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Revision and Amendment of State Constitutions

THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS

BY

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PREFACE

My purpose in this study is to give a statement of the practice concerning the amendment and revision of state constitutions, and to discuss the legal principles controlling the alteration of such constitutions. Emphasis has been placed upon present conditions, but some attention has been devoted to the historical aspects of the subject, especially with respect to the constitutional convention, which cannot be understood except when treated historically.

Judge Jameson's great work on "Constitutional Conventions" has been used freely, as have also Oberholtzer's "Referendum in America" and Borgeaud's "Adoption and Amendment of Constitutions." Judge Lobingier's recent work on "The People's Law" did not appear until this study was almost completed, but it has been used to some extent. My indebtedness to these works is great, and I have also received much assistance from Professor J. Q. Dealey's monograph on "Our State Constitutions;" from Cooley's "Constitutional Limitations," and from Professor J. W. Garner's article on the "Amendment of State Constitutions" which appeared in volume one of the American Political Science Review.

Of the works dealing specifically with the subject of constitutional changes in the United States, Judge Lobingier's is almost purely historical, and devotes little

attention to the practical or legal aspects of the subject. 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. Oberholtzer and Borgeaud based their treatment of the subject largely upon the foundation of Judge Jameson's theory. It has been my effort to study the practice of constitutional alteration and the legal principles relating thereto, without reference to any preconceived theory or to questions as to what methods of procedure may be considered most expedient. When Judge Jameson wrote there had been only a few judicial decisions with reference either to the powers of conventions or to the amending procedure through legislative action, and since his work was published little has been done toward treating the legal aspects of the subject. For this study the judicial decisions have been carefully read, and an effort has been made to present the principles which they have established.

The work upon this monograph was done in part during the years 1908–10 while the author held a research appointment as Henry E. Johnston scholar in Johns Hopkins University, and part of the material here used was first presented in a course of lectures delivered at that University in 1909 on "Distinctions between Constitutions and Statutes in the Constitutional Law of the United States." These lectures discussed (1) the development of methods for constitutional alteration distinct from those for the enactment of statutes, and (2) the development of judicial control over legislation. The first branch of this subject has been elaborated somewhat for publication. The chapter on the first state constitutional conventions appeared in very nearly its

present form in the American Political Science Review for November, 1908, and a part of Chapter IV appeared in the November, 1910, number of the Columbia Law Review. Professor W. W. Willoughby of Johns Hopkins University has been kind enough to read this work in proof, and to make many useful suggestions.

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CHAPTER I

The First State Constitutional Conventions, 1776-1783.

The administrative control exercised over the American colonies by the British government was maintained: (1) by means of charters, and of commissions and instructions under which government in the several colonies was conducted. (2) By the general supervision exercised over the colonies by the board of trade. (3) By the disallowance of colonial laws, upon the recommendation of this board. (4) By appeals taken from the colonial courts to the King in Council. Although control over the colonies was badly disintegrated and was by no means strong, it should however be borne in mind that the colonial governments were definitely limited, and that these limitations were to a certain extent at least maintained through responsibility to a superior authority. The limitations placed upon the colonies were partly written and partly unwritten. The charters of Rhode Island, Connecticut, Massachusetts, Pennsylvania, and Maryland laid down definite restrictions upon the power of the provincial governments; in the other colonies commissions and instructions to royal governors served very largely the same purpose. The limitations enforced by the supervisory control of the board of trade and by the disallowance of colonial laws were by no means based entirely upon the written instruments of government, but rested largely upon the broader ground of safeguarding the general interests of the whole British empire.

The term constitution was sometimes applied to the charters or written instruments binding particular colonies,[1] but this term as usually employed both in England and America before the Revolution was understood to refer to the general and more permanent principles upon which government is based. The term was used on both sides of the Atlantic to signify something superior to legislative enactments,[2] and the principles of the constitution were appealed to as beyond the control of the British parliament.

Closely associated with this idea of a constitution beyond the power of legislative alteration, was the theory of the social contract; that is, that government is in some way based upon contract between the people and the state. By the separation of the colonies from Great Britain it was conceived that this contract was dissolved; as expressed by a meeting of New Hampshire towns: "It is our humble opinion, that, when the Declaration of Independency took place, the Colonies were absolutely in a state of nature, and the powers of Government reverted to the people at large." [3]

The political experience and theories of the colonists thus supplied three principles: (1) The employment of definite written instruments of government. (2) The idea of a constitution superior to legislative enactments, and of cer-

[1] Md. Archives, vii, 61.

[2] By the Pennsylvania Charter of Liberties of 1701 specific provision was made for the alteration of the Charter by legislative act, but in a manner different from that provided for ordinary legislation. Ordinary legislation might be enacted by a quorum of the assembly with the approval of the governor, if two-thirds of all members were present. "And no Act, Law or Ordinance whatsoever shall, at any time hereafter, be made or done, to alter, change or diminish the Form or Effect of this Charter, or of any Part or Clause therein, contrary to the true Intent and Meaning thereof, without the Consent of the Governor for the Time being, and Six Parts of Seven of the Assembly met."

[3] N. H. State Papers, viii, 425.

tain natural rights secured by such a constitution. (3) The theory of the social contract. There was no inherent necessity that written constitutions should be drawn up by the colonists in 1776 and 1777, for they were founding unitary states in which it was not essential that they should commit their constitutions to writing. But when we consider the conditions of their political experience we must perceive that to them the only natural and proper thing to do was to frame written instruments of government.

For practically the first time in history, the people of the revolutionary period were brought in contact with the problem of establishing written constitutions, of framing for themselves the permanent social contract upon which their political institutions should be based. It is my purpose here to indicate the part which the people took in framing constitutions; the manner in which they by their procedure distinguished between constitutions and statutory enactments. In considering this question it should be remembered that the Revolution was a period of civil war, and that the procedure in adopting constitutions may in some cases have been different from what it was, had the people been establishing governments in a time of peace.

The New Hampshire provincial congress in November, 1775, at the time of providing for the election of members to a new congress, voted that the precepts sent to the several towns should contain the request that " in case there should be a recommendation from the Continental Congress for this Colony to Assume Government in any way that will require a house of Representatives, That the said Congress for this Colony be Impowered to Resolve themselves into such a House as may be recommended, and remain such for the aforesaid Term of one year." [4] The Continental Con-

[4] N. H. Provincial Papers, vii, 660.

gress, on November 3, 1775, recommended "to the provincial Convention of New Hampshire, to call a full and free representation of the people, and that the representatives, if they think necessary, establish such a form of government, as, in their judgment, will best produce the happiness of the people, and most effectually secure peace and good order in the province, during the continuance of the present dispute between G[reat] Britain and the colonies."

The provincial congress of New Hampshire, elected with power to resolve itself into a house of representatives, took such a step and adopted a temporary constitution on January 5, 1776.[5] This action was not taken without opposition. The instructions to the representatives of Portsmouth had declared in favor of a continuance of government by the congress.[6] Petitions from a number of towns were presented against the taking-up of government, and several members of the house also protested against this action.[7] Portsmouth protested on January 10, 1776, that "we would . . . have wished to have had the minds of the People fully Taken on such a Momentous Concernment, and to have Known the Plan, before it was Adopted, & carried into Execution, which is Their Inherent right;" and the instructions given to their representatives in the succeeding July provided specifically "that they nor any other Representative in future shall consent to any alteration, Innovation or abridgement of the Constitutional Form that may be adopted without first consulting their constituents in a matter of so much importance to their Safety." [8]

The objections of the eastern towns of New Hampshire

[5] N. H. State Papers, viii, 2.

[6] N. H. Provincial Papers, vii, 701.

[7] N. H. State Papers, viii, 14-17, 33.

[8] *Ibid.*, viii, 301.

were based principally upon opposition to such a pronounced step toward independence, or upon doubts as to the expediency of such a step; but the towns of the county of Grafton, in the New Hampshire Grants, objected both to the method of adoption and to the substance of the constitution. Several towns refused to elect representatives because "No Bill of Rights had been drawn up, or form of Government Come into, agreeable to the minds of the people of this state, by an Assembly peculiarly chosen for that purpose, since the Colonies were declared independent of the Crown of Great Britain." [9] Indeed the agitation in the western towns became so serious that it was necessary for the assembly to send a committee to conciliate that section, and to assure its inhabitants that the form of government adopted in 1776 was purely temporary.[10]

The proceedings of this committee with the meetings of the towns of the New Hampshire Grants are of interest as bearing upon the earlier steps leading to the adoption of a permanent form of government in New Hampshire. At a meeting of the town of Walpole in February, 1777, it was resolved that "a new and lasting Plan of government is necessary to be formed. And if the necessary business of the State forbid the dissolution of the present Assembly, and calling a new one for the purpose aforesaid, that the present Assembly issue Precepts to the several incorporated Towns within the State for such a Number of Delegates to be proportioned to the several Counties within the state as they, the Assembly, shall think proper for the express purpose of the Organization of Government; that a plan thereof be sent to each Town for their [its] approbation; Which, being approved of by a Majority, shall be the Constitutional

[9] N. H. State Papers, viii, 421-425.

[10] *Ibid.*, viii, 422, 450.

Plan of Government for this State. . . ." [11] The convention of the united committees of the towns of the New Hampshire Grants, which met at Hanover in June of the same year, insisted that "the further establishing a permanent Plan of Government in the State be submitted to an Assembly that shall be convened . . . for that purpose only." [12]

The subsequent constitutional procedure of New Hampshire followed the lines laid down in the petitions of the western towns. The House of Representatives voted on December 27, 1777, "that it be recommended to Towns Parishes & places in this State, if they see fit, to instruct their Representatives at the next session, to appoint & call a full & free Representation of all the people of this State to meet in Convention at such time & place as shall be appointed by the General Assembly, for the sole purpose of framing & laying a permanent plan or system for the future Government of this State." [13] The Council took no action upon this matter, but many of the members of the next assembly were instructed to call a convention, and the two houses voted in February, 1778, "That the Honble the President of the Council issue to every Town, Parish & District within this State a Precept recommending to them to elect and choose one or more persons as they shall judge expedient to convene at Concord in said State, on the tenth day of June next. . . . And such System or form of Government as may be agreed upon by Such Convention being printed & sent to each & every Town, Parish & District in this State for the approbation of the People, which system or form of government, being approved of by three-

[11] N. H. Town Papers, xiii, 603. See also *ibid.*, xi, 23; xii, 57.

[12] *Ibid.*, xiii, 763.

[13] N. H. State Papers, viii, 757.

fourths parts of the Inhabitants of this State in their respective Town meetings legally called for that purpose, and a return of such approbation being made to said Convention & confirmed by them, shall remain as a permanent system or Form of Government of the State, and not otherwise." [14] The convention called by virtue of this vote adopted a constitution in June, 1779, which was rejected by the people.

The procedure in calling the second constitutional convention of New Hampshire was the same as that pursued in calling the first convention. The precepts issued in October, 1780, for the election of members to the next assembly contained the following clause: "It is also recommended to empower such Representative to join in calling a Convention to settle a plan of Government for this State." [15] When the new assembly met a joint committee was almost immediately appointed, which recommended another convention, and the resolve of April, 1781, provided that the constitution should be approved "by such number of the Inhabitants of this State in their respective town meetings legally called for that purpose, as shall be ordered by said Convention. . . . And if the first proposed System or form of Government should be rejected by the People, that the Same Convention shall be empowered to proceed and make such amendments and alterations from time to time as may be necessary—provided always that after such alterations, the same be sent out for the approbation of the People in the manner as aforesaid." [16] In sending its first constitution to the people, in September, 1781, this convention provided that a two-thirds vote should be necessary for its

[14] N. H. State Papers, viii, 775.

[15] *Ibid.*, viii, 874.

[16] *Ibid.*, viii, 894, 897.

adoption.[17] The constitution was rejected as was also a revised copy of it submitted by the same convention in August, 1782. The convention met again in June, 1783, and sent out another constitution which was agreed to by two-thirds of the voters.[18]

The development of the constitutional convention in Massachusetts was similar to that of New Hampshire, but of a slightly later date. The resumption of the charter in 1775 was accomplished by the provincial congress, without any reference to the consent of the people. By a resolve of September 17, 1776, the House of Representatives recommended that the towns authorize their representatives to form a constitution. Many towns granted the requested authorization, but Boston and several others refused to do so, a meeting of the committees of Worcester County voting that "a State Congress, chosen for the sole purpose of forming a Constitution of Government, is (in the opinion of this Convention) more eligible than a House of Representatives;"[19] and the General Court did not at that time carry the matter further. The request was repeated on May 5, 1777, and a sufficient number of towns took the desired action. Such action was uniformly coupled with the demand that the constitution framed by the members of the General

[17] N. H. Town Papers, ix, 877.

[18] *Ibid.*, ix, 883-895, 903-919. Another illustration of the popular submission of constitutional questions in New Hampshire during this period is found in the state's action upon the Articles of Confederation in 1777-78, and upon the amendment thereto proposed in 1783; the questions of adopting the articles and of approving the amendment, were submitted to the towns for action. New Hampshire State Papers, viii, 754, 758, 773, 774, 981, 982. My attention was directed to these references by Lobingier's *The People's Law*, 180, 181.

[19] Boston Town Records, 1770-1777, 247. Force, *American Archives*, Fifth Series, iii, 866. J. Franklin Jameson in Johns Hopkins University Studies, iv, 204.

Court should afterward be submitted to the towns for approval. Some of the towns opposed the formation of a constitution by the regular legislative body. The Boston town meeting adopted instructions to its representatives which said: "*With respect to the General Courts forming a new Constitution.* You are directed by a unanimous Vote of a full Meeting, on no Terms to consent to it, but to use your influence, & oppose it Heartily, if such an Attempt should be made, for we apprehend this Matter (*at a suitable time*) will properly come before the people at large to delegate a *select number for that purpose & that alone. . . .*" [20]

The Massachusetts assembly resolved itself into a constitutional convention on June 17, 1777, and on February 28, 1778, adopted a constitution, which was published several days later. This constitution was submitted to the freemen in their town meetings, and it was suggested that they empower their representatives in the next General Court to establish the constitution, if it should have been approved by the people.[21] The proposed constitution was rejected by the people for various reasons, among which an important one was that it had not been framed by a body chosen for the one purpose of forming a constitution.[22]

On February 20, 1779, the General Court resolved that those qualified to vote for representatives should be requested to express their opinion as to the desirability of forming a constitution, and as to whether they would em-

[20] Boston Town Records, 1770-1777, 284. Resolves of Mass., May 5, 1777.

[21] Resolves of Mass., March 4, 1778.

[22] Cushing, *Transition from provincial to commonwealth government in Mass.*, 190, 200-204, 214-226. The present account of the constitutional development of Massachusetts is based largely upon Dr. Cushing's monograph.

power their representatives to call a convention for the sole purpose of framing such a constitution.[23] Both propositions were carried, and the General Court in June, 1779, resolved that elections should be held for a convention to meet at Cambridge on the first day of the succeeding September. The next house of representatives was to establish the constitution, if it should be ratified by two-thirds of the free male inhabitants, over twenty-one years of age, acting in town meetings called for that purpose.[24] The constitution of 1780 was adopted by this body and ratified by the people.

In all of the other states except South Carolina, Virginia and New Jersey the procedure was practically the same. In each case the constitution was framed and put into effect by a body exercising general legislative power, but which had direct authority from the people to form a constitution. But it will be necessary to present the evidence upon which the foregoing statement is based.

In May, 1776, the New York provincial congress discussed the recommendation of the Continental Congress that a government should be organized, appointed a committee to consider the matter, and accepted its report which

[23] Resolves of Mass., February 20, 1779.

[24] *Ibid.*, June 21, 1779. As an indication of the attitude of the House of Representatives of Massachusetts on constitutional questions it may be worth while to call attention to the fact that the House submitted the Articles of Confederation to the towns instead of acting directly upon the matter. Journal of the House of Representatives of Massachusetts, 1777-78, 141, 143 (Dec. 15, 1777). Records of Town of Weston, 244. Merrill's, *History of Amesbury*, 272-274. See also Lobingier, *The People's Law*, 168. The question as to the expediency of declaring independence was submitted to the towns by the Massachusetts house of representatives in May, 1776. Edward M. Hartwell in *Monthly Bulletin* of the Statistics Department of the City of Boston, vol. xi (1909), p. 154.

said "that the right of framing, creating or new modeling civil government, is, and ought to be in the people. . . . That doubts have arisen whether this Congress are invested with sufficient authority to frame and institute such new form of internal government and police. That those doubts can and of right ought to be removed by the good people of this colony only." The committee recommended that a new congress be convened "with the like powers as are now vested in this congress, and with express authority to institute and establish such new and internal form of government as aforesaid." [25] Such action was taken and the delegates who met in convention at White Plains on July 9, 1776, had express authority from their constituents to form a constitution. In Kings County where new elections were not held the county committee instructed the member of the former congress to attend, but the convention voted that he should not act in the matter of forming a government.[26]

The constitution formed by this convention was not submitted to the people, and there seems to have been no idea upon the part of the convention that such action should be taken; in fact, even if submission had been seriously considered it would have been impracticable because of the distracted condition of the the state, a large part of whose territory was occupied by the enemy. But certainly there was in 1776 some sentiment in favor of a submission, and in one quarter at least objection was made to the resolution of the provincial congress in May, 1776, providing for a

[25] Journals of the provincial congress of New York, i, 462. Becker (*History of Political Parties in the Province of New York, 1760-1776*, p. 268) says that Gouverneur Morris apparently contemplated a constitutional convention distinct from the congress, but there seems to be no evidence that Morris had in mind the election of an independent convention for the framing of a constitution.

[26] Journals of the provincial congress of New York, i, 572.

convention to institute and establish a new form of government. The Mechanicks in Union for the city and county of New York, in an address to the provincial congress on June 14, 1776, said: "We could not, we never can, believe you intended that the future delegates or yourselves should be vested with the power of framing a new Constitution for this Colony, and that its inhabitants at large should not exercise the right which *God* has given them, in common with all men, to judge whether it be consistent with their interest to accept or reject a Constitution framed for that State of which they are members. This is the birthright of every man, to whatever state he may belong. There he is, or ought to be, by inalienable right, a co-legislator with all the other members of that community." [27]

In Maryland the provincial convention resolved on July 3, 1776: "That a new convention be elected for the express purpose of forming a new government, by the authority of the people only, and enacting and ordering all things for the preservation, safety, and general weal of this colony." [28] That some of the people of this state took a lively interest in the organization of government is shown by the fact that B. T. B. Worthington, Charles Carroll, barrister, and Samuel Chase, the two latter undoubted leaders and members of the committee to prepare a form of government, resigned from the convention because they had received "instructions from their constituents, enjoining them, in framing a government for this state, implicitly to adhere to points in their opinion incompatible with good government and the public peace and happiness.[29] Although there was

[27] Force, *American Archives*, Fourth Series, vi, 895-898. This address is quoted in full in Lobingier, *The People's Law*, 157-161.

[28] Proceedings of the conventions of Maryland, 184.

[29] *Ibid.*, 222, 228.

no formal reference of the first constitution of Maryland to the people, the action taken by the convention on September 17, 1776, probably served a similar purpose. The committee had reported to the convention a proposed bill of rights and constitution; action upon this report was postponed until September 30th, and it was resolved "that the said bill of rights and form of government be immediately printed for the consideration of the people at large, and that twelve copies thereof be sent without delay to each county in the state." [30]

The North Carolina provincial congress had the framing of a constitution under consideration in April, 1776, but the members were unable to agree, and adopted a temporary form of government.[31] It seems to have been generally understood that the consideration of the matter would be renewed by the next congress, and the Council of Safety on August 9, 1776, resolved "that it be recommended to the good people of this now Independent State of North Carolina to pay the greatest attention to the Election to be held on the fifteenth of October next, of delegates to represent them in Congress, and to have particularly in view this important consideration. That it will be the business of the Delegates then chosen not only to make Laws for the good Government of, but also to form a Constitution for this State, that this last as it is the Corner Stone of all Law, so it ought to be fixed and permanent." [32]

Mecklenburg county drew up an elaborate set of instructions for its members to the provincial congress, which were also adopted in part by Orange county. These instructions are of sufficient interest to be quoted almost in full, in so

[30] Proceedings of the conventions of Maryland, 258.

[31] N. C. Colonial Records, x, 498, 579.

[32] *Ibid.*, x, 696.

far as they relate to the present subject. The following principles were to be recognized in framing a bill of rights and constitution: "1st. Political power is of two kinds, one principal and superior, the other derived and inferior. 2d. The principal supreme power is possessed by the people at large, the derived and inferior power by the servants which they employ. . . . 4th. Whatever is constituted and ordained by the principal supreme power can not be altered, suspended or abrogated by any other power, but the same power that ordained may alter, suspend and abrogate its own ordinances. 5th. The rules whereby the inferior power is to be exercised are to be constituted by the principal supreme power, and can be altered, suspended and abrogated by the same and no other." The delegates were finally instructed to "endeavor that the form of Government when made out and agreed to by the Congress shall be transmitted to the several counties of this State to be considered by the people at large for their approbation and consent if they should choose to give it to the end that it may derive its force from the principal supreme power." [33] The congress met on November 12, 1776; on Friday, December 6th, the committee reported the form of a constitution and it was ordered, "That the same be taken into consideration on Monday next; that one copy of the said Form of a Constitution be furnished for each District in this State, and one copy for each County. . . ." The constitution was adopted on December 18, 1776.[34]

On July 27, 1776, the assembly of Delaware took under consideration the resolves of the Continental Congress of May 10th, and decided that a new government should be formed and, "That it be recommended to the good people

[33] N. C. Colonial Records, x, 870 a-f.

[34] *Ibid.*, x, 954, 974, 1040.

of the several Counties in this Government to choose a suitable number of Deputies to meet in Convention, there to order and declare the future form of government for this State." [35] The convention of Delaware was not expressly limited to the one task of forming a constitution and did not consider its powers so restricted. While in session it took such other actions as the assembly might have taken had it been in session at the same time.[36]

By the Pennsylvania charter of privileges of 1701 it was provided that the charter might be altered by the governor and six-sevenths of the assembly. When the continental resolve of May 10, 1776, was taken under consideration, the assembly, acting as nearly as possible in pursuance of the charter, assumed that it had power to establish a new form of government. But the assembly was under the control of the conservatives, and the radical element determined to prevent its exercising this power. The Philadelphia committee called a conference of county committees, which met on June 18, 1776, and resolved: "That it is necessary that a provincial convention be called by this conference for the express purpose of forming a new government in this province, on the authority of the people only." [37] The convention which met in pursuance of this call framed the Pennsylvania constitution of 1776. During the whole period of its existence it also acted as the regular legislative body of the state.

On September 5, 1776, this convention ordered four hundred copies of its proposed frame of government "printed

[35] Force, *American Archives,* Fifth Series, i, 617.

[36] Proceedings of the convention of the Delaware State. The proceedings of this convention were published contemporaneously by James Adams at Wilmington. Force, Fifth Series, ii, 285.

[37] Journals of the House of Representatives of Pa., 1776-1781, p. 36.

for public consideration;" the consideration of the constitution was resumed by the convention on September 16, and it was adopted on September 28.[38] A meeting at Philadelphia on October 21 and 22, 1776, protested that the convention "did not allow time to the people of this State to take into their consideration the proposed frame of Government."[39] The printing for public consideration and the postponement of action may however be considered a submission to the people, although it must be said that such submission was of a very informal character.

The Georgia provincial congress discussed the subject of forming a government, in March, 1776, but its members alleged that they had no authority from their constituents to enter upon the matter, and agreed to submit the subject for the consideration of the people.[40] A temporary form of government was adopted. In a circular issued with reference to the convention which had been called to meet at Savannah in October, 1776, President Bulloch enjoined upon the people the "necessity of making choice of upright and good men to represent them in the ensuing convention—men whose actions had proved their friendship to the cause of freedom, and whose depth of political judgment qualified them to frame a constitution for the future government of the country."[41] The constitution of 1777 was adopted by this body.

The first constitution of Vermont was framed by a convention called in pursuance of a circular of a previous con-

[38] Journals of the House of Representatives of Pa., 1776-1781, 76, 84, 89.

[39] Pennsylvania Gazette, October 23, 1776.

[40] McCall, *History of Georgia*, ii, 75.

[41] Stevens, *History of Georgia*, ii, 297, quoting from President Bulloch's circular.

vention, of June, 1777, recommending "to the freeholders and inhabitants of each town in this state to meet at some convenient place in each town on the 23d day of this instant June and choose delegates to attend a general convention at the meeting-house in Windsor . . . to form a constitution for said state." [42] Ira Allen says that Bennington objected to this constitution because it was not ratified by the people,[43] but the truth of this statement has been doubted.

The first constitutions of South Carolina, Virginia, and New Jersey were adopted by provincial congresses chosen for the purpose of directing the revolutionary movement against Great Britain, and without any specific authorization from the people to take such action. Yet in both South Carolina and Virginia the question was raised as to the power of the provincial congress to adopt a constitution, and was decided in the affirmative, largely, perhaps, upon the argument of expediency.

In February, 1776, a committee appointed by the provincial congress of South Carolina reported a constitution, but action upon it was opposed by many members, "some of them because they were not prepared for so decisive a measure—others, because they did not consider the present members as vested with that power by their constituents." [44] This opposition was not sufficiently strong to prevail, and the constitution was adopted.

It has frequently been asserted that the South Carolina constitution of 1778 was passed as an ordinary act of the

[42] Records of the Council of Safety and the Governor and Council of Vt., i, 58. This constitution was revised by a convention of December, 1777, and this second convention seems to have acted without having any special authority to do so.

[43] Allen, *History of Vermont*, 108-111. (Collections Vt. Hist. Soc. i, 391). But see Chipman's *Memoir of Thomas Chittenden*, 108-111.

[44] Drayton, *Memoirs of the American Revolution*, ii, 172, 176.

legislature,[45] but what evidence there is goes to indicate that the members of the legislature were authorized by their constituents to adopt a constitution. Defects seem almost immediately to have been discovered in the constitution of 1776. A committee of the assembly, appointed in October, 1776, reported certain alterations which it considered expedient.[46] Ramsay says that the elections of October, 1776, were "conducted on the idea that the members chosen, over and above the ordinary powers of legislators, should have the power to frame a new constitution suited to the declared independence of the state."[47] This matter was immediately taken up by the new legislature. Richard Hutson wrote to Isaac Hayne on January 18, 1777, "We yesterday finished the difficult Reports of the committee on the Constitution with regard to amendments therein, and it is now ordered to be thrown into a Bill. A motion will be made, and I have no doubt but it will be carried, to have it printed and circulated through the State, and to postpone the passing of it till the next session. . . ."[48] Such a postponement was taken, in order that the people might have

[45] This view has been strengthened by the case of Thomas *v.* Daniel, 2 McCord, 354, in which the court said: "The form of government adopted by the legislature of 1776, was no more than any other legislative act, and was subject to the revision and repeal of a succeeding legislature. The legislature of 1778, did revise and repeal the act of 1776, and adopted another form of government, which is called the constitution of 1778. This constitution pretends to no control over succeeding legislatures although it does restrain the officers of government in the exercise of the powers vested in them for the administration of the laws. Had it attempted to restrain future legislatures, it would have been inoperative; as each legislature possessed all the power of the people, who can undo whatever they may have done."

[46] Force, *American Archives*, Fifth Series, iii, 61, 64, 71, 73.

[47] Ramsay, *Revolution in South Carolina*, i, 129.

[48] McCrady, *South Carolina in the Revolution*, 1775-1780, p. 213.

an opportunity to express themselves, and the legislature did not take final action upon the constitution until its December session, 1777. In the meantime the proposed constitution was printed and circulated among the people.[49] President Rutledge, in refusing his assent to the constitution of 1778 and in a contemporary letter to Henry Laurens, denied the power of the legislature to adopt a constitution, and practically denied that a power to change the form of government existed anywhere except upon the dissolution of an existing government.[50]

The New Jersey provincial congress, which met in June, 1776, entered upon the establishment of a constitution, in compliance with petitions from the inhabitants of different parts of that province, although there were also a number of petitions against such action.[51] There is no evidence as to whether this body doubted its power to take such action.

The attitude of the leaders of the Virginia convention of

[49] With the bill as printed by Peter Timothy at Charleston in 1777, there appears an order of the two houses, of February 3, 1777, "That the Bill, intitled 'A Bill for establishing the Constitution of the State of South Carolina' . . . be printed and made public."

[50] Ramsay, *Revolution in South Carolina*, i, 132. Correspondence of Henry Laurens, 103.

[51] Mulford, *History of New Jersey*, 415, 416. The election of delegates to the provincial congress was held on May 27, and the resolution of the Continental Congress that all government under the crown of Great Britain should be suppressed had been ordered published on May 15; it is possible, therefore, that the question of establishing a new state government may have been discussed before the election of May 27. It is certainly true that the question was under discussion immediately after the election; almost as soon as the new provincial congress assembled (June 10, 1776) petitions began to be presented both for and against the establishment of a new government; it would seem that the petitioners had no doubt of the power of that body to act in the matter. Minutes of the Provincial Congress and the Council of Safety of New Jersey, 451, 455, 458, 464, 468, 470, 471. New Jersey Archives, Second Series, i, 130.

1776 is well indicated by the statement of Edmund Randolph: "As soon as the Convention had pronounced the vote of independence, the formation of a constitution or frame of government followed of course. . . Mr. Jefferson who was in Congress urged a youthful friend in the Convention [Edmund Randolph] to oppose a *permanent* constitution, until the people should elect deputies for the special purpose. He denied the power of the body elected (as he conceived them to be agents for the management of the war) to exceed some temporary regimen. The member alluded to communicated the ideas of Mr. Jefferson to some of the leaders in the house, Edmund Pendleton, Patrick Henry and George Mason. These gentlemen saw no distinction between the conceded power to declare independence, and its necessary consequence, the fencing of society by the institution of government. Nor were they sure, that to be backward in this act of sovereignty might not imply a distrust, whether the rule had been wrested from the king." [52] St. George Tucker has stated strongly the case in favor of the convention's exercising the power without specific authority from the people. He says the convention was not an ordinary legislature, but a revolutionary body deriving its power directly from the people. "It was the great body of the people assembled in the persons of their deputies, to consult for the common good, and to act in all things for the safety of the people." Tucker also calls especial attention

[52] Rowland's *Life of George Mason*, i, 235. See also Jefferson's *Notes on Virginia*. Ford's *Writings of Jefferson*, iii, 225-229. Jefferson's draft of a constitution, which was not before the leaders of the convention until after the work of framing a constitution was nearly finished, contemplated submission to the people. "It is proposed that the above bill, after correction by the convention, shall be referred by them to the people to be assembled in their respective counties; and that the suffrages of two-thirds of the counties shall be requisite to establish it." Ford's *Writings of Jefferson*, ii, 30.

to the fact that the formation of a government had been under discussion among the people.[53] No one familiar with the close relationship which existed between the local and central revolutionary organizations in the colonies in 1776 can doubt that the actions of the provincial congresses of South Carolina, Virginia and New Jersey expressed the sentiments of the people of these states.

In this connection attention should also be called to the constitution framed by a convention in December, 1784, for the proposed state of Franklin. The convention resolved: "That this Convention recommend this Constitution for the sereous Consideration of the People during Six Ensuing Months after which time Before the Expiration of the Year that they Choose a Convention for the Express purpose of adopting it in the name of the people if Agreed to By them or altering it as Instructed By them." The constitution went into operation immediately, but was not ratified by the subsequent convention of November, 1785, and the North Carolina constitution of 1776 was with some modifications adopted for the new state; the action of the second convention was not submitted in any manner for popular approval.[54]

We are now accustomed to the practice of having state constitutions framed by conventions entirely independent of the regular legislature, and of having such conventions as a rule submit their work for the approval of the people. In the development of this independent machinery for the

[53] Tucker's *Blackstone*, i, part 1, Appendix, 87-92. This is a summary of Tucker's opinion in the case of Kamper *v.* Hawkins, in the General Court of Virginia in 1793. Works of John Adams, iv, 191. Henry's *Patrick Henry*, i, 418. Force, Fourth Series, vi, 748.

[54] American Historical Magazine and Tennessee Historical Society Quarterly, i, 48-63; ix, 399-408. Caldwell, *Studies in the Constitutional History of Tennessee*, 2d. ed., 48-59.

framing of state constitutions there have been three steps: (1) The establishment of the distinction between the constitution and ordinary legislation, and the development of a distinct method for the formation of constitutions. (2) The development of the constitutional convention as a body distinct and separate from the regular legislature. (3) The submission of a constitution to a vote of the people, after it has been framed by a constitutional convention. The first step is fundamental; the other two involve but the elaboration of machinery to carry out more clearly the distinction between constitutions and ordinary legislation. It cannot be said that the third step has yet been fully taken, and that submission of a constitution to the people is essential; the Virginia constitution of 1902 was not submitted to a vote of the people.[55]

The people of the colonies were familiar with the distinction between statute and constitution; at the foundation of their political convictions lay the theory that the principles of government are permanent and may be changed only by the people. But for the first time they were brought face to face with the problem of establishing such principles, of framing written constitutions superior to and limiting all ordinary governmental organs. Theirs was the first step in the development of the constitutional convention, in the establishment of principles for the adoption of constitutions different from those to which they were accustomed for the enactment of laws.

Even had the people come in 1776 to a belief that constitutions should be adopted by representative bodies independent of the regular legislature, such a system would have been in many cases hazardous and impracticable. The leaders of the people were already assembled in provincial

[55] A. E. McKinley in Political Science Quarterly, xviii, 509.

congresses, organizing for military defense, and in most of the states both central and local organizations were busily engaged in suppressing opposition to revolutionary measures. They succeeded in many cases in suppressing opposition only by virtue of their superior aggressiveness. To permit the creation of independent conventions would be to risk the loss of much that had been gained by united and aggressive action. Permanent governments, if established at all, must be established by existing provincial representative bodies. That the people recognized the superiority of constitutions to statutes is clearly shown by the fact that nine [56] of the twelve constitutions adopted between 1776 and 1778, and the proposed Massachusetts constitution of 1778, were drafted by legislative bodies especially empowered by their constituents to take such action; and by the further fact that expediency was urged as the most important argument against similar authorization in South Carolina and Virginia in 1776.

