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**TAXATION OF MINERAL WEALTH AND
THE NEVADA CONSTITUTIONAL
CONVENTION OF 1864**

DR. GORDON MORRIS BAKKEN

COVER
Carson City main
street. Early 1860's.

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*The Taxation of Mineral Wealth
and the Nevada Constitutional
Convention of 1864*

GORDON MORRIS BAKKEN

INTRODUCTION

The Nevada constitutional convention of 1864 wrote fundamental law for the new state. In reporting a constitution to the people, the convention delegates deliberated the taxation of mineral wealth at great length. Not only was the issue crucial for Nevada, but also for the 19th century Rocky Mountain mining community at large. The work of the Nevada delegates produced a precedent for future miners to argue in their own situation. More pervasively, the Nevada delegates used arguments and displayed voting behavior which became characteristic of later constitutional conventions.

The internal operations of the convention displayed the significance of the institution for public policy decision-making and indicated many of its problems. The constitutional convention was a unique forum for the making of public policy because its opinion was enshrined in fundamental law. Traditionally, this entrenchment had been difficult to displace. Recognizing this feature, delegates were extraordinarily vehement in their claims for convention favor. This exacerbated interest divisions and inordinately elevated the importance of parliamentary procedure.

The interest fight that mining taxation generated unearthed many of the current arguments on constitution-making itself. The delegates often wondered aloud about their roles and that of the convention at large in drafting a constitution. Many felt that specific action of any kind was "legislation" rather than fundamental law. However, this argument increasingly became a rhetorical tool of opposition. But this did not diminish the zeal of those who had firm convictions about constitution-making. In this broader context of 19th century constitution-making, Nevada's delegates vividly portrayed the interest divisions and voiced the arguments which came to characterize legal thinking on taxing mineral wealth in the mining west.

The taxation of mineral wealth was a critical issue for many western constitutional conventions, but for Nevada, the whole document depended upon a palatable solution. Miners threatened to reject the whole document if adverse sections were included. Within the convention, a crisis atmosphere often was generated by internal deadlock. In this context, delegates bargained for compromise and a constitution. The Nevada convention deliberations graphically displayed the impact of procedure and bloc voting in the making of fundamental law.

The patterns of delegate bloc voting can be described through quantitative devices. The cluster bloc technique compares the voting behavior of each delegate with his colleagues. By comparing voting records, the computer produces pair agreement scores. If these agreement scores are placed in a matrix with the highest scores in the upper left, a cluster bloc is constructed. The Guttman scaleogram program is another device of description. This technique isolates a roll call in which a small group of delegates vote against the majority. It then adds other roll calls to the first in which the original group are joined in agreement by others in subsequent roll calls. The original group is considered to have held radical viewpoints and the added delegates to have held increasingly moderate views on mining taxation. The final added roll call contains only a small group in opposition to the original minority. The scale that the computer produces graphically displays the contours of radical and moderate opinion on the issue. Neither the cluster bloc technique, nor the Guttman scale is perfect or all revealing; but if used together in conjunction with the debates and the tactics of parliamentary procedure, these methods can reveal the constituent factors which produced Nevada's mining taxation section.

Nevada's experience with its 1863 constitution demonstrated the critical nature of the mining tax. The 1863 document, providing for a tax on all mines whether productive or not, was resoundingly rejected by the people.¹ When the delegates reassembled in 1864, they produced a constitution which remedied this political indiscretion.² But change was not without opposition. The failure to tax the mines, the opponents asserted, would result in rejection at the polls as surely as complete taxation had.³

Many delegates questioned the appropriateness of doing more than extending the power to act to future legislatures. It was politically expedient to avoid fixing a mining tax in the constitution, but 19th century delegates were prone to legislate rather than assign power to legislatures already found untrustworthy. A compromise in the form of constitutional legislation was also as expedient as deferring to future legislatures. When deadlock was evident in Nevada's convention, J. S. Crosman, a Lyon county miner, proposed a compromise which he thought appeared "like legislation," but was "no more so than many things which we have already adopted." But other delegates rebutted his argument with condemnations of unconstitutional tinkering with fundamental law.⁴ The lines of conflict were drawn by this conception of role as much as by

the issue, but constitutional activists were generally miners and opponents cattlemen.

