LEGISLATIVE FINALITY OF CONSTITUTIONAL AMENDATORY PROPOSALS

Leach v. Brown, 167 Ohio St. 1, 145 N.E.2d 525 (1957)

A joint resolution to amend the Ohio Constitution was initiated and adopted by the House of Representatives and sent to the Senate where the Committee on Municipal Affairs recommended certain amendments. Article XVI, section 1 of the Ohio Constitution provided that ". . . such proposed amendments shall be entered on the journals. . . ." The Senate voted affirmatively upon the amended proposal but the clerk erroneously copied the original resolution into the Senate journal. The amended resolution was returned to the House where it received an unanimous vote. The Speaker of the House and the President of the Senate signed the proposal and sent it to the Secretary of State for submission to the electorate. The plaintiff sought to enjoin further action by the Secretary of State alleging that non-compliance with the constitutional mandate was fatal to the resolution. A temporary injunction was issued by the court of common pleas, dissolved in the court of appeals, and reinstated by the Ohio Supreme Court.

Legislative deviation from the procedural provisions of the constitution relating to the ordinary law-making function as well as to the power to propose constitutional amendments has been a constant source of litigation. Inasmuch as the legislative procedures used in passing ordinary legislation substantially parallel the mechanics of enactment used in adopting joint resolutions, an inquiry as to the judicial reaction to requests to review the former should give perspective in resolving the problem the court faced in the principal case.

Historically, the judiciary's assertion of its right to inquire into the legislative mechanics of enactment can be traced to *Pylkington's case*[1] in the fifteenth century. Subsequent judicial reaction has ranged from adherence to the "Enrolled Bill Rule" where the bill is conclusive and in effect renders the subject matter beyond the judiciary's competence, to the "Strict Journal Entry Rule" where the journal is conclusive as to contents and legislative deviation in procedure may be shown by extrinsic evidence. Modification of both extremes is evidenced by the "Modified Enrolled Bill Rule" where the bill as enrolled is *prima facia* correct and only a journal that shows an affirmative contradiction of a constitutional requirement will overcome the presumption of validity, and the "Journal Entry Rule" where an omission of a required step as well as an affirmative showing of non-compliance with constitutional mandates may be shown by the journals.[2]

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[1] Y.B. 33 Hen. VI., 17 pl. 18; see Lloyd, *Pylkington's Case and its Successors*, 69 U. PA. L. REV. 20 (1920).

[2] WIGMORE, EVIDENCE §1350 (3d ed. 1940); see Metzenbaum, *Judicial Inter-*

Judgment on the relative merits of these four rules is aided by an understanding of the nature of the legislative records in question. An enrolled bill refers to a bill which has been passed by both houses of the legislature, signed by the respective presiding officers, the Governor, and filed with the Secretary of State. On the other hand, the journal is a record of the activities of the legislative bodies, required by the constitution and kept by the clerk.[3] Neither of the records is an original enactment. When an allegation is made that the enrolled bill has not properly passed through the channels of enactment, or that the contents differ from those voted upon, parol testimony is not admissible, and the mode of proof is restricted to a comparison of the journal with the enrollment.[4]

Dean Wigmore has succinctly reduced to three the arguments against the conclusiveness of the enrolled bill:[5] (1) legal theory, or that the enrollment is not a record, (2) practical policy, or that there is danger of error or fraud, and (3) constitutional necessity, or the impossibility of securing in any other way the enforcement of constitutional restrictions on the legislature. That little difficulty is encountered in discarding the first two arguments is illustrated by the following:[6]

> The first argument, on which stress is seldom laid, is met by the principle that there may be conclusive preferences for testimony irrespective of records—the second argument cannot for a moment stand . . . against the considerations that there is equal or greater danger of error and fraud in the journals, and that the latter plunges the community into the uncertainty of repeated litigation on a question never capable of final settlement.

Although these arguments are generally accepted, there still exists a general reluctance by the courts to impose a self-limitation upon their power to enforce legislative restrictions because of the greater emphasis they attribute to the argument of constitutional necessity. The sufficiency of this as a proper criterion upon which to ground judicial review seems deserving of further comment on the theoretical as well as practical level.

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pretation of Constitutional Limitations on Legislative Procedure in Ohio, 11 OHIO ST. L.J. 456 (1950), for extensive citations to commentaries dealing with the same problem in other jurisdictions.

[3] SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §1401 (3d ed. 1943).

[4] WIGMORE, *op. cit. supra* note 2; State *ex rel.* Herron v. Smith, 44 Ohio St. 348, 7 N.E. 447 (1886); *but see* Harbage v. Tracy, 24 Ohio L.Abs. 553 (1937) (journals were held admissible to prove fraud), *aff'd,* 64 Ohio App. 151 (1939), *app. diss'd,* 136 Ohio St. 534 (1939).

[5] WIGMORE, *op. cit. supra* note 2.

