Vanderbilt Law Review

Volume 2
Issue 1 *Issue 1 - December 1948*

Article 10

12-1948

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Walter F. Dodd

STATE CONSTITUTIONAL CONVENTIONS AND STATE LEGISLATIVE POWER

WALTER F. DODD *

The State of Tennessee faces a serious problem in that it badly needs changes in its Constitution of 1870 and finds it substantially impossible to make such changes by means of proposed amendments by the two houses of its General Assembly. The requirements (1) that legislative proposal be by a majority of all members of the two houses and that it be agreed to by two thirds of the General Assembly then next chosen, and (2) that approval of a proposed amendment be "by a majority of all the citizens of the State, voting for Representatives," [1] substantially defeat possibility of change, as has been found with respect to such requirements in other states. The further requirement that amendments are not to be proposed oftener than once in six years materially restricts legislative proposals, and such proposal if made has little chance of adoption. In the State of Tennessee there appears to be no possibility that the General Assembly should submit a revised constitution to popular vote as was done in the State of Georgia in 1945.

It is necessary, therefore, if needed changes are to be made by a revision of the constitution, that use be made of the constitutional provision that:

> "The legislature shall have the right, at any time, by law, to submit to the people the question of calling a convention to alter, reform or abolish this constitution, and when, upon such submission, a majority of all the votes cast shall be in favor of said proposition, then delegates shall be chosen, and the convention shall assemble in such mode and manner as shall be prescribed." [2]

A Constitutional Revision Commission was appointed by the Governor on authority of a joint resolution of the General Assembly. As a result of a thorough study of the situation, the Commission has recommended that the legislature submit to popular vote the question of calling a constitutional convention with authority to revise only as to (1) amendments and conventions; (2) taxation; (3) apportionment of senators and representatives; (4) legislative quorum; (5) compensation of legislators; (6) governor's term; (7) governor's veto power; (8) suffrage; (9) municipal home rule and city-county consolidations.[3] On the basis of its studies, the Commission has made

* Of Dodd & Edmunds, Chicago, Illinois. Author, REVISION AND AMENDMENT OF STATE CONSTITUTIONS (1910), STATE GOVERNMENT (2d ed. 1928), ADMINISTRATION OF WORKMEN'S COMPENSATION (1936) and other legal treatises; editor, CASES ON CONSTITUTIONAL LAW (3d ed. 1941); Professor of Law, Yale University, 1927-30.

1. Art XI, § 3.
2. *Ibid.*
3. REPORT OF CONSTITUTIONAL REVISION COMMISSION (1946) ("The Frierson Report").

specific recommendations as to each topic, but does not seek to bind a constitutional convention to its specific recommendations, except as to the limitation to the designated topics.

The Commission reported that

> "Our first conclusion is that a general revision or a new Constitution is not needed, would be unwise, and, in all probability, would be rejected at the polls." [4]

The Commission also said that "an unlimited convention is not needed and probably would be rejected." [5]

If the Commission's proposal should be adopted, the holding of a convention would require: (1) the submission to the people by the Legislature of the question of calling a convention "to alter, reform or abolish" the existing constitution only as to the nine specified topics; and (2) a popular vote in favor of a constitutional convention so limited.

If the legislature has authority to submit the question as to a convention with limited powers, such question is subject to approval or disapproval by the popular vote; and by virtue of such legislative and popular action a controlling instruction is given to the constitutional convention. The questions of law are (1) whether the legislature can submit the limited issue to popular vote, and (2) whether the limited authority is imposed upon the constitutional convention by a favorable popular vote.

The Constitution Revision Commission takes the position that such power is vested in the legislature. The Attorney General of the State takes an opposing view.[6] With respect to his opinion, two questions were submitted to the Attorney General: (1) as indicated above, whether the legislature can submit the question of a constitutional convention with limited authority to propose amendments and (2) whether the constitutional convention would be so limited by legislative action approved by popular vote. Obviously the legislative and popular action would not be controlling if they did not restrict the constitutional convention.

Decisions of courts of the several states bear upon this problem, but that of each state must be construed with respect to the constitutional provisions of that state.

