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Guest Speaker; Delegate to 1972 Constitutional Convention

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BACKGROUND

THE 1972 MONTANA CONSTITUTION IN HISTORICAL CONTEXT

Richard Roeder*

To those not familiar with the record, Montana's adoption of a new constitution on June 6, 1972, may have appeared as the climax of a sudden thrust for change. In reality, it was the culmination of decades of intermittent but mounting concern about the adequacy of the 1889 Montana Constitution as fundamental law for the future. The story begins in the 1889 Constitutional Convention.

The 1889 Constitutional Convention has yet to be subjected to careful, critical scrutiny. Those few who have written about it have emphasized the debate over the hiring of a stenographer to record the proceedings as a conspiracy of silence—which it was not—to hide a scheme to protect mining interests from paying their fair share of taxes.¹

Long, tedious debates in the 1889 convention do reflect real differences of opinion and divisions among groups of delegates. But to focus on disagreement is to miss the far more fundamental fact of consensus. The delegates of 1889 thought they were laying the legal foundation for a new commonwealth with bright prospects. They were, therefore, codifying into fundamental law what they

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1. J. HOWARD, *MONTANA HIGH, WIDE, AND HANDSOME* 60-64 (1943). The necessary corrective to HOWARD is Smurr, *The Montana 'Tax Conspiracy' of 1889*, (parts 1 & 2), *MONTANA: THE MAGAZINE OF WESTERN HISTORY*, vol. 2, Spr. at 46-53 & vol. 3, Sum. at 47-56 (1955).

saw as the primary object of political action, namely to facilitate economic development. They were also addressing problems that twenty-five years of territorial experience had revealed and trying to surmount fears of popular government common to the nation at that time.

The taxation of mines was not a real issue in the 1889 Constitutional Convention. A net proceeds tax had long been present in the territorial statutes, and as a constitutional issue it had been fought out and resolved in the 1884 constitutional convention to the satisfaction of mining interests.² The major opponent of a special privilege for mines in 1884, Joseph K. Toole, had changed his mind by 1889 and had become a supporter. That a special mines tax would be a part of the new constitution was a foregone conclusion that almost all delegates recognized as necessary for continued mining prosperity, the keystone to the new state's immediate economic development.

Although not previously discussed to any length, the debate as to whether Montana should provide a tax break for irrigation corporations reveals both the consensus on the desirability of economic development and the disagreement on the best means to this end.³ Mining and the integrated metals industry that Marcus Daly was developing had provided a large measure of prosperity for the territory of Montana. The territory, however, had benefited enormously from the then recent decline of Nevada's Comstock Lode which had brought miners and businessmen north. The delegates were fully aware of Nevada's fate and that boom and bust could occur equally as well in Montana. One particularly acute way this awareness manifested itself was the reference by residents to Butte as the "camp" or the "Big Butte Camp," but a "camp" nevertheless. The delegates realized that the future prosperity of the state called for some more permanent economic foundation. They believed the best alternative was agriculture; it might provide the long and continued economic prosperity that mining could not.

At the time, a significant future for agriculture seemed possible only with further development of irrigation systems. What could be done on an individual or small-scale, local basis had already been accomplished. What was needed was to harness Montana's major rivers through the construction of storage reservoirs,

2. TAXATION—NET PROCEEDS OF MINES, *Laws, Resolutions and Memorials of the Territory of Montana Passed at the Eleventh Regular Session of the Legislative Assembly*, 65-68 (1879).

3. See generally PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION 479-512 and 551-71 (1921).

canals, and extensive ditch systems. All of this, however, would require enormous outlays of capital. Where would it come from? Some delegates saw an easy fix in a tax break, believing that a tax break for irrigation corporations similar to that for mining would attract automatically the necessary investment. The upshot of this proposal was one of the most extended and heated debates of the convention.

Opponents of the tax break prevailed. Some of them, such as former territorial delegate Martin Maginnis, predicted that only the federal government would be capable of the investment necessary for such significant irrigation projects. The tax break debates nevertheless reveal a consensus that had prevailed through the twenty-five years of territorial experience: the primary purpose of the government was to facilitate economic development, and the political process determined which groups would benefit most immediately and directly from that development.

