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WHEN CONVENTIONAL WISDOM IS WRONG: WHY RECENT PROPOSED AMENDMENTS TO THE MINNESOTA CONSTITUTION SHOULD NOT HAVE BEEN PUT TO A POPULAR VOTE

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When Conventional Wisdom Is Wrong: Why Recent Proposed Amendments To The Minnesota Constitution Should Not Have Been Put To A Popular Vote

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I. Introduction

The 87th Minnesota Legislature proposed two constitutional amendments to be put to a vote of Minnesota citizens at the November 2012 general election. One proposed constitutional amendment defined marriage as being between one man and one woman. The other proposed constitutional amendment required voters voting in person to present a valid government issued photo identification before being permitted to vote, among other things. Although both proposed constitutional amendments were presented to and vetoed by Governor Mark Dayton, and although no votes to override his vetoes were ever taken, both proposed constitutional amendments nonetheless appeared on the November 2012 general election ballot. The amendments were rejected at the election.

The proposed amendments appeared on the ballot notwithstanding Governor Dayton's vetoes because over the course of the past ninety years Minnesota attorney generals have opined that Minnesota governors do not have the authority to veto proposed constitutional amendments, and those faulty opinions have become part of conventional wisdom. This article posits that contrary to those erroneous attorney general opinions, the

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Minnesota Constitution unambiguously empowers Minnesota governors to veto "***[e]very*** bill" and "***[e]ach*** order, resolution or vote" which has received the concurrence of both houses of the legislature,[2] which would include proposed constitutional amendments. Because the legislature did not override the Governor's veto of either proposed amendment, they should not have been placed on the ballot and put to a vote of the people.

Three attorney general opinions dating back to the 1920s, opining that the governor cannot veto proposed constitutional amendments, all ignore the Minnesota Supreme Court's controlling 1882 decision in *Secombe v. Kittelson.*[3] In *Secombe*, the Minnesota Supreme Court rejected a challenge to the validity of the first amendment to the Minnesota Constitution on the ground that it had not been approved by the governor, ruling that since the acting governor had authority to sign the proposed amendment in the governor's place, the amendment was valid[4]. Since the only reason the constitution provides for presentment to the governor is to give the governor an opportunity to approve the measure or exercise his veto, it is clear that it has been understood since before statehood that proposed amendments must be presented to the governor for his approval or veto. None of the Minnesota attorney general opinions opining on the governor's power to veto proposed amendments cite *Secombe.* Instead, they have relied upon the United States Supreme Court decision which "held" that the President does not have the power to veto proposed amendments to the U.S. Constitution.[5] For the reasons described in this article, the text of Article 4, Sections 23 and 24, and the decision in *Secombe*, not *Hollingsworth*, should control whether the governor has the right to veto proposed amendments to the Minnesota Constitution.

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2 MINN. CONST. art. IV, § 23, 24 (emphasis added).
3 Secombe v. Kittelson, 12 N.W. 519 (Minn. 1882).
4 *Id.* at 520-21.
5 Hollingsworth v. Virginia, 3 U.S. 378, 381 (1798).

II. The Proposed Amendments For The 2012 Election

On May 23, 2011, the Revisor of Statutes, presented to Governor Dayton[6] Chapter 88, Senate File 1308, of the 2011 Session Laws (hereinafter "Marriage Amendment") which defined marriage as being between one man and one woman.[7] By letter dated May 25, 2011, Governor Dayton advised the President of the Senate that he had vetoed Chapter 88, Senate File 1308 and was returning it to the Senate.[8] In his veto letter, Governor Dayton described his veto as "symbolic." The legislature never voted on whether or not to override Governor Dayton's veto.

By letter dated April 5, 2012, the Governor was presented with Chapter 167, House File 2738, of the 2012 Session Laws (hereinafter the "Voter Identification Amendment").[9] On April 9, 2012, Governor Dayton vetoed the Voter Identification Amendment and timely returned it to the Speaker of the Minnesota House, together with his objections thereto.[10] The Legislature did not take a vote on whether to override his veto.

Notwithstanding the failure of either house of the Minnesota Legislature to override Governor Dayton's vetoes, both amendments were filed with Secretary of State Mark Ritchie, and were on the ballot in the general election held in November, 2012.

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[6] Letter from Michele L. Timmons, Revisor of Statutes, to Mark Dayton, Governor (May 23, 2011) (on file at the Minnesota Office of the Revisor), *available at* http://mn.gov/governor/multimedia/pdf/RevisorLetter.pdf.

[7] S.F. 1308, 87th Leg., 2011 Reg. Sess. (Minn. 2011) [hereinafter Marriage Amendment].

[8] Letter from Mark Dayton, Governor, to Michelle L. Fischbach, President of the Senate (May 25, 2011) (Brief of Petitioner at A-2, Limmer v. Ritchie, 819 N.W.2d 622 (Minn. 2012)), *available at* http://www.scribd.com/doc/99602839/Marriage-Amendment-Lawsuit.

[9] H.F. 2738, 87th Leg., 2012 Reg. Sess. (Minn. 2012). [hereinafter Voter Identification Amendment].

[10] Letter from Mark Dayton, Governor, to Kurt Zellers, Speaker of the House (April 9, 2012.), *available at* http://mn.gov/governor/images/ch_167_hf_2738_veto_letter.pdf.

III. The Governor's Veto Power Under The Minnesota Constitution

The Minnesota Constitution was adopted in 1857 (hereafter referred to as "1857 Constitution"). The 1857 Constitution was amended and restructured on November 5, 1974 ("1974 Constitution") to reform "its structure, style and form in order to improve its clarity by removing obsolete and inconsequential provisions, by improving its organization and by correcting grammar and style of language, but without making consequential changes in legal effect."[11] Article 4 of the 1974 Constitution contains the following pertinent provisions:

> **Sec. 23. Approval Of Bills By Governer; Action On Veto.**
> Every bill passed in conformity to the rules of each house and the joint rules of the two houses ***shall be presented*** to the governor. ***If he approves a bill, he shall sign it***, deposit it in the office of the secretary of state and notify the house in which it originated of that fact. ***If he vetoes a bill, he shall return it with his objections*** to the house in which it originated. His objections shall be entered in the journal. ***If, after reconsideration, two-thirds of that house agree to pass the bill, it shall be sent, together with the governor's objections, to the other house, which shall likewise reconsider it. If approved by two-thirds of that house it becomes a law and shall be deposited in the office of the secretary of state. . . .***
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> **Sec. 24. Presentation Of Orders, Resolutions, And Votes To Governor.**

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[11] 1 MINN. STAT. ANN. p. 341 (1976).

> ***Each order, resolution or vote requiring the concurrence of the two houses*** except such as relate to the business or adjournment of the legislature shall be presented to the governor and is subject to his veto as prescribed in case of a bill.[12]

Article 23 is substantially similar to Article 11 of the original 1857 Constitution. Article 24 is substantially similar to Article 12 of the original 1857 Constitution. Article 9 of the 1974 Constitution provides in pertinent part as follows:

> **Section 1. Amendments; Ratification.**
> A majority of the members elected to each house of the legislature may propose amendments to this constitution. Proposed amendments shall be published with the laws passed at the same session and submitted to the people for their approval or rejection at a general election. If a majority of all the electors voting at the election vote to ratify an amendment, it becomes a part of this constitution. [13]

IV. A Short History On The Formation Of The Minnesota Constitution

In 1849 Congress passed the Organic Act creating the Minnesota Territory out of the Wisconsin Territory. The Organic Act, which functioned as Minnesota's constitution until 1857, provided that the "legislative power and authority of said Territory shall be vested in the governor and a legislative assembly."[14] Every bill passed by the legislature was required to be presented to the territorial governor for approval or veto, and a veto could be

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12 MINN. CONST. art. IV, § 23, 24 (emphasis added).
13 MINN. CONST. art. IX, § 1.
14 30 Cong. Ch. 121, 9 Stat. 403, 404 (1849).

overridden by a two-thirds vote of the legislature.[15] Being an Act of Congress, the Organic Act contained no mechanism for amendment by the residents of the Minnesota Territory.

Minnesota obtained leave of Congress to hold a constitutional convention in 1857. The constitutional convention held that summer immediately became chaotic. Democrats and Republicans held separate conventions and considerable animosity existed between the two groups, particularly surrounding the issue of giving Negroes[16] the right to vote (Republicans for; Democrats against). Ultimately, a compromise committee of five Democrats and five Republicans forged a proposed constitution which was ultimately approved, though there are two versions of the constitution, one Democratic and one Republican, which differ in grammatical and other particulars.[17] The compromise committee which drew up the actual constitution kept no record of its deliberations. "The published debates of the two wings of the convention are, therefore, of little value in explaining the provisions and phraseology of the compromise committee's constitution, and they have been only infrequently cited."[18] As early as 1865, the Minnesota Supreme Court noted that "it seems quite obvious" that the debates at the constitutional convention cannot be relied upon to interpret the document.[19]

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15 *Id.* at 409.

16 The term "Negroes" was the contemporary term used in the deliberations leading up to the 1857 Constitution, in the 1857 Constitution itself, and in the 1867 Amendment granting Negro males suffrage. It is used here for historical accuracy. FINAL REPORT OF THE MINNESOTA CONSTITUTIONAL STUDY COMMISSION 4 (February1973) [Hereinafter FINAL REPORT]; MARY JANE MORRISON, THE MINNESOTA STATE CONSTITUTION – A REFERENCE GUIDE 1-2 (2002); THEODORE CHRISTIANSON, MINNESOTA: THE LAND OF SKY-TINTED WATERS: A HISTORY OF THE STATE AND ITS PEOPLE 289-290 (1935).

