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1889-1970
The Montana Constitution:
Resource or Burden?

CONSTITUTIONAL AMENDMENTS AND CONVENTION REFERENDUM
GENERAL ELECTION, NOVEMBER 3, 1970

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Prepared for Public Distribution by Montana Constitution Revision Commission

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The Forty-First Legislative Assembly submitted to the voters in the November 3, 1970 General Election a referendum for calling a constitutional convention and the maximum three amendments permitted by the Constitution.

Convention Referendum

Approval of the Convention Referendum would direct the forty-Second Legislative Assembly to call a convention to revise, alter, or amend the constitution of Montana. Delegates to the convention would be elected from House of Representative districts by the people at a special election. Any revisions, alterations or amendments proposed by the convention would be submitted to the voters for approval.

Nineteen-Year-Old Vote Amendment

Approval of the Nineteen-Year-Old Vote Amendment would reduce the voting age from twenty-one to nineteen, allowing persons nineteen and twenty years old to vote.

Twenty Department Amendment

Approval of the Twenty Department Amendment would direct the legislature to allocate among not more than twenty departments, no later than July 1, 1973, all state executive and administrative offices, boards, bureaus, commissions, agencies, and instrumentalities, except the office of governor, lieutenant governor, secretary of state, attorney general, state treasurer, state auditor, and superintendent of public instruction.

Executive Reorganization Amendments Amendment

Approval of the Additional Amendments Amendment would permit the legislative assembly to submit at the 1972, 1974 and 1976 general elections, in addition to the three amendments otherwise authorized, amendments providing for the reorganization of the executive department of government.

FINDINGS AND RECOMMENDATIONS OF THE MONTANA CONSTITUTION REVISION COMMISSION

1. The Montana Constitution, framed in 1889, impairs effective state and local government.
2. There is a need for substantial revision and improvement of the Montana Constitution.
3. The changes needed in the Montana Constitution cannot be accomplished adequately through the present amendment process.
4. A constitutional convention is the most feasible and desirable method of accomplishing comprehensive constitutional revision.

CONSTITUTIONAL CONVENTION REFERENDUM

[SB 297; 1969 Laws Chap. 65; noted under
Montana Constitution Art. XIX, Sec. 8, R.C.M., 1947]

AN ACT TO SUBMIT TO THE ELECTORS OF THE STATE OF MONTANA THE QUESTION
WHETHER THE LEGISLATIVE ASSEMBLY SHALL CALL A CONSTITUTIONAL CONVENTION.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA:

Section 1. At the general election to be held in November 1970 there shall be submitted to the electors of the state of Montana the question whether the legislative assembly at the 1971 session, and in accordance with Article XIX, section 8 of the Montana constitution, shall call a convention to revise, alter, or amend the constitution of Montana.

Section 2. When the question is submitted to the electors of the electors of the state of Montana there shall be printed on the ballot the full title and section 1 of this act, an explanatory statement by the attorney general like that for constitutional amendments submitted to the electors, and the following words:

" For calling a constitutional convention.

Against calling a constitutional convention."

THE MONTANA CONSTITUTION DENIES MONTANANS AN EFFECTIVE,
EFFICIENT, RESPONSIBLE STATE ADMINISTRATION

In our democratic society an executive branch of government should be organized with two main objectives: First, it should be politically responsible to the people through the election process; and second, it should be organized to perform with maximum effectiveness and efficiency the tasks assigned to it by the legislature.

Both of these objectives--responsibility and efficiency--are prevented, and citizen control over government is weakened by the Montana constitution, which provides and permits an executive branch of sprawling and uncoordinated agencies.

The Montana executive-administrative branch of government consists of over 160 officials, boards, bureaus, and commissions. Seventeen of these officers and agencies are created by the constitution, and the constitution does not prevent the proliferation of agencies created by the legislature. Even though the Governor is vested with the supreme executive power of the state and it is his duty to see to the faithful execution of the laws, the actual number of independent officers, boards, bureaus and commissions which have little or no direct connection to the Governor's office virtually prevents the Governor from providing effective leadership in state government. Even if the Governor had the authority with which he is nominally vested, it would be impossible for him to keep in touch with all the boards, commissions and offices that presently exist; and it would be equally impossible to supervise and coordinate their activities.