The delegates also saw the constitutional convention as an opportunity to address problems that had arisen in the twenty-five years of territorial government. One of the most important of these—and an issue that evoked some of the longer debates—related to the territorial system of justice. In 1889, Montana employed a federal system of district courts and a supreme court for the territory. The delegates were concerned that district judges sat together as a supreme court, and reviewed their own work at the appellate level. Perhaps more importantly, the territorial court system had been costly and inefficient. Territorial courts had been hopelessly overworked and far behind on their calendars. Also because courts were few in number, citizens often had to travel great distances, and often suffered costly delays. Hence, the delegates sought to create a new court system which would be less costly and more readily available.⁴

The proceedings of the constitutional convention also amply show the delegates' fear of popular government. Public life since the Civil War had revealed an alarming tendency of government to succumb to costly corruption, as politicians in local, state, and national governments had used their positions to rob public treasuries and fatten themselves and their friends. The work of the 1889 delegates illustrates a determination to forestall such developments in Montana. To this end, the delegates wrote a long constitution full of details designed to protect the new state from the corruption of the east by attempting to ensure frugality and hon-

4. *Id.* at 276-329.

esty in government. The legislature would meet for short biennial terms; its actions confined by detailed restrictions on taxation, indebtedness, and special local laws. If the legislature were to meet infrequently, the argument went, its capacity for damage would be diminished; and when it did meet, its actions would be limited by detailed restrictions.

Similarly, the executive branch would be divided among seven major elective officers who presumably would check and balance each other. While the 1889 Constitution proclaimed that the "supreme executive power of the state shall be vested in the governor," delegates agreed that the office would be largely ceremonial.⁵ The executive branch would actually function through a system of ex officio boards and commissions where the elective officers could study and watch each other as if in a public poker game. Delegate fear of popular government eventually resulted in a fundamental law characterized by minutiae and statutory detail.

After thirty-seven days of labor, the 1889 delegates were proud of their work. They believed they had solved some old problems and provided for an expanding future. In his valedictory, convention President William A. Clark judged that they had laid a legal foundation for ages to come. Clark's prophecy proved to be wide of the mark. The 1889 Constitution was becoming obsolete almost upon its adoption, its inadequacy becoming apparent within the first generation of statehood. The shortcomings of the constitution emerged partially because Americans were beginning to demand more from their government. At the time of statehood, citizens had limited expectations—a minimum of law and order, a criminal justice system, and a facilitation of commercial transactions. Convention debates impart these limited expectations, exemplified by the delegates' characterization of the governor's office as part-time and ceremonial.⁶

On the eve of statehood, however, Montanans and citizens around the nation were on the threshold of a new era. The populism of the 1890s and the progressive movement of the early twentieth century made new demands on the political system and vastly expanded the involvement of government in the lives of its citizens. Even a cursory glance at legislative journals and session laws attests to these changes. As time went on, the volumes grew thicker and the statutes addressed more varied subjects. During

5. MONT. CONST. of 1889, art. VII § 5. For a discussion of the executive article see Roeder, *Energy in the Executive*, 33 MONT. L. REV. 1, 1-13 (1972).

6. This expectation evolved from the experience of territorial days, when public duties left the governor with ample time to pursue other professional and business interests.

the 1890s, for example, the public demanded that laws such as boiler inspections and mine safety measures be used to cushion the harsher aspects of the new, industrial, capitalism and provide some protection for workers. During the early twentieth century, such demands expanded to include railway safety measures, an eight-hour work day, and the replacement of the legal doctrines governing industrial-accident liability with a workmen's compensation system.

During this time of interest in reform, citizens also demanded purification of the political process. To accomplish this, the citizens sought to diminish the role of political parties, and to make the political process more responsive to popular will through such devices as direct primary nominations and a constitutional amendment for direct legislation through initiative and referendum. The early years of the twentieth century also saw mounting insistence that our society be made more moral and humane through a public health system, child labor laws, a juvenile court system, and compulsory school attendance laws, along with the outlawing of gambling, saloons, and prostitution.

As the Montana Legislature, session by session, responded favorably to what seemed like reasonable and overwhelming demands for reform, it created a fragmented, unplanned but steadily expanding bureaucracy. In 1889-1890, Montana's executive branch consisted of approximately twenty officers, commissions, and boards. By 1920, this number had increased to over one hundred. This kind of government growth was not unique to Montana; it was a national phenomenon characteristic at all levels of government. A consequence of a growing local and national awareness of government expansion was an efficiency and reorganization movement that began in 1910 when President Taft appointed a Commission on Economy and Efficiency. The following year, Wisconsin set up a similar body; many other states, including Montana, soon followed Wisconsin's example.⁷

Montana found itself in the mainstream of the movement. By 1910, legislators started to recognize that somehow they had created a large, uncontrolled executive branch. After some partisan bickering about how the other party had created government positions for the party faithful, there emerged an essentially nonpartisan concern about what to do with the bureaucracy that the legislature had created. This concern resulted in intermittent study groups and reorganization efforts that finally culminated in the

7. Roeder, *Energy in the Executive*, 33 MONT. L. REV. 1, 4 (1972).

successful executive reorganization and constitutional reform of the early 1970s.