17 FINAL REPORT, *supra* note 16, at 4; MORRISON, *supra* note 36, at 1-2; CHRISTIANSON, *supra* note 16, at 279-291.

18 William Anderson, *The Need for Constitutional Revision in Minnesota*, 11 MINN. L. REV. 189, 191 (1927).

19 Taylor v. Taylor, 10 Minn. 107, 126 (1865).

Even if the records of the constitutional convention proceedings were reliable, they would be of little help in resolving the issue discussed here. There is nothing in the reports of the proceedings of either the Democratic or Republican wings of the convention which address the governor's right to veto proposed constitutional amendments.[20] Similarly, there is nothing in the reports of the proceedings which indicates that the delegates knew (or did not know) that the language relating to the veto power which they were adopting was substantially the same as the language of Article I, Section 7, Clause 3 of the United States Constitution. Nor is there any indication that delegates were aware of the decision in *Hollingsworth v. Virginia*,[21] which "held" that the President does not have the power to veto proposed amendments to the U.S. Constitution (*see infra* at 22-26).

Unlike the Organic Act, the 1857 Constitution provided that the legislature consisted only of the Senate and House of Representatives; the governor was not part of the legislature.[22] The 1857 Constitution retained from the Organic Act the gubernatorial veto right over "bills," subject to a vote to override by two-thirds of the members of each house of the legislature.[23] In addition, the 1857 Constitution added the provision that the governor must be presented, and either accept or veto, all "resolutions, orders and votes," again subject to a legislative override.[24] It also added the provision in Article 5, Section 4 that the governor would have a "negative" subject to whatever limitations the constitution placed

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[20] *See* MINNESOTA CONSTITUTIONAL CONVENTION, JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE TERRITORY OF MINNESOTA BEGUN AND HELD IN THE CITY OF SAINT PAUL, CAPITAL OF SAID TERRITORY (1857). Debates and proceedings of the Minnesota constitutional convention for the territory of Minnesota, to form a state constitution preparatory to its admission into the Union as a state (Democratic); Debates and proceedings of the constitutional convention for the territory of Minnesota, to form a state constitution preparatory to its admission into the Union as a state (Republican).

[21] 3 U.S. 378 (1798).

[22] MINN. CONST. art. IV, § 1 (1857).

[23] *Id.* at § 11.

[24] *Id.* at § 12.

on that negative. Also unlike the Organic Act, the 1857 Constitution included the power to amend the Constitution.[25] Article 14, Section 1 of the 1857 Constitution differs from the federal Constitution in that it only requires a simple majority vote of each house of the legislature in order for an amendment to be proposed, and a simple majority of voters voting on the amendment itself for it to be adopted.[26] Thus, a transitory political majority in the legislature has the power to propose permanent changes to Minnesota's Constitution so long as a simple majority of the electorate agrees. The requirement of a simple majority in only one legislative session was the "Great Compromise" of 1857 in which the Republicans, who favored giving Negroes the right to vote, agreed to accept the Constitution largely in the form proposed by the Democrats, who opposed giving Negroes the right to vote, in return for a simplified amendment process.[27] However, there is nothing in the records of the convention that suggests that the simplification of the amendment process had anything at all to do with whether or not the governor would have a veto over proposed amendments. Indeed, though the Republicans favored a stronger governor, the Democrats' provisions for a weaker governor prevailed, yet Article 4, Section 12, which gave the governor a veto over "[e]ach order, resolution or vote" - was agreed upon by both parties.[28]

Both the Republicans and the Democrats had originally proposed an amendment process similar to other states requiring that amendments had to be proposed by majorities of each house of

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[25] *Id.* at art. XIV, § 1.

[26] *Compare* MINN. CONST. art. XIV, § 1 (1857), *with* U.S. CONST. art. V. The process for amending the U.S. Constitution is very different from the process for amending the Minnesota Constitution. *Id.* Proposed amendments to the federal constitution must pass each house of Congress by a two-thirds vote, not a simple majority. *Id.* Proposed amendments are then submitted to state legislatures, three-fourths of which must approve the proposed amendment; unlike amendments to the Minnesota Constitution, proposed amendments to the federal constitution are not put to a popular vote. U.S. CONST. art. V.

[27] CHRISTIANSON, *supra* note 16, at 289-290; FINAL REPORT, *supra* note 16, at 4.

[28] Anderson, *supra* note 18, at 119-122.

two successive legislatures before being put to a vote of the electorate; the Great Compromise eliminated the need to have two successive legislatures approve the proposal, reducing the requirement to just one session. In addition, the Democrats' proposal that a majority of the voters at an election had to approve a constitutional amendment was scrapped in favor of the Republican proposal that amendments need only be approved by a simple majority of those voting on the specific question.[29] Finally, the Democrats' proposal did not include a provision for calling of constitutional conventions, but a Republican supported provision for calling such conventions was included as part of the Great Compromise.[30]

V. A Short History On The Legislative Procedures For Presenting Proposed Amendments

Although the history of the constitutional convention sheds no light on whether constitutional amendments were to be presented to the governor for acceptance or veto, the behavior of the legislature from the moment the constitution was adopted leaves little doubt that the presentment clause applied to constitutional amendments. The Permanent Rules of the Senate, the Standing Rules of the House, and the Joint Rules of Both Houses, all adopted by the first legislature in 1857, made no distinction between how bills and resolutions relating to statutes and bills and resolutions relating to constitutional amendments were to be handled. Once both houses had agreed on the language, "all bills and resolutions" were to be presented to the governor.[31]

The first two amendments adopted by the legislature in 1858, just months after the constitution was passed, were each

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[29] In 1898 the constitution was amended to adopt the original proposal of the Democrats that amendments had to be passed by a majority voting in the election, not just a majority of those voting on the amendment proposal.

[30] Anderson, *supra* note 18, at 129-30.

[31] Joint Rules of Both Houses, Joint Rule No. XII, p. 52 (1857).

presented to and signed by the acting governor.[32] The same rules were in place in 1860 when the next two amendments were approved by the legislature and presented to the governor for acceptance.[33] By the time of the 1881-1882 session of the legislature, during which *Secombe v. Kittleson* was decided, the procedure for adopting bills and resolutions for constitutional amendments was still not differentiated from the procedure for statutes. The joint rule had been re-codified as Rule 11, and the language had been refined to provide that after bills and resolutions had passed both houses the Senate and House committees on enrolled bills "shall then obtain the signatures and certificates of the proper officers to the enrolled copies, present the same to the Governor for his approval, and report the date of such presentation to their respective houses."[34]

The language of Joint Rule 11 remained substantially unchanged until 2000. True to the provisions of the Joint Rules, from the adoption of the 1857 Constitution to the 1920s and beyond, virtually every proposed constitutional amendment has been presented to the governor for approval or veto.[35]

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[32] Secombe, 12 N.W. at 519-20.

[33] Legislative Manual For Second State Legislature, Joint Rules, Joint Rule No. XII, p. 91 (1860).

[34] Legislative Manual for the State of Minnesota, Joint Rules, Joint Rule No. 11, pp. 441-442 (1881).

[35] See Table A. When we began the project which led to this article, there was no available summary of whether past proposed constitutional amendments had been presented to the governor prior to being submitted to the people. In the summer of 2012, volunteers recruited by the American Civil Liberties Union of Minnesota ("ACLU-MN") reviewed the archives of the Minnesota Historical Society to document the history of presentment of past constitutional amendments. As of the writing of this article they had completed their research for the period from 1858 through 1922 and verified that all proposed constitutional amendments to that point in time had been presented to the governor; that research is summarized in Table A. The information amassed by the ACLU-MN research volunteers has been deposited at the Minnesota History Center and the State Law Library for use by future researchers.

All available evidence suggests that people involved in the constitutional convention and the early legislature intended that under the 1857 constitution, presentment to the governor of proposed amendments was required. Since the rules and procedures they implemented immediately after the adoption of the constitution remained in place uninterrupted for over 140 years, there is a strong historical basis for interpreting Article 4, Sections 23 and 24 of the 1974 Constitution as requiring presentment of constitutional amendments to the governor for acceptance or veto.[36] Indeed, in the 1970s and the 1980s and as late as 2011 and 2012, proposed amendments were presented to the Governor for signature immediately after approval by the legislature[37] and prior to being put to the electorate for a vote.[38] "[W]here we have a clear understanding, as we do in this case, as to what our constitution meant in 1857, as defined almost contemporaneously in 1869 by this court, the only way that constitution should be changed is by the consent of the people in the form of a constitutional amendment as provided by the constitution itself."[39]

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[36] Immediately after Minnesota was admitted to the Union, the first Governor, Henry Sibley who had been president of the Constitutional Convention, complained that the constitution was too easy to amend and that it could be done "without the satisfaction of the Governor." *See* H.R. Journal, 1858 Sess., at 608 (MN. 1858). During Sibley's tenure no amendments were proposed. The Democrat Sibley's understanding of the governor's role in the amendment process which had been insisted upon by the Republicans was not shared by either the acting territorial governor who preceded him or his Republican successor, both of whom approved the amendments presented to them.