The grant of "executive power" to the Governor is not sufficient if other constitutional provisions create a fragmented executive structure beyond the effective control of the people, the legislature, or the governor. A responsible executive branch, properly headed by a Governor vested with adequate authority, balanced by a system of controls such as the legislative post-audit, would increase the effectiveness of the legislature.

A convention could consider improving the quality of state government by making executive and administrative agencies, boards, bureaus and commissions responsible to the Governor as the chief executive of the state. This would not only strengthen state government by providing some insurance that the Governor's and legislature's policies would be carried out, but it would improve citizen control over state government by making the governor clearly responsible for the executive department of state government.

The calling of a constitutional convention would permit the convention to consider ways to revise the Montana constitution to provide for an effective, efficient, responsible state administration subject to citizen control.

THE MONTANA CONSTITUTION CONTAINS
MANY ILL-ADVISED LIMITATIONS ON THE STATE LEGISLATURE

The Montana constitution creates a weak legislature with inadequate time to manage the business of the state. The legislature is unnecessarily hampered by constitutional rules governing its procedures, restrictions on its powers, and the inclusion of a great amount of statutory material in the constitution. The constitution curbs the legislature in its crucial role of law-making and policy determination and thus the constitution also curbs the power of the people whom the legislature represents.

The paramount restriction on the legislature that would be considered by a convention is the constitutional limitation on the length and frequency of legislative sessions. The constitution does not provide sufficient time for the legislature to manage the state's business. The false economy of a 60-day biennial legislature; originally set when Montana was still a territory; results in hastily drawn bills; does not provide adequate time for committee consideration, public hearings or formal action on bills; creates an atmosphere more marked by frenzy than calm consideration; does not allow time for even interested citizens to become informed on the work of the legislature, makes the legislature more susceptible to pressure group lobbying, and generally lowers the quality of legislation approved by the legislature. Consistently the volume of legislation has required the legislature to extend beyond the present 60-day constitutional limit. Attempts to reduce legislative delay, such as early introduction of bills, have not substantially increased the time available for legislative business. The legislature is the best judge of the time necessary to complete the legislative business of the state. Montanans are poorly served by a constitution that requires their elected representatives to substitute haste for careful deliberation in the legislative process.

The convention could consider improving and streamlining the Legislature by removing hindering procedural provisions in the constitution that impede the legislature from doing its work effectively and responsibly and add unnecessarily to the expense in both time and money of a session, such as the requirement that bills be signed in open session. Many procedural rules now frozen in the constitution could be provided for by House and Senate rules adopted by the legislature.

The deletion of "statutory provisions," those provisions that do not properly belong in Montana's fundamental law, would enable the legislature, within the limits of its authority, to deal with matters which are its legitimate concern but are now beyond its power. Statutory detail in the Montana constitution includes provisions on the structure and duties of state administrative agencies, procedures for the administration of state moneys, regulations of corporations, structure and procedure for county government, method of selection and removal of judges, and administration of property tax assessment. All of these areas are statutory in nature and all are subject to the need for frequent amendment and revision. Montanans would be better served if statutory provisions were provided for by statute instead of being frozen in the constitution.

The Montana constitution has been enlarged to indefensible length by the inclusion of these legislative provisions, and by reason of its enlargement the underlying idea of a constitution as fundamental law and a foundation of government has been lost sight of.

THE MONTANA CONSTITUTION CONTAINS MANY ILL ADVISED

PROVISIONS REGARDING STATE FINANCES

It is not surprising that fiscal provisions written in the Montana constitution in 1889 are inadequate today. The ability of the state to administer its financial affairs is hampered by constitutional provisions regarding budgeting, appropriation of funds, expenditure of funds, audit of expenditures, assessment of property, authorization of taxes, and investment of funds. For the most part, these provisions should be statutory matters, rather than procedural arrangements frozen in the constitution.

Few, if any, of the provisions of the Montana constitution are more complex than those governing state and local finance. The complexity of the financial provisions is illustrated by extensive court cases interpreting the language of the financial sections. The extensive and ambiguous financial provisions in the constitution have frequently forced the supreme court, rather than the legislature, to become the policy-making body in the area of state and local finance.

