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The Bill of Rights

Analysis

The Constitutional Convention will, during the week of March 6-11,1972 debate the merits of the Bill of Rights Committee proposal.

The proposal before the Convention is unique in the near-unanimity of the Committee members and in the dramatic proposals it has included and has failed to include.

The topic matter is of great importance to Montanans because it deals with the rights of citizens in their relationships with government and with other citizens.

The proposed article is intended to replace Article III of the current Constitution entitled "A Declaration of Rights of the People of the State of Montana." The Committee, in its introduction, alleges that "not one of the traditional rights of that Declaration has been diminished" and remarks that "new safeguards have been added where appropriate."

The current Constitution contains 31 sections, the proposed provision has 34 sections. In the new draft, 13 sections remain unchanged, while the draft makes deletions, alterations, or additions in 14 of the original Bill of Rights. The proposal contains 7 entirely new provisions. This analysis will attempt to give an in-depth comparison of the old and new, and will also attempt to provide some insight into the implications.

In casting their ballots for or against the proposed versions, the eleven members of the committe only cast 7 negative votes, which all came from delegates Marshall Murray and Robert Hanson. Both Murray and Hanson voted against the "inalienable rights" section and the "right to know" section. Murray voted against the "self-government" provision, and Hanson, in his votes, voted against the "adult rights" and "rights of persons under the age of majority" provisions.

The Committee, in its report to the Convention, did not discuss the various provisions which were deleted. These were sections 15,25,28 and 29 of the current Constitution. We can thus only guess at their reasons.

Section 15 deals with the appropriation and use of waters as a public use, and makes provision for damages incurred in opening private roads.

Section 25 puts aliens on the same footing as citizens in granting the right to inherit.

Section 28 prohibits slavery or involuntary servitude, except as the punishment for a crime.

Section 29 provides that the provisions of the Montana Constitution are "mandatory and prohibitory, unless by express words they are declared to be otherwise." We'll now look at changes which will affect us directly.

Preamble

The Preamble defines the source of authority from which the instrument is derived--the people--and it defines the object for which the Constitution is formed. It serves as the artery which transmits life to the Constitution by infusing it with authority. The Convention in writing a new preamble to the Constitution expressed a desire to "improve the quality of life" and to improve "equality of opportunity." Because the Preamble is generally held not of itself to be a source of any substantive power, it matters little what the Convention does with this provision.

Inalienable Rights

Montana's current provision on inalienable and essential rights is in section 3 of Article 3. It provides for the right of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.

In a brave departure, the Committee has added the right of "pursuing life's basic necessities" and of seeking "health." In its explanation, the Committee says that with regard to the right to pursue life's basic necessities, it was merely a statement of principle and the intent was not to create a substantive right. The Committee did not qualify in such a manner the right to seek health.

The difficulty comes in interpretation. Later courts will not go to the Committee report to determine intent. If they did, the report would, in this case, reflect an intended principle on one hand and an intended sub stantive right on the other.

The legislative assistant to the Bill of Rights Committee, in a very knowledgable treatise, describes such reasoning as used above, e.g. that the right is merely a statement of principle and not an enforceable right as being curious reasoning. Applegate, Bill of Rights, Constitutional Convention Commission, pp. 336-7.

Applegate very correctly states that such a provision might not be inoperative. He goes even further and states that a "statement that health and other basic necessities are basic human rights is one which "does create enforceable personal rights and obligations on the part of government, or at least sets a direction for government in a manner similar to other constitutional provisions." (at p. 337).

The question thus becomes: does the proposed provision create a substantive right for all the necessities of life to be provided by the public treasury? And: does such a provision guarantee the so-called "right to work"?

These, of course, are matters that can be debated and the intent of the convention determined in the floor proceedings. The final sentence of the proposed provision, section 3 in the new draft, brings up a matter of fundamental philosophy.

That last sentence reads: "In enjoying these rights, the people recognize corresponding responsibilities." To whom? To each other, or to the

State of Montana. By this sentence the Committee has transformed their work-product into a bill of rights and duties, a departure rarely seen in American government. A look at the U.S. Bill of Rights will show no such philosophy infused in that document. Only european and other non-democratic constitutions provide affirmative duties of the individual towards other individuals other than that provided in the civil and criminal laws of the particular nation.