[37] Letter from Michele L. Timmons, Revisor of Statutes, to Mark Dayton, Governor (May 23, 2011) (on file at the Minnesota Office of Revisor), *available at* http://mn.gov/governor/multimedia/pdf/RevisorLetter.pdf.; Letter from Michele L. Timmons, Revisor of Statutes, to Mark Dayton, Governor (April 5, 2012) (on file at the Minnesota Office of Revisor).

[38] *See* S. 30, 1971 Leg., Extra Sess. (MN. 1971); S. 164, 1971 Leg., Reg. Sess. (MN. 1971); S. 1924, 1971 Leg., Reg. Sess. (MN. 1971); S. 108, 1971 Leg., Reg. Sess. (MN. 1971); and S. 2321, 1988 Leg., Reg. Sess. (MN. 1988).

[39] State v. Hamm, 423 N.W.2d 379, 382-83 (Minn. 1988).

VI. Governor Dayton's Veto Was Effective

In the first decision of the Minnesota Supreme Court construing the 1857 Constitution after its adoption, the rule was set forth that:

> [i]n construing a statute or constitutional provision, the great object is to ascertain and interpret so as to carry out the intention of the lawgiver; and as a primary rule, the language used is to be first considered, as being the best evidence of what that intention is; and when the words are clear, explicit, unambiguous, and free from obscurity, courts are bound to expound the language according to the common sense and ordinary meaning of the words.[40]

That rule of interpretation has not changed in the subsequent 154 years of statehood:

> When examining constitutional provisions, our task is to give effect to the clear, explicit, unambiguous and ordinary meaning of the language. Unambiguous words need no interpretation. . . [w]e will not 'substitute for words used in the constitution having a well-defined meaning other words having a different meaning.[41]

"A constitution is intended to be framed in brief and precise language, and represents the will and wisdom of the constitutional convention, and that of the people who adopt it."[42] Because a constitution is "the most solemn and deliberate of human writings" it must be "absolutely certain - that the people did not intend what the language they have employed in its natural signification

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[40] Minn. & Pac. R.R. Co. v. Sibley, 2 Minn. 13, 20 (1858).

[41] State v. Lessley, 779 N.W.2d 825, 833 (Minn. 2010) (internal citations omitted) (emphasis added).

[42] State ex rel. Childs v. Sutton, 65 N.W. 262, 263 (Minn. 1895).

imports, before a court will feel itself at liberty to depart from the plain reading of a constitutional provision."[43]

The Minnesota Supreme Court has also been very clear that the various articles and sections of the Constitutions are not to be read in isolation from one another.[44] These basic rules of construction compel the conclusion that Minnesota governors have the right to veto proposed constitutional amendments.

VII. The Presentment And Veto Clauses Of The Minnesota Constitution Give The Governor The Authority To Veto Proposed Constitutional Amendments

Article 4, Section 23 of the 1974 Constitution[45] provides that "***Every*** bill passed in conformity to the rules of each house and the joint rules of the two houses ***shall be*** presented to the governor" who must then either approve or veto the bill (emphasis added). Article 4, Section 24 of the 1974 Constitution[46] provides that "***Each*** order, resolution or vote requiring the concurrence of the two houses *except such* as relate to the business or adjournment of the legislature ***shall be*** presented to the governor and is subject to his veto as prescribed in case of a bill" (emphasis added). By definition, proposed constitutional amendments can only result from a vote requiring the concurrence of the two houses.

The framers of the 1857 Constitution did not limit presentment and veto to simply the legislature's law-making function, but extended it by plain language to all orders, resolutions and votes other than those which "relate to the business or adjournment of the [legislature]."[47] By its terms, Article 4, Section

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[43] *Id.* (quoting Newell v. People, 65 N.W. 263 (1852)).

[44] State ex rel. Marr v. Stearns, 75 N.W. 210, 212 (1898), rev'd on other grounds, Stearns v. Minnesota, 179 U.S. 223 (1900).

[45] Article 4, Section 23 of the 1974 Constitution is substantially identical to Article 4, Section 11 of the 1857 Constitution.

[46] Article 4, Section 24 of the 1974 Constitution is substantially identical to Article 4, Section 12 of the 1857 Constitution.

[47] MINN. CONST. art. 4, § 12 (1857).

12 constrains the power of the legislature. If the framers had not intended to extend presentment and the governor's right to accept or veto beyond the lawmaking power, there would have been no reason to include orders, resolutions, and votes within the scope of presentment and veto. Indeed, Article 4, Section 12 would have been superfluous if the framers had intended to limit presentment and veto to ordinary legislation only.[48]

There is no exception specified in either the 1857 or the 1974 Constitution which would exempt a proposed constitutional amendment, resulting from a vote of a majority of the members of each house of the legislature, from being presented to the governor and subjected to his approval or veto.

The text of Article 9, Section 1 on constitutional amendments does not yield a contrary conclusion. That provision describes a three step process: First, a simple majority of each house of the legislature must propose an amendment. Second, the proposed amendment must be published with the laws passed at the same session of the legislature. Third, the amendment must be submitted "to the people for their approval or rejection at a general election."[49] That the text of Article 9, Section 1 does not explicitly reference presentment to, and acceptance or veto by, the governor is not indicative that presentment is not required nor that veto is not permitted. Provisions of the constitution adopted at the same time "must be construed together, as a whole, and with reference to the purposes for which the constitution was ordained. It is not permissible to select a single, isolated provision, and give it effect

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[48] During the final debate on Art. I, § 7, cl. 2, of the U.S. Constitution, James Madison expressed concern that it might easily be evaded by the simple expedient of calling a proposed law a "resolution" or "vote" rather than a "bill." I.N.S. v. Chadha, 462 U.S. 919, 947 (1983) (quoting 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 301-302 (1911)). Because of this concern, Art. I, § 7, cl. 3 of the U.S. Constitution, which is identical to Article IV, Section 23 and 24 of the 1974 Minnesota Constitution, which required presentment of orders, resolutions and votes requiring the concurrence of both houses, was added. *Id.*

[49] MINN. CONST. art. IX, § 1.

according to its literal reading, without reference to modifications made by the express language of other provisions of the instrument."[50] Indeed, by its terms, Article 9, Section 1, does not refer to a host of steps involved in passing a constitutional amendment, including voting by the legislature as a requirement to making a proposal, yet in order for a proposal to be made a vote of the legislature must be taken. It follows that established rules of constitutional construction require Article 9, Section 1 to be read in conjunction with Article 4, Sections 23 and 24.

There being no exception for constitutional amendments specified anywhere in the Constitution, it follows that Governor Dayton had the power to veto the Voter Identification Amendment and Marriage Amendment. Because the Legislature did not override the vetoes, straightforward application of the Minnesota Supreme Court's well-established principles required that the Voter Identification Amendment and Marriage Amendment should not have been on the November 2012 general election ballots.

VIII. The Minnesota Supreme Court's Decision In *Secombe v. Kittelson* Is Controlling

Not only does the language of the Constitution support the governor's authority to veto amendments, controlling precedent does too. In *Secombe v. Kittelson*,[51] the Court squarely faced the question of whether constitutional amendments must be presented to the governor for acceptance or veto. In 1881 the legislature authorized the issuance of railroad bonds under the authority of the first amendment to the 1857 Constitution. Voters approved the 1857 Constitution in October, 1857. The first legislature convened from December 1857 to March 1858. In March, 1858, the legislature proposed two amendments to the constitution. Both were presented to and signed by the acting territorial governor, and they were approved by voters at an election in April, 1858. The acting

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50 Stearns, 75 N.W. at 212.

51 12 N.W. 519, 520 (Minn. 1882).

governor proclaimed the amendments adopted on May 5, 1858; six days later, Congress admitted Minnesota into the Union.[52]

The complaint in *Secombe* alleged the bonds were invalid on several grounds, one of which was that the 1858 constitutional amendment had not been adopted "in accordance with the provisions of the said constitution."[53] The complaint was dismissed by the trial court, and on appeal the plaintiff argued that Article 9, Section 10 of the 1857 Constitution, which was adopted by amendment in 1858, was "null and void" because it had not been "proposed or submitted to the people of the State for their approval or rejection, or adopted by the people of the State, in accordance with the provisions and requirements of the constitution."[54] In support of this argument, the plaintiff cited Article XIV, section 1, Article IV, sections 11, 12, and 21,[55] and Article V, sections 6 and 7.[56] Unfortunately, the appellant's brief contains no further argument on this point. The brief submitted by the Attorney General in opposition is completely silent on the issue of whether the amendment was properly passed; the Attorney General instead took the position that the Court lacked jurisdiction so it was unnecessary to address any other points.[57]

Justice Mitchell, in the Court's opinion, explained the basis for the appellant's claim that the amendment had not been properly adopted. He explained that the first ground was that the amendment had not been presented to and accepted by the governor as required by Article 4, Sections 11 and 12 of the 1857 Constitution; the second ground was that the governor of the territory was not the

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52 *Id.* at 519-20.

53 Complaint at 3 Secombe v. Kittelson, 12 N.W. 519 (Minn. 1882).

54 Points and Authorities of Appellant at 10, Secombe v. Kittelson, 12 N.W. 519 (Minn. 1882).

55 Article 4, Section 21 of the 1857 Constitution relates to enrollment of bills which have passed both houses of the legislature.