The reality of a foreign capitalized industry caused many delegates to question the wisdom of tax policy. The locus of tax benefits troubled delegates because they were caught between the need for foreign capital and their parochial sense of keeping dollars at home. The distance and traditional insensitivity of unseen investors controlling local affairs grated the sensibilities of many delegates. In the Nevada convention, John A. Collins, himself a miner, blasted the contention that tax incentives benefited the "poor miner." "The truth [was]," he contended, "that the miners who [were] proposed to be protected in this way, [were] those men who never had any interest in our community—men who [did] not live [there], at all."⁵ Albert T. Hawley, leader of the cow-county delegates, agreed adding that it created a "privileged class." A. J. Lockwood, an Ormsby county mechanic, equally wanted "to make those gentlemen who [were] rolling in wealth in San Francisco, pay something for the support of our government."⁶ The alliance of farmer-labor was forged early in the debates with substantial support coming from small mine owners and mine laborers.⁷ This alliance was economically oriented, but more importantly it opposed the California control of the domestic economy.

The delegate attitude toward alien ownership was developed in the territorial period and brought to bear in the conventions. It was an emotional appeal to nativist sentiment and the obvious inequities of the past. However, the argument failed to acknowledge the economic factors inherent in the issue. The encouragement policy had been popular on the national and the local level. This had produced the abhorrent results, but the delegates were pressed for viable alternatives. Their sole appeal was to emotion, but it did encourage others to impose at least minimal tax burdens on the mines.

Although the past experience with mining taxation had been inequitable, most delegates thought that mining required protection in its infancy and that it should be encouraged to expand. This was part of their resource allocation function and their belief that the constitution was an economic instrument. But delegates who were dissatisfied with an extractive industry, colonial economics, and obvious inequities forced explicit evaluation of the issues.

Nevada delegates questioned the uniqueness of mines and proposed that farms too be taxed only on their net proceeds. Others wanted *ad valorem* taxation of all property without discrimination. Miners countered with claims of unique economic problems and long expositions on indirect benefits.⁸ But all agreed that mines had to be taxed for political and economic reasons. Excepting Colorado which exempted mines for ten years, a majority of Rocky Mountain delegates agreed that some tax had to be imposed.⁹ The delegates disagreed, however, on the form and extent of the tax.

While agreeing on the taxability of mines, delegates pondered the

proper taxable event on which to impose the burden. The delegates were aware of the various steps mines went through seeking profitability. First, the mining claim, although a legitimate subject of taxation, was approached with caution for fear that a burdensome levy would crush it in the cradle. Excessive taxes could also frighten away capital needed to develop the infant claim. Even when a mine existed, its productivity was uncertain and adverse taxation could nip a potential local boom in the bud. When profitable, what ever that meant, the mining company had considerable capital invested and could bear the tax burden. So most delegates reasoned. But how heavy the burden should be and when a mine was "profitable" remained unsettled questions.

Nevada's convention delegates used a variety of arguments in debating the problem. The issue in Nevada was, of course, most immediate and dramatic because of the rejection of the 1863 document on this exact point. The miners accepted the proposition that a tax had to be levied for political reasons, but they wanted to minimize the burden. J. S. Crosman outlined the moderate pro-mining position stating that although he was "opposed to taxing the mines indiscriminately," yet he was "in favor of taxing those which [were] yielding a revenue." J. H. Warwick, a Lander county lawyer, joined Crosman asserting that the mining interests did not want to escape taxation, but needed time to "sprout and grow." It was only "just and right," he continued to tax "to the extent to which the mines pay" because "this mining interest . . . [needed] encouragement." This moderate position was undercut by radicals like Samuel A. Chapin, a Storey county miner, who exacerbated the miner-farmer division with his rhetoric. He agreed that the mines needed encouragement, but "would sooner levy a tax upon the people and property of [the] State to offer a bounty for the prospecting, discovery, and development of our mines."¹⁰