In New Hampshire and Massachusetts, during the revolutionary period, was developed the constitutional convention as we know it to-day; that is, the independent body for constitutional action, with the submission of its work 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 of 1776,[57] and Massachusetts, by the resumption of its charter in July, 1775. In neither was the need of a new government of great urgency; in neither was

[56] New Hampshire, Pennsylvania, Maryland, Delaware, North Carolina, New York, Georgia, Vermont, South Carolina (1778).

[57] The New Hampshire constitution of 1776 really organized a legislature only, and legislative action completed the governmental structure. See a paper by the present writer in Proceedings of the N. H. Bar Association for 1906.

there an aggressive tory element. Neither of these states was threatened by military operations after the surrender of Burgoyne in October, 1777.[58] In neither state was danger to be apprehended from the creation of an independent convention and the submission of its work to a vote of the people.

In summarizing the action of the states from 1776 to 1784 in the adoption of their constitutions, we may perhaps distinguish four forms of procedure:

(1) Constitutions framed by purely legislative bodies, which had received no express authority from the people for this purpose, and such constitutions being put into operation without submission to the people in any manner—South Carolina (1776), Virginia, New Jersey. The method of adopting these constitutions differed not at all from that pursued in the passage of ordinary statutes, although the conventions and congresses which acted were not, of course, legislative bodies of a regular character.

(2) The legislative body framing a constitution under authority expressly conferred upon it for this purpose by the people, without the constitution being in any manner submitted to the people for approval—New Hampshire (1776), Delaware, Georgia, New York, Vermont.

(3) The legislative body framing a constitution under authority expressly conferred upon it for this purpose by the people, with a subsequent formal or informal submission of the constitution to the people—Maryland, Pennsylvania, North Carolina, South Carolina (1778), Massachusetts (1778); of this group of states Massachusetts is the only one which formally submitted its constitution to the people.

[58] Cushing, *Transition of Massachusetts*, 187, calls attention to the favorable position of Massachusetts in 1778 for the framing of a constitution.

(4) The framing of a constitution by a body chosen for that purpose only, with the subsequent submission of the proposed constitution to the people for approval—New Hampshire, 1779-1783; Massachusetts, 1779-80.

Thus we see that only in Massachusetts and New Hampshire was developed what has since become the characteristic procedure in the framing of new state constituions. As has already been suggested, the earlier development of this procedure in these states was due largely to their freedom from external danger and from internal conflict when they came to form new governments, and also to the fact that they already had stable governments in existence, and could therefore proceed in a more leisurely manner to frame new constitutions. Some writers have suggested that Massachusetts and New Hampshire were in advance of the other states in this regard because more democratic [59]—this may be true to a certain extent, but the conditions under which they framed their constitutions were more favorable to the development of an orderly procedure. It is true, however, that the New England town meeting furnished a ready means for taking the will of the people upon such a question as that of adopting a constitution, while no such effective instrument for this purpose existed outside of New England. Yet we find that New Hampshire in 1776, when there was danger to the revolutionary party from both within and without, did not submit its constitution to the people for approval. So Massachusetts resumed her charter in June, 1775, by means of the regular legislative body then in existence, the provincial congress, without consulting the people, this action being in conformity with a recommendation made by the Continental Congress.[60]

[59] Oberholtzer, *Referendum in America*, 107-111.

[60] Journals of each provincial congress of Massachusetts, 359.

Rhode Island and Connecticut in 1776 continued their charter governments without submitting their action to the people.[61]

In this paper it is assumed that the fundamental principle of American constitutional development is the distinction of the constitution from ordinary legislation, and the proceedings of the early conventions have been examined to discover how far this distinction influenced the action of those bodies from 1776 to 1784. In connection with this subject it will also be of interest to discover what machinery the constitutions of the revolution themselves established for their amendment or for the adoption of new constitutions.

[61] Rhode Island Colonial Records, vii, 522, 582. Connecticut State Records, i, 3. Judge Simeon E. Baldwin in New Haven Historical Society Papers, v, 204-207. So too, in September, 1777, when there was thought of framing a new constitution for Rhode Island, there seems to have been no idea of calling a convention, but a committee of the general assembly was appointed "to form a plan of government for this state, and lay the same before this Assembly as soon as conveniently may be." Rhode Island Colonial Records, viii, 304.

Judge J. A. Jameson (*Constitutional Conventions*, 4th ed., 115) argues that John Adams first advocated independent constitutional conventions, with the submission of their work to the people. However, a careful reading of Adams' works hardly seems to sustain this view. Adams was more interested in the setting up of independent state governments in 1775 and 1776 than in the procedure by which they should be established; he did suggest that conventions be called to establish new governments, and that constitutions be submitted to the people if there were any doubt as to their opinion. His positive suggestions as to how new governments should be organized were, however, far different from the present method of an independent convention, framing a constitution and then taking no further action. His idea seemed to be that the people should elect an assembly or convention, and that this body should organize the new government, itself remaining the popular branch of the legislature; this, it may be remembered, was the plan successfully pursued by New Hampshire and South Carolina in effecting their transition to new state governments in 1776. Works of John Adams, iii, 13-16, 20; iv, 186, 195-209. North Carolina Colonial Records, xi, 321-327.

The absence of provision for alteration in the constitutions of 1776-77, should not be taken as an indication that their framers thought the regular legislatures competent to alter or establish constitutions, but rather that they did not consider the matter at all.[62] Thus the constitutions of South Carolina (1776), Virginia, and New Jersey, framed by bodies not expressly authorized by the people to do so, contain no provisions for amendment, but neither do the constitutions of New Hampshire (1776), North Carolina, and New York, framed by bodies which had such express authorization. The rejected Massachusetts constitution of 1778 was framed by a body having specific authorization to take such action, but contained no provision for constitutional alterations.

Of the eight constitutions of the revolutionary period which made provision for their amendment, those of Maryland, Delaware, and South Carolina (1778) provided for final action in such cases by the legislature, but in a manner different from that for the enactment of laws.[63] In Pennsylvania a council of censors was to be elected every seventh year "to enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are entitled

[62] Jefferson's draft of a constitution for Virginia contained a provision for alteration upon legislative proposal and after popular approval, but this draft was not really before the Virginia convention until after its work had been practically completed. Ford's *Writings of Jefferson*, ii, 29, 30. Jefferson's draft of a proposed state constitution, in 1783, made provision for alterations by a convention chosen for that express purpose, but did not provide for a submission to the people of the work of such convention. *Ibid.*, iii, 320, 332.

[63] For a discussion of amendment through legislative action, see p. 120.

to by the constitution." The council of censors, two-thirds of its members concurring, was to have power to call a convention to amend the constitution in such parts as the council of censors should think necessary, and it was further provided that "the amendments proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject." Vermont copied this provision of the Pennsylvania constitution, except that it provided a different manner for the election of members of the council of censors.[64]

In Georgia also provision was made for a constitutional convention, but here it was to be called by the legislature upon the petition of a majority of the voters of a majority of the counties. The petitions of the people were to specify the amendments desired, and the legislature was required to order the calling of a convention, "specifying the alterations to be made, according to the petitions preferred to the assembly by the majority of the counties as aforesaid." [65]

The Massachusetts constitution of 1780 made provision for the submission to the people in 1795 of the question as to the desirability of revising the constitution. If two-thirds of those voting on the question should favor a revision the General Court was to call a convention for that purpose. The New Hampshire constitution of 1784 was the first to contain the specific requirement not only of a separate convention for constitutional action, but also that the work of such convention should be submitted to the approval of the

[64] Pa. Constitution of 1776, art. 47. Vermont Constitution of 1777, art. 44.

[65] Georgia Constitution of 1777, art. 63.

people. This constitution provided that "the general court shall at the expiration of seven years from the time this constitution shall take effect, issue precepts . . . to the several towns and incorporated places, to elect delegates to meet in convention for the purpose aforesaid: the said delegates to be chosen in the same manner, and proportioned as the representatives to the general assembly; provided that no alteration shall be made in this constitution before the same shall be laid before the towns and unincorporated places, and approved by two-thirds of the qualified voters present, and voting upon the question." [66]

[66] The proposed constitution for New Hampshire which was rejected in 1779 provided for amendment upon proposal of the legislature and after popular approval. The amending provision in the proposed constitution of 1781 was similar to that quoted in the text above, except that it contained no specific requirement that amendments proposed by a convention be submitted to the people. The proposed constitution of 1782 contained the same provision as that which was adopted in 1783 and became effective in 1784. New Hampshire Town Papers, ix, 841, 877, 894.

CHAPTER II

The Constitutional Convention, 1784-1908.

It has already been suggested that there have been three steps in the development of our procedure for the framing of state constitutions: (1) The development of the distinction between constitutions and statutes. (2) The development of the constitutional convention as a body distinct and separate from the regular legislature. (3) The submission of proposed constitutions to a vote of the people.

Taking up for a moment the first step in this development, it is probably unnecessary to call attention to the fact that in 1776 the distinction between constitutions and statutes was not as clear as it later became. The constitutions were recognized as binding upon state legislatures, but as yet their binding force was only a moral one—no definite sanction had been developed and the states were at this time certainly to a large extent in a position similar to that of countries which recognize no power in the state as competent to prevent legislative encroachments upon the written constitution.

As is well known, the texts of the first state constitutions gave little power to the executives, but in time of war it was necessary that there should be some person or body always in existence with authority to act in important matters. For this reason we find in many of the states during the revolutionary period committees or councils of safety exercising powers unknown to the constitutions, or we find that the legislatures bestowed upon the state governors powers greater than those conferred by the constitutions. Thus

by an ordinance of the convention which adopted the Virginia constitution of 1776, it was provided that "superadded to the powers given to the governor and privy council by the form of government passed this convention, the governor, with the advice of the privy council, shall have and possess all the powers and authority given to the committee of safety by an ordinance appointing a committee of safety passed at Richmond, July, 1775, or by any resolution of convention. . . ." The extraordinary and extraconstitutional powers of the governor were subsequently renewed by acts of the Virginia assembly.[1] Maryland acts of February, 1777, and March, 1778, gave the governor and council extraordinary powers, in addition to those conferred by the constitution.[2]

Gordon calls attention to the fact that the only restriction placed upon the legislature of New Jersey by the constitution of 1776 was that by which each member of the council and assembly was required to swear or affirm that: "I will not assent to any law, vote or proceeding which shall appear to me injurious to the public welfare of said colony, nor that shall annul or repeal that part of the third section in the Charter of the Colony, which establishes, that elections of members of the Legislative Council and Assembly shall be annual; nor that part of the twenty-second section in said Charter, respecting the trial by jury, nor that shall annul, repeal, or alter any part or parts of the eighteenth or nineteenth sections of the same."[3] This oath was an attempt to construct a moral obligation not to alter certain clauses

[1] Hening's Statutes at Large of Virginia, ix, 121, 178, 309, 428, 462, 477.

[2] Maryland laws, February, 1777, chap. 24; June, 1777, chap. 7; October, 1777, chap. 2; March, 1778, chap. 3.

[3] Gordon, *History of New Jersey*, 182.

of the constitution, and was probably not thought of as placing constitutional provisions beyond legislative alteration.[4] In 1777 the legislature of New Jersey replaced the word "colony" by the word "state" in the constitution of that state,[5] and this alteration while only a verbal one, is probably indicative of the then recognized power of the legislature. So, in Rhode Island, where the colonial charter served in place of a constitution, the charter seems at first to have been thought to be subject to amendment by regular legislative action, and was in fact several times so amended.[6]

The New York constitution of 1777, by its provision for a council of revision, raises a strong presumption that legislative action should be final and conclusive, subject to no further control by judicial or other authorities. In order to prevent hasty action upon laws which might be "inconsistent with the spirit of this constitution or with the public good," the governor, chancellor, and judges of the supreme court were constituted a council of revision, with a veto upon legislative acts, which might be overcome by a vote of two-thirds of each house of the legislature. The judges were thus brought in as a part of the legislative branch of government, and were, it may be presumed, not expected to have any further supervision over legislation.

[4] It may be worth noting that the New Jersey case of Holmes *v.* Walton (1780), the first great case in which a law was declared invalid, was a case involving trial by jury. See Austin Scott's article on Holmes *v.* Walton in the American Historical Review, iv, 456.

[5] Wilson's Acts of the General Assembly of New Jersey (1776-1783), p. 24.

[6] Mowry, *The Dorr War*, 22, 37. In Trevett *v.* Weeden (1786), however, the Rhode Island court seems to have taken the view that the charter and also some colonial legislation of a fundamental character were not subject to legislative alteration. The same view was taken with reference to suffrage legislation by a Rhode Island legislative committee in 1829. 28th Cong., 1st Sess., House Report, No. 546, p. 377.

New York is the only state which associated judges with the work of legislation but that this plan of judicial advice was considered in other states is shown by two proposals made respectively in Virginia and Vermont. Thomas Jefferson in his proposed constitution for Virginia, drafted in 1783, provided that the "governor, two councillors of State, and a judge from each of the Superior Courts of Chancery, Common Law, and Admiralty, shall be a council to revise all bills which shall have passed both houses of assembly," and this council was to have practically the same powers as the council of revision of New York.[7] Judge Nathaniel Chipman, of Vermont, in a book published in 1793,[8] suggested that: "The principal members in the judiciary, may, when the particular duties of their office will permit, be, with propriety, united with the head of the executive department, to form a council of revision upon all laws proposed to be passed by the legislature." Judge Chipman at this time evidently had no idea that the courts of Vermont would assume the power to declare laws invalid, for he continues: "Still, the legislature must be the sole judges, whether the information given coincides with the general interest of the community, and the principles of the government, or is dictated by particular views or particular interests."

The language employed by the Massachusetts constitution of 1780 also seems to imply that the courts were not expected to exercise a power of annuling laws. Provision was made for a popular vote in 1795 upon the question of calling a constitutional convention "in order the more effectually to adhere to the principles of the constitution, and

[7] Ford's *Writings of Jefferson*, iii, 330.

[8] *Sketches of the Principles of Government* (Rutland, 1793), pp. 126, 127.

to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary." This language was copied almost verbatim into the New Hampshire constitution of 1784,[9] except that here the vote upon holding a convention was to be taken at the expiration of seven years. These provisions strongly imply that the people in constitutional conventions should, at intervals, themselves correct violations of the constitution made by the regular organs of government. No idea seems to have been entertained at this time that the courts would assume the function of annuling laws which they thought opposed to the constitution.

But we must turn to the first constitutions of Pennsylvania and Vermont in order to find the clearest expression of legislative power with reference to matters regulated by the constitutions. The Pennsylvania constitution of 1776 created a council of censors to be elected by the people every seventh year, one of whose duties it was to "enquire whether the constitution has been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duties as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are intitled to by the constitution." In the exercise of its power the council of censors was given "authority to pass public censures, to order impeachments, and to recommend to the legislature the repealing of such laws as appear to them to have been enacted contrary to the principles of the constitution." This language was copied into the Vermont constitution of 1777.[10] It will be noticed that the above-quoted provi-

[9] The same language appeared in the proposed constitutions which were rejected in 1781 and 1782.

[10] The proposed constitution for the State of Frankland (1785)

sions seem clearly to recognize laws in conflict with the constitution as valid laws, which would remain in force even after the action of the council of censors unless the legislature chose to heed the recommendations of that body.

In the council of censors there was established a definite and periodical check upon the legislative power, but this check seems not to have been very effective. Only one council of censors was elected in Pennsylvania, that of 1783-1784, and the council itself was abolished by the constitution of 1790. The Pennsylvania council of censors of 1783-84 drew up a long report which, while it recognized that in certain cases the constitution had been violated through necessity, also called attention to numerous legislative acts which were in conflict with the constitution, and censured the legislature for its failure to observe the form of government adopted in 1776. This report seems to have had little influence.[11]

The first council of censors of Vermont, in its address to the freemen of that state, issued in February, 1786, called attention to frequent clear violations of the constitution by the legislature. The Vermont council, however, recognized that there was no effective check upon the legislative power by virtue simply of a recommendation upon its part that certain laws should be repealed. The legislature had assumed control over land titles in a manner contrary to the

provided for a council of safety, chosen each fifth year, with powers similar to those of the Vermont and Pennsylvania councils, except that this council had no authority to recommend amendments to the constitution. The Frankland proposal was quite evidently copied from Pennsylvania. American Historical Magazine i, 62-63 (Nashville, 1896).

[11] Proceedings relative to calling the conventions of 1776 and 1790, pp. 83-123. However, at least one law was repealed as a result of the recommendations of the council of censors. Dallas, Laws of the Commonwealth of Pennsylvania, ii, 213, 252.

constitution, so that, according to the council of censors, "the surest title to an estate in Vermont would be the favor of its assembly." Yet the council concluded that redress "could not be expected; none but the legislature, whose interest it would be to withhold it, being competent to give it." [12] The legislature was supreme, and the constitution formed simply a moral check upon its power. In 1787 a legislative act was passed specifically altering an important provision of the constitution, but this act seems not to have been questioned as unconstitutional. The act of March 8, 1787, limited the right to vote to freeholders, while the constitution conferred the right to vote upon freemen, and defined a freeman as "every man of the full age of twenty-one years, having resided in this State for the space of one whole year, and is of a quiet and peaceful behavior. . . ." [13]

Another indication of the feeling toward the constitution in Vermont is the act of the assembly of that state, of February, 1779, which provided "that the constitution of this State, as established by general convention held at Windsor, July and December, 1777, together with, and agreeable to, such alterations and additions as shall be made in such constitution, agreeable to the 44th section in the plan of government, shall be forever considered, held, and maintained, as part of the laws of this State." [14] Similar enactments were repeated in June, 1782, and March, 1787; the act of 1787 was formally repealed in 1797.[15] These legislative confirmations are sometimes cited as attempts to give validity to con-

[12] Slade's Vermont State Papers, 537.

[13] Statutes of Vermont, 1787, p. 50. Chipman, *Memoir of Thomas Chittenden*, 111-113.

[14] Vermont State Papers, 287.

[15] Slade's Vermont State Papers, 449. Vermont Statutes of 1787, p. 31. Vermont Revised Laws of 1798, p. 600.

stitutions improperly adopted,[16] but certainly there can be no charge of improper adoption brought with reference to the revised constitution of Vermont of 1786. Rather it should be said that the Vermont legislature thought itself competent to give additional force to the constitution by such action. A Vermont author has well expressed what were at that time probably the views in this state as to the relation between the constitution and the legislature: "In all governments which had previously existed, the legislature, the law-making power had been sovereign, absolute, and uncontrollable. Judge Blackstone says: 'Legislation is the greatest act of superiority that can be exercised by one being over another, wherefore it is requisite to the very essence of law, that it be made by the supreme power. Sovereignty and legislation are, indeed, convertible terms. One cannot subsist without the other.' This constitutional law, this omnipotence of the Legislature, the Colonists brought with them from the mother country, as they brought with them the common law. And when they constituted the legislature, they considered that its power was necessarily supreme and uncontrollable, and that all constitutional restrictions upon their power were merely directory. No idea was entertained that an act of the legislature, however repugnant to the constitution, could be adjudged void and set aside by the judiciary, which was considered by all a subordinate department of government." [17] Because of the peculiar institution of the council of censors, the development of a definite distinction between constitutions and statutes and of a judicial sanction for the enforcement of this distinction, seems to have come later in Pennsylvania and Vermont than in many of the other states.[18]

[16] Jameson, *Constitutional Conventions*, 4th ed., 141.

[17] Chipman, *Memoir of Thomas Chittenden*, 102, 112-113.

[18] Austin *v.* Trustees of the University of Pennsylvania, 1 Yeates,

Returning now to the subject of the procedure employed for the framing of state constitutions, I think it may be said that by 1784 the constitutional convention was firmly established as a body distinct and separate from the regular legislature. Although an absolutely separate body had up to this time been employed for constitutional legislation only in New Hampshire and Massachusetts, yet in the other states the regular legislative bodies were used largely because of emergencies which made undesirable the assembling of a body of representatives distinct from that already in existence. Conventions as independent bodies were pro-

260 (1793) speaks of a law as "unconstitutional" but seems to mean nothing more than that the law had been declared by the council of censors to be a violation of the constitution; the law had been repealed and the question of its validity was not before the court. Respublica *v.* Duquet, 2 Yeates, 493 (1799), Emerick *v.* Harris, 1 Binney, 415 (1808), and Commonwealth *v.* Smith, 4 Binney, 117 (1811), all assert that the courts have power to declare laws invalid, but do not exercise the power. Justice Gibson in Eakin *v.* Raub, 12 S. & R. (Pa.), 330, 355 (1825) says that to that time no law had been declared invalid, and the power was not made use of in Eakin *v.* Raub. James Wilson, however, in his lectures before the college of Philadelphia in 1790-91 argued that the courts had power to declare laws invalid. *Works of James Wilson* (Andrews' edition), I, 411-418. Dupy *v.* Wickshire, 1 D. Chipman, 237 (1814), is the first Vermont case of this character. It is of interest in this connection to suggest that Judge Nathaniel Chipman, the leading lawyer in Vermont, in his *Sketches of the Principles of Government* (Rutland, 1793), p. 127, says that the courts should not have power over legislative acts; but that in his *Principles of Government* (Burlington, 1833), pp. 288-297, he is a strong advocate of the judicial power to annul laws. In New York also there were no early cases in which laws were held invalid unless Rutgers *v.* Waddington (1786) be considered such a case. In certain early cases the legislative repeal of a law after a court had declared it unconstitutional, was probably based upon the view that a judicial decision did not annul the law, but was in the nature of a recommendation to the legislature. Meigs, *The Relation of the Judiciary to the Constitution*, American Law Review, xix, 175, 185, 188 (March-April, 1885).

vided for by the first constitutions of Pennsylvania, Vermont, Georgia, and Massachusetts, and by the New Hampshire constitution of 1784.[19] Since 1784 state constitutions have, with few exceptions, been framed or adopted by conventions chosen by the people for this purpose.[20]

In discussing the development of the state constitutional convention it will be well to consider: (1) The usual methods by which conventions have been assembled. (2) The extent to which constitutions have been submitted to a vote of the people, or have been put into effect without popular approval. (3) The legal position of the convention in our constitutional system.

The Usual Methods by Which Conventions Have Been Assembled.

Attention has already been called to the fact that many of the state constitutions adopted during the revolutionary period paid little attention to the elaboration of machinery for the revision of constitutions. Of the earlier methods devised for the revision of constitutions that adopted by Pennsylvania and Vermont is the most curious. The councils of censors of these states, elected every seven years, had power, by a vote of two-thirds of their members to "call a convention to meet within two years after their [the coun-

[19] Jefferson, in his draft of a proposed constitution for Virginia, made in 1783, provided a convention for the purpose of making changes in the constitution. Ford, *Writings of Jefferson,* iii, 332.

[20] The most important exception to this statement is the Nebraska constitution of 1866, which was framed by the territorial legislature, and by this body submitted to a vote of the people. Brittle *v.* People, 2 Neb., 198, 206. In 1873 a new constitution for Michigan was drafted by a commission appointed under the authority of a legislative act, and was submitted to the people by the legislature, but was rejected. A proposed new constitution for Rhode Island, drafted in a similar manner, was rejected in 1898 and 1899.

cil of censors'] sitting, if there appear to them an absolute necessity of amending any articles of the constitution which may be defective, explaining such as may be thought not clearly expressed, and of adding such as are necessary for the preservation of the rights and happiness of the people: But the articles to be amended, and the amendments proposed, and such articles as are proposed to be added or abolished, shall be promulgated at least six months before the day appointed for the election of such convention, for the previous consideration of the people, that they may have an opportunity of instructing their delegates on the subject." Conventions elected under this provision were thus chosen by the people merely to ratify or reject amendments proposed by the council of censors, and were not constitutional conventions in the sense that they had authority to draft new constitutions, or to frame amendments for themselves.

The council of censors proved unpopular in Pennsylvania, where it had a short and inglorious career. Many features of the Pennsylvania constitution were opposed by a large body of citizens of that state, and strong protest was made against the provisions by which it was made unamendable for a period of seven years.[21] In fact this provision of the constitution was ignored from the very first. The assembly on June 17, 1777, adopted a resolution providing that the sense of the people should be taken as to the advisability of calling a convention to revise the constitution. The British invasion prevented the carrying-out of this resolution. Again on November 28, 1778, the assembly resolved to submit the question of a convention to the people, the members of the convention to be chosen at the same time when the question was voted on; but this resolution was re-

[21] Pennsylvania Gazette, Oct. 23, 1776.

scinded by the assembly before the time set for the vote to be taken.[22] Only one council of censors was elected, that of 1783-84, but although it was agreed that some changes should be made in the constitution of 1776, political controversies made it impossible for two-thirds of the council to agree to any proposed amendments, or upon calling a convention. In March, 1789, the general assembly of Pennsylvania, disregarding entirely the constitutional provisions with reference to the council of censors, ordered that the sense of the people of the state be taken as to the calling of a convention to frame a new constitution. In September, 1789, the assembly, declaring that a majority of the citizens of the state approved a convention in preference to the council of censors, provided for the election of a constitutional convention. The convention chosen by virtue of the assembly's order framed the Pennsylvania constitution of 1790, by which the council of censors was abolished.[23] The council of censors of Vermont had a more successful career, and was regularly chosen, every seven years, in conformity with the constitution, until 1869, and during this time nine conventions were called to pass upon constitutional amendments proposed by the council. The last council, that of 1869, recommended an amendment abolishing the council of censors, and this amendment was ratified by the convention of 1870. Constitutional revision by councils of cen-

[22] Journals of the House of Representatives of Pa., 1776-1781, pp. 145, 246, 324. Pennsylvania Colonial Records, xi, 220. For the political issues in Pennsylvania during this period see Oberholtzer, *Referendum in America*, chap. ii, and Paul Leicester Ford, *The Adoption of the Pennsylvania Constitution of 1776*, Political Science Quarterly, x, 426.

[23] Proceedings relative to calling the conventions of 1776 and 1790, pp. 129-137.

sors had proven ineffective, and these councils were finally discarded.[24]

The Georgia constitution of 1777 made provision for a constitutional convention, which should be called upon the petition of a majority of the voters of a majority of the counties. The petitions of the people were to specify the amendments desired and the legislature was required to order the calling of a convention, "specifying the alterations to be made according to the petitions preferred to the assembly by the majority of the counties as aforesaid." This method of initiating constitutional changes was extremely cumbersome, and would probably have proven unworkable had it been tried. However, no effort seems to have been made to use the constitutional method of revision. In 1788, when it was desired to revise the constitution of 1777, the legislature of the state named three persons from each county to meet and take into consideration amendments necessary to be made in the constitution. The convention so constituted met and framed a constitution, which was referred by the legislature to another convention composed of three persons elected from each county. The second convention amended the proposed constitution, and a third convention chosen by the people was authorized by the legislature to adopt the constitution, with or without the amendments proposed by the second convention. This third convention ratified the Georgia constitution of 1789.[25]

Except for the constitutions of Pennsylvania, Vermont, and Georgia, the only constitutions of the revolutionary period which made provision for the calling of constitutional

[24] See *The Council of Censors*, by Lewis Hamilton Meader, Providence, 1899. (Papers from the Historical Seminary of Brown University.)

[25] Jameson, *Constitutional Conventions*, 135, 136.

conventions were those of Massachusetts and New Hampshire. The Massachusetts constitution of 1780 made provision for the submission to the people in 1795 of the question as to the desirability of revising the constitution, and if the vote were favorable, a convention was to be called. No convention was called in 1795, and after that date no constitutional provisions were in force in Massachusetts with reference to the calling of a constitutional convention. The New Hampshire constitution of 1784 provided for the calling of a convention in seven years, if a popular vote should favor such action, and the amended constitution of 1792 provided for a vote of the people every seven years upon the question as to whether a constitutional convention should be called. But of the revolutionary frames of government which continued after 1784, four made no provision whatever for constitutional changes;[26] and three others made no provision for revision by constitutional conventions, providing simply for amendment through legislative action. Moreover, of later constitutions many have made no provision for revision by conventions. Among these may be mentioned Georgia (1798), Connecticut (1818), New York (1821), Missouri (1820), Rhode Island (1842), Pennsylvania (1790, 1838, 1873), Virginia (1830, 1851, 1864), Vermont (1870), Arkansas (1868, 1874), Tennessee (1834), Texas (1868), and Louisiana (1845, 1851, 1864, 1868, 1879, 1898). Twelve of the state constitutions now in force contain no provision whatever for constitutional conventions.[27] When, in states having no provision

[26] Of later constitutions no provisions for constitutional change of any character were made by those of Virginia, 1830, 1851 and 1864, and Pennsylvania, 1790.

[27] Arkansas, Connecticut, Indiana, Louisiana, Massachusetts, Mississippi, New Jersey, North Dakota, Pennsylvania, Rhode Island, Texas, Vermont. For a list of constitutions containing no provision for con-

for conventions, need was felt for a constitutional revision, the question necessarily arose as to whether conventions might be called in spite of the absence of constitutional authorization to do so. 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 of the legislature unless expressly forbidden, and is considered a regular exercise of legislative power. Judge Jameson calls attention to twenty-seven conventions which have met without there being any authority in the constitutions for their assembling,[28] and since he wrote there have been at least three cases of the same character—Mississippi in 1890, Louisiana in 1898, and Connecticut in 1902. Of the twelve states which have no express constitutional provisions for the calling of conventions, precedents in eight or nine seem to be practically conclusive in favor of the legislative power

ventions see Jameson, *Constitutional Conventions*, 551. The Oregon constitution of 1857 contained no provision for a convention, but such a provision was introduced by an amendment of 1906.

[28] Jameson, 210. In fact 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. 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. 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.

to act in this matter without express authorization;[29] in the three others[30] there are no precedents, although the question of holding a convention was twice submitted to the people of Rhode Island in 1853; and the Vermont constitutional commission in its report of January 6, 1910, suggests that a general constitutional revision should be left to a convention, and speaks as if there were no doubt as to the power to hold a convention in that state.

The only authorities which may be cited against the legislative power to call conventions, where the constitutions do not expressly give such power, are opinions rendered by the judges of the supreme courts of Massachusetts and Rhode Island, in 1833 and 1883 respectively, in response to questions submitted by the legislative bodies of these states. 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;[31] 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. The Rhode Island opinion of 1883,[32] however, is explicit in its advocacy of the view that a convention could not properly be called in that state because the constitution gave no express authority for revision by a convention. This Rhode Island expression is the

[29] Arkansas, Connecticut, Louisiana, Massachusetts, Mississippi, New Jersey, Pennsylvania, Texas, and probably Indiana.

[30] Rhode Island under constitution of 1842; Vermont under constitution as amended in 1870; North Dakota under the constitution of 1889.

[31] 6 Cushing, 573.

[32] 14 R. I., 649.

only one which denies the power of the legislature to call a convention for the revision of a constitution although there is no express constitutional authority for such a purpose, and this view has caused difficulties in the effort to obtain constitutional revision in that state.[33]

In order to avoid difficulties, however, most of the constitutions since 1784 have made definite provision for the calling of conventions by the state legislatures or in some other manner. It will be well to discuss briefly: (1) The constitutions which give the legislatures power to call conventions, without submitting the question of a convention to a vote of the people. (2) Those which expressly permit the legislatures to submit the question of a convention to the people, whenever the legislatures themselves may think proper. (3) Those which require that a vote be taken by the people at periodical intervals, upon the question of holding a convention, without reference to legislative action.

The calling of conventions by legislative action alone, without requiring the submission of the question to a vote of the people, has been the method adopted by a few states, and is the one still permitted by the constitutions of Maine and Georgia. Then, too, when no provision is contained in a state constitution regarding the calling of a convention,

[33] The Rhode Island judges were simply giving an advisory opinion, which has none of the force of a judicial decision, but their opinion has prevented the holding of a convention in that state. For an account of efforts to obtain a constitutional revision in Rhode Island, see Charles S. Bradley's *The Methods of Changing the Constitutions of the States, especially that of Rhode Island,* Boston, (1885); and Amasa M. Eaton's *Constitution-Making in Rhode Island* (Providence, 1899). As has been said above, the Rhode Island opinion is contrary to the uniform practice of the states. For dicta that conventions may be held without express constitutional authorization, see Collier *v.* Frierson, 24 Ala., 108; Wells *v.* Bain, 75 Pa. St., 39; and Wood's Appeal, 75 Pa. St., 59.

it would seem to be within the discretion of the legislature as to whether the question should be submitted to the people. Yet even in these cases the feeling has existed that the people should be consulted upon a matter of so much importance. New Hampshire in 1778 and 1780 and Massachusetts in 1779 submitted to the people the question as to whether conventions should be called, and conventions were in each case called after the people had voted that they should be held. The Pennsylvania legislature of 1789, although disregarding the regular constitutional provisions for revision by a council of censors, did obtain the approval of the people with reference to the question of so disregarding the constitution, and as to whether a convention was desired by the popular will.[34] So in New York in 1821,[35] in Virginia in 1828, and in a number of other cases the question of calling a convention has been submitted to a vote of the people, even where there were no constitutional provisions with reference to the calling of conventions, and where the legislature might have acted without consulting the people.[36]

[34] For a statement that only a small number of people expressed themselves upon this question when submitted, see Proceedings relative to calling the conventions of 1776 and 1790, p. 136.

[35] Submission of this question in New York in 1821 was forced by a veto of the council of revision, which presented a strong argument in favor of such action. See Jameson, 669, and Street's *Council of Revision*, 390-393, 455-479.

