The Role of the Montana Supreme Court in Constitutional Revision

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1. INTRODUCTION:

Courts and Constitutional Revision

American tradition regards written constitutions as “higher law” to which the agencies of government and ordinary statutory and case law must conform. The constitutions have their own special “rules of change”\(^1\) that differ from rules for change of statutory and common law, and this distinction is attested by the fact that they are commonly set apart in a special article of the constitution. Article V of the United States Constitution drafted in 1787 may have fixed the style; Article XIX of Montana’s statehood charter set out the rules for “Future Amendments” and Article XIV of the new constitution concerns “Constitutional Revision.” But the segregated placement of these rules in the constitution is symbolic rather than determinative of their distinctive character.

These distinctive rules reflect the ultimately theoretical or principled view that change of “organic law” is a specialized process for performing a unique and particularly responsible function in a representative system of government. Deepest traditions of social contract theory and historic notions of popular sovereignty are involved, and these were eloquently expressed in Article III § 2 of Montana’s 1889 declaration of rights. It said that “the people of the state have the sole and exclusive right . . . to alter and abolish their constitution and form of government, whenever they may deem it necessary to their safety and happiness” subject to conformity with the United States Constitution and, obviously, with the rules of change decreed in Article XIX for constitutional

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\(^1\)The term is suggested by H. HART, THE CONCEPT OF LAW 93 (1963) who uses it for “‘secondary’” rules (rules about rules) required to overcome static qualities in the “‘primary’” rules (rules about how people behave). Rules governing processes for constitutional change would be a special form of secondary rules.
revision. Article II § 2 of the 1972 constitution carries forward the concept in almost identical language.

The earliest utterances of the Montana supreme court on constitutional revision in the 1890s recognized the distinctive function involved, and the distinctive nature of the processes to be observed. In 1894 and again in 1899 a unanimous court rejected arguments that rules of statutory construction should limit Article XIX; the court said that legislators proposing changes in 'organic law' were "mere machinists operating intermediate machinery" who could not alter "the single mode of proceeding which the people have directly prescribed." 2

The earliest state constitutions were difficult to revise, but nineteenth century experience with over-rigid constitutional texts led quite generally to relaxation of the rules for constitutional revision. When the Montana constitution of 1889 was drafted, its arrangements for proposal of constitutional change by extraordinary legislative majorities and ratification of such proposals by simple majority of voters were close to the norm. In one respect the Montana constitution was more difficult to revise than many of its contemporaries: no more than three amendments might be proposed for ratification at one time. 3

With a few early nineteenth century exceptions, the executive had no formal role in the proposal or adoption of constitutional changes. By 1910 the leading authority on state constitutional revision could say "the doctrine is well-established that executive approval is not required for the legislative proposal of constitutional amendments." 4 That rule had been clear for the national Constitution since 1798 when the United States Supreme Court held that the Eleventh Amendment had been properly ratified without submission to the president. 5

Judicial intervention in the processes of state constitutional revision developed rather suddenly in the last decades of the nineteenth century.

2 State ex rel. Woods v. Tooker, 15 Mont. 8, 37 P. 840 (1894) invalidated the first proposed amendment to the constitution after a favorable vote on ratification; at 842 the court said "we seem to be in a somewhat different field than that suggested by relators' counsel as to the construction of statutes." Durfee v. Harper, 22 Mont. 354, 56 P. 582 (1899) held another proposed amendment to have been improperly proposed by the legislature; the court said at 585 that while statutes derive their force from enactment by legislators who are "supreme in the exercise of a constitutional lawmaking power," constitutional revision "obtains life [only] by the direct power of the people." 6

W. Dodd, The Revision and Amendment of State Constitutions 134-136 (1910) [hereinafter cited as Dodd], classifies the state constitution of the time according to relative difficulty of amendment. He may have underestimated the restrictive effect of the Montana three-amendment limitation; see Waldron, 'Constitutional Issues of 1968,' Montana Public Affairs Report No. 4 (October 1968), Bureau of Government Research, University of Montana, suggesting that the limitation was qualitative as well as quantitative; three proposals rarely survived the bicameral hurdles and those that did tended to be non-controversial if not trivial. This may have been a factor in the ratification rate of 68 per cent for 57 amendments voted upon from 1894 to 1972. 7

Dodd, supra note 3 at 150.151.

W. H. Huginsworth, Virginia, 3 U.S. (3 Dall.) 378 (1798).
CONSTITUTIONAL REVISION

There appears to have been one case prior to 1880 in which a state court held a constitutional amendment to have been improperly adopted, and "up to 1890 probably not more than twenty such cases had come before the courts." The propriety of such judicial intervention was not uncontested at the time, and a literate but legally unsophisticated reader of the Montana constitution might wonder, if the people have "sole and exclusive right" to change their constitution with legislative assistance, how the state's courts got into the act at all. They did, to nullify three of the five amendments proposed during the first decade of statehood. Such was the trend of the times. By 1910 it was "the settled rule that, in the absence of specific and definite constitutional provisions which vest the final decision in some other officer or department, the judicial authority of the state extends over every step in the amending process." This assumption of authority by the courts reflected the sweep of judicial review in the state courts during the last half of the nineteenth century. It does not appear that the language of Article III § 2 ever was pleaded to exclude Montana courts from the process of constitutional revision, although its language might seem to warrant such a plea of exception to the "settled rule" just quoted.

In any event the Montana supreme court, from its earliest nullification decisions, has been involved more than a dozen times in the process of revising the state constitution. The constitution of 1972 bears the marks of this intervention in several explicit provisions that repudiate some of the court's decisions about change of the 1889 charter. This essay examines the performance of the modern court in this intervention, concluding that it has been notably "activist" in its willingness to become involved in the processes of constitutional revision, and notably "conservative" in its view of the power of the people and their constituted representatives to change basic constitutional rules. Abandoning the wisdom of the early court on such matters, the modern justices have achieved this stance by failure or refusal to respect fundamental differences in function and process that distinguish constitutional revision from ordinary legislative processes.

The 1972 constitution is notably easier to amend than the predecessor, and its liberalized "rules of change" doubtless contributed to Time

*Dodd, supra note 3 at 211-212 n. 157.
†Id. at 211.
§Constitutional revision is easier under the 1972 constitution than the 1889 constitution in the following respects:

(1) popular initiative of constitutional amendments (art. XIV, § 9) and for a constitutional convention (art. XIV, § 2) where the 1889 constitution required special legislative majorities to initiate either.

(2) popular vote every 20 years whether to hold a constitutional convention (art. XIV, § 3).

(3) no limitation on the number of amendments that can be submitted and considered for adoption at one time.

(4) ratification of proposals from a constitutional convention by a majority of electors voting on general (art. XIV, § 7) rather than "at the election."
magazine’s description of it as “populist.” But that characterization was singularly inept for the judicial structure that was carried forward virtually unchanged into the new constitution—a judiciary that will sometimes review application and observance of the new rules for constitutional revision. The new constitution seeks to close some of the doors to judicial intervention in constitutional revision that the Montana supreme court found or fabricated under the 1889 constitution. Yet the threshold for judicial intervention in constitutional revision remains notably wide so long as two lively exercises of the modern court stand undisturbed:

1) In leading cases in 1960 and 1972, the court held that rules for constitutional revision are limited by rules for the legislative process, if legislative rules are not expressly excluded from application to constitutional change. This rule has not been repudiated by terms of the new constitution or by the sitting court, all of whose members concurred in the 1972 decision; patently the rule overhangs interpretation of Article XIV in the new constitution.

2) The incumbent court wielded its power of contempt against the lawyer-president of the 1972 convention when he felt his position required him to criticize the court’s application of the rule just mentioned to activities of elected convention delegates. The court has given no indication that it may not again employ this fearsome and readily-abused contempt power against any lawyer in public office who dares publicly to criticize the court for the way it exercises its judicial powers. The new constitution continues the historic immunity of legislators “for any speech or debate in the legislature” (1972 Constitution, Article V § 8) but the protection is limited to utterance in legislative chambers and there is no comparable protection for convention delegates.

Some terms must be defined. As used in this essay, “activism” or

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(5) delegates to a convention need not convene within three months after their election. This will allow more time for preparation by elected delegates before they formally convene.

(6) ratification election after proposal of changes by a convention need not occur within six months as required by 1889 constitution.

(7) two-thirds of entire legislative membership “whether one or more bodies” can propose amendments (art. XIV, § 8) or submit the question whether to call a convention (art. XIV, § 1). The 1889 constitution required two-thirds of the elected members of each house to propose such actions.

*TIME, April 10, 1972 at 18.

**Compare MONT. CONST. art. VIII (1889) and MONT. CONST. art. VII (1972). Subsequent references are to the 1889 constitution unless the 1972 constitution is expressly indicated. See Sullivan, “The Judiciary,” in Montana’s Proposed Constitution of 1972, MONTANA PUBLIC AFFAIRS REPORT No. 11, 9-10 (April 1972), Bureau of Government Research, University of Montana.

“restraint” are terms that characterize a court’s approach to decision of a case. One or more of several specific contexts appear in the Montana cases:

1) jurisdictional: the supreme court citation of constitutional convention president Graybill for possible contempt was an egregious court-initiated instance of judicial activism in the jurisdictional sense.

2) judicial review: reversal of the not unreasonable judgment of the legislature or convention as constituted agencies for revision. The 1960 Livingstone case is the most significant instance.

3) doctrinal innovation: search for a ground of decision different from conventional approaches. The Kvaalen decision limiting post-adjournment expenditures of convention delegates on grounds found in legislative Article V rather than amending Article XIX or in mere statutory interpretation is a provocative instance.

“Conservative” and “liberal” are terms employed to characterize the nature of the judicial decision, in relation to the scope allowed agencies of constitutional revision to exercise that function. A “conservative” decision limits the scope or freedom to revise by finding limitations beyond those expressly stated in the rules of revision. The “presumption” lies against the validity of the method or activity employed to revise the constitution and the net effect is to preserve the constitutional status quo. By contrast “liberal” interpretation presumes the validity of revision activity by legislator, delegate or voters; it restricts the revision activity only when some clearly relevant rule of change is violated beyond reasonable doubt. The “presumption” favors validity of the challenged revision activity and the opportunity for constitutional change is widened. Our use of the terms “conservative” and “liberal” is not far removed from the notions of “strict” or “literal” construction versus “liberal” construction of statutes and constitutional provisions used by Dodd in the leading study of state constitutional revision.12

How should a court interpret the rules for constitutional revision? The view of this essay is that the notion of “strict” versus “liberal” construction leads nowhere or anywhere, depending whether the court emphasizes one element or another of a rule, one rule or another among applicable rules, one guide or another to interpretation.13 The point may

12DODD, supra note 3 at 216-217 identified the “‘strict view which subjects the amending process to control by ordinary legislation, and which if adhered to would greatly restrict the legislative power of proposing amendments.’”

