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Constitutional Coup? The Case that Promulgated a New Constitution for Montana

Robert G. Natelson*

ABSTRACT

This Article examines one of the most important state court cases ever decided. In Montana ex rel. Cashmore v. Anderson, the Montana Supreme Court exercised its original jurisdiction to order, by a 3-2 margin, that the state's original constitution be replaced with one the people apparently had failed to ratify. In doing so, the court yielded to interest groups that favored replacing the original state constitution with an instrument based on radically different premises. Political threats may have caused the swing justice to vote for the new constitution, but even if that did not occur, the case represents a striking example of the failure of the rule of law. The Article also proposes reforms that may reduce the chances of a recurrence.

KEYWORDS

Constitutional Law, State Constitutional Law, Montana Supreme Court, Montana Constitution; Cashmore v. Anderson

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* Professor of Law (ret.), The University of Montana; Senior Fellow in Constitutional Jurisprudence, the Independence Institute, Denver, Colorado; Senior Fellow in Constitutional Jurisprudence, the Montana Policy Institute. The author was a prominent political figure in Montana during the 1990s and early 2000s, and ran for governor twice. The author acknowledges Andrew P. Morriss, Professor of Law and Dean of the School of Innovation at Texas A&M University; Gary S. Lawson, Philip S. Beck Professor of Law, Boston University School of Law; Linda Frey, Professor of History at the University of Montana; and David B. Kopel, Research Director at the Independence Institute for comments on the manuscript; Taylor Stafford, intern in constitutional studies at the Independence Institute, and Ann Koopman of Bozeman, Montana, for research assistance; and former Montana governor Stan Stephens of Kalispell, reporters Charles S. Johnson and Frank Adams of Helena, Judge Charles Lovell of Helena, and 1972 convention delegate Bob Campbell of Missoula, for political and historical insights.

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"Government must be free to act."
— Montana Governor Forrest Anderson

"The fix was in."
—Linda S. Frey, Professor of History,
The University of Montana

I. The Most Important Montana Case Ever[1]

On August 18, 1972, the Montana Supreme Court, in a 3-2 decision, issued its judgment in *State of Montana ex rel. Cashmore v. Anderson*.[2] At the time, the case was described as the most important Montana's high court had ever decided.[3] And so it was. By resolving a contested referendum, the court replaced the state's original 1889 constitution with a new one based on very different political premises. By freeing state and local government from constitutional restrictions designed to curb corruption, special interest influence, and excessive state spending, the case paved the way for dramatic changes in state policies[4] that arguably contributed to Montana's precipitous relative economic decline in the ensuing years.[5]

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1 *Frequently cited sources*: Following are sources frequently cited in this article, along with the short citation applied:
100 Delegates: Montana Constitutional Convention of 1972 (1989) [hereinafter 100 Delegates]
Dorothy Eck, *Montana's Constitution of 1972: How It Came to Pass*, *available at* https://i2i.org/wp-content/uploads/Eck.pdf [hereinafter *Eck, Constitution*]
Larry M. Elison & Fritz Snyder, The Montana State Constitution (2000, 2011) [hereinafter Elison & Snyder]
Mike Males, *Convention 1972: Constitutional Myths Come True*, Montana Eagle, Mar. 17, 1982 [hereinafter *Males*]
Montana Constitutional Convention Commission, Montana Constitutional Convention Occasional Papers [hereinafter Occasional Paper No. ___]
Proceedings and Debates of the Constitutional Convention Held in the City of Helena, Montana, July 4th, 1889, August 17th, 1889 (State Publishing Co., 1921) [hereinafter 1889 Convention]
Montana Legislature, Verbatim Transcript, Montana Constitutional Convention, 1972 (1981) (7 vols.) [hereinafter 1972 Convention]
Ellis L. Waldron & Paul B. Wilson, Atlas of Montana Elections, 1889-1976 (University of Montana 1978) [hereinafter Atlas]

2 500 P.2d 921 (Mont. 1972), *cert. denied*, 410 U.S. 931 (1973).

3 J.D. Holmes, *The Constitution: Never Before an Issue Like This*, Great Falls Tribune, Jul. 14, 1972 at 4 (quoting a lawyer as stating, "No question of like importance, of such breadth and magnitude, has ever been submitted to this court in its existence … .").

4 *Males, supra* note 1, at 19 ("It is fair to say only one thing that has been said about the new constitution is correct: It really is the dynamo which has led to the uniquely progressive and activist Montana government of the 1970s"); Leo Graybill, Jr., *Opinion*, *id.* at 11 (the convention president, referring to "the new enlarged bureaucracy in Helena which some parts of the new Constitution fostered").

5 Robert G. Natelson, Tax and Spending Limits for Montana? Criteria for Assessing Current Proposals 5-9 (Independence Institute Issue Paper 94-10, 1994) (discussing Montana's fiscal policies in the decades after ratification).

The *Cashmore* case was distinctive for other reasons as well. Rather than allowing the case to work its way up the judicial hierarchy, the Montana Supreme Court granted a request that the court dispose of it immediately by exercising original jurisdiction. Even when a dispute over determinative facts arose shortly before the scheduled hearing the court retained the case rather than remit it to a fact-finder. Then without providing the losing side sufficient time to respond to the new factual issues, the court held a hearing limited to legal issues and soon thereafter issued its decision.

Before the case arose, there was an almost-universal understanding of the specific voter majority required for approval of a new Montana constitution. *Cashmore* not only abandoned that understanding for a different one, but did so *after* the referendum already had been held.

For a case of such consequence the majority and dissenting opinions were oddly drafted. They were indifferently researched, curiously disorganized, internally inconsistent, and occasionally incoherent. The dissent showed signs of being patched together at different times and under different circumstances. Some Montanans in a position to know believe that one justice on the five-man court changed his mind after initial drafts were prepared, thereby forcing hasty re-drafting. Some claim the vote switch was the product of political pressure.

Such a case cries out for scholarly review. But there has been almost none in the 46 years since the constitution was proclaimed. Montana's principal organ of legal analysis, the *Montana Law Review*, has published almost nothing on the subject.[6] Two professors at the law school that sponsors the *Review* penned a 250-page book on the 1972 constitution, but managed to dismiss the *Cashmore* case in a single paragraph.[7] Perhaps this silence is related to the school's deep involvement in the network that created, and continues to promote, the 1972 constitution.[8]

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6 The *Review's* sole treatment has been a three page discussion in an article on another topic, not by a legal scholar but by a political scientist. *See* Ellis Waldron, *The Role of the Montana Supreme Court in Constitutional Revision*, 35 Mont. L. Rev. 227, 259-61 (1974).

Waldron's attitude toward the 1972 constitution was not one of unbiased scholarship. He was a zealous advocate, having served as a consultant to the Legislative Council when it developed its report assailing the 1889 constitution, Occasional Paper No. 6, *supra* note 1, at ix, was a member of the Constitutional Convention Commission, Occasional Paper No. 1, *supra* note 1, at ii, and wrote its report on legislative reapportionment. Constitutional Convention Commission, Legislative Reapportionment, Memorandum # 10 (1972).

I had published several times in the *Montana Law Review* when in 2007 I offered to produce an examination of *Cashmore*. The *Review's* editors declined the offer as too controversial.

7 Elison & Snyder, *supra* note 1.

Their single paragraph contains two inaccuracies. First, it incorrectly identifies the petitioner as the Montana Farm Bureau Federation. Second, after stating that "the Montana Supreme Court ruled that the constitution had been approved," it claims a "federal district court . . . reached a similar decision." In fact, the federal court ruled only that state officials had not misled voters so as to violate the U.S. Constitution or federal law. Burger v. Judge, 364 F. Supp. 504 (D. Mont.), *affirmed,* 414 U.S. 1058 (1973).

8 The *Montana Law Review* is funded in part by the Montana Bar Association, which in turn was created by, and is largely an arm of, the state supreme court. Law school faculty and staff were deeply involved in the movement for a new constitution. Professors David

The silence on *Cashmore* has been accompanied by much celebration of the 1972 constitution itself.[9] Below the patina of satisfaction, however, the document remains controversial in some quarters.[10] In any event, it is always appropriate to inquire whether a state constitution was properly adopted. The same question is commonly asked even of our venerated American Constitution.[11] In a republic where the people are said to be the font of political power, it is best to ensure that any state constitution is truly the product of popular will.

R. Mason and William F. Crowley participated in the Legislative Council report that promoted a new instrument. Occasional Paper No. 6, *supra* note 1, at ix. Professors Mason, John McCrory, Albert Stone, and Larry Elison advised delegates, *e.g*., 4 1972 Convention, *supra* note 1, at 1016 (referring to Mason's advice); *id.* at 1206 (referring to McCrory's advice); 5 *id*. at 1318 & 1330 (following Stone's advice); *id*. at 1794 & 6 *id*. at 1851 (following Elison's advice). Crowley also served as chief of staff to Governor Forrest Anderson, who issued the controversial ratification proclamation. *Infra* notes 200-204 and accompanying text. Professor Margery H. Brown served on the Constitutional Convention Commission, Alexander Blewett, *Preface*, in Occasional Paper No. 1, *supra* note 1, at iii, *available at* https://i2i.org/wp-content/uploads/occasionalpapers1.pdf, while Professor Garner Cromwell formally advised the convention, 2 1972 Convention, *supra* note 1, at 1035; 7 *id. at* 2821, 2920, 2965 *et passim.*

Individuals affiliated with the law school continue to issue uniformly celebratory treatments, *e.g*. Fritz Snyder, *Montana's Top Document: Its Transition into the Twenty-First Century*, 34-SEP Mont. Law. 8 (2009) (chief law school librarian) (telling surviving convention delegates "[Y]ou did a wonderful job! You gave us a marvelous document!" and so forth); *see generally* Elison & Snyder, *supra* note 2 (composed by two members of the same faculty). The school (on whose faculty I served for 24 years) now bears the name of the son of the chairman of the Constitutional Convention Commission. Great Falls Tribune, May 20, 2015 (reporting on the renaming after the younger Blewett made a $10 million gift to the school).

9 *E.g. Fresh Chance Gulch*, Time Magazine, Apr. 10, 1972 (referring to the 1889 constitution as "creaky" and referring to the new one as a "model"); Kristen Inbody, *MT Constitution Lets the 'Sunshine in,"* Great Falls Tribune, Oct. 31, 2014 (celebratory "news" story). Similar favorable treatment pervades the only book on the constitution. *See generally* Elison & Snyder, *supra* note 1.

Praise for the constitution and its framers frequently approaches hagiography, *e.g.*, James C. Nelson, *Keeping Faith With the Vision: Interpreting a Constitution for This and Future Generations*, 71 Mont. L. Rev. 299 (2010) (former state supreme court justice) ("It is, in my view, the most progressive, people-friendly, and pro-civil-rights organic document of any state constitution"; *id*. at 301; "I firmly believe that Montana's Constitution is the finest, most progressive state constitution in the country," *id*. at 322).

10 From 1992 to 1996, I served as chairman of Montanans for Better Government and hosted a state public affairs radio show from 1997-99. I was a gubernatorial candidate in 1996 and 2000. I learned of the discontent on the "hustings," mostly from people with no media access.

To reveal my own bias: I believe a new constitution should have been written rather than merely patching up the old, but I find the convention's product to be neither remarkably good nor remarkably bad. It certainly could use some amendment.

11 *See* Michael Farris, *Defying Conventional Wisdom: The Constitution Was Not the Product of a Runaway Convention*, 40 Harvard. J. L. Pub. Pol. 61, 63-64 (2017) (summarizing the controversy).

II. The Law of Majorities

A. The Default Rule and Variations From It

Cashmore centered on the nature of the majority required by the 1889 Montana constitution for ratification of proposals from a new constitutional convention. Understanding the issue requires a short review of the law of majorities.

In 1760 England's Court of King's Bench decided *Oldknow v. Wainright*.[12] In that case the court, speaking through its chief justice, Lord Mansfield, held the default rule for group decision making to be a majority of those actually voting on the issue under consideration. In other words, for a proposal to pass, it need garner only more "yes" votes than "no" votes on that particular issue. Abstentions and absentees were not counted either way.

One may think of this default rule as a fraction: The numerator is the set of all voting "yes," the denominator is the number of people voting on the specific question, and for the "yes" vote to prevail, the fraction must be greater than 1/2.

However, constitutions and statutes frequently alter this default rule by raising the numerator, raising the denominator, or raising both. For example, the rule in the United States Constitution prescribing two thirds of those voting in each house of Congress to override a presidential veto[13] represents an increase in the numerator. The Constitution's rule that treaties are ratified only by two thirds of all Senators present, whether or not voting, raises both the numerator and the denominator.[14]

Like the U.S. Constitution, state constitutions commonly augment the numerator or denominator for legislative decisions.[15] Unlike the U.S. Constitution, state constitutions and other laws also authorize popular referenda, and in the course of doing so they also may raise the required numerator or denominator.[16] Two heightened denominators are particularly common in the referendum context: (1) all electors in the jurisdiction, whether or not they participate in the election[17] and (2) all electors participating in the election no matter on which issues they

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12 [K.B. 1760] 2 Burr. 1017, 97 Eng. Rep. 683.

13 U.S. Const., art. I, § 7, cl. 2.

14 *Id.,* art. II, § 2, cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

15 *See, e.g.*, Colo. Const. art. IV, § 11 (requiring two-thirds of the members of each legislative chamber to override the governor's veto).

16 For increases in the numerator, see *e.g.*, Belknap v. City of Louisville, 36 S.W. 1118 (Ky. App. 1896) (two thirds); Missouri *ex rel.* Dobbins v. Sutterfield, 54 Mo. 391 (1873) (two-thirds); State of New Mexico *ex rel.* Witt v. State Canvassing Board, 437 P.2d 143 (N.M. 1968) (employing votes of both two thirds and three fourths). For a statutory increase in the denominator, see In re Contest of Le Sueur Election, 149 N.W. 1914 (Minn. 1914) (comparing statutes, some of which required a majority of those voting at the election with the one at issue, which required only a majority of those voting on the question).

17 *E.g.*, People *ex rel.* Davenport v. Brown, 11 Ill. 478 (1850) (construing "a majority of the voters of such county, at any general election" to mean "all the legal voters of the county").

voted or abstained.[18] The rule under consideration in *Cashmore* was of the latter kind.[19]

Judges faced with language apparently altering a decisional fraction attempt to recover what the language meant to the voters who ratified it.[20] (This is sometimes imprecisely called the determining the "intention of the framers").[21] Judges may deduce the ratifiers' understanding from the face of the instrument; but if circumstances render the language unclear, they consider other evidence.

Suppose, for example, that a court is confronted with what appears to be the heightened denominator, "all electors in the jurisdiction." Some pre-*Cashmore* courts interpreted this literally to mean all electors, whether or not they participated in the election at issue.[22] Others deemed it unlikely the ratifiers intended the bar to be that high, and construed "all electors" to mean either all electors participating in the election[23] or merely all those voting on the particular question.[24] Thus, when interpreting "all electors," the courts had split three ways.

On the other hand, there was no split on the meaning the heightened denominator at issue in *Cashmore:* all electors participating in the election.[25]

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18 *E.g.*, Colo. Const. art. XIX, § 1 (specifying that ratification of constitutional changes proposed by convention shall be "by a majority of the electors voting at the election"); *id*., art. XX, § 3 (requiring "a majority of all the electors voting in the election" to call a constitutional convention); Utah Const., art. 23, § 2 (same); *cf.* Ill. Const. of 1970, art. XIV, § 2 (alternative requirements of three-fifths or "a majority of those voting in the election").

19 Mont. Const. art. XIV, § 8 (1889):

> Said convention shall … prepare such revisions, alteration or amendments to the constitution as may be deemed necessary, which shall he submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose … and unless so submitted and *approved by a majority of the electors voting at the election,* no such revision, alteration or amendment shall take effect.
>
> Italics added.

20 *E.g.*, Hills v. City of Chicago, 60 Ill. 86 (1871) ("The first and cardinal rule is, that we must so construe it as to give effect to the intent of the people in adopting it."); Stoliker v. Waite, 101 N.W. 2d 299, 302 (Mich. 1960) (stating that the rule of decision is for the people of each state to determine).

21 *E.g.*, Belknap v. City of Louisville, 36 S.W. 1118, 1120 (Ky. 1896) ("intention of the framers"); State *ex rel.* Foraker, 23 N.E. 491 (Ohio 1890) ("The framers of the Constitution well understood the use of language … .").