[36] Among the cases in which legislatures were bound by no constitutional provisions, but yet submitted this question to the people, may be cited: Massachusetts, 1820, 1852; New York, 1821, 1845; Virginia, 1829, 1850; Maryland, 1850; North Carolina, 1835; Pennsylvania, 1835, 1871; Missouri, 1844; Louisiana, 1853, 1898; Tennessee, 1869; Texas, 1875; Connecticut, 1902. The following conventions were called without the question being first submitted to the people: Connecticut, 1818; Rhode Island, 1824, 1834, 1841, 1842; New Jersey, 1844; Missouri, 1861, 1865; Arkansas, 1874; North Carolina, 1876; Louisiana, 1879; Mississippi, 1890. To the latter class should be added the secession and re-

In the greater number of constitutions, however, provision is expressly made that the people shall be consulted as to the calling of conventions. The curious provision in the Georgia constitution of 1777 is the first instance of requiring action by the people for the calling of a convention, as it is also the first instance in which the popular initiative was sought to be given for such a purpose. 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, the Tennessee constitution of 1796, the Kentucky constitution of 1799, and the Ohio constitution of 1802. The Kentucky provision of 1799, which was substantially repeated in the constitution of 1850, threw great obstacles in the way of calling a con-

construction conventions in the Southern States. Of the seceding states in 1861 only Tennessee, North Carolina, and Arkansas submitted to the people the question as to whether conventions should be held. In Rhode Island the question as to whether conventions should be held was submitted to the people in 1821 and 1822, but the conventions actually called later were assembled without popular authorization. For a strong expression in favor of such submission see the resolve of the convention called in Mississippi in 1851 to consider the slavery question. Resolved "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." Journal of the Convention, (Jackson, 1851), pp. 48, 50.

vention by requiring two successive popular votes,[37] but this plan was not followed by other states except in the one case of the Louisiana constitution of 1812. 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. 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 adopted into the constitutions of twenty-six states.[38] The legislative majority required to propose this question varies, but the more usual requirement (that in sixteen states[39]) is that such a proposal be passed by two-thirds of each house, although such action may be taken in some states[40] by a majority of the members of each house, and Nebraska requires a vote of three-fifths of the members elected to each branch of the legislature.

[37] On this account great difficulty was experienced in calling a convention in Kentucky.

[38] Alabama, California, Colorado, Delaware, Florida, Idaho, Illinois, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

[39] California, Colorado, Delaware, Florida, Idaho, Illinois, Kansas, Minnesota, Montana, Nevada, North Carolina, South Carolina, South Dakota, Utah, Washington, Wyoming. In Ohio also a submission to the people may be had upon the vote of two-thirds of the legislature, at other times than the regular twenty-year periods when the question is submitted without legislative action. Georgia and Maine, while not requiring a popular submission of this question, provide that legislative action calling a convention shall be by a two-thirds vote.

[40] Alabama, Kentucky, Missouri, Oklahoma, Oregon, Tennessee, Virginia, West Virginia, Wisconsin; to these should also be added the three states of Iowa, Michigan, and New York, which while providing for the periodical submission of this question without legislative action, also permit the legislature by a law to submit the question at any other time.

Some states have, however, preferred not to leave it to the discretion of the legislature as to when the people may vote upon the question of calling a convention, but have specifically provided by their constitutions that popular votes shall be taken upon this subject at certain definite intervals. Pennsylvania and Vermont in their first constitutions provided that the councils of censors elected every seven years might call conventions without submitting the question to a vote of the people. The New Hampshire constitution of 1784 provided that the question of calling a convention should be submitted to the people at the expiration of seven years; the Georgia constitution of 1789 provided for a convention in 1794, and an amendment to this constitution adopted in 1795 provided for another convention in 1797; these Georgia constitutions definitely arranged for conventions without a vote of the people upon the subject. The Massachusetts constitution of 1780 provided that the question of calling a constitutional convention be submitted to the people in 1795, and the Kentucky constitution of 1792 provided for a similar vote in that state in 1797 and 1798 (two popular votes in successive years). Such provisions as those above referred to were merely temporary. The first constitution to provide for the submission of the question to the people at regular intervals was that of New Hampshire in 1792, which required that the question of a convention be submitted to the people once every seven years, and that the legislature should call a convention if a majority of the voters should favor it. Indiana was the next state to adopt a similar plan, providing in 1816 for a vote on every twelfth year; and the plan of requiring a vote upon this question at regular intervals became for a time a somewhat popular one. The Virginia constitution of 1870 required a popular vote every twenty years upon the question of calling a convention, but the constitution of 1902 leaves it to

the legislative discretion as to when this question shall be submitted to the people. The plan of fixing definite terms for the submission of this question has not gained in favor as against the arrangement for submission at the legislative discretion. Indiana and Virginia have had such provisions, and have abandoned them. The legislatures have ordinarily been found responsive to popular sentiment in this respect. There are now six states which require the periodical submission of this question. New Hampshire still requires a vote once every seven years; Iowa every ten years; Michigan every sixteen years; Maryland,[41] New York, and Ohio every twenty years. The constitutions of Iowa, New York, Michigan and Ohio also contain provisions permitting the legislatures of these states to submit to the people the question of calling a convention, at other times than the ten, sixteen and twenty-year periods. The Oklahoma constitution of 1907 leaves to the legislature the discretion as to when the question of holding a convention shall be submitted to the people, but requires that the question be submitted at least once in every twenty years.

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.[42]

[41] The Maryland constitution of 1851 required a vote every ten years, but this was changed by the constitution of 1864.

[42] Of the fourteen constitutions which make no provision for the submission of this question to the people, those of Arkansas, Connecticut, Indiana, Louisiana, Massachusetts, Mississippi, New Jersey, North Dakota, Pennsylvania, Rhode Island, Texas, and Vermont contain no provisions whatever regarding constitutional conventions. Those of Maine and Georgia simply authorize the legislatures to call conventions, two-thirds of the members of both houses concurring.

The popular vote required to authorize a convention varies; fourteen states either expressly or impliedly provide that the necessary vote shall be that of a majority of those cast upon the subject of holding a convention,[43] and Kentucky has a similar provision with the additional requirement that the total number of votes cast for the calling of a convention be equal to one-fourth of the number of votes cast at the preceding general election; thirteen states require that the proposal of a convention should be approved by a majority of those voting at a general election;[44] Alabama and Tennessee require a majority of the votes cast in the election at which the proposal is submitted, but permit such submission to be made at either a general or special election; Iowa and Michigan require the affirmative vote of a majority of the electors qualified to vote for members of the legislature.[45]

When a majority of the qualified voters, or a majority of all persons voting at a general election, is required, it is ex-

[43] California, Colorado, Delaware, Florida, Missouri, Montana, New Hampshire, New York, North Carolina, Oklahoma, Oregon, Virginia, West Virginia, Wisconsin.

[44] Idaho, Illinois, Kansas, Maryland, Minnesota, Nebraska, Nevada, Ohio, South Carolina, South Dakota, Utah, Washington, Wyoming. A bill introduced in the Ohio legislative session of 1910 provided that straight party votes might be counted for or against the calling of a convention, if the party conventions should take action for or against a convention. See p. 194.

[45] The regular ten, sixteen and twenty year votes in Iowa, Michigan and New York are required to be taken at general elections but votes at other times may be taken at special elections. In twenty-two states the question must always be submitted at general elections: California, Colorado, Delaware, Florida, Idaho, Illinois, Kansas, Kentucky, Maryland, Minnesota, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oregon, South Carolina, South Dakota, Utah, Washington, Wisconsin, Wyoming. In Alabama, Missouri, Montana, Oklahoma, Tennessee, Virginia and West Virginia the vote may be taken at either general or special elections.

tremely difficult to get a popular vote sufficient to call a convention, because of the impossibility of arousing sufficient interest in the matter to induce all those voting for candidates to express themselves as to a convention. In Michigan, for example, a large majority of the votes cast upon the question in 1898 and 1904 was in favor of a convention, but a sufficient number of votes was not cast, and it was not until 1906 that a popular vote could be obtained large enough to call a convention. In Delaware until 1893 the question of calling a convention was required to be submitted at a special election, and in order to be carried must have received the vote of a majority of all citizens entitled to vote for representatives; under these provisions several unsuccessful attempts were made to call a convention, and finally, in 1893, a constitutional amendment was adopted permitting the question to be submitted at a general election, where it was at last found possible to get an expression by a majority of the qualified voters of the state.[46] Although many states still require a majority of those voting at a general election,[47] it now seems clear that this throws too great obstacles in the way of calling a convention. The obstacles became almost insuperable when, as under the Kentucky constitution of 1850, two successive popular votes were required, in each of which it was necessary to obtain a majority of all citizens entitled to vote for representatives.[48] The most satisfactory plan seems to be that of providing simply that a majority of those voting upon the question should favor a convention; however, in order to prevent a convention being called by means of the votes of a small

[46] Oberholtzer, *Referendum in America*, 135.

[47] Or a majority of the qualified voters, as in Iowa and Michigan.

[48] Oberholtzer, 133, 134. It may be worth while to call attention to the fact that Kentucky in 1891 and Delaware in 1897 adopted less cumbersome methods for the calling of conventions.

minority it may be well to adopt a provision such as was introduced into the Kentucky constitution of 1891, requiring that the vote in favor of calling a convention be equal to at least one-fourth of the number of qualified voters of the state. Power with reference to the calling of a convention must, it would seem, be lodged in the hands of those who take sufficient interest to vote upon the matter, provided there be proper assurance that they represent to a large enough degree the intelligent public opinion of the community.[49]

The introduction of the initiative and referendum in South Dakota, Oregon, Montana, Oklahoma, Missouri, and Maine makes it possible for the people of these states [50] to initiate and adopt a measure providing that a convention be held, and thus removes this question to a large extent from legislative control.[51] In Maine, where the constitution does not require that the question of holding a convention be submitted to the people, the people may initiate and adopt by popular vote a measure for this purpose. In the same manner each of these states may require that there be a popular vote upon any law under which a convention is proposed to be held.[52]

[49] For a discussion of the popular vote required for the adoption of constitutions and of amendments, see pp. 69, 185.

[50] The Utah initiative and referendum amendment of 1900 has never become effective because of the failure of legislation to make it operative.

[51] Dr. Borgeaud advocated the plan of having a vote upon the question of a convention at any time when a petition should be filed by a sufficiently large number of voters. He considered this plan better than that of requiring a vote at regular intervals or leaving the matter to the discretion of the legislature. *Adoption and Amendment of Constitutions*, pp. 182, 183.

[52] Reference is made below, p. 57, to specific constitutional provisions in Oregon and Oklahoma with respect to this matter.

After a convention has been authorized by the people it becomes necessary in most states for the legislature to provide for the election of the convention. 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 constitutional convention. 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 1894.[53] 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, no further legislative action being necessary after a convention is once authorized by the people; the constitution itself contains all necessary provisions concerning the election of delegates and the assembling of the convention. No legislative act is necessary, and the convention is made independent of the regular legislature. 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,

[53] In 1860 and 1864 popular votes in New Hampshire in favor of a convention did not result in any legislative action. "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 Aug. 19, 1864, showed a majority of the voters in favor of calling a convention; but the Legislature at the June session, 1865, by joint resolution decided to take no action in the matter." Colby, *Manual of the Constitution of New Hampshire* (1902), p. 218.

after the people have voted that a convention shall be held; the constitution itself contains full provisions regarding the apportionment and election of delegates, and writs for an election are required to be issued by the governor after a favorable vote of the people.

In all of the states except those mentioned above [54] 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. Either (1) the legislature authorizes the election of a convention without a popular vote approving such action, or (2) a vote of the people is taken upon or independently of legislative authorization, and after such vote a legislative act must be passed providing for the convention.[55] Legislative bodies will not ordi-

[54] Together with those having the initiative and referendum.

[55] An interesting point is that as to whether legislative acts, providing for a popular vote upon the question of calling a convention or making provision for the meeting of a convention, require the approval of the governor. The Alabama constitution specifically provides: "No act or resolution of the legislature . . . calling a convention for the purpose of altering or amending the constitution of this state, shall be submitted for the approval of the governor, but shall be valid without his approval," and the Delaware constitution contains a similar provision. In the other states there is no express provision upon this matter, but the language usually indicates whether the governor's approval is or is not required. The California constitution, for example, provides that the question of holding a convention shall be submitted to the people "whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to revise this constitution," but if the people approve of a convention, "the legislature shall, at its next session, provide by law for calling the same;" the governor's veto does not apply to the legislative vote submitting the question to the people, but would, it seems, apply to the law under which it is proposed to call the convention. The same may be said as to the constitutions of Colorado, Florida, Idaho, Illinois, Minnesota, Nebraska, Nevada, North Carolina, Ohio, South Carolina, South Dakota, Utah, Washington, Wyoming. In fact most of the provisions for a popular vote upon the question are for

narily ignore the expressed will of the people, so that the dependence of the constitutional convention upon the legislature has produced little inconvenience, yet logically the plan adopted by New York, Michigan, and Missouri seems the better one, for it makes the superior legislative body—the convention—independent of the inferior body—the regular legislature.

Although no other state constitutions go as far as those of New York, Michigan, and Missouri, yet only ten states leave the matter entirely in the hands of the legislature;[56] several either restrict the legislative discretion as to the number of delegates or themselves fix the number;[57] others regulate the number of delegates, their apportionment, and the method of their election;[58] while the constitutions of Delaware, Illinois, and Montana contain even more detailed provisions controlling the election and conduct of conventions The Oregon and Oklahoma constitutions contain no specific restrictions upon legislative action in this matter; but require that a law providing for a convention be approved by the people on a referendum vote.

As has been suggested, the legislatures have in a number

such a vote after action by the two houses without the governor's approval. See a dictum in Carton *v.* Secretary of State, 151 Mich., 341. Yet in Nebraska where the submission of this question to a popular vote seems to be clearly a matter within the power of the two houses, independently of the governor, a joint resolution of 1903 upon this subject was vetoed by the governor after the adjournment of the legislature, and no further action was taken. Nebraska Laws, 1903, pp. 744-745. For a discussion of the executive veto upon the proposal of constitutional amendments, see p. 148.

[56] Alabama, Iowa, Georgia, Kansas, Maine, North Carolina, Tennessee, Virginia, West Virginia, Wisconsin.

[57] Idaho, Nevada, South Carolina, Utah, Washington, Wyoming.

[58] California, Colorado, Florida, Kentucky, Maryland, Minnesota, Nebraska, New Hampshire, Ohio, South Dakota. The Florida constitution does not regulate the method of election.

of states discretion to determine how delegates shall be elected to constitutional conventions. The qualifications for the exercise of the right to vote are usually fixed by existing constitutions, and are thus ordinarily not matters for legislative determination;[59] but where there are no such constitutional regulations of this matter, it lies within the discretion of the legislature. Where legislatures have the determination, they have usually as a matter of course fixed the same qualifications as those required for other elections. In certain cases, however, even where the voting qualifications have been fixed by constitutional provisions, legislatures have specified different qualifications for voters who should take part in electing delegates to constitutional conventions.[60]

[59] Green *v.* Shumway, 39 N. Y., 418 (1868).

[60] Jameson, *Constitutional Conventions*, 4th ed., 260-269, 510-524. Lobingier, *The People's Law*, 220-222, 241, 243, 247, 271. The statements made above with reference to qualifications of those voting for delegates to a convention apply also with reference to the voting on a proposed constitution. 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, as in New York (1821), Rhode Island (1842), New Jersey (1844), Maryland (1867), and Tennessee (1870), with reference to the vote for delegates to a convention, and in Illinois (1870), Virginia (1830), Tennessee (1834), New Jersey (1844), and Maryland (1867), with reference to the popular vote upon a proposed constitution. The Missouri convention of 1865 in submitting its proposed constitution to the people of that state restricted the right to vote to those who should take an oath that they had always been loyal to the United States Government, and this restriction was upheld upon the ground that the convention had power to put the constitution into operation without popular approval, and so might, if it submitted the instrument, determine to whom it should be submitted. State *v.* Neal, 42 Mo., 119. The same action was taken by the Maryland convention of 1864. See Miles *v.* Bradford, 22 Md., 170. But here, as also in Virginia (1830), New York (1821), and New Jersey (1844), the constitution did not require submission, while in Maryland (1867) submission was specifically required, and the suffrage qualifications were specified in

It may be worth while to refer briefly to the calling of conventions for the purpose of framing constitutions for states seeking admission into the union. In the more regular procedure for the admission of territories to statehood, Congress passes an enabling act providing for a convention, such enabling act regulating in detail the election of delegates and the conduct of business by the convention. Territorial legislatures may, of course, call conventions or a convention may be called by a territorial governor,[61] but a constitution drafted by such a convention has no effect unless it is approved by Congress, and the territory is admitted as a state under it.[62] Properly, constitutions of proposed new states should be drafted by conventions assembled under the authority either of Congress or of the existing territorial governments. In one case, at least, however, a convention has proceeded without the authorization either of Congress or of the territorial government, but its acts subsequently obtained validity by virtue of congressional ratification.[63] The Southern reconstruction conventions held under the authority of the congressional acts of 1867 may for all practical purposes be classed with territorial conventions held under congressional enabling acts.[64]

the constitution. Where the existing constitution requires a vote upon the question of holding a convention or upon a proposed constitution, and itself also fixes the suffrage qualifications for state elections, neither legislature nor convention has the legal right to prescribe other qualifications. See Green *v.* Shumway, 39 N. Y., 418, 426 (1868).

[61] As in California in 1849.

[62] 2 Opinions of the Attorney-General, 726. The constitution of a proposed state need not necessarily be framed by a convention. The constitution of 1866, under which the state of Nebraska was admitted to the union, was drafted by the territorial legislature and then approved by a vote of the people.

[63] See the Michigan case referred to below, p. 61.

[64] Neither Congress nor a territorial legislature, in providing for a

In several cases the question has arisen as to whether the people of a state, acting independently and without any authority under the existing government, may call a convention and form a new constitution. This question presented itself particularly in Rhode Island in 1841 and 1842. The state was still governed under the charter of 1663, and the suffrage qualifications as fixed by the legislature were extremely undemocratic. Efforts to obtain relief through the legislature had failed. Those in favor of a more extended suffrage formed associations, and arranged for the meeting of a convention to frame a new constitution. The convention was not authorized in any manner by the existing government. The convention met and framed a constitution which was submitted to the people for adoption, and was adopted by a majority of those voting upon it, such majority appearing also to be a majority of the male citizens of the state. An attempt was made to organize government under the new constitution, armed conflict ensued with the charter government, and the movement collapsed upon the announcement by the president of the United States that he would support the charter government.[65] Many of the reforms de-

convention, is under the necessity of submitting to the people the question whether a convention is desired. Congress has occasionally submitted to the people of a territory the question as to whether they wished statehood under certain conditions, as in 1906 when the question of joint statehood was submitted to the people of Arizona and New Mexico. In several cases territorial legislatures have submitted the question whether conventions should be assembled and constitutions framed preparatory to seeking admission as states. This was done in Wisconsin several times between 1841 and 1847; in Iowa in 1840, 1842, and 1844; and in Nebraska in 1859. Lobingier, *The People's Law*, 263-267, 275-277, 282.

[65] Luther *v.* Borden, 7 How., 1. A full account of this affair may be found in Mowry's *The Dorr War or the Constitutional Struggle in Rhode Island.* (Providence, 1901). See also Jameson, 218-226. For a dictum that the people of a state may adopt a constitution, in-

manded were later obtained through action under the charter government.

In Maryland in 1837 there were conditions somewhat similar to those in Rhode Island, and the supporters of reform elected a convention without any authorization from the regular government, but the convention took no action because the more important of the proposed reforms were adopted as constitutional amendments by the legislature of the state.[66] Somewhat similar to the Rhode Island case was that of the convention assembled 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; the 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.[67] The territory of Michigan in 1835 adopted a constitution and applied for admission into the Union. Congress passed an act admitting Michigan, provided that a restricted boundary should receive the assent of a convention of delegates elected by the people of the territory for that purpose; a convention elected for this purpose under an act of the new state legislature rejected the condition; thereupon a popular movement was begun, delegates were elected to a new convention, which assembled without either congressional or state authorization, and assented to

dependently of the existing state government, see Goodrich *v.* Moore, 2 Minn., 61. Koehler *v.* Hill, 60 Ia., 615, 616 contains vigorous dicta opposed to this view.

[66] McSherry, *History of Maryland*, 346-356.

[67] Jameson, 202-204.

the condition imposed by Congress as necessary for admission to statehood; Congress accepted this action as satisfactory and by its acceptance ratified the action of the irregular convention.[68] Territorial conventions irregularly assembled may, therefore, have their action validated by subsequent congressional ratification. Upon the basis of the Rhode Island case it would seem, however, that there is little chance of a constitution being adopted in the states, independently of or in opposition to the existing governments—such a procedure is revolutionary, and though in certain cases revolution may be amply justified, yet the relations between federal and state governments doom such a movement to failure; the federal government is obligated to protect a state from domestic violence " on application of the Legislature, or of the Executive (when the Legislature cannot be convened)", and must thus support the existing state governments; the United States thus guarantees such undemocratic state governments as those of Rhode Island and Connecticut against overthrow by any popular movement, although it is at the same time under obligation to guarantee to the states a republican form of government.

Submission of Constitutions to a Vote of the People.

Attention has already been called to the fact that of the state constitutions adopted before 1784 only those of New Hampshire and Massachusetts were formally submitted to a vote of the people, although in several other states a plan

[68] Jameson, 185-191. Congress has in another case shown a willingness to overlook irregularities in the form of assenting to conditions for admission to statehood. The Nebraska constitution of 1866 restricted the right to vote to whites. A congressional act of 1867 provided for the admission of Nebraska on condition that there should be no race discrimination. The Nebraska legislature assented to this condition (which altered the constitution), and the state was admitted. Brittle *v.* People, 2 Neb., 198.

was pursued which may have accomplished the same purpose. The Pennsylvania assembly, when providing in 1789 for the assembling of a constitutional convention, resolved that "it would be expedient, just, and reasonable, that the convention should publish their amendments and alterations for the consideration of the people, and adjourn at least four months previous to confirmation." The convention met, framed a constitution, published it for distribution among the people, and then adjourned from February 26 to August 9, 1790, in order that the people might have an opportunity to consider the proposed form of government; on August 9 the convention reassembled, made some changes in the proposed constitution, and adopted it as the form of government for the state; the proceedings here cannot be considered equivalent to a formal submission to the people, but did recognize the necessity for popular participation, and may be treated as an informal submission.[69] Although not directly submitted for popular approval the Vermont constitution of 1786 (and its later amendments to 1870) and the Georgia constitution of 1789 were ratified by popular votes. In Vermont the revised constitution of 1786 and subsequent amendments thereto were proposed by councils of censors, and ratified or rejected by conventions chosen by the people for that express purpose.[70] In Georgia the constitution of 1789 was framed and revised by two successive conventions and was then submitted to a third convention chosen by the people for the express purpose of rati-

[69] Proceedings relative to calling the conventions of 1776 and 1790, pp. 134, 234, 246. Jameson, 501.

[70] So too the federal constitution was ratified by conventions chosen in the several states for that express purpose, although in Rhode Island the constitution was first submitted to a popular vote. Bates, *Rhode Island and the formation of the union* (Columbia University Studies, x), 163-200.

fying or rejecting it. The New Hampshire constitution of 1792 was submitted to a direct vote of the people, and after this date the first states to submit their constitutions for popular approval were Connecticut in 1818 and Maine in 1819. Rhode Island in 1824 submitted a constitution to the people which was, however, rejected. New York submitted its constitution of 1821 to a popular vote, and was the first state outside of New England to submit a constitution to a direct vote of the people. The popular submission of constitutions first developed in New England, largely, it would seem, as Oberholtzer says,[71] because there alone the people had in their town meetings workable instruments for the expression of popular sentiment upon such a question.

The policy of submitting constitutions to the people soon became a general one. Virginia submitted its second constitution for popular approval in 1829, and from this time until 1860 the submission of constitutions to a popular vote was the prevailing practice.[72] Conventions in Georgia in 1833

[71] Oberholtzer, *Referendum in America*, 110, 111.

[72] It will be of interest to refer briefly to the extent to which congressional enabling acts have required that the constitutions of new states be submitted to the people. The earlier enabling acts did not require submission, and their language not only seems to indicate that popular approval was not considered necessary, but actually precluded submission. The joint resolution of March 1, 1845, for the admission of Texas, is the first congressional action which indicates that it was thought desirable to have constitutions submitted to the people; this resolution, while not requiring such submission, did provide that "the constitution thereof, with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action." (The Texas constitution of 1836 had been submitted to the people.) The enabling act for Minnesota, passed February 26, 1857, is the first act of this character specifically to require popular submission, and the practice so begun has been consistently adhered to since that date. But, although popular submission was not expressly required by enabling acts, every state admitted since 1836 has come into the union

and 1839, in Tennessee in 1834, in Michigan and North Carolina in 1835, in Pennsylvania in 1837-38, and in Florida in 1839,[73] submitted the results of their labors for the approval of the people. However, the conventions of Delaware in 1831, Mississippi in 1832,[74] and Arkansas in 1836 did not submit their constitutions for popular approval. From 1840 to 1860 the practice of submitting constitutions for the approval of the people was followed without exception,[75] but during the civil war period submission became the exception rather than the rule in the Southern States. The Virginia convention of 1861 submitted its constitution and ordinance of secession to the people; the Georgia convention of 1861 submitted its revised constitution, but not its ordinance of secession;[76] the Texas convention of 1861 sub-

with a constitution approved by the people; the states admitted between 1837 and 1857 either framed their constitutions without the authority of congressional enabling acts (as in Michigan, Florida, Iowa and California), or submitted their constitutions although not required to do so by congressional act (as in Wisconsin). For a fuller discussion of this subject see Lobingier, *The People's Law*, 263-267, 275, 280, 294-297.

[73] The reports of the popular vote upon the Florida constitution of 1839 may be found in the *Tallehassee Floridian*, May 18-June 15, 1839.

[74] A motion was made in the Mississippi convention, but rejected, that the constitution be submitted to a popular vote. Journal of the Mississippi convention of 1832, pp. 289-290.

[75] But the Illinois convention of 1847 declared one article of the constitution in force without submitting it to the people. Constitution of 1848, schedule, sec. 4. So too the Kentucky convention of 1849-50 "after submitting their work to the people, made material amendments to that constitution as ratified by the people," by adding an entirely new section which went into effect without popular approval. Miller *v.* Johnson, 92 Ky., 589, 590, 604.

[76] A motion made in the Georgia convention to submit the ordinance of secession to the people was defeated. A movement in favor of submission also took place in the Alabama convention of 1861. Lobingier, *The People's Law*, pp. 215, 225.

mitted its ordinance of secession to a popular vote, but not the amendments which it made to the state constitution; in Tennessee the question of holding a convention was submitted to the people and negatived, and later the question of secession was submitted by the legislature and received a majority of the popular vote. The conventions of the other seceding states did not submit their actions for popular approval. Of the reconstruction conventions held in 1864, 1865, and 1866, those of Arkansas (1864), Louisiana (1864), Tennessee (1865), North Carolina (1865), Georgia (1865), and Texas (1866), submitted their proposed constitutions or amendments to a vote of the people, but those in the other five states did not do so. The conventions just referred to were assembled under the authority of President Johnson; except in the case of Tennessee, governments organized under constitutions framed by these conventions were not recognized by Congress. The constitutions under which the other Southern States were readmitted to the union were in each case submitted to a vote of the people of the respective states, this being one of the conditions of the congressional reconstruction acts of 1867; although persons who had participated in the secession movement were excluded from voting. A Missouri constitutional convention held sessions in 1861, 1862, and 1863, adopted a number of constitutional amendments which were not submitted to the people, and acted in many ways as if it were the regular legislative body of the state. With reference both to Missouri and to the seceding states, it should of course be remembered that conditions were abnormal, so that methods proper for a time of peace may have been inapplicable. Still it would seem that these cases do show that the practice of submitting constitutions for popular approval had not yet become well-established in the Southern States. The submission of the constitutions under which

the seceding states were readmitted into the union was under compulsion of federal law, and consequently indicates nothing as to the strength of this practice in the South.

Yet from 1870 to 1890 this practice was uniformly acted upon, and the constitutions drafted by conventions were then submitted to a vote of the people almost as a matter of course. However, during the past twenty years there has been a wide departure from what may before this time have been regarded almost as a well-established custom. During this period eleven state constitutions have been adopted. Five of these constitutions were submitted to a vote of the people without reservation—those of New York (1894), Utah (1895), Alabama (1901), Oklahoma (1907), and Michigan (1908);[77] five constitutions adopted during this period were not submitted to the people in any manner—those of Mississippi (1890), South Carolina (1895), Delaware (1897), Louisiana (1898), and Virginia (1902); and one other, that of Kentucky (1891), was altered by the convention after it had been approved by the people.

The constitutional conventions of Mississippi, South Carolina, and Louisiana were convened primarily for the purpose of disfranchising the colored voters, and submission of their constitutions to the people might well have placed in peril the principal object which they had in view.[78] The conventions of South Carolina and Louisiana were authorized by express votes of the people to whom this question was submitted, but in the case of Mississippi there was no submission to the people of the question whether or not a convention was desired. In neither Mississippi nor South Carolina did the legislative acts calling the conventions re-

[77] Submission was required in Utah and Oklahoma by congressional enabling acts.

[78] In Louisiana a constitutional amendment restricting the suffrage had actually been defeated in 1896.

quire that the completed work of the conventions be submitted to the people. The Louisiana act expressly provided that the convention should have full power to frame and adopt a constitution without submission to the people. In Virginia the question of holding a convention was voted upon by the people as required by the constitution of 1870; and the 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 to the people, largely, it would seem, for fear of its being defeated by the elements to be disfranchised, in combination with the corporations and other interests adversely affected by the new constitution.[79]

The failure to submit constitutions to the people in Mississippi, South Carolina, Louisiana, and Virginia may perhaps be explained as a necessary part of the plan to disfranchise the colored population in these states, and may on this account be treated as exceptional. The cases of Kentucky and Delaware cannot, however, be explained so easily. In Kentucky the convention of 1891 submitted to the people the constitution framed by it, as required by the convention act. The people adopted the constitution, but after they had voted on it, the convention reassembled and made a number of changes in the constitution. In Delaware the convention was authorized by a vote of the people, and the legislature in calling the convention recommended that the constitution be submitted to the legal voters of the state, but the convention disregarded this recommendation.

In view of the facts discussed above, I think that it is impossible to assert, as Judge Jameson did, that the submission

[79] A. E. McKinley in Political Science Quarterly, xviii, 480, 508. For a rather full discussion of the action of the conventions of Mississippi, South Carolina, Delaware, Louisiana and Virginia see Lobingier, *The People's Law*, pp. 301-325.

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 a legislature in calling a convention may effectively bind such a body to submit its work for the approval of the people.[80] 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.[81] As has been suggested, however, all of the states, with the exceptions just

[80] Of course, in Oklahoma and Oregon, where the convention is assembled under an act approved by a popular vote, and in the other states where a similar popular action may have been had through the initiative and referendum, a convention would not be apt to disobey the act under which it assembled. Yet in Oregon in 1910 the calling of a convention was opposed on the ground that: "There is danger that the convention will refuse to obey the provisions of the bill by which it is called, and will decree and promulgate the new constitution of Oregon without submitting it to the people for their approval or rejection."

[81] California, Colorado, Idaho, Illinois, Maryland, Michigan, Missouri, Montana, Nebraska, New Hampshire, New York, Ohio, Oklahoma, Utah, Washington, West Virginia, Wyoming. In all of these states, except Idaho, Washington, West Virginia, and Wyoming, the constitutions also specify the popular vote required to ratify a proposed constitution. Several (Michigan, Maryland, Nebraska, New York, Ohio, Oklahoma) require a majority of those voting upon the question of adoption or rejection; others (California, Colorado, Illinois, Missouri, Montana) require a majority of all persons voting at an election, but California expressly and the other states just mentioned impliedly, require that such submission be at a special election; New Hampshire requires the approval of two-thirds of those voting upon the question of adoption or rejection, and Utah requires "a majority of the electors of the state voting at the next general election." As to the form in which conventions submit their work to the people see note on p. 258.

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. The Delaware constitutions of 1776, 1792, 1831, and 1897 were not submitted to a popular vote; the Mississippi constitutions of 1817, 1832, and 1890 were not submitted for popular approval,[82] and the constitution of 1869 was submitted only under compulsion of congressional legislation. Even in these states, however, we find that sentiment was favorable to popular submission during the decade just preceding the civil war. The Delaware convention of 1852-53 submitted to the people a proposed constitution, which was rejected. The Mississippi legislature of 1850 called a convention to consider the slavery question, and provided that "the acts of the convention proposed to be held by this act, before they become binding on this State, shall be submitted to the people at the ballot box for their approval or disapproval, at such time, and in such manner, as the Convention may determine." The convention assembled in 1851, but took no formal action with reference to the subject which it had been called to consider, and on this account resolved that it was "unnecessary to refer to the people for their approval or disapproval at the Ballot Box, its action in the premises." Other resolutions of the convention clearly show, however, its view that the popular judgment should have been obtained, had any action been taken by the convention.[83]

Summarizing briefly the procedure adopted for the framing of state constitutions, it should be said that they are elaborated by constitutional conventions chosen for this express purpose, and distinct both in organization and election

[82] Sproule *v.* Fredericks, 69 Miss., 903. State *v.* Williams, 49 Miss., 640.

[83] Journal of the Convention (Jackson, 1851), pp. 48, 50.

from the ordinary legislative bodies. According to what is now the more usual procedure in the adoption of constitutions, there are three popular votes connected with the matter: (1) The vote of the people authorizing a convention. (2) The election by the people of delegates to the convention. (3) The submission to the people for approval of the constitution framed by the convention.

Some of the states dispense with the first vote and others with the third. Mississippi in 1890 dispensed both with the first and the third, and in this case the only participation which the people had in framing their new constitution was that of voting for delegates to a constitutional convention. In electing delegates simply the people could hardly express very clearly their views on constitutional questions and under the Mississippi plan they really had no greater share in constitution-making than in legislation, except that delegates to a convention, chosen as they were for only one purpose, would be more amenable to popular sentiment. Yet it might easily be possible under the Mississippi plan for a constitution to be adopted in opposition to the wishes of a majority of the people—this, in fact, was the purpose in Mississippi. The Mississippi plan seems perfectly legal, where the constitution existing at the time requires neither a vote upon the question of holding a convention nor a submission of the constitution to the people; but from the standpoint of effectiveness in expressing the public will such a plan is extremely defective.

CHAPTER III

The Legal Position of the Constitutional Convention [1]

A constitutional convention is a body called together for a limited purpose—that of framing and submitting to the people or of framing and adopting a new constitution, or of revising and amending an old constitution. The convention has become in our constitutional system a regular organ for the expression of state will with reference to the state's fundamental law. It is in no sense a revolutionary or extra-constitutional body and does not supersede in any way the organs of the existing state government. The existing state government continues in full operation until superseded by a new government organized under the constitution framed or adopted by the convention.[2]

Bearing in mind the limited functions of a constitutional convention, we must inquire here as to what are the relations of the convention to the organs of the regular state government, and especially as to the relations between the

[1] Judge Jameson's discussion of this subject is perhaps the most important. For other discussions see A. Caperton Braxton, *Powers of Conventions*, Virginia Law Register, vii, 79 (June, 1901); Revised Record, New York Constitutional Convention of 1894, vol. i, pp. 244-266; Debates Michigan Constitutional Convention of 1908, ii, 1274-1276; Debates Virginia Constitutional Convention of 1901-2,, i, 3-17, 29-88, ii, 3104-3139, 3154-3259; arguments of counsel in the case of Wells *v.* Bain, Philadelphia Press, Dec. 3, 4, 5, 1873.

