Between Authority and Liberty: State Constitution Making in Revolutionary America* (U.N.C. Press 1997); Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (La. St. U. Press 1980).

27. For an authoritative overview, see Helen Hershkoff, *Positive Rights and the Evolution of State Constitutions*, 33 Rutgers L.J. 799 (2002), and more generally, Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality*, 112 Harv. L. Rev. 1131 (1999).

28. Thus, the federal Constitution enumerates the legislative powers of Congress and limits Congress to those “legislative Powers herein granted.” U.S. Const. art. I, § 1. This limited grant of power is confirmed by the Tenth Amendment, which reads: “All powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. Const. amend. X.

29. Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 175–179* (8th ed., Little, Brown, & Co. 1927) (discussing the character of state legislative power and listing supporting cases). For indications that the situation may be somewhat more complicated than it initially appears, see Walter F. Dodd, *The Functions of a State Constitution*, 30 Pol. Sci. Q. 201, 205–206 (Acad. Pol. Sci. 1915); Robert F. Williams, *State Constitutional Law Processes*, 24 Wm. & Mary L. Rev. 169, 178–79 (1983); Robert F. Williams, *Comment: On the Importance of a Theory of Legislative Power Under State Constitutions*, 15 Quinnipiac L. Rev. 57 (1995).

2011 STATE CONSTITUTIONAL DESIGN AND INTERPRETATION 13

granting powers to them.³⁰ Because state legislative power exists in the absence of constitutional limitations and because state courts have characteristically interpreted such limitations narrowly,³¹ many state-constitution makers have found it necessary to elaborate in considerable detail the restrictions they sought to impose.³² This helps explain why many state constitutions are lengthy documents.

Another explanation can be found in the changing views of the functions that state constitutions should serve. According to Morton Keller, “The ultimate thrust of constitutional revision after the Civil War was not to enhance the power of the state but rather ‘a grand design to reduce the field of state law and withhold from it every subject which it is not necessary to concede.’”³³ Obviously, this effort to deny powers to state legislatures required a proliferation of prohibitions. Other scholars have found that state-constitution makers in western states in the late nineteenth century, while suspicious of state legislatures, also wished to expand the powers of government to deal with emerging problems.³⁴ This too required constitutional expansion, especially insofar as these delegates inserted public-policy mandates directly into state constitutions so that constitutions “increasingly became instruments of government rather than merely frameworks for government.”³⁵ Again, the result was lengthier constitutions. Today, 30 state constitutions contain more than 20,000 words.³⁶ Even the 1972 Montana Constitution is more than 14,000 words long.³⁷ Put differently, state constitutions offer textualists a lot of text to interpret.

The federal Constitution grants powers and imposes limitations on power. But state constitutions also impose duties on state governments. Thus, the Montana Constitution aims for “a system of education which will develop the full educational potential of each person,” and to that end, di-

30. As the Kansas Supreme Court has observed, “Where the constitutionality of a [state] statute is involved, the question presented is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby.” *State ex rel. Schneider v. Kennedy*, 587 P.2d 844, 850 (Kan. 1978); see also Frank P. Grad & Robert F. Williams, *State Constitutions for the Twenty-first Century, Volume 2: Drafting State Constitutions, Revisions, and Amendments* ch. 2 (SUNY Press 2006).

31. See Williams, *The Law of American State Constitutions*, *supra* n. 4, at 251, 267–279.

32. See e.g. Neb. Const. Art. III, § 14; N.M. Const. art. IV, §§ 15–21. For an overview of these limitations and their genesis, see Charles Chauncey Binney, *Restrictions upon Local and Special Legislation in State Constitutions*, 41 *Amer. L. Register & Rev.* 1019, 1024–28 (1894).

33. Morton Keller, *Affairs of the State: Public Life in Late Nineteenth Century America* 112 (Harvard U. Press 1977) (quoting Simeon E. Baldwin).

34. See e.g. Amy Bridges, *Managing the Periphery in the Gilded Age: Writing Constitutions for the Western States*, 22 *Studies Am. Pol. Dev.* 32 (Spring 2008).

35. Tarr, *supra* n. 3, at 132. See also Christopher W. Hammons, *Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions*, 93 *Am. Pol. Sci. Rev.* 837 (1999).

36. *The Book of the States*, *supra* n. 9, at 12.

