CONSTITUTIONAL CONVENTIONS

THEIR NATURE, POWERS, AND LIMITATIONS

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BY

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FOR THE USE OF THE MASSACHUSETTS CONVENTION
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"A frequent recurrence to fundamental principles is absolutely necessary, to preserve the blessings of liberty."

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TO

ELVA STUART HOAR

PREFACE

THE impendency of constitutional conventions in Illinois, Indiana, Massachusetts, Nebraska and New Hampshire, has stirred up a vast amount of legal and lay discussion as to the nature and powers of such bodies. The Illinois, Nebraska and New Hampshire conventions are expressly authorized by the constitutions of those States. But the Indiana and Massachusetts conventions, not being so authorized, are generally regarded as being revolutionary, and are considered by many to be wholly unconstitutional and void.

Where can one turn for authoritative information on these questions? The only treatise exclusively on Constitutional Conventions is the one by Judge Jameson, published in 1867, and to some extent revised in 1887. Even in its day, this book was rendered less valuable by the fact that it was written to support a preconceived theory, in the interests of which theory Judge Jameson freely distorted both law and facts.[1] To-day this book is obsolete (most of the judicial decisions on the subject being since 1887), and is out of print.

The fact that there is no modern or even ancient accessible work on the nature and powers of constitutional conventions, has led me to attempt to fill the gap with the present book, which represents no preconceived theory, but rather merely an impartial collection of all the available law and precedent.

[1] "Judge Jameson's work constructed a theory regarding constitutional conventions, which conformed more or less closely to the facts, but in which the facts were subordinated to the theory." *Dodd*, p. vi. But Jameson, speaking from the grave as it were, in reply to Dodd and the present author, says: "which, in substance, is an intimation that this work is what the Germans call a *tendenz* work, written to maintain a particular thesis, the subordination of the Constitutional Convention to the law of the land. . . . what work upon history or constitutional law was ever written which was not a *tendenz* work in the same sense; that is, written from some special point of view to establish truths, of which the author is strongly convinced, and to refute errors deemed dangerous, and, if not combatted, likely to prevail?" *Jameson*, pp. 656–657.

The best modern treatment of the subject is contained in Dodd's "Revision and Amendment of State Constitutions" (1910), which however is written more from an historical than from a legal point of view, and which deals chiefly with methods of constitutional amendment, other than the convention method. I am greatly indebted to this work. Jameson's book also has been constantly before me, and much that is still valuable therein has been used.

But, in the main, I have consulted original sources themselves, rather than any author's interpretation of them. For the texts of the various constitutions themselves, I have used Thorp's compilation which was published by Congress in 1909.

My two colleagues on the Commission to Compile Material for the Massachusetts Convention of 1917, namely, Professor William B. Munro[1] of Harvard University and Lawrence B. Evans, Esq.,[2] of the Boston Bar, also Honorable Robert Luce[3] and my wife, have very kindly read my manuscript and have aided me with many valuable suggestions.

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MAY 1, 1917.

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CONSTITUTIONAL CONVENTIONS

Chapter I

THE ORIGIN OF CONVENTIONS

Constitutional conventions, as a means of amending written constitutions, are distinctly an American institution. In fact, written constitutions themselves originated in this country.

The idea of a constitution is Anglo-Saxon. The word is used on both sides of the Atlantic to signify something superior to legislative enactments; in other words, a body of fundamental principles of government which are beyond the control of the Legislature.

A constitution is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.[1] 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.

The American colonies, however, were bound not only by the terms of the unwritten British constitution, but more directly by the charters or other written instruments whereby Great Britain directed their government. These charters, of course, became suspended the moment the colonies declared their independence, as did also the operation on the colonies of even the British constitution itself. As it has sometimes been expressed, the colonies reverted to a state of nature.[2]

It was inevitable that in their attempts to emerge from this state of nature and organize a new social contract, each colony should make its contract embody the fundamental principles of the British constitution, and that they should promulgate these contracts in written form, like their former charters. Several

[1] Mass. Const., Preamble.

[2] See pp. 26–28, *infra*.

of the colonies, in fact, re-adopted their charters to serve them as constitutions.[1]

The political experience and theories of the colonists thus supplied four principles: (1) The employment of definite written instruments, prescribing the nature and form of government; (2) the idea of a constitution superior to ordinary legislation; (3) the conception of certain natural rights asserted by such a constitution; and (4) the theory of the social contract. The written constitution, born in America, was the embodiment of these four principles.[2]

The constitutional convention, as we know it to-day, also developed in America. It is true that governments had in the past been changed by conventions (*i.e.* comings-together), but these had always been unrepresentative and spontaneous. As Braxton says:

> The first and crudest conventions were in no sense representative bodies; but were mere voluntary, irregular, illegitimate assemblies of individuals, acting on their own motion and on their own behalf, who felt themselves sufficiently powerful to resort to the ultimate right of Revolution, and wrest, by violence, from their sovereigns, such governmental concessions as they desired. The existence of such bodies was neither provided for, nor recognized by, the laws or existing social system. They relied merely on the right of *vis major* to justify their actions and support their demands. Such was the Convention of the Barons at Runnymede in 1215, that framed, and, in a sense, enacted, Magna Charta, the first faint suggestion in England of a written constitution.[3]

But in America the representative convention developed. It was a step as far beyond Runnymede as our constitutions were beyond Magna Charta.

The first American constitutions originated in a variety of ways. In order to understand the foundation upon which each rested, it will be necessary to consider: first, the origin of the Revolutionary legislative body in each of the thirteen States; and secondly, the method in which each constitution was enacted. Only three States went through the form of continuing

[1] Massachusetts until 1780; Connecticut until 1818; Rhode Island until 1842.

[2] *Dodd*, pp. 2–3.

[3] *A. Caperton Braxton* in VII "Va. Law Reg.," 79, 82.

the charter legislature, to wit: Delaware, Connecticut, and Rhode Island.[1]

Massachusetts is usually incorrectly classified as being among this number, owing to a failure to appreciate that the Provincial Congress of 1774 was not a continuation of the General Court of the preceding June.[2]

Similarly with Virginia. We learn from a decision of her own Supreme Court that the Revolutionary government was not a continuation of the House of Burgesses.[3] The rest of the States held unauthorized elections with little or no pretense at legality.[4]

In nearly all of the States, certain more or less voluntary organizations, called committees of safety, shared the governing power.[5]

The dissolution of the constitutional assemblies, by the governors appointed by the crown, obliged the people to resort to other methods of deliberating for the common good. Hence the first introduction of convention: bodies neither authorized by, or known to the then constitutional government; bodies, on the contrary, which the constitutional officers of the then existing governments considered as illegal, and treated as such. Nevertheless, they met, deliberated, and resolved for the common good. They were the people, assembled by their deputies; not a legal, or constitutional assembly, or part of the government as then organized. . . . They were, in effect, the people themselves, assembled by their delegates, to whom the care of the commonwealth was especially, as well as unboundedly confided.[6]

Regardless of the legality or illegality of the inception of these various governing bodies, they become, by virtue of military force and of popular acquiescence,[7] the *de facto* governments of their respective States.

Let us now consider the methods in which these *de facto* governments brought about the establishment of written constitutions.[8]

[1] *Dodd*, p. 14; *Jameson*, pp. 113 and 128–129.
[2] *George Tolman*, "Preliminaries of the Concord Fight" (1902), p. 6.
[3] *Kamper* v. *Hawkins* (1793), 3 Va. 20, 68–74.
[4] *Jameson*, pp. 113, 114 n. 1, 119, 122, 126, 130, 132–134.
[5] *Jameson*, p. 113.
[6] *Kamper* v. *Hawkins* (1793), 3 Va. 20, 68.
[7] See Chapter XVII, *infra*.
[8] The following classification is based upon *Dodd*, pp. 24–25, with some regrouping, however, based upon an analysis of the full accounts.

In eight instances the legislative body adopted and promulgated the constitution in the same manner in which it would have passed a mere statute, without either advance authority from, or ratification by, the people.[1]

In five instances the action was taken by a legislative body expressly authorized thereto by popular vote; but the constitution was not submitted in any manner to the people.[2]

In four instances the constitutions were enacted by the legislature under express authority from the people, and copies were distributed some time before enactment, in order to give the people an opportunity to object and suggest changes.[3]

In one instance, the legislature submitted a constitution to the people without previous authority, but it was rejected.[4]

The legislative bodies above referred to were in some cases legislatures attempting to frame constitutions, and in other cases conventions exercising legislative powers. The distinction is immaterial; they were the only regular legislative bodies of their respective States.

In three instances, constitutions were framed by special conventions, separate from the regular legislative bodies, and were submitted to the people.[5] These three conventions, together with the conventions which framed and adopted the Federal Constitution, mark the birth of the constitutional convention movement in this country, and accordingly deserve more than passing notice.

In New Hampshire and Massachusetts, during the Revolutionary War period, there was developed the convention as we know it to-day; that is, an independent body for the sole purpose of framing a constitution, and submitting it to a vote of the people. But it should be remembered that before this development took place, both of these States had established fairly stable governments, New Hampshire by its constitution

[1] North Carolina (April, 1776), South Carolina (1776), Georgia (1776), Virginia (1776), New Jersey (1776), and the continuation of the charters in Massachusetts, Rhode Island, and Connecticut.

[2] New Hampshire (1776), Delaware (1776), Georgia (1777), New York (1777), and Vermont (1777). *Jameson* (pp. 128–130) gives Delaware the credit of holding the first regular convention, but see *Dodd*, p. 15.

[3] Maryland (1776), Pennsylvania (1776), North Carolina (Dec. 1776), and South Carolina (1778).

[4] Massachusetts (1778).

[5] New Hampshire (1778 and 1781–1783) and Massachusetts (1780).

of 1776, and Massachusetts by an amended form of its colony charter. In neither was there urgent need of a new government; in neither was there an aggressive Tory element. Neither of these States was threatened by military operations at the time. In neither State was there any danger to be apprehended from the creation of an independent convention and the submission of its work to a vote of the people.

The history of the development of the convention method in these two States was as follows.

Massachusetts, unlike Rhode Island, which remained under its colony charter until 1842, was one of the earliest States to adopt an independent form of government. In the spring of 1774, Governor Gage forcibly prorogued the Massachusetts legislature. The people promptly prepared to elect a provincial congress of their own to take its place. To offset this move, Gage called for the election of a new legislature. The people elected practically the same delegates to both the provincial congress and the legislature, whereupon Gage cancelled his call. Nevertheless, the legislature met and adjourned over to merge with the congress. This congress and its successor, which sat for five months in 1775, reënacted the charter in a slightly amended form, which served Massachusetts as a constitution until 1780. Under it the Great and General Court (*i. e.* the legislature) and the Governor's Council were regularly elected as formerly, the latter exercising the executive powers.

Soon after the Declaration of Independence, steps were taken in Massachusetts toward framing a new form of government. In accordance with a recommendation of the previous legislature, the two branches of the legislature of 1777–1778 met together as a convention and submitted a constitution, which, however, was indignantly rejected by the electorate, because they resented the legislature's assumption that it could call a convention without first obtaining an authorization from the people.

In the following year the chastened legislature called upon the voters to state whether they wished a constitution and whether they would authorize the legislature to call a convention. The vote on both questions was affirmative, and the legislature accordingly called the convention which drafted

the present Massachusetts constitution. This constitution was adopted in 1780.[1]

The experience of New Hampshire was very similar. In response to a recommendation by the Continental Congress, the provincial congress of New Hampshire adopted a temporary constitution on January 5, 1776, although in the face of strong protest from many parts of the State. The agitation in the western towns became so serious that it was necessary for the provincial congress to send a committee to assure that section that the form of government adopted was purely temporary.

Delegates from certain of the towns met in Hanover in June, 1777, and passed resolutions that any permanent plan of government should be framed by a convention convened solely for that purpose. Subsequent constitutional procedure in New Hampshire followed those suggested lines.

The legislature of 1777 asked that the various representatives be instructed by their towns as to the expediency of holding a convention. Many of the members of the next legislature were so instructed, and accordingly it was voted in February, 1778, that a convention be held in June of that year. The convention, called by virtue of this vote, drafted a constitution; but it was rejected by the people.

This procedure was repeated in calling a second convention, which met in 1781 and submitted a constitution, which also was rejected. The same convention submitted a revised copy in 1782, and a second revision in 1783, which was finally adopted.[2]

As already said, it was the idea of a separate convention which defeated the constitution framed by the Massachusetts legislature in 1777–1778. As a recent writer has said:

> The material factor which defeated the constitution was the widespread belief that the only convention which could stand for all the people and best define its rights and determine its form of government, was a convention consisting of delegates to whom the powers of the people were delegated for the sole purpose of

[1] *George Tolman*, "Preliminaries of the Concord Fight" (1902); 1917 Manual of the General Court (Mass.), pp. 86–87; *Dodd*, pp. 8–10; *Frothingham*, Const. and Govt. of Mass.; II "Mass. Law Quarterly," 1.

[2] *Dodd*, pp. 3–8.

framing a constitution, and not a body of representatives entrusted at the same time with other duties.[1]

Dodd gives to the towns of the New Hampshire grants, meeting in Hanover in June, 1777, the credit of originating the convention idea.[2] But to the town of Concord, Massachusetts, belongs the honor of antedating the towns of the New Hampshire grants. On October 21, 1776, the town voted on the question of authorizing the legislature to frame a constitution:

> That the Supreme Legislative, either in their proper capacity, or in Joint Committee, are by no means a body proper to form and establish a Constitution, or form of Government; for reasons following: first, because we conceive that a Constitution in its proper idea intends a system of principles established to secure the subject, in the possession and enjoyment of their rights and privileges, against any encroachments of the governing part, second, because the same body that forms a constitution have of consequence a power to alter it, third, because a constitution alterable by the Supreme Legislative is no security at all to the subject against any encroachment of the governing part on any, or on all of their rights and privileges.

Accordingly they recommended the calling of a convention.[3]

This procedure of constitution-framing by a convention chosen for that express purpose, which idea was originated in Concord, Massachusetts, and was copied by the New Hampshire towns, was also followed in Vermont in 1786, and with respect to the Federal Constitution.

Jameson points out that the congress which framed the Articles of Confederation possessed not a single one of the elements necessary to give it legitimacy as a constitutional convention.[4] The body which framed the permanent Constitution of the United States was scarcely more legitimate.

The Annapolis convention had met merely to settle the commercial disputes of the American States, but had recommended that the succeeding convention at Philadelphia should

[1] *Arthur Lord* in II "Mass. Law Quarterly," 1, 5; *cf.* Journal, Mass. Conv., 1779–1780, p. 225.

[2] *Dodd*, p. 6.

[3] "Mass. Archives," Vol. 156, No. 182. A facsimile is to be printed in the manual of the Mass. 1917 Convention.

[4] *Jameson*, pp. 147–148.

consider "other objects than those of commerce." Accordingly, a convention met in May, 1787, at Philadelphia, "to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union." [1] This convention was really a diplomatic treaty-making body, rather than a constitutional convention in the purest sense of the term.

But the conventions of the eleven States which ratified the Constitution were all regularly-called constitutional conventions. The same may be said of the conventions of North Carolina, Rhode Island, and Vermont, which ratified the Constitution after it was declared established.[2]

So much for the origin of the idea of a written constitution, and for the employment of conventions to draft these instruments. Let us now consider the growth of the idea of the convention as a method of amending or altering constitutions already established.

The absence of any provision for alteration in the early constitutions should not be taken as an indication that their framers thought the regular legislatures competent to alter them, but rather that they did not consider the matter at all.[3]

Thus six of the early constitutions, and the rejected Massachusetts constitution of 1778, provided no method for their own amendment.[4]

Of the eight constitutions which did provide for amendment, three provided for legislative action (in a manner different and more difficult, however, than the passage of a mere statute),[5] two provided for submission by a council of censors for ratification by a specially called convention,[6] one provided for a convention called by petition,[7] and one for a convention called by a popular vote at a certain fixed date.[8]

[1] *Jameson*, pp. 149–150.
[2] *Jameson*, p. 153.
[3] *Dodd*, p. 27.
[4] South Carolina (1776), Virginia (1776), New Jersey (1776), New Hampshire (1776), New York (1777), and North Carolina (Dec. 1776).
[5] Maryland (1776), Delaware (1776), and South Carolina (1778).
[6] Pennsylvania (1776) and Vermont (1777).
[7] Georgia (1776).
[8] Massachusetts (1780). The vote was unfavorable, no convention was held, and thus this method lapsed by non-user. There was a similar provision in the Kentucky constitution of 1792, and under it was framed the constitution of 1799.

The New Hampshire constitution of 1784 contained a similar provision, but with the added qualification that the work of this convention should be submitted to the voters for their approval.

But soon it became apparent that it would be convenient for each State to have two methods of changing its constitutions; although only four constitutions had, up to 1835, adopted both the legislative and convention methods.[1] Up to 1917, one hundred and thirty-nine constitutions have been framed by that many conventions. Of these, nine have contained no method of amendment, twenty-nine have contained provisions for amendment by convention alone, thirty-six by the legislative method alone, and sixty-five by both modes.[2]

In all of the States except New Hampshire, specific provision is now made for the amendment of State constitutions, by action by the legislature.[3]

In twelve States, the constitution may now be amended by popular initiative without the interposition of either the legislature or a convention.[4]

Only twelve of the State constitutions now in force omit to provide for the holding of constitutional conventions.[5] Yet conventions have been held in all of these States except Rhode Island, Indiana, and Vermont. The question of holding a convention has twice been submitted in Rhode Island, in spite of a Supreme Court opinion declaring the convention method unconstitutional, and there have been authoritative expressions of opinion in Vermont and Indiana that a convention could be held there.[6]

It may therefore be said that New Hampshire is the only state in which amendments may not be proposed by the legislature, and that Rhode Island is perhaps the only exception to the rule that conventions may be held for the revision of State constitutions.[7]

[1] United States (1787), South Carolina (1790), and Delaware (1792 and 1831).

[2] *Jameson*, pp. 550–551; *Dodd*, pp. 119–120. Arizona and New Mexico in 1910; Louisiana in 1913.

[3] "Columbia Dig.," pp. 10–21.

[4] "Columbia Dig.," p. 771. These States are Arizona, Arkansas, California, Colorado, Michigan, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, and Oregon.

[5] "Columbia Dig.," p. 21. These States are Arkansas, Connecticut, Indiana, Louisiana, Massachusetts, Mississippi, New Jersey, North Dakota, Pennsylvania, Rhode Island, Texas, and Vermont.

[6] See Chapter IV, *infra*.

[7] *Dodd*, p. 120.

The Federal Constitution provides for the holding of a Federal convention as an alternative to the usual method of submission of amendments by Congress.[1]

Thus the convention method and the legislative method of amending constitutions have now become equally established throughout the length and breadth of the United States.

[1] U. S. Constitution, Art. V.

Chapter II

FUNDAMENTAL PRINCIPLES

In order to understand the nature, powers, and limitations of constitutional conventions, it will be necessary first to discuss a few fundamental principles of government; for the convention, designed as it is to tinker with such a basic instrument as the constitution, must of necessity get closer to fundamentals than any other governmental agency.

Government in America is based upon popular sovereignty. The Federal Constitution was ordained and established by "the people of the United States," [1] and guarantees to each of the several States "a republican form of government." [2] This means, in other words, a representative form.

It is founded upon the theory that the people are fit to rule, but that it would be cumbersome for them to govern themselves directly. Accordingly, for the facilitation of business, but for no other purpose, the people choose from their own number representatives to represent their point of view and to put into effect the collective will.

As Jameson expresses it:

> Of the American system of government, the two leading principles are, first, that laws and Constitutions can be rightfully formed and established only by the people over whom they are to be put in force; and, secondly, that the people being a corporate unit, comprising all the citizens of the state, and, therefore, too unwieldy to do this important work directly, agents or representatives must be employed to do it, and that, in such numbers, so selected, and charged respectively with such functions, as to make it reasonably certain that the will of the people will be not only adequately but speedily executed.[3]

[1] U. S. Const., Preamble.
[2] U. S. Const., Art. IV, § IV.
[3] *Jameson*, p. 1; "Works of Daniel Webster," VI, pp. 221–224.

These principles were recognized by our forefathers in framing the various Bills of Rights, which declare in substance that, as all power resides originally in the people, and is derived from them, the several magistrates and officers of government are their substitutes and agents, and are at all times accountable to them.[1]

The various agents of the people possess only such power as is expressly or impliedly delegated to them by the constitution or laws under which they hold office; and do not possess even this, if it happen to be beyond the power of such constitution or laws to grant.

As the Supreme Court of South Carolina said in an early decision:

> Whatever authority this Court or any other constituted authority in this State possesses, it possesses by delegation from the people, and is exercised in their right. What they have failed to delegate, even if it operates injuriously and in bad faith towards their confederates, the Court cannot possess.[2]

The Declaration of Independence, which is the first great declaration of American principles, says truly, "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

It follows, as a necessary conclusion from this statement in the great Declaration, that the people have an unalienable right to change their government whenever the common good requires. In fact, that very conclusion is drawn by the Declaration itself.

Yet, because of the training of our ancestors, this idea was difficult of establishment. As Braxton points out:

> Both Church and State taught and enforced the dogma that governments were of divine origin, and existed by divine right; and to this proposition the corollary was obvious, that the people had no right to alter what God had established. Finally the idea took

[1] Mass. Decl. of Rts., Art. V.

[2] *McCready* v. *Hunt* (1834), 2 Hill Law (S. C.) 1, 270. *Cf. Reliance* v. *Prison Com.* (1914), 161 Ky. 135, 142.

root and began to develop, that while government, in its general sense, as distinguished from anarchy, may be said to be a divine institution, yet no particular form of government could lay just claim to any divine right of preference over any other form. In this one idea lay the germ of all modern political and civil liberty. Yet, simple and elementary as it seems to us, in this age of enlightenment, it was many years before this idea could be reconciled to the tender consciences of many pious persons who had been taught from their childhood, as a part of their religion to hold in superstitious veneration this "Icon Basilike" and all that it stood for.[1]

Practically every one of the original State constitutions of America contains an assertion of this fundamental right of the people to change their form of government. The following quotations from these constitutions may prove instructive on this point:

Some mode should be established by common consent, and for the good of the people, the origin and end of all governments, for regulating the internal polity of this colony.[2]

All political power is vested in and derived from the people only.[3]

All government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.[4]

When any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.[5]

Whenever these great ends of government are not obtained, the people have a right, by common consent, to change it, and take such measures as to them may appear necessary to promote their safety and happiness. . . . The community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.[6]

The people, from whom all power originates and for whose benefit all government is intended.[7]

[1] VII "Va. Law Reg.," 79, 84.
[2] S. C. Const. (1776), Preamble.
[3] N. C. Const. (1776), Decl. of Rts., Art. I.
[4] Md. Const. (1776), Art. I.
[5] Va. Const. (1776), Bill of Rts., § 3.
[6] Pa. Const. (1776), Preamble and Decl. of Rts., Art. V.
[7] Ga. Const. (1777), Preamble.

Whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness. . . . The people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it.[1]

All government of right originates from the people, is founded in consent, and instituted for the general good. Whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old, or establish a new government. The doctrine of non-resistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.[2]

All just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness; and they may, for this end, as circumstances require, from time to time, alter their constitution of government.[3]

It is important to note that these "self-evident truths," these "fundamental rights" are *admitted* rather than *guaranteed* by the constitutions. See the following:

Now no truth can be self-evident, which becomes evident only under particular conditions, as when it is deducible only from . . . the provisions of some positive code. . . . If the truth in question is a self-evident truth, it is one which would obtain equally whether asserted in the constitution . . . or not.[4]

It needed no reservation in the organic law to preserve to the people their inherent power to change their government.[5]

The Supreme Court of Rhode Island stands alone in denying the principles laid down in the Bills of Rights. In 1883 it said:

/It has been contended that there is a great unwritten common law of the states, which existed before the Constitution, and which the Constitution was powerless to modify or abolish, under which the people have the right, whenever invited by the General Assembly, . . . to alter and amend their constitutions, . . . Our Constitu-

[1] Mass. Const., Preamble and Bill of Rts., Art. VII.
[2] N. H. Const. (1784), Preamble and Bill of Rts., Art. X.
[3] Del. Const. (1792), Preamble.
[4] *Jameson*, pp. 235–236.
[5] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 344.

tion is . . . the Supreme law of the State! We know of no law, except the Constitution and laws of the United States, which is paramount to it.[1]

And this in the teeth of the fact that the Bill of Rights then in force in Rhode Island proclaimed:

> The basis of our political systems is the right of the people to make and alter their constitutions of government.[2]

And of the fact that the Rhode Island convention which ratified the Federal Constitution included in the ratification these words:

> That the powers of government may be re-assumed by the people, whensoever it shall become necessary to their happiness.

Holcombe has an ingenious theory that the Federal Constitution destroyed this right referred to in the various State constitutions, but he is apparently alone in this.[3]

How may the people exercise this right to change their government? They may do it in any one of three ways: namely, (1) by some authorized procedure; (2) by a lawful act of the whole people in their sovereign capacity; or (3) by the spontaneous act of an unrepresentative part of the people.

By the term "authorized procedure," I mean some method provided by the charter or constitution under which the State in question is governed, or by the express permission of some sovereign government, in case the people in question are a subject people. An example of the latter sort is when Congress passes an act permitting some subject territory of the United States to frame a form of government preparatory to its admission to statehood.

The whole people in their sovereign capacity, acting through the forms of law at a regular election, may do what they will with their own frame of government, even though that frame of government does not expressly permit such action, and even though the frame of government attempts to prohibit such action. This method of change of government will be amplified and justified in Chapter IV.

[1] *Opinion of Justices* (1883), 14 R. I. 649, 654.
[2] R. I. Const., Art. I, § 1.
[3] *Holcombe,* "State Government," p 33. See p. 168, *infra.*

When a part of the people or even a majority of them act outside the forms of law, they have no power except the power of force to bind those who do not join in the movement. Such a change or attempted change of government is nothing but factional, even though it may be conducted in a most orderly manner. Factional changes of government, or "spontaneous changes," as Jameson calls them, will be discussed more fully toward the end of this chapter.[1]

The Pennsylvania Supreme Court has attempted to draw a distinction between these three methods of change of government. The court's language is as follows:

> The words "in such manner as they may think proper," in the declaration of rights, embrace but three known recognized modes by which the whole people, the state, can give their consent to an alteration of an existing lawful frame of government, viz.:
>
> 1. The mode provided in the existing constitution.
>
> 2. A law, as the instrumental process of raising the body for revision and conveying to it the powers of the people.
>
> 3. *Revolution.*
>
> The first two are peaceful means through which the consent of the people to alteration is obtained, and by which the existing government consents to be displaced without *revolution.* The government gives its consent, either by pursuing the mode provided in the constitution, or by passing a law to call a convention. If consent be not so given by the existing government the remedy of the people is in the third mode, — *revolution.*
>
> . . . . . .
>
> If the legislature, possessing these powers of government, be unwilling to pass a law to take the sense of the people, or to delegate to a convention *all* the powers the people desire to confer upon their delegates, the remedy is still in their own hands; they can elect new representatives that will. If their representatives are still unfaithful, or the government becomes tyrannical, the right of revolution yet remains.[2]

The author would suggest that the following changes be made in the parts which he has italicized: namely, that the first "revolution" be changed to "spontaneous action, ratified by acquiescence," and that the second and third "revolution" be changed to "spontaneous action."

[1] See pp. 19–23, *infra.* *Cf. Jameson,* p. 104.

[2] *Wells* v. *Bain* (1872), 75 Pa. 39, at 47–48.

Let us not however attempt to decide at just this point whether the Pennsylvania Court correctly used the term "revolution." This is really a question of terminology rather than of fundamentals. The definition of the word will be discussed in Chapter III,[1] and in Chapter IV there will be considered the question as to whether popular conventions may properly be designated as "revolutionary."[2]

On the fundamental points expressed, the Pennsylvania Court was entirely correct. It laid down the principles that the electorate is really a representative body, a body representing "the people."

The people here meant are the whole — those who constitute the entire state, male and female citizens, infants and adults. A mere majority of those persons who are qualified as electors are not the people, though when authorized to do so, they may represent the whole people.

. . . . . .

The electors who can pronounce the voice of the people are those alone who possess the qualifications sanctioned by the people in order to represent them, otherwise they speak for themselves only, and do not represent the people.

. . . . . .

A majority of the adult males having the qualifications of electors can bind the whole people only when they have authority to do so.

. . . . . .

The great error of the argument of those who claim to be the people, or the delegates of the people, is in the use of the word *people*. Who are the people? Not so many as choose to assemble in a county, or a city, or a district, of their own mere will, and to say — we the people. Who gave them power to represent all others who stay away? Not even the press, that wide-spread and most powerful of all subordinate agencies, can speak for them by authority. The voice of the people can be heard only through an authorized form, for, as we have seen, without this authority a part cannot speak for the whole, and this brings us back to a law as the only authority by which the will of the whole people, the body politic called the state, can be collected under an existing lawful government.[3]

[1] See pp. 31–33, *infra*. [2] See p. 54, *infra*.

[3] *Wells* v. *Bain* (1872), 75 Pa. 39, at 46, 47, 49, and 53.

And Braxton says, in the same connection:

The "people" to whom our Bills of Rights refer, the only "people" whom civilization recognizes as having any sovereign or political rights, are the people, not in a state of nature, but as organized into social government. When, therefore, we are discussing any problem or doctrine of government, or of political or civil rights, let us lay aside all consideration of the people in a "state of nature"; let us omit all reference to that idle dream of the early theorists, about the people meeting together in a "vast plain" — a thing they, of course, never did and never possibly could have done; and instead, let us ever consider the people, not as a capricious, erratic, lawless monster, but as an all-powerful, but orderly, force moving only in lawful form, in accordance with the great rules and principles, and in pursuance of the methods, which are essential to its organized existence.[1]

The people do not vote at a popular election any more than they vote at a session of the legislature. They speak only through representatives in either instance. The people include men, women, and children. In some governmental functions, these people speak through the electors, in other instances through the legislature, but always through representatives.

Some writers have even gone to the extent of stating that the electors are the people. Witness the following:

Under our system of government it is apparently well settled that the ultimate sovereignty is in the people, in the restricted sense of those who are enfranchised. The power to change the fundamental — the written constitution — is in them alone. It is this principle which causes the courts to recognize generally the right of the legislature, as the organ of the people, to submit a call for a convention of the people, and to regard such a convention as a valid method of constitution making, although the existing constitution contains no provision to that effect.[2]

The Massachusetts Supreme Court has recently held that "people" as mentioned in the Bill of Rights are *all* the people, whereas "people" in provisions relative to elections are merely the qualified voters.[3] This would seem to be a very sensible distinction.

But be that as it may. A majority of the electors can repre-

[1] VII "Va. Law Reg.," 79, 87.
[2] XXIX "Harv. Law Rev.," 529.
[3] 1917 Mass. Senate Doc., 512. See pp. 208–209, *infra*.

sent the people only at a duly held election. The action of a majority of the electors in any other manner is just as ineffective as would be the action of a majority of the legislators taken during a legislative recess.

The Pennsylvania Court expresses these thoughts in the following language:

> The people, that entire body called the state, can be bound as a whole only by an act of authority proceeding from *themselves*. In a state of peaceful government they have conferred this authority upon a part to speak for the whole only at an election authorized by law. It is only when an election is authorized by law, that the electors, who represent the state or whole people, are bound to attend, and if they do not, can be bound by the expression of the will of those who do attend.[1]
>
> Law is the highest form of a people's will in a state of peaceful government, when a people act through a law the act is theirs.[2]

Judged by these standards, it will be seen that a spontaneous convention is not really a movement of the whole people, no matter how large a percentage of the voters it actually represents.

This may answer the suggestion which is often made by loose thinkers on this subject; namely, if some rich man or some body of men were to pay the expenses of holding a state-wide election, and were to invite all the voters to attend, would not an amendment adopted at such an election become a valid part of the constitution through thus receiving the popular sanction? But the Pennsylvania Court replies as follows:

> Let us suppose a voluntary election unauthorized by law, and delegates elected. It is plain a convention composed of such delegates would possess no power to displace the existing government, and impose a new constitution on the whole people. Those voting at the unauthorized election had no power to represent or to bind those who did not choose to vote.
>
> . . . . . .
>
> Suppose a constitution formed by a volunteer convention, assuming to represent the people, and an attempt to set it up and displace the existing lawful government. It is clear that neither the

[1] *Wells* v. *Bain* (1872), 75 Pa. 39, 47. See also in this connection the quotation on page 22, *infra*.

[2] *Wood's Appeal* (1874), 75 Pa. 59, 71–72.

people as a whole nor the government having given their assent in any binding form, the executive, judiciary and all officers sworn to support the existing constitution would be bound, in maintenance of the lawfully-existing institutions of the people, to resist the usurpation, even to the whole extent of the force of the state. If overpowered, the new government would be established, not by peaceful means, but by actual revolution.[1]

The leading example of factional convention in the United States is the "People's Convention" in 1841 in Rhode Island, which culminated in what is generally known as "Dorr's Rebellion," to be discussed a little later.

In Maryland, in 1837, there were conditions like those in Rhode Island in 1841, and the supporters of reform elected a convention without any authorization from the regular government, but the convention took no action, for the legislature hastened to adopt the most important proposed reforms.[2]

Somewhat similar to the Maryland case was that of the convention at Topeka in the territory of Kansas in 1855. This convention was assembled upon the recommendation of meetings and associations of private individuals. The constitution which it framed was submitted to a popular vote and received a majority of the votes cast upon the question of its adoption, although only its friends voted upon this question. This constitution was never recognized by Congress, though it would seem that the irregularity of its formation and adoption might have been cured by congressional ratification, had Congress cared to take such action.[3]

The territory of Michigan in 1835 adopted a constitution and applied for admission into the Union. Congress passed an act that Michigan should be admitted if she would agree to a restricted boundary. The new State rejected the condition. Thereupon a popular movement was begun, and delegates were elected to a convention, which assembled without either congressional or State authorization, and assented to the condition imposed by Congress. Congress accepted this action as satisfactory and by its acceptance ratified the action of the irregular convention.[4]

[1] *Wells* v. *Bain* (1872), 75 Pa. 39, 48–49.
[2] *Jameson*, p. 216; *Dodd*, p. 61.
[3] *Jameson*, pp. 202–204; *Dodd*, p. 61.
[4] *Jameson*, pp. 188–189; *Dodd*, pp. 61–62.

Thus what is originally merely a factional convention may in some cases become an authorized convention by subsequent ratification; in such cases, by Congress.

But apart from some curing ratification, we have seen that, although the people are supreme, they have no method of expression except through their representatives, the voters; and they in turn can only speak by means of elections regularly called and held.

It was this little technical point alone which justified the prosecution of Thomas W. Dorr for supporting the "People's Constitution" of 1841 in Rhode Island. Under his leadership the people of that State attempted to overthrow the tyrannous rule of the landholding classes who were still entrenched behind the King's charter. Caucuses of the adult male citizens throughout the State sent delegates to a convention which submitted a fair and democratic constitution to a special election called by it. At this election a clear majority of all the adult males voted for the new frame of government. Not only this, but among those voting in favor was a clear majority of those duly registered as voters under the charter. Dorr was subsequently elected Governor. He attempted to assume office, but John Tyler, Whig President of the United States, interfered at the request of the Whig charter government, and forced Dorr and many of his followers into exile, by threatening to send Federal troops into the State. This partisan action, by the way, is chiefly what drove the Whigs from power in the succeeding national election. Equally partisan was the Democratic congressional report on Tyler's action, which report will be cited elsewhere in this volume.

On Dorr's return, a few years later, he was tried and convicted of high treason. In the meantime, the Charterists themselves had submitted a constitution, which had received the votes of less than one third of the adult males, less than half of the registered vote.

Yet technically this became the constitution of the State, and the People's Constitution did not. Neither method of procedure was authorized by the charter. The valid one received seven thousand votes; the invalid one nearly fourteen thousand. Yet the difference in validity lay in this: the seven thousand voted at a duly called election, and hence had authority

to speak for the whole people; whereas the fourteen thousand voted at an irregular election, and hence spoke only for themselves.[1]

The following quotations from the unreported opinion of the Rhode Island Supreme Court rendered at Dorr's trial may prove instructive.

> This court can recognize no other [*i. e.* constitution] than that under which it holds its existence. . . . Any irregular action, without legal authority, is no action at all, that can be taken notice of by a court of law. . . . It matters not therefore whether a majority, or what majority, voted for a pretended constitution, as is alleged by the prisoner, and as he now asks to be permitted to prove. The numbers are nothing; we must look to the legality of the proceeding, which, being without form of legal authority, is void and of no effect.[2]

See also the following quotations from the argument of Daniel Webster in the famous case of Luther *v.* Borden in which the United States Supreme Court went very fully into the validity of Dorr's Rebellion, although deciding the case on other grounds:

> When it is necessary to ascertain the will of the people, the legislature must provide the means of ascertaining it.
>
> . . . . . .
>
> There must be an authentic mode of ascertaining the public will somehow and somewhere. If not, it is a government of the strongest and most numerous.[3]

One of the five instances in which new States have been formed within the boundaries of other States, presents an example of a factional convention. Vermont is not such an instance, as she had maintained her independence against the State of New York and the United States for fourteen years;[4] and hence, however irregular had been her original organization, her government had become regular through lapse of time and acquiescence of her people.[5]

But in the case of West Virginia, the legality of its admission

[1] For full accounts of "Dorr's Rebellion" see Committee Rept., 546, 1st Sess., 28th Cong.; *Mowry*, "The Dorr War" (1901); *Luther* v. *Borden* (1849), 7 How. 1.

[2] "Trial of Dorr," p. 38.

[3] 7 How. 1, 31–32.

[4] *Jameson*, p. 139.

[5] See Chapter XVII, *infra*.

into the Union depends to a large extent on the legality of the absolutely revolutionary pro-union government, which was set up in the State of Virginia shortly after the outbreak of the Civil War. This government appears to have been ordained by a convention extremely factional, representing but a fraction of the people of a fraction of the State; and yet the assent of this government to the dismemberment of Virginia was rendered effective by force of Federal arms, just as the factional government in Rhode Island was rendered *in*effective by the same force.[1]

The possibility of spontaneous changes being legal has been suggested in the following dictum:

> It may well be questioned whether, had the Legislature refused to make provision for calling a convention, the people in their sovereign capacity would not have had the right to have taken such measures for framing and adopting a constitution as to them seemed meet.[2]

The Committee of Congress, chosen for partisan purposes to prepare a report on Dorr's Rebellion, discreditable to President Tyler, framed an ingenious theory along the lines of the above dictum, to the effect that a majority of the adult males constitute the people. This theory they expressed in the following language:

> That the (political) people include all free white male persons, of the age of twenty-one years, who are citizens of the State, are of sound mind, and have not forfeited their right by some crime against the society of which they are members.[3]

It is true that the original Virginia Bill of Rights says that "a majority of the community hath an indubitable, unalienable and indefeasible right, etc."[4] And Walker says that the right of revolution exists "whenever a majority desire it."[5]

But in the light of the foregoing discussion, it is probable that what Walker and the framers of the Virginia constitution really

[1] Jameson makes a half-hearted claim that all this was perfectly constitutional. *Jameson*, pp. 168–172.

[2] *Goodrich* v. *Moore* (1858), 2 Minn. 61, 66.

[3] Committee Rept., 546, 1st Sess., 28th Cong., p. 50.

[4] Va. Bill of Rights, § 3.

[5] *Walker*, "American Law" (11 ed.), p. 231.

meant was the right of the people, speaking through a majority of their electors.

At any rate, particularly in these days when women are clamoring that they too are people, it is easier to follow the Pennsylvania view that all male, female, and minor citizens are people, but that the people can speak only through duly qualified voters.[1]

Of course, it is true that many factional movements have succeeded in overturning the government. But they have been ratified by subsequent events, which made up for the illegality of their beginnings. The spontaneous governments of the American colonies succeeded when force triumphed over England. The "People's" government of Rhode Island failed, and the Union government of West Virginia succeeded, because of force, applied by the Federal authorities.

> Revolutionary conventions . . . are not peculiar to any country, but have existed wherever, and will continue occasionally to exist as long as, the ultimate and eternal right of revolution remains — a right which, it is said, depends solely upon the power to successfully invoke it.[2]

> If overpowered, the new government would be established, not by peaceful means, but by actual revolution.[3]

Thus authorized movements depend upon either constitutional or congressional authority; popular movements depend upon the power of the people; spontaneous movements depend upon force, or at least upon acquiescence.

No exact line can be drawn between the three different classes of change of government; each merges into the next, and many instances are on the line.

Daniel Webster has summed up, in the following words, the ground which we have just covered, and this summary has twice received the approval of the United States Supreme Court:

> Mr. Webster's argument in that case took a wider sweep, and contained a masterly statement of the American system of government, as recognizing that the people are the source of all political power, but that as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised

[1] See quotation from *Wells* v. *Bain*, p. 17, *supra*.
[2] *Braxton*, VII "Va. Law Reg.," 79, 82.
[3] *Wells* v. *Bain* (1872), 75 Pa. 39, 49.

by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule; that through its regulated exercise each man's power tells in the constitution of the government and in the enactment of laws; that the people limit themselves in regard to the qualifications of electors and the qualifications of the elected, and to certain forms for the conduct of elections; that our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes; and that the Constitution and laws do not proceed on the ground of revolution or any right of revolution, but on the idea of results achieved by orderly action under the authority of existing governments, proceedings outside of which are not contemplated by our institutions.[1]

One more fundamental point, not directly related to the foregoing, must however be discussed: namely, the meaning of constitutionality and unconstitutionality, and the relation between the constitution and governmental affairs in general.[2]

This is a subject under which there exists a good deal of misapprehension, with the result that lawyers, writers, and even judges have been found laying down the principle that anything which is not authorized by the constitution must, therefore, be considered as prohibited by the constitution. And yet the great distinction drawn by Chief Justice Lemuel Shaw between Federal and State constitutions rests upon a denial of this assumption.[3]

The purport of his decision was that there exists midway between the class of actions prohibited by the constitution and the class of action authorized by the constitution, a twilight zone consisting of those actions which are neither authorized nor prohibited.

As the Federal government has no powers other than those expressly or impliedly given to it by the Constitution, all Federal activities within the twilight zone are just as illegal as those which fall into the expressly prohibited class. As the people reserve to themselves all powers not expressly or im-

[1] *Re Duncan* (1891), 139 U. S. 449, 461; *Taylor* v. *Beckham* (1899), 178 U. S. 548, 579.

[2] For a definition of "constitutional," see p. 30, *infra*.

[3] *Commonwealth* v. *Kimball* (1837), 24 Pick. 359.

pliedly granted to the three branches of the government, it follows that with respect to the State constitutions, any action falling within the twilight zone is lawful through not being prohibited.

Thus it is seen that there are three classes of cases in constitutional law, namely: (1) things authorized; (2) things neither authorized nor prohibited; and (3) things prohibited.

To this may perhaps be added a fourth class, namely, things which the constitution has no power either to authorize or to prohibit.

Thus with respect to the control of State constitutions over the question of amending the constitution, any given method may be either (1) expressly authorized; (2) permitted because not prohibited; (3) prohibited; or (4) beyond the jurisdiction of the constitution.

This fourth class is perhaps a subdivision of the second. Any amendatory method which is beyond the control of the constitution falls into class 4, regardless of whether the constitution attempts to authorize or prohibit it, or merely remains silent on the subject.

A word more relative to this fourth class. Some persons will deny that there can exist a class of actions, which are neither constitutional nor unconstitutional, being beyond the control of the constitution. To such a person, the following question should be put: "Under the State constitution, is it constitutional or unconstitutional for the President of the United States to call out the State militia?" The answer is: "The State constitution has nothing to do with the matter." This is merely one example to show the possibility of the existence of *extra-* or even *supra-*constitutional matters.

Now to another point: the suggestion was made in Chapter I that when the colonies declared their independence, they reverted to a state of nature.[1] This suggestion deserves a little analytical attention.

Dodd quotes with approval the following from a resolution passed at a meeting of New Hampshire towns in 1776:

> It is our humble opinion, that, when the Declaration of Independency took place, the Colonies were absolutely in a state of

[1] P. 1, *supra*.

nature, and the powers of Government reverted to the people at large.[1]

And the Supreme Court of Virginia has said:

The instant that the declaration of independence took effect, had the convention proceeded no farther, the government, as formerly exercised by the crown of Great Britain, being thereby totally dissolved, there would never have been an ordinary legislature, nor any other organized body, or authority in Virginia. Every man would have been utterly absolved from every social tie, and remitted to a perfect state of nature.[2]

But Braxton says:

What, then, is this "right of the people" (or of a majority of them) to "alter their government," which the advocates of conventional omnipotence invoke to support their views? Is it the right to resolve themselves into a "state of nature," to "scatter the elements of government around them," and to "stand upon the foundations of society" — "to conjure up chaos?" Surely not.

To the religious man, government, in its broadest sense, is still regarded as ordained by God, and therefore the people have no right to abolish it; to the non-religious, it is still an absolute essential for the existence of society. What right, then, have the people to abolish government? The "people," as we have seen — the only "people" whom political society can recognize are the people organized into a government of some sort. If, then, they should abolish all government, they would manifestly destroy their own existence.

When we speak of the right of the people to govern themselves we do not mean what the words literally imply, but merely their right to alter or amend their government, or to replace it with a new one, at their pleasure.

The existence of government is absolutely essential to the existence of the "people" in any political sense; and the only way in which the people have a right to abolish the government is by substituting a new one in its stead. There can be no hiatus between them.

The idea of the people resuming — taking back into their own hands — all the powers of government is a delusion. The people can never take the powers of government into their own hands;

[1] N. H. State Papers, Vol. VIII, p. 425; *Dodd*, p. 2.
[2] *Kamper* v. *Hawkins* (1793), 3 Va. 20, 72.

the utmost they can do is to enlarge or curtail, amend or alter, those powers in the hands of their government, or to transfer them from one government to another; but they can never "resume" them *in toto*. Not only have they no right, but they have no power to do so. They can abolish government, and thereby destroy their own political existence, but they can never directly exercise the powers of government — only a government of some sort can possibly do this.[1]

In other words, the people are all-powerful like Samson; but when they pull down the temple of the state, they thereby destroy themselves.

Of course, Braxton is right; but is he not setting up a man of straw so as to knock it down again? He is attacking the oratorical flights of fancy of those who assert convention sovereignty,[2] rather than attacking the real foundations of their arguments.

Most other writers assume that which Braxton sets out so elaborately to prove. Thus Jameson says that the people are a corporate unit, comprising all the citizens of the state.[3] The Pennsylvania Supreme Court has defined the people as "the body politic called the state."[4]

And the Supreme Court of Virginia reaches the same conclusion, although basing the result upon the inconvenience rather than the impossibility of a state of nature.[5]

From all the foregoing discussion, we can deduce the following fundamental principles to guide us in considering the status, powers, and limitations of constitutional conventions.

Ours is a representative government, founded on popular sovereignty.

"The people" are the people as organized into a state of social government; they cannot abolish government without thereby terminating their own existence as the people.

Governments derive their powers from the consent of the governed; therefore the governed have a right to withdraw that consent and to change their government at will. They can exercise this right either by an authorized procedure, by a

[1] VII "Va. Law Reg.," 79, 88–89.
[2] Convention sovereignty will be considered on its merits in Chapter XI.
[3] *Jameson*, p. 1.
[4] *Wells* v. *Bain* (1872), 75 Pa. 39, 53.
[5] *Kamper* v. *Hawkins* (1793), 3 Va. 20, 72.

lawful though unauthorized act of the whole people, or by a spontaneous act, provided that in the case of such spontaneous act, it be later ratified by some higher power, *i. e.* either Congress in the case of a Territory, or the people themselves in the case of the State. The people can speak only through their representatives, the voters, and the voters can speak only at a regular election.

It is not necessary that a given action be either authorized or prohibited by the constitution; it may be permitted by not being mentioned at all, or it may be valid because outside the power of the constitution.

Chapter III

ANALYSIS OF QUESTIONS

In the light of the historical development of constitutional conventions and of the fundamental principles already discussed, we are now prepared to analyze the various questions, for the object of answering which this book is written.

First, let us observe the French proverb, "Definissons nos termes!"