22 People *ex rel.* Davenport v. Brown, 11 Ill. 478 (1850) (construing "a majority of the voters of such county, at any general election" to mean "all the legal voters of the county"); Missouri *ex rel.* Dobbins v. Sutterfield, 54 Mo. 391 (1873); Green v. State Board of Canvassers, 47 P. 259 (*Id*. 1896).

23 State *ex rel.* Blair v. Brooks, 99 P. 874, 875 (Wyo. 1909); State v. Hathaway, 478 P.2d 56 (Wyo. 1970); Bayard v. Klinge, 16 Minn. 249, 252 (1871) (reporting that the Minnesota courts had construed the language that way); Everett v. Smith 22 Minn. 53 (1875) (same).

24 *E.g.,* Walker v. Oswald, 11 A. 711 (Md. 1887) (relying on legislation governing returns as evidence of meaning).

25 *Infra* notes 50-70 and accompanying text.

B. The Meaning of "A Majority of Electors Voting at the Election" in 1889

At the time the *Cashmore* case arose, the existing state constitution—drafted and ratified in 1889—prescribed that to become effective, constitutional convention proposals had to be "approved by a majority of the electors voting at the election."[26] Thus, the 1889 constitution retained the default rule's majority numerator but raised the denominator from those voting on the issue to all electors participating in the election, no matter what issues or candidates they chose to vote on.

The 1889 framing convention spent some time considering decisional fractions. The issue arose when a convention committee produced draft language addressing future constitutional revision. The draft language prescribed that the legislature would *propose* constitutional amendments and calls for new constitutional convention while the people, voting in referenda, would *approve or reject* those proposals. Similarly, a new convention could *propose* constitutional changes, which the people would *ratify or reject*.

The committee recommended that for the legislature to propose either an amendment or a new convention, the proposal garner the affirmative vote of "two-thirds of the members elected to each house."[27] In other words, the committee recommended that legislative proposals require approval by both an augmented numerator and an augmented denominator. But for the people to ratify an amendment or to call a new convention, the committee draft recommended adherence to the default rule—that is, a majority of those voting on the issue.[28] For popular ratification of convention proposals, the committee draft suggested the default numerator but a heightened denominator: "a majority of the electors voting at the election."[29]

During general floor discussion of the committee draft, Alfred Myers of Billings moved to reduce the legislative numerator for proposing a convention to a simple majority, as in an abortive state constitution prepared five years earlier.[30] William Bickford of Missoula similarly moved to reduce the legislative numerator for proposing amendments to a majority.[31] Both motions were defeated, but they provoked an interchange on the merits of different numerators.

In addition, Louis Rotwitt of White Sulphur Springs moved to heighten the denominator for calling a convention from "those voting on the question" to "All members."[32] Apparently, he was under the impression that he was addressing a legislative rather than a popular vote. On being apprised of his error, he withdrew

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26 Mont. Const. of 1889 art. XIV, § 8:
Said convention shall … prepare such revisions, alteration or amendments to the constitution as may be deemed necessary, which shall he submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose … and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect.

27 1889 Convention, *supra* note 1, at 576 & 577.

28 *Id.*

29 *Id.*

30 *Id.*, at 577; *cf*. Mont. Const. of 1884, art. xvi, § 12.

31 *Id*., at 577-78.

32 *Id*., at 577.

his motion.[33] The convention then approved the committee draft without alteration. As a result, the finished constitution required that any future convention proposals be approved by a "majority of electors voting at the election".[34]

In adopting this "majority of electors voting at the election" standard, the 1889 convention was adopting a rule already incorporated in the constitutions of at least twelve states: Michigan,[35] Alabama,[36] Arkansas,[37] California,[38] Florida,[39] Illinois,[40] Kansas,[41] Minnesota,[42] Nebraska,[43] Nevada,[44] Texas,[45] and Virginia.[46] The proposed 1884 Montana constitution adopted the same rule twice.[47]

To understand how the rule operated in practice, posit an election in a (tiny) state with seven qualified electors. Under the law of the state (1) candidates are elected by the default rule but (2) ballot propositions must garner "a majority of electors voting at the election." The state has seven qualified electors, of whom five have deposited ballots. There are two candidates for governor and two for senator, and Propositions A and B are also at issue.

> *Elector 1 votes for governor and on Proposition A.
> *Elector 2 votes for governor, senator and on Propositions A and B.
> *Elector 3 votes for governor, senator, and on Proposition B.
> *Elector 4 votes for senator and on Proposition A.
> *Elector 5 votes on Proposition A only.

Only three votes were cast for governor and senator. Under the law of the state (the traditional default rule), a gubernatorial or senatorial candidate can win by garnering only two votes. However, because the number of "electors

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33 *Id*., at 577.

34 Mont. Const. of 1889, art. XIV, § 8:
> Said convention shall … prepare such revisions, alteration or amendments to the constitution as may be deemed necessary, which shall he submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose … and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect.

35 Mich. Const. of 1835, art. xiii, § 2 ("a majority of the electors voting at such election" necessary to approve a constitutional convention).

36 Ala. Const. of 1865, art. IX, § 2; Ala. Const. of 1867, art. XVI, 1.

37 Ark. Const. of 1874, art. XIX, § 22.

38 Cal. Const. of 1849, art. X, § 2).

39 Fla. Const. of 1868, art. XVIII, § 2.

40 Ill. Const. of 1870, art. XIV.

41 Kan. Const. of 1855, art. XVI, § 2; Kan. Const. of 1857, art. XII, § 5; Kan. Const. of 1858, art. XVIII, §§ 1, 3 & 4.

42 Minn. Const. of 1857, art. IX.

43 Neb. Const. of 1875, art. XV, § 1.

44 Nev. Const. art. XVI, § 2.

45 Tex. Const. of 1870, art. XII ("a majority of the electors so qualified voting at such election").

46 Va. Const. of 1870, art. XII ("a majority of the electors so qualified voting at such election").

47 Mont. Const. of 1884, art. xvi, § 12 (approval of new constitution), *id*., art. viii, § 4 (referendum on appropriations for capital buildings and grounds).

voting at the election" is five, a proposition must receive three "yes" votes to be successful. Proposition A passes if three of the four electors who voted on the measure voted "yes." But Proposition B loses even if both electors who voted on it voted "yes".[48]

There is no serious question that this was the dominant understanding of "majority of electors voting at the election" when the 1889 constitution was drafted and ratified. For one thing, there were at least four reported cases on the subject, and they all affirmed this meaning.[49] Moreover, the framers of the Nevada and Florida constitutions had supplemented their adoption of the rule with an easily-determined proxy for "electors voting at the election."[50] There would have been no reason for this proxy if "electors voting at the election" was a mere synonym for "those voting on the measure."

C. "A Majority of Electors Voting at the Election" between 1889 and 1972

In 1905, a federal judge surveying the field reported that "the courts construing statutes or constitutional provisions requiring a majority of the votes cast at the election have almost unanimously held that it required a majority of all voters who participated at that election, and not merely a majority of those who voted on the particular question submitted."[51]

When *Cashmore* was decided in 1972, a "majority of electors voting at the election" was still required for constitutional revision in many states,[52] and the prevailing sense of the phrase had not changed.[53]

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48 Of course, if the applicable denominator is "a majority of all qualified electors," whether or not they vote, the each proposition would need four (of seven) votes to pass.

49 Bayard v. Klinge, 16 Minn. 249 (1871); Duperier v. Viator, 35 La. Ann. 957 (1883) (construing "a majority of same voting at such election" to mean a majority of all who vote); State *ex rel.* Stevenson v. Babcock, 22 N.W. 372 (Neb. 1885) (construing "a majority of the electors voting at such election" to mean a majority of all participating in the election); *see also* State *ex rel.* Jones v. County Comm'rs, 6 Neb. 474 (1877) (construing "a majority of the legal voters of such county, voting at any general election" to mean a majority of all who vote).

50 Nev. Const., art. XVI, § 2; Fla. Const. of 1868, art. XVIII ("the highest number of votes cast at such election for the candidates for any office or on any question").

51 Knight v. Shelton, 134 F. 423, 432 (E.D. Ark. 1905). *See also* State *ex rel.* v. Foraker, 23 N.E. 491 (Ohio 1890); People *ex rel.* Wells v. Town of Berkeley, 36 P. 591 (Cal. 1894); Belknap v. City of Louisville, 36 S.W. 1118 (Ky. App. 1896); State *ex rel.* Litson v. McGowan, 39 S.W. 771 (Mo. 1897); State *ex rel.* McClurg v. Powell, 27 So. 927 (Miss. 1900); Board of Trustees for Sumner County v. Board of County Comm'rs, 60 P. 1057 (Kan. 1900).

52 2 George D. Braden, et al., The Constitution of the State of Texas: An Annotated and Comparative Analysis 826 (1977) (stating that even for simple amendments [as opposed to larger revisions] about 30 states required a majority of those voting on the question, eleven required a majority of all electors voting at the election, and the rest imposed supermajorities of various kinds.

53 *E.g.*, Rice v. Palmer, 96 S.W. 396 (Ark. 1906); State *ex rel.* Denman v. Cato, 95 So. 691 (Miss. 1923); *In re* Todd, 193 N.E. 865 (Ind. 1935); People v. Stevenson, 117 N.E. 747 (Ill. 1971).

Only in very few cases had distinctive language[54] or unique history[55] forced a different interpretation.

Courts offered several reasons for construing "electors voting at the election" to mean all those participating, irrespective of what they voted on. Some courts stated that it was the plain meaning of the language.[56] One asserted that "[t]o ratify is to affirm, and the Constitution requires in order to ratify that there be an affirmative expression of the majority of the electors to whom the question is submitted, the withholding of which is not sufficient".[57] Still another compared the rule to Swiss practice, under which majorities were required of both voters and cantons.[58]

In some cases, a party alleged that the relevant "election" was not the general election but a special election held simultaneously with it. If this was true, the decisional denominator consisted only of those voting in the special election rather than everyone who frequented the polls on Election Day.[59] Obviously, if a ballot issue was segregated into a special election, then the smaller required denominator increased the chances that the proposition would be approved.

Whether the ballot measure was offered at a special election or a general election was a mixed issue of fact and law, and judicial resolution depended on substance rather than form.[60] If language in the governing law did not resolve the issue clearly,[61] the courts weighed several factors in arriving at a conclusion. No one of these factors was determinative, but the following tended to show that the election was special:

- The governing law referred to the issue being voted on in an election being held for that particular purpose.[62]

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54 *E.g.*, State *ex rel.* Durkheimer v. Grace, 25 P. 382 (Or. 1890) (in an election to locate a county seat, "the place receiving the majority of all votes cast" necessarily meant the majority as against other places).

55 Unique history affected the results of two cases. In State *ex rel.* Larabee v. Barnes, 55 N.W. 883 (N.D. 1893), the election was governed by a federal statute that contemplated election only on a single issue, so the wording had to be interpreted in that context. In State of New Mexico *ex rel.* Witt v. State Canvassing Board, 437 P.2d 143, 152 (N.M. 1968), the court was construing a constitutional amendment designed to render further amendment easier, but the usual "majority of electors voting" interpretation would have made it more difficult.

56 *E.g.,* State *ex rel.* v. Foraker, 23 N.E. 491, 491 (Ohio 1890) ("The plain reading of this language would seem to indicate but one construction"); People v. Stevenson, 117 N.E. 747, 747 (Ill. 1971) ("The language seems plain and unambiguous").

57 State *ex rel.* Blair v. Brooks, 99 P. 874, 875 (Wyo. 1909).

58 Rice v. Palmer, 96 S.W. 396 400 (Ark. 1906)

59 *E.g.*, State *ex rel.* McClurg v. Powell, 27 So. 927 (Miss. 1900) (acknowledging that the referendum at issue could have been offered at a special election, but finding that it was in fact part of the general election).

60 City of Pasadena v. Chamberlain, 219 P. 965 (Cal. 1923).

61 *E.g.*, Harris v. Walker, 74 So. 40 (Ala. 1917) (concluding that constitutional language contemplated the referendum was a special election); Ladd v. Yett, 273 S.W. 1006 (Tex. App. 1925) (statutory emphasis on divisibility of issues); Falls Church Taxpayers League v. City of Falls Church, 125 S.E.2d 817 (Va. 1962) (reproducing a portion of the city charter, which identified the election as special).

62 Armour Bros. Banking Co. v. Board of County Comm'rs, 41 F. 321 (D. Kan. 1890); Howland v. Board of Supervisors, 41 P. 864 (Cal. 1895); Montgomery County Fiscal Court v. Trimble, 47 S.W. 773 (Ky. 1898); but *see* Belknap v. City of Louisville, 36 S.W.

- The law called for a separate return process for "the election."[63]
- The law made no provision for tallying the total number of voters.[64]
- The notice of the referendum was a different document from the notice for the general election.[65]
- The referendum was held on ballots separate from those employed in the general election.[66]
- The referendum was called or administered by an agency different from that administering the general election.[67]

If the court determined that there was a special election consisting of only one question, then the number voting at the election was the same as the number voting on that question. If the special election included several issues,[68] the denominator consisted of all voters participating in that special election, irrespective of the issues on which they voted or abstained;[69] however, it still did not include everyone who voted in the simultaneous general election.

1118 (Ky. App. 1896) (treating the referendum at issue as part of the general election despite its being called for a particular purpose).

63 Itasca v. Independent School District, 123 S.W. 117 (Tex. 1909).

64 State *ex rel.* McCue, 119 N.W. 360 (N.D. 1909). This deficiency might be filled by employing the highest number of votes cast for any candidate or measure. However, this expedient was used only when a correct certification was unavailable. State *ex rel.* Denman v. Cato, 95 So. 691 (Miss. 1923).

65 Wilson v. Wasco Co. 163 P. 317 (Or. 1917); Morse v. Granite County, 119 P. 286 (Mont. 1911). The applicability of *Morse* is questionable, however, because a comma rendered the constitutional wording ambiguous ("the approval of a majority of electors thereof, voting") and the statutory wording required "a majority of the electors"—a term often construed as meaning a majority of those voting on the question. *Supra* notes 23 & 24 and accompanying text.

66 State *ex rel.* McCue, 119 N.W. 360 (N.D. 1909); Morse v. Granite County, 119 P. 286 (Mont. 1911); In re Contest of Le Sueur Election, 149 N.W. 1914 (Minn. 1914).

67 Wilson v. Wasco Co. 163 P. 317 (Or. 1917). The court summarized:

> Called as it was for a special purpose by a special order, and by a separate and special notice, we are of the opinion that it was a special election for the purpose of voting on the question of issuing bonds. *Id.* at 319.

68 *E.g.*, City of Pasadena v. Chamberlain, 219 P. 965 (Cal. 1923) (four issues).

69 People *ex rel.* Smith v. City of Woodlake, 100 P.2d 71 (1940).

III. The Movement for a More Liberal[70] Montana Constitution

A. The Campaign Begins

During the late 1960s, government interests in conjunction with the Montana League of Women Voters, initiated a campaign to replace the state's constitution with a more "liberal" or "progressive" charter. A primary goal was to rid the state of the 1889 constitution's restraints on state and local fiscal powers.

Those fiscal restraints were extensive. Some were designed to prevent corruption.[71] Others were adopted to forestall overspending of the kind that had propelled several states into bankruptcy.[72] Among other restrictions, the 1889 constitution banned legislative appropriations lasting longer than two years,[73] capped the property tax assessment of certain mines and mining claims,[74] required that local funds be raised locally rather than be raised statewide,[75] and forbade state debt for construction of railroads.[76] Additional provisions mandated referenda for raising the general property tax beyond a certain level,[77] raising state debt beyond $100,000, raising county debt over five percent of taxable property value,[78] and increasing local government debt beyond three percent of taxable value.[79]

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[70] At this time in Montana the terms *liberal* and *progressive* were employed as synonyms, and I use them that way in this article. They signified advocacy of largely unrestricted government power to achieve ends of "social justice," including redistribution, funding of social programs, and increased regulation of the private sector.
Dorothy Eck, a self-identified liberal and progressive, was the president of the Montana League of Women Voters and later served as a convention vice president. On the League's role, see Dorothy Eck, *Transcript of Recorded Interview* (Jun. 5, 2012), Bozeman Public Library, MT ROOM 328.3 ECK, *available at* https://i2i.org/wp-content/uploads/Eck-interview.pdf. In an article on the constitution, she wrote:

> [T]hese were pro-government activists. They weren't demanding less government but were calling for strengthened, effective, efficient units of government with authority to make government work.