37. *Id.*

rects the Legislature to “provide a basic system of free quality public elementary and secondary schools.”³⁸ Other state constitutions likewise impose educational responsibilities. For example, the New Jersey Constitution mandates that “[t]he Legislature shall provide for the support of a thorough and efficient system of free public schools,”³⁹ and the Texas Constitution says that “it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”⁴⁰

The duties assigned to state governments are not limited to education. The Montana Constitution mandates that “the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations” and directs the Legislature to “provide for the administration and enforcement of that duty.”⁴¹ Alaska’s government is directed to “provide for the promotion and protection of public health,”⁴² and Idaho’s government is directed “to pass all necessary laws to provide for the protection of livestock against the introduction or spread” of various diseases.⁴³ These duties and the alleged failure of state governments to meet their responsibilities can provide a basis for litigation quite different in character from that found under the federal Constitution. In Montana, for example, the Montana Supreme Court has heard challenges based on state obligations to ensure “equality of educational opportunity” and “provide a basic system of free quality public schools”⁴⁴ and to “maintain and improve a clean and healthful environment.”⁴⁵

C. Changeability

State constitutions are also distinctive because of the propensity of state-constitution makers to amend and revise them. The federal Constitution was adopted 222 years ago and has been amended only 27 times. In contrast, states change their constitutions regularly, amending them frequently and even replacing them periodically. Only 19 states retain their

38. Mont. Const. art. X, §§ 1, 3.

39. N.J. Const. art. VIII, § 4, ¶ 1.

40. Tex. Const. art. VII, § 1.

41. Mont. Const. art. IX, § 1, cl. 1, 2.

42. Alaska Const. art. VII, § 4.

43. Idaho Const. art. XVI, § 1.

44. Mont. Const. art. X, §§ 1, 3; *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989).

45. Mont. Const. art. IX, § 1; *Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality & Seven-Up Pete Joint Venture*, 988 P.2d 1286 (1999). See more generally Barton H. Thompson, Jr., *The Environment and Natural Resources*, in *State Constitutions for the Twenty-first Century, Volume 3: The Agenda of State Constitutional Reform* ch. 10 (G. Alan Tarr & Robert F. Williams eds., SUNY Press, 2006) [hereinafter *The Agenda of State Constitutional Reform*].

2011 STATE CONSTITUTIONAL DESIGN AND INTERPRETATION 15

original constitutions, and most states have had three or more.⁴⁶ Most current state constitutions have averaged more than one constitutional amendment for every year since their passage.⁴⁷ Montana ranks just below average, having adopted only two constitutions and, as of 2008, having amended its current Constitution only 30 times.⁴⁸

This changeability complicates the task of state constitutional interpretation in at least three respects. First, state-constitution interpreters must interpret current constitutional provisions in light of their similarity to or divergence from their predecessors in earlier constitutions of the state, and they must interpret the language of any constitutional amendment in light of the changes it introduced to the constitution.⁴⁹ Second, given the frequency of amendment, state-constitution interpreters are often placed in the position of having to reconcile provisions adopted at various points in time that at least potentially reflect differing political perspectives.⁵⁰ Third, insofar as states often borrow ideas and provisions from sister states, state-constitution interpreters must be aware of the origins of a state's provision and how the similar language was interpreted in the originating state.⁵¹

II. STATE CONSTITUTIONAL INTERPRETATION

Interpretation of a state constitution in light of its text and original meaning plays out in ways that are neither consistently liberal nor consistently conservative from a political perspective. Some examples from the civil-liberties area illustrate the point.⁵²

One can begin with the issue of public-school finance. In *San Antonio Independent School District v. Rodriguez*,⁵³ the United States Supreme Court ruled that even though Texas's reliance on local property taxes to finance public schools led to substantial inter-district differences in per-pupil funding, this did not violate the Equal Protection Clause of the Fourteenth Amendment.⁵⁴ This ruling, while dispositive for federal constitutional law, was altogether irrelevant for state constitutional interpretation. The pertinent state constitutional language is very different from the federal Equal Protection Clause, as evidenced by the education provisions quoted

46. *The Book of the States*, *supra* n. 9 at 12.

47. *Id.*

48. *Id.*

49. For a more detailed discussion of the complexities posed by multiple constitutions and constitutional borrowing, see Tarr, *supra* note 3, at ch. 6.

50. *Id.*

51. *Id.*

52. For an authoritative consideration of how to interpret state guarantees of civil liberties, see Williams, *The Law of American State Constitutions*, *supra* n. 4, at ch. 6.

53. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

54. *Id.* at 54–55.

earlier.⁵⁵ Moreover, the constitutional language in Montana and other states was adopted by different sets of founders and at different points in time than the Equal Protection Clause of the federal Constitution. The Montana Supreme Court concluded that spending disparities among school districts unconstitutionally denied equality of educational opportunity among students.⁵⁶ However, courts in other states have varied in their views as to whether their state constitutions permit or prohibit the inter-district disparities that result from reliance on local property taxes.⁵⁷ What is clear is that *Rodriguez* offers little guidance for states attempting to answer this question.

