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Editor's Note: Gatewood v. Matthews *held valid the submission to the Kentucky electorate of a proposed new constitution drafted by an appointed commission, although the existing constitution specifies revision by a convention of elected delegates. The authors review the political history of the case, discuss the opinion, and present the relevant arguments, pro and con, derived from political theorists and case precedents. They conclude that the decision is supported by both types of authority and is based soundly upon the right of the people and the government acting together to achieve governmental change.*

> "[T]hat government of the people,
> by the people, for the people,
> shall not perish from the earth."
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> — A. Lincoln

On November 8, 1966, the voters of Kentucky will be faced with the question of whether to abolish their 75-year-old constitution in favor of a modern draft document usually referred to as the Assembly Constitution. If a majority of those voting on the proposition are in favor of "reforming" the constitution, Kentucky will have a new constitution on January 3, 1967. The vote will be taken pursuant to an act of the 1966 Legislature, Senate Bill [hereinafter referred to as S.B.] 161, which directs the Secretary of State to certify the following question to be placed on the ballot:

> Are you in favor of reforming the Constitution of the Commonwealth to cause same to be in the same form and language as finally submitted to the Governor and the General Assembly of Kentucky by the Constitution Revision Assembly and set forth in Senate Bill 161 . . . ?

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The striking thing about the proposal is that it is being submitted neither as an exercise of the amending process under section 256 of the existing constitution nor as a result of the deliberation of a constitutional convention called pursuant to section 258. The proposal finds its origin in Section 4 of the Bill of Rights which ensures to the people the right to alter, reform or abolish their government. The theory of S.B. 161 is that section 4 offers an additional alternative method of reforming the existing constitution by means of an exercise of popular sovereignty. The words of section 4, which reputedly were penned by Thomas Jefferson, are:

> All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, and happiness and the protection of property. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they deem proper.

Soon after S.B. 161 had been passed and signed, a taxpayer's suit was instituted in the Franklin Circuit Court to prevent certification of the proposal. The plaintiff, Gatewood, contended that it is "improper" to reform the constitution of 1891 in any way other than the amending and convention processes specifically set out in sections 256-263 of the present constitution. The circuit court sustained the proposed procedure on April 27, and on May 31 the Court of Appeals affirmed, with one dissenting vote, holding that the rights of the people, reserved by section 4, afforded an alternate basis for reform.[1]

It is the purpose of this article to examine the decision in the *Gatewood* case in the light of the broad problem of constitutional revision and change. Part I will deal with the specific Kentucky constitutional provisions, legislation and decisions. Part II will survey the problem from the standpoint of political theory. Part III will deal with the precedents in other jurisdictions which relate most closely to Kentucky's unique proposal for an exercise of popular sovereignty.

It is hoped that this three-part analysis will afford some clarity and, at the same time, present a fair opportunity to examine the

[1] Gatewood v. Matthews, 403 S.W.2d 716 (Ky. 1966).

interrelations of the Kentucky decision with political theory and case precedents. Some confusion seeps into Hoar's *Constitutional Conventions,*[2] the last definitive work on the subject, when the author attempts to connect the two types of authority in line; a parallel connection may provide a more suitable circuit. Political scientists, unfettered by the problems of *stare decisis* and of fitting their analyses to the limits of the document, are wont to take entirely different slants into the revision problem than do lawyers. The results are often strikingly in agreement, but the in-roads and analyses developed are entirely different, and it seems advisable to consider separately the conclusions of the theorists and the case doctrine of the judges.

I. REVISION IN KENTUCKY

The Kentucky Constitution,[3] written near the close of a period of intensive distrust of government, and especially of legislatures, resembles neither the earlier American constitutions nor the modern constitutions of the twentieth century. It is a prolix document, consisting of two hundred sixty-three sections, many of them clearly statutory, rather than constitutional, in nature. In 1890, the state was overwhelmingly rural and the delegates to the convention were fearful of both "the corporations" and the legislature. As a result they included many limitations on the powers of the General Assembly, and, as further evidence of their distrust, they wrote many detailed laws into the constitution. To cap their efforts, the convention fathers inserted procedural requirements intended to make it very difficult for the Assembly to change the constitution either by amendment or by calling another constitutional convention.

A. Conventions and Amendments

The constitution of 1891 provides that any amendment proposal in either house must be approved by three-fifths of *all* the members elected to each house of the legislature. It must then be submitted to voters at the next general election for members of the House of Representatives. The Secretary of State must

[2] HOAR, CONSTITUTIONAL CONVENTIONS (1917).

[3] The present Kentucky Constitution, adopted in 1891, is the fourth. Previous constitutions were adopted in 1792, 1799, and 1845.

publish the proposal ninety days before the date of submission.[4] If a majority of the votes cast for and against the amendment is for the proposed amendment it becomes part of the constitution. No more than two amendments may appear on the same ballot, and no amendment may relate to more than one subject. A defeated amendment may not be resubmitted for five years.[5]

Provisions for revision by convention are even stiffer.[6] A majority of each house of the General Assembly must vote in two consecutive sessions to take the sense of the people on the "necessity and expediency" of calling a constitutional convention. If approval by a majority of electors follows and the total votes cast equal one fourth of the qualified voters voting in the last general election, the next Assembly must pass a law calling a convention for the revision or amendment of the constitution. No requirement is made that the convention submit its constitution to the people for ratification.

1. *Convention Calls.*—Efforts to reform the 1891 constitution by calling a convention have three times passed the dual legislative gamut and have been voted down by the people each time. When the General Assembly took the sense of the people in 1931 and in 1947, both proposals called for "unlimited conventions," free to revise or replace the constitution with the convention's own document. Neither proposal contemplated submission of the new constitution to the people for ratification. It seems likely that the people were fearful of the possible results of an "open-end" constitutional convention in the troublous times of depression and post World War II.

In the 1959 Extraordinary Session, the Legislature took a different tack and proposed a "limited" convention,[7] whose power was restricted to twelve specified subjects.[8] It was also stipulated that any constitution agreed upon by the limited convention could not become effective until ratified by a majority of the voters in a general election. On the theory that any convention

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[4] KY. CONST. § 257.
[5] KY. CONST. § 256.
[6] KY. CONST. § 258.
[7] "Such a convention might be called and so circumscribed as to quiet the fears of persons who do not wish to hazard the Bill of Rights, for example, to the whims of present day philosophical or political consideration." REPORT OF THE CONSTITUTION REVIEW COMMISSION 8 (1950).
[8] Ky. Acts, Ex. Sess. (1959). See REEVES, KENTUCKY GOVERNMENT 24 (1966).

was necessarily "sovereign," an action was brought to test the validity of the General Assembly's call for a limited convention and the requirement of a referendum. The Court of Appeals ruled in favor of the validity of a limited call on the theory that a favorable vote of the people on the Legislature's proposal for a limited convention would make the limitation one imposed by the sovereign *people* on its agents, the delegates to the convention, not a limitation by the General Assembly on the powers of the convention.[9] At the general election of 1960, however, the voters defeated the proposal for a limited convention by a narrow margin. The vote was 342,501 to 324,577, although only 60% of those voting chose to vote on the constitutional question.

2. *Amendments.*—Although the procedural requirements for adding amendments to the constitution of 1891 are not as onerous as those for calling a constitutional convention, the requirements that each amendment deal with only one subject, that only two amendments may be submitted at one time, and that no amendment may be resubmitted within five years have constituted real barriers to constitutional change. During the seventy-five years since the adoption of the 1891 constitution, forty-four amendments have been proposed and only eighteen of them have been adopted.[10] In the last fifteen years only three minor amendments have been approved. The possibility of wholesale constitutional reform by the technique of proposing a new constitution as a "single amendment"—a course followed in other states—seems to be foreclosed by the restrictions on the amending process written into the constitution of 1891.

The most sustained and serious effort to use the amendment procedure as a route to constitutional revision was made in the early fifties. Governor Earle Clements created a Constitutional Commission of seven members by an Executive Order dated February 1, 1949. The Commission, in a report[11] in 1950 to the Governor and the General Assembly, pointed out that there were at least twenty-seven changes under consideration, and that a constitutional convention with general or limited powers could not possibly produce a new constitution which would be effective

[9] Chenault v. Carter, 332 S.W.2d 623 (Ky. 1960).
[10] REEVES, *op. cit. supra* note 8, at 20.
[11] REPORT OF THE CONSTITUTION REVIEW COMMISSION (1950).

before 1956. On the other hand, section 256, the amending clause, could be amended to allow free amendment. Under this proposal, multiple amendments could be adopted, thereby avoiding the four year delay. The Report contained a draft bill for the amendment of section 256 which would have allowed the General Assembly to propose amendments in a special session as well as a general session, would have allowed submission at the next general election, would have removed the limits from the number of amendments which could be submitted, would have allowed the submission at any time, and would have allowed a single vote on a group of amendments.[12]

The 1950 Legislature enacted a bill giving statutory status to the "Constitutional Review Commission,"[13] and proposed the suggested amendment to section 256.[14] The proposal was defeated at the polls in the November 1951 general election; the Commission thereafter had to be content with transmitting to ensuing sessions of the Legislature its proposals for the two most urgently needed amendments. None of the amendments proposed in the 1952, 1954 or 1956 reports of the Commission was adopted, and the 1956 Legislature abolished the Commission and transferred its functions to the Legislative Research Commission.[15] In 1960, the Legislature established the Constitutional Revision Committee as an agency of the Legislative Research Commission to conduct a program of study, review, examination, and exposition of the Constitution of Kentucky.[16] The initial efforts of this Committee went to the study and support of the call for a limited convention, which was submitted to the people at the November 1960 election and narrowly defeated as noted above.

In 1962, two amendments were proposed. One would have revised both the amending clause and the convention clause with a single amendment. Section 256 would have been changed to allow five amendments instead of two to be submitted at any one time. Section 258 would have been changed to allow a constitutional convention to be proposed by the vote at one session of the General Assembly and to require a vote of the people on

[12] *Id.* at 52.
[13] KY. REV. STAT. § 447.160 (1950) [hereinafter cited as KRS].
[14] Ky. Acts, ch. 7 (1950).
[15] Ky. Acts, 1st Ex. Sess., ch. 7, art. XII, § 2 (1956).
[16] KRS § 7.170 (1960).

any constitution adopted by the convention. The second proposal for amending the constitution would have abolished the maximum salary limits set in the constitution and given the General Assembly power to fix maximum compensation of state officers.[17] Both amendments were defeated by the voters at the general election in November 1963.[18] No amendments have been proposed to the voters by the General Assembly since 1962, as the focus has shifted to proposals for limited or general revision of the constitution.

B. The Assembly Proposal

1. The 1964 Session Acts.—When the 1964 General Assembly met, it had the opportunity to act upon a proposal of the 1962 Legislature for taking the sense of the people on whether to call a convention limited to eight subjects.[19] Reenactment of the call by the 1964 General Assembly would submit it to the people for a vote under section 258. On the other hand, after duly consulting the Constitutional Revision Committee, it could propose two amendments to the constitution in the face of the fact that the two amendments proposed by the 1962 General Assembly had been defeated.

Instead, the General Assembly took three steps which set it forthrightly in another direction. It abolished the Constitutional Revision Committee and established a Constitutional Revision Assembly.[20] Secondly, it adopted a resolution declaring that the policy of the Legislature was not to submit any amendments to the constitution at the 1964 session.[21] Finally, it adopted a bill calling for an unlimited constitutional convention under section 258 of the constitution.[22] These actions opened the possibility of the drafting of a wholly new constitution by the Assembly, which might later be submitted to a limited convention or to the

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[17] Ky. Acts, ch. 118 (1962).

[18] The contest for Governor between Breathitt and Nunn completely dominated the election. A total vote of 885,947 was cast in this race. Less than one fourth of the voters bothered to express themselves on the amendments. The vote on the proposal to amend the amending clause was No—122,947, Yes—82,998. Although Breathitt might normally have been expected to campaign in behalf of the amendments, other issues of greater importance made it impolitic to push them.

[19] Ky. Acts, ch. 111 (1962).

[20] KRS § 7.170 (1960).

[21] Ky. Acts, S. Res. 38 (1964).

[22] Ky. Acts, ch. 81 (1964).

people, and in the meantime kept alive the possibility of an unlimited convention. Piecemeal revision by amendment or by a convention limited to eight subjects was dropped.

2. *The Assembly Drafts a Constitution.*—The Constitutional Assembly created by the 1964 Legislature began functioning quickly. The act, which became effective on February 7, 1964, under an emergency clause, created an assembly of fifty members, consisting of the seven former elected governors of Kentucky and forty-three delegates to be appointed by a committee composed of the Governor, the Lieutenant Governor, the Speaker of the House, and the Chief Justice of the Court of Appeals. Five delegates were to be appointed at large, and the remainder were to be appointed, one from each of the thirty-eight state senatorial districts. The delegates were speedily named by the Constitution Committee,[23] and the first session of the Assembly was convened in Frankfort in the historic Old Capitol on February 17, 1964, only ten days after the effective date of the act, with forty-four delegates present. The Assembly promptly elected officers,[24] created standing committees, and received staff support, largely through the Legislative Research Committee.

The Assembly worked steadily for almost two years. The five committees—State Government; Local Government; Bill of Rights and elections; Education, Health and Welfare; Bill of Rights Process—in turn created sub-committees, which met in repeated session. Initial action was taken in the sub-committees, passed on to the parent committees, and then reported to the full Assembly. A coodinating committee, composed of a chairman and the five committee chairmen, was charged with coordinating the work of the other committees and achieving uniformity of style. After all committee reports had been filed with the Assembly, they were submitted to the entire Assembly, which held repeated sessions to discuss the reports. After the entire document had been debated at

[23] Members named included the two U.S. Senators and one U.S. Representative, the Mayor of Louisville and the Jefferson County Judge, three former judges of the Court of Appeals, members of both Houses of the General Assembly and other distinguished citizens. Thirty of the fifty members were lawyers.

[24] Honorable Earle C. Clements, former Governor and U.S. Senator, was elected Chairman; Marlow W. Cook, County Judge of Jefferson County and James W. Stites, former Chief Justice of the Court of Appeals, were elected Co-chairmen; Dee A. Akers, Morehead State College, was elected Secretary.

length on the floor of the Assembly, it was adopted on December 28, 1965, by a unanimous vote of all the delegates present and transmitted to the Governor and the 1966 General Assembly under date of December 31, 1965.

3. The Method of Submission.—In the meantime, discussion began on the proper and desirable method of putting into effect the work of the Assembly. One of the five principal committees of the Assembly, the Committee on Revision Process, established a sub-committee on the Method of Submission. Professor John E. Reeves was elected chairman of the sub-committee at its first meeting on July 23, 1964. At this meeting the following two alternatives were proposed for submitting "the finished document" of the Constitutional Assembly to the people:

1. To submit the work of the Assembly to the people at an election for approval ro rejection as an amendment to the present constitution.
2. To let a constitutional convention of 100 delegates be elected and limit their consideration to the proposed new draft as drawn by the Assembly.[25]

Mr. Ben Fowler, legal counsel for the committee, was asked to research the question and to distribute a memorandum to the Assembly. On May 20, 1965, at the sixth meeting of the Assembly, views of counsel were distributed to the members, and the Coordinating Committee came forward with a report putting the Assembly on record as asking the Governor to include, in any call for an extraordinary session of the legislature in 1965, a call for a constitutional convention limited to action upon the document proposed by the Constitutional Revision Assembly.[26] The Chairman made it clear that the purpose was not to commit the Assembly at that time to a particular method of submitting its work to the people, but rather to add to the alternatives available to the 1966 legislature by issuing the first proposal of a limited convention in the 1965 Extra Session, if one were called.

Delegate Tom Waller opposed the resolution on the ground that there did not have to be a constitutional convention in view

[25] Minutes, First Meeting of Method of Submission Sub-committee, July 23, 1964.