In 1919, for example, the legislature created a State Efficiency and Trade Commission. In its report to Governor Sam V. Stewart, the commission made several recommendations for administrative change, but it observed that constitutional obstacles in the form of boards manned *ex officio* by elective officers were “insuperable in any attempt to carry out a . . . scheme of reorganization.” Similarly, in his state-of-the-state message of 1921, Governor Joseph Dixon’s recommended changes included animadversions on Montana’s constitution. Dixon said he would ask for a constitutional convention bill if he thought there was any chance for its passage.⁸ But that would have to wait for another half century.⁹ Interest in governmental change declined after 1921, even though interest in establishing an accounting system and an office of the state controller remained.

During the 1940s and 1950s, partly in response to the expansion of government that accompanied New Deal programs, interest in government reorganization revived and expanded. For instance, the 1941 Legislature set up a Select Committee on State Government, which reported that “Constitutional limitations make any immediate complete re-organization impossible.” The legislature followed up by creating a Governor’s Committee on Reorganization and Economy to report to the 1943 Legislature. To assist it, the Governor’s Committee hired Griffenhagen and Associates, who produced a 1,400-page report containing numerous suggestions for change, including basic constitutional amendments.

In addition to the various study groups outlined above, the legislature also began to recognize the inadequacies of the 1889 Constitution. Bills providing for constitutional amendments suggest the legislature’s dissatisfaction with the state’s basic law. As early as 1901, legislators introduced eight bills for amendments, and the number continued to increase to as many as fifteen in 1921. During the late 1920s, interest in constitutional change apparently slackened, but during the Great Depression amendment bills increased each session, reaching twenty-two in 1935. The number of bills dropped off again during World War II, but the number reached eighteen in 1949 and rose to a new high of thirty-

8. Message of Governor Joseph M. Dixon to 1921 Montana Legislature, 1, 20-21 (copy located at the UNIVERSITY OF MONTANA SCHOOL OF LAW).

9. In 1945, Leo Graybill, Sr., introduced the first unsuccessful bill for a referendum vote on the holding of a constitutional convention. H.B. 241, 29th Mont. Leg. (1945).

two in 1965.¹⁰

The amendment process, however, was not generally a source of significant constitutional change. Many of the early proposed amendments addressed detailed problems, such as the taxation and indebtedness powers of local governments or the terms and salaries of local government officials. In other words, the specificity of the 1889 Constitution bred a need for adjusting details. The limit of three amendments on the general election ballot also severely limited constitutional change through the amendment process. Despite numerous amendment proposals in nearly every legislative session during the twentieth century, seldom did three proposals reach the voters. Because of the limit of three, legislative leaders generally delayed passage of amendment bills until the end of the session in order to broker which three to pass. In the crush of the final hours of a session, however, most were lost.

During the post-World War II period, citizens interested in problems of state government broadened their concerns to include examination of the legislative and judicial branches as well as the executive. In 1949, the first amendment bill for annual sessions of the legislature appeared.¹¹ From the early 1950s to 1972, the manner in which the legislature operated became an object of concern to knowledgeable legislators and interested citizens. Nationally as well as locally, the 1950s reflected a broad interest in the Legislative Council movement as an alternative to more fundamental change. The state Supreme Court declared Montana's first legislative council law unconstitutional,¹² but a new bill in 1957 succeeded in establishing the Legislative Council.¹³ The Council itself proved to be a medium for governmental change as evidenced by council reports of the early 1960s advocating executive reorganization.

Despite Legislative Council efforts to improve the legislative process, some citizens continued to express dissatisfaction with the legislature's work. During the late 1960s, citizen groups joined with interested legislators in focusing on the legislature's failings as an

10. See e.g., MONT. CONST. REVISION COMM., *Constitutional Amendments Introduced in the Legislative Assembly 1889-1969*.

11. H.B. 221, 31st Mont. Leg. (1949) (introduced by Representative Page of Missoula). At this time, some people expressed interest in an unicameral legislature. S.B. 94, 31st Mont. Leg. (1949) (introduced by Senators Tripp and Burns).

12. *State ex rel Mitchell v. Holmes*, 128 Mont. 275, 277, 274 P.2d 611, 613 (1954) (court by a vote of three to two declared 1953 Mont. Laws 143 unconstitutional which had created a Legislative Council).