56 Article VI, section 6 of the 1857 Constitution deals with the duties of the Lieutenant Governor. Article VI, section 7 deals with the terms of office of each Executive officer.

57 Points and Authorities for Respondent, at 5-6, Secombe v. Kittelson, 12 N.W. 519 (Minn. 1882).

governor of the state and therefore had no authority to approve an amendment proposed by the first state legislature; only the governor had such authority.[58] The third ground was that because Minnesota had not yet been admitted to the Union at the time the amendment was proposed, approved, and proclaimed, the amendment was not valid.[59]

The *Secombe* court rejected the appellant's claim and held that the amendment was validly adopted[60]. Initially, the Court noted[61]that "an inspection of the enrolled bill, now on file in the office of the secretary of state, shows that it was in fact signed by Charles L. Chase, secretary of the territory, as 'acting governor.'" [62]The Court then held that even though Minnesota had not yet been admitted to the Union, the state government went into operation when the 1857 Constitution was adopted "by the people" and that the territorial governor acted thereafter as governor of the state; under the Organic Act, the secretary of state was acting governor in the governor's absence and his signature approving the amendment was sufficient.[63] In rejecting the appellant's argument, the Court

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58 Secombe, 12 N.W. at 519-520.

59 *Id.* at 520.

60 *Id.* at 521.

61 *Id.* Chase's role in signing the amendment was well known at the time he signed it. Republicans in the legislature objected to the legislature convening at all before Minnesota was admitted to the Union. WILLIAM ANDERSON AND ALBERT J. LOBB, A HISTORY OF THE CONSTITUTION OF MINNESOTA 134-35 (1921). The Democrats voted to proceed anyway. *Id.* at 135. Chase signed all bills and the two constitutional amendments passed by the first legislature despite the fact that the territorial governor had permanently departed the territory, and despite the fact that there was a "governor-elect impatiently waiting to assume office" when statehood was granted. *Id.* All of this subjected Minnesota to criticism in Congress when statehood was debated and was undoubtedly known to Justice Mitchell, who was elected to the legislature in 1859.

62 Secombe, 12 N.W. at 520.

63 Secombe, 12 N.W. at 520. Section 3 of the Organic Act provided that "in case of the death, removal, resignation, or necessary absence of the governor from the Territory, the secretary shall be, and he is hereby, authorized and required to execute and perform all the powers and duties of the governor during such vacancy or necessary absence . . ." 9 Stat. 403, 404 (1849).

said that if the argument that the governor of the territory did not have the authority to sign the amendment was correct, it would lead to "grave results" because the acting governor had signed another constitutional amendment as well as ninety bills.[64] Choosing a belts-and-suspenders approach, the Court also held that even if the adoption of the amendment had taken place irregularly, "[s]uch irregularities, if any, must be regarded as healed by the subsequent act of congress admitting Minnesota into the Union . . .[and] they must be deemed cured by the recognition and ratification of this amendment as a part of the constitution by the state after its admission into the Union."[65] With the issue of whether the governor signed the amendment squarely presented, neither the Attorney General nor the Court suggested that the argument failed because presentment to the governor for approval or veto was not required under Article 4, Sections 11 or 12 of the 1857 Constitution. Indeed, the Court plainly agreed with the proposition that presentment and acceptance were necessary to validity, and the decision is based on the holding that presentment and acceptance occurred.

The Minnesota Supreme Court's 1882 ruling that the proposed amendment was properly signed by the acting governor was a holding which is entitled to the benefit of the doctrine of stare decisis.[66] "Before decisions of [the Minnesota Supreme] Court should be overruled or ignored in subsequent cases, there should be some good reason for doing so. That is particularly true of decisions construing our constitution. Where such decisions have stood unchallenged for many years they should not be lightly overruled."[67] For example, in *In re Haggerty*,[68] the Minnesota Supreme Court ruled that two cases decided shortly after the 1857 Constitution was adopted "obviously were decided with a better perspective on the meaning and policies behind the constitutional"

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64 Secombe, 12 N.W. at 520.

65 *Id.* at 521-522.

66 State ex rel. Foster v. Naftalin, 74 N.W.2d 249, 268 (Minn. 1956).

67 *Id.* at 267-68.

68 448 N.W.2d 363 (Minn. 1989).

provision and thus would be accorded stare decisis status because the issues they decided "ought to be considered as laid at rest forever."[69]

It is also worth noting several significant historical facts relating to *Secombe*. Charles L. Chase, the acting-governor who signed the two proposed amendments in 1857, was the convener of and a delegate to the Constitutional Convention.[70] Justice William Mitchell, who wrote the Court's opinion in *Secombe*, was a member of the 1859-1860 Legislature[71] which proposed, and presented to the Governor, the first two constitutional amendments after statehood, both of which were approved.[72]

Moreover, not only were the first two amendments to the constitution adopted prior to statehood, and the next two amendments adopted during Justice Mitchell's term in the legislature presented to the governor for approval, but research shows that the vast majority of constitutional amendments from 1857 to the present were presented to the governor for approval.[73] Also, in a treatise on constitutional conventions originally published in 1867, the author stated that based upon his interview with the Secretary of State, Minnesota presents proposed constitutional

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[69] *Id.* at 364-365 (internal citations omitted). Even if *Secombe* does not explicitly hold that presentment of constitutional amendments is constitutionally required, statements of the court constitute judicial dictum which are also entitled to great weight. State v. Rainer, 103 N.W.2d 389, 396 (Minn. 1960) ("an expression of opinion on a question directly involved and argued by counsel though not entirely necessary to the decision . . . qualifies as judicial dictum and as such is entitled to much greater weight than mere obiter dictum and should not be lightly disregarded."); *accord* In re John Ward Gillman Engraved June 20, 1775 Copper Printing Plate v. Heritage Auctions, Inc., 806 N.W.2d 861, 866 (Minn. Ct. App. 2011).

[70] ANDERSON & LOBB, *supra* note 61, at 80, 135.

[71] *See* Minnesota Legislators Past & Present – Session Search Results, http://www.leg.state.mn.us/legdb/results.aspx?t=session&sess=2&body=both.

[72] *See* H. Con. Res. 1, 1860 Leg., Reg. Sess. (Minn. 1860) and 1860 Minn. Laws 170.

[73] *See* Table A.

amendments to the governor "for his sanction."[74] The historical record leaves no doubt that the key players in Minnesota's early constitutional history (the legislature, governors and the Supreme Court) all understood that presentment of proposed amendments to the governor was required. The clear language of the 1857 and 1974 Constitutions, the uninterrupted legislative practice of presenting amendments to the governor, and the Supreme Court's decision in *Secombe* leave no room for doubt that Minnesota governors have the power to veto amendments to the constitution.

IX. Dicta In *Breza v. Kiffmeyer* Did Not Overrule Or Diminish *Secombe*

From 1857 until 2005, it appears that no Governor vetoed a proposed constitutional amendment. On May 19, 2005, Governor Pawlenty vetoed a bill related to transportation funding that had embedded within it a proposed constitutional amendment relating to transportation. In his veto message, Governor Pawlenty stated that the proposed constitutional amendment "contains a cornerstone of my transportation proposal," and thanked the legislature for passing it; he said "this provision will go forward notwithstanding my veto because constitutional amendments are not subject to veto."[75]

In *Breza v. Kiffmeyer*,[76] the petitioners challenged several aspects of the proposed constitutional amendment, but they did *not* challenge Governor Pawlenty's assertion that constitutional amendments are not subject to veto; instead, the petitioners in *Breza* accepted Governor Pawlenty's assertion and told the Supreme Court that "the proposed constitutional amendment survives in accordance with the Opinion of the Attorney General on the theory

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[74] JOHN ALEXANDER JAMESON, THE CONSTITUTIONAL CONVENTION; ITS HISTORY, POWERS, AND MODES OF PROCEEDING 518 (3d ed. 1873).

[75] Letter from Tim Pawlenty, Governor, to Sviggum, Speaker (May 19, 2005) (vetoing Ch. 88, House File 2461 2).

[76] 723 N.W.2d 633 (Minn. 2006).

that the amendment is not subject to gubernatorial veto."[77] In a footnote to his brief, the Attorney General, representing the Secretary of State, fully agreed with the petitioner.[78] Thus, the question whether a governor could effectively veto a proposed constitutional amendment was neither put at issue, disputed, nor briefed in *Breza*.

In a footnote to its opinion in *Breza*, the Minnesota Supreme Court said that "amendments proposed by legislative action are not subject to gubernatorial approval or veto," citing as the only authority for this statement the same Attorney General Opinion that petitioners and respondent had each cited, Op. Att'y Gen. No. 213-C at 3-5 (March 9, 1994).[79] Under the circumstances, it is hardly surprising that the *Breza* decision does not mention, let alone discuss, *Secombe v Kittelson*, *supra*. Given the failure of the parties to join issue on the validity of the veto as it applied to the constitutional amendment, the Court's footnote on the point is mere obiter dictum, and is not entitled to the same weight as the holding (nor judicial dictum) of *Secombe v. Kittelson*.[80]

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[77] Petition Pursuant to Minn. Stat. § 204B.44 to Enjoin Election on Ballot Question, Breza v. Kiffmeyer, 723 N.W.2d 633 (Minn. 2006).

[78] Response of Secretary of State, Breza v. Kiffmeyer, 723 N.W.2d 633 (Minn. 2006).

[79] Breza, 723 N.W.2d at 634 n.2.