The term "constitutional convention" is not felicitous, for the word "constitutional" may mean to some people "authorized by the constitution," and to others merely "relating to the constitution." Hence the apparent anomaly of the phrase "an unconstitutional constitutional convention." Therefore, a "constitutional convention," as used in this book, may be defined as "a convention employed as a step toward framing or revising a constitution." To avoid ambiguity, such conventions will nearly always be referred to merely as "conventions," omitting the word "constitutional." To the same end, the word "constitutional" will never be used immediately preceding the word "convention" to indicate the constitutionality of the convention; but rather some circumlocution will be employed.

Even when used to refer to the constitutionality of the convention, the terms "constitutional" and "unconstitutional" present an ambiguity. "Constitutional," as we have seen in the preceding chapter, may refer either to something authorized by the constitution, or to something valid through not being prohibited by the constitution, or even to something which is legal because beyond the control of the constitution. "Unconstitutional" may mean the reverse of any of those three things. As used in this book, the term "constitutional" will be used only to apply to matters over which the constitution has control, and which in the exercise of that control it either authorizes or omits to prohibit.

A circumlocution will be used, whenever possible, in place of the word "submission"; for this word might equally well mean "acquiescence in" or "reference to."

"Revolution," as applied to conventions, is a word upon which there can be no possibility of agreement. Jameson, Dodd, Braxton, and others insist that popular conventions are not revolutionary, and reserve the term "revolution" for spontaneous conventions alone.

Dodd says:

> The convention . . . is in no sense a revolutionary . . . body.[1]

Braxton says:

> A constitutional convention is a normal and legal institution, . . . it involves neither revolution nor a dissolution of the ordinary government, even in theory.
>
> In the earlier days existing social systems did not contemplate the legal possibility of, and therefore made no provision for, any fundamental change in their constitutions: hence, the only means of effecting such change was, by revolution, to overthrow the existing government, and, by force, either to engraft upon it the desired changes, or else to substitute an entirely new system in its place. But, as the science of government became better understood, and the great doctrine of the right (not merely the power) of the people to change their government, was promulgated, it was found that it was not necessary to resort to revolution in order to change or modify government, but that such changes or modifications might be made as peacefully, as orderly and as legally as any ordinary function of government could be exercised. From the idea involved in this doctrine grew the modern Constitutional Convention, an institution so far unconnected and inconsistent with revolution, either peaceful or violent, that its whole purpose and raison d'être is to prevent, and do away with, the necessity of excuse for revolution — in fact, it might properly be called the "Anti-Revolutionary Convention." [2]

But it is to be remembered that Dodd and Braxton wrote in States (Illinois and Virginia respectively) where conventions are held under the authority of constitutions. Accordingly their views as to *all* conventions are colored by the fact that the

[1] *Dodd*, p. 72.
[2] VII "Va. Law Reg.," 79, 96, 81.

conventions with which they have had to deal have been of the authorized variety. Similarly the present author's point of view may be colored by the fact that conventions in Massachusetts are generally recognized as being revolutionary.

The Supreme Court of Pennsylvania says:

> It is not pretended that the late convention sat as a revolutionary body.[1]

If they are correct in their theory that conventions, sanctioned by the inalienable right of the people and assisted by the existing legislature, are not revolutionary, then, by their test, the secession conventions of the Southern States were not revolutionary, nor is even the coming constitutional convention in Russia.

By "revolution" they probably mean "revolution by violence." But violence or lack of violence ought not to be the test in determining the fundamental nature of a governmental overturn.

In the words of Reverend William B. Greene:

> It is not necessary, in order that there be a revolution, that there should be blood shed, powder burned, and other attendants of war displayed. A revolution may take place peaceably, and if the right is once recognized in a country, it should take place peaceably, because in the recognition of that right, is also the recognition of the duty of obedience upon the part of the Government.[2]

Walker uses the word "revolution" in the same sense when he says:

> But it is needless to enlarge upon the general right of revolution. It must of necessity exist, whenever a majority desire it, even though the existing government should be in terms made perpetual, as some of the provisions in our constitutions are declared to be.[3]

Gen. Benjamin F. Butler, leader of the majority in the Massachusetts convention of 1853, expressed the sentiments of his party when he said in that body:

[1] *Wells* v. *Bain* (1872), 75 Pa. No. 39, 48.
[2] Deb. Mass. Conv. of 1853, I, 129.
[3] *Walker*, "American Law" (11 ed.), p. 231.

Are we not now engaged in a revolution — a peaceful revolution by the ballot-box, and not by the sword and the bayonet? Sir, these are revolutionary times, so far as the Government is concerned. We are assembled to revolutionize, so far as it may be judged expedient, the organic structure of our present Constitution. I look upon this whole proceeding of calling a convention as a mode of revolution by which we may peaceably accomplish that which in other countries is attained by the sword, and by force. Here, through the medium of the ballot-box, the people take to themselves the supreme control of the whole machinery of the government.[1]

However, as already said, it will be impossible to agree on this term. Dispute would be profitless. Accordingly, let us agree that, *for the purposes of this book*, the author will use the word "revolution" to mean any overturn unauthorized by the constitution.

The New York Supreme Court nearly reaches this definition, when it says:

A change in the fundamental law, when not made in the form which that law has prescribed, must always be a work of the utmost delicacy. Under any other form of government than our own, it could amount to nothing less than a revolution.[2]

They might have added, "And under ours it is revolutionary, even though not *a* revolution."

And the Rhode Island Supreme Court, although denying the lawfulness of conventions, says that if there is any such law, it is a law of revolutionary rather than of constitutional change.[3]

Ruling Case Law says:

An attempt by the majority to change the fundamental law in violation of the self-imposed restrictions is unconstitutional and revolutionary.[4]

Having disposed of the foregoing definitions, we ought next to proceed to classify the various sorts of constitution conventions. Now, the convention is only one of the many means for altering the form of government.

[1] Deb. Mass. Conv. of 1853, I, 78–79.
[2] Journal, 69th N. Y. Assembly, p. 920.
[3] *Opinion of Justices* (1883), 14 R. I. 649, 654.
[4] 6 R. C. L., § 16.

We have seen, during the discussion of fundamental principles in the last chapter, that changes of government may be either authorized, popular, or spontaneous.[1]

Among the authorized methods are: amendment by legislative action, amendment by popular vote after submission by the legislature, amendment by the initiative, and amendment by convention.

With respect to a popular uprising, the convention is apparently the only method whereby the form of government can be legally changed in disregard of constituted authority; although if the question of amendment could get on to the ballot at a regular election in some *other* unauthorized way, the action of the electors in ratifying it would probably be just as binding.

Spontaneous methods of change of government all, in the last analysis, depend upon force for their success; therefore it is immaterial in which of the many possible spontaneous ways a constitution is promulgated, if it be later established by force. The force is all that is material. Success succeeds, and failure fails; no other difference is apparent between successful and unsuccessful spontaneous conventions.

Thus each of the three classes of changes in constitutions — to wit, authorized, popular, and spontaneous — may take the form of a convention; and accordingly we have as the three sorts of conventions to be considered in this book, the authorized convention, the popular convention, and the spontaneous convention.

The spontaneous convention we may disregard, as it is bound by no law and derives whatever force it may have from subsequent events, rather than from the way in which it is either constituted or conducted. Spontaneous conventions are without the form of law and, therefore, cannot possibly provide us with useful precedents.

This book aims to discuss the nature, powers, and limitations of both authorized and popular conventions. The nature of authorized conventions depends largely upon the source of the authority. But popular conventions all probably derive their authority from the people, although this is disputed by Jameson, who asserts that they derive their authority from the legislature. A whole chapter will be devoted to discussing this point of dis-

[1] See p. 15, *supra*.

agreement.[1] The question of whether the legislature calls the convention leads us to the question of whether the legislature can call itself a convention, to which question a chapter will be devoted.[2]

The question naturally arises in connection with popular conventions as to whether, inasmuch as they are not authorized by the constitution, they are not thereby rendered unconstitutional and void. A chapter will be devoted to this point also.[3]

Aside from the question of the source of authority of the two sorts of conventions, there are the questions of their relation to the other departments of government, the relative powers of the various departments, and the extent to which any of the departments can interfere with the convention or the convention interfere with any of the departments.

Accordingly, *inter alia*, we shall consider whether the State executive has power to interfere with both sorts of convention under various provisions or lack of provisions in the State constitutions, and also whether the Federal executive has power to intervene in determining the legality of convention action in one of the States. One chapter will be devoted to these considerations.[4]

Next as to the legislative department. Judge Jameson's entire work on constitutional conventions was written with the view to proving the supremacy of the legislative branch over the convention.[5] For the purposes of his discussion, he assumed that all conventions, whether called at the one extreme under the provisions of the State constitution, or at the other by a direct vote of the people, were in either event the creatures of the legislature and hence subject to its control. Also, he treated the question of the power of the legislature to amend the statute calling a convention, as being merely a question of the right of the legislature to control the convention; whereas in reality it involves three questions: *i. e.* the power of the legislature, the source of the statute, and whether the legislature can amend an act passed by the people.

The question, here involved, of the power of the legislature, is the same question that is involved in considering whether the

[1] Chapter V, *infra*.
[2] Chapter VI, *infra*.
[3] Chapter IV, *infra*.
[4] Chapter VII, *infra*.
[5] *Dodd*, p. 73.

legislature can restrict a convention by the terms of the *original* convention act.

The question of who enacts the convention act is the same question as that already referred to, relating to the source of authority of popular conventions. The question as to whether the legislature can amend a statute passed by the people in their sovereign capacity is self-explanatory.

These three questions last referred to are each treated in a separate chapter.[1]

The restricting of the convention by the original convention act, if it be submitted to the people, instead of being, as we have just supposed, enacted by the legislature alone, involves the question of the power of the *people* to restrict the convention. This same question is involved when we discuss whether constituents have a right to give binding instructions to a convention delegate. Popular control of conventions is the subject of one of the chapters.[2]

In contradistinction to the idea of legislative or even popular control, is the theory that the convention, once launched, becomes the sovereign, and remains supreme so long as it is in existence. Conventions, claiming this degree of sovereignty, have exercised extraordinary powers, including the enactment of legislation and the removal of executive officers. They have even tried to amend the convention act by which they themselves were created. Extraordinary powers claimed by conventions, including interference with the legislative and executive branches, form the contents of one chapter.[3]

Two questions closely related to each other are: whether the constitution applies to conventions, and whether the courts will interfere with conventions. Some people might assume that these are the same question; but it is clear that the constitution may perhaps apply, and yet that the courts may in some cases refuse to interfere with the convention, on the ground that it is a coördinate government body, and is therefore the judge of its own constitutional limitations; in other words, that the questions involved are political rather than legal. On the other hand, the courts may interfere with a convention, on grounds

[1] See Chapter IX on the power of the legislature; Chapter V on the source of the statute; and Chapter VIII on the power to amend.

[2] Chapter X, *infra*.

[3] Chapter XI, *infra*.

not furnished by the constitution. Then, too, a court might also render assistance to a convention in enforcing its rights and powers. Accordingly, the author has tried to divide those somewhat interrelated questions into two chapters, one dealing with judicial intervention,[1] and the other dealing with the question as to whether the constitution applies to conventions.[2]

It is obvious that as all bodies have some incidental powers beyond the strict duties of such bodies, so also the convention must have some incidental powers which do not strictly relate to the framing of a constitution. These are discussed in a separate chapter, which deals with the internal control of the convention by itself; and to this chapter the author has added some words on the privileges of the individual members.[3]

Not only is the legal status of the convention important, but also the legal status of the individual delegates. Are they public officers, and should they take an oath to support the constitution which they are engaged in overturning? Ought they to take any oath of office? These questions form the subject matter of another chapter, on the status of delegates.[4]

The questions of the need and method of submission of amendments by the convention to the electorate, are incidentally touched upon under almost every phase of the subject of constitutional conventions. There is involved the applicability of constitutional provisions, the binding force of the convention act, the power of the legislature to amend that act, and the right of judicial, executive, or popular interference. Yet the questions of the need and method of submission of the amendments are so important in themselves that the authorities and precedents have been collected in one chapter.[5]

A final matter for consideration is the doctrine that the validity and effect of *all* constitutional changes depends, in the last analysis, upon "getting away with it"; in other words, on the people and the existing government accepting and acquiescing in the change. One chapter is devoted to this doctrine of acquiescence.[6]

The concluding chapter of the book is a summary of the answers to the questions presented and analyzed in this chapter.[7]

[1] Chapter XII, *infra*. [2] Chapter XIII, *infra*. [3] Chapter XIV, *infra*.
[4] Chapter XV, *infra*. [5] Chapter XVI, *infra*. [6] Chapter XVII, *infra*.
[7] Chapter XVIII, *infra*.

Chapter IV

POPULAR CONVENTIONS ARE LEGAL

The exact legal status of popular conventions (*i. e.* those conventions which are held in such an orderly manner as clearly to represent the popular will, and yet which are not expressly authorized by the existing constitution) is a very important matter to consider.

As we saw in Chapter II, any given method of amending the constitution of a State may be either (1) authorized by the constitution, or (2) permitted because not prohibited or because the constitution is powerless to prohibit, or (3) effectually prohibited.[1]

In which class does the popular convention fall? There are authorities for placing this sort of convention in each of the three classes.

It might seem at first glance that the convention method of amending the constitution could not possibly be legal except in the cases in which the State constitution expressly authorizes this method; and yet if this were so, the legality of at least one of the many such conventions which have been held throughout the United States, would certainly have been questioned before this.

We have already discussed historically a number of these instances.[2] Practically all the original constitutions of the thirteen colonies and Vermont were framed by popular conventions held by revolutionary governments without any further legal sanction than the will of the people as expressed through their electorate. Thus the Supreme Court of Virginia has said:

> The convention of Virginia had not the shadow of a legal, or constitutional form about it. It derived its existence and authority from a higher source; a power which can supersede all law, and

[1] See p. 26, *supra*.

[2] See Chapter I, *supra*.

annul the constitution itself — namely, the people, in their sovereign, unlimited, and unlimitable authority and capacity.[1]

Some of these constitutions, now recognized as valid, did not even have this sanction, and may therefore be regarded as merely factional.

The Constitution of the United States was superimposed upon the various State constitutions without any authority derived from any of them, and in direct violation of the provision of the Articles of Confederation.[2] Not only this, but it might legally have been adopted by the people of the various States, against the will of the various State governments, for the United States Supreme Court has said:

> The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.
>
> It has been said that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government does not remain to be settled in this country.[3]

Most of the secession conventions were popular, or even spontaneous. Many new States have been admitted to the Union under constitutions framed by the people without the authority of Congress, but Congress has ratified the illegal action in admitting them.

But the most important precedents for the purposes of the present discussion are States, which, although at peace under a duly established constitution which did not provide for the holding of a constitutional convention, nevertheless held conventions, the legality of which has not been questioned.

Jameson mentions twenty-seven such conventions held prior to 1887.[4]

[1] *Kamper* v. *Hawkins* (1793), 3 Va. 20, 74.

[2] Articles of Confederation, Art. XIII. See p. 49, *infra*.

[3] *McCulloch* v. *Maryland* (1819), 4 Wheat. 316, 404.

[4] *Jameson*, p. 210, n. 1. These conventions are as follows: Arkansas, 1874; Connecticut, 1818; Georgia, 1833 and 1839; Indiana, 1850; Louisiana, 1852

Dodd reports three more prior to 1908, to wit: Missouri in 1890, Louisiana in 1898, and Connecticut in 1902.[1] Since 1908, no popular conventions have been held: but Massachusetts is holding one in 1917, and Indiana is to hold one in 1918.

Jameson has the following to say on the legality of such conventions:

> The question of the legitimacy of Conventions thus called, I shall have occasion to consider in other parts of this work, when treating of the relations of legislatures to Conventions, and of the powers of the former resulting from those relations. I shall, therefore, here only observe, — 1. That, whenever a Constitution needs a general revision, a Convention is indispensably necessary; and if there is contained in the Constitution no provision for such a body, the calling of one is, in my judgment, directly within the scope of the ordinary legislative power; and, 2. That, were it not a proper exercise of legislative power, the usurpation has been so often committed with the general acquiescence, that it is now too late to question it as such. It must be laid down as among the established prerogatives of our General Assemblies, that, the Constitution being silent, whenever they deem it expedient, they may call Conventions to revise the fundamental law.[2]

Cooley and the Supreme Courts of Alabama, Louisiana, and North Dakota have also said that, in the absence of any prohibition in the State constitution, a convention may be lawfully held.[3]

Dodd says, following Jameson's line of thought:

> It has now become the established rule that where the constitution contains no provision for the calling of a convention, but has no provision expressly confining amendment to a particular method, the legislature may provide by law for the calling of a convention — that is, the enactment of such a law is within the power

and 1879; Massachusetts, 1853; Missouri, 1845, 1861, and 1865; New Jersey, 1844; New York, 1801, 1821, and 1846; North Carolina, 1835; Pennsylvania, 1837 and 1872; Rhode Island, 1824, 1832, 1841, and 1842; South Carolina, 1790; Tennessee, 1870; Texas, 1876; Virginia, 1829 and 1850. To this list there should probably be added at least the following: Massachusetts, 1820; Delaware, 1791 and 1852; Maryland, 1850.

[1] *Dodd*, p. 44.

[2] *Jameson*, pp. 210–211.

[3] *Cooley*, Const. Lims. (7 ed.), p. 56; *Collier* v. *Frierson* (1854), 24 Ala. 100, 108; *State* v. *Am. Sugar Co.* (1915), 137 La. 407, 413; *State* v. *Dahl* (1896), 6 N. D. 81.

of the legislature unless expressly forbidden, and is considered a regular exercise of legislative power.[1]

There are now twelve States which have no express constitutional provisions for the calling of conventions,[2] yet in eight of these, to wit, Arkansas, Connecticut, Louisiana, Mississippi, New Jersey, Pennsylvania, Texas, and Massachusetts, conventions have been held without any serious question being made as to their legality.

In Rhode Island the question of holding a convention was in 1853 twice submitted to the people, but further submission of the question has been effectively discouraged by an adverse opinion of the Supreme Court of that State.[3]

In Vermont, the special commission appointed in 1908 to present to the next legislature proposals of amendment to the constitution, although it proposed some changes in the amendment clause, nevertheless omitted to propose the convention method and yet suggested the possibility of holding a convention, thus showing that in its opinion express constitutional authorization would be unnecessary.[4]

The North Dakota Supreme Court has decided that the unauthorized convention would be lawful in that State.[5] This opinion has recently been reiterated by the Attorney-General of that State.[6]

Some doubt has been expressed as to whether the Indiana convention of 1850 furnishes a precedent for holding a convention under the present constitution there. Although the constitution then in force authorized the holding of conventions, it cannot be considered as authorizing the convention of 1850, for the conventions authorized by the constitution were to be held in 1828, 1840, 1852, etc. It would seem, however, that it is even a stronger disregard of the constitution to hold a convention whenever you please, under a constitution which says you may hold it in 1828, 1840, or 1852, than to hold a convention whenever you please, under a constitution which makes no mention of conventions; just as it would be more disobedient

[1] *Dodd*, p. 44.
[2] "Columbia Dig.," p. 21.
[3] *Opinion of Justices* (1883), 14 R. I. 649.
[4] Report of Jan. 6, 1910, pp. 3, 18.
[5] *State* v. *Dahl* (1896), 6 N. D. 81.
[6] N. D. House Journal, Jan. 26, 1917.

for a child to go down-town at 2:00, after obtaining permission to go at 3:00, than it would if his parents had never in all his life mentioned the subject of going down-town.

The Supreme Court of Indiana has asserted the legality of this convention.[1] The present constitution of Indiana contains *no* provision for the holding of conventions, yet one is about to be held there in 1918. But it is possible that this State, by striking out the convention provision from her constitution, manifested an intention never again to have a convention.[2]

Thus we see that in all of the twelve States whose constitutions are silent on the subject, except Rhode Island, and possibly Indiana, conventions can now be held.

Let us now consider the legal authorities which hold that this ought not to be so.

In several of the conventions of this class, the objection has been raised that they were illegitimate bodies because called without special authority in the respective constitutions.[3]

But as Jameson points out:

> The objection has commonly been urged by a minority, whose party or other interests inclined them to look with disfavor upon any change in the existing Constitution.[4]

In spite of the ulterior nature of their motives, however, their views have found the way into some textbooks and encyclopedias. The following is an example:

> The people must act by majorities, and in adopting the constitution the majority which does so has in effect prescribed the method by which the majority of the people may alter or amend it. An attempt by the majority to change the fundamental law in violation of the self-imposed restrictions is unconstitutional and revolutionary.[5]

And, as Jameson says, these objections gain some plausibility because of the existence of other methods of amending the respective constitutions.

There having been provided, it has been said, a mode in which constitutional changes might be effected, it was a violation of legal

[1] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 377–378.
[2] N. D. House Journal, Jan. 26, 1917.
[3] *Jameson*, p. 211, n. 3.
[4] *Jameson*, p. 211.
[5] 6 R. C. L., § 16.

analogy to infer a power to do substantially the same thing in another way, not authorized specifically by the Constitution, according to the well established rule, *expressio unius est exclusio alterius.*[1]

This was exactly the line of reasoning pursued by the only real legal authority against the validity of popular conventions, namely, the Supreme Court of Rhode Island. In an opinion rendered to the legislature in 1883, this court said:

> The ordinary rule is that where power is given to do a thing in a particular way, there the affirmative words, marking out the particular way, prohibit all other ways by implication, so that the particular way is the only way in which the power can be legally executed.
>
> The mode provided in the Constitution for the amendment thereof is the only mode in which it can be constitutionally amended. . . . *Expressio unius est exclusio alterius.* . . . One of the greatest of modern jurists, Chief Justice Shaw, was of the same way of thinking, and, conjointly with his associates, declared it to be his opinion that the Constitution of Massachusetts is constitutionally amendable only as therein provided. . . . Any law inconsistent with it is void, and, therefore, if the provision which it contains for its own amendment is exclusive, implying a prohibition of amendments in any other manner, then, of course, any act of the Assembly providing for a convention to amend the Constitution is unconstitutional and void.[2]

It will be noticed that this opinion apparently cites the Supreme Court of Massachusetts as being of like mind; yet a careful analysis of the language used by each court will show that the Providence Court does not so cite the Massachusetts Court, and that the Massachusetts Court did not so hold.

Before discussing the Massachusetts opinion itself, however, let us first take up another interpretation of it. Attorney-General Attwill of Massachusetts, in a legal opinion rendered to the legislature of 1917, squarely cites the Massachusetts Supreme Court as denying the validity of constitutional conventions in that State; but having unnecessarily cited the court as taking this extreme position, he then proceeds to overrule the court by himself taking the opposite extreme position of holding that the convention is not only legal, but is *expressly*

[1] *Jameson,* p. 211.

[2] 14 R. I. 649, 651.

authorized by the Massachusetts constitution. The material parts of his opinion are as follows:

> If the convention called to revise, alter or amend the Constitution pursuant to the vote of the people at the last annual election, under Gen. St. 1916, c. 98, is *authorized* by the provisions of our present Constitution, the position of a delegate to the convention is a "place under the authority of the Commonwealth."
>
> It has been asserted by many, and seems to have been the opinion of the justices of the Supreme Judicial Court in an opinion to the Legislature (reported in 6 Cush. 573) that article IX of the Amendments to the Constitution, providing a method for the adoption of specific and particular amendments to our Constitution, excluded by implication any authorization to the people to revise or change it by the convention method, and this view is not unsupported by other authority.[1]

He then quotes the various provisions of the Massachusetts constitution which recognize the right of the people to alter their form of government, and continues:

> This incontestable, unalienable and indefeasible right, which indeed is the essence of a republican form of government, cannot, in my judgment, be taken away except by plain and unmistakable language. That the people of one generation can deprive the people of a succeeding generation of their unalienable right to reform, alter or totally change their form of government, except in a restricted manner, when their protection, safety, prosperity and happiness require it, is repugnant to our theory of government, that the right to govern depends upon the consent of the governed. It seems to me a much more reasonable, if not a necessary, construction of the Constitution to hold that article IX of the Amendments provides only a manner of amending the constitution in addition to other methods that may be adopted by the people of changing their form of government, under the fundamental right *guaranteed* by the Bill of Rights, whenever "their protection, safety, prosperity, and happiness" require it. . . .
>
> Accordingly, I am of the opinion that the Convention will be held under the authority of the Commonwealth.[2]

Thus Attorney-General Attwill, the latest authority on the subject, goes to the opposite extreme from the Rhode Island

[1] 1917 Mass. House Doc. 1711, p. 2.
[2] 1917 Mass. House Doc. 1711, pp. 2–3.

Court, and goes further in sustaining the validity of popular conventions than any one before him. It would seem that he goes unnecessarily far.

Mr. Attwill's opinion would just as strongly support his conclusions (without, however, being as at present a rather forced construction of the constitution), if he had changed the italicized words (the italics are mine), by substituting for the word "authorized" the words "not effectually prohibited," [1] and for the word "guaranteed" the word "admitted." [2] Read over his language with these two words changed.

Thus we find the Rhode Island Court *apparently* citing the Massachusetts Court as deciding that popular conventions are unconstitutional and void; and we find Mr. Attwill *clearly* so citing the court, but attempting to overrule it.

Let us now take up the Massachusetts case itself, and see what it really decided. The opinion reads as follows:

Under and pursuant to the existing Constitution, there is no authority given by any reasonable construction or necessary implication, by which any specific and particular amendment or amendments of the Constitution can be made, in any other manner than that prescribed in the ninth article of the amendments adopted in 1820. Considering that previous to 1820 no mode was provided by the Constitution for its own amendment, that no other power for that purpose, than in the mode alluded to, is anywhere given in the Constitution, by implication or otherwise, and that the mode thereby provided appears manifestly to have been carefully considered, and the power of altering the Constitution thereby conferred to have been cautiously restrained and guarded, we think a strong implication arises against the existence of any other power, under the Constitution, for the same purposes.[3]

It will be noticed that all that this court decided was that "*under and pursuant to the existing constitution*" there is no authority for any other method of amendment than the one

[1] See p. 50, *infra*.

[2] The Bills of Rights cannot guarantee the self-evident rights asserted in the Declaration of Independence. As Jameson says: "If the truth in question is a self-evident truth, it is one which would obtain equally whether asserted in the Constitution . . . or not." *Jameson*, p. 236, *cf.* p. 53, *infra*. *Grinnell*, in II "Mass. Law Quarterly," p. 275, agrees with the author in the foregoing criticism.

[3] 6 Cush. 573, 574.

therein provided; in other words, that there exists no other method "*under the constitution.*"

The Rhode Island Court may have recognized this, for it cites the Massachusetts Court as holding that "the constitution of Massachusetts is *constitutionally* amendable only as therein provided." [1]

The restrictions placed on their opinion by the Massachusetts Justices will be better understood, if we glance at the opening words of that opinion, which are not usually quoted in this connection. The legislature had attempted to ascertain from the court whether amendments to the constitution could be made in any other manner than that prescribed in the constitution itself. The court avoided making a square answer to this question, although it was obvious that what the legislature wanted to know was whether they could legally call a convention to revise the constitution. The court opened its opinion with these significant words:

> The court do not understand, that it was the intention of the house of representatives, to request their opinion upon the natural right of the people in cases of great emergency, or upon the obvious failure of their existing constitution to accomplish the objects for which it was designed, to provide for the amendment or alteration of their fundamental laws; nor what would be the effect of any change and alteration of their constitution, made under such circumstances and sanctioned by the assent of the people. Such a view of the subject would involve the general question of natural rights, and the inherent and fundamental principles upon which civil society is founded, rather than any question upon the nature, construction, or operation of the existing constitution of the commonwealth, and the laws made under it. We presume, therefore, that the opinion requested applies to the existing constitution and laws of the commonwealth, and the rights and powers derived from and under them. Considering the questions in this light, etc., etc.[2]

Modern interpretations of this early Massachusetts opinion are as follows:

> It was assumed in the opinion, that the opinion requested applies to the existing constitution and laws of the Commonwealth and the rights and powers derived from and under them, and did

[1] 14 R. I. 649, 651.

[2] 6 Cush. 573, 574.

not depend upon the natural right of the people in cases of great emergency, or upon the obvious failure of their existing constitution to accomplish the objects for which it was designed, to provide for the amendment and alteration of their fundamental laws.[1]

It was contended that there was precedent for this opinion [*i. e.* the Rhode Island one] in an earlier opinion of the supreme court of Massachusetts. A careful study of the opinion of the Massachusetts court, however, shows that its opinion related to another matter.[2]

Thus the Massachusetts Court recognizes the existence of the fundamental principles considered in the second chapter of this book, and the existence of a higher authority than that of the constitution itself. And although the court speaks of this higher right as existing "in cases of great emergency, or upon the obvious failure of their existing constitution," [3] yet the right has not been limited to such cases in actual practice in Massachusetts.

There the legislature in 1851 and again in 1852, without the existence of any emergency, submitted to the voters the question of holding a constitutional convention. On its second submission, the question carried, and a convention was held.

Judge Morton of the Massachusetts Supreme Court, after joining with his colleagues in expressing the already cited opinion that the convention method was unauthorized by the constitution, ran for the convention of 1853 and took a seat in that body. In the course of one of the debates, he said of the statute which had called the convention into being that it was law because it had been sanctioned by the votes of the people.[4]

The Massachusetts and the Rhode Island courts were perhaps right in saying that the existence of one express method for amending the constitution, impliedly prohibits the use of any other method of amendment; but the Rhode Island Court stands alone in drawing from this the conclusion that popular conventions are, therefore, invalid. The trouble with the Rhode

[1] *Arthur Lord*, in II "Mass. Law Quarterly," 1, 24 (1916).

[2] *Holcombe*, "State Government," p. 95.

[3] The Rhode Island court, even, has recognized the right to hold unauthorized conventions "*ex necessitate.*" *Opinion of Justices* (1883), 14 R. I. 649, 653.

[4] Deb. Mass. Conv. of 1853, Vol. I, p. 76.

Island Court was that it could not conceive of anything not constitutional being valid.[1]

If the express authorization of the *legislative* method of amendment impliedly prohibits the convention method, *a fortiori* would the express authorization of the *convention* method impliedly prohibit the holding of a convention in ways not provided for. Yet conventions have been successfully held in Georgia in 1788, in Indiana in 1850, in Delaware in 1852, in Florida in 1865, and in Pennsylvania in 1789, in direct violation of such provisions.[2]

The Supreme Court of Indiana has recently asserted the legality of such conventions:

> It may be answered, that the General Assembly, in the action taken in those years, made no attempt to assume the power, under the general grant of authority to legislate, to formulate a new Constitution, or to revise the existing one. It merely asked the people to express their will in relation to calling a convention to revise or amend the Constitution, to be expressed through the ballot, and when it was expressed it was a warrant and a command which the legislative agency carried out as given. Under such circumstances, the calling of a convention, as Jameson in his work shows, is in accordance with sound political principles, and a well-recognized and established practice. The rule thus established in American constitutional law by the evolution of the constitutional convention from the two revolutionary conventions of England in 1666 [*sic*] and 1689, he shows is applicable to states like ours, having a limited provision for amendment, through the initiative of the legislature, but no provision for a convention for a general revision.[3]

Compare:

> The decided weight of authority and the more numerous precedents are arrayed on the side of the doctrine which supports the existence of this inherent legislative power to call a constitutional convention, notwithstanding the fact that the instrument itself points out how it may be amended.[4]

Not only have conventions been successfully held without question in States whose constitutions either are entirely silent

[1] On extraconstitutional validity, see p. 26, *supra.*
[2] For descriptions of these conventions, see pp. 51–52, *infra.*
[3] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 377–378.
[4] *State* v. *Dahl* (1896), 6 N. D. 81, 87. Op. Atty. Gen., in N. D. House Journal, Jan. 26, 1917.

as to methods of amendment, or impliedly prohibit this method by naming another; but they have been even held in States whose constitutions *expressly* prohibit them.

In Delaware, where the constitution of 1776 provided that the constitution should not be "altered, changed or diminished, without the consent of five parts in seven of the assembly, and seven members of the legislative council," the legislature of that State in 1791 called a constitutional convention in spite of the provision that the constitution should be altered in only one way.[1]

So also the Maryland legislature called the convention of 1850, although the constitution of 1776 specifically provided that the constitution should be altered only by a bill passed by two successive general assemblies of that State.[2] The Georgia constitution of 1798 contained a provision with respect to amendment similar to that in the Maryland constitution of 1776, but in this State also conventions were nevertheless held, namely, in the years 1833 and 1839.[3]

To these four examples of the legal holding of a constitutional convention, although expressly prohibited by the constitution, may be added the convention which framed the Constitution of the United States, as this convention was expressly prohibited by the following language in the Articles of Confederation:

> The articles of this Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislature of every State.[4]

The Rhode Island Supreme Court said in the already-cited opinion that "an implied is as effectual as an express prohibition.[5] The court might well have said: "An express prohibition is as *in*effectual as an implied."

These five examples apparently completely dispose of Mr. Attwill's theory that popular conventions derive their validity through being expressly authorized by the constitution. Would not a better view be that the various Bills of Rights admit the existence of a higher power than the constitution, to wit, the

[1] *Jameson*, pp. 214–215.
[2] *Jameson*, pp. 215–216.
[3] *Dodd*, p. 44, n. 28.
[4] Art. XIII.
[5] *Opinion of Justices* (1883), 14 R. I. 649, 654.

will of the people; rather than that they graciously grant to succeeding generations a privilege which it would be in their power to withhold.

The Supreme Court of Massachusetts has recently refused to pass on the question of whether popular conventions are legal, and if so, whether they are held under the constitution; saying merely that *if* they are held under the constitution, such and such is the law. They say:

> The validity and the powers of this convention are not necessarily involved in these questions. . . . If the convention to revise and alter the Constitution is held under the Constitution, it is because the people of the Commonwealth have under the Constitution the right to alter their frame of government according to orderly methods as provided by law, and through the medium of an act of the Legislature.[1]

But even if these provisions in Bills of Rights may be considered as expressly granting such a power to the people, they may be regarded as in much the same position as the man who was trying to show his authority over his dog by ordering him to sit up and beg. The dog refused to obey. Finally the man, still determined to show his authority, cried out: "Well, then, lie down! I *will* be obeyed!" If the constitution really does authorize the convention, this authorization is immaterial; for the constitution, as we have seen, would have no power to prohibit it.

This view may be carried still further to apply to even those constitutions which *expressly* authorize the holding of a convention. If these constitutions, too, would have no power to prohibit the convention, their authorization of it is at the most the mere providing of a means for the expression of a superior popular right.[2] Most of the constitutions concede the right of the people to be at least consulted before a convention is held.

Thus the popular nature of even expressly authorized conventions is now generally recognized in practice, if not in theory. That the constitution is merely helping out a superior right, rather than granting a privilege to the people, is shown by the

[1] 1917 Mass. Senate Doc., 512.

[2] A similar argument was successfully used in a contested election case in the Illinois convention of 1862. See p. 185, *infra*.

fact that the people may accept so much of the constitutional assistance as they wish, and may disregard the constitutional limitations. Delaware furnishes us an example of this.

The Delaware constitution of 1831 provided that no constitutional convention should be called except by authority of the people, and that the only way to obtain this authority would be to take a vote on the third Tuesday of May of any year and obtain the affirmative vote "of a majority of all the citizens of the state having a right to vote for representatives." Acting under this provision of the constitution, the general assembly in 1851 passed an act to take the vote of the people. At the election held under this act a majority of the votes cast were in favor of a convention, but the number was not sufficient to constitute a majority of all citizens who had a right to vote for representatives. Nevertheless the legislature declared that the question had carried and passed another act calling a convention.[1]

If the constitution of Delaware could effectively limit the right of the people to call a convention, then this convention was illegal and void. If, on the other hand, the people can lawfully disregard the constitution even in cases where the constitution provides for a convention, then this convention was valid. The question arose in the convention itself, and the majority opinion of the delegates was that the clause of the constitution was merely recommendatory, not peremptory.[2]

Similarly with respect to the Indiana convention of 1850. The Indiana constitution in 1816, then in force, authorized the calling of a convention every twelfth year, but a convention was held within one of the twelve-year periods, and was never questioned.[3]

The Pennsylvania convention of 1789 also belongs in this class. The constitution then in force in that State provided that it should be amended only in a manner therein directed, namely, by a convention called by the council of censors. An attempt was twice made to obtain a majority of the censors in favor of calling a convention, but both attempts failed. Finally, just prior to the sitting of the next council, the general assembly took the matter into its own hands by obtaining

[1] *Jameson*, p. 209, n. 1.
[2] *Jameson*, p. 209, n. 1.
[3] *Jameson*, p. 210, n. 1.

a popular expression of opinion on the expediency of holding a convention. This was done by an informal canvass during a recess of the legislature. The result satisfied the members that the people wished a convention, and one was accordingly called, which framed and established the constitution of 1790.[1]

Similarly with respect to the series of Georgia conventions in 1788–1789. The constitution of 1777, then in force, authorized a convention upon the petition of a majority of the voters of a majority of the counties. The legislature disregarded this provision and appointed a convention in 1788 to draft a new constitution. The people elected delegates to a convention in the fall of that year which modified the constitution drafted by the first convention and submitted it to a third convention elected by the people in 1789.[2] Yet Jameson refers to the "regularity" of this procedure.[3]

Similarly with respect to the Florida convention of 1865. The constitution of 1838 of that State provided that "no convention of the people shall be called, unless by the concurrence of two thirds of each House of the General Assembly." Yet the Florida constitution of 1865 was drawn by a convention called by the Governor, and was sustained by the Supreme Court of the State.[4]

These five examples would seem to establish the principle that conventions, even when expressly authorized by the constitution, are nevertheless popular in their nature, and have pretty much the same standing as though the constitution had been silent on the subject. In other words, constitutional provisions permitting the holding of conventions are, like legislative acts on the subject, merely recommendatory to the people.

Thus we come back to the fact that all conventions are valid if called by the people speaking through the electorate at a regular election. This is true, regardless of whether the constitution attempts to prohibit or to authorize them, or is merely silent on the subject. Their validity rests not upon constitutional provision nor upon legislative act, but upon the fundamental sovereignty of the people themselves.

[1] *Jameson*, pp. 213–214.
[2] *Dodd*, p. 42.
[3] *Jameson*, p. 135.
[4] *Bradford* v. *Shine* (1871), 13 Fla. 393, 415.

Judge Jameson makes an interesting attempt to reconcile his theory of legislative supremacy with the fundamental principles from which he, as an able jurist, is unable to escape. It may prove instructive to analyze his views on this point.

He says as follows:

Revolution can never be resorted to under the Federal Constitution, or under any other Constitution, *legally;* but, when the evils under which a commonwealth languishes, become so great as to make revolution, including insurrection and rebellion, less intolerable than an endurance of those evils, it will be justifiable, although the Federal relations of that commonwealth may be such as to array against her forces vastly greater than they would be were she and the other States independent and isolated communities. The right of revolution stands not upon the letter of any law, but upon the necessity of self-preservation, and is just as perfect in the single man, or in the petty State, as in the most numerous and powerful empire in the world. This right, the founders of our system were careful to preserve, not as a right *under*, but, when necessity demanded its exercise, *over* our Constitutions, State and Federal.

. . . . . .

Thus, the Declaration of Independence affirms, "that whenever any form of government becomes destructive" of the ends of government, "it is the right of the people to alter or abolish it, and to institute a 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."

Not only so, but it classes this affirmation among *the self-evident truths:* "We hold these truths to be self-evident."

Now, no truth can be self-evident, which becomes evident only under particular conditions, as when it is deducible only from the construction of legal instruments, or from the provisions of some positive code. It must be a truth independently of such conditions, as would be indispensable to give it rank as a *legal* truth. If the truth in question is a self-evident truth, it is one which would obtain equally whether asserted in the Constitution and laws or not.

. . . . . .

The second class of documents consists in the Bills of Rights of a large number of our Constitutions, containing broad general assertions of the right of a people to alter or abolish their form of government, *at any time, and in such manner as they may deem expedient.* The peculiarity of these documents is, that they *seem* to assert

the right in question as a *legal* right; at least, they furnish a plausible argument for those who are willing to have it believed that the right is a *legal one;* when, in fact, it is a revolutionary right. The framers of those Constitutions generally inserted in them provisions for their own amendment. Had nothing further been said, it might have been inferred, that no other mode of securing needed changes was under any circumstances to be pursued, but that prescribed in those instruments. Such, however, was not the intention of their framers. They meant to leave to the people, besides, the great right of revolution, formally and solemnly asserted in the Declaration of Independence. They, therefore, affirmed it to be a right of the people to alter or abolish their Constitutions, *in any manner whatever;* that is, *first, legally,* in the mode pointed out in their Constitutions, or by the customary law of the land; and *secondly, illegally,* that is, for sufficient causes, by revolutionary force.[1]

Judge Jameson lays down these fundamental principles absolutely correctly. He recognizes that a change of government under the fundamental right of the people is a right *over* our constitutions rather than a right *under* them. In other words, it is an extraconstitutional or supraconstitutional right, rather than a constitutional right. He recognizes that the self-evident truths laid down by the Declaration of Independence and the Bills of Rights would obtain equally, whether asserted in the constitution or not. In other words, constitutions do not guarantee these rights; they merely admit them.

Where he errs is when he tries to apply these principles to his preconceived theory. He divides conventions into merely two classes, *i. e.* legal and revolutionary. This classification would fit very nicely were it not for the existence of the four cases already referred to, in which conventions were held in the very teeth of prohibitory provisions in the existing constitutions. Jameson himself refers to three of these conventions, and admits that they were wholly illegitimate in their origin. He goes on to say:

It is obvious, that to justify such proceedings, on legal grounds, would be to take away from the fundamental law that characteristic quality by which it is the law of laws — the supreme law of

[1] *Jameson,* pp. 235–236.

the land. If it be not the supreme law, for all the purposes of a Constitution, in the American sense, it might as well be a piece of blank paper. . . .

There is in my judgment, no way in which the action of those bodies, in those cases, can be justified, except by affirming the legal right of the inhabitants of a given territory, organized as a body politic, to meet at will, as individuals, without the authority of law, and, on their own claim that they are the people of the State, to dictate to the government such changes in its laws, Constitution, or policy, as they may deem desirable.[1]

Thus Jameson has to classify these conventions as merely spontaneous, although forced to admit at least their *de facto* validity. Is it not simpler to classify these conventions, together with conventions held in the absence of any mention in the constitutions, as in a class standing halfway between constitutional cases and cases in which the convention requires armed force for its assistance? In other words, the following out of the fundamental principles, as laid down by Jameson himself, forces us to the classification adopted at the opening of Chapter III, namely, authorized conventions, popular conventions, and spontaneous conventions.

Judge Walker, in the latest edition of his monumental work on American law, has this to say relative to popular sovereignty:

This indeed is self-evident, since all power comes from the people. They have created the government, and may destroy it, when it ceases to satisfy them. Delegated power, as above stated, is not irrevocable. . . . But it is needless to enlarge upon the general right of revolution. It must of necessity exist, whenever a majority desire it, even though the existing government should be in terms made perpetual, as some of the provisions in our constitutions are declared to be.[2]

Judge Jameson's description of legitimate revolution, quoted a little way back,[3] fits exactly the great class of conventions which the present author has denominated "popular," and which Jameson himself admits are not authorized by any constitution. Following his definition, we may assume that popular conventions are extra- or supra-constitutional.

[1] *Jameson*, p. 217.
[2] *Walker*, American Law (11 ed.), p. 231.
[3] *Jameson*, p. 235. See pp. 53–54, *supra*.

As he himself punningly puts it, the right of the people to change their government is not a right *under* the constitution, but is rather a right *over* the constitution.[1]

Or to quote from the Supreme Court of Virginia in an early decision:

> The convention of Virginia had not the shadow of a legal, or constitutional form about it. It derived its existence and authority from a higher source; a power which can supersede all law, and annul the constitution itself—namely, the people, in their sovereign, unlimited, and unlimitable authority and capacity.[2]

Or from the Supreme Court of New York:

> Neither the calling of a convention, nor the convention itself is a proceeding under the constitution. It is over and beyond the constitution.[3]

It is true, however, that the Rhode Island Supreme Court and Dodd can be cited in opposition to this idea of a sanction above and superior to the constitution.

Dodd says that the convention is in no sense an extraconstitutional body.[4] But that statement may very well be true with respect to conventions in his State, Maryland, where the constitution expressly authorizes them; without, however, being at all true with respect to popular conventions.

The Rhode Island Court says:

> Finally, it has been contended that there is a great unwritten common law of the states, which existed before the Constitution, and which the Constitution was powerless to modify or abolish, under which the people have the right, whenever invited by the General Assembly, and as some maintain, without any invitation, to alter and amend their constitutions. If there be any such law, for there is no record of it, or of any legislation or custom in this State recognizing it, then it is, in our opinion, rather a law, if law it can be called, of revolutionary than of constitutional change. Our Constitution is, as already stated, by its own terms, the supreme law of the State. We know of no law, except the Constitution and laws of the United States, which is paramount to it.[5]

[1] *Jameson*, p. 235.
[2] *Kamper* v. *Hawkins* (1793), 3 Va. 20, 74.
[3] Journal, 69th N. Y. Assembly, p. 919.
[4] *Dodd*, p. 72.
[5] *Opinion of Justices* (1883), 14 R. I. 649, 654.

But we must take into consideration the fact that the court were undoubtedly influenced by a recollection of Dorr's Rebellion, and so denied not only the existence of any such thing as extraconstitutional law, but also the validity of the popular convention, which even Dodd admits.

This is also admitted by the Declaration of Independence and practically all of the various American Bills of Rights.[1]

Thus we may conclude that although popular conventions are not constitutional, it does not necessarily follow from this that they are void, although the Rhode Island Supreme Court so contends.[2] They are really authorized by a power above the constitution, to wit, the sovereignty of the people, and hence are supraconstitutional and perfectly valid.[3]

[1] See pp. 12–14, *supra*.

[2] *Opinion of Justices* (1883), 14 R. I. 649.

[3] Frank W. Grinnell, one of the ablest of the ultra-conservative members of the Massachusetts bar, has an article in No. 4 of Vol. II of the "Massachusetts Law Quarterly" (pp. 274–280) (appearing too late to quote in this book), in which article he too asserts the extraconstitutionality of conventions which are not expressly mentioned in the constitution. On the general subject of this chapter, see particularly "Methods of Changing the Constitutions of the States, Especially that of Rhode Island," by Charles S. Bradley, ex-Chief Justice of the Supreme Court of Rhode Island. Boston, 1885.

Chapter V

WHO CALLS THE CONVENTION?

Whether the legislature has the power to amend the act by which a convention is called is an important question to be treated later in this book. It depends in part upon a consideration of whether it is the legislature or the people who originally enacted that act. In fact, the whole matter of the status of the convention and of its members depends to some extent upon a solution of this problem, to which this chapter will accordingly be devoted.

First let us eliminate certain types of convention to which this discussion does not properly relate. Since the introduction of the initiative and referendum in the West and Middle West, not only may constitutional amendments be made in twelve States by an initiative petition without the interposition of either the legislature or a convention;[1] but also in six additional States, the people can initiate and adopt a measure providing for the holding of a convention; and may, by referendum, veto any statutes by which the legislature attempts to interfere with a convention.[2] In all of these States except Arkansas, Maine, and North Dakota, the constitutions provide that legislative acts for the calling of a convention must be referred to the people;[3] and in these three under the referendum, the people can compel the reference of this question to them. Thus in these States the convention is entirely, absolutely, and unquestionably within the control of the people, and hence owes nothing of its authority to the legislature.

So, too, if we adopt the theory that conventions which are

[1] These States are Arizona, Arkansas, California, Colorado, Michigan, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, and Oregon. "Columbia Digest," p. 771.

[2] These States are Idaho, Maine, Montana, South Dakota, Utah, and Washington. "Columbia Digest," p. 771.

[3] "Columbia Digest," p. 21.

expressly authorized by the constitution derive their authority from that document rather than from the people, we may disregard such cases for the purposes of this discussion.