13Id. at 217: “‘[T]he judicial construction of the amending clause has usually been liberal, and has resolved doubts in favor of the validity of amendments approved by the people.’ But ‘discussing the strict or liberal interpretation of the amending clause, it should perhaps be said that the same court may at one time be liberal and at another strict. The function of passing upon the validity of laws or proposed amendments is primarily political, not judicial, and where the opinion of a court happens to be opposed to a proposal it is usually not difficult to find some reason for declaring such proposal invalid.’”
be illustrated by the Montana court’s choice among available constitutional guides to interpretation in the constitutional revision cases. The 1889 constitution afforded a “liberal” principle and a “conservative” principle by which to interpret the rules of constitutional change set forth in Article XIX.

Article III § 2 affirmed the “sole and exclusive right” of the people to “alter and abolish their constitution and form of government” within the limitations imposed by the United States constitution and, of course, the rules of change in Article XIX. This expansive language explicitly addressed the problem of constitutional change and seemed to support both judicial “restraint” and judicial “liberalism” in revision cases. The Montana court cited this provision as a guide in two early cases that developed notions of “substantial” rather than “literal” compliance with procedural requirements of Article XIX. But that doctrine was repudiated in 1934 and Article III, § 2 has never been cited by the modern supreme court as having relevance to the constitutional revision process.

Article III § 29 said provisions of the constitution were “mandatory and prohibitory” unless otherwise expressly declared. This oracular conceptual mare’s nest was classical support for “activist” judicial intervention and, conceivably, for “conservative” decision. The Montana court frequently invoked it in those modes, and made it one of the constitutional pegs for the 1960 decision that enjoined three proposed constitutional amendments from the ratification ballot.

Seven times from 1894 to 1934 the Montana supreme court accepted requests to test the proposal and ratification of constitutional amendments against the requirements of Article XIX § 9 that regulated constitutional amendment. Five of the cases involved claims that there had been procedural errors in legislative proposal of the amendments, or in official advertising of the proposals prior to the ratification election. Three of these five claims were sustained:14 the first and second, in the 1890s, nullified amendments that had been ratified, and the last in 1934 enjoined submission of a proposed amendment to the voters. The third and fourth cases sustained amendments that had been ratified, finding that compliance with procedural requirements had been sufficiently “substantial” to sustain their validity.15 Three of the seven cases asked the court, after ratification of an amendment, to find that it should have been submitted as two or more proposals. This appeal was a somewhat tenuous argument that Article XIX, requiring separate numbering and

14 State ex rel. Woods v. Tockeř, supra note 2 (insufficient publication of proposed amendment before ratification election); Durfee v. Harper, supra note 2 (insufficient entry of proposed amendment in legislative journals); Tipton v. Mitchell, 97 Mont. 420, 355 P.2d 110 (1934) (insufficient entry of proposed amendment in legislative journals).

15 State ex rel. Hay v. Alderson, 49 Mont. 387, 142 P. 210 (1914) (publication of proposed amendment before ratification election); Martien v. Porter, 68 Mont. 450, 219 P. 817 (1923) (adequacy of entry of proposed amendment in legislative journals).
vote when "more amendments than one" were submitted in a single election, also required separate submission of separable propositions. The court refused to second-guess the legislature on allowable scope of a proposed amendment; in each instance it found sufficient unity of purpose to sustain the proposal.16

Among these earlier decisions the approach of the court was "activist" by tests of this essay in developing the "liberal" notion that "substantial compliance" with constitutional requirements of procedure would suffice. This doctrinal development was expressly repudiated in the last case of the earlier series, in 1934.17 In general the earlier cases seem unexceptionable and not notably ideological by any of the norms employed in this essay. A quarter-century elapsed before another case challenged the constitutional revision process in 1960. This action introduced the modern court to review of constitutional revision processes and set the scene for five court actions involving the constitutional convention of 1972 and ratification of its product.

2. The Court Limits Article XIX by Article V: Livingstone (1960)

Prior to 1960 the Montana supreme court had interpreted provisions of Article XIX § 9 for proposal and ratification of constitutional amendments rigorously enough to invalidate three of the seven challenged attempts at amendment. It had looked beyond the confines of the rules of change in Article XIX only to recognize one or the other of the two guides to constitutional interpretation that appeared in Article III, the declaration of rights.

In 1960 the supreme court enjoined three proposed amendments from the general election ballot, holding that legislative proposals of constitutional amendments must go to the governor on their way to the people.18 It reached this holding despite: (1) silence of the amendment article about executive involvement; (2) explicit legislative judgment to the contrary buttressed by opinion of the attorney general; and (3) overwhelming weight of constitutional theory and practice to the contrary elsewhere for more than a century. The court held that language of a section in legislative Article V must govern the process of constitutional revision in Article XIX because proposals of constitutional amendments were not expressly exempted by the legislative article, from the scope of its requirements for legislative process. To reach this hold-

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16State ex rel. Teague v. Silver Bow Commissioners, 34 Mont. 426, 87 P. 450 (1906); State ex rel. Hay v. Alderson, supra note 15; State ex rel. Corry v. Cooney, 70 Mont. 355, 225 P. 1007 (1924).
17The "substantial compliance" notion was enunciated in State ex rel. Hay v. Alderson, supra note 15 at 216; the majority in Martien v. Porter, supra note 15 at 822 relied in part on doctrine; Tipton v. Mitchell, supra note 14 at 114 unanimously repudiated the doctrine.
18State ex rel. Livingstone v. Murray, supra note 11.
ing it had to ignore equally applicable language in the legislative article whose recognition would have denied the entire basis of its holding.

This remarkable decision of four members of the court in Livingstone established the conceptual framework for judicial review of activities of the constitutional convention of 1972. The two senior incumbent justices, who happen also to have dissented from the 1972 holding that the new constitution had been ratified, were members of the four-member majority that decided Livingstone in 1960. That litigation is best approached on the doctrinal ground the court itself chose for decision. This brief paragraph was the fulcrum of the decision:

[1] Some contention was made that certain articles of the Constitution [presumably Article XIX §§ 8 and 9] were in some way separate and distinct from the rest of the Constitution. [2] However, the Constitution, like a statute, must be considered as a whole. [3] The division of our Constitution into sections, articles and chapters is a mere matter of convenience for reference purposes and is of no significance in applying rules of construction and interpretation.8

The first “contention” sentence requires exploration in detail, but the second and third sentences can be more briefly addressed. The second sentence was an ambiguous maxim from the judicial grab-bag to introduce the third sentence, a dictum that had appeared in some Montana tax cases construing the meaning of sections within Article XII on “Revenue and Taxation” in relation to each other and the single subject of taxation. To apply a proposition from that narrow context to one involving relationships between separate articles on legislation and constitutional revision was, to say the least, creative. How the judicial acorn from the tax cases grew into Livingstone is quite a story.

History and usage, however uncertain their message, cannot be ignored. In Montana, at least since 1897, the legislature had in fact submitted bills proposing constitutional amendments to the governor for approval or, presumably, for veto. This practice may have been a cautious deference to a court that had nullified early attempts at amendment on some showing of procedural irregularity. Article XIX made no reference to such submission of proposed amendments to the governor, but two sections of the legislative article just might be construed to include proposals of constitutional amendments because they had not expressly excluded such proposals. The first was Article V, § 40 that eventually furnished a constitutional peg for Livingstone. It said:

8Id. at 555-556, citing State ex rel. Hinz v. Moody, 71 Mont. 473, 230 P. 575 (1924) and Cruse v. Fischl, 55 Mont. 258, 175 P. 878 (1918). The third sentence was from Hilger v. Moore, 56 Mont. 146, 182 P. 477, 480 (1919) which seems to have cited T. Cooley, CONSTITUTIONAL LIMITATIONS 91 (no edition indicated) as the source. The Hinz opinion repeated the language about “the division of our Constitution into chapters and sections” as a “mere matter of convenience” in quotations from Hilger and cites T. Cooley, CONSTITUTIONAL LIMITATIONS (7th edition) at 91. This edition is not available to the author. Of course there were no “chapters” in the 1889 constitution; but so great was the authority of Cooley, it would seem, that the quotation was persuasive whether it hit facts or not. Thus the language about “chapters” made its way perhaps from Cooley through Hilger to Hinz to Livingstone.
Every order, resolution or vote, in which the concurrence of both houses may be necessary, except on the question of adjournment, or relating solely to the transaction of the business of the two houses, shall be presented to the governor, and before it shall take effect be approved by him, or, being disapproved, be repassed by two-thirds of both houses, as prescribed in the case of a bill.

The language is very close to that of Article I, § 7 (3) of the United States Constitution of 1789, differing primarily by addition in Montana of the second exception about business of the two houses. Virtually the same language also appeared in the Pennsylvania constitution of 1873 (Article III, § 26), and in those of Alabama (Article V, § 125), Maine (Article IV, Pt. 3 § 2) and Rhode Island (Amended Article XV).

In 1798 the United States Supreme Court rejected a contention that the Eleventh Amendment to the United States Constitution was a nullity because Congress has not sent it to the president before submission to the states, under terms of Article I, § 7 respecting “every order, resolution or vote.” Justice Chase abruptly dismissed the contention:

There can, surely, be no necessity to answer that argument. The negative of the president applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the constitution.

A century later the Pennsylvania supreme court took the same position on a comparable claim that its version of the requirement had been violated by failure to submit a proposed amendment to the governor. The Greist decision reiterated what seemed to be universal acceptance of the Hollingsworth rationale—that proposal and ratification of amendments was not legislation but something else, to which strictures on the legislative process simply did not apply. Amendment provisions established “a system entirely complete in itself” that is distinct and separate” from lawmaking. The Pennsylvania governor had no role in the amendment process.

Article XIX of the Montana constitution required no particular form for proposal of amendments; the legislature employed bills for the purpose. The executive veto provision of Article VII, § 12 started with the following statement: “Every bill passed by the legislative assembly shall, before it becomes a law, be presented to the governor. If he approve, he shall sign it. . . .” Veto provisions of the United States Constitution (Article I. § 7 (2)) and of 42 other state constitutions start with identical or comparable language about “every bill passed.” Seventeen of these veto provisions appear in legislative articles, and 27 including Montana in the executive article. Proposals of constitutional amendments are not expressly excepted from terms of these veto articles; yet nowhere, apparently, have proposals of constitutional amendments been included among “every bill” subject to veto. Hollingsworth in 1798 may have established that understanding, which certainly comported...

Hollingsworth v. Virginia, supra note 5 at 382.

with common assumptions about the special importance and distinctive nature of the constitutional revision process.

In 1906 the first section of Montana's legislative Article V was amended to provide for popular initiative and voter-initiated referendum as "direct legislation." This sentence was included: "The veto power of the governor shall not extend to measures referred to the people by the legislative assembly or by initiative [or] referendum petitions." The "or" preceding "initiative" clearly distinguished "measures" originating in the legislature and referred to the people, from either initiative petitions or referendum petitions that followed the first "or." Two kinds of "measures" originating in the legislature and referred to the people were well enough known in 1906: proposals of constitutional amendments, and statutes enacted by the legislature to become effective only upon approval by the people—sometimes called "legislative" referenda. Both of these kinds of "measures" along with both modes of direct legislation were exempted from the governor's veto by language that seemed "clear, direct and unambiguous, in the English language"—to borrow the Livingstone court's description of § 40 in the same article.