[2] Judge Jameson expresses a somewhat similar view. *Constitutional Conventions*, 4th ed., 315-317. Upon the question as to when a new constitution goes into effect see p. 204, note.

convention and the regular legislative body of the state. We have already referred to the fact that in all of the states except New York and Michigan legislative acts are necessary for the calling of constitutional conventions.[3] Can the legislature, in the exercise of this power, place limitations upon a convention, requiring it not to consider certain subjects, or that it insert certain provisions in the new constitution, or that it submit its work for the approval of the people, when such submission is not required by the existing constitution?

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, but even he hesitated to push this doctrine to its extreme limits; for example, he thought that a convention might disregard a legislative requirement that its work be not submitted to the people, and also took the position that the legislative limitations upon a convention "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 functions." This amounts to a statement that the convention is not absolutely subordinate to the regular state legislature, and is in direct contradiction to Jameson's fundamental thesis.[4]

Under a number of the present state constitutions it may be definitely said that a legislature may not bind a conven-

[3] However, in states which have adopted the initiative and referendum, laws for this purpose may be enacted by the people without action by the legislatures.

[4] Jameson, 362-365, 494-495.

tion in any way. In New York and Michigan conventions assemble without any legislative action, when authorized by a vote of the people; in these states, constitutional provisions were adopted for the express purpose of making conventions entirely independent of legislative control and any effort by the legislature to control the convention's action would clearly be a violation of the constitution. 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 submitting to the people the question as to whether a convention shall be held. 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 by the regular legislative body.[5] The Alabama constitution of 1901 expressly confers full power upon a convention to act in the drafting of a new constitution.

But in many cases there are no constitutional provisions expressly or impliedly restraining legislative interference with conventions. What principles should control in states whose constitutions simply empower the assembling of conventions under a legislative act, or where the constitutions contain no provision with reference to conventions? In some cases the view has been taken that the people, by voting for delegates under a legislative act or by acting thereunder, themselves adopt the restrictions placed upon the conven-

[5] For an argument to this effect see Debates Michigan Constitutional Convention of 1908, ii, 1274-1276. See also a suggestion in Miller *v.* Johnson, 92 Ky., 589. This view was adopted by Chief Justice Grant in Carton *v.* Secretary of State, 151 Mich., 337, 339-343.

tion by such an act, and that the restrictions sought to be placed upon the convention by the legislature thus become restrictions imposed by the people, but in most cases this would clearly not be true.[6] The popular action in connection with a convention may be had in several ways. The question of calling a convention may, in certain states, be determined by the legislature without consulting the people, and an election may be called for the purpose of electing delegates to such convention; 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. In Oregon and Oklahoma there must be submitted to the people the act under which it is proposed to call a convention, but here, while the people have a greater control, it may be necessary for them to pass upon two questions in one, to determine not only whether they want a convention but also whether they want one under the terms proposed by the legislature;[7] even here the act calling a convention cannot be said

[6] Wells *v.* Bain, 75 Pa. St., 39; Wood's Appeal, 75 Pa. St., 59; State *ex rel.* Fortier *v.* Capdeville, 104 La., 561, 568-69; *Ex parte* Birmingham and Atlantic Railway Co., 145 Ala., 514; State *v.* Favre, 51 La. Ann., 434; State *ex rel.* McCready *v.* Hunt, 2 Hill (S. C.) Law, 1, 222-223, 240-243, 270, 271, 273, 275; Opinion of the Justices, 6 Cushing (Mass.), 574.

[7] A similar practice has been followed in some other cases, as in Louisiana in 1896. The Supreme Court of Massachusetts in 1833 took the ground that an act so approved would be binding upon a convention, which would therefore have to observe the restrictions contained in the act. Opinion of the Justices, 6 Cushing, 574 (1833). The judges of the supreme court of New York took the view in 1846 that an act so approved by the people was not subject to subsequent legislative alteration, but a contrary view was taken by the New York legislature. Jameson, 382-387, 663-666. Upon this point see A. Caperton Braxton

to be an act of the people. Popular participation to a still greater extent may be obtained by the separate submission of the two questions, (a) whether a convention is desired, and (b) then, if a convention is desired, whether the people approve the act under which the legislature proposes to call the convention; and here there may be said to be a popular approval of the legislative act.

But the more usual practice is for the question of calling a convention to be submitted to the people, and if they approve, for the legislature to enact a law under which the convention is elected and assembled. Now it cannot be said that the people, by their preliminary vote determining whether or not a convention shall be called, delegate to the legislature power to impose restrictions upon such convention; they simply vote for or against a convention, and there would be a strong presumption that in voting for a convention, they meant to vote for one with full power to propose or adopt a revision of the state constitution. This was the case 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 [8] sought to impose certain restric-

in Virginia Law Register, vii, 100-106. 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. The Alabama legislature by its act of December 11, 1900, submitted to the people the question of holding a convention and provided that if the popular vote should be favorable a convention should be held under the terms of this act; delegates to the proposed convention were voted for at the same election. The people did not vote upon the act itself but may in theory be said to have voted for a convention with knowledge of the terms of the act. But it is clear that in fact the question as to the holding of a convention was the only one passed upon by the people, and that the legislative act itself cannot be said to have received popular approval. Alabama acts, 1900-01, p. 224.

[8] This act was not submitted to the people.

tions 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.

The presumption in favor of a convention's having full power to act in the framing of a new constitution would, of course, not apply where no constitutional revision had been in contemplation either by the legislature or by the people, but where a convention had been called by legislative act to determine a particular question of public policy, or to interpret a clause of the existing constitution, as in New York in 1801, in South Carolina in 1832-33, and in Mississippi in 1850-51.[9]

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[10]—that

[9] It is in view of the specific purpose of the South Carolina convention of 1832-33 that we must interpret the language of the judges in State *ex rel.* McCready *v.* Hunt, 2 Hill (S. C.) Law, 1. The language of Judge O'Neall (pp. 222-223), for example, was proper with reference to the facts of the case, and need not be construed as laying down the principle that a constitutional convention is subordinate to the regular legislature: "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." See also *ibid.*, 240-243, 270, 271, 273, 275. But see Bradford *v.* Shine, 13 Fla., 393, 411-415.

[10] 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, be-

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 legis-

ginning with that of New York in 1821, but no 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. Jameson, 303-309, 410. The theory was advanced by several members of the Virginia constitutional convention of 1901-02, but denied by others. Debates of the Virginia Constitutional Convention of 1901-02, i, 63, 77, 83; ii, 3132. Dr. J. L. M. Curry in an address before the Louisiana convention of 1898 also stated the theory of conventional sovereignty. Amasa M. Eaton in Harvard Law Review, xiii, 284. It has attained the dignity of being embodied in dicta by the highest courts of several states. McMullen *v.* Hodge, 5 Tex. 34, 73 (1849): "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. . . " Sproule *v.* Fredericks, 69 Miss., 898, 904 (1892): "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 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."

lative consent. 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,[11] or that the legislature might prevent the submission of its work to the people.

The process of piece-meal amendment of state constitutions[12] is absolutely under the control of the state legislatures, except in the states which have adopted the popular initiative. By the ordinary amending procedure no action may be taken except upon the initiative of the legislature; this method of altering constitutions is 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 the one 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 regular legislative body. 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. Should the latter attempt to enact a law prohibiting the constitutional convention from restricting the existing power of the legislature, the act would be at

[11] Language introduced into the Alabama constitution of 1901 would seem explicitly to inhibit any such action.

[12] As distinct from amendment or revision by conventions.

once recognized as an unwarranted invasion of the rights of the people." [13]

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, but independent within its proper sphere. Under this view the legislature cannot bind the convention as to what shall be placed in the constitution, or as to the exercise of its proper duties. If then we say that the convention is independent of the regular legislature in the exercise of its proper duties, it will be necessary to discuss for a moment what are its proper functions. These are simply to propose a new constitution or to propose constitutional amendments to the people for approval; or, in states where the submission of constitutions is not required, to frame and adopt a constitution if they think proper. In this sphere, and in the exercise of powers incidental to its proper functions, it would seem that constitutional conventions should not be subject to control by legislative acts.

It may be well to call attention to some of the cases in which legislatures have sought to limit the power of con-

[13] Revised Record New York Constitutional Convention of 1894, i, 250. Similar language was used in a committee report to the Michigan convention of 1908. Debates Michigan Constitutional Convention of 1908, ii, 1274-1276. 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 constitution, than is the legislature in placing limitations upon the convention, if the legislature were assumed to have such power. This practical consideration is particularly strong with reference to those states whose constitutions require that the work of a convention be submitted to the people.

ventions. 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 restrictions were observed.[14] A similar oath was required by legislative act and taken by the delegates to the Georgia convention of 1833. 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.[15] The legislative acts under which conventions were assembled in Illinois in 1862 and 1869 required that delegates to the conventions should take an oath to support the constitution of the state; objection was made to this oath, inasmuch as the conventions were chosen to propose a revision of the state constitution, and the convention of 1862 refused to take the oath; the convention of 1869 took the oath in a modified form.[16]

[14] Jameson, 282-284, 366, 381.

[15] Louisiana acts, 1896, no. 52. The Louisiana act of 1896 was submitted to and approved by the people, as was also the act calling the North Carolina convention of 1835. The Louisiana convention of 1898 expressly recognized the legislative act as binding upon it, and the same view is found in a dictum of the Louisiana supreme court in Louisiana Railway and Navigation Co. *v.* Madere, 50 So., 609 (1909). It would seem that these conventions 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.

[16] Jameson, 282-284. A similar question arose in the Virginia convention of 1901-02; the Virginia constitution of 1870 required all officers of the state to take an oath to the state constitution and "to accept the civil and political equality of all men before the law;" it was argued that delegates to the convention were not officers as the term was used in the constitution of 1870 and the oath was not taken. Debates Virginia Convention of 1901-02, i, 3-17, 29-88. Upon the question as to whether delegates to a convention are state officers

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, but did not bind the delegates to the convention by oath to observe the legislative restrictions.[17] The legislative restrictions were not observed 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."

The New York convention of 1867 sat beyond the time fixed by the legislature for its work to be submitted to the people, because its work was not completed within the time fixed by legislative act. In Alabama the legislature limited to fifty days the compensation of delegates to the convention of 1901, but the convention resolved that the pay of its members should continue after the expiration of the fifty days and until the completion of its work. This action is in strong contrast with that of the New York convention of 1894, which under similar circumstances continued its work but without further compensation. With reference to the appropriation of money it seems clear that ordinarily a convention has no power, because in most cases the existing constitutions provide that money shall only be paid

see Jameson, 317-320. By the constitutions of Colorado, Illinois, and Montana delegates to a convention are required to take an oath to support both the federal and state constitutions.

[17] Alabama acts, 1900-01, p. 224.

from the state treasury upon a legislative appropriation; sufficient appropriations of money have usually been made by the legislatures for the use of conventions.[18]

Of especial importance are the cases in which legislatures have required that proposed constitutions be submitted to the people in a particular manner or at a particular time, and in which conventions have declined to observe such restrictions. Wells *v.* Bain and Wood's Appeal [19] are the most important cases of this character, and are the ones most relied upon as authority for the view that conventions are absolutely bound by legislative acts. 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, and that one-third of the members of the convention should have power to require the separate submission of any change proposed by the convention. 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.[20] It also refused to submit the judiciary article separately although it was claimed that a third of the members of the convention had

[18] Jameson, 435-436.

[19] 75 Pa. St., 39, 59. The statements in Wood's Appeal are mere dicta and are of no force as authority.

[20] This action was taken because the regular election machinery of Philadelphia was admittedly corrupt, and there was strong reason to suspect that it would be employed fraudulently to defeat the proposed new constitution.

required such separate submission. An injunction was granted restraining the commissioners appointed by the convention from holding the election in Philadelphia. The court decided that sufficient basis had not been presented to show that the convention had violated the provisions of the law with reference to a separate submission when this was demanded by one-third of the members, but 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.[21]

In the more recent case of Carton *v.* Secretary of State,[22] the legislature of Michigan in the law under which the convention was called provided that the new constitution should be submitted to the people in April, 1908; but the convention did not complete its work until the latter part of February, and ordered that the submission should be in November instead of April, 1908. The secretary of state doubted the power of the convention to fix a date other than

[21] In connection with Wells *v.* Bain attention should be called to the thorough argument of the case, which may be found in the Philadelphia Press, Dec. 3, 4, 5, 1873. The arguments advanced in support of the convention's power were clearer and more convincing than those presented by the court. It has been suggested elsewhere that a state legislature, in the exercise of its general powers, may call a convention even in the absence of express constitutional authority to do so. See p. 44. 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, but such an argument, even if it be considered valid, is applicable only to those states whose constitutions contain no provision whatever with reference to the calling of conventions. See statement in Carton *v.* Secretary of State, 151 Mich., 343.

[22] 151 Mich., 337, 340-343, 379 (1908).

that set by the legislature, and the president of the convention sought a mandamus to compel him to act upon the convention's order. The mandamus was granted, but the court was not in agreement as to the reasons for such action. Several members of the court took the ground that the existing constitution impliedly required submission at the general election in November, and that therefore the legislative requirement was invalid as in violation of the constitution. Chief Justice Grant, with whom one other member of the court concurred, took the broader ground that: "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 an 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. . . . The convention was the proper body to determine at what election it [the proposed constitution] should be submitted unless that is fixed in the present constitution. . . . I can find no language in the constitution from which any implication can arise that this power was vested in the legislature." Justice Hooker, in a dissenting opinion, contended that the convention was bound by the legislative act, but said that he had "no intention to dispute the fact that the convention has a sphere in which the legislature cannot intrude, a discretion that it cannot control, but that discretion has its clear limitations."

The legislature of Kentucky, acting under the constitution of 1850, passed an act in 1890 providing for the election of delegates to a constitutional convention. The constitution of 1850 authorized the legislature to call a convention, after two popular votes in favor of such action, but

contained no provision regarding the submission of a constitution to a vote of the people; the legislative act, however, provided that before any constitution drafted by the convention should become operative, it should be submitted to the voters of the state and ratified by a majority thereof. The convention met in September, 1890, drafted a constitution and submitted it to the people in the following April, and the constitution was ratified by a popular vote. The convention reassembled in September, 1891, made numerous changes in the constitution, some of which were alleged to have been material, and promulgated the amended instrument. An effort was then made to enjoin the printing and preservation of the constitution, and to have it declared invalid. The court of appeals of the state declined to pass upon the power of the legislature to bind the convention, but held that the constitution must be recognized as valid inasmuch as the people and the political organs of government had acted under it as a valid instrument.[23]

Similarly the legislature of Virginia, in calling the convention of 1901-02, required that it should submit its work to the people, although there was no such requirement in the Virginia constitution of 1869. The convention entirely disregarded the legislative requirement that its work should be submitted to the people, and promulgated the constitution of 1902 without submitting it to a popular vote.[24] Taylor, who was tried without a jury under the constitution of 1902, and sentenced for a felony, contended that this con-

[23] Miller *v.* Johnson, 92 Ky., 589; 15 L. R. A., 524 (1892). So the Illinois convention of 1847, although required by legislative act to submit its work to the people did not submit one article of the constitution which it framed, but its action was never contested in the courts.

[24] As to the reasons for such action see A. E. McKinley, *Two New Southern Constitutions,* Political Science Quarterly, xviii, 480.

stitution was invalid because not submitted to the people. Here also the court refused to consider the question as to whether the legislature might bind the convention, but said that the organs of the regular state government and the people had been acting under the constitution for nearly a year and that: "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. . . ." [25] Thus we have the highest courts of the states of Kentucky and Virginia declining to hold constitutions invalid which had been framed in violation of statutory restrictions, and under the circumstances it is difficult to conceive how the courts could have done otherwise than sustain the constitutions in these cases.

Upon the larger question as to whether a constitution shall or shall not be submitted to the people, and as to the method of submission if it is submitted, although there is little authority either way, it would seem that the legislature cannot bind a convention; Wells *v.* Bain and Judge Jameson's work are the only authorities supporting to its full extent the theory of conventional subordination to the legislature.[26] Judge Jameson took the ground that the submission of a constitution is an act within the power of the or-

[25] Taylor *v.* Commonwealth, 101 Va., 829 (1903).

[26] 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 convention. *Ex parte* Birmingham and Atlantic Railway Co., 145 Ala., 514.

dinary legislature,[27] but it is difficult to look upon it otherwise than as a step in the framing of a constitution. To admit that after a convention has acted the legislature may submit its work in any way it thinks proper, or may defeat the proposed constitution by refusing to submit it at all (if the existing constitution requires such submission), is practically to destroy the value of the convention as an independent organ.

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,[28] and to issue orders for elections to fill vacancies in its membership.[29]

[27] Jameson, 417-421.

[28] Revised Record New York Constitutional Convention of 1894, i, 244-270; Lincoln, *Constitutional History of New York*, iii, 666. A person claiming to have been elected a member of the New York convention of 1894 sought a writ of prohibition from the supreme court of that state to prevent the convention's determining his right to a seat therein, and claimed that whether or not he was entitled to the seat was a question for determination by the courts. The convention adopted a strong report, prepared by its judiciary committee, denying the power of the court, and the court discontinued proceedings in the case. Some constitutions, as for example, those of Delaware and New York, contain specific provisions regarding the power of conventions to determine their rules of proceedings, pass upon the qualifications of their members, choose their own officers, and to fill vacancies. In Colorado vacancies in a convention are filled by means of writs of election issued by the governor of the state, and in Kentucky power is specifically conferred upon the general assembly to provide for the hearing of contested elections and issuing writs of election in case of a tie.

[29] Jameson denies that a convention has power to issue orders for

A dictum of the Minnesota court in the case of Goodrich *v.* Moore [30] went much further than this. The president of the convention of 1857 had made a contract for the printing of the journal and proceedings of the convention, and this contract was subsequently ratified by the legislature, which appropriated money to pay for the printing; Goodrich, the state printer, claimed that he was entitled by virtue of his position to do the printing, and obtained an injunction to prevent Moore from proceeding with the work. The court dissolved the injunction, and said: "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 sov-

elections to fill vacancies, unless such power is expressly conferred by legislative act. *Constitutional Conventions*, 331-340, 392-393. But he is of the opinion that a convention has at least the powers of an unofficial public meeting. *Ibid.*, 455-472.

[30] 2 Minn., 61 (1858).

ereign 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." The court was unquestionably right in its statement regarding the power of a convention to control its own proceedings, independently of the legislature, but it is questionable whether the people in their sovereign capacity may properly assemble in convention, and it is also doubtful whether the printing of its proceedings for permanent record is an essential or incidental function of a constitutional convention.

As has been said, few cases have arisen in which courts have been called upon to pass on restrictions which legislatures have sought to impose upon conventions. In addition to the cases referred to above, several other cases have given rise to dicta upon the question. In Loomis *v.* Jackson [31] the decision was rendered by a special election court, which had no other function than that of deciding an election contest; in addition this court did not have before it any effort by the legislature to restrict a convention, so that its expression was purely dictum. The person rendering the decision of this court said: "I have had no difficulty in reaching the following conclusion upon the constitutional questions presented in this specification, viz: 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

[31] 6 W. Va., 613, 708 (1873).

these powers. . . ." Similarly in Sproule *v.* Fredericks,[32] the Mississippi court said that the legislature would have no power to require a convention to submit its work to the people, but in this case the legislature had not made any effort so to restrict the convention, and the judicial expression here also was purely dictum.

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. Legislative acts are usually necessary for the assembling of conventions, but this dependence of conventions upon legislatures has as yet caused few conflicts. 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.[33] However, it would be better to have the assembling of conventions made independent of legis-

[32] 69 Miss., 898 (1892). Dixon *v.* State, 74 Miss., 277.

[33] Jameson, 369-377, reviews these cases, and says that only in three cases have conventions disobeyed legislative restrictions. To the cases of Illinois, 1862 and 1869, and Pennsylvania, 1873, should certainly be added those of Illinois, 1848, Alabama, 1901, and Virginia, 1902.

lative action, as in New York and Michigan. 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.

Except in Pennsylvania, it would seem that a convention may, unless restricted by the existing state constitution, determine whether or not it will submit its work to the people and equally as to the manner of submission, and may regulate the details of its procedure, irrespective of legislative action in these matters.[34] Submission of a constitution to the people may be and is the more proper policy, but it would seem to be a matter within the discretion of the convention itself, unless submission is required by the existing constitution.

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.

It is clear that existing constitutional provisions are bind-

[34] The constitutions of Oklahoma and Oregon by requiring that acts providing for a convention be submitted to the people, would seem impliedly to make the terms of such acts binding upon a convention when assembled. In states having the initiative and referendum, an act adopted by the people would perhaps in no case be disregarded by a convention assembled thereunder, even though legally the terms of the act might be disregarded. See Opinion of the Justices, 6 Cushing, 574 (1833), and State *ex rel.* Fortier *v.* Capdeville, 104 La., 561 (1901).

ing upon a convention.[35] 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. 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.[36]

Reference is made in another part of this discussion to the attitude of the courts toward constitutional provisions regarding the amendment of state constitutions.[37] It has been shown that the courts as a rule construe such provisions liberally, but declare invalid amendments even after they have been approved by the people, with reference to which the constitutional requirements have not been substantially observed. If the courts took the same position with reference to a complete constitution, it is clear that

[35] The constitution may of course, place definite limitations upon the power of a convention, or subordinate it to the legislature. By the Kentucky constitution of 1799 the legislature in passing an act taking the sense of the people upon the calling of a convention was required to specify "the alterations intended to be made," and the convention seemingly would have been bound by such specification.

[36] See the state cases of McElvain *v.* Mudd, 44 Ala., 48; State *v.* Keith, 63 N. C., 140; Gibbes *v.* G. & C. R. R. Co., 13 S. C., 228; Hawkins *v.* Filkins, 24 Ark., 286; Penn *v.* Tollison, 26 Ark., 545; Berry *v.* Bellows, 30 Ark., 198; Bragg *v.* Tuffts, 49 Ark., 554. See also Cooley, *Constitutional Limitations*, 7th ed., p. 62.

[37] See pp. 215-221.

they would hold a constitution invalid, even after its approval by the people, if the convention had not been assembled in accordance with the constitutional forms, or if when assembled the convention in framing a constitution had not complied with the constitutional requirements. To what extent and in what manner will the courts enforce constitutional restrictions upon the forming of new constitutions?

There is no judicial authority squarely upon this question, but a similar question has been discussed in the decisions which have related to the violation of legislative restrictions sought to be imposed upon conventions, and some light may be thrown upon the judicial attitude by a discussion of these cases. In the case of Frantz *v.* Autry,[38] it was contended that the convention of Oklahoma had exceeded the powers conferred upon it by the congressional enabling act, in erecting new counties and appointing officers for such counties. An injunction was sought to restrain the officers appointed by the convention from acting, and also to restrain the submission to the people of that part of the constitution which provided for the division of the county in question. The court upheld the action of the convention as within its power, and in its decision declared that the convention was a legislative body of the highest order and "that the courts will not interfere by injunction or otherwise with the exercise of legislative or political functions." The court said further: "To concede the power of the courts to enjoin and restrain the convention in the exercise of its powers in incorporating any legislative matter that it may deem appropriate therein, on the ground that it is unconstitutional and void, in advance of the submission of the same to the people for ratification or rejection, and prior to the time that it is approved by the President, would, it seems to

[38] 18 Okla., 561, 604, 605 (1907).

us, lead to interminable litigation, and the inevitable result would be to tie the hands of the convention and indefinitely postpone the submission of the constitution or any of its provisions, to a vote of the people. Fortunately, such is not the law. If the constitution, or any of its provisions, is repugnant to the constitution of the United States or any of the terms and conditions of the enabling act, these questions can be litigated and determined at the appropriate time. 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."

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; similarly several state courts have declined to interfere with the submission of a proposed constitutional amendment to the people by the legislature, reserving the power, however, to declare the amendment invalid after popular approval if it were shown to have been improperly adopted. "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." [89] The convention

[89] Revised Record New York Constitutional Convention, i, 245. (Report of Judiciary Committee.) A similar statement may be found in the report by a committee to the Michigan convention of 1908. Debates Michigan Constitutional Convention of 1908, ii, 1274-1276.

is a legislative body, and according to the well-established rule courts will not restrain the enactment of legislation, although they will inquire into the validity of legislation after it has been enacted. However, the Pennsylvania court in Wells *v.* Bain did restrain the submission of a constitution in a particular manner, and this case is precisely in point because submission was here enforced in the manner required by legislative act, and in Pennsylvania a legislative restriction was considered equally as binding as a restriction imposed by a constitutional provision. It seems clear, however, that courts would only in extreme cases interfere with a convention's action, and restrain the submission of a constitution to the people, or seek to prevent submission in a particular manner, even though a convention in such matters had not strictly observed the constitutional requirements.[40]

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. Constitutional amendments have frequently been declared invalid because not properly proposed, even after the people had approved such amendments, and a similar attitude might be taken by the courts with reference to particular provisons in a new constitution, if the constitutional objection did not relate to the whole. But even here the judicial action would be a delicate one, although not much more delicate than that of passing upon an amendment which had received popular approval. The Pennsylvania legislature in 1872 by its act calling a convention forbade

[40] For a discussion of the use of injunctions to restrain the submission of proposed constitutional amendments, and as to whether it is within the province of a court to pass upon the question of the proper adoption of constitutional provisions see pp. 209, 228. See also Miles *v.* Bradford, 22 Md., 170 (1864).

the convention to amend the bill of rights; the convention did amend the bill of rights, and an injunction was sought to restrain submission to the people; the injunction was denied by the lower court, and the case was appealed to the state supreme court, but was not heard until after the constitution had been ratified by a popular vote. The court dismissed the case, saying: "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." [41] 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." [42] 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. Had the restrictions here been ones imposed by the Pennsylvania constituion of 1838, the case would have been precisely parallel with those in which amendments have been declared invalid because not adopted in compliance with constitutional forms, but the Pennsylvania court declined to extend to this case its theory that a

[41] Wood's Appeal, 75 Pa. St., 59.

[42] Jameson, 407.

convention may be absolutely bound by legislative act. Under the prevailing doctrine with reference to amendments the court's duty would have been clear had the restrictions been imposed by constitutional provisions rather than by legislative act.

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 attitude should be any more liberal than with respect to constitutional amendments.[43] 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.[44]

But when a whole constitution is tainted with irregularity, the difficulty of a court in declaring it invalid is correspondingly increased, especially if the constitution has been approved by the people and put into effect before the question as to the irregularity is presented to the court. For example, the constitution of Kentucky provides: "When a majority of all the members elected to each house of the general assembly shall concur, by a yea and nay vote, to be entered upon their respective journals, in enacting a law to take the sense of the people of the state as to the necessity and expediency of calling a convention for the purpose of revising or amending this constitution, and such amend-

[43] See pp. 215-221.

[44] Secombe *v.* Kittleson, 29 Minn., 555.

ments as may have been made to the same, such law shall be spread upon their respective journals. If the next general assembly shall, in like manner, concur in such law it shall provide for having a poll opened in each voting precinct" to take the sense of the people upon the question of calling a convention. Suppose that after a constitution had been adopted and put into operation under this provision, it were shown in a case properly before the court that some one of the steps required for calling a convention (for example, the entering of the law upon the journals) had not been complied with. Under similar conditions, perhaps, an amendment would be declared invalid, but if a complete constitution had already been put into operation it would be a very hardy court which would decide that the constitution was invalid because of an irregularity in the calling of a convention by which it had been framed.[45]

Cases somewhat similar to that suggested above have arisen both in Kentucky and Virigina, except that the requirements which had been violated in these cases were imposed by laws and not by constitutions. In each case the requirements related to the submission of the constitution

[45] An actual case similar to that mentioned above is that of the Delaware convention of 1852-53. Here the question of holding a convention was submitted to the people, and the convention was held although the question did not receive the affirmative vote of "a majority of all the citizens in the State, having a right to vote for representatives," as required by the constitution. If the constitution proposed by this convention had been adopted, the question of its validity might have been raised on the ground that the convention had been improperly called. So too the Maryland constitution of 1776 and the Georgia constitution of 1798 provided that constitutional changes should be made only by legislative action, but conventions were held in both states, and the acts of such conventions might have been attacked as invalid because in violation of constitutional provisions. But the questions here raised are purely theoretical, for the courts would at these earlier dates have almost surely considered these matters as political ones and have declined to pass upon them at all.

to the people, and in each the court declined to consider the question upon its merits. In Kentucky the legislature of 1890 required that the work of the convention of 1890-91 be submitted to the people; after submission to and approval by the people the convention further revised and amended the constitution. Had the Kentucky court gone into the merits of the case and held the convention strictly bound by the legislative act requiring submission, it would have had to enforce the constitution as voted upon by the people; if the convention acted illegally in revising the constitution after popular approval, it would have been easy in this case to separate out the illegal action and declare it invalid.[46] But the court elected to treat the question as one affecting the validity of the constitution as a whole[47] 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." In the case which came before it the Virginia court said: "The constitution of 1902 was ordained and proclaimed by a convention duly called by a direct vote of the people of the state to revise and amend the Constitution of 1869. The result of the work of that convention has been recognized, accepted,

[46] Miller *v.* Johnson, 92 Ky., 589.

[47] The court did consider the question of separating out the parts claimed to be invalid from those recognized as binding, but declined to enter upon such an undertaking, because of its view that the point referred to above was decisive.

and acted upon as the only valid Constitution of the State by the Governor in swearing fealty to it and proclaiming it, as directed thereby; by the Legislature in its formal official act adopting a joint resolution, July 15, 1902, recognizing the Constitution ordained by the convention which assembled in the city of Richmond on the 12th day of June, 1901, as the Constitution of Virginia; by the individual oaths of its members to support it, and by its having been engaged for nearly a year in legislating under it and putting its provisions into operation; by the judiciary in taking the oath prescribed thereby to support it, and by enforcing its provisions; and by the people in their primary capacity by peacefully accepting it and acquiescing in it, by registering as voters under it to the extent of thousands throughout the state, and by voting, under its provisions, at a general election for their representatives in the Congress of the United States. . . . 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." [48]

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

[48] Taylor *v.* Commonwealth, 101 Va., 829. This case was cited with approval in Weston *v.* Ryan, 70 Neb., 216, 217.

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." [49]

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 constitition 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.[50] On the whole it would seem that because

[49] 7 Howard, 1, 40. See also Brittle *v.* People, 2 Neb., 214, and the dictum in Koehler *v.* Hill, 60 Ia., 543, 608, 614.

[50] For a similar attitude taken by the courts of Colorado and Nebraska with reference to amendments vitally affecting the organization of government see pp. 222-225.

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 pursued in interpreting the constitutional restrictions placed upon the legislative power to propose amendments.

The discussion so far has related primarily to express constitutional restrictions upon or with reference to conventions. Implied restrictions upon conventions may be said to fall into two groups: (1) those implied from the constitution under which a convention is called; (2) those implied from the limited functions of conventions. These two classes of implied limitations coalesce and may be considered together. First, a constitution by providing for the calling of a convention to revise or frame the organic law of the state impliedly limits the functions of such a body to that one act and to the exercise of only such powers as are necessary or incident thereto. Second, in the absence of constitutional provisions regarding the convention, a convention if called acts under the constitution in existence, and by such constitution the exercise of executive, judicial, and regular legislative power are expressly conferred upon existing organs of government, which cannot properly be replaced until a new constitution framed by the convention is put into operation. Where the existing constitution provides that a certain power shall be exercised only by an organ of the existing government, as in provisions that money shall not be paid from the state treasury except under the authority of a legislative act,[51] it is undoubted

[51] For a discussion of cases in which conventions have sought to appropriate money see Jameson, 435-446. Carton *v.* Secretary of State, 151 Mich., 342. The Louisiana convention of 1898 authorized loans not only for the payment of its expenses but also for the mobilization of troops during the Spanish-American War, and its action was followed by legislative appropriations for these purposes. The constitu-

that a convention assembled under such a constitution may not exercise the power; the case is almost equally strong against a convention's power to exercise authority which has been expressly conferred upon another body by the constitution under which the convention is acting.[52] Third, in addition to the limitations implied from the constitution itself, it may be said that a convention is ordinarily a body assembled for a limited and definite purpose, and cannot be presumed to have other powers than those necessary for the performance of its proper functions.[53]

A number of cases have arisen in which conventions have exercised or have sought to exercise regular governmental power. The conventions of the early revolutionary period exercised such powers, but they were primarily provisional governments, and only incidentally constitutional conven-

tions of Colorado and Montana specifically authorize the legislatures to provide for the expenses of conventions, and that of Kentucky provides that the legislature shall fix the compensation of delegates to a convention. In New York and Delaware a convention has power "to appoint such officers, employees and assistants as it may deem necessary, and fix their compensation, and to provide for the printing of its documents, journal and proceedings." There is a similar provision in the Michigan constitution.

[52] With reference to an attempt by a convention to interfere with the existing state government Jameson very properly says: "That body cannot remove from office, or instruct those holding office, by any direct proceeding, as by a 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 duties." *Constitutional Conventions*, 4th ed., 320-325.

[53] If the above statements have any basis it would seem possible to hold that a convention is a body of limited power, without subordinating it to the legislature. Judge Jameson's theory that a convention must be either sovereign or subordinate to legislative control seems untenable. Jameson, 422-430.

tions, and are not relevant to the present discussion. The Louisiana convention of 1864 instructed the legislature to raise the salaries of school teachers.[54] During the secession [55] and reconstruction periods in the Southern States conventions in some cases took over almost all powers of government, although the state legislatures were naturally the bodies which suffered most from encroachments by the conventions. In Missouri a convention was elected on February 18, 1861, to "consider the relations between the government of the United States and the government and people of the State of Missouri; and to adopt such measures for vindicating the sovereignty of the state, and the protection of its institutions, as shall appear to them to be demanded." No secession ordinance was to be valid until ratified by the qualified voters of the state. The convention proved to be strongly union in sentiment, while the organized state government was equally as strong in its sympathy with the South. The convention met in February, 1861, and adjourned to the following December, having first appointed a committee to call it before that date if its assembling should seem necessary; the convention met again in July; Governor Jackson had now left the state; the convention removed Jackson and appointed another governor in his place, declared the seats of the members of the general assembly vacant, and abrogated the laws which the assembly had passed for the defense of the state against the federal government. The provisional officers chosen by

[54] Jameson, 320, note.