[26] Minutes, Sixth Meeting of Constitutional Revision Assembly, May 20, 1965.

of Section 4 of the Bill of Rights. As Mr. Waller picturesquely put it:

> [I]f we start with the assumption that all power is vested in the people and that they can't rid themselves of it if they tried, then the power to adopt a new constitution is inherent in the people and I cannot understand how the Constitution Convention of 1891 could delegate to itself and keep from all the rest of humanity to the end of time the right to determine how a constitution may be adopted, whether by the masses with shotguns or hoe handles or by vote or how it might be done.
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> Now I recognize that Section 258 prescribes a method of changing the Constitution. I do not read in it any language, nor do I think there should be any, that would limit the method. I think any process, preferably orderly, that complies with Seciton 4 of the Bill of Rights might prove to be sufficient. I cannot imagine that a constitution adopted by the people at an election, counted and certified, could fail to be the Constitution of the People of Kentucky. . . .
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> [I] do not want any limit on this memorialization to the Governor to call the legislature that would intimate that I, for one, am committed to a constitutional convention. I want to pursue this thing further—see if we can get a direct vote of the people on the question 'we do or we do not accept the proposed constitution.'[27]

After considerable discussion, the Assembly voted to follow the recommendation of the Coordinating Committee. On July 23, 1965, Governor Breathitt proclaimed an Extraordinary Session to meet August 23 to consider four subjects, one of them, a call for a constitutional convention for the purpose of "adopting, rejecting or modifying the constitutional revisions as approved and adopted by the Constitutional Revision Assembly."

The 1965 Extra Session adopted House Bill 2, which proposed to take the sense of the people "on the necessity and expediency of calling a convention for the purpose of revising the constitution . . . in accordance with the changes proposed by the Constitutional Revision Assembly." It provided that the authority of the delegates was limited to voting on the main proposition in accordance with the will of their constituencies and that the dele-

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[27] *Id.* at 13.

gates were required to present themselves to the people of their districts in such a way as to enable the voters to exercise a choice between re-adoption of the present constitution or adoption of the revised constitution of the Assembly.

4. The 1966 Legislature Goes to the People.—When the 1966 legislature met six choices were available to it. First, it could build on the groundwork laid by Chapter 81 of the Kentucky Acts of 1964 and issue a call for a general convention, in exact accord with the provisions of section 258 of the constitution of 1891. S.B. 142 was introduced to keep alive this choice.

Second, it could build on the groundwork laid by Chapter 2 of the Kentucky Acts of 1965, First Extra Session, and take the sense of the people as to whether to call a limited convention, limited to the adoption of the revised constitution proposed by the Constituitonal Revision Assembly. S.B. 143 was introduced to keep alive this choice.

Third, it could propose to the people that, in the exercise of their inherent power under Section 4 of the Bill of Rights to alter or reform the Constitution of the Commonwealth, they reform the constitution of 1891 by substituting the Assembly Constitution for it. Senate Bill 161 was introduced to open up this choice.

Three other possibilities were suggested, but never formally proposed in the General Assembly. One was that the legislature present the Assembly Constitution to the people as a "single amendment," to be voted on in the 1966 general election. The "single amendment" would amend the 1891 constitution by substituting the Assembly Constitution in its place. Although this had been one of the two alternatives suggested in the original report of the Subcommittee on Method of Submission,[28] it was now abandoned. This proposal, which had been followed in other states, seemed to fly squarely in the face of the limitations of section 256 in regard to "one subject," although persuasive arguments were made for its legality.[29]

Another possibility was the plan used in New Jersey in 1943.[30] There the legislature passed a bill calling on the people to vote

[28] Minutes, First Meeting of Method of Submission Sub-committee, July 23, 1964.

[29] Keeton, *Methods of Constitutional Revision in Texas*, 35 TEXAS L. REV. 901 (1957). See also the discussion of "one subject" in REPORT OF THE CONSTITUTION REVIEW COMMISSION 22 (1952).

[30] See Reeves, *The Constitution Making Process*, 36 KY. L.J. 63 (1947).

to authorize the legislature to establish a commission to draft a constitution for adoption by the people at a succeeding election. This would have required two votes instead of one, but would have had the theoretical advantage that the drafting commission was first authorized by the people to submit a document, even if the draftsmen were not elected delegates. Apparently this suggestion was never seriously regarded by the 1966 Legislature. This is not surprising, since the Assembly Constitution was already in final draft and in the hands of the Legislature.

Finally, there was the additional possibility mentioned by Mr. Waller[31]—revision "by the masses with shotguns or hoehandles"—a proposal for a revolution against the existing constitution which was never given any serious thought, even by Mr. Waller.

The proposal for an unlimited convention could have been readopted by the 1966 Legislature, and a vote of the people taken in the 1967 election. Then, in 1968, delegates could have been elected to a convention which could have presented a constitution by 1970. It would then be once more submitted to the people, pursuant to the limits of Section 4 of the 1964 Act. Revision would be postponed until the 1970's! Was it really necessary to take the sense of the people thrice—before, for, and after a convention? And there was the matter of practical politics. The people had rejected proposals for conventions three times before. Would the people risk an unlimited convention even with the safeguard of resubmission? Finally, why go to all that trouble when the excellent document drafted by the Assembly was already at hand?

The proposal of a limited convention based on the 1965 legislation was given more consideration. It could have resulted in a vote at the 1967 elections and the election of delegates running on pro-Assembly Constitution or anti-Assembly Constitution platforms in the 1968 election. A one-day convention to record formally the will of the people, resulting in prompt acceptance or rejection of the revision, could have resulted in reform by early 1969. Two votes of the people would still be required and some question had been raised whether the Legislature could so totally limit the discretion of the "sovereign convention" that it was no convention at all. Indeed it was a proposal for little more than

[31] Minutes, Sixth Meeting of Constitutional Revision Assembly, May 20, 1965.

a referendum by agency, and there were questions raised as to its legality.[32]

The proposal for a direct vote of the people on "reformation" had been gathering support. The theory of the sub-committee on Method of Submission was that the 1966 Legislature might put the Assembly Constitution to a vote at the 1967 general elections as an expression of the people on "reformation." Doubts were expressed, of course, as to whether this method of constitutional change was in accord with the constitution, but legal opinions of counsel for the Constitution Revision Assembly approved it.

The ultimate choice of a method of revision was probably dictated by the time factor. The governor's term of office would expire in December 1968, and he could not succeed himself. A convention, limited or unlimited, could not complete the work of revision within that time. Friends of revision would lose their enthusiasm; opponents would have time to organize, and any revision would be born into a hostile world. If a direct vote of the people were taken at the 1966 general election, a friendly administration would be in a position to play an active role in support of revision. The election would be important enough to turn out the voters, since a Senate and a number of House seats were at stake. Yet no major state officers were in contest, and thus the energies of the supporters of revision would not be diverted by factional politics. In addition, the vote would be taken while interest in the work of the Assembly was still alive. The decision was made by the leadership to proceed with S.B. 161. The bill passed the Senate by a vote of 32-0 on February 28. The House passed it by a vote of 79-17 on March 16 and it was enrolled, signed, and sent to the Governor. The Legislature, by-passing the amendment and convention methods, had decided to invite the people to vote for constitutional revision by "reforming" the existing document in one stroke.

5. The Court Test.—S.B. 161 was delivered to the Governor on March 16. On March 22 a suit was filed in Franklin Circuit Court by W. C. Gatewood, a Boone County farmer, against

[32] In Chenault v. Carter, 332 S.W.2d 623, the Court sustained the validity of a call for a constitutional convention limited to twelve subjects. This does not necessarily mean support for a completely limited convention. See HOAR, *op. cit. supra* note 2, at 103.

Robert Matthews, the Attorney General, and Thelma L. Stovall, the Secretary of State, contesting the validity of the act. The plaintiff asked for a declaration of rights and an injunction to prevent the defendants from certifying the question of adoption of the proposed constitution to be placed on the ballot for the November 8, 1966, elections. Robert C. Carter intervened as amicus curiae on the side of the plaintiff.

Counsel for the plaintiff argued that the mode of revision prescribed in the 1891 constitution, sections 256 to 263—the convention method—was mandatory and exclusive and that any other mode of constitutional revision was improper, extraconstitutional and revolutionary. Counsel for the defendants contended that Section 4 of the Bill of Rights reserved a popular sovereignty to the people, which could be exercised to reform the constitution by popular vote, without regard to the limitations imposed upon use of the amendment and convention processes.

The case was argued April 22 before Circuit Judge Henry Meigs, who handed down his opinion on April 27 ordering dismissal of the plaintiff's complaint and "sustaining the validity of KRS 7.170 and Senate Bill 161 in their entirety." Judge Meigs found that the "fundamental principles of popular sovereignty summarized by Section 4 of the Bill of Rights," in conjunction with the plenary power of the Legislature to exercise any legislative powers not expressly forbidden to it, amply supported submission of the proposal of the Legislature to the people.

Plaintiff appealed to the Court of Appeals, which heard oral argument on May 17, and on May 31 affirmed by a vote of 6-1, Judge Hill dissenting.[33] The majority opinion by Judge Williams put the issue this way: "The primary question to be considered is whether by the terms of Sections 256 and 258 of the Constitution the people have imposed upon themselves exclusive modes of amending or of revising the constitution."[34] His conclusion:

> The action taken by the legislature does not violate the form or the spirit of the Constitution of Kentucky or the Constitution of the United States. When the people vote on the proposed Constitution it will be an expression of the inalien-

[33] 403 S.W.2d 716.
[34] *Id.* at 718.

> able right of the ultimate sovereign to reform the government. That right is guaranteed by Section 4 of the Bill of Rights, and is not preempted by the inclusion in the Constitution of alternate modes of revision.[35]

In answering this question, Judge Williams followed traditional legal analyses. The question is novel. Cases strictly construing the amending clause are not in point, and in no case has the Court ever held the amendment and revision procedures specified in the constitution to be exclusive. Section 4 of the Bill of Rights reserves the right of the people to "alter, reform or abolish" their government and section 26 recognizes the Bill of Rights as supreme. Therefore section 4 is not to be construed in *pari materia* with sections 256 and 258 and can't be restricted by implication.

Constitutional history was invoked to support this interpretation. A resolution at the 1890 convention providing that "the Constitution shall not be altered, amended or changed in any way except as provided in this article" was not adopted. History also showed a preference for popular ratification, despite the lack of any provision for it, in 1850, 1891, and in 1947.

Finally, Judge Williams argued for the basic political soundness of the judgment. He emphasized that the intent of the framers was to preserve the inalienable right of each generation to choose for itself. He found that two conditions must exist for this exercise of the supreme will of the people:

(1) due and proper notice and opportunity to acquaint themselves with any revision,

(2) exercise of their choice directly by a free and popular election.

Testing the Assembly proposal against the intent of the framers so defined, he held it valid. The requirement that two successive legislatures issue a call for a convention was to inform the public; today, news is disseminated faster and more efficiently. The requirement that the delegates to the convention be elected was to give the people a voice; the direct vote on the Assembly Constitution goes further. It gives the people opportunity to participate directly and individually, not through representatives. Finally the

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[35] *Id.* at 721.

proposed Assembly Constitution is a nullity unless a majority vote of the people gives it force and effect.

Judge Hill's dissenting opinion seems to misconceive the theory of the majority opinion. Arguing that the only lawful method of constitutional revision is the convention as authorized by sections 258-263, he charges the majority with recognizing a right of the Legislature to repeal the constitution in toto or by piecemeal. He argues that S.B. 161 is an attempt by the Legislature to preempt the powers of the people reserved to them by section 4. He concedes that "practical application of this section [Section 4] is almost impossible. . . . The truth is, the people spoke when they enacted and adopted the Constitution of the Commonwealth of Kentucky. Until they speak again, the legislature exercising the general powers of government must conform to the plain mandate of that document. . . ."[36]

II. THE PROBLEM AND THE POLITICAL THEORY

A. The Problem—Factors Involved

An obvious legal problem is involved in revising and adopting a constitution in complete disregard of prescriptions for revision in the constitution in effect at the time. On its face such a procedure is nonconstitutional, extraconstitutional, or even "unconstitutional," at least in a nonlegal sense.

To what extent is the revision method of S.B. 161 "unconstitutional"? The following are necessary for the legality of convention revision procedure under the constitution of 1891: (1) twofold approval of the convention plan by two successive Legislatures; (2) electorate approval of the convention proposal; (3) the election of delegates by the people on the basis of geographic districts; (4) promulgation of a proposed constitution by an elected-delegate convention. Under the terms of the constitution of 1891 this convention-drawn constitution would automatically become effective and the previous document void without a further ratifying vote by the citizenry.

The plan of S.B. 161, puruant to section 4 of the constitution, provides instead for: (1) establishment of a drafting commission

[36] *Id.* at 722-23.

by the state legislature; (2) selection of the commission primarily on a geographic basis by a committee composed of representatives of the three branches of government; (3) submission of a proposed document to the vote of the people with majority vote alone giving the document any legal effect.

Thus, stated in terms of factors involved, the problem becomes one of the legality of a constitutional change which omits checks provided in the constitutional scheme for revision by convention and substitutes therefor a procedure which involves similar, but different, checks on constitutional change.

In an effort to go beyond the narrow framework of an argument in terms of the "plain meaning," intent of the framers, and other canons of constitutional construction, it seems advisable to look to basic constitutional theory of the political writers before turning to the judicial precedents.

B. The Argument From Political Theory

The central argument which this section makes may be stated as follows: A constitution is not a mystical, God-given, immutable being which defines the social and political life of the state for eternity. A constitution is a rationally conceived document, resembling a social compact, which sets out the form of the government together with certain political and legal rights according to the conceptions of the writers. As a matter of historical reality, the social and political organizations and necessities of any given group of people—*e.g.*, a state—are subject to drastic changes.

To best provide for fulfillment of the social and political needs of the people, the constitution must be amenable to amendment and revision in order to reflect these changes. Revision and amendment procedures must, however, be sufficiently regularized to preserve the continuity of governmental, social, and political institutions as well as the legitimacy of the government and the constitution itself. Where the procedures specified for changing the basic document are so rigid as to practically prohibit necessary change, the "people" have the inherent right to effectuate revision in circumvention of the existing constitution's dictates so long as the procedures for doing so take place within such limits as to maintain the legitimacy of the new constitution.

The "people" as such cannot exercise their political power.

The political power of the state is wielded by the legislative and executive branches of the government. Thus the political right of the people to effectuate constitutional change may only be exercised with the aid of the legislature and governor. Assuming circumvention is justified, the legislature and the governor, being vested with the duty of exercising the political power of the state, may together legitimately propose a revised constitution in disregard of the procedures specified in the existing constitution. Upon subsequent approval by the electorate, it may be adopted as the official basic document. In a larger sense the amending procedures dictated within the constitution are merely the conceptions of its authors at the time it was written as to the procedures which would be necessary to maintain legitimacy throughout the change. As such, the specifications are entitled only to a position as persuasive authority once the decision is made to write a whole new document.

C. Constitution: The Concept

1. Traditional Definitions.—Unfortunately most textbook definitions of *constitution* only serve for purposes of identification and shed no light whatsoever on the constitution as a functional concept. Without a functional or analytic approach it would be extremely difficult to examine the legality of the various ways of amending a constitution. A traditional description of a constitution is a basic law of a state enacted by the people.[37] Such a statement obviously provides negligible information on the instrument's amenability to revision.

2. Marshall and Jefferson.—Two classic statements of the nature of a constitution were made by Chief Justice Marshall and Thomas Jefferson. Marshall believed a constitution was a sacred document, not to be afflicted with major changes. He stated:

> Between these alternatives, there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. . . . [I]f the latter part be true, then written constitutions are absurd attempts, on the

[37] State v. Griswold, 67 Conn. 290, 34 Atl. 1046, 1047 (1896); *In re* Silkman, 84 N.Y. Supp. 1025, 1029, 88 App. Div. 102 (1903).