So here is how things seemed to stand, from 1906: if constitutional provisions outside Article XIX regulated its process for proposal of amendments, then the original language of Article V § 40 regarding "every order, resolution, or vote" might have subjected proposed amendments to veto; but Article V § 1 as amended now exempted them from veto; if the two provisions of Article V were in conflict the provision later adopted would prevail on the presumption that the people knew what they were doing when they adopted it.

Relationships within Article V might be stated another way: exemption of certain "measures" from veto in § 1 must exempt proposals of

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The second "or" between "initiative" and "referendum" obviously belonged there since no such thing as an "initiative referendum petition" existed. But the state lived without the word for more than 60 years and the fact that the last portion of the sentence was literal nonsense may not have affected the Livingstone case since the majority chose to ignore existence, or at least relevance, of the entire sentence. How the word disappeared and reappeared has a curious history. The typewritten engrossed copy of H. B. 286, 1905 Legislative Assembly that proposed the amendment contained this conjunction of letters: [no spaces] "by Initiative or Referendum . . ." The word "Initiative" was squeezed in between "by" and "or" over an erasure. But the handwritten enrolled version of the bill omitted the "or" after "Initiative" and so it went to the governor for signature and subsequently appeared in the Revised Codes of 1907, 1921, 1935 and 1947 through the most recent pocket part of 1973. The second "or" did not appear in official pamphlet reprints of the constitution issued in the 1940s and 1950s, in the author's possession. But in 1967 the second "or" finally appeared in an official pamphlet edition of the constitution printed by Allen Smith Company, publishers of the Revised Codes of Montana. In a letter to the author October 29, 1973, President Robert C. Lewis explained: "Apparently, I believed at the time that the omission of the word was a typographical error on our page proofs. Our regular procedure for making corrections in the text of laws printed in the Montana Codes is to bracket any words inserted or changed and to add an explanatory compiler's note. Obviously, the regular procedure was not followed in this case."

State ex rel. Livingstone v. Murray, supra note 11 at 556.
constitutional revision from veto fully as much as either §40 or Article VII §12 would subject them to veto. The matter can be put still another way: Article V §1 exempted a special and limited class of “measures referred by the legislature to the people” from veto. The particularity of that provision should prevail against the generality of Article V §40 (“every order, resolution or vote”) or of Article VII §2 (“every bill passed”) if the mode of construction was to include proposals of constitutional amendments within the reach of any of them. We will note the curious treatment of the exception clause in Article V, §1 by all parties and the court in Livingstone.

In 1943 Governor Ford addressed the problem of Article V when he wanted to veto proposal of a constitutional amendment that had been submitted to him. “I was without volition in the matter,” he said, “in the face of the words contained in Section 1 of Article V of the constitution [quoting the provision]... There is no provision requiring the approval of a measure such as Senate Bill No. 199 [proposing an amendment], and I assume that since he is prohibited from vetoing the bill the approval of the governor is not necessary.”24 The proposal was submitted to vote without his signature and the people “vetoed” it for him by refusing ratification in November, 1944. So the issue of gubernatorial signature was mooted for the time.

Governor Ford’s view seems to have been forgotten by 1959, but in that year similar reasoning moved the legislature to submit three proposed amendments directly to the people without first sending them to the governor. Legislative leaders feared that the governor might veto one of the proposed amendments that would remove him from an ex officio position on reorganized boards for administration of public schools and higher education. The house speaker asked the attorney general for an opinion on procedure, and the response was unequivocal:

1. A constitutional amendment proposed by the legislature need not be submitted to the governor for approval.
2. Article XIX, section 9 of the Montana Constitution is complete by itself and details the steps to be taken to amend the constitution. No other requirement can be imposed.

The attorney general reported that “legal writers and cases are in agreement... I find no authority to the contrary... not a single judicial decision in opposition to the authorities cited. The rule appears to be universal.”25

Three proposed amendments were filed with the secretary of state without passing through the governor’s office. The legislative course

24Ford’s letter of March 16, 1943, to the secretary of state containing the statement excerpted above is filed with the official approved copy of S. B. 199, 1943 Legislative Assembly in vaults of the secretary of state.
was deliberate, based upon a judgment supported by reasonable interpretation of the constitution (particularly Article V § 1) and supported by the unequivocal opinion of the attorney general. The circumstances were a classic illustration why the governor should have no role in proposal of constitutional amendments under the theory of “distribution of powers” mandated by Article IV of the Montana constitution. The legislature’s approach would put Montana in line with practice elsewhere and was fully consistent with notions of the special revision function involved.

Concerned taxpayer Livingstone promptly asked the Montana supreme court to enjoin publication of the proposed amendments, claiming violation of four provisions of the constitution: the amendment to divide the state board of education into two boards and to remove the governor from both would violate the requirements of unity of subject suggested by Article XIX, § 9, and of clarity of title required for legislation by Article V, § 23. Failure to submit the amendments to the governor breached the “every order, resolution or vote” requirement of Article V § 40 and the “every bill” requirement of Article VII § 12. The entire language of the original complaint invoking constitutional provisions other than Article XIX follows:

(4) the Act violates Section 23 of Article V of the Constitution of the State of Montana in that it contains more than one subject, and the same are not clearly expressed in its title.

(5) the Act violates Section 12 of Article VII and Section 40 of Article V of the Constitution of the State of Montana in that it was never signed or otherwise approved by the Governor of the State of Montana.

The 28-page brief supporting Livingstone’s complaint evidently thought so little of complaint (5) that the matter was not mentioned. The brief focused exclusively on complaint (4) that the proposed education amendment was outside constitutional boundaries of legislative discretion about scope of proposed amendments.

At the ex parte hearing that granted a temporary injunction against publication of the amendments, the court itself expressed interest in complaint (5) about omission of the governor from the proposal process. The justices requested additional argument on that point.

In a telephone conversation with the author August 29, 1973, the 1959 house speaker, John J. MacDonald of Jordan, Montana, recalled legislative reliance upon MONT. CONST. art. V. § 1 as authority to abandon prior legislative practice and thereby avoid a possible veto of the proposed amendment. The attorney general cited Commonwealth v. Greist, supra note 21 as a leading case on exception of constitutional amendments from provisions comparable to MONT. CONST. art. V, § 40. The publication of the proposed amendment in Laws of Montana 1959, ch. 191 referred at 401 to the attorney general’s opinion to explain absence of an approval date by the governor; see also ch. 193 and 194.

Relator’s Complaint, 4-5, filed June 6, 1960 in No. 10165, The Supreme Court of Montana. The court rearranged and restated these contentions in State ex rel. Livingstone v. Murray, supra note 11 at 553-554.

This appears from statements in Supplemental Memorandum of the Relator, June 15, 1960, Supreme Court of Montana No. 10165. The record suggests that relator’s counsel still did not fully credit the court’s interest in omission of the governor from
Petitioner's supplemental memorandum asserted that non-involvement of the governor in constitutional revision in "the other 49 states" was irrelevant because "comparison only shows that [their constitutions] are substantially different, on this particular point." The Pennsylvania Greist case construing language virtually identical to Article V § 40 of the Montana constitution was dismissed with the ambiguous assertion that the Pennsylvania provision "appears to us to vary in substantial degree from the way in which Montana's constitution was framed." The executive article of the Montana constitution did not expressly exclude bills proposing amendments from veto, so such proposals must be subject to veto. If the framers had intended to except proposed amendments they could easily have said so. The memorandum acknowledged that Article V § 1 exempted certain "measures" from veto, but asserted: "This is a bill contemplating an amendment to the constitution and does not fall into either the category of an initiative or a referendum." While true enough, this statement was a non sequitur and appeared to ask the court to exclude proposals of constitutional amendments from the category of "measures referred to the people by the legislative assembly." The memorandum pursued the matter no further but conceivably it accomplished the purpose suggested; the court majority simply did not address the problem of reconciling their holding with this exception clause of Article V § 1.

A deputy attorney general representing the secretary of state moved to quash the temporary injunction. In a 20-page brief supporting that motion, thirteen pages addressed what petitioner had identified as the "basic issue" of allegedly diverse subject matter in the amendment. Three pages of the brief reiterated the position the attorney general had taken in his opinion to the legislative leaders: the governor simply was not involved in the amendment process, anywhere, and there was no authority or persuasion for the contrary, anywhere. Language of Montana's Article V § 40 was like the federal constitutional provision Hollingsworth construed in 1798, and the Pennsylvania constitutional provision construed by Greist in 1900.

The attorney general's brief offered an argument recently persuasive to the South Carolina supreme court in circumstances and with constitutional provisions comparable to those of Montana. The South Carolina legislature also had been submitting amendment proposals to the governor. Two-thirds of the "members elected" in each house must pro-

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proposal of the amendment. Almost half of the 14-page "supplemental memorandum" was a newly-introduced and somewhat strained argument that the bill proposing the amendment had improperly incorporated the state's election laws "by reference" when it decreed that the ratification vote would be conducted and counted "in manner provided by law for general elections." Clements v. Hall, 23 Ariz. 2, 201 P. 87 (1921) was extensively quoted to support this proposition.

Supplemental Memorandum, supra note 28 at 3 and 5; emphasis added.

Id. at 13. Absence of the second "or" between "initiative" and "referendum" evidently did not mislead relator's counsel as to the distinction between them.
pose constitutional amendments. If the governor vetoed a bill proposing an amendment, only "two-thirds of the members present" (that is one more than half of the number required for initial proposal) could over-ride the veto. Why then submit the proposal to the governor at all? 31

Some curious omissions from the paper pleadings in Livingstone invite comment. Counsel for neither side presented its most telling argument. Petitioner's brief failed to mention the almost unbroken usage that had submitted legislative proposals of constitutional amendments to the governor. 32 Defendant's response omitted any mention of the provision in Article V § 1 that seemed to except proposals of constitutional amendments from gubernatorial veto. Moreover, counsel for each side committed most energy and space to argument of propositions that the four-member court majority completely ignored in its opinion. But the majority did note legislative usage as support for its holding while the solitary concurring justice used language of Article V § 1 to repudiate the majority opinion. So both matters may have been discussed at oral argument in June, 1960.

All members of the court agreed to make the injunction permanent against submission of the amendments to popular vote. Justice Bottomly, writing for himself, Chief Justice James Harrison and Justices Adair and Castles, followed the lead opened at the ex parte hearing and held that legislative failure to submit the proposals to the governor was "a fatal defect" furnishing the sole ground necessary to grant the injunction.

Bottomly's decisional "fulcrum" was quoted in full and discussed above. 33 Its application led to Article V § 40 and to the conclusion that constitutional amendments must be included among "every order, resolution or vote" to be submitted to the governor. That language was "clear, certain, direct, and unambiguous, and . . . speaks for itself; it needs no interpretation." 34 By simply ignoring the existence of Article V § 1 (exempting "measures" from veto, as discussed above) the majority found "no conflict [of Article V § 40] with any other provision of our State Constitution." 35 They could find no "exception to the

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31Brief for Defendant in Support of Motion to Quash, June 16, 1960, No. 10165, Supreme Court of Montana, citing Kalber v. Redfearn, 215 S.C. 224, 54 S.E.2d 791, 796 (1949) that, after years of legislative practice submitting proposals of constitutional amendments to the governor, such submission was not required, in part for the reason indicated. Emphasis added.