The opposition vehemently blasted mining contentions on all points. John A. Collins admitted that many ingenious arguments had been conjured up against taxing "a hole in the ground, and bed-rock tunnels, and all that, and about legislating against the poor miner," but he asserted "that 'poor miner' was a humbug and a myth." The men who claimed to represent the "poor miner," Collins charged, were trying to fatten San Francisco wallets. George A. Nourse, a Washoe county lawyer, joined Collins and remarked that the mining interest "never would feel it (the tax burden) at all."¹¹ Many delegates felt that placing the tax burden on net proceeds would be a meaningless gesture and would yield little revenue, so much needed in a new state.

The Nevada delegates had the most protracted debates on the mining tax, but the tactics developed were common in the other Rocky Mountain conventions. The issue in Nevada was recognized as crucial to the constitution, but the deadlock that resulted was so devastating that final resolution of the conflict was left to future legislatures. The 1863 section specifically included "mines and mining property" within its provision for a "uniform and equal rate of assessment and taxation." The convention procedure brought the section to the floor and it was immediately

hacked apart with amendments. The miners proposed to strike "including mines and mining property" and add "provided, that in the taxation of mines, the proceeds only shall be taxed" and "the improvements thereon will be taxed as other property."¹² The latter part was a concession to the cow county delegates because it allowed equipment to be taxed; hence, the miners would be paying at least token taxes. James A. Banks, sponsor of the preceding amendment, explained that he wanted the question of whether net or gross proceeds were to be taxed left to the legislatures.¹³ The miners wanted to avoid a final convention settlement because they were confident of a favorable state legislature. The rejection of the 1863 constitution gave them not only confidence in their constituency, but also a powerful weapon to force compromise solutions, if needed.

The cow county delegates wanted immediate solutions to force the miners to pay something. To stave off cow county objections, the miners offered compromise sections from the outset. Charles E. DeLong, a Storey county lawyer, proposed that "net proceeds" be taxed. This, he maintained to sooth the opposition, would eliminate dissention in the legislature.¹⁴ Thomas Fitch, representing "a mining constituency," suggested that leaving the problem to the legislature would avoid deadlock and receive popular support.¹⁵ Both sides of the same coin were offered, but the opposition would have none of it.

The cow county delegates deluged the convention with amendments similar to the one which defeated the 1863 constitution, but the miners persisted in compromise. In an effort to pass an innocuous section, the miners proposed a bare bones section without the "including mines and mining property" clause. This gave complete discretion to the legislature, but again their efforts were beaten back.¹⁶ As division deepened, the voices of compromise became more apparent. Cornelius M. Brosnan, a Storey county lawyer, called for "a spirit of conciliation," but debate continued unabated. Delegates repeated previous stands, but as the furor of debate subsided, Charles W. Tozer's amendment to strike "including mines and mining property" passed. But the cow county delegates continued their amendment fight.¹⁷ The reaction of a majority of delegates to the apparent deadlock produced enough votes to initiate action, but dissidents continued their tactic of disruption.

The growing polarity of opinion in the convention forced delegates to abdicate the decision-making process to the legislature in order to produce a constitution. William Wetherill's statement, late in the debates, was indicative of delegate sentiment. Himself a miner, Wetherill refused to introduce a proposition to restrict the legislature from taxing the mines "one dime." He did so because of "the contrariety of sentiment prevailing" in the convention and contented himself with a general statement favoring abdication to the legislature.¹⁸ The delegates, seeing deadlock and wanting to pursue other business, called for future decisions based on the "will of the people" and the "wisdom of future legislatures." This growing desire to proceed killed radical amendments as soon as they were proposed.¹⁹