Most of the constitutions which contain provisions for the calling of conventions now provide that they be called after the legislature has submitted the question of a convention to the people and has obtained their approval, such a popular vote to be taken whenever the legislatures themselves may think proper. The first provisions of this character were those contained in the Delaware constitution of 1792,[1] the Tennessee constitution of 1796,[2] the Kentucky constitution of 1799,[3] and the Ohio constitution of 1802.[4] The Kentucky provision of 1799, which was substantially repeated in the constitution of 1850, threw great obstacles in the way of calling a convention, by requiring two successive popular votes; but this plan was not followed by other States except in the one case of the Louisiana constitution of 1812.[5] The Kentucky constitution of 1891 discarded the requirement, but does require the vote of two successive general assemblies to propose the question to the people.[6] The plan of permitting the legislature at its discretion to submit to the people the question of calling a constitutional convention, has for many years been the most popular one, and is now in force by the constitutions of twenty-five States.[7]

Some States do not even leave it to the discretion of the legislature as to when the people shall vote on the question of calling a convention, but specifically provide by their constitutions that popular votes shall be taken at definite intervals. There are now six States which require the periodical submission of this question.[8] The constitutions of four of these permit the legislature to submit the question to the people at other than the regular periodical times.[9]

[1] *Thorpe*, Vol. 1, p. 580.
[2] *Thorpe*, Vol. 6, p. 3421.
[3] *Thorpe*, Vol. 3, p. 1288.
[4] *Thorpe*, Vol. 5, p. 2908.
[5] *Thorpe*, Vol. 5, p. 1390.
[6] *Thorpe*, Vol. 5, p. 1355.
[7] These States are Alabama, California, Colorado, Delaware, Florida, Idaho, Illinois, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. "Columbia Digest," pp. 22–23.
[8] These States are: Maryland, New Hampshire, Iowa, Michigan, New York, and Ohio. "Columbia Digest," p. 22.
[9] Iowa, Michigan, New York, and Ohio. "Columbia Digest," p. 22.

The Oklahoma constitution requires the legislature to submit the question at least once in every twenty years, leaving the particular time to the legislature's discretion.[1]

Thus the practice of obtaining the popular approval for the calling of a convention may be said to have become almost the settled rule. Thirty-two State constitutions require such a popular expression of approval, and even where it has not been expressly required, such a popular vote has been taken in a majority of cases in recent years.[2]

Maine and Georgia are the only States whose constitutions now provide for the holding of a constitutional convention, without also containing a provision for first obtaining the approval of the people.[3]

In the case of these States it may be argued that the convention derives its authority from the legislature alone; although in the case of Maine it may well be argued that the convention derives its authority from popular acquiescence, as manifested in the failure of the people to circulate a referendum petition; and in both cases it might possibly be argued (on the analogy of the Pennsylvania decision to be discussed a little later in this chapter) that the people ratify the legislative statute by participating in the election of delegates under it.

In the case of the thirty-two State constitutions which require a popular vote in advance of calling the convention, it may be contended that the people call the convention under a permission graciously conferred on them by the constitution, but the Delaware, Indiana, Pennsylvania, Georgia, and Florida cases discussed in the last chapter,[4] in which cases valid conventions were held in open disregard of constitutional provisions relative to the manner of holding conventions, lend weight to the theory that a convention authorized by the constitution stands upon no different footing with respect to the source of its authority, than a convention which is not so authorized, or than one which is even prohibited.

As we saw, when discussing fundamental principles in Chapter II, if conventions are beyond the jurisdiction of the constitution, it matters not whether the constitution attempts to pro-

[1] "Columbia Digest," p. 22.
[2] See *infra*, p. 66.
[3] "Columbia Digest," p. 21.
[4] *Supra*, pp. 51–52.

hibit or to authorize them, or is silent on the subject; *all* such conventions are supraconstitutional.[1]

Nevertheless, the New Hampshire Supreme Court has said that where a convention is authorized by the constitution, it becomes an ordinary legislative matter to call the convention and arrange the details.[2] The question of who calls the convention was not, however, before the court.

This brings us to that class of conventions, the discussion of which is the chief object of this book, namely, conventions held under the authority of supraconstitutional fundamental law.

When the legislators, acting as the representatives of the people, call such a convention without first submitting the question to their constituents, it is clear that in the absence of any other controlling circumstance, the convention owes its existence to the legislature. But there is some doubt as to whether the legislature can legally call a convention without obtaining the popular permission.[3]

When the legislature submits to the people the question of holding a convention, there is much disputed authority and precedent as to whether the convention act is enacted in whole, in part, or at all, by the people. There are two classes of cases for us to consider: (1) those in which the convention act is passed prior to the submission of the question to the people, and (2) those in which the people first express their opinion and then the legislature calls the convention. Let us first consider the former class of cases.

This question is to some extent wrapped up in the question of the power of the legislature to amend the convention act, to be discussed in a later chapter,[4] and the two questions have been more or less confused by the courts and textbook writers. The author will endeavor, however, to disentangle them.

We saw, in the preceding chapter, that Jameson justified the legality of popular conventions on the ground that "the calling of one is, in my judgment, directly within the scope of the ordinary legislative power."[5]

[1] *Supra*, p. 26.
[2] *Opinion of Justices* (1911), 76 N. H. 586, 587.
[3] See pp. 66–68, *infra*.
[4] See Chapter VIII, *infra*.
[5] *Supra*, p. 40. *Jameson*, p. 211.

And Dodd follows him with, "The enactment of such a law . . . is considered a regular exercise of legislative power."[1] Dodd has somewhat modified his views since he wrote the last quotation, as is shown by the fact that in a more recent article of his he omits to make any such statement.[2] Jameson's idea raises at once the question as to whether the calling of a convention is within the powers of a legislature at all; for if not, that settles the question of the authorship of the convention act. This is exactly the line of reasoning pursued by the New York Supreme Court, which said:

The legislature is not supreme. It is only one of the instruments of that absolute sovereignty which resides in the whole body of the people. Like other departments of the government, it acts under a delegation of powers; and cannot rightfully go beyond the limits which have been assigned to it. This delegation of powers has been made by a fundamental law, which no one department of the government, nor all the departments united, have authority to change. That can only be done by the people themselves. A power has been given to the legislature to propose amendments to the Constitution, which, when approved and ratified by the people, become a part of the fundamental law. But no power has been delegated to the legislature to call a convention to revise the Constitution. That is a measure which must come from, and be the act of the people themselves.[3]

Compare Thompson, speaking in the Virginia convention of 1829:

No one ever supposed that the Acts to take the sense of the people, and to organize a Convention, were Acts of ordinary legislation; or, properly speaking, Acts of legislation at all, as little so as an election by that body of any officer. . . . The truth is, the action of the ordinary legislature on this subject . . . is not of the character of ordinary legislation. It is in the nature of a resolve or ordinance adopted by the agents of the people, not in their legislative character, for the purpose of collecting and ascertaining the public will, both as to the call and organization of a Convention and upon the ratification or rejection of the work of a Convention.

[1] *Dodd*, p. 44.
[2] I "Cyc. American Government," 427.
[3] Journal, 69th N. Y. Assembly, p. 919. This opinion was approved in full by a committee headed by Elihu Root, in a report to the New York Convention of 1894. Rev. Record, Vol. I, pp. 258–260, 270.

It being a matter of interest to know what the acts were, if not acts of legislation, the speaker thus explained his views on that subject:

The Acts spoken of were called for by their constituents, resulted from the necessity of the case, and were justified by that supreme and paramount law, the *salus populi*. In short, they supplied the only mode by which the original right of the people to meet in full and free Convention to reform, alter, or abolish their form of government, could be exercised without jeopardizing the peace, tranquillity, and harmony of the State.[1]

And compare the following from the Supreme Courts of South Carolina, Michigan, North Dakota, Massachusetts, and Indiana respectively:

The legislature in passing the act for calling together the convention, were not acting in their legislative capacity. The act has no relation to the general powers of legislation.[2]

Nowhere in article 4, entitled "Legislative Department," is any reference made expressly or impliedly to amendments or revisions of the Constitution. Only by section 2, article 20, has the legislature any power to act upon a revision of the Constitution. The power there conferred is ministerial rather than legislative. But the name is immaterial. It does not require the approval of the governor to make it valid. It is made the sole agency by which the people may determine (1) whether they desire a revision, and (2) if they decide that they do, to provide for the election of delegates.[3]

That it did not take the form of an ordinary law is too clear for controversy. The joint resolution has no title. Its enacting clause is not couched in the language prescribed by the constitution to be employed in the enactment of ordinary laws; nor was it ever submitted to the governor for approval. Whenever it is necessary that the expression of sovereign will should take the form of ordinary legislation, these requirements must be strictly observed. But, in declaring its purpose that a specific proposition should be submitted to the people for their approval or disapproval, the legislature is not discharging the ordinary function of enacting laws.[4]

[1] *Jameson*, pp. 579–580.
[2] *McCready* v. *Hunt* (1834), 2 Hill Law (S. C.) 1, 271.
[3] *Carton* v. *Secy. of State* (1908), 151 Mich. 337, 341.
[4] *State* v. *Dahl* (1896), 6 N. D. 81, 82.

The Constitution has vested no authority in the legislature *in its ordinary action* to provide by law for submitting to the people the expediency of calling a Convention of delegates for the purpose of revising or altering the Constitution of the Commonwealth.[1]

In assuming to legislate in relation to structural changes in the government, the legislature is not acting within the power it takes under the general grant of authority to enact, alter and repeal laws under and pursuant to the Constitution.[2]

Compare Dodd: "The process of amendment is a process of superior legislation."[3]

Now, if a convention act is not ordinary legislation, does it not therefore verge on being a "fundamental law"? Jameson has himself pointed out that:

Of the power of the people to enact fundamental laws there is not only no doubt, but it is clear that no other body has power to enact them, except by express warrant for the particular occasion.[4]

And compare Braxton:

The *People alone* have the power of enacting or changing the Fundamental Law; . . . from them alone does the Convention derive its powers in that regard.[5]

These quotations ought to be sufficient to differentiate the passage of *ordinary* laws from the passage of laws which verge on the fundamental.

Another point which bears strongly on this is that although the legislature of Massachusetts, prior to the adoption of the XLII Amendment, could *not* lawfully refer to a popular vote any question within the legislature's own legislative powers,[6] yet the legislature *could* lawfully refer to a popular vote, a statute calling a constitutional convention, thus showing that such a statute is *not* within the legislative powers of the *legislature*, but *is* within the legislative powers of the *electorate*.[7]

[1] *Opinion of Justices* (1833), 6 Cush. 573, 574–575.
[2] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 357.
[3] *Dodd*, p. 232.
[4] *Jameson*, p. 395, n. 1.
[5] *Braxton*, VII "Va. Law Reg.," 100, 101.
[6] *Opinion of Justices* (1894), 160 Mass. 586, 589. See also *Jameson*, pp. 420–421, and n. 1.
[7] This was successfully done in 1819 and 1852.

A still further consideration is as follows: If it be the legislature which enacts the convention act and thus calls the convention into being, then the legislature can confer on another body (*i. e.* the convention) a power (*i. e.* to propose a constitution) which the legislature itself does not possess;[1] which is absurd.[2]

The most recent court decision on the subject might appear, from the following language, to agree with Jameson's original idea that a convention act is ordinary legislation:

> In the absence of any provision in the Constitution on the subject it seems that the legislature alone can give validity to a convention. See 6 R. C. L., § 17, p. 27.[3]

But when we look up the court's reference to R. C. L., a different face is put on the matter, for R. C. L. says:

> In the absence of any provision in the constitution on the subject, it seems that the legislature alone can give legality to a convention. Where a change in the constitution is made under proceedings initiated by the legislature it is not because the legislature possesses any inherent power to change the existing constitution through a convention, but because it is the only means through which an authorized consent of the whole people, the entire state, can be lawfully obtained.[4]

And later, in the court decision itself, it is held that the particular convention referred to was the creature of the people.[5]

Thus, regardless of whether the legislature may all by itself legally call a convention, it is clear that the weight of authority is against the view that the calling of a convention is among the regular legislative powers.

Judge Cooley does not ascribe to the regular legislative powers the right to institute convention proceedings, but rather ascribes this right to the fact that some department must start the ball rolling and that the legislature is the best fitted for this, being nearest the people.[6]

[1] See p. 85, *infra*.
[2] Senator Niles, in *Jameson*, p. 196.
[3] *State* v. *American Sugar Co.* (1915), 137 La. 407, 413.
[4] 6 R. C. L., § 17, p. 27.
[5] *State* v. *American Sugar Co.* (1915), 137 La. 407, 415.
[6] *Cooley*, Const. Lims. (7 ed.), pp. 56, 59–60.

The Massachusetts Supreme Court in its recent opinion says that if the convention is held under the constitution (which we have seen it is not), the people have a right to proceed through the medium of an act of the legislature. But they do not state whether or not this act becomes the act of the people.[1]

It is undoubted that conventions have in the past been called by legislatures without advance permission from the voters, but the growing tendency has been to first take a popular vote.[2]

Thus Jameson, although he is the chief exponent of the doctrine of absolute legislative supremacy, says:

> The intervention of the legislature is necessary to give a legal starting-point to a Convention, and to hedge it about by such restraints as shall ensure obedience to the law; but as a Convention ought to be called only when demanded by the public necessities, and then to be as nearly as possible the act of the sovereign body itself, it would seem proper to leave the matter to the decision of the electoral body, which stands nearest to the sovereign, and best represents its opinion. Such seems to be the prevailing sentiment in most of the States.[3]

And in New York in 1820 a convention act was vetoed for the following reasons:

> It is worthy, therefore, of great consideration, and may well be doubted, whether it belongs to the ordinary legislature, chosen only to make laws in pursuance of the provisions of the existing Constitution, to call a Convention in the first instance, to revise, alter, and perhaps remodel the whole fabric of the government, and

[1] 1917 Mass. Senate Doc. 512.

[2] *Dodd*, pp. 46–47, and n. 36; *Jameson*, p. 210, and n. 1. Jameson's note does not differentiate between conventions called with, and those called without, popular permission. Dodd's note is inaccurate. Of the conventions cited by them, the author has only been able to find that the following were called by the legislature acting alone: New York, 1801; Connecticut, 1818; Rhode Island, 1824, 1834, 1841 and 1842; New Jersey, 1844; North Carolina, 1876; Louisiana, 1879; Mississippi, 1890; and a majority of the secession and reconstruction conventions. The New York convention came so shortly after the Revolution as to be almost a War convention. Those of Connecticut and Rhode Island were called by charter legislatures with unlimited powers. The New Jersey constitution of 1776 was amendable by the legislature. The rest of the conventions were Southern, doubtless based on Civil War precedents.

[3] *Jameson*, p. 111.

before they have received a legitimate and full expression of the will of the people that such changes should be made.[1]

Compare the following:

That in the opinion of this Convention, without intending to call in question the motives of the members of the Legislature, by the call of this Convention, the Legislature, at its late extraordinary session, was unauthorized by the people; and that said act, in peremptorily ordering a Convention of the people of the State, without first submitting to them the question whether there should be a Convention or no Convention, was an unwarranted assumption of power by the Legislature; at war with the spirit of republican institutions, an encroachment upon the rights of the people, and can never be rightfully invoked as a precedent.[2]

. . . the agents of the people, who have not been selected on that particular issue, should not take upon themselves the responsibility of burdening the people with the expense of such a movement, without first submitting to them the question of whether they desire such a convention to be called. The argument against the taking of the initiative by the legislature in such cases, without first ascertaining public sentiment on the question, is so strong, and lies so plainly on the surface, that in many states the constitution, in terms, requires the submission of the proposition to popular vote, and a majority vote in its favor, before the legislature can legally summon the people to meet in convention to revise their organic law.[3]

The coming Indiana convention of 1918 sharply diverges from this tendency, for the legislature passed the convention act, not only without popular permission, but actually in the teeth of a popular refusal.[4] The legislature of 1913 submitted to the electorate the question of calling a convention, and the electorate overwhelmingly voted in the negative. Nevertheless, the legislature went right ahead, just as though they had obtained the authority from a favorable vote,[5] and passed the convention act of 1917. But the courts of Indiana are prone

[1] *Jameson*, p. 670.
[2] Journal, Miss. Conv. 1851, pp. 48 and 50.
[3] *State* v. *Dahl* (1896), 6 N. D. 81, 86.
[4] The only precedent for such action is the Rhode Island convention of 1824. But the people repudiated the work of this convention, two to one. *Mowry*, "The Dorr War," pp. 30–33.
[5] See pp. 73–74, *infra*.

to upset any legislative encroachments upon the process of altering the fundamental law;[1] and so, until we see whether or not the courts interfere with this convention, it would be best not to regard it as a precedent.

But see a 1915 court opinion, which cites Cooley:

> None of the Constitutions of the state of Louisiana contains provisions relative to conventions of the people, except the Constitution of 1812.
>
> This silence of the organic law on the subject-matter leaves the question of calling such convention to the representatives of the people in legislative session convened.[2]

Later passages, however, in this same opinion show that the court, like Judge Cooley, regarded the legislature as the mere initiator of the proceedings, and regarded the electorate as the real source of the convention's powers.[3]

Compare Ruling Case Law:

> Call of Constitutional Conventions. — The customary manner of calling constitutional conventions in the United States is by resolution of the legislature followed by a submission of the question to the electorate.[4]

And compare a 1916 writer:

> The weight of opinion to-day seems to be that the legislature may properly submit to the people the question of holding a convention to revise the constitution, and if the voters elect to hold such a convention the amendments proposed by that convention, if ratified by the people, become a part of the fundamental constitution, in the absence of any provisions of the constitution prohibiting such a method of amendment.[5]

Thus convention-calling is not a regular function of the legislature, and 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. In case that permission is obtained, who is it that calls the convention?

The Supreme Court of Massachusetts said in 1833:

[1] *Ellingham* v. *Dye* (1912), 178 Ind. 336.
[2] *State* v. *Am. Sugar Co.* (1915), 137 La. 407, 413.
[3] *State* v. *Am. Sugar Co.* (1915), 137 La. 407, 415.
[4] 6 R. C. L., § 17, p. 27.
[5] II "Mass. Law Quarterly," 1, 26.

If . . . the people, by the terms of their vote, decide to call a convention of delegates . . . we are of opinion that such delegates would derive their whole authority and commission from such vote.[1]

Marcus Morton, one of the judges to join in rendering this opinion, amplified it as follows in the Massachusetts convention of 1853, in which he sat as a delegate:

This Act derives its force directly from the people. The legislature only proposed the Act, and the people of the Commonwealth having sanctioned it by their votes, it became law. . . . The legislature had the right of proposing the Act calling a Convention, and of submitting it to the people; but its whole force is derived from acceptance of the Act by the people of the Commonwealth themselves.[2]

The New York Supreme Court in 1846 had likewise said:

A convention is not a government measure, but a movement of the people, having for its object a change, either in whole or in part, of the existing form of government.

As the people have not only omitted to confer any power on the Legislature to call a Convention, but have also prescribed another mode of amending the organic law, we are unable to see that the Act of 1845 had any obligatory force at the time of its enactment. It could only operate by way of advice or recommendation, and not as a law. It amounted to nothing more than a proposition or suggestion to the people, to decide whether they would or would not have a convention. The question the people have settled in the affirmative, and the law derives its obligation from that act, and not from the power of the Legislature to pass it.

The people have not only decided in favor of a Convention, but they have determined that it shall be held in accordance with the provisions of the Act of 1845. No other proposition was before them, and of course their votes could have had reference to nothing else.[3]

See also the following quotations to the same effect:

A constitutional convention lawfully convened, does not derive its powers from the legislature, but from the people.[4]

[1] *Opinion of Justices* (1833), 6 Cush. 573, 575.
[2] Deb. Mass. Conv. 1853, Vol. I, p. 76.
[3] Journal, 69th N. Y. Assembly, p. 919.
[4] *Loomis* v. *Jackson* (1873), 6 W. Va. 613, 708.

It is the People, and the People alone, who enacted the call for this Convention, by adopting the proposition submitted to them by the Legislature in 1900.[1]

When the call for the Convention was adopted by the People, in 1900, it became the act of the People, and not of the Legislature, which merely framed and proposed it.[2]

The people, when they voted for the holding of the Convention, voted for it to be held "in accordance with Act No. 52 of 1896."[3]

The Constitutional Convention . . . derives its authority directly from the people.[4]

We cannot suppose that the voters meant that it was their will that a Convention should be called, without any regard to the time, place, or manner, of calling the Convention; for that was all prescribed in the Act of 1852, under which they voted. . . . The voters must have well understood the whole matter when they were called upon to signify their will. When, therefore, they voted that it was expedient to call a Convention to revise the Constitution, that vote must have carried with it a desire that the Convention should be called with regard to the time, place, and manner, indicated in the Act; and that the vote carried with it everything contained in the Act in relation to the manner of voting, the holding of meetings, where they should be called, and where the elections should be held. They expected and intended all these to conform to the Act when they gave that Act their sanction.[5]

When the people, acting under a proper resolution of the Legislature, vote in favor of calling a convention, they are presumed to ratify the terms of the call, which thereby becomes the basis of the authority delegated to the convention.[6]

Opposed to this idea of popular origin is Jameson's theory that "so far as those Acts were ever to have force as laws, they were to derive it from the legislature." [7]

Hon. Joel Parker maintained the correctness of this position in the Massachusetts convention of 1853, as follows:

[1] *Braxton*, VII "Va. Law Reg.," 100, 103.
[2] *Braxton*, VII "Va. Law Reg.," 100, 104.
[3] *State* v. *Capdevielle* (1901), 104 La. 561, 569.
[4] *Braxton*, VII "Va. Law Reg.," 79, 97.
[5] *Speech of Mr. Hyde*, Deb. Mass. Conv. 1853, Vol. I, p. 124.
[6] 6 R. C. L., § 18, p. 27; *State* v. *Am. Sugar Co.* (1915), 137 La. 407, 415.
[7] *Jameson*, p. 398.

The contingency attached to it [convention act of 1852] gave it no different character from that of any other act upon the statute book. It was passed under the constitution and by the legislature as a legislative act. The act provided for putting the question to the people and the question was put. The people answered in such a way that the rest of the act took effect as an act of the legislature and not as an act of the people distinct from the legislature; it gave to the act no other character than that which it had possessed before as a legislative act.[1]

Rufus Choate has expressed a more moderate point of view than Jameson and Parker, in the following words:

What did the people, in point of fact, do in regard to this point of the law of 1852? Was it not exactly this? The legislature caused to be presented to them, according to the forms of law, the question for substance, whether they deemed it expedient that a Convention should be called to consider of revising the Constitution. They answered yes; and there they rested. . . .

Under that repose, under that inaction of the people, after that manifestation of their will in that general form, it became a matter for mere law in its ordinary course, to devise and enact details.[2]

But we should not forget that the act discussed by the New York Supreme Court and by them held to have been enacted in its entirety by the electorate, was exactly similar to the one discussed by Rufus Choate.

Thus it will be seen that there are two theories with respect to who enacts the convention act, under which the people vote to hold a convention. The theory with the greatest weight of authority behind it is based upon the fact that there would be no convention unless the people voted affirmatively, that an affirmative vote would result in holding exactly the sort of convention in every detail provided in the act, and that the people are presumed to know the terms of the act under which they vote. The conclusion drawn from this is that the convention act in its every detail is enacted by the people voting under it.

The opposing theory, as laid down by Choate, is based upon the fact that the only question *expressly* submitted to the people is "Shall there be a convention?"; that if the legislature had merely submitted this question without providing the de-

[1] Deb. Mass. Conv. 1853, Vol. I, pp. 154–155.
[2] Deb. Mass. Conv. 1853, Vol. I, pp. 117–119.

tails in advance, it would have been competent for the legislature to have provided the details *after* an affirmative vote by the electorate. From this they conclude that the providing of details *before* the vote of the electorate is equally as much the action of the legislature.

In view of the almost evenly divided opinion on this subject, both points of view are fully expressed here without discrimination, although the author personally strongly inclines to the former.

Several court dicta go to extremes in asserting the popular origin of conventions. Thus the Pennsylvania Supreme Court has held that the mere voting for delegates, under a convention act which the legislature has not submitted to the people, makes that statute the act of the people. Their exact language is as follows:

> When, therefore, the people elected delegates under the second Act, they adopted the terms it contained by acting under it.[1]

Dodd comments adversely on this decision as follows:

> In the Pennsylvania decision cited above: the question of holding a convention was submitted to the people and decided in the affirmative; the subsequent legislative act calling the convention (this act was not submitted to the people) sought to impose certain restrictions upon the convention, and the court then said that these restrictions were imposed by the people; the facts found by the court did not conform to the real facts of the case.[2]
>
> It is clear, of course, that the people in voting for delegates to a convention have no way of expressing either approval or disapproval of the terms of the act under which the convention is called; here clearly there is no popular adoption of restrictions sought to be imposed upon a convention by legislative act.[3]

Yet the Pennsylvania idea has been accepted in other decisions, as the following quotations show:

> The people elected delegates in reference to this call; it was not contemplated that they should do any act which was not necessary to give effect to the object and purpose of the people.[4]

[1] *Wells* v. *Bain* (1872), 75 Pa. 39, 55.
[2] *Dodd*, pp. 76–77.
[3] *Dodd*, p. 75.
[4] *McCready* v. *Hunt* (1834), 2 Hill Law (S. C.) 1, 222–223.

The convention was called upon the lines which were suggested by the Legislature, and in exact conformity with the will of the sovereign, as expressed at an election duly held in keeping therewith, and the delegates duly chosen thereto were regularly convened.[1]

When a people act through a law, the act is theirs, and the fact that they used the legislature as their instrument to confer their powers, makes them the superiors and not the legislature.[2]

Under the Pennsylvania theory, *all* convention acts, under which the electorate chooses the delegates, become thereby the product of a popular vote.

The only alternative theory would appear to be the ingenious one suggested by Holcombe in the following language:

Where the call for the convention is not submitted to the people for an expression of their consent, such power as the convention may possess is apparently delegated to it by the legislature on its own authority. It is an accepted principle of the unwritten constitution, however, that legislative power may not be delegated by the body on which the people have conferred it. The calling of a convention, therefore, without a vote of the people must be regarded as an abdication of power by the regular legislature in favor of an extra-constitutional body. Such a body is a revolutionary rather than a constitutional convention, and the extent of its powers would apparently be determined by itself, subject only to the limits which the people in their capacity of ultimate sovereign may be able to impose.[3]

So much for cases in which the legislature frames the convention act *before* the popular vote. Even when the act is framed *after* the popular vote, the legislature is not proceeding under its general powers, but rather under a special grant of power contained in the favorable vote. Thus the people choose the legislature as their agents to frame the convention act.

Dodd says:

There are dicta to this effect based upon the theory that the people in voting for a convention confer upon the legislature authority to limit the powers of such conventions.[4]

[1] *State* v. *Favre* (1899), 51 La. Ann. 434, 436.
[2] *Wood's Appeal* (1874), 75 Pa. 59, 72.
[3] *Holcombe*, State Government, p. 126.
[4] *Dodd*, p. 87, n. 26. But he disagrees with this, saying: "There would be a strong presumption that in voting for a convention they meant to vote for one with full power." *Dodd*, p. 76. Compare pp. 103–104, *infra*.

And the Supreme Court of Indiana has said:

> The General Assembly . . . merely asked the people to express their will in relation to calling a convention . . . and when it was expressed it was a warrant and a command which the legislative authority carried out as given.[1]

Of course, in case the entire act is expressly submitted to the people for ratification (as is required by the constitutions of Oregon and Oklahoma, and as is regularly practiced in many other States),[2] there would seem to be no doubt that it derives its force and validity from the popular approval.

Dodd, however, points out that it is necessary in such a case for the people to pass on two questions in one, namely, whether they want a convention, and whether they want one under the terms proposed by the legislature; and he infers from this that there is some doubt as to whether even such a statute is the act of the people.[3] This seems like far-fetched reasoning, however.

The only situation in which one could be absolutely certain that the convention act was the product of the legislature alone, would be if the legislature called the convention and itself chose the delegates.[4] Yet there is argumentative authority even against this, for in the case of the Pennsylvania convention of 1872, the convention act was not submitted to the people, and the legislature chose part of the delegates; yet the entire proceeding was held by the courts to be popular in its nature.[5]

But, as we saw early in this chapter, the whole question of whether the legislature or the people enacts the convention act may be cleared up by a consideration of the relative powers of the legislature and the people. We have already seen that the people have a supraconstitutional right to take steps to change their government, and that this right is conceded by most constitutions.[6] Where does the legislature derive any right to take steps to change the form of government except in cases

[1] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 377–378.
[2] *Dodd*, p. 75.
[3] *Dodd*, p. 75.
[4] As in the case of the Georgia convention of 1788. *Jameson*, p. 135.
[5] *Wells* v. *Bain* (1872), 75 Pa. 39, 52.
[6] *Supra*, pp. 13–14.

in which that right is expressly conferred upon the legislature by either the constitution or the people? Legislatures have no inherent rights. Their powers are derived from the constitution and hence in States whose constitutions do not provide for the holding of a constitutional convention, it would seem that the legislature cannot call a convention,[1] and hence that a convention in order to be valid must be the act of the people.

Yet, although the legislature cannot lawfully call a convention unless it possesses authority derived either from the constitution or directly from the people, on the other hand the people cannot call a constitutional convention without some means being first provided for the expression of popular opinion.[2] It is also necessary, either before or after the people have expressed their wish for a convention, for some law to provide for the election of the delegates.

At one time in the early history of the country the view was entertained that the people could legally assemble in convention and revise their constitution without the sanction of the legislature, but this doctrine is no longer recognized.[3]

The Pennsylvania Supreme Court has said in this connection:

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 convention, 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. . . . If the legislature, possessing these powers of government, be unwilling to pass a law to take the sense of the people, . . . the remedy is still in their own hands; they can elect new representatives that will. . . . The people required the law, as the act of the existing government, to which they had appealed under the Bill of Rights, to furnish them legal process to raise a convention for revision of their fundamental compact, and without which legal process the act of no one man could bind another.[4]

Judge Jameson comments on this decision in the following words, the conciseness of which leaves nothing further to be said on the subject.

[1] *Supra*, pp. 62–65.
[2] *Supra*, pp. 16–19.
[3] 6 R. C. L., § 17, p. 27.
[4] *Wells* v. *Bain* (1872), 75 Pa. 39, 47–48.

Admitting the competency of the people to call conventions, it would be impracticable, except through legislative interposition.[1]

A supraconstitutional right requiring the assistance of constitutional authority is certainly an anomaly, and yet that is what exists in the case of conventions. It has already been pointed out in Chapter II that the reason for the failure of Dorr's Rebellion in Rhode Island was this one technical point — he did not have the assistance of duly constituted authority, and hence there was no means of ascertaining whether he represented the people or merely a faction of the people.[2]

And yet as Dodd points out,[3] the legislature may stand in the way of the fulfillment of the popular will, just as the legislatures have in some cases nullified constitutional provisions by refusing to pass an enabling act thereon. The remedy of electing new representatives, as suggested by the Pennsylvania Supreme Court,[4] is not sufficient.

In one case at least, difficulty has been encountered in obtaining the passage of a law for the assembling of a convention authorized by the people. In 1886 a popular vote taken in New York (under the constitution of 1846, which provided for such a vote once every twenty years) was overwhelmingly in favor of the calling of a convention. But, owing to a disagreement between the legislature and the Governor, who belonged to different political parties, it was impossible for some time to obtain the passage of a law authorizing the convention, and the convention did not actually meet until eight years after the popular vote. In the constitution adopted by this convention, it was sought to avoid such a difficulty for the future by making the constitutional provisions regarding a convention self-executing.[5]

Not merely is the popular vote on the question of holding a convention to be taken at twenty-year intervals, but the last vestige of intervention by the legislature in the matter is swept finally away. In case the people vote in the affirmative, the constitution itself provides, minutely, for the apportionment, election, organization, and procedure of the convention. Thus there is now imbedded in the constitution of New York a complete system

[1] *Jameson*, p. 539.
[2] See pp. 21–22, *supra*.
[3] *Dodd*, pp. 55–56, and n. 53.
[4] *Wells* v. *Bain* (1872), 75 Pa. 39, 47.
[5] *Dodd*, p. 55.

for total revision of the constitution of that state beyond the control of the legislature. The people initiate, the convention drafts, the people enact.[1]

The popular will was similarly thwarted in New Hampshire in 1860 and 1864.[2]

The Michigan constitution of 1908 accomplishes the same result by provisions similar to those of the New York constitution of 1894. The Missouri constitution of 1875 also makes the assembling of a convention independent of legislative action, after the people have voted that a convention shall be held; the constitution itself containing full provisions regarding the apportionment and election of delegates. Writs for an election are required to be issued by the Governor after a favorable vote of the people.[3]

But, in all of the States except those mentioned above, the assembling of conventions is to a large extent dependent upon legislative action, even after the people have voted that a convention shall be held.[4]

From all the foregoing, we can make the following deductions as to who it is that calls a convention; in other words, who it is that enacts the convention act.

If the act originates by an initiative petition, it is clear that the people pass the act, although there may be some dispute as to whether they proceed under the authority of the constitution, or under a supraconstitutional authority, with the mere assistance of the constitution.

In case the constitution provides for the holding of a convention without either legislative or popular action, such a convention will probably derive its whole force and validity from the constitution. If the constitution provides for the holding of a convention after action by the legislature alone, it is probable that such a convention derives its validity from the constitution and is called into being by the legislature. But in the last two cases it may well be that the people, by acting under the convention act or constitutional provision, ratify it and make it theirs.

[1] *Judson*, Essentials of a Written Const. (U. of Chi. 1903), p. 21.
[2] *Dodd*, p. 55, n. 53.
[3] *Dodd*, pp. 55–56.
[4] Compare the discussion of this same point, pp. 116–117, *infra*.

If the constitution authorizes a convention after popular vote, it may be that the convention is the creature of the people with the permission of the constitution; but owing to the fact that the constitution could not withhold this permission, and in the light of the four cases in which the constitutional methods were disregarded, it is possible that even such a convention derives its whole authority from the popular vote, and that the constitution merely provides the means, the same as a statute would have done.

When the legislature passes a convention act without submitting it to the people, if there is a previous vote of the people authorizing a convention in general terms, it may be that this vote delegates to the legislature the power to enact details.

When the legislature submits the question to the people, either with or without the sanction of the constitution, the weight of authority is that the convention derives its whole sanction from the popular vote, and that such details as are enacted by the legislature prior to the popular vote derive their binding force from the people and not from the legislature; *a fortiori*, if the legislature submits the entire act for popular ratification.

Yet we have seen that there is need of a means through which the people may express their will. This may be provided either by a statute or by a constitutional provision; preferably the latter, as that frees the convention from the danger of legislative usurpation.

Chapter VI

LEGISLATURES AS CONVENTIONS

In the preceding chapter we discussed the power of the legislature to call a constitutional convention. There we found that, although the present tendency is to regard a reference of the question to the people as absolutely essential, yet, in the early days, this was not always done.[1] In fact, on occasions, the legislature has even elected a part or all of the delegates itself.[2]

The original conventions of the period of the Revolutionary War combined the functions of conventions and legislatures,[3] but as the convention system developed, the two bodies gradually became more and more differentiated. Thus we see the western towns of New Hampshire protesting in 1777 against the framing of a permanent plan of government by the legislature,[4] and we see the people of Massachusetts in 1778 overwhelmingly voting down a constitution drafted by a legislature which had resolved itself into a constitutional convention.[5]

A constitution drafted by a legislative commission in Michigan in 1873, and constitutions drafted by the Rhode Island legislature and submitted in 1898 and 1899, were rejected by the people.[6]

The only example of successful drafting of a constitution by a legislature occurred in the Territory of Nebraska in 1866. But it is interesting to note that the Supreme Court of that State held the entire proceeding to be irregular, being cured, however, by the admission of the State into the Union.[7]

Legislatures generally have not presumed that they had any power to resolve themselves into constitutional conventions,

[1] See p. 66, *supra*.
[2] See p. 74, *supra*.
[3] See p. 4, *supra*.
[4] See p. 6, *supra*.
[5] See pp. 5, 6–7, *supra*.
[6] *Dodd*, p. 39, n. 20.
[7] *Brittle* v. *People* (1873), 2 Neb. 198, 216.

until we come to the case of Indiana in 1911. The general assembly of that year drafted and incorporated in a bill what was therein termed a proposed new constitution, which was really a copy of the existing constitution with twenty-three changes in its provisions, and submitted it to a vote of the people at the general election to be held in November, 1912.[1]

The Indiana legislature doubtless proceeded upon the theory that, if a legislature can call a convention and choose the delegates to it, the legislature can call itself a convention and choose its own members as the delegates. Doubtless the legislature thought that, even though this method of procedure was contrary to both the customary convention method and the constitutional method of submission by two successive legislatures; yet, nevertheless, a popular ratification of the proposed new constitution would cure all irregularities in its inception.

Maybe the legislature was right in this latter assumption,[2] but that can never be ascertained, for the Supreme Court of the State nipped the proceeding in the bud by enjoining the submission of this new constitution to the people. The Supreme Court of California had also, in an earlier decision, given some intimation as to what the law would be in a case like this.

These two decisions have developed the following principles of law relative to the powerlessness of the legislature to resolve itself into a constitutional convention.

First: A constitution is a legislative act of the people. On this point the Indiana Court says:

> A state constitution has been aptly termed a legislative act by the people themselves in their sovereign capacity, and, therefore, the paramount law.[3]

Secondly: There is a marked distinction between the legislative powers of the people and the legislative powers of the legislature. On this see the following:

> To erect the State or to institute the form of its government is a function inherent in the sovereign people. To carry out its purpose of protecting and enforcing the rights and liberties of which the ordained constitution is a guaranty, by enacting rules of civil

[1] Ind. Laws, 1911, c. 118.
[2] See p. 216, *infra*.
[3] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 345.

conduct relating to the details and particulars of the government instituted, is the function of the legislature under the general grant of authority. It needed no reservation in the organic law to preserve to the people their inherent power to change their government against such a general grant of legislative authority.[1]

A constitution is legislation direct from the people, acting in their sovereign capacity, while a statute is legislation from their representatives, subject to limitations prescribed by the superior authority.[2]

The Parliament of Great Britain, is possessed of all legislative powers whatsoever. It can enact ordinary statutes, and it can pass laws strictly fundamental. Not so with our legislatures.[3]

The two houses and the governor constitute the entirety of the body which considers and finally determines all matters of legislation. But it is the two houses and the great mass of the electors of the commonwealth combined which constitute the body which considers and determines the questions of constitutional amendment. With all matters of legislation the people in their capacity of electors have nothing to do. But with constitutional amendments they have everything to do, for the ultimate fate of all proposed amendments depends absolutely upon their approval. If they approve, the proposed amendment at once becomes a part of the constitution; if they disapprove, it fails utterly and never comes into existence. The fundamental distinction which thus becomes most manifest, between the mere legislative machinery of the government, and that machinery which alone possesses the power to ordain amendments to the constitution of the commonwealth is most radical and extreme.[4]

We have seen that, in the United States, the constitutional Convention belongs to the *genus* legislature, — by which it is meant that its proper function is to elaborate, to a certain extent, to be determined by the tenor of its commission, the fundamental law, much as the legislature enacts the ordinary municipal law. Of these two species of law, the distinction between which has been already explained, it is the important thing to note, that the one denominated fundamental is, generally speaking, the work only of a Convention, a special and extraordinary assembly, convening at no regularly recurring periods, but whenever the harvest

[1] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 344.
[2] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 345.
[3] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 347.
[4] *Commonwealth* v. *Griest* (1900), 196 Pa. 396, 410–411.

of constitutional reforms has become ripe; while, on the other hand, the ordinary statute law, whose provisions are tentatory and transient, is, regularly at least, the work of a legislature, — a body meeting periodically at short intervals of time.[1]

Thirdly: The legislature, in taking any steps toward the framing of a constitution, does not act in its legislative capacity. This we have already seen in the last chapter, where were reviewed many authorities to the effect that the calling of a convention, being a step in the framing of fundamental law, is not strictly within general legislative powers.

Many decisions bearing more or less on this point, but relating more particularly to the extralegislative nature of the proposal of constitutional amendments, are collected in the Indiana decision.[2]

Furthermore, the Indiana decision says that in the ordinary legislative method of constitutional amendment, the legislature is *quoad hoc* empowered to act as a convention.

> By express constitutional provision, they act in conventional capacity, in the way of recommending specific amendments to their constitution.[3]

The Indiana Court quotes with approval the following from the Supreme Court of Arkansas:

> The General Assembly, in amending the constitution, does not act in the exercise of its ordinary legislative authority, of its general powers; but it possesses and acts in the character and capacity of a convention, and is quoad hoc, a convention expressing the supreme will of the sovereign people.[4]

and Jameson's following comment thereon:

> It expresses with admirable brevity, force, and clearness, the true doctrine in regard to the power of our General Assemblies under similar clauses of our Constitutions.[5]

This, however, cannot be meant literally, for it is easily observable that the courts will enforce strict compliance with the

[1] *Jameson*, p. 422.
[2] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 347–352. *Cf. State* v. *Hall* (1916), 159 N. W. 281, 282.
[3] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 347.
[4] *State* v. *Cox* (1848), 3 English (Ark.) 436, 444; quoted 178 Ind. 336, 348.
[5] *Jameson*, p. 586; quoted 178 Ind. 336, 348. *Cf. Collier* v. *Frierson* (1854), 24 Ala. 100, 102.

constitutional provisions for the legislative method of amendment, whereas they are much more cautious in interfering with the popular method of amendment through the medium of a convention.

The language used, however, is all right as illustrating the principle that the legislature, in framing a constitutional change, is not acting as a legislature, but is rather acting under an extra-legislative power specifically delegated to it by the people for this purpose.

Fourthly: The legislature gets by express grant, its power to frame constitutional changes. See the following quotations:

> In submitting propositions for the amendment of the constitution, the legislature is not in the exercise of its legislative power, or any sovereignty of the people that has been intrusted to it, but is merely acting under a limited power conferred upon it by the people.
>
> The extent of this power is limited to the object for which it is given, and is measured by the terms in which it has been conferred, and cannot be extended by the legislature to any other object, or enlarged beyond these terms.[1]

> This right to propose amendments to the constitution is not the exercise of legislative power by the General Assembly in its ordinary sense, but such power is vested in the legislature only by the grant found in the constitution, and such power must be exercised within the terms of the grant.[2]

> Where authority is specifically granted to the legislature by the constitution to prepare and submit amendments, that establishes its competency, and, to the extent of the specific authorization and within its limitation, it is always to be considered as chosen for the purpose.[3]

> Power over the Constitution and its change has ever been considered to remain with the people alone, except as they had, in their Constitution, specially delegated powers and duties to the legislative body relative thereto for the aid of the people only.[4]

Fifthly: It follows that the legislature cannot act as a convention without a similar express grant, either in the constitu-

[1] *Livermore* v. *Waite* (1894), 102 Cal. 113, 118.
[2] *Chicago* v. *Reeves* (1906), 220 Ill. 274, 288.
[3] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 353.
[4] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 357.

tion, or given by the people under their extraconstitutional powers.

The legislature is not authorized to assume the function of a constitutional convention, and propose for adoption by the people a revision of the entire constitution under the form of an amendment.[1]

This is quoted with approval by the Indiana Court.[2]
Jameson has said:

It is thoroughly settled that, under our Constitutions, State and Federal, a legislature cannot exercise the functions of a convention — cannot, in other words, take upon itself the duty of framing, amending, or suspending the operation of the fundamental law.[3]

This also is cited with the approval by the Indiana Court.[4]
Sixthly: The general grant of legislative powers is not enough to empower the legislature either to act as, or to call, a convention; for, as we have seen, the framing of fundamental law is not a strictly legislative duty.[5] Thus the Indiana Court says:

But this general grant of authority to exercise the legislative element of sovereign power has never been considered to include authority over fundamental legislation. It has always been declared to vest in the legislative department authority to make, alter and repeal laws, as rules of civil conduct pursuant to the Constitution made and ordained by the people themselves and to carry out the details of the government so instituted.[6]

In assuming to legislate in relation to structural changes in the government, the legislature is not acting within the power it takes under the general grant of authority to enact, alter and repeal laws under and pursuant to the Constitution. For, to deal with organic law — to determine what it shall be, when it needs change, the character of the change and to declare and ordain it — is peculiarly

[1] *Livermore* v. *Waite* (1894), 102 Cal. 113, 118.
[2] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 349.
[3] *Jameson*, p. 422.
[4] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 352.
[5] See full discussion of this point, pp. 80–83, *infra*.
[6] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 343.

a power belonging to the people, and this fact they have declared, as we have seen, in the first section of the bill of rights.[1]

Had it been thought then that the general grant of legislative authority placed in the hands of the General Assembly the power to accomplish the same work which that body was asking the people to authorize a constitutional convention to do, it is not to be supposed that the fruitless efforts to secure a convention would have continued. But, on the contrary, it is highly probable that the General Assembly would itself have done the work of revision or reframing amendments, and thus have avoided the delay and the greater expense, entailed by a convention. No one then claimed that the framing of fundamental law might be done by legislative act under the general grant of legislative authority.[2]

Seventhly: Nevertheless, by long custom the legislatures have acquired the power to assist the people to hold a constitutional convention. Thus Jameson has said:

> It is clear that no means are legitimate for the purpose indicated but Conventions, unless employed under an express warrant of the Constitution.[3]

The author's conclusion is, that the change or amendment of the written constitutions which prevail under the American system is confined to two modes: 1, by the agency of conventions called by the General Assembly in obedience to a vote of the people, and usually pursued when a general revision is desired; and 2, through the agency of the specific power granted to the General Assembly by constitutional provision to frame and submit proposed amendments, which is considered preferable, when no extensive change in the organic law is proposed.[4]

The extraconstitutional legality of such conventions has already been discussed in Chapter IV.

Thus the Indiana decision appears to have established the law that the legislature has no authority to resolve itself into a constitutional convention.

But this law is likely soon to be upset by precedent in the neighboring State of North Dakota. There, the present constitution requires amendments to be twice passed by the legisla-

[1] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 357.
[2] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 360–361.
[3] *Jameson*, p. 549.
[4] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 355.

ture before submission to the people;[1] yet at the last session the majority party (*i. e.* the Farmers' Nonpartisan League) introduced a bill for the immediate submission of a complete new constitution, embodying the reforms pledged by the Farmers' platform.[2] This bill passed the House, but was blocked by the hold-over members of the Senate. If, as now seems possible, the Farmers gain control of both Houses at the next election, the bill will be adopted, and will undoubtedly be sustained by the Supreme Court, which is now dominated by the Farmers.

Thus, until we learn the result of the North Dakota experiment, the Indiana decision must remain open, especially as it was made by a court of the opposite political party than the party which at the time controlled the legislature.[3]

In this connection it is interesting to compare the following from a recent opinion by the Attorney-General of North Dakota:

> An examination of our State and Federal Constitutions shows that no procedure for revision or for the adoption of a new State Constitution, as an organic whole, is provided for.
>
> The Constitution of North Dakota, Section 2, however, does contain the following declaration:
>
> "All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people; and they have the right to alter or reform the same whenever the public good may require."
>
> . . . . . .
>
> Moreover, in our system of government, constitutions derive their power from the people, not the people from constitutions. The rights and powers of the people existed before a constitution was formed. In other words, before the establishment of a constitution, the people possessed sovereign power.
>
> That power they still possess, except in so far as they may have delegated it to State or National Governments, or have voluntarily restricted themselves in its exercise under their constitutions.
>
> . . . . . .
>
> Many of our states have adopted express methods of revising their constitutions through constitutional conventions. However,

[1] N. Dak. Const., Art. XV, § 202.
[2] 1917, N. D. House Bill 44.
[3] VI "Am. Polit. Sci. Rev.," 43, 44.

for generations, many states had no express method of revision, and at least a dozen states, North Dakota being among them, have none today.

. . . . . .

It is urged that, since our Constitution provides a method of amendment, by exclusion the Legislature is prohibited from initiating a revision itself by drafting a new Constitution. This argument is untenable when dealing with sovereignty of the people seeking expression through revision. It is an instance where the ordinary doctrine of exclusion applicable to contracts is not binding. Moreover, if such an argument were applicable to legislative revision it would be equally applicable to revision by convention, and on that subject our own Supreme Court, in 68 N. W. 421 (N. D.), has said:

"The decided weight of authority and the more numerous precedents are arrayed on the side of the doctrine which supports the existence of this inherent legislative power to call a constitutional convention, notwithstanding the fact that the instrument itself points out how it may be amended."