32Three hours in vaults of the secretary of state sufficed to establish the continuity of that practice from 1897; earlier proposals were not readily located. Pleading this substantial record could, of course, have brought to the surface Governor Ford's 1943 exception and its support for the respondent's position derived from Article V, § 1. Neither party nor the court in Livingstone appear to have been aware of the Ford position indicated supra note 24.

33See note 19 supra.

34State ex rel. Livingstone v. Murray, supra note 11 at 556.
mandatory provisions of section 40, of Article V, and Section 29, of Article III, anywhere in the Constitution."\(^{38}\)

Bottomly found that the conjunction of Article V § 40 ("every order, resolution or vote") and Article III § 29 ("mandatory and prohibitory") was "unique among state constitutions. We find no other state constitutions which contain the same provisions as ours." Therefore, he said, decisions from other state and federal jurisdictions "are not in point here."\(^{37}\) That kind of logic spared Bottomly a lot of explaining and it was more ingenious than ingenuous. If constitutional amendment proposals were to be subjected to governor's veto, why was Article V § 40 chosen, with its language about "every order, resolution or vote" rather than Article VII § 12 with its "every bill" requirement? The latter requirement appears in almost identical form in the national constitution and in more than forty state constitutions, and nowhere had it been construed to cover constitutional amendment proposals. But the language of Article V § 40 appeared elsewhere only in the national constitution and in four other state constitutions. None of those other constitutions happened also to be among the several that, like Montana, recited the "mandatory and prohibitory" language of Article III § 29.\(^{38}\)

Resort to this unique conjunction between Article V § 40 and Article III § 29 spared the majority the need to explain that none of the other states with a provision like the first applied it to proposals of constitutional amendments. It also spared explanation that none of the other states with a provision like the latter understood it to require that "every bill" included amendment proposals among matters submitted to the governor for veto.

The majority opinion said that Montana's constitutional founders had not excepted proposed amendments from the sweep of Article V § 40 because "such an act requires a vote in each House and the concurrence of both houses."\(^{39}\) If this amounted to more than iteration, it raised as many questions as it settled, as do most guesses about "intent of the framers." Did the majority assume that the Montana founders were ignorant of the ancient and unchallenged teaching about the language

\(^{36}\)Id.

\(^{37}\)Id. at 557; Bottomly's ambiguous statement is construed to relate to this conjunction of sections; read more broadly it would have been a vacuous truism.

\(^{38}\)The counterpart of MONT. CONST. art. V § 40 appeared in U.S. CONST. art. I, § 7 (3); ALA. CONST. art. V, § 125; ME. CONST. art. IV, Pt. 3, § 2; PA. CONST. art. III, § 26 (to 1968); R. I. CONST. amend. art. XV (1909); ARIZ. CONST. art. IV, Pt. 2, § 12. The counterpart of MONT. CONST. art. III, § 29 seems to have originated in CAL. CONST. art. I, § 22 (1879), and appeared also in ARIZ. CONST. art. II, § 22; N.D. CONST. art. I, § 21; S. C. CONST. art. I, § 29; UTAH CONST. art. I, § 26; WASH. CONST. art. I, § 29. G. & C. MERRIAM CO., WEBSTER'S NEW COLLEGIATE DICTIONARY (1949): "Oracular: 2. resembling an oracle, as in solemnity, wisdom, obscurity, ambiguity, dogmatism."

\(^{39}\)State ex rel. Livingston v. Murray, supra note 11 at 557, emphasis in original.
they had borrowed for Article V § 40? If the founders meant that section to include constitutional amendment proposals, why did they not express that intent, in face of the universally accepted authority of Hollingsworth to the contrary? Montana's founders had not borrowed the language without heed, because they added an exception for matters "relating solely to the transaction of the business of the two houses" that appears in none of the comparable provisions in other constitutions.

Bottomly ignored Hollingsworth from the eighteenth century. True, that case construed the virtually identical provision in the national constitution, which is said to require different principles of construction from state constitutions. But in view of the awesome 160-year authority of Hollingsworth on virtually identical language, should not that distinction have been made, to exclude persuasion from the federal case? Bottomly did note the contrary persuasion of Greist in Pennsylvania in 1900 construing language virtually identical to Montana's § 40. Yet he dismissed Greist with the statement that no counterpart to either Article V § 40 or Article III § 29 appeared in the Pennsylvania constitution. What was Greist supposed to have been about?

Almost as an afterthought the majority opinion in Livingstone mentioned "another matter" that "for almost three quarters of a century" amendment proposals had been submitted to the governor. While this usage was "not determinative nor conclusive on this court" it suggested a common "understanding and interpretation of the constitutional requirements and of the procedure required." No matter that Governor Ford had doubts in 1943 and that the current legislature and attorney general had repudiated that understanding.

Justice Angstman concurred in the holding of the majority because he believed, as Livingstone counsel had pleaded, that dual subject matter of the proposed amendment violated requirements of Article XIX § 9 for separate proposal of different amendments. But Angstman frontally rejected the basis for the majority opinion. He said that Article XIX § 9 was a "special provision" relating to amendment process, "not controlled by general provisions in the constitution and particularly not by section 40 of Article V . . . . Special provisions control over general ones . . . . Here the special provision dealing with amendments to the Constitution was followed and that was sufficient [to meet procedural requirements]." Moreover, the language of Article V § 1 probably excluded proposals of amendments from veto.

"Bottomly's dismissal of the Greist decision does not scan on either factual or logical grounds. Language of Pa. Const. art. III, § 26, virtually identical in relevant portions to Mont. Const. art. V, § 40, was extant in 1960; it did disappear from the Pennsylvania constitution in 1968 but it was there when Bottomly said it was not. Even in the provision had disappeared by 1960, that fact would not have diminished the persuasiveness of the Greist decision as to its meaning when it was in the constitution.

"State ex rel. Livingstone v. Murray, supra note 11 at 557.

"Id. at 558. "While strictly speaking a proposed constitutional amendment may not
On its facts all Livingstone said was that the legislature must continue to send proposals of constitutional amendments to the governor. Article VI § 10 of the 1972 constitution set this matter right, excepting from veto "bills proposing amendments to the Montana constitution." The new constitution also dropped the troublesome language of Article V § 40 about "every order, resolution or vote" and deleted the oracular caveat of Article III § 29 about "mandatory and prohibitory" intent of constitutional provisions. Both elements of Justice Bottomly's unique conjunction of constitutional manifestations are gone. The constitutional underpinnings of Livingstone might seem to have been destroyed. Before reaching such a conclusion the recent cases on the constitutional convention must be considered. They suggest that in 1974 the constitutional logic of Livingstone might still be alive and well among all sitting members of the Montana supreme court.

3. The Supreme Court and Article XIX, § 8: The Convention and Constitution of 1972

In 1969 and 1970 the legislature and voters of Montana decided to have a constitutional convention, the first since statehood, to draft a new constitution. Article XIX § 8 of the 1888 constitution declared the basic rules for this process and required the 1971 legislature to implement the voters' decision with an enabling act. The provisions of § 8 for election, organization and conduct of a convention and for submission of its product to the voters were skeletal indeed for any particular stage of the complicated process. There was much room and obvious need for interpretation and interpolation by the legislature and by the convention and—it would soon appear—by the court.

But there were comparable provisions in other state constitutions on almost every point and many of these provisions had been explored and variously interpreted by courts of other states. Thus, on any point that might be litigated regarding the revision process, the nature of judicial choice in Montana would be apparent with unusual clarity because the slate for Article XIX, § 8 was clean. Five actions within eighteen months soon gave the court ample opportunity to exercise judicial choice in its writings on that slate.

The 1971 legislature invited the supreme court into the action at the outset. Legislators may have wished to forestall time-consuming litigation that could upset the complex and time-strictured scenario for revision sketched by § 8. As they drafted the enabling act they requested...
and got a declaratory judgment from the court on three questions in February 1971.43

1. Section 8 of Article XIX required election of delegates “at the same places, and in the same districts” as state legislative representatives. The court declared that this required convention delegates to be elected in November 1971 from districts newly created after the 1970 census for 1972 legislative elections. Assuming that the 1971 legislature met its current obligation under Article VI § 2 to reapportion legislative districts according to the 1970 census, then Article XIX § 8 required delegates to be elected from those “same districts.” The conclusion seemed unarguable but it meant that the legislature must complete a reapportionment in time for filing by convention candidates in August 1971.44

2. Article XIX § 8 required delegates to be “elected in the same manner” as members of the house of representatives with qualifications “the same as members of the senate.” Legislators wondered if they might provide nonpartisan nomination and election of convention delegates rather than the partisan nomination and election required by statute for legislative elections. In Nebraska, whose constitution required convention delegates to be “chosen” (rather than “elected”) in the same manner as legislators, a 1919 decision had allowed the legislature to provide for nonpartisan election of constitutional convention delegates. The Nebraska court had reasoned that where only party convention or caucus nomination were known when the Nebraska constitutional requirement was adopted, it should not be construed to have ruled out such subsequent historical developments as the primary nominating elections.45

The Montana court held that § 8 required observance of statutory provisions for partisan nomination and election of representatives as those provisions stood at the time of the convention referendum in 1970. Subsequent election of delegates could not be by nonpartisan processes. Voters in the 1970 convention referendum had “cast their votes on the basis of the then existing election laws for representatives and accordingly, constitutional convention delegates.” Retroactively to change those laws “in midstream” would abridge the rights of those who had voted in the 1970 referendum. The legislature “may not now substantially change the election laws for delegates . . . and accordingly may

42nd Assembly v. Lennon, 156 Mont. 416, 481 P.2d 330 (1971). The Montana court does not give advisory opinions; its discussions of jurisdiction in this declaratory judgment action is passed over here.

4The timing got close; reapportionment legislation that defined legislative districts in which delegate candidates would file was enacted by a second special legislative session, Laws of Montana 1971, 2d Ex. Sess. ch. 8, approved June 29, 1971. The filing deadline for delegate candidates was August 5 for the convention nominating primary September 14, 1971.

not now provide solely for nonpartisan nomination and election of such delegates” as contemplated by the pending legislation.46

So the court chose the more restrictive or “conservative” option. Its argument against change “in midstream” of the revision process was not unpersuasive, but no decisions from other states were cited to support this construction of requirements in § 8. The court’s dismissal of a contrary view in the experience of some other states was more abrupt than persuasively argued. It was “unimpressed” by decisions the other way in Nebraska and two other states, and brushed them aside as “entirely unwarranted” for Montana; they were distinguishable for the “particular state history and their particular constitutional provisions.”47 Montanans who might wonder if the difference between Nebraska’s “chosen” delegates and Montana’s “elected” delegates was a critical constitutional distinction were not enlightened.

3. The court also declared, in response to legislative inquiry, that elected state officials, district judges and incumbent legislators might not serve as delegates. This view did not rest upon interpretation of any explicit provision of Article XIX, § 8, and divergent interpretations of constitutional prohibitions against dual office-holding in other states afforded the court a rather obvious choice of interpretation.

Diverse Montana constitutional provisions prohibited various elected officials from holding another “civil” or “public” office during incumbency.48 The court ruled that a convention delegate would hold such a “civil” or “public” office (treating those terms as synonymous). It followed that officials constitutionally prohibited from dual office might not serve as convention delegates.