[6] *Id.* at 699. The majority of cases also substantiates such conclusion. For excellent discussions see State *ex rel.* Hammond v. Lynch, 169 Iowa 148, 151 N.W. 81 (1915); Kelly v. Marran, 21 N.M. 239, 153 Pac. 262 (1915).

At the outset, it seems clear that the notion that judicial review properly extends to all provisions of the constitution, and that they are per se justiciable issues to be safeguarded by the judiciary, is not generally accepted.[7] Although the classic illustrations—guarantee of Republican form of government[8] and executive finality in the field of foreign relations[9]—were enunciated by the United States Supreme Court, there has not been a total absence of the doctrine on the state level. As early as 1854 in *Miller* v. *State*[10] the Ohio Supreme Court speaking through Chief Justice Thurman recognized the impracticalities of such extensive judicial authority.[11]

> True, the courts are made judges in the last resort of the constitutionality of all laws, and . . . where a statue is on its face plainly unconstitutional, it is their duty so to declare it; but it does not necessarily follow that they are authorized to supervise every step of legislative action, and inquire into the regularity of all legislative proceedings that result in laws.

The court went on to hold that the constitutional mandate that "every bill shall be fully and distinctly read" was merely directory upon the legislature and secured by their sense of duty and oath of obligation. Similiar conclusions were also reached in *Pim v. Nicholson*[12] where there was brought into question the constitutional provision that no bill shall contain more than one subject, clearly expressed in its title.

However, this approach has not been all inclusive, and there have been other provisions which have been labeled mandatory, and judicial review held proper. In *Ritzman v. Campbell*,[13] where the enrolled bill rule as to the contents of an act was definitely established, the court expressly reserved the right to inspect the journals to determine whether the bill as enrolled received the necessary vote. Senator Metzenbaum traces this reservation to the earlier case of *Fordyce v Godman*[14] where the journals were held to be proper evidence to determine whether a bill had passed with the requisite number of votes. Although the reasoning in the *Fordyce* case is inconclusive, Chief Justice Thurman in the *Miller*

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[7] Dodd, *Judicially Non-Enforceable Provisions of the Constitutions,* 80 U. Pa. L. REV. 54 (1931); Finkelstein, *Judicial Self-Limitation,* 37 HARV. L. REV. 338 1923); Weston, *Political Questions,* 38 HARV. L. REV. 296 (1925).

[8] Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1911).

[9] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[10] 3 Ohio St. 475 (1854).

[11] *Id.* at 485.

[12] 6 Ohio St. 177 (1856). *Accord,* Seeley v. Thomas, 31 Ohio St. 301 (1877); Ohio *ex rel.* Att. Gen. v. Covington, 29 Ohio St. 102 (1876). In Weil v. State, 46 Ohio St. 450, 21 N.E. 643 (1889), OHIO CONST., art 11, §16, "the section or sections so amended shall be repealed . . ." was held directory. See also Lehman v. McBride, 15 Ohio St. 573 (1863).

[13] 93 Ohio St. 246, 112 N.E. 591 (1915).

[14] 20 Ohio St. 1 (1870); Metzenbaum, *op. cit supra* note 2.

case gratuitously expressed the opinion that mode of procedure is to be distinguished from authority.[15]

The sufficiency of drawing such a distinction seems highly artificial. If the reason for the adoption of the enrolled bill rule as to content is because of equal danger of fraud in the journals then the same reasoning would be applicable as to matters of "authority." If adoption of the enrolled bill rule as to content is premised on the "political question" doctrine, then judicial review would be precluded in the first instance. Although never squarely before the United States Supreme Court, in *Coleman v. Miller*[16] Justice Frankfurter classified such legislative records as judicially non-cognizable:

> The procedures for voting in legislative assemblies—who are members, how and when they should vote, what is the requisite number of votes for different phases of legislative activity, what votes were cast and how they were counted—surely are matters that not merely concern political action but are of the very essence of political action, if "political" has any connotation at all.

However, for the purposes of this note this inconsistency may be disregarded since the issue raised in the principal case was one of content and clearly within the scope of the enrolled bill rule as defined in the *Ritzman* case.

Since the issues raised with respect to the conclusiveness of legislative proposals to amend the constitution are similiar to those just discussed, one would anticipate a similiar judicial reaction. However, the majority of courts have been so engrossed in their vindication of the constitutional requirements that there has been a general failure to consider whether, by relying on evidence of dubious character, they might be invading the legislative and political processes. This anomalous situation is attributable to two assumptions the courts make when reviewing amendatory proposals.

The first is that "the legislature is not exercising its legislative power or any sovereignty of the people that has been intrusted to it, but merely acting under a limited power which is conferred upon it by the people. . . ."[17] Thus, despite the fact that identical procedures are used by the legislature, the majority of courts refuse to go behind the enrolled bill when reviewing legislative enactments, yet hold its counterpart, the joint resolution, nugatory when identical deviation is shown by the journals. Indeed, such a fluctuation of the probative value of the same records would seem to raise acute evidential as well as logical problems even if such distinctions do exist. Even though the legislature is performing two different functions, a comparison of the respective constitutional provisions from which the powers are derived raises serious

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[15] *Supra* note 10, at 483.