> part of the people, to limit a power in its own nature illimitable.
>
> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that the act of the legislature repugnant to the constitution is void.[38]

Jefferson, on the other hand, did not hold constitutions in such high regard. Jefferson wrote:

> Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the convenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead.[39]

These two men present the dichotomy which has prevailed in discussion of the amendability of constitutions. Is the constitution a sacred document whose principles and very language must rule over the government regardless of changed political contexts? Or is a constitution a rationally written document of one age whose precise provisions may only be effective in that generation and may be subject to criticism and change in later ages?

3. The Constitution as a Social Compact.—In the best known work on the validity of various types of constitutional reforms, Robert Hoar declares:

> A constitution is a social compact, by which the whole people convenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. In other words, it is the Anglo-Saxon theory that government is in some way based upon a contract between the people and the state.[40]

The social compact analysis may well be the most fruitful approach to the problem of constitutional revision. For the concept

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[38] Marbury v. Madison, 5 U.S. (1 Cranch) 49, 69 (1803).

[39] Letter from Thomas Jefferson to Samuel Kercheval, July 12, 1816, quoted in Douglas, *Stare Decisis*, 4 RECORD A.B.C.N.Y. 152, 176 (1949).

[40] HOAR, *op. cit. supra* note 2, at 1.

explains in some measure what the constitution does: It binds the members of the community or state together, sets up a government for the group, and gives this government powers under an express agency from the people. This is important. The government exercises its powers within the channels prescribed in the compact, but that power does not come from the compact; it comes from the people.

Another advantage in the social compact approach is that a body of theory exists dealing with its mechanics. The three best known writers who have discussed the compact are Thomas Hobbes (b. 1588), John Locke (b. 1632), and Jean Jacques Rousseau (b. 1712). While none of these three dealt with constitutions, their discussions of the social compact are nicely in point.

All three conceived of a starting point for the social compact at a time before the advent of government, when man lived in a "state of nature" with only imperfect social and political rights at best. For various reasons men joined together in a contract of government. Strictly speaking, the compacts formed are not themselves constitutions, but may underlie such basic documents formed or existing concurrently with them.

In Hobbes's scheme men meet and initiate the social contract, contemporaneously establishing the "Covenants," rough equivalent of a constitution. The Sovereign, the legislative or monarchial government set up by the agreements, was above the "Covenants." It was an "easie truth, that Covenants being but words, and breath, have no force to oblige, contain, constrain, or protect any man, but what it has from the publique sword. . . ."[41]

John Locke was a legislative supremacist and his ideas are usually associated with the theoretical framework of the British Parliament. In *Essay on Civil Government* he speaks of nothing which may be identified as a written constitution, except perhaps the rules concerning the establishment and organization of the legislative. However, he writes of the inauguration of a new legislative as such a fundamental change that it may be equated with a constitutional overhaul. Locke posits: "[T]he legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legisla-

[41] Hobbes, *Leviathan*, WESTERN POLITICAL HERITAGE 503 (Elliott & McDonald ed. 1961).

tive when they find the legislative act contrary to the trust reposed in them. . . ."[42] And the right of revolution against the government is explicitly given to the people after enduring a "long train of abuses."[43]

Rousseau distinguished four types of laws, the first of which was "the action of the complete body upon itself, the relation of the whole to the whole, of the Sovereign to the State. . . ."[44] This indicates a constitution within our understanding of the term. Such acts are referred to by Rousseau as "political laws" and "fundamental laws."

Immediately upon setting out the first class of laws, Rousseau continues:

> [I]f there is, in each State, only one good system, the people that is in possession of it should hold fast to this; but if the established order is bad, why should . . . [its laws] be regarded as fundamental? Besides, in any case, a people is always in a position to change its laws, however good. . . .[45]

Again, Rousseau provided:

> The opening of the [legislative] assemblies, whose sole object is the maintenance of the social treaty, should always take the form of putting two propositions that may not be suppressed. . . . The first is: 'Does it please the Sovereign to preserve the present form of government?'[46]

Thus all three theorists are agreed in their conceptions of the social compact to the extent that it is a rationally constructed agreement among the members of the society and should be subject to change when its provisions do not suit the people. Because the social compact is an agreement among the people for their political and social betterment, the power of the people to set up their government is above the power inherent in the compact. The legislature governs with power delegated from the people as set out in the compact; it does not govern with power delegated from the compact itself.

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[42] Locke, *Essay on Civil Government,* WESTERN POLITICAL HERITAGE 587 (Elliott & McDonald ed. 1961).

[43] *Id.* at 595.

[44] Rousseau, *Social Contract,* WESTERN POLITICAL HERITAGE 648 (Elliott & McDonald ed. 1961).

[45] *Ibid.*

[46] *Id.* at 658.

4. The Declaration of Independence and Kentucky's Section Four.—The statements in the Declaration of Independence of the United States follow this theme. That document announces: "[T]o secure these rights, Governments are instituted among men, drawing their just powers from the consent of the governed."[47]

Robert Hoar has commented that "as a necessary conclusion from this statement . . . the people have an inalienable right to change their government whenever the common good requires. In fact, that very conclusion is drawn by the Declaration itself."[48] And while Kentucky's Bill of Rights section four draws no conclusions, it is obvious that these same social compact themes underlay its phrases.

D. The Political Writers

1. Locke's Analysis of Constitutional Change.—In addition to his theory on the social contract John Locke also developed the concept of the constituent power. At all times in the community there is a residuary and unorganized power of resistance, the constituent power, which seeks to restrain the existing government. Although this power may at times work through the established constitution, it exists and operates quite apart from it. He also posits a constituent group, men who constitute the more intelligent and vital part of the community and who have the independence to criticize the existing form of government. They are that part of the community capable of wielding the de facto residuary power to change or replace an established order by a new constitution. Group size and strength grow as government becomes less suited to rule the society of its citizens.

Ideally the amending process is set up in the existing constitution so as to anticipate the rise of such feelings and convert them into legal change. Too rigid restrictions in the amending clause defeat this purpose. Then, "should the amending power fail to work the constituent power may emerge at the critical

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[47] The (United States of America) Declaration of Independence.

[48] HOAR, *op. cit. supra* note 2, at 12. Hoar's "very conclusion" obviously refers to the next sentence of the Declaration of Independence: "[W]henever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

point."[49] And "no matter how elaborate the provisions for amendment may be, they must never, from a political viewpoint, be assumed to have superseded the constituent power."[50]

Locke's analysis is suggestive in considering the problem presented in this article. The constituent group may be identified as the politically-concerned members of the community. In the present instance, since we are concerned with revision of the constitution rather than a change in the government, the legislature and executive branch of the government may also be identified as members of the reform movement. As the social and political needs of the people change, the constituent group must become active to initiate and effectuate revision of the compact or constitution. The ultimate power of rewriting the constitution inheres in the people, but it is the constituent group which must actually exercise it. The provisions of the constitution as to certain procedures for revision must not be allowed to frustrate the constituent power.

2. *Classification of Revision Schemes.* — The problem of classifying the revision scheme has always plagued writers on the subject. In general three categories have been evolved to define the conventions which, it was assumed, would be the authors of the constitutions. There are (1) conventions which comply with the existing constitution's prescriptions, (2) "popular" conventions, and (3) spontaneous "revolutionary" conventions.[51] Popular conventions are those held without authority of the existing constitutions, but which clearly represent the popular will.[52] Revolutionary conventions, held without either type of authorization, are defined as the spontaneous act of an unrepresentative part of the people.

On the basis of these general classifications, Kentucky's revision plan might be characterized as revolutionary on the ground that the revision plan lacked *prior* approval of the electorate. However, the terms have not been applied strictly according to definition. One of the leading cases on extraconstitutional revision states that a revolutionary attempt to alter the form of

[49] FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 130 (1950).
[50] *Id.* at 136.
[51] See HOAR, *op. cit. supra* note 2, at 15; Bebout and Kass, *How Can New Jersey Get a New Constitution?*, 6 NEWARK L. REV. 2, 8 (1941); Hendricks, *Some Legal Aspects of Constitutional Conventions*, 2 TEXAS L. REV. 195 (1924).
[52] HOAR, *op. cit. supra* note 2, at 30.

government—to change the constitution—is action by the people without government consent voiced by law, but when the revision is based upon promulgated laws the change is legal.[53] The Assembly proposal for revision has the overwhelming support of government—legislative, executive, and judicial—at every stage. To classify it as "revolutionary" would hardly be accurate.

Modern writers are questioning the use of this classification system, although theorists and courts in the first quarter of the century often based their decisions on the legality of various attempts on the application of these categories. For example, revolutionary conventions were said to have no *legal* rights and were "possible only in fact."[54] Such statements force agreement with the proposition that the use of the old pigeonholes is "an unrealistic exercise in verbal gymnastics."[55] Because constitutional overhauls take place in a dynamic political environment with numerous elements in operation, it is unrealistic to argue that any simple system of classification can show more than a tendency toward either legality or its alternatives.

3. Analysis Via the Concept of Legitimacy.—The analysis of the problem of constitutional revision which employs the concept of "legitmacy" makes one great assumption. It assumes that at bottom the only real requirement in constitutional change is the maintenance of stability, continuity, and popularity of the government and the political system throughout the revision. Stability is closely intertwined with the concept of legitimacy:

> The stability of any given democracy depends . . . upon the effectiveness and the legitimacy of its political system. . . . Legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society.[56]

Thus the overall requisite for any method of constitutional revision is that it maintain the legitimacy of the government and the basic document itself. Rewriting in accordance with provisions

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[53] Wells v. Bain, 75 Pa. 39 (1874).

[54] JAMESON, THE CONSTITUTIONAL CONVENTION, quoted in Bebout and Kass, *supra* note 51, at 9.

[55] Bebout and Kass, *supra* note 51, at 9. Those authors suggest as a substitute this test: "Does it [the method of revision] conduce to the full and free exercise of the right of the sovereign people to control their government through a constitution satisfactory to themselves?" *Id.* at 10. But it seems this bat could be swung equally well by batters on opposing teams.

[56] LIPSET, POLITICAL MAN 64 (1963).

in the established constitution is one method whereby legitimacy may be maintained. However, this by no means excludes the legitimacy of other procedures of revision.

There are two fundamental conditions necessary to legitimize constitution-making or remaking. Carl Friedrich has made this statement of them:

> To make the constitutional decision genuine it is also necessary that it be participated in by some of those who are being governed as contrasted with those who do the governing . . . [And] there is . . . another important condition which must be fulfilled in order to render the constitutional decision genuine: the decision must be reached after the mature deliberation of those who participate in the decision . . . . For mature deliberation of an issue by any number of people who are to act collectively presupposes an exchange of views on the issues involved in the decision. If that opportunity is not available, nothing can be decided. This is the fundamental reason why plebiscites, so popular . . . fail to have the legitimizing effect which their initiators hope for . . . They carry little persuasive force in the community because few of the participants feel any responsibility for the action taken.[57]

Friedrich's statement of the basic requisites of legitimacy cast shadows on the Kentucky scheme of revision in three areas where the elements specified in the 1891 constitution for the revision process have been omitted. These are the popular vote authorizing the convention, the popular election of delegates, and the composition of the instrument in open convention. The question is whether the process chosen for revision, excluding these elements, provides for sufficient participation of the governed and mature deliberation of the issues by the manufacturers of the proposed draft.

A review of the history of the long months of debate and discussion leading to the publication of the final draft of the new constitution shows conclusively that the requirement of deliberation by participants was satisfied. While the convention system would doubtless have provided the more classic type of forum for the airing of issues, the employment of modern communications

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[57] FRIEDRICH, *op. cit. supra* note 49, at 128-29.

media insured a degree of participation well above the minimum necessary for "mature deliberation." Compilation of the record of the various communications among the members of the Revision Assembly, staff members, close friends, and other interested advisors—including letters, telephone conversations, etc.—would be a long and tedious task and would serve no useful purpose. A perusal of the Louisville *Courier-Journal,* a newspaper of statewide circulation, reveals the conscientious approach and dedication of the Assembly, as well as the opportunity given for public participation.

The real difficulty lies in the fulfillment of Friedrich's other condition: that the "governed" participate in the process. His criticism of plebiscites hits with the ferocity of a red-hot iron at a scheme which leaves only the final ratification vote for the formal participation of the electorate.

The answer lies in the fact that the revision process under discussion here takes place, not in a newly-born African nation with no important traditions or guidelines, but rather in a state of the United States with a one hundred and seventy-year history behind its political institutions. The truly basic decisions concerning the government were made long ago. Inasmuch as these institutions have achieved an accepted function of performing political acts for the people as their representatives and agents, the "participation of the governed" may to a great degree be effected by the open and regular promulgation of the constitution by these institutions in strict accordance with the principles in the previous constitution which the passage of time has not made invalid. Furthermore, the commission did not consist of government employees or elected officials. Its membership was appointed statewide from the class of the governed. The draft written by the commission was debated and passed upon by the elected representatives of the people. Press coverage of the various debates and public hearings added to the public's participation. In such a context Friedrich's conditions should be satisfied by the extra-constitutional revision procedures employed.

Friedrich's criticism of the plebiscite is quite pointed. But it seems questionable whether mere participation in the two added elections (the authorizing vote and election of delegates) provided

by the present constitution would provide a significantly greater legitimizing effect.

This is not to say Friedrich can be ignored. While this article argues that Kentucky's constitution revision in accord with S.B. 161 meets the basic conditions of legitimacy, Friedrich's requirement of *participation* by the governed does lay bare the weakest link in its chain. First, despite the amount of communication involved in the revision of the document, it is probable that the masses of the voters were not deeply concerned in the drafting stage. One poll showing that forty percent of the voters of the state were not aware that a new constitution was being drafted to replace the instrument of 1891 casts some doubt on the involvement of the people.[58] Second, it is entirely possible that the kind of constitution which would be shaped in a fully authorized convention, with elected delegates, open to public debate on the document's articles and to criticism by the state's press, might well be entirely different from the one quietly written by an "aristocratic" commission.[59] And being appointed rather than publicly elected, the commissioners were not accountable to the voters; nevertheless, the very fact of their being appointed by a committee drawn from the three branches of government may have prevented the members from using free imagination. The knowledge that the commission was not formally authorized by the electorate, but that its product would come up for its approval, also could have thwarted any desires to produce free-wheeling changes.

The counter-argument, if not the answer here, is that there will be full participation of a sort during the period before the ratification election when the new document is fully published and discussed. And the fact that the commission members proceeded with conscious direction of attention toward producing a document which the people would approve perhaps made the proposed instrument much more responsive to the necessities of the people than a convention draft might be.

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[58] See Kentucky State Journal, June 12, 1966, p. 5, col. 5.

[59] Louisville Courier-Journal, April 23, 1966, § B, p. 1, col. 1, and May 18, 1966, § A, p. 1, col. 1. Carter, intervenor in the *Gatewood* case, argued alternatively that the Constitution Revision Assembly was composed of "aristocrats," and that under the procedure of S.B. 161 "this document might just as well have been drafted in the back room of some bar or grill as long as the Legislature submits it to a vote of the people."

E. The Power of the Elected Executive and Legislature to Perform the Political Acts of the State on Behalf of the People

Once the idea of the sacred, unrevisable-by-human-hand constitution is done away with, there remains an objective hurdle to be overcome in demonstrating the legality of Kentucky's revision plan. As previously noted, the direct submission plan omits two votes of approval by the populace: the vote authorizing the convention and the election of convention delegates.

The problem now is to expose the fallacy of the concept of the mythical people. The statement in Kentucky's Bill of Rights that all power is inherent in the people echoes a similar statement in other state constitutions and in the writings of many political theorists. But the statement that the power is in the people is merely a truism. Of course the power lies in the people: the people are the whole state. The usual corollary to the principle, however, is that the people is a mystical being capable of wielding its political power to bring about political reforms.

This is nonsense. The power lies in the people because the state as a collection of people has inherent in it a certain amount of political power. But this is not to say that the power lies in one part of the state's people (the voters) and not in another (the legislature). The group of people who are the common members of the electorate have no truly active political power. This is simply because the exercise of political power requires organization and machinery for execution and enforcement. This type of machinery is possessed only by the government, which is set up by agreement of the people to exercise the political power of the state on their behalf.

