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Constitutional Law--Appointment of Constitutional Conventions

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in the principal case admits that questions as to liability under the statute are to be determined by federal law. Instead of taking this course, the court, citing Justice Frankfurter's dissent in *Monroe v. Pape, supra,* decided that the general background of tort liability should be the source of the law applied. When that law is found in state decisions, the footnoted rule is in effect reversed as state law becomes controlling.

The decision that judicial immunity and volenti non fit injuria apply to the federal acts will probably not have severe consequences. It is difficult to imagine a person consenting to a deprivation of his civil rights other than in a factual situation similar to the one in the principal case. However, the method the court used in arriving at the decision concerning the defense of consent does establish a questionable precedent. In applying a federal statute specifically enacted to override state law, it seems very strange that the court should look to state law.

Forrest Hansbury Roles

Constitutional Law—Apportionment of Constitutional Conventions

The Governor of West Virginia sought a writ of mandamus in the state's Supreme Court of Appeals to require the Commissioner of Finance and Administration to affix his signature to certain contracts for publishing notices of a special public election on the question of calling a convention to alter the state's constitution. *Held,* writ denied. The statute setting up the method by which delegates to the convention would be chosen and under which the expenditure of funds would be made was unconstitutional in that it violated the state's constitutional provision regulating apportionments of representation. *State ex rel. Smith v. Gore,* 143 S.E.2d 791 (W. Va. 1965).

The principal case was decided on the basis of the applicability of article II, section 4, of the West Virginia Constitution to the apportionment of a constitutional convention. The constitution provides: "Every citizen shall be entitled to equal representation in government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall, as far as practicable, be preserved." It was not necessary for the court to consider the

possible application of the equal protection clause of the fourteenth amendment or the "one man one vote" concept developed consequent to *Baker v. Carr,* 369 U. S. 186 (1962), and subsequent federal reapportionment cases relying on the fourteenth amendment. For a discussion of the *Baker* case see Note, 65 W. VA. L. REV. 129 (1963).

Similarly in *Robertson v. Hatcher,* 148 W. Va. 239, 135 S.E.2d 675 (1964), the court, in declaring the apportionment of the house of delegates unconstitutional, found it unnecessary to consider federal constitutional problems as the act in question clearly violated the express wording of article VI, sections 6, 7, of the West Virginia Constitution. These provisions govern specifically the allocation of delegates to counties having less than a particular ratio of population.

Notwithstanding the number of cases involving the reapportionment of state legislatures and other bodies that have arisen since *Baker v. Carr, supra,* the question of apportionment of a constitutional convention, which in many instances is the vehicle by which a reapportionment of other bodies is effected, apparently has been the central issue in only one instance other than the principal case. In *West v. Carr,* 212 Tenn. 367, 370 S.W.2d 469 (1963), *cert. denied,* 378 U.S. 557 (1964), the Tennessee court upheld the apportionment of a constitutional convention based on the same system as the apportionment of the state's house of representatives, which had been declared invalid as a result of *Baker v. Carr, supra.* The court concluded that a fundamental difference existed between a legislative body and a constitutional convention which made the reasoning of the *Baker* case inapplicable—the convention could not take final action but was limited to proposing constitutional changes for ratification or rejection by the people.

In reaching its decision the Tennessee court relied upon the concept that a constitutional convention is not a co-ordinate branch of government in the usually accepted sense. This view stems from the early cases of *State v. Doyle,* 138 La. 750, 70 So. 322 (1915), and *Wells v. Bain,* 75 Pa. 39 (1874), which stand for the proposition that a constitutional convention is simply a body raised by law to discuss and to propose amendments or changes in the existing constitution which are without force so long as they remain

proposals. Although this reasoning is not without merit, the court in the principal case was more realistic in appraising the purpose of a convention. The West Virginia court pointed out that the function of a convention encompasses much more than making a mere proposal to the people because it formulates and determines what the constitution will contain. The court concluded that the mere right to approve or to disapprove a proposed constitution does not afford to the public the voice in its formation required by article II, section 4, of the West Virginia Constitution. Analogous reasoning was used by the Supreme Court in *Lucas v. Colorado General Assembly,* 377 U. S. 713 (1964). The Court held that even though an apportionment plan for the Colorado Senate had been ratified by a substantial portion of the state's voters by referendum, the plan was unconstitutional because it failed to meet the required standards of apportionment. In other words, constitutional rights may not be taken from the minority by majority vote, and the mere possibility that the majority may reject something proposed by the representatives of the minority does not give to each citizen the required protection of his constitutional rights.

