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on the State Constitutions of the United States

The

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SECOND EDITION

Robert B. Keiter

The Wyoming State Constitution

Second Edition

Robert B. Keiter

Foreword by Michael Golden

THE OXFORD COMMENTARIES ON THE STATE
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G. Alan Tarr, Series Editor

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■ The Wyoming State Constitution

The Oxford Commentaries on the State Constitutions of the United States

G. Alan Tarr, Series Editor

*Professor G. Alan Tarr, Director of the Center on State Constitutional Studies at Rutgers University, serves as General Editor for this important new series which in its entirety will cover each of the fifty states. Each volume of *The Oxford Commentaries on the State Constitutions of the United States* contains a historical overview of the state's constitutional development, plus a section-by-section analysis of the state's current constitution. Other features included in the volumes are the text of the state's constitution, a bibliographic essay, table of cases, and index. This series provides essential reference tools for those investigating state constitutional development and constitutional law.*

*For my late parents, Dr. M. Roberta and Blair E. Keiter,
who taught me that principles matter*

■ SERIES FOREWORD

In 1776, following the declaration of independence from England, the former colonies began to draft their own constitutions. Their handiwork attracted widespread interest, and draft constitutions circulated up and down the Atlantic seaboard, as constitution-makers sought to benefit from the insights of their counterparts in sister states. In Europe, the new constitutions found a ready audience seeking enlightenment from the American experiments in self-government. Even the delegates to the Constitutional Convention of 1787, despite their reservations about the course of political developments in the states during the decade after independence, found much that was useful in the newly adopted constitutions. And when James Madison, fulfilling a pledge given during the ratification debates, drafted the federal Bill of Rights, he found his model in the famous Declaration of Rights of the Virginia Constitution.

By the 1900s, however, few people would have looked to state constitutions for enlightenment. Instead, a familiar litany of complaints was heard whenever state constitutions were mentioned. State constitutions were too long and too detailed, combining basic principles with policy prescriptions and prohibitions that had no place in the fundamental law of a state. By including such provisions, it was argued, state constitutions deprived state governments of the flexibility they needed to respond effectively in changing circumstances. This—among other factors—encouraged political reformers to look to the federal government, which was not plagued by such constitutional constraints, thereby shifting the locus of political initiative away from the states. Meanwhile, civil libertarians concluded that state bills of rights, at least as interpreted by state courts, did not adequately protect rights and therefore looked to the federal courts and the federal Bill of Rights for redress. As power and responsibility shifted from the states to Washington, so too did the attention of scholars, the legal community, and the general public.

During the early 1970s, however, state constitutions were “rediscovered.” The immediate impetus for this rediscovery was former President Richard Nixon’s appointment of Warren Burger to succeed Earl Warren as Chief Justice of the U.S. Supreme Court. To civil libertarians, this appointment seemed to signal a decisive shift in the Supreme Court’s jurisprudence, because Burger was expected to lead the Court away from the liberal activism that had characterized the Warren Court. They therefore sought ways to safeguard the gains they had achieved for defendants, racial minorities, and the poor during Warren’s tenure from erosion by the Burger Court. In particular, they began to look to state bills

of rights to secure the rights of defendants and to support other civil-liberties claims that they advanced in state courts.

The “new judicial federalism,” as it came to be called, quite quickly advanced beyond its initial concern to evade the mandates of the Burger Court. Indeed, less than two decades after it originated, it became a nationwide phenomenon. For when judges and scholars turned their attention to state constitutions, they discovered an unsuspected richness. They found not only provisions that paralleled the federal Bill of Rights but also constitutional guarantees of the right to privacy and of gender equality, for example, that had no analogue in the U.S. Constitution. Careful examination of the text and history of state guarantees revealed important differences between even those provisions that most resembled federal guarantees and their federal counterparts. Looking beyond state declarations of rights, jurists and scholars discovered affirmative constitutional mandates to state governments to address such important policy concerns as education and housing. Taken altogether, these discoveries underlined the importance for the legal community of developing a better understanding of state constitutions.

Yet the renewed interest in state constitutions has not been limited to judges and lawyers. State constitutional reformers have renewed their efforts with notable success: since 1960, ten states have adopted new constitutions and several others have undertaken major constitutional revisions. These changes have usually resulted in more streamlined constitutions and more effective state governments. Also, in recent years political activists on both the left and the right have pursued their goals through state constitutional amendments, often enacted through the initiative process, under which policy proposals can be placed directly on the ballot for voters to endorse or reject. Scholars too have begun to rediscover how state constitutional history can illuminate changes in political thought and practice, providing a basis for theories about the dynamics of political change in America.