[80] Rainer, 103 N.W.2d 389; Wandersee v. Brellenthin Chevrolet Co., 102 N.W.2d 514, 520 (1960) (quoting Barrows v. Garvey, 193 P. 2d 913, 915 (1948) (". . . statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication.")); *see also* In re John Ward Gillman Engraved June 20, 1775 Copper Printing Plate, 806 N.W.2d at 866 ("Obiter dictum is Latin for 'something said in passing,' . . . whereas judicial dictum involves a court's expression of its 'opinion on a question directly involved and argued by counsel. . .'") (internal citations omitted).

X. Past Attorney Generals Mistakenly Concluded The Governor Does Not Have The Authority To Veto Proposed Constitutional Amendments

Prior Attorney General Opinions Ignored *Secombe.* The 1994 Attorney General Opinion cited by the parties and by the Minnesota Supreme Court in *Breza* responded to a question posed by Governor Arne Carlson that asked "[m]ust proposed amendments to the Minnesota Constitution be presented to the governor for signature or veto?"[81] The Attorney General answered the question in the negative, relying primarily upon several prior Attorney General Opinions[82] and the U.S. Supreme Court's decision in *Hollingsworth v. Virginia.*[83] The Attorney General relied secondarily on the Minnesota Supreme Court's decision in *State ex rel. Peterson v. Quinlivan.*[84]

None of the Attorney General Opinions in question mention, let alone analyze, *Secombe,* despite the fact that the 1946 Minnesota Attorney General Opinion acknowledges the fact that "it has been the practice in Minnesota for the governor to sign a bill submitting to the voters a proposed constitutional amendment."[85] Neither in 1946, nor in 1994, did the attorneys general attempt to reconcile the historical fact that constitutional amendments had been submitted to

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[81] Letter from Hubert H. Humphrey III, Attorney General, to the Honorable Arne H. Carlson, Govenor (March 9, 1994).

[82] One of those prior opinions, Op. Minn. Atty Gen. 86-a (November 12, 1946), relied upon *Hollingsworth,* but also referred to supreme court decisions in Nebraska, Pennsylvania and Iowa. The other prior opinion, which was in the form of a letter to the attorney general of Arkansas, asserted without explanation or analysis that constitutional amendments were "not within the meaning of the word 'laws,' as used in the constitutional provision relating to the veto power." Op. Minn. Atty Gen. 213-c 1 (April 1, 1922). A significant flaw in the 1922 opinion is that the veto power applies to bills, orders, resolutions, and votes, not to "laws." Both Attorney General Opinions are devoid of rigorous or meaningful analysis.

[83] 3 U.S. at 380.

[84] State ex rel. Peterson v. Quinlivan, 268 N.W. 858 (Minn.1936).

[85] Op. Minn. Att'y Gen. 86-a 2 (November 12, 1946).

Minnesota governors for signature from the very inception of its constitution with their opinions that doing so was not required, nor did they make any attempt to explain their decisions in the face of the plain language of the constitution.

Secombe should control. Moreover, as discussed below, reliance on both *Hollingsworth* and *Quinlivan* was misplaced.[86] The Minnesota Supreme Court is not bound by erroneous opinions of the attorneys general, and if those opinions were in error there "is no justification for any further violation of that instrument."[87]

XI. *Hollingsworth v. Virginia* Is Not Applicable To The Minnesota Constitution

The presentment clause of the U.S. Constitution, Article 1, Section 7, Clause 3, contains the same language regarding presentment and veto of bills, orders, resolutions, and votes as is found in Article 4, Sections 23 and 24 of the 1974 Minnesota Constitution. The Minnesota Supreme Court has held, at least in cases involving individual liberties, that absent a "principled basis" not to do so, it would follow the U.S. Supreme Court's interpretation of language substantially similar to language in the 1974 Constitution.[88] In addition to the fact that *Secombe v. Kittelson* is stare decisis and controlling, there are other principled bases not to follow *Hollingsworth v. Virginia,* because "federal

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[86] The Attorney General also noted that the Supreme Court of Maine and the attorneys general of Nebraska, Arkansas, and Pennsylvania had reached the same answer when construing similar language in their state's constitutions. The Attorney General also noted a contrary decision by the Supreme Court of Montana.

[87] Sutton, 65 N.W. at 264.

[88] Rickert v. State, 795 N.W.2d 236, 247 (Minn. 2011).

precedent does not adequately protect our citizens' basic rights and liberties,"[89] as embodied in the 1974 Constitution.

In 1793, the U.S. Supreme Court held that a private citizen could sue a state in the Supreme Court.[90] The decision created a popular outcry against the Court, and in 1794 Congress very swiftly proposed adoption of the Eleventh Amendment, which prohibits suits against a state by citizens of another state in federal court. The amendment was adopted by the requisite number of states, but was thereafter challenged as void on several grounds, including because it had not been submitted to President Washington pursuant to Article 1, Section 7, Clause 3. The U.S. Attorney General argued that there was no need for submission to the President because the requisite two-thirds of the members of each house of Congress necessary to override a veto had already voted in favor of the amendment, to which the petitioner's counsel responded that the President's veto message might have swayed some votes to change.[91] The U.S. Attorney General also argued that amending the constitution is a "substantive act, unconnected with the ordinary business of legislation, and not within the policy, or terms, of investing the President with a qualified negative on the acts and resolutions of Congress."[92] To the Attorney General's statement, Justice Chase is reported to have commented "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."[93]

The U.S. Supreme Court, under political pressure not to compound the anger at it over the *Chisholm* decision, and

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89 Kahn v. Griffin, 701 N.W.2d 815, 828 (Minn. 2005). *See also* State v. Hershberger, 462 N.W.2d 393, 397-399 (Minn. 1990); Friedman v. Comm'r of Publ. Safety, 473 N.W.2d 828, 830 (Minn. 1991); Skeen v. State, 505 N.W.2d 299, 313-315 (Minn. 1993).

90 Chisholm v. Georgia, 2 U.S. 419 (1793).

91 Hollingsworth, 3 U.S. at 379.

92 *Id.* at 381.

93 *Id.* at 381 n.2.

apparently concerned about the potential for voiding the Bill of Rights,[94] issued a per curiam order the day after oral argument stating merely that the Eleventh Amendment had been "constitutionally adopted."[95] No opinion explaining the rationale for the decision in *Hollingsworth* was ever issued, and no explanation was offered for ignoring the plain and unambiguous language of Article 1, Section 7, Clause 3. Nothing in the decision expressly states that the presentment clause of the U.S Constitution does not cover constitutional amendments. Given that history, it is hardly surprising that both the correctness of the decision and the basis for it have been a subject of controversy ever since.

The eminent constitutional scholar Charles L. Black, Jr., has vigorously argued that *Hollingsworth* was wrongly decided. While acknowledging that the practice of not presenting constitutional amendments to the President is now so well established in American constitutional jurisprudence as to be beyond dispute, Professor Black sharply criticized the decision, noting that:

> [t]he only even semirational ground for this is that the two-thirds vote necessary to pass an amendment is enough to overcome a veto, so that submission to the President is otiose. This is not a good ground, because it denigrates the process of reason by disregarding the possibility that some members of Congress might be convinced by the reasons in the President's veto message; why else should he be required to send it?[96]

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[94] The Bill of Rights, the first ten amendments to the U.S. Constitution, had not been presented to President Washington for approval or veto, either. "[R]ejection of the congressional reading would have upset settled expectations by invalidating the Bill of Rights." David P. Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819, 842 (1981).

[95] JAMESON, *supra* note 74, at 514.

[96] Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 208-209 (1972); *accord* Geringer v. Bebout, 10 P.3d 514, 522 (Wyo. 2000) ("Disapproval [by the governor] may persuade some legislators that their proposal is . . . not wise or prudent, may be a reaction to

In a subsequent article Professor Black noted that *Hollingsworth* "leaves us entirely in the dark as to how or why the Court thought [that] it had evaded the clear language of Article I, Section 7, Clause 3," and he notes that Justice Chase's comment "is definitely not a part of the Court's opinion in this case. There was, in fact, nothing we could now call an 'opinion.'"[97] Professor Black goes on to say "an unreasoned decision, uttered in the teeth of plain constitutional language, and with no really adequate reason even projectable, ought not to be followed beyond its own facts."[98] After stating "I still think the case to have been wrongly decided, if plain words can have plain meaning," he continues:

> That is really all there is to it; the clarity of Article I, Section 7 cannot be made brighter by much speaking. Everyone knows that there is very often more to constitutional law than merely following the text. But when the text speaks plainly to a bedrock procedural point, and when no extra textual reasons can be adduced for not following it, how can it be right simply to treat it as though it were not there? Is this not most reprehensible of all in the case of the constitutional-amendment process, the legitimacy of each step of which ought to be especially clear?[99]

Other noted legal scholars have similarly been sharply critical of the decision in *Hollingsworth*.[100]

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fleeting or transitory circumstances, or does comport with other provisions of the Wyoming Constitution or the United States Constitution – the sort of 'stuff' that political courage is often made of.").

97 Charles L. Black, Jr., *On Article 1, Section 7, Clause 3---And the Amendment of the Constitution*, 87 YALE L.J. 896, 898 (1978).

98 *Id.*

99 *Id.* at 899.