The complex legal questions that this one sentence opens up can be quickly seen. If a person is drowning in the middle of a lake and you are on the edge, you may have a moral obligation to help him, but are under no legal obligation to do so unless you are responsible for his predicament. Can you now be sued for not following your duty correlative to his right to seeking safety?

This one sentence, in combination with the new rights expressed in the same provision, and in combination with the preamble and the provision regarding the right of privacy can also be construed as standing for a person or the state to regulate conduct that is not currently recongized under our current civil or criminal laws. Which is fine if the people of Montana are adequately apprised of such an intent upon acceptance of such a provision.

The analysis above points out the difficulty of a convention with insufficient time to examine the ramifications of each and every word, and it points out the problem of bringing the new Constitution to an early vote.

Individual Dignity

Section 4 of the proposed bill of rights is a new and innovative provision. It is basically an anti-discrimination provision that bars discrimination of one's "civil or political rights" on account of "race, color, sex, culture, social origin or condition, or political or religious ideas" and prohibits such discrimination by any "person, firm, corporation,or institution" or by the state of Montana or any of its subdivisions.

The provision suggested is guaranteed to provide fertile grounds for extended debate by the convention, as it goes beyond--far beyond--any provisions that are currently in the federal Constitution or current federal civil rights acts. If enacted, it would easily be the broadest civil rights act in the United States. A comparison of current federal law is quickly necessary to determine the ramifications of the proposal. The following citations to "USC" are to provisions of federal law, the United States Code

42 USC sec. 1982 protects the right to be free from private discrimination because of race in the purchase of property, in access to public housing, and the right to be free from judicial enforcement of racially restrictive covenants. The proposal before the convention would add to this discrimination based on sex, economic status, religious beliefs, or any religious beliefs.

The proposal does not exempt state, county or local officials exercising discretionary authority under color of law. It goes beyond 42 USC 1983, the Civil Rights Act of 1871. Under the latter act, the right of students in public schools to wear their hair as they desire has been protected against school authorities who have suspended students. Comparably,

Under the latter act, the right to be free from unreasonable denials of public employment opportunities can be protected in a section 1983 action. Thus, employment cannot be denied by the use of tests which have no relevance to the job. Protectable by a section 1983 action is the right to be free from racial discrimination in public dining facilities. In each case, under the proposal, the additional factors of sex, economic standing, and political and religious beliefs would forbid discrimination by individuals, corporations, unions, or agencies of any part of state, local or county government.

Under the 1964 Civil Rights Act, private clubs or other establishments not in fact open to the public are exempted. Under the proposal, these exemptions would not be available. The Civil Rights Act of 1964 also extends to dscrimination by employers, employment agencies and labor organizations. The proposal would encompass what the act does, without any requirements of interstate commerce being affected.

The Civil Rights Act of 1964, Title VII has certain exemptions. Under this law, it is not unlawful practice to dscriminate "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

Nor is it an unlawful practice for educational institutions to discriminate where they are controlled by a particular religion and their program "is directed toward the propagation of a particular religion." Neither of these exceptions would be available under the proposed act.

Under the Civil Rights Act, it is not unlawful to discriminate against members of the Communist Party, nor to use tests to determine the suitability for employment and promotion, nor to give different compensation for employment at different locations. The proposal may not provide exception.

The Open Housing Act of 1968, 42 USC sections 3601 et seq., provides a ban on discrimination on grounds of race, color, religion or national origin in the sale or rental of housing. A person subject to the act can not refuse to sell or rent after a bona fide offer has been received. A person is forbidden to state that housing is not available when it is. Nor can lending institutions discriminate against applicants for real estate loans on the basis of race.

Exempted from the Act are boarding houses in which the owner lives, so long as it contains no more than three other units for families living independently. Similarly exempt are private clubs not in fact open to the public when such clubs give preference to their members in housing not operated on a commercial basis. Religious organizations and their non-profit affiliates can limit occupancy of housing units to members of the religious group. Single family dwellings are generally exempt from the coverage.