Eck, Constitution, *supra* note 1.

[71] *E.g.* Mont. Const. of 1889 art. v, § 29 (prohibiting payment of extra compensation after services to state are performed), § 30 (requiring competitive bidding for contacts supplying state government and prohibiting conflicts of interest), § 31 (restraining public officers' receipt of emoluments).

[72] John Joseph Wallis, *Constitutions, Corporations, and Corruption: American States and Constitutional Change*, *1842 to 1852*, 65 J. Econ. Hist. 211, 216-17 (2005) (describing defaults and near defaults due to excessive debt and infrastructure spending).

[73] Mont. Const. of 1889, art. XII, § 12.

[74] *Id.*, art. XII, § 3.

[75] *Id.*, art. XII, § 4.

[76] *Id*., art. V, § 38. This section probably served a double purpose. The bankruptcy and near-bankruptcy of several states earlier in the century had been caused by excessive spending and debt for infrastructure, *Wallis, supra* note 72, so this provision helped ensure state solvency. It also forestalled some corruption.

[77] *Id.*, art. XII, § 9.

[78] *Id.,* art. XIII, §§ 2 & 5.

[79] *Id.*, art. XIII, § 6.

Those in favor of a new constitution tapped public resources to promote their cause. Notably, they induced the Montana Legislative Council, an arm of the state legislature, to issue a report on the subject of a new constitution.[80] This report was not a balanced document. It was a political manifesto. It argued that "more than 50 percent of the Montana Constitution is inadequate for today's needs"[81] and that state constitutions should be "concerned with principles" rather than detail.[82] It further contended that the excess of detail in the 1889 constitution afforded insufficient flexibility and unduly constrained government fiscal authority:[83]

> Many of the complaints about constitutional limitations converge on the issue of the legislature's power over state finances. The restrictions, including those on maximum tax rates, authority to incur debt, borrowing discretion, requirements for a popular referendum to approve taxes and debt, and the earmarking of funds, clearly impair legislative autonomy and integrity. These provisions are viewed by some as unrealistic and as hindrances to effective state government.[84]

Regarding debt restrictions, the report alleged that they "limit[ed] the state in developing sound fiscal policies.[85]

Those advocating a new state constitution then induced the legislature to create a Constitutional Revision Commission, also publicly funded. This body issued papers criticizing limits on government authority[86] and recommending that the legislature schedule a referendum for a constitutional convention.[87] Furthermore, the Revision Commission began a public relations campaign to persuade Montanans of the need for a new charter.[88] As part of the campaign the Revision Commission authored a pamphlet published by Montana State University (MSU).[89] The pamphlet asserted

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80 Occasional Paper No. 6, *supra* note 2 (reproducing the Legislative Council Report), *available at* https://i2i.org/wp-content/uploads/occasionalpapers6.pdf.

81 *Id.* at iii (preface by Alexander Blewett).

82 *Id*. at 5.

83 *Id*. at 57.

84 *Id*.

85 *Id*. at 63.

86 *E.g.*, Occasional Paper No. 7, *supra* note 1, at 20, *available at* https://i2i.org/wp-content/uploads/occasionalpapers7.pdf (reproducing a subcommittee report claiming that "The restrictions, which so hamper imagination and flexibility in developing fiscal programs have created obstacles to sound fiscal planning, management, and organization."); *id*. at 30 (reproducing another subcommittee recommendation: "Grant as much freedom of action as possible in local affairs so that units of local government can use their own power and initiative in meeting future responsibilities.").

87 100 Delegates: Montana Constitutional Convention of 1972, 12 (1989); *See* Alexander Blewett, *Preface*, *Occasional Paper* No. 7, *supra* note 1, at iii, *available at* https://i2i.org/wp-content/uploads/occasionalpapers7.pdf.

88 Alexander Blewett, *Preface*, Occasional Paper No. 6, *supra* note 1, at iii, *available at* https://i2i.org/wp-content/uploads/occasionalpapers6.pdf (stating that the legislatively-created Constitution Revision Commission decided to "devote its efforts to carrying on a public education program on the need for constitutional revision" in advance of the November 1970 vote on whether to call a convention).

89 Montana Constitutional Revision Commission, Montana Constitutional Revision (Cooperative Extension Service, MSU Bozeman, 1972), *available at* https://

that a state constitution "should express only fundamental law and principle and omit procedural details except, of course, for procedural provisions in the Bill of Rights … . The legislature should be permitted to meet in annual sessions of unlimited length," and "[m]ore authority, fiscal and otherwise, should be granted to local governments."[90]

MSU independently published another pamphlet entitled *We, the People ... An Introduction to the Montana Constitution*.[91] It argued that the existing constitution was "cluttered with statutory details which obstruct adaptation to changing social, economic, and environmental conditions; it places restrictions on all branches of government that prevent them from dealing with modern problems … ."[92] This MSU pamphlet suggested a new constitution with a preamble modeled on that of Illinois and reciting various progressive aspirations: "to provide for the health, safety, and welfare of the people; eliminate poverty and inequality; [and] assure legal, social and economic justice … ."[93]

The times were propitious for progressive change. The Anaconda Company, generally a conservative influence in Montana politics, was in decline,[94] and liberal forces were ascendant.[95] On November 3, 1970, when the legislatively-authorized

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i2i.org/wp-content/uploads/Constitutional-Revision-Const.Rev_.Commn-MSU.pdf. *See, e.g. id.* at 33, 34, 41, 49-50, 51-52 & 54.

90 *Id*. at 18. This publication was marred by many statements of dubious accuracy. For example, American constitutions never are limited to "fundamental law and principle"; all, including the U.S. Constitution, include significant detail. The pamphlet also claimed that written constitutions were an American invention and that the framers "found few guidelines" in prior works. *Id*. at 31-32. Both of these statements are false. *See generally*, Robert G. Natelson, The Original Constitution: What It Actually Said and Meant 3-4 (3d ed. 2014) (discussing prior constitutions and sources of guidelines); *see also* Colonial Origins of the American Constitution (Donald S. Lutz, ed. 1998) (reproducing constitutional documents adopted by American colonists).

91 Lucile Speer, We, the People . . . An Introduction to the MT Constitution (Coop. Extension Service, MSU Bozeman, 1971), *available at* https://i2i.org/wp-content/uploads/Speer-We-the-People.pdf.

92 *Id.* at 100.

93 *Id.* at 101.

94 Thomas Paine, *Constitutional Retrospect and Prospect*, Montana Eagle, Mar. 17, 1982, at 4.

95 A Montana Technological University website describes the period as "Montana's Dramatic Period of Progressive Change: 1965-1980: From a Corporate Colony to a Citizen's [sic] State and the Challenge of Keeping It That Way," *available at* https://digitalcommons.mtech.edu/crucible_materials/6/. The description is typical of the unconscious bias Montana government officials often display in discussing this era. In fact, the Anaconda Company, while exercising great political influence, had not reduced the state to a "corporate colony." *See* Robert G. Natelson, *Montana's Supreme Court Relies on Erroneous History in Rejecting* Citizens United*,* Center for Competitive Politics 5-7 (2012) *available at* https://www.ifs.org/wp-content/uploads/2012/06/2012-06-Natelson-Montanas-Supreme-Court-Relies-on-Erroneous-History.pdf (outlining instances in which the Anaconda Company was unable to control Montana elections).

Although the period under discussion was an unusually liberal one, the reader should not assume that Montana is otherwise a particularly conservative state. Rather, it traditionally has shared a political affinities with the "prairie socialism" of states such as Minnesota and North Dakota. Montana's most famous political figures, U.S. Senators Mike Mansfield and Burton K. Wheeler and U.S. Rep. Jeanette Rankin were all

referendum on calling a new convention was held, the governor, lieutenant governor, secretary of state, treasurer and superintendent of public instruction were all Democrats. So were both U.S. Senators, one of the two U.S. Representatives, and the state senate.[96] (In the 1972 general election the state house was to flip to the Democrats as well).[97] Of those participating in the convention referendum, 65 percent voted to authorize a convention.[98]

The following year the legislature adopted an enabling act[99] scheduling the convention, and replacing the Constitutional Revision Commission with a Constitutional Convention Commission. The latter was to "undertake studies and research … compile, prepare and assess essential information for the delegates, without any recommendations … ."[100]

B. The Constitutional Convention

Convention delegates were elected on November 2, 1971. The elections produced an assembly tilted distinctly to the left: Of the 100 delegates elected, 58 were Democrats, 36 were Republicans and six were (generally liberal) Independents.[101] The partisan imbalance may understate liberal convention strength, for the Montana Republican party then included a large progressive element in the Theodore Roosevelt/Robert LaFollette tradition. Some Republican delegates certainly fit in this category.[102] Overall, the convention was, according to one liberal writer, "the most radical assembly the state had ever seen."[103] While some Montanans did not see the convention as an invitation to radical change,[104] some of the most influential delegates did.[105]

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progressives. Although the state has been trending in a conservative direction in recent years, Democrats still do very well in statewide races. For example, at this writing the governor, and lieutenant governor, and one of the two U.S. Senators are Democrats. There is also a tradition of relative progressivism even among Montana Republicans. *Infra* note 103.

96 Brad E. Hainsworth, *The 1970 Election in Montana*, 24 W Pol. Q. 301 (1971). *See also Political Party Strength in Montana*, *available at* https://en.wikipedia.org/wiki/Political_party_strength_in_Montana; Atlas, *supra* note 1, at 239 (summarizing 1968 election results); *id*. at 248 (summarizing 1970 election results).

97 Atlas, *supra* note 1, at 264 (summarizing 1972 election results).

98 *Eck, Constitution, supra* note 1.

99 Extraordinary Senate Bill 6 (1971).

100 100 Delegates, *supra* note 1, at 12; Extraordinary Senate Bill 6, § 20(7) (1971).

101 *Id*., at 12; *Males*, *supra* note 1, at 5 (noting the liberalism of the independents).

102 For example, delegate Jean M. Bowman was active in the liberal League of Women Voters, but was elected as a Republican and served as convention secretary. 1 Montana Constitutional Convention Proceedings 36 (1979); 100 Delegates, *supra* note 1, at 43.

103 *Males, supra* note 1, at 5. Apparently, the staff members who served the convention were even more radical. *Id.* at 19.

104 *E.g*. Olive Rice, *Constitution Should Reflect People's Will*, Gallatin County Tribune, Mar. 9, 1972, p.1 (arguing that the convention was called to revise the constitution "not to 'reform' it or rewrite it to the extent of changing its basic concepts").

105 *E.g*., *Missoula Delegate Claims Convention Fears Public*, Gallatin County Tribune, Mar. 9, 1972, p.1, 8 (reporting delegate Robert Campbell as urging radical change and arguing "We've got two and a half weeks to change this state").

The assembly met on November 29, 1971 for a three-day organizational session. As president, it elected lawyer Leo Graybill, Jr., a passionate progressive.[106] It re-convened for business on January 17, 1972[107] and met until adjournment on March 24.[108]

For all the convention's liberalism, one cannot explain its relative unanimity—all 100 delegates ultimately signed the constitution[109] and only nine eventually opposed it[110]—by its political composition alone. There were several contributing factors. One was the decision to break up the conservative minority by seating delegates alphabetically rather than by party or political composition. This decision was hailed as commendable non-partisanship, but a primary effect was to reduce the piercing examination of the majority's proposals traditionally offered by a cohesive loyal opposition.

Another factor leading to relative unanimity was a ruling by the state supreme court that state legislators could not serve as delegates.[111] This eliminated as potential candidates many who might deploy political knowledge in opposition to the convention's dominant sentiment.[112] As a result, most delegates were relatively inexperienced in government, and none, including the professors among them, seems to have had even an academic knowledge of constitutional law, history, or drafting. In that pre-Internet era, this left the delegates heavily reliant for technical information on speakers and on staff consultations and publications.

The convention leadership's series of "distinguished speakers" uniformly promoted a progressive agenda.[113] All advocated, as one journalist observed,

> the same idea of appointed officials, fewer legislators, one house instead of two, or a one-man Public Service Commissioner, with no speaker

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106 3 1972 Convention, *supra* note 1, at 16. Former Governor Stephens believes Graybill exercised a powerful influence on convention deliberations. Telephone Conversation with former Montana Governor Stan Stephens, Aug. 2, 2018.

107 3 1972 Convention, *supra* note 1, at 109.

108 7 1972 Convention, *supra* note 1, at 3046 (adjournment).

109 *A Proclamation by the Governor of the State of Montana*, Jun. 20, 1972, at 36-39, *available at* https://i2i.org/wp-content/uploads/Anderson-proclam.pdf (reproducing the signatures).

110 Atlas, *supra* note 1, at 260.

111 Forty-Second Legislative Assembly v. Lennon, 481 P.2d 330 (Mont. 1971).

112 Former governor Stan Stephens believes this had the effect of making the convention more liberal. Telephone Conversations with former Montana Governor Stan Stephens, Aug. 2, 2018 & Sept. 25, 2018.

113 The "distinguished speakers" were Jesse Unruh, the controversial Democratic speaker of the California State Assembly, 3 1972 Convention, *supra* note 1, at 217; his former staffer Larry Margolis, *id*. at 309; aviator Charles A. Lindbergh, who was then crusading for environmental causes, *id* at 387; John Gardiner, president of Common Cause, a liberal lobbying group, 6 *id*. at 1853; and former Congresswoman Jeanette Rankin, an environmentalist and peace activist, *id*. at 2207. Of those and certain other outside speakers, one journalist observed that "For the most part, the speakers were in favor of more power vested in fewer government officials." Olive Rice, *Common Cause Leader to Address Convention*, Gallatin County Tribune, Mar. 9, 1972, p.8. Rice lists Nebraska state senator Terry Carpenter as among the speakers, but he failed to attend due to illness. 3 1972 Convention, *supra* note 1, at 325.

> urging that political power be retained in the hands of the people at every level.[114]

The Constitutional Convention Commission produced a great deal of technical information for the delegates, but some of that information was biased as well. For example, the Commission reproduced the Legislative Council report discussed earlier[115] and the 1969 committee recommendations from the Constitution Revision Commission.[116] Both criticized the existing constitution at length,[117] particularly its fiscal limits,[118] but presented no alternative points of view. Similarly, the Commission reprinted a 1967 Montana Legislative Council report that compared the 1889 constitution, generally unfavorably, to those of other states.[119] The constitutions selected for comparison were those of Puerto Rico, Alaska, Hawaii, Michigan, New Jersey, and a "model constitution" produced by the National Municipal League.

This choice of constitutions was clearly gerrymandered. None of the documents selected derived from states adjacent to Montana, within the Rocky Mountain region, or, with the possible exception of Alaska, particularly comparable to Montana.[120] Yet the selection included one constitution from a jurisdiction that was not a state (Puerto Rico) and another—the National Municipal League model—that had never been adopted at all. The Convention Commission chairman's explanation was that the documents included were "more recent" or "better."[121]

The inclusion of the National Municipal League model in a set of constitutions from which all states surrounding Montana were excluded illustrates the extent of League material included in the information provided to the delegates. The

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114 Olive Rice, *Delegates Conclude Their Roles; Burden Falls on People Now*, Gallatin County Tribune, Mar. 30, 1972, p.1.

115 Occasional Paper No. 6, *supra* note 1, at iii, *available at* https://i2i.org/wp-content/uploads/occasionalpapers6.pdf.

116 Occasional Paper No. 7, *supra* note 1, at iii, *available at* https://i2i.org/wp-content/uploads/occasionalpapers7.pdf.

117 Occasional Papers No. 6, *available at* https://i2i.org/wp-content/uploads/occasionalpapers6.pdf. & 7, *supra* note 1.

118 *E.g.*, Occasional Paper No. 5, *supra* note 1, *available at* https://i2i.org/wp-content/uploads/Occasionalpapers5.pdf (unpaginated) (criticizing limits on mining taxes); Occasional Paper No. 7, *supra* note 2 at 144, *available at https://i2i.org/wp-content/uploads/occasionalpapers7.pdf* (recommending replacement of most fiscal limits).

119 Occasional Paper No. 5, *supra* note 1, *available at* https://i2i.org/wp-content/uploads/Occasionalpapers5.pdf.

120 *Id*. at iii.

