



Arabic or Roman?

Citation Numbering Leaves More Questions than Answers

BY RANDOLPH M. FIEDLER, ESQ.

Without cheating, assume you are citing to the Second Article of the Nevada Constitution and fill in the blank: Nev. Const. art. ____. Did you engrave stately twin columns, the formal “II,” a Roman numeral yearning for and celebrating a classical, idyllic past? Or are you an unpretentious person of the people, casually scratching the unassuming Arabic numeral “2,” readily recognized by lay and lawyer alike? Which is right? Are you sure?

The Bluebook is aggravatingly agnostic (albeit with implicit Roman numeral bias in its examples).¹ Bryan A. Garner, an alleged expert, instructs: “use Roman numerals for articles and amendments to the U.S. and state constitutions,” without regard to each state’s own text.² But this instruction does not reflect the respect for comity and federalism that New Hampshire, Vermont, Indiana, Mississippi, Texas, Kansas, South Dakota, Wyoming, Oklahoma, New Mexico, and Arizona deserve. For anyone who cares about a Republic, if we can keep it, of dual sovereignty, *The Redbook* approach is insufficient.³ See *New*

State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

Our current Nevada Supreme Court justices – the final word on construing the Nevada Constitution – all favor the Arabic numeral, though Justice Kristina Pickering sprinkled some Roman numerals in as late as 2013 keeping all of us on our toes.⁴ Technically, though, the use of Arabic rather than Roman numerals was “unnecessary to a determination of the questions involved” in all those cases, so at best this is nonbinding dicta. See *City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 539 (2011).

If you’re still reading (which is commendable, given that every time I try to bring this up at a cocktail hour, everyone suddenly has to pick up their kid or go to the bathroom), you’ve probably gone to the Legislature’s website and spotted for yourself the unambiguous Arabic numbering for all of the articles. Existential crisis averted; we can all go home, right?

Well, no. Because it’s more like almost all of the articles. Article XVIII lingers, even after its repeal, like so many unwanted ghosts insisting on acknowledgment.⁵ Insofar as the Eighteenth ex-Article suggests stylistic ambiguity, we might resort to the original text of the Nevada Constitution. Get-out-of-text-free cards notwithstanding, “we’re all textualists now,” so let us be

textualist. See *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

Only, the Legislature’s website hosts two “Original 1864” versions, one typeset, one handwritten.

ment, do establish this

CONSTITUTION.

ARTICLE I.

DECLARATION OF RIGHTS.

SECTION 1. All men are, by nature, free and equal, and have certain inalienable rights, among which are those of enjoying and defend-

Establish the CONSTITUTION.

Article. 1.

Declaration of Rights.

All men are by Nature free and equal and have certain inalienable rights, among which are those of enjoying and defending life and liberty, and pursuing and obtaining safety and happiness.

tained by the people.

ARTICLE II.

RIGHT OF SUFFRAGE.

SECTION 1. Every white male citizen of the United States, (not laboring under the disabilities named in this Constitution,) of the age of

This enumeration of rights shall not be construed to deny or disparage others retained by the people.

Article, 2.

Right of Suffrage.

Every white male citizen of the United States (not laboring under the disabilities named in this Constitution,) of the age of twenty one years and upwards, residing in the State six months, and in

Apparently, the delegates to the constitutional convention voted on a version that varied from the voters’ version, which is kind of awkward.

Nevada’s enabling act contemplated members of a constitutional convention would approve a constitution, which happened, and then that same constitution would go to the voters for approval, which technically didn’t happen.⁶ But it’s fine; there’s a third version – the infamously famous telegram – to break the tie. Even if the framers and the voters approved different versions, a presidential 2-1 seems precedential enough.

Backing up: After the voters approved the new state Constitution, the Nevada enabling act required the governor to certify for the president of the U.S. that the voters approved the Constitution and include a copy of that new Constitution. Only then could President Abraham Lincoln declare Nevada admitted to the Union “on an equal footing with the original states.”⁷ Borrowing Professor Michael S. Green’s account, after the voters approved Nevada’s Constitution:

A costly comedy of errors followed. Nye sent the constitution to Washington, DC, by mail, but it never arrived. His friend Seward tried to persuade Lincoln to proclaim statehood without seeing the document.

When the president refused, Seward informed Nye, who then ordered it telegraphed to the nation’s capital. The second-longest telegram ever transmitted, it cost more than \$4,300 to send.⁸

So, did the \$81,145-adjusted-for-inflation telegram proclaim a numeric champion for the new Battle Born State? No. In what can only be described as nihilistic typographical hedonism, the telegraphed document, notwithstanding the pricey, per-character cost of transmission, was “inconsistent in its manner of numbering.” Yes, I emailed the National Archives about this. (And, yes, I should have better things to do). David A. Langbart, of Research Services, kindly informed me that the telegram provided “Article First” and “Article Second” with “number ‘2’ in a circle.” “I saw no use of Roman numerals.”

Three “original” Nevada Constitutions; three different citing conventions. It appears that we, in the maybe-not-a-State of Nevada, need a get-out-of-text-three card.

Perhaps aware of this dubious origin, Justices Cornelius Brosnan and James Lewis of the first Nevada Supreme Court, avoided a position by using both Roman and Arabic numerals seemingly interchangeably; their counterpart, Justice H.O. Beatty, lacked their indecision and founded a Roman Numeral Citing Nevada Supreme Court Justice Dynasty that his son continued.⁹

In the time since, scholars of the Nevada Constitution have not resolved this issue, some citing the delegates’ version and some citing the voters’ version; the most diligent scholars cite both.¹⁰

So, which is right? We may never know. The standing doctrine might prevent this question from getting to the court, given most plaintiffs will not have “suffer[ed] a personal injury traceable” to this constitutional controversy. See *Nevada Policy Research Institute, Inc. v. Cannizzaro*, 138 Nev. Adv. Op. 28 (April 21, 2022). But because this implicates the very statehood of the state, maybe the court will expand the public-interest exception. And if the court is looking for someone to “vigorously and effectively present his case against an adverse party,” this author can think of at least one person who has spent some time researching the question (his wife might even say too much time). Id.