And this political power is not an inherent type of force, but a functional competence. That is, the government exercises the political power of the state because it is the group in society which has been given the functional duty of governing and leading in political affairs. Thus this conception does not contend that the political power of the state as a whole is usurped by the government, which alone has political power as a result. The government may act only with the continued approval of the masses of the voters. Thus comes the phenomenon of nearly annual elections

and submission to the people of basic changes in the political scheme, such as constitutional revision.

The argument is that, given the competence of the government to exercise the political power of the state, the requirements of an authorizing vote and a vote for the election of delegates are unnecessary when the right of the people to approve or disapprove the government's action is preserved before the measures become effective. The proposition is even more forceful when taken in the context which we are considering here; namely, the steps provided for in the existing constitution for electorate approval of the government's acts make the revision process so time-consuming and difficult as to make revision a practical impossibility.

1. The Mystical Power of the People Is a Fallacious Conception.—Early political theorists and modern jurists seem to take quite literally the phrase that the political power of the state inheres in the people. These writers analyze the political acts of the government with a mystical approach. They seem to visualize the legislatures, governors, and constitutional conventions as in reality the people themselves. The representative bodies amount to little more than the hands which actually only hold the writing quill which is moved and guided by "the people." Commonplace are such statements as "a constitutional convention is the people themselves, acting through their delegates. . . . "[60] Elsewhere: "[C]onventions are valid if called by the people speaking through the electorate . . . ," and their validity does not rest upon constitutional provisions or legislative acts, "but upon the fundamental sovereignty of the people themselves."[61]

Such statements applied literally ignore both the history and modern reality of American politics. State and national politics in the American colonies operated on a strictly aristocratic basis. Property ownership restrictions on voting rights significantly limited the number of people who were allowed to participate even to the extent of marking a ballot. The more accurate analysis of the machinery of political acts is something along the line of Locke's constituent power-group theory. The political and

[60] Bebout, *Recent Constitutional Writing*, 35 TEXAS L. REV. 1071, 1087 (1956-57). The author comments that this theory most nearly describes reality when the people outside the convention are kept fully informed of its progress and are invited to participate fully in the preliminary stages of decision making.

[61] HOAR, CONSTITUTIONAL CONVENTIONS 52 (1917).

governmental acts of all communities and states have always been planned, initiated, and executed by the fractional percentage of the population who are politically active. These acts do not derive their legitimacy from being performed by the people themselves mystically through the actors; they are legitimate because the remaining populace either yields a ratifying vote or merely acquiesces in the leadership.[62]

The legislative explosion which occurred in both state and national governments during the 1930's, plus the court decisions which upheld them in the latter part of that decade, support this thesis. Of course, these events did not quite establish legislative ability to revise constitutions. But the political reality of an active legislature and executive initiating political programs and changes which are accepted by the people through acquiescence or ratification was dramatically demonstrated.

The position of the legislature is even more imposing in the states where it occupies a paramount spot in the political arena. Strong dictum in a recent Supreme Court decision firmly declared the preeminence of state legislatures over "the people" in the arena of political action:

> State legislatures are, historically, the fountainhead of representative government in this country. A number of them have their roots in colonial times, and substantially antedate the creation of our Nation and our Federal Government. In fact, the first formal stirrings of American political independence are to be found, in large part, in the views and actions of several of the colonial legisiative bodies. With the birth of our National Government, and the adoption and ratification of the Federal Constitution, state legislatures retained a most important place in our Nation's governmental structure. But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. *Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them.*[63] (Emphasis added.)

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[62] Even Robert Hoar makes statements supporting this view (*Id.* at 219), despite his overall commitment to the literal version of the power-in-the-people theory.

[63] Reynolds v. Sims, 377 U.S. 533, 564-65 (1964).

One commentator has suggested that this case stands for the principle that the legislature receives its power from the people, lacking inherent power of its own.[64] This contention is extremely difficult to accept. Within an institutionalized political structure the question of the source of an institution's power is irrelevant. The only revealing question is, what function does that institution exercise in the system?

It is time for a second look at the popular power clause. A reinterpretation has been offered which seems more realistic than the older mystical versions. These clauses should not be taken as divine revelations that the people have power over all government. Rather they must be understood as a functional statement guaranteeing the people the right to alter or reform the government, not as a right *under* the constitution, but as a right *over* it.[65] That is, these clauses grant authority under which limits on the ability of the legislature to act do *not* limit the power of the people, and the legislature may take a vote of approval and act accordingly, even if in conflict with constitutional provisions for revision procedures.[66] And where the authorizing vote is one of the stipulated procedures preventing the initiation of the proper reforms, because of certain circumstances such as time, the authorizing vote may also be dispensed with. The legislature, receiving its power to exercise the political power of the people as a functional agent, would be acting in that capacity. It would have power, then, to plan a circumvention of the constitution on its own, subject to final ratification of the people.

2. The Fundamental vs. Ordinary Legislation Is a Misconception.—Another theory used to restrict legislative activity in the realm of extraconstitutional revision was the distinction between "fundamental" law and ordinary legislation. The theme was that legislatures were competent to pass ordinary laws, but were not competent to legislate "fundamental" law. The distinction has been understood by some writers to mean that while legislatures could fabricate ordinary rules, *e.g.*, traffic regulation, they could not promulgate laws setting up novel methods for constitutional

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[64] Shull, *Legislature and the Process of Constitutional Amendment*, 53 KY. L.J. 531 (1964-65).
[65] Bebout and Kass, *supra* note 51, at 9 (quoting Judge Jameson).
[66] Stubbs, *Constitution-Making in Georgia*, 6 GA. B.J. 207, 211 (1944).

revision. The reasoning was that such laws were "fundamental" and could therefore be produced only by popular action.

A glance at the historical context in which this classification originated reduces the potency of such arguments. The early constitutions from which the language was taken were not concerned with the limitations of government action as against the values of self-government. This area is rather the focus and preoccupation of today's constitutional inquiry. The older constitutions were concerned with the organization of the powers, or departments, of government and left great latitude for the exercise of the powers given to the legislatures.

The "fundamental" law denied to the legislative power by early writers was law establishing the *arrangement* of the departments and powers of government. The ordinary versus "fundamental" dichotomy had nothing to do with limiting the extent of the exercise of powers granted,[67] which is the problem in determining whether the legislature may provide for the composition of a constitutional *draft* in a method not provided for in the existing constitution. Placing the old distinction in a modern context there is great "difficulty . . . differentiating law that is 'constitutional' or 'fundamental' from law which is 'legislative' or 'statutory'. . . . No adequate criteria have yet been evolved which will satisfactorily perform this task."[68]

3. Historic Precedents.—Citing historic precedents, the political theorists admit the power of the legislature to call a constitutional convention when no provision is made for one in the existing constitution if the legislature first obtains authorization from the people. One analyst notes that the Tennessee Legislature employed just such means four times in the state's history and was upheld by the courts each time. He relates that the usual reasoning supporting the legislature's actions is that power to pass such laws is implied in the popular power clause and also in the clauses giving the legislature the power to submit amendments on its own authority.[69]

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[67] O'ROURKE & CAMPBELL, CONSTITUTION-MAKING IN A DEMOCRACY 32 (1943).

[68] *Id.* at 193.

[69] Witham, *On Amending the Constitution of Tennessee*, 11 TENN. L. REV. 175, 178-79 (1933). The cases referred to in this article are: Evans v. McCabe,

(Continued on next page)

In 1942-1943 the New Jersey Legislature appointed a commission to write a new constitution and then received an electoral mandate to submit a legislative draft. The constitution in force provided only for submission of specific amendments. The Legislature approved the commission-authored document offered to it. The procedure was supported by William Miller on the grounds that the legislature had the power to initiate processes of constitutional change, subject to ratification by the people, and that the popular power clause prevented construction of expressly designated revision procedures as excluding any other method by which the people might alter or reform their constitution.[70] The constitution was subsequently defeated at the polls.

Finally, a leading authority on constitutional revision states that the power of the legislature (upon authorization) to establish conventions not provided for by existing basic law rests on the right of the people to change or alter their government.[71]

History is replete with examples of the exercise of legislative power to initiate constitutional reform by extraconstitutional means where no authorizing vote was obtained. The most famous example is the federal constitution. The Articles of Confederation made no provision for revision. The Constitutional Convention which met in Philadelphia could not have been sanctioned under the Articles. The delegates to that convention were not elected for the most part. The validity of the federal constitution stands on the basis that it contained a provision that it would become effective if ratified by two-thirds of the states, and such ratification was received.

When Great Britain nullified the state charters, the states set up de facto governments which had to write constitutions. Five states never authorized their governments to perform such acts. The validity of the constitutions of those states was based instead on a ratifying vote.[72]

(Footnote continued from preceding page)
Comm'r, 164 Tenn. App. 672, 52 S.W.2d 159 and 617 (1932); Davis v. State, 71 Tenn. 377 (1879); Hore v. Deaderick, 27 Tenn. 1 (1847); Bell v. Bank, 7 Tenn. 269 (1821).

[70] Miller, *The Report of New Jersey's Constitutional Commission*, 36 AM. POL. SCI. REV. 900, 905 (1942).

[71] Reeves, *supra* note 30, at 66. Robert Hoar noted thirty-one such instances when he published in 1917. See HOAR, *op. cit. supra* note 61, at 39-40.

[72] *Ibid.*

The Georgia Constitution of 1777 provided for revision by a petition-called convention. In 1788 the Legislature simply appointed three fit persons from each county who met in Augusta and revised the constitution, apparently without any petitions ever having appeared.[73]

The Pennsylvania Constitutional Convention of 1776 was not popularly authorized since the Legislature was full of Tories who would not have consented to a convention. The meetings were held by political activists on their own initiative. By 1789 procedures had become somewhat more regular in that state. The Legislature passed an act stating that "should they [the people] concur in opinion with this house . . . that a convention . . . is necessary, it is hereby submitted to their decision. . . ."[74] A convention was later called. The convention act stated that the Legislature was assured that a large majority of the people wanted a convention because it had received petitions from the people and replies to inquiries, plus information from fellow members as to popular sentiment.[75]

Again, the Arkansas Constitution of 1836 was written by an extraconstitutional convention called by the Legislature without an authorizing vote. The convention which turned out the constitution of 1861 was authorized, but it was not empowered to write an entire document.[76]

Also to be taken into account as extraconstitutional, nonauthorized conventions are the Virginia convention of 1901-02;[77] the 1851 Delaware convention, where the authorizing vote fell short of the required number, and the 1865 Florida convention, where state courts held valid a convention called by the Governor in violation of a constitutional provision that it be done by the legislature.[78] Ten additional instances of legislature-called conventions without an authorizing vote may be cited, not including the majority of secession and reconstruction conventions.[79]

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[73] Stubbs, *supra* note 66, at 208.

[74] Shenton, *Can the Legislature Alone Call a Constitutional Convention?*, 10 10 TEMP. L.Q. 25, 26 (1935).

[75] *Id.* at 27.

[76] Barnhart, *A New Constitution for Arkansas?*, 17 ARK. L. REV. 1, 11 (1962-.63).

[77] Shenton, *supra* note 74, at 39.

[78] HOAR, *op. cit. supra* note 61, at 51-52.

[79] Shenton, *supra note* 74, at 39, quoting HOAR, *op. cit. supra* note 61, at 66. The states and years referred to are: Conn.–1818; La.–1879; Miss.–1890; N.C.–1876; N.J.–1844; N.Y.–1801; R.I.–1824, 1834, 1841, 1842.

In addition, three states currently provide for conventions to be called by the legislatures without popular authorization: Maine, Georgia, and Alaska.[80] The Alaska document is entitled to special persuasive weight. Written in 1961, it has been hailed as a superb model, combining the best provisions of existing state constitutions and incorporating well-recognized trends.

Following reference to some of the precedents mentioned above, one commentator concluded "This history indicates that as far as precedent goes the legislature has authority to call a constitutional convention and may do so without first submitting the question to the people as some state constitutions require."[81]

Another theorist terms the pre-convention popular authorization a "prevalent custom," then cites several historical incidents and concludes that "the extreme point to which any legal pronouncement ought to go is that the pre-convention referendum cannot be omitted if the submission is omitted and the submission cannot be omitted if the pre-convention referendum is omitted."[82] And still another declares: "Generally speaking, it can be said that state constitutional amendment requires submission by the legislature and approval by popular vote, but beyond this, methods of amendment show such wide variation that it cannot be said that any particular mode predominates."[83]

4. The Requirement of Form.—It would be universally agreed that to achieve constitutional status any proposal must undergo a gestation period in the legislature and a vote of approval on the final form by the electorate. The important point, as illuminated by the above comments on historical precedent, is that beyond this skeleton of legality there are no magic words, which when uttered will, with metaphysical certainty, put flesh on the body of the revision and cause it to walk erect. The bones have stature to stand on their own, and the muscle fiber needed for animation may be provided in a number of ways; there is no universal formula.

Marshall's requirement that constitutional changes be distinguished, as such, is satisfied by the presence of elements of both

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[80] GRAVES, MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 32 (1960).
[81] Barnhart, *supra* note 76, at 11.
[82] Shenton, *supra* note 74, at 39.
[83] Reeves and Vanlandingham, *Amending and Revising State Constitutions*, 35 KY. L.J. 119, 121 (1947).

legislative gestation and popular approval. A third distinguishing factor might be added as a composite of the first two, namely, that because it does have different form, special composition, and unique discussions surrounding it, the constitutional revision provisions are obviously propounded and voted upon as something quite above ordinary legislation.

The basic conditions for a showing of legality of the revision procedure are a demonstration of the necessity for circumventing the revision plan established in the existing constitution, gestation in and promulgation by the elected government of the plan for revision, compliance with that plan, and popular approval by the people of the finished product. Beyond these elements, as the historical precedents tend to show, requirements for a popular vote authorizing the drafting of the proposed new constitution and the popular election of the convention delegates are matters of form only. As matters of form they should be viewed as capable of being eliminated without endangering the legality of the revision plan.

5. *Delegated vs. Functional Power.*—The fundamental conceptual argument regarding the legality of a constitutional reformation plan which omits these "matters of form" involves a battle between two opposing views of the source of the government's power to govern. One adversary is the delegated powers doctrine. Its opponent is the functional power theory.

The functional argument is that the executive and legislative branches of the government are installed by the people to perform the governmental acts of the state. This puts the government in a functional position to exercise the political power of the state, including supervision of the amendment and revision of the constitution. This particular function is recognized by the provisions in the existing constitution which grant the legislature direct submission power for amendments and the role of prime mover in the revision process.

The question is the scope of the legislative and executive power in this field. Two arguments support the proposition that the power extends to the extraconstitutional promulgation of a constitution draft for direct submission to the electorate for ratification, so that neither popular authorization nor the election of convention delegates is necessary.

First, the political power of the state inheres in the people, rather than in the constitution, and the government is the body in that people or state which has functional executive control of that political power. Also, the government has a specific grant of authority in the area of constitutional revision. Where the welfare of the people demands a new constitution and the revision prescriptions in the existing one are so rigid as to make revision a practical impossibility, the political power of the state may be exercised to circumvent those prescriptions. That is, given the competence of the government in the area of constitutional revision and its functional exercise of the political power of the state, the specifications in the existing constitution providing for its revision are not exclusive. Methods other than those specified may be initiated by the government. This assumes, of course, that the elements of the ratifying vote of the electorate are left intact. One writer has suggested this theory, that the prescriptions for revision contained in the existing constitution are binding on those who seek to rewrite it, is nothing more than an invalid analogy from contract law.[84]

Second, given this competence of the government in the area of constitutional revision, certainly to the extent of initiating reforms, it is redundant to submit to the people the question of whether to begin a revised draft. The people have effective checks on the formation of the new constitution in the form of election of legislators and the vote on ratification of the final document, and these should be sufficient to provide for legality.[85]

Opposing the functional powers concept is the delegated powers doctrine. The foundation of its logic is the premise that power resides in the people themselves at all times, taking the "people" as meaning the common non-governmental members of the electorate. The legislature and executive have no inherent power. Their authority is derived strictly and solely from the

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[84] Opinion of the Att'y Gen. of N.D., discussed in HOAR, *op. cit. supra* note 61, at 86, citing N.D. H.R. JOUR. for Jan. 26, 1917.