In the construction of state and federal constitutions, it has long been established that, "The federal constitution confers powers particularly enumerated; that of the state contains a general grant of all powers not excepted." [7] Theoretically, state powers are original powers, vested in the state legislature,

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4. *Id.* at 3.
5. *Id.* at 5.
6. Opinion of Attorney General to Constitutional Revision Commission, May 16, 1946 (Published in pamphlet form under title "Right of the Legislature to Call a Limited Constitutional Convention").
7. Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 160 (1853).

and subject only to such limitations as appear in the state constitutional texts. Although no principle of constitutional construction is strictly adhered to, each case with reference to state constitutional conventions must be considered with reference to constitutional provisions or the absence thereof in the respective states.

The legislative power, in the absence of restriction, is well stated as to conventions, in the case of *Erwin* v. *Nolan:* [8]

> ". . . the claim as to the superior power of this convention over that of the Legislature is a mere flourish of words, and will not stand the test of analysis. The Legislature, within its own province, as defined by law, is supreme. To no greater extent is a convention, which, like the Legislature, must derive its power from the law. That the convention derived its power from the people is true, but the power thus conferred was limited by the people themselves to the terms of the legislative enactment under which the members of the convention were elected. If this limitation, or some other which defined the purpose of the act, had not been embodied therein, no reason would have been presented for requiring the people to vote upon the selection of delegates to the convention. In the absence, therefore, of this or some other prescribed purpose, the act would not only have been futile, but absurd."

The present problem relates only to the extent to which the scope of action by a constitutional convention in proposing constitutional changes may be restricted by legislative action approved by popular vote. The power of the legislature to propose such restrictions to the people depends upon the extent to which the state constitution restricts the action of the state legislature. In this connection state constitutions may be classified into several groups:

(1) Some state constitutions contain no provisions for constitutional conventions; [9] and two provide for constitutional conventions without requiring a popular vote upon whether such a convention shall be held.[10]

(2) Several states provide for periodical submission to popular vote of the question of holding a convention; [11] and three of these prescribe in detail the powers and duties of the convention.[12]

(3) The other state constitutions require a popular expression of approval to be obtained by the state legislative body in order to hold a constitutional convention.

In all of the states whose constitutions make no provision for constitutional conventions, it has been substantially recognized since In re *Opinion to the Governor,*[13] that such conventions may be assembled by legislative act, and that the proposal for such a convention should preferably receive popular

8. 280 Mo. 401, 217 S. W. 837, 840 (1920).
9. Ark., Conn., Ind., La., Mass., Miss., N. J., N. D., Pa., R. I., Tex., Vt.
10. Ga., Me.
11. Ia., Md., Mich., Mo., N. Y., N. H., Ohio.
12. Mich., Mo., N. Y.
13. 55 R. I. 56, 178 Atl. 433 (1935).

approval. The power, however, is legislative, and the power to provide for a popular vote upon the holding of a convention when it is not required by a constitution exists because of lack of prohibition by the state constitution. The legislative power to take steps for a convention and to provide a popular vote upon whether it shall be assembled is, in the states where such power has been neither granted nor denied, a general grant of legislative power through the omission of either specific grant or prohibition. And in a state where a power exists in the legislature because not denied, this power is exercised by the legislature when it specifies the conditions under which there may be a popular expression of opinion; and a popular approval becomes a part of the legislative action.

That the limitations imposed by the legislature and approved by popular vote are controlling is definitely determined by the opinions of courts of states whose constitutions do not provide for constitutional conventions.

Massachusetts is one of the states whose constitution does not provide for constitutional conventions. The *Opinion of Justices,*[14] involved an inquiry as to whether a constitutional convention could propose other amendments to the people if the legislature should pass a law limited to specific parts, and should have the approval of such law by a majority of the people. The court said that the convention would derive its whole authority from the vote of the people and that "upon the general principles governing the delegation of power and authority, they would have no right, under such vote, to act upon and propose amendments in other parts of the constitution not so specified." [15]

Rhode Island is another state whose constitution does not provide for constitutional conventions. In Re *Opinion to the Governor,*[16] the court said:

> "If, at the time the question of calling the convention is submitted to them, the people are informed of the scope of the convention and the manner in which it is to conduct its deliberations, and report its results by virtue of the act of the General Assembly specifying such matters, then a convention called in this manner will be limited as therein set forth and the convention will then be bound to confine itself within the stated limits of the act of the Assembly."