Financial limitations are the principal limitations in the constitution on the ability of the governor, legislature, and local government to provide efficient, economical and necessary public services financed adequately by an equitable tax structure. These constitutional restrictions bear most heavily upon the fiscal powers of the legislature to tax, to appropriate money, to incur and finance debt and to establish the administrative structure necessary to exercise these powers.

These fiscal restrictions have not served well, and it is time to examine those provisions in the Montana constitution that unnecessarily prevent sound fiscal planning, management and organization and to consider replacing them with provisions that are flexible, but retain adequate fiscal safeguards. Many constitutional financial provisions contain outmoded approaches and procedures that are costly and inefficient. Many of these financial provisions and procedures could be provided for by law, rather than being fixed in the constitution.

In its simplest form, the problem of what to include in the constitution on taxation and finance is a test of one's belief in our system of representative democracy. It is difficult to reconcile a constitution containing a series of constitutional prohibitions or limitations upon the legislature's exercise of discretion in respect to taxation and finance with a real belief in representative democracy. The inclusion of constitutional restrictions of the legislature's authority to manage state finances demonstrates a lack of faith in the capacity or desire of the elected representatives of the voters to establish and maintain an adequate and equitable system of financing public services.

A constitutional convention would afford the people an opportunity to clarify the present provisions on finance, vest increased discretion in the Legislative Assembly over state finance, and at the same time retain adequate safeguards for the people's interest.

THE MONTANA CONSTITUTION DENIES LOCAL GOVERNMENTS CONTROL OVER THEIR OWN AFFAIRS

The Montana constitution prevents effective local control over local government by vesting too much authority over local government in the state legislature, prevents the legislature from providing effective financial aid to cities, towns and counties, and contains many ill-advised restrictions on the powers of local governments. Stripped of the freedom to act in purely local matters, cities, towns, and counties have been forced to encumber the legislature with a maze of bills of a local nature.

Local government is increasing, not declining, in importance; and if local government in Montana is to meet the challenges of the new federalism, its basic legal authority must be studied and a proper framework developed.

The constitution denies counties legislative power that is permitted municipalities. Counties are performing an increasing number of functions of government, particularly counties that contain a large proportion of urban residents. Many functions once considered properly those of municipal corporations are now, even in rural areas, performed by special districts created by counties. The number and variety of functions varies from one county to the next. In the recognition of the evolution of functions performed by many of Montana's counties, the constitution should free the legislature to delegate activities to whichever unit of local government is best capable of performing the local service.

The Montana constitutional framework has produced a state-local relationship in Montana in which all units of local government have had to justify every action by reference to provisions of law defining both powers and procedures. As a result, the legislature is burdened with a maze of local government bills, and for local government in Montana statutory law has become a voluminous and intricate handbook, sharply inhibiting the response of local government to local needs.

The Montana constitution hampers rather than encourages intergovernmental cooperation in meeting problems that can best be handled by the coordinated activity of units of local government and the local government article contains unnecessary detail, more appropriate to the state statute books than the constitution. A notable exception is a 1922 amendment which explicitly frees the legislature to provide optional forms of government for cities, towns and counties or for any of these units in consolidated arrangements.

A constitutional convention would permit the writing of a local government article that could clearly state that it is the intention of the people to vest in local government maximum freedom to deal with local affairs. At the same time, the article could leave unimpaired the power of the legislature to enact laws of statewide or regional concern. The convention could specifically authorize cooperative agreements between units of local government and provide for a grant of residual power to all units of local government. By approving such a provision, the delegates in convention could in effect require future legislatures to distinguish local matters that are of statewide concern and subject to state law and those matters of local government that can best be handled at the local level. As a result, local government could exercise any legislative power not denied it be general law. This concept of shared powers would mean that local governments, both counties and municipalities, would be free to act on any problem unless definite state action had been taken. Such a streamlined article on local government would free the legislature of the burden of acting on a host of purely local bills so that it can concentrate on matters of importance to the whole state and would free counties and municipalities to deal effectively with matters of local concern.

THE JUDICIAL BRANCH--IS IT ADEQUATE?