[55] 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.

the convention continued in office until August, 1864. The convention itself acted as the legislative body of the State, exercising these exceptional powers until July, 1863.[56]

The Missouri convention exercised extraordinary powers from necessity, because of the disappearance of the state government. In the seceding states the conventions acted by the side of organized governments, but would seem to have had full power to act with reference to matters of federal relations, as well as to revise the constitutions so as to make them conformable to the new conditions in which the states found themselves. The conventions of Mississippi, Texas, and Georgia confined themselves rather closely to the purposes for which they were assembled; those of South Carolina, North Carolina, Alabama, Louisiana, Virginia, Arkansas,[57] and Florida exercised regular legislative power in addition; the conventions of South Carolina, North Carolina, Arkansas, Virginia, and Florida each held several sessions, the South Carolina convention remaining in existence for nearly two years; the Alabama convention recognized the purely legislative character of much of its work, and provided that its ordinances should be subject to amendment and repeal by the general assembly.

The conventions held in the southern states in 1865-66, under proclamation of President Johnson, and those held in 1867-68, under congressional reconstruction acts,[58] were vested with powers greater than ordinary constitutional conventions in states with organized governments, inasmuch as they were authorized not only to frame constitutions

[56] Ordinances passed at the various sessions of the Missouri State Convention, 1861 and 1862 (St. Louis, 1862). Journal of the Missouri State Convention, June, 1863 (St. Louis, 1863).

[57] See statement in Bragg *v.* Tuffts, 49 Ark., 554.

[58] Richardson, *Messages and Papers of the Presidents*, vi, 312-314. United States Statutes at Large, xv, 2-4.

but also to take steps necessary for the erection of state governments.[59] In Virginia, Arkansas, Louisiana, South Carolina, Florida, and Georgia, the conventions of this period seem to have confined themselves rather closely to their proper functions, but in North Carolina (1865-66, 1868), Alabama (1865, 1867-68), Mississippi (1865), and Texas (1868), they acted as regular legislative bodies and passed ordinances of a purely legislative character.

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. Territorial conventions possess only such powers as are conferred upon them by the congressional acts under which they assemble; their acts in excess of such power may however be ratified by subsequent action of congress.[60]

[59] But the Florida court in Bradford *v.* Shine, 13 Fla., 393, 411-415, took a different view regarding the convention of 1865 in that state. President Johnson's proclamation provided for a convention "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 to restore said state to its constitutional relations to the federal government. . . " 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. . . " It held invalid a clause of the constitution of 1865 the inclusion of which it thought not to be within the power of the convention.

[60] Conventions assembling in territories without congressional authorization may in the same manner have their acts ratified by subsequent congressional action. For statements regarding powers of territorial conventions see Benner *v.* Porter, 9 How., 235, and McCornick *v.* Western Union Telegraph Co., 79 Fed., 449.

Several cases have occurred since 1860 in which conventions acting beside regularly organized governments in time of peace have exercised legislative power. The Missouri convention of 1865 passed several ordinances of a purely legislative character.[61] The same statement holds with reference to the Mississippi convention of 1890,[62] the South Carolina convention of 1895, the Louisiana convention of 1898,[63] and the Alabama convention of 1901. In the South Carolina convention a motion was made "that there shall be no session of the legislature this year, but that the convention shall do its work in its place."[64]

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 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

[61] Jameson, 322-324.

[62] Thorpe, *Federal and State Constitutions*, iv, 2129.

[63] *Ibid.*, iii, 1595; vi, 3345.

[64] Amasa M. Eaton in American Law Review, xxxi, 198, 210.

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.

In State *v.* Neal,[65] the supreme court of Missouri squarely upheld the power of the convention of 1865 to adopt ordinances of a legislative character. Neal had been indicted for perjury in violating an oath taken under the provisions of an ordinance of the convention. The court in sustaining the ordinance, 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." Even though the question of submitting the constitution were within the discretion of the convention it would seem that if this question were decided in the affirmative the constitution should have been submitted to all voters qualified under the existing constitution and that under the principles here laid down, a disfranchising ordinance was beyond the power of the convention. The court, however, took the view that the passage of the ordinance was within the power of the convention as a part of its authority with reference to a revision of the constitution.

[65] 42 Mo., 119 (1868).

Several cases came before the courts of Alabama involving ordinances passed by the conventions of 1865 and 1867-1868. In the cases arising with reference to the ordinances of 1865, the courts enforced such ordinances without questioning their validity, and when the question of validity was raised said that this convention was vested with all powers necessary to restore the state to its proper federal relations and in reality acted and possessed power to act as a provisional legislature.[66] The Alabama court at first took the same view with reference to the ordinances of the convention of 1867-68,[67] but later took a somewhat different position. In Plowman *v.* Thornton [68] there was brought into question the election ordinance of the convention, by which the terms of officers under the new government were so regulated that they should hold until their successors were appointed. The court held the ordinance to be properly within the power of a body convened not only "for the formation of a constitution" but also for "the organization and establishment of a state government," but said: "We assent fully to the proposition that the power of the convention was special and limited, and that it had not legislative power. But within this special and limited power was embraced the power of adopting an ordinance putting in operation the governmental agencies."

The case of Quinlan *v.* Houston & Texas Central Railway Company [69] involved the validity of a Texas ordinance of 1868 providing for the levy of a tax on certain counties

[66] Scheible *v.* Bacho, 41 Ala., 423; Kirtland *v.* Molton, 41 Ala., 548; Tarleton *v.* Bank, 41 Ala., 722; Powell *v.* Boon, 43 Ala., 459; Washington *v.* Washington, 69 Ala., 281.

[67] McElvain *v.* Mudd, 44 Ala., 48; *Ex parte* Hall, 47 Ala., 675; Crump *v.* Battles, 49 Ala., 223.

[68] 52 Ala., 559 (1875).

[69] 89 Tex., 356, 376-377 (1896).

in aid of a railway company, should a popular vote of such counties favor this action. The court said: "We are of opinion, however, that the ordinance was not valid. The convention which met on June 1, 1868, was assembled in pursuance of an act of congress passed March 23, 1867. It was called for the purpose of framing a constitution for the state with a view to its restoration to the union. The constitution to be framed by it was to be submitted to a vote of the people. . . . The act of congress did not invest the convention with the power of independent legislation. 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 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. . . . There is no provision for a submission of the independent ordinances. In Stewart *v.* Crosby, 15 Texas, 546, an ordinance attached to the constitution of 1845 was held valid. In that case the court says: 'For the present, then, it may suffice to say we think it free from doubt that the ordinance appended to the constitution is a part of the fundamental law of the land. Having been framed by the convention that framed the constitution of the state, and adopted by the convention and the people along with the constitution, it is of equal authority and binding force upon the executive, legislative, and judicial departments of the government of

the state as if it had been incorporated in the constitution, forming a component part of it.' This decision was followed without comment in Grigsby *v.* Peak, 57 Texas, 142, in passing upon the validity of an ordinance of the convention of 1866. . . . 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 the people, and in our opinion therefore had the power to pass ordinances without submitting them for adoption to a popular vote.[70] 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."

To the same effect is a dictum in the case of Gibbes *v.* Greenville & Columbia Railroad Company.[71] In this case there was under consideration a South Carolina convention ordinance of 1868 annuling earlier legislative acts under which contract rights had been acquired. The court declared the ordinance invalid as impairing the obligation of contracts, but said: "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 passed by a convention called for a particular and different purpose. The body

[70] This convention did submit the constitution which it framed but not the ordinance which was involved in this case.

[71] 13 S. C., 228 (1878). See also the statements of the South Carolina court in State *ex. rel.* McCready *v.* Hunt, 2 Hill (S. C.) Law, 1, 270.

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." [72]

The Illinois convention of 1862 adopted an ordinance reorganizing the government of the city of Chicago, and repealing certain legislative acts in conflict with the ordinance; this ordinance was to become effective if approved by the people of Chicago, and was so approved. Several months after this approval the constitution framed by the convention, together with the ordinance regarding Chicago, was rejected by the people of the state. The supreme court of Illinois declined to enforce the ordinance, but the reasons for its action are not known.[73] The case of *Ex parte* Birmingham and Atlantic Railway Company [74] involved the ordinance power of the Alabama convention of 1901. The convention provided by ordinance that a term of court should be held at Pell City in St. Clair county, and the rail-

[72] In State *v.* Keith, 63 N. C., 140 (1869), which was also decided upon the ground that the ordinance in question violated the federal constitution, the court discussed to some extent the legislative powers of the North Carolina convention of 1868. In Bragg *v.* Tuffts, 49 Ark., 554 (1887), the power of a convention to act as a regular legislative body is denied, but here too the ordinance in question was held invalid on federal grounds. A statement by Mr. William H. Armstrong in his argument in the case of Wells *v.* Bain is also of interest here: "I do not believe that the convention has legislative powers in the sense that they could enact a law and put that law into operation, which should of itself or by itself be binding upon the state, and for the plainest of reasons. A convention is called to do a specific and particular work. They are called to frame a constitution, and that constitution is absolutely null and void and nothing in contemplation of law, until it becomes a constitution either by proclamation or adoption, or both." Philadelphia Press, Dec. 4, 1873, p. 8.

[73] Jameson, 430-434.

[74] 145 Ala., 514 (1905).

road company sought to restrain the hearing of the case by a term of court held at that place. The law under which the convention assembled required that all its acts be submitted to the people. The constitution was submitted to the people for approval, but this ordinance was not a part of the constitution and was not submitted. The court said: "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." The court in this case, however, did not argue that a convention must not exercise legislative power, but seemed to take the view that the ordinance was invalid because not submitted to the people as required by legislative act—that is, that the act of the legislature was absolutely binding upon the convention.

In the case of Frantz *v.* Autry [75] the court was called upon to consider the powers of a territorial convention acting under the authority of a congressional enabling act. The constitution as drafted for submission to the people divided Woods county into three counties; the election ordinance passed by the convention erected the three counties, appointed officers for them, and provided that they should serve as independent election districts, all of this before the people had sanctioned the separation of the county by adopting the constitution. An injunction was sought to prevent the new officers from serving and also to prevent the submission of that part of the constitution which provided for the division of Woods county. An injunction was granted by the lower court but was dissolved by the territorial supreme court. The supreme court took the ground that the convention had authority under the con-

[75] 18 Okla., 561, 631 (1907).

gressional act not only to frame a constitution and provide for its submission to the people, but also to provide for the establishment of a full state government; and considered the erection of the counties as incidental to the exercise of these powers. The erection of new districts for election purposes would seem to have been properly within the power of the convention, but it is not clear why the convention should need to exercise power to erect counties for governmental purposes, unless it were necessary to appoint county officers in order to have counties properly act as election districts. Chief Justice Burford, who concurred in the conclusions of the court expressed clearly the limitations upon the powers of this (territorial) convention: "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." Justice Burwell, in dissenting, said that the constitution could only operate for the future, and was inoperative until after approval by the people; and that until then no new counties or officers could be created; his view was that the power exercised was not necessary to the convention's functions; and that while the convention might not be restrained, yet the courts must restrain the convention's officers from improper interference with the territorial officers before the constitution was adopted. The question is a close one, but it does seem that the convention went further than was necessary for the proper exercise of its functions.

It may be said to be fairly well established, then, that a convention may not supersede the regular executive, legislative, and judicial organs of a state; it properly acts only by means of the constitution which it frames or adopts,

and has only such powers as are necessary or incidental to the exercise of this function. Yet 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.[76] 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 [77] if the ordinances are submitted to the people with or at the same time as the proposed constitution.[78]

But how as to such separate legislation in a state where the submission of a constitution to the people is not required? In State *v.* Neal and Grigsby *v.* Peak convention ordinances were upheld because the conventions were not required to submit any of their actions to the people, al-

[76] "It seems plain that the really important law-making body at the present time is the convention." Dealey, *Our State Constitutions,* 9. See also Oberholtzer, *Referendum in America,* 76-98, and Jameson, 429-430. Bradford *v.* Shine, 13 Fla., 393, 411-415, is a case in which a convention's power in this respect was denied but under such conditions that this case can hardly be cited as a precedent here.

[77] The West Virginia constitution of 1876 recognizes such power by providing that: "And all acts and ordinances of said convention shall be submitted to the voters of the state for ratification or rejection, and shall have no validity whatever until they are ratified."

[78] For a discussion of the manner in which a convention may submit its work to the people see note on p. 258.

though they did submit the constitutions which they framed but not the ordinances which were before the courts. The Mississippi convention of 1890 and the South Carolina convention of 1895 did not submit either their constitutions or their ordinances to the people, and the constitutions in these cases stand upon the same basis as ordinances of a purely legislative character which the conventions may have enacted. Although it may be agreed that these conventions improperly exercised powers of a purely legislative character, sitll if the courts upheld constitutions promulgated by such conventions without popular approval, they would hardly dare annul legislative acts adopted by these bodies in the same manner; although they might interfere if a convention attempted to prolong its existence and exercise governmental powers after its constitutional functions had clearly ended.[79] 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.

[79] There have been only a few cases where conventions have, in time of peace, sought to prolong their existence after their work had been completed. For a discussion of this subject see Jameson, 476-489.

CHAPTER IV

The Amendment of State Constitutions

Reference has already been made to the fact that our states have developed two methods of altering their constitutions, the first, through constitutional conventions chosen for the purpose; the second, by means of giving power to the regular legislative bodies to propose or adopt amendments. We have said that the convention as an instrument for constitutional revision was first developed during the revolutionary period, and that constitutional conventions were provided for in the first constitutions of Pennsylvania, Vermont, Georgia, and Massachusetts, and in the New Hampshire constitution of 1784. Six of the revolutionary constitutions contained no provision for alteration in any manner. The five above referred to contained provision for alteration only by means of conventions. Three of the revolutionary constitutions, those of Maryland, Delaware, and South Carolina (1778), made provision for constitutional amendment by legislative action.

No one of the first state constitutions made provision for its alteration in more than one manner—those which considered the matter at all provided simply for one or the other methods here under consideration. But it soon became apparent that machinery would be needed both for the proposal of single amendments and for the revision of entire constitutions. Judge Jameson, speaking in 1887, said:

"Of the one hundred and nineteen constitutions framed

by that number of conventions nine have contained no provision for their amendment or revision; twenty-nine have contained provision for their amendment or revision through the agency of conventions only; thirty-five through the agency of the general assemblies only; and forty-six for their amendment through the agency of either conventions or the general assemblies . . . These two modes . . . have kept pretty equal pace throughout the whole range of our constitutional history, some constitutions adopting the one mode and some the other; but for the first sixty years only four authorizing both modes, that of the United States of 1787, that of South Carolina, 1790, and those of Delaware of 1792 and 1831. During the period beginning in 1835 and ending in 1885, however, ten constitutions have provided for amendment by convention only, twenty-two in the legislative mode only, and forty-one in both modes, showing a growing conviction that the legislative mode has advantages which make its more general adoption seem desirable, and yet that it alone is not adequate to the exigencies of the times, but needs to have coupled with it a provision for a convention when the people should deem it necessary or expedient to make a general revision of the constitution." [1]

Of the seventeen constitutions adopted since 1887,[2] all but one (that of North Dakota) contain provision for alteration both by legislative proposal and by constitu-

[1] Jameson, *Constitutional Conventions*, 4th ed., 550-551. See also Charles S. Bradley's *Methods of changing the Constitutions of the States, especially that of Rhode Island* (Boston, 1885), appendix, pp. 78-82. Of constitutions adopted since the Revolution those of Pennsylvania, 1790, and Virginia, 1830, 1851, 1864, contained no provision for alteration or amendment.

[2] Idaho, Montana, North Dakota, South Dakota, Washington, Wyoming, Mississippi, Kentucky, New York, South Carolina, Utah, Delaware, Louisiana, Alabama, Virginia, Oklahoma, Michigan.

tional convention; the Oregon constitution of 1857 contained no specific provision for revision by convention, but such a provision was inserted into it by amendment of 1906. In all of the states except New Hampshire specific provision is now made for the amendment of state constitutions upon the initiative of the legislature. As already suggested in an earlier chapter, the convention system has been adopted almost as extensively, and although twelve of the state constitutions now in force make no specific provision for conventions, yet in a number of these states conventions have been held, and Rhode Island is the only one of them in which the view is officially declared against the holding of a convention. 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. The amendment of constitutions by conventions really antedated the general use of the method of partial amendment through legislative action, although the two methods were introduced at the same time—the convention was more extensively used at first, but its cumbersomeness for small changes [3] soon caused the states which employed it to adopt in addition or as a substitute the method of initiating proposed amendments in the legislature.

The method of constitutional amendment through the regular legislative organs of the state had its origin in the South. The constitutions of Maryland (1776), Delaware (1776), and South Carolina (1778) made provision for partial amendment through legislative action. Delaware provided that certain parts of its constitution should not

[3] The New York convention of 1801, for example, was called primarily for the purpose of determining the interpretation of one clause of the constitution of 1777.

be subject to amendment and that "no other part of this constitution shall be altered, changed, or diminished without the consent of five parts in seven of the assembly, and seven members of the legislative council."[4] The legislative council was composed of nine members. In South Carolina (1778) it was provided that "no part of this constitution shall be altered without notice previously given of ninety days, nor shall any part of the same be changed without the consent of a majority of the members of the senate and house of representatives."[5] For ordinary legislation sixty-nine members of the assembly, out of more than two hundred, formed a quorum, and less than half of the members of the senate were sufficient to act. These two constitutions established a distinction between constitutional and ordinary legislation, but the distinction was a very slight one. Constitutional changes might be adopted by a single legislature, but a larger majority was required for such action than for ordinary legislation.

Maryland made a sharper distinction between constitutional amendments and ordinary legislation. The constitution of that state (1776) provided that no part of the constitution or bill of rights should be altered "unless a bill so to alter change or abolish the same shall pass the general assembly, and be published at least three months before a new election, and shall be confirmed by the general assembly, after a new election of delegates, in the first session after such new election," and that no part relating especially to the Eastern Shore should be altered without the concurrence of two-thirds of the members of both branches of the legislature.[6]

[4] Delaware constitution of 1776, Art. 30.

[5] South Carolina constitution of 1778, Art. 44.

[6] Maryland constitution of 1776, Art. 59.

The Maryland provision was for some time copied, but those of Delaware and South Carolina were not imitated. South Carolina in 1790 and Delaware in 1792 copied the Maryland plan, and the South Carolina provision of 1790 represents pretty well this method of amendment: "No part of this constitution shall be altered, unless a bill to alter the same shall have been read three times in the house of representatives and three times in the senate, and agreed to by two-thirds of both branches of the whole representation; neither shall any alteration take place until the bill so agreed to be published three months previous to a new election for members to the house of representatives; and if the alteration proposed by the legislature shall be agreed to, in their first session, by two-thirds of the whole representation in both branches of the legislature, after the same shall have been read three times, on three several days, in each house, then, and not otherwise, the same shall become a part of the constitution."

It was thought not to be sufficient to have constitutional amendments adopted, as in South Carolina in 1778 and Delaware in 1776, simply by an increased majority of a single legislature. So the Maryland plan for two successive legislative actions was borrowed, but the older requirement that such action be had by increased legislative majorities was also retained. The people did not vote directly on a proposed amendment, but it was considered sufficient to have an amendment passed by two successive legislatures, by a vote greater than that required for ordinary legislation. The people were presumed to have passed upon the amendment in the election of a new house of representatives, and if a proposed amendment were one of great popular interest, it would naturally have been made an issue in this election. This arrangement represented a decided step in advance in popular control over

amendments, as compared with that first adopted in Delaware (1776) and South Carolina (1778), and for a time was considered to give a sufficient popular participation in the adoption of constitutional amendments. Amending provisions somewhat similar to those of South Carolina (1790) were adopted in Delaware (1792, 1831, 1897), Georgia (1798), Missouri (1820), Arkansas (1836, 1864), South Carolina (1865), and Florida (1839). However, the growing democratic movement brought about a feeling that it would be desirable to have a more definite popular participation in the amendment of constitutions, and Delaware (1897) is the only state which still clings to an amending procedure without a popular vote of approval upon each proposed amendment.

By the Alabama constitution of 1819 provision was made by which the people should vote directly upon proposed amendments—the earlier plan as used in Maryland and South Carolina was so altered that the people should vote directly upon amendments proposed by the legislature—but to the next succeeding legislature was left the determination as to whether an amendment specifically approved by the people should be adopted into the constitution. The plan of submitting a proposed amendment to the people, but of giving to a second legislature the final decision of the matter has not been very extensively employed, and has been abandoned by Alabama and Texas, the two States in which it was first employed.[7] South Carolina adopted this plan in 1868 and still retains it. The South Carolina constitution of 1895 provides that: "If the same [amendment or amendments] be agreed to by two-thirds of the members elected to each house, such amendment or amend-

[7] Such provisions were contained in the Alabama constitutions of 1819, 1865, and 1867, and in the Texas constitutions of 1845, 1866, and 1868.

ments shall be entered on the journals respectively, with the yeas and nays taken thereon; and the same shall be submitted to the qualified electors of the state at the next general election thereafter for representatives; and if a majority of the electors qualified to vote for members of the general assembly, voting thereon, shall vote in favor of such amendment or amendments, and a majority of each branch of the next general assembly shall, after such an election and before another, ratify the same amendment or amendments, by yeas and nays, the same shall become part of the constitution." The Mississippi constitution of 1890 also leaves the final determination with reference to an amendment to the legislature by providing that after an amendment has received the popular approval "then it shall be inserted by the next succeeding legislature as a part of this constitution." An amendment approved by the people may thus be defeated by the legislature's disobeying the constitutional order to insert it into the constitution.[8]

However, with these exceptions the whole development has been toward confining legislative action simply to the proposal of amendments, the vote of the people being the final determination as to whether an amendment becomes or fails to become a part of the state's fundamental law. The first suggestion for amendment upon the proposal of the legislature and after approval by the people was that contained in the draft of a proposed constitution for Virginia prepared by Jefferson in 1776; a similar provision was inserted into the proposed constitution which was rejected by the people of New Hampshire in 1779: "The general court shall have no power to alter any part of this constitution: but in case they should concur in any pro-

[8] Upon this subject see p. 196. Similar language appeared in the Mississippi constitutions of 1832 and 1868.

posed alteration, amendment, or addition, the same being agreed to by a majority of the people, shall become valid." [9]

The first constitution to take the final determination upon amendments from the legislature and to confide this power in the hands of the people was that of Connecticut in 1818. The Connecticut provision reads as follows: "Whenever a majority of the house of representatives shall deem it necessary to alter or amend this constitution, they may propose such alterations and amendments, which proposed amendments shall be continued to the next general assembly, and be published with the laws which may have been passed at the same session; and if two-thirds of each house, at the next session of said assembly, shall approve the amendments proposed by yeas and nays, said amendments shall, by the secretary, be transmitted to the town clerk in each town in the state, whose duty it shall be to present the same to the inhabitants thereof, for their consideration, at a town meeting, legally warned and held for that purpose; and if it shall appear, in a manner to be provided by law, that a majority of the electors present at such meetings shall have approved such amendments, the same shall be valid, to all intents and purposes, as a part of this constitution."

Connecticut thus borrowed the amending procedure already in use in a number of states, but added thereto a direct popular vote after the second legislative action. The reason for two legislative actions was to test popular sentiment with reference to a proposed amendment, but the need for doing this ceased when the question was submitted to a direct vote of the people. This fact was not appreciated by the Connecticut convention, which borrowed the two

[9] Ford's *Writings of Jefferson*, ii, 29, 30. *New Hampshire Town Papers*, ix, 841. Jefferson's plan required the approval of a proposed change by county meetings in two-thirds of the counties.

successive legislative steps from the Southern constitutions. The Maine constitution of 1819 is the first to dispense with two legislative actions, and to provide for the adoption of an amendment upon proposal by the legislature and subsequent approval by the people. The amending provision adopted by Maine in 1819 reads as follows: "The legislature, whenever two-thirds of both houses shall deem it necessary, may propose amendments to this constitution; and when any amendment shall be so agreed upon, a resolution shall be passed and sent to the selectmen of the several towns, and the assessors of the several plantations, empowering and directing them to notify the inhabitants of their respective towns and plantations, in the manner prescribed by law, at their next annual meetings in the month of September, to give in their votes on the question whether such amendment shall be made; and if it shall appear that a majority of the inhabitants voting on the question are in favor of such amendment, it shall become a part of this constitution."

Since 1818 most of the states adopting new constitutions have followed either the Connecticut or Maine plans—have provided for the proposal of amendments either by two successive legislatures or simply by one legislature, with the amendment becoming effective upon the subsequent approval of the people. A few states have since that date adhered to the plan of amendment by two successive legislatures, without a popular vote, and a few also have clung to the system adopted into the Alabama constitution of 1819, providing for a popular vote upon each amendment, but leaving to a succeeding legislature the determination of whether an amendment approved by the people should become effective. Delaware (1897) is now the only state which does not require a popular vote upon amendments. South Carolina and Mississippi are the only ones in which

a popular vote of approval may be nullified by subsequent legislative action.[10]

Popular control over the adoption of amendments has, therefore, been almost fully established. But until recently the power to propose amendments had been left entirely in the hands of state legislatures. During the past few years, however, there has been a demand for a popular share in the proposal of amendments as well, and several states have adopted constitutional provisions permitting this to be done, although leaving undisturbed the legislative power of proposing amendments. An Oregon constitutional provision of 1902 permits the proposal of amendments to a vote of the people by a petition of eight per cent of the legal voters of the state; Oklahoma in 1907 provided that an amendment may be initiated by a petition of fifteen per cent of the legal voters of the state; and Missouri in 1908 adopted a provision permitting amendments to be proposed by a petition of eight per cent of the legal voters in at least two-thirds of the congressional districts of the state. The Michigan constitution of 1908 provides for the popular initiation of amendments, but permits the state legislature to prevent the submission of such proposals to the people if it wishes to do so. The Michigan provision reads as follows: "Amendments may also be proposed to this constitution by petition of the qualified electors of this state but no proposed amendment shall be submitted to the electors unless the number of petitioners therefor shall exceed twenty per cent of the total number of electors voting for secretary of state at the preceding

[10] It is of some interest to note that the Alabama convention of 1819 and the Missssippi convention of 1832, although not submitting their work to a popular vote, did provide in the constitutions which they drafted that proposed amendments should be submitted to a direct vote of the people.

election of such officer. All petitions shall contain the full text of any proposed amendment, together with any existing provisions of the constitution which would be altered or abrogated thereby . . . All petitions for amendments filed with the secretary of state shall be certified by that officer to the legislature at the opening of its next regular session; and, when such petitions for any one proposed amendment shall be signed by not less than the required number of petitioners, he shall also submit the proposed amendment to the electors at the first regular election thereafter, unless the legislature in joint convention shall disapprove of the proposed amendment by a majority vote of the members elected. The legislature may, by a like vote, submit an alternative or a substitute proposal on the same subject." It is probable that this provision will result in the submission to the voters of Michigan of practically all proposed amendments petitioned for. The people, having gained control over the ratification of amendments, have thus assumed a large control over the proposal of amendments as well.[11]

[11] No part of the amending clause of the Michigan constitution may be changed by means of an initiative proposal. An amendment proposed by popular initiative must, in order to be adopted receive the affirmative vote of "not less than one-third of the highest number of votes cast at the said election for any office," while amendments proposed by the legislature are required to obtain simply a majority of the votes cast upon their adoption or rejection. The initiative for the proposal of amendments was employed in Oregon in 1906 and 1908; five amendments were proposed in 1906 and six in 1908, with reference to the following subjects: *In 1906.* (1) Woman's suffrage. (2) Amendment of the constitution; referendum on laws for the holding of constitutional conventions. (3) Giving cities exclusive power to frame and amend their charters. (4) Permitting state printing and compensation of state printer to be regulated by law. (5) Extending initiative and referendum to towns, cities, etc. Referendum on sections or items of legislative acts. *In 1908.* (6) Woman's suffrage. (7) Permitting cities and towns to regulate theaters,

Along with this steady increase of popular control has gone a movement toward the simplification of the amending process. The general adoption of a method of constitutional amendment through legislative proposal was in itself the one important step toward greater ease in altering the state's fundamental law. This method once adopted, the tendency has been to make its use easier. A feeling once existed that the constitution was an instrument embodying permanent and unchanging principles, and that it should therefore be altered infrequently; as a corollary to this view numerous restrictions were placed upon the power of amendment. But now, since our state constitutions have come to be filled with legislative details which require frequent alteration, the view as to the unchangeable nature of constitutions has undergone a change. Frequent alterations are now necessary to bring the constitutional provisions into harmony with changing conditions, and this fact has made it necessary that machinery be devised for making such changes easily and promptly.

Reference was made above to the fact that Connecticut in 1818 adopted the plan of requiring two legislative actions before a proposed amendment should be submitted to the people. Maine in her constitutional provision of

race-tracks, pool-rooms, sale of liquor, etc. (8) Single tax amendment—exemption from taxation of improvements on property. (9) Recall of elective officers. (10) Proportional representation. (11) Indictment by grand jury rather than prosecution on information. The proposals numbered one, six, seven, and eight were rejected by the people; the others were adopted.

A proposal for a popular initiative upon laws and constitutional amendments was adopted by the Arkansas legislature in 1909, and will be submitted to the people in September, 1910. Arkansas Acts, 1909, p. 1238. A similar proposal adopted by the Nevada legislature in 1909 must be submitted to and approved by the succeeding legislature before it may be acted upon by the people. Nevada Laws, 1909, p. 347.

1819 recognized that one legislative proposal is sufficient if the proposed amendment is to be submitted to the people for approval. The example of Maine, although adopted by Mississippi in 1832, was not followed immediately by other states, and this simpler amending process did not begin to be very widely used until after 1850. Michigan in 1850, Ohio in 1851, and Louisiana in 1852 permitted amendment upon the proposal of one legislature simply, and since that time this method has been the one most generally adopted into new constitutions. Of the seventeen constitutions adopted since 1885 all but three [12] provide for action by one legislature only; and Oregon by an amendment of 1906 made a similar provision. The recent development has been quite decidedly toward permitting action by one legislature rather than by two. In the states providing for only one legislative action it has usually been customary to require such action to be taken by more than a majority of the legislature; of the thirty state constitutions to which amendments may now be proposed by one legislative action, six permit such proposal by a majority vote,[13] seven require a three-fifths vote,[14] and seventeen require a vote of two-thirds of the members of each of the two houses.[15] Among the states which require the action of two successive legislatures for the proposal of amendments, the tendency has been to require a smaller majority of the legislative

[12] North Dakota, 1889; New York, 1894; Virginia, 1902.

[13] Arkansas (1874), Minnesota (1857, 1898), Missouri (1875), Oklahoma (1907), Oregon (1906), South Dakota (1889).

[14] Alabama (1901), Florida (1885), Kentucky (1891), Maryland (1867), Nebraska (1875), North Carolina (1875), Ohio (1851).

[15] California (1879), Colorado (1876), Georgia (1877), Idaho (1889), Illinois (1870), Kansas (1859), Louisiana (1898), Maine (1819), Michigan (1908), Mississippi (1890), Montana (1859), South Carolina (1895), Texas (1876), Utah (1895), Washington (1889), West Virginia (1872), Wyoming (1889).

bodies for such proposals. The Connecticut provision of 1818 permitted the first legislative proposal to be made by a majority of the house of representatives, but required that the second legislative action be taken by two-thirds of each house. Massachusetts by an amendment of 1821 required that both the first and second proposals be approved by a majority of the senators and two-thirds of the house of representatives. For a time some of the states followed the practice of requiring two-thirds or at least three-fifths of the legislative vote for the first and second legislative proposals; but since Pennsylvania in 1838 prescribed a simple majority of all members elected to each house, this has been the more general requirement. Of the fourteen states which now require two successive legislative proposals, ten prescribe that such proposals shall be by a majority of the members elected to each house.[16] Of the other four states reference has been made above to Connecticut and Massachusetts; Vermont by an amendment of 1870 requires that the first proposal be made by two-thirds of the members of the senate and a majority of the members of the house of representatives, but requires simply a majority of the members of each house for the second proposal.[17] Tennessee (1870) permits the first proposal to be made by a majority of all members elected to each house, but re-

[16] Indiana (1851), Iowa (1857), Nevada (1864), New Jersey (1844), New York (1894), North Dakota (1889), Pennsylvania (1873), Rhode Island (1842), Virginia (1902), Wisconsin (1848). The New York constitution of 1821 required action by a majority of the members elected to the first legislature and by two-thirds of the members elected to the second legislature, but this was changed in 1846 to the requirement of a majority in each case.

[17] In Connecticut, as has been suggested above, the first legislative action is by the house of representatives alone, without the concurrence of the senate. In Vermont the proposal of amendment must originate in the senate, but the first legislative action upon it must be by both house and senate.

quires a two-thirds vote for the second proposal. In this connection it may be worth while to mention that in Delaware, where a proposed amendment is not required to be submitted to a popular vote, an amendment is adopted when passed by two successive legislatures, if agreed to in each case by two-thirds of all members elected to each house.

Although there has been a tendency to simplify the process of legislative proposal, there are two other respects in which there seems to be little if any tendency in recent years to make easier the amendment of state constitutions; these are (1) the actual limitations in the constitutions as to the number, frequency, and character of proposals, and (2) the popular vote required for the adoption of amendments.

Of the eleven constitutions now in force which impose limitations upon the proposal of amendments the greater number are of comparatively recent date.[18] New Jersey and Pennsylvania permit the proposal of amendments only once in five years, Tennessee once in six years, Vermont once in ten years.[19] The Illinois constitution provides that no amendment shall be proposed to more than one article of the constitution at the same session, and that the same article shall not be amended oftener than once in four years. The Colorado constitution of 1876 provided that the legis-

[18] Arkansas (1874), Colorado (1876), Illinois (1870), Indiana (1851), Kansas (1859), Kentucky (1891), Montana (1889), New Jersey (1844), Pennsylvania (1873), Tennessee (1870), Vermont (1870).