Courts in several states, some quite recently, had ruled that convention delegates did not possess “sovereign” powers of “public” office for either or both of two reasons: their office was held under the “people” rather than under the “state [government]”;49 or they had no “power” beyond that of making recommendations to the people.50

42d Assembly v. Lennon, supra note 43 at 335.


5Specific constitutional language varied with the office: MONT. CONST. art. V, § 7 said a legislator might not hold an elective or appointive “civil office under the state” during “the term for which he shall have been elected.” Art. VII, § 4 said none of the seven elective state executive officers could hold any other “public office” during their “term of office” except ex officio on the board of education. Art. VIII, § 35 said a state or district judge could hold no other “public office” while “he remains in the office to which he has been elected or appointed.”

6A decision of the Arkansas supreme court the previous year clearly would have relieved Montana legislators from the precise stricture of MONT. CONST. art. V, § 7 as to office “under the state.” Harvey v. Ridgway, 248 Ark. 35, 450 S.W.2d 281 (1970); see also Frantz v. Autry, 18 Okla. 561, 91 P. 193 (1907); Chenault v. Carter, 332 S.W.2d 623 (Ky. 1960).

Courts in several states also had said that convention delegates lacked the permanency of tenure required to constitute public office because their functions ceased upon adjournment of the convention.\(^5^1\) In 1970 the Arkansas supreme court allowed a state senator to seek election to that state’s impending constitutional convention under constitutional strictures virtually identical to those of Montana (Article V § 7) regulating legislators. But the Arkansas decision had been four-to-three and its majority conceded that “legal precedent does not furnish a sound and clear answer to the precise question presented.”\(^5^2\)

The Montana court turned back to the 1927 *Barney* case,\(^5^3\) a leading Montana exploration of tests to determine public office, and concluded that convention delegates would meet all five of its tests. Clearly the delegate’s office was created by public law, with powers and duties defined by statute or constitution, to be exercised with some independence from superior authority. Application of two other *Barney* tests was conceded to be more debatable, and the court mentioned the existence of persuasive holdings in other jurisdictions that would have exempted Montana convention delegates from the criteria of usual public office. Yet the court concluded that convention delegates would “possess a delegation of a portion of the sovereign power of government” to be exercised for the public benefit; they also would have “some permanency and continuity” in an office that was not merely “temporary or occasional” at least during their service in the convention.\(^5^4\) Convention delegates would meet all of the *Barney* tests, enunciated in a 1927 case about service of a state legislator as auditor for the state railroad commission. Justice Haswell spoke for the unanimous court:

> A delegate to the constitutional convention exercises sovereign powers of a legislative character of the highest order. That the final product of such legislative authority is subject to referendum, renders it no less an exercise of sovereign power. The delegation of unlimited power is not essential to the exercise of sovereign power. To draw a distinction between other state officers and delegates to a constitutional convention, both of whom act as agents of the people exercising sovereign powers in their behalf, is to deny our basic concept of government.\(^5^5\)

This was a revealing passage, even with all of its ambiguous bumble about sovereignty set aside. The court’s refusal to distinguish between other state officers and delegates to a constitutional convention was the core of its approach. Elsewhere than the Montana court, recognition of that precise distinction between agents and processes of statutory

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\(^{51}\) Baker v. Moorhead, *supra* note 45; *Election Supervisors v. Attorney General*, *supra* note 50 at 400 said a delegate was like a “male honeybee” who “performs his creative duty and then ceases to exist as a public functionary”—with appropriate credit to Maeterlinck.

\(^{52}\) Harvey v. Ridgway, *supra* note 49 at 283.


\(^{55}\) *Id.* at 334.
and of constitutional change was a basic concept of government founded
on recognition of deep differences between legislators enacting statutes
and legislators proposing constitutional changes.56

A decade earlier when petitioning counsel in Livingstone had tenta-
vitely floated the surface resemblance between statutory enactment and
constitutional amendment as a kind of pre-trial balloon, the court ma-
majority seized upon that superficial resemblance and fashioned it into a
constitutional principle more dispositive for the case than the profound
differences of process, of function and of theory that distinguish con-
stitutional revision from ordinary legislation. Two members of that
court still sat in 1971 and, although unmentioned, the Livingstone prin-
ciple seems to have blocked the view back to the wisdom of the 1890s
about the distinction.

Legislators had asked the court to think ahead to a somewhat novel
future convention that would meet a year hence in familiar legislative
chambers. Again the court seized upon the superficial analogy between
legislative and constitutional change. The question before it was election
of delegates and the constitution said they must be elected “in the same
manner, at the same places, and in the same districts” as legislators.
That said little about who they might be, and nothing about their powers
and responsibilities nor what they would do as delegates. The Durfee
court of 1899 might have characterized the coincidence in mode of
election as “intermediate machinery” that must not obstruct awareness
of differences in process and function. But the 1971 court now asserted
that convention delegates would possess “powers of a legislative character
of the highest order.” Patently this went beyond anything in the lan-
guage of Article XIX (or of Article V on legislative powers) and mis-
took superficial similarities of “intermediate machinery” to conceal pro-
found differences of function, of process and of authority that would
distinguish delegates in a future convention from members of a legis-
lature. The court cloaked all of this confusion in a verbal drum-roll
about “sovereignty”—that penultimate ambiguity of both lawyer and
political orator.57

56“Early Montana cases had kept the distinction clearly in view, supra note 2, but the
recognition disappeared for all but concurring Justice Angstman in Livingstone,
supra note 11. The author has found nothing to qualify the declaration of the at-
torney general to the 1959 legislature that the distinction had been universally
recognized in the revision process they contemplated, supra note 31; see also infra,
note 116.

5742d Assembly v. Lennon, supra note 43 at 334. The term “sovereign” appeared in
the 1889 Montana constitution as an attribute of the state (art. III, § 2) rather
than of the people; on its face it was meaningless because of the obligations of the
state to the national government under the United States constitution. But art. III,
§ 2 did also declare the “sole and exclusive right” of the people to govern them-
seves and “to alter and abolish their constitution and form of government.” We
have remarked the court’s disinclination to see the “sole and exclusive right” clause
as a limitation on its own powers to participate in constitutional revision. If dele-
geates indeed exercised “sovereign powers on their [the people’s] behalf” this ob-
viously was the result of the “sole and exclusive right” clause rather than any
view that their functions were “legislative” or “subject to referendum.”
So the court in Lennon chose an interpretation of delegate powers and functions contrary to the view in a number of other states. This choice was "conservative" in its restriction of options sought by some legislators and potential convention candidates. It was not dictated by the terms of Article XIX § 8, but rested upon a judicial deduction from the logic of provisions against dual office-holding by "usual" public officials.

The court said this prohibition would "insure independent consideration by the delegates . . . reduce concentration of political power" in the convention and foreclose creation of new offices or higher compensation for incumbent officers who might sit as delegates.58 Appealing or persuasive as such considerations might be, they were policy views of the court nowhere voiced by Article XIX § 8 as criteria for service, or for exclusion from service, as delegates to a constitutional convention. The court got to them by way of its questionable analogy between legislator and convention delegate. It analogized delegates to "ordinary" public officers of determinate authority, with continuous responsibility during a fixed term, and with electoral accountability at the end of such a term, should they seek reelection. In the lexicon of this essay, this was a considerable exercise in doctrinal "activism."

Convention delegates were elected in November 1971 and adjourned sine die March 24, 1972 after completing a draft of a new constitution. Five days after that adjournment one of the delegates raised the question reciprocal to Lennon, whether he could now seek election as state treasurer in the 1972 primary and general elections.59 Petitioner Mahoney seized upon language of the court in Lennon to argue that decision of that case had not foreclosed his candidacy. The court had said that delegates would be public officers until their duties had been discharged. Delegates met the Barney test of "permanence and continuity" by the nature of their work "while the convention is in session and carrying out its duties. . . . [A] public position need not be conceived and created in perpetuity in order to qualify as a public officer."60 Early in the convention the attorney general had given a formal opinion that convention delegates could seek public office in the 1972 primary and general elections if "the term . . . commences after the constitutional convention adjourns sine die." Petitioner Mahoney reiterated the attor-
ney general’s view that “no definite duration is specified for the term of delegate . . . the term of a delegate will last until the convention adjourns sine die.”

An area of respectable judicial maneuver and choice was open to the court. With no real embarrassment it could have noted its difficulty with application of the Barney continuity test for public office to convention delegates in the Lennon declaratory judgment of 1971. There it had acknowledged decisions in other states that would now support the petition of Mahoney and the recent opinion of the attorney general. Moreover if delegate powers were held to cease at sine die adjournment of the convention the court would have a strong ground for the decision it would soon announce in a “companion” case already briefed and argued before the court. But a famous legal wit once called law a “killy-loo” bird that “insisted on flying backward because it didn’t care where it was going but was mightily interested in where it had been.”

Speaking for a unanimous court, Justice Castles announced the Mahoney decision on April 21, 1972. The opinion turned to language of the convention enabling act to conclude that delegate terms would extend to the expiration of that legislation and to the termination of convention appropriations authority more than a year later on June 30, 1973. “Delegates were elected for a term ending on repeal of the act,” Castles declared, with convention duties now held to continue at least “through submission of its proposals to the people at an election to be held after ‘adjournment.’” The “in session” remark in Lennon did not control Mahoney because “the Court did not have before it the situation we have now. Rather, we have almost the reverse.”

Convention resolution 14 had prohibited any delegate “who shall seek public office in the primary election to be held on June 6, 1972” from serving on a post-adjournment committee of delegates to conclude business of the convention. The convention, supported by an attorney general’s opinion, thought its members might seek elective office if the convention adjourned two months prior to June 6, 1972. Justice Castles construed the convention resolution:

From a reading of Section 1 [of resolution 14] it is obvious that the Convention continues to exist. The Committee acts on behalf of the Convention, in its place and stead. It carries on until the procedural, administrative and voter education affairs are concluded, and the money appropriated to it has been spent. These particular items of business are substantial parts of the business of the Committee and the Convention. It would appear that the only thing that the Committee cannot do that the Convention did is propose further

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The text includes footnotes and references to specific cases and opinions, indicating a thorough legal analysis of the case. The date of the publication is 1974, suggesting this is an excerpt from a scholarly work or analysis of the Montana Supreme Court's role in constitutional revision.
constitutional provisions or change or modify those proposed. Other than that, the Committee has all the power of the Convention... We can see no difference in what the Convention was doing before March 24, 1972, and what the Committee is authorized to do, other than making proposals for inclusion in the new constitution.66

This seems to have been dictum because Mahoney was not a member of the post-adjournment committee of delegates here so generously endowed with continuing powers; and a discussion of Resolution 14 was not required to dispose of Mahoney’s petition. The language quoted was altogether remarkable for what it gratuitously said about the powers of the post-adjournment committee, since the powers of that committee were the central question in Kvaalen, argued three days earlier and to be decided only seven days after Mahoney.