A similar view has been taken in Louisiana, whose constitution also makes no provision for a constitutional convention. In *State* v. *Jones,*[17] the court said that with the exception of three specified matters "the power of the convention to frame and adopt a new Constitution was as full as could be conveyed by the Legislature and the people of the state."

The Pennsylvania constitution makes no provision for a constitutional

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14. 6 Cush. 573 (Mass. 1833).
15. *Id.* at 575.
16. 55 R. I. 56, 99, 178 Atl. 433, 452 (1935).
17. 151 La. 714, 92 So. 310 (1922).

convention, and, with respect to a convention provided by statute with popular approval, the court said, in *Wells v. Bain:* [18]

> "This law, being unrepealed, and being acted upon by the people, became their own delegation of authority—the chart of the delegates to guide and control them in the duties they were elected to perform as the servants of the people. Without this legislation the convention had not existed; and to exist on terms not found in or contrary to the law is to seek for a grant of powers to be found nowhere else, except in a state of revolution."

The constitution of New Jersey makes no provision for a constitutional convention, and has not in this respect been construed by the courts of that state, but the recent experience of that state is of importance because of its relation to the present problem in Tennessee. The New Jersey legislature passed an act "to provide for a state constitutional convention so instructed by the legal voters that it shall have no power to propose any change in the present basis of representation in the legislature," or make "change in the present territorial limits of the respective counties." This act was approved by popular vote; delegates to the convention were elected at the same time; the convention proposed a new constitution without change in boundaries of counties or in legislative representation; the new constitution was submitted to popular vote and adopted in 1947.

The cases referred to above arose in states whose constitutions contain no provisions as to constitutional conventions. Such constitutional provisions with respect thereto as exist in other state constitutions are, of course, restrictive upon the state legislatures. As previously indicated, the constitutions of Michigan, Missouri (1945) and New York not only provide for periodical popular votes upon the holding of conventions, independently of legislative action, but also make detailed provisions regarding the choice and procedure of delegates.

The internal procedure of a convention has properly been regarded as within the convention's power, independently of constitutional provisions. This was announced in the New York convention of 1894 and the Michigan convention of 1908; and is the basis of decision in *Goodrich v. Moore.*[19] The majority opinion in *Carton v. Secretary of State,*[20] merely denied a legislative power to control the day of submission of the convention's work, when the convention had been unable to complete its work.

The power of a legislature to submit to popular vote the question of having a constitutional convention with restricted powers, and the power of legal voters to approve such a convention, exist unless forbidden by the constitution itself. A constitutional provision without such prohibitions brings

18. 75 Pa. 39, 52 (1873).
19. 2 Minn. 61 (1858).
20. 151 Mich. 337, 115 N. W. 429 (1908).

this issue to the same basis as if there were no constitutional provision for a convention; and attention has already been called to the fact that decisions in states whose constitutions make no provisions for conventions support the view that restrictions may be imposed upon the topics to be considered, if such restrictions are submitted by the legislature and approved by popular vote.

The issue is therefore one of construction of the last sentence of Article XI, section 3, of the constitution of Tennessee. That sentence is here repeated and reads as follows:

> "The legislature shall have the right, at any time, by law to submit to the people the question of calling a convention to *alter, reform or abolish* this Constitution; and when upon such submission, a majority of all the votes cast shall be in favor of said proposition, then delegates shall be chosen, and the convention shall assemble in such mode and manner as shall be prescribed."

Does this grant to the legislature a power which would not otherwise exist; and does it limit the submission by the legislature to the voters so as to require that the voters may express themselves for or against a constitutional convention only if the convention is to have authority in its own judgment to propose changes in any or all parts of the constitution?

The only judicial determination of an issue parallel to this is that of the Virginia Supreme Court of Appeals in the case of *Staples v. Gilmer*.[21] Section 197 of the constitution of Virginia provides that a majority of the members elected to each house may submit to the electors the question "shall there be a convention to *revise the Constitution and amend the same?*" By an act, the Virginia General Assembly proposed to submit the above question to the electors, with the added provision that, if a constitutional convention were approved, the delegation of power to a convention by the people should be limited to constitutional amendments regarding the right to vote "by members of the armed forces while in active service in time of war."