100 *See, e.g.*, Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 130 n.130 (1984) (noting the "flat inconsistency between the decision in *Hollingsworth* and the language of the presentment clause"); David P. Currie, *The Constitution in the Supreme Court 1789-1801*, 48 U. CHI. L. REV. 819, 841 (1981) ("The language of the veto clause seems to include constitutional amendments. . . Justice Chase's oral retort that 'the

The rationale advanced by the U.S. Attorney General in 1798 for not presenting amendments to the U.S. Constitution to the President is simply inapplicable to the 1857 Constitution or the 1974 Constitution, of course, because all that Minnesota requires for the initial proposal is a simple majority of the legislators of each house, while in the event of a veto a supermajority of two-thirds is required to override. That is not the situation at the federal level, and the rationale which justified *Hollingsworth* is not transferable to the Minnesota constitutions. Thus, because of the difference in procedures for amending the federal and state constitutions, there is a principled basis for the Minnesota Supreme Court to interpret the 1974 Constitution differently than *Hollingsworth* interpreted the U.S. Constitution.

XII. The Attorney General Relied On Inapposite Authority

The 1994 Attorney General Opinion also relied on *State ex rel. Peterson v. Quinlivan*[101] to support its conclusion. Such reliance is unwarranted.

Chapter 3 of the Laws of the Minnesota Territory for 1851 chartered the University of Minnesota and section 4 of that law provided that "[t]he government of this University shall be vested in a Board of twelve Regents, who shall be elected by the Legislature. . ."[102] Article VIII, section 4 of the 1857 Constitution provided that "[a]ll the rights, immunities, franchises and endowments heretofore granted or conferred are hereby *perpetuated* unto the said university

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negative of the president applies only to the ordinary cases of legislation' is surely incorrect if taken literally, because the veto clause on its face encompasses '[e]very Order, Resolution, or Vote' and extends the President's participation beyond 'ordinary . . . legislation.'") (internal citations omitted); Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J. L. & PUB. POL'Y 87, 90 n.3 (1984) (referring to the presentment clause as one of several which was "clear in the abstract" but whose "meaning has been blurred in the process of interpretation.").

101 268 N.W. 858 (Minn. 1936).

102 1851 Minn. Laws 10.

. . ."[103] The Minnesota Supreme Court held that by virtue of Article 8, Section 4, the University is "constitutionally independent of all other executive authority," and that "[a]ll the executive power over University affairs having been put in the regents by the Constitution, none of it may lawfully be exercised or placed elsewhere by the Legislature."[104]

The question presented six years later in *Quinlivan* was whether the Legislature had the constitutional power to elect regents of the University of Minnesota or whether "that function is constitutionally part of the executive function of the governor."[105] Relying upon its decision in *Chase* that the 1851 Territorial Law establishing the University was controlling, the Court held that regents therefore had to be elected "by 'joint convention' of their own representatives in the legislature" as provided in the Territorial Law.[106] The question of whether or not the election of Regents was subject to the presentment provisions of Article 4, Sections 11 and 12, was not squarely presented in *Quinlivan*, but the decisions in both *Chase* and *Quinlivan* make it clear that the language of the 1851 Territorial Law establishing the University will always trump the 1857 Constitution by virtue of Article 8, Section 4 of the constitution.[107] Thus, to the extent *Quinlivan* is an exception to the requirement that bills, resolutions, order and votes must be presented to the governor for acceptance or veto, it is an exception explicitly found within another provision of the 1857 Constitution.[108] The same cannot be said of the amendment process; there is no specific exemption from the presentment requirements for amendments anywhere to be found in the 1857 or 1974 Constitutions.

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103 State ex rel. Univ. of Minn. v. Chase, 220 N.W. 951, 953-54 (Minn. 1928) (emphasis in original).

104 *Id.* at 951.

105 Quinlivan, 268 N.W. at 859.

106 *Id.* at 861.

107 Chase, 220 N.W. at 955; Quinlivan, 268 N.W. at 865.

108 Quinlivan, 268 N.W. at 865.

XIII. The Decisions Of Supreme Courts Of Other States Are Not Controlling

The various Minnesota Attorney General Opinions discussed above refer to decisions by other state supreme courts and other state attorney generals to support their conclusion that the Minnesota Governor does not have the power to veto constitutional amendments. The vast majority of state courts to address the issue have indeed followed *Hollingsworth* and determined that proposed amendments need not be presented to the governor.[109] Putting aside the wisdom of following *Hollingsworth,* cases interpreting the constitutions of other states are almost all largely distinguishable because they involve either different language than Article 4, Section 24 of the Minnesota Constitution, or the procedures for amending constitutions in those states were unlike Minnesota because they did not permit a simple transitory legislative majority to propose changes to the state's constitution. Further, in none of those states is there an early supreme court decision, such as *Secombe,* squarely on point, holding that presentment to the governor was required. The constitutions at issue in other states usually require either a super majority of legislators to vote in favor of the amendment in the first instance, or require that the proposed amendment be ratified by a subsequent legislature prior to being presented to the public for vote.[110] In only one state of which we are aware (Arkansas) has a governor been ruled not to have a veto where, like Minnesota, amendments can be proposed by a simple majority of two houses without having to be voted upon by a subsequent legislature.[111]

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[109] *See, e.g.*, Commonwealth v. Griest, 46 A. 505, 507 (Pa. 1900); In Re Senate File No. 31, 41 N.W. 981, 983 (Neb. 1889); Warfield v. Vandiver, 60 A. 538, 539 (Md. 1905).

[110] Table B to this article shows the features of the constitutions in each state that has considered the veto issue, and demonstrates how they are distinguishable from the Minnesota constitutions. Table B lists 15 states that have considered the veto issue.

[111] *Id.*

Given the unique structure of Minnesota's constitutional amendment process, to permit a legislature otherwise unable to override the veto of a statute to accomplish the same legislation by completely bypassing the executive branch through the expedient of proposing a constitutional amendment would run roughshod over the fundamental separation of powers provided by Article 4, Section 24 of the Minnesota Constitution. That is undoubtedly why presentment of constitutional amendments to the governor began immediately upon adoption of the 1857 Constitution, and has continued ever since, and is undoubtedly why in *Secombe* the Court accepted without question the premise that such presentment was constitutionally required. Moreover, though the majority of state court cases considering the issue have followed *Hollingsworth*, not *Secombe,* two notable state supreme court decisions considering the issue do conclude that the governors of those states have the power to veto constitutional amendments[112].

In *Geringer v. Bebout*[113], the Wyoming Supreme Court said language virtually identical to Article 4, Section 24, of the Minnesota Constitution requiring that "[e]very order, resolution or vote, in which the concurrence of both houses may be necessary, ... shall be presented to the governor . . ." meant what it said and said what it meant and, therefore, applied to proposed constitutional amendments.[114] In the words of the *Geringer* court:

> The language of Art. 3, §41 is broad and inclusive, using the words 'every order, resolution or vote.' We are confident that this language encompasses a vote to propose a constitutional amendment. Where we find the language of the constitution to be plain and unambiguous, and thus the intent of the framers'

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112 *Id.*

113 Geringer v. Bebout, 10 P.3d 514 (Wyo. 2000).

114 *Id.* at 519. Compare Geringer language "[e]very order, resolution or vote, in which the concurrence of both houses may be necessary, . . . shall be presented to the governor . . ." with language from Article 4, Section 24, of the Minnesota Constitution: "[e]ach order, resolution or vote requiring the concurrence of the two houses . . . shall be presented to the governor . . ."

> and of those who adopted the constitution is clear, we need not employ principles of construction to ascertain the constitution's intended meaning.[115]

Forty years prior to *Geringer*, the Montana Supreme Court in *State ex rel. Livingstone v. Murray*,[116] likewise ruled that its state constitution, with language virtually identical to Article 4, Section 24 of the Minnesota Constitution, required presentment of proposed constitutional amendments to the governor. The relevant provision of the Montana constitution provided:

Every order, resolution or vote, in which the concurrence of both houses may be necessary . . . shall be presented to the governor, and before it shall take effect be approved by him, or being disapproved, be re-passed by two-thirds of both houses, as prescribed in case of a bill.

The Court said:

> Certainly this requirement [that every vote in which the concurrence of both houses may be necessary] means just what it says, the word 'every' used in a statute, is defined by Black's Law Dictionary (Deluxe ed.) as meaning 'Each one of all; all the separate individuals who constitute the whole.' *See* Webster's International Dictionary (2d ed.). The above section 40, of Article V, is clear, certain, direct and unambiguous, and in the English language; it speaks for itself; it needs no interpretation; there is no conflict with any other provision of our State Constitution. Section 29 of Article III, requires this court to enforce as mandatory each section of the Constitution unless

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[115] *Id.* at 521. The Court further held that even if Article 3, § 41 were ambiguous it would reach the same result, given the historic practice in Wyoming of presenting amendments to the governor and the fact that on several occasions the governor had vetoed proposed amendments. *Id.* at 521-22.

[116] 354 P.2d 552 (Mont. 1960).

> expressly declared otherwise in the Constitution itself.[117]

Given the differences between the Minnesota constitutions and those of other states, reliance on the decisions of other state supreme courts to deny the Minnesota governor the right to veto constitutional amendments is unwarranted.

XIV. CONCLUSION

Over the course of the last ninety years, Minnesota's attorneys general and governors have operated under the historically incorrect and constitutionally unsound belief that the governor did not have the right to veto proposed constitutional amendments and the ability to force the legislature to override such vetoes by a two-thirds vote before the proposed amendment was put to the people for a vote. As a result of those erroneous beliefs, Minnesota voters were asked in November 2012 to vote upon two constitutional amendments that should not have been put to them for a vote in the absence of a legislative override of the veto.[118]

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[117] *Id.* at 556.