A second instructive issue is voucher plans for school choice, which may enable students to use state-provided vouchers to attend parochial schools. The United States Supreme Court in *Zelman v. Simmons-Harris* ruled that voucher programs do not violate the federal Establishment Clause.⁵⁸ However, the text and generating history of state provisions concerning religion are very different. Most states have a functional analogue of the Establishment Clause, though typically it is more detailed than the federal provision.⁵⁹ Montana is an outlier here—its religious-freedom provision is virtually identical to the First Amendment which provides: “The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”⁶⁰ Even so, Montana does not necessarily follow the federal lead on matters of church and state. Like most other state constitutions, the Montana Constitution also includes provisions dealing specifically with state aid to religious schools. Article X, § 6 begins:

The Legislature, counties, cities, towns, school districts, and public Corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.⁶¹

55. See e.g. Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 Tex. L. Rev. 1195 (1985); Jeffrey M. Shaman, *Equality and Liberty in the Golden Age of State Constitutional Law* (Oxford U. Press 2008); *supra* n. 36–38 and accompanying text.

56. *Helena Elementary Sch. Dist. No. 1*, 769 P.2d at 690.

57. For a discussion and listing of state cases on public school finance, see G. Alan Tarr, *Judicial Process and Judicial Policymaking* 311–318 (5th ed., Cengage Learning 2010). See generally Douglas S. Reed, *On Equal Terms: The Constitutional Politics of Educational Opportunity* (Princeton U. Press 2001).

58. *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002).

59. For an analysis of the differences between federal and state protections, see G. Alan Tarr, *Church and State in the States*, 64 Wash. L. Rev. 73 (1989); Christine M. Durham, *What Goes Around Comes Around: The New Relevancy of State Constitutional Religion Clauses*, 38 Val. U. L. Rev. 353 (2004).

60. Mont. Const. art. II, § 5.

61. *Id.* at art. X, § 6, ¶ 1. Although this language is virtually identical to Article XI, § 8 of the 1889 Montana Constitution, the delegates to the 1972 convention added a second paragraph designed to pro-

2011 *STATE CONSTITUTIONAL DESIGN AND INTERPRETATION* 17

This comprehensive and explicit ban on aid to sectarian institutions, which dates from the 1889 Constitution, seems a more substantial barrier to state aid than the First Amendment. At a minimum, an interpreter committed to textual analysis must address what this provision adds to the Establishment Clause found in Article II, § 5 of the Montana Constitution and its influence on state-provided vouchers.

Another issue of particular interest under the Montana Constitution is freedom of speech or expression. Montana's Article II, § 7 reads:

No law shall be passed impairing the freedom of speech or expression. Every person shall be free to speak or publish whatever he will on any subject, being responsible for all abuse of that liberty. In all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and the jury, under the direction of the court, shall determine the law and the facts.⁶²

Although the language of the first clause resembles the First Amendment, a state-constitution interpreter cannot treat the other clauses as mere surplusage. Indeed, the constitution makers' decision not merely to replicate the First Amendment suggests an intended difference in constitutional meaning.

Several aspects of this provision are particularly noteworthy. First, the Montana provision not only bans interferences with freedom of speech but also provides a positive freedom to speak. Some states with similar provisions have interpreted this positive right as broader than that guaranteed by the First Amendment, encompassing a right in some circumstances to speak on private property open to the public.⁶³ Second, the Montana provision protects a right not only of speech but also of "expression." The use of this term represents a shift from the 1889 Constitution,⁶⁴ and a constitution interpreter would have to determine the meaning of this change. This addition is logically viewed as protecting something beyond what was protected by the 1889 language, though exactly what this right of free expression encompasses is not obvious on its face. Third, the Montana Constitution specifically protects speech "on any subject." The United States Supreme Court has tended to distinguish the level of protection for speech depending

protect federal grants from being rejected by constitutional mandate. The second paragraph reads: "This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to nonpublic education." See also *Elison & Snyder, supra* n. 10, at 181–182.

62. Mont. Const. art. II, § 7.

63. See e.g. *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341 (Cal.1979); *State v. Schmid*, 423 A.2d 615 (N.J. 1980); *Alderwood Assocs. v. Wash. Envtl. Council*, 635 P.2d 108 (Wash. 1981) (en banc). For a discussion of these cases, see G. Alan Tarr, *State Constitutionalism and "First Amendment" Rights*, in *Human Rights in the States: New Directions in Constitutional Policymaking* ch. 2 (Stanley Friedelbaum ed., Greenwood Press 1988); Sanford Levinson, *Freedom of Speech and the Right of Access to Private Property under State Constitutional Law*, in *Developments in State Constitutional Law* 51–70 (Bradley D. McGraw ed., West 1985).