. . . . . .

The sovereign power of revision having reached the threshold of the legislature without express written authority and solely by its irresistible right to expression, what mysterious power can then, without vestige of authority, assume the right to bridle it and lead it tamely down the narrow, though highly respectable, avenue of revision by convention?

. . . . . .

In my opinion any method followed by the legislature in placing before the people a new constitution for adoption or rejection in their sovereign capacity is legal.[1]

He differentiates the Indiana case as follows:

In connection with this I will also say that the case of Ellingham *vs.* Dye, 99 N. E. 1, apparently opposed to the legality of legislative revision, is clearly not applicable to the situation in this State, owing to an unusual and, perhaps, entirely unique occurrence in the history of Indiana when the provisions for revision contained in the Indiana constitution up to 1851 were then stricken out with the express intention that *never again would the Indiana constitution be revised, but only changed by amendment.*[2]

[1] No. Dak. House Journal for Jan. 26, 1917.
[2] No. Dak. House Journal for Jan. 26, 1917.

Whatever may be said for the correctness of his differentiation, the fact remains that in his main argument he overlooks two points: (1) that the legislature having probably no power to call a convention without popular permission,[1] *a fortiori* has no power to call itself a convention without such permission; and (2) that his citations, not given above, on the power of the legislature to submit a whole constitution, relate to submission in the *regular* constitutional manner, and not irregularly as attempted in Indiana and North Dakota.[2]

Nevertheless, as already suggested, it would be well to await the success of the North Dakota experiment before definitely passing upon the subject matter of this chapter.

[1] See pp. 62–65, *supra*.

[2] *Dodd*, pp. 260–261.

Chapter VII

EXECUTIVE INTERVENTION

The question of the power of one of these departments to interfere with a convention largely depends upon a determination of the exact status of the convention. Regardless of whether or not the convention is revolutionary, there can be no doubt that, either with or without constitutional sanction, the convention has become established as a regular organ of American government. The separation of the departments of government is a fundamental principle of American constitutional law. Nearly all of our constitutions lay down the rule that:

> The legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them.[1]

And not only may no department exercise the powers of any other, but each department is also forbidden to interfere with the functions of any other.

This is important in connection with Dodd's theory as to the relation which the convention bears to the three regular departments. He says:

> The better view would seem to be that the convention is a regular organ of the state (although as a rule called only at long intervals) — neither sovereign nor subordinate to the legislature.[2]

The following quotations from various authorities sustain this view:

> But a rather better view, less extreme than either of the preceding ones, regards the convention as a regular organ of the existing government coördinate with the other branches. In its

[1] Mass. Decl. of Rts., Art. XXX.

[2] *Dodd*, p. 80.

sphere of constitution making it should be supreme, subject only to limitation by the people.[1]

The convention is an independent and sovereign body whose sole power and duty are to prepare and submit to the people a revision of the constitution, or a new constitution to take the place of an old one.[2]

Nothing could conduce more to simplicity of view, than to consider this institution as a branch of that system by which the state, considered as a political society, works out its will in relation both to itself and to the citizens of which it is composed. And this . . . I am satisfied is the correct view to take of the question.[3]

A Constitutional Convention is a legislative body of the highest order. It proceeds by legislative methods. Its acts are legislative acts. Its function is not to execute or interpret laws, but to make them. That the consent of the general body of electors may be necessary to give effect to the ordinances of the Convention, no more changes their legislative character, than the requirement of the Governor's consent changes the nature of the action of the Senate and Assembly.[4]

It is the highest legislative body known to freemen in a representative government.[5]

It is of the greatest importance that a body chosen by the people of this state to revise the organic law of the state, should be as free from interference from the several departments of government, as the legislative, executive and judiciary are, from interference by each other.[6]

The only authority contra appears to be the Supreme Court of Pennsylvania, which has said:

The convention is not a co-ordinate branch of the government. It exercises no governmental power, but is a body raised by law in aid of the popular desire to discuss and propose amendments.[7]

[1] XXIX "Harv. Law Rev.," 520.

[2] *Carton* v. *Secy. of State* (1908), 151 Mich. 337, 340.

[3] *Jameson*, p. 315. Compare the quotation from *Jameson*, pp. 319–320, on p. 187, *infra*. And compare *Jameson*, pp. 23–24.

[4] Report of Judiciary Committee, headed by Elihu Root, and unanimously adopted by the Convention. Rev. Record, N. Y. Conv. 1894, Vol. I, p. 245.

[5] *Sproule* v. *Fredericks* (1898), 69 Miss. 898, 904.

[6] Report of Judiciary Committee, headed by Elihu Root, and unanimously adopted by the Convention. Rev. Record, N. Y. Conv. 1894, Vol. I, p. 250. Quoted with approval in Deb. Mich. Conv. 1907–1908, p. 1275.

[7] *Wells* v. *Bain* (1872), 75 Pa. 39, 57.

Thus the weight of authority is to the effect that the convention, when in session, is a fourth branch of the government, with the same immunity from interference as that possessed by the other three. The executive and judiciary have no more right to interfere with the fourth branch than they do with the other legislative branch, namely, the legislature. The legislature has no right to interfere with a legislative body of higher standing.

Let us now consider intervention by the executive department, either of the state or nation. The converse question, *i. e.* the power of the convention to interfere in the affairs of the executive department, will be considered in a later chapter.[1]

First, with respect to the State executive. By this is meant the chief executive, *i. e.* the Governor, or the Governor acting with the consent and assistance of some advisory body.

The executive branch, like the other two branches, derives its delegated authority entirely from the constitution, and has no powers except those expressly or impliedly granted therein, and no powers even when granted, if they are such as to be beyond the power of the constitution to grant. This must be borne in mind throughout this chapter.

The first manner in which a governor might interfere with a convention would be to prevent the holding of a convention by vetoing the convention act.

Under the initiative and referendum, in all the States in which it is in force,[2] a convention initiated by the people would not be subject to executive veto, as the constitutions of those States do not authorize such a veto.

With respect to conventions expressly called by the constitution, or conventions the call for which is submitted to the people by the constitution without legislative action, it is likewise clear that there is no way in which the Governor could veto the project.

With respect to constitutions which authorize the passage of conventions acts, the results differ in different States. In Alabama and Delaware the convention act need not be submitted to the Governor for his approval, and is expressly de-

[1] Chapter XI, *infra*.

[2] Namely Arizona, Arkansas, California, Colorado, Michigan, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Idaho, Maine, Montana, South Dakota, Utah, and Washington. "Columbia Digest," p. 771.

clared to be valid without his approval.[1] No other constitutions make express provision in this connection, but it would appear that an act of the legislature calling for a popular vote would not be subject to veto, no veto power being mentioned in this connection; although a legislative act providing for the details of holding the convention, if regarded as ordinary legislation, would be subject to the regular veto power of the Governor.[2]

The usual practice in such States has been to submit to the people the question of holding a convention; without asking for the Governor's approval. This would naturally follow from the fact that a convention act is not a bit of ordinary legislation.

> It does not require the approval of the governor to make it valid.[3]

Yet in Nebraska, which is a State of this sort, and where therefore the submission of this question to a popular vote would seem to be clearly within the power of the legislature, independent of the Governor, a joint resolution in 1903 upon this subject was vetoed by the Governor, and no further action was taken.[4]

In New York, the Governor by quarreling with the legislature, postponed for eight years the holding of the convention authorized by a popular vote in 1886.[5]

But although the executive veto of an act to take the sense of the people has been successfully employed on these occasions, yet executive approval is usually dispensed with. What authority there is sustains this custom, which thus has the support of the weight of both judicial and actual precedent.

In the absence of constitutional provisions authorizing the holding of a convention, we have seen that the people require the assistance of the legislature in order to express their will on the subject, yet the act rendering this assistance is not strictly legislative in its nature. Thus, although it is customary to refer such an act to the Governor for his approval, this has been held to be unnecessary:

[1] Ala. Const., XVIII, 286; Del. Const., XVI, 2, 4.
[2] *Dodd*, p. 56, n. 55.
[3] *Carton* v. *Secy. of State* (1908), 151 Mich. 337, 341.
[4] *Dodd*, p. 57, n. 55.
[5] *Dodd*, p. 55.

That it did not take the form of an ordinary law is too clear for controversy. The joint resolution has no title. Its enacting clause is not couched in the language prescribed by the constitution to be employed in the enactment of ordinary laws; nor was it ever submitted to the governor for approval. Whenever it is necessary that the expression of sovereign will should take the form of ordinary legislation, these requirements must be strictly observed. But, in declaring its purpose that a specific proposition should be submitted to the people for their approval or disapproval, the legislature is not discharging the ordinary function of enacting laws.[1]

If the people, by voting to have a convention, thereby impliedly authorize the legislature to enact details,[2] such authorization may well be on the same plane with an authorization contained in the constitution and hence justify the submission of such acts to the Governor. This is the general practice.

Thus it is seen that the Governor can prevent the holding of a convention by vetoing the legislative act providing for the details of a convention. The Governor, however, has no power to prevent the holding of a convention called under the popular initiative, or provided for by the constitution in a manner which does not allow legislative interference.

All of the foregoing sorts of interference by the Governor are seen to be really a part of his legislative power, rather than of his executive power.

Whenever a legislature would have power to interfere by inaction with the holding of a constitutional convention,[3] the Governor probably possesses a coextensive power to interfere by vetoing legislative action.

The Governor, in his executive capacity, however, can assume a very important role, in case the legitimacy of the convention or of any of its actions comes into dispute. In the case of two conflicting sets of claimants to office in any department, one set claiming under the old constitution and the other set claiming under the new, the Governor and the other executive officers who have control of the State finances may be in a position, by the giving or withholding of salaries, to determine effectually which set of officers is legal.

[1] *State* v. *Dahl* (1896), 6 N. D. 81, 82.

[2] See p. 72, *supra*.

[3] See pp. 116–117, *infra*.

So, too, in jurisdictions where the courts consider the legality of the acts of a popular convention to be a political rather than a judicial question,[1] the recognition or nonrecognition of the new constitution by the Governor may be the deciding point in determining its validity or invalidity.

Braxton says that any act of the existing government in recognition of an irregular constitutional change should be regarded as acquiescence and ratification on the part of the people.[2]

Thus the Military Governor of Tennessee, acting on the authority of the President, ratified the constitution which had been submitted by the purely spontaneous convention of 1865.[3]

The Federal executive can very often determine whether a convention is valid or merely factional. The clauses of the Federal constitution guaranteeing to each State a republican form of government and permitting the President to maintain order in any State if requested by the State legislature or by the State executive if the legislature is not in session,[4] give the President the power to interfere with a constitutional convention.

> The power of deciding whether the exigency has arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.[5]

On two occasions the President of the United States has interfered to decide whether the government of a State was valid or factional. In the case of Rhode Island, as pointed

[1] See pp. 162–163, *infra*.
[2] VII "Va. Law Reg.," 79, 97.
[3] *Ridley* v. *Sherbrook* (1866), 43 Tenn. 569, 577.
[4] U. S. Const., Art. IV, § 4.
[5] *Luther* v. *Borden* (1849), 7 How. 1, 43.

out in the foregoing quotation, the President acting on the application of one of the two claimants of the governorship, who incidentally was a member of his own political party, recognized him as the executive of the State and took measures to call out the militia to support his authority. Thus President Tyler upset the People's Constitution of 1841 in Rhode Island.[1]

On the other hand, President Lincoln gave validity to the extremely factional loyal government of Virginia by recognizing it as the lawful government of that State. This recognition is all that gives validity to the dismemberment of that State and the creation of West Virginia.

> The repeated acts of the United States in all its departments, recognizing the loyal government of Virginia of which the legislature in question was a part, as an existing State government, stamped that government and legislature as legal and valid. For over four years after the establishment of the loyal government of Virginia, the President of the United States was engaged, in concert with that government, in expelling from her borders the rebel invaders.[2]

These two instances demonstrate not only the power of the Federal executive, but also the power of the state executive. In one case it was the Governor under the old régime, and in the other the Governor under the new régime that took the steps to secure intervention by the President of the United States.

It should be noted, however, that the President has no power, under the constitution, to intervene in the internal affairs of a State except upon the request of some one claiming to be the State government.

The two objects for which the Federal government may intervene are to protect the State against internal violence, and to guarantee to the State a republican form of government.

If the intervention is for the purpose of protecting the State from internal violence, the express terms of the constitution provide that such protection shall be furnished only "on application of the Legislature, or of the executive (when the Legislature cannot be convened)." [3]

In the case of intervention for the purpose of guaranteeing

[1] See pp. 21–22, *supra*, on "Dorr's Rebellion."
[2] *Jameson*, p. 172.
[3] U. S. Const., Art. IV, § 4.

a republican form of government, this requirement of a request is not so clear, not being expressly mentioned.

Thus Braxton suggests:

> If any State of the American Union should attempt to lay aside its republican form of government, and substitute in its stead that of an irresponsible, omnipotent Convention, combining in itself all the powers of Government, (Legislature, Judicial and Executive,) even for a single day, it would clearly be ground for the forcible intervention of the Federal authority, to put down and stamp out a government so foreign to all ideas of a free republic.[1]

But it is arguable that this clause, too, is for the protection of the States, and cannot be invoked unless a State itself requests it.

Thus we see that in some instances executives can prevent the holding of a convention and in some instances ratify or nullify its action, but there has been no way suggested in which an executive may, pending a conventional change, interfere with the details of the convention procedure.

[1] VII "Va. Law Reg.," 79, 91.

Chapter VIII

THE CONVENTION ACT NOT AMENDABLE

Judge Jameson's book on constitutional conventions was written for the sole purpose of proving the supremacy of the legislature over the convention. He treated the question of the power of the legislature to amend the statute calling a convention as being merely a question of the right of the legislature to control the convention; whereas in reality it involves three questions: *i. e.*, the power of the legislature, the source of the statute, and whether the legislature can amend an act passed by the people.

The first of these three questions, namely, whether the legislature can control the convention, will be considered in the next chapter. In that consideration we shall see that restrictions, which the legislature attempts to impose upon a convention, are probably not binding unless ratified by the people; precedents to the contrary being divisible into cases in which the electorate did the restricting, cases in which the restrictions were acceptable to the convention, and cases in which the restrictions were imposed by an outside sovereign. The instances, there discussed, of legislative interference by other means than the original convention act or amendments thereto do not concern us here.

The second of the three involved questions was considered in Chapter V. There we saw that the people enact the convention act where they have the initiative, or where the legislature submits the entire act to them for ratification; probably, where they vote to hold a convention under the act; and possibly, where they merely elect delegates under the act, or where they acquiesce in an act by not invoking the referendum against it. It is possible that even constitution provisions for the holding of a convention become popular enactments because the people act under them, either by voting for the convention, or even merely by voting for delegates.

The present chapter will be devoted to the third question involved, namely, whether the legislature can amend an act of this sort, assuming it to have been passed by the people.

Where the facts show, or judicial decisions hold, that the convention act was passed by the legislature, the legislature clearly has the power to amend this act; unless we adopt the theory of the Pennsylvania Supreme Court, already discussed,[1] to the effect that the mere participation by the people in the election of delegates under a convention act passed by the legislature alone amounts to a ratification and adoption of that act by the people, and makes it the act of the people rather than of the legislature. Under that theory, *all* convention acts would owe their force and validity to a popular vote, unless we can assume the case of a convention with delegates which are chosen by the legislature.[2]

This leads us to the main question to be considered in this chapter: namely, whether, if the people enacted the convention act, the legislature can amend it.

In order to present this sole question, without any diverting complications, we must assume: (1) that the people did originally pass the convention act in its entirety,[3] and (2) that the matter which the legislature proposes now to add to it is matter within the scope of ordinary legislative powers.[4] Let us therefore make these two assumptions, merely, however, for the purposes of this chapter.

A discussion of the main subject has usually been very much involved in a consideration of the other two, which we are here attempting to exclude. An attempt will be made, however, to select for the purposes of this chapter so much of the authorities as relates solely to the subject matter of this chapter.

The clearest statement on this subject is contained in the opinion rendered by the New York Supreme Court to the 69th New York Assembly in 1846. It is as follows:

[1] See p. 72, *supra*.

[2] This was the case with respect to the first of the two Georgia conventions in 1788. *Jameson*, p. 135. Constitutional commissions may perhaps be regarded as such conventions. *Dodd*, pp. 262–265.

[3] See Chapter V, *supra*.

[4] This assumption is incorrect (see pp. 62–65, *supra*), but must be postulated for the purposes of the present argument. If the argument fails (as it does) even *with* this assumption, *a fortiori* when this assumption is found to be incorrect.

The next question is, "Whether this legislature has any power to alter or amend that law." As a general rule, the legislature can alter or annul any law which it has power to pass. A proper solution of the question proposed by the Assembly involves, therefore, an inquiry concerning the source from which the act of 1845 derives its obligation.

. . . . . .

If the Act of the last session is not a law of the legislature, but a law made by the people themselves, the conclusion is obvious, that the legislature cannot annul it, nor make any substantial change in its provisions. If the legislature can alter the rule of representation, it can repeal the law altogether, and thus defeat a measure which has been willed by a higher power.[1]

Another expression of opinion to the same effect is as follows:

In ascertaining the powers of the Convention, we cannot look to the Act of February, 1901, passed *after* the Convention had been ordered by the People; and that the limitations imposed by that Act, which was never submitted to, nor ratified by the People, are of no binding force.[2]

The author knows of no decisions or court opinions contra. The recent opinion of the Supreme Court of Massachusetts, although it appears to support the author's proposition, is not in reality in point, for the ground on which it declares the particular convention act to be unamendable, is merely the unconstitutionality of the particular subject matter.[3]

Jameson has collected a number of decisions to the effect that the legislature may amend statutes which have been submitted to the people for a vote.[4] This is undoubted law. But we should note: (1) that none of these decisions related to convention acts, and (2) that convention acts are not an exercise of ordinary legislative power.[5] These two considerations should be sufficient to differentiate the cases cited by Jameson.

If Jameson had lived in the days of the initiative and referendum, he might well have added cases like the following:

[1] Journal, 69th N. Y. Assembly, pp. 919 and 920.
[2] *Braxton*, VII "Va. Law Reg.," 100, 101–102.
[3] 1917, Mass. Senate Doc., 512.
[4] *Jameson*, pp. 398–401.
[5] See pp. 62–65, 80–83, *supra*.

The Supreme Court of every state having an initiative and referendum constitutional provision similar to that of this state which has been called upon to determine the question has held that the Legislature has the power to repeal or amend the initiated law.[1]

But in these cases, the powers of the legislature to amend are always expressly based upon the theory that the people, in initiating legislation, are merely exercising the legislative function which for ordinary occasions they have delegated to the legislature. *Ratione cessante, cessat ipsa lex.* A convention act, not being within the legislative function,[2] it is not so amendable. In fact, as the extralegislative power which the legislature has to frame a convention act exists only *ex necessitate*,[3] it is probable that this power does not exist in States which have adopted the initiative and referendum. Thus neither the cases cited by Jameson, nor the more modern cases arising under the initiative and referendum are authority for the proposition that the legislature can amend a convention act.

The author has been unable to find any authorities which express an opinion that the legislature may amend a convention act, if originally enacted by the people; and it is possible that, in the cases in which legislatures have actually amended convention acts, they have proceeded upon the theory that such acts were not enacted by the people, rather than upon the theory that, although the people had enacted them, the legislature could amend them. Even when the legislature has passed the original convention act *after* the popular vote authorizing the convention, it is arguable that the people choose the legislature as their agent for the special extralegislative purpose of framing the convention act,[4] and that when this purpose is fulfilled, the legislature becomes *quoad hoc, functus officio.* In plain English, the job being completed, the legislature has no further powers in that connection.

In the following described cases, convention acts have been amended by legislatures.

[1] *Richards* v. *Whisman* (1915), 36 S. D. 260, 272.
[2] See pp. 62–65, 80–83, *supra.*
[3] See p. 47, *supra.*
[4] See pp. 73–74, *supra.*

New York Assembly of 1845 passed a statute for the holding of a convention in a certain detailed manner, if the people should so vote at the next election. The people so voted. The Assembly of 1846 then proceeded to amend the convention act, so as to change the system of apportionment of delegates. But before doing this, they asked the opinion of the Supreme Court of that State as to whether they had the power to do so.

The court replied that the convention act was the act of the people, and that therefore the legislature had no power to amend it. The court's language in this connection has been given earlier in this chapter.[1] The legislature, however, disregarded the advice of the court and amended the act, and the delegates to the convention were elected under the act as amended.[2]

The validity of this action by the legislature was never questioned by the convention. But this is not to be wondered at; for had the delegates declared this action to be illegal, they would thereby have declared their own election illegal, and their own seats vacant, and would have thus rendered themselves incompetent to make the very decision which they were making. The only tenable decision which the delegates could make was to sustain the validity of the act under which they had obtained their seats.

A similar situation was pointed out by the United States Supreme Court when it held that the only possible tenable decision by a state court would be to uphold the legality of the constitution under which the judges themselves held their seats. The language of the court in this connection is as follows:

> And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power.[3]

[1] See p. 99, *supra*.

[2] *Jameson*, p. 387.

[3] *Luther* v. *Borden* (1849), 7 How. 1, 40. Compare the cases quoted, pp. 157–158, *infra*.

Not only was this action by the New York Assembly never questioned by the convention; it was never questioned at all. Thus here we have a case of a legislature successfully overruling a court.

The Berlin controversy in Massachusetts furnishes another example of a legislature successfully amending a convention act.

In 1853 the legislature of Massachusetts, emboldened by the example of the New York Assembly, attempted to follow that example. After the ratification of the convention act of 1852 by the people, the legislature struck out the provision that the election of delegates should be by secret ballot. The election was held under the amended law, for the candidates had no other alternative except to withdraw from the contest. Nevertheless, great indignation was aroused by this action of the legislature.

One of the first and most bitterly debated questions, therefore, which arose in the convention of 1853 was whether the legislature had any right so to override the action of the people. A complete repudiation of this action, however, would as in the New York case, have had an embarrassing result; for if the legislative action was illegal and void, why then the election held under it was void, and the delegates so elected would not be entitled to their seats.

Similarly with the delegates to the Massachusetts convention of 1853. Accordingly they seated themselves, thereby ratifying the action of the legislature, and then proceeded to excoriate the legislature for its action.

The vacancy from the town of Berlin furnished the opportunity for criticizing the legislature. Henry Wilson, the "Natick Cobbler," who later became Vice President of the United States, had been elected from both Natick and Berlin, and had declined election from the latter. The question arose as to how to instruct the selectmen of Berlin to fill the vacancy. Ben Butler seized the opportunity and moved that the vacancy be filled in the manner provided by the original convention act, rather than in the manner provided by that act as amended by the legislature. Rufus Choate led the defense of the legislature, but he was overwhelmingly defeated. Thus the convention went on record as repudiating the idea that the

legislature can amend a convention act after its adoption by the people.[1]

These were both cases in which the people had voted for the convention, under the convention act.

We saw in an earlier chapter that there was some authority for the proposition that the people assume, ratify, and become responsible for a convention act, by merely participating in the election of delegates to the convention to be held under it.[2] In one such case there has been an attempt at legislative amendment. This occurred in the bloody days in Kansas just prior to the Civil War. The Kansas legislature of 1855 took the sense of the electorate at the October election of 1856 on the advisability of holding a constitutional convention. The electorate approved. The legislature accordingly passed an act providing for the choice of delegates in June and for a convention in September, which was to have full discretion as to how to submit its constitution for ratification. So far in the proceedings, the slavery men had been in control, and they controlled the convention. The convention submitted two alternative constitutions to be voted on, December 21, 1857, but did not provide any method for the rejection of both.

The free-state legislature, which was elected in October of that year, met December 17 and voted to submit the whole question of the constitution on January 4. The form with the strongest slavery provisions carried in December, but both constitutions were rejected in January; only slavery men participating in the first election and only free-staters in the second.

Thus the question was presented to Congress as to the authority of the legislature to amend the convention act after the people had elected delegates under it and thereby ratified it. The national House decided that the legislature did have this power, but President Buchanan and the national Senate decided that it did not; so no decision was reached, and the matter was deadlocked.[3]

Virginia presents the most recent example of an attempt to amend a convention act. The legislature of 1900 submitted to the voters the question "Shall there be a convention to revise the constitution and amend the same?"[4] The vote was

[1] See *Jameson*, pp. 333–338.
[2] See p. 72, *supra*.
[3] *Jameson*, pp. 534–536.
[4] Va. Acts 1900, c. 778.

favorable. Accordingly in 1901 the legislature passed a statute prescribing the details for the convention.[1] Now the people having voted that the convention should revise and amend the constitution, a provision in the second act requiring the convention merely to frame and submit was considered by many to be an attempt by the legislature to amend a vote of the people.[2] Accordingly the convention refused to submit, and the constitution promulgated by the convention was accepted by the State officials and was sustained by the courts.[3]

So far as the author knows, these are the only cases where a legislature has attempted to amend a convention act, enacted by the people rather than by the legislature.

From all the foregoing we see that, although an ordinary bit of legislation enacted by the people is amendable by the legislature, nevertheless a convention act, not being ordinary legislation, is not so amendable. But it is possible for certain sorts of amendments to succeed, by reason that the nature of the amendment leaves to the convention and the people no choice but to acquiesce in the amendment or to give up the convention. Successful examples of this limited sort are not precedents for the general proposition that the legislature can make *any* sort of amendment.

[1] Va. Acts 1901, c. 243.
[2] VII "Va. Law Reg.," pp. 100–106.
[3] *Taylor* v. *Commonwealth* (1903), 101 Va. 829.

Chapter IX

LEGISLATIVE CONTROL

The question of legislative control of the convention was the main consideration which induced Judge Jameson to write his book.

Dodd says:

> Judge J. A. Jameson in his work on *Constitutional Conventions* took the position that a convention is absolutely bound by restrictions placed upon it in the legislative act by which it is called. Judge Jameson took this view because he thought it necessary that a convention be completely subordinate to the existing government.[1]

> Under Judge Jameson's theory a constitutional convention called by a vote of the people may be restricted by simple legislative act so that it may not revise or propose the revision of any part of the existing constitution which the legislature may forbid it to touch. The convention is made subordinate to an organ of the existing government. Judge Jameson proceeded on the assumption that a constitutional convention must possess sovereign power — that is, all of the power of the state — or that it must be strictly subordinate to the regular legislature. He could conceive of no middle ground between these extremes. In attempting to demolish the theory that the convention is sovereign, he went to the other extreme and really made the legislature the supreme body with respect to the alteration of state constitutions, for under his view a convention may be restrained by a legislature as to what shall be placed in the constitution, and no alteration can be made without legislative consent.[2]

Legislative interference with a convention may take place in any of five ways, namely (1) by inserting restrictions in the original convention act; (2) by amending that act; (3) by inaction; (4) by withholding support; or (5) by governmental

[1] *Dodd*, p. 73.

[2] *Dodd*, pp. 77–79.

recognition. These five methods will first be analyzed and then discussed in order. The question of the power of the legislature to control the convention by means of the original convention act depends largely on the question of whether the legislature passes that act at all, which has already been considered in Chapter V. If it be found that the voters enacted any given convention act, the question will then take the form: Can the *electorate* control the convention? The question in this form will be considered in Chapter X.

The power of the legislature to control the convention by means of an amendment to the original convention act depends largely upon whether the legislature has any right to amend the act. This was considered in the preceding chapter. The questions of legislative inaction and of legislative recognition of a new constitution require no analysis.

Let us, then, first consider the general power of the legislature to control the convention by means either of the original act or of an amendment (otherwise lawful) thereto. Jameson built up his book around the doctrine of legislative supremacy, because he could not conceive of conventions and legislatures being coördinate. The antithesis of the doctrine of legislative supremacy is the doctrine of convention sovereignty, which will be discussed in a later chapter.[1] The reverse of the theory that the legislature has power to control the convention is the theory that the convention has extraordinary power to enact ordinary legislation. This is a phase of the doctrine of convention sovereignty. The question of whether the legislature has power to require oaths by the convention delegates and submission of the new constitution to the people will be discussed in the chapters on those subjects.[2]

Has the legislature the power to restrict the convention in advance? Under a number of the present State constitutions, it may be definitely said that a legislature cannot bind a convention in any way. In New York and Michigan, conventions, when authorized by a vote of the people, assemble without any legislative action; for in these States constitutional provisions have been adopted for the express purpose of making conventions entirely independent of legislative control; and there any effort by the legislature to control the convention's

[1] Chapter XI, *infra*. [2] Chapters XIV and XVI, *infra*.

action would clearly be a violation of the constitution.[1] The same statement holds with reference to the Missouri constitution, by the terms of which the only step to be taken by the legislature is that of submitting to the people the question as to whether a convention shall be held.[2] And the same is probably true with reference to constitutions which impose upon the legislature the one specific duty of providing for the election of delegates after the people have decided that a convention shall be held. Inasmuch as both bodies are legislative in character, a specific power conferred upon the regular legislature may perhaps be said by implication to exclude any other control over the convention.[3]

By necessary implication, the legislature is prohibited from any control over the method of revising the Constitution. The convention is an independent and sovereign body whose sole power and duty are to prepare and submit to the people a revision of the Constitution, or a new Constitution to take the place of the old one. It is elected by the people, answerable to the people, and its work must be submitted to the people through their electors for approval or disapproval.[4]

The Alabama constitution of 1901 expressly confers full power upon a convention to act in the drafting of a new constitution, thereby excluding the possibility of legislative interference.[5]

The process of amendment of State constitutions in the legislative manner is absolutely under the control of the State legislatures, except in the States which have adopted the popular initiative. Under this procedure no action may be taken except upon the initiative of the legislature, this method of altering constitutions thus being absolutely subject to legislative control.

The calling of constitutional conventions is also to a large extent subject to legislative control, but the convention method of altering constitutions is considerably more independent of the regular legislature, unless Judge Jameson's theory be adopted. The convention loses a large part of its usefulness as an organ of the State if it be treated as strictly subject to control by the legislature.[6]

[1] *Dodd*, p. 55. [2] *Dodd*, pp. 55–56. [3] *Dodd*, p. 74.
[4] *Carton* v. *Secy. of State* (1908), 151 Mich. 337, 340–341.
[5] *Dodd*, p. 74. [6] *Dodd*, p. 79.

This view was well expressed by the Judiciary Committee of the New York convention of 1894:

It is of the greatest importance that a body chosen by the people of this State to revise the organic law of the State, should be as free from interference from the several departments of government as the legislative, executive and judiciary are, from interference by each other. Unless this were so, the will of the people might easily be nullified by the existing judiciary or legislature.[1]

Thus the weight of authority, at least with respect to conventions authorized by the constitution, is that the legislature cannot, or at least ought not to be permitted to, restrict the convention in advance.

Let us, however, discuss a few actual cases in which the legislature did succeed in restricting the convention. One common method of attempted restriction has been for the legislature to provide that no delegate should be permitted to take his seat in the convention until he should have taken an oath to proceed in a certain manner. This course was pursued with respect to the North Carolina conventions of 1835 and 1875, the Georgia convention of 1833, the Illinois conventions of 1862 and 1869, and the Louisiana convention of 1898. The last-named convention expressly recognized the restrictions as binding upon it.[2]

The Georgia convention also took the oath required. The North Carolina conventions objected to the oath, but nevertheless took it and observed the restrictions.[3] The two Illinois conventions took the oath in a very modified form. Several of these cases lose their value as precedents in this connection, however; for the convention act was submitted to and approved by the people, and hence the restrictions may be said to have been placed on the convention by the people and not by the legislature.[4]

Dodd says:

It would seem that these conventions might, had they thought proper, have declined to take the oaths, and have organized and

[1] Report of Judiciary Committee, headed by Elihu Root, and unanimously adopted by the convention. Rev. Record, N. Y. Conv. 1894, Vol. I, p. 250.

[2] *Dodd*, p. 81.

[3] *Dodd*, p. 81.

[4] *Jameson*, p. 284.

proceeded to act without doing so, just as was done by the Illinois convention of 1862.[1]

In the first of the two Pennsylvania cases arising out of the convention of 1872, the Supreme Court issued an injunction restraining the convention from submitting its constitution to a popular vote in a manner different from that prescribed by the legislature.[2]

The Pennsylvania constitution of 1838 contained no provision with reference to the calling of a convention, but the legislature of 1872 provided for the assembling of a convention, after having first submitted to the people the question as to whether or not a convention was desired. The act of 1872, under which the convention assembled, provided that the constitution which it framed should be voted upon at an election held in the same manner as general elections. . . . The convention disregarded the legislative act by providing machinery of its own for the submission of the constitution in Philadelphia, and appointed election commissioners for this special purpose. . . . An injunction was granted restraining the commissioners appointed by the convention from holding the election in Philadelphia. The court . . . declared that the submission of the constitution in a manner different from that provided by law was clearly illegal. The court said that the convention had no power except that conferred by legislative act, and that any violation of such act or any action in excess thereof would be restrained.

. . . . . .

If the calling of a convention is thus assumed to be an exercise of regular legislative power, may it not be plausibly argued that the convention, when called, is absolutely subject to the conditions of the legislative act? This is, to a large extent, the argument of Wells *v.* Bain.[3]

But this decision loses weight in this connection from the fact that the court expressly held the convention act to be the creature of the people and not of the legislature.

Jameson bases his theory of legislative supremacy largely upon the Pennsylvania decision just discussed. But in doing so he fails to notice that a later case in the same volume of Penn-

[1] *Dodd*, p. 81, n. 15. The matter of oaths will be more fully discussed in a later chapter. See pp. 187–190, *infra*.

[2] *Wells* v. *Bain* (1872), 75 Pa. 39.

[3] *Dodd*, pp. 83–84 and n. 21.

sylvania reports holds squarely that the legislature cannot limit the convention, but that the people can and did in this instance.

Thus the first Pennsylvania case, interpreted in the light of the second, is clearly no authority at all for the doctrine of legislative supremacy. The exact language of the second Pennsylvania decision is as follows:

> It is simply evasive to affirm that the legislature cannot limit the right of the people to alter or reform their government. Certainly it cannot. . . . When the people act through a law, the act is theirs, and the fact that they used the legislature as their instrument to confer their powers makes them the superiors, and not the legislature.[1]

And compare the following:

> The restrictions sought to be placed upon conventions by legislative acts have not in practice been recognized as of binding force, except in a few cases.[2]
>
> First. That a constitutional convention lawfully convened, does not derive its powers from the legislature, but from the people.
>
> Second. That the powers of a constitutional convention are in the nature of sovereign powers.
>
> Third. That the legislature can neither limit or restrict them in the exercise of these powers.[3]

Although there is some authority to the effect that the people, in voting to permit the legislature to call a convention, thereby constitute the legislators their agents to restrict the convention,[4] yet Dodd is strongly of the opinion that, on the contrary, the popular vote should be interpreted as calling for an unrestricted convention.[5]

Jameson cites a large number of minor instances in which conventions adhered to the terms of the convention act,[6] but in at least half of these the act had been submitted to the people, and in the rest these restrictions were apparently satisfactory to the convention, as it accepted them without protest.

[1] *Wood's Appeal* (1874), 75 Pa. 59, 71–72.
[2] I "Cyc. American Government," 430.
[3] *Loomis* v. *Jackson* (1873), 6 W. Va. 613, 708.
[4] *Dodd*, p. 87, n. 26.
[5] *Dodd*, p. 76. *Cf. Braxton*, VII "Va. Law Reg.," 100–106.
[6] *Jameson*, pp. 369–375.

The instances of successful restraint of territorial conventions by Congress, cited by him,[1] are not in point, for Congress is an outside sovereign, not at all comparable to the legislature of the territory itself.

Thus there is a marked scarcity of instances in which the legislature has succeeded in restricting the convention. In the following instances the legislature failed to impose these restrictions successfully.

The second Pennsylvania case turned, among other things, on the point that the convention act had imposed the restriction that the convention should not alter the Bill of Rights. The convention altered the Bill of Rights, and this was held not to invalidate the new constitution.[2] If we follow Jameson in treating this as a legislative restriction, we have here an example of a successful disregard of a restriction, and of the judicial sustaining of this disregard. The convention itself treated this as a legislative restriction, and altered the Bill of Rights, not because they thought it needed altering, but solely as a slap at the legislature.[3] Treated, however, as a popular restriction, this decision will be discussed in the next chapter.

We have already seen that the Illinois conventions of 1862 and 1869 successfully disregarded the legislative requirements of an oath by the delegates.[4]

The Georgia convention of 1789, called for the sole purpose of accepting or rejecting a constitution which had been prepared by the convention of 1788, proposed certain alterations, which were laid before a third convention.[5]

The New York convention of 1867 sat beyond the time fixed by the legislature for the submission of its work to the people, and submitted its work at a later date.[6] The Alabama convention of 1901 increased the pay of its delegates above the amount limited by the legislature.[7]

The statute calling the Michigan convention of 1908 provided that the constitution should be submitted to the people in April. The convention ordered its submission in November. The Secretary of State doubted the power of the convention

[1] *Jameson*, pp. 367–368.
[2] *Wood's Appeal* (1874), 75 Pa. 59.
[3] Deb. Pa. Conv. 1872, Vol. VIII, pp. 54, 57, 63.
[4] *Jameson*, p. 284.
[5] *Jameson*, pp. 135–136. [6] *Dodd*, p. 82. [7] *Dodd*, p. 82.

to fix a date other than that set by the legislature and refused to comply with the order of the convention; whereupon the officers of the convention obtained a mandamus from the Supreme Court and compelled submission at the date set by the convention.[1] The reasons for the mandamus were varied, but two of the court, including the Chief Justice, said:

> By necessary implication, the legislature is prohibited from any control over the method of revising the constitution. The convention is an independent and sovereign body. . . . It is elected by the people, answerable to the people, and its work must be submitted to the people through their electors for approval or disapproval. . . . The convention was the proper body to determine at what election it should be submitted unless that is fixed in the present constitution. . . . I find no language in the constitution from which any implication can arise that this power was vested in the legislature.[2]

Even Judge Hooker in his dissenting opinion in that case said, "The convention has a sphere in which the legislature cannot intrude, a discretion that it cannot control." [3]

The Kentucky convention of 1890–1891 made in the constitution some changes which they did not submit to the people, although required to do so by the legislative act.[4] The Virginia convention of 1901–1902 promulgated its entire constitution without a popular vote, although required by the convention act to submit the constitution to the people.[5] In both of these cases, the changes were recognized by the existing government and acquiesced in by the people; and the courts refused to interfere.[6] Similarly the Illinois convention of 1847 omitted to submit one of its amendments.[7]

The Alabama legislature, in its act providing for the convention of 1901, forbade the convention to do certain things and required that it incorporate certain provisions into the new constitution. The legislative restrictions were not ob-

[1] *Dodd*, pp. 84–85.
[2] *Carton* v. *Secy. of State* (1908), 151 Mich. 337, 340–343.
[3] *Carton* v. *Secy. of State* (1908), 151 Mich. 337.
[4] *Dodd*, pp. 85–86.
[5] *Dodd*, p. 86.
[6] *Miller* v. *Johnson* (1892), 92 Ky. 589; *Taylor* v. *Commonwealth* (1903), 101 Va. 829.
[7] *Dodd*, p. 86, n. 23.

served in full, and an effort was made to prevent future legislative interference with conventions by inserting into the constitution of 1901 the provision that "Nothing herein contained shall be construed as restricting the jurisdiction and power of the convention, when duly assembled in pursuance of this section, to establish such ordinances and to do and perform such things as to the convention may seem necessary or proper for the purpose of altering, revising or amending the existing constitution."[1]

The insertion of this provision was clearly intended as a rebuke to the legislature.

Dodd sums up the matter of legislative restrictions in the following words:

> From the above discussion it may be seen that where the question has been raised the conventions and courts have in but a few cases taken the view that constitutional conventions are absolutely bound by restrictions sought to be placed upon them by legislative acts. The restrictions placed upon conventions have certainly not in practice been recognized as of binding force, except in a few cases, and theoretically the convention in the performance of its proper functions should be independent of the regular legislative organs of the state. . . . The good sense of the people has ordinarily caused both legislatures and conventions to restrict themselves to their proper spheres. The general obedience of conventions to the legislative acts under which they were called has been due to the fact that legislative acts have usually required only those things which the convention would have done without legislative requirement; cases of conflict arise only when a legislature attempts to restrict a convention in such a manner as to interfere with its proper functions, and such cases have not been numerous. . . . The possibility of conflict is avoided if the convention as an organ for constitutional revision is entirely freed from the control of the regular legislature.[2]

Both the legislature and the convention are chosen by the people, and when it is remembered that abler men are usually chosen to conventions than to legislatures, it is perhaps clear that conventions are apt to be equally as competent to exercise the limited powers committed to them as are legislatures to instruct the conventions as to what they shall or shall not do. The convention is less apt to abuse its power in the drafting of a con-

[1] *Dodd*, p. 82.

[2] *Dodd*, pp. 91–92.

stitution, than is the legislature in placing limitations upon the convention, if the legislature were assumed to have such power.[1]

As a rule, then, constitutional conventions are subject only to the following restrictions: (1) those contained in or implied from provisions in the existing state and federal constitutions, and (2) in the absence of constitutional provisions, those derived or implied from the limited functions of conventions. To these restrictions Jameson and others would add those imposed by legislative acts under which conventions are called, but such restrictions are certainly not yet recognized as of absolute binding force, except in Pennsylvania, and should not be so recognized if the convention is to be an instrument of great usefulness.[2]

Even Jameson hesitated to push his doctrine of legislative supremacy to its extreme limits.[3] For example, he took the position that legislative interference with a convention is

subject to the limitation, that its requirements must be in harmony with the principles of the convention system, or, rather, not inconsistent with the exercise by the convention, to some extent, of its essential and characteristic function.[4]

Thus Jameson in effect promulgates the doctrine of reasonable restrictions; that is, he believes that the validity of legislative restrictions depends upon whether or not they interfere with the natural prerogatives of a convention. This knocks the very bottom out of the theory of legislative supremacy.

The right of the legislature to impose reasonable restrictions upon a convention is very similar to the right of the legislature to impose such restrictions upon the judiciary: *i. e.*, the legislature may prescribe reasonable means and methods for the administration of justice, but has no power to deprive the courts of any of their inherent functions.

But even this is open to doubt. The power to restrict the judiciary is based upon the fact that court legislation is indispensable, and must emanate from the legislative body. But the convention is a legislative body of a higher order than the legislature,[5] and can legislate for itself.[6] *Ratione cessante, cessat ipsa lex.*

[1] *Dodd*, p. 80, n. 13. [2] *Dodd*, p. 92. [3] *Dodd*, p. 73.
[4] *Jameson*, p. 364. [5] See p. 90, *supra*. [6] See pp. 146, 147, *infra*.

From all the foregoing we see that the legislature probably has no power to restrict either an authorized or a popular convention; whenever it has succeeded, this has been due more to force of circumstances than to legal rights. Even the power to impose reasonable restrictions is doubtful.

So much for the question as to whether the legislature can bind a convention in advance. Let us next consider whether the legislature can interfere with the convention method during its pendency.

Dodd says:

> Judge Jameson pushed his theory to its logical conclusion and held that a convention, even after elected and assembled, might be dissolved by legislative act, or that the legislature might prevent the submission of its work to the people.[1]

On this point Jameson himself says:

> If the provisions made by a convention for submitting its work to the people are deemed to be inexpedient, whether made with or without authority of law, the proper law-making authority of the state may repeal or alter them at pleasure.[2]

But it is interesting to note that Jameson amplifies this thought by saying that the question has never arisen in practice, and by justifying his proposition only in case of treason by the convention.[3]

Hon. Joel Parker, however, went even further than Jameson, saying:

> I say it was legally competent for the legislature, at the time they modified that law, to have repealed it totally, so far as it stood a law upon the statute book, to have put an end to all further action under it. It might have been done legally. I do not say that a revolution might not have occurred in consequence of such a proceeding; that is another thing. I am aware, Sir, that such a disregard of the will of the people might justify a resort to force; but that is another thing. As a law upon the statute book, having the force and vigor of a law upon the statute book, and no more, the legislature have the same power over it which they have over any other law, and they might have repealed it if they had seen fit to do so. Why did they not do it? Because they ought not to; be-

[1] *Dodd*, p. 79. [2] *Jameson*, p. 421. [3] *Jameson*, p. 421, n. 2.

cause it was not proper, under the circumstances, that they should exercise that power, and they exercised their power in a way that they did not think proper. I maintain further, Sir, that I am willing to place myself upon the issue, that this Convention sits here today under that as a statute law and nothing more; and the legislature being still in session here, may constitutionally and legally put an end to the existence of this Convention as a body assembled under the Constitution and under law, before that session closes. (Sensation.) [1]

The only reported instance of an attempt by the legislature to interfere with a pending convention was when the free-state legislature of Kansas, during the bloody days just prior to its admission to the Union, attempted to change the date set by a convention for the submission of its constitution to the people. The pro-slavery men voted at one election and the free-state men at the other, with two different results. Congress on one hand disagreed with President Buchanan and the Senate on the other as to which result was valid, and so the constitution adopted at the date originally set by the convention failed of national recognition.

The New York Supreme Court, however, pooh-poohs the idea that the legislature has the power to nullify the work of the convention:

> If the legislature can alter the rule of representation, it can repeal the law altogether and thus defeat a measure which has been willed by a higher power.[2]

Dodd's foregoing reference to Jameson is seen by the context to be disapproving. And all the authorities to the effect that the legislature cannot *amend* the convention act, are *a fortiori* authorities for the proposition that it cannot *repeal* it.

Thus the weight of authority is that the legislature may not restrict a convention or nullify its work, but that the people may. This power of the people will be discussed in the next chapter.

There is, however, one way in which the legislature can very effectively interfere with amendment by convention. We have already seen the dependence of the people upon legislative

[1] Deb. Mass. Conv. 1853, Vol. I, p. 155.
[2] Journal, 69th N. Y. Assembly, p. 920.

means for expressing their will.[1] Without the assistance of either constitutional provisions or legislation, the people cannot pass on the question of calling a convention. Without such assistance, a convention cannot be elected and held. Thus in those States in which the constitution does not provide all the necessary details for holding a convention, the legislature can successfully block the popular will by mere inaction. We have already seen how in 1886 in New York, the popular vote to hold a convention was thwarted by the legislature, so that this convention was not held until 1894.[2]

Similarly in New Hampshire. Although the vote taken under act of July 4, 1860, showed a majority in favor of calling a convention, the Senate and House of Representatives at the June session, 1861, failed to agree upon a bill for that purpose. Again the vote under act of August 19, 1864, showed a majority of the voters in favor of calling a convention; but the legislature of the June session, 1865, by joint resolution decided to take no action in the matter.[3]

The courts have recognized this power of the legislature to prevent the holding of a convention. Thus the Supreme Court of Pennsylvania says of the vote of the people in favor of calling a convention:

> It was not even a mandate, further than the moral force contained in an expressed desire of the people. It is very evident, had the matter dropped there, and the legislature had made no call, no convention and no terms would ever have existed. Not a line, nor a word, nor a syllable in this act expresses an intent of the people to make the call themselves, or on what terms it shall be made, or what powers should be conferred.[4]

Similarly there are many ways in which the legislature, although keeping within its proper functions and powers, can greatly hamper the work of a convention. Holcombe in his recent book has clearly pointed out the distinction between legal and illegal attempts at interference. He says:

> The convention should be free to disregard any special limitations which the legislature may seek to impose subsequently to the

[1] See pp. 76–77, *supra*.
[2] See p. 76, *supra*.
[3] *Colby*, 1912 Manual of N. H. Const., pp. 209–211.
[4] *Wells* v. *Bain* (1872), 75 Pa. 39, 50–51.

vote by the people sanctioning the call of the convention, but it should not be free to disregard the general law of the state, whether expressed in the constitution or in the acts of the legislature. A convention, for example, may disregard a legislative act, not submitted to the people for their approval, which seeks to limit the duration of the deliberations of the convention, but it may not disregard a legislative act providing that appropriations for the support of the convention shall lapse after a limited period. In other words, the executive or judiciary of the state would not be justified in turning a convention out of doors after the period set by the legislature for the termination of its deliberations had expired, but they would be justified in withholding further funds. The convention might continue in session, but it would have to look to the people for indemnification for any further expenses that might be incurred.[1]

Thus we see that although the legislature cannot directly interfere with a convention, it can do so indirectly by inaction, or by withholding governmental support. In event the latter is attempted, however, the convention probably has full incidental powers to support itself, for it can pledge the faith of the State to pay for its legitimate expenses.[2]

There is one further way in which the legislature can interfere with a convention. It can determine the validity or invalidity of the new constitution, if that be a political question. Thus Braxton says that any act of the existing government in recognition of irregular constitutional changes should be regarded as acquiescence and ratification by the people.[3]

And we have already seen that when the Federal executive interferes to recognize or suppress a State government, the State executive participates to some extent in this action by requesting it.[4] Similarly the State legislature may participate; in fact, the Federal Constitution provides that intervention to restore order shall be done only at the request of the legislature of the State if that legislature be in session.[5]

Thus, from all the foregoing discussion, we see that, although the legislature apparently has no power to restrict a convention

[1] *Holcombe*, State Government, pp. 127–128.
[2] See pp. 173, 177, *infra*.
[3] VII "Va. Law Reg.," 79, 97.
[4] See p. 95, *supra*.
[5] U. S. Const., Art. IV, § 4.

in advance, or to nullify its results by abolishing it or by preventing the submission of its work to the people, yet the legislature does have power in many cases to prevent the holding of a convention. And in event of a dispute as to the validity of a new constitution, the legislature may possibly be in a position to determine this question by the political act of either recognizing or refusing to recognize the change, or by calling on the Federal government for support or suppression.