But then: is there anything more Nevada than not having an answer to an important question of law?



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ENDNOTES:

1. *The Bluebook*, R. 11 (21st ed. 2020).
2. Bryan A. Garner, *The Redbook: A Manual on Legal Style*, § 5.19(b) (4th ed. 2018).
3. See Neil Gorsuch, *A Republic, If You Can Keep It* 21 (2019) (“ur blessings cannot be taken for granted and need constant tending. As Franklin said, we have been given a republic, if we can keep it.”).

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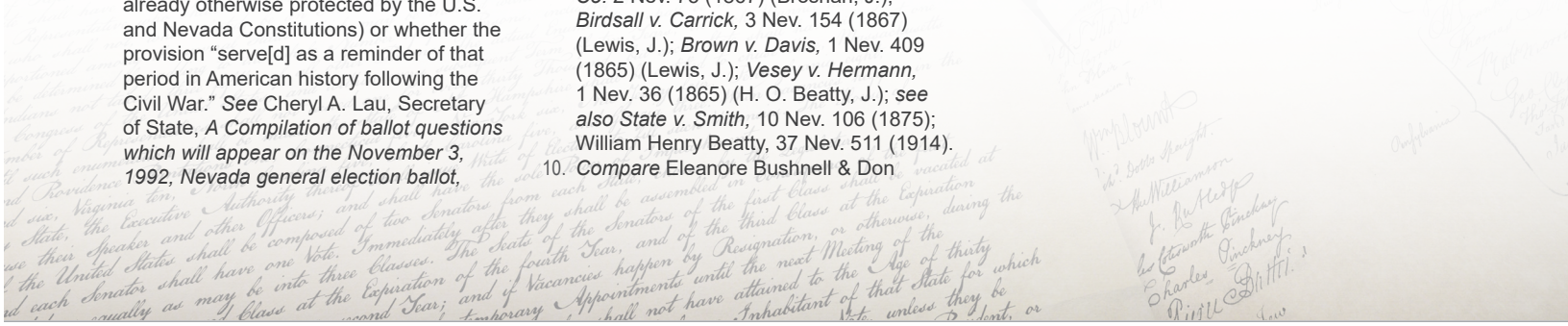
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4. See, e.g., *State v. Frederick*, 129 Nev. 251 (2013) (Parraguirre, J.); *Doe Dancer I v. La Fuente*, 137 Nev. 20 (2021) (Pickering, J.); *Matthews v. State*, 136 Nev. 343 (2020) (Silver, J.); *Sewell v. Eighth Jud. Dist. Ct. (State)*, 137 Nev. 90 (2021) (Cadish, J.); *Myers v. Reno Cab Co., Inc.*, 492 P.3d 545 (2021) (Stiglich, J.); *Ramsey v. City of N. Las Vegas*, 133 Nev. 96 (2017) (Hardesty, J.); *Helton v. Nevada Voters First PAC*, 138 Nev. Adv. Op. 45 (2022) (Herndon, J.); but see *State v. Lloyd*, 129 Nev. 739, 750 (2013) (Pickering, J.) (“art. I”).
5. Voters were not directly presented with the question of repealing the Roman numeral in the subsequent ballot, which only addressed whether the provision was obsolete (because the right to vote is already otherwise protected by the U.S. and Nevada Constitutions) or whether the provision “serve[d] as a reminder of that period in American history following the Civil War.” See Cheryl A. Lau, Secretary of State, *A Compilation of ballot questions which will appear on the November 3, 1992, Nevada general election ballot*,

7–8 (Sept. 28, 1992), available at <https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1992.pdf>.

6. *The Statutes at Large, Treaties, & Proclamations of the United States of America*, v. XIII, ch.36, pp. 30–32 (George P. Sanger, ed. 1866).
7. *Id.*
8. Michael S. Green, *Nevada: A History of the Silver State* 91 (2015).
9. See *Armstrong v. Paul*, 1 Nev. 134 (1865) (Brosnan, J.); *Low v. Crown Point Min. Co.* 2 Nev. 75 (1867) (Brosnan, J.); *Birdsall v. Carrick*, 3 Nev. 154 (1867) (Lewis, J.); *Brown v. Davis*, 1 Nev. 409 (1865) (Lewis, J.); *Vesey v. Hermann*, 1 Nev. 36 (1865) (H. O. Beatty, J.); see also *State v. Smith*, 10 Nev. 106 (1875); William Henry Beatty, 37 Nev. 511 (1914).
10. Compare Eleanore Bushnell & Don


W. Driggs, *The Nevada Constitution: Origin and Growth* 161 (6th ed. 1980) (Roman) with Michael W. Bowers, *The Nevada Constitution: A Reference Guide* 24 (1993) (Arabic); see also William D. Popkin, *Interpreting Conflicting Provisions of the Nevada State Constitution* 5 Nev. L. J. 308 (2004) (Arabic); Joanna M. Myers, *When the Governor Legislates: Post-Enactment Budget Changes and the Separation of Powers in Nevada*, 10 Nev. L. J. 229 (2009) (Roman); Brittany Lee Walker, *Schwartz v. Lopez and the Fate of Nevada’s Education Savings Accounts*, 17 Nev. L. J. 805, 816 nn. 91, 94 (2017) (both).



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