

July 1990

Keynote Speech to the Law School Symposium of the 1972 Constitution

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Governor of Montana

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Recommended Citation

Stan Stephens, *Keynote Speech to the Law School Symposium of the 1972 Constitution*, 51 Mont. L. Rev. (1990).

Available at: <https://scholarworks.umt.edu/mlr/vol51/iss2/2>

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KEYNOTE ADDRESSES

KEYNOTE SPEECH TO THE LAW SCHOOL SYMPOSIUM ON THE 1972 CONSTITUTION*

Governor Stan Stephens**

This evening I find myself in the somewhat enviable position of being a Monday morning quarterback. I have the luxury of being able to glance back over the past nineteen years and provide some observations and form some conclusions concerning the implementation of Montana's 1972 Constitution. The constitution's impact on the lives of Montanans is too serious a subject to be treated lightly. Therefore, when asked to express one's views and opinions, it is wise to avoid snap judgments or reaching conclusions that reveal personal biases.

At the outset, I want to provide a little history of how it all happened. Montana gave birth to its 1972 Constitution during very turbulent times. The decade of the sixties was gone but barely forgotten. The dominant themes of the day were an often hostile distrust for big business and big government, an uncaring attitude toward the traditions of the past, and a determination—sometimes

* I want to express my thanks to Dean Martin Burke and to the organizers of this conference for their courtesy in granting me an opportunity to participate in this most timely event that occurs during the celebration of Montana's centennial year. I commend the sponsors and organizers of the conference for bringing Montanans together in a discussion and exchange of views on a subject of importance to us all.

** Stan Stephens has been a resident of Montana since 1949. He came to Montana at the age of nineteen and began a thirty-eight-year career in broadcasting that included service with the United States Armed Forces Broadcast Network in Korea during the Korean War. During his broadcast career, he worked in all phases of the industry. He was a news and editorial writer, announcer, and chief executive officer for two radio stations and three cable television systems in Montana.

Stephens, a republican, began his political career in 1969 with election to the Montana State Senate. During his sixteen years of legislative service, he held every senate leadership position, an accomplishment no other Montana legislator has accomplished. He retired from the Montana Senate in 1986 and was elected Governor of Montana in 1988. His four-year term includes presiding as Montana's Centennial Governor in 1989.

bordering on the reckless—to change the system.

As was being done in other states, Montana decided to change its constitution. In spirited elections held throughout the state, we elected 100 delegates, convened them in Helena for several months of deliberations and, in 1972, placed their finished product before the voters of the state for approval or rejection. Considerable debate raged across the state as to whether the 1972 version was worthy of replacing the 1889 document. The people voted and, in forty-four of fifty-six counties, the document was rejected. I have searched my mind for any other topic that might be placed before the voters of this state, rejected by *forty-four* of *fifty-six* counties and still manage to gain a majority vote. I cannot think of any such subject. Only the vote on the 1972 Constitution surmounted such an implausible set of odds, with only twelve counties approving the constitution and, out of 237,000 votes cast, the winning margin was 2,532 votes. Because of the close vote, a group challenged the validity before the Montana Supreme Court, which, finally, by a ruling of three to two, proclaimed the 1972 Constitution to be ratified.¹

A provision in the 1889 Constitution required the Montana Supreme Court to rule on the validity of the election when its results were challenged.² The plaintiffs argued that while 237,600 electors voted at the election, less than half that number (116,415) voted for the proposed 1972 Constitution.³ The others voted only on companion issues, and, therefore, the proposed 1972 Constitution lacked the required majority approval to take effect. With Chief Justice James T. Harrison and Associate Justice Wesley Castles dissenting, a majority of three composed of Justices Frank Haswell, John C. Harrison, and Gene Daly denied the challenge of the plaintiffs.⁴

From 1972 to the present, sufficient time has elapsed to produce some conclusions as to just how well the constitution is functioning. There can be little argument that the new constitution greatly broadened the powers of the judicial branch. With the elimination of sovereign immunity, later amended to limited sovereign immunity, the door to judicial opportunity opened wide. If America has become a litigious society, Montana has followed the trend. The courts' caseloads have mushroomed, our supreme court has been expanded from five to seven members and, responding to

1. *State ex rel. Cashmore v. Anderson*, 160 Mont. 175, 500 P.2d 921 (1972).