121 Alexander Blewett, *Preface*, Occasional Paper No. 5, *supra* note at 2, at iii, *available at* https://i2i.org/wp-content/uploads/Occasionalpapers5.pdf:

> Some of these constitutions were chosen based upon the general opinion of authorities that they represent the better state constitutions, others because they are comparatively new documents. The Model State Constitution was used because this is the only document of its kind known to exist.

Of course, the fact that a document is "comparatively new" is not a criterion of political wisdom. The acclaimed U.S. Constitution was far older than any of those included. And while the Model State Constitution might be "the only document of its kind known to exist," it might have been more instructive to select a document that actually had been adopted somewhere.

Constitutional Convention Commission provided the delegates with a bibliography of constitutional readings: of the 24 sources listed, 17 were League sponsored.[122] The Convention Commission also provided delegates with a pamphlet containing reports of subcommittees of its predecessor Constitution Revision Commission; that pamphlet repeatedly relied on League materials.[123] Furthermore, during the convention the leadership granted the League's executive director, William N. Cassella, Jr., extraordinary and repeated access to the delegates.[124]

The National Municipal League is not, of course, an unbiased source. It is a lobbying group that advocates for local government officials and promotes an agenda seen as favorable to its constituency. Its influence over the proceedings did not go unnoticed. As one journalist sympathetic to the convention observed, "[A] preponderance of research material furnished to the delegates seemed to come from one source (the National Municipal League and related groups) … ."[125]

Unfortunately the press did little to counterbalance the skewed ideological environment in which the convention worked. Lee Enterprises, the owner of four Montana daily newspapers, composed and published a newspaper supplement with headlines echoing the prevailing ideological line: "Money straitjacket: can cords be cut?" the supplement asked. "The constitutional convention offers an opportunity to cut the cords of the financial straitjacket in which the 1889 framers clothed the legislature".[126] The supplement further declared that "Rigid constitutional taxation provisions prevent the state from responding to rapidly changing social and economic needs by denying needed flexibility " and that "The weight of modern constitutional thought is that a special tax situation has no place in a document of fundamental principles".[127] "[C]onstitutional scholars emphasize," the supplement added, "that the best constitutions are brief, simple statements of the fundamental,

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122 Montana Constitutional Convention Commission, Selected Bibliography 3-5 (1972), *available at* https://i2i.org/wp-content/uploads/Selected-Bibliography.pdf. The Commission's predecessor also relied heavily on League publications, *e.g*., Montana Constitutional Revision Commission, Montana Constitutional Revision 40 (Cooperative Extension Service, MSU Bozeman, 1972), *available at* https://i2i.org/wp-content/uploads/Constitutional-Revision-Const.Rev_.Commn-MSU.pdf (citing the model constitution); *id.* at 46-47 (additional references).

123 *E.g.,* Occasional Paper No. 7, *supra* note 1, *available at* https://i2i.org/wp-content/uploads/occasionalpapers7.pdfat 5. 8, 23, 141 & 164. For other examples of reliance on League publications by the Revision Commission, see, *e.g*., Montana Constitutional Revision Commission, Montana Constitutional Revision 40 (Cooperative Extension Service, MSU Bozeman, 1972), *available at* https://i2i.org/wp-content/uploads/Constitutional-Revision-Const.Rev_.Commn-MSU.pdf (citing the model constitution); *id.* at 46-47 (additional references).

124 Olive Rice, *Common Cause Leader to Address Convention*, Gallatin County Tribune, Mar. 9, 1972, p.8 (referring to the address to the convention of the League executive director, William N. Cassella, Jr.); 3 1972 Convention, *supra* note 1, at 267 (quoting the convention president as announcing that Cassella would have multiple meetings with committees, committee chairmen, and executive officers); *see also id*. at 277; 7 *id*. at 2513, 2558.

125 Olive Rice, *Delegates Conclude Their Roles; Burden Falls on People Now*, Gallatin County Tribune, Mar. 30, 1972, at 1.

126 Lee Enterprises, *Constitutional Convention* (Newspaper Supplement), Jan. 16, 1972, at 14.

127 *Id*. at 15.

enduring principles of government".[128] I have looked in vain through contemporary newspapers for any serious effort to investigate or balance these debatable claims.[129]

Under such circumstances, even conservative-leaning convention delegates might well assume that the limits the 1889 constitution placed on state and local government were atypical or senseless.

C. The Character of the New Constitution

The document produced by the convention has been described as "populist."[130] Some of its provisions were of this cast, most notably its provisions for citizen initiatives.[131] But if populist government means directly responsive to the people, then in important respects the document was a less populist than its predecessor. Rather than dispersing power, the delegates generally adopted what was called a "short ballot" policy—that is lodging more power in fewer hands.[132] The new charter reduced the number of directly-elected executive officers,[133] and cut the size of both legislative chambers.[134] It also abolished referenda on nearly all fiscal decisions,[135] and expanded the authority of the executive branch at the expense of the legislature.[136] It increased the power of the judiciary at the expense of the

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128 *Id*. at 16.

129 For other examples of this media approach see Robert E. Miller, *New Constitution Provides for Flexible Government*, Gallatin County Tribune, Apr. 13, 1972, at 3B (praising new constitution's lack of specific rules pertaining to local government); Associated Press, *ConCon shortens document*, Billings Gazette, Mar. 24, 1972 (repeating an unrebutted claim that exclusion of detail from the draft constitution is "encouraging").

130 *Eck, Constitution, supra* note 1.

131 Mont. Const. art. III, § 4 (laws); *id*., art. XIV, § 9 (constitutional amendment). At the time, the citizen initiative was seen as useful mostly to liberal interests. Widespread use of the citizen initiative by conservative groups was still several years in the future. It began with California's Proposition 13 in 1978. *See* https://www.californiataxdata.com/pdf/Prop13.pdf. On the so-called "tax revolt," *see* Robert G. Natelson, *The Colorado Taxpayer's Bill of Rights* 7 (Independence Institute 2016).
Also of a populist nature was the constitution's "right to know," subject, however, to judicial balancing. Mont. Const. art. II, § 9 ("No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.").

132 This was a persistent theme in the convention. *See* Olive Rice, *Common Cause Leader to Address Convention*, Gallatin County Tribune, Mar. 9, 1972, at 8; Olive Rice, *Delegates Conclude Their Roles; Buren Falls on People Now*, Gallatin County Tribune, Mar. 30, 1972, at 1; Associated Press, *Convention Receives Short Ballot Proposal,* Missoulian, Feb. 3, 1972, at 10.

133 The state treasurer was no longer elected.

134 Formerly, there had been 55 senators and 104 representatives. Atlas, *supra* note 1, at 251. The 1972 constitution limited the number to 50 and 100. Mont. Const. art. v, § 2.

135 *Supra* notes 71-79 and accompanying text.

136 Ted Schwinden, *Face-Off*, Montana Eagle, Mar. 17, 1982, at 11 (outlining the increased authority of the governor under the 1972 constitution). The constitution also made it more difficult for the house of representatives to impeach executive and judicial officers. *Compare* Mont. Const. art. iv, § 16 (1889) (majority to impeach) *with* Mont. Const. art. v, § 13(3) (two thirds to impeach).

legislature by including language that, because vague and untethered to historical content, enabled judges to make key policy decisions.[137] One influential delegate suggested the convention feared the people rather than trusted them.[138]

The new constitution deleted most of the old constitution's anti-corruption provisions,[139] extended state authority over the environment and natural resources,[140] deleted the two-year limit on legislative appropriations, abolished caps on state taxation, and left local caps to legislative decision.[141] It also permitted two thirds of state lawmakers to authorize an unlimited amount of state debt without a referendum.[142] Several provisions apparently created new constitutional rights, but some of these actually were, at least in part, transfers of entitlements from some citizens to others, with judiciary to oversee the transfers.[143] The delegates abandoned their goals of brevity, generality, and flexibility for the sake of retaining several provisions that buttressed government authority or exclusivity.[144]

Liberal or *progressive*, in the colloquial sense of augmenting government power for good or ill, are thus more accurate descriptions of the result than "populist".[145]

D. Structuring the Election to Ensure Victory

The 1889 constitution gave the convention power to "appoint[…]" an election for the vote on "such revisions, alteration, or amendments to the constitution as may be

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137 *E.g.* Mont. Const. art. II, § 3 & art. IX, § 1 ("clean and healthful environment"); art. II, § 4 ("individual dignity"); art. II, §9 ("right to know" subject to a judicial balancing test), § 10 (right to privacy, overridden on showing of a judicially-determined "compelling state interest"). The state supreme court has not been shy about building policy around such phrases. *See, e.g.*, Montana Environmental Information Center v. Montana Dep't of Environmental Quality, 988 P.2d 1236 (Mont. 1999) (construing environmental rights); Gryczan v. State, 942 P.2d 112 (Mont. 1997) (construing private right to invalidate anti-sodomy law). At the time the constitution was written some people were aware of the potential implications of such broad language. *E.g.,* Gerald J. Neely, *Con Con Newsletter*, Mar. 10, 1972, at 3-5 (discussing interpretative problems).

138 *Missoula Delegate Claims Convention Fears Public*, Gallatin County Tribune, Mar. 9, 1972, p.1.

139 *Supra* note 71.

140 Mont. Const., art. IX..

141 *See generally,* Mont. Const., art. VIII.

142 Mont. Const., art. VIII, § 8.

143 *E.g., id*., art. II, § 4 (creating "right of individual dignity" enforceable against private parties); art. IX, § 1 (creating an environmental right enforceable against private parties).

144 E.g., Mont. Const. art. V, § 11(5) (forbidding appropriations to entities not under state control); art. VIII, § (inalienability of the taxing power); art. X, § 6 (banning aid to "sectarian" schools, in part to protect public school system from competition); art. X, § 10 (keeping educational funds "sacred").

145 Ten years after the constitution was adopted, the convention president acknowledged the effect. Leo Graybill, Jr., *Opinion*, Montana Eagle, Mar. 17, 1982, at 11 ("The Constitution's detractors have generally opposed its radical changes ... have disliked centralization, and been uncomfortable with the new enlarged bureaucracy in Helena which some parts of the new Constitution fostered."). *Fresh Chance Gulch*, Time Magazine, Apr. 10, 1972 (stating that the constitution's bill of rights "rings with progressive principles" and praising its abandonment of property tax limits).

deemed necessary".[146] The convention used that power to structure the election to the new constitution's advantage.

A significant obstacle to ratification was the 1889 constitution's requirement that convention proposals garner a "majority of electors voting in the election" rather than merely a majority of those voting on the question. The distinction was well understood: The convention enabling act repeated the constitutional language[147] and the Constitutional Convention Commission specifically addressed the challenge in its study of the enabling act:

> "Since 25 per cent of the voters at general elections commonly do not vote on constitutional questions, convention proposals placed on the general election ballot almost certainly would not receive the vote of a majority of the persons voting at the election, as is required by the Constitution.[148]

The Commission offered a solution: "This problem can be avoided by conducting a special election on the same day as the general election but not as part of the general election."[149]

Just in case this was not clear to the delegates, during the convention Marshall Murray, an attorney and chairman of the convention rules committee, described the issue in a memorandum to all convention officers, rules committee members, and committee chairmen. Murray wrote:

> Another compelling reason for the calling of a special election is the statistic that nearly twenty-five percent (25%) of all electors voting in an election in which there is a special issue, failed to vote on the question of the special issue. Since a majority of electors voting in the election is required, it is probable, if not likely, that adoption could be defeated by "failure to vote" rather than by a negative vote."[150]

Although Murray's memorandum was not addressed to all delegates, on February 5, 1972, all were provided with a copy of it.

Pursuant to his recommendation, Murray rose on the floor to move Resolution Number 10, providing for a special election on June 6.[151] He again explained the "majority of electors voting at the election" requirement and the plan to hold a special election so as to eliminate primary election voters from those "voting at the

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146 Mont. Const. of 1889, art. XIX, § 8 (providing that the convention's recommendations "shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose").

147 Montana Constitutional Convention Commission, Constitutional Convention Enabling Act 27 (1972), *partially available at* https://i2i.org/wp-content/uploads/Enabling-act-partial.pdf (quoting § 17(9): "If a majority of the electors voting at the special election shall vote for the proposals of the convention the governor shall by his proclamation declare the proposals to have been adopted by the people of Montana.").

148 *Id.* at 28.

149 *Id.*

150 Memorandum, Marshall Murray to Leo Graybill, Jr., et al. (undated), *id.* at 2, *available at* http:/www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/Murray%20to%20Graybill.pdf.

151 3 1972 Convention, *supra* note 1, at 330.

election."[152] He further explained that separate ballots, poll books, and tally books would be used to segregate the constitutional referenda from the primaries.[153]

Later in the convention, delegate John M. Schiltz introduced the proposed ballot and adoption schedule. He described the "majority of electors voting at the election" rule, employing a blackboard for illustrations. Schiltz emphasized that all six lawyers on the Style and Drafting Committee agreed on the required standard.[154] In the ensuing days, the convention discussed the topic several more times, always with the same understanding.[155]

Meanwhile the delegates were considering how they might otherwise structure the election to increase the constitution's chances of ratification. First, they opted for an early date. They did so to capitalize on convention publicity and curb the ability of opponents to organize.[156] They selected June 6, 1972, the day of the party primaries.

Next, the convention segregated into separate ballot questions two constitutional provisions most delegates favored, but thought would impair the instrument's chances of ratification if inserted directly. One was a provision for a unicameral legislature[157] and the other was abolition of the death penalty. In addition, they decided to add a separate question on whether to abandon the state's constitutional ban on gambling.[158]

The convention segregated the constitutional issues from the party primaries by designating those issues collectively as a "special election." This would eliminate citizens from the decisional denominator who voted only in the primaries, thus raising the chances that the "yes" votes on the constitution would comprise a majority of "electors voting at the election."

Following recommendations of its committee on style, the convention next structured the special election ballot to further promote the constitution's chances. The convention decided to employ paper ballots rather than the then-customary voting machines. The convention's ballot form violated traditional rules of ballot neutrality by stating "You Should Vote 4 Times"[159]—a legend later changed to "Please vote on all four issues."[160]

As Professor Ellis L. Waldron observed, "Many delegates believed that to make legalization [of gambling] depend on the ratification of the constitution would gain

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152 *Id*.
153 *Id*. at 334 & 336.
154 7 *Id*. at 2864.
155 *Id*. at 2895, 2905 & 2972.
156 Associated Press, *Delegates Set June 6 for Constitution Vote*, Great Falls Tribune, Feb. 6, 1972, p.1; 3 1972 Convention, *supra note* 1, at 331 (remarks by Delegate Murray). *See also id*. at 331, 333 & 337 (reporting delegates' comments on retaining media "momentum").
157 Two thirds of the delegates favored unicameralism, Males, *supra note* 1, at 5, but the Roeder newspaper supplement discussed *infra* notes 185 - 189 and accompanying text, explained that the unicameral option was a separate proposition because "the convention thought that citizens would be more likely to vote for the constitution if it contained a bicameral rather than a unicameral legislature." Supplement, at 11.
158 Mont. Const. of 1889, art. III, § 9.
159 Convention Committee on Style, Drafting, Transition and Submission, *Final Report* 21 (Mar. 22, 1972).
160 *Cashmore*, 500 P.2d at 923 (reproducing ballot).

votes for ratification by determined advocates of gambling."[161] Accordingly, the ballot informed electors that "If the proposed constitution fails to receive a majority of the votes cast, alternative issues also fail."[162] Thus, the ballot communicated that only if the constitution was adopted would legalized gambling be possible.

The convention also sought to piggyback the constitution on the popular issue of the death penalty. Montana already employed the death penalty, so normally one would expect a "yes" vote to favor a change from the status quo—that is, for abolition. However, the convention drafted the ballot to phrase the question the opposite way, so the elector had to vote "yes" to *continue* the death penalty. Because of the ballot legend stating that if the constitution failed alternative issues would also fail, some may have been misled some into believing the only way to save the death penalty was to vote for the constitution.

Hence, the administration of the referendum as a separate election, the timing of the election, and the structure of the official ballot form all were carefully designed to inflate the constitution's share of the popular vote.

E. The Ratification Campaign

During the ratification campaign, liberal and pro-government groups strongly promoted the new document.[163] Of course they did not emphasize that their proposal would restrict popular referenda on taxes and debt or reduce the number of elected offices. Instead they focused on the new constitution's flexibility, its relative brevity, and the benefits of relying more on legislative decision making.[164]

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161 Atlas, *supra* note 1, at 261. The measure was directed specifically at voters in Silver Bow County (Butte), who were known to favor gambling. Oral Conversation with Charles S. Johnson, Helena, Aug. 24, 1972. Although Silver Bow County rejected the constitution, the margin was probably less than it otherwise would have been.