64. Mont. Const. art. III, § 10 (1889) (superseded 1972 by Mont. Const. art II, § 7).

on its character, with the greatest protection accorded to political speech.⁶⁵ The language of the Montana Constitution, however, seems to point in a different direction. Thus, the precedents of the United States Supreme Court regarding the First Amendment may not provide much assistance in interpreting the distinctive language of the Montana Constitution.⁶⁶

Also of interest under the Montana Constitution is the right to bear arms. The Second Amendment of the United States Constitution reads: "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."⁶⁷ Advocates and opponents of restrictions on the private possession of firearms have offered starkly divergent interpretations of the amendment, with gun-control advocates claiming that it protects only a collective right to bear arms and then only while in service in the militia.⁶⁸ Recently, in *District of Columbia v. Heller*, a closely divided Supreme Court disagreed and held the Second Amendment protects an individual right to bear arms with few limitations.⁶⁹

But even prior to *Heller*, the "collective-right" understanding had no place in the interpretation of the Montana Constitution. Article II, § 12 of the Montana Constitution states: "The right of any person to keep or bear arms in defense of his own home, person, and property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons."⁷⁰ It thus makes abundantly clear that the Montana Constitution protects an individual right, not a collective right, to bear arms and that the right extends to personal self-defense as well as to defense of the State.

65. *E.g. Buckley v. Valeo*, 424 U.S. 1 (1976); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

66. Despite these differences in language, Larry Elison and Fritz Snyder have concluded: "The Montana Supreme Court has been cautious in interpreting the constitutional protection of freedom of speech and press. It has not pushed the limits of free speech beyond what the U.S. Supreme Court's interpretation of the First Amendment requires." Elison and Snyder, *supra* n. 10, at 43-44.

67. U.S. Const. amend. II.

68. Proponents of the collective-right approach include Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. Dayton L. Rev. 5 (1989); Michael A. Bellesiles, *Suicide Pact: New Readings of the Second Amendment*, 16 Const. Commentary 247 (1999); Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 Const. Commentary 221 (1999). Proponents of the personal-right approach, which has found increasing scholarly support in recent years, include Stephen P. Halbrook, *The Founders' Second Amendment: Origins of the Right to Bear Arms* (Ivan R. Dee 2008); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L. Rev. 461 (1995); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793 (1998). For an effort to offer an alternative that bridges the gap between the two approaches, see David C. Williams, *The Mythic Meanings of the Second Amendment: Taming Political Violence in a Constitutional Republic* (Yale U. Press 2003).

69. *D.C. v. Heller*, 554 U.S. 570, 595 (2008).

70. Mont. Const. art. II, § 12.

2011 STATE CONSTITUTIONAL DESIGN AND INTERPRETATION 19

Thus far, the focus has been on state provisions that either have no federal analogue or differ textually from the guarantees of the federal Bill of Rights. This is certainly important in Montana because the Montana Constitution has 17 provisions in its Declaration of Rights that have no parallel in the federal Bill of Rights.⁷¹ However, because state supreme courts are the authoritative interpreters of state constitutions, the opportunity for independent interpretation exists even when the language of state and federal guarantees is the same.

This is reflected in the constitutional protection against unreasonable searches and seizures. Most state guarantees—including Montana's—are identical or virtually identical in language to the federal Fourth Amendment, prohibiting "unreasonable searches and seizures."⁷² This textual similarity, however, does not require—and need not require—state courts to reach the same results as the United States Supreme Court reaches in Fourth Amendment cases. For example, several courts have considered whether police can constitutionally search trash bags without a warrant when the bags have been deposited on the curb for collection. In *California v. Greenwood*, the United States Supreme Court concluded the Fourth Amendment did not require police to obtain a search warrant to search the trash.⁷³ One year later, confronting the same set of facts and interpreting a state constitutional provision virtually identical to the Fourth Amendment, the New Jersey Supreme Court in *State v. Hemele* reached the opposite conclusion.⁷⁴ Whether or not the New Jersey Supreme Court's interpretation of the New Jersey Constitution was correct, it was perfectly legitimate for the New Jersey justices to disagree with the United States Supreme Court even though the text of the federal and state constitutions were the same.⁷⁵

The legitimacy of the New Jersey Supreme Court's disagreement stems from two factors. First, the New Jersey justices were interpreting a different document, and a different generating history might justify a divergent interpretation of identical language. Second, even if the meanings of the state and federal constitutional provisions are the same, the New Jersey

71. Ronald K. L. Collins, *Reliance on State Constitutions: The Montana Disaster*, 63 Tex. L. Rev. 1095, 1122 (1985).

72. The Montana provision reads: "The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing." Mont. Const. art. II, § 11. On the substance of state guarantees against unreasonable search and seizure more generally, see Barry Latzer, *State Constitutional Criminal Law* (Thomas Leg. Publg., Inc. 1995).