[16] Coleman v. Miller 307 U.S. 433, 469 (1939) (concurring opinion).

[17] Leach v. Brown, 167 Ohio St. 1,5, 145 N.E.2d 525, 527 (1957).

questions as to whether there is a differentiation in the actual power delegated.[18]

The second assumption under which the courts labor is that "the constitution is the organic and fundamental law, and to permit a change in it without strict adherence to the rules therein laid down would be a step in the destruction of the stability of government."[19] Although the intention of the judiciary is commendable, serious consideration should be given as to whether judicial intervention actually produces such results. Without a complete reiteration of the arguments as to the comparative trustworthiness of the legislative records in question, it should be noted in passing that one of the most persuasive reasons for the adoption of the enrolled bill rule was the fear of even greater errors in the journalization.

However, rather than undermining the patently weak arguments presented by the majority in support of their conclusion, criticism more properly orientated should be addressed to the court's abandonment of the "political question" doctrine. Logically, the judiciary's endorsement of the proposition that legislative compliance with constitutional mandates is more properly secured by the sense of duty and oath of the members thereof should apply with equal vigor whether the members be passing an ordinary bill or a joint resolution.

But of even more fundamental importance is determining whether judicial review should be properly extended to encompass the procedures in the amendatory process in view of the fact that judicial review already extends to the substance of an amendment. In the 1920's the United States Supreme Court held that the breadth of judicial review included both functions.[20] That this assertion did not go without just criticism is illustrated by the following quotation from Dodd:[21]

> For a court to pass upon the propriety of placing a matter in a constitution, either state or federal (except as expressly provided by the language of the constitution itself), would deny the people and the amending process any authority to place in the constitution anything which the court might itself regard as not properly belonging in the text of a constitution, and would introduce into American constitutional practice a highly undesirable type of judicial control.

And the high Court when next confronted with the issue reversed their position in *Coleman v. Miller*[22] and held amendatory procedures to be

[18] OHIO CONST. art. 11, §15, "Bills may originate in either house." OHIO CONST., art XVI, §15, "Either branch of the General Assembly may propose amendments to this Constitution."

[19] *Supra* note 17, at 5, 145 N.E.2d at 528.

[20] Dillon v. Gloss, 266 U.S. 368 (1921); Hawke v. Smith, 253 U.S. 221 (1920); National Prohibition Cases, 253 U.S. 350 (1920). See Orfield, *The Federal Amending Power: Genesis and Justiciability,* 14 MINN. L. REV. 369, 373-384 (1930).

[21] *Amending the Federal Constitution,* 30 YALE L.J. 321, 334 (1921).

[22] *Supra* note 16. See Dowling, *Clarifying the Amending Process,* 1 WASH. & LEE L. REV. 215 (1940).

more properly classed as "political questions" and judicially noncognizable. Although the weight of the authority is to the contrary, the conclusiveness of amendatory proposals has also gained support in a few state courts.[23]

In view of the foregoing analysis the principal case is subject to criticism on practical as well as theoretical grounds. As stated by Chief Justice Weygandt in the dissent a joint resolution must be authenticated in the same manner as an enrolled bill, and "there is no valid reason for confusing the law by attempting an unrealistic distinction."[24] If the reason for the adoption of the enrolled bill rule is the relative untrustworthiness of the journals, then utilization of them to test steps in proposals to amend the constitution seems patently absurd. On the other hand, if the adoption of the enrolled bill rule is bottomed on the assumption that the mechanics of enactment are secured by the sense of duty and conscience of the general assembly, then to infer that the legislature has less moral fortitude when confronted with proposals to amend the constitution, seems equally absurd. In addition, it may well be doubted whether, in such action, the judiciary has encroached on the "political department" and assumed power over the sovereign—the people themselves—since an adverse holding forclosed a vote by the electorate. Finally, it is submitted that such a drastic encroachment on the sovereign power of the people because of a clerical error strips the rules of constitutional construction of any semblance of balancing of interests traditionally adherred to by the American courts.

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[23] Elder v. Sours, 31 Colo. 369, 74 Pac. 167 (1903); Worman v. Hagan, 78 Md. 152, 27 Atl. 616 (1893); Board of Supervisors v. Loomis, 135 Mich. 556, 98 N.W. 262 (1904); Green v. Weller, 32 Miss. 650 (1886); Martien v. Porter, 68 Mont. 450 (1923); Brittel v. People, 2 Neb. 198 (1872); Bott v. Secretary of State, 62 N.J.L. 107 (1901); Smith v. Lucero, 23 N.M. 411, 168 Pac. 709 (1918); McAlister v. State, 95 Okla. 200, 219 Pac. 134 (1923); Hanley v. Wetmore, 15 R.I. 386, 6 Atl. 777 (1886).

[24] *Supra* note 17, at 11, 145 N.E.2d at 531.