162 *Cashmore*, 500 P.2d at 923 (reproducing ballot).

163 *E.g.*, Dan K. Mizner, Executive Director of the Montana League of Cities and Towns, to Fred Martin, Mar. 23, 1972, *available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/LeagueCitiesTowns.pdf (praising the new constitution for lifting the debt limit and otherwise conceding more power to local governments); Bryant & Robin Hatch, Co-Chairmen, Montana Common Cause, to Dorothy Eck, Apr. 14, 1972, *available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/CommonCause.pdf (endorsing the constitution; Common Cause was and is a liberal lobbying group); AFL-CIO flyer, "Vote for the New State Constitution", *available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/AFL-CIO%20flyer.pdf; Roy Warner, *Montana Common Cause to Propagate Constitution,* Gallatin County Tribune, Apr. 20, 1972, at 1.
See also Males, supra note 1, at 19 (stating that "The AFL-CIO, League of Women Voters, Common Cause, and other progressive groups supported ratification); *see also* Gallatin Citizens Corps Flyer, *Would a New State Constitution Mean Better Government? You know it would!, available a*t http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/GallatinCitizensCorps.pdf (listing 19 organizations in support including the foregoing groups and various public education, environmental, and government interests).

164 *E.g.*, Richard Roeder, *Proposed 1972 Constitution for the State of Montana*, Newspaper Insert (1972), *available at* http://www.umt.edu/media/law/library%5CmontanaConstitution%5Ccampbell/1972MTConstNewspaperSupp.pdf ("The 1972 Constitution also offers flexibility. It achieves this by leaving many matters to future legislative

At times during the campaign the new constitution's advocates felt beleaguered,[165] but overall they enjoyed enormous advantages over their opponents. Two daily newspapers endorsed the constitution, while none opposed it.[166] News coverage was consistently favorable. As one sympathetic observer noted, "the press … started campaigning for the constitution with non-stop headlines … . The small but vocal campaign by convention delegates urging ratification was rarely balanced by coverage of opposition arguments."[167] Advocates, by reason of the convention and several years of preparation, already were organized, but the scattered distribution of Montana's population rendered it difficult for opponents to marshal their forces within the available time.[168] Numerous civic associations supported the "pro" campaign,[169] but only a few, such as the Montana Farm Bureau[170] and the Montana Contractors Association,[171] actively opposed ratification. The voices of others who might have opposed the constitution were muted.[172] The state Chamber of Commerce—often considered a center-right organization—took no position.[173] In fact, one Chamber chapter endorsed the document.[174] The Montana Taxpayers

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determination … . [S]uch reliance is both necessary and democratic."). *See also* Gallatin Citizens Corp flyer, *available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/GallatinCitizensCorps.pdf (claiming the 1889 constitution "lacks flexibility to meet present and future needs").

165 *E.g.*, J.C. Garlington, *Analysis of the "Comparison of the Existing and Proposed Montana Constitutions"* (May 12, 1972), *available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/Garlington%20response.pdf (claiming an opposition flier "contains serious errors and unfair criticisms"). *See also* John Kuglin, *28,500 Budget Earmarked for Defeat of Proposed Constitution*, Great Falls Tribune, Jun. 1, 1972, at 1.

166 Atlas, *supra* note 1, at 250.

167 *Males, supra* note 1, at 19. Press representatives sometimes forgot their duty of objectivity during the convention, and advised delegates on tactics, *e.g.*, 3 1972 Convention, *supra note* 1, at (remarks by Delegate Martin announcing the tactical advice to him by a reporter).

168 Associated Press, *Delegates Set June 6 for Constitution Vote*, Great Falls Tribune, Feb. 6, 1972, at 1.

169 Atlas, *supra* note 1, at 259 ("Numerous organizations of labor, women, educators, environmentalists, public employees and some business-oriented groups endorsed ratification of the proposed constitution.").

170 Montana Farm Bureau, *The Big Decision "On Our Constitution"*, *available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/Farm%20Bureau/Farm%20Bureau%20Pamphlet.pdf.

171 Atlas, *supra* note 1, at 259.

172 *Cf. Billings Attorney Seeks Debate on Constitution,* Gallatin County Tribune, Apr. 20, 1972, p. 2 (noting lack of discussion of constitution's weaknesses).

173 *See* Montana Chamber of Commerce, *Con Con News, Constitutional Election Issues*, Jun. 6, *available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/Cham%20Comm%20Newsletter%20ocr.pdf; *See also* Gerald J. Neely, Montana's New Constitution: A Critical Look, *available at* http://www.umt.edu/media/law/library%5CmontanaConstitution%5Ccampbell/NeelyPamphlet.pdf (a pamphlet written by a proponent, but limited mostly to a neutral survey).

174 Gallatin Citizens Corps Flyer, *Would a New State Constitution Mean Better Government? You Know It Would!, available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/GallatinCitizensCorps.pdf (listing the Great Falls Chamber in support).

Association published critical information, but principally urged its members to "Study the Constitutional Issues."[175]

F. The Understood Margin Required for Ratification

During the proceedings in the *Cashmore* case, the constitution's opponents claimed the voting public was led to believe that ratification would require the affirmative vote of all participating in the election, and that failure to vote on an issue was effectively a "no."[176] This was true. Indeed, it was so true that the opponents can be charged with significant understatement.

First, the standard was fully aired and explained in the Montana press. When Marshall Murray, who chaired the convention rules committee, issued his memorandum on the standard, the Associated Press reported its content.[177] Shortly thereafter, a *Great Falls Tribune* article elucidated the issue for the general public:

> This means that more than half of the persons voting at the election must vote on each proposition for it to pass … . In other words, if 100,000 Montanans voted in the election, yet cast less than 50,001 votes for or against any one proposition, that proposition would fail.[178]

On March 24, the day the convention adjourned, the Billings Gazette ran *two* articles explaining the "majority of electors voting" standard.[179] Many similar articles appeared in newspapers throughout the state explicating the rule as it pertained to some or all ballot issues.[180]

Second, when using government resources to campaign for constitution, advocates repeatedly explained the "majority of electors voting" standard. During

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175 14 Montana Taxpayer, No. 12, at 1 (Apr. 1972); John Kuglin, *28,500 Budget Earmarked for Defeat of Proposed Constitution*, Great Falls Tribune, Jun. 1, 1972, at 1 (stating that the organization had been critical of certain aspects but had not taken an official position).

176 *E.g.*, Brief of Intervenors Manning et al., at 11-13, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

177 Associated Press, *Delegates Set June 6 for Constitution Vote*, Great Falls Tribune, Feb. 6, 1972, at 1 (explaining Murray's advice).

178 John Kuglin, *Style Committee Most Crucial*, Great Falls Tribune, Feb. 27, 1972, at 21.

179 Dennis E. Curran, *Unicameralism Favored, Expected to Lose,* Billings Gazette, Mar. 24, 1972, p.7; Associated Press, *New Constitution Finally on Paper,* Billings Gazette, Mar. 24, 1972, at 13.

180 *E.g.,* Editorial, *New Constitution Deserves Support*, Montana Standard (Butte), May 21, 1972, at 6; Associated Press, *New Constitution Gains Approval*, Missoulian, Mar. 23, 1972, at 1; Charles S. Johnson, *New Constitution Easy to Amend*, Missoulian, Apr. 4, 1972, at 11; Charles S. Johnson, *New Constitution Has Easier Method to Amend*, Montana Standard, Apr. 11, 1972, at 10; Associated Press, *Con-Con Can't Decide About Unicameral Idea*, Montana Standard, Mar. 22, 1972, at 1; Dennis E. Curran, *Unicameralism Takes Delegate Vote*, Missoulian, Mar. 24, 1972, at 12; Dennis E. Curran, *Ballot Quick May Doom Unicameral Legislature Preferred by Delegates*, Montana Standard, Mar. 24, 1972, at 1; *Billings Attorney Seeks Debate on Constitution,* Gallatin County Tribune, Apr. 20, 1972, at 2; Associated Press, *Delegates Make Side Issue of Unicameral,* Daily Inter Lake (Kalispell), Mar. 22, 1972, at 9; Editorial, *Options Important Too,* Daily Inter Lake, Jun. 4, 1972, at 4.

the convention, its leadership had applied for a federal grant for "public education," and the convention set aside $11,000 for a film on the convention.[181] The Montana Supreme Court foiled efforts to employ convention funds this way,[182] but advocates found other public sources. They seem to have used some to contribute to a pamphlet that, while billed as a "Critical View" of the constitution, still concluded that its "good points do outweigh the bad points."[183] This publication explained that a ballot issue needed a majority of those participating in the election, not merely a majority of the yes/no vote.[184]

Similarly, employees of Montana State University used state and federal resources to produce, print, and distribute a newspaper supplement promoting ratification.[185] The authors were MSU Professors Pierce C. Mullen and Richard Roeder, the latter of whom had served on the Constitutional Revision Commission[186] and as a convention delegate. Their supplement was twelve pages long and elaborately illustrated with drawings of an engaging young cowboy. It was inserted in all Montana daily newspapers. The supplement masqueraded as objective, even featuring a statement that it had been "reviewed for … objectivity by Mrs. Margaret S. Warden, Mrs. Thomas Payne and Mr. Fred Martin." In fact, the text was strongly

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181 Olive Rice, *Constitutional Convention Promises Excitement and Vigorous Debate*, Gallatin County Tribune, Jan. 27, 1972, at 1 (reporting on application for government grant). The film was never made.

182 State of Montana *ex rel.* Kvaalen v. Graybill, 496 P.2d 1127 (Mont. 1972) (ruling that the convention enabling act did not grant power to promote public education). According to the court, the amount consisted of approximately $15,000 in unexpended state funds and $30,000 in federal funds. *Id*. at 1129; *see also* Atlas, *supra* note 1, at 259 (citing the $45,000 figure). *But see* John Toole, *Administration Committee*, in 100 Delegates, *supra* note 1, at 17 (stating that the convention had reserved a $80,000 surplus for "voter education" but "the Supreme Court took it away from us."). When Leo Graybill, Jr., a lawyer, criticized the court for this decision, the court threatened disciplinary action against him. Atlas, *supra* note 1, at 259; *In re* Graybill, 497 P.2d 690 (Mont. 1972).
The convention also applied unsuccessfully for a $50,000 federal grant for "public education." Olive Rice, *Constitutional Convention Promises Excitement and Vigorous Debate*, Gallatin County Tribune, Jan. 27, 1972, at 1.

183 Gerald J. Neely, Montana's New Constitution: A Critical Look 1 (1972), available at http://www.umt.edu/media/law/library%5CmontanaConstitution%5Ccampbell/NeelyPamphlet.pdf. Neely stated this position in other forums as well. David T. Earley, *Explanation Needed 'to Sell' Constitution*, Billings Gazette, Mar. 31, 1972, at 11.

184 Neely, Critical Look, *supra* note 183 (unpaginated; at sheets 4-5).

185 Margaret Warden, *Public Information Committee*, in 100 Delegates, *supra* note 1, at 19. (The supplement, *Proposed 1972 Constitution for the State of Montana* (1972), is available at http://www.umt.edu/media/law/library%5CmontanaConstitution%5Ccampbell/1972MTConstNewspaperSupp.pdf); Burger v. Judge, 364 F. Supp. 504, 509 fn. 13 (D. Mont.), *affirmed*, 414 U.S. 1058 (1973) ("It was partially financed by Community Services Program, Title I of the Higher Education Act of 1965, with the state providing office expense and state employees furnishing services; and supplementary funding was provided by Concerned Citizens for Constitutional Improvement (a private group of Montana citizens)").

186 Montana Constitutional Revision Commission, Montana Constitutional Revision 1 (Cooperative Extension Service, MSU Bozeman, 1972), *available at* https://i2i.org/wp-content/uploads/Constitutional-Revision-Const.Rev_.Commn-MSU.pdf (listing Roeder as a member).

pro-constitution,[187] and failed to disclose that Warden, Payne, and Martin—those purportedly assuring "objectivity"—all had served as convention delegates and strongly supported the constitution.

This supplement fully explained the "majority of electors voting" standard, noting that each measure required a majority of the total vote on all measures to pass.[188] It warned of the consequences of abstaining: "If you fail to vote on any item, you will aid in its defeat".[189] Each issue would need more than a majority of the yes/no vote; it would need a majority of everyone who cast a vote on any of the four issues.

Furthermore, the same assumption guided Montana's election officers and influenced their communications with the public. In the official voter information pamphlet distributed to all electors before Election Day[190] was a sample ballot structured with the "majority of electors voting at the election" rule in mind. It admonished electors to vote on all issues and warned them that if the constitution did not pass, all other issues would fail.[191] The secretary of state sent instructions to county election officers emphasizing the importance of entering "the total number of electors who are listed on the poll books for the separate election on the proposed constitution."[192] Accompanying the instructions was a form entitled "Election Returns," which identified the special election as the "Ratification or rejection of the proposals of the Constitutional Convention".[193]

In sum, the required majority by which the constitutional issues would pass or fail was communicated to every Montanan paying attention.

G. The Referendum Results

The election returns showed the voters were clear about some issues. The proposal to continue the death penalty garnered 65 percent of the yes/no vote. Large majorities

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187 For example, in treating the 1889 constitution, the supplement stated "While these same details [in the 1889 constitution] have not always achieved their intended purposes, they have sometimes had the unintended effect of hamstringing effective state government." *Id.* at 2.

188 Richard Roeder, *Proposed 1972 Constitution for the State of Montana*, Newspaper Insert 10-12 (1972), available at http://www.umt.edu/media/law/library%5CmontanaConstitution%5Ccampbell/1972MTConstNewspaperSupp.pdf:

> Article XIX, Section 8 of the 1889 Constitution requires that any item the convention submits to the people can be adopted only by a majority of the electors voting at the election. We know that as they go down the ballot voters fail to vote in increasing numbers on each subsequent item. Consequently, the likelihood of a proposition failing for the lack of a majority of those voting in the election increases with the addition of each item on the ballot. … If you fail to vote on any item, you will aid in its defeat.

189 *Id*. at 12.

190 Montana Constitutional Convention, Proposed 1972 Constitution for the State of Montana, Official Text With Explanation 2, *available at* http://www.umt.edu/media/law/library/MontanaConstitution/Miscellaneous%20Documents/Const%20VIP.pdf.

191 *Cashmore*, 500 P.2d at 923 (reproducing ballot).

192 *Id.*, 500 P.2d at 939 (dissenting opinion) (reproducing instructions).

193 *Id.*, 500 P.2d at 940 (dissenting opinion) (reproducing form).

opposed a unicameral legislature (56 percent) and wanted to permit the state to authorize gambling (61 percent). But despite all its campaign advantages, the constitution fell short of the required majority. It won slightly under 50.6 percent of the yes/no tally, but garnered less than 49 percent of the total special election vote as reported by the secretary of state. About a third of those issued ballots failed to vote on the constitution,[194] perhaps from understanding that abstention meant "no." Thus, the constitution fell 2386 votes short. In 44 of Montana's 56 counties it failed to garner even a majority of even the yes/no vote.[195]

IV. The Proclamation, the Lawsuit, and the Decision

Before the election, the convention leaders had shared the common understanding that "a majority of the electors voting at the election" meant a majority of all voters participating.[196] Once they saw the election results, however, they turned on a dime. They now claimed that "a majority of the electors voting at the election" meant only that the "yes" vote had to be greater than the "no" vote.[197] The lawyer-delegates, who during the convention had been unanimous in affirming the former meaning promptly began to argue for the latter.[198]

Overruling the scruples of Frank Murray, the Democratic Secretary of State,[199] Governor Forrest Anderson, also a Democrat, signed a proclamation of ratification on June 20, 1972.[200] A fierce argument ensued between Murray and Anderson,[201] but the governor remained fixed. When Murray objected that the governor had

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194 Associated Press, *Constitution OK Still in Question*, Great Falls Tribune, Jun. 13, 1972, at 1.

195 Atlas, *supra* note 1, at 259.

196 *Supra* notes 150-55 and accompanying text.

197 *E.g.,* Associated Press, *Constitution OK Still in Question*, Great Falls Tribune, Jun. 13, 1972, at 1 (stating that "Convention President Leo Graybill, Jr. … and Vice President John H. Toole … said Monday they were confident the constitution had passed legally. In a letter to other delegates, they said they believed MT legal proceedings would uphold the principle that a majority voting for or against the main issue—the constitution—approved it.").