73. *Cal. v. Greenwood*, 486 U.S. 35, 37 (1988).

74. *State v. Hemele*, 576 A.2d 793, 810 (N.J. 1990).

75. Robert F. Williams has provided the most thoughtful elaboration of this position. See Williams, *In the Supreme Court's Shadow*, *supra* n. 4; Williams, *In the Glare of the Supreme Court*, *supra* n. 4.

Supreme Court can legitimately disagree with the United States Supreme Court's interpretation.⁷⁶

When interpreting the *federal* Constitution, a state court must adhere to authoritative Supreme Court precedents. But when interpreting its own state constitution, the state supreme court is the authoritative interpreter and is obliged to give the best interpretation even if it diverges from the United States Supreme Court's interpretation of identical language.⁷⁷ Rulings of the United States Supreme Court may be persuasive authority for state-constitution interpretation, but they are no more authoritative than other state supreme courts' interpretations of their own constitutions.⁷⁸ Otherwise, as Judge Dorothy Beasley has noted, "The virtual piggybacking of the state clause onto the federal clause renders the former a parasite instead of an independent source of authority."⁷⁹

Of course, state judges are not obliged to depart from federal precedent in interpreting identical language in their own constitutions. State judges may find the Supreme Court's interpretation and application of the constitutional text persuasive. This appears to be the case in Montana with search-and-seizure law. Larry Elison and Fritz Snyder observe: "Generally, cases raising search and seizure questions under Article II, Section 11 of the Montana Constitution followed the lead of the United States Supreme Court."⁸⁰ Montana is hardly alone in this respect.⁸¹ Nonetheless, state judges always retain the power to reasonably disagree with the rulings of the Supreme Court when interpreting state guarantees.

This article has focused on examples drawn from guarantees of civil liberties, but the same principles apply to interpretation of other state constitutional provisions as well. For example, state understandings of the separation of powers and of the definition of executive, legislative, and judicial powers may also be distinctive.⁸² For state-constitution interpreters, the situation is simultaneously daunting and invigorating. They may not simply rely on doctrines and precedents from the nation's capital; they must closely

76. *Id.*

77. Williams, *The Law of American State Constitutions*, *supra* n. 4, at 193–200.

78. *Id.*

79. Dorothy T. Beasley, *The Georgia Bill of Rights: Dead or Alive?*, 34 *Emory L.J.* 341, 414 (1985).

80. Elison & Snyder, *supra* n. 10, at 53.

81. See Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 *Just. Sys. J.* 37 (1992–1994); Susan P. Fino, *The Role of State Supreme Courts in the New Judicial Federalism* 142 (Greenwood Press 1987); and Michael Esler, *State Supreme Court Commitment to State Law*, 78 *Judicature* 25 (1994–1995).

82. On state separation of powers doctrine, see G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 *N.Y.U. Annual Survey Am. L.* 329 (2003); Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 *Roger Williams U. L. Rev.* 79 (1998); Williams, *The Law of American State Constitutions*, *supra* n. 4, at ch. 8.

2011 STATE CONSTITUTIONAL DESIGN AND INTERPRETATION 21

analyze state sources.⁸³ Yet if one is committed to a vibrant American federalism, this is as it should be.⁸⁴ Each state is a distinct polity with its own fundamental law, and it is appropriate in a federal system that state constitutions receive the same close attention and careful study as is given to the federal Constitution.

III. IMPLICATIONS FOR CONSTITUTION MAKERS

The discussion of state constitutions thus far should be of particular interest to those involved in drafting constitutions because insight into how judges will approach the interpretation of their handiwork may enable drafters to better frame provisions in order to achieve their objectives. In addition, there are some distinctive challenges that jurists confront in state constitutional interpretation. This section will explore how this insight can guide the task of constitutional drafting.⁸⁵

In drafting constitutional provisions, drafters must first be cognizant of the legal parameters within which they operate. Article XIV, § 1 of the Montana Constitution authorizes the Legislature to call an “unlimited convention,” and § 2 of the same Article allows voters to call an “unlimited convention” by initiative. It is reasonable to conclude that the periodic submission to the voters of whether to call a convention means an unlimited convention.⁸⁶ Thus, delegates are not constrained by state law as to the subjects they can consider and the provisions they can propose. However, voters are constrained in their proposal of constitutional amendments via the initiative. Article XIV, § 11 of the Montana Constitution states that “if more than one amendment is submitted at the same election, each shall be so prepared and distinguished that it can be voted on separately.”⁸⁷ Relying on that language, the Montana Supreme Court in *Marshall v. State ex rel. Cooney* struck down an amendment that required voter approval for all new taxes, because the amendment amended three parts of the Montana Consti-

83. See Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. Annual Survey Am. L. 211 (2003).

84. “Therefore, rather than blindly following federal precedent, state judges should independently seek their own best interpretation of their state constitutions. This does not mean that they should altogether ignore federal rulings—they may be adopted or rejected, depending on their inherent persuasiveness. But when state judges forthrightly assert their own perspectives, it is argued, the result is a healthier and more vibrant federalism.” Tarr, *supra* n. 1.