13. *State ex rel James v. Aronson*, 132 Mont. 120, 314 P.2d 849 (1957) (court by a vote of three to two upheld the constitutionality of 1957 Mont. Laws 34 which had created the Legislative Council).

institution. In 1966, the Montana-Idaho Assembly on the State Legislature (an Idaho-Montana citizens group brought together under the aegis of Columbia University's American Assembly) recommended that all constitutional limits on the length and frequency of legislative sessions be eliminated.¹⁴ Similarly, in a report to the 1967 Legislature, the Montana Citizens Committee on the State Legislature (a broad-based group organized in August 1966 with the assistance of the Citizens Conference on State Legislatures of Kansas City, Missouri) recommended changes, including annual sessions.¹⁵ In another of its reports, the Citizens Committee advocated numerous changes to the 1969 Legislature, including a smaller legislature, single-member districts, and annual sessions.¹⁶

This broadening interest in governmental change did not ignore Montana's court system. Unfortunately, prior to the adoption of the 1972 Constitution, the amendment process was of little use in securing court reform. Only two court amendments had ever been approved. In 1900, voters decided to allow a future legislature to increase the size of the Supreme Court from three to five and to allow district judges to sit for disqualified supreme court judges. Finally in 1964, voters took the bold step of ratifying an amendment that removed the prohibition against an increase in a judge's salary during the judge's term in office.

Although only two amendments were ever ratified, several other attempts to amend the judicial article were made. In 1945, the first comprehensive judicial amendment was introduced in the House. The measure, which never got out of committee, would have replaced the popular election of judges with nomination by a judicial committee and appointment by the governor. In 1951 and 1957, attempts to give the legislature power to amend Montana's inferior court system also failed. In 1962, the electorate rejected a constitutional amendment that would have permitted the legislature to eliminate justice courts and police and municipal courts.¹⁷

But as in other areas of government, interest in court reform would not disappear. In the early fall of 1966, a group of Montana citizens in Great Falls, with the support of the American Judicature Society, organized a Citizens' Conference on the Montana Judicial System for an intensive three-day study of the workings of

14. MONT.-IDAHO ASSEMBLY ON STATE LEGISLATURES, *Report & Recommendations*, 1-4 (Dec. 1966).

15. MONTANA CITIZENS COMMITTEE ON THE STATE LEGISLATURE, *Report to the Fortieth Legislative Assembly of the State of Montana*, 8 (Jan. 1967).

16. *Id.* at 9, 13, 19.

17. Loring, *Constitutional Revision and the Judiciary*, 2 MONT. PUB. AFF. REP. (1968) (available in archives division of the University of Montana Mansfield Library).

Montana's court system. The conference's recommendations included replacing justice of the peace courts and police judges with deputy judges chosen by district judges, adoption of a merit system for selecting judges, and a unified court system headed by the chief justice of the state supreme court.

Some of the participants in the Judicial Conference subsequently organized the Montana Citizens for Court Improvement. Although the bills that the Citizens for Court Improvement supported failed to pass in the 1967 Legislature, the group continued to function and received additional support from the University of Montana School of Law. The fall 1967 issue of the *Montana Law Review* carried *Montana's Judicial System—A Blueprint for Modernization*, by David R. Mason and William F. Crowley.¹⁸ Professors Mason and Crowley followed this article with a summary piece in the fall 1968 issue of the University of Montana's Bureau of Government Research periodical, *Montana Public Affairs*.¹⁹

In the fall of 1971, the University of Montana, in cooperation with the Montana Bar Association, held a third citizens conference. The conference resulted in the drafting of a Montana Plan, which, after five years of consultation among citizens, judges, and lawyers, was presented to the Constitutional Convention.²⁰ The object of the plan was a unified court system, a district court level of justice in all cases, and selection of qualified judges by merit.

Finally, constitutional change was fostered over many decades by the needs of local government. Counties and municipal corporations labored under the heavy weight of a judicially imposed Dillon's Rule, and the pinch-penny control of a rurally dominated legislature that showed little sympathy for the needs of cities and towns. A few bright spots did exist, however, such as legislation that allowed a county manager plan as adopted in Petroleum County, and the unsuccessful early attempts at city-county consolidation by Butte and Silver Bow County.

Legislative reapportionment of the mid-1960s helped release new pressures to address urgent urban problems and raised new possibilities of constitutional reform as a means of vitalizing local as well as state government. By the late 1960s, it was clear that many forces, some dating almost back to the beginnings of state-

18. 29 MONT. L. REV. 1 (1967).

19. 2 MONT. PUB. AFF. REP. (1968) (available in archives division of the University of Montana Mansfield Library).

20. For a discussion of the convention's treatment of the judiciary see Bowman, *The Judicial Article: What Went Wrong?*, *infra* this issue.

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hood and others of more recent origin, were converging to support wholesale constitutional reform. This brief summary of events cannot pretend to be exhaustive of these factors. It ignores, among many others, the sale of the Anaconda Company press and the very important part played by the fleeting vitality of the Lee chain of newspapers. I hope though that this summary will suggest that constitutional reform was not a matter of a moment, but the coming together of the interests and concerns of many groups and individuals, all of whom were seeking the unattainable ideal of effective self-government—an ideal that, while ever elusive, as good citizens, we ought ever to pursue.