Both sides resorted to procedural devices to delay decision, but this too met strong resistance. George A. Nourse's attempt to have debate cut was branded "an outrage" and "gag law." The chair ruled one delegate after another out of order. Delegates offered amendments and withdrew them. James A. Banks, a leading miner, submitted that the mining interests had sought "by every honorable means which [their] ingenuity could invent to join . . . in support of all the compromises proposed;" but they had "not been met in a like spirit."²⁰ The cow county delegates, indeed, did not show a like spirit. They continued to offer amendments which some of their numbers even thought "absurd."²¹

Final consideration was secured by the barest of margins. Charles E. DeLong, in the belief that there was "an object and design to prevent a final vote until members [were] absent from [the] hall," moved the previous question and was sustained by only three votes.²² The article which excepted "mines and mining claims, the proceeds of which alone shall be taxed" was then passed. John A. Collins, leader of the moderate miners, commented that "under the circumstances it [was] the best thing . . . that [could] be done, and . . . [he was] compelled to vote" for it.²³ J. G. McClinton, an Esmeralda county newspaperman, expressed a similar thought.²⁴ The half-a-loaf solution was the only one left to both sides due to the relatively equal strength of the factions. The group of men which allowed the convention to reach a decision was composed of delegates who favored the development of mines, but equally wanted equitable taxes paid.²⁵ These men first voiced compromise and were able to temper the caustic proposals of the radicals on both sides. Because of the size and intensity of opposing factions, they played an important role in finalizing constitutional provision. In later Rocky Mountain conventions analogous moderate factions likewise tempered the ire of opposing economic interests. The radicals, of course, helped to defeat their own purpose by advocating the extreme which alienated many delegates. But in most conventions, miners outnumbered farmers and the industry was made safe for exploitation.

1. See Kent David Richards, "Growth and Development of Government in the Far West: The Oregon Provisional Government, Jefferson Territory, Provisional and Territorial Nevada," (Ph.D. dissertation, University of Wisconsin, 1966), p. 202.

2. *Official Report of the Debates and Proceedings of the Constitutional Convention of the State of Nevada*, (San Francisco, 1866), p. 222. The original section read "The Legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, including mines and mining property; excepting such property only as may be exempted by law for municipal, educational, literary, scientific, religious, or charitable purpose." *Ibid*, p. 222.

3. *Ibid*, p. 224 (Haines), p. 412 (Haines), p. 357 (Lockwood).

4. *Supra*, note 2 for the section being debated. *Debates . . . Nevada*, p. 353 (Crosman), p. 424 (Murdock), p. 444 (Hawley).

5. *Debates . . . Nevada*, p. 325.

6. *Ibid*, p. 337 (Hawley), p. 356 (Lockwood).

7. Voting agreement scores based on 14 roll calls on the mining taxation section show Lockwood voting with Hawley 92%, Collins with Hawley 50%, Collins with Lockwood 67%. *Boguetab* analysis. The Guttman scaleogram analysis of the same roll calls put Hawley in undisputed leadership of the cow country delegates, Lockwood closely associated, and Collins voting more with the mine owners. The roll calls may be found at *Proceedings . . . Nevada*, p. 406, 416, 420, 422, 429, 431, 437, 443, 444, 446, 446, 520, 520, 521.

8. *Debates . . . Nevada*, p. 222–223 (Nourse), p. 224 (DeLong), p. 224–225 (Banks), p. 225 (Hawley), p. 229 for the text of the *ad valorem* amendment and p. 323 for the statement on the amendment by J. Neely Johnson, its author, p. 407 (Kennedy).

9. *Proceedings . . . Montana*, p. 475–476 (Clark). *Journals . . . Wyoming*, p. 653–655 (Teschemacher), p. 663 (Brown), p. 685 (Baxter). *Proceedings . . . Idaho*, p. 1704 (King), p. 1719 (Batten). *Proceedings . . . Utah*, p. 1070 (Varian), p. 1075 (Evans), p. 1081 (Heybourne).