85. Williams, *The Law of American State Constitutions*, *supra* n. 4, at ch. 4; Grad & Williams, *supra* n. 30, at chs. 3, 5.

86. Mont. Const. art XIV, §§ 1–3. In permitting only unlimited constitutional conventions, Montana is in a minority among the states. See Gerald Benjamin, *Constitutional Amendment and Revision*, in *The Agenda of State Constitutional Reform*, *supra* n. 45, at 177, 194.

87. Mont. Const. art. XIV, § 11.

tution and failed to allow a separate vote for the amendment of each provision.⁸⁸

Constitution drafters must also be aware that the Supremacy Clause of the federal Constitution dictates that state constitutions are subordinate to valid federal law, whether constitutional, statutory, or administrative.⁸⁹ Therefore, drafters must be aware of and avoid drafting provisions that conflict with applicable federal law. When federal law changes, drafters may be obliged to rewrite provisions that were previously acceptable. As Frank Grad and Robert Williams have noted, the United States Supreme Court's "one person, one vote" rulings and Congress's enactment of the Voting Rights Act of 1965 exemplify how changes in federal law may require a response from state-constitution drafters, requiring changes in state constitutions to extend voting rights and reapportion state legislatures.⁹⁰ Yet pertinent federal law may be the beginning rather than the end of a drafter's investigation, for federal law may merely preclude certain *means* of achieving the drafter's aim and not the pursuit of the objective by alternative means. For example, states can pursue equality of educational opportunity through affirmative action programs in admissions, but not through programs that establish racial quotas or fail to consider applicants as individuals rather than merely members of groups.⁹¹

State-constitution makers must also be aware that judicial interpretation of their handiwork will occur in the context of what might be called a "universe of constitutions."⁹² Whereas justices of the United States Supreme Court only rarely seek guidance in the rulings of state supreme courts or lower federal courts,⁹³ state judges regularly inquire into how sister courts, both state and federal, have interpreted similar provisions.⁹⁴ Other states' opinions may be a source of legal doctrine and often serve as persuasive precedent. This is hardly surprising; in consulting the constitutional jurisprudence of sister states, state judges are merely extending into the realm of constitutional interpretation a mode of decision-making that they have long employed in common-law cases.⁹⁵

88. *Marshall v. State ex rel. Cooney*, 975 P.2d 325 (Mont. 1999).

89. U.S. Const. art. VI, cl. 2.

90. Grad & Williams, *supra* n. 30, at 35.

91. *Compare Grutter v. Bollinger*, 539 U.S. 306 (2003) with *Gratz v. Bollinger*, 539 U.S. 244 (2003).

92. The discussion in this and succeeding paragraphs draws upon Tarr, *supra* n. 3, at 199–208.

93. See William J. Brennan, Jr., *State Supreme Court Judge versus United States Supreme Court Justice: A Change in Function and Perspective*, 19 Fla. L. Rev. 225 (1966); J. Skelly Wright, *In Praise of State Courts: Confession of a Federal Judge*, 11 Hastings Const. L.Q. 165 (1984).

94. See Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 Am. Pol. Sci. Rev. 178–193 (1985); Tarr, *supra* n. 3, at 199–201.

95. This can be problematic. As Justice Hans Linde has noted, state courts may as a result "find themselves pulled between fidelity to the state's own charter and the sense that constitutional law is a

2011 *STATE CONSTITUTIONAL DESIGN AND INTERPRETATION* 23

Drafters should also understand that in consulting other constitutions, judges will likely begin with their own state's prior constitutions. Although these documents will not assist in the interpretation of entirely new provisions, they can provide insight into both constitutional modifications and continuities. If delegates have modified a provision's text, interpreters must assume the change was introduced for a purpose. Sometimes it is clear from the context that the change merely involved constitutional housekeeping, an attempt to eliminate archaic language. For example, in 2007, New Jersey amended its Constitution to rephrase a provision that denied the vote to those lacking mental capacity; the new language reflected modern terminology and deleted terminology that is now considered offensive.⁹⁶ Sometimes linguistic changes involve an effort to remove from the constitution essentially "statutory" provisions. For example, the Louisiana Constitutional Convention of 1973 devoted most of its energies to simplifying and shortening the State's existing Constitution by removing statutory, obsolete, and inconsistent material, and the voters of Louisiana adopted their handiwork in 1974. Some of the excised material was subsequently enacted as statutes.⁹⁷ Most often, however, constitution makers alter constitutional language in order to introduce changes in meaning. Therefore, judges typically determine the meaning of constitutional language in part by examining the language it replaced.⁹⁸ Put differently, judges consider not only a state constitution's current provision but also the previous version and the way it was interpreted by the courts.