The legal standing of a convention may also depend upon recognition or nonrecognition by the Federal legislature.[1] In the case of a territorial convention, this power is absolute.[2]

On legislative control in general see also the first three pages of the next chapter.

[1] *Cf. Pac. States Tel. Co.* v. *Oregon* (1912), 223 U. S. 118.
[2] U. S. Const., Art. IV, § 3.

Chapter X

POPULAR CONTROL

Can the electorate control the convention? This question is differentiable and has been differentiated from that of legislative control, discussed in the last chapter. Thus Dodd says:

> Mr. Braxton takes the view that a convention is bound by a legislative act which has been approved by the people upon a popular vote, but not by other legislative acts.[1]

Braxton himself says:

> The Legislature has no authority to enlarge or curtail the powers of the constitutional convention, which derives its authority directly from the people.[2]
>
> If it be true, as the writer endeavored to show in his first article above referred to, that the *people alone* have the power of enacting or changing the Fundamental Law; that from them alone does the Convention derive its powers in that regard; and that they can confer just so much, or so little, of those powers upon the Convention as they please — then it necessarily follows that the *Legislature* (which is not "the People") cannot prescribe the Convention's powers.
>
> If this conclusion be sound, it follows that, in ascertaining the powers of the Convention, we cannot look to the Act of February, 1901, passed *after* the Convention had been ordered by the People; and that the limitations imposed by that Act, which was never submitted to, nor ratified by the People, are of no binding force.[3]

This draws a clear distinction between the lack of power of the legislature to control the convention, and the power of the people to control it. This distinction is the real answer to the question of whether the convention is bound by the convention

[1] *Dodd*, p. 76, n. 7.
[2] VII "Va. Law Reg.," 79, 96–97.
[3] VII "Va. Law Reg.," 100, 101–102.

act. If the convention act be the creature of the people, the convention *is* bound.

Most of the cases usually cited in support of legislative supremacy will be found on analysis merely to sustain the doctrine of popular supremacy, *i. e.* the limitation of the convention to the powers expressly or impliedly delegated to it by the people. Thus the Pennsylvania case, which is usually cited as the chief support of the doctrine of legislative supremacy is seen in the light of a statement later made by the same court to hold merely that *the people* can restrict the convention by the terms of the convention act.[1] Most of the cases cited in favor of legislative supremacy are open to the same construction. Similarly any case which may possibly be cited in denial of the right of the people to limit the convention may be found on analysis to depend upon a misconstruction of the situation, the court assuming that the question of *legislative* supremacy was involved and hence intending to deny merely the existence of any *legislative* control.

The foregoing distinction, namely, that although the legislature may not restrict the convention, the people may, has been variously expressed as follows:

> It is true that 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.[2]

Proceeding from the accepted rule that whatever powers the convention may possess must be derived from the people, he argues that the terms of the vote actually adopted by the people are the evidence of the extent of these powers, and that any restrictions which the legislature may seek to impose without the express approval of the people are unauthorized and hence invalid. The legislature may propose to the people whatever limitations it pleases, but these limitations must be accepted by the people in order to take effect upon the convention.[3]

Where, then, it may be asked, must we look for the real limitations of the Convention's powers, if not to the Act of February,

[1] *Wood's Appeal* (1874), 75 Pa. 59, 71–72.
[2] *McCready* v. *Hunt* (1834), 2 Hill Law (S. C.) 1, 222–223.
[3] *Holcombe*, State Government, p. 127.

1901? The answer is obvious: To the Act of March 5, 1900, under which the Convention was ordered to be called. But, it will be objected, this is also an Act of the Legislature, and can therefore have no more force than the Act of February, 1901, which, being subsequent, is really controlling. It will be seen, however, that the Act of March, 1900, so far as the Legislature was concerned, settled nothing; it was a mere proposition, which acquired binding force only by its acceptance by the People, who alone may be said to have enacted it.[1]

So much for the distinction between the results of legislative and popular enactment. The above quotations establish the principle that the people may control their convention in advance. The following quotations also support this view.

The people, therefore, in voting for the holding of a convention, not only limited the powers of the convention to the amendment and revision, of the constitution of 1875, but required that its action be submitted back to them.[2]

This enabling act, which was subsequently adopted by the people, prohibited, etc.[3]

The people, when they voted for the holding of the Convention, voted for it to be held "in accordance with Act No. 52 of 1896," thus instructing their delegates, elected at the same time, to observe the limitations placed upon the power of the Convention by the act of the Legislature.[4]

Considering that the constitution has vested no authority in the legislature, in its ordinary action, to provide by law for submitting to the people the expediency of calling a convention of delegates, for the purpose of revising or altering the constitution of the commonwealth, it is difficult to give an opinion upon the question, what would be the power of such a convention, if called. If, however, the people should, by the terms of their vote, decide to call a convention of delegates to consider the expediency of altering the constitution in some particular part thereof, we are of opinion that such delegates would derive their whole authority and commission from such vote; and, upon the general principles governing the delegation of power and authority, they would

[1] *Braxton*, VII "Va. Law Reg.," 100, 102.
[2] *Ex parte Birmingham Ry.* (1905), 145 Ala. 514, 529.
[3] *La. Ry.* v. *Madere* (1909), 124 La. 635, 641.
[4] *State* v. *Capdevielle* (1901), 104 La. 561, 569.

have no right, under such vote, to act upon and propose amendments in other parts of the constitution not so specified.[1]

Act No. 1 of the Extra Session of 1913 calling for a convention with full power and authority to frame and adopt, without submission to the people, a new Constitution of the state, subject, however, to a number of restrictions enumerated in said act, having been adopted by the people, constituted a mandate to the convention of 1913.[2]

The author knows of no judicial authority in opposition to the doctrine that the people can restrict the convention in advance.

A recent article in the *Harvard Law Review*, however, doubts the practicability of the popular power to restrict the convention by adopting a convention act framed by the legislature.

Where the limitations are included in the popular call for a convention, they should be binding, probably. If the people initiated the call, this would be clear. But where, as is more usual, the legislature frames the call, this may in substance give the legislature power to restrict. The only way in which the people could avoid such a restriction would be to reject all proposals containing it, and elect a legislature which would submit a proposal without it; a clumsy and inadequate remedy.[3]

In other words, when the Legislature frames the convention act, the people must either adopt the restrictions suggested by the legislature or else give up having any convention at all.

Thus it may well be argued that, actually if not theoretically, the power of restriction is in the hands of the legislature.

Similarly when, under the Pennsylvania theory, the people adopt the convention act by merely proceeding under it to the election of delegates. The Pennsylvania court points out that, even in such a case, it is the people and not the legislators who restrict the convention.

The people have the same right to limit the powers of their delegates that they have to bound the power of their representatives. Each are representatives, but only in a different sphere. It is simply evasive to affirm that the legislature cannot limit the right

[1] *Opinion of Justices* (1833), 6 Cush. 573, 574–575.
[2] *State* v. *Am. Sugar Co.* (1915), 137 La. 407, 415.
[3] XXIX "Harv. Law Rev.," 530, n.

of the people to alter or reform their government. Certainly it cannot. The question is not upon the power of the legislature to restrain the *people*, but upon the right of the people, by the instrumentality of the law, to limit their delegates. . . .

Law is the highest form of a people's will in a state of peaceful government. When a people act through a law the act is theirs, and the fact that they used the legislature as their instrument to confer their powers makes them the superiors and not the legislature.[1]

And the South Carolina Court agrees, in the following language:

It is true, the legislature can not 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.[2]

Yet this court points out the valuelessness of this power.

If, by their agents, (two thirds of the members of both branches of the Legislature) the people are not allowed to impose restrictions on their convention, they cannot do so at all. It will, most evidently, be practically impossible for them to do so by their votes at elections.[3]

Nevertheless, for the purpose of preventing *subsequent* legislative tampering with a convention act adopted by the voters, or under which they have acted, it is well worth while to bear in mind the distinction that the people can, and the legislature cannot, restrict a convention.

Actual instances of successful restriction of the convention by the people are as follows. We have already seen that most of the instances of apparent legislative restriction, cited in the preceding chapter, are really cases of popular restriction. Such, for example, were the restrictions placed on the Louisiana convention of 1898 and the North Carolina convention of 1835, and recognized as binding by those conventions. The Louisiana Supreme Court in recognizing the binding force of these restrictions, expressly laid it to the popular vote.[4]

[1] *Wood's Appeal* (1874), 75 Pa. 59, 71–72.
[2] *McCready* v. *Hunt* (1834), 2 Hill Law (S. C.) 1, 222.
[3] *McCready* v. *Hunt* (1834), 2 Hill Law (S. C.) 1, 273.
[4] *La. Ry.* v. *Madere* (1909), 124 La. 635, 641.

As already suggested, instances in which conventions have overridden popular restrictions may be explained on the theory that the convention supposed them to be merely legislative restrictions; for the doctrine of convention sovereignty, to be discussed in the next chapter, never went so far as to deny the supremacy of the people over their agents, the convention. Although conventions have assumed that the people have delegated to them enormous and extraordinary implied powers, no convention has ever presumed to assert squarely that the people might not have expressly withheld any of these powers.

May the people amend the convention act? If the legislature submits the amendment to the people, the legislature becomes a party to the amendment and hence assents to the popular action. Thus, if the original act was the product of the legislature alone, the legislature assents to delegating to the people the right to amend it, even if we were to assume that the people would not have this right inherently, apart from the legislative assent.

If the legislature withholds this assent, the people may amend the act by popular initiative in such States as possess that method of legislation; for even if the convention act is the creature of the legislature alone, it is subject to amendment by the initiative in the same manner as any other legislative act.

If the original act was the act of the people, they certainly have the right to change or recall their original action. All that ever stands in the way of change or recall of legislative action by the body which enacted it is the accrual of vested rights under the original enactment, and it is impossible to conceive that anyone, except the people as a whole, could acquire a vested right in a movement to initiate a change of government.

The power to amend, of course, carries with it the power to repeal; hence the people may at any time abolish a constitutional convention which they have called into being. Of course, a simpler way to nullify the whole action of the convention, would be by refusing to ratify the constitution when the convention submits it. This is practically a universal right, for constitutions are now practically universally submitted for popular approval.

There is one more way in which the electorate can control the

convention, and that is by the means of instructions to the delegates. The existence of this right depends on what fundamental theory of government we assume. There are two contending theories. One, which has already been stated in the chapter on fundamental principles,[1] and which has the support of express authority in many of our Bills of Rights, is to the effect that the people are supreme and would directly govern themselves if it were convenient and expedient. Direct government not being convenient and expedient, the people send to their various legislative bodies representatives, whose duty it is to represent and give effect to the point of view of their constituents.

The opposing, un-American theory is that the people are unfit to rule; that, at most, they are just barely able to elect a few supermen to govern them; and that these supermen, to whom are delegated the powers of government, owe no duty to consult the wishes of their incompetent constituents.

In other words, either we live under a representative form of government, or we live under an elective aristocracy.

It is strange that Jameson, after laying down in an early part of his book the principle that representatives must be so selected as to make it reasonably certain that the will of the people will be executed,[2] should in a later part of his book scornfully deny the right of the people to instruct their delegates.[3]

The binding force of instructions is a question of morals rather than of law. On many occasions members of conventions have had such a high moral sense that, when they found their instructions conflicting with their consciences, they have resigned from the convention rather than violate either. Such was the case of Mr. Vance in the Ohio convention of 1850, as related by Jameson,[4] and of Messrs. Worthington, Carroll, and Chase in the Maryland convention of 1776, as related by Dodd.[5]

Instructions may be either formal or informal. Of course, formal instructions are preferable, for they give the delegate an official expression of the opinion of his constituents. But as we have already seen, the people cannot speak officially save through their electors at a regularly constituted election, and such an election requires legislative assistance; so in States

[1] See pp. 11–12, *supra*. [2] *Jameson*, p. 1. [3] *Jameson*, pp. 353–354.
[4] *Jameson*, p. 353. [5] *Dodd*, p. 12.

which do not already have some machinery for obtaining a popular expression of opinion,[1] the legislature can by mere inaction effectively prevent the official instruction of delegates, if the legislature fears that the expressed sentiments of the people will turn out to be contrary to the sentiments which the legislature would desire the convention to hold.

Informal instruction may be had by means of mass meetings, petitions, etc.; but, as we have already seen, the question of instructions to delegates is largely a moral one. A delegate who desires to represent his constituents can find many ways of sounding them on their views; perhaps the simplest way being to declare his own platform in advance of his election, and let the people elect or reject him on that basis, "to the end that it may be a government of laws and not of men." [2]

[1] For example, Mass. St. 1913, c. 819.
[2] Mass. Decl. of Rts., Art. XXX.

Chapter XI

EXTRAORDINARY POWERS CLAIMED

Many conventions have claimed the right to exercise powers far beyond the mere framing of constitutions or constitutional amendments. It was to combat these claims of convention sovereignty that Jameson wrote his book in 1867 and that Braxton published his *Virginia Law Register* article in 1901.[1]

Jameson met the claim of convention sovereignty with the equally untenable claim of legislative sovereignty. Braxton met it with the much more tenable theory that the convention, like any other governmental body, possessed only such powers as were expressly or impliedly delegated to it; but even he was guided by a zeal much like Jameson's[2] and admits that he has proceeded on theory rather than on law and precedent.[3]

The conventions of the Revolutionary War were governed by no law but the law of extreme necessity. In order to maintain order and carry the war to a successful completion, it was necessary that they should exercise governmental power as well as merely frame constitutions. A conflict between legislature and convention would have been most unfortunate and disastrous. Thus in some States the legislatures framed the constitutions, and in others the conventions did the legislating, so that it is hard to classify these bodies as either conventions or legislatures.[4] We have seen that the independent constitutional convention originated only in those States and at such times as were free from military invasion and danger from an aggressive Tory element.

The Pennsylvania Supreme Court says, with respect to the doctrine of convention sovereignty,

> Such a doctrine, however suited to revolutionary times, when new governments must be formed, as best the people can, is wholly

[1] VII "Va. Law Reg.," 79.
[2] *Dodd*, p. vi.
[3] VII "Va. Law Reg.," 79, 97, n. 2.
[4] See p. 3, *supra*.

unfitted when applied to a state of peace and to an existing government, instituted by the people themselves and guarded by a well matured bill of rights.[1]

See also the following:

The authorities generally except ordinances, and even Constitutions, enacted in time of war, or upon the heels thereof, from the more rigid rule as applicable to those adopted in time of peace and tranquility.[2]

No argument for the implied power of absolute sovereignty in a convention can be drawn from revolutionary times, when necessity begets a new government. Governments thus accepted and ratified by silent submission afford no precedents for the power of a convention in a time of profound tranquility, and for a people living under self-established, safe institutions.[3]

When the first American conventions were held, the authority of England had been thrown off and no definite form of government established in its place. Under such circumstances, those Conventions were doubtless justified in assuming and exercising the most absolute sovereignty, not only in providing a new Constitution and political system, but in exercising, themselves, dictatorial powers, until they were ready to launch their new governments. But how can a convention, elected and assembled according to law, with all the functions of existing government in full operation, excuse the attempt to assume the unlimited powers of a Revolutionary convention? [4]

Neither are the secession and reconstruction conventions of the Civil War period very valuable as precedents, owing to the extreme emergency of the situation. Dodd says:

It is doubtful whether the Missouri and secession conventions may properly be called constitutional conventions in the sense in which that term is used here; they were called to consider the relations of their states to the federal government, and their actions in changing constitutions were but incidental to their primary object, which was not the framing or revision of constitutions.[5]

The conventions held in the southern states in 1865–66, under proclamation of President Johnson, and those held in 1867–68,

[1] *Wood's Appeal* (1874), 75 Pa. 59, 70.
[2] *Ex parte Birmingham Ry.* (1905), 145 Ala. 514, 532.
[3] *Ellingham* v. *Dye* (1912), 178 Ind. 336, 379.
[4] *Braxton*, VII "Va. Law Reg.," 79, 83.
[5] *Dodd*, p. 105, n. 55.

under congressional reconstruction acts, were vested with powers greater than ordinary constitutional conventions in states with organized governments, inasmuch as they were authorized not only to frame constitutions but also to take steps necessary for the erection of state governments.[1]

Attention should also be called to the fact that conventions called in territories under congressional enabling acts ordinarily possess wider powers than conventions called in organized states, inasmuch as they have not only to frame a constitution but also to provide for the organization of state governments.[2]

The Cyclopedia of American Government sums this up as follows:

Actually, conventions assembled during the early revolutionary period, and in Missouri and the southern states during the Civil War, exercised wider powers than those just referred to as proper powers of constitutional conventions. But it has already been suggested that the conventions of the early revolutionary period were primarily provisional governments and only incidentally constitutional conventions. In Missouri, from 1861 to 1863, and in the southern states during the same period conditions were exceptional and to a certain extent justified conventions in acting outside of what was their more proper field. The reconstruction conventions in the southern states, in 1865–66, and 1867–68, although called not only to frame constitutions but also to reëstablish state governments, did, actually, in a number of cases, go outside of their proper sphere and act as if they were bodies possessing all the capacities of the regular legislatures.[3]

Yet even reconstruction conventions have been held to be subject to the same inherent restrictions as ordinary conventions. This is true of the attitude of the Florida Supreme Court toward the convention of 1865 in that State. The court held invalid a clause in the constitution adopted by that convention because it thought the clause not within the convention's powers. The convention had been called "for the purpose of altering or amending the constitution . . . and with authority to exercise within the limits of said state all the powers necessary and proper to enable such loyal people of the state of Florida

[1] *Dodd*, pp. 106–107. [2] *Dodd*, p. 107.
[3] I "Cyc. American Government," 430–431.

to restore said state to its constitutional relations to the federal government."[1] The court said:

The functions of the convention were confined to the objects for which it was elected, the presentation of an amended constitution, having reference to the declaration of certain general principles and rules of government, and providing for the organization thereof by the election of the necessary officers.[2]

Thus, if one of these conventions is to be cited as a precedent in opposition to convention sovereignty, the rest of them might just as well be cited in support of this doctrine; the objection being merely to the weight, rather than to the admissibility of the evidence.

The doctrine of convention sovereignty has been often propounded, particularly by members of conventions. The following statements of this doctrine may prove instructive:

In the New York convention of 1821 a Mr. Livingstone (it does not appear whether Peter R. or Alexander) said:

We have been told by the honorable gentleman from Albany (Mr. Van Vechten) that we were not sent here to deprive any portion of the community of their vested rights. Sir, the people are here themselves. They are present by their delegates. No restriction limits our proceedings. What are these *vested* rights? Sir, we are standing upon the foundations of society. The elements of government are scattered around us. All rights are buried; and from the shoots that spring from their grave we are to weave a bower that shall overshadow and protect our liberties.[3]

The Hon. George M. Dallas, in a letter published in "The Pennsylvanian" of September 5, 1836, said:

A Convention is the provided machinery of peaceful revolution. It is the civilized substitute for intestine war. . . . When ours shall assemble, it will possess, within the territory of Pennsylvania, every attribute of absolute sovereignty, except such as may have been yielded and are embodied in the Constitution of the United States. What may it not do? It may reorganize our entire system of social existence, terminating and proscribing what is deemed injurious, and establishing what is preferred. It might restore the institution of slavery among us; it might make our penal code as

[1] *Dodd*, p. 107, n. 59.
[2] *Bradford* v. *Shine* (1871), 13 Fla. 393, 412–413.
[3] *Jameson*, p. 303.

bloody as that of Draco; it might withdraw the charters of the cities; it might supersede a standing judiciary by a scheme of occasional arbitration and umpirage; it might prohibit particular professions or trades; it might permanently suspend the privilege of the writ of *habeas corpus,* and take from us . . . the trial by jury. These are fearful matters, of which intelligent and virtuous freemen can never be guilty, and I mention them merely as illustrations of the inherent and almost boundless power of a Convention.[1]

So, in the Illinois convention of 1847, Onslow Peters said:

He had and would continue to vote against any and every proposition which would recognize any restriction of the powers of this Convention. We are . . . the sovereignty of the State. We are what the people of the State would be, if they were congregated here in one mass meeting. We are what Louis XIV said he was, 'We are the State.' We can trample the Constitution under our feet as waste paper, and no one can call us to account save the people.[2]

The Committee on Printing of the Illinois convention of 1862 said, in one of their reports:

When the people, therefore, have elected delegates, . . . and they have assembled and organized, then a peaceable revolution of the State government, so far as the same may be effected by amendments of the Constitution, has been entered upon, limited only by the Federal Constitution. All power incident to the great object of the Convention belongs to it. It is a virtual assemblage of the people of the State, sovereign within its boundaries, as to all matters connected with the happiness, prosperity and freedom of the citizens, and supreme in the exercise of all power necessary to the establishment of a free constitutional government, except as restrained by the Constitution of the United States.[3]

In a speech in the same body, General Singleton said:

Sir, that this Convention of the people is sovereign, possessed of sovereign power, is as true as any proposition can be. If the State is sovereign the Convention is sovereign. If this Convention here does not represent the power of the people, where can you find its representative? If sovereign power does not reside in this body, there is no such thing as sovereignty.[4]

The Pennsylvania convention of 1873 replied to the decision of the Supreme Court in Wells *v.* Bain, which appeared to the

[1] *Jameson,* pp. 303–304.
[2] *Jameson,* p. 304.
[3] *Jameson,* p. 304.
[4] *Jameson,* p. 304.

convention to be an assertion of legislative supremacy, by passing a resolution in which they declared that the convention, subject to the Constitution of the United States, is answerable only to the people from whom it derives its power.[1]

It may be because of this resolution that the Supreme Court of Pennsylvania in the later case of Wood's Appeal shifted its ground from an assertion of legislative supremacy to an assertion of popular supremacy.[2]

Benjamin F. Butler asserted in the Massachusetts convention of 1853:

> We are told that we assume the power, and that we are merely the agents and attorneys, of the people. Sir, we are the delegates of the people, chosen to act in their stead. We have the same power and the same right, within the scope of the business assigned to us, that they would have, were they all convened in this hall.[3]

Dodd points out that the doctrine of convention sovereignty has attained the dignity of being embodied in dicta by the highest courts of several States.[4] Thus the Supreme Court of Texas has said:

> So in case of a peaceful change of government by the people assembled in convention for the purpose of forming a constitution. . . . It would be in the power of such convention to take away or destroy individual rights, but such an intention would never be presumed.[5]

So also the Supreme Court of Mississippi:

> We have spoken of the constitutional convention as a *sovereign body*, and that characterization perfectly defines the correct view, in our opinion, of the real nature of that august assembly. It is the highest legislative body known to freemen in a representative government. It is supreme in its sphere. It wields the powers of sovereignty, specially delegated to it for the purpose and occasion by the whole electoral body, for the good of the whole commonwealth. The sole limitation upon its power is, that no change in the form of government shall be done or attempted. The spirit of

[1] *Jameson*, p. 410.
[2] See pp. 109–110, *supra*.
[3] Deb. Mass. Conv. 1853, Vol. I, p. 78. And *cf.* Deb. Ky. Conv. 1849, p. 863; Deb. Ala. Conv. 1861, p. 114; Deb. Va. Conv. 1901, Vol. I, pp. 63, 77, 83; Vol. II, p. 3132; *Amasa M. Eaton* in XIII "Harv. Law Rev.," 284.
[4] *Dodd*, p. 78, n. 10.
[5] *McMullen* v. *Hodge* (1849), 5 Tex. 34, 73.

republicanism must breathe through every part of the frame-work, but the particular fashioning of the parts of this frame-work is confined to the wisdom, the faithfulness and the patriotism of the great convocation representing the people in their sovereignty.[1]

And the Supreme Court of Michigan:

The convention is an independent and sovereign body.[2]

Jameson sums up the history of this doctrine as follows:

The records of our conventions reveal no trace of it earlier than the New York convention of 1821, from which an extract has been given. In 1829 it again made its appearance in the Virginia convention but obscurely and hesitatingly. . . . The next appearance was in the letter of Mr. Dallas, from which an extract has been given above, and in the convention held in Pennsylvania in the following year, — the latter the fruit of the seed sown by that gentleman. . . . Ten years afterwards, this theory was enunciated, in the terms we have seen above, by Mr. Peters, in the Illinois Convention of 1847. In 1849, it made its appearance in the Kentucky Convention, and four years later, in that of Massachusetts, under the patronage of Messrs. Hallett and Butler. In 1860–1861, it produced its legitimate fruits in the so-called secession of the eleven slaveholding States from the Union, a movement matured and consummated by its aid; and finally, in 1862, its echo was heard in the free State of Illinois, some members of whose Convention unwisely seized upon a time of national peril to endorse a disorganizing dogma, in the general adoption of which at the South that peril had originated.[3]

Jameson also lays the spontaneous conventions of Maryland in 1837, and Rhode Island in 1841 to this dogma, as he calls it.[4] It is probable, however, that he is unduly exercised. Dodd says in this connection:

Judge Jameson's work may be said to have been written to disprove the theory that a convention has sovereign power, and under these conditions the theory assumed in his mind a much more important position than it ever attained in fact. The theory of conventional sovereignty was advanced by speakers before several conventions, beginning with that of New York in 1821, but no

[1] *Sproule* v. *Fredericks* (1892), 69 Miss. 898, 904.
[2] *Carton* v. *Secy. of State* (1908), 151 Mich. 337, 340–341.
[3] *Jameson*, pp. 307–308.
[4] *Jameson*, p. 309.

convention seems ever to have attempted to act upon the theory or even to have endorsed it. The report made to the Illinois convention of 1862 and the resolutions adopted by the Pennsylvania convention of 1873 went little if any further than to assert the convention's independence of the legislative and other organs of the existing state government.[1]

The full quotation from Gen. Butler, even as given by Jameson shows that Butler was not advocating convention sovereignty, for Butler said, "In my judgment, we have every incidental power necessary to do the business of the people." [2] Incidental and emergency powers, and independence of the legislature are all that has ever been seriously claimed in the line of convention sovereignty; but Braxton and Jameson construct men of straw out of the oratorical utterances of convention members, and then proceed valiantly to knock these straw-men down.

Nevertheless, lest some one might seriously raise the claim of convention sovereignty, beyond mere incidental powers and freedom from legislative control, it may be well to select the following line of argument in opposition:

> We are told they were elected by the people. This, however, is not enough. For what purpose were they elected by the people? To represent their sovereignty. But was it to represent their sovereignty to every purpose, or was it for some specific purpose? To this no other answer can be given than the act of the legislature under which the convention was assembled. Certainly, the people may, if they will, elect delegates for a particular purpose, without conferring on them all their authority. To deny this, would be to detract from the power of the people, and to impose on them a most inconvenient and dangerous disability.[3]

> No doubt there might be a convention unlimited in its powers, and representing all the authority of the people. But when they are about to confer this high authority, certainly they ought to be aware that they are doing so.[4]

If, by a mere determination of the people to call a convention, whether it be by a vote or otherwise, the entire sovereignty of the people passes ipso facto into a body of deputies or attorneys, so

[1] *Dodd*, pp. 77–78, n. 10.
[2] Deb. Mass. Conv. 1853, Vol. I, p. 78; *Jameson*, p. 334.
[3] *McCready* v. *Hunt* (1834), 2 Hill Law (S. C.) 1, 270–271.
[4] *McCready* v. *Hunt* (1834), 2 Hill Law (S. C.) 1, 271–272.

that these deputies can without ratification, alter a government and abolish its bill of rights at pleasure, and impose at will a new government upon the people without restraint upon the governing power, no true liberty remains. Then the servants sit above their masters by the merest imputation, and a people's welfare must always rest upon the transient circumstances of the hour, which produce the convention and the accidental character of the majority which controls it.[1]

The present inquiry is not how much power *may* be conferred by law, but *what* power was conferred on this convention?[2]

In the appointment of delegates to that convention, the people acted upon the faith that they were to be charged with those duties and no others, and the assumption of any other powers than those necessary to the attainment of the objects in view, would have been a violation of the trust reposed in them, and an usurpation of the rights of the people.[3]

It will not do to assert that the whole original power of the people was conferred by the election. . . . The law was the warrant of their election, and expressed the very terms chosen and adopted by the people, under which *they* delegated their power to these agents. The delegates possess no inherent power, and when convened by the law at the time and place fixed in it, sit and act under it, as their letter of attorney from the people themselves, and can know and discover the will of the people only so far as they can discern it through this the only warrant they have ever received to act for the people. If they claim through any other source, they must be able to point to it.[4]

Can it be supposed that the good people of this State thought that in the appointment of delegates to that convention, they were conferring on them the authority to transfer their allegiance to the grand Turk, or the Emperor of Russia, or to indulge in any other caprice they might think proper? [5]

Did the people by this act, without an expressed intent, and by mere inference, intend to abdicate all their own power,their rights, their interests, and their duty to each other in favor of a body of mere agents, and to confer upon them, by a blank warrant, the absolute power to dictate their institutions, and to determine

[1] *Wood's Appeal* (1874), 75 Pa. 59, 70.
[2] *Wells* v. *Bain* (1872), 75 Pa. 39, 50.
[3] *McCready* v. *Hunt* (1834), 2 Hill Law (S. C.) 1, 242.
[4] *Wells* v. *Bain* (1872), 75 Pa. 39, 48.
[5] *McCready* v. *Hunt* (1834), 2 Hill Law (S. C.) 1, 242.

finally upon all their most cherished interests? If the argument be admitted for an instant that because nothing was said in this law on the subject of *delegation*, therefore, greater powers were conferred than were granted in the subsequent Act of 1872, then all power belonging to the people passed, and they did grant by it the enormous power stated. Then, by a covert intent, hidden in the folds of this act, the people delegated power to repeal all laws, abolish all institutions, and drive from place the legislature, the governor, the judges, and every officer of the Commonwealth, without submitting the work of the delegates to the ratification of the people.[1]

In considering this question of delegated power some are apt to forget that the people are already under a constitution and an existing frame of government instituted by themselves, which stand as barriers to the exercise of the original powers of the people, unless in an authorized form.[2]

The regular Government continues in full force, de jure as well as de facto, uninterrupted and unaffected, even in theory, by the existing Constitutional Convention, until a new Constitution is actually and legally adopted.

A Constitutional Convention is not the People, with sovereign and unlimited powers, but a mere Committee of the People, with only such limited powers as the People may expressly bestow upon them, the granting of which powers will be strictly construed against the Convention.[3]

Three and a half or four millions of people cannot assemble themselves together in their primary capacity — they can act only through constituted agencies. No one is entitled to represent them unless he can show their warrant — how and when he was constituted their agent.[4]

Upon the common-place principle that the authority of the agent is limited by the powers conferred on him by the principal, the powers of the delegates were limited to the objects designated by the act under which the convention was called.[5]

Beyond a general purpose of revising the constitution, the authority of the delegates is not set forth. They are not endowed with

[1] *Wells* v. *Bain* (1872), 75 Pa. 39, 50–51.
[2] *Wells* v. *Bain* (1872), 75 Pa. 39, 53.
[3] *Braxton*, VII "Va. Law Reg.," 79, 96.
[4] *Wells* v. *Bain* (1872), 75 Pa. 39, 53.
[5] *McCready* v. *Hunt* (1834), 2 Hill Law (S. C.) 1, 242.

the entire sovereignty of the state. Their agency, like every branch of the public service, is marked on all sides by fixed bounds.[1]

Let us examine in detail the few instances in which conventions have assumed to interfere with the other branches of the government. This interference is, of course, illegal if we hold to the theory that the convention is a fourth branch of the government, and that the four branches of government are shut up in separate compartments.[2]

First let us consider attempts by conventions to interfere with the executive department. Jameson says:

> That body cannot remove from office, or instruct those holding office, by any direct proceeding, as by resolution or vote applying to particular cases. It is its business to frame a written Constitution; at most, to enact one. It has no power, under such a commission, to discharge the public servants, except so far as their discharge might result from the performance of its acknowledged duty.[3]

Jameson divides convention interference with the executive into three questions as follows:

> 1. Can a Convention appoint officers to fill vacancies in the various governmental departments?
> 2. Can it eject from office persons holding positions in the government by regular election or appointment?
> 3. Can it direct such officers in the discharge of their duties? [4]

The Missouri convention of 1865, called by the legislature, but elected by the people, prepared various amendments which were submitted to the people and adopted; and in addition it adopted and put into operation, without submission to the people, an ordinance abolishing slavery in the State, and an ordinance vacating certain judicial and executive offices and authorizing the Governor to fill the vacancies. The convention had only been authorized to amend the constitution.[5] It is clear that the convention itself did not regard these acts as an amendment of the constitution, for it submitted all the true amendments to the people.

The convention of 1861 in the same State had removed

[1] *Opinion of Justices* (1889), 76 N. H. 612, 617.
[2] See pp. 89–91, *supra.*
[3] *Jameson,* p. 321. [4] *Jameson,* p. 320. [5] *Jameson,* pp. 322–324.

various executive and legislative officers and had repealed certain acts of the legislature. It also had passed considerable legislation for the government of the State.[1]

Jameson comments as follows:

> All these acts were clearly usurpations of authority properly belonging to other departments of the State government. That that government was in treasonable hands might justify the Convention, on moral grounds, in seizing, by revolutionary force, powers not its own, but could not alter the legal character of its acts. In 1865, the same necessity perhaps existed, and, if so, mighty justify acts clearly of the same general character, legally considered, as those of its predecessor of 1861. But, as I have said, upon this question I pass no opinion. If the acts characterized as revolutionary were strictly necessary, it was not the first time in history that a party, having morally and politically the better case, had legally the worst of the argument.[2]

These Missouri cases are the only examples of attempted usurpation of executive powers cited by Jameson, up to 1887. No further examples are cited by Braxton up to 1901, or by Dodd up to 1910, and the author knows of none since then. Like the conventions of the Revolutionary War, these conventions possessed the justification of extreme necessity and hence are really not precedents.

The conflicts with the judiciary, except as aforesaid, have all been cases of interference *by*, rather than interference *with*, the courts.

Jameson introduces the subject of interference with the legislature by the following summing up of what has gone before.

> With the Executive and Judiciary of a State, a Convention has, in the ordinary and normal operation of its government, no direct relations. Neither of these departments has any thing to do with calling it together, except in perhaps rare cases, in which some specific and extraordinary duty has been prescribed to it by the legislature; and neither of them, while a Convention is in session, has any occasion to come in contact with it. The only cases in which either of those departments could be brought into direct relations with that body, would be where the latter should attempt to direct it in the discharge of its constitutional duties, — a case which has already been considered, — or in which one of the

[1] *Jameson*, p. 325. [2] *Jameson*, p. 325.

former should attempt to revolve outside its proper orbit, and thus bring about collisions with the latter. Inasmuch, however, as neither of the three could with any show of right do any act which should result in such a collision, except when acting in assumed conformity to some law, giving to usurpation an apparent legality, no questions could arise between them as to their respective powers, which would not resolve themselves into questions as to the relative powers of Conventions and legislatures, the only law-making bodies, save the electors, which have been already considered, known to our Constitutions. I shall therefore spend no time in considering the relations of those two departments to Conventions, but pass to those which the latter bear to legislatures, and the powers resulting therefrom, which belong to each of those bodies.[1]

Dodd's collection of examples of legislation by conventions [2] is rather misleading, as he frequently refers to ordinances which are clearly within the constitutional powers of the convention, as being ordinances of a legislative character. It is necessary to analyze each of the bits of alleged legislation passed by conventions, in order to determine whether it be of a strict legislative nature, or merely incidental to the proper duties of the convention.

Instances of pure legislation have been as follows. The South Carolina convention of 1895 established a new county, paid interest on the public debt, put the counties on a cash basis, and passed three statutes validating the subscriptions for stock in several railroads.[3] In fact, this convention got so carried away with the idea of legislating, that one of the members moved "that there shall be no session of the legislature this year, but the convention shall do its work in its place." [4]

The Mississippi convention of 1890 enacted a general election law, established a commission to collect information for the next legislature on a certain subject, created the office of land commissioner, validated the titles to certain land which had been homesteaded, issued bonds to construct levees, and exempted factories from taxation.[5]

[1] *Jameson*, pp. 355–356.
[2] *Dodd*, p. 108.
[3] *Thorpe*, Vol. VI, pp. 3345–3354.
[4] *Amasa M. Eaton* in XXXI "Am. Law Rev.," 198, 210.
[5] *IV Thorpe*, 2129–2137.

The Louisiana convention of 1898 authorized the mobilization of state troops.[1]

We have already referred to the action of the Missouri convention of 1865 in removing certain of the State officers and providing for the filling of vacancies. This convention also adopted and put into operation, without submission to the people, an ordinance abolishing slavery in Missouri.[2]

The Supreme Court of Alabama sustained the power of the convention of 1865 to act as a provisional legislature.[3] This Supreme Court at first took the same view with reference to the convention of 1867–1868, but later held that this convention did not have legislative power.[4]

The South Carolina convention of 1868 annulled certain earlier legislative acts under which contract rights had been acquired.[5] The Supreme Court of South Carolina declared this ordinance void as imparing the obligation of contracts, but delivered the following dictum:

> It is not easy to define the powers which a convention of people may rightfully exercise. It has been doubted whether any act of mere legislation in a state having a constitution can be passed by a convention called for a particular and different purpose. The body is not constituted with two houses, and in other respects lacks the organization necessary for ordinary legislation. The convention of 1868 was not called for a purpose fairly embracing the subject of this ordinance, which was never submitted to the people.[6]

The Alabama convention of 1901 provided by ordinance that a term of court should be held at Pell City.[7] The Supreme Court held this ordinance void because not submitted to the people.[8]

The territorial convention of Oklahoma provided in its constitution for dividing Woods County into three counties. It also passed an ordinance to carry this provision into effect and tried to enforce the ordinance before the adoption of the

[1] *Thorpe*, Vol. III, p. 1596.
[2] *Jameson*, p. 322.
[3] Cases cited in *Dodd*, p. 110, n. 66.
[4] *Plowman* v. *Thornton* (1875), 52 Ala. 559, 569.
[5] *Dodd*, p. 112.
[6] *Gibbes* v. *Railroad* (1879), 13 S. C. 228, 242.
[7] *Dodd*, pp. 113–114.
[8] *Ex parte Birmingham Ry.* (1905), 145 Ala. 514, 519.

constitution by the people.[1] The Supreme Court of the territory held:

> The convention has no power to enact laws; it possesses no legislative powers except such as may be necessary to exercise in prescribing by ordinance the methods and procedure for obtaining the expression of the electors upon the ratification of the proposed constitution, and for the election of the officers provided for in the constitution.[2]

But the court found that this particular ordinance was within the implied powers of the convention.

Compare:

> The passage of an ordinance, then, to raise revenue was an assumption of power by the convention, that was never ratified by the people of the state.[3]

Some conventions seek to validate their purely legislative ordinances by including in the constitution which they prepare, a provision to the effect that all ordinances passed by the convention shall have the same force as though included in the constitution. This was the case in the South Carolina convention of 1895, which passed a large number of purely legislative ordinances, as well as several ordinances relating to the duties of the convention.[4]

The Mississippi constitution of 1890 declared void all laws repugnant to the ordinances of the convention, thus giving these ordinances validity.[5]

The Louisiana constitution of 1898 expressly ratified the ordinances providing for loans for the mobilization of troops and for the expenses of the convention.[6]

Of course, a simple procedure for a convention which wishes to legislate would be actually to include the legislation in the constitution. That has frequently been done with unquestioned success; in fact many of our State constitutions to-day consist for the most part of legislative details which ought to have been left to the ordinary legislature.

[1] *Dodd*, pp. 114–115.
[2] *Franz* v. *Autry* (1907), 18 Okla. 561, 631.
[3] *Bragg* v. *Tuffts* (1887), 49 Ark. 554, 561.
[4] Art. XVII, § 11.
[5] § 275.
[6] Art. 326.

For example:

The constitution of Oklahoma contains eleven pages of legislation relating to the subject of corporations alone, besides much more ordinary legislative matter relating to homesteads and exemptions, banks and banking, insurance, the employment of children, and education. It forbids plural marriages, fixes the maximum rate of interest, abolishes the so-called fellow-servant doctrine and regulates the use of the contributory-negligence and assumption-of-risk doctrines as defenses in certain suits for damages, establishes the eight-hour day on public works and in coal mines, and determines the test for the purity of kerosene oil. The convention also provided for the separate submission to the electorate of a proposal to prohibit the sale of intoxicating liquors. The acts of the Oklahoma convention of 1907 are merely the most striking evidence of the growing tendency throughout the states, especially in the South and West, to transform the constitutional convention into an ordinary legislative body.[1]

Such provisions are so numerous that they need no mention. Dodd says:

The constitutional convention is a legislative body, although with limited functions, and it is within the sole determination of the convention as to what provisions shall be inserted into a new constitution. A constitutional convention may not properly enact a law or ordinance abolishing the fellow-servant rule, but it may insert into the new constitution a provision accomplishing the same purpose. By the insertion into new constitutions of matters really not fundamental in character constitutional conventions have come to exercise great powers of legislation.[2]

The Supreme Court of Texas said with regard to an ordinance of the territorial convention of 1868:

It is true that the question of the propriety of incorporating any specific provision into the fundamental law was for the sole determination of the convention. But we are of opinion that when a convention is called to frame a constitution which is to be submitted to a popular vote for adoption, it cannot pass ordinances and give them validity without submitting them to the people for ratification as a part of the constitution. . . . The ordinance of the convention in question, which divided the state

[1] *Holcombe*, State Government, p. 126.
[2] *Dodd*, p. 116. *Cf. Schertz* v. *Bank* (1892), 47 Ill. App. 124, 133.

into congressional districts, and that which provided for a submission of the proposed constitution to a vote of the people, are appended to the constitution as framed and the whole are signed by the president and members as one instrument.[1]

But this subterfuge of including legislation in the constitution has not always gone unchallenged. Thus the Supreme Court of Florida struck out of the constitution of 1865 a purely legislative provision, repealing the statute of limitations.[2] That constitution, however, had been promulgated without being submitted to the people for ratification.[3]

Conventions which wish to legislate, however, do not always find it necessary to include or refer to their legislation in their constitution. Dodd says:

> Not only may a convention legislate by inserting provisions into a new constitution, but it may also do so by the submission to the people of separate clauses or ordinances to be voted upon either as a part of the constitution or separately from it — that is, it may exercise ordinance power if the ordinances are submitted to the people with or at the same time as the proposed constitution.[4]

Most of the court decisions which have declared the convention ordinances to be invalid have proceeded, not on the ground that the convention had no power to frame these ordinances, but rather on the ground that they ought to have been submitted to the people for approval. See the following quotations:

> The ordinance now under consideration was not submitted to a vote, though two others, which were added, incorporated into and signed as a part of the constitution, were so submitted. Since the convention could not finally legislate, and since *a vote of the people was necessary to make its action effective,* we conclude that the ordinance in question was invalid, and not effective for any purpose.[5]

It is not easy to define the powers which a convention of the people may rightfully exercise. It has been doubted whether any act of mere legislation in a state having a constitution can be

[1] *Quinlan* v. *Houston Ry. Co.* (1896), 89 Tex. 356, 376.
[2] *Bradford* v. *Shine* (1871), 13 Fla. 393, 411–415.
[3] *Thorpe*, Vol. II, p. 685, n. a.
[4] *Dodd*, p. 116.
[5] *Quinlan* v. *Houston Ry. Co.* (1896), 89 Tex. 356, 377.

passed by a convention called for a particular and different purpose. The body is not constituted with two houses, and in other respects lacks the organization necessary for ordinary legislation. The convention of 1868 was not called for a purpose fairly embracing the subject of this ordinance, *which was never submitted to the people.*[1]

The ordinance in question pertains in no way to an amendment or revision of the constitution, and it was beyond the power of the convention to pass this ordinance, or it could not become binding or of legal force *without having been submitted to and ratified by the people.*[2]

It is contended that, if the adoption of the ordinance was beyond the authority of the convention, it is nevertheless valid and binding, because the constitution was submitted to and was ratified by the people. The authorities are almost uniform that the ratification of an unauthorized act by the people (and the people are the principal in this instance) renders the act valid and binding.[3]

The Supreme Court of Texas, however, has doubted the validity of ordinances submitted to the people separately from the constitution,[4] but this case would seem to have gone on the question of separate submission of constitutional provisions, rather than on the question of the legislative power of the convention.

But what is the status of such separate legislation in cases where the submission of the constitution to the people is not required, either by the existing constitution or by a convention act ratified and adopted by the people. In such cases it is quite probable that the convention may successfully promulgate ordinances of a purely legislative character. The Supreme Court of Texas has said:

The convention which passed the ordinance which was held valid in Grigsby *v.* Peak was called by virtue of the proclamation of President Johnson. This proclamation did not require any part of the work of the convention to be submitted to the vote of

[1] *Gibbes* v. *Railroad* (1879), 13 S. C. 228, 242.
[2] *Ex parte Birmingham Ry.* (1905), 145 Ala. 514, 516.
[3] *Ex parte Birmingham Ry.* (1905), 145 Ala. 514, 528; and *cf.* same case, p. 530.
[4] *Quinlan* v. *Houston Ry. Co.* (1896), 89 Tex. 356, 376; quoted pp. 143–144, *supra.*

the people, and in our opinion therefore had the power to pass ordinances without submitting them for adoption to a popular vote.[1]

Dodd says:

In states where conventions may promulgate their work without popular approval, although their invasion of the purely legislative field may be deprecated, there seems to be nothing to prevent such action except the self-restraint and common sense of the convention itself. The same forces which practically compel conventions to submit their work to the people, in most of the states where they are not required by constitutional provisions to do this, will also keep them pretty definitely within their proper sphere, even where the courts may decline to interfere.[2]

But, as has already been pointed out, most of the ordinances of so-called legislative character turn out on inspection to be properly incidental to the work of the convention. Among instances of incidental legislation have been the following.

The Missouri convention of 1865 passed an ordinance providing for the method of submitting the new constitution to the voters. The Supreme Court of that State, in a prosecution for violating the oath required of each voter under that ordinance, held that the enactment of the ordinance was within the necessary incidental powers of a convention, and *a fortiori* since this convention was not required to submit its work to the people. The court said:

The convention might (if it had deemed proper to do so) have declared the constitution framed by it in full force and effect without making provision for its submission to the voters of the State. As the representatives of the people, clothed with an authority as ample as that, certainly its power to prescribe the means by which it was thought best to ascertain the sense of the qualified voters of the State upon that instrument cannot be seriously questioned.[3]

Whenever the convention act or the constitution omit to prescribe the detailed manner of submission or of the internal government of the convention, the conventions themselves have

[1] *Quinlan* v. *Houston Ry. Co.* (1896), 89 Tex. 376, 377; *Grigsby* v. *Peak* (1882), 57 Tex. 142.

[2] *Dodd*, p. 117.