Under the proposal of the Committee, none of these exemptions would be available, and the coverage would extend to discrimination on the basis of political beliefs, sex, and economic condition.

the right of a public school teacher to wear a beard and moustache was protected in a section 1983 action. In a section 1983 action a federal court has protected the right of a student not to be expelled without procedural and substantive due process.

This analysis is not being made to somehow indicate that the proposal of the Committee is "good" or"bad", but rather to make clear the possible ramifications of the provision. Particular problem areas are evident. Can a fraternity house or a Jaycee Club ban women? Must a landlord of a one-unit apartment rent to a Democrat? Can a hippie poster shop refuse employment to someone with a crewcut and narrow tie?

Right of Participation

In a new provision, proposed section 8, the Committee has stated that the public shall have to right to "expect governmental agencies to afford every feasible opportunity for citizen participation in the operation of the government prior to the final decision."

The purpose of this provision is not evident from the Committee discussion of the proposal, which merely restates the provision. The section possibly could have ramifications in the area of environmental decisions by various branches of state government whereby citizens can gain access to administrative decisions which will in turn trigger the judicial enforcement mechanism of any environmental provision in the Constitution or the laws of the state.

Right to Know

Section 9 of the proposed bill of rights is a new section. Under it, no person can be deprived of the "right to examine documents or to observe the deliberations of all public bodies or agencies" of government, and adds the exception where "demands of individual privacy exceeds the merits of public disclosure."

The provision has been attacked by the Montana Press Association and by B E Longo, a Billings attorney and attorney for the Billings Gazette as a possible danger to freedom of the press and as a possible "crippling restriction on the right to inspect public records." Great Falls Tribune, March 5, 1972.

The provision eliminates the distinction between public and private records found in current Montana statutes.

A parallel can be found in the federal Freedom of Information Act of 1966, which was a result of increasing awareness in Washington that the Administrative Procedures Act was being used to support withholding of information. The question immediately posed is: will legislative action in providing a judicial remedy be necessary assuming the new provision would eliminate current statutory law on the subject?

Right of Privacy

Section 10 of the proposal guarantees the "right of privacy" and says that it shall not be infringed without a showing of a "compelling state interest."

The Press Association has likewise attacked this provision in conjunction with the right of knowing provision.

The provision must be read in conjunction with the next proposal, section 11, which is merely a restatement of the current search and seizure provision in Montana, with "invasions of privacy" added.

Under these two provisions, is it the intent of the committee to require a court order by officials of government before they can listen in or record a telephone conversation? If an individual eavesdrops, does the provision, or both of them, create civil liability? Each of these may or may not be desireable, but in any event, if such is the intent of the committee it is not apparent from the language. How does the "probable cause" that is required in provision 11 differ from the "compelling state interest" in provision 10?

Adult and Minor Rights

Suggested provisions 14 and 15 are new provisions which, when combined, provide that 18 year olds are adults for all purposes, and that anyone under 18 has the same rights as one over 18, plus a provision that states that "persons eighteen(18) years of age" shall have the "right to hold any public office in thestate."

What is a drafting deficiency, the provision if technically read only guarantees the right of public office to 18 year olds, does not speak to those over 18, and presumably does not forbid one under 18 from holding the office in question. That part of the provision will undoubtedly be modified at any rate.

The exception to the extension of rights to minors is where the laws "enhance the protection for such persons."

The provision will, if adopted, open many fertile fields of litigation because of the current treatment minors receive under the law.

A law that enhances the protection for such a person is not necessarily the same as a law which specifically precludes certain rights for an individual under legal age.

The problem of hair length will immediately arise. Under certain court cases, minors simply have not been accorded to wear their hair the same length as adults may wish to. Are such judicial rulings for the enhancement of the protection for such persons? Probably not. Another problem is that minors currently are liable for punishment for more offenses than adults: disobedience, curfew, undesireable associations, wearing armbands, critical published statements. What of these?