In this second edition, Robert B. Keiter updates his original study of the Wyoming Constitution as part of *The Oxford Commentaries on the State Constitutions of the United States*, a series which reflects the renewed interest in state constitutions and will contribute to our knowledge about them. Because the constitutional tradition of each state is distinctive, the volume begins with the history and development of constitutionalism in Wyoming. It then provides the complete text of the state’s current constitution, with each section accompanied with commentary that explains the provision and traces its origins and its interpretation by the courts and by other governmental bodies. Finally, the book concludes with a bibliography, a table of cases cited in the volume, and a topical index.

G. Alan Tarr

■ FOREWORD TO THE SECOND EDITION

My initial formal legal education at the University of Wyoming College of Law in the mid-1960s included study of the U.S. Constitution, but not the Wyoming Constitution. Following law school graduation and success with the state bar examination, I served four years of active military service as a lawyer, during which time the only constitution I was concerned with was the federal charter and its impact on the soldiers who were duty bound to uphold it. On my return to civilian life and the private practice of law in the early 1970s, I was suddenly, and happily, exposed to the Wyoming Constitution because my law firm was representing clients actively involved in school finance litigation and protecting the constitutional rights of clients at both state and federal levels. In these early years I became acutely aware that state constitutions perform functions that have no analogue at the federal level, especially in the areas of public education, individual rights protections, and government structure and powers.

By the time I was appointed to the Wyoming Supreme Court in the late 1980s, there had been an explosion of national scholarly interest in state constitutional law. That scholarly interest in Wyoming constitutional law was spearheaded by Professor Robert B. Keiter, who was then on the faculty of our state college of law. The Wyoming bench and bar were the beneficiaries of that development in 1993 with the publication of the *Wyoming State Constitution—A Reference Guide*, co-authored by Professor Keiter and Tim Newcomb. From that time to the present, that valuable comprehensive study of the history of the founding document, its articles and sections, and judicial decisions respecting its various provisions, has been within arm's reach to assist me and my judicial colleagues whenever the need arises.

The year 2015 marks the 125th anniversary of Wyoming's founding document, and I am extremely pleased that Professor Keiter has written this updated edition to capture the developments in our state constitutional law over the last twenty-two years. No other constitutional scholar is more qualified to write this reference guide, and I am confident that Professor Keiter's singular contribution to the study of Wyoming constitutional law will continue to be the most useful resource for citizens, judicial officers, lawyers, and government officials for many years to come.

Michael Golden
Justice, Wyoming Supreme Court (Ret.)

■ FOREWORD TO THE FIRST EDITION

More than 100 years ago, Wyoming's territorial leaders gathered in Cheyenne to convene a constitutional convention. So anxious were our forefathers to take this important step toward statehood, that the convention was called without congressional approval.

Wyoming, these leaders believed, had matured to the point where only statehood would allow real economic and social development to progress. Further, they objected to a territorial government appointed from Washington, which had proved intrusive, when not indifferent, and which lacked any real understanding of the unique characteristics of Wyoming and the West. So urgent was their desire to assert some control over their own destiny that they crafted the document which has governed our state for more than 100 years in just twenty-five days.

Today, these same circumstances of federal intrusion and indifference from a government often far removed from the concerns of western states sound woefully familiar and have led to a resurgent interest in state constitutions. Federal gridlock on so many key issues has led state and local leaders to turn to the tools at hand as we face the reality that no one else will solve our problems for us.

As we use our state constitutions as guides to achieve the goal of greater self-determination, it is important we understand the rationale and history of these documents. To this end, Bob Keiter and Tim Newcomb have performed an invaluable service to our state with their book *The Wyoming State Constitution: A Reference Guide*.

This book is the first to meld a comprehensive history and analysis of the Wyoming Constitution and its interpretations. In vivid and accessible language, the authors recount the circumstances leading up to the call for the constitutional convention, the convention debate, the evolution of the resulting document, and the interpretation of its principles. Keiter and Newcomb remind us that the Wyoming Constitution, like its federal counterpart, is a living, breathing document which still shapes our institutions and impacts all Wyoming citizens.

I read this book at a time when I and other state leaders must grapple with issues of revenue and taxation, government organization, and personal liberty. I was struck by how much our constitution has framed the debate of today on these and other subjects, and how the prescience of those who founded our state has dictated the options and opportunities available to us through words and ideas set on paper more than five generations ago. We can be grateful for the wisdom and vision which led our forefathers to recognize the justness of equality for women, and to accommodate our government to the unique character of

Wyoming, leading, for example, to the Wyoming Constitution (along with that of Colorado), forging the basis for contemporary western water law.

We can be equally grateful that our founders knew there would be change and adaptation if our state was to meet the challenges of progress. Here, again, Keiter and Newcomb ably document and analyze key decisions and opinions interpreting each section of the Wyoming Constitution. They have also created an indispensable bibliography, table of cases, and index, including an index to the official journal of the constitutional convention.