[3] *State* v. *Neal* (1868), 42 Mo. 119, 123.

always covered the matter by ordinances or rules, and such ordinances or rules have rarely been questioned. Conventions also frequently pass acts to put the new constitution into effect. Most of the ordinances of the South Carolina convention of 1895, the Mississippi convention of 1890, the Louisiana convention of 1898, and the Missouri convention of 1865, cited by Dodd as "ordinances of a purely legislative character" [1] turn out upon examination to be really incidental to the powers of the convention.

Thus we see that conventions, unless expressly called for some further purpose, are bound to the framing of a constitution and the passage of necessary rules and ordinances incidental thereto. They have no power to legislate or to interfere with members of the other two branches of government.

The powers of legislation permitted to a convention are apparently limited to preliminary, temporary, and provisional measures.[2]

A related question to the legislative powers of a convention is the question of its power to perform the functions assigned to the State legislature. Whatever may be said in theory in opposition to this assumption of power,[3] the fact remains that it has been actually exercised.

The Illinois convention of 1862 divided the State into congressional districts, under United States Constitution, Article I, Section IV, which assigns that duty to the State legislatures.[4] This has also been uniformly done by conventions in territories seeking admission to the Union, and has been done by some reconstruction conventions.[5] Such redistrictings, including the Illinois case, have uniformly been accepted by Congress.

The same Illinois convention of 1862 ratified the pro-slavery amendment to the Federal Constitution, under United States Constitution, Article V, which assigns that duty to the State legislatures.[6] The validity of this action, however, was never determined, as not enough other States ever ratified this amendment.

Can conventions increase their own powers? This question is sometimes stated in the form: has a convention the power to amend the convention act which calls it into being? This is

[1] *Dodd*, p. 108.
[2] 6 R. C. L., § 18, pp. 27–28.
[3] *Jameson*, pp. 448–452.
[4] *Jameson*, pp. 446–447.
[5] *Jameson*, p. 449.
[6] *Jameson*, p. 450.

really the converse of the question of the powers of the legislature and the people to restrict the convention. Any violation of valid restrictions may of course be ratified by the acceptance of the constitution or a ratifying ordinance by the people.

Complete interference with the various branches of the government may perhaps be more successful than partial interference. If the old government is completely overthrown, there will be left no one in authority who can question the rights of the convention. Allusion has been made several times in this book to the statement by the Supreme Court of the United States that a court has no power to hold invalid the constitution under which it sits.[1]

The Rhode Island Supreme Court, to whom the Federal Court was referring in that quotation, went further and intimated that if the question had been before a court established by the rival government, that court would have had to decide exactly the opposite from this court.[2]

And as has already been intimated, the executive officers having charge of money matters under the new government (or under the old government, if they were in sympathy with the new) could effectually put the new government into power by means of this control.[3]

Thus it appears that if a convention decides to exceed its proper functions and attempt to exercise convention sovereignty, it had better be as sovereign as possible. Extremes of moderation and immoderation are thus seen to meet, in success.

[1] See pp. 101 and 102, *supra;* and 158, *infra.*
[2] "Trial of Dorr," p. 38. Quoted on p. 157, *infra.*
[3] See p. 93, *supra.*

Chapter XII

JUDICIAL INTERVENTION

To what extent can the judicial branch of the government interfere with the procedure of constitutional amendment by the convention method?

We can best understand the discussion of this question if we first consider the matter of judicial interference with amendments adopted under constitutional methods. Such a study will show us how ready the courts are to seize on the slightest flaw as a ground for declaring a supposed amendment to be void. Taking up first the case of amendments submitted by the legislature to a popular vote, we find the courts upsetting amendments, even after popular ratification, on the following grounds: Because not enough legislators voted thereon;[1] because the amendment had been entered in the House Journal by title instead of in full;[2] because the amendment was proposed by a special instead of regular session;[3] because of slight discrepancies in the journal entries of two sessions, although it was clear that both sessions acted on the identical amendment;[4] because the proposed amendment was not advertised in the newspapers at just the right time;[5] because the amendment treated two separable subjects;[6] and for other similar reasons.[7]

[1] *Holmberg* v. *Jones* (1901), 7 Ida. 752, 757–758.

[2] *Koehler* v. *Hill* (1883), 60 Ia. 543; *State* v. *Brookhart* (1901), 113 Ia. 250; *People* v. *Strother* (1885), 67 Cal. 624; *Thomason* v. *Ruggles* (1886), 69 Cal. 465; *Paving Co.* v. *Hilton* (1886), 69 Cal. 479; *Paving Co.* v. *Tompkins* (1887), 72 Cal. 5; *People* v. *Loomis* (1904), 135 Mich. 556; *Re Senate File*, 25 Neb. 864, 883–886; *Durfee* v. *Harper* (1899), 22 Mont. 354; *State* v. *Tufley* (1887), 19 Nev. 391.

[3] *People* v. *Curry* (1900), 130 Cal. 82. This amendment, however, had not yet been acted on by the people.

[4] *Koehler* v. *Hill* (1883), 60 Ia. 543.

[5] *State* v. *Tooker* (1894), 15 Mont. 8.

[6] *State* v. *Powell* (1900), 77 Miss. 543. The real reason for this decision, however, was that the amendment in question affected the tenure of the judges who rendered the decision. *McBee* v. *Brady* (1909), 15 Ida. 761; *Armstrong* v. *Berkey* (1909), 23 Ok. 176.

[7] *McConaughty* v. *Secy. of State* (1909), 106 Minn. 392; *State* v. *Swift* (1880),

Of course, there are some decisions in which the courts have been more liberal, but these are mostly in earlier cases, before the control of the courts over the constitution had been fully developed, and are in the minority. Dodd points out that since 1890 the courts have frequently exercised supervision over all steps in the amending process,[1] and he goes on to say,

> It may be said then that the courts exercise supervision over all steps of the amending process *which are specified by the constitution.*[2]

The italics in the last quotation are the present author's. They point out an important distinction. Following that distinction, it is probable that the courts would exercise the same supervision over a convention, so far as that convention was authorized by the constitution,[3] as they would over the legislative method of amending.

As Dodd says:

> Although, then, a convention, in framing a complete constitution or a revised instrument, would seem, in theory, to be bound by existing constitutional restrictions upon the exercise of its power, as strictly as is the legislature in proposing constitutional amendments, yet there are difficulties in the way of enforcing this rule. If a constitution has been proposed for the approval of the people, a court would hardly enjoin its submission, although this might be done; if this were not done the only other opportunity for the court to act would be after a constitution had been approved and before it had gone into operation, for after it had become effective a court would hardly dare overturn the government organized under it when there were no opposing bodies claiming to be the lawful government — the question as to the validity of the constitution would have become a political question with which the court should properly refuse to meddle. On the whole it would seem that because of practical considerations courts must pursue a more liberal policy in passing upon the acts of a convention, especially after they have been approved by the people, than it has [*sic*] pursued in

69 Ind. 505; *Re Denny* (1901), 156 Ind. 104; *State* v. *Brooks* (1909), 17 Wyo. 344; *Hatch* v. *Stoneman* (1885), 66 Cal. 632; *State* v. *Davis* (1888), 20 Nev. 220; *Livermore* v. *Waite* (1894), 102 Cal. 113; *Collier* v. *Frierson* (1854), 24 Ala. 100.

[1] *Dodd*, p. 212, n. 157.

[2] *Dodd*, p. 215.

[3] The author has been unable to find any instances of this, however.

interpreting the constitutional restrictions placed upon the legislative power to propose amendments.[1]

Or, as the Supreme Court of Alabama has said:

We entertain no doubt that, to change the Constitution in any other mode than by a Convention, every requisition which is demanded by the instrument itself must be fulfilled, and the omission of any one is fatal to the amendment.[2]

The real reason for this is probably the fact, as we have already seen, that as conventions may be held in the absence of constitutional provisions, or in the face of provisions prohibiting them, or even in a different manner from provisions permitting them, the constitution has really little to do with conventions, and hence constitutional provisions authorizing such conventions have no higher standing than bits of ordinary legislation to the same effect. This may explain the reason why courts are more hesitant to interfere with *this* amending process. We will therefore consider the judicial interference with the convention method, as if it were altogether an extraconstitutional proceeding.

Can the courts interfere with such proceedings while they are pending? There is a good deal of authority that courts will not interfere with even the legislative method of amendment while it is pending, but will wait to pass on the validity of the finally adopted constitutional provisions.[3] *A fortiori*, courts ought not to interfere with the convention method while it is pending. Yet courts have so interfered. The Pennsylvania Supreme Court issued an injunction prohibiting the convention of 1872 from submitting their constitutional changes to the people in a way different from that prescribed by the convention act. The court said:

The first remark to be made is, that all the departments of government are yet in full life and vigor, not being displaced by any authorized act of the people. As a court we are still bound to administer justice as heretofore. If the acts complained of in these bills are invasions of rights without authority, we must exercise our lawful jurisdiction to restrain them. One of our equity

[1] *Dodd*, pp. 102–103.
[2] *Collier* v. *Frierson* (1854), 24 Ala. 100, 108.
[3] *Dodd*, pp. 230–232.

powers is the prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community or the rights of individuals. . . . In this case we are called upon not to strike down, but to protect a lawful system, and to prevent intrusion by unlawful authority. If this ordinance is invalid, as we have seen it is as to the city elections, the taxes of the citizens will be diverted to unlawful uses, the electors will be endangered in the exercise of their lawful franchise, and an officer necessary to the lawful execution of the election law ousted by unlawful usurpation of his functions.[1]

Yet this court refused to interfere in matters of internal management, even though they were in violation of the provisions of the convention act, saying:

If they do this wrong, no appeal is given to the judiciary, and the error can be corrected only by the people themselves, by rejecting the work of the convention.[2]

The Supreme Court of Oklahoma refused to interfere with a convention of that State, saying:

The courts will not interfere by injunction or otherwise with the exercise of legislative or political conventions.[3]

Dodd comments on this decision as follows:

This is simply a statement that the court would not interfere with the process of constitution-making, but would hold itself free to declare an act of the convention invalid, after it had been approved by the people, if it were in excess of the convention's power.[4]

The process of amendment is a process of superior legislation, and the courts ordinarily decline to interfere with the processes of legislation, although they may always pass upon the validity of the completed product of such process.[5]

In one instance, in New York, the court, after taking jurisdiction of a proceeding to interfere with the internal government of the convention, dismissed the proceeding because of a sharp rebuke administered by the convention.[6] The convention said, in the course of this rebuke:

[1] *Wells* v. *Bain* (1872), 75 Pa. 39, 56–57.
[2] *Wood's Appeal* (1874), 75 Pa. 59.
[3] *Franz* v. *Autry* (1907), 18 Okla. 561, 604.
[4] *Dodd*, p. 95.
[5] *Dodd*, p. 232.
[6] See pp. 170–171, *infra*.

It is far more important that a Constitutional Convention should possess these safeguards of its independence than it is for an ordinary Legislature; because the Convention's acts are of a more momentous and lasting consequence and because it has to pass upon the power, emoluments and the very existence of the judicial and legislative officers who might otherwise interfere with it.[1]

So much for the interference of the courts with pending convention proceedings. How about their interference with the constitutional changes, when these are finally adopted by the people? Some of the cases, which hold that the courts cannot interfere with pending proceedings, intimate that the time for interference is after the proceedings have been completed. Thus the Supreme Court of Oklahoma says:

The moment the constitution is ratified by the people, and approved by the President of the United States, then every section, clause, and provision therein becomes subject to judicial cognizance.[2]

And compare:

It [*i. e.* the court] has the power, and it is its duty, whenever the question arises in the usual course of litigation, wherein the substantial rights of any actual litigant are involved, to decide whether any statute has been legally enacted, or whether any change in the constitution has been legally effected, but it will hardly be contended that it can interpose in any case to restrain the enactment of an unconstitutional law. . . . If they (the courts) cannot prevent the legislature from enacting unconstitutional laws, they cannot prevent it and the electors from making ineffectual efforts to amend the constitution.[3]

But as Dodd points out:

But after a constitution has been submitted to and adopted by the people, additional difficulties present themselves in the way of declaring it or even particular portions of it invalid.[4]

The *Harvard Law Review* has recently set forth, in an editorial note, the following exhaustive views on this subject:

Consider first the power of the courts to deal with a constitution

[1] Report of Judiciary Committee, Rev. Record, N. Y. Conv. 1894, Vol. I, p. 245.
[2] *Franz* v. *Autry* (1907), 18 Okla. 561, 605.
[3] *Cranmer* v. *Thorson* (1896), 9 S. D. 149, 154–155.
[4] *Dodd*, p. 96.

which has been enacted by the convention without submission to popular vote, but has been accepted as in force by the other branches of the government. If the court assumes to declare the whole constitution invalid, maintaining that it is organized under the old, such a proceeding should be entirely futile. There is no organized government under the old constitution and by its hypothesis, the court has disclaimed its authority to bind any government claiming to be organized under the new. Where, as in the principal case, the court apparently admits the validity of the new constitution, but declares part of it invalid, its course seems even less justifiable. In recognizing part of the new constitution it must recognize its complete validity. Since a court cannot attack the fundamental law, it can declare the new constitution invalid only by action under the old. But this can no longer exist, for its existence is hopelessly inconsistent with the validity of the new. For whether it be called a lawful revision or a peaceful revolution, by an enactment of the new constitution the old government has been displaced and a new one substituted. The court is further beset in these cases by the difficulty that this acquiescence by the legislature may amount to a ratification by the people through the organized government as their agent. If the court recognizes the power of the legislature to bind the convention, it is inconsistent to deny the legislature the power to unloose that bond. If it believe in conventional sovereignty it will, of course, never declare the constitution invalid. If in addition the constitution has been submitted and adopted by popular vote, it would seem that any court which admits that the ultimate sovereignty is in the people must recognize its validity.

But where the convention has merely amended the existing constitution a different question is presented. Here assuming the validity of the restrictions imposed on the convention, a court should have no difficulty in enjoining the submission of an amendment which involves a violation of those restrictions. But if the amendment is submitted for popular approval and is ratified, it seems that that expression of popular will should override any irregularity in violating any restriction not imposed by the constitution itself. If the amendment is merely enacted without submission to popular vote, then unless the acquiescence of the legislature can be construed to be an adoption, its validity may certainly be attacked.[1]

The Supreme Court of Pennsylvania, after interfering with the pending procedure (*i. e.* the convention ordinance establish-

[1] XXIX "Harv. Law Rev.," 531–532.

ing a new election system for the submission of the constitution) in the case of Wells *v.* Bain, refused to interfere with the completed constitution in the case of Wood's Appeal. The court said:

> The change made by the people in their political institutions, by the adoption of the proposed Constitution . . . forbids any inquiry into the merits of the case. The question is no longer judicial.[1]

Judge Jameson took the same view of the matter and said of this case:

> The constitution framed by the convention had been submitted to and adopted by the people, including the change recommended to be made in the Bill of Rights; and thus, however irregular, or even revolutionary, its inception had been, it had become the fundamental law of the State, and the Supreme Court must accept it as such.[2]

Dodd, however, feels that the court might have acted in the second case as it did in the first, and says:

> Inasmuch as the Pennsylvania court regarded the statutory restriction as having a binding force equal to that of a constitutional restriction, it would seem that it might, in a case properly brought before it, logically have declared invalid the amendments to the bill of rights, in the same manner as courts declare invalid amendments not proposed in accordance with constitutional forms, even after their approval by the people. The provisions tainted by irregularity were here clearly separable from the remainder of the constitution.[3]

But he goes on to say:

> The courts would unquestionably be cautious about singling out and declaring invalid particular clauses in constitutions which had been approved by the people, but with reference to which constitutional requirements had not been strictly observed. No cases have squarely arisen upon this point, and cases would hardly arise where certain clearly separable parts of constitutions would be so tainted with irregularity as to warrant judicial annulment; should such cases arise, however, it is difficult to see why the judicial

[1] *Wood's Appeal* (1874), 75 Pa. 59.
[2] *Jameson*, p. 407.
[3] *Dodd*, p. 97.

attitude should be any more liberal than with respect to constitutional amendments. The better view is that courts should not inquire too technically into irregularities in the submission of a constitution or of an amendment which has been ratified by the people.[1]

The Supreme Courts of Kentucky and Virginia concur with the Supreme Court of Pennsylvania in holding that the adoption of a constitutional amendment changes the question from a judicial one to a political one. Both cases involved the validity of constitutions which the convention had promulgated without submitting to the people, although required by the convention act to do so.

The Kentucky Court elected to treat the question as one affecting the validity of the constitution as a whole and said:

> It is a matter of current history that both the executive and legislative branches of the government have recognized its validity as a constitution, and are now daily doing so. Is this question, therefore, one of a judicial character? Does its determination fall within the organic power of the court?

The court further said that the people had acted under the constitution,

> the political power of the government has in many ways recognized it, and under such circumstances it is our duty to treat and regard it as a valid constitution and now the organic law of our Commonwealth.[2]

The Virginia Court said of the constitution of 1902:

> The Constitution having been thus acknowledged and accepted by the officers administering the government and by the people of the State, and being, as a matter of fact, in force throughout the State, and there being no government in existence under the constitution of 1869 opposing or denying its validity, we have no difficulty in holding that the Constitution in question . . . is the only rightful, valid, and existing Constitution of this State, and that to it all the citizens of Virginia owe their obedience and loyal allegiance.[3]

[1] *Dodd*, p. 98.
[2] *Miller* v. *Johnson* (1892), 92 Ky. 589.
[3] *Taylor* v. *Commonwealth* (1903), 101 Va. 829, 831.

But

The distinction between such a case and one involving merely an amendment, not in any manner pertaining to the judicial authority, must at once be apparent to the legal mind. The authorities recognize the distinction.[1]

The value of a judicial determination of the validity of a constitution is minimized by the principle which requires the members of a court to decide in favor of the constitution under which they themselves hold office. Thus the Rhode Island Supreme Court said at the trial of Dorr:

If a government had been set up under what is called the People's Constitution, and they had appointed judges to give effect to their proceedings, and deriving authority from such a source, such a court might have been addressed on a question like this. But we are not that court. We know and can know but one government, one authority in the State. We can recognize the Constitution under which we hold our places, and no other. All other proceedings under any other are to us as nullities.[2]

Likewise the United States Supreme Court said, in a case growing out of the Dorr controversy:

Where a claim exists by two governments over a country, the courts of each are bound to consider the claims of their own government as right, being settled for the time being by the proper political tribunal.[3]

And this principle was carried out by a court acting under the new government in a West Virginia case:

The legality of the election for officers held on the 22nd day of August, 1872, after the ratification of the new constitution and schedule, is not to be called in question by any court created or continued by the provisions of that constitution. When it is proposed that this Court shall determine that the sovereign power of this state cannot lawfully commission a judge of its own creation, it is invited to commit judicial suicide. Courts sit to ex-

[1] *Koehler* v. *Hill* (1883), 60 Ia. 543, 614.
[2] "Trial of Dorr," p. 38.
[3] *Luther* v. *Borden* (1849), 7 How. 1, 57; citing *Williams* v. *Suff. Ins. Co.*, 3 Sumner 270.

pound the laws made by their government, and not to declare that government itself an usurpation.[1]

The idea of "judicial suicide" expressed by the West Virginia Court has also been phrased as follows:

A court which under the circumstances named, should enter upon an inquiry as to the existence of the constitution under which it was acting, would be like a man trying to prove his personal existence, and would be obliged to assume the very point in dispute, before taking the first step in the argument.[2]

The singular spectacle of a court sitting as a court to declare that we are not a court.[3]

And if a state court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power.[4]

Thus a judicial determination of the validity or invalidity of a new constitution merely means that the judges who render it are very much attached to their positions.

All of the foregoing discussion has related to interference with the amending process. The power of the courts to interfere with the convention when it is exercising powers outside the main purpose of its creation, presents an entirely different question.

As Dodd says:

It has already been suggested that a court would find it difficult to declare a complete constitution invalid because of irregularities in the proceedings or action of a convention. What is the attitude of the courts in enforcing these implied restrictions upon the powers of a convention, in preventing encroachments by a convention, upon powers reserved to other governmental organs of the state? In the first place it should be said that a convention's action in

[1] *Loomis* v. *Jackson* (1873), 6 W. Va. 613, 708.
[2] *Koehler* v. *Hill* (1883), 60 Ia. 543, 608–609.
[3] *Brittle* v. *People* (1873), 2 Neb. 198, 214.
[4] *Luther* v. *Borden* (1849), 7 How. 1, 40.

these matters may be controlled by the courts much more easily than irregularities in the framing of a complete constitution. If a convention should attempt to remove an officer of the state government and to appoint another in his place, the court may properly restore the removed officer without in any way interfering with the convention's proper functions; if the convention passes an ordinance of a purely legislative character, the court in a case properly brought before it may declare the ordinance invalid and decline to enforce it. Improper acts committed by a convention in the framing of a constitution may be acts done in the exercise of a power within the competence of the convention, and are difficult to correct, because of the close interrelation of the irregular acts with those which may be regular and proper. When it encroaches upon the existing government, a convention acts in excess of power and its action may be controlled without interference with the functions which properly belong to it.[1]

and see also the following quotations from other sources:

The claim for absolute sovereignty in the convention, apparently sustained in the opinion, is of such magnitude and overwhelming importance to the people themselves, it cannot be passed unnoticed. In defence of their just rights, we are bound to show that it is unsound and dangerous. Their liberties would be suspended by a thread more slender than the hair which held the tyrant's sword over the head of Damocles, if they could not, while yet their existing government remained unchanged, obtain from the courts protection against the usurpation of power by their servants in the convention. . . .

There is no subject more momentous or deeply interesting to the people of this state than an assumption of absolute power by their servants. The claim of a body of mere deputies to exercise all their sovereignty, absolutely, instantly, and without ratification, is so full of peril to a free people, living under their own instituted government, and a well matured bill of rights, the bulwark and security of their liberties, that they will pause before they allow the claim and inquire how they delegated this fearful power and how they are thus absolutely bound and can be controlled by persons appointed to a special service. Struck by the danger, and prompted by self-interest, they will at once distinguish between their *own rights* and the *powers* they commit to others. These rights it is, the judiciary is called in to maintain.[2]

[1] *Dodd*, pp. 108–109.

[2] *Wood's Appeal* (1874), 75 Pa. 59, 69.

While it [*i. e.* the convention] acts within the scope of its delegated powers, it is not amenable for its acts, but when it assumes to legislate, to repeal and displace existing institutions before they are displaced by the adoption of its propositions, it acts without authority, and the citizens injured thereby are entitled, under the declaration of rights, to an *open* court and to redress at our hands.[1]

But the question was made whether the convention which passed the ordinance was not limited by the purpose for which it was assembled; and I am of opinion that it was so limited. And this detracts in no degree from the sovereign character of its act when within that purpose. We have no authority to judge of, revise or control any act of the people; but when any thing is presented to us as the act of the people, we must of necessity judge and determine whether it be indeed their act. The sole difficulty seems to me to have arisen from confounding together the authority attributed by the constitution to the people, with that of the convention. Certainly the convention was not the people for any other purpose than that for which the people elected and delegated them.[2]

We have already seen that the convention is really a fourth branch of the government.[3] The same rules with respect to judicial interference ought to apply as would apply to judicial interference with either the legislature or the executive. So long as the convention is acting within the scope of its duties as a framer of constitutions, the courts ought not to interfere, no matter how much the convention appears to exceed its powers. But the moment a convention strays into legislative, executive, or judicial fields, it is the duty of the court, acting under the existing constitution, to promptly put a stop to such usurpation.

So much for the State courts. What should be the attitude of the Federal courts toward a State constitutional convention? It would seem that the Federal courts ought not to interfere, except in the case of a violation of the Federal Constitution. There are no Federal decisions on amendments adopted by the convention method, but the language of the decisions relating to legislative amendments is broad enough to cover the case of conventions. There are two decisions on this point in inferior Federal courts. The case of Smith *v.* Good was an action upon

[1] *Wells* v. *Bain* (1872), 75 Pa. 39, 57.
[2] *McCready* v. *Hunt* (1834), 2 Hill Law (S. C.) 1, 270.
[3] See pp. 89–91, *supra*.

a promissory note given for the purchase of liquor in violation of the Rhode Island prohibition amendment of 1866. The plaintiff contended that the amendment had not been legally adopted. But the court said:

When the political power of the state declares that an amendment to the constitution has been duly adopted, and the amendment is acquiesced in by the people, and has never been adjudged illegal by the state court, the jurisdiction of a federal court to question the validity of such a change in the fundamental law of a state should clearly appear. . . . The very framework of the federal government presupposes that the states are to be the judges of their own laws; and it is not for the federal courts to interpose, unless some provision of the federal constitution has been violated. It is not pretended in this case that any federal question is raised.[1]

An opposite position was taken in the later case of Knight *v.* Shelton. This was a suit for damages brought against election officials because they refused to receive the plaintiff's vote for member of Congress. The defendant relied on the failure of the plaintiff to pay a poll tax as required by an Arkansas amendment in 1892. The court held that this amendment had not been legally adopted.[2] Dodd says:

Knight *v.* Shelton and Smith *v.* Good are, of course, easily distinguishable on the ground that in the first case no federal question was involved, while in Knight *v.* Shelton a federal question was raised as to the right to vote for members of Congress. But whether the plaintiff had been improperly deprived of such right depended upon an amendment which had been acted upon by the state as valid for twelve years, and which had not been passed upon by the state court.[3]

In Knight *v.* Shelton the question was not raised as to the impropriety and possible inconvenience of a federal court's passing upon the validity of a state constitutional amendment as tested by the requirements of the state constitution. It happens that the Arkansas court has in a later case taken a view similar to that taken by the federal court, but suppose it had taken a contrary view, and should insist upon treating as valid an amendment which the federal court had declared invalid. We should then have the

[1] *Smith* v. *Good* (1888), 34 Fed. 204, 205–206.
[2] *Knight* v. *Shelton* (1905), 134 Fed. 423, 441.
[3] *Dodd*, pp. 226–227, n. 190.

absurd situation of an amendment valid in the state courts and at the same time invalid in the federal courts, unless the federal courts should follow the state decision after it is rendered.[1]

An attempt has recently been made in the Federal courts to set aside a State constitutional amendment, on the ground that it was contrary to the principles of republican government guaranteed by the Federal Constitution to the States. But the court refused to pass on this point, saying that it was a political question.[2] In view of this decision, it is unlikely that the Federal courts will ever again be called on to interfere with amendments to State constitutions, unless a Federal question is involved.

On the whole, the question of judicial interference by either the State or the Federal judiciary with the exercise by the convention of its fourth-branch power is seen to be a political question, and hence outside the jurisdiction of the court. See the following quotations on this point:

> The change made by the people in their political institutions, by the adoption of the proposed Constitution since this decree, forbids an inquiry into the merits of this case. The question is no longer judicial.[3]

> In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision.[4]

> The question, whether the new matter contained in the Constitution adopted by the convention of 1913 is satisfactory to the people of this state and should be retained in force and effect, is, in my humble opinion, a political question, and not a legal question.[5]

A closely related question is whether the validity of adoption is a political or judicial question; a difficulty which can only be pointed out without discussion here. The difficulty of treating

[1] *Dodd*, p. 227.
[2] *Pac. States Tel. Co.* v. *Oregon* (1912), 223 U. S. 118.
[3] *Wood's Appeal* (1874), 75 Pa. 59, 68–69.
[4] *Luther* v. *Borden* (1849), 7 How. 1, 39.
[5] *Foley* v. *Dem. Com.* (1915), 70 So. 104, 105.

it as a judicial question is evidenced by a peculiar doctrine of our law. Courts which declare their power to overthrow an invalid amendment, will refuse to do so if such an amendment has been in force unquestioned for a considerable time. To reconcile these two ideas seems impossible; but the doctrine may indicate that this should more properly be treated as a political question, and that the courts should have no power to overthrow any amendment which the other branches of the government have recognized as valid.[1]

Courts and Juries, gentlemen, do not count votes to determine whether a constitution has been adopted, . . . It belongs to the Legislature to exercise this high duty . . . we cannot revise and reverse their acts, in this particular, without usurping their power. . . . if we did so, we should cease to be a mere judicial, and become a political tribunal, with the whole sovereignty in our hands. . . . Sovereignty is above Courts or Juries, and the creature cannot sit in judgment on its creator.[2]

If the courts cannot interfere with the fourth-branch functions of a convention, can they assist the convention? By analogy from the attitude of the courts toward the functions of the executive and legislative branches, it would seem that the courts ought to render this assistance.

An example of this is furnished by a recent Michigan case. The Secretary of State refused to submit the constitution prepared by the convention of 1908 on the ballots of the November election, contending that action ought to be had in April. The president of the convention applied to the Supreme Court for a mandamus to compel the Secretary of State to obey the convention's orders. The Supreme Court granted this mandamus.[3]

In North Dakota, the legislature, without constitutional authorization, passed a joint resolution, submitting to the electorate the question of holding a convention, and secured a mandamus forcing the Secretary of State to place the question on the ballots.[4]

Thus the courts will assist, if necessary, in putting through the convention procedure.

Another way in which the courts can assist the convention

[1] XXIX "Harv. Law Rev.," 532–535.
[2] "Trial of Dorr," p. 85.
[3] *Carton* v. *Secy. of State* (1908), 151 Mich. 337.
[4] *State* v. *Dahl* (1896), 6 N. D. 81.

method of amendment would be to render judicial advice if requested. Judicial advice has been rendered by the Supreme Courts in New York, Massachusetts, Rhode Island, and New Hampshire to the legislatures of those States on matters pertaining to the constitutional convention.[1]

Whether the court would render advice at the request of the convention itself would depend upon the general attitude of the court toward its advisory functions. Thus the Supreme Court of New York, which rendered its opinion to the legislature without any constitutional duty to do so, would undoubtedly take the same attitude if requested by the convention. The Supreme Court of Massachusetts, on the other hand, always strictly interprets the constitutional provision for rendering advice to the Governor and legislature and refuses to do so unless absolutely bound. This court, therefore, would probably refuse to advise the convention.

On the whole, it may be said that the courts have no power to interfere with convention proceedings relative to the framing of the constitution and will probably treat the finally adopted changes as a political question, although the courts will prevent the convention from usurping the powers of other departments. The courts will assist the convention to perform its legitimate functions and will prevent the encroachment of any other branches of government upon it. The courts will advise the other branches of the government relative to the convention and will advise the convention in States where the courts do not interpret their advisory duties too strictly.

[1] Journal, 69th N. Y. Assembly, p. 918; *Opinion of Justices* (1833), 6 Cush. 573; 1917 Mass. Senate Doc., 512; *Opinion of Justices* (1883), 14 R. I. 649; *Opinion of Justices*, 76 N. H. 586 and 612.

Chapter XIII

DOES THE CONSTITUTION APPLY?

An interesting and important question is the extent to which the existing constitution applies to a convention called to revise it. Dodd says:

It is clear that existing constitutional provisions are binding upon a convention. A convention does not in any way supersede the existing constitutional organization and is bound by all restrictions either expressly or impliedly placed upon its actions by the constitution in force at the time. A new constitution does not become effective until promulgated by the convention, if this is permitted by the existing constitution, or until ratified by the people, if such action is required. In replacing the existing constitutional organization a convention properly acts only by the instrument of government which it frames or adopts.[1]

But we must remember that Dodd is writing in a State[2] where the only conventions are those which the constitution of that State purports to authorize, which probably influenced his point of view. This chapter is designed to meet his argument and also that of the following quotations, which appear to hold that the existing constitution applies to extraconstitutional conventions:

Some are apt to forget that the people are already under a constitution with an existing frame of government instituted by themselves, which stand as barriers to the exercise of the original powers of the people, unless in an authorized form.[3]

In the words of the Father of his Country, we declare, "that the basis of our political systems is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all." [4]

[1] *Dodd*, pp. 92–93.
[2] Illinois.
[3] *Wells* v. *Bain* (1872), 75 Pa. 39, 53.
[4] R. I. Bill of Rts., § 1.

But, when analyzed, these quotations are seen merely to hold that the existing constitution remains in force until superseded by the new.

It may well be that the constitution applies to the proceedings of a convention which is called under express provisions of the constitution authorizing such a convention; and it would seem in the main to be true that, at least when the people adopt the provisions of a constitution by voting under it to hold a convention, those constitutional provisions become absolutely binding upon the convention.

That the binding force of constitutional provisions on conventions held by authority of the constitution is due not to the constitution itself, but to the popular vote thereunder, is borne out by the case of the Delaware convention of 1852. In this case the popular vote on the question of holding the convention was less than that required by the constitution. Nevertheless, the convention was called and held.

Similarly in Indiana, in 1850, a convention was held under the provisions of the constitution at a year different from that prescribed by that document.[1]

Compare also the discussion of the force of general constitutional provisions on the qualifications of voters, which subject is discussed in the chapter on submission of amendments.[2]

Regardless of whether the constitutional provisions are binding in the case of a convention held ostensibly *under* the constitution, they are not binding on conventions which are clearly *extra*-constitutional. We have already seen that the constitution has no power to prevent the holding of such conventions, either by implied or even by express prohibition.[3]

If the constitution cannot prevent the holding of such a convention, is it reasonable to suppose that the constitution can limit such a convention? The power to limit is the power to destroy. If the convention can defy the constitution in the matter of its complete existence, it can certainly defy the constitution in the matter of attempted limitations.

We shall see in another chapter that members of such conventions, although they hold office under the authority of the *State*, do not hold office under authority of the State *constitu-*

[1] See these and other similar instances, pp. 50–52, *supra*.
[2] See pp. 205–212, *infra*.
[3] See pp. 39–43, 48–49, *supra*.

tion.[1] Similarly we shall see that when a convention has general powers to submit the fruit of its labors to the people for ratification, it may choose for that purpose whatever electorate it considers will best represent the people.[2]

And compare:

> Under the Constitution of 1879, the power of the Legislature to submit proposals to the people for the holding of a convention was not subject to the restrictions applicable to constitutional amendments.[3]

Thus the State constitution may apply to some extent to conventions held under its express authority, but clearly has absolutely no application to extraconstitutional conventions. Dodd intimates that the subject matter of new amendments may be limited by the already existing constitution, but he states that in the present State constitutions there are practically no restrictions upon the character of proposed amendments. Such restrictions were formerly held binding on the legislative amending process.[4] But he suggests:

> It may be that the constitutional difficulty might in certain cases have been evaded by first abrogating the restriction by an amendment, and then adopting the desired change. But, as has been suggested, the state constitutions now in force contain practically no such restrictions, and amendments are therefore subject to judicial control, as tested by the state constitutions, with respect to their method of enactment only and not with respect to their content and substance.[5]

Thus the question now has merely an academic interest. Nevertheless it would seem that the people in their sovereign capacity, as represented by the convention, might destroy any part of a constitution which they have the power to destroy in full. It seems absurd to think that the people could preclude

[1] See pp. 185–187, *infra.*

[2] See pp. 205–212, *infra.* The recent opinion of the Supreme Court of Massachusetts (1917, Senate Doc., 512) may appear, at first glance, to rebut this proposition. But it is to be noted that the court expressly refused to pass upon the question of whether or not the convention is to be held *under* the constitution. See a discussion of this opinion, pp. 208–210, *infra.*

[3] *State* v. *Am. Sugar Co.* (1915), 137 La. 407, 414; *State* v. *Favre* (1899), 51 La. Ann. 434, 436.

[4] *Dodd,* p. 236, and cases cited.

[5] *Dodd,* p. 236.

themselves as to *subject-matter* of amendments, any more than one generation could preclude another as to *methods* of amendment. Thus the legislature, people, and Supreme Court of Maine connived to strike out of the original Maine constitution some provisions which were expressly declared to be irrepealable without the consent of the legislature of Massachusetts.[1]

Thus we see that, in the case of authorized conventions, the provisions of the existing constitution probably apply, so far as applicable. This is certainly true to the extent that the people choose to avail themselves of the constitutional provisions.

But in the case of an extraconstitutional convention, the constitution has no more power to restrict the convention procedure than it has to prevent the convention's existence.

Does the Federal Constitution apply? The following quotation from Ruling Case Law will serve to lead us from the inapplicability of State constitutions to the applicability of the Federal Constitution.

> The character and extent of a constitution that may be framed by that body is generally considered as being freed from any limitations other than those contained in the constitution of the United States. If on its submission to the people it is adopted, it becomes the measure of authority for all the departments of government — the organic law of the state, to which every citizen must yield an acquiescent obedience.[2]

Holcombe goes even further and contends that the union of the States in 1787 forever destroyed the fundamental right of the people of each State to change their government at will.

He says:

> By the Federal Constitution of 1787, the right of revolution was definitely taken away from the people of the separate states and reserved exclusively to the people of the United States as a whole. Under the more perfect union the whole power of the United States stands ready to protect the established government of any state against domestic violence. There can be no state revolution, therefore, which is not at the same time a national revolution.[3]

The following are some more moderate expressions of opinion on the subject:

[1] *Thorpe*, Vol. VII, p. 4178, Art. X, § 5; p. 4186, § 7.
[2] 6 R. C. L., § 17, p. 27.
[3] *Holcombe*, State Government, p. 33.

The federal constitution is, of course, superior to a state constitution, and any amendment conflicting with the federal instrument is invalid.[1]

As an organ of the state and as a legislative body a convention is, of course, subject to the provisions of the federal constitution as to contracts, *ex post facto* laws, and to all other restrictions imposed upon the states by that instrument.[2]

It has, however, been recently held that the provisions of the Federal Constitution guaranteeing a republican form of government to each State, do not apply to restrict the subject matter of State constitutions.[3] These provisions were inserted in the Federal Constitution to protect, not to hamper the States.

Of course the Federal Constitution contains no provisions which would interfere with the proceedings of the convention method except the guarantee in the XVth article of amendments, which provides that

> The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

Provisions in the Federal Constitution requiring certain things to be done by a State legislature might give the Federal government the right to disregard such acts if done by a convention under the assumption of legislative powers.[4]

Thus the Federal Constitution applies to the proceedings only with respect to the right to vote, and applies to the results only so far as they violate provisions of the Constitution, excepting however the provision guaranteeing to the States a republican form of government.

[1] *Dodd*, p. 235.
[2] *Dodd*, p. 93, and cases cited.
[3] *Pac. States Tel. Co.* v. *Oregon* (1912), 223 U. S. 118.
[4] See p. 147, *supra*.

Chapter XIV

INTERNAL PROCEDURE

Whatever control the other departments of the government have over a convention, it is obvious that the internal control of the convention by itself presents an entirely different question. As Dodd says:

> Even if we should assume that the legislature may limit a convention as to the submission of a constitution, or as to methods of submission, it would yet seem clear that the legislature cannot deprive a convention of powers necessary for its conduct as a deliberative assembly. The convention would seem in any case, in the absence of constitutional requirements in the matter, to have power to establish its own rules of order and of procedure, elect its officers, pass upon the qualifications and election of its members, and to issue orders for elections to fill vacancies in its membership.[1]

And compare:

> It is a deliberative body, having all the necessary authority to make rules for its own procedure, and to decide upon all questions falling within the scope of its authority.[2]

We have already seen in the discussion of the legislative powers of a convention that it has undoubted power to pass such rules and ordinances as are necessary for its own proceedings.[3]

Primarily, a convention is the sole judge of the elections of its own members. This is illustrated by the case of the New York convention of 1894. The convention was proceeding to determine a contested election case, whereupon one of the contestants applied to the Supreme Court for an injunction to prohibit the convention from passing upon the question, claiming that whether or not he was entitled to the seat was

[1] *Dodd*, p. 88.
[2] *Wells* v. *Bain* (1872), 75 Pa. 39, 55.
[3] See pp. 146–147, *supra*.

a question for the determination of the courts. The court assumed jurisdiction and was about to proceed with the case, but the Judiciary Committee of the convention adopted a strong report denying the power of the court, and the court promptly accepted the rebuke and discontinued the case.[1] The following quotation from the convention report, to which the court yielded, is instructive:

> It is of the greatest importance that a body chosen by the people of this state to revise the organic law of the state, should be as free from interference from the several departments of government, as the legislative, executive and judiciary are, from interference by each other.[2]

This report also contains a valuable collection of precedents of contested elections in ninety-four American conventions, and concludes therefrom that:

> Without any exception, the practice has been uniform from first to last in favor of the Convention exercising the prerogative of deciding who were elected members.[3]

The power to be the judge of their own elections may carry with it by implication the power to fill vacancies. This, however, is denied by Jameson at considerable length. Jameson denies that a convention can itself fill vacancies in its own ranks because, as he says, that would render the convention *pro tanto* self-appointing; and for the same reason he denies its right to authorize the colleagues of resigning or deceased members to name their successors.[4] No cases have arisen in which a convention has tried to do either of these things without being expressly authorized by the convention act.

A different question is presented, however, when we consider whether a convention can issue precepts to the constituencies of retiring or deceased delegates, directing new elections to fill the vacancies. The only case in which any dispute has arisen over this power was the Berlin controversy in the Massachusetts

[1] *Lincoln*, Const. Hist. of N. Y., Vol. III. p. 666. Elihu Root was chairman of this committee. Lincoln himself drew the report. It was unanimously accepted by the convention. Rev. Record, N. Y. Conv. 1894, Vol. I, p. 270.

[2] Rev. Record, N. Y. Conv. 1894, Vol. I, p. 250.

[3] Rev. Record, N. Y. Conv. 1894, Vol. I, p. 267–270.

[4] *Jameson*, p. 331.

convention of 1853, which is discussed at length by Jameson.[1] It must be remembered, however, that this contest was in reality the first struggle for supremacy between two opposing parties in that convention, and was based more on the question of the power of the legislature to amend the convention act by abolishing the secret ballot, than on the question of the power of the convention to authorize the filling of vacancies. But, whatever we may think of the arguments pro and con in that convention, we cannot evade the fact that the convention by an overwhelming majority decided in favor of its power to authorize the filling of vacancies.

This precedent, coupled with the well-known power of all parliamentary bodies to provide for the filling of vacancies in as near as possible the same manner as the original seats were filled,[2] leads inevitably to the conclusion that conventions do have the power which was successfully asserted by the Massachusetts convention of 1853.

A book published by the recent Constitutional Convention Commission in New York says:

> Another question of importance is that as to the filling of vacancies which may occur after delegates have once been elected to a constitutional convention. In conventions there have been a number of elaborate and somewhat theoretical arguments regarding the power of a convention to provide for the filling of vacancies therein, in the absence of constitutional or statutory provision for this purpose. The more sensible view under such circumstances is that the convention may direct an election to fill a vacancy.[3]

The status and oaths of delegates are discussed in the next chapter.

Obviously the first duty of a convention is to obtain quarters. Jameson says:

> The general rule is undoubtedly this: — as Conventions are commonly numerous assemblies, containing, in most cases, the same number of members as the State legislatures, they are pos-

[1] *Jameson*, pp. 333–342.

[2] *Opinion of Justices* (1826), 3 Pick. 517, 520.

[3] N. Y. Rev. of Consts., p. 58. The full title is "Revision of the State Constitution," published by the New York Constitutional Convention Commission in 1915.

sessed of such powers as are requisite to secure their own comfort, to protect and preserve their dignity and efficiency, and to insure orderly procedure in their business. For the attainment of these ends, they are not without the authority possessed by agents in general, and, in my judgment, they are possessed of no other or greater. Thus, they must have a suitable hall, adequately warmed and lighted; and, though the Acts calling them were silent on the point, they would unquestionably have power to engage one, and to pledge the faith of the State for the rental thereof.[1]

The next requirement would be to obtain suitable officers.

There can be no doubt, a Convention would be authorized to appoint such officers and servants as the custom of public assemblies, in free communities, has sanctioned, or as may seem under the circumstances to be necessary.

In respect to a president and secretary or secretaries there can be no question. The convenience of members and the despatch of business would point also to messengers or pages as requisite. The same may be said perhaps of one or more door-keepers, since, if the hall where the session is held, were accessible to everybody, at all hours, the functions of the Convention might be seriously interrupted, and its dignity insulted. With respect to a sergeant-at-arms, some doubt exists. It is a universal practice in Conventions to appoint such an officer, and the right of doing so for certain purposes cannot be denied.[2]

The doubt with relation to the powers of this officer comes under the head of maintaining order to be discussed a little later in this chapter.[3]

Having engaged its hall and chosen its officers, the convention must next adopt some method of procedure, and to this end may establish all necessary rules. These are frequently modeled after the rules of the more numerous legislative body of the State.

A Convention having provided itself with the officers needed to do or to expedite its work, its attention would be next directed to the subject of maintaining order in the transaction of its business, and in the conduct of its members. For this purpose rules of order are necessary. There is sometimes inserted in the Act calling the Convention, a power to establish such rules as should be deemed

[1] *Jameson*, pp. 455–456. [2] *Jameson*, p. 456. [3] See p. 180, *infra*.

requisite; but, without such a clause, a Convention would clearly be authorized so to do. It is usual, before rules have been reported by the special committee for that purpose, to adopt temporarily those of the last Convention, or of the last State House of Representatives. In the absence of such a vote, it has been said that the *lex parliamentaria*, as laid down in the best writers, is in force.[1]

Legislative acts, under which conventions have been assembled, have usually not attempted to determine in any detail how conventions should proceed. A constitutional convention should have freedom to determine its own organization and procedure.[2]

If the purpose is merely that of proposing a few amendments to the constitution, as has several times been the case in New Hampshire, the procedure should naturally differ from that in a convention which proposes to submit a complete revision of the constitution, or at least to scrutinize carefully all provisions of an existing constitution.[3]

Jameson points out that the convention may enter upon its task of framing or amending the constitution either directly as a body or by resolving itself into a committee or committees. Two of the three common methods of procedure by committees are (a) the committee of the whole, or (b) to appoint a single selected committee of limited numbers to draft the amendments. Jameson refers to only ten conventions which have adopted the second plan, all but two of these occurring during the Revolutionary War period.[4] It is obvious that the reason for adopting this method at that time was that the main duties of those conventions was governmental rather than constitution-framing.

The third and most common method of procedure is for the convention to apportion the work among several committees.

The *Cyclopaedia of American Government* says of these three alternative methods:

In the framing of a constitution it, of course, may be possible for a convention to conduct all of its work directly in convention — that is, acting, as a body, without going into committee of the whole or dividing the work among committees. But such a plan would be cumbersome and unsatisfactory and has not been employed.

[1] *Jameson*, pp. 460–461.
[2] N. Y. Revision of Consts., p. 60.
[3] N. Y. Revision of Consts., p. 62.
[4] *Jameson*, pp. 287–289.

The plan ordinarily employed is that of using committees. In the use of committees three methods have been employed: (1) The transaction of business mainly in committee of the whole, with perhaps some smaller committees appointed to handle particular matters. This method is one which would be apt to work unsatisfactorily unless the plans for a constitution had been pretty well matured before the meeting of the convention. The committee of the whole was used to a large extent by the federal convention of 1787, and was adopted also by the Pennsylvania convention which met in 1789.

(2) In a number of the earlier conventions the plan was adopted of appointing a small committee, with full power to prepare and report a draft of a constitution to the full convention. This plan was adopted by the revolutionary conventions of Maryland, Virginia, New Jersey and Pennsylvania in 1776, and by those of New York and Vermont in 1777, but the conventions in these cases were assembled not only for the framing of constitutions, but also for the conduct of warlike operations, and the appointment of a special committee left the other members of the convention free to attend to the general duties of these bodies, which were equally urgent. The Massachusetts general court in 1778 appointed a special committee to frame a constitution, as also did the Massachusetts convention of 1779–80, the Tennessee convention of 1796, and the California convention of 1849.

(3) But the more usual practice has been for a convention to appoint a number of committees, and to distribute among them the several parts of the constitution, to be considered and reported upon to the convention either in regular session or in committee of the whole. The number of committees appointed for such a purpose has varied considerably, running from four in one case to more than thirty in others. The members of such committees have been as a rule appointed by the president of the convention. One of the most important committees of a convention is the committee on style or on arrangement and phraseology, which is usually appointed for the purpose of harmonizing the various proposals adopted by the convention and putting a constitution into something like the final form in which it should be adopted.[1]

It is well not to model these committees directly on the committees of the legislature, for if this is done, some committees will be found overburdened by work and others without a single matter referred to them.

[1] I Cyc. American Govt., 428.