198 Charles S. Johnson, *Canvass Confirms Doubts of Constitution Vote*, Great Falls Tribune, Jun. 15, 1972, at 1 (reporting that lawyer delegates claimed that only a majority of the yes/no vote was required).

199 Atlas, *supra* note 1, at 259.

200 *A Proclamation by the Governor of the State of Montana*, Jun. 20, 1972, *available at* https://i2i.org/wp-content/uploads/Anderson-proclam.pdf.

201 J.D. Holmes, *Constitution Proclaimed*, Great Falls Tribune, Jun. 21, 1972, at 1 ("Because Anderson and Murray had just finished arguing about an interpretation of the June 6 primary vote on the proposed constitution, tempers were still short."). Murray protested, "I didn't see you sign it," to which Anderson rejoined "I'll put my signature on it again while you're sitting there*." Id.*
According to my sources, one of which was Professor William Crowley, who in 1972 served as Anderson's chief of staff, the actual exchange was saltier, with Anderson exclaiming, "Then I'll sign it again, you son of a bitch." According to Judge Charles C. Lovell, who argued the *Cashmore* case for the court, Crowley was the author of the ratification proclamation. Oral Conversation with Judge Charles C. Lovell, Helena, Aug. 24, 2018.

not signed the document in his presence, Anderson scrawled his signature on the document a second time.[202] The proclamation shows one signature superimposed on an earlier one.[203]

U.S. District Judge Charles C. Lovell, who as a young lawyer argued *Cashmore* for the state attorney general's office, says he was never quite sure of Anderson's motives in signing—whether he believed the constitutional majority standard didn't mean what everyone said it did, or whether he was putting on a political show.[204] The grandiose language of the news release accompanying the proclamation is consistent with the latter: "Government must be free to act," Anderson declared, "and I proclaim the passage of this Constitution, declaring it to be a major step in that direction."[205]

Contemporaneously with the signing, lawyers for William C. Cashmore, a Helena physician, and Stanley C. Burger, executive director of the Farm Bureau,[206] appeared before the Montana Supreme Court. In separate but substantively identical applications the two of them—styled "relators" in the pleadings—asked the court to assume original jurisdiction, emphasizing the importance of the case and claiming there were no factual disputes. For relief they requested an order directing the governor to appear and show cause why the new constitution should not be declared invalid. They further asked for an injunction or, alternatively, a writ of prohibition preventing the governor from proclaiming ratification.[207] But the governor had signed a just few minutes earlier, rendering their requests for an injunction or writ of prohibition moot.[208] Accordingly, the court, in an order issued two days later, treated their applications as requests for a declaratory judgment. The order recited an earlier, presumably oral, order consolidating the two cases. It further recited the absence of factual issues, fixed a schedule for response, and invited other interested parties to intervene or file briefs as amici curiae.[209]

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202 Atlas, *supra* note 1, at 259.

203 *A Proclamation by the Governor of the State of Montana*, Jun. 20, 1972, *available at* https://i2i.org/wp-content/uploads/Anderson-proclam.pdf.

204 Oral Conversation with U.S. District Judge Charles C. Lovell, Helena, Aug. 24, 2018.

205 Statement by Governor Forrest H. Anderson, Helena, June 20, 1972, *available at* http://www.umt.edu/media/law/library/MontanaConstitution/MHS%20Ratif/Anderson.pdf. *See also* Brief of Respondent Anderson at 7, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/ ("I proclaimed the new Constitution effective, and I stand on that decision").

206 Dr. Cashmore had served as a Republican in the state senate from 1961 to 1963 and in the house in 1969 and again in 1971. Ellis Waldron, Montana Legislators, 1864-1979: Profiles and Biographical Directory (Bureau of Gov't Research, University of Montana, 1980). Dr. Cashmore ran unsuccessfully for constitutional convention delegate in 1971. Atlas, *supra* note 1, at 257. Burger was a long-time conservative activist who founded the Montana Farm Bureau as a more conservative alternative to the liberal Farmers Union. Telephone Conversation with Tom Rolfe of Helena, Montana, Aug. 6, 2018.

207 Application of Burger, available at https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/; Application of Cashmore, *available at id*.

208 J.D. Holmes, *Constitution Proclaimed, Passed, Protested*, Great Falls Tribune, Jun. 21, 1972, p. 1. A conspiratorial right wing group also commenced a suit, Associated Press, *Citizens' Group Protests Passage of Constitution*, Great Falls Tribune, Jun. 22, 1972, p.3, but it was soon dismissed.

209 Per curiam order, Jun. 22, 1972, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

On June 28, the governor filed his answer and a supporting brief.[210] He did so pro se, although the documents likely were drafted by his chief of staff, William Crowley, a University of Montana law professor and civil procedure expert.[211] The governor admitted there was no factual dispute, but contested the relators' interpretation of the law. On June 20, at Lovell's recommendation, the Republican attorney general requested permission to intervene to support the Democratic governor, and the court immediately granted this request.[212] On July 11, the court scheduled oral argument for July 17.[213] On July 11 also Burger filed his principal brief, and Cashmore did so the following day.[214]

As in the referendum campaign, the constitution's opponents found themselves outgunned. Intervening to support the governor and the attorney general were the City of Billings, Montana's largest municipality; Robert L. Kelleher, a lawyer who had served as a convention delegate; and a group of former delegates led by Leo Graybill, Jr., the convention president. Submitting amicus curiae briefs on the same side were five organizations, including Common Cause and the League of Women Voters.[215] No organization or governmental unit supported the relators. They were backed by four amici, all individuals, and a single group of six individuals.[216] Among the pro-relator amicus briefs, only that of Billings lawyer Gerald J. Neely represented a respectable effort.[217]

The relators soon faced a more serious disadvantage. The court had assumed original jurisdiction on the premise, accepted by all, that there was no factual dispute. The relators, their supporting intervenors, and their allied amici had prepared their briefs on that supposition. Then, on July 12—a scant five days before oral argument and more than three weeks after receiving permission to intervene—the attorney

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210 Answer and brief *available a*t https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

211 I served on the same faculty as Professor Crowley for many years. I have personal knowledge of the fact that he customarily taught courses in Civil Procedure, focusing almost exclusively on the procedure of Montana.

212 The Attorney General's Application for Leave to Intervene and the court's order are available at https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.
The Montana attorney general usually represents state officers, of course, which argues for his supporting the governor. On the other hand, the attorney general also defends the results of ballot issues, and under existing rules the voters had rejected the constitution. However, Judge Lovell says there was no debate over which side to take. Oral Conversation with U.S. District Judge Charles C. Lovell, Helena, Aug. 24, 2018.

213 Oral Argument Schedule, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

214 Burger's brief and Cashmore's memorandum of law (brief) are available at https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

215 Register of Action in the Supreme Court of the State of Montana, Case No. 12309, *available at* https://i2i.org/wp-content/uploads/Cashmore-Register-of-Action.pdf; *see also* Associated Press, *17 Attorneys to Air Views on Constitution,* Great Falls Tribune, Jul. 7, 1972, p.17.
All briefs filed in the case are available at https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

216 *Id.*

217 Brief of Amicus Gerald J. Neely, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

general filed his formal answer.[218] This document challenged for the first time the consensus that there was no factual dispute.

The attorney general's answer, backed by a brief filed two days later,[219] contended that the number certified by the secretary of state as the total voting was an overstatement. According to the attorney general, the secretary of state's figure included all ballots issued to electors at the polls, including those that were blank, mutilated, discarded, or otherwise not properly voted. "[T]he total number of individual electors voting at such election," the attorney general stated, "is some number less than, and perhaps markedly less than, 237,600."[220]

Apparently several intervenors and amici allied with the governor knew in advance that the attorney general had this surprise planned, because within two days the Graybill intervenors, the League of Women Voters, and Common Cause all had filed briefs focusing on the new factual dispute.[221]

Under these circumstances, the court could have pursued any of three defensible courses. The best would have been to remit the case to a trial judge for a hearing on the factual question—and, preferably, for development of the legal issues as well. The second best would have been to employ a special master to resolve the factual question. A barely-defensible option would have been to postpone oral argument and afford the relators time to investigate and respond. But the court adopted none of these courses. Instead, it retained original jurisdiction and proceeded with oral arguments as scheduled.

Those arguments were held on July 17, with numerous convention delegates peering from the courtroom galleries.[222] Judge Lovell says that he focused his argument on dicta from a 1902 case because the dicta had been composed by Montana's longest serving Chief Justice, Theodore M. Brantley.[223] Lawyers speculated that Justices Frank I. Haswell and Gene B. Daly probably would vote for the new constitution because they were more liberal, while Chief Justice James T. Harrison and Justice Wesley Castles, who were relatively conservative, would oppose it. The swing justice was said to be Justice John C. Harrison.[224]

On the face of it, those predictions seem to have been confirmed.[225] On August 18, 1972, the court ruled 3-2 in favor of the governor and for ratification, holding

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218 Answer of Attorney General, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

219 Brief of Attorney General, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

220 Answer of Attorney General, *available at https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/*.

221 Briefs *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

222 J.D. Holmes, *237,000 Key Figure in Constitution's Fate*, Great Falls Tribune, Jul. 18, 1972, p.1; *see also* Frank Adams, *Constitution Backers Lean to Optimism,* Great Falls Tribune, Jul. 18, 1972, at 1 (reporting that at least 30 delegates were in the galleries).

223 Oral Conversation with Judge Charles C. Lovell, Helena, Aug. 24, 1972. Judge Lovell's account is confirmed by a newspaper report. J.D. Holmes, *237,000 Key Figure in Constitution's Fate*, Great Falls Tribune, Jul. 18, 1972, at 1. The case was *Tinkel v. Griffin*, 68 P. 859 (Mont. 1902), discussed *infra.*

224 Frank Adams, *Constitution Backers Lean to Optimism,* Great Falls Tribune, Jul. 18, 1972, at 1.

225 Frank Adams (column), Great Falls Tribune, Aug. 27, 1972, at 25. *But see infra* notes 303-08 and accompanying text (proposing the alternative hypothesis that Justice Haswell was the swing vote).

that a majority of the vote on the issue was sufficient. Justice Haswell wrote on behalf of a majority that included Gene B. Daly and John C. Harrison. James T. Harrison penned the dissent for himself and Castles.

V. *Cashmore*'s Majority Opinion

In view of the importance of the case and its departure from previous authority, it would be gratifying to report that Justice Haswell's opinion was rigorously researched, carefully written, and powerfully argued. Unfortunately, such a report cannot be made. Indeed, the opinion's organizational defects are such that reorganization is necessary before analysis can be attempted. When reorganized, Justice Haswell's opinion coalesces into six fundamental propositions:

A. The framers did not clearly require an "extraordinary majority" because "a majority of electors voting at the election" is ambiguous.
B. The precedents from other states are in hopeless conflict.
C. The Montana precedents favor a simple majority.
D. "Natural right" favors a simple majority rather than an extraordinary majority.
E. The constitution's variation in language is explainable on grounds other than variation of meaning.
F. The constitution was adopted even under the relators' understanding of the rule.

We consider each point, in turn.

A. The Court's Claim that the Constitutional Language was Ambiguous

After noting that rules of statutory construction apply to interpreting the constitution,[226] Justice Haswell conceded that "a literal construction would seem to support relators"[227]—that is, "electors voting at the election" seems to mean everyone who voted on any issue. He then proceeded:

> The quoted language speaks of approval 'by a majority of the electors voting at the election'. But voting on what? The constitutional language does not expressly answer this. However, the substance of the language of the entire provision indicates that it refers to voting on approval or rejection of the proposed constitution, and it is to that question that the quoted language is directed. *There is absolutely nothing to indicate that the framers had in mind a multiple issue ballot* wherein contingent alternative issues would be submitted to the electors in addition to the primary question of approval or rejection of the proposed constitution itself … . The best that can be said for relators is that the quoted language is ambiguous when read in connection with the entire constitutional

[226] *Cashmore*, 500 P.2d at 926.
[227] *Id.*, 500 P.2d at 927.

> provision relating to submission of the proposed constitution to the electors.[228]

One problem with this passage is that the constitutional language clearly *did* contemplate a multiple issue election. It authorized the convention to refer to the voters "such revisions, alteration, or amendments" as may be deemed necessary."[229] The legislature providing for the convention referendum interpreted it that way, as had the Constitutional Convention Commission.[230] As the dissent pointed out,[231] in a case decided just the previous year Justice Haswell himself had noted with apparent approval the referendum's provision for multiple issues.[232]

A more fundamental weakness is that Justice Haswell's rhetorical question, "But voting on what?" is irrelevant to the constitutional denominator. That denominator is based on the number of electors voting in the election, not the issues on which they vote. In other words, the court found ambiguity not in the constitution's actual language, but in hypothetical language different from what the document actually said.

Later in the opinion, Justice Haswell cited several constitutional provisions requiring super-majorities—that is, heightened decisional numerators.[233] He then returned to the issue of ambiguity:

> Finally, if the framers of our Constitution had intended to require an extraordinary majority for approval of a proposed constitution submitted by an elected constitutional convention, they could easily have said so. Our Constitution contains several provisions requiring extraordinary majorities, but wherever such requirement is imposed the language is loud, clear and unambiguous. … Here, we are simply not satisfied that the framers of our Constitution intended to require more than a simple majority vote on approval of the proposed constitution.[234]

Of course, the provision at issue required only a simple majority, not an "extraordinary majority." The change from the default rule was not in the numerator but in the denominator. Just as critically, the framers did indeed "sa[y] so." As explained in

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228 *Id.,* 500 P.2d at 927. (Italics added.).

229 Mont. Const. of 1889, art. XIX.

230 Montana Constitutional Convention Commission, Constitutional Convention Enabling Act 28 (1972):

> The convention may submit proposals for ratification in any of the following forms: (1) as a unit in the form of a new constitution, (2) as a unit with the exception of separate proposals to be voted upon individually, or (3) in the form of a series of separate amendments.

231 *Cashmore*, 500 P.2d at 931.

232 Forty-Second Legislative Assembly v. Lennon, 481 P.2d 330, 338 (Mont. 1971):

> [S]ince the referendum uses the language "revise, alter, or amend the constitution" it must have been contemplated that the work of the convention might be partial or total and that the individual parts might be submitted to the people. Therefore each Article might be separately submitted.

233 *Cashmore*, 500 P. at 928.

234 *Id.*, 500 P.2d at 929.

Part II, at the time they inserted the heightened denominator language into the 1889 constitution, that denominator's meaning was universally understood.

B. The Court's Claim that Precedents from Other States Were in Hopeless Conflict

On this subject, Justice Haswell wrote for the court:

> We recognize that there are two distinct and opposing lines of authority in other jurisdictions having the same or similar constitutional language. … These cases are cited merely to indicate the two conflicting lines of authority but are not relied upon or determinative of our decision in the instant case. We prefer to look to Montana statutes and cases for guidance in interpreting the meaning of our own constitutional provisions.[235]

In fact, there were not "two distinct and opposing lines of authority." Those cases equating "a majority of electors voting at the election" with "a majority voting on the question" arose from single issue special elections. In other words, they differed only in the scope of the election, not in the meaning of "a majority of electors voting."[236] As the *Cashmore* dissenters pointed out, the alleged split of authority was more apparent than real.[237]

This passage seems to have served the rhetorical purposes of dismissing all authority but two Montana cases on which the court's majority wished to rely.

C. The Court's Claim that the Montana Precedents Favored a Simple Majority

Having disposed of other authority, Justice Haswell opined that "we must consider the policy and philosophy of government contained in our Constitution as enunciated in numerous [Montana] cases … . "[238] Those "numerous" cases turned out to be two: *Tinkel v. Griffin*[239] and *Morse v. Granite County*.[240]

Tinkel involved a one-issue special election, so the number of votes in the election was identical to the number of votes on the issue.[241] In addition, the constitutional provision at issue in *Tinkel* was worded differently from the governing provision in *Cashmore*. The clause relevant to *Tinkel* required that for a county bond issue to pass, approval was necessary by "a majority of the electors

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235 *Id.,* 500 P.2d at 926.

236 *Supra* note 59 and accompanying text.

237 *Cashmore*, 500 P.2d at 933 ("[A]t first blush, the authorities may seem to be split, but there is something we feel reconciles any apparent variance in the cases."). The dissent was, correctly, referring to the fact that the 1972 referendum was a special election, but it failed to follow through with a sufficient explanation of why that was significant. *Cf.* Rice v. Palmer, 96 S.W. 396, 400 (Ark. 1906) (calling the purported split "more apparent than real").