[19] The Pennsylvania restriction was also in the constitution of 1838. The Vermont constitutional commission in its report in January, 1910, recommends the adoption of a provision permitting amendments to be proposed at any session of the general assembly and providing that the first proposal may be made by a majority rather than two-thirds of the members of the senate. Governor Fort, of New Jersey, in 1908 recommended that an amendment be adopted permitting the submission of amendments once in three years.

lature should have no power to propose amendments to more than one article of the constitution at the same session, but this provision was amended in 1900 so as to permit the proposal of amendments to six articles at the same time. In Indiana, while an amendment agreed upon by one legislature is awaiting the action of the succeeding legislature, or of the electors, no additional amendment may be proposed; a similar provision of the Oregon constitution [20] was repealed in 1906. Arkansas, Kansas, and Montana forbid the submission of more than three amendments at the same election; Kentucky forbids the submission of more than two amendments, and provides that the same amendment shall not be submitted oftener than once in five years. The provisions in Florida, Kentucky and Texas [21] that amendments may be submitted only at regular legislative sessions do not constitute serious restrictions upon the amending power. The present restrictions upon the proposal of amendments in Arkansas, Kansas, Montana, and Colorado are so slight as to have little appreciable influence; but the limitations in Pennsylvania, New Jersey, Tennessee, Vermont, and Illinois are so strict as to prevent the ready adaptation of the constitutions to changed conditions. In Illinois amendments were proposed in 1892 and 1896, which would have released the legislature from some of the restrictions placed upon it by the constitution, but these amendments failed to be adopted.

In a number of states the popular vote required for the adoption of an amendment makes the alteration of the constitution extremely difficult, and in these states there has been little tendency toward making the process of amendment easier. In all but thirteen states an amendment which

[20] Kadderly *v.* Portland, 44 Ore., 118.

[21] And a somewhat similar provision in Virginia.

receives a majority of the votes cast upon the question of its adoption or rejection, is adopted. In eleven states [22] an amendment to be adopted must receive a majority of all votes cast at the election in which it is submitted; that is, if at an election in Indiana 600,000 votes were cast for governor, a proposed amendment in order to be adopted must have received an affirmative vote of at least 300,001; because of the fact that more interest is ordinarily taken in candidates than in measures, proposed amendments usually fail in these states for the reason that not enough votes are cast for them to give such a majority as is constitutionally required. Oregon in 1906 abolished the requirement that amendments to be adopted should receive a majority of all votes cast at the election when they were submitted; but this requirement was adopted by Minnesota in 1898 and by Oklahoma in 1907. Mississippi in 1902 rejected a proposal that amendments should be considered to have obtained the popular approval when they received a majority of the votes cast upon their adoption or rejection. Rhode Island requires that a proposed amendment, in order to be adopted shall be approved by three-fifths of the electors of the state voting thereon, and in New Hampshire no amendment may be adopted unless approved by two-thirds of the electors voting thereon; in these states also, proposed amendments often fail of adoption because they do not receive the requisite majority.[23]

Of the present state constitutions the provisions for specific amendment may be divided into six classes:

(1) The proposal of amendments by a constitutional convention only. (New Hampshire, 1792).

[22] Alabama, Arkansas, Illinois, Indiana, Minnesota, Mississippi, Nebraska, Ohio, Oklahoma, Tennessee, Wyoming.

[23] See p. 185 for a discussion of the efforts to amend in these states.

(2) Amendment by the action of two successive legislatures, without a direct popular vote. (Delaware, 1897).

(3) Proposal by the legislature, with a popular vote upon the proposal, but with the final determination left with the legislature after the people have approved a proposed amendment. (Mississippi, 1890; South Carolina, 1895).

(4) Amendments proposed by the legislature, and subject to popular approval, but with the amending process subject to such restrictions as to make constitutional alteration difficult. Such restrictions are of three kinds.

(a) The requirement of action by two successive legislatures for the proposal of amendments. (Connecticut, 1818; Indiana, 1851; Iowa, 1857; Massachusetts, 1821; Nevada, 1864; New Jersey, 1844; New York, 1894; North Dakota, 1889; Pennsylvania, 1873; Rhode Island, 1842; Tennessee, 1870; Vermont, 1870; Virginia, 1902; Wisconsin, 1848).

(b) Limitations as to the number, frequency, and character of proposals. (Arkansas, 1874; Colorado, 1876, 1900; Illinois, 1870; Indiana, 1851; Kansas, 1859; Kentucky, 1891; Montana, 1889; New Jersey, 1844; Pennsylvania, 1873; Tennessee, 1870; Vermont, 1870).

(c) Requirements of a popular vote greater than that of a majority of all persons voting upon the amendment. (Alabama, 1901; Arkansas, 1874; Illinois, 1870; Indiana, 1851; Minnesota, 1898; Nebraska, 1875; Ohio, 1851; Oklahoma, 1907; Rhode Island, 1842; Tennessee, 1870; Wyoming, 1889. Here also should be classed Mississippi, 1890, and the New Hampshire requirement that an amendment receive two-thirds of the vote cast upon the question of its adoption or rejection.)

(5) The unrestricted proposal of amendments by one legislative action merely, and their adoption by the vote of a majority of the persons voting thereon. (California,

1879; Florida, 1885; Georgia, 1877; Idaho, 1889; Louisiana, 1898; Maine, 1819; Maryland, 1867; Missouri, 1875; Michigan, 1908; North Carolina, 1875; Oregon, 1906; South Dakota, 1889; Texas, 1875; Utah, 1895; Washington, 1889; West Virginia, 1872. The restrictions upon the legislative proposal of amendments in Colorado, Kansas, and Montana are so slight as to make it proper to class the constitutions of these states here rather than among those difficult of amendment. South Carolina may also be classed with this group in so far as respects the proposal and popular vote upon amendments.)

(6) Those which, in addition to the legislative power of proposal, permit the popular initiation of constitutional amendments. (Oregon, 1902; Oklahoma, 1907; Michigan, 1908; Missouri, 1908.)

As has already been suggested the tendency is toward the easy amending process represented by the fifth type, and the development in quite recent years has been to make amendment still easier by giving the power of initiating amendments to the people. The group of states whose constitutions are least flexible is that of subdivision (c) of the fourth type; but where, in addition to the requirement of a majority of all votes at an election, there are other restrictions upon the amending process, the alteration of a constitution often becomes practically impossible. This is true of Tennessee, where we have a combination of limitations—not only is a majority of all votes required to be cast for an amendment, but also amendments may only be proposed once in six years and the action of two successive legislatures is required for such proposal. So, but to a less extent than in Tennessee, the amending procedure of Illinois and Indiana is burdened by restrictions to such an extent as to be practically unworkable.

The requirement of proposal by two successive legis-

latures, while it defeats many projects which would otherwise go to the people, cannot be said to interpose a serious obstacle in the way of constitutional alteration. Nor in fact, even in the cases of Vermont, Tennessee, New Jersey, Pennsylvania, and Illinois, do the restrictions upon the proposal of amendments interpose insuperable barriers. But when these provisions are combined with the requirement of a popular vote which is ordinarily impossible to obtain except upon questions of the greatest importance, as is done in Tennessee, the amending process becomes almost useless.[24] Even where the restrictions are not so stringent, but where two legislative actions are required and the legislative proposal of amendments restricted, the amending process is so slow and cumbersome as to prevent a ready adjustment of the fundamental law to changing conditions. Almost all of our state constitutions are full of detailed provisions adopted to meet evils or defects apparent at the time when such constitutions were adopted. These provisions, under different circumstances, often prove a bar to progress and require prompt removal. Of course it is possible to argue that detailed provisions devised to meet temporary needs are out of place in the constitution, and should not

[24] In most of these states the difficulty of amendment by the legislative process is not balanced by ease of alteration through the assembling of a convention. In Illinois, Minnesota, Nebraska, Ohio, and Wyoming, a convention may not be called except after the affirmative vote of a majority of those voting at a general election. In Tennessee the question may be submitted at a special election, but must receive a majority of the votes cast at the election when it is submitted. In Oklahoma a convention may be called if a majority of those voting upon the measure should approve the legislative act providing for a convention; in Oklahoma, therefore, it should not be difficult to assemble a convention, if there were any strong sentiment in favor of such action, and the same is true of Tennessee, where the question could perhaps be carried without difficulty if submitted at a special election.

be put there at all; but the fact is that the constitutions do contain such provisions, and that the present tendency is to increase rather than to reduce their number. As long as constitutions are filled with legislative details, many of which must necessarily be subject to frequent change, the instrument which does not take this fact into consideration and make provision for such change is defective.

The hindrances to constitutional change which have been devised are of two kinds: (1) those which make any change difficult; (2) those which make an actual change fairly easy, but which provide a method of change requiring a long time for its operation. The provisions requiring a popular vote larger than that of a majority of those voting upon the measure, belong to the first class; those requiring two legislative actions and permitting the proposal of amendments only at long intervals, belong to the second class. Simply the requirement of a long time to obtain an amendment forms, however, an important check upon constitutional change. Where the action of two legislatures is required to propose an amendment the time required is a very long one, as legislative sessions are now biennial in all but a few of the states; the plan of permitting proposal by one legislature reduces the time required for constitutional alteration by more than one half. In South Carolina and Mississippi a second legislative action is required after popular approval; in South Carolina where legislative sessions are annual this is apt not to produce a long delay, although the legislature has two years within which to act. Regular legislative sessions in Mississippi are quadrennial and here the amending process is particularly slow; two amendments proposed by the legislature in March, 1900, were voted upon by the people in November, 1900, and were inserted into the constitution by legislative action

in January, 1904.[25] The plan of proposal by a single legislature with adoption by subsequent vote of the people ordinarily permits an amendment to be made in two years less time than where two legislative actions are required; in most of the states the process of amendment even with proposal by a single legislature requires for its operation a period of nearly two years.[26] The popular initiative as employed in Oregon reduces the time required for the adoption of an amendment to less than six months; initiative petitions must be presented at least four months before the election, and the measure proposed by petition becomes a part of the constitution upon its adoption by the people at such election.

Mr. Bryce in his interesting discussion of flexible and rigid constitutions[27] classes as flexible those constitutions which may be altered in the same manner as ordinary legislation; and as rigid those which may not be changed by the regular legislative processes, but for the alteration of which some different and usually more cumbersome machinery has been devised; he therefore classes as rigid the constitutions of the states of the United States. Mr.

[25] Mississippi laws, 1904, pp. 223, 225. A Mississippi proposed amendment of 1908 would have permitted action by the legislature upon amendments at the biennial special sessions, and would have reduced the time required for adoption by two years, but this proposal was not submitted to a vote of the people, because not advertised in accordance with constitutional requirements; amendments may be inserted into the constitution at an extraordinary session of the legislature, if such a session is convened by the governor with power to take such action.

[26] That is, if an amendment is proposed at a regular biennial session in the early spring of an odd year and is submitted at the regular election in November of the succeeding even year. An amendment to the Maine constitution adopted in 1908 requires that amendments be submitted in the September following their proposal, and thus reduces the time required for the adoption of an amendment to less than one year.

[27] *Studies in History and Jurisprudence,* 124-213.

Bryce's classification has been very properly criticized by Mr. A. Lawrence Lowell on the ground that in many countries where a distinction is made between the functions of constitution-making and ordinary legislation, such distinction is so slight as to be of little value. "From countries which can change their fundamental constitution by the ordinary process of legislation we pass by almost imperceptible degrees to those where the constitutional and law-making powers are in substantially different hands." [28]

We may use the terms rigid and flexible here in their more commonly accepted sense, and refer to constitutions as flexible when they may be easily changed, and as rigid when they are difficult to change. It is of course true that constitutions alterable by the regular legislative processes will be easier to change than others, and should therefore be classed as flexible; but of constitutions not alterable by the ordinary legislative processes (and here we must class all constitutions of states in the United States except in so far as several of the states have adopted the initiative and referendum), some may be changed with ease and others may be altered only with great difficulty. The constitutions of Delaware, Oregon, California, and Louisiana, for example, are flexible in the sense in which that term is here used, while the constitutions of Tennessee, Illinois, and Indiana are rigid.[29]

[28] Lowell, *Government of England*, i, 3. For example, the Delaware (1776) and South Carolina (1778) amending provisions made a very slight distinction between constitutional alteration and ordinary legislation; and the Delaware constitution of 1897 makes less of a distinction than do the constitutions now in force in other states. For a discussion of the cases in which, through the introduction of the initiative and referendum, similar methods are being employed for constitution-making and for ordinary legislation, see p. 250.

[29] Most of the constitutions of the New England and Middle Western States are rigid. See papers by J. A. Fairlie and Allen Johnson in

In the amendment of state constitutions, except in Delaware, there are always two distinct steps, first, the proposal of the amendment, and second, its approval by the people. Many constitutions specify in detail the procedure in each of these steps, and determine the methods of bringing proposed amendments to the attention of the people who are to pass upon them finally. For example the Pennsylvania constitution of 1873 provides: "Any amendment or amendments to this constitution may be proposed in the senate or house of representatives; and, if the same shall be agreed to by a majority of the members elected to each house, such proposed amendment or amendments shall be entered on their journals with the yeas and nays taken thereon, and the secretary of the commonwealth shall cause the same to be published three months before the next general election, in at least two newspapers in every county in which such newspapers shall be published; and if, in the general assembly next afterwards chosen, such proposed amendment or amendments shall be agreed to by a majority of the members elected to each house, the secretary of the commonwealth shall cause the same again to be published in the

Proceedings of the American Political Science Association, 1908. It may be worth while to call attention to the fact that amendments are often more frequent in one state than in another, even though the amending process may be equally as easy in the one as in the other. For example, amendments are frequently proposed and adopted in California, Louisiana, and Missouri, but not so frequently in Maine and Maryland; so in New York amendments are frequently adopted, while in Massachusetts, whose amending process is equally as simple, amendments are infrequently made. Somewhat similarly, the Mexican constitution, whose amending process is comparable with that of the United States in cumbersomeness, has been frequently altered, while it seems to be the general view that our federal constitution cannot be amended except in times of national crises. The frequency or infrequency of amendments depends to a great extent, of course, upon popular satisfaction or dissatisfaction with existing institutions, and also upon the conservatism of the population of a state or country.

manner aforesaid; and such proposed amendment or amendments shall be submitted to the qualified electors of the state in such manner, and at such time at least three months after being so agreed to by both houses, as the general assembly shall prescribe; and, if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become part of the constitution. . . . When two or more amendments shall be submitted they shall be voted upon separately." Here we have seven distinct requirements: (1) Proposal in senate or house. (2) Agreement upon the proposed amendment by a majority of the members elected to each house. (3) Entry of the proposed amendment upon the journals of each house with the yeas and nays thereon. (4) Publication by the secretary of state. (5) A second agreement by the two houses. (6) A second publication by the secretary of state. (7) Submission to and approval by a majority of the voters. The Pennsylvania requirements are more elaborate than those now provided in most of the states. However, some of these steps are required in all of the states, and it may be worth while to discuss in some detail the constitutional provisions now in force regarding the proposal, submission, and adoption of amendments.

As to the legislative majority required for the proposal of amendments, reference has already been made to the provisions of all constitutions now in force. Most of the constitutions require that the legislative proposal be adopted by the vote of a majority, or three-fifths, or two-thirds (or other vote as the case may be) of all members elected to each of the two houses. In these states, therefore, there can be no question as to whether the majority required is a majority of a quorum or a majority of all elected mem-

bers;[30] the constitution itself specifies the latter rule. In several of the constitutions, however, the language either does not specify as to whether the majority must be one of all members elected to each house, or is not absolutely clear in the matter.[31] Vermont provides for the first proposal of amendment by a vote of two-thirds of the members of the senate and a majority of the members of the house, and that the second legislative action be by a "majority of the members of the senate and house of representatives," and this language, it would seem, must be construed to require a majority of all members. Mississippi requires two-thirds of "each house of the legislature," and similar language is used in the constitutions of Connecticut, Maine, Minnesota, and North Carolina. The language of the Mississippi constitution has been the subject of judicial construction. In Green *v.* Weller[32] the court said that a vote of "two-thirds of each house" must be construed to mean only a vote of two-thirds of a quorum of each house; and a similar interpretation was given to the same language by the supreme court of Missouri in the case of State *v.* McBride.[33] The constitution of Massachusetts makes it plain that only the action of a quorum is required for the proposal of amendments by providing that both legislative actions in that state shall be taken by a "majority of the senators and two-thirds of the members of the house of representatives present and voting thereon."

Several states require that proposed amendments be read three times on three separate days before passage.[34] In a

[30] See statement in Holmberg *v.* Jones, 7 Ida., 752, 757, 758.

[31] Connecticut, Maine, Massachusetts, Minnesota, Mississippi, North Carolina, Vermont.

[32] 32 Miss., 650 (1856). [33] 4 Mo., 303 (1836).

[34] Alabama, Louisiana, Mississippi, South Carolina, Tennessee, West Virginia.

recent case in Louisiana objection was made to an amendment on the ground that it had not been read in full on three separate days in each house. The supreme court of Louisiana very sensibly took the view that the constitution of that state did not require a proposed amendment to be read *in full* on three separate days, and said: "It seems evident, then, that when the constitution prescribes legislative readings it means the ordinary parliamentary reading by title, or in such other manner as the particular house shall direct." [35]

Most of the constitutions require the entry of a proposed amendment upon the legislative journals, together with the ayes and nays. By most of the constitutions making this requirement [36] the provision is simply that the amendment shall be entered upon the journals of the two houses, and this language has given rise to some judicial discussion as to what form of entry is necessary. Where the constitution specifies entry *in full* on the journals of the two houses, as is done in certain cases,[37] there is of course no question; but where full entry is not specifically required the question has often arisen as to whether the entry of the proposed amendment in full upon the journals is necessary, or if a mere identifying entry or journal reference is sufficient.

[35] Saunders *v.* Board of Liquidation, 110 La., 313 (1903).

[36] Arkansas, California, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. Rhode Island requires that the ayes and nays be published with the proposed amendment, and in Alabama the vote upon a proposed amendment is required to be "taken by yeas and nays and entered on the journals."

[37] Colorado, Illinois, Kentucky, Montana. The language of the Missouri constitution seems to require full entry but is not clear.

There is perhaps no question but that the constitutions which require journal entry intended to require a full entry of the proposed amendment, for legislative journals would ordinarily, as a matter of course, contain an entry of action upon amendments without any such requirement; the provision seems to have been introduced for the very purpose of requiring full entry. But where a legislature has construed the language differently, and has not made a full entry, and the proposed amendment has been adopted by the people, the question properly presents itself to the court that the language is not perfectly clear, and that if possible the view should be taken which would uphold the validity of such an amendment. And this in fact has been the more usual attitude of the courts.[38]

[38] Where one constitution required entry in the journals and under it entry by title had been customary, the adoption of a new constitution with the same provision would, it seems, be an approval of the liberal construction, for if the other rule had been desired, the framers of the new constitution could easily have inserted a specific requirement of full entry. Journal entry in full is certainly not now of great practical importance, and this matter is one with reference to which the courts can well afford to be liberal.

Of some interest is the report of a joint committee of the South Carolina legislature upon this subject in 1906. An amendment substituting biennial for annual legislative sessions had been submitted to and adopted by the people in November, 1904. A joint committee was appointed to consider the question of the legislature's ratifying the amendment. The committee recommended that the amendment be not ratified, and said that it had not been properly adopted because not entered on the journals of the two houses; entry had been by title only, and the constitution simply required that proposed amendments should "be entered on the journals." In view of the cases discussed below, it may be questioned whether the supreme court of South Carolina would have taken a view as strict as that of the legislative committee; it should be remembered also that it is entirely within the discretion of the legislature of South Carolina as to whether it shall ratify an amendment adopted by the people and the proposed amendment in this case would probably not have been ratified, even if the journal

In Iowa the stricter view is held. Here the constitution requires simply that the proposed amendments shall be entered on the journals, but the supreme court of that state held that entry by title only was insufficient, and declared invalid constitutional amendments approved by the people, because the legislative entry was deemed insufficient.[39] The more general judicial interpretation of such provisions has, however, been different. In California the court wavered for a while but finally held an identifying reference in the legislative journals to be sufficient;[40] and the same view has been adopted by the courts of Maryland,[41] Kansas,[42] South Dakota,[43] and Florida.[44] In a recent Michigan case the court said: "We are impressed that those cases which require an entry of the resolution in full as passed have much the better of the argument," but did not find it necessary to pass upon this question because it found the entry to be sufficient in either case. The supreme court of Nebraska has also taken the view that full entry is required, although its statement with respect to this matter was perhaps not necessary to the decision of the case before the court.[45]

entry had been thought sufficient. The committee's view, therefore, has little weight as a precedent. South Carolina House Journal, 1906, pp. 47-49.

[39] Koehler *v.* Hill, 60 Iowa, 543 (1883); State *v.* Brookhart, 113 Iowa, 250 (1901).

[40] People *v.* Strother, 67 Cal., 624; Thomason *v.* Ruggles, 69 Cal., 465; Oakland Paving Co. *v.* Hilton, 69 Cal., 479; Oakland Paving Co. *v.* Tompkins, 72 Cal., 5; Thomason *v.* Ashworth, 73 Cal., 73.

[41] Worman *v.* Hagan, 78 Md., 152.

[42] Constitutional Prohibitory Amendment, 24 Kan., 700.

[43] State *v.* Herried, 10 S. D., 109.

[44] West *v.* State, 50 Fla., 154.

[45] People *v.* Loomis, 135 Mich., 556. *In re* Senate File No. 31, 25 Neb., 864, 883-886.

Where entry in full is required there is of course little room for argument, but even here where cases have arisen the Colorado court has been very liberal in its attitude. In Nesbit *v.* People[46] it was found that the senate and house journal entries of a proposed amendment did not agree and that full entry was not correctly made, but the court decided to overlook this informality and sustain the amendment; and the same position was taken in the later case of People *v.* Sours.[47] In the Michigan case of People *v.* Loomis, referred to above, the court, while leaning strongly to the view that entry in full was necessary although this was not specifically required, took the position that even if entry in full were required a slight informality in the entry would be overlooked; here an amendment had been proposed in the house and entered in full; the senate amended the proposal and entered it in full as altered; the house then adopted the senate amendments, but did not enter the amended proposal in full on its journals, and such entry was said to be sufficient to comply with a requirement of full entry.[48] In the Montana case of Durfee v.

[46] 19 Colo., 441.

[47] 31 Colo., 369. In Colorado, where "full entry" is specifically required, the rule as interpreted by the courts is more liberal than in Iowa, where there is no such specific requirement. The Kansas and Colorado courts have called attention to the fact that if the rule regarding journal entry is strictly construed an amendment may be defeated by the carelessness of a clerical employee, even after its approval by the people. Constitutional Prohibitory Amendment, 24 Kan., 711. People *v.* Sours, 31 Colo., 382. In the Kansas case Judge Brewer said: "The records of the proceedings of the two houses are made, not by the houses themselves, but by clerical officers. True, they are under the control of the respective houses, but in fact the records are made by clerks. May they defeat the legislative will? The constitution does not make amendments dependent upon their approval or their action."

[48] The facts in this case are almost parallel with those in *Re* Senate File No. 31, 25 Neb., 864, 883, 884.

Harper,[49] full entry upon the journals of the two houses was not made although this was specifically required, and the proposed amendment was therefore held invalid. Similarly in Nevada, where an entry upon the journals was required, no entry whatever was made, and the proposed amendment was held invalid because of failure to comply with a specific constitutional requirement.[50]

The question has frequently arisen whether, under constitutions giving the governor the veto power over legislation, this executive power also extends to legislative acts proposing constitutional amendments. Several of the earlier constitutions [51] specifically gave this power to the governor, but this practice did not continue, and the only constitutions now in force which contain provisions regarding the governor's participation in the proposal of amendments are those of Kentucky, Delaware and Alabama; these constitutions expressly provide that the governor's approval shall not be necessary. The practice, however, developed, and has in some cases continued of submitting for the governor's approval resolutions or bills proposing constitutional amendments.[52] This practice still continues in Arkansas [53] and in some other states. In Arkansas, such

[49] 22 Mont., 354.

[50] State *v.* Tufly, 19 Nev., 391. In this case it is said that "no entry of the proposed amendment was made upon the journal of either house," but it may be that the court considered "entry" to be equivalent to "full entry," and meant simply that full entry had not been made. However, an examination of the journals shows no entry of any sort which can be identified as that of the amendment under consideration.

[51] Delaware, 1792, 1831; Louisiana, 1845.

[52] Jameson, *Constitutional Conventions*, 4th ed., pp. 492, 593. See also Green *v.* Weller, 32 Miss., 677.

[53] Arkansas acts, 1903, p. 485. In Arkansas there is a statute which specifically provides that the governor shall have a veto over proposed amendments. As to the binding force of such a statute see pp. 152-154.

submission to the governor, even if his veto power were formally recognized, would constitute no serious limitation upon legislative power, for the governor's veto in that state may be overcome by the vote of a majority of all members elected to each house. In several of the states where it has been customary to submit proposed amendments to the governor for approval, conflicts have arisen between the legislative bodies and the governor; and in judicial proceedings resulting from such conflicts, the courts have held that no executive veto exists with reference to proposed amendments. A review of the judicial decisions upon this point will indicate the present situation.

Perhaps the most interesting case involving the governor's veto of proposed amendments is that of State *ex. rel.* Morris *v.* Mason.[54] Here the legislature of Louisiana proposed an amendment for the creation of a lottery; and in accordance with the practice in that state the proposal was submitted to the governor for approval. The governor vetoed the proposal; the legislature then denied that he had any constitutional power to do so, and the legislature's position was upheld by the supreme court. The necessity of questioning the governor's power was purely accidental in this case. When the proposal was passed, the lottery advocates had a sufficient majority in each house to overcome a veto without questioning its propriety, but before the governor's veto was given the state senate had lost by death one member whose vote was necessary to overcome the veto. The lottery party thus found it necessary either to question the veto power or to lose all that they had sought to gain by corrupting the legislature. It may be worth noting that the proposed lottery amendment was defeated when submitted to the

[54] 43 La. Ann., 590 (1891).

people. Since the decision of State *v.* Mason, the practice has continued in Louisiana of submitting proposed amendments to the governor for approval, but such action is in no way necessary.

So in Michigan the usual practice was to submit proposed amendments to the governor for approval, but this practice was departed from in 1907, and the supreme court of Michigan held that the governor's approval was unnecessary.[55] In cases which have arisen in North Dakota, Pennsylvania, and Nebraska a similar view has been taken.[56]

In the Maryland constitution it is provided that each amendment shall be proposed by a separate "bill," and here it was contended with some plausibility that such a proposal should be subject to the governor's veto power as well as other bills. In 1904 a proposed amendment was adopted by the legislature, but was not submitted to the governor, although it had been the practice to do this; however, the governor vetoed the proposal and declined to submit it to the people, but was required to do so by mandamus. The Maryland court said that the word "bill" was used in the amending clause simply to express a proposal or project, and not in the same manner as the word was used elsewhere in the constitution to refer to bills which should become law by legislative enactment and executive approval.[57]

The doctrine is well-established that executive approval is not required for the legislative proposal of constitu-

[55] Murphy Chair Co. *v.* Attorney-General, 148 Mich., 563 (1907).

[56] State *v.* Dahl, 6 N. D., 81 (1896); Commonwealth *v.* Griest, 196 Pa. St., 396 (1900); *In re* Senate File No. 31, 25 Neb., 864 (1889); See also Koehler *v.* Hill, 60 Ia., 543, 558.

[57] Warfield *v.* Vandiver, 101 Md., 78 (1905).

tional amendments.[58] However, the supreme court of California has sought to establish a principle which would produce the same result. The constitution of California provides that: "Any amendment or amendments to this constitution may be proposed in the senate or assembly, and if two-thirds of all the members elected to each of the two houses shall vote in favor thereof, such proposed amendment or amendments shall be entered in their journals with the ayes and nays taken thereon; and it shall be the duty of the legislature to submit such proposed amendment or amendments to the people, in such manner . . . as may be deemed expedient." The supreme court of California held that the act of proposal was one of the legislature alone, independent of the governor, but that the provision for submitting an amendment required the governor's approval—that the legislature alone might propose, but could not alone submit its proposal to the people; the two steps are of course parts of one act—one is useless without the other—and the California court's position is absolutely indefensible; it would seem to be a judicial quibble invented for the purpose of defeating the submission of a proposal to which the court was opposed.[59] A contrary position was taken by the court of appeals of Maryland in the case of Warfield *v.* Vandiver,[60] although the dissenting judges argued in favor of the California doctrine.

[58] The same is true of amendments proposed to the federal constitution. See Hollingsworth *v.* Virginia, 3 Dallas, 378, and Jameson, *Constitutional Conventions*, 4th ed., 586-592.

[59] Hatch *v.* Stoneman, 66 Cal., 632 (1885).

[60] Warfield *v.* Vandiver, 101 Md., 78 (1905). The same point was raised but dismissed in Commonwealth *v.* Griest, 196 Pa. St., 396, 413, 414, and in State *ex rel.* Morris *v.* Mason, 34 La. Ann., 590, 649-655. The Louisiana court clearly distinguishes between legislation, as such, and the proposal and submission of an amendment; where the provisions with reference to submission relate only to the amendment or

If it be true that the proposal of amendments is a function of the legislature, independently of the governor, then such power must be taken to carry with it full authority to determine how, within constitutional restrictions, the proposal shall be submitted to the people. Any other principle would leave the legislature helpless to exercise a power which it is conceded to possess. On the other hand there has been much legislation laying down rules to be followed in the submission of future amendments, and legislation of this character, should, without doubt, be subject to the governor's approval, as are other legislative acts. Acts of this character would usually be followed by succeeding legislatures, but would seem to have no absolutely binding force. The legislative power to propose amendments is a continuing power and cannot be limited by some former legislative act, even though that act were one of ordinary legislation, enacted by the legislature with executive approval—that is, if an act were passed by the legislature, and approved by the governor, providing a certain form of ballot for the submission of amendments, it would seem to be within the power of the succeeding legislature, acting without the approval of the governor in submitting a proposed amendment, to provide for a different form of ballot for such amendment. In a recent Michigan case a point arose similar to the one here involved. An act was passed in 1905 regulating the manner of submitting amendments; an amendment was submitted by the legislature in 1907 in a manner different from that prescribed by the act of 1905, and its validity was contested on this ground. The supreme court of Michigan held that the legislature had

amendments proposed at a given time, and cease to be in force when such amendment or amendments are adopted or rejected, they do not constitute legislation which is subject to the executive veto.

power to submit amendments to the people and to determine the method of submission; and that it was not restricted by any previous legislation.[61] An opposing principle was, however, laid down in Nevada by the case of State *v.* Davis.[62] The constitution of Nevada made it the duty of the legislature to submit amendments to the people "in such manner and at such time as the legislature shall prescribe." The legislature by an act of 1887 had established certain rules regarding the publication and distribution of proposed amendments, and these rules had not been complied with in the case before the court. The court held that it was the duty of the legislature to determine the manner of submission, and that such manner when determined was binding upon it. It held the amendments invalid which had been submitted in a manner different from that prescribed by the law of 1887, and said: "Whatever may be said of the policy of the law, the conditions imposed are within the proper province of the legislature, and being imposed, were indispensible to a valid adoption of the proposed amendments." The establishment by law of definite restrictions upon the amending power, in addition to the restrictions imposed by the constitution, might take the control of the amending process to a large extent out of the hands of the legislative bodies, in which such power is sought to be vested, and practically place it in the hands of the governor, without whose consent legal restrictions so imposed could not be removed. Such a result certainly was not contemplated and might possibly lead to a deadlock. The better view would seem to be that a legislative body in its proposal of amendments is bound only by

[61] Murphy Chair Co. *v.* Attorney-General, 148 Mich., 563 (1907). See also Lovett *v.* Ferguson, 10 S. D., 44 (1897), and *In re* Denny, 156 Ind., 111.

[62] 20 Nev., 220 (1888).

such restrictions upon this function as are contained in the constitution itself. One legislature may not impose restrictions upon the exercise of this power by a succeeding legislature, by means of a law enacted with the approval of the governor. For example, in Arkansas there is a legislative act providing that proposed amendments shall be subject to the governor's veto; this requirement is one which is not laid down in the constitution, and may be ignored by any succeeding legislature, without being formally repealed.[63]

With reference to restrictions in the constitution itself, it may be said that the legislature as a body for the proposal of amendments is bound only by the rules specifically laid down in the article of the constitution which regulates the amending process—that is, it is not bound by the requirements that its action as a regular legislative body be submitted to the governor nor by the numerous restrictions usually imposed as to the procedure on regular legislative bills. This point came out squarely in the Minnesota case of Julius *v.* Callahan.[64] Here it was contended that a constitutional amendment was invalid because the subject was not expressed in the title of the act of proposal, this being a constitutional requirement with reference to ordinary legislative acts, but the court said that the restrictions

[63] Kirby's Digest, 1904, pp. 324, 325. This provision is apt to cause no practical difficulty because the majority required in Arkansas to overcome an executive veto is the same as that required to propose an amendment, but the same principle applies here equally as in cases where restrictions of a more burdensome character might be imposed. But in North Carolina provision is specifically made that submission of proposed amendments shall be in "such manner as is prescribed by law," and in Kentucky publication is to be had in a manner prescribed by law, so that in these cases rules laid down by the legislature would be binding until repealed.