It is instructional at this point to quote Mr. Applegate in his treatise for the Bill of Rights Committee:

> "In the final analysis, the main question is not whether the rights of young persons under the age of majority are identical with those of adults. As the recent White House Conference on Children

reported to the President, the issue is 'how the limits of adult control may be drawn so as not to infringe on the child's right to grow in freedom in accordance with the spirit of civil liberties embodied in the Constitution.'" (at p. 305)

Trial by Jury

Under proposed section 26, the Committee proposes the provision be of such form as to allow a person to waive the right to a jury trial in cases involving a felony. One cannot do so now.

The proposal also provides for a unanimous verdict for misdemeanors, where only a two-thirds guilty verdict is necessary at present.

Left Out

Obviously certain matters were left out of the proposed Bill of Rights and the discussion of the Convention will probably center on some of the rights delegates feel should have been included.

Brief mention was made of those specifically excluded that were in the current constitution. Others bear scruitiny.

In proposed section 7, the word "press" is used in the title, but not specifically in the body of the section. The word "write" was deleted from the old provision. Each can possibly be read into the remaining words.

The right of freedom of association is not specifically mentioned. A valuable right, it is protected by U.S. Supreme Court decisions, but it is difficult to see what objection there is to mentioning it in the Montana proposal.

Except by judicial decision the self-incrimination provision in our Constitution is not perfectly clear. Does it apply to witnesses? Can a person refuse to answer in a civil proceeding, and under what circumstances? The Committee could have cleared the air by dealing with this problem.

The matters of consumer protection, environment, abortion, euthenasia, and right to work are not included in the proposed version.

Rights of Convicted

The Committee has proposed that, as to convicted persons, "full rights shall be automatically restored upon termination of state supervision for any offense against the state." This is a new provision.

Under current provisions in the Montana Constitution, restoration to full citizenship is conditional upon action by the Governor which in turn is conditional upon approval of the Board of Pardons.

Eminent Domain

The committee added language to the eminent domain section so as to "assure that full and just compensation be made in all eminent domain actions." By adding a provision that just compensation "shall include necessary expenses of litigation..." the committee intended to include "all costs including appriaser fees, attorney fees and court costs."

The intent of the committee, however, may be different than the plain meaning of the words. And it is doubtful that the committee intent would ever be used in a judicial proceeding.

Section 15 of Article 3, abolished in the committee recommendation, likewise provided that a person benefited by opening of private roads, is to pay the "expenses of the proceeding...". The Montana Supreme Court, in the case of Tomten v. Thomas, 125 Mont 159, 232 P 2d 723, held that attorney fees are not allowed as an expense of the proceeding.

If in fact the Committee's interpretation were to prevail, by analogy attorney fees could be interpreted to be expenses which the prevailing party receives in most legal actions,e.g., if you sue and win you get your attorney fees too. Which may not be what the Committee really had in mind.

Also, the provisions could be construed to abolish the necessity of a guardian in certain instances, such as in suing or involving trusts.

Administration of Justice

Article III, section 6 of the current Constitution provides that court shall be open to all, with a speedy remedy afforded for every injury. The Committee has added to this provision by providing that "no person shall be deprived of this full legal redress" in situations where an injured worker is injured by the negligence of a third party and his boss is covered by Workman's compensation.

The obvious intent of the addition is to overrule a recent Montana Supreme Court decision holding that the employee has no redress against third parties for injuries caused by them if his immediate employer is covered under the Workmen's Compensation Laws.

The difficulty comes with the use of "this full legal redress". The language thus used is a characterization of the old language providing a speedy remedy for every injury. The words "full legal redress" may be broader than "speedy remedy." And example: the new language could be construed by a court to prohibit certain forms of "no-fault" insurance, which preclude suits,in certain instances, for anything other than actual medical expenses and property damage, to the exclusion of the concept of "pain and suffering."

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ONE HOUSE or TWO?

Belle Zeller in her book, American State Legislatures, states:

> "Observers of the Nebraska unicameral legislature agree that the lobby is still present and still powerful; some believe, however, that it is forced to work more in the open, and that the members whom it controls find greater difficulty in escaping responsibility. Certainly in eliminating the need for conference committees, the unicameral legislature has removed one focal point of undue influence or corruption."