See the following further quotations on the number and make-up of committees:

The New York convention of 1894 had thirty-one committees; the Virginia convention of 1901–02, sixteen; the Michigan convention of 1907–08, twenty-nine; the Ohio convention of 1912, twenty-five. The Illinois convention of 1869–70 had thirty-nine committees, a number much larger than was needed; of these committees, six made no report whatever to the convention.[1]

For a convention there may be said to be three types of committees: 1, those on the formal business of the convention, such as committees on rules, on printing, etc.; 2, those whose functions are largely technical, such as a committee on arrangement and phraseology; 3, those whose function would be largely that of obtaining agreement upon broad questions of principle, such as might be to a large extent a committee dealing with the subject of municipal home rule. Of course, most committees will have duties of all three types, but some difference in size is justified. Committees of the first type should naturally be small; those of the second type may well be larger, but even for the third type committees having many more than nine members are not apt to work very effectively. The average size of committees in the Illinois convention of 1869–70 was nine. The average size of committees in the Ohio convention of 1912 was seventeen, and because of this the committee work was less effective than it might have been.[2]

In the Michigan convention of 1907–08 the first committee appointed was one on permanent organization and order of business. This committee was afterward made permanent. It reported the plan of committee organization, and made other reports during the session of the convention. One of its recommendations, which was adopted, provided for a weekly meeting of chairmen of committees, to be presided over by the president of the convention, "at which meeting the chairmen of the several committees shall report progress and consider such other matters as may be of interest in advancing the work of the convention." Such a plan, if properly carried out should do much to unify the work of a Convention.[3]

The committee on arrangement and phraseology should serve in large part as a central drafting organ to give unity to the work of the convention.[4]

[1] N. Y. Revision of Consts., p. 63.
[2] N. Y. Revision of Consts., p. 64.
[3] N. Y. Revision of Consts., p. 69.
[4] N. Y. Revision of Consts., p. 69.

Separate committees will also be necessary to deal with questions which are at the time of great popular interest, because an effort will naturally be made to have these subjects dealt with in the constitution. For example if a convention were assembled in Illinois today it would be almost necessary to have separate committees upon the liquor traffic, taxation, the initiative and referendum, and apportionment and minority representation.[1]

The following are the more important committees common to three of the most recent constitutional conventions: Arrangement and Phraseology, Banks, Corporations, Counties and Towns, Education, Suffrage, Judiciary, Bill of Rights, Legislature, Methods of Amendment, Miscellaneous, Municipal Government, Rules, Submission and Address, Taxation.[2]

Committees are of course organs of the convention, appointed for the purpose of maturing matters for consideration by that body. A committee should therefore at all times be subject to control by a majority of the convention, and should have no power (by failing to report upon any matter) to prevent its consideration by the convention.[3]

The committee must do the detailed work of the Convention, and each committee should have before it as soon as possible all of the proposals relating to the subject which it is to consider. In order to accomplish this purpose, some conventions have definitely agreed that after a certain day no proposals should be entertained, unless presented by one of the standing committees.[4]

Many convention rules have very properly prescribed the form in which the proposals should be introduced, requiring that all proposals be in writing, contain but one subject, and have titles.[5]

A convention may undoubtedly incur expense for its legitimate needs. We have already seen that a convention can pledge the faith of the State for the expense of hiring a hall.[6] But it is a far cry from pledging the *faith* of the State to pledging the *credit* of the State. Thus, although the attempts

[1] N. Y. Revision of Consts., p. 63.
[2] Journal, Mich. Conv. 1907–1908, Vol. I, p. 15; Journal, Ohio Conv. 1912, p. 41; Rev. Record, N. Y. Conv. 1915, Vol. I, pp. 49–52.
[3] N. Y. Revision of Consts., p. 64.
[4] N. Y. Revision of Consts., pp. 66–67.
[5] N. Y. Revision of Consts., p. 67.
[6] See p. 173, *supra*.

of the earlier conventions to appropriate money were successful,[1] they have been uniformly unsuccessful in later years,[2] and the attorneys general of three States have ruled against the legality of such a proceeding.[3] Nevertheless, the legislature, when called on, has never failed to make the necessary appropriations to meet the expenses incurred by the convention.[4]

Reverting now to the various proper objects of expenditure. A convention undoubtedly has power to supply its members with stationery, and probably with newspapers.[5] Jameson has the following valuable suggestions to make, relative to the stenographic reports and printing for the convention:

> The same principle applies to the case of phonographic reports and printing for the Convention. It would be a most niggardly policy which would refuse the expenditure necessary to the preservation of most full and accurate reports of its debates and proceedings. Upon this subject, however, there has been very great difference of views in different Conventions. In many of the States, volumes have been published, containing both the journals and the debates of all their Conventions. In others, the subject seems not to have been regarded as of any consequence whatsoever; and what little has been preserved has been owing to the private enterprise of the newspaper press. The result is, that the memorials of the most important public bodies ever assembled in those States, are often very meagre, and more often confused and inaccurate. Such a policy is "penny wise and pound foolish." In after years, when it has become impossible to replace what has been lost, more enlightened public opinion commonly finds cause to regret a paltry economy which deprives history of its most important data. It should be remembered, that our Conventions lay the foundations of States, many of which are to rival the greatness and glory of Rome, of England, and of France. In a hundred years from now, what treasures would they not expend, could they purchase therewith complete copies of their early constitutional records — docu-

[1] Pennsylvania (1837); Louisiana (1844 and 1864). *Jameson*, pp. 436–437.

[2] Illinois (1862); New York (1867); Georgia (1867 and 1877); Pennsylvania (1873). *Jameson*, pp. 437–438, 441–442, 444–446. But see p. 180, *infra*.

[3] Massachusetts (1779–80); United States (1787); Illinois (1862); New York (1867); Georgia (1877); Pennsylvania (1873). *Jameson*, pp. 435–436, 438, 445, 446.

[4] Hon. J. H. Martindale of New York in 1867; Hon. R. N. Ely of Georgia in 1877; and Hon. Samuel E. Dimmick of Pennsylvania in 1873. *Jameson*, pp. 442, 445–446.

[5] *Jameson*, pp. 457–458.

ments standing to their several organizations in the same relation as would the discussions of those ancient sages who framed the Twelve Tables of the Roman law, to the Republic of Rome.[1]

The question of printing the proceedings of the Minnesota convention of 1857 came before the courts because Goodrich, the State printer, claimed that he was entitled, by virtue of his business, to do the printing, and obtained an injunction from the lower court to prevent Moore, the convention printer, from doing it. The Supreme Court said, in dissolving this injunction:

But even had the legislature intended and attempted to claim and exercise the act of providing a printer for the constitutional convention, it would have been an unauthorized and unwarrantable interference with the rights of that body. The admission of such a right in the legislature, would place the convention under its entire control, leaving it without authority even to appoint or elect its own officers, or adopt measures for the transaction of its legitimate business. It would have less power than a town meeting, and be incompetent to perform the objects for which it convened. It would be absurd to suppose a constitutional convention had only such limited authority. It is the highest legislative assembly recognized in law, invested with the right of enacting or framing the supreme law of the state. It must have plenary power for this, and over all of the incidents thereof. The fact that the convention assembled by authority of the legislature renders it in no respect inferior thereto, as it may well be questioned whether, had the legislature refused to make provision for calling a convention, the people in their sovereign capacity would not have had the right to have taken such measures for framing and adopting a constitution as to them seemed meet. At all events there can be no doubt but that, however called, the convention had full control of all its proceedings, and may provide in such manner as it sees fit to perpetuate its records either by printing or manuscript, or may refuse to do either.[2]

And Ruling Case Law says:

A constitutional convention has full control of all its proceedings, and may provide in such manner as it sees fit to perpetuate its record, either by printing or by manuscript.[3]

[1] *Jameson*, p. 458.
[2] *Goodrich* v. *Moore* (1858), 2 Minn. 61, 66.
[3] 6 R. C. L., § 17, p. 27.

The convention has equal control over other printing necessarily incidental to its business. As Jameson says:

In relation to the printing for the Convention, the case is very clear. If the Act calling the body provides for it, or requires it to be done in a particular manner or by a designated person, or limits it in amount or in cost, doubtless the Act should be obeyed. But, unless thus restricted, the power of the body to order its printing to be done, is as undoubted as to engage a hall or the requisite executive officers. The only alternative is, the employment of secretaries enough to furnish written copies of all papers and documents used in the course of its business. This would be possible, and such provision would, after a sort, answer the purpose. But it is certain, that the measures proposed would be neither so well understood nor so rapidly matured, if thus presented, as if they were printed. To this may be added, that the expense of printed would be much less than of written copies, and that the length of the session would probably be reduced by the use of them. The employment, then, of printed matter, being clearly within the power of the Convention, as incident to the speedy and convenient execution of its commission, the extent of it rests in the discretion of that body, and it can bind the government, within reasonable limits, by its contracts therefor.[1]

A further important consideration is the power of the convention to maintain order and punish for contempt. Jameson doubts the power of the Sergeant-at-Arms of the convention to be anything more than a mere doorkeeper.[2] But that really is a subsidiary question depending on what power the convention itself has to enforce order. Jameson says:

The power of a Convention to discipline its own members for offences committed in its presence is undoubted, and of considerable extent. The order and dignity of public deliberative bodies may, in many ways, be so assailed as seriously to interfere with the progress of business, if not wholly to interrupt it, yet without the commission of any misdemeanor for which the offenders would be amenable to the laws. A Convention, having no power to make laws giving the magistrates jurisdiction of such offences, unless it could, by sanctions of its own, enforce its rules for the preservation of order, it would be at the mercy of such members as chose to do the work of violence, but to do it in such a manner as to elude the penalties for a breach of the peace. To prevent this is the princi-

[1] *Jameson*, p. 460. [2] *Jameson*, pp. 456–457.

pal object of rules; and every public assembly, by its very nature, must have power to make and to enforce them in some modes appropriate to its own Constitution. To Conventions, however, it must be admitted, the range of sanctions is not very wide. For minor offences, it would be confined, probably, to reprimand, and for the more heinous, to expulsion from the body; or, in cases of actual violence to arrest and tradition to the public authorities. Power to this extent I conceive to be indispensable to the existence of any deliberative assembly; and, without assuming the character of a legislature, with power to create and to invest officers and tribunals with jurisdiction to punish offences, I can imagine it possessed of no greater. The power to arrest an offender, in the case supposed of actual violence, would involve that of safely keeping, and, if necessary, of confining him until he could be delivered to the officers of the law. So, the power to expel a member would carry with it that of suspending, which is less, or of suspending with forfeiture of pay, temporarily or altogether, according to the degree of the offence. But the power could not be claimed, in the former case, to imprison as a punishment, or for a longer time than should be necessary to secure the arrested member until he could be transferred to the magistrates, on complaint regularly made; or, in the latter, to pass from a forfeiture of pay (if that be regarded as allowable) to the imposition of pecuniary mulcts.[1]

Many convention acts expressly give to conventions the power to expel members and punish its members and officers by imprisonment or otherwise. The Georgia convention of 1867 expelled a member for insulting the president of that body.[2]

The report of the Judiciary Committee to the New York convention of 1894 asserts that a convention has the power of expulsion.[3]

The power of a convention to discipline strangers is a different question. Jameson denies this power, because of his desire to belittle conventions in comparison with legislatures, for the purpose of the main thesis of his book, namely legislative supremacy over conventions. Thus Jameson says:

As a Convention is not a legislature, though a body, by delegation, exercising some legislative functions, but of so limited and subordinate a character as to entitle it to rank only as a legislative

[1] *Jameson*, pp. 463–464.
[2] *Jameson*, p. 466.
[3] Rev. Record, N. Y. Conv. 1894, pp. 267–269.

committee, it cannot do, even for its own defence, acts within the competence only of a legislature, or of a body with powers of definite legislation.[1]

But in view of the modern theory that a convention is a legislative body of superior standing to the ordinary legislature,[2] it would appear that a convention would have at least the same degree of powers in this particular as is inherent in inferior legislative bodies.[3]

The Illinois convention of 1862 appointed a committee to investigate charges against certain of its members, with power to send for persons and papers and to swear witnesses.[4] The Louisiana convention of 1864 caused a newspaper editor to be arrested and brought before it for contempt for publishing certain criticisms of the president and other members of the convention. In this they had the assistance of the Federal Department Commander and the Federal Provost Marshal. General Banks released the editor, however, before the contempt proceedings were completed.[5]

Various convention acts have contained provisions expressly authorizing conventions to discipline strangers.[6] The author knows of no case in which this has been done, however, either with or without the express authority of the convention act.

In all the foregoing discussion the author has assumed the absence of anything in any popular statute, restricting or enlarging the powers and duties of the convention. The convention has certain express powers and certain powers implied from the inherent nature of the body, all of which are delegated to it by the people in their sovereign capacity. No constitution except that of the Federal government can restrict the people in delegating to a convention or in withholding from a convention any powers that they choose.[7] Therefore the language of any convention act, provided it be passed by the people, should be carefully consulted upon the question of determining the powers of any particular convention.

One very important power of the convention has been re-

[1] *Jameson*, p. 461.
[2] See p. 90, *supra*.
[3] *Jameson*, pp. 466–467. See 36 Cyc. 851 on the contempt and other powers of legislatures.
[4] *Jameson*, pp. 468–470.
[5] *Jameson*, pp. 472–473.
[6] *Jameson*, pp. 470–472.
[7] See pp. 165–168, *supra*.

served for the last, and that is the power of the convention to reconvene after the election (to which it submits its proposed changes in the constitution), in order to make and promulgate a codification of the constitution. The convention act which created the Kentucky convention of 1890 provided that, before any changes in the constitution should become operative, they should be submitted to the voters of the State and ratified by a majority thereof. Proposed changes were ratified by a popular vote in April, 1891. The convention reconvened in September, 1891, to which date they had adjourned, and made numerous changes in the constitution, some of which were claimed to have been material, and promulgated the codified instrument. An effort was made to enjoin the printing and preservation of this constitution, but the Court of Appeals recognized as valid the constitution promulgated by the convention.[1] It is probable that the court was influenced by the extreme practical convenience of enabling a convention to make a codification of the instrument after the adoption of changes by the people.

The convention which framed the original constitution of Massachusetts assumed that it had a similar power, although no such power had been granted it by the convention act. The convention act provided that the constitution should not take effect unless ratified by a two thirds vote of the people.[2] The convention, however, desiring to secure an acceptable constitution, provided that the instrument which it drew should be voted on, article by article, by the people of the State, and that in any town where a majority voted against an article, the town meeting should suggest what changes would render that article acceptable.

> In order that the said Convention, at the adjournment, may collect the general sense of their constituents on the several parts of the proposed Constitution: And if there doth not appear to be two thirds of their constituents in favour thereof, that the Convention may alter it in such a manner as that it may be agreeable to the sentiments of two thirds of the voters throughout the State.[3]

This power of altering was not exercised, for it appeared from the returns that two thirds of the voters were in favor of the instrument as drawn; and it was accordingly promulgated by

[1] *Miller* v. *Johnson* (1892), 92 Ky. 589.
[2] Journal, Mass. Conv. 1779–1780, p. 6.
[3] Journal, Mass. Conv. 1779–1780, p. 169.

the convention without change.[1] But the assumption by the convention of its power to make changes after submission is an important precedent. *A fortiori* would a convention have the power to codify the constitution without making any changes.

An alternative method of procedure would be for the convention to submit on the ballot a proposition authorizing the convention, or a committee thereof or some other body, to codify the constitution as amended at that election, and to promulgate the codification.

The legislature of Maine, in submitting various amendments in 1875, submitted a proposition that the Chief Justice of the Supreme Court should have power to codify the constitution, by including amendments then adopted and all prior amendments, and by striking out all obsolete matter. This proposition was accepted by the voters and was accordingly followed by the Chief Justice, with the result that the constitution of Maine was brought up to date and put into a much more workable form than formerly.[2]

Similarly a convention might submit to the people an ordinance authorizing *itself* to make such a codification, although it would probably have power to do this without such authorization, particularly in States where the convention procedure is extraconstitutional rather than constitutional.

The importance of such a power of codification is not to be overlooked.

Thus we see that a convention ordinarily has full control over its internal affairs, including its own membership, the filling of vacancies, the obtaining of quarters, the election of officers and employees, the establishment of rules, the purchasing of supplies, the printing of records, etc., the maintenance of internal order, and even the disciplining of strangers; but these powers may be enlarged or curtailed by popular vote.

The convention's control over the process of submitting its work for popular ratification will be discussed in a later chapter.[3] Its power to pass necessary incidental legislation has already been discussed.[4]

[1] Journal, Mass. Conv. 1779–1780, pp. 186–187.
[2] *Thorpe*, Vol. III, p. 1646, n. a.
[3] See pp. 196–213, *infra*.
[4] See pp. 146–147, *supra*.

Chapter XV

STATUS OF DELEGATES

The most important questions relative to the status of delegates to a convention are as follows: Are they public officers and should they take an oath to support the existing constitution?

First, as to whether the delegates are public officers. This question arose in the Illinois convention of 1862 under a provision of the then constitution of that State,[1] which provided that judges of certain courts should not be eligible to any other office, or public trust, of profit, during the term for which they were elected or for one year thereafter. One of the delegates had been a judge of one of these courts within one year prior to his election to the convention. His competitor contested his election on this ground. On the part of the judge, it was contended that the words of the constitution referred to the distribution of powers by the constitution to the three regular branches of government, to neither of which did the convention belong. Even the fact that the convention was authorized by the constitution was immaterial, for the constitution merely provided a means for the people to exercise their undoubted right to hold a convention and did not prescribe the qualifications of delegates, as it did those of judges, members of the legislature, and members of the executive department. If the constitution had regarded the members of the convention as State officers, it would certainly have contained provisions prescribing their qualifications, the time and mode of their election, and their powers and duties.

In behalf of the contestant, no great claim was made that a seat in the convention was a public office, but it was contended very strongly that it was certainly a position of public trust of the greatest magnitude. The convention, however, decided

[1] Art. V, § 10.

to permit the judge to retain his seat.[1] Jameson differs with this conclusion in the following language:

In my judgment, there can be but little doubt, that a member of a Convention is, in the enlarged and proper acceptation of the term, an "officer" of the State. . . . A Convention is a part of the apparatus by which a sovereign society does its work as a political organism. It is the sovereign, as organized for the purpose of renewing or repairing the governmental machinery. That same sovereign, as organized for the purpose of making laws, is the legislature; as organized for the purpose of applying or carrying into effect the laws, it is the judiciary or the executive. These successive forms into which the sovereign resolves itself, are but systems of organization having relation more or less directly to the government of the society. Together, they constitute the government.[2]

The position of delegate to the Illinois convention was undoubtedly a position of public trust, and even a public office; but was not, if we regard such conventions as extraconstitutional, a position under the constitution. When a constitution refers to the incompatibility of offices, such provisions should be construed as relating solely to positions under the constitution itself and not to apply to any other positions unless clearly so stated.

Attorney-General Attwill in a recent opinion to the Massachusetts legislature, reaches the same results, but on different grounds:

I have come to the conclusion, with some hesitation, that the position of delegate in the convention is not an office of the Commonwealth.

Whatever may be said in relation to a member of the Legislature, he at least takes part in the execution of one of the powers of government, whereas a delegate in the convention acts substantially as one of a committee of the people, whose power is restricted to making a report to the people.

The whole purpose of the convention is to take under consideration the propriety of revising or altering the present Constitution, and to report back to the people such revision, alteration or amendment as it may propose. Its powers are similar to that of a committee, its work is entirely preliminary, and it has no power to do any act which of itself has any final effect.

[1] *Jameson*, pp. 317–318.

[2] *Jameson*, pp. 319–320.

It is my view that the word "office," as used in article VIII of the Amendments, refers to a position the incumbent of which exercises some power of government, and not to the position of a person selected to act in an advisory capacity in framing a scheme or change of government to be submitted to the people for adoption or rejection.[1]

It does not appear necessary to debase the convention in this way in order to reach his conclusion. It would be sufficient to hold that the word "officer" in the constitution means *constitutional* officer. Mr. Attwill had, however, debarred himself from using this ground by his theory (expressed earlier in the same opinion) that the convention is a constitutional proceeding.[2]

Let us next take up the question of oaths of members. Jameson says:

The question whether the members of a Convention should be sworn before entering upon their duties, has been variously answered in different Conventions. Of the whole number whose proceedings have been accessible to me, about one half only have administered an oath. These were the following Conventions: those of Pennsylvania, 1776; North Carolina, 1835; New Jersey, 1844; Missouri, 1845; Illinois, 1847 and 1862; California and Kentucky, 1849; Ohio and Indiana, 1850; Iowa and the two Minnesota Conventions, in 1857; and Maryland, in 1864. On the other hand, an oath was not administered in the following Conventions: Maryland, 1776 and 1850; Tennessee, 1796 and 1834; Virginia, 1829 and 1850; Pennsylvania, 1789 and 1837; New York, 1821 and 1846; Massachusetts, 1779, 1821, and 1853; Michigan, 1850; Wisconsin, 1847; and Louisiana, 1812, 1844, and 1852. In those Conventions in which an oath has been administered, the most common form has been substantially that used by the Illinois Convention of 1847, which was as follows: "You do solemnly swear, that you will support the Constitution of the United States, and that you will faithfully discharge your duty as delegates to this Convention, for the purpose of revising and amending the Constitution of the State of Illinois." That administered in Maryland, in 1864, beside the foregoing, contained an oath of allegiance to the government of the United States. A more restricted form was employed in the California Convention of 1849,

[1] 1917 Mass. House Doc., 1711. Compare *Atty. Gen.* v. *Tillinghast* (1909), 203 Mass. 539, 543.

[2] See pp. 43–45, *supra*.

and in the Minnesota Republican Convention of 1857, namely: "You do solemnly swear that you will support the Constitution of the United States."

In several of the Conventions in which an oath has been administered, opposition has been made either to taking any oath at all, or to taking one in the form proposed by the Convention, or prescribed by the Act under which it assembled.

It has been urged that no oath was necessary or proper; that if the Convention was a mere committee, with powers only of proposing amendments, it was a useless ceremony to bind it by oaths to do or not to do acts which it could do only on the hypothesis that it possessed a power of self-direction inconsistent with its supposed character; that it was even dangerous so to do, as involving an admission that, without an oath or some positive prohibition, it would have power, and perhaps be at liberty, to act definitively. On the other hand, if the Convention was an embodiment of the sovereignty of the State or nation, empowered to pull down and reconstruct the edifice of government, as freely as the sovereign could itself do, were it possible for it to act in person and directly, then an oath would be doubly futile, since it could not fetter a power that was practically unlimited and uncontrollable.

In reply to this, however, it has been forcibly urged that, if not necessary, it is proper that a body like a Convention, intrusted with important public duties, should deliberate under the obligation of an oath; that it could do no harm, and might operate to restrain members from doing, for selfish or partisan ends, that by which the interest of the people at large might be jeopardized. This would become more apparent, when it was considered that an oath derives its efficacy more from its tendency to remind the taker of his obligation to a higher power, than from any liability the taking of it may impose upon him to punishment for perjury.

What form of oath should be used has, however, been more frequently the subject of dispute than whether any oath was proper. In Conventions to frame State Constitutions, assuming that an oath is to be administered at all, it is generally conceded to be proper that it should embrace an undertaking to be faithful and obedient to the Constitution of the United States. This could not well be contested, since the State Constitutions are, by the terms of the Federal charter, to be valid only when conformable to its provisions. It is also generally admitted to be proper, if an oath be taken at all, that the members should be sworn honestly and faithfully to perform their duties as members of the Convention. A question of more difficulty is, whether the oath should

contain a clause to support the Constitution of the State. This question has been raised in several Conventions, and has been uniformly decided in the negative. The reasonings of the opposite parties upon this question have been based on their respective conceptions of the nature and powers of a Convention. Those who have opposed taking the oath have done so on the ground, that to do so would be inconsistent with their duties as members of a Convention; that they were deputed by the sovereign society to pull to pieces, or, as some have expressed it, "to trample under their feet," the existing Constitution, and to build up instead of it a new one; that to take an oath to support the Constitution of the State, would be to swear that they would not perform the very duty for which they were appointed.[1]

Among the conventions which have raised the question and refused to take the oath are those of Louisiana in 1844, Ohio in 1850, Iowa in 1857, and Illinois in 1862[2] and 1869.

In the last two instances, the convention act required an oath to support the constitution of the State. The convention of 1862 struck out the words "of the State," and the convention of 1869 accomplished the same result by adding after them the words "so far as its provisions are compatible with and applicable to my position," thus recognizing the principle that the convention was extraconstitutional.[3]

Similar recognition was given by the Virginia convention of 1901–1902. The then existing constitution required all State officers to take an oath to support the State constitution. It was argued that delegates to the convention were not officers, and accordingly the oath was not taken.[4]

The constitutions of Colorado, Illinois, and Montana expressly provided that delegates to conventions must take an oath to support both Federal and State constitutions.[5] There is no record of the applicability of this provision ever having been questioned.

In North Carolina the legislature in 1835 and 1875 placed restrictions upon what the conventions should do, and provided that no delegate should be permitted to take his seat until he should take an oath to observe such restrictions. In these cases the oaths were objected to, but were taken, and the

[1] *Jameson*, pp. 280–282.
[2] *Jameson*, p. 282, n. 1.
[3] *Jameson*, p. 284.
[4] *Dodd*, p. 81, n. 16.
[5] "Columbia Digest," p. 28.

restrictions were observed.[1] A similar oath, required by legislative act, was taken by the delegates to the Georgia convention of 1833.[2] The same plan was followed by the Louisiana legislature of 1896, and the restrictions were substantially observed by the convention which assembled in that State in 1898.[3] The Louisiana act of 1896 had been submitted to and approved by the people, as had also the act calling the North Carolina convention of 1835.[4] The Louisiana convention of 1898 expressly recognized the popular statute as binding upon it, and the same view is found in a dictum of the Louisiana Supreme Court.[5] It would seem that such of these conventions as were called merely by the legislature[6] might, had they thought proper, have declined to take the oaths, and have organized and proceeded to act without doing so, just as was done by the Illinois convention of 1862.[7]

As we have seen, the question of taking an oath to support the State constitution has been decided in the negative wherever it has been raised, with the single exception of North Carolina, in which State it had been the people who had required the oath. This would seem to be a reasonable decision, based on the superiority of the convention to the constitution. It would be a strange anomaly to require a superior to take oath to obey an inferior.

Similarly there is a bit of an anomaly for the legislature and the Governor, after taking an oath to support the existing constitution, to then provide for the holding of a convention for the overturning of that instrument in a manner unauthorized, or even impliedly or expressly prohibited, by it. Yet this may be justified by arguing that as an oath to support the State constitution does not bind the taker to commit treason against the United States, neither does it bind him to forswear his primary allegiance to the people.

From all the foregoing we see that convention delegates are not officers under the existing constitution, even in the case of a convention apparently authorized by that instrument, and that it would be extremely anomalous for them to take an oath

[1] *Dodd*, p. 81. [2] *Dodd*, p. 81. [3] *Dodd*, p. 81.
[4] *Dodd*, p. 81, n. 15.
[5] *Dodd*, p. 81, n. 15; *La. Ry. Co.* v. *Madere* (1909), 124 La. 635, 642.
[6] North Carolina (1875); Georgia (1833).
[7] *Dodd*, p. 81, n. 15.

to support the State constitution; although they ought to swear to support the constitution of the United States and faithfully and impartially to perform the duties of their position.

It may be useful now to append a few remarks in relation to the question of privileges, as applicable to Conventions. Are the members of a Convention, or is the body itself, entitled to claim the immunities usually accorded to the legislature, and to its individual members, such as exemption from legal process, from service as jurors or witnesses, or from legal question tending to impair the freedom of their debates and proceedings? It is doubtless essential, in order to enable a legislature, or any other public assembly, to accomplish the work assigned to it, that its members should not be prevented or withdrawn from their attendance, by any causes of a less important character; but that, for a certain time at least, they should be excused from obeying any other call, not so immediately necessary for the welfare or safety of the State; they must also be always protected in the exercise of the rights of speech, debate and determination in reference to all subjects upon which they may be rightfully called to deliberate and act; it is absolutely necessary, finally, that the aggregate body should be exempted from such interferences or annoyances as would tend to impair its collective authority or usefulness. The immunities thus indispensable are, in the case of legislatures, commonly secured by rules and maxims or constitutional provisions, and are styled privileges, as being rights or exemptions appertaining to their office, to which citizens generally are not entitled.

Out of the catalogue of privileges above given, it is not easy to select one with which a Convention or its members could safely dispense. It ought never to be, as without them it would frequently be, in the power of the enemies of reform to prevent or postpone it by arresting, harassing or intimidating the delegates to the body by whom it is to be accomplished. But the real difficulty is, not to determine whether or not a Convention ought to enjoy those privileges, but to ascertain how and by whom they should be protected and enforced.

Upon this point, there is, in my judgment, but one position that can be maintained with safety, and that is, that Conventions must stand upon the same footing with jurors and witnesses; they must look to the law of the land and to its appointed administrators, and not to their own powers, for protection in their office. If a juror or a witness, going or returning, is harassed by arrest, he does not himself or with his professional associates cite the offending officer before him for punishment, but sues out a writ of *Habeas*

Corpus, and on pleading his privilege procures his discharge. Beside this, for personal indignity or injury, he may appeal to the laws for pecuniary compensation. The same course is doubtless open to any member of a Convention, and it furnishes for all ordinary cases a practical and sufficient remedy. Behind those bodies stands continually, armed in full panoply, the state, with all its administrative and remedial agencies, ready to protect and defend them.[1]

Various convention acts declare expressly the privileges and the immunities of the delegates.

Thus it appears that the delegates, although "officers," are not "officers" within the meaning of the constitution. They need not take an oath to support the State constitution unless required to do so by a popular statute. They have similar privileges and immunities to those enjoyed by members of the State legislature and jurors, but should look to the courts to enforce them.

[1] *Jameson*, pp. 473–474.

Chapter XVI

SUBMISSION OF AMENDMENTS

Of the original constitutions of the thirteen colonies, only those of New Hampshire and Massachusetts were formally submitted to a vote of the people, although in several other instances an informal canvass was made. The Vermont constitution of 1786 and the Georgia constitution of 1789 were ratified by different bodies from those that framed them, these second bodies being chosen by a direct vote of the people for that purpose. The New Hampshire constitution of 1792, the Connecticut constitution of 1818, and the Maine constitution of 1819 were submitted to a popular vote. New York followed in 1821. The popular submission of constitutions first developed in New England, largely, it would seem, because there alone the people had in their town meetings workable instruments for the expression of popular sentiment upon such a question.[1] This policy soon became general, although it received a setback in the South during the Civil War, doubtless because of fear of the negro vote. Most of the reconstruction constitutions were voted on by the people, although secessionists were excluded from voting. Since 1890 fourteen State constitutions have been adopted. Seven of these were submitted to a vote of the people; six were adopted without submission; and one, that of Kentucky in 1891, was altered by the convention after it had received the popular approval.[2]

Dodd says:

> In view of the facts discussed above, I think that it is impossible to assert, as Judge Jameson did, that the submission of a constitution to a vote of the people is imperatively required by some customary constitutional law of this country, or even to say that

[1] *Dodd*, pp. 62–64.

[2] *Dodd*, pp. 64–67. Arizona and New Mexico submitted to the people in 1910. Louisiana in 1913 did not.

a legislature in calling a convention may effectively bind such a body to submit its work for the approval of the people. We are, then, forced to the conclusion, that at present the only rules positively binding a convention to submit its constitution to the people are those contained in the constitution which the convention may have been called to revise. Of the thirty-four state constitutions which contain provisions regarding constitutional conventions, seventeen require that constitutions framed by such conventions be submitted to the people. As has been suggested, however, all of the states, with the exceptions just referred to, have followed the same rule since 1840. Of only two states — Delaware and Mississippi — may it be said that the practice is opposed to a convention's submitting the results of its labors to a vote of the people.[1]

There are no recorded instances of a convention refusing to submit the fruit of its labors to the people when required by express constitutional provision. There have been instances, however, in which conventions have disobeyed similar express requirements of the convention act. But, if a convention act voted on by the people acquires from this vote a supraconstitutional force,[2] it would seem that its provisions ought to be even more binding than those of the constitution.

In Virginia, in 1901, the question of holding a convention was voted upon by the people as required by the constitution of 1870; and the subsequent legislative act authorizing the convention provided that the constitution framed by it should be submitted to a vote of the people. However, the convention did not submit its constitution, largely, it would seem, for fear of its being defeated by the elements to be disfranchised, in combination with interests adversely affected by the new constitution.[3] The general sentiment of the bar of the State was that the second act, not having been voted on by the people, was not binding upon the convention.[4]

The Illinois convention of 1847 declared one article of the constitution to be in force without submission to the people, although the convention act (purely legislative in its character) required the submission of all amendments.[5]

[1] *Dodd*, pp. 68–70.
[2] See pp. 55–56, *supra*.
[3] *Dodd*, p. 68.
[4] VII "Va. Law Reg.," 100.
[5] Ill. Laws 1846–1847, Act of Feb. 24, 1847, Sec. 6; Ill. Const. 1847, Schedule, Art. 4.

These really are the only instances of conventions disregarding the convention act in this respect, although Dodd also cites that of the Kentucky convention of 1890–1891.[1] This case however, falls under the implied power of a convention to codify and perfect its constitution after ratification by the people,[2] for the Kentucky convention did obey the requirement that it should submit its constitution to the people. But even if we consider this case as an instance of disregard of the convention act, it may be differentiated because of the fact that the Kentucky act was the creature of the legislature alone and hence might properly be disregarded by the convention. Both the Kentucky and Virginia courts recognized these constitutions as valid; basing their recognition, however, on popular acquiescence rather than on the validity of the proceeding itself.[3]

The provision for popular submission contained in a convention act which has not been voted on by the people has, nevertheless, been declared by the Pennsylvania Supreme Court to be binding, on the ground that the people elected their delegates under the act, relying on its terms. The court said:

> When the people voted under this law, did they not vote for delegates upon the express terms that they should submit their work to the people for approval? Did not every man who went to the polls do so with the belief in his heart that, by the express condition on which his vote was given, the delegates could not bind him without his subsequent assent to what the delegates had done? On what principle of interpretation of human action can the servant now set himself up against the condition of his master and say the condition is void? Who made it void? Not the electors; they voted upon it.[4]

We have already seen that it is the general custom to submit constitutional changes to the people, even when not required by the express terms of the convention act. In fact, there have been expressions of opinion to the effect that the action of an extraconstitutional convention has no validity until ratified by a popular vote. Thus Ruling Case Law says:

[1] *Dodd*, p. 68.
[2] See pp. 182–184, *supra*.
[3] *Taylor* v. *Commonwealth* (1903), 101 Va. 829; *Miller* v. *Johnson* (1892), 92 Ky. 589.
[4] *Wells* v. *Bain* (1872), 75 Pa. 39, 52.

The new constitution prepared by a convention derives its force from the action of the people and not from that of the legislature which may have issued the call for the constitutional convention.[1]

Judge Morton of the Massachusetts Supreme Court said, in the Massachusetts convention of 1853:

If the people choose to adopt what we submit to them, it then becomes authoritative — not because it comes from a legally constituted body, but because the people choose to adopt it.[2]

But both of these proceeded upon the theory that it was the legislature alone which called the convention. If that be true, then certainly the work of the convention must be submitted to the people, in order to give the convention any standing at all.

Having discussed the question of *necessity* of submission, we next come to the question of *time* of submission. When the determination of the time for submission has been left to the convention, has the legislature the power to change it? The Lecompton controversy in Kansas arose on just this point. The convention, which was pro-slavery, arranged for the submission of two alternative forms of its constitution at an election to be held in December, 1857. Thereupon the free-state legislature, which convened four days before the date set for this election, voted to submit the constitutions in January. Only slavery men participated in the first election and only free-staters in the second, with the result that the most pro-slavery of the two constitutions was carried in December, and both were rejected in January. No decision was reached as to which was the valid action, for President Buchanan and the national Senate deadlocked with the national House on the question.[3]

For the legislature to change the time for submission, if the time was set by the people, would amount to an illegal attempt at amending the convention act;[4] and regardless of the source

[1] 6 R. C. L., § 17, p. 27.
[2] Deb. Mass. Conv. 1853, Vol. I, p. 75.
[3] For a fuller discussion, see pp. 103, 116, *supra*.
[4] See pp. 97–104, *supra*.

of the act, would amount to an illegal attempt to restrict the convention.[1]

A somewhat similar question, however, arose more recently in New Hampshire. The question involved was as to the time of taking effect of the amendments proposed by the convention of 1889. The Supreme Court held that although this question was a matter primarily for the legislature, yet as the convention had acted and issued an ordinance decreeing that the amendments should take effect when voted on, the amendments had so taken effect, and it was thereafter too late for the legislature to change the date. This opinion, although delivered in 1889, was not published in the New Hampshire reports until 1911.[2] This same opinion points out that the practice in New Hampshire has been for the legislature to delegate to the convention the legislative power of determining when the amendments should take effect. If no time were fixed, the amendments would take effect upon their ratification.

A Constitution, or an amendment, takes effect on the day of its adoption by the people, unless otherwise provided in the existing Constitution, or by the Convention acting under legislative authority.[3]

When the time for submission is prescribed by the convention act, can the convention change the time? This must needs be within the inherent powers of a convention, even though the convention act be popular rather than legislative. Otherwise, the whole procedure might come to nought because of a technical restriction. Such restrictions are directory rather than mandatory, the main object being submission to the people at some time, rather than submission at any particular time or not at all. Thus the New York convention of 1867 sat beyond the time fixed by the convention act for its work to be submitted to the people, for the simple and compelling reason that its work had not then been completed.[4]

The Michigan convention of 1907–1908 was required by a purely legislative convention act to submit its constitution at the April election of 1908. The convention decided to submit at the November election of that year, and by mandamus

[1] See pp. 105–116, *supra*.
[2] *Opinion of Justices* (1889), 76 N. H. 612.
[3] *Jameson*, p. 545, n. 1.
[4] *Dodd*, p. 82.

forced the Secretary of State to recognize that the convention and not the legislature was the master.[1]

The next question to be considered is: Need the convention submit its constitutional changes *en bloc?* That this question should arise at all is probably due to the idea that there is something inherently different between a *new* constitution and an *amended* constitution. But as the Supreme Court of Rhode Island has well said:

> Any new constitution, therefore, which a convention would form, would be a new constitution only in name; but would be in fact our present Constitution amended. It is impossible for us to imagine any alteration, consistent with a republican form of government, which cannot be effected by specific amendment as provided in the Constitution.[2]

But in spite of this, there have been a number of adverse expressions of opinion, which can all, however, be traced to a misconception of the famous opinion of the justices of the Massachusetts Supreme Court of 1833.[3] Thus Dodd erroneously says:

> The Massachusetts judges thought that there was no power to adopt specific amendments except in the manner provided by the constitution, but did not express any opinion upon the question whether a convention might be called for a general constitutional revision; their opinion cannot therefore be cited in support of the view that a convention may not be called for a general revision without constitutional authorization, and such a convention was in fact held in Massachusetts in 1853.[4]

Yet what the Massachusetts Supreme Court really said was this:

> The court do not understand that it was the intention of the House of Representatives to request their opinion upon the natural right of the people in cases of great emergency, or upon the obvious failure of their existing constitution to accomplish the objects for which it was designed, to provide for the amendment or alteration of their fundamental laws; nor what would be the

[1] *Carton* v. *Secy. of State* (1908), 151 Mich. 337, 338–339.
[2] *Opinion of Justices* (1883), 14 R. I. 699, 654.
[3] *Opinion of Justices* (1833), 6 Cush. 573.
[4] *Dodd*, p. 45.

effect of any change and alteration of their Constitution, made under such circumstances and sanctioned by the assent of the people. Such a view of the subject would involve the general question of natural rights, and the inherent and fundamental principles upon which civil society is founded, rather than any question upon the nature, construction, or operation of the existing constitution of the Commonwealth, and the laws made under it. We presume, therefore, that the opinion requested applies to the existing constitution and laws of the Commonwealth, and the rights and powers derived from and under them. Considering the questions in this light, we are of opinion, . . . that, under and pursuant to the existing Constitution, there is no authority given by any reasonable construction or necessary implication, by which any specific and particular amendment or amendments of the Constitution can be made, in any other manner than that prescribed in the ninth article of the amendments adopted in 1820.[1]

Jameson construes the phrase "specific and particular amendment or amendments" as follows:

The force of these quotations may be better apprehended by considering what the Convention meant by a "specific amendment." Undoubtedly it meant an amendment which had been distinctly formulated in its terms in the public mind, and one of which the necessity had been generally acknowledged, in contradistinction from a change, indeterminate in its character and extent, which might be shown to be advisable upon a revision of the whole Constitution. A specific amendment, being a definite proposition, might safely be submitted to the people to pass upon, yes or no; for it required no modification to adjust it to possible changes in other parts of the same instrument. Not so with an indeterminate amendment, to be matured by discussion, and after multiplied adjustments, and which might turn out to be a single proposition, or a few simple propositions, or a completely new Constitution. For such a work only a Convention is adapted.

Recurring, then, to the question whether, where a Constitution contains no provision for amendments save in the legislative mode, a Convention can be called, the answer must be, both upon principle and upon precedent, that a Convention can be called, certainly when a revision of the whole Constitution is desired, to determine what amendments, if any, are needed, or, if deemed advisable, to frame a new Constitution. In general, whenever a Convention is called, the intention is to authorize a revision of

[1] *Opinion of Justices* (1833), 6 Cush. 573, 574.

the entire Constitution, though upon its meeting, the result of its labors may be only to recommend specific amendments.[1]

The phrase "specific and particular amendment or amendments" is the exact phrase used in the amending clause of the present Massachusetts constitution. It is a technical phrase of Massachusetts constitutional law and means no more or less than the mere word "amendment." It has always been so recognized in that State, as is shown by the fact that every attempt to establish a new method of constitutional amendment has always used the whole phrase. Thus, according to Jameson's interpretation and to the practice in Massachusetts, any *definite* constitutional change, from the establishment of a complete new constitution down to the changing of a mere comma would be a specific and particular amendment.

The real distinction drawn by the Massachusetts Supreme Court was not between single amendments and a general revision of the constitution, but was between constitutional and extraconstitutional methods of revision. The Supreme Court very decidedly does not refer to the extraconstitutional method as consisting only in a *general* revision of the constitution, but on the contrary refers to it as "the amendment or alteration of their fundamental laws" and as "any change and alteration of their constitution." That this is the view held by constitutional lawyers in Massachusetts is seen by the following quotation from a very recent local law article:

> It was assumed in the opinion, that the opinion requested applies to the existing constitutions and laws of the Commonwealth and the rights and powers derived from and under them, and did not depend upon the natural right of the people in cases of great emergency, or upon the obvious failure of their existing constitution to accomplish the objects for which it was designed, to provide for the amendment and alteration of their fundamental laws.[2]

It is also seen from the fact that the voters of Massachusetts, in calling the convention of 1917, voted on the question: "Shall there be a convention to revise, alter *or amend* the constitution of the Commonwealth?" [3] The affirmative vote on

[1] *Jameson*, pp. 614–615.
[2] *Arthur Lord* in II "Mass. Law Quarterly," 1, 24.
[3] Mass. Gen. St. 1916, c. 98, § 1.

this question clearly authorized the convention to submit separate amendments. So also the convention act provides:

> Any such revision, alterations *or amendments*, when made and adopted by the said convention, shall be submitted to the people for their ratification and adoption, in such manner as the convention shall direct.[1]

The use of the word "amendments" in the plural shows that the submission of separate amendments was within the contemplation of the act, and the convention is authorized to use its discretion in this matter by the words "in such manner as the convention shall direct."

The convention to be held in Indiana in 1918, although called for the purpose of framing an entire constitution, is expressly authorized by the convention act to submit any question separately.[2]

The only real distinction between a general revision and revision by separate amendments is that the constitutional convention would be too expensive unless there were a lot of changes to be made. As Judson says:

> The convention is a very proper form of organization for framing a complete constitution. It is, however, obviously too cumbersome and expensive a thing for mere amendment, unless, indeed, the amendment in question should be of extraordinary importance.[3]

Dodd takes the same view in the following language:

> The discussion heretofore has been based upon the general view that constitutional conventions are employed for the complete revision of state constitutions or for the framing of new constitutions, and that, where a general revision is not desired, the regular legislative machinery is used to initiate specific amendments. This view is, in the main, correct. Yet of course a constitutional convention when assembled may not make a general revision but may simply propose specific amendments. In the state of New Hampshire specific amendments may only be proposed by a convention. However, where only a few changes are

[1] Mass. Gen. St. 1916, c. 98, § 6.
[2] Ind. 1917 Senate Bill 77, § 1.
[3] *Judson*, Essentials of a Written Const., p. 14.

desired the convention is an expensive and cumbersome instrument which will not often be employed except in case of necessity. On the other hand several constitutions make no provision for a convention, and in Rhode Island the absence of such provision has been held to prevent the holding of a convention so that here the legislative process is the only one available for constitutional alteration.

May not the legislative power of initiating amendments be used in such a manner as to propose a complete constitutional revision? This may be done where the legislature is not restricted as to the number or character of amendments which it may propose, but precedent is against the exercise of such power by a legislature, although in Rhode Island this is the only way of obtaining a complete constitutional revision. Two state legislatures have submitted to the people revised constitutions in the guise of amendments, but in both cases the legislative revisions were rejected. The Michigan legislature submitted a revised constitution in 1874, and the Rhode Island legislature submitted the same instrument twice, in two successive years, 1898 and 1899.

Judge Jameson has said as to the legislative method of proposing amendments. "It ought to be confined, it is believed, to changes which are few, simple, independent, and of comparatively small importance. For a general revision of a Constitution, or even for single propositions involving radical changes as to the policy of which the popular mind has not been informed by prior discussion, the employment of this mode is impracticable, or of doubtful expediency." Judge Jameson's point is purely one as to expediency, and it is legally proper, it would seem, in the absence of specific constitutional restrictions, to propose to the people by the legislative process any constitutional alteration short of a complete revision, or even a complete revision.[1]

The subsidiary question he touched on, namely the power of the legislature to submit a whole constitution in the regular legislative method for submitting amendments, should be distinguished from the question of the power of the legislature to submit a whole constitution, acting like a constitutional convention, which latter question was discussed in an earlier chapter.[2]

Reverting to the question of separate submission, we find that Jameson presents a strong argument in favor of separate submission:

[1] *Dodd*, pp. 258–261. [2] Chapter VI, *supra*.

A Constitution may be wholly new, or it may be an old one revised by altering or adding to its material provisions. It may, also, in a hundred separate subdivisions, contain but a fourth of that number of distinct topics, or each subdivision may be substantive and independent. It is obvious that the submitting body, weighing accurately the public sense, may determine whether the whole Constitution must stand or fall as a unit, or whether some parts, being adopted and going into effect without the rest, the new system would be adequate to the exigencies of the state, and may submit it as a whole or in parts accordingly. But it is perfectly clear that every distinct proposition not vital to the scheme as a whole, or to some other material part, ought to be separately submitted. If it were not nearly impracticable, the best mode would be to submit every distinct proposition separately, so that each voter could vote yes or nay upon it, regardless of anything but its absolute propriety.[1]

Nevertheless it is true that

In far the larger proportion of the cases in which submission has been made, it has been of the instruments entire. This was naturally true, in general, of all such as were the first constitutions of their respective States.