What does this mean for state-constitution makers? If they change the wording of a provision, they can expect courts to interpret their action as introducing a change in constitutional meaning. As Frank Grad and Robert Williams caution, "The guiding rule for the drafter ought to be that as far as possible the traditional, frequently construed terminology ought to be used in new constitutional provisions unless a change of law or different meaning is intended."⁹⁹ Furthermore, if modern terms are substituted merely to

shared enterprise." Hans A. Linde, *Are State Constitutions Common Law?* 34 *Ariz. L. Rev.* 215, 228 (1992); see generally Hans A. Linde, *State Constitutions are Not Common Law: Comments on Gardner's Failed Discourse*, 24 *Rutgers L.J.* 927 (1993). For a sophisticated argument in favor of a national state constitutional law, rather than a state-specific version, see Gardner, *supra* n. 1. For a collection of thoughtful essays on state constitutional interpretation in a federal system, see James A. Gardner & Jim Rossi, *Dual Enforcement of Constitutional Norms* (Oxford U. Press 2009).

96. The earlier version of the provision read: "No idiot or insane person shall enjoy the right of suffrage." The amended version reads: "No person who has been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting shall enjoy the right of suffrage." See N.J. Const., Art. II, § 1, ¶ 6.

97. See Lee Hargrave, *The Louisiana State Constitution: A Reference Guide* 17–18 (Greenwood Publ. Group 1991).

98. For examples of interpreters engaging in a comparative analysis of current and prior constitutions, see Tarr, *supra* n. 3, at 201–202.

99. Grad & Williams, *supra* n. 30, at 55.

replace archaic phraseology, “the record ought to establish that no change in meaning was intended.”¹⁰⁰ Finally, drafters should be particularly careful about linguistic changes in bills of rights “where archaic usages have frequently achieved not only a settled meaning but also considerable popular veneration.”¹⁰¹

What may be less obvious is that if constitution makers carry over language unchanged from a prior constitution, this also affects judicial interpretation. Judges are likely to interpret the retention of the same language from one constitution to the next as a decision not to change constitutional meaning.¹⁰² This situation is comparable to legislative reenactment of a statute after it has been interpreted by the courts. Because legislators had the opportunity to amend the statute if they disagreed with the court’s interpretation, their failure to amend it during reenactment can be understood as an affirmation of the court’s interpretation. Thus, “a standard source on statutory construction has concluded that ‘where the legislature adopts an expression which has received judicial interpretation, interpretation is prima facie evidence of legislative intent.’”¹⁰³

Applying this same logic to constitutional revision, judges may well conclude that retention of constitutional language entails an endorsement of the provision’s judicial interpretation, effectively making authoritative the body of case law developed under the preceding constitution. This would mean that neither judges nor other constitution interpreters could legitimately diverge from the interpretation that had been ratified by reenactment.¹⁰⁴

I have suggested elsewhere that the analogy between a statute’s reenactment of a statute and the carrying over of a constitutional provision is less than perfect and that constitutional ratification lacks the character of active endorsement that is found in the reenactment of a statute.¹⁰⁵ But judges remain free to accept or reject that argument, and state-constitution makers must consider potential future judicial behavior. Because courts may well treat retained constitutional language the way they treat reenacted statutes, constitution makers must factor this into their deliberations. If they agree with the court’s interpretation of a constitutional provision, they would be wise not to fiddle with the language. If, however, they are either

100. *Id.*

101. *Id.*

102. Grad & Williams, *supra* n. 30, at 55.

103. Tarr, *supra* n. 3, at 203 (quoting Norman J. Singer, *Sutherland Statutory Construction* 69 (5th ed., Clark Boardman Callaghan 1992)). Not all scholars agree with this conclusion. See e.g. William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 243–245, 311–312 (Harvard U. Press 1994).

104. See e.g. *Reed v. Fain*, 145 So. 2d 858 (Fla. 1962); *Gray v. Bryant*, 125 So. 2d 846 (Fla. 1960); *Hitchcock v. State*, 131 A.2d 714 (Md. 1957).

105. Tarr, *supra* n. 3, at 204–205.

2011 STATE CONSTITUTIONAL DESIGN AND INTERPRETATION 25

dissatisfied with the court's interpretation of a provision or wish to provide judges greater leeway to alter interpretation in light of changed conditions or attitudes, then the constitution makers should avoid merely carrying over the familiar language.