Though the reasoning used in the principal case may be analogous to that used by federal courts in reapportionment cases, the fact remains that no federal constitutional question was decided. In like manner the *West* case, *supra,* was decided ostensibly on the ground that the manner of convention apportionment violated no part of the Tennessee Constitution, and the court apparently felt that the fourteenth amendment was inapplicable to a constitutional convention. Whether or not the equal protection clause is applicable to a state constitutional convention would appear to be an open question.

The equal protection clause has been applied to the apportionment of the upper house of a state legislature, *Lucas v. Colorado, General Assembly, supra,* and in *Gray v. Sanders,* 372 U.S. 368 (1963), it was relied on in holding the Georgia county unit system of electing a governor invalid. In *Wesberry v. Sanders,* 376 U.S. 1 (1964), the apportionment of Georgia's congressional districts was in issue and again the "one man one vote" concept was applied. The issue involved in *Reed v. Mann,* 237 F. Supp. 22 (N. D. Ga. 1964), was the manner in which county commissioners were elected in various Georgia counties; the court held that the "one man

one vote" rule was applicable to the residents of a particular unit of local government.

Although the Supreme Court has not held that the equal protection clause applies to the apportionment of a constitutional convention, the issue has been discussed in *Fortson v. Toombs,* 379 U.S. 621 (1965), and has been indirectly involved in other cases. In *Fortson* the district court had enjoined state election officials from placing on the ballot a constitutional amendment designed to amend the existing constitution by substituting an entirely new constitution. The district court's order stated that it was not to be construed to forbid the calling of a convention to amend or change the constitution if the convention were based as nearly as practicable on population. The majority opinion of the Supreme Court vacated part of the district court's order because it was moot. However, Justice Harlan in a separate opinion stated that there is nothing in the fourteenth amendment or elsewhere in the Constitution or in the Court's decisions which requires a state to make constitutional change by some method in which every citizen in the population is given an opportunity to be heard. As the issue was not actually presented or passed upon, the statement amounts to no more than a dictum.

In *Pinney v. Butterworth,* 378 U.S. 564 (1964), concerning the apportionment of the Connecticut Legislature, the Supreme Court remanded the case to the district court with directions to enter an order in conformity with the principles set forth in *Reynolds v. Sims,* 377 U.S. 533 (1964). In the *Reynolds* case the Court had set up guide lines for future reapportionments. The district court, in modifying its prior order setting up the schedule to be followed in apportionment, directed that the membership of the constitutional convention, which would deal with the legislative reapportionment, conform with the standards required by the fourteenth amendment.

In at least one instance a state court has intimated that the equal protection clause applies to a state constitutional convention. In *Jackman v. Bodine,* 43 N.J. 453, 205 A.2d 713 (1964), the court held the New Jersey Legislature was malapportioned and entered judgment allowing the legislature to call a constitutional convention, providing that, ". . . the delegates to which Convention shall be apportioned according to population." However, the court fail-

ed to specify whether apportionment according to population had to comply with the requirements of the equal protection clause.

Should it become necessary for the Supreme Court to pass upon the question, the outcome probably will rest in large measure on the method the state provides for the selection of delegates. If the delegates are elected at large or appointed in a proper manner by a properly constituted legislature, it is unlikely that a denial of equal protection will be found. On the other hand, considering the sweeping language used in many of the federal apportionment cases together with the broad interpretation of the function of a constitutional convention as set forth in the principal case, if the method selected fails to meet the standards employed in apportioning a legislature, the guarantees of equal protection may be held to be violated.

As previously indicated, the decision in the principal case was based upon the provision in the West Virginia Constitution guaranteeing equal representation in all apportionments of government. This provision would appear to be unique because research has not disclosed a comparable provision in another state constitution. See INDEX DIGEST TO STATE CONSTITUTIONS (2d ed. 1959). This is understandable when one considers the underlying reasons for West Virginia's existence. One of the paramount grievances of western Virginians toward the east was the denial of what they considered equal representation, both in the state legislature and in conventions. See Hagans, ERECTION AND FORMATION OF THE STATE OF WEST VIRGINIA (1891) (reprinted in full in 1 W. Va. 5). To prevent a possible repetition of this grevious situation the authors of the West Virginia Constitution specifically provided for equal representation in *all* apportionments of representation.

Not only is the language of the "equal representation" clause of the West Virginia Constitution comparable with the language of "equal protection" in the fourteenth amendment to the federal constitution, but both provisions are products of the same period of American history--they were adopted shortly after the War Between the States. Thus, the principal case may well provide instructive precedent in future controversies pertaining to the apportionment of constitutional conventions.

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