[85] Much of the argument from inherent legislative power is presented in Bebout and Kass, *The Status of Constitutional Conventions in New Jersey*, 3 NEWARK L. REV. 146, 155-72 (1938). Bebout's competence argument is made in terms of amending a constitution which sets out no revision procedures. However, by inclusion of the argument that the inherent legislative power, as representative of the political power of the whole people, dictates that no explicit revision procedures are exclusive, the reasoning applies with equal weight to rewriting of a constitution which does provide amendment methods.

constitution, which is the embodiment of the people's political power. All capacities not explicitly delegated by that document remain with the people. If the legislature wishes to call a convention it must, as provided in the present constitution, receive an authorization from the electorate. Stated in more characteristic terminology, the legislature must receive expression of the will of the people that the changes should be made. Thus constitutional revision must proceed by the letter of the established document, and any call for a convention must be proceeded by popular authorization. It is doubtful a commission could be used.

Following a typical rendering of the argument, Robert Hoar added, "there is a growing tendency toward the view that the legislature has no power to call a convention without first obtaining permission from the people."[86]

Hoar's statement of the legal trend may be dispensed with quickly. Examination of the cases he emphasizes leaves some doubt whether there actually was such a trend.[87] Now it is sufficient to say that, if such a trend actually seemed to be emerging, it never broke the surface.

Dispelling the illusion of the delegated powers doctrine may be accomplished with some degree of finality. As early as 1923 one author on the subject noted that at that time, despite the significant acceptance of the theory among scholars, only two case opinions could be found which actually discredited its antithesis, the doctrine of functional inherent legislative power. He stated that his own examination of the "authorities" indicated that the weight of opinion favored the legislative authority argument.[88]

The delegated powers doctrine achieves much of its persuasiveness because it seems to non-political theorists to offer an explanation of the origin of the powers of the legislature. But there is a flaw in the bedrock. A theory of the "origin" of the

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[86] HOAR, *op. cit. supra* note 61, at 68.

[87] *Id.* at 66-68. Hoar emphasizes three cases: State v. American Sugar Co., 137 La. 407 (1915); State v. Dahl, 6 N.D. 81 (1896); and Wells v. Bain, 75 Pa. 39 (1872). The first case held that silence in the organic law on the matter of constitutional revision left the matter to the representatives of the people. Hoar also buttressed his conclusion by reference to non-justiciated instances of extraconstitutional revision attempts, but on their face they are not persuasive.

[88] Haines, *Can a State Legislature Call a Constitutional Convention Without First Submitting the Question to the Electorate?*, 1 TEXAS L. REV. 329 (1923). Haines cites as against the inherent legislative power concept: Bennett v. Jackson, 186 Ind. App. 533, 116 N.E. 921 (1912); *In re* Constitutional Convention, 14 R.I. 649 (1883).

government's power to govern is useless for anything other than perhaps an analytic tool. It may distinguish the governed from the governing elements in society, but it will never tell what we want to know: What are the mechanics of the system in operation?

In the political state there is no such force operating as a positive continual outpouring of the delegation of power flowing from the people to the government which gives that body its authority to make laws. It is more accurate to say that institutions established within a system continue to operate within that system in a certain capacity, fulfilling a specific function. The government promulgates laws and these laws, which may change any but the most explicit provisions of the constitution, achieve authenticity from the consent of the people and their acquiescence in that government.

This institutional power concept seems to have underlain the provision in the federal constitution which provides that powers not expressly given to the federal government are left to the states. The concept of state governments presented there is not that of a secretarial staff for the "people." This statement can only be interpreted as depicting the state as a political body with a legislature and governor in possession of political power, able to exercise its strength and execute its rules. This is the concept of the federal system under which the states receive their legality as political organizations.

Another flaw in the delegated powers argument is the nature of a constitution. What would a basic document look like if it were truly a statement and invoice of powers delegated to the government from the people? It would read like a code of detailed rules and procedures such as would equal the quantity of verbiage found in the production of the legislature itself during its first twenty-five years. This is not the nature of constitutions; they are by nature compact and concise, designed for flexibility. Inasmuch as they do formulate the structure of government, they merely lay out the basic institutions and define in very general terms their functions in the system and their areas of competence. Extending the proposition, if such a mountainous document were actually composed and effectuated, absolute chaos would shortly result from attempts to decide exactly what laws the legislature could

enact.[89] The only rational conclusion is that the delegated powers doctrine does not conform with the working realities of constitutional government.

F. Extension of the Argument to the Drafting of the Revised Constitution by Appointed Commission

Strictly speaking, the discussion has heretofore reached only the point of establishing the power of the legislature to call an extraconstitutional convention without authorization from the people. The arguments have been broad enough to include a commission, but the authorities relied upon dealt only with the convention-method of drafting. Now consideration must be given to the further problem of drafting the revision in an appointed commission rather than in an elected convention. Employment of a commission for writing the new constitution—rather than the convention required by the established constitution—has gradually come to be accepted by authorities in this field. In 1929, when the commision concept was novel, the California Legislature submitted to the electorate a proposal to call a convention, and, in a companion action, it authorized the governor to appoint a commission to investigate and report upon the need for revision of the state's basic document and to advise the governor on the need for calling a constitutional convention. When the proposal to call a convention failed at the polls that year, the commission recommended submission of a proposal permitting the legislature itself to revise the constitution and to submit its instrument to the people for ratification.[90]

In 1943 the electorate of New Jersey authorized the legislature to act as a convention. The final product of the convention was a slightly revised edition of a paper fashioned by a revision commission the year before. Unfortunately, the attempt to have the document ratified failed.[91]

The 1943 Georgia General Assembly resolved that a commission of twenty-three members should rework the state's constitution. When returned to the legislature, the draft was approved

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[89] See Haines, *supra* note 88, at 333-35.

[90] Akin, *The Movement For Revision of the California Constitution: The State Constitutional Commission*, 25 AM. POL. SCI. REV. 337, 342 (1931).

[91] Bebout, *supra* note 60, at 1075.

and submitted to the electorate. The voters approved it as the new constitution, and the legality of the procedure was upheld by the Supreme Court of Georgia.[92]

None of these three states had constitutional provisions for authorizing a commission to accomplish the reshaping. Such endeavors have caused one authority to remark recently:

> [T]he commission has a less firm legal position than a convention. A commission can hardly be said to be the voice of the people. . . . But properly created and utilized, the commission seems to offer great possibilities for the kind of constitutional writing that the times demand.[93]

Apparently theorists have not discussed the problem of submitting a commission-written document directly to the people. Categorically the situation falls in the area of the problem of whether a legislature may serve as a constitutional convention. Actually, there seems to be negligible difference between the two questions.

The primary argument offered by most writers against performance by the legislature as a convention is the delegated powers doctrine.[94] The flaws in this argument have already been underscored.

The other main objection to the legislative-convention procedure is that the legislative fuction does not extend to drafting fundamental material which sets out elemental structural changes in the government.[95] There is no apparent difference between legislative appointment of a convention without popular authorization and legislative self-appointment as a convention. The same arguments which support the validity of the first method are applicable to the second method. The legislature does not pretend to sit as a law-making body in such a case; it is obviously meeting only for the purpose of drafting a constitution, not ordinary laws. The ineffectiveness of the fundamental law versus ordinary legislation dichotomy has already been covered. Unequal

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[92] Saye, *Georgia's Proposed New Constitution*, 39 AM. POL. SCI. REV. 459 (1945); Wheeler v. Board of Trustees, 37 S.E.2d 322 (Ga. 1946).

[93] Barnhart, *supra* note 76, at 13.

[94] See HOAR, *op. cit. supra* note 61, at 80-83; Keeton, *Methods of Constitutional Revision in Texas*, 35 TEXAS L. REV. 901, 902-04 (1957).

[95] See HOAR, *op. cit. supra* note 61, at 84.

representation in the legislature would definitely be a consideration here, but should furnish no real obstacle.

Mr. Hoar agrees with the validity of the legislature-convention. After reviewing the arguments against the procedure, he states: "Nevertheless, by long custom the legislatures have acquired the power to assist the people to hold a constitutional convention."[96] He believes that conventions unauthorized by the constitution have so often been held in the United States that it is now too late to question their validity, or "extraconstitutional legality." After noting five examples of constitutions produced by legislation through extraconstitutional methods, Hoar concludes:

> These five examples . . . establish the principle that conventions, even those expressly authorized by the constitution, are nevertheless popular in their nature, and . . . in other words, constitutional provisions permitting the holding of conventions are merely recommendatory to the people.[97]

Hoar's point here, in his chapter on legislatures as conventions, is that regardless of theoretical considerations, it is established that legality may be easily bestowed on procedures quite outside the mandates of the existing constitution. Such methods then are as legal as methods which comply with the constitution. And once this is recognized, it is senseless to argue denial of legality on such technical grounds as drafting of the instrument by the legislature rather than by convention.

G. Added Considerations

Another factor present in the Kentucky situation lends added strength to the argument for legality of its extraconstitutional revision procedure. That factor is the leadership and full participation of the Governor in all proceedings. The modern role of the Governor as a repository of executive political power in the state was spotlighted by Woodrow Wilson:

> [A] new role . . . has been thrust upon our executives. The people . . . are impatient of a Governor who will not exercise energetic leadership, who will not make his appeals directly to public opinion and insist that the dictates of public opinion

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[96] *Id.* at 85.

[97] *Id.* at 52. Hoar's five examples are: (a) Indiana, 1816; (b) Delaware, 1851; (c) Pennsylvania, 1789; (d) Georgia, 1788-89; and (e) Florida, 1865.

> be carried out in definite legal reforms, of his own suggestion.[98]

One writer, referring to similar statements by Wilson and Theodore Roosevelt, concludes that the Governor now plays a leading and influential part in the procurement of a new constitution.[99] Robert Hoar declares that the Governor has a key role in the revision process, and his recognition or non-recognition of the proceedings may be the deciding factor in determining the validity or invalidity of the attempt.[100] Thus complete sanction and even management by the Governor, the elected political chief executive of the whole people of the state, is a significant element in rendering the extraconstitutional revision proceedings legal.

Finally, some reference must be made to the support lent to the argument for the inherent functional power of the government by the acquiescence doctrine. This concept states that acts of the government otherwise illegal become legal when the people demonstrate their acceptance by lack of protest and participation in the scheme. The argument would apply to provisions for extraconstitutional revision of the basic document. Hoar allocates great weight to the legalizing effect of acquiescence:

> On the whole, we may conclude that acquiescence will validate an illegal constitution, and non-acquiescence will invalidate a legal constitution. Thus we revert in the end to fundamental principles, particularly that all governments derive their just powers from the consent of the governed, rather than from any compliance with legal formalities.[101]

The necessary and undeniable implication is that in any state the legislative and executive branches operate in the capacity of the governing function. They do not act only as they are specifically empowered by the delegated power of the people. They act, rather, with the inherent authority of the institution whose function and capacity is to exercise the society's political power.

Therefore if the political power of the people and the state as a whole may overcome prescriptions in the existing constitution as to revision procedures when such procedures become so im-

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98 HERSFORD, WOODROW WILSON AND NEW JERSEY MADE OVER 73 (1912).
99 Bebout and Kass, *supra* note 51, at 43-44.
100 HOAR, *op. cit. supra* note 61, at 93.
101 *Id.* at 219.

practical as to prohibit revision, then the government as a repository of that political power may, without popular authorization, initiate an alternative revision plan subject to the ratifying vote of the electorate.

III. CASE MATERIAL AND THE ARGUMENT FOR THE LEGALITY OF THE DIRECT SUBMISSION METHOD OF CONSTITUTIONAL REVISION

The judicial doctrines in the field of state constitutional law which remain for consideration in this article cover only the last points of the more expansive argument presented by the nonjudicial theorists. The issue in these cases is the right of the political power of the state, whether expressed in terms of the power of the people or of the legislature, to depart from explicit provisions for revision in an existing constitution under certain circumstances. Various approaches and doctrines have embodied this idea, and they are considered here divided into categories. Not all the cases, of course, hold in favor of the legality of the revision attempt. The opposing legal theories are considered in connection with the positive doctrines.

A. Popular Sovereignty

1. The Political Power Inherent in the People.—The decision in *Gatewood v. Matthews*[102] was founded on a concept which the opinion elaborated and enshrined as has no other decision in the field of state constitutional revision. The political power inhering in the people gives them the right to seek orderly revision of their constitution through the initiating aid of their government in extraconstitutional ways where not explicitly prohibited from so doing.

The Court of Appeals defined the question before it as "whether by the terms of [the revision and amendment sections of the Constitution] . . . the people have imposed upon themselves exclusive modes of amending or of revising their constitution."[103] They began their argument by reference to Section 4 of the 1891 Kentucky Constitution's Bill of Rights, which was noted earlier.

[102] 403 S.W.2d 716.
[103] *Id.* at 718.

They quoted a statement of Kentucky's recognition of the doctrine of popular sovereignty from an earlier Kentucky case:

> It is conceded by all that the people are the source of all governmental power; and as the stream cannot rise above its source, so there is no power above them. Sovereignty resides with them, and they are the supreme law-making power. Indeed, it has been declared in each of the several constitutions of this state, that "all power is inherent in the people," and this is true from the very nature of our government. . . .[104]

The decision reached its climax with an eloquent statement of the inherent political right of the people:

> The right of each generation to choose for itself is inalienable, as it was recognized and said from the very beginning. Being thus inalienable, that right cannot be cut down or subjected to conditions any more than it could be completely denied by one generation to another. So long as the people have due and proper notice and opportunity to acquaint themselves with any revision, and make their choice directly by a free and popular election, their will is supreme, and it is to be done.[105]

This is a more far-reaching statement of political power as inhering in the people than can be found in any other major case on the legality of extraconstitutional revision.

The opinion of the Court by Judge Williams and the concurring opinion by Judge Milliken emphasize and glorify the popular sovereignty doctrine in various ways. There is the appeal to history. The words are Jefferson's and they express the specific achievements of the people in their struggle to establish their sovereignty.[106] There is an appeal to the special character of the doctrine. It is part of the Bill of Rights, the most supreme and inviolate part of the constitution.[107] There is the appeal to reason. It is just "inconceivable" that the writers of the constitution would have attempted to limit or deprive future generations of their freedom to reform their government.[108] Perhaps, in short, this

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[104] Miller v. Johnson, 92 Ky. 589, 592, 18 S.W. 522, 523 (1892) quoted in Gatewood v. Matthews, 403 S.W.2d 716, 718.
[105] 403 S.W.2d 716, 721.
[106] *Id.* at 718.
[107] *Ibid.*
[108] *Id.* at 719.

inalienable right is truly inalienable, even by people in convention assembled. The doctrine of popular sovereignty, given this pre-eminent place in the constitution, can perform two functions. It may be used to justify disregarding some of the restrictive interpretations urged to prevent change, but simultaneously it affords specific constitutional terminology to legitimize and to limit changes which might otherwise be thought of as extraconstitutional.