Drafters should also realize that judges are unlikely to limit their attention to earlier constitutions of their own state or even sister states from whom constitutional provisions were borrowed. Drafters of state constitutions often borrow from sister states' constitutions or from the United States Constitution.¹⁰⁶ Such borrowing may occur because the sister states share a similar heritage and political outlook or because they have developed solutions for problems that the constitution makers are facing. Whatever the reason, in engaging in borrowing from other states, state-constitution makers choose among various formulations, and judges must take this choice into account in their interpretation of a "borrowed" provision.

For example, states' right-to-privacy provisions differ, as do provisions concerning gender equality.¹⁰⁷ When constitution-drafters decide to borrow another state's constitutional language, what exactly are they incorporating?¹⁰⁸ Does a borrowing state thereby adopt the meaning of the provision in the originating state? Or, more to the point, does it endorse the meaning given to the provision by the courts of the originating state, so that this interpretation becomes part of the borrowing state's constitution? This is a serious concern, because in interpreting a state constitution on the basis of text and original meaning, judges are expected to look to the origins of the provisions as elaborated by the courts of the originating state. For state-constitution makers, the lesson is clear: they must be aware of the judicial interpretation of constitutional language in the state from which they are borrowing, and if they disagree with that interpretation, they should use alternative language that does not come with the baggage of judicial precedent.

IV. CONCLUSION

Writing at the time of the American founding, John Adams noted, "How few of the human race . . . have ever enjoyed an opportunity of

106. Montana's constitution makers may have looked even further afield. The human dignity guarantee of Article II, § 4 apparently came from the Puerto Rican Declaration of Rights. See Elison & Snyder, *supra* n. 10, at 34. More generally, see Tarr, *supra* n. 3, at 50–55.

107. On privacy, see Jennifer Friesen, *State Constitutional Law: Litigating Individual Rights, Claims, and Defenses* ch. 2 (4th ed., LexisNexis 2006). On gender equality, see G. Alan Tarr & Mary Cornelia Porter, *Gender Equality and Judicial Federalism: The Role of State Appellate Courts*, 9 *Hastings Const. L.Q.* 919 (1981). See generally Robert F. Williams, *Rights*, in *The Agenda of State Constitutional Reform*, *supra* n. 45, at ch. 1.

108. For further elaboration of this argument, see Tarr, *supra* n. 3, at 206–207.

making an election of government, more than of air, soil, or climate for themselves or their children!"¹⁰⁹ But Montana's constitution makers of 1972, wisely heeding Thomas Jefferson's admonition that each new generation should have the opportunity to revise the framework under which they are governed, provided for the public to periodically decide whether to call a new convention.¹¹⁰ The citizens of Montana themselves overwhelmingly voted against a convention in 1990, and they did so in 2010 as well, though by a lesser margin.¹¹¹ In doing so, they aligned themselves with the vast majority of states that have regularly rejected convention calls: between 1970 and 2002, the outcome of votes on automatic convention calls was positive only four times and negative 25 times. In 2008, more than 60% of voters in Connecticut, Hawaii, and Illinois rejected conventions calls.¹¹² And in 2010, voters in Iowa, Maryland, and Michigan, like the voters in Montana, also voted against calling a convention.¹¹³

Although Montana's voters rejected calling a convention, they did approve the Montana Prevent Double Taxation Amendment, which had been proposed by initiative, and it is likely that in future years they will approve further constitutional changes.¹¹⁴ For those involved in the task of amending or revising a state constitution, this article can serve a cautionary function. What the framers devise and the voters ratify will ultimately come before the state's courts for interpretation, and their interpretations are likely to be grounded in the text of the constitution and the original meaning of its words. Recognition of this fact should guide Montana's constitution makers and constitution amenders in their task, so that the document they devise will in practice reflect the will of the people and make effectual the popular sovereignty guaranteed and celebrated in the Montana Constitution.¹¹⁵

109. Wood, *supra* n. 26, at 127.

110. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), quoted in Williams, *The Law of American State Constitutions*, *supra* n. 4, at 73–74.

111. Elison & Snyder, *supra* n. 10, at 16.

112. Benjamin, *supra* n. 86, at 193; Williams, *The Law of American State Constitutions*, *supra* n. 4, at 388.

113. Ballotpedia, *Chart of 2010 Ballot Measure Issues*, http://ballotpedia.org/wiki/index.php/Chart_of_2010_ballot_measure_issues (last accessed Jan. 22, 2011).

114. Ballotpedia, *Montana New Property Tax Elimination Amendment, CI-105*, [http://ballotpedia.org/wiki/index.php/Montana_New_Property_Tax_Elimination_Amendment,_CI-105_\(2010\)](http://ballotpedia.org/wiki/index.php/Montana_New_Property_Tax_Elimination_Amendment,_CI-105_(2010)) (last accessed Jan. 22, 2011).

115. Mont. Const. art. II, § 1.