[64] 63 Minn., 154 (1895).

imposed upon the legislature acting in its ordinary capacity did not apply to the proposal of amendments; that a formal act or statute was not necessary for such a proposal, but that a joint resolution of the two houses was sufficient. Whether the formal act of proposal be called a joint resolution or act (or by any other name) makes no difference—the ordinary constitutional rules controling legislative action do not apply to them unless such rules are expressly repeated in the amending clause of the constitution.[65]

Although the legislative proposal of amendments is an act different in character from ordinary legislation (and subject in many ways to different rules) still it is essentially a legislative act. In this connection a curious question arose in 1900 under the California constitutional provision that a special session of the legislature should have "no power to legislate on any subjects other than those specified in the proclamation" of the governor convening the special session. At a special session of the California legislature in 1900 a constitutional amendment was proposed, although this was a subject not included in the governor's proclama-

[65] Nesbit *v.* People, 19 Colo., 441. Commonwealth *v.* Griest, 196 Pa. St., 396. State *v.* Dahl, 6 N. D., 81. *In re* Senate File No. 31, 25 Neb., 864. Edwards *v.* Lesueur, 132 Mo., 441. People *v.* Sours, 31 Colo., 379. Warfield *v.* Vandiver, 101 Md., 78 (1909). State *ex rel.* Morris *v.* Mason, 43 La. Ann., 590, 649-658. McBee *v.* Brady, 100 Pac., 97 (Idaho, 1909). In several cases the question has been raised as to the form in which amendments should be proposed but judicial expressions upon this subject have usually been dicta. The usual method, and that favored by the courts when they have expressed themselves is that by joint resolution. The Idaho court in McBee *v.* Brady suggested that the legislative proposal should indicate "the particular matter to be inserted or omitted as an amendment and the particular place the amendment is to be made," but this was merely a suggestion; so also in this case the court suggested that matter not relating directly to the proposal or submission of the amendment should not be included in the resolution. Upon this subject see also Lovett *v.* Ferguson, 10 S. D., 44.

tion. The secretary of state ignored the legislative proposal, and an action was brought to compel him to submit the proposed amendment to the people. The court said that the power to propose amendments is legislative in character, and that the proposal was therefore void, because not within the power of the special session.[66]

As already suggested, a number of states require the action of two successive legislatures for the proposal of an amendment. Under such a requirement it is necessary of course that each proposed amendment be approved in the same form by the two legislatures.[67] But where the first legislature makes several distinct proposals, each such proposal must stand alone, and any one of them may be approved or rejected by the succeeding legislature,[68] even though the first legislature may have included all of its proposals in one resolution. In Trustees of University of North Carolina *v.* McIver [69] the first assembly proposed seventeen amendments in one bill, and the second assembly adopted only eight of the seventeen, framing them in eight

[66] People *v.* Curry, 130 Cal., 82 (1900).

[67] Koehler *v.* Hill, 60 Iowa, 543, 549, is based in part on the ground that the proposed amendment as entered in the senate journal of the first legislature did not agree with the entries in the journals of the two houses of the second legislature; these entries might have been said, therefore, to show that the action of the two legislatures was not the same. But the evidence in this case did show that both legislatures acted upon the same proposal; the only defect was that one journal entry was not properly made.

[68] "Where a constitution authorizes specific amendments thereof by the action of two successive general assemblies, and several amendments are proposed by one general assembly, and one or more of them are rejected by the next general assembly, those which have received the approval of both are valid as parts of the constitution, the proceedings being otherwise regular." Jameson, *Constitutional Conventions*, 4th ed., p. 618.

[69] 72 N. C., 76 (1875).

separate bills. It was contended that the seventeen proposals must hang together, and that the second legislature must approve all or none, but the court held that each proposed amendment was independent, even when combined with others in a single bill, and that the action of the second assembly was a proper one. A similar position was taken by the supreme court of Rhode Island in an opinion rendered at the request of the senate of that state in 1909.[70] Here the first legislature had proposed an amendment which really comprised three distinct subjects, and the court was of the opinion that these subjects might be separated and submitted separately by the second legislature. It said that the numbering and arrangement of sections were not of the substance of the amendment and might be changed, but that the proposals themselves "should still appear in the same form of words as they were in the original resolution."[71] The adoption of any other principle than that laid down in Trustees *v.* McIver would reduce materially the power of the second legislature. The constitutions which require two legislative actions evidently intended that the second legislature should be free to adopt or reject each specific proposal of the first, and did not contemplate that

[70] *In re* Opinion of Supreme Court, 71 Atl., 798.

[71] The language of the Rhode Island constitution provides that amendments shall "be published and submitted to the electors in the mode provided in the act of approval" by the second legislature, and justified the separation of one amendment into several proposals as was done here; in other states it would seem that a single proposed amendment might not be split up into several proposals by the second legislature, but that it would have to be acted upon as a whole both by such legislature and by the people. Reference is made by the Rhode Island court to legislative actions in that state in 1854 precisely parallel with those in Trustees *v.* McIver: the first assembly proposed nine distinct articles of amendment in a single resolution; the succeeding assembly approved only five of the nine and submitted them separately to the people.

the first legislature should attempt to bind the second to the adoption or rejection of a whole group of proposed amendments.

To this point the discussion of the actual steps in the amending process has related to legislative action purely. It will now be well to consider some questions which relate to the submission of proposed amendments, and of these the most important are those relating: (1) To the publication of legislative proposals. (2) To the form of submission, especially with reference to the separate submission of each legislative proposal. (3) To the elections, whether general or special, at which such proposals must be submitted; and (4) to the popular vote required for the adoption of proposed amendments.

Publication of Proposed Amendments

In all of the states except Indiana, North Carolina, Oklahoma, Oregon, and South Carolina the constitutions contain some provisions regarding the publication of proposed amendments. Mississippi requires that public notice be given for three months, Michigan requires that proposed amendments be published and posted, Connecticut and Minnesota provide simply for publication with the laws; while California, Illinois, Iowa, Kentucky, Massachusetts, Nevada,[72] North Dakota, South Dakota, Tennessee, Wisconsin, and Virginia simply provide for publication without specifying how proposed amendments shall be published.[73] Of the fourteen states which require two legis-

[72] In Nevada, where publication for three months is required, publication in the state laws was held sufficient in State *v.* Grey, 21 Nev., 378.

[73] But Illinois, Iowa, Kentucky, Mississippi, Nevada, North Dakota, South Dakota, Tennessee, Wisconsin, and Virginia do specify as to the time within which publication shall be made.

lative actions for the proposal of amendments, eleven [74] require some form of publication after the first and before the second legislative action, but only two, Pennsylvania and Rhode Island, require publication both before the second legislative action and before the final submission of the proposal to the people. In the states which require publication the more usual provision is that the proposals shall be published in at least one newspaper in every county of the state; Delaware requires publication in three newspapers of each county, Pennsylvania in two newspapers; Vermont requires publication in the "principal newspapers of the state;" Georgia in one or more papers in each congressional district. The period of publication specified in the constitutions varies from four weeks in Missouri and Colorado to six months in Arkansas, Ohio, and Tennessee, but three months is the period fixed by most of the constitutions.

Where a constitution contains specific provisions regarding the publication of proposed amendments such provisions must be substantially complied with in order that amendments may be validly adopted. For example, the Montana constitution requires the secretary of state to publish proposed amendments for three months before the election at which they are to be submitted; the case of State *v.* Tooker [75] involved proposed amendments which had been published for only two weeks, and the amendments were held invalid although ratified by a popular vote. As a rule where there has been substantial compliance with the con-

[74] Connecticut, Iowa, Massachusetts, Nevada, New Jersey, New York, North Dakota, Tennessee, Vermont, Virginia, Wisconsin. Indiana requires no publication.

[75] 15 Mont., 8 (1894). See also State *v.* Board of Commissioners of Silver Bow County, 34 Mont., 426 (1906), where a similar question was sought to be raised.

stitutional provisions, this is deemed sufficient.[76] For example, the Nebraska constitution requires that a proposed amendment be "published once each week in at least one newspaper in each county where a newspaper is published, for three months immediately preceding" the election. In the case of State *ex. rel.* Thompson *v.* Winnett,[77] the publication of a proposed amendment in one county had been made for one week less than the time required, but the court held this defect to be immaterial, and not to defeat the proposed amendment. So in Missouri the constitution requires publication of an amendment in each county for four consecutive weeks before the election, and in Russell *v.* Croy [78] those opposed to the contested amendment urged that this requirement made necessary four publications in each county within twenty-eight days before the election. The court said: "If we must construe the constitution in this respect as strictly as appellants would have us construe it, and if we must say that four weeks there means twenty-eight days, then we must say that the four publications called for must have occurred within the twenty-eight days next preceding November 6th, that is, from Tuesday, October the 9th, to November the 5th, both inclusive, not sooner than the one nor later than the other date. But in a county where the newspaper was not published on Tuesday, the publication could not begin on the 9th, and if Saturday was the day of issue, the first insertion within the twenty-eight days next preceding the election would be on the 13th. If the officer had begun

[76] For the judicial attitude in general upon this matter see State *v.* Grey, 21 Nev., 378 (1893), and Commonwealth *v.* Griest, 196 Pa. St., 396 (1900). See also Prohibitory Amendment Cases, 24 Kan., 700, 710.

[77] 78 Nebraska, 379 (1907).

[78] 164 Mo., 69, 93, 95 (1901).

to publish on the Saturday previous in order to cover the full limit of twenty-eight days, he would have compassed thirty-one days, but he would not have accomplished a publication once a week within the last twenty-eight days, and he would have fallen outside the constitutional line, if four weeks in that connection means twenty-eight days." The court followed the executive department's ruling that publication for the four weeks preceding the election means the four calendar weeks immediately preceding, so that publication upon any day within each of the four preceding weeks was sufficient. This was, of course, the only common-sense rule and the only one possible of observation, when publication must be in weekly papers whose days of weekly issue vary, and from the attitude of the Nebraska and Missouri courts it is perhaps clear that in construing constitutional requirements of publication the courts take a liberal and sensible position.[79]

[79] A secretary of state may defeat a proposed amendment by neglecting to publish it in conformity with the constitutional requirements. This fact was vigorously urged by Judge Brewer in the Prohibitory Amendment Cases, 24 Kan., 710, as a reason for liberal construction of the constitutional requirements: "Suppose a unanimous vote of both houses of the legislature, and a unanimous vote of the people in favor of a constitutional amendment, but that the secretary [of state] had omitted to publish in one county in which a newspaper was published, would it not be simply an insult to common sense to hold that thereby the will of the legislature and people had been defeated? Is it within the power of the secretary, either through ignorance or design, to thwart the popular decision? Is he given a veto or can he create one? This may be an extreme case, but it only illustrates the principle." The duty of publishing a proposed amendment is of course ministerial, and may be compelled by mandamus. Commonwealth *v.* Griest, 196 Pa. St., 396. State *ex rel.* Morris *v.* Mason, 43 La. Ann., 590. But as Judge Brewer suggested, publication might be improperly made through carelessness or design, and it would be difficult to detect such improprieties and to remedy them by an application for mandamus. Upon this point see also State *v.* Winnett, 78 Neb., 379, 387. In 1905 seven proposals of amendments were made

As has already been suggested several constitutions make no requirements whatever regarding the publication of proposed amendments, several others do not specify the manner of publication or require only publication in the laws passed by the legislature; and of the fourteen states requiring two legislative actions for the proposal of amendments, eleven provide for publication of the proposals in some manner after the first and before the second legislative action, but require no publication just before submission to the people. Because in many cases such incomplete provision is made in the constitutions for informing the people with reference to proposals of amendment which are to be voted upon, statutes have been adopted in a number of states establishing further regulations concerning publication, and a brief discussion of such statutory provisions will be of some interest.[80]

A number of states have no statutory regulation of this matter, and in many others statutory provisions simply repeat or paraphrase the language of the constitution. Such provisions, of course, have no interest for us here, but in many cases statutory enactments supplement the constitu-

by the Idaho legislature; the proposing resolutions in all cases but one contained specific provisions concerning publication and the expense thereof; no effort was made by the secretary of state to publish and submit the proposals for which this provision was omitted. In Commonwealth *v.* Griest, also, no provision was made for the expense of publication, but the court said here that it was the duty of the secretary of the commonwealth to publish in compliance with the constitutional terms, if the newspapers would undertake the publication—that is, to undertake to perform his duties as prescribed by the constitution, but here the specific duty was imposed upon the secretary by constitutional provision.

[80] These statutory rules are, as has already been suggested, in most cases not binding upon the legislature if it chooses to disregard them, but in practice they are, except in infrequent cases, followed until expressly repealed.

tional requirements or establish rules where there are none provided by the constitution. In some cases, as in Arkansas, Florida, and Missouri, the rules supplementary to those laid down in the constitution relate to the posting of proposed amendments in public places in each county or polling district.[81] In Iowa, Nevada, New Jersey, New York, and North Dakota (states in which the constitutions require two legislative actions, and publication after the first but not after the second legislative action) statutes provide for the publication of proposed amendments just before the election at which they are to be voted upon. New Jersey in its provision for the special election of 1909 required publication in at least two newspapers of each county once each week for four weeks before the election. Iowa requires publication in one newspaper in each county ten days before the election, or posting in five public places if there is no newspaper. Nevada requires three publications in each county thirty days before the election; North Dakota two publications in one or more newspapers in each county just preceding the election, and that public notices be posted if there is no newspaper. New York requires publication in newspapers published in each county once a week for three months preceding the election.[82]

In Massachusetts also the constitution requires that proposed amendments be published after the first and before the second legislative action, but makes no provision for publication just before a proposed amendment is to be

[81] Kirby's Digest (Ark.), 1904, secs. 2785, 2786. Florida laws, 1905, p. 82. Missouri Annotated Statutes, 1906, vol. iii, secs. 7091, 7094, 7119.

[82] Nevada Statutes, 1903, p. 204. Iowa Code, 1897, pp. 127-128, 402. New Jersey Laws, 1909, p. 392. North Dakota Revised Codes, 1905, secs. 634, 2294-2296. New York Consolidated Laws, 1909, ii, 953, iii, 2242.

submitted to the people. Here it is provided by statute that proposed amendments shall be published in the annual volumes of acts and resolves. Each separate portion or signature containing a law or a proposed amendment is printed in an edition of twenty-five thousand, and copies are sent to each city or town, to all local officers, and to others who may apply for them. The remaining copies are apportioned to the cities and towns, and are sent to the clerks thereof to be delivered to any person who may apply for them. There is no method of bringing proposed amendments directly to the attention of those who are to vote upon them.[83]

The Rhode Island constitution requires that a proposed amendment shall be "published," before its submission to the people, and by statute provision is made that public acts of a general nature (a phrase which includes amendments) shall be published in all the newspapers of the state; no special provision is made for the publication of proposed amendments.[84] The Mississippi constitution requires that "public notice" of a proposed amendment shall be given three months before the election, and this requirement is supplemented by a statutory provision that publication shall be made two weeks before the election "in the official newspaper in the respective counties of the state, or shall be posted in three public places" if the newspaper refuses to do the publishing at the price fixed by the law.[85]

But the publication of a proposed amendment as an advertisement in the newspapers for several weeks or months before an election accomplishes little toward bringing it directly to the attention of the voters or of informing them

[83] Massachusetts Revised Laws, 1902, i, 91.

[84] R. I. General Laws, 1896, p. 119.

[85] Mississippi Laws, 1908, p. 140.

as to the merit of the proposal. A legal advertisement is not the most effective method of reaching the general public. In addition the form of publication is in many cases such as to leave the reader ignorant of what change will be made by a proposed amendment. Of course when a proposal is of great importance, wide public attention will very likely be directed to it, and the public will be informed by printed and oral discussions. But the fact is that most proposed amendments are not with reference to matters likely to attract wide attention, but deal rather with matters of a local and often of a trivial character. Through the present methods employed in most of our states for the publication of constitutional proposals, the public is left practically uninstructed.[86]

The formal publication of proposed amendments in newspapers practically fails of its purpose, and this fact has led several states to try methods of bringing the ends aimed at in proposed amendments more directly to the attention of voters. In New York, for example, concurrent resolutions proposing amendments to the constitution are required to be published "in such a manner, by the use of italics and brackets, as to indicate the new matter added or the old matter eliminated."[87] A somewhat more effective method of informing voters regarding the purpose and probable effect of proposed amendments, is that provided in Minnesota: "At least four months preceding such election, the attorney-general shall furnish to the secretary of state a statement of the purpose and effect of all amendments proposed, showing clearly the form of the existing sections,

[86] Formal newspaper publication is not as effective now in bringing a proposal to the attention of the public as it was when this method was first adopted, and is more effective now in rural than in urban communities.

[87] New York Consolidated Laws, iii, 2242.

and of the same as they read if amended. Prior to the election, the secretary of state shall give three weeks' published notice of such statement in each county in the state in which qualified newspapers are published and in not more than three newspapers in each county. . . . He shall also forward to each county auditor a number of copies of such statement, in poster form, sufficient to enable him to supply at least six of such copies for each election district of his county. The auditor shall furnish such copies to the town, village and city clerks, who shall give three weeks' posted notice thereof, and cause one copy to be conspicuously posted at each polling place on election day." [88] Somewhat similar statutory provisions have been enacted in Illinois and Michigan; [89] in Illinois such a statement is simply required to be posted in public places within the election district; in Michigan the statement is to be posted in each election precinct, and the secretary of state is required three times to send copies of such statement to the several daily and weekly newspapers published within the state, sixty, thirty, and fifteen days before election, with the request that publicity be given to such statements.

The Minnesota plan provides for presenting to the voters (by means of newspaper publication and by posters) some intelligible statement regarding what is expected to be the effect upon the fundamental law of a proposed amendment. It leaves unaltered the old method of publication, which is certainly to a great extent ineffective as a means of bringing a matter directly to the attention of voters.

[88] Minnesota General Laws, 1907, p. 166. So far as can be discovered this plan has not proved of very great service in Minnesota. For similar plans employed in Switzerland see Lowell, *Governments and Parties in Continental Europe*, ii, 275, 276.

[89] Michigan Public Acts, 1905, p. 34; Constitution of 1908, art. xvii, sec. 3. Hurd's Revised Statutes of Illinois, 1908, pp. 146, 147, 988.

Nevada in 1887 took a further step toward bringing proposed amendments directly to the attention of voters; proposed amendments were required to be published in one daily newspaper of general circulation, and it was made the duty of the clerk of each county "to mail to every registered voter within his county a copy of the newspaper containing the proposed amendments."[90] A California statute of 1893 required sample ballots to be mailed to each voter before the day of the election, and by an enactment of 1899 it was further provided: "Whenever the legislature shall propose any amendment to the constitution of this state . . . or whenever said legislature shall submit any proposition to a vote of the qualified electors of the state, the secretary of state shall duly, and not less than twenty-five days before election, certify the same to the clerk of each county of the state; shall cause to be printed at the state printing office, in convenient form, one and one-half times as many copies of such amendment or proposition as there are registered voters in the state, and at least thirty days before any election at which such amendment or proposition is to be voted on, shall furnish each county clerk in the state with one and one-half times as many such copies as there are registered voters in his county. The clerk of each county shall thereafter cause to be mailed to each voter a copy of such constitutional amendment or other proposition . . ."[91]

Oregon adopted the initiative and referendum by a constitutional amendment of 1902, and by an act of 1903, for the purpose of carrying this amendment into operation, adopted the California plan of distributing proposed laws and constitutional amendments to the voters, but went a step further and provided that arguments for and against

[90] Nevada Laws, 1887, p. 122. This law is not now in force. Laws of 1903, p. 204.

[91] California Statutes, 1893, p. 304; 1899, p. 27.

such proposals might be distributed at the same time as the text of the proposals themselves. The Oregon law of 1903 was modified in 1907. The general features of the Oregon legislation have been followed by Oklahoma in 1907, Montana in 1907, and California in 1909; the Montana legislation applies only to laws initiated by popular petition or upon which a referendum vote has been demanded, and not to proposed constitutional amendments.[92]

The essential part of the Oregon plan is worth quoting in full as set forth in the act of 1907: "The secretary of state shall cause to be printed in pamphlet form a true copy of the title and text of each measure to be submitted, with the number and form in which the ballot title thereof will be printed on the official ballot. The person, committee, or duly authorized officers of any organization filing any petition for the initiative, but no other person or organization, shall have the right to file with the secretary of state for printing and distribution any argument advocating such measure. . . Any person, committee, or organization may file with the secretary of state, for printing and distribution, any arguments they may desire, opposing any measure. . . . Arguments advocating or opposing any measures referred to the people by the legislative assembly, or by referendum petition, at a regular general election, shall be governed by the same rules as to time, but may be filed with the secretary of state by any person, committee, or organization. . . . But in every case the person or persons offering such arguments for printing and distribution shall pay to the secretary of state sufficient money to pay all the expenses for paper and printing to supply one copy with every copy of the measure to be printed by the state; and he shall forth-

[92] Oregon General Laws, 1907, pp. 403-405. Oklahoma General Statutes, 1908, p. 781. Montana Laws, 1907, pp. 122, 124. California Statutes, 1909, p. 254.

with notify the persons offering the same of the amount of money necessary. The secretary of state shall cause one copy of each of said arguments to be bound in the pamphlet copy of the measures to be submitted as herein provided, and all such measures and arguments to be submitted at one election shall be bound together in a single pamphlet. All the printing shall be done by the state. . . The title page of each argument shall show the measure or measures it favors or opposes and by what persons or organization it is issued. When such arguments are printed he [the secretary of state] shall pay the state printer therefor from the money deposited with him and refund the surplus, if any, to the parties who paid it to him. The cost of printing, binding, and distributing the measures proposed, and of binding and distributing the arguments, shall be paid by the state as a part of the state printing, it being intended that only the cost of paper and printing the arguments shall be paid by the parties presenting the same, and they shall not be charged any higher rate for such work than is paid by the state for similar work and paper. Not later than the fifty-fifth day before the regular general election at which such measures are to be voted upon, the secretary of state shall transmit by mail, with postage fully prepaid, to every voter in the state whose address he may have, one copy of such pamphlet; *provided*, that if the secretary shall, at or about the same time, be mailing any other pamphlet to every voter, he may, if practicable, bind the matter herein provided for in the first part of said pamphlet . . . or he may enclose the pamphlets under one cover. In the case of a special election he shall mail said pamphlet to every voter not less than twenty days before said special election." [93]

[93] The Oregon law of 1903 provided that already printed arguments

In Oregon arguments may be submitted by practically any person or organization which is willing to bear the cost of printing,[94] and the same is true with reference to laws submitted to the people of Montana. But in Oklahoma and California the arguments for and against each measure are official arguments. In Oklahoma for example: "Arguments shall be prepared for and against each measure to be submitted to a direct vote of the people of the state, the length of the arguments not to exceed two thousand words for each side, in which one-fourth may be in answer to opponents' arguments. For one side the arguments shall be prepared by a joint committee of the house and senate, and for the other by a committee representing the petitioners. Where the legislature submits a competing bill the argument against it shall be prepared by the committee that prepared the affirmative of the opposing bill. Where the legislature submits any other question the argument for the negative shall be prepared by a committee representing the members in the legislature who voted against the substance of the measure." [95] In California "the author of such amendment and one member of the same house who voted with the majority on the submission of such amend-

might be furnished to the secretary of state in sufficient number for distribution to all voters, and that such arguments should be sent to the clerks of the several counties for distribution to the voters by the local registration officers. The Montana law, similar to the Oregon enactment of 1903, provides that any person desiring to present an argument for or against a measure may submit to the secretary of state a printed argument in a sufficient number of copies to be distributed to each qualified voter of the state; distribution in Montana is by county clerks who are required to mail the bound pamphlet containing the text of measures and arguments to each voter.

[94] The limitation with reference to measures initiated by petition is not a serious one.

[95] Oklahoma Laws, 1907-1908, p. 447.

ment, and one member of the same house as the author who voted with the minority against the submission of such amendment, both of whom shall be selected by the presiding officer of such house . . . shall within one year after the adjournment of the legislature prepare a brief statement showing the purpose of said amendment, and a comparative statement of the operation of the present section or article of the constitution, and the reasons advanced by the majority for its adoption, and the reasons advanced by the minority against its adoption, and any other reason why such amendment should be adopted, or be not adopted." [96] The Oklahoma and California provisions may be better adapted to keep down the bulk of the arguments, but the chances are that more careful and better arguments would be submitted under the Oregon and Montana plans. In California and Oklahoma the arguments are printed at the expense of state.

The California arguments are to be sent by the secretary of state to the county clerks of each county and are mailed to the registered voters by the county clerks. In Oklahoma a mandatory primary election is held on the first Tuesday in August of each even-numbered year for the nomination by all political parties of candidates to be voted upon at the general election in the succeeding November; the text of measures to be voted upon, together with the arguments, bound together in a pamphlet, is distributed to voters at the primary election; copies not called for at this time are to be distributed by the election inspectors, in so far as is possible, within their respective precincts; in the case of special elections the election inspectors are required to call a public meeting of the electors, and to distribute the pamphlet arguments in such other manner as they may find possible. The

[96] California Statutes, 1909, p. 254.

Oklahoma method of distributing measures, with the arguments for and against them, would seem to be cumbersome and unsatisfactory, especially when such measures are to be voted upon at a special election.

The plan of distributing proposed constitutional amendments to the people, together with arguments for and against them, is new. California has just adopted it; the Montana law does not apply to constitutional amendments, although this was probably an oversight; Oklahoma has held one election under the law of 1907—that of November, 1908;[97] Oregon has held two elections (June, 1904; June, 1906) under the law of 1903, and one (June, 1908) under the law of 1907. Oregon is the only state in which there is yet basis for judging the new plan. In 1906 ten measures were submitted to the people of Oregon—five proposed amendments and five laws—and but one of these, the equal suffrage amendment, was argued. At the election of 1908 nineteen measures were submitted (of which ten were proposed amendments), and arguments were submitted upon thirteen of these proposals. The results seem to have been very satisfactory—great popular interest has been taken in the elections, and the plan of bringing issues directly home to the voters has undoubtedly had something to do with the interest shown in measures to be voted upon. Both in 1906 and 1908 a very large proportion of those voting for state officers have also voted upon the proposed measures; this, however, should not

[97] Five measures were submitted to the people of Oklahoma in November, 1908, three of which were proposed constitutional amendments. All of the measures were argued, but only sixteen pages were required to contain both arguments and the text of the proposals. Upon each of these measures a large popular vote was polled, although two of the proposed amendments which received a majority of the votes cast were not carried, because they did not obtain a majority of all votes cast at the election.

perhaps be looked upon as necessarily an argument in favor of the plan; the referendum in Oregon is still new and many of the questions were important ones—these facts may readily explain the large popular vote. It is clear that the Oregon method is a more intelligent and effective one for the purpose of reaching the individual voter and informing him upon the measures submitted to him, than is the method of publishing the text of an amendment in local newspapers, without any explanation whatever.

Professor George H. Haynes, in an article discussing the Oregon experiment, has called attention to two difficulties connected with it: (1) the failure to limit the number of pages of argument which may be submitted; (2) the cost of distributing the pamphlets.

As to the first point it may be said that the Oklahoma and California laws, with their officially prepared arguments, and with the definite limitation of length in Oklahoma, are fairly well guarded against voluminous arguments. In Oregon, where there are no limitations except those imposed by the cost of printing, no difficulty has yet arisen. The arguments together with the text of measures in 1906 constituted about sixty pages, and the pamphlet issued in 1908 contained one hundred and twenty-eight pages, but nineteen measures were submitted in 1908, while but ten were voted upon in 1906. None of the arguments in the 1908 pamphlet were excessively long, and those submitting arguments may perhaps usually be relied upon to know that a long argument defeats its purpose. But common sense does not always rule, and some definite restriction of the length of arguments seems desirable as a precautionary measure. Perhaps even more important than a restriction of the length of arguments would be a restriction as to the number of proposals to be submitted at any one election. Nineteen measures at one election are too many to submit even to the most intelligent electorate.

As to the cost of the Oregon method Professor Haynes says: "Had these pamphlets [for the 1906 election] been sent out by mail, as is to be done under the existing law, the postage on each would have been three cents, making a total of about $4,300 for placing them in the hands of all the voters of the state. It is evident, therefore, that the supplying of free text-books to voters is a somewhat costly enterprise." The pamphlet sent out for the Oregon election of June, 1908, although it contained twice as many pages as were sent out in 1906, went for 3 cents postage, and the cost of mailing in 1908 was $3,750.[98]

But in considering the cost of the Oregon method, it must be remembered that the present method of advertising

[98] For an interesting discussion of the Oregon law see an article by Prof. George H. Haynes on *The Education of Voters,* Political Science Quarterly, xxii, 484.

The Oregon law of 1907 made no provision for the preparation of a list of voters for the use of the secretary of state, and the cost of preparing such a list increased the expense of distributing the pamphlets for the election of 1908. The total cost of printing and distributing 125,000 pamphlets in 1908 was as follows:

Paper	$2,226.50
Printing	5,042.74
Binding	1,433.45
Envelopes	889.00
Postage	3,750.00
Clerk hire	1,023.74
Registration lists	1,101.55
Cartage	52.15
Total	$15,519.13

Of this amount those submitting arguments paid $3,157.17 for paper and printing, so that the total expense of the state was $12,361.96. Biennial Report, Secretary of State of Oregon, 1906-1908, pp. 33a, 34a. The Oklahoma plan of distributing pamphlets avoids all expenses except those for paper and printing. In California sample ballots are mailed to each voter, and the additional cost of mailing the statements regarding proposed amendments should not be very great.

proposed amendments is also expensive. In Missouri, for example, the cost of publishing proposed amendments in recent years has been as follows:

1900	13,615.75
1902	24,051.28
1904	12,351.55
1906	5,022.05
1908	21,168.05

This expense has been for the publication of proposed amendments alone, without arguments, and in a manner which does not bring the matter squarely to the attention of the voters; the cost in 1906 is very low because in that year only two short amendments were submitted. If it be assumed that there are now one million voters in Missouri the cost of mailing the text of amendments to the voters would not be more than ten thousand dollars, and the distribution of a pamphlet similar to that used in Oregon in 1908, would involve an expenditure for postage of about thirty thousand dollars. The cost of printing would, of course, be greater under the Oregon plan, but if the text of the measures were distributed without argument, the cost of both printing and postage would probably be less than the cost of publication in the newspapers in 1902 and 1908.

In Louisiana the publication of proposed amendments in the years 1904, 1906, and 1908 cost on an average more than twenty thousand dollars for each year. Assuming the Oregon method to have been employed in these years, with a pamphlet similar to the Oregon pamphlet of 1908, the relative costs of distribution through the mails and of publication would be as follows:

Year	Number of registered voters	Cost of publication [99]	Estimated cost of distributing through mails
1904	108,079	$17,699.30	$3,242.37
1906	107,731	21,240.00	3,231.97
1908	156,554	25,000.00	4,696.62

This comparison is based upon the assumption that the text of measures together with arguments upon the measures should be distributed through the mails. A fairer comparison would be one between the cost of distributing the text of measures alone and that of publishing the text alone (as is done in Louisiana); this would reduce the postage charges to one-third of the figures given above. The cost of printing either the text of measures alone or the text with arguments, if borne by the state, must, however, be taken into consideration, as also other expenses incident to the plan of distribution through the mails; but in Louisiana the cost of printing and distributing the pamphlets would probably be much less than that of publication in newspapers under the present system. Oregon and Louisiana may properly be brought into comparison here, as respects the relative cost of reaching the people, for the number of registered voters in each of the two states is approximately the same; and in them the number of measures submitted to the people during the past few years is fairly comparable; Oregon has put the text of proposed amendments (and laws), together with arguments for and against them, into the hands of each voter at a cost less than that of Louisiana for the publication of the text alone in the newspapers of the state.

Missouri now requires the publication of proposed amend-

[99] The cost of publication for 1904 is taken from the auditor's reports; for 1906 and 1908 the figures are taken from the appropriation acts and represent the estimated cost of publication; in 1908 amendments were submitted at two elections so that the cost of distributing through the mails would be double that estimated above.

ments in each county for four weeks; Louisiana, publication for two months; as has already been suggested publication for three months is the more usual requirement. Arkansas, Ohio, and Tennessee require publication for six months, Arkansas and Ohio specifying that publication shall be in a newspaper in each county. In Ohio it has been the custom to provide by law for publication in two newspapers of each county, one representing each political party, and also in the German newspapers of the state;[100] in view of these conditions it is perhaps to have been expected that the publication of five short proposals in 1903 should have cost seventy thousand dollars, and that the publication of two proposed amendments submitted in 1905 should have involved an expenditure of more than thirty-four thousand dollars.[101] The plan of distributing proposed amendments by mail is cheaper and more effective than that of publication in the newspapers of the state, but the new plan will probably not be adopted very quickly because many constitutions specifically require publication in newspapers, and constitutional changes in this matter must come slowly.[102] It is of course possible to require the distribution of proposed amendments to each voter personally, while also complying with a constitutional requirement of publication in the

[100] Ohio Laws, 1902, p. 291; 1904, p. 484; 1908, p. 261.

[101] Reports of Ohio State Auditor, 1904, p. 30; 1906, p. 31.

[102] Governor Hughes of New York in his message of January 5, 1910, called attention to the fact that little interest is taken in proposed amendments and urged that means be devised to apprise voters of the nature of amendments submitted. He said: "The delivery of the text of the amendments at the time of registration in districts where personal registration is necessary, and suitable notification elsewhere, would be of no little advantage." Similar statements were made by Governor Higgins of New York in 1906, and by Governor Hughes in 1908 and 1909. Bills embodying Governor Hughes' suggestions were introduced in the New York senate and assembly during the session of 1910.

newspapers. In Wyoming the constitution requires that proposed amendments be published for twelve consecutive weeks in at least one newspaper in each county, and a law of 1909 provides in addition that each proposal shall be printed on a slip or leaflet and be circulated by mail or otherwise among the electors;[103] but this of course adds very much to the cost of publication. Where publication in newspapers is required, a large number of publications is hardly worth while; for attracting public attention publication for one month would seem to be equally as effective as publication for six months. In Florida, however, a proposed amendment reducing the time of publication from three months to one month was defeated in 1906.

Form of Submission

The Illinois constitution provides that "the general assembly shall have no power to propose amendments to more than one article of this constitution at the same session," and in Kentucky "no amendment shall relate to more than one subject." Colorado before 1900 had a provision similar to that of Illinois but by amendment altered its constitutional provision to read so that "the general assembly shall have no power to propose amendments to more than six articles of this constitution at the same session." Colorado also requires "that if more than one amendment be submitted at any general election, each of said amendments shall be voted upon separately and votes thereon cast shall be separately counted the same as though but one amendment was submitted;" and twenty-eight other states also require that where more than one proposed amendment is submitted, each proposal shall be submitted so that it may be voted upon separately.[104] These restric-

[103] Wyoming laws, 1909, pp. 27-28.

[104] Arkansas, California, Florida, Georgia, Idaho, Indiana, Iowa,

tions have given rise to some judicial discussion as to what is "one amendment" or "an amendment to more than one article" of the constitution.