Given the logic and holding of Lennon, the Mahoney decision could have been no real surprise. Judicial choice had been narrowed but, as delegate Mahoney pleaded, it had not been foreclosed. The choice in Mahoney was essentially no more nor less supportable than the choice in Lennon, regarding double office holding. It was a “conservative” choice, tinged considerably with judicial “activism.” As in Lennon, nothing in the terms of Article XIX § 8 dictated the decision in Mahoney.

The post-adjournment committee of delegates created by convention resolution 14 expected to spend about $45,000 for “voter education materials” prior to the ratification election June 6, 1972. On April 7 veteran state representative Kvaalen asked the court to declare voter education expenditures improper and to enjoin them. The court heard oral argument April 18 and decision was announced April 28 to enjoin expenditure of public funds for education, midway between adjournment of the convention and the date of the ratification election.67

Kvaalen was represented by counsel who had persuaded the Livingstone court twelve years earlier that a provision of the legislative article in the constitution limited process under the amendment article. The chief justice and senior justice of the sitting court had joined the Livingstone majority. The gambit was worth another try. Petitioner pleaded that “all power of the convention having expired upon its adjournment sine die” it followed that “the attempt by the constitutional convention to delegate its powers and duties, and particularly its power to spend funds... after adjournment... is unlawful and void.”68 The argument could have been sustained to this juncture by statutory interpretation. It was converted into a Livingstone-style constitutional argument along these lines: convention powers died at sine die adjournment

66Id. at 1126.
67State ex rel. Kvaalen v; Graybill, supra note 62. Petitioning as a taxpayer, farmer-rancher Kvaalen was serving a sixth term as representative (Republican) of an eastern district bordering on North Dakota. His home county and the four-county district soon voted 58 per cent against ratification of the proposed constitution.
68Relator’s Memorandum of Authorities at 5, filed April 7, 1972 in No. 12260, The Supreme Court of Montana.
and could not be delegated to anyone after adjournment; delegates lost their status as public officers at adjournment, reverting to the status of private citizens; this brought the proposed expenditures for voter education after adjournment within the strictures of Article V, §35 prohibiting any "appropriation . . . for . . . educational . . . purposes to any person . . . not under the absolute control of the state."

Counsel for the delegate committee including sixteen lawyer-delegates responded that the convention appropriations for voter education funds, and the authorization of "voter education materials" to be prepared and disseminated by the post-adjournment committee of delegates, were compatible with Article XIX, §8 of the constitution and with the convention enabling act. The constitutional requirement for submission of the proposed constitution to popular vote reasonably implied authority "to inform the electors of the revisions and alterations it proposes." The enabling act had directed publication of the proposed constitution "together with appropriate information . . . in such manner as the convention prescribes" and had directed the convention "also [to] publish a report to the people explaining its proposals." Convention resolution 5 had restricted voter education to "factual reporting of provisions of the constitution" so that the committee function was only "to decide the best way to disseminate" that kind of information. "Public policy" suggested desirability of an "informed electorate" and three other state conventions had made similar post-adjournment expenditures. In two states these expenditures had been judicially sustained against challenge, most notably in Missouri where "facts and circumstances are nearly identical to the facts at bar."

On April 28 the court unanimously declared that expenditure of public funds for voter education activities by the post-adjournment committee of delegates was unconstitutional and enjoined those expenditures. Just a week earlier Justice Castles, for the unanimous court in Mahoney, had discussed powers of the post-adjournment committee under Resolution 14:

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*Id. at 8-9. Two decisions of the court under MONT. CONST. art. V, § 35 were noted: Vets Welfare Comm. v. VFW, 141 Mont. 500, 379 P.2d 107 (1963) enjoining expenditures of public funds by a veterans organization; and State ex rel. Browning v. Brandford, 106 Mont. 395, 81 P.2d 677 (1938) prohibiting allocation of state welfare funds to the WPA, a federal agency "not answerable to the State of Montana." A Supplementary Memorandum filed April 17 noted that a Rhode Island decision enjoined expenditures for education by a public information committee of a constitutional convention because of vagueness of the convention resolution. Relator argued that Montana Resolution 14 "is as vague and uncertain as the one discussed" in Sennott v. Hawkins, 103 R.I. 730, 240 A.2d 236 (1968). A Missouri case, State ex rel. News Corp. v. Smith, 353 Mo. 845, 184 S.W.2d 598 (1945) allowing a claim for printing of an Address to the People prepared by a post-adjournment committee of delegates was "an expedient result under the circumstances" but "cannot be explained on the basis of logical analysis." Supp. Memo. 4.


*State ex rel. Kwaal v. Graybill, supra note 62.

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It would appear that the only thing that the committee cannot do that the Convention did is propose further constitutional provisions or change or modify those proposed. Other than that, the Committee has all the power of the Convention. 77

Seven days after this declaration the court unanimously held that "any power and authority" the convention had "for voter education purposes must be exercised by the convention itself and may not be delegated to a committee."73 But the convention "itself has no further power and authority concerning voter education or" use of public funds "for such purposes."74 Indeed it never had possessed such powers "beyond the specific requirements and authority found in the Enabling Act".75 The Act appeared to anticipate that the publication and reporting activities of the convention contemplated in its sections 17(4) and 3(5) would be paid for by funds appropriated to the secretary of state for a voter information pamphlet and not from "the Convention's budget and appropriation."76 Any authority of the convention contained in section 17(4) and (5) for voter education had been "satisfied"77 when the secretary of state published a tabloid edition of the proposed constitution with funds appropriated to him for that purpose containing brief explanatory comments on each section prepared by the convention, along with a schedule of transition, a sample ballot and other information for the voters.

Resolution 11 had commissioned this tabloid publication "as required by subsections (4) and (5) of Section 17,"78 so with preparation and editing of that tabloid edition, there was no authority left in the convention for additional "voter education affairs" to be delegated to a post-adjournment committee of 19 delegates.

Various claims of the post-adjournment committee of delegates that they possessed authority to conduct "voter education affairs" by other media from convention funds were dismissed in this fashion:

They had no inherent powers as a constitutional convention; such claims derived from cases decided during the American Revolution or post-Civil War reconstruction when "there was no effective or established government to supervise the work of the convention." The cases simply were "not applicable to present conditions."79 This was short shrift for powers of the people so generously declared in Article III, § 2.

73 Mahoney v. Murray, supra note 59 at 1126.
74 State ex rel. Kvaalen v. Graybill, supra note 62 at 1133, declaratory judgment (2).
75 Id. at 1136.
76 Id. at 1135.
77 Id. at 1131, emphasis in original.
78 Id. at 1135.
79 Id. at 1136, emphasis added. Query: did the court seize upon this linking of "(4) and (5)" in language of Resolution XI, which may have been an inadvertence of the convention, as evidence that the convention thought it had exhausted its authority and responsibility under the enabling act? A theory of the Kvaalen holding and opinion can be constructed on that word "and" in the resolution, and it is not clear that this was not the court's "fulcrum" for its decision.
No plenary authority for voter education flowed by implication from convention authority in Article XIX § 8 to see that its product "shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that purpose." The court said "the power or duty to hold an election does not, in itself, imply a corresponding power to educate the voters and expend public funds therefor."80

Nor did the enabling act give "carte blanche power . . . to expend public funds for voter education purposes" by its Section 9 provision that the Convention "may make such other expenditures as it deems proper to carry out its work." The court said "if the Convention's work does not encompass voter education, Section 9 does not authorize such expenditure."81

The court brushed aside delegates' claim that an Address to the People published by a committee of delegates after adjournment of the 1889 convention was precedent for their own voter education expenditures. The court said the claim was "drawn from tenuous, and perhaps nonexistent facts. We find nothing in the cited convention proceedings supporting respondent's conclusion."82 This was a curious statement: of course convention proceedings would not be conclusive evidence as to post-convention matters; besides the statement was not responsive to the fact of such a publication, accurately described by counsel for the delegates.83

More significantly the court declared that the Montana convention's attempt to delegate authority to its post-adjournment committee was "without substantial guidelines, other than [restriction to] . . . factual reporting of the proceedings of the convention."84 Except for this limitation and the fact that funds had been "budgeted for public information" the "committee is free to expend these funds as it sees fit for voter education activities." The state auditor and treasurer had indicated they would honor statutory "presumption of regularity" for committee expenditures "absent a ruling by this court."85

At this juncture, despite the ex cathedra quality of various statements like those about insufficient guidelines for delegation of authority, the court had a rather cogently reasoned opinion resting on conventional

80Id. at 1134.
81Id. at 1134.
82Id. at 1135.
83Id. at 1135. One of the pamphlets, a somewhat rare and valued artifact, is in the author's possession. Was the pamphlet, or a photocopy, not in evidence? The court also referred petitioner's reading of State v. Smith, supra note 69, that allowed payment of a printer's claim contracted post-adjournment for an Address to the People. It said that decision seemed "practical" but that "its logic on any other ground escapes us." Id. at 1135.
84Id. at 1133-1134.
85Id. at 1134.
statutory and constitutional interpretation to support its decision against voter education expenditures. The holding and opinion were clearly "conservative" by the tests of this essay, but the court's reading of the enabling act, convention resolutions and Article XIX was no more strained than the delegates' plea for "liberal" construction of the same materials to sustain voter education expenditures.

The constitutionally exceptionable quality of the Kvaalen holding and opinion developed when the court went beyond the necessities of the argument already sketched and linked the notion of insufficiently hedged delegation to requirements of Article V, § 35. It said that "under the circumstances disclosed here, the required 'absolute control by the state' over its appropriation of public funds is purely fictitious." Delegates had argued that they were like legislators spending funds in interim activities after adjournment, whose expenditures the court had sanctioned in 1957. Both legislators and delegates were elected public officials functioning after sine die adjournment of the parent body, spending appropriated funds under statutory, budgetary and administrative controls of the state. The court rejected this analogy from legislator to delegate; the 1957 legislative council case was "not applicable here" because "voter education" was involved rather than "administrative and procedural matters to conclude the Convention duties through the election." This was not responsive to the rather impressive analogy delegates had pleaded regarding "absolute control by the state" over both legislators and delegates in comparable circumstances; both were preparing and recommending law for future adoption by some constituted agency.

Finally, to bring a committee of elected public officers with continuing if limited public powers into the literal confines of Article V, § 35, delegates had somehow to become mere "persons" since they were not a corporation, a community, or a denominational or sectarian group. The court offered no explanation for this imaginative insertion of a committee of convention delegates into a 19th-century period piece prohibiting legislative appropriations to private eleemosynary activities.