These points are countered by the bicamerlists. They argue that traditional form is understood and familiar to the people, thereby permitting them a greater exercise of control. That procedural rules rather than legislative structure are more important in making the legislative process visible.

They feel that the unicameral legislature is more susceptible, not less, to control by a special interest group, that the present structure with its numerous committees is much less likely to be significantly influenced by a lobby interest.

The unicameralists feel that since legislative power is centered in one house, responsiblility can be fixed and the practice of "buckpassing" eliminated. It is countered, however, that the practice of passing legislation in one house with the intent to kill it in the second house derives from important political requirements, and that in a unicameral legislature, such legislation will continue to be introduced and probably passed.

It is agreed that legislative business should be conducted efficiently and promptly. Proponents of unicameralism say that procedural delays and the duplication of the dual committee system would be eliminated and that the friction and rivalry between the two houses, which results in deadlocks, are removed.

They feel that legislative business is conducted in a more orderly fashion because leadership is concentrated in one house, which permits more effective working relations between the executive branch and the legislature.

The unicameralists argue that with a single house fewer bills will be introduced, thus reducing the size of the legislative workload. The last year of Nebraska's bicameral legislature--1935--saw 1,956 bills introduced. Under the unicameral form in 1963, only 815 bills were introduced.

They further urge that a single house alleviates the end of session log-jam because there is no second house to alter a bill and thus require additional action by the second house, nor to hold a bill until the last possible moment to improve chances for passage in the second house.

The bicameralists urge that the expense and inefficiency of the committee system and the two houses can be corrected by the establishment of joint committees with parallel functions in each house and joint rules committee for coordinated management of the legislature. They claim that efficiency in procedures is only one of the values sought in the legislative process and can be maximized only as others are diminished.

It seems clear that most of the claimed virtues of unicameralism have been realized in the Nebraska experience. In their single house of 43 members, responsibility is more easily pinpointed than in the previous two-house legislature. The legislative process has been facilitated with fewer bills introduced and a higher percentage of them passed. With a smaller number of legislators- -a concept not automatically acceptable to small Montana counties-- the prestige of membership has risen and with it the quality of candidates for legislative office. Costs have, of course, been lowered. The prime question is whether these results can be achieved in a bicameral legislature with less trouble and effort than in shifting to a unicameral system.

The Kansas Commission on Constitutional Revision recognized "the hold of tradition and the widely varying views that exist" on the issue of unicameral vs. bicameral, "decided that an effort to achieve the practicable, less - than - perfect, is to be preferred to a vain attempt for the ideal."

Some of the factors which will have to be considered by the delegates to the upcoming Constitutional Convention are: (1) the weight of the tradition of bicameralism in Montana; (2) the argument of operational efficiency advanced in favor of unicameralism; (3) the force of the argument that interest or pressure groups can, in the long run, control one body more easily than two; (4) whether the bicameral legislature operates to socialize conflicts and thus contain the wilder impacts of social forces.

The choice is not an easy one. It is not immediately apparent whether unicameralism is good or bad for a particular state, but the issue will have to be faced at the outset of the convention.

Non-immunity from Suit

Basically, the state and its subdivisions--with certain ill-defined exceptions--is immune from suit. Proposed section 18 eliminates this immunity from suit. But only as to the state and its subdivisions.

Left unanswered is the immunity of certain charitable and educational institutions that are private.

Habeas Corpus

Proposed section 19, providing for the writ of habeas corpus--the right to test the legitimacy of one's detention--modifies the old provision by deleting the provision that it may be suspended "in case of rebellion, or invasion" when the public safety requires it.

The rationale of the Committee is that the federal government could be counted upon to assist in keeping the state courts open to review any writ of habeas corpus submitted even in a statewide emergency.

Bail

The Committee has left the bail section intact. It provides in effect that bail is available except in capital cases (cases involving the death penalty) when proof of guilt is evident or the presumption of it great.

Not considered by the Committee is the problem of the possible elimination of capital punishment by either the Supreme Court of Montana or the Supreme Court of the United States. As it stands, if either of the two courts should abolish the death penalty as being "cruel" or "unusual", a person, insane, who murders fifty people brutally, could go free on bail.

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