2. *Id.*

3. *Id.* at 189, 500 P.2d at 929.

4. *Id.* at 192, 500 P.2d at 930.

mandates laid down in several articles within the constitution, we have seen the emergence of an activist and legislative judiciary. While the makeup of the seven members of the supreme court and their respective philosophies will determine just how activist and legislative the court is to be, it can be reasonably argued that until quite recently we have not had co-equal branches of government and that clearly the judiciary has been dominant.

When comparing the Montana and the United States Constitutions, one quickly recognizes that while the United States Constitution acts as a restraint on government, our Montana Constitution takes comfort in specifically directing government as to what it must do. The document is replete with legislative provisions, some of which can only be described as esoteric. No doubt the good intentions of the framers were meant to guide the legislature, but, in some cases, they tied the legislature's hands and, in other cases, they mandated noble goals, which, when literally, interpreted were open-ended with potential for astronomical costs and virtually impossible to achieve. Article IX, section 4 of the Montana Constitution states: "The legislature shall provide for the identification, acquisition, restoration, enhancement, preservation, and administration of scenic, historic, archaeological, scientific, cultural, and recreational areas, sites, records and objects, and for their use and enjoyment by the people." This sounds fine, but what limits, if any, are to be observed in meeting these goals? In another example, the legislature is mandated to provide an office of consumer counsel.⁵ In addition, the constitution orders the establishment of veterans' homes.⁶

The constitution also mandates that "each person" and the state "shall maintain and *improve* a clean and healthful environment,"⁷ and that "[t]he legislature shall . . . prevent *unreasonable* depletion and degradation of natural resources."⁸ What constitutes an *improved* clean and healthful environment and how do we define *unreasonable* depletion and degradation?⁹

Article II, section 3 states that all persons are guaranteed the right to pursue life's basic necessities. Again, what constitutes life's basic necessities?

Article XII, sections 1 and 2 order the legislature to provide Departments of Agriculture and Labor. Why only these two and,

5. MONT. CONST. art. XIII, § 2.

6. MONT. CONST. art. XII, § 3.

7. MONT. CONST. art. IX, § 1(1) (emphasis added).

8. MONT. CONST. art. IX, § 1(3) (emphasis added).

9. MONT. CONST. art. II, § 3.

indeed, is it necessary for the constitution to structure any or all of the executive branch agencies?

The Constitutional Convention delegates, few of whom had served as legislators, did not hold the legislative branch in high regard and obviously felt it necessary to impose requirements on the legislative branch beyond what is contained in most other constitutions.

Let me again state that I believe the delegates acted in good faith, but a number of the articles approved by the convention clearly reveal the delegates uncertainty and indecisiveness concerning their deliberations. Article XIV of the Montana Constitution calls up the question of holding additional conventions in the future. This article requires the question to be revisited every twenty years,¹⁰ which cuts away at the belief that the framers were designing a permanent document and shows instead that they wanted to make sure they included an escape-clause provision. Constitutional documents are, by their very nature, designed to be a permanent framework of principles by which a people operate. Article XIV takes the opposite view.

In retrospect, our constitution paid little heed to the need for economic development and the maintenance and furtherance of a vibrant economy. Indeed, in 1972, a high degree of open animosity existed toward business and particularly those business concerns who had, in the past, engaged in ruthless and environmentally unsound practices in developing our natural resources. While that era was clearly over, memories of the past continued to linger and the convention crystallized in our constitution an attitude toward business and economic development that set the stage for an economy unable to grow, prosper, and compete with our sister states.