*Id.*

*State ex rel. James v. Aronson, 132 Mont. 120, 314 P.2d 849 (1957).*

*State ex rel. Kvaalen v. Graybill, supra note 62 at 1134.*

*On occasion the court has insisted that constitutional provisions must be read as a whole and in context to determine their meaning, supra note 19. The complete text of Article V, § 35: "No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association." If "intent of the framers" is a relevant consideration to determine the meaning and purpose of a constitutional provision, § 35 was the first of a group of five sections in Article V of the sort that swept into American state constitutions after about 1850 to lock barn doors against extensive corruption of public finance that attended building of railroads and other internal improvements, and to control the influence of stock corporations, banks and other trusts. See Secrist, *An Economic Analysis of the Constitutional Restrictions Upon Public Indebtedness in the United States*, BULLETIN 637 (University of Wisconsin 1914); Ratchford, "Constitutional Provisions Governing State Borrowing," 32 AM. POL. SCI. REV. 694
It did not even recite all 35 words of § 35 to explore whether the letter or spirit of its single sentence reasonably comprehended appropriations to elected public officials. The article previously had served to enjoin legislative appropriations to a veterans’ organization and to a federal public works agency which, although public, was subject to federal rather than state controls.\textsuperscript{90}

Why had the court again, as in \textit{Livingstone}, reached out to limit Article XIX by Article V? The constitutional assumption of relevance between the two articles was the same in both cases. In the earlier case the “mandatory and prohibitory” requirement of Article III § 29 furnished a bridge between them, but neither that conceptual bridge nor \textit{Livingstone} itself were mentioned in argument or decision of \textit{Kvaalen}. Was it significant that the language of Article III § 29 had disappeared from the draft of the new constitution now before the voters? That section still was as much law of the constitution to limit processes of constitutional revision in April 1972 as it had been in 1960. But it might not be around much longer. Constitutional essences of the two cases can be stated in equation form:\textsuperscript{91}

\textbf{LIVINGSTONE (1960)}:
\begin{align*}
\text{XIX} \S 9 & \quad \text{V} \S 40 \quad [\text{V} \S 1] \\
\text{proposed} & \quad \text{every} \quad [\text{no}] \\
\text{amendm't} & \quad \text{vote} \quad [\text{veto}] \\
\text{governor} & \quad \text{mandate} \quad [\text{no}] \\
\text{tory} & \quad \text{signs}
\end{align*}
\text{KVAALEN (1972)}:
\begin{align*}
\text{XIX} \S 8 & \quad \text{V} \S 35 \quad [\text{III} \S 29] \\
\text{dele-} & \quad \text{excluded} \quad [\text{no}] \\
\text{gate} & \quad \text{person} \quad [\text{tory}] \\
\text{education} & \quad \text{power}
\end{align*}

In any event, without reliance upon Article III § 29, this now was the \textit{Livingstone-Kvaalen} rule for constitutional revision in Montana:

(1938). Section 35 bore close historical and logical relationship to the notion that public funds could be spent only for public purposes. See McAllister, “Public Purpose in Taxation,” 18 \textit{Calif. L. Rev.} 137 and 241 (1930), reprinted \textit{1 Selected Essays on Constitutional Law}, bk. 5, 1 (Assoc. of Amer. Law Schools, 1938).

\textsuperscript{90}Cited by relator, \textit{supra} note 69.

\textsuperscript{91}Livingston: XIX § 9 vote proposing amendment was a vote under V § 40 that must be submitted to the governor. Provision of XIX § 9 common to other constitutions (governor not mentioned so not included in amendment process) must be read differently in Montana because uncommon V § 40 was in unique conjunction with uncommon III § 29. Exception of “measures” (amendment proposals) from veto by V § 1 was ignored; as was III § 2 (sole power of people to amend) which could (by its equal weight and special relevance in III) have cancelled out III § 29, to sustain legislative discretion in ignoring the governor as an agent in proposal of amendments. Kvaalen: III dropped from the equation (both III § 29 to limit, and III § 2 to justify, convention discretion). Delegates under XIX § 8 were persons under V § 35 who might not receive educational appropriations; therefore there could be no voter education activities by delegates under XIX § 8, at least after adjournment. The court proceeded directly from XIX § 8 to V § 35 and back to XIX § 8 because nothing in either article expressly precluded application of the verbal fit between them. Article V § 1 was not applicable to Kvaalen facts.
1) Any provision of the legislative article verbally applicable to limit constitutional revision agencies or processes might be so applied, absent specific prohibitions or exception against such application.

2) Differences of authority, function and agency between legislative enactment and constitutional revision are immaterial if the verbal fit of constitutional limitations on legislative activity to constitutional revision is apparent to the court.

In the court of first and last resort on such matters in Montana, one law firm had won two significant constitutional decisions separated by more than a decade with these propositions.

What significance attaches to the fact that the same counsel won both *Livingstone* and *Kvaalen* with novel appeals to limit Article XIX by Article V? Only this much, probably: the court's disposition to think by surface verbal analogy from legislative to constitutional revision processes and agencies, first manifested in *Livingstone*, also shaped its holdings in *Lennon* when the court next thought about the matter. Perhaps in *Kvaalen* the court might again traverse a now familiar conceptual track without relying on a discredited crutch like "mandatory and prohibitory" § 29 of Article III? Counsel tried it. The court embraced it with less caution than in the earlier case.

In the context of this essay *Kvaalen* was "conservative" in its restriction of powers convention delegates thought they had, and "activist" in its unnecessary resort to Article V, § 35 as ground for the decision when more conventional grounds would have sufficed.

If this essay reads the constitutional footings of *Livingstone* and *Kvaalen* correctly, their rule overhangs interpretation of the new constitution of 1972; all the essential elements of its application are there, and nothing but some vaunted "populist" spirit distinguishes the new charter from the predecessor in this context. Declarations about authority of the people to "alter and abolish the constitution and form of government whenever they deem it necessary" are essentially unchanged. There are fewer exception and exclusion clauses in the new charter than in its predecessor. The "conservative" import of the *Livingstone-Kvaalen* rule for future constitutional revision efforts appears to have gained orthodoxy among the justices of the Montana supreme court. All incumbents have accepted its validity and none has challenged its authority.

Irate about the *Kvaalen* decision, delegates dug into their own pockets and a citizens committee solicited private contributions to carry on the campaign for ratification of the new constitution. Convention...
CONSTITUTIONAL REVISION

president Leo Graybill, Jr., a Great Falls attorney, discussed the matter in a public forum on the University of Montana campus in Missoula. On May 24, a newspaper reported his remarks to include statements about “an antagonistic Supreme Court” whose members “frankly don’t like the new requirements” for their own reelection.\(^\text{3}\) That day the supreme court ordered Graybill to appear before it two days after the ratification election to show cause why “disciplinary proceedings” should not be taken. Speaking per curiam the judges reminded Graybill of his duties to the court under lawyers’ canons of ethics and said his statements as reported appeared to be “false, malicious, politically motivated, contemptuous and designed to mislead the public.”\(^\text{94}\)

Some delegates protested the court’s abrupt intrusion into the ratification campaign but lawyer-delegates were conspicuously silent.\(^\text{95}\) Whatever the tenor of Graybill’s remarks or the court’s declared concern for “preserving the integrity of the judicial processes,”\(^\text{96}\) its disciplinary powers would have been no less if invoked and exercised after the ratification election. The court would have avoided any suggestion of political concern with outcome of the election—the very sort of concern Graybill was reported to have charged against the justices. Graybill responded on May 26 that he had answered student questions “frankly and sincerely” but with no intent to convey disrespect for the court. While not unmindful of his duties as a lawyer and court officer, he had spoken “as a delegate and as president of the Convention, and not as an attorney commenting on any case or judicial matter” before the court. He suggested early disposition rather than delay to remove “extraneous issues” from the ratification campaign and to give himself and other lawyer-delegates “direction” how to “comport themselves” until the election is held.\(^\text{97}\) That same day the court accepted his “explanation and apology” and dismissed the proceeding.\(^\text{98}\) Thirteen lines of the 19-line per curiam order restated Graybill’s response and the balance summarized the procedure for its presentation and acceptance. The order was conspicuously silent about the court’s standards or expectations for a lawyer in public office. Graybill and his fellow lawyer-delegates not unreasonably might conclude that any criticism by them of the court or its decisions must be accompanied by “explanation and apology.”

\(^\text{3}\)Daily Missoulian, May 24, 1972 at 6 col. 1 as quoted in Per Curiam Order and Citation In re Graybill Jr., No. 12285, May 24, 1972, Supreme Court of Montana.
\(^\text{4}\)Order and Citation, supra note 93.
\(^\text{5}\)Daily Missoulian, May 26, 1972, at 1 col. 1: “Delegate lawyers contacted by The Associated Press were cautious and unanimously chose not to comment on the court order.”
\(^\text{6}\)Order and Citation, supra note 93.
\(^\text{7}\)Affidavit and Motion In Re Graybill, filed May 26, 1972 in No. 12285, The Supreme Court of Montana.
\(^\text{8}\)In re Graybill, Order of May 26, 1972, 159 Mont. 549, 497 P.2d 690 (1972).
The provocative timing\(^{96}\) and ambiguous conclusion of this bizarre episode certainly would have shocked the "conscience" of Justice Felix Frankfurter who had instructed his colleagues on the United States Supreme Court, the judiciary in general and the public at large about the bitter fruits of judicial entry into the "political thicket" with its "clash of political forces in political settlements."\(^{100}\) By criteria of this essay the Montana court was both "activist" and "conservative" \textit{In re Graybill}. It had inhibited participation of at least sixteen lawyer-delegates in the ratification campaign when their professionally informed judgments about existing and proposed judicial articles would have been peculiarly valuable to voting citizens. But this may have been the least pervasive of its effects. Termination of the proceeding with no advice to lawyers-in-office about the court's standards for application of lawyers' canons to their public activities created a serious dilemma not only for such lawyers but for citizens at large. The Montana citizen must wonder whether a vote for a lawyer seeking public office is a vote for a person partially disabled from performance of that office by vulnerability of private livelihood if the court should conclude that official activities endangered "integrity of the judicial processes." Such considerations give unique and persistent force to the "conservative activism" of the court in this episode.

On June 6, 1972, eleven days after disposition of the Graybill citation, the ratification election was held in conjunction with the regular biennial primary nominating elections. A separate special ballot presented the central issue of ratification, for or against the "proposed Constitution," along with three special constitutional referenda (unicameral legislature, legalization of gambling, and abolition of the death penalty). The ballot asked that electors "Please Vote on All Four Issues" and said that "if the proposed constitution fails to receive a majority of the votes cast, alternative issues also fail." On June 20 the official canvass reported 230,298 votes cast on ratification with a majority of 50.55 percent of that number favoring adoption of the new constitution. Somewhat smaller total votes were reported on each of the three constitutional referenda.

The secretary of state had directed county canvassers to show the "total number of electors who are listed on the poll books for the separate election on the proposed constitution" in a space labelled "number of electors voting." On the basis of those reports the final canvass re-
ported a total of 237,600 "electors voting" in the special election. Analysis of voting within counties indicated that a total of 290 more votes had been cast in eighteen counties on the gambling referendum than on ratification.