[118] Elsewhere in this issue of the Journal, Professor Mary Jane Morrison acknowledges that there is a "good faith basis" for reaching the conclusion that the Governor has a veto power over proposed constitutional amendments, but asserts that "the better view" is that he does not. Mary Jane Morrison, *Amending the Minnesota Constitution in Context: The Two Proposals in 2012*, 34 HAMLINE J. PUB. L. & POL'Y 115, 126-27 (2013). Professor Morrison's stated rationale is that the the sentence in Article 9, Section 1 stating that "Proposed amendments shall be published with the laws passed at the same session and submitted to the people for their approval" might be thwarted in cases where a Governor vetoed a proposed amendment and the legislature failed to override the veto, so that the "simplest reading is that the Governor does not have a veto power" over proposed constitutional amendments. We disagree with Professor Morrison; in our view upon reading the Constitution as a whole, which is how it is required to be read, an amendment is not "proposed" until it has been adopted by the legislature and approved by the governor as discussed in this article.

Table A

Proposed Amendments to Minnesota Constitution 1858 to 1922

Year	Purpose	Ballot Language	Governor Approved Date	Adopted or Rejected
1858	To establish state government May 1, 1858	1858 Laws of MN Chapter 2	3-8-1858	A
1858	To authorize $5 million railroad loan	1858 Laws of MN Chapter 1	3-9-1858	A
1860	To require popular approval of tax to pay railroad bonds to repeal the $5 million amendment	1860 Concurrent Resolution 1	3-10-1860	A
1860	To Limit legislative sessions to 60 days	1860 laws of MN Chapter 22	3-10-1860	A
1865	To authorize Negroes to vote	1865 Laws of MN Chapter 57	2-25-1865	R
1867	To subject shares in state and national banks to state taxation	1867 Laws of MN Chapter 118		R
1867	To authorize Negroes to vote	1867 Laws of MN Chapter 25	2-27-1867	R
1868	To authorize sale of 500,000 acres of internal improvement lands and investment of proceeds in state of national securities	1868 Laws of MN Chapter 108	3-06-1868	R
1868	To abolish requirement of grand jury	1868 Laws of MN Chapter 107	3-06-1868	R
1868	To authorize Negroes to vote	1868 Laws of MN 106	3-06-1868	A
1869	To authorize special assessments for local improvements	1869 Laws of MN Chapter 51	3-04-1869	A
1869	To abolish Manomin County	1869 Laws of MN Chapter 50	3-05-1869	A
1870	To exempt holders of railroad stock from double liability	1870 Laws of MN Chapter 21	3-03-1870	R
1871	To authorize the state loan for asylum buildings	1871 Laws of MN Chapter 19	3-03-1871	R
1871	To require popular approval of changes in railroad gross earnings tax law	1871 Laws of MN Chapter 18	2-21-1871	A
1872	To allow sale of internal improvement lands	1872 Laws of MN Chapter 14	3-04-1872	A
1872	To restrict issuance of county, town, and municipal bonds to aid railroads	1872 Laws of MN Chapter 13	3-01-1872	A

Year	Purpose	Ballot Language	Governor Approved Date	Adopted or Rejected
1872	To exempt stockholders from liability	1872 Laws of MN Chapter 12	3-01-1872	A
1872	To authorize state loan for asylum buildings	1872 Laws of MN, Chapter 11	3-01-1872	A
1873	To effectively provide for the safekeeping of public funds	1873 Laws of MN Chapter 4	3-08-1873	A
1873	To provide for state canvassing board	1873 Laws of MN Chapter 3	3-10-1872	A
1873	To extend terms of representatives & senators	1873 Laws of MN Chapter 3	3-10-1872	R
1873	To provide for biennial sessions of the legislative	1873 Laws of MN Chapter 3	3-10-1872	R
1875	To establish single liability for stockholders in corporations	1875 Laws of MN Chapter 4	3-08-1875	R
1875	To prescribe manner in which school funds could be invested	1875 Laws of MN Chapter 3	3-04-1875	A
1875	To authorize the legislature to grant women suffrage in school affairs	1875 Laws of MN Chapter 2	3-04-1875	A
1875	To provide for an indefinite number of judges in each judicial district	1875 Laws of MN Chapter 1	3-05-1875; 3-08-1875	A
1876	To authorize district judges to sit on supreme bench when supreme court justices disqualified	1876 Laws of MN Chapter 3	2-24-1876	A
1876	To establish single liability for stockholders in all corporations except banks	1876 Laws of MN Chapter 2	2-25-1876	R
1876	To authorize governor to veto items of appropriation bills	1876 Laws of MN Chapter 1	2-14-1876	A
1877	To prohibit use of state school funds to support sectarian schools	1877 Laws of MN Chapter 3	3-02-1877	A
1877	To authorize sale of internal improvement lands	1877 Laws of MN Chapter 5	3-01-1877	R
1877	To establish single liability for stockholders	1877 Laws of MN Chapter 4	2-15-1877	R
1877	To authorize women to vote in local option elections	1877 Laws of MN Chapter 2	3-02-1876	R
1877	To provide for state canvassing board	1877 Laws of MN Chapter 1	3-05-1877	A
1877	To extend terms of representatives and senators	1877 Laws of MN Chapter 1	3-05-1877	A
1877	To establish biennial sessions of legislature	1877 Laws of MN Chapter 1	3-05-1877	A
1879	To restrict issuance of county, town and municipal bonds to aid railroads	1879 Laws of MN Chapter 1	2-25-1879; 2-26-1879	A
1881	To provide for sale of swamp lands	1881 Laws of MN Chapter 4	3-03-1881	A

Year	Purpose	Ballot Language	Governor Approved Date	Adopted or Rejected
1881	To prohibit special legislation on certain subjects	1881 Laws of MN Chapter 3	3-03-1881	A
1881	To regulate compensation of legislators	1881 Laws of MN Chapter 2	3-03-1881	R
1881	To remove time limitations from sessions of legislature	1881 Laws of MN Chapter 2	3-03-1881	R
1881	To authorize levy of water-mains assessments on a frontage basis	1881 Laws of MN Chapter 1	3-03-1881	A
1883	To make terms of district judges six instead of seven years	1883 Laws of MN Chapter 3	3-01-1883	A
1883	To make terms of justices of supreme court six instead of seven years	1883 Laws of MN Chapter 3	3-01-1883	A
1883	To make term of clerk of supreme court four instead of three years	1883 Laws of MN Chapter 3	3-01-1883	A
1883	To establish the official year and to provide for biennial elections	1883 Laws of MN Chapter 2	3-01-1883	A
1883	To make auditor's term four years	1883 Laws of MN Chapter 1	3-01-1883	A
1886	To provide for loans of state school funds to counties and school districts	1885 Laws of MN Chapter 1	3-07-1885	A
1888	To extend biennial sessions of legislature to 90 days each	1887 Laws of MN Chapter 3	3-08-1887	A
1888	To guarantee the payment of liens of workmen and material-men	1887 Laws of MN Chapter 2	2-21-1887	A
1888	To prohibit the monopolization of markets of food products	1887 Laws of MN Chapter 1	3-03-1887	A
1890	To provide for verdicts by 5/6 of jury in civil cases	1889 Laws of MN Chapter 1	3-13-1889	A
1892	To authorize various gross earnings taxes and a tonnage tax on iron ore	1891 Laws of Chapter 2	4-21-1891	R
1892	To extend and strengthen the prohibition against special legislation	1891 Laws of MN Chapter 1	4-15-1891	A
1894	To authorize inheritance taxes	1893 Laws of MN Chapter 1	4-17-1893	A
1896	To provide flexible system for taxing large corporations	1895 Laws of MN Chapter 7	4-26-1895	A
1896	To permit cities, towns and villages, as well as counties and school districts, to borrow school and university funds	1895 Laws of MN Chapter 6	4-12-1895	A
1896	To require compensation for property destroyed or damaged for public use	1895 Laws of MN Chapter 5	3-25-1895	A
1896	To authorize home rule for cities	1895 Laws of MN Chapter 4	4-08-1895	A
1896	To prohibit aliens from voting	1895 Laws of MN Chapter 3	3-02-1895	A