In fulfilling the obligations of the office of governor, I expect to refer again and again to this book, as I believe all will who seek to influence Wyoming public policy for decades to come. Further, this is not a book for lawyers and scholars alone, but is an important reference work for any citizen who seeks to understand the history, character, diversity, and future of Wyoming.

Mike Sullivan, Governor

■ PREFACE TO THE SECOND EDITION

During the past two-plus decades since the first edition of *The Wyoming State Constitution* was published, the Wyoming Constitution has emerged from relative obscurity. The Wyoming Supreme Court and the state's lawyers have regularly had occasion to rely upon it as the fundamental charter for state government and as a source of treasured civil rights. Indeed, the Wyoming Constitution has provided important guidance in resolving such critical issues as the scope of the governor's line item veto authority, the legislature's public education funding obligations, and the search and seizure authority of law enforcement officers when stopping a passing motorist. While not inattentive to U.S. Supreme Court precedent under the U.S. Constitution, the Wyoming Supreme Court has signaled its intention to develop an independent state constitutional jurisprudence derived from standard interpretive principles but also sensitive to the state's own history and traditions. In doing so, it has provided the state's lawyers with a roadmap for framing state constitutional arguments and, in the spirit of judicial federalism, is elevating the stature and importance of the state's constitution.

In a state noted for its independence and self-sufficiency, this commitment to the Wyoming Constitution as an independent source of fundamental rights and basic foundation for the state's governmental institutions is a welcome development. Wyoming, as Tim Newcomb and I discovered while researching the first edition of this book, has a truly rich and deep constitutional tradition. From the often heated debates of the 1889 Constitutional Convention, to the penetrating analysis found in Wyoming Supreme Court Justice Fred Blume's constitutional decisions, to the recurrent and varied stream of proposed constitutional amendments, and to the careful craftsmanship reflected in recent supreme court opinions, the state can take pride in a tradition of pragmatic yet progressive constitutionalism. With Wyoming's small population, the public as well as the state's bar and judiciary enjoy unique opportunities to participate directly in an ongoing dialogue over the scope and meaning of the state's constitution's manifold provisions. A litany of recent issues raise profound and timeless questions about the state's destiny: What is the appropriate division of power among the three branches of state government; what responsibility does the state have to ensure equal educational opportunity; and how should individual constitutional rights—many of which have no counterpart under the federal Constitution—be defined and protected? Just as we hoped that the first edition of this book would encourage and enrich that dialogue, I hope this second edition promotes even deeper understanding about the role of the state constitution and the judiciary

in articulating enduring principles that ensure institutional stability while giving due regard to a progressive tradition that allows the state to grow and change.

The book is organized for easy use. The first chapter provides an overview of Wyoming constitutional history. Part I begins with the 1889 Constitutional Convention, then examines the amendments to the constitution, and concludes with an analysis of the Wyoming Supreme Court's role in interpreting the document. Part II sequentially examines each article and section, noting pertinent historical information and amendments, as well as significant judicial interpretations. Space constraints limit the textual discussion to important general principles, not a detailed analysis of each judicial decision. The book concludes with a bibliographical essay, a listing of case citations, and a general index. Because the *Journal and Debates of the Constitutional Convention of the State of Wyoming (Journal)*, the only comprehensive record of the 1889 Constitutional Convention proceedings, is poorly indexed, relevant *Journal* page references are noted throughout the text.

This second edition could not have come to fruition without the assistance of several people. The Albert and Elaine Borchard Fund for Faculty Excellence at the University of Utah S.J. Quinney College of Law provided much-appreciated financial assistance. My co-author on the first edition, Tim Newcomb, graciously reviewed several parts of the manuscript and offered unfailingly helpful comments and insights. During their tenure as Behle and Quinney Fellows, University of Utah law students Hannah Follender, Michelle Kfoury, Sheena Christman, Mitch Longson, Haley Carmer, and Landon Newell provided me with thorough and timely research assistance. Suzanne Darais and Laura Ngai from the College of Law's Quinney Library worked their usual magic tracking down obscure sources and responding promptly to my reference questions. Patti Beekhuizen, Angela Turnbow, and Suzanne Faddis meticulously took care of the formatting and word processing of the manuscript. As always, my dear wife, Linda Keiter, cheerfully lent moral support and guidance throughout.

Finally, though more than twenty years have elapsed since I departed the University of Wyoming law faculty, my affection for the state and my former colleagues and students remains. To those who helped with the first edition, namely, Virginia Amend, Lynne Boomgaarden, Gerry Gallivan, Michael Golden, David Gosar, Mike Horan, Ted Lauer, George Rudolph, and Mark Squillace, this second edition rests squarely upon the solid foundation you helped Tim Newcomb and me to produce. With so many former students now occupying key elected and judicial positions, I have great confidence that the Wyoming Constitution and the institutions it has created are in good hands. I remain deeply grateful to all.

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