238 500 P.2d at 928.

239 68 P. 859 (Mont. 1902).

240 119 P. 286 (Mont. 1911).

241 68 P. at 860.

thereof, voting at an election".[242] Thus, the provision relevant to *Tinkel*, unlike that relevant to *Cashmore*, featured a comma before the word "voting." This signals, of course, that the ensuing phrase is not restrictive—that is, the ensuring phrase does not define or limit the meaning of "electors." (This use of the comma as a non-restrictive signal was paralleled elsewhere in the 1889 constitution.[243]) A county bond issue, in other words, needed approval by a majority of *all* electors. The statute implementing Article V, Section 13 interpreted the comma as non-restrictive as well, for it required approval by "a majority of the electors of the county."[244]

As noted earlier,[245] some cases interpret "a majority of electors" to mean either (1) the majority of electors voting or (2) a majority voting on the question. One can classify *Tinkel* among the second group. But that was not relevant to the interpretation of the clause at issue in *Cashmore*.[246]

Morse v. Granite County[247] was in all relevant respects identical to *Tinkel*. In *Morse* the court stated that the single issue referendum had been offered at a general election, but closer examination of the court's opinion shows that the referendum actually was a single-issue special election held concurrently with the general election: It was a one-county affair characterized by a separate call, separate notice, and separate ballots.[248] Moreover, it was a county bonding referendum, subject to the same constitutional and statutory provisions that governed *Tinkel*.[249]

Justice Haswell must have understood that neither *Tinkel* nor *Morse* dictated the answer in *Cashmore*.[250] This explains why he glossed over the law and facts governing those cases in favor of dicta in *Tinkel*, which he cited primarily as evidence of "policy and philosophy."[251]

D. The Court's Claim that the 1889 Constitution's Variation in Language was Explainable on Grounds Other than Variation of Meaning

There is a presumption that when a legal document employs different phrases the phrases carry different meanings.[252] However, in writing for the court Justice Haswell stated that the "differences in the language employed by the framers of our

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242 Mont. Const. of 1889, art. V, § 13.

243 *Id.*, art. XVI, §2 ("a majority of the qualified electors of the county, at a general election").

244 The statute, Mont. Rev. Code § 2933, is quoted in *Morse*, 119 P.2d at 291.

245 *Supra* note 244 and accompanying text.

246 Justice Haswell emphasized *Tinkel's* status as a Montana case; however, the opinion in *Tinkel* was based heavily on a Kentucky decision, *Montgomery County Fiscal Court v. Trimble*, 47 S.W. 773 (Ky. 1898), from which the *Tinkel* opinion borrowed a 247 word extract. 68 P. at 861.

247 119 P. 286 (Mont. 1911).

248 119 P. at 288.

249 119 P. at 291.

250 Certainly this was pointed out in several briefs. *E.g.,* Brief of Petitioner, The State of Montana *ex rel.* v. Burger (Cashmore), *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/, at 15-17 (discussing *Tinkel* and *Morse*); Amicus Curiae Brief of Gerald J. Neely, *available at id.* at 21 (discussing *Tinkel*).

251 500 P.2d at 929 ("Additionally, we must consider the policy and philosophy of government contained in our Constitution as enunciated in numerous cases including *Tinkel v. Griffin*").

252 *E.g*. Henson v. Santander Consumer USA, Inc., 137 S.Ct. 1718, 1723 (2017).

Constitution in the different election provisions … are no evidence of a differing intent on the part of the framers, but are the result of inherent constitutional differences in the elections themselves, which in turn requires different language."[253] He explained:

> The first part of Section 8 relating to calling a constitutional convention requires a referendum vote by "a majority of those voting on the question"; Section 9 dealing with submission of individual constitutional amendments by the legislature requires referendum to the qualified electors and approval "by a majority of those voting thereon". That part of Section 8 we are called upon to construe requires . . . approval by 'a majority of the electors voting at the election".
>
> The reason for the difference in language between these three provisions is readily apparent. The referendum to the voters on the calling of a constitutional convention is normally held at a general election as was done here; consequently, the phrase requiring "a majority of those voting on the question" was employed to distinguish the constitutional referendum question from other general election issues.
>
> The language of Section 9 relating to submission to the electors of individual constitutional amendments proposed by the legislature must be at a general election where up to three such amendments can be submitted at the same election, thus the language "approved by a majority of those voting thereon" is used.
>
> The language of Section 8, that we must construe.—"a majority of the electors voting at the election" was used because a separate election is required for approval or rejection of a constitution proposed by a constitutional convention and there is no need to differentiate between approval or rejection of a proposed constitution at such separate election and issues at some other election held at the same time.[254]

Yet this passage adds text to the 1889 constitution that was not present. It states, "The referendum to the voters on the calling of a constitutional convention is normally held at a general election as was done here," but nothing in the constitution so required. It required only that the legislature "submit [the proposal for a convention] to the electors of the state."[255] Nor was there any evidence that including the referendum in a general election, as in 1970, was any more "normal" than holding a special election for the purpose. The claim that "a separate election is required for approval or rejection of a constitution proposed by a constitutional convention" was similarly without textual basis. The constitution required only that the convention designate an election for the referendum; there was no requirement that the election be general or special.[256]

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253 500 P.2d at 927.
254 *Id.*
255 Mont. Const. of 1889, art. xix, § 8.
256 *Id.*

Thus, Justice Haswell's opinion created distinctions between elections that did not exist. And without them, no reason remained for disregarding the presumption that different language signifies different meaning.

E. The Court's Claim that "Natural Right" Favors a Simple Majority Rather than an Extraordinary Majority

"We are mindful of the principle," Justice Haswell wrote,

> that when a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted. Section 93-401-23, R.C. M. 1947. Majority rule is a natural right and fundamental tenet of government in a democracy, and only the strongest evidence that something more than a majority, i.e., an extraordinary majority, is required in a given situation will suffice. Here no such evidence exists.

Of course the differences between the parties arose not from differences about majority rule but about the group from which a majority is determined. The dispute was over decisional denominators rather than numerators. More importantly, perhaps, Justice Haswell cited no authority for the proposition that majority rule is a matter of natural right. On the contrary, one reason super-majority requirements appear in constitutions is to better protect the "natural rights" of individuals and minorities.[257]

F. The Court's Claim that the Constitution Was Adopted Even Under the Traditional Rule

Near the end of his majority opinion, Justice Haswell alluded to the factual issue raised by the attorney general: The secretary of state reported 237,600 electors as voting, but that figure may have included all those receiving ballots rather those who cast them properly.[258] Justice Haswell therefore determined that "the figure of 237,600 labeled 'total number of electors voting at the election' on the Secretary of State's certificate is demonstrably incorrect, and the disputable statutory presumption of correctness of such figure … must yield to the facts."

Certainly the court should have yielded to the facts, but it neither ordered a recanvassing nor appointed a fact-finder to determine what those facts were. Instead, the majority opinion insisted that

> We can make that determination on the materials before us. If we take the total number of electors who cast ballots that were counted on the issue receiving the largest total vote, this should approximate the total number of electors voting in the election.[259]

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257 *E.g.*, John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 Tex. L. Rev. 703, 722 (2002) ("Both the large republic and supermajority rule founded government on popular consent yet reduced the power of particular factions to oppress the rights of minority opponents.").

258 *Cashmore*, 500 P.2d at 930.

259 500 P.2d at 930.

Accordingly, the majority added together the number of votes on the most-voted for issue in each county—that is, the gambling question in 18 counties and the constitution in the remaining 38. This yielded a total of 230,588 voters. The constitution, wrote Justice Haswell, was ratified under the traditional rule because the affirmative vote of 116,415 represented a majority of 230,588.[260]

Unfortunately, these calculations demonstrated a lack of numerical understanding. In absence of specific legal authorization, one cannot employ the most-voted-on question as a proxy for total votes cast because some electors opt to vote only on issues *other* than the most-voted-on question. Consider the hypothetical five-voter election posited above:[261]

> *Elector 1 votes for governor and on Proposition A.
> *Elector 2 votes for governor, senator and on Propositions A and B.
> *Elector 3 votes for governor, senator, and on Proposition B.
> *Elector 4 votes for senator and on Proposition A.
> *Elector 5 votes on Proposition A only.

The most voted-on candidate or issue is Proposition A—four votes. But that was not the number of electors who voted (five), because Elector 3 voted for the candidates and on Proposition B, but not on Proposition A.

Nor was this a merely theoretical concern in the actual referendum:

- Advocates of the constitution, the press, and presumably election officials repeatedly told the electors that an abstention on any proposition was effectively a vote against it.[262] The death penalty was, as it is now, a subject of passionate views. Those who went to the polls to vote for the death penalty, particularly social conservatives, had reason not to bother voting on the other (more liberal) proposals. The court's count omitted all of those voters.
- Gambling was also contentious. No doubt there were single-issue voters who went to the polls to cast their ballot on gambling and nothing else. The court's count omitted electors who chose only to vote on gambling in counties where the constitution was the most-voted-on issue.
- Some people in the eighteen counties where gambling was the most-voted-on issue may have chosen only to vote on the constitution, on unicameralism, and/or on the death penalty. The court's count omitted them as well.

In other words, *the court's estimate omitted every elector in 36 counties who cast a ballot but decided not to vote on the constitution and every elector in the other eighteen counties who cast a ballot but decided not to vote on gambling*. The number omitted may have been very significant—but even an undercount of less than one percent would have raised the denominator sufficiently to depress the constitution's percentage below the necessary majority.[263]

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260 *Id*.

261 *Supra* note 48 and accompanying text.

262 *Supra* Part III.E.

263 If the number of "electors who vote[d] at the election" was higher than 232,831, the constitution would not have had the necessary majority. The 2243 figure is 232,831 *minus* 230,588, the number of voters conceded by the court's opinion.

VI. Chief Justice Harrison's Dissent

Chief Justice James T. Harrison's dissenting opinion[264] was structured in a peculiar manner. It revealed signs of piecemeal drafting, with different parts written at different times and perhaps by different authors.

As finally issued, the dissenting opinion began with a preface of about 660 words. This preface was haunted by a spirit of exasperation. It recited earlier proceedings and complained that the majority was not acting in a consistent manner. It specifically criticized Justice Haswell for contradicting his own statement in an earlier case.[265]

After the preface came the core exegesis. It was composed in the indicative mood.[266] It consisted of about 6300 words, of which more than half—a recital of authorities—was cribbed nearly verbatim from Dr. Cashmore's principal brief.[267] The core exegesis also borrowed from an exhaustive amicus brief by Billings lawyer Gerald J. Neely.[268] Near the end of the core was a 150-word insert written in the subjunctive mood,[269] after which the opinion returned to the indicative.[270] The last three paragraphs were written in the subjunctive and served as a conclusion.[271] Like the preface, this conclusion is testy in tone.[272]

From the overall structure it appears that the core exegesis was to be the majority opinion, but when it became clear the writer or writers did not command the majority, he (or they) interlineated the 150-word passage, added the frustrated preface, and appended the testy conclusion.

Supporting the hypothesis of piecework composition are some other oddities. One passage was incoherent and another bore no relation to the remainder of the text. The incoherent passage appeared in the portion of the opinion that agreed with the holding in *Tinkel*:

> We have no argument with that philosophy. The same argument is applicable to the case at bar because the total number of votes for the proposed constitution may have been less than a majority of those who voted on that separate issue.[273]

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264 *Cashmore,* 500 P.2d at 930-45.

265 *Id*., 500 P.2d at 931.

266 The indicative mood is a grammatical term used to indicate the meaning of verbs. As illustrated by the text *infra*, it is to be distinguished from the subjunctive mood. The indicative mood is used, inter alia, for statements of fact, e.g., "I *see* a giraffe." The subjunctive is used, inter alia, for statements contrary to fact, e.g., "I see only an elephant; if I *saw* a giraffe I *would tell* you."

267 *See* Memorandum [*i.e*., brief] in Support of Application for Declaratory Judgment, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

268 Amicus Curiae Brief of Gerald J. Neely, State of Montana *ex rel.* Cashmore v. Anderson (1972), *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

269 *Id*. at 943 (beginning, "The foregoing should pose a dilemma for the court … .

270 *Id*. (beginning, "A canvassing board cannot evade its duties …. .").

271 *Id*. at 945 (beginning "We would order … ").

272 *Id*. at 945 ("In filing the foregoing dissent, we recognize the futility of it. By a three to two vote this Court is declaring a new constitution to have been adopted. We believe the majority opinion to be wrong … .").

273 *Id*., at 938.

Perhaps the writer intended to say he agreed with *Tinkel* insofar as it limited the decisional denominator to those who voted in the special election, but that *Tinkel* was *inapplicable* because the proposed constitution may have received less than a majority of those who voted in the special election.

The passage without relation to anything else in the opinion was as follows:

> We would find then that 'positive assent' is the same as 'a majority of the electors voting at the election'. This positive assent is referred to by many writers and courts as an extraordinary majority.[274]

This passage appears to have been dropped into the opinion by mistake. There is no other reference to "positive assent" in either the majority or dissenting opinions. The passage derives from the part of Neely's brief that explained the "majority of electors voting at the election" requirement as one that ensured that ratifiers approve by positive assent rather than by silence.[275]

The coherent portions of the dissent's core exegesis cited and reproduced extracts from constitutional provisions and from eight decided cases defining "a majority of electors voting at the election." It then distinguished *Tinkel* and *Morse*, and finally discussed the factual question of how many voted in the special election.[276] It argued that the number of electors who voted was "the critical, controlling fact figure,"[277] and that the court should order a "recanvass" [*sic*] to resolve it. Apparently, this process would involve only requiring each county election officer to clarify whether the number of voters he or she submitted to the secretary of state consisted of *all* ballots issued or only of ballots *legally voted*.

Despite its length, the dissent suffered from several lost opportunities. First, its author(s) should have contended that original jurisdiction had been improvidently granted or, once granted, should have been revoked after the factual issue surfaced. The factual issue—and, indeed, the complex and important legal issues—justified careful consideration at the district court level, or at least by a special master.

Second, the dissent should have noted the unfairness of the proceedings: Five days before the hearing—after all parties had agreed that there was no factual dispute and after the briefs of the relators and their allies had been prepared—the attorney general and his allies produced a factual dispute. Under the circumstances, the court should have postponed the hearing, asked the relators for briefs on the factual issue, or otherwise permitted an opportunity for response.

Third, the dissent strung together a list of relevant cases, but failed to draw two necessary conclusions: One was that the phrase "a majority of electors voting at the election" had a clear, accepted meaning, not a disputed or debatable one. The other was that *this was also the meaning when the voters ratified the 1889 constitution*. It was this understanding that should have governed the case, not the "philosophy" of the *Tinkel* dicta issued thirteen years later.

Fourth, the dissent failed to show how that meaning, and the public message that an abstention meant "no," invited those who opposed the constitution to abstain.

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274 *Id*., at 939.
275 Amicus Brief of Gerald J. Neely, *supra*, at 3 & 40.
276 *Cashmore*, 500 P. at 939-43.
277 *Id.*, 500 P.2d at 943 (dissenting opinion).

Fifth, the dissent failed to mention how the manipulated structure of the paper ballot could have affected the election results. For example, contrary to the standard practice (followed for the other three propositions) that a "yes" vote is a vote to alter the status quo, the ballot provided that a "yes" vote continued the death penalty. It also advised voters that "If the proposed constitution fails to receive a majority of the votes cast, alternative issues also fail."[278] Hence electors who contributed to the landslide majority in favor of the death penalty might well have voted for the constitution only because they were misled into believing that without the new constitution Montana could no longer inflict the death penalty.

Finally, the dissent failed to challenge the majority's erroneous claim that the number of electors casting ballots on the most voted-upon issue was equivalent to the total number of electors voting.

VII. The Motion for a Rehearing

On September 5, Burger filed a petition for rehearing. The petition included extensive argument. Much of it represented a futile effort to persuade the court to reconsider its legal conclusions, but it also included the first written rebuttal of the attorney general's claim of factual dispute. The petition pointed out that county election officials copied the voter numbers they sent to the secretary of state from their "poll books," and that under state law a poll book recorded only those who actually cast valid ballots, not everyone who was issued a ballot. Attached to the petition were affidavits from two county clerks affirming that the numbers they transmitted represented only those who had properly voted.[279]

The Burger petition also featured elaborate statistical examples showing that the number of votes on the most-voted-upon issue was not the same as the total number of electors participating in the election.