Year	Purpose	Ballot Language	Governor Approved Date	Adopted or Rejected
1896	To take pardoning power from governor and to confer it on a pardon board	1895 Laws of MN Chapter 2	4-26-1895	A
1898	To provide state road and bridge fund	1897 Laws of MN Chapter 333	4-23-1897	A
1898	To amend the municipal home rule section	1897 Laws of MN Chapter 280	4-23-1897	A
1898	To make it more difficult to amend constitution	1897 Laws of MN chapter 185	4-21-1897	A
1898	To permit women to vote for and serve on library boards	1897 Laws of MN Chapter 175	4-21-1897	A
1900	To increase debt limit of municipalities borrowing permanent school funds	1899 Laws of MN Chapter 92	3-23-1899	R
1902	To simplify the taxing provisions of the constitution	1902 1st Sp Sess Laws of Chapter 1		R
1902	To increase debt limit of municipalities borrowing permanent school funds	1902 1st Sp Sess Laws of Chapter 1	3-01-1901	R
1902	To increase state road and bridge tax	1902 1st Sp Sess Laws of Chapter 1	4-13-1901	R
1904	To abolish the requirement of a grand jury	1903 Laws of MN Chapter 269	3-03-1903	A
1904	To increase debt limit of municipalities	1903 Laws of MN Chapter 25	3-05-1903	A
1906	To permit farmers to sell their produce without licenses	1905 Laws of MN Chapter 283	4-19-1905	A
1906	To increase state road and bridge tax	1905 Laws of MN Chapter 212	4-17-1905	A
1906	To simplify the taxing provisions by a "wide open" section	1905 Laws of MN Chapter 168	4-13-1905	A
1908	To authorize legislature to establish educational qualifications for county superintendents of schools	1907 Laws of MN Chapter 480	No date	R
1908	To authorize state hail insurance	1907 Laws of MN Chapter 479	4-25-1907	R
1908	To permit unlimited state taxation for road & bridge purposes	1907 Laws of MN Chapter 478	4-24-1907	R
1908	To limit the exemption of church property from taxation to that "used for religious purposes"	1907 Laws of MN Chapter 477	4-20-1907	R
1910	To authorize tax exemptions to encourage reforestation	1909 Laws of MN Chapter 511	3-29-1909	R
1910	To authorize & require an annual state tax for reforestation work	1909 Laws of MN Chapter 510	4-20-1909	R

Year	Purpose	Ballot Language	Governor Approved Date	Adopted or Rejected
1910	To authorize reapportionment of legislative representation at any time	1909 Laws of MN Chapter 509	4-20-1909	R
1910	To authorize state hail insurance	1909 Laws of MN Chapter 508	4-21-1909	R
1910	To repeal the requirement as to publication of treasurer's report annually in a St. Paul newspaper and also in the biennial sessions laws	1909 Laws of MN Chapter 507	4-22-1909	R
1910	To permit state to assume half of the cost of any road or bridge project	1909 Laws of MN Chapter 506	4-17-1909	A
1912	To limit size of state senate and number of senators from any county	1911 Laws of MN Chapter 395		R
1912	To authorize legislature to establish educational qualifications	1911 Laws of MN Chapter 394	4-20-1911	R
1912	To amend the municipal home rule clause	1911 Laws of MN Chapter 393	4-18-1911	R
1912	To authorize investment of school and university funds	1911 Laws of MN Chapter 392	4-20-1911	R
1912	To authorize state hail insurance	1911 Laws of MN Chapter 391	3-24-1911	R
1912	To authorize a one mill state tax	1911 Laws of MN Chapter 390	3-16-1911	A
1914	To authorize certain public lands to be set aside as state forests	1913 Laws of MN Chapter 592	No date	A
1914	To authorize state bounties for reforestation	1913 Laws of MN Chapter 591	3 -14-1913	R
1914	To authorize special dog taxes	1913 Laws of MN Chapter 594	No date	R
1914	To authorize the recall by the voters of "every public official"	1913 Laws of MN Chapter 593	No date	R
1914	To limit number of senators from any county	1913 Laws of MN Chapter 590	No date	R
1914	To extend terms of probate judges to four years	1913 Laws of MN Chapter 589	No date	R
1914	To authorize investment of school and university funds	1913 Laws of MN Chapter 588	2-18-1913	R
1914	To repeal the requirement as to publication of treasurer's report annually	1913 Laws of MN Chapter 587	No date	R
1914	To authorize a revolving fund for improving states school and swamp lands	1913 Laws of MN Chapter 586	No date	R
1914	To increase number of justices of supreme court	1913 Laws of MN Chapter 585	No date	R
1914	To establish initiative and referendum	1913 Laws of MN Chapter 584	No date	R

Year	Purpose	Ballot Language	Governor Approved Date	Adopted or Rejected
1916	To extend terms of probate judges to four years	1915 laws of MN Chapter 386	4-24-1915	R
1916	To establish initiative and referendum	1915 Laws of MN Chapter 385	4-24-1915	R
1916	To authorize condemnation for construction of drainage ditches	1915 Laws of MN Chapter 384	4-24-1915	R
1916	To authorize the governor to cut down items in appropriation bills.	1915 Laws of MN Chapter 383	4-24-1915	R
1916	To increase number of justices of supreme court	1915 Laws of MN Chapter 382	4-24-1915	R
1916	To authorize the state to mine ore under public waters	1915 Laws of MN Chapter 381	4-06-1915	R
1916	To authorize investment of school and university funds in first mortgages	1915 Laws of MN Chapter 380	2-17-1915	A
1916	To authorized a revolving fund for improving school and swamp lands.	1915 Laws of MN Chapter 379	3-03-1915	A
1918	To prohibit the manufacture and the sale of liquor	1917 Laws of MN Chapter 515	No date	R
1920	To authorize state income tax	1919 Laws of MN Chapter 532	No date	R
1920	To extend terms of probate judges to four years	1919 Laws of MN Chapter 531	No date	A
1920	To provide a state trunk highway system	1919 Laws of MN Chapter 530	No date	A
1922	To tax mining of iron and other ores	1921 Laws of MN Chapter 529	No date	A
1922	To establish a state rural credit system to aid agricultural development	1921 Laws of MN Chapter 528	No date	A

Table B

State constitutions that have considered the veto issue, and how they are distinguishable from the Minnesota constitutions

State	Title	Holding	Super Majority Required	Requirement of Multiple Legislature's Approving?
Arkansas	*Mitchell v.Hopper*, 241 S.W. 10 (Ark. 1922)	Governor has no right to veto proposed constitutional amendments.	No.	No.
California	*Hatch v. Stoneman*, 6 P. 734 (Cal. 1885)	Governor does not have right to veto proposed constitutional amendment but governor does have the right to veto the proposal to submit the time at which a proposed amendment is submitted to the people as such must be passed by a bill subject to gubernatorial veto.	Yes. Two thirds of all members elected to each house must vote in favor.	No.
Colorado	*People ex rel. Stewart v. Ramer*, 160 P. 1032 (Colo. 1916)	Governor's veto of proposed constitutional amendment was ineffective as governor had no veto right.	Yes. Amendments must be approved by two thirds majority of members elected to each house.	No.
Florida	*Collier v. Gray*, 157 So. 40 (Fla. 1934)	Not necessary that governor concurs with proposed constitutional amendments.	Yes. Proposed amendments must be approved by 3/5 of all members of each house.	No.

State	Title	Holding	Super Majority Required	Requirement of Multiple Legislature's Approving?
Iowa	*Koehler & Lange v. Hill*, 14 N.W. 738 (Iowa 1883)	Suggesting that governor has no right to veto proposed amendments and holding that proposed amendment ratified by popular vote was invalid because one of house journals did not reflect passage of amendment as required by constitution.	No.	Yes. Proposed amendments must be approved by majority of members of both houses of two successive general assemblies.
Louisiana	*State ex rel. Morris v. Mason*, 9 So. 776 (La. 1891)	Governor does not have power to veto proposed constitutional amendments.	Yes. 2/3 majority of both houses of legislature must approve.	No.
Maine	*In re Opinion of Justices*, 261 A.2d 53 (Me. 1970)	House of Representatives does not need to override governor's veto of proposed constitutional amendment because governor does not have right to veto amendments.	Yes. 2/3 majority of both houses of legislature must approve.	No.
Maryland	*Warfield v. Vandiver*, 60 A. 538 (Md. 1905)	Governor does not have right to veto proposed constitutional amendments.	Yes. Proposed amendments must be approved by 3/5ths of all of the members of both houses.	No.
Montana	*State ex rel. Livingstone v. Murray*, 354 P.2d 552 (Mont. 1960)	Governor has right to veto proposed constitutional amendments.	Yes. 2/3 of all members elected to each house must approve.	No.
Nebraska	*In re Senate File 31*, 41 N.W. 981 (Neb. 1889)	Proposed amendments to constitution do not need to be submitted to Governor for approval.	Yes. 2/3 of all members elected to each house must approve.	No.
New Mexico	*Hutcheson v. Gonzales*, 71 P.2d 140 (N.M. 1937)	Governor does not have right to veto proposed constitutional amendments but a 2/3rds vote can override his veto.	No. A majority of all members of each house shall vote in favor.	No.

State	Title	Holding	Super Majority Required	Requirement of Multiple Legislature's Approving?
North Dakota	*State ex rel. Wineman v. Dahl*, 68 N.W. 418 (N.D. 1896)	Joint resolution of both houses of legislature calling for people to vote on whether to call constitutional convention for amending constitution was not ordinary law requiring presentment to governor.	No.	Yes. Although *Dahl* did not involve a proposed constitutional amendment the North Dakota constitution requires that proposed amendments be approved by a simple majority of members of both houses of two successive general assemblies.
Pennsylvania	*Commonwealth v. Griest*, 46 A. 505 (Pa.1900)	Proposed amendments do not need to be presented to Governor.	No.	Yes. Two consecutive Legislatures must approve.
South Carolina	*Kalber v. Redfearn*, 54 S.E.2d 791 (S.C. 1949)	Proposed amendments do not need to be presented to governor.	Yes. Must be approved by 2/3 of members elected to each house.	No.
Wyoming	*Geringer v. Bebout*, 10 P.3d 514 (Wyo. 2000)	Governor has right to veto proposed constitutional amendments.	Yes. Must be approved by 2/3 of members elected to each house.	No.

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