The Court points to a number of Kentucky precedents for use of the doctrine of popular sovereignty to relieve against a rigorous interpretation of the convention clauses. It was used to justify the historic fact of popular ratification of the constitutions of 1850 and 1891 despite the lack of a provision therefor in the prior documents. It was invoked in *Gaines v. O'Connell*[109] to justify the requirement, imposed by the Legislature under the 1947 convention proposal, that any constitution drafted be submitted to the people. Section 258 *et seq.* of the 1891 constitution did not confer power to require submission of a convention document. The fact that this course better enabled the people "to keep a firm hold on their established liberties" was held to justify the restriction. The same popular soverignty, which there justified limiting the convention's powers by requiring a referendum, is now invoked to relax the convention's monopoly of constitutional revision by substituting a direct vote of the people.[110]

Popular sovereignty has been invoked in other jurisdictions to justify the calling of conventions where there was no provision for such action in the existing constitution,[111] or even where an amendment clause seemed to propose that process as the only form of constitutional change.[112] Indeed it is often pointed out that the federal constitution was submitted to the popular vote of the people, although the delegates were called to meet merely to propose amendments as provided for by the Articles of Confedera-

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[109] 305 Ky. 397, 204 S.W.2d 425 (1947).

[110] The Court also cited Chenault v. Carter, 332 S.W.2d 623 (Ky. 1960), which sustained a call for a "limited convention" to consider revising only twelve subjects.

[111] The Court cites *In re* Opinion to the Governor, 55 R.I. 56, 178 Atl. 433 (1935). There the court approved a call for a convention although no such procedure was provided for in the constitution. See text at notes 72, *et seq.*, *supra.*

[112] See text at notes 70, *et seq.*, *supra.*

tion.[113] The precedent most closely in point for *Gatewood* is the decision of the Georgia court in *Wheeler v. Board of Trustees.*[114] There the Georgia Legislature, faced with a highly restrictive convention clause, proposed a constitution to the people for direct adoption. When the acts of the new Georgia officials were attacked as void, the court sustained the new constitution as an exercise of the sovereign power of the people under the Georgia Bill of Rights.

The other side of the coin is use of the constitutional doctrine of popular sovereignty by the Court as a peg on which to hang constitutional limitations on the process of change. The *Gatewood* opinion at times, of course, seems to attach validity of S.B. 161 solely to the popular referendum. Several times the Court repeats the thought that the Legislature does nothing and "the document is as nothing" until the people ratify it.[115]

If one looks further, however, he finds in the opinion a detailed statement of the facts of the participation of the General Assembly and the Governor in the proposal of the Assembly Constitution and of the composition and careful work of the Constitutional Assembly itself. Attention is also given to the means provided for the publication of the assembly's work to the voters. The Court spells out the constitutional limits on the people's inalienable right to change their government: "So long as the people have due and proper notice and opportunity to acquaint themselves with any revision, and make their choice directly by a free and popular election, their will is supreme and is to be done."[116]

The Court then applies its test in comparing the convention procedures under section 258 with the Assembly proposal under section 4. It concludes that not only does S.B. 161 more adequately inform the people, but instead of allowing them to participate only through representatives, it allows the people to participate individually, directly, and with final force and effect. Judge Milliken's concurring opinion strikes a similar note:

> The crucial problem for the court is to protect at every stage the democratic process, the orderly and fair presentation to

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[113] See text at Part III, § D. at notes 161, *et seq., infra.*
[114] 200 Ga. 323, 37 S.E.2d 322 (1946).
[115] 403 S.W.2d 716, 721.
[116] *Ibid.*

> the people of any proposal pertaining to their basic law, and I think the method here employed is orderly, is in the open and is as fair as any other method of presentation so far devised.[117]

2. Major Arguments Presented Against the Popular Sovereignty Doctrine in Gatewood.—Gatewood, the anti-revision appellant, began his argument in the Court of Appeals with a quotation from *American Jurisprudence Second*:

> Any attempt to revise a constitution or adopt a new one in any manner other than that provided in the existing instrument is almost invariably treated as extraconstitutional and revolutionary. Thus, even if the vote of the people should be overwhelming in adopting a constitution formulated by a convention not legally called, it would be the duty of the executive and judiciary and all officers sworn to support the old constitution to resist to the utmost the installation of government under the new revolutionary constitution. If overpowered, the new government would be established, not by peaceful means, but by actual revolution.[118]

Gatewood contended that the popular power clause in the 1891 constitution had originated in a time of world-wide revoluntionary upheavals and was therefore an overstated proposition of the right of revolution which had become obsolete with the passage of time. It is now, he urged, an impractical historical statement of principles.[119]

Judge Hill, in his dissenting opinion, characterizes section 4 as "the cocky boast of a sovereign people revelling in the enjoyment of new-won freedom and sovereignty." Although refusing to assign it to the rubbish heap of history, Judge Hill sees little future for it:

> [I]t may well leave in the "people" a residual power to accomplish ends not otherwise provided for in the Constitution. It should be recognized, however, that the practical application of this section is almost impossible. It provides no plan of implementation. Who are "the people"?[120]

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[117] *Id.* at 722.
[118] Brief for Appellant, p. 3, quoting 16 AM. JUR. 2d, *Constitutional Law* § 26, p. 197 (1964).
[119] Brief for Appellant, p. 6.
[120] 403 S.W.2d 716, 723.

Appellant cited a number of cases in support of the proposition that no departure from the exact prescriptions of various constitutional sections has ever been sanctioned by the Court of Appeals.[121] *McCreary v. Speer*[122] held that intensive publication of a proposed amendment for sixty days prior to the ratification election rendered the amendment attempt void in view of the constitutional requirement of ninety days' publication, despite a majority vote for the amendment at the polls. Another Kentucky case, handed down in 1940, was cited for the same holding.[123] Appellant cited dicta in various Kentucky decisions that "neither the legislature nor the people, or both, can short-circuit the Constitution."[124] "[T]he legislature summons the convention only after the people have expressed their will to this effect . . ."[125] and the "choice of whether a constitutional convention shall be called rests entirely with the electorate. . . . [D]elegates to the convention are the agents not of the legislature, but of the people themselves."[126]

Gatewood attempted to trap the appellees in their own argument by also arguing one of their leading cases for himself. The 1891 constitution had been written by a convention properly established by the legislature. It was submitted to the people and

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[121] Brief for Appellant, pp. 7-13. Appellant cited, in order: Varney v. Justice, 86 Ky. 596, 6 S.W. 457 (1888); Zimmerman v. Brooks, 118 Ky. 85, 80 S.W. 443 (1904); McCreary v. Speer, 156 Ky. 783, 162 S.W. 99 (1914); Harrod v. Hatcher, 281 Ky. 712, 137 S.W.2d 405 (1940); Miller v. Johnson, 92 Ky. 589, 18 S.W. 522 (1892); Ellingham v. Dye, 178 Ind. 336, 99 N.E. 1 (1912), *writ of error dismissed sub nom.*, Marshall v. Dye, 231 U.S. 250 (1913); Stovall v. Gartrell, 332 S.W.2d 256 (Ky. 1960); Gaines v. O'Connell, 305 Ky. 397, 204 S.W.2d 425 (1947).

[122] 156 Ky. 783, 162 S.W. 99 (1914).

[123] Harrod v. Hatcher, 281 Ky. 712, 137 S.W.2d 405 (1940).

[124] Stovall v. Gartrell, 332 S.W.2d 256, 258 (Ky. 1960). This statement was made in connection with a proposed amendment creating a veteran's bonus which was held void as an amendment because it did not follow the constitutional requirements of § 256 for the method of framing the question for the voters. The referendum was held valid as an approval of an act exceeding the debt limitations of § 49 of the constitution pursuant to § 50. The *Gatewood* case does not involve proper framing of an amendment.

[125] Gaines v. O'Connell, 305 Ky. 397, 408, 204 S.W.2d 425, 431 (1947). (This was a direct quote from *In re* Opinion to the Governor, 55 R.I. 56, 178 Atl. 433.).

[126] Chenault v. Carter, 332 S.W.2d 623, 626 (Ky. 1960). This case and the *Gaines* case stand for the proposition that no § 258 convention may be held without prior vote of the people—a sensible precaution where the document written by the convention is the constitution. S.B. 161 contemplates a vote of the people on the Assembly document, which satisfies the requirement of popular approval, unless prior popular authorization of extraconstitutional revision is required. See the textual discussion of the 1943 New Jersey revision, at notes 70, 91, *supra.*

ratified, but then the convention rewrote the instrument. In *Miller v. Johnson*[127] the Court of Appeals upheld the legality of the final draft relying chiefly on the doctrine of acquiescence supported by a popular sovereignty argument. In addition, in another line of argument the Court stated that it would not reach the question of whether the constitution would have to be promulgated and ratified exactly as provided in the existing constitution because another doctrine upheld the document. Namely, the "convention . . . was the offspring of law. The instrument which we are asked to declare invalid as a constitution, has been made and promulgated according to the forms of law."[128] And, the "instrument provides for amendment and change. If a wrong has been done, it can and the proper way in which it should be remedied, is by the people acting as a body politic."[129]

The Court warned, however, that:

> If a set of men, not selected by the people according to the forms of law were to formulate an instrument and declare it a constitution, it would undoubtedly be the duty of the courts to declare its work a nullity. This would be revolution and this the courts of the existing government must resist until they are overturned by power, and a new government established.[130]

Appellant contended these statements were firm legal dictates that, if the 1891 constitution was found lacking, it was to be changed by the legal method provided therein and that changes produced in any manner inconsistent with those provisions would be void. Appellant then added a flourish to his line of reasoning from *Miller* by following up with a statement that the people had delegated their powers of revision in the 1891 constitution; therefore, the Legislature was bound to those forms of revision.

Finally, he relied on *Ellingham v. Dye*,[131] where the Indiana court held an attempted revision invalid on the ground that the constitution, the fundamental law of the state, received its force from being the express will of the people and any course of

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[127] Miller v. Johnson, 92 Ky. 589, 18 S.W. 522 (1892).
[128] *Id.* at 593, 18 S.W. at 523.
[129] *Id.* at 596, 18 S.W. at 524.
[130] *Id.* at 593, 18 S.W. at 523.
[131] 178 Ind. 336, 99 N.E. 1 (1912), *writ of error dismissed sub nom.*, Marshall v. Dye, 231 U.S. 250 (1913).

revision which disregarded this express will was a direct violation of fundamental law.

3. Criticism of Appellant Gatewood's Argument.—Appellant's quotation from *American Jurisprudence* is a superficial analysis of the overall problem. It simply posits that all extraconstitutional means of revision are revolutionary. Few legal problems are settled satisfactorily merely by using name tags. In all but a very few cases the legislature and officers of the government are in reality sponsoring the revision movement. Judges are part of the political milieu. They cannot shut their eyes to the fact that the remainder of the government favors the legality of the revision and in some cases actually lends it vestments of legality by partial assimilation of the revision into the state's legal processes. One of the few cases where the incumbent government resisted the revision movement, *Luther v. Borden,*[132] presents the rule that matters of battles between old and new constitutions for official recognition are questions for the political mechanisms, not the courts. Thus the fact that an extraconstitutional revision may be "revolutionary" has no direct connection to its legality.

The cases relied upon by the appellant, such as the *McCreary* case, are not in point. The attempted revisions in these cases depended upon compliance with sections 256 and 258 for legality. The *Gatewood* situation is concerned only with the government-sanctioned revision of the constitution in a mode completely different from the one provided. Hence that revision does not depend for its legality upon compliance with prescriptions in the 1891 constitution.

Gatewood's treatment of the *Miller* decision is interesting, but not persuasive. The Court of Appeals did approve the legality of a very questionable assumption of constitution-writing-power by a theoretically and legally dissolved convention. Its warning that it would invalidate the works of any "set of men" not in the forms of law was weak dictum and is certainly not relevant to the work of the Assembly Convention.

Appellant's restatement of *Miller* and citation of *Ellingham* introduced the delegated powers doctrine. It attempted to use the popular sovereignty concept against itself by saying that the

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[132] 48 U.S. (7 How.) 1 (1849).

political force of the state does inhere in the people and the constitution is a statement of a delegation of some of that power to the legislature. Therefore, the argument—that acts of the legislature must conform to the patterns set out in the constitution since the people have specified that these are the *only* circumstances under which the acts of that body will receive their approval—seems to have popular-legal sanction and hence validity.

The reasoning is familiar, yet faults lie in its implicit use of the "sacred constitution" and its disregard of the problem of the "mute people." The argument is that the original establishment of the constitution was an event in which the people defined for all times the structure and functions of their governmental system. Previous allusion has been made to the historical reality that governments and societies change with time and constitutions should change to reflect those underlying shifts. In fact, they do change one way or the other. The structural portions, as well as the revision sections, are subject to becoming inefficient. Is there not an inherent contradiction in positing a supreme popular power—that is, the concept of the whole political power of the state as existing *over* the manifestations of that political power—and then providing that that power can only change its written expression in accordance with the dictates of previous written expressions?

The "mute people" problem is also derived from the first proposition of the delegated powers argument. Assuming the political power of the state resides in the people, even over the constitution, then *some* extraconstitutional power at least is admitted. However, the argument so binds the actions of the legislature that the people have no functional means to effectuate that power, as Judge Hill clearly admitted in his dissent. The people are left mute and popular sovereignty guaranteed by the constitution fails for want of "a plan of implementation."

B. The Legislative Power

1. Power of the Legislature to Initiate Extraconstitutional Revision.—Doctrines other than popular sovereignty have been employed in cases both upholding and striking down attempts at extraconstitutional revision. Not uncommon are cases approving legislatively devised extraconstitutional methods of revision on

the straight theory of the power of the legislature in such matters.

In *Gatewood,* the Court does not face up squarely to the role of the Legislature in the Assembly Constitution. So completely does the opinion wrap itself in the doctrine of popular sovereignty that it even attempts to minimize the acts of the Legislature by insisting that, "in the ultimate sense, the legislature does nothing unless an until the people ratify."[133] If taken literally this means that unless the people adopt the constitution, S.B. 161 was not enacted. "In this respect," the Court says, "the legislature merely performs the role of messenger or conduit."[134] It is difficult to contend that the Legislature has exceeded its power when it has not in the eyes of the Court, done anything.

Judge Hill takes a rather jaundiced view of this explanation of the constitutionality of S.B. 161. He puts the problem this way: "Here we are testing a legislative act and not a process of revision of the constitution. The legislature either has or does not have the authority to legislate on this important question."[135]

He observes that nowhere in the constitution is the *Legislature* given authority to formulate or submit a new constitution to the people. He charges that the majority opinion "recognizes the right of the legislature to repeal the Constitution in toto or piecemeal."[136]

Judge Hill is not convinced by the argument from section 4. Section 4 does not give the Legislature any authority. The proponents of the act contend that the *Legislature* is the people. If the Legislature is "the people," then the referendum called for by S.B. 161 is unnecessary. He argues that nothing in section 4 requires balloting by the "people."

If the majority opinion does blandly ignore the role of the legislator, certainly Judge Hill's opinion overstates the results of the Court's decision, which does not validate legislatively written constitutions, even if counsel for appellee did concede in an argument that a new constitution could be so framed. Indeed, when the Legislature suggested several alterations in the Assembly document, the Assembly was reconvened and made changes in the

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133 403 S.W.2d 716, 721.
134 *Id.* at 720.
135 *Id.* at 723.
136 *Ibid.*

proposal, so that every word of it would be approved by the Assembly.[137] Certainly the whole thrust of the Court's decision was that the Legislature is *not* "the people" and cannot act as or for the people.

Judge Hill insisted that in enacting S.B. 161 the Legislature was exercising "general powers" of legislation. An earlier Kentucky case to the contrary, *Hatcher v. Meredith*,[138] held the amending power to be "special in nature" and "not legislative in character." The General Assembly had promulgated an amendment that opponents claimed did not comply with the constitutional directives as to the number of subjects included. A suit was brought to enjoin the Secretary of State from entering the amendment on the ballot. In holding that the proposed amendment was valid, the Court said that, while the privilege of actually amending the constitution belonged to the people and not to the Legislature, the Assembly was given *plenary* authority to propose constitutional amendments to the people—a power which differs widely from the General Assembly's function of enacting laws. The Court of Appeals declared, "The authority granted to the General Assembly in connection with amendments to the Constitution is to propose them to the voters. . . . [T]his is a special power which is not legislative in character . . . [but is special in nature]."[139]

It is perhaps not too far-fetched to suggest that the power of the Legislature to make proposals to the people under section 4 is a special power, not legislative in character, and not to be judged by doctrines applicable to the delegation of general legislative powers.