The act providing for a popular vote upon the holding of a convention for this limited purpose was, with one dissent, sustained by the Virginia Supreme Court of Appeals, which made the following statement:

> "If the electors vote in favor of a convention, it may amend the Constitution as well as revise it, and where the legislature, in the performance of its representative function, asks the electors if they desire a convention to amend or revise a certain part of the Constitution but not the whole Constitution, an affirmative vote of the people on such question would have the binding effect of the people themselves limiting the scope of the convention to the very portion of the Constitution suggested to them by the legislature. The wishes of the people are supreme. Some agency must ascertain the desire of the people, and the legislature, by section 197, has been selected by them to do so." [22]

21. 183 Va. 613, 33 S. E. 2d 49, 158 A. L. R. 495 (1945). See the excellent annotation to this case in 158 A. L. R. 512 (1945).

22. 183 Va. at 627, 33 S. E. 2d at 55, 158 A. L. R. at 503.

With respect to the power of the legislature to ascertain the desire of the people regarding the scope of powers of a proposed constitutional convention, the language of the constitution of Tennessee is broader than that of the constitution of Virginia. Under the Virginia language the question to be submitted is specified as "to revise the constitution and amend the same," and a strict construction may require a complete power to revise, although this was not required. The language of the Tennessee constitution leaves the form of submission to the legislature, and specifically authorizes that it may be in an alternative of "alter, reform or abolish." The form of the question is not specified.

As heretofore indicated, decisions by the courts of states with respect to the powers of constitutional conventions must be considered in connection with the differences of issue in the several states. Such differences naturally depend upon differences in the language of constitutions with respect to constitutional conventions. In addition, the function of a constitutional convention gives it control over its proceedings and over the character of its recommendations within the field of its authority. This is expressed in an early Minnesota case.[23]

In *Carton v. Secretary of State,*[24] the Supreme Court of Michigan said: "In this State the Constitution is the charter of the convention and its sole charter." This is a statement of fact with respect to the then-existing constitution of Michigan, and was opposed by three members of the court.

The position that the state constitution is the sole charter of a constitutional convention would clearly apply to a convention assembled in New York upon the basis of a vote each twenty years upon having a convention, without action by the legislature, and with a constitutional provision as to every detail of organization and procedure. Although the New York legislature may also submit the question of holding conventions at such times as it may by law provide, a convention assembled in either manner is governed by the constitution, and its proposals are submitted "to a vote of the electors of the state at the time and in the manner provided by such convention." [25]

But in states whose constitutions have no provision for a convention but which normally call conventions upon a popular approval of a legislative proposal, and in those which, like Tennessee, merely provide in their constitutions that a legislature obtain the approval of the voters of the State, a state constitution is neither the charter nor the sole charter of a convention when one is assembled. The controlling element is the popular approval of the legislative proposal. The legislative proposal becomes controlling upon its approval by popular vote. In *State* ex rel. *M'Cready v. Hunt,*[26] the court said:

23. Goodrich v. Moore, 2 Minn. 61 (1858).
24. 151 Mich. 337, 347, 115 N. W. 429, 433 (1908).
25. N. Y. CONST. Art 19, § 2.
26. 2 Hill's Law 1, 223 (S. C. 1834).

> "It is true, the legislature cannot limit the convention; but if the people elect them for the purpose of doing a specific act or duty pointed out by the act of the legislature, the act would define their powers. For the people elect in reference to that and nothing else."

As to the effect of popular approval of a legislative proposal, see also In re *Opinion to the Governor*.[27]

Reference was previously made to the recent experience of the State of New Jersey in revising its constitution although excluding certain provisions thereof from alteration. This was done in a state whose constitution had no provisions as to constitutional conventions. The brief provision in the Tennessee constitution with respect to such conventions makes it possible to employ the method which proved successful in New Jersey, except that in the State of Tennessee the delegates to a convention cannot be chosen until after the question of calling a convention has been submitted and approved.[28] Aside from this point, the issue in the State of Tennessee is one of policy rather than of law.

27. 55 R. I. 56, 178 Atl. 433 (1935).
28. Derryberry v. State Board of Election Com'rs, 150 Tenn. 525, 266 S. W. 102 (1924).