10. *Debates . . . Nevada*, p. 228 (Crosman), p. 332–333 (Warwick), p. 340 (Chapin). Their respective voting records also bear out their role as pro-mining leaders. On the Guttman scaleogram J. S. Crosman has the most extreme voting record. Samuel Chapin's voting record agrees 100% with Crosman's. J. H. Warwick agreed with Crosman 85% and Chapin 86% of the time. *Boguetab* analysis. For the 14 votes considered in the analysis see note 15, *supra*.

11. *Ibid*, p. 325 (Collins), p. 334 (Nourse). George A. Nourse voted with his Washoe and Roop delegates and ranks next to Hawley in the extremity of his voting record. In the *Boguetab* analysis, Nourse and his fellow county delegates voted as a bloc 100% of the time. Hawley voted with this group 79%, John A. Collins, 57%.

12. *Debates . . . Nevada*, p. 222–223.

13. *Ibid*, p. 223.

14. *Ibid*, p. 223.

15. *Ibid*, p. 226. Fitch amendment: "The Legislature shall provide for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property." Thomas Fitch was a member of a voting bloc which represented a pro-mining attitude, but backed off from support for radical proposals. As a center group, it was essential in the compromises made in convention. Its members based on a minimum 64% agreement score were: Thomas Fitch, Storey county lawyer, John A. Collis, Storey county miner, Cornelius M. Brosnan, Storey county lawyer, George A. Hudson, Lyon county mill owner, Frank Kennedy, Lyon county lawyer, H. G. Parker, Lyon county mining superintendent, and Charles E. DeLong, Storey county lawyer.

16. *Ibid*, p. 229. See the Johnson amendment: "The Legislature shall provide by law for the assessment and collection of taxes by a uniform rule, so that taxes shall be assessed and collected on all property, possessory rights and claims, according to their true value in money." See *Ibid*, p. 328. See the Mason amendment. *Ibid*, p. 342 (Collins).

17. *Ibid*, p. 351 (Brosnan), p. 359 (Banks), p. 383, 406 (Tozer), p. 406. Nourse amendment test: "The Legislature shall provide by law for a uniform and equal rate of assessment and taxation of all property, possessions, and possessory rights, excepting such only as may be exempted by law for municipal, educational, literary, scientific, religious, and charitable purposes." The Nourse amendment would have included mines and mining property under "possessions" (personalty and chattels) and possessory rights (mining claims). Frank Kennedy also offered an amendment which covered similar ground: "all property, real, personal, and mixed."

18. *Ibid*, p. 410–411.

19. *Ibid*, p. 416 (Kennedy amendment), p. 416–417 (Chapin amendment introduced and p. 420 lost), p. 420 (Banks amendment: “Provided, that no tax shall be imposed on any mining claim, or possessory right thereto, which, at the time of making the assessment, has a market value in money of less than dollars per foot.” p. 420 Chapin amendment: \$25, Kennedy: \$5, Tozer: \$15,000. Banks amendment with blank left to legislature lost 9 to 24. p. 422).

20. *Ibid*, p. 423, 424–426 (Murdock). The Murdock amendment lost p. 431. *Ibid*, p. 431. Banks amendment: “Provided, that no tax shall be imposed on any mining claim, or possessory right thereto, which, during the year immediately preceding the time of making the assessment, has produced an amount of ore the value of which is less than one thousand dollars.” He withdraw the amendment. p. 436.

21. *Ibid*, p. 436–437, p. 442 (Hawley), p. 443. Nourse amendment: “Provided, further, that the rate of taxation upon the annual proceeds of the mines shall be so fixed as to make the burden of taxation upon the owners of mines as nearly as possible equal, in proportion to their property, to that upon the owners of other property.” The amendment was lost. p. 444.

22. *Ibid*, p. 443.

23. *Ibid*, p. 444.

24. *Ibid*, p. 445. The final vote on the article was 20 to 10. *Ibid*, p. 521.