One additional argument for broad legislative power was based on the theory that, unlike the federal constitution, the Kentucky

[137] When S.B. 161 was before the House on February 17, an informal poll showed members were overwhelmingly in favor of biennial elections instead of annual elections. The General Chairman promptly summoned the delegates of the Constitutional Revision Assembly into special session on February 22 to amend article VII, § 3 of the proposed constitution so that all state elections would be held in even years only to coincide with the even-year elections of a Congress. Thus the draft of December 28, 1965, was reopened by the Constitution Revision Assembly rather than the General Assembly. Two purposes were served: (1) the character of the document as an Assembly product was preserved; (2) the Legislature was prevented from opening a Pandora's Box, which might have followed an effort to amend the draft in the General Assembly.

[138] 295 Ky. 194, 173 S.W.2d 665 (1943).

[139] *Id.* at 204, 173 S.W.2d at 670.

Constitution is not a grant of powers to the General Assembly, but a restriction on the plenary power of that body in the legislative field. The opinion of the Court ignored this contention in favor of the alternate proposition that the people have every governmental power not surrendered by the Constitutions of the United States and Kentucky.

Cases in other states have found authority in the legislature to initiate constitutional change despite a want of specific delegation. In a 1935 Rhode Island decision, *In re Opinion to the Governor,*[140] the established constitution had provided for change only by legislatively proposed amendments with no provision for a constitutional convention. The court held that the legislature had the right to provide by law for a constitutional convention to draft a whole new document when such act was not otherwise expressly prohibited in the constitution. "[T]he power granted to the General Assembly by article thirteen [the power of amendment by legislative proposal and popular ratification] can naturally and reasonably be viewed as an *additional* rather than an exclusive power. . . ."[141] The court stated that if the constitution were interpreted so as to restrict the right of the Legislature to go beyond the fundamental law's provision, the power of the people would be diminished. The authority of the people has not been infringed so long as they maintain the final decision on ratification of the document.

The Rhode Island opinion was criticized by Shenton on two grounds.[142] He contends that the real issue in such cases is the rule of construction to be used and argues personally for an interpretation that the explicit terms of revision in the established constitution are exclusive. Secondly he argues that, although the legislature must have some function in constitutional revision, in this case they went too far. For support and explanation he cites a paragraph from another leading case, *Wells v. Bain*, decided in Pennsylvania in 1874:

> When a law becomes the instrumental process of amendment, it is not because the legislature possesses any inherent power to change the existing constitution through a con-

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[140] 55 R.I. 56, 178 Atl. 433 (1935).
[141] *Id.*, 178 Atl. at 441.
[142] Shenton, *Can the Legislature Alone Call a Constitutional Convention?*, 10 TEMP. L.Q. 25, 39 (1935); Stovall v. Gartrell, 332 S.W.2d 256, 258 (Ky. 1960).

> vention, but because it is the only means through which an *authorized* consent of the whole people, the entire state, can be lawfully obtained in a state of peace.[143]

The criticisms are of dubious weight. Cases based on rules of construction will be discussed later. The second objection, in which Shenton suggests that a determination should be made as to the minimum amount of legislative activity necessary in extra-constitutional revision and a line drawn at that point, is clearly unrealistic. If, as contended in the quotation, action of the legislature will result in the authorized consent of the whole people, it is difficult to understand why legislative leadership, giving the people the power of ratification, is undesirable. True, the quote from *Wells* does seem to demonstrate reasoning against the basic, crudely-stated theory of the legal inherent power of the legislature. But it does not at all refute the theory in its more sophisticated version—that the legislature, as an institution in a closed political system operating in the governing function, has the political power of the whole state supporting its political actions. On the contrary, it impliedly acknowledges the validity of this theory.

In Louisiana too, there was no provision for revision. A convention called in 1915 for the purpose of revision was upheld as legal. In the absence of an explicit constitutional provision, the "power to originate proceedings for that purpose rested with the Legislature of the state, as the department most nearly representing its general sovereignty," and as "the representatives of the people."[144]

2. Delegated powers.—The opinions which have rejected extraconstitutional attempts to revise the basic documents are based primarily upon the delegated powers doctrine. One leading case supporting the doctrine is as closely in point with the *Gatewood* situation as any case revealed by our research. That case is *Ellingham v. Dye,*[145] discussed previously. There the court dealt with a legislative draft of a proposed constitution which was to be submitted to the voters at the next election. The existing

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[143] 75 Pa. 39, 47.

[144] State v. American Sugar Refining Co., 137 La. 407, 68 So. 742, 744 (1915).

[145] 178 Ind. 336, 99 N.E. 1 (1912), *writ of error dismissed sub nom.*, Marshall v. Dye, 231 U.S. 250 (1913).

constitution provided for revision only by convention. The court held that the promulgation and placement of the draft on the ballot was an unconstitutional exercise of power by the Legislature, which governed only by reason of powers held under the constitution. The court said the authority to pass fundamental laws lies only with the people and the representative capacity of the Legislature ceases when it exceeds the bounds prescribed for it; where in a constitutional system the legislature is allowed to exercise only certain powers, the courts have the power to decide whether it has exceeded its authority.

And in another leading case, also in point, the Indiana court ruled that the Legislature could not call for a constitutional revision convention without first obtaining an authorizing vote from the people. Since the existing constitution did not provide for convention revision, "custom" must prevail and the almost universal custom is a vote by the people prior to action by the legislature. The reasoning followed the line that the right of changing the constitution lay only with the people and that, until the people authorized the legislature to initiate revision by calling a convention, an unauthorized calling was an infringement upon the power of the people.[146]

This latter decision was criticized by Shenton who contends the reasoning of the court proves too much. If the legislature has no power whatsoever to call a convention and the constitution contained no provision for calling one, then a vote of the people could only be advisory, hence no convention could ever legally be called. Also there had to be a power to call a convention in the legislature before the "custom" could ever have begun. Shenton then argues that the best approach is to acknowledge that the people have the right to change the form of government, but that right is ineffectual and cannot be realized until the legislature leads in the initial stages. This gives an admitted inherent power to the legislature; the proper inquiry left for the courts is, "What is the scope of the legislature's competence?"[147]

Shenton's proposal seems to comply with the hypothetical arguments which the authors have proposed throughout this article. The unrealistic delegated powers theory would be done

[146] Bennett v. Jackson, 186 Ind. 533, 116 N.E. 921 (1917).
[147] Shenton, *supra* note 142, at 30-33.

away with, supplanted by a more fruitful analysis. Although it is not time to say there is a trend toward the inherent legislative power doctrine, it is worthwhile to note that the most recent cases support it.[148] A 1935 Rhode Island decision, *In re Opinion to the Governor,* overruled *In re Constitutional Convention,*[149] an earlier Rhode Island case which was cited by Robert Hoar as the only real legal authority against the validity of extraconstitutional conventions.[150] The overruling occurred at a time when the legislative explosion of the early 1930's was in full swing.

C. Rules of Construction

1. Substantial Compliance.—Slight discrepancies in revision procedures are validated by the substantial compliance doctrine. The Kentucky case of *Gaines v. O'Connell*[151] involved a taxpayer's suit for an injunction against "taking the sense of the people" on the proposal for a constitutional convention. The basis for the suit was that the General Assembly did not provide for a method of publication and the Secretary of State did not publish a notice until seventy-eight days before the election. The Court refused to grant the prayer on grounds that the method of execution was in substantial compliance with the constitutional dictates on the matter and as such should be upheld. Three grounds supported the Court's use of this principle. The justices stated that a "construction of a provision of the Constitution which would make difficult or impossible any fair and just method of revising it will not be adopted by the courts."[152] Then the Court reasoned that the General Assembly had been given the power to initiate the call for a convention and could appropriate the entire machinery of the general election law to pursue that purpose. Considering, then, the broad perspective and sensible view provided by these powers and the practical unanimity of the General Assembly, the Court ought not nullify the vast political operation, stop the

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[148] This statement is based on the dates of the leading cases. A 1960 opinion contained the statement that the power to call a convention rests with the electorate and not the Legislature. Chenault v. Carter, 332 S.W.2d 623 (Ky. 1960). But this is extremely weak dictum. The legislative proposal in question contained a provision to submit the convention call to a referendum in compliance with the existing constitution.

[149] 14 R.I. 649 (1883).

[150] HOAR, CONSTITUTIONAL CONVENTIONS 43 (1917).

[151] 305 Ky. 397, 204 S.W.2d 425 (1947).

[152] *Id.* at 402, 204 S.W.2d at 428.

machinery, and thereby prevent an expression of the popular will. Finally, the Court uttered the proposition that "the legislature has all power except where restricted by federal or state constitutions."[153] Special reference was made to the irregularities in the enactment of the 1891 constitution, which was upheld by the Kentucky Court.[154]

Gaines furnished by far the most complete rationalization for the doctrine of substantial compliance. Other courts have said, more simply, that where the essentials of the revision procedures are present (approval by both legislature and people) and the method proposed does not defraud the people, minor flaws in the process will not render it invalid. Allowing technical discrepancies such as shortened publication periods to prevent submission would thwart the power of the legislature and the right of the people to express their will.[155]

This doctrine gives considerable support to the principle of the inherent functional political power of the legislature. The gist of the argument supporting the doctrine seems to be, in fact, that up to the point of defrauding the people the legislature has the inherent authority to initiate constitutional change. And it exercises this power as the people's representatives whose capacity it is to direct political action in the state. Again, there seems to be substantial conformity to the concept of institutional-functional power presented earlier in this article.

This principle is also evident in the background of the liberal construction rule, likewise used to validate extraconstitutional revision procedures. The Kentucky Court stated in one case:

> Where it is possible, the *constitution should be construed liberally,* that it may continue as a useful instrument in the life of our society. Doubtful questions ought to be resolved in favor of the freedom of the living generation to govern its own affairs in the light of modern circumstances.[156] (Emphasis added.)

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[153] *Id.* at 404, 204 S.W.2d at 429, citing as authority Board of Educ. v. City of Louisville, 288 Ky. 656, 157 S.W.2d 337 (1941).

[154] Miller v. Johnson, 92 Ky. 589, 18 S.W. 522 (1892).

[155] State *ex rel.* Morgan v. O'Brien, 134 W. Va. 1, 60 S.E.2d 722, 727 (1948). *Contra,* Stovall v. Gartrell, 332 S.W.2d 256 (Ky. 1960); Arnett v. Sullivan, 279 Ky. 720, 132 S.W.2d 76 (1939); McCreary v. Speer, 156 Ky. 783, 162 S.W. 99 (1914).

[156] Board of Educ. of Graves County v. De Weese, 343 S.W.2d 598, 606 (Ky. 1960) (dictum).

2. Strict Compliance.—In an earlier case the Kentucky Court of Appeals, through the use of a rigid rule of construction, declared a legislative act unconstitutional. That case involved a bill passed in 1938 which provided for the use of voting machines. This law was held to violate article 147 of the constitution which specifies that the vote in an election must be by secret official ballot marked by each voter at the polls and deposited in the ballot box. The legislation ran outside the bounds of "the restrictive character of the language of the Constitution of Kentucky."[157]

The case well illustrates the use of the doctrine of strict compliance in striking down extraconstitutional revision attempts. However, the case can be distinguished on two points from the problem incurred in *Gatewood.* The case was an attempt under the cloak of authority of the present constitutional government to sneak through a method of voting differing from that provided in the constitution; it was not an attempt at revision. Secondly, no amount of liberal construction applied to the wording of article 147 could have made it read to permit voting machines. Unlike *Gatewood,* whether the Legislature could transcend the article was never in issue.

3. Recommendatory vs. Mandatory.—In *Baker v. Moorhead*[158] the court held valid a statute which established a voting procedure for the election of delegates to the constitutional convention differing from the stipulated method in the constitution. The rule was announced: "[P]rovisions of a Constitution, providing for the calling of a future convention for the drafting of a new Constitution, might be construed as directory or as recommendatory merely, when other portions of it would not be."[159] And, of course, once the rule is established that some parts of the revision process specified in the old constitution are merely recommendatory, where is the line to be drawn? For the Court has held that, to the contrary, provisions of a constitution regulating its own amendment, otherwise than by convention, are not merely directory but are mandatory.[160]

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[157] Jefferson County *ex rel.* Grauman v. Jefferson County Fiscal Court, 273 Ky. 674, 680, 117 S.W.2d 918, 921 (1938).

[158] 103 Neb. 811, 174 N.W. 430 (1919).

[159] *Id.,* 174 N.W. at 431.

[160] McCreary v. Speer, 156 Ky. 783, 162 S.W. 99 (1914); see also Arnett v. Sullivan, 279 Ky. 720, 132 S.W.2d 76 (1939). Did the Court believe the convention prescription was merely directory and subject to deletion?

A line of reasoning implicitly accepted by the Court of Appeals in *Gatewood* was made in the appellee's brief on the point that the words "mandatory" and "exclusive" should be distinguished. Appellee agreed that the language of the constitution was mandatory; that every procedure which attempted to fly the flag of legality by compliance with it must comply exactly. But at least insofar as the article providing for new revision is concerned, the language did not exclude from the field of legality methods of revision which were ostensibly entirely different than those provided.

D. Ratification and Acquiescence

1. Ratification.—The best known example of the legalizing force of ratification is the present federal constitution. The meeting at Philadelphia had been in progress for some time before it received congressional sanction.

The Articles of Confederation specified that any reform had to be ratified by thirteen states. The federal constitution provided that it would become official and binding if ratified by only nine. Thus: "The binding force of the constitution rests, not on its being the legitimate successor to the Articles of Confederation, which it is not, but on its adoption by the people of the states in the exercise of their primary and inherent right. . . ."[161]

The classic case of *Luther v. Borden*[162] concerned Dorr's Rebellion in Rhode Island in which a certain group of the citizens established a new constitution and attempted to install a new government under it. The old government had the new one arrested. In the opinion there is strong dictum to the effect that the new constitution would have successfully and legally superseded the old charter government if it had been shown that the new one was ratified by the eligible voters.

The legalizing power of ratification was clearly brought out in two Florida cases. The courts held bluntly that where some procedure was omitted or disregarded by the Legislature in processing the amendment, the validity of the amendment was not open to question after publication and approval by the people.[163]

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[161] 16 C.J.S. *Constitutional Law* § 4 (1956), quoted in Stubbs, *Constitution-Making in Georgia*, 6 GA. B.J. 207, 211 (1944).

[162] 48 U.S. (7 How.) 1 (1849).

[163] Revels v. De Goyer, 159 Fla. 898, 33 So. 2d 719 (1948); Sylvester v. Tindall, 154 Fla. 663, 18 So. 2d 892 (1944).

The Kentucky case of *Miller v. Johnson,* discussed previously, gave unusually broad powers to those supporting constitutional revision. The opinion was lengthy, and the Court managed to include nearly every possible argument for holding the final document legal. The primary argument contained a mixture of ratification and acquiescence as the legalizing elements. A convention had been properly set up and its proposed constitution ratified by the people. Then the supposedly defunct convention again revised the instrument. The Court of Appeals stated:

> We need not consider the validity of the amendments made after the convention re-assembled. If the making of them was in excess of its power, yet as the entire instrument has been recognized as valid in the manner suggested, it would be equally an abuse of power by the judiciary, and violation of the rights of the people, who can and properly should remedy the matter, if not to their liking, if it were to declare the instrument or a portion invalid, and bring confusion and anarchy upon the State.[164]

The case is cited by theorists for its acquiescence argument, and this is indeed the strongest in terms of logic. The Court emphasized that both the political and judicial departments of the state had sanctioned the new constitution through use.