The following day, Dr. Cashmore also filed a petition for rehearing. Cashmore's petition noted that the constitutional referendum was part of a multi-issue special election, and discussed cases arising in such elections. It also urged a "recount" of the vote.[280]

The attorney general's response accused the relators of trying to re-litigate issues the court already had decided.[281] After the filing of some additional papers—among them two very short amicus briefs in support of the relators but not really on point[282]—the court denied re-hearing without explanation. The vote for denial was the same 3-2 tally that resulted in the initial decision.[283]

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278 *Id.,* 500 P.2d at 923 (reproducing ballot form).

279 Petition for Rehearing, *available at* https://i2i.org/wp-content/uploads/1972-0905-Rehg-Petition-Burger.pdf.

280 Petition for Rehearing of the Relator, William F. Cashmore, M.D., *available at* https://i2i.org/wp-content/uploads/1972-0906-Rehg-Petition-Cashmore.pdf.

281 Objections to Petitions for Rehearing, *available at* https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/; Memorandum in Support of Objections to Petitions, *available at id*.

282 These materials are available at https://i2i.org/court-papers-in-montana-ex-rel-cashmore-v-anderson/.

283 Associated Press, *High court rejects constitution test,* Great Falls Tribune, Sept. 26, 1972, at 1.

The denial was, in retrospect, probably inevitable. The petitions contained little more on the legal issues than that already offered by the parties, intervenors, or amici in the earlier proceedings. The Burger petition, it is true, demonstrated clearly the error in equating the vote on the most-voted-on issues with "electors voting at the election." Additionally, it cast doubt on the conclusion that there were fewer than 237,600 actual voters. But the statistical portion of the court's opinion had been dicta anyway.

VIII. The Aftermath

After the Montana Supreme Court issued its decision on rehearing, Dr. Cashmore surrendered, as he earlier had announced he would.[284] Burger appealed to the U.S. Supreme Court, which denied certiorari.[285] He next sued in federal district court, claiming that, in violation of the Fourteenth Amendment to the U.S Constitution, the state had misled voters by informing them that an abstention on the constitution was a "no" vote.[286] He was joined by another voter, who alleged that he

> was one of the 7,302 electors who did not vote on the constitution ... . He testified in his deposition that he voted for a bicameral legislature, gambling, and the death penalty, and that he understood that if the proposed constitution failed "the alternate issues also fail." He failed to vote on the proposed constitution for two reasons: first, because he did not know enough "about the issues involved", and second, because he felt that if he did not vote, "it was a vote against it." He had read the ballot and the newspaper supplement. [His] wife voted as he did.[287]

However the district court found no Fourteenth Amendment violation:

> There is no suggestion that any publication or statement, either official or unofficial, was intended to misrepresent any facts or deceive or mislead the voters. The official ballot and publication followed the language of the existing constitution. The other statements at most contained an erroneous interpretation of an ambiguous provision in the Montana Constitution—an interpretation deemed correct by two of the five justices of the Montana Supreme Court.
>
> In no document was there any advice or suggestion that the electors should not vote on the proposed constitution. On the contrary, the unofficial as well as the official publications urged a vote on all four issues.[288]

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284 Tribune Capitol Bureau, *Document Ruling Seen Acceptable*, Great Falls Tribune, Jun. 24, 1972, at 7 ("But, says Cashmore, 'we should settle things in Montana without going to Washington. Certainly a matter of this kind should be settled here.'"); Associated Press, *Challenger of Constitution Accepts Court Ruling Despite Disappointment,* Great Falls Tribune, Aug. 19, 1972, pat 3.

285 410 U.S. 931 (1973).

286 Burger v. Judge, 364 F.Supp. 504 (D. Mont.), *cert. denied*, 414 U.S. 1058 (1973).

287 *Id.* at 509.

288 *Id*. at 511.

The court added that the newspaper supplement was an "unofficial" document and that if "any electors were in fact misled, they were simply mistaken as to the effect of their abstention from voting and not deprived of any right or opportunity to vote … ."[289]

Although most election errors do not constitute Fourteenth Amendment violations, this decision is somewhat disquieting. Surely the Montana public was entitled to assume the constitutional language would be interpreted as represented by all concerned, with abstentions being counted as "no" votes. Perhaps Montana officials can be accused of changing settled election rules after the election was over—which surely is a Fourteenth Amendment violation.[290]

IX. What Happened?

When the court granted original jurisdiction it did so upon the representation by all parties that there were no unresolved issues of fact. Once it became clear this was not true, a prudent tribunal would have remitted the case to a trial judge or at least to a special master. If the trier of fact found that a critical number of ballots issued were not validly cast, the constitution would have been ratified under the traditional rule, and there would have been no need to spend court time on exhaustive treatment of the law. Even in the absence of a factual dispute, the case could have benefited from lower court review because of the extensive amount of case law interpreting the phrase "a majority of the electors voting at the election."

Why did the court retain original jurisdiction in such circumstances? *Cashmore* is not the only case in which the Montana Supreme Court's exercise of original jurisdiction amounted to judicial malpractice,[291] but it was certainly the most important. And another question is "Why, having retained jurisdiction, did the justices decide to abandon a settled rule of law on which all parties, no matter what their views on the new constitution, had relied?"

The answer to the latter question may be simply because Charles C. Lovell from the attorney general's office, funneling his appeal through the words of Montana's longest-serving chief justice, out-argued the constitution's opponents. Otherwise, the two questions may have some common answers. First, there is a substantial body of research showing that the decisions of judges, in particular elected judges, are influenced by personal incentives and judicial self-interest.[292]

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289 *Id.* at 512

290 *Cf.* Bush v. Gore, 531 U.S. 98 (2000) (voting, once recognized by the state, is a fundamental right, and voters must be treated equally; shifting rules after the election is inconsistent with the Equal Protection Clause); Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) (finding due process violation where ballots cast in accordance with existing practice were invalidated after the election by retroactive application of new rule).

291 *See* Marshall v. State of Montana, 975 P.2d 325 (Mont. 1999), in which the court took original jurisdiction of challenge to voter-passed constitutional initiative without inquiring into the standing of the plaintiffs, and invalidated the initiative by altering a ballot rule after the election was held.

292 Joanna Shepherd, *Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory, and Judicial Behavior,* 2011 Ill. L. Rev. 1753 (2011) (summarizing recent findings, including the influence of such factors as length of tenure, judicial elections, whether the elections are partisan or non-partisan, fear of reversal, and campaign contributions).

It is not disrespectful to the Montana Supreme Court to observe that the justices had powerful incentives to short-circuit the judicial process and uphold the 1972 constitution. The new constitution's omission of fiscal limitations could be expected to increase funding for the judiciary. The greater scope for legislation and some of the new constitution's open-ended language promised more judicial business and more scope for judicial efforts to "do good." The new constitution also extended the justices' terms of office from six years to eight.[293]

Additional influences on the justices may have arisen from their daily associations: They were, after all, public employees and human beings. They were in the hub of a county that awarded the new constitution the second highest percentage of any county in the state.[294] The information flow in Helena at the time was such that they would have been inundated with claims that the new constitution was good for Montana. It was unlikely they had encountered any coherent, intelligent arguments to the contrary.[295] They worked in the same building as the governor, and the fact that they already had issued one decision against the movement for a new constitution[296] may have discouraged them from issuing another.[297]

The justices may have been subtly affected also by the foreseeable consequences of alternative outcomes. It seems all but certain that the constitution's advocates would have "punished" an adverse decision, perhaps with continued litigation and perhaps through mass media favorable to the new constitution. A decision against the constitution, on the other hand, entailed fewer costs. The constitution's opponents had demonstrated their media ineptitude during the ratification campaign, and Dr. Cashmore had made a tactically unwise public statement ruling out in advance any federal court proceedings.[298] It was not then known that Burger was determined enough to proceed without him.

In such circumstances it is not remarkable that three justices voted to short-circuit the process, disregard precedent, and rule the constitution ratified. It is perhaps more remarkable that two justices did not.

Why, then, having decided to retain original jurisdiction and abandon the traditional rule, did they not take more time and care in organizing and composing their opinions?"

Part of the answer to this question may lie in the proceedings within the court's chambers. Some insiders claim the initial vote among the justices was 2-3 *against* the constitution, that each side prepared an opinion on that basis, that one justice switched sides, and that both opinions had to be re-written.[299] This claim is corroborated by the structure of the dissent. As noted earlier, its core exegesis shows signs of having been composed as the opinion of the majority. Its preface

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293 *Compare* Mont. Const. of 1889, art. vii, § 7 (six years) with Mont. Const. art. vii, § 7 (eight years).

294 Atlas, *supra* note 1, at 262 (showing that Lewis and Clark County awarded the new constitution over 59 percent of the vote, second only to Cascade County (Great Falls)).

295 *Supra* Part III.A & III.B (discussing the public information flow).

296 Montana *ex rel.* Kvaalen v. Graybill, 496 P.2d 1127 (Mont. 1972) (holding that the convention, once adjourned, had no authority to spend government funds for "public education").

297 *Shepherd, supra* note 292, at 1761 ("Judges who consistently vote against the interests of the other branches of government may hurt their chances for reappointment).

298 *Supra* note 284 and accompanying text.

299 Telephone Conversation with Robert Campbell, Aug. 13, 2018.

and conclusion display a sense of exasperation the core exegesis does not show, and may have been tacked on later.[300] Moreover, the court's decision was unaccountably delayed, and work continued feverishly right up to the very day Associate Justice John C. Harrison was to leave on a European vacation.[301]

If the initial vote was 2-3, then who switched? The person usually identified is the affable John C. Harrison,[302] the same justice whom experienced attorneys identified early as the likely swing vote.[303] To be sure, there is some evidence Justice Harrison did not switch. First, he subsequently denied changing his position.[304] Second, even before the case was heard Harrison had acknowledged that in the referendum he had voted *for* the constitution.[305] Of course, a judge is not supposed to take his or her political preferences into account in deciding the law, but in practice this can be a difficult abstraction to apply, and it can be particularly difficult for a judge with circumscribed legal abilities—which Harrison certainly was.[306] Finally, the target of the dissent's exasperation was Justice Haswell, not Harrison.[307]

But several reports nevertheless identify John C. Harrison as the justice who changed his vote. According to a prominent constitutional convention delegate, someone leaked the story of the 2-3 preliminary tally (with Harrison voting against) to U.S. Senator Lee Metcalf, a strong advocate of the new constitution. Accordingly, Metcalf confronted Harrison in Helena and threatened to run him out of the state Democratic Party if he voted to (in his words) "kill the constitution."[308] This tale of political pressure has been corroborated in part by Charles S. Johnson, former chief of the Lee Enterprises Helena Capitol Bureau and widely considered the dean of the Helena press corps. Johnson says he was present at the 1997 celebration of the constitution's 25th anniversary, when former convention president Leo Graybill openly announced in a banquet speech to attendees that he had personally contacted

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300 *Supra* notes 273-75 and accompanying text.

301 Associated Press, *Constitution Vote Ruling Could Be Today*, Great Falls Tribune, Aug. 18, 1972, at 1.

302 Telephone Conversation with Robert Campbell, Jul. 30, 2018; Telephone Conversation with Robert Campbell, Aug. 13, 2018. Campbell remains active in post-convention memorial events.

303 Frank Adams, *Constitution Backers Lean to Optimism,* Great Falls Tribune, Jul. 18, 1972, p.1.

304 Telephone Conversation with reporter Frank Adams of Helena, Aug. 8, 2018; Telephone Conversation with constitutional convention delegate Robert Campbell, Jul. 30, 2018; Telephone Conversation with reporter Charles S. Johnson of Helena, Aug. 2, 2018; Oral Conversation with reporter Charles S. Johnson, Aug. 24, 2018.

305 *Supra* note 304 and accompanying text.

306 Harrison apparently was in academic trouble at the University of Montana law school ("I needed a few grade points") when he demanded a grade change from his Water Law professor. When the professor refused, Harrison cursed at him, and was expelled. Harrison next enrolled at George Washington University law school, where he graduated in the bottom 36 percentile, despite having the advantage of prior law school experience. After graduation he failed the Montana bar exam twice before passing it.
This information is based on an interview with Harrison himself. *See* Frank Adams, *Expelled UM Law Student Rises to State Supreme Court*, Great Falls Tribune, Sept. 10, 1978, at 11.

307 *Supra* notes 265 - 272 and accompanying text.

308 Telephone Conversation with Robert Campbell, Jul. 30, 2018; Telephone Conversation with Robert Campbell, Aug. 13, 2018.

Metcalf and asked the Senator to induce Harrison to change his vote.[309] Researcher Ann Koopman of Bozeman has recovered the official program for the event, and it confirms that Johnson participated and that Graybill was one of two banquet speakers.[310]

If tampering did occur, then it further explains why the justices did not draft their opinions with more care. There is not much incentive one to take pride in one's written product when that product is not really your own.

X. Conclusion

There is, of course, no chance the Montana Supreme Court will reverse the result in *Cashmore*. In fact, the court is highly protective of the 1972 constitution.[311] Several reforms can, however, reduce the chances of similar results in the future, both in Montana and in other states.

One such reform would be to adopt rules that prevent state supreme courts from assuming original jurisdiction except in the most dire emergencies. Even in emergencies a case with unresolved factual issues is never appropriate for original jurisdiction without a mechanism for reliable fact-finding. After all, we have lower courts for a reason: They resolve factual issues in hearings specially designed to do so, and they clarify legal issues for higher tribunals. There was no real emergency in the *Cashmore* case, no reason it should not have been examined first by a trial court, and every reason to believe it should have been.

When appeals courts do exercise original jurisdiction, they should apply the usual standards for late-breaking evidence—that is, exclude it or provide the opposing party with a fair opportunity to respond. This would seem to be a basic requirement of due process.

More fundamentally, legal reformers should examine seriously the effects of incentives on judges and how to address them so as to better preserve judicial impartiality. For example, jurists who live in a capital city are as likely as anyone else to be caught up in the thinking that prevails in that capital city. When justices of a state's highest court are reviewing the validity of a measure from which they, and the institution they work for, will benefit or suffer, they face a conflict of interest.

This Article does not focus on judicial reform, and I do not, therefore, offer comprehensive solutions. At the least, however, we might abandon the dogma that the state's highest court must be located in the same place as the governor, legislature, and central bureaucracy. The Montana Supreme Court might be better located in Billings or Great Falls, or perhaps rotate between the two, rather than in the small-town political hot-house that is Helena.

Existing mechanisms for temporarily replacing judges who face conflicts of interest can be more broadly applied. Replacement could come from the ranks of district judges. Alternatively, or in addition, Montana could team with other low

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309 Telephone Conversation with Charles S. Johnson, Aug. 2, 2018.

310 Program for constitutional symposium, Jun. 27-28, 1997, *available at* https://i2i.org/wp-content/uploads/MT-Const-25th-Anniv-program.pdf.

311 *E.g.*, Marshall v. State of Montana, 975 P.2d 325 (Mont. 1999); Montana Ass'n of Counties v. Montana, 404 P.3d 733 (Mont. 2017) (together rendering significant amendments almost impossible).

population states to form an interstate pool consisting of judges of unusually high quality. Montana could draw from the pool for impartial judges from other states in cases in which state supreme court justices face conflicts and the matter for determination does not require detailed knowledge of Montana law.[312] This is not as radical as it sounds: Many other low-population jurisdictions utilize common judges,[313] and Montana already teams with other states to provide certain other services.[314]

More important than any specific suggestion, however, is the lesson that the rule of law is a fragile thing, and easily shattered when those in power find the reasons for shattering it sufficiently appealing.

[312] I am indebted to Andrew P. Morriss, Professor of Law and Dean of the School of Innovation at Texas A&M University, for this suggestion.

[313] *E.g., Caricom, The Caribbean Court of Justice*, https://caricom.org/the-caribbean-court-of-justice. Many present and former British dependencies—Jamaica among them—continue to rely on the Judicial Committee of the British Privy Council. *Judicial Committee of the Privy Council*, https://www.jcpc.uk/about/did-you-know.html ("Today, a total of 27 Commonwealth countries, UK overseas territories and crown dependencies use the JCPC as their final court of appeal.").

[314] *E.g.*, Montana's participation in the WWAMI Medical School program with Washington, Wyoming, Alaska, and Idaho, http://www.montana.edu/wwami/.