25. See note 15, *supra*. See Appendix A.

APPENDIX A: NEVADA MINING TAXATION

YYYYYYYYYYYYYYYYNNNNNNNNNNNNNNNN

+0	+	+	++	+++	+	++	+	+	J.S. Crosman
	+	++	+	++	+++	+	+	++	W.W. Belden
		+++	+	+++	+++		+	++	Israel Crawford
+	+	+	++	+++	++	++	+	+	Samuel A. Chapin
+	+	+	++	+++	++	++	+	+	E.F. Dunn
+			+0	+0	++++			0+++	Charles E. DeLong
+			+	++	++++	++++	+	+	B.S. Mason
+			+	++	++++	++++	+	+	J.G. McClinton
				++	++++	++++	+	+	Nelson E. Murdock
				+	++	+0	+0	++++	F.M. Proctor
				+	++	++++	++++	+	Frank Tagliabue
				+	++	++++	++++	+	Charles Tozer
				+	++	++++	++++	+	J.H. Warwick
				+	++	++++	++++	+	William Wetherill
++			+	++++	+++	+			John A. Collins
+				+0	+00	++	+00	+	J.W. Haines
				+	++++	++++	+	+	Cornelius Brosnan
+	+			++	+++	++	++++	+	James A. Banks
+				++++	++++	++++	++++		George A. Hudson
+	+			++++	+++	+	++++		Frank H. Kennedy
+				+0	+++	+	0	++++	H.G. Parker
				+	++	++++	++++	+	Josiah Earl
				++	+0	++++	++++	+0	Thomas Fitch
				+	+	+0	+++	0	A.J. Lockwood
						+++	00000	+++	Nathaniel A.H. Ball
+				+	+	+++	++++	++	Almon Hovey
+	++	+	+	+++	+	+	++	++	H.B. Brady
+	++	+	+	+++	+	+	++	++	G.N. Folsom
+	++	+	+	+++	+	+	++	++	George A. Nourse
+	++	+	+	+++	+	+	++	++	James H. Sturtevant
+	+	+	+	+++	++	0	++	++	J. Neely Johnson
	++		+	+++	0	+	+0	++	J.H. Kinkead
	++	+	+	++++	+	++	+++		George L. Gibson
	+	+	+	++++	+	++	+++		Albert T. Hawley

APPENDIX A: NEVADA MINING TAXATION

HAWLEY COW COUNTY BLOC

J. H. Kinhead
 100 George Nourse
 100 100 G. N. Folsom
 100 100 100 H. B. Brady
 100 100 100 100 J. H. Sturtevant
 100 93 93 93 93 W. W. Belden
 90 93 93 93 93 85 J. N. Johnson
 90 92 92 92 92 83 100 A. J. Lockwood
 83 89 89 89 89 78 89 88 J. W. Haines
 91 86 86 86 86 79 77 83 89 George L. Gibson
 82 79 79 79 79 71 85 92 89 93 A. T. Hawley

JOHN A. COLLINS MODERATE BLOC

Thomas Fitch
 82 John A. Collins
 70 85 Cornelius M. Brosnan
 73 64 85 George A. Hudson
 82 71 77 93 Frank Kennedy
 64 64 80 91 82 H. G. Parker
 64 64 80 91 82 82 Charles E. DeLong

CHAPIN MINER BLOC

B. S. Mason
 100 J. G. McClinton
 100 100 F. M. Proctor
 93 93 100 N. E. Murdock
 93 93 100 100 F. Tagliabue
 93 93 100 100 100 Charles W. Tozer
 93 93 100 100 100 100 J. H. Warwick
 93 93 100 100 100 100 William Wetherill
 79 79 83 86 86 86 86 86 Josiah Earl
 71 71 75 79 79 79 79 79 93 James A. Banks
 79 79 83 86 86 86 86 86 86 93 E. F. Dunn
 79 79 83 86 86 86 86 86 86 93 100 Samuel Chapin
 85 85 83 85 85 85 85 85 85 92 100 100 J. S. Crosman
 92 92 91 85 85 85 85 85 69 62 69 69 75 Almon Hovey



Gordon Morris Bakken received his B.S., M.S. and Ph.D. from the University of Wisconsin. His dissertation was entitled *Rocky Mountain Constitution-Making, 1850-1912*.

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