Yet, as the above quotation shows, the ratification argument also occupied an important position. The traditional ratification reasoning is that the approval of the final product shows that the people, in whom the political power of the whole state resides, sanction the new constitution. The *Miller* approach seems to be that the people have sanctioned the convention itself through approval of their tentative draft. Or perhaps what the Court means is that the people, through the political power vested in them, have vested the convention with the power and duty of providing the Commonwealth with a constitution, no matter what its content. This would seem to be the implication from the statement that the result of declaring the convention's re-written document illegal would be anarchy.

At any rate the principle expounded by the Court is clear. The political power of the state inheres in the people. Thus a constitutional revision promulgated by the official political organs

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[164] 92 Ky. 589, 597, 18 S.W. 522, 524.

of the state and ratified by the people will be thereby made legal, despite the discrepancies existing between the method of revision employed and that prescribed in the previous basic document.

2. *Acquiescence.*—The Court's most outstanding argument in *Miller v. Johnson* was its acquiescence reasoning. After reviewing the history of the document finally established as the constitution, the justices stated: "great interests have already arisen under it; important rights exist by virtue of it; persons have been convicted of the highest crimes known to the law according to its provisions; the political power of the government has in many ways recognized it. . . ."[165] The document produced by the impromptu convention was held to be a legal constitution because the people of the state and particularly the state government, exercising the state's political power, had acquiesced in the functioning of the instrument as the state's basic document.

Leading cases from other jurisdictions have sustained constitutional reforms with the same argument as grounds for their decisions. In *Taylor v. Commonwealth*[166] the Virginia court held that the 1902 constitution, having been acknowledged and accepted by the officers and ministering officials of the state government and by the people, and being in force without opposition, is legal irrespective of whether the convention could amend the previous constitution without submitting it to the people. In Nebraska, after the proposed constitution had gone through the established procedures and was adopted preparatory to admission to the Union, certain provisions were added to it as required by Congress. The supplemented document was held valid by that state's court although the people had never voted on the additions.[167]

Weston v. Ryan[168] involved a situation where an amendment was properly proposed in the Legislature and submitted to the populace in an election. The opinion indicates that on the first count of the ratification vote the amendment failed to collect enough supporting ballots to become legal. A recount was then conducted with questionable procedure, and the Legislature declared the amendment had passed. A suit was brought several

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165 *Id.* at 596, 18 S.W. at 524.
166 101 Va. 829, 44 S.E. 754 (1903).
167 Brittle v. People, 2 Neb. 198 (1872).
168 70 Neb. 211, 218, 97 N.W. 347, 349 (1903).

years later to have the amendment declared void. The court finally ruled, sixteen years after the amendment was committed to the books, that where nothing was shown to have been substantially incorrect about the recount, the court could not possibly declare the amendment invalid after the period of acquiescence by the people and Legislature.

Nearly the same type of acquiescence as that of the Kentucky Court in *Miller* was followed in a well-reasoned dissent in the Alabama case of *Johnson v. Craft*.[169] This dissent argued that liberal interpretation should be used to give validity to amendments which had been recognized as part of the organic law by all departments of government and by the people.

E. The Political Question Doctrine

The United States Supreme Court handed down its classic *Luther v. Borden* opinion in 1849.[170] The constitution existing in Rhode Island at the time was the original colonial charter, which lacked a provision for revision. Thomas Dorr and friends met and established a new constitution, holding an election to ratify it. A government was elected under the auspices of this document. The officials serving under authority of the original charter sent out troops to quash the new government, and troopers entered Luther's domicile. Luther brought an action for trespass against Borden, one of the officials ordering the search. The success of the plaintiff's case depended upon the validity of the new government over the old. The holding was that, since the new government had been eradicated by force by the older, the conflict between the two had been resolved politically, and the judicial branch of the government had no basis on which to judge their relative validities. Thus the question of which constitution and government was the legal one was a "political question," and the judiciary must sit back and do nothing more than uphold the legal power of the victor in the political revolution.

The Court said the state judiciary could not decide the question of which government was legal, because any such court taking jurisdiction of the controversy would have to do so under the authority of one government or the other. Thus it would be

[169] 205 Ala. 386, 87 So. 375 (1921).
[170] 48 U.S. (7 How.) 1 (1849).

an impossible contradiction for a state court to declare the opposing government legal, within its proper function as a court. And since neither of the opposing political groups had clear title to the government, the judiciary could not take part in the fray by recognizing one.

The Court followed through with a line of reasoning stemming from article four of the federal constitution, which states that the United States shall guarantee to every state a republican form of government. While it was necessary under this clause to first decide which was the valid government before taking further action, the Court said it could not make that decision. Congress had already decided. The passage of the act of 28 February 1795 provided the President with power to call out the militia to supress an insurrection in any state. And although no militia had been called, the President had taken steps to recognize the Governor under the charter (original) government and to support him if necessary.

The case was cited in Kentucky's primary constitutional validity decision, *Miller v. Johnson*.[171] The principle set out was that the question of which of the two state constitutions was legal is a political question and therefore the courts may only approve the decision of the political department. The Court stated that there was no frame of reference for a judicial decision of such a question.

Another Kentucky case involved the validity of a proposed amendment which removed the constitutional limitation on the salaries of public officials and provided that the Legislature would fix rates of remuneration in the future. Action was brought to prevent submission to the voters on the grounds that it conflicted with several sections of the constitution. In holding that there was no such conflict, the Court still used language suggestive of the political question doctrine: "It may be said that the Act proposing the Amendment is obscure, or that it would not be wise to adopt it, but these are questions in the first instance for the General Assembly and in the latter instance for the people."[172]

In an Oklahoma case it was not the state government which made the choice as to validity but the people themselves. An

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[171] 92 Ky. 589, 18 S.W. 522 (1892).
[172] Hatcher v. Meredith, 295 Ky. 194, 204, 173 S.W.2d 665, 670 (1943).

initiative petition for amendment was filed with the Secretary of State and another circulated among the electorate pursuant to initiative and referendum provisions in the state statutes. However, although the two drafts were in substance identical, the wording differed. In adjudication of the suit brought to have the amendment declared invalid, the court held that, as read with another section of the statutes declaring a liberal construction rule, the amendment petition procedure had been in substantial compliance with the laws proscribing it and was therefore valid. The opinion contained this language:

> Generally the power to propose and adopt a proposition of any nature and to amend their Constitution is vested in the people, and in the exercise of such power they constitute the legislative branch of the state government, and are not subject to interference or control by the judiciary.[173]

The dissent in *Ellingham v. Dye*[174] presented the doctrine in a shape which corresponds to Kentucky's *Gatewood* situation, where the suit to have the document declared illegal was brought before the submission of the proposal to the electorate. The minority reasoned that, if the court could bring the legislature and executive before it and decide whether they had performed their duties legally in passing an extraconstitutional revision bill, then the actual legislative and executive powers of the state have been shifted over to the courts. Secondly, the present constitution clearly gave the legislature and electorate the power over constitutional revision. The court had no functional position from which to interfere with a direction by the legislature that the Governor submit the bill containing the new constitution to a vote; that is: "To issue an injunction in this action would be to enjoin the Legislature and electors in the exercise of their legislative duty."[175] Of course, the argument failed to persuade the majority of the court. But the logic is persuasive.

F. Separation of Powers

No cases in point apply the separation of powers argument to the question of the validity of extraconstitutional revision. The

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[173] Cress v. Estes, 43 Okla. 213, 214, 142 Pac. 411, 412 (1914).
[174] 178 Ind. 336, 99 N.E. 1 (1912), *writ of error dismissed sub nom.*, Marshall v. Dye, 231 U.S. 250 (1913).
[175] *Id.* at 439, 99 N.E. at 38.

doctrine does seem applicable to the situation in which the legislature and governor of a state have officially promulgated a bill proposing such revision and the courts are called upon to enjoin execution of the bill's provisions.

The leading case presenting the doctrine was handed down by the United States Supreme Court in 1867. Mississippi brought suit to enjoin President Johnson from executing certain provisions of the Reconstruction Act. The Court dismissed the suit, explaining in part that it had no functional power to enjoin the President from the execution of a properly enacted item of legislation. And this was said despite some very plainly unconstitutional aspects of the bill, which the Court refused to rule upon.[176]

The case is not altogether a separation of powers argument. It also involves judicial restraint. Indications that the courts should restrain themselves from deciding the merits of a case involving confrontation with the massive political power which the legislative and executive branches of the government can wield call forth the separation of powers principle.

The argument as employed in the dissent in *Ellingham v. Dye*[177] indicates its relevancy to the *Gatewood* predicament. Confronted with a legislature and executive committed and determined to enact a revised constitution, the dissent says it is questionable for the court to declare the legislature's revision bill unconstitutional and attempt to enjoin the Governor from executing it; there would simply be no means for the court to enforce its processes.

Yet, again, the majority did not feel restraint was necessary in that case and they were proven right. The court's processes were enforced. Still the validity of the restraint-encouraged separation of powers argument is unimpaired. The key is simply balancing the respect for the court involved against the political power and determination of the legislature and Governor.

G. Elected Delegates v. the Commission Form

One case stands for the direct proposition that the legislature of a state may not choose the delegates for a constitutional con-

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[176] Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867).
[177] 178 Ind. 336, 415, 99 N.E. 1, 32 (1912) (dissenting opinion).

vention. The court stated in *In re Opinion to the Governor*[178] that a constitutional convention is an assembly of the people themselves acting through their duly elected representatives. Thus the delegates must be elected by the people and may not be forced upon the people by the legislature.

But recent authority holds that the legislature may appoint a commission to write the revision even when the existing constitution provides for a convention system of reform.[179] This 1946 Georgia decision held legal the revision of the state constitution by submission to the people of a legislature-approved draft prepared by a legislative-appointed commission.

The Georgia revision predicament differed from the *Gatewood* problem only in that the existing Georgia Constitution did not require that their legislature-passed proposal for a convention be authorized by the electorate before the convention could be set up. And the lines of reasoning in the two opinions are strikingly similar. Against a background of the Georgia Constitution's popular power clause, nearly identical to Section Four of Kentucky's Bill of Rights, the court projected the dominating image of the sovereign power of the people. The constitution only erects the government of the state, with its power and authority; it does not create the sovereign power of the people. The political power of the people is the superior power, and it can be restricted only by self-limitations. The only limitation the people have imposed on their revision power is to authorize the legislature to initiate all amendments and revisions. The people have never restricted themselves to revision by convention as an exclusive means of rewriting. Thus a legislature may quite legally decide to appoint a commission to write the draft of a proposed new constitution and declare it valid upon submission to the people.

It appears that perhaps the most valid means of distinguishing the Rhode Island and Georgia opinions is to examine the ostensible basis of authority posited for each of the revision methods. It is reasonable to require revision organization, purporting to be conventions in compliance with the stipulations in an existing constitution, to be composed of elected delegates because of the inherent nature of a convention. And it is equally

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[178] 55 R.I. 56, 178 Atl. 433, 452 (1935).
[179] Wheeler v. Board of Trustees, 37 S.E.2d 322 (Ga. 1946).

reasonable to state at the same time that a revision organ, designated a commission in an admitted extraconstitutional revision scheme, could be composed of legislative appointees.

H. The Fundamental Law

In 1879 the Kansas Legislature passed an amendment proposal by a two-thirds vote as stipulated in the existing constitution. However, other constitutional prescriptions that the bill be properly written in the legislative journal and election machinery be provided for, were not followed. In ruling on the action brought to test the validity of the amendment, the Kansas court stated that its single inquiry was whether the proposal had received the sanction of popular approval in the manner imposed by the state's fundamental law. The requirements for amendment could be reduced to two essentials: passage of the bill by two-thirds of the legislature and approval by a majority vote. The court found that these essentials were present. But if either of these two elements provided by the constitution were missing, the amendment attempt would be declared illegal. For "no number of legislatures, and no amount of legislative action, can change the fundamental law."[180]

The holding of the case when restated is obviously related to the *Gatewood* case. Although the prescriptions of the existing constitution concerning amendment and revision may be reduced to their basic elements, those stipulations are a fundamental law. As such they may not be disregarded under any circumstances.

IV. CONCLUSION

Attempting a *reductio ad absurdum* in oral argument before the Court of Appeals, Gatewood's counsel suggested that a decision approving the legislative by-passing of the constitutional revision procedures by Revision Assembly drafting would authorize a future delegation of the writing to a supermarket manager. And what, he asked, would prevent complete revision of the Kentucky Constitution as an annual affair?

The fact that the *Gatewood* decision authorizes a limited circumvention of the revision procedures specified in the 1891 constitution does not mean that its holding may be extended to

[180] Prohibitory Amendment Cases, 24 Kan. 700, 712 (1881).

an absurdity. The opinion does not suggest that when the Legislature becomes restless enough it can arrange for constitutional revision in any method which would ensure success. *Gatewood* holds that the people have a political power *above* the constitution and when constitutional change becomes necessary for their benefit, and measures set up in the existing constitution for revision are unworkable, the legislature has the functional political capacity to initiate revision by extraconstitutional means and procedures published in legislation and subject to popular vote, and that revision will become valid when approved by the voters. Two basic elements appear in the case, both essential: the principles of popular sovereignty and legislative functional power, and the presence of complete procedural legality and legitimacy.

The Kentucky Constitution itself, in Section 4 of the Bill of Rights, sets out plainly that the concept of popular sovereignty and power over the constitution is a basic principle of the state's government. It is a necessary corollary that the people can change the constitution when they deem it necessary. The functional power of the legislature to initiate extraconstitutional revision subject to the ratification of the people has been recognized in virtually all cases upholding the validity of extraconstitutional action by the state government. Some of the approaches used by the courts which have embodied this principle are substantial compliance, ratification, political question, and the straight doctrine of legislative power. A 1946 Georgia case had employed this theory to hold valid an extraconstitutional revision exactly similar to Kentucky's except that the Georgia Constitution had not required an authorizing vote to set up a constitutional convention. The *Gatewood* Court thus gave the legislature no power which historical and judicial precedents and political theorists had not already recognized.

More important in terms of the inherent limits of the *Gatewood* decision, the legislative power was exercised so as to lend every possible degree of procedural legality and legitimacy to the revision process. A legislative act provided for each step in the process of re-writing, legislative and executive approval, and popular ratification. In a state with more than one hundred and seventy years of stable rule by law, this fact of procedural legality becomes, in some respects, as important as compliance with the

terms of the existing constitution. Furthermore, the Legislature and Governor, elected representatives of the people, were themselves part of the constituent group and participated fully in every act of the revision process. The gestation period of the document was sufficiently long and well publicized to draw citizen interest and expression of opinion. Virtually all the state's top political leadership and constitutional-law authorities were included in the Revision Assembly. The commission form of drafting had become well accepted in other states and by political theorists when it was employed in Kentucky.

The suggestion that the *Gatewood* decision furnishes the basis for delegating the responsibility of drafting some future constitution could only be made on the basis of the power element in the decision and in ignorance of the second element. The necessity of complete procedural legality and legitimacy, equally as essential to the case as power, would prevent both an annual substitution of documents and drafting by a "supermarket manager," or by a handful of politicians in a back room.

Flaws do exist in the opinion. Circumvention of the prescriptions for revision set out in the constitution of 1891 was allowed on an assumption that these provisions are unworkable. State political history as presented in this paper supports the assumption. But a thorough opinion should have demonstrated explicitly that revision via constitutional provisions was politically impossible. Secondly, it is regrettable that the opinion of the Court seemed to adhere so singlemindedly to the agreement of the "people," and failed to stress the role played by the Governor, the Legislature, and the Constitutional Assembly in participating in reform.

In summary, the decision of the *Gatewood* Court in refusing to enjoin the vote on the proposal by the Legislature of the Constitutional Assembly's draft document was clearly sound. It is in agreement with prior decisions in Kentucky in related areas. It is also in accord with decisions in other jurisdictions, and its theoretical underpinnings are adequate.

The vote on November 8 is not revolutionary nor is it a mere plebiscite or referendum. It is the end result of the government and the people acting together to exercise a right to change insured by the constitution.