Is the judicial system designed for Montana in 1889 adequate for Montana in 1970? The Montana constitution provided for a three-level court system consisting of the Supreme Court, district courts, and justice of the peace, police and municipal courts. There are five Supreme Court justices; at present the state is divided into eighteen judicial districts, each district having from one to three judges, with a total of twenty-eight district judges; there are approximately 230 justices of the peace and police judges. Supreme Court justices and district court judges are elected on non-partisan ballots. Justices of the peace and police judges are elected on partisan ballots. Supreme Court justices and district court judges must be attorneys. There are no legal qualifications for justices of the peace and police judges.

For some time there has been discussion of the adequacy of the Montana court structure. Proposals for changing the structure of the judicial system have come from the legal profession, the Montana Legislative Council, and the general public.

A constitutional convention would permit a full and public discussion of the Montana judicial system. Basic changes which could be discussed include:

1. Establish a two-level court system as opposed to the three-level system currently provided for, or modernize the three-level system.
2. Determine whether justice of the peace, police and municipal courts should have constitutional status.
3. Consider substitutes for current inferior court system.
4. Provide for small claims procedure.
5. Improve the quality of all legal proceedings to the district court level.
6. Permit the expansion of the number of Supreme Court justices to seven.
7. Provide for a system of administration within the court system with well defined lines of administrative control.
8. Vest the legislature with authority to provide for the election or other method of selection of justices and judges.
9. Permit the legislature to provide for censure, suspension, removal, or retirement of justices and judges, in addition to the present methods of impeachment.
10. Allow for the appointment, rather than the election, of the Clerk of the Supreme Court and the clerks of the district courts.
11. Delete the provision for election of county attorney so that the legislature may provide for district attorneys.

EDUCATION AND THE CONSTITUTION

The people of Montana, in 1889, embedded in the state constitution the clear responsibility of the Legislative Assembly "to establish and maintain a general uniform and thorough system of public, free, common schools."

The Montana constitution also provides for a state board of education and a state superintendent of public instruction with powers and duties to be regulated by statute. The constitution contemplates the creation of school districts, provides safeguards for the earnings from federal land grants and permanent school funds, prohibits the use of public funds for any school controlled in whole or part by any church, limits the indebtedness of school districts to five percent of the value of taxable property in each district and provides for county superintendents of schools.

In general the educational provisions of the constitution are generally regarded as satisfactory, but a convention expectedly would consider several recommendations made by various official studies in recent years. These include the suggestion that the superintendent of public instruction should be an appointive office of the state board of education, rather than a political elective office. In 26 states, state superintendents of public instruction are now appointed by the state board of education rather than elected.

The convention could review the role and function of the constitutional office of County Superintendent of Schools. In some counties, it is virtually impossible to persuade anyone to serve as county superintendent of schools. If the office were removed from the constitution, the legislature could then provide by statute for the qualifications, status, and role of the county superintendents.

The convention could consider establishing separate governing boards for the university system and the public schools. The Montana and Idaho state boards of education are the only state boards that "mix" control of major university systems with supervision of other public education. Many official reports have suggested that this dual responsibility spreads the board's concerns "too far and too thin." A Montana Legislative Council study showed that the board of education devotes only five percent of its time to primary and secondary education.

The convention could also examine the effects the constitutional investment restrictions have on the earning of the public school funds. These constitutional restrictions could be replaced by statutory investment guidelines. The constitutional guarantee of the school funds against loss or diversion could be retained, but the present constitutional restrictions on investment of public school funds adopted in 1938 could be modified to permit the legislature to provide by law for sound investment and management of these public funds to produce the maximum amount of income.

The constitution limits bonded indebtedness to five percent of the taxable valuation of a school district. Since valuations are not uniformly determined, the five percent debt limitation itself is not uniform, and financing of school construction is unduly limited in counties where assessment ratios are low. The present constitutionally imposed debt limit does not provide a uniform protection to taxpayers because its effect is dependent upon the varying practices of the several county assessors. The convention could consider replacing the present constitutional debt restrictions with an authorization for the legislature to supervise the level of school district and other local debt.

A constitutional convention would provide an opportunity to review the state's responsibility to provide for a system of public education. The present constitutional provisions could be evaluated and the necessary and desirable improvements be recommended by the convention to the people for their approval.