When the state canvass was completed June 20 the governor promptly proclaimed the new constitution to have been ratified because "a majority of all votes cast at said election for or against the proposed Constitution were in favor of said proposed Constitution," even as counsel for petitioners Cashmore and Burger petitioned the state supreme court to declare that the constitution had not received the majority required by Article XIX § 9. They argued, in effect, that the 116,415 votes reported cast for ratification was only 48.99 percent of the 237,600 reported as "electors voting" in the special constitutional election. The court heard argument on the petitions in mid-July and August 18, announced a three-to-two decision that ratification by the constitutionally required "majority of the electors voting at the election" had occurred. For the first time in five actions involving development of the new constitution, the court divided. The two senior justices dissented, insisting there was "a critical fact question that no analysis short of a recanvass by precinct can answer." 1

Justice Haswell gave the majority opinion, joined by Justices John C. Harrison and Daly. He said:

[W]e hold that "approval[!] by a majority of the electors voting at the election" as used in Article XIX, section 8 . . . means approval by a majority of the total number of electors casting valid ballots on the question of approval or rejection of the proposed 1972 Montana Constitution. We hold that it does not refer to or include those electors who failed to express an opinion by a vote on that issue. 102

The majority decision appears in effect to have substituted the ratification formula of the new constitution for that of the 1889 constitution governing the election. For the majority the constitutionally required total became "those voting thereon" (1972 Constitution, Article XIV § 7) rather than "those voting at the election" (1889 Constitution, Article XIX § 9). Haswell did not quite put the matter this way, but he got to the position by extending the "constitutional philosophy" 103 of an early Montana bond-election case to ratification of a new constitution. Tinkel v. Griffin had argued, in 1902, that the majority that mattered should be "of those who feel an interest in government" and that ab-

101 State ex rel. Cashmore v. Anderson, supra note 92, reproduces ballot and county canvass forms and gives some of the canvass totals. The dissenters' statement is at 943. Additional data were derived from Report of the Official Canvass At the Separate Election for Ratification of the Proposed Constitution, June 6, 1972. See also Waldron, Montana's 1972 Constitutional Election, MONTANA PUBLIC AFFAIRS REPORT No. 12 (June 1972), Bureau of Government Research, University of Montana, Missoula.

102 Id. at 929; the word is "approved" in the constitution.
stainers should be assumed to have acquiesced in whatever the balance of active voters, for or against, had decided.\textsuperscript{104}

This philosophy, which the majority said “we extend to the instant case involving Article XIX, section 8, and the multiple issue election here involved,”\textsuperscript{105} denied the principal contention of petitioners that all valid ballots cast on any one of the four issues in the special constitutional election must be counted in the total “voting in that election” from which the constitutionally required majority was determined. Haswell said that to count abstainers from the ratification issue as “electors voting against the proposed constitution was not proper” in the absence of some showing of clear and unmistakable intent in Article XIX § 8 to require an exceptional majority in a multiple-issue election.\textsuperscript{106}

Chief Justice James Harrison dissented, joined by Justice Castles. He would have granted a writ of mandamus, despite lapse of the statutory time, to require a statewide recount of the special election ballots at the precinct level. This was needed, he said, to establish a “critical, controlling fact” that could not be determined from the official canvass before the court. Where 7,302 more voters were reported as voting in the election than the total recorded on the ratification issue, “it is impossible . . . to determine how many of that number are actual votes cast or just ballots issued.”

In other words, does 237,600 represent a net voting figure or a gross figure of those receiving ballots? . . . It is clear that the “number voting” should be a net figure.\textsuperscript{107}

The secretary of state had precipitated the “dilemma”\textsuperscript{108} by calling for the “total number of electors who are listed on the poll books” which then was translated into the total of “electors voting.” If state election laws regarding spoiled and voided ballots “were followed meticulously, the number of votes counted would be all good ballots and result in a net figure.”\textsuperscript{109} But examination of the returns suggested that the total was a combination of net figures in some counties with gross figures in others.\textsuperscript{110} The election was notably close and the effect of a recanvass was impossible to anticipate. Counsel had presented the case “on burden of proof and presumptions of law,” but the Chief Justice said:

[T]o change such a basic document as our Constitution, a clear cut will of the people expressed within the rules laid out in Article XIX section 8 is mandatory and should not rest on the niceties and subtleties of the rules on burden of proof and presumptions of law.

\textsuperscript{104}Id. at 929, quoting Tinkel v. Griffin, 26 Mont. 426, 68 P. 859, 861 (1902).
\textsuperscript{105}Id. at 929.
\textsuperscript{106}Id. at 928.
\textsuperscript{107}Id. at 942.
\textsuperscript{108}Id. at 943.
\textsuperscript{109}Id. at 942.
\textsuperscript{110}Id. at 943.
We are here concerned with hard, cold, mathematical facts which can be determined. This court has the responsibility to see that the facts are determined.\textsuperscript{11}

The majority’s use of the \textit{Tinkel} “philosophy” about active voting was certainly a “liberal” position that vindicated the popular majority who voted on the single issue of ratification. In the absence of factual certainty about the majority of those voting “at the election” (if that included all who cast a valid ballot on any of the four issues in the special election) it was more “liberal” than anything but presumptions about the latter facts could sustain. The majority conceded that “a literal construction would seem to support relators,”\textsuperscript{12} who contended there had not been the required constitutional majority. The position of the dissenting justices to require a recount that would presumably settle basic factual questions is not readily characterized as “conservative.” Counsel seem, from the opinions, not to have squarely joined the issue whether the matter should be resolved as a factual question or a legal question, and the case may have been pleaded that way.\textsuperscript{13}

Thus by a one-vote margin the court validated the painfully close apparent verdict of the voters in a profoundly important ratification election. For the criteria of this essay it seems best to score the judicial approach as neutral. But the majority verdict was “liberal” in effect, and a fair amount of doctrinal activism was apparent in its search for a rationale to sustain its holding. The court’s tradition of doctrinal activism apparent in earlier “conservative” holdings—\textit{Livingstone, Lennon} and \textit{Kvaalen}—was continued.

5. Conclusion

Evaluations of the decisions—whether “activist” and “conservative” or “liberal” in the defined sense\textsuperscript{14}—are summarized in the following Table. Obviously the judgments made about the cases are normative and persuasive only to the extent the discussion may have sustained the particular estimates. If the decision and circumstances seemed not to require one of the normative classifications a “neutral” classification (—) was assigned. The cases and decisions were not equal in importance or impact and there is no suggestion that results of the evaluations are susceptible to statistical treatment beyond the evident fact that they may cumulate. The central theme of the essay has been that the modern
court has been notably “activist” and “conservative” in its approach to the cases involving processes of constitutional revision. The Table does suggest one corollary of this theme: the court divided only when a majority made a “liberal” decision.

<table>
<thead>
<tr>
<th>Date</th>
<th>Name of Case</th>
<th>Court Alignment</th>
<th>Judicial Approach</th>
<th>Nature of Decision</th>
</tr>
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<tbody>
<tr>
<td>1894</td>
<td>Woods</td>
<td>3-0</td>
<td>-</td>
<td>C</td>
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<tr>
<td>1899</td>
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<td>1934</td>
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</tr>
</tbody>
</table>

**MODERN COURT**

- 1960 Livingstone 5-0 A C
- 1971 Lennon 5-0 A
- Districts
- Partisan Nom.
- Public Office
- 1972 Mahoney 5-0 A C
- 1972 Kvaalen 5-0 A C
- 1972 Graybill 5-0 A C
- 1972 Cashmore 3-2 -(A Maj?) L (Maj.)

The special portent of *Livingstone* and *Kvaalen* is their principle that the rules of constitutional change in Article XIV of the new constitution no less than Article XIX of the old constitution may be limited by provisions of the legislative article (or elsewhere in the constitution?) if there is a superficial verbal “fit” between such provisions and the process of constitutional revision. The *Livingstone* decision ignored provision of Article V § 1 that would block its application of Article V § 40 to constitutional amendment process in that case, and it used Article III § 29 as the bridge between the legislative rules and constitutional revision rules. Neither Article V § 40 nor Article III § 29 had any necessary or inescapable applicability to the issue of that case. In *Kvaalen* the court accepted surface similarities between Article V § 35 and what convention delegates sought to do. With no little distortion of § 35 it used the legislative article to limit what elected delegates to a constitutional convention could do. What is more it need not have restorted to Article V § 35 at all to achieve that restriction.

In future cases involving constitutional revision under the new constitution will the court persist in this acceptance of surface analogies to limit the distinctive and peculiarly significant “rules of change” in...
Article XIV? Will it rethink the reflexive bases of its decisions from Livingstone to Kvaalen and acknowledge what the early Montana court saw quite clearly—that legislators are "mere machinists operating intermediate machinery" when they propose change of "organic law" that "obtains life by the direct power of the people?" The Montana court said that in Durfee in 1899.115

Some old and troublesome texts have disappeared from the new constitution. The people still say they "may alter or abolish the constitution and form of government whenever they deem it necessary (Article II § 2)." Before the court applies some constitutional provision from outside the "rules of change" of Article XIV to restrict their operation, it may reasonably be expected to examine very carefully whether such an application is warranted by the functions and special purposes of Article XIV for constitutional revision. It can ask whether such an application is supported by something more persuasive than a superficial verbal "fit" of some words to others. It can ask whether application of various requirements of the constitution to the revision article violates "separation of powers" decreed in both the 1889 constitution (Article IV) and the new constitution (Article III § 1), by introducing into the revision scenario participants and concepts that were not put there for good and understood reasons. Such would be the course of judicial restraint and it is fully compatible with "conservative" stance, if the court must persist in that view of the power of the people to change their basic law.

The Montana supreme court went out into the wilderness in its Livingstone decision. In the world of lawyers' digests where each judicial acorn is neither better nor worse than the next, the holding is noted as a singular exception to the rule that executives are not part of the constitutional revision process.116 In the lawyers' Hooper-rating for popularity of judicial decisions, Livingstone has been cited only twice, by the Montana court itself, to support jurisdiction in cases not involving constitutional revision.117

The relation between counsel and court has been mentioned in this essay. The adage that "a lawyer will argue anything to win a case" is probably both accurate enough and suggestive of a desirable situation. The law grows by judicial response to imaginative pleading of counsel. But a court is under no obligation to accept arguments without doing its own homework and its own thinking. Proposals to limit Article XIX

115Durfee v. Harper, supra note 2 at 585.
116See 16 Am. Jur2d Constitutional Law § 34 (1964); 16 C.J.S. Constitutional Law § 9 at 51-52 (1956). No rubric has been found for the Livingstone-Kvaalen principle in the American Digest system; this is a kind of negative evidence as to its uniqueness, but the author is not prepared to say that no other state courts have made similar holdings.
by Article V may have been imaginative efforts of counsel in *Livingstone* and *Kvaalen*, but their essentially uncritical acceptance by the court in those cases was not by the same token evidence of well-founded creativity in the court.

Of course it is difficult for a court to reach a sensible and principled decision on a controversial problem of public policy in the heat of political controversy, when there is little time for either research or reflection. It is relatively easy to survey the battleground from the lawyer’s office or the scholar’s study a year, a decade or a generation later and say that things should have been different. But precisely because judges are human and because their ideas are tools of decision, what they do in the stress of decision is curiously revealing about the pictures in their heads.

When the pictures in the judges’ heads lead them in case after case to reject responsibly held judgments of collateral agencies and branches of government about their own authority and responsibilities, the judges have an especially heavy obligation to impose their judicial views only when their choices are convincingly made from sound constitutional premises and persuasively sustained by principled opinions. The conservative nature of choices made by the Montana supreme court in its modern cases on constitutional revision may ultimately have to be judged in the realm of political values, but its opinions in *Livingstone* and *Lennon* and *Kvaalen* and the timing and unresolved ambiguity of *In re Graybill* left much to be desired as persuasive support for decisions that thrust the court into the very center of the constitutional revision arena.