Many examples of judicial activism exist. This activism encompasses a broad spectrum of social issues, including administration of justice, welfare assistance, tort reform and, in recent times, public elementary and secondary education. As Professor James Lopach states:

The court's activism, at least in the instances of tort reform and welfare reform, has placed it inappropriately at the center of the state's politics. The constitutional design for the state's political system will be realized only if the legislature is allowed to be as intended, the people's branch of government. The Montana Supreme Court should encourage this role rather than promote itself as the legislature's rival in policy matters.¹¹

10. MONT. CONST. art. XIV, § 3.

11. Lopach, *The Montana Supreme Court in Politics*, 48 MONT. L. REV. 267 (1987).

Examples of enhanced judicial legislation in the past decade point to the efforts of the legislature to address tort reform and welfare classifications. In these instances, prior to the recent case of *Meech v. Hillhaven West, Inc.*,¹² the Montana Supreme Court read a right into the state's constitution to overturn legislative acts. I am confident that the Constitutional Convention delegates did not foresee a supreme court that would find constitutional fundamental rights outside of article II.

Nor could those delegates visualize a decade in which unlimited damages in both the private and public sectors resulting from tort liability would jeopardize health care availability in Montana. This unlimited tort liability has resulted in skyrocketing premiums, which, in turn, threatens the availability of insurance in Montana. Moreover, no one could predict a time when access to obstetrical care for expectant mothers in our rural state would be in short supply.

If we decide to review our constitution and to call a Constitutional Convention, then that convention must prepare our state to face one important fact: We are in a global economy. We must compete in the national and international marketplace, and that means we must provide investors and entrepreneurs with reasonable assurances of a stable economic climate and a constitution with defined principles. Without that stability of clear-cut legal precedent—especially in tort liability—industry and business will continue to sidestep Montana because the state represents an unreasonable risk.

Certainly our constitution has a number of worthy attributes. First, the convention sustained the power of the governor to veto and to line-item veto measures, which allows the governor to veto only a portion of the legislation before him or her.¹³ Second, the convention provided the executive with the power of the amendatory veto, which allows a Montana governor to participate more fully in the legislative process.¹⁴ The amendatory veto allows the governor to amend or revise proposed legislation and return that same legislation to the assembly for further consideration. Thus, the amendatory veto grants flexibility to the executive and does not handcuff the executive to an outright veto. Moreover, the amendatory veto permits a final review of technical and constitutional problems with pending legislation. (I used the amendatory veto power extensively in the 1989 session, and the legislature sus-

12. — Mont. —, 776 P.2d 488 (1989).

13. MONT. CONST. art. VI, § 10(5).

14. MONT. CONST. art. VI, § 10(2).

tained a great majority of my amendments by a majority vote.)

I must add, however, that my remarks would be incomplete if I did not address the basic question before the conference, which is whether we should advocate the calling of a new Constitutional Convention as provided for in article XIV, section 3. My one-word response to that question is "no." It is my view that our present constitution can serve our people well as we move into the 1990s and on into the twenty-first century.

Allocating limited economic resources as well as balancing the competing interests of development and environment and other contemporary public-policy issues should remain within the institutional competence and judgment of the legislative branch. Judicial legislation and creating legal precedent by formulating judicial philosophy will jeopardize our state's growth and competitive position in the world marketplace. I am confident, as recent supreme court decisions indicate, of a maturing of judicial temperament. I am equally confident that a greater awareness of Montana's need to evolve economically will result in all three branches of government renewing their commitments to their respective roles, and that, at this time, we do not need another convention.

Reasonable methods of amending our constitution currently exist, through initiative or by the legislature. These processes may better refine our constitutional principles, because, generally, responsible, public-minded people propose such initiatives, then the press and competing interests scrutinize them, and, ultimately, the people themselves put them to the test at a public vote. Thus, for these reasons, I do not believe Montana currently needs a 1992 Constitutional Convention.