The earliest departure from this mode was in Massachusetts, in 1780, in which the Frame of Government and Bill of Rights were both submitted in such a way as to enable the people to reject the whole or any part of either, . . . a course followed by all the subsequent Conventions in that State, though the Act calling the Convention of 1820 left it to the discretion of that body to determine the mode in which the submission should be made. The example set by Massachusetts in 1780 was followed by New Hampshire in 1791, and in the subsequent revision in 1850. The Acts calling the New York Conventions of 1821 and 1846 required those bodies to submit their proposed amendments to the people, together or in distinct propositions, as to them should seem expedient. Accordingly, the Convention of 1821 provided that they should be submitted "together, and not in distinct parts;" and that of 1846, expressing the opinion that the amendments it proposed could not be prepared so as to be voted on separately, submitted them *en masse* excepting one, that relating to "equal suffrage to colored persons," which was submitted as a separate article. Under a similar discretion, the Pennsylvania Convention

[1] *Jameson*, pp. 531–532.

of 1837 submitted its amendments *en masse*. The Illinois Convention of 1847 and 1862, and the Oregon Convention of 1857, pursued a course similar to that of the New York Convention of 1846, submitting the great body of their respective Constitutions entire, but a few articles relating to slavery, to the immigration of colored persons, the public debt, and other subjects considered of doubtful policy, separately.[1]

In 1820 a convention act was vetoed in New York, for the following reason, among others:

Because the bill contemplates an amended Constitution, to be submitted to the people to be adopted or rejected, *in toto*, without prescribng any mode by which a discrimination may be made between such provisions as shall be deemed salutary and such as shall be disapproved by the judgment of the people. If the people are competent to pass upon the entire amendments, of which there can be no doubt, they are equally competent to adopt such of them as they approve, and to reject such as they disapprove; and this undoubted right of the people is the more important if the Convention is to be called in the first instance without a previous consultation of the pure and original source of all legitimate authority.[2]

The more recent constitutional conventions which have been held have proceeded in the following manner:

The Michigan convention of 1907–1908 submitted a new constitution entire.[3] The New Hampshire convention of 1912 submitted twelve separate amendments of the old constitution.[4] The Ohio convention of 1912 submitted forty-two separate propositions.[5] The New York convention of 1915 submitted a new constitution and two additional separate propositions.[6]

See the following quotations on methods of submission:

Conventions may submit separate amendments to be voted on by the people one by one or all together.[7]

[1] *Jameson*, p. 533.
[2] *Jameson*, p. 671.
[3] Journal, Mich. Conv. 1907–1908, Vol. II, pp. 1502–1533.
[4] Journal, N. H. Conv. 1912, pp. 562–564.
[5] Journal, Ohio Conv. 1912, pp. 1050–1073.
[6] Rev. Record, N. Y. Conv. 1915, Vol. IV, p. 4335. For a list of earlier instances see *Dodd*, p. 259, n. 243.
[7] *McClure*, "State Const. Making," p. 351.

It lies in the discretion of a convention ordinarily as to whether its work shall be submitted: 1, in the form of separate amendments to an existing constitution; 2, as a complete new constitution; or 3, as a new constitution, but with separate provisions which may be voted upon independently.[1]

Thus we may conclude that a constitutional convention may submit its changes in whatever form it considers best adapted to ascertain and accomplish the will of the people.

A related question is the power of the convention to enlarge or reduce the electorate to which it refers the amendments. Some constitutional provisions and convention acts are specific on this point. Thus the act for the holding of the Indiana convention of 1918 provides that the "new constitution shall be submitted to the legal voters of the state of Indiana to be by them ratified or rejected." [2] Another act of the same session extended the vote in this connection to women.[3]

On the other hand, the act for the holding of the Massachusetts convention of 1917 merely provides that the amendments "shall be submitted to the people for their ratification and adoption, in such manner as the convention shall direct." [4]

In cases where the constitution has been held to apply to a convention, it has been held that neither the legislature nor the convention has a right to prescribe other qualifications than those set forth in the constitution.[5]

Where the constitution does not apply, however, Dodd has pointed out that

> In most of the cases in which constitutional provisions regarding the suffrage have not been observed, there has actually been a widening of the suffrage . . . with reference to the vote for delegates to a convention, and . . . with reference to the popular vote upon a proposed constitution.[6]

In many of the cases cited by Dodd the change was made by the legislature rather than by the convention, but even these

[1] N. Y. Revision of Consts., p. 71; *Dodd*, p. 258, n. 243.
[2] Ind. 1917 Convention Act, § 1.
[3] Ind. 1917 Senate Bill 77, § 1.
[4] Mass. Gen. St. 1916, c. 98, § 6. The Supreme Court of Massachusetts has ruled (Senate Doc. 512 of 1917) that this means submission to those entitled to vote for certain State officers.
[5] *Green* v. *Shumway* (1868), 39 N. Y. 418, 426.
[6] *Dodd*, p. 58, n. 60.

serve to illustrate the inapplicability of the constitutional qualifications of voters.

The convention which framed the original constitution of Massachusetts extended the right of suffrage beyond that prescribed by the charter then in force. The charter said:

> Provided alwayes that noe Freeholder or other Person shall have a Vote in the Elec̃on of Members to serve in any Greate and Generall Court or Assembly to be held as aforesaid who at the time of such Elec̃on shall not have an estate of Freehold in Land within Our said Province or Territory to the value of Forty Shillings per Annũ at the least or other estate to the value of Forty pounds Sterl'.[1]

And the constitution framed by the convention increased these qualifications fifty per cent as follows:

> And at such meetings every male inhabitant of twenty-one years of age and upwards, having a freehold estate within the commonwealth, of the annual income of three pounds, or any estate of the value of sixty pounds, shall have a right to give in his vote for the senators for the district of which he is an inhabitant.[2]

Nevertheless, the various towns, on the recommendation of the legislature, permitted all adult freemen to vote for delegates; and the convention, following the same recommendation, chose the adult freemen as the electorate to represent the people, in passing upon the proposed constitution.

It may be well to give a tabulation of some instances in which the electorate has been altered for the purpose of voting on constitutional changes:

In the following case the legislature plus the electorate extended the electorate: New York (1821).[3]

In the following, the legislature alone did the extending: New Jersey (1844),[4] Rhode Island (1841 and 1842).[5]

In one case the convention did so, acting with assent of both legislature and electorate: Massachusetts (1780).[6]

[1] *Thorpe*, Vol. III, pp. 1878–1879.
[2] Mass. Const., Ch. I, § II, Art. II. Similarly as to other officers.
[3] Laws of N. Y., 1821, c. 90.
[4] Laws of N. J. 1843–1844, p. 111; *Bott* v. *Secy. of State* (1898), 62 N. J. L. 107, 121, 123–124.
[5] *Mowry*, The Dorr War, pp. 119–120, 283.
[6] See above on this page.

In two cases the convention did so, with the assent of the legislature: Virginia (1830),[1] Illinois (1869).[2]

In the following, the convention on its own initiative extended the electorate: Louisiana (1845 and 1852),[3] Michigan (1835),[4] Texas (1845),[5] Virginia (1851),[6] West Virginia (1863),[7] Tennessee (1834),[8] Kansas (1859),[9] Arkansas (1868).[10]

Two of these conventions reduced the electorate in some particulars as well as extending it in others: Tennessee (1834),[11] and Arkansas (1868).[12]

Electorates have also been reduced by oaths of allegiance required by reconstruction acts, and by the following conventions: Maryland (1864), Missouri (1865), New York (1867).[13] Such oaths have been held to be *ex post facto* laws, when required as a condition precedent to holding office or pursuing certain lines of business.[14] But, as voting is not a property right, it is to be doubted if the principle of these cases would be extended to prohibit the application of the same restriction to voters.

The Supreme Court of Missouri has, in the following language, sustained the validity of the ordinance of the convention of 1865, which reduced the electorate to those who could take the test oath:

> As the representatives of the people, clothed with an authority so ample as that, certainly its power to prescribe the means by which it was thought best to ascertain the sense of the qualified voters of the State upon that instrument cannot be seriously questioned. The ordinance had in itself every element necessary to give it legal force and effect, and was therefore binding upon the voter.[15]

The Justices of the Supreme Court of Massachusetts have, however, recently given an opinion which apparently holds that the electorate prescribed by the constitution for voting for certain mentioned offices and on amendments submitted by the

[1] Va. Acts, 1828–1829, c. 15; *Thorpe*, Vol. III, p. 3825.
[2] Ill. Act, Feb. 25, 1869; *Thorpe*, Vol. II, p. 1047.
[3] *Thorpe*, Vol. III, p. 1410; Vol. III, p. 1428.
[4] *Thorpe*, Vol. IV, p. 1942.
[5] *Thorpe*, Vol. VI, p. 3566.
[6] *Thorpe*, Vol. VII, p. 3850.
[7] *Thorpe*, Vol. VII, p. 4011.
[8] *Thorpe*, Vol. VI, p. 3441.
[9] *Thorpe*, Vol. II, p. 1259.
[10] *Thorpe*, Vol. II, p. 330.
[11] *Thorpe*, Vol. VI, p. 3441.
[12] *Thorpe*, Vol. II, p. 330.
[13] *Jameson*, p. 522.
[14] *Cummings* v. *Missouri* (1866), 4 Wall. 277, 318.
[15] *State* v. *Neal* (1868), 42 Mo. 119, 123.

legislative method is the only electorate which can vote under the convention method.

They first say:

> The validity and powers of this convention are not necessarily involved in these questions. Without discussing that subject, we are of opinion that . . . if the convention to revise and alter the Constitution is held under the Constitution, etc.

This is their premise, assumed by them merely for the purposes of argument; doubtless because they rightly felt that, if the convention is authorized by some *extra*constitutional power, they, the justices of the court, being constitutional officers, would have no right to pass upon any questions involved. Acting on the foregoing premise, namely, that the convention is held *under* the constitution, which however they refuse to decide, the justices say:

> The Constitution of Massachusetts in its original form defined the qualifications of the electorate. Chapter 1, Section II, Article II; Chapter 1, Section III, Article IV. These qualifications have been modified by Articles III, XVII, XX, XXVIII, XXXI and XXXII of the Amendments. The words of the Constitution as it now stands are "Every male citizen of twenty-one years of age and upwards, excepting paupers and persons under guardianship, who shall have resided within the Commonwealth one year, and within the town or district in which he may claim a right to vote six months next preceding any election . . . shall have a right to vote" for governor and other officers. Although these provisions in express terms relate only to the qualifications of voters for the elective officers therein named, it is a necessary and imperative implication that these electors and these only can be treated as qualified to vote to change the Constitution. The words "qualified voters" as used in Article IX of the Amendments, wherein are the provisions for amendments to the Constitution, mean the voters qualified according to the requirements of the Constitution. It is an essential and inevitable limitation upon the power vested in the legislative body of a state established by a written Constitution that it cannot provide for the revision or change of the frame of government except in a lawful and orderly method and by the body of electors determined according to the terms of that frame of government. The "people" who have a right to vote upon any essential aspect of that revision and change, either for members of the convention or the acceptance

or rejection of its work, are the people who have a right to vote for state officers and upon state questions, namely, the voters as described by the Constitution itself. It is elementary that the existing Constitution continues in full force and effect until changed or destroyed by act of the sovereign people. It seems indisputable that there is no power under the Constitution, except the sovereign people acting in accordance with their self-imposed, limiting methods of procedure, to enlarge the electorate so as to include as voters persons not eligible to vote upon amendments to the existing Constitution. . . . The Legislature can proceed only under the Constitution. It would be contrary to its duty to that Constitution to provide for its revision or alteration by a body of electors, whose qualifications were different from those ascertained by the terms of that Constitution. The power of the Legislature to enact that women may be members of or vote for local or other subordinate boards of officers (See *Opinions of Justices*, 115 Mass. 602; 136 Mass. 578) is of a different character. The existence of that power touching officers created by the Legislature affords no basis for argument that like power exists to change the electorate established by the Constitution for state affairs.[1]

In opposition to this opinion, it may be argued as follows: *First*, the court is proceeding upon a premise which is rather questionable, and on the validity of which the court is therefore wise in refusing to pass, namely, that the constitution *authorizes* a popular convention.[2]

Secondly, the court assumes, as its second premise, that the constitution of Massachusetts establishes an "electorate for state affairs"; whereas it is arguable from an inspection of that instrument itself, that the electorate which it establishes relates merely to the election of certain specified State officers, and possibly to the ratification of amendments submitted by the legislature.[3] The theory that the constitution, by prescribing an electorate for certain *officers*, thereby impliedly prescribes the same electorate for *all* State *affairs*, may well be a violation of the principle of construction of instruments, that the express mention of one thing amounts to

[1] Mass. 1917 Senate Doc. 512.

[2] See pp. 45, 50, *supra*.

[3] Mass. Const., Amendments III, XVI, XVII, and possibly IX. The Justices themselves say, in this very opinion: "these provisions in express terms relate only to the qualifications of voters for the elective officers therein named."

an implied exclusion of all else.[1] This opinion of the Massachusetts court, if carried to its logical conclusion, would render invalid the partial suffrage laws, whereby in many States women may, by legislative act, vote for such State officers as are not expressly mentioned in the constitution,[2] which laws have been held valid in actual litigation.[3]

Thirdly, the court ignores all of the instances in which, with uniform success, legislatures and conventions have enlarged or reduced the electorate.[4] Is it not arguable that, if there had been any doubt of the legality of such changes, it would have been raised in the courts before this?

Fourthly, the court's opinion is sustainable upon another ground than that mentioned by them, namely, upon the ground that the legislature cannot amend what the people have enacted.[5]

For these reasons, we may well wait for a decision by the Massachusetts court in a litigated case,[6] before concluding that this is their final view on the subject. The last above reason suggests a related ground on which the court might have based its opinion, and which if valid, would bar the convention from changing the electorate, although it would not have barred the inclusion of such a change in the original act. The ground is, that the voters, in adopting the act, used the term "people" in its commonly accepted sense of "voters," and that this use of the word is binding both on the legislature and the convention. But on the other hand, it is equally arguable that this word was used in the light of the many precedents in which conventions have picked what electorate should represent the people.

Jameson discusses, as follows, the alteration of the electorate by a convention:

[1] This legal maxim reads: "*Expressio unius est exclusio alterius.*" It is possible to construe the recent Massachusetts opinion as changing it to read: "*Expressio unius est inclusio omnium aliorum.*"

[2] Ill. Laws of 1913, p. 333; Ind. 1917 Senate Bill 77; Ohio Act of 1917; Michigan Act of 1917; Rhode Island Act of 1917; Nebraska Act of 1917; North Dakota Act of 1917.

[3] "The Constitution refers only to elections provided for by that instrument." *Scown* v. *Czarnecki* (1914), 264 Ill. 305, 312; approved in *People* v. *Militzer* (1916), 272 Ill. 387, 392.

[4] See the instances given immediately *supra.*

[5] See pp. 97–104, *supra.*

[6] *Woods* v. *Woburn* (1915), 220 Mass. 416, 418; *Young* v. *Duncan* (1914), 218 Mass. 346, 351, and cases therein cited.

Of these, the largest proportion were cases in which submission was made to the electors *plus* certain designated classes of persons previously not entitled to vote at such elections, and the residue, of cases in which submission was made to the electors *minus* certain classes of persons thus entitled, according to existing laws.

. . . . . .

In most of these cases the effect was, on the whole, doubtless to increase the existing electorate. In five of them the Convention Acts expressly authorized the Conventions to submit in the manner described, but in the residue no such authority was given or pretended.

It is evident that in these cases, a new principle was introduced, namely, that of submitting proposed changes in the fundamental law to persons other than the body entrusted with the electoral function under existing laws; in some cases, to citizens forming no part of the existing governmental system; in others, to a part only of the citizens comprised in that system. Such a submission, especially when made to persons not forming a part of the existing electorate, it is conceived, was not only a novelty but a capital innovation, upon which might hang, for the States concerned, the most weighty consequences; and, unless the principles which ought to govern in the enactment of fundamental laws are misconceived, it was unconstitutional and in the highest degree dangerous.[1]

But the uniform success of such electoral changes shows that, even if unconstitutional, they are nevertheless valid and effective. Besides, there is no reason to suppose that a matter not covered by the constitution, and which the constitution probably could not control if it tried,[2] can be unconstitutional.

The Indiana constitution does not provide for the holding of conventions, but does provide that only males shall vote on proposed constitutional amendments. Nevertheless, the legislature has decreed that women may vote on the constitutional amendments which may be submitted by the coming convention,[3] thus clearly showing that the opinion in that State is to the effect that general constitutional provisions relative to the qualifications of voters do not apply to amendments submitted by an extraconstitutional convention.

[1] *Jameson*, pp. 516–517.
[2] See pp. 50–52, 166–167, *supra*.
[3] Ind. Const., II, 2; Ind. 1917 Senate Bill 77.

An objection is sometimes made that if the convention has the power to *enlarge* the electorate in order to get a better expression of public opinion, they have an equal power to *reduce* the electorate; and this is urged in support of the theory that they have no power to tamper with the electorate at all; but this argument can be met by quoting the following passage from the Constitution of the United States:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude.[1]

As to method of submission we have already seen that an extraconstitutional convention has the power, after the submission of changes to the people, to reconvene and codify the new constitution.[2] The manner of conducting the election at which the amendments are submitted is usually entrusted by the convention act to the convention. And in this connection, the convention has the power to pass all necessary incidental legislation.[3] But where the legislature attempts to prescribe the method, there is at least one decision to the effect that the legislative provisions are binding, particularly when ratified by the people.

The power claimed for the convention is, by ordinance, to raise a commission to direct the election upon the amended constitution, in the city of Philadelphia, and to confer power on this commission to make a registration of voters, and furnish the lists so made to the election officers of each precinct; to appoint a judge and two inspectors for each division, by whom the election therein shall be *conducted*. This ordinance further claims the power to regulate the qualifications of the officers thus appointed to hold the election and to control the general returns of the election. It is clear, therefore, that the ordinance assumes a *present* power to displace the election officers now in office under the election laws for the city, to substitute officers appointed under the authority of the convention, and to set aside these election laws so far as relates to the qualification of the officers and the manner in which the general returns shall be made, and in other respects not necessary to be noticed. The authority to do this is claimed under the fifth section

[1] U. S. Const., Amendment XV, § 1.
[2] See pp. 182–184, *supra*.
[3] See pp. 146–147, *supra*.

of the Act of 1872, giving the convention power to *submit* the amendments, at such time or times, and in such manner as the convention shall prescribe, subject, however, to the limitation as to the separate submission of amendments contained in this act. It is argued that the manner of submission confers a power to *conduct the election* upon the *matter submitted.* To state the proposition is to refute it, for the manner of submitting the amendments is a totally different thing from conducting the election upon the submitted amendments.[1]

But the question was really one of the power of popular, rather than of legislative, control.

One final suggestion:

When the work of a convention is submitted, it would be desirable to have mailed to each voter the text of proposals, together with explanations. For a populous state this would be expensive, but the expense would justify itself.[2]

From all the foregoing, we may deduce as follows: In the absence of popular restrictions on the convention, or in the presence of authorization to determine the manner of submission, the general authority of the convention over the manner of submission will include the date of the election, the election officials, the time at which the amendments shall take effect and even the choice of the particular electorate who shall be employed by the convention to represent the will of the people. The right to determine when the changes shall take effect includes the right to decree that they shall take effect when codified and promulgated by the reconvened convention.

[1] *Wells* v. *Bain* (1872), 75 Pa. 39, 53–54.
[2] N. Y. Revision of Consts., p. 72.

Chapter XVII

THE DOCTRINE OF ACQUIESCENCE

One further matter deserves brief attention, namely, the question as to what gives validity to constitutional changes adopted by the convention method. A mere lapse of time has been held to validate amendments adopted in violation of provisions of the existing constitution. Thus in 1894 the Supreme Court of Colorado refused to inquire into the validity of an amendment which had been in operation for ten years.[1] In 1903 the Supreme Court of Nebraska refused to inquire into the validity of an amendment adopted sixteen years before.[2] Dodd, however, says:

> Several expressions in the cases discussed above would raise the inference that an amendment might be secure from judicial attack simply because it had been long acquiesced in and uncontested. This view can hardly be a proper one. In the cases above, acquiescence was coupled with the fact that the amendments made essential changes in governmental organization, and such changes having been accomplished, were regarded as making the question a political one. But an amendment which did not make an essential change in the governmental organization — one the annulling of which would not disarrange the governmental machinery — may, it would seem, be attacked as invalid at any time, just as a law acted upon perhaps for years as valid, may be then held unconstitutional by the court. Mere lapse of time raises no presumption in favor of the validity of either a law or amendment, but long acquiescence without contesting its validity may be considered as having weight in determining the question of constitutionality.[3]

Recently in North Dakota a mere custom of the Supreme Court, favorable to the tenure of the Judges themselves, was

[1] *Nesbit* v. *People* (1894), 19 Col. 441, 455.
[2] *Weston* v. *Ryan* (1903), 70 Neb. 211, 218.
[3] *Dodd*, pp. 225–226.

held to have become ingrafted on to the constitution by mere lapse of time and acquiescence.[1]

In the case in which the Virginia convention of 1901 promulgated a constitution without complying with the requirement that it submit this constitution to the people, the court held:

> The Constitution having been thus acknowledged and accepted by the officers administering the government and by the people of the State, and being, as a matter of fact, in force throughout the State, and there being no government in existence under the constitution of 1869 opposing or denying its validity, we have no difficulty in holding that the Constitution in question . . . is the only rightful, valid, and existing Constitution of this State, and that to it all the citizens of Virginia owe their obedience and loyal allegiance.[2]

Dodd says:

> Another reason why courts would hesitate to pronounce invalid a constitution which was already in operation is that a court acting under such constitution would, in rendering a decision of this character, necessarily pronounce against its own competence as a court. A court organized under a government, even though that government be revolutionary in character, has no greater validity than the government under which it acts, and would hardly destroy itself by holding that government to be invalid. This view was first presented by a dictum of Chief Justice Taney in Luther *v.* Borden, and may be said to be a sound one: "And if a state court could enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial determination upon the question it undertook to try." [3]

And he adds that

> Courts must pursue a more liberal policy in passing upon the acts of a convention, especially after they have been approved by

[1] *Linde* v. *Robinson* (1917), 160 N. W. 512.

[2] *Taylor* v. *Commonwealth* (1903), 101 Va. 829, 831. And *cf. Miller* v. *Johnson* (1892), 92 Ky. 589.

[3] *Dodd*, pp. 101–102. *Cf. Brittle* v. *People* (1873), 2 Neb. 198, 214; *Loomis* v. *Jackson* (1873), 6 W. Va. 613, 708; *Koehler* v. *Hill* (1883), 60 Ia. 543, 608, 614; *Luther* v. *Borden* (1849), 7 How. 1, 40; "Trial of Dorr," p. 38. See pp. 157–158, *supra*.

the people, than it has [sic] pursued in interpreting the constitutional restrictions placed upon the legislative power to propose amendments.[1]

If lapse of time and acquiescence by the people and government will give validity to constitutional changes made under the authority of the constitution, then *a fortiori*, as Dodd suggests, with respect to changes made by extraconstitutional means.

If the reconvening of the Kentucky convention of 1890 was valid, although unauthorized by the convention act, and the constitution promulgated by it became the constitution of the State,[2] this rather upsets a pretty little theory which might otherwise be deduced and which has been deduced by some writers on the subject. It has been said that any irregularities on the part of either the legislature or the convention are cured when the people accept the changed constitution at a regular election. In other words, that the object of the whole procedure is to submit amendments to the people, and that it matters not how legally this is done, so long as it *is* done. Judge Morton may have had this theory in mind when he said in the Massachusetts convention of 1853:

> Whether we sit legally or illegally, whether we are here by right or by usurpation, if the people choose to adopt what we submit to them, it then becomes authority — not because it comes from a legally constituted body, but because the people choose to adopt it.[3]

But in the Kentucky case, there was no such curing submission to popular vote, because in that case the unauthorized act was done by the convention after, rather than before, the special election.

Thus we are forced to fall back on the theory that an amendment obtained by the convention method derives its validity not from the passage of the convention act by the legislature or its ratification by the voters, not from the election of the delegates to the convention, not from any action by the convention itself, and not even from the acceptance of the amendments by popular vote; but rather from the mere acquiescence in the

[1] *Dodd*, p. 103.
[2] See p. 183, *supra*.
[3] Deb. Mass. Conv. 1853, Vol. I, p. 74.

result on the part of the old government and of the people at large.

Thus amendment by extraconstitutional convention rests not on the submission *of* the amendment *to* the people, but rather on the submission *to* the amendment *by* the people.

The Massachusetts Supreme Court in 1833 alluded to this "sanction by the assent of the people." [1]

And it is clear that if President Tyler had not come to the rescue of the landlords of Rhode Island in 1841, by suppressing the People's Constitution with Federal troops,[2] Thomas Wilson Dorr would have been seated as governor, and his constitution, unlawful though its inception, would have become the supreme law of Rhode Island through being sanctioned by the assent of the people. This was a purely spontaneous convention, but so also were the Union governments of Virginia and West Virginia and the many successful conventions of the Revolutionary War.

The following quotations support the doctrine of acquiescence, set forth in this chapter:

> Such irregularly enacted changes may, however, be ratified by the subsequent acquiescence of the People, as well as by their formal vote; and any act of the existing Government in recognition of such irregular constitutional changes should be regarded as such acquiescence and ratification by the people.[3]

> If that instrument was valid, as the supreme law, it was because the people had tacitly expressed their assent to it by electing officers under it, and by acquiescing in its provisions.[4]

It will be inferred from the foregoing that the acquiescence which may give validity to an excessive exercise of power by a Convention must involve more than a mere affirmative vote of the qualified electors. These have no power to authorize or to condone a breach of constitutional duty; they can neither make nor repeal nor suspend the operation of a law. They are not "the people" in any case where they act without law or beyond the law. The acquiescence which ratifies or validates an act otherwise void is that of no single department or functionary, save as that department or functionary is supported by the consenting judgment of

[1] *Opinion of Justices* (1833), 6 Cush. 573.
[2] See pp. 21, 22, *supra.*
[3] *Braxton,* VII "Va. Law Reg.," 79, 96–97.
[4] *Jameson,* p. 519.

the sovereign whose voice it speaks. It is the acquiescence of the sovereign community, clearly manifest and continuous, that is alone effectual. As to the particular acts which are to manifest that judgment, or the length of time over which they should extend, no precise rule can be given. The most that can be said is, that when the sovereign body has clearly moved, and that movement gives evidence of irresistible force and of continuance, the various systems of officials, constituting the existing government, must heed and bow to it, or go down before it. Acquiescence, though silent and scarcely visible, is such a movement.[1]

The convention or congress which in its broadest sense made that constitution was assembled without sanction of law. It was composed of delegates elected at the instance of a committee of citizens . . . this body proceeded to frame and adopt a constitution, which was not submitted to the people for ratification . . . Nevertheless, from the time that instrument was promulgated until 1844, it was the fundamental instrument of government of this state, submitted to by the legislative, executive and judicial departments of the government, and also by the people of this state, as having the force of a constitution.[2]

It has even been asserted that a popular refusal to call a new convention is a ratification of the old constitution:

By the Act. No. 33 of an Extraordinary Session of the General Assembly, of this year, a proposition to hold a constitutional convention and adopt a new Constitution was submitted to the people, and was rejected by the electors voting in the election called for that purpose last August. This, in my humble opinion, was an express ratification of the Constitution of 1913.[3]

In spite of all the foregoing, we must remember that acquiescence does not validate the means, but merely the result. Thus Jameson says:

Before closing the discussion of the principles regulating the legitimate call of Constitutional Conventions, one remark is necessary to guard against misconstruction. A Constitution, or an amendment to a Constitution, originating in a Convention justly stigmatized as illegitimate, may, notwithstanding its origin, become valid as a fundamental law. This may happen

[1] *Jameson*, pp. 541–542.
[2] *Bott* v. *Secy. of State* (1898), 62 N. J. L. 107, 118–119.
[3] *Foley* v. *Dem. Com.* (1915), 70 So. 104, 105.

. . . by the mere acquiescence of the sovereign society. Such a ratification of the supposed Constitution or amendment would not, however, legitimate the body from whom the Constitution or amendment proceeded. That no power human or divine could do, because, by the hypothesis, such body was in its origin illegitimate . . . The ratification by the acquiescence of the sovereign, would be a direct exercise of sovereign power, illegal doubtless, but yet standing out prominently as a fact, as such finding in the original overwhelming power of the sovereign a practical justification, which it would be folly to gainsay.[1]

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

[1] *Jameson*, p. 112.

Chapter XVIII

CONCLUSIONS

What are the conclusions to be drawn from the discussion contained in this book?

It has seemed best to the author to collect all these conclusions in a final chapter. In every case in which there is not a fair preponderance of precedent and authority in favor of any given conclusion, that fact will appear. So that the following represents a summary of the law of constitutional conventions.

I

Written constitutions are an American institution, based upon the following four ideas: to wit, that charters of government should be in writing, that there exist certain inherent rights which should be asserted in these charters, that these charters should be superior to mere statutes, and that these charters are contracts between each citizen and the whole State.[1]

The convention, as a distinct body for the framing or alteration of constitutions, was originated in America during the Revolutionary War.[2]

Since then there have gradually developed two leading methods of amending constitutions: *i. e.*, by the regular legislature (now possible in every State except New Hampshire), or by a convention (now possible in every State except Rhode Island); in either case, almost always requiring a submission of the proposed changes to the people.[3]

In twelve States, amendment is now possible by direct popular initiative, without the interposition of either the legislature or a convention.[4]

[1] See pp. 1–2, *supra*.
[2] See pp. 2–8, *supra*.
[3] See pp. 8–10, *supra*.
[4] See p. 9, *supra*.

II

Government in America is based upon the theory of popular sovereignty; the people governing through representatives.[1]

The term "the people" means the people as organized into the State, rather than as a collection of individuals.[2]

All persons, men and women, infants and adults, comprise "the people." [3]

The people can speak only through their authorized representatives, the legal voters. Therefore the term "the people" is often used to mean the mouthpieces of the people.[4]

These, in turn, can represent the people only at an election duly called and held. It is only at such an election that the minority can be bound by the action of the majority; and the non-voters be bound by the action of those who vote.[5]

When a part of the people, or even a majority of them, act outside the forms of law, they have no right to bind the rest.[6]

The people have the right to change their form of government at will, using whatever method suits them.[7]

This is a fundamental right, which constitutions are powerless to deny, restrict, or limit as to method.[8]

The people may exercise this right in any one of three ways: (1) by some authorized procedure; (2) by a lawful act representing the whole people; or (3) by acquiescing in a spontaneous act of a part of the people.[9]

An authorized procedure is one which has the sanction of Congress in the case of a territory, or of the constitution in the case of a State.[10]

An extraconstitutional movement for the alteration of the constitution, derives its validity from the inherent power of the people.[11]

A spontaneous movement becomes effective only by subsequent popular acquiescence, produced usually by force.[12]

With respect to the constitutionality of any given method of amendment, it may be either (1) authorized; (2) permitted by

[1] See pp. 11–12, *supra*.
[2] See pp. 18, 20–28, *supra*.
[3] See p. 17, *supra*.
[4] See p. 17, *supra*.
[5] See pp. 16–22, *supra*.
[6] See pp. 16–22, *supra*.
[7] See p. 12, *supra*.
[8] See pp. 14, 15, *supra*.
[9] See pp. 15, 24, *supra*.
[10] See p. 15, *supra*.
[11] See p. 15, *supra*.
[12] See pp. 22–24, *supra*.

not being prohibited; (3) prohibited; or (4) beyond the constitution's control.[1]

Anything beyond the constitution's control enjoys exactly the same status, regardless of whether the constitution attempts to authorize, or to prohibit it, or merely remains silent on the subject.[2]

III

The word "constitutional," in the phrase "constitutional convention," does not refer to the constitutionality of the convention.[3]

Any dispute as to whether or not a convention is a "revolution" is merely a dispute over definitions, for the word "revolutionary" may equally well mean "unlawful and violent" or merely "unauthorized by the constitution." It is used in the latter sense in this book.[4]

Each of the three classes of changes in constitutions — *i. e.* authorized, popular, and spontaneous — may take the form of a convention; thus giving us three sorts of conventions.[5]

IV

Spontaneous conventions, not being bound by law, can furnish us with no useful precedents.[6]

Conventions unauthorized by the constitution have so often been held in the United States that it is now too late to question their validity.[7]

They are lawful in at least ten of the twelve States whose constitutions impliedly prohibit them by expressly authorizing another method of amendment.[8]

Implied prohibition is as effective as express prohibition.[9]

Popular conventions have been successfully held on five occasions, in spite of *express* prohibition.[10]

Such conventions are not held *under* the constitution, for under the constitution they would be *un*constitutional.[11]

There is some basis for the theory that even when a consti-

[1] See pp. 25–26, *supra.*
[2] See p. 26, *supra.*
[3] See p. 30, *supra.*
[4] See pp. 31–33, *supra.*
[5] See p. 34, *supra.*
[6] See p. 34, *supra.*
[7] See pp. 38–41, *supra.*
[8] See pp. 41–42, *supra.*
[9] See pp. 43, 48, *supra.*
[10] See p. 49, *supra.*
[11] See pp. 45–46, *supra.*

tution purports to authorize a convention, the convention really derives its authority from a higher source; and that the provisions in the constitution, like those in a convention act passed by the legislature, merely serve to provide the means for the exercise of a superior right, inherent in the people.[1]

Conventions called by the people, speaking through their electorate at a regular election, are of unquestionable validity; and are extra- or supra-constitutional, rather than constitutional.[2]

V

The people enact the convention act, where they invoke the initiative.[3]

Where the constitution requires that a convention act be referred to a popular vote, the voters call the convention.[4]

Where the constitution permits the legislature to call a convention, it is the act of the legislature alone, unless we hold that the people ratify the action by not invoking the referendum, or by voting under the act.[5]

It is arguable that a convention called by the people under authority granted by the constitution stands upon no different footing than if the constitution withheld this authority.[6]

In the absence of applicable constitutional provisions, legislatures have sometimes called conventions without taking a popular vote; but the validity of such conventions nowadays may be doubted.[7]

The passing of a convention act is not within the *legislative* powers of the legislature.[8]

Where the legislature submits the convention act to a popular vote, it is clear that the voters enact the act.[9]

The same is probably true when the people vote on the mere question of holding a convention, under an act which already purports to have been passed by the legislature.[10]

By analogy, a similar constitutional provision may become a popular enactment.[11]

[1] See pp. 50–52, *supra.*
[2] See pp. 48, 54–55, *supra.*
[3] See p. 58, *supra.*
[4] See pp. 59–60, *supra.*
[5] See p. 60, *supra.*
[6] See pp. 60–61, *supra.*
[7] See pp. 61, 66–68, *supra.*
[8] See pp. 61–65, *supra.*
[9] See p. 78, *supra.*
[10] See pp. 68–72, *supra.*
[11] See p. 77, *supra.*

Thus it is possible that all provisions — whether statutory or in constitutions — for the holding of conventions are in reality given their entire validity by popular action thereunder.[1]

Nevertheless, the people have not the machinery to hold a convention, unless they are assisted either by the legislature or the constitution.[2]

It is preferable that this machinery be provided in detail by the constitution, as the people then will not be subject to the whim of the legislature, but may have a convention whenever they desire to exercise their unquestionable right to have one.[3]

The only action which could be characterized as distinctly that of the legislature alone, would be for the legislature both to call the convention and elect the delegates, without any popular participation at any stage of the proceedings.[4]

VI

A state constitution is a legislative act of the people.[5]

There is a marked distinction between the legislative powers of the people and the legislative powers of the legislature.[6]

In exercising the legislative method of amendment, the legislature acts as a convention, being specially empowered thereto; but with this difference, that it is much more strictly bound to the terms of its warrant of authority than is an ordinary convention.[7]

The legislature owes its powers, in this connection, to an express grant.[8]

As to whether the legislature can act as an ordinary convention without a similar express grant, the authorities are divided.[9]

It is clear, however, that the legislature cannot claim this right under its general grant of *legislative* powers.[10]

The only possible difference between Indiana (where the legislature cannot turn itself into a convention) and North Dakota (where it can) lies in the theory that Indiana, by striking

[1] See p. 74, *supra*.
[2] See pp. 75–77, *supra*.
[3] See pp. 76–77, *supra*.
[4] See p. 74, *supra*.
[5] See p. 80, *supra*.
[6] See pp. 80–82, *supra*.
[7] See pp. 82–83, *supra*.
[8] See p. 83, *supra*.
[9] See pp. 83–84, 85–88, *supra*.
[10] See pp. 84–85, *supra*.

the convention provision from her constitution, has manifested an intention never again to have a convention of *any* sort.[1]

VII

The convention, although called at irregular intervals, is really a fourth branch of the government, and hence should enjoy the same independence from each of the three regular branches as they do from each other.[2]

The Governor cannot veto an initiative statute, which either calls a convention or prescribes the details.[3]

The Governor cannot veto a legislative act which takes a popular vote on calling a convention, under provisions in the constitution, but can probably veto one which prescribes the details.[4]

If the constitution provides for both the popular vote and the details, the Governor cannot prevent the holding of the convention.[5]

The authorities disagree as to whether the Governor can veto a convention act which is unauthorized by the constitution.[6]

All the foregoing gubernatorial interference is exercised, however, under the Governor's legislative, rather than under his executive, powers.[7]

In his executive capacity, the Governor is often the authoritative official to decide whether or not a new constitution is legal.[8]

Similarly, the Federal executive has the power to settle the question, acting under either of two clauses in the Federal Constitution. One of these clauses guarantees a republican form of government to each State; the other authorizes the president to maintain order in any State which requests it.[9]

The Governor participates to some extent in this Federal interference, by requesting it.[10]

VIII

The question: "Can the legislature amend the convention act?" involves three questions: namely, (1) The general power

[1] See p. 87, *supra*.
[2] See pp. 89–91, *supra*.
[3] See p. 91, *supra*.
[4] See pp. 91–92, *supra*.
[5] See p. 91, *supra*.
[6] See pp. 92–93, *supra*.
[7] See p. 93, *supra*.
[8] See pp. 93–94, *supra*.
[9] See pp. 94–96, *supra*.
[10] See p. 95, *supra*.

of the legislature to interfere with conventions; (2) Who enacted the act? and (3) Can the legislature amend that which the people have enacted?[1]

Assuming the premises, *i. e.* that the subject matter of the amendment is within the delegated powers of the legislature, but that the people enacted the original act; then it is certain that the legislature cannot amend it.[2]

The legislature can amend a convention act passed solely by it, unless we adopt the theory that the people have assumed responsibility for the act by participating in an election held under it.[3]

IX

The question of the power of the legislature to control the convention depends largely upon who passes the convention act.[4]

If the legislature passes it, it probably is not binding upon the convention; if the people pass it, it probably is binding.[5]

The confusion of precedents and authorities upon this point is largely due to a failure to analyze the source of the statute in question.[6]

It is clear that the legislature cannot bind a convention authorized by the constitution.[7]

The convention would lose a large part of its usefulness, if it were subject to legislative control.[8]

Where conventions have acceded to legislative restrictions, this merely proves that the restrictions seemed reasonable, not that they were binding.[9]

Perhaps, however, the legislature can impose restrictions upon a convention to the same extent that it can upon the judiciary; but this may be doubted on the ground that the convention is a body of the same sort as the legislature, but of a higher order.[10]

It is clear that the legislature has no power to abolish a pending convention, except perhaps in cases of great emergency.[11]

But the legislature may possibly be able indirectly to abolish a convention, by withholding funds.[12]

[1] See p. 97, *supra.*
[2] See pp. 98–104, *supra.*
[3] See p. 98, *supra.*
[4] See pp. 120–121, *supra.*
[5] See pp. 108–114, 121–125, *supra.*
[6] See p. 121, *supra.*
[7] See pp. 106–108, *supra.*
[8] See p. 108, *supra.*
[9] See pp. 108–111, *supra.*
[10] See pp. 114–115, *supra.*
[11] See pp. 115–116, *supra.*
[12] See pp. 117–118, *supra.*

In case the legality of a convention is in doubt, the legislature may be in a position to determine it, by recognition or non-recognition, or by soliciting Federal intervention.[1]

The legal standing of a convention may, in some instances, if a Federal question is involved, be determined by Congress.[2]

The legislature is in a position to direct the course of *popular* control of conventions, by framing the convention act.[3]

X

The electorate can amend a convention act, regardless of whether it was originally passed by the legislature alone, by the legislature and the electorate, or by the electorate alone.[4]

No one, except the people as a whole, can acquire a vested right in a convention movement.[5]

The electorate can abolish the convention at any time, or merely nullify its work by refusing to accept it.[6]

The people have a right to instruct their delegates, but the instructions will have a moral rather than a legal force.[7]

XI

The conventions of the Revolution exercised sovereign powers, by necessity.[8]

Similarly with respect to secession (not strictly constitutional conventions), reconstruction, and territorial conventions.[9]

These furnish no precedent for State conventions in times of peace; but the objection is to the weight, rather than to the admissibility, of the evidence.[10]

The "doctrine of convention sovereignty" so-called, represents merely oratorical flights of fancy, and goes no further in actual practice than to assert the possession by the convention of incidental and emergency powers, and its independence from legislative control.[11]

A convention has no right to legislate.[12]

[1] See p. 118, *supra.*
[2] See p. 119, *supra.*
[3] See pp. 123–124, *supra.*
[4] See p. 125, *supra.*
[5] See p. 125, *supra.*
[6] See p. 125, *supra.*
[7] See pp. 125–127, *supra.*
[8] See pp. 128–129, *supra.*
[9] See pp. 129–130, *supra.*
[10] See p. 130, *supra.*
[11] See pp. 131–135, *supra.*
[12] See pp. 139–142, *supra.*

But it can validate its legislation by inserting it in the constitution.[1]

Or by a blanket validating-clause in the constitution.[2]

Or by submitting the legislation to the people.[3]

If the constitution or the convention act exempts the convention from the necessity of submitting its work to the people, it may legislate to its heart's content.[4]

A convention may pass such rules and ordinances as are necessarily incident to its business of constitution-framing, or as are necessary to putting its constitution into effect.[5]

The principle whereby territorial and reconstruction conventions have exercised powers entrusted by the Federal Constitution to the State *legislatures*, may possibly be extended to *State* conventions.[6]

A complete overturn of the existing government is apt to be more successful than partial interference would be.[7]

XII

The courts require a strict compliance with the constitutional provisions relative to amendment by the *legislative* method.[8]

But are not so strict with respect to constitutional provisions relative to the *convention* method.[9]

It is an open question whether courts will interfere with the convention method in matters not covered by the constitution, although probably they ought not to.[10]

It is clear that they cannot and will not interfere in the *internal* affairs of a convention.[11]

The weight of authority is that the courts will not interfere *after* the adoption of a change by the people.[12]

The question then becomes political rather than legal.[13]

But this doctrine may not apply to amendments which do not go to the root of the whole structure of the government.[14]

The value of a judicial determination of the validity of a

[1] See pp. 142–144, *supra.*
[2] See p. 142, *supra.*
[3] See pp. 144–146, *supra.*
[4] See p. 146, *supra.*
[5] See pp. 146–147, *supra.*
[6] See p. 147, *supra.*
[7] See p. 148, *supra.*
[8] See pp. 149–151, *supra.*
[9] See pp. 150–151, *supra.*
[10] See pp. 151–153, *supra.*
[11] See pp. 152–153, *supra.*
[12] See pp. 153–157, *supra.*
[13] See pp. 155–158, 162–163, *supra.*
[14] See pp. 155–156, *supra.*

government is minimized by the fact that a court is bound to decide in favor of the constitution under which *it* holds office.[1]

A different question is presented by the case of judicial interference with the convention, in matters *outside* the convention's proper functions.[2]

It is clear that a court will stop an *ultra vires* act by a convention, as readily as it would stop an *ultra vires* act by any other department.[3]

The Federal courts have no power to interfere with a convention, except in case of the violation of the United States Constitution, or where some other Federal question is involved, such as the election of Congressmen.[4]

The courts will assist a convention to secure its rights; much the same as they would assist any other branch of the government.[5]

In States where the courts do not interpret their advisory duties too strictly, they will probably assist the convention by judicial advice, much the same as they would assist any other branch of the government.[6]

XIII

Constitutional provisions for the holding of a convention are probably merely directory.[7]

But, like a convention act, they may be made mandatory by popular action thereunder.[8]

The constitution cannot prevent the holding of a convention.[9]

By the same token, it should not be able to restrict a convention.[10]

The constitution has absolutely no application to extraconstitutional conventions.[11]

Unamendable portions of a constitution may be amended by a convention, although not by the legislative method.[12]

Conventions, like other branches of the State government, are, however, bound by the Federal Constitution.[13]

[1] See pp. 157–158, *supra.*
[2] See pp. 158–160, *supra.*
[3] See p. 160, *supra.*
[4] See pp. 160–162, *supra.*
[5] See p. 163, *supra.*
[6] See pp. 163–164, *supra.*
[7] See p. 166, *supra.*
[8] See pp. 166, 168, *supra.*
[9] See p. 166, *supra.*
[10] See pp. 166–168, *supra.*
[11] See p. 168, *supra.*
[12] See pp. 167–168, *supra.*
[13] See pp. 168–169, *supra.*

XIV

A convention is the sole judge of its own membership.[1]

This right carries with it the power to provide for the filling of vacancies and to expel members.[2]

It can hire a hall, choose officers and employees, adopt rules, purchase supplies, perpetuate its records, and arrange for all necessary printing.[3]

It need not employ the regular State printer.[4]

It may maintain order and punish both members and outsiders for direct contempt.[5]

It can pledge the State's faith, and perhaps its credit, for its legitimate expenses.[6]

In general, it has all powers necessarily incident to the business delegated to it.[7]

It may probably reconvene after the popular adoption of its proposals, to codify and promulgate the amended constitution; at least for the latter purpose.[8]

XV

The term "officer" in a constitution means a person holding office *under* that constitution.[9]

Thus, although delegates to an unauthorized convention are "officers," they are not "officers" within the meaning of the constitution.[10]

It would be anomalous for the delegates to take an oath to support that which they have assembled to overturn, *i. e.* the State constitution.[11]

But, as the Federal Constitution is binding upon them, they should swear to support *it;* and should also swear to perform faithfully the duties of delegate.[12]

Delegates are entitled to the same privileges and immunities as members of the legislature.[13]

[1] See pp. 170–171, *supra.*
[2] See pp. 171–172, 181, *supra.*
[3] See pp. 172–180, *supra.*
[4] See p. 179, *supra.*
[5] See pp. 180–182, *supra.*
[6] See pp. 177–178, 180, *supra.*
[7] See p. 184, *supra.*
[8] See pp. 182–184, *supra.*
[9] See pp. 185–187, *supra.*
[10] See p. 186, *supra.*
[11] See pp. 187–190, *supra.*
[12] See pp. 190–191, *supra.*
[13] See pp. 191–192, *supra.*

XVI

Submission of amendments to the people is necessary when required by the constitution or by a convention act which the people have enacted.[1]

And there is some authority to the effect that the work of an extraconstitutional convention is not valid until it has been ratified by a popular vote.[2]

This is probably true, at least in cases in which the convention was called by the legislature acting alone.[3]

The legislature cannot change the time for submission; for that would amount to amending the convention act, which is impossible if the people originally enacted it; and would amount to legislative interference, which also is illegal.[4]

The convention can change the time for submission, even if the convention act is popular in its nature.[5]

There is no inherent difference between a *new* constitution and an *amended* constitution.[6]

The phrase "specific and particular amendment" means merely "amendment"; or, at the most, a single definite proposition, as distinguished from a vague general need for change.[7]

A convention called to make a general revision may submit a number of separate amendments, or a new constitution, or a new constitution plus a few separable propositions.[8]

Every distinct proposition, not vital to the scheme as a whole, ought to be submitted separately.[9]

The convention probably can lawfully enlarge or reduce the electorate to which it submits its work, subject only to the provisions of the Federal Constitution.[10]

In the absence of popular directions, the convention may lawfully prescribe all the details for submission and promulgation of the constitutional changes recommended by it.[11]

XVII

The validity of all constitutional changes rests, in the last analysis, upon "the assent of the people." [12]

[1] See pp. 193–195, *supra.*
[2] See pp. 195–196, *supra.*
[3] See p. 196, *supra.*
[4] See pp. 196–197, *supra.*
[5] See pp. 197–198, *supra.*
[6] See p. 198, *supra.*
[7] See pp. 198–200, *supra.*
[8] See pp. 200–205, *supra.*
[9] See pp. 202–203, *supra.*
[10] See pp. 205–212, *supra.*
[11] See pp. 212–213, *supra.*
[12] See pp. 217–218, *supra.*

Lapse of time, and popular and governmental acquiescence, will cure almost any informality.[1]

But this cure affects merely the results, and does not relate back and validate the means.[2]

The validity of a convention-born amendment rests not on the submission *of* the amendment *to* the people, but rather on the submission *to* the amendment *by* the people.[3]

All governments derive their just powers from the consent of the governed.[4]

[1] See pp. 214–216, *supra.*
[2] See p. 218, *supra.*
[3] See p. 217, *supra.*
[4] See p. 219, *supra.*

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