With reference to this matter the courts have ordinarily taken a liberal and common-sense view. In the Illinois case of City of Chicago *v.* Reeves [105] an amendment adopted in 1904 was attacked as altering more than one article of the constitution. The court rejected this contention and said that the restriction "was not intended to prevent implied amendments or changes which were necessarily worked in other articles of the constitution by the express amendment of a particular article of the constitution. Any other view would be so narrow as to prohibit the general assembly in many, if not in all, cases, from proposing amendments to a particular article of the constitution," in as much as the several articles are closely interrelated and interdependent.

As to what may be considered one amendment the courts have in most cases pursued a liberal policy. A Wisconsin constitutional amendment of 1881 provided for the substitution of biennial for annual legislative sessions, and also adjusted the legislative elections and salaries to the new biennal system. To the contention that this measure really

Kansas, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Washington, West Virginia, Wisconsin, Wyoming. Vermont requires the general assembly "to enact all such laws as shall be necessary to procure a free and fair vote upon each amendment proposed," but this seems not to require the separate submission of each amendment. The Vermont Constitutional Commission in its report of January 6, 1910, said: "We recommend that all amendments be submitted individually so that the rejection of one may not necessarily involve the rejection of the others."

[105] 220 Ill., 274 (1906). See also Wilson *v.* Board of Trustees. 133 Ill., 443.

constituted more than one amendment the court replied: "Such a construction would, we think, be so narrow as to render it practically impossible to amend the constitution. . . . Certainly no good could result from a separate submission which is not equally as well and better accomplished by submitting them together as one amendment; and the separate submission might result in the absurdity of the ratification of the one and the rejection of the other. . . In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other." [106] Similarly a recent amendment in Iowa which had for its object the substitution of biennial for annual legislative sessions, was attacked on grounds similar to the Wisconsin amendment, and the court replied: "If the amendment has but one object and purpose, and all else included therein is incident thereto, and reasonably necessary to effect the object and purpose contemplated, it is not inimical to the charge of containing more than one amendment." [107] In Colorado an amendment adopted in 1902 provided (1) for the consolidation of the city of Denver and the county of Arapahoe, and for the framing of a charter by the new municipal corporation, and also (2) for the framing of home-rule charters by all cities of the first and second classes within the state. These two matters were separate and independent, and might well have been submitted as two amendments, but the Colorado court decided: "That an amendment may embrace more than one subject. That if an amendment embraces more than one subject, said subjects need not be separately submitted if they are germane to the general

[106] State *ex rel.* Hudd *v.* Timme, 54 Wis., 318 (1882).

[107] Lobaugh *v.* Cook, 127 Iowa, 181 (1905).

subject of the amendment, and if they are so connected with or dependent upon the general subject that it might not be desirable that one be adopted and not the other." [108] The view expressed by the Colorado court is a sound one, but there is room for difference of opinion as to whether the amendment under consideration did not violate the rule.

A stricter view of this matter has been taken by the supreme court of Mississippi. A proposed amendment submitted to the people of that state in 1899 provided for the popular election of judges, and also contained rules regarding the nomination and election of judicial officers. The supreme court declared that this measure was really four amendments in that it provided (1) for the popular election of judges of the supreme court, (2) for a similar method of choosing circuit judges, and (3) chancellors; and (4) for methods of nominating and electing these officers. The court said: "Whether amendments are one or many must be solved by their inherent nature, by the consideration whether they are separate and independent each of the other so as that each can stand alone without the other, leaving the constitutional system symmetrical, harmonious, and independent on the subject." [109] The test applied by the Mississippi court is too narrow; in many cases matters which might stand alone may, it would seem, properly be embodied in the same amendment if they relate to the same subject and are designed to accomplish the same purpose; in the case under discussion the question of

[108] People *v.* Sours, 31 Colo., 369 (1903). Upon this subject see also State *ex rel.* Morris *v.* Mason, 43 La. Ann., 590 (1891); State *ex rel.* Adams *v.* Herried, 10 S. D., 109 (1897); Gabbert *v.* Chicago, Rock Island and Pacific Railway Co., 171 Mo., 84 (1902); Hubbard *v.* Railroad Co., 173 Mo., 249 (1903); State *v.* Board of Commissioners, 34 Mont., 426 (1906).

[109] State *v.* Powell, 77 Miss., 543 (1900).

electing judges by popular vote is one of this character, although, as the court says, it might be possible to provide separately for the method of choosing each grade of judges; if the method of electing all judges be taken as one proper to be included in one amendment, certainly rules for the nomination and election of such judges are merely incidental to the main purpose of the proposal. The Mississippi decision can hardly be considered a sound one and is perhaps not entitled to very great weight in this connection, inasmuch as the amendment in question was also held to be invalid for other reasons.

Yet this decision has recently been followed by the supreme court of Idaho, which lays down a rule almost as strict as that of the Mississippi court. In the case of McBee *v.* Brady [110] the Idaho court said: "The determination whether a proposed change in the constitution constitutes one or more amendments, it seems to us, depends upon whether the change as proposed relates to one subject and accomplishes a single purpose, and the true test should be, can the change or changes proposed be divided into subjects

[110] 100 Pac. 97 (Idaho, 1909). Attention should also be called to Lozier *v.* Alexander Drug Co., 99 Pac., 808 (affirmed, Armstrong *v.* Berkey, 99 Pac., 921). Here was drawn in question an effort of the Oklahoma legislature to submit to the people part of a law, and to have it become effective as a constitutional amendment if it should receive a sufficient popular vote; the part of the law submitted was to become a provision of the constitution if approved by a majority of the persons voting at the election, but was to be altogether repealed if it did not receive a majority of the votes cast upon the question of its adoption or rejection. An affirmative vote counted in favor of the proposal as an amendment, but no option was given to those who favored the measure as a law but were opposed to its incorporation into the constitution; a negative vote on the other hand counted not only against the measure as an amendment but for its repeal as a law. The court held that such submission was improper because the voter had no opportunity to vote independently for or against the law, or for or against the proposed amendment.

distinct and independent, and can any one of which be adopted without in any way being controlled, modified or qualified by the other? If not, then there are as many amendments as there are distinct and independent subjects, and it matters not whether the proposed change affects one or many sections or articles of the constitution."

With reference to the time of submitting proposed amendments and to the form of submission little need be said. Twenty-two states require submission at general elections;[111] two provide for submission at general elections, but expressly permit special elections to be ordered.[112] The language of the Connecticut constitution seems to require submission to town meetings especially called for that purpose, and a similar provision is contained in the revised amending clause of Maine. New Jersey specifically requires that proposed amendments be submitted "at a special election to be held for that purpose only." The other state constitutions either make no provision whatever regarding the elections at which proposed amendments shall be submitted, or expressly leave the matter within the discretion of the legislature.[113]

[111] Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, North Carolina, Ohio, South Carolina, South Dakota, Utah, Washington, West Virginia, Wyoming. As to what is a general election see Westinghausen *v.* People, 44 Mich., 265; Chase *v.* Board of Election Commissioners, 151 Mich., 407; Tecumseh National Bank *v.* Saunders, 51 Neb., 801; Commonwealth *v.* Griest, 196 Pa. St., 396, 415-418; *In re* Denny, 156 Ind., 104, 110. See also State *v.* Board of Examiners, 21 Nev., 67.

[112] Oklahoma, Oregon.

[113] Where such discretion is given it is customary for proposed amendments to be submitted at general elections. Such a requirement as that in New Jersey is unwise, because a large vote upon proposed measures usually cannot be obtained at special elections. New Jersey held special elections on proposed amendments in 1897, 1903, and 1909.

The Michigan constitution expressly provides that proposed amendments shall be submitted on "a ballot or ballots separate from the ballot containing the names of nominees for public office." A similar provision is made by statute in several other states.[114] The Michigan constitution also requires that the text of proposed amendments be printed in full on the ballot. Alabama requires that "the substance or subject matter of each proposed amendment shall be so printed that the nature thereof shall be clearly indicated." In practically all of the other states the constitutional provisions are of such a character as to make it necessary that the full text or a clear indication of the character of the proposal appear upon the ballot.[115]

These elections were held in September, and general state elections in the succeeding November. In the special election of 1897 the vote was more than half as large as that at the general election; in 1903 only a little more than twelve per cent of that at the general election; and in 1909 less than twenty per cent of that at the general election. Governor Fort of New Jersey in his message of 1908 recommended the adoption of an amendment providing that a vote might be had at general elections.

[114] Idaho Laws, 1905, p. 315. Maine Laws, 1905, ch. 135. Missouri Laws, 1909, p. 492. New York Consolidated Laws, 1909, ii, 978. South Dakota Laws, 1899, p. 88. Wyoming Laws, 1909, p. 27. Writing with reference to the operation of the Idaho law Hon. Burton L. French of Idaho says: "You will notice that at each of the three first elections [1900, 1902, 1904] few persons comparatively speaking voted at all on the amendments. A better showing is made at each of the last two elections [1906, 1908]. The reason is because in the last two elections constitutional amendments were submitted on separate slips [or ballots] which were handed to each voter at the time the ticket was handed to him, and as a result he was compelled at least to notice them. Under the former system, the constitutional amendment was submitted by being printed at the bottom of the ticket. It was easily overlooked."

[115] As to what is a sufficient indication of the character of a proposed amendment see Murphy Chair Company *v.* Attorney-General, 148 Mich., 563; State *v.* Winnett, 78 Neb., 379, 394; Russell *v.* Croy,

Popular Vote Required for the Adoption of Amendments

Most of the states provide that a proposed amendment in order to be adopted shall receive simply a majority of the votes cast upon the question of its adoption or rejection,[116] and the Kentucky constitution makes its meaning perfectly clear in this respect by providing that "if it shall appear that a majority of the votes cast for and against an amendment . . . was for the amendment then the same shall become a part of the constitution."

In three states[117] proposed amendments in order to be adopted must be ratified by "a majority of the electors" of the state, and in each of them this language has been the subject of judicial construction. In the case of State *v.* Swift[118] there was involved the validity of a proposed amendment which had been submitted in 1880 and had received an affirmative vote of 169,483 and a negative vote of 152,251; the total vote cast at the election was 380,471, and the total number of persons eligible to vote in 1877 was

164 Mo., 69, 95-97; Worman *v.* Hagan, 78 Md., 166; Lovett *v.* Ferguson, 10 S. D., 45, 56; McBee *v.* Brady, 100 Pac., 97, 104 (Idaho, 1909); People *v.* Sours, 31 Colo., 369, 388; Lozier *v.* Alexander Drug Co., 99 Pac., 808 (Okla., 1909). The Oklahoma decision just referred to is very confused, but seems to imply that if the ballot title of a measure submitted to the people did not indicate clearly the character of the measure, the proposal would be invalid, although the full text of the measure had been distributed to every voter and even though it might be shown that the voters were not misled by such title. See also Armstrong *v.* Berkey, 99 Pac., 921.

[116] See Bott *v.* Secretary of State, 62 N. J. Law, 107; 63 N. J. Law, 300; and Itasca Independent School District *v.* McElroy, 123 S. W., 117; 124 S. W., 1011 (Texas). See also State *v.* Barnes, 3 N. D., 319.

[117] Idaho, Indiana, Wyoming. The Oregon constitution had until 1906 a provison similar to that in these states, which was construed by the administrative officers to require a majority of all persons voting at the election.

[118] 69 Ind., 505 (1880).

451,028. The court held that the proposed amendment was not adopted, because it had not received a majority of the votes cast at the election, and the judge delivering the opinion expressed his own view that in order to carry an amendment a majority of the electors, whether voting or not, was required. State *v.* Swift was affirmed in a later case, in which it was said that in the absence of a provision for registration the number voting would be presumed to be the number of qualified electors.[119] The language of the Wyoming constitution did not come before the courts until 1909, but before this date had always been construed by the administrative officers of that state to require a majority of all votes cast at the election. In the case of State *ex rel.* Blair *v.* Brooks [120] there was involved the validity of a proposed amendment which had been submitted in 1908; at the election 37,561 votes were cast, and the amendment received an affirmative vote of 12,160; the negative vote was 1363. The court said that the term "electors" meant all persons entitled to vote and included "not only those who vote, but those who are qualified yet fail to exercise the right of franchise." The proposed amendment was held not to have been adopted, inasmuch as it had not received even a majority of all votes cast at the election, and the court did not pass upon the question whether a proposal in order to be approved should have to receive the votes of a majority of the qualified electors. In Idaho the constitutional provision regarding the vote required to carry an amendment was at first construed by the election officials in the same way that the Indiana and Wyoming provisions have been construed by the courts of those states; the matter came before the supreme

[119] *In re* Denny, 156 Ind., 104 (1901).

[120] 99 Pac., 874 (1909).

court of Idaho in 1896, however, and the court took the opposite ground that a "majority of the electors" meant "a majority of the electors voting upon the measure," and said that any other construction of the language would make amendment practically impossible.[121] Before 1898 the Minnesota constitution required for the ratification of a proposed amendment "a majority of the voters present and voting" and the Minnesota supreme court held this to mean "present and voting upon the proposed amendment," and so avoided the necessity of an amendment's obtaining a majority of all votes cast at the election.[122] A Minnesota amendment of 1898, however, changed this rule, and specifically requires "a majority of all the electors" voting at a general election, for the adoption of a proposed amendment.[123]

In the states[124] which, like Minnesota, require that a proposed amendment receive a majority of all votes cast in the election at which it is submitted, there is of course no room for doubt, and the courts when they have had occasion to pass upon proposals not receiving the requisite vote,

[121] Green *v.* State Board of Canvassers, 5 Ida., 130 (1896).

[122] Dayton *v.* City of St. Paul, 22 Minn., 400 (1876). Similar language in the Mississippi constitution of 1890 has received a contrary interpretation.

[123] For the interpretation of language similar to that used in the present Minnesota constitution see State *v.* Stearns, 72 Minn., 200.

[124] Alabama, Arkansas, Illinois, Minnesota, Mississippi, Nebraska, Ohio, Oklahoma, Tennessee. Tennessee requires a majority of all persons voting for representatives. North Carolina, which requires "a majority of the votes cast," should also probably be put into this class. In Arkansas, Illinois, Minnesota, Nebraska, North Carolina, and Ohio amendments must be submitted at a general election so that the majority required is a majority of the votes cast at a general election; the same is also true of Wyoming. Alabama, Mississippi and Oklahoma may amend their constitutions more easily at special than at general elections, but not so Indiana, Wyoming, and Tennessee.

have uniformly held them not to have been adopted.[125] To the states in which amendment is made difficult by the popular majority required should be added Rhode Island, which requires the approval of three-fifths of all those voting upon an amendment, and New Hampshire, which requires that two-thirds of those voting on a proposal should favor it.

In the group of states [126] which require the approval of a majority of all persons voting at the election, constitutional amendment is extremely difficult. Persons voting at an election are usually more interested in the individual candidates than in the measures proposed, and for this reason many persons who vote for candidates will not vote at all upon measures. The number of votes cast upon proposed amendments in practically all cases falls very much short of the total vote cast at the same election. But, under the rule in these states abstention from voting upon a measure counts really as a vote against it, and no proposal stands much chance of adoption unless it has aroused a very great popular interest.

For these reasons the plan of requiring a majority of all votes cast at a general election has made constitutional amendment practically impossible. Speaking of Nebraska's experience, Judge Lobingier says: "In Nebraska in 1896 the electors were invited to vote on no less than twelve amendments to the constitution. The total vote for the office of governor in that year was 217,768, while on the very important amendment relating to the increase

[125] State *v.* Babcock, 17 Neb., 188. Tecumseh National Bank *v.* Saunders, 51 Neb., 801. State *v.* Foraker, 46 Ohio St., 677. State *v.* Powell, 77 Miss., 543. Rice *v.* Palmer, 78 Ark., 432. Railway Co. *v.* Kavanaugh, 78 Ark., 468. Knight *v.* Shelton, 134 Fed., 423.

[126] Alabama, Arkansas, Illinois, Indiana, Minnesota, Mississippi, Nebraska, Ohio, Oklahoma, Tennessee, Wyoming.

in the number of supreme court justices, there was reported as having been cast only 122,475, or about sixty-one per cent of those cast for gubernatorial candidates. Indeed proposed amendments have been submitted in that state in all but two or three of the even years since 1881, and until the present decade only one of these was declared adopted, though the trend is manifestly toward greater popular interest and most of the rejected amendments received a majority of the votes cast thereon, being lost by reason only of the constitutional requirement of a majority of all votes cast at the election." [127] A similar difficulty has been experienced in all of the other states which make this requirement.[128] No amendment to the Indiana constitution has been adopted since 1881, although a number of proposals have been submitted and have received a majority of the votes cast upon the question of their adoption. In Wyoming proposals submitted in 1900 and 1908 failed of adoption for the same reason. Minnesota adopted by amendment in 1898 the rule that a proposed amendment, in order to be adopted, must receive a majority of all votes cast at a general election; of the thirteen proposals submitted since that date, nine have failed of adoption under this rule, although they received a majority of the votes cast upon the proposals.

It is interesting to note that in this group of states proposed amendments, which have failed not because of an adverse vote but because of abstention from voting, are frequently submitted several times in succession, in the hope that they may finally receive a sufficient vote. In

[127] Lobingier, *The People's Law*, p. 344. See also a letter of Charles B. Letton in the Omaha Bee, Oct. 5, 1902, and Nebraska Blue Book, 1899-1900, pp. 280-291.

[128] For Illinois see Prof. J. W. Garner, in Proceedings of the American Political Science Association, 1907, p. 171.

Indiana a proposed amendment permitting the legislature to prescribe qualifications for admission to the bar, was submitted to the people in 1900 and 1906, and will be submitted again in 1910; there is no strong opposition to the proposal, but on the other hand there is no great public interest in it, and the chances are decidedly against its receiving the required vote in 1910; in 1900 nearly sixty per cent of the voters expressed themselves upon this proposal, in 1906 less than nine per cent. In Arkansas the two proposals submitted in 1908 had each been submitted before and had failed because not enough votes had been cast upon the question of their adoption. A Minnesota proposal concerning the investment of school funds, to which there was no strong opposition, was submitted at three successive elections (1900, 1902, and 1904) before it received the required vote; and Minnesota has had a somewhat similar experience with other proposals.

The practical impossibility of obtaining for a proposed amendment a majority of all votes cast for candidates at the same election, has led several states in this group to devise methods of evading or at any rate of avoiding the difficulty presented by their constitutional provisions. Two plans have been employed for this purpose, and it will be of interest to discuss each of them briefly.

The Alabama constitution of 1875 required that proposed amendments be submitted at a general election, and that in order to be adopted they should receive the vote of "a majority of all the qualified electors of the State, who voted for representatives." [129] The legislature, in submitting a proposed amendment to the people in 1898, provided that the ballot should have printed on it the words

[129] There were similar provisions in the Alabama constitutions of 1819, 1865, and 1867.

"For Birmingham Amendment," and that "any elector desiring to vote for said amendment shall leave such words intact upon his ballot, and any elector desiring to vote against said amendment shall evidence his intention to so vote by erasing or striking out said words with pen or pencil. The leaving of said words upon the ballot shall be taken as a favorable vote, and the erasure or striking out of said words as aforesaid shall be taken as an adverse vote, upon said amendment." Under this law the amendment was carried. Against this method it was contended that it made necessary a vote either for or against the amendment, and that it really made inaction a vote for the proposal, but to this the Alabama court replied that a voter had no constitutional right to a ballot which would permit him to abstain altogether from voting upon a measure, and that the depositing of the ballot was itself an affirmative action in favor of the amendment.[130] Whatever may be the legal theory, the fact is clear that without such a ballot the inaction of an elector (that is, failure to mark the ballot) is practically a vote against the amendment (as each abstention decreases by just so much the possibility of its receiving a majority of all votes cast at the election),[131] while under the Alabama statute inaction (that

[130] May and Thomas Hardware Co. *v.* Birmingham, 123 Ala., 306 (1898). This plan could not be employed now in Alabama, for the Alabama constitution of 1901 specifically requires a different form of ballot.

[131] This fact was clearly recognized by the Idaho court in Green *v.* State Board of Canvassers, 5 Ida., 130, 141, where one of the justices said: "The constitution and the statutes say: 'All you electors who believe that equal right of suffrage should be extended to women stand up and be counted.' Twelve thousand one hundred and twenty-six voters stand up, and are counted in the affirmative. The constitution and statutes say with equal distinctness: 'All you qualified electors who believe that the equal right of suffrage should not be extended to women stand up and be counted.' Six thousand two hundred and

is, failure to mark the ballot) is counted as an affirmative vote. There is not, so far as can be seen, any objection to placing the burden upon those opposed to an amendment rather than upon those who favor it; and certainly there can be no objection to the voter's being required to express himself either for or against a measure which is submitted to him for approval. There would seem to be no constitutional right to abstain from voting on an amendment when casting a ballot in an election at which an amendment is submitted.

In connection with proposed amendments submitted to the people of New Jersey in 1897, a question arose somewhat similar to one of those discussed in Alabama. In New Jersey, it may be remembered, proposed amendments are submitted at special elections and are adopted if they receive a majority of the votes cast at such election, so that no difficulty presented itself such as that in Alabama. Three proposals were submitted to the people of New Jersey in 1897, and the ballot provided by legislative act read: "For all propositions on this ballot which are not canceled with ink or pencil, and against all which are so canceled." It was contended that submission in this form did not comply with the constitutional requirement that amendments should be submitted so that each might be voted on separately—that the "law compelled every voter who desired to vote for or against any proposed amendment

eighty-two stand up and are counted. Eighteen thousand four hundred and eight votes in all cast upon the question. But, say the defendants, there were about ten thousand qualified voters in the state who did not vote at all on the question, that should be counted as having voted 'No'. Why should they be counted in the negative? . . . . These electors either have no opinion on the subject, or they have none that they cared to express. Why should they be counted as having voted in the negative, when they did not vote at all on the subject?" See also an expression in State *v.* Laylin, 69 Ohio St., 14.

to also vote for or against the two other propositions," and that the voter had the right to remain neutral as to some amendments and to vote upon the others. The supreme court of the state took the ground that the voter had no such right; but the court of errors and appeals, without passing squarely upon the question, said: "There is, indeed, a sense in which, under such a law, the people could not vote for or against each amendment separately and distinctly—that is, they would be required to determine how they would vote on any amendment in conjunction with a determination as to how they would vote on each of the others. But in another and an important sense they could vote for or against each separately and distinctly —that is, a determination to vote for or against any one left them entirely free to determine how they would vote on each of the others." [132] Inasmuch as this was a special election the elector of course had discretion as to whether he should vote on all the proposals submitted or abstain altogether from voting. The ballot used in the New Jersey election of 1897 (somewhat similar to the Alabama ballot of 1898) made it easier to vote affirmatively than negatively upon the proposed amendments, a negative vote requiring a marking of the ballot, which was not necessary for an affirmative vote, but this matter was not considered by the New Jersey courts. The important point, for our

[132] Bott *v.* Secretary of State, 62 N. J. Law, 107; 63 N. J. Law, 289, 301. Certainly it would have been improper so to submit proposals that one voting affirmatively upon one measure should also be required to vote affirmatively upon another. The elector must be free to declare himself either for or against each proposal separately, but can hardly have any constitutional right to express himself upon one measure and to abstain from voting upon another measure submitted at the same time. Upon the question as to whether an affirmative vote on an amendment may be made dependent upon an affirmative vote on another measure see Lozier *v.* Alexander Drug Co., 99 Pac., 808.

discussion, in these cases, is that as to whether a voter in casting his ballot has a constitutional right to abstain from voting upon a proposed amendment, as well as a right to vote either for or against it, but this question was left unsettled by the New Jersey court of errors and appeals.

Nebraska and Ohio have tried a method different from that employed in Alabama in order to obtain a sufficient vote to carry constitutional amendments. Nebraska in 1901 provided that: "A state convention of any political party may take action upon any constitutional amendment, which is to be voted upon at the following election, and said convention may declare for or against such amendment, and such declaration shall be considered as a portion of their ticket . . . " Where a political party endorsed a proposed amendment, such endorsement was to be printed as a portion of the party ticket, and a straight party vote was counted for the amendment; and in the same manner if the party action were against the amendment a straight party vote would be counted against such amendment.[133] This plan was copied by Ohio in 1902, and the Ohio law continued in force until 1908 when it was repealed for political reasons.[134]

The above-quoted Nebraska law remained in force until 1907, when a mandatory direct primary law was passed. By this law the convention method of acting upon amendments was abandoned, and it was provided that: "At the general primary election next preceding any general election at which any constitutional amendment shall by law be required to be submitted to the electors of the state . . . it shall be the duty of the county clerks to cause to be printed in the primary election ballots of all political parties

[133] Nebraska Laws, 1901, p. 341.

[134] Ohio Laws, 1902, pp. 352-353; 1908, p. 120.

the question of such constitutional amendments . . . and each elector may declare himself in favor of or against any such amendments . . . and if a majority of the electors of any party voting upon such amendment shall declare in favor of or against any such amendment, such declaration shall be considered as a portion of the ticket of such party." [135] Party action upon proposed amendments was optional under the law of 1901, but it was made compulsory in 1907.

The counting of straight party votes for amendments when such amendments have been endorsed by the political parties, has been upheld by the courts both in Ohio and Nebraska. Under the statutes of both Nebraska and Ohio an elector might vote a straight party ticket and thus cast his ballot for his party's action concerning the proposed amendments; or might vote the straight party ticket in general, but vote on any proposed amendment in opposition to his party's action (by so marking opposite the amendments on the printed ballot); or might decline to vote the party ticket, and cast his vote either for or against the amendment, or not vote on the amendment at all; but if his party had, let us say, endorsed the amendments, the voter must either cast his vote for the amendment or split his ticket. His inaction with reference to the amendment (that is, by not voting for or against it specifically) is counted for it if his party has endorsed the proposal, or against the amendment if his party has declared against it; so too, if several amendments are submitted at once, and his party has endorsed all or more than one of them, voting a straight party ticket casts a ballot for all such proposals.

These laws were attacked on the ground that they did

[135] Nebraska Laws, 1907, p. 217; 1909, p. 54. Cobbey's Annotated Statutes, 1909, secs. 5808, 5819, 5837, 5895, 6956-6969.

not permit the electors to vote on "each amendment separately," as required by the constitutions of Ohio and Nebraska. To this the Ohio court replied: "The act of the general assembly . . . enables the elector to vote with or against his party, on each or all of the amendments, or to vote separately upon each and every proposed amendment, or not to vote at all if he so desires;"[136] and the Nebraska court said: "The voter may vote a straight party ticket if he desires, but he is not compelled to do so. He may vote a straight party ticket in general and make such exceptions as he desires either as to the individual candidates or as to any proposed constitutional amendment."[137] The Nebraska and Ohio plans make it more difficult for a voter to abstain from voting upon a proposed amendment on which his party has taken action (for to do this he must decline altogether to vote a straight party ticket), and also make it difficult for him to vote against his party's action (for to do this he must go to the trouble of splitting his ticket). As remarked by one of the counsel in the Ohio case this system has the result of making "the indifferent voter support a constitutional amendment in favor of which his party has taken action." But it can hardly be said that a voter in casting his ballot has a constitutional right to abstain altogether from voting upon a measure submitted to him; and if the law does permit him to abstain from expressing himself, he can make no objection if such abstention is made more difficult than an expression of opinion for or against the measure; nor would it seem that he could properly object if (as in Alabama in 1898, and in Ohio and Nebraska if a measure had party endorsement) to a negative vote being made somewhat more difficult than an affirmative vote.

[136] Ohio *ex rel.* Sheets *v.* Laylin, 69 Ohio St., 1, 14 (1903).

[137] State *ex rel.* Thompson *v.* Winnett, 78 Neb., 379 (1907).

By the system of party endorsements Nebraska was able to amend its constitution once in 1906 and twice in 1908. In Ohio the plan was employed in the elections of 1903 and 1905, but the law was repealed in 1908, so as not to be available for the election of November, 1908. In 1903 five proposed amendments were submitted in Ohio; of the five two (relating to county representation and the liability of stockholders) were endorsed by both the republican and democratic parties, and received the vote of these two parties almost in full; one (conferring the veto power upon the governor) was endorsed by the republicans and opposed by the democrats, and was carried by the republican vote; upon the fourth amendment (that regarding taxation) the republicans, without endorsing, invited "careful consideration," and the democratic endorsement was given; the straight democratic vote for the amendment was not sufficient to give it a majority of all votes cast at the election; a fifth amendment submitted at the same time received the endorsement of neither democrats nor republicans—upon this amendment only about 50,000 votes were cast out of a total vote at the election of nearly nine hundred thousand. Two amendments submitted in 1905 were carried by means of party endorsements. Only by means of the party endorsements was it possible to carry the amendments which were adopted in 1903 and 1905. In 1908, when the party endorsement was no longer employed, three amendments were submitted, and although each of them received an overwhelming majority of the votes cast upon it, all of them were lost, because less than forty per cent of those voting at the election expressed themselves upon the amendments.

The requirement that a proposed amendment receive a majority of all votes cast at a general election may therefore be said to make the amending process practically un-

workable, unless some method is employed of counting votes for or against proposed amendments where the voter himself is too indifferent to mark such proposals upon his ballot. Such schemes, however valid they may be technically, are really evasions of constitutional requirements, and practically nullify these requirements. But the strict constitutional plan, having proven unworkable, must permit of alteration by construction so as to allow necessary changes. Our constitutions contain much legislative matter, devised to meet conditions existing when they were framed, and must be changed when conditions have altered. Of the methods of popular ratification most employed—(1) by a majority of those voting on the measure, even though it be a minority of those voting on other matters at the same time, (2) by a majority of those voting at the election when the proposal is submitted—the second has proven practically unworkable, without schemes for the counting of votes which practically nullify it; the first, on the other hand, often permits constitutional alterations by a small minority of the electors, and is objectionable for this reason. It is a question whether the second plan, aided by party endorsements or by the Alabama method of voting, is not better than final action by a minority. Under the Alabama plan an elector votes for an amendment unless he is definitely opposed to it; he is presumed to be for it rather than against it if he does nothing. Under the party endorsement plan the elector votes for his party action unless he is definitely opposed to it. Both methods may be said simply to count those who really do not express any opinion of their own upon the proposal, but who do nothing about the matter because it is easier to do nothing. This is true of the Alabama plan. But the plan employed in Nebraska and Ohio means more than this. Under our system of government political parties may be said

to be essential, and endorsement of a measure by a more or less representative party convention or by a party primary may be fairly said to represent the opinions of a large number of party members.[138] This is especially true where, as in Nebraska since 1907, a referendum upon proposed amendments is required to be taken in the party primaries. The Nebraska plan does, however, permit a small party minority which is interested in a proposal to commit an indifferent party majority by means of the primary, for the party endorsement is that of a majority voting upon the question, not that of a majority voting at the primary; the result actually is the same as in the states which permit amendment by a majority of those voting on the question, irrespective of whether there is a majority of all persons voting at the election. For example, let us assume that in a Nebraska republican primary one hundred thousand votes were cast; and that on a proposed amendment only ten thousand votes were cast, of which a majority were favorable; an endorsement of such proposal would then go on the republican ticket, and would obtain practically the whole republican vote, and the amendment would be carried, not because a majority of the party voters favored it, for the majority was evidently indifferent, but because of the action of a small minority. So that in effect we have the same result as in a state which does not re-

[138] But measures may often be submitted which have little or no bearing upon party policies. Often, too, the parties may not care to commit themselves, and under the Ohio plan it was not necessary that they commit themselves although inaction would be equivalent to adverse action, but under the Nebraska law of 1907 some definite party action upon proposed amendments is compulsory. It is always possible, of course, for the dominant party to bring about the repeal of the law by which party endorsement is required, if it does not wish to commit itself in any way upon a pending measure, and this is what was done in Ohio in 1908.

quire a majority of all persons voting at the general election. A similar result, with control by a still smaller minority, might often be expected from the use of the convention plan of party endorsement. But this is simply to say that unless a question is one of great popular interest (and most proposed amendments are not such), a proposal cannot ordinarily be carried, even though practically unopposed, if it must obtain a majority of all votes cast at a general election.

Except with reference to matters of great importance, it may therefore be said that the requirement of such a majority makes constitutional alteration too difficult, when we take into consideration the fact that our state constitutions contain so many provisions which are not fundamental in character and which require frequent change. But the plan used by most of the states permits amendment by a minority [139]—in fact amendments are usually adopted by a minority of the people and often by a very small minority. There is a feeling and a very proper one, that constitutional alterations should not be made by so small a body of people —sometimes as few as one-tenth of the voters—and this feeling has led to the proposal that no amendment should be carried unless it received a certain fixed proportion of the votes cast. So in New York: "The possibility that a constitutional amendment might be adopted by a minority of the electors of the state led to a proposed increase in the vote required to make the amendment effectual. . . . In

[139] The plan of permitting the adoption of proposed amendments if they receive a majority of the votes cast upon the question of their adoption or rejection, practically results in the adoption of any proposal to which there is no strong opposition, even though there may be little sentiment in favor of it. The Nebraska plan will, it seems, accomplish very nearly the same purpose, but by the use of more cumbersome machinery. For a further discussion of popular votes upon proposed amendments, see pp. 275-278.

1883 it was proposed to require a majority of all the electors of the state to adopt an amendment; and in 1893 it was proposed that an amendment should not be deemed adopted unless the total vote for and against it should equal 70 per cent of the total vote cast for the members of assembly at the last preceding election." Neither of these proposals was adopted by the legislature for submission to the people.[140] The Michigan constitution of 1908 permits the proposal of amendments by popular petition, but provides that the affirmative vote necessary to adopt amendments so proposed " shall not be less than one-third of the highest number of votes cast at the said election for any office," although amendments proposed by the legislature may be adopted by a majority of those voting thereon. Reference has already been made to the Kentucky requirement that the affirmative vote on the question of calling a constitutional convention shall be " equal to one-fourth of the number of qualified voters who voted at the last preceding general election."

No trial has yet been made of the plan of requiring the vote of a certain fixed proportion of the qualified electors in order to carry an amendment. New Hampshire and Rhode Island have, however, employed another method of assuring that amendments shall not be adopted by too small a minority of voters. New Hampshire requires that proposed amendments be approved by two-thirds of the qualified voters voting thereon, and Rhode Island requires an affirmative vote of three-fifths of the electors voting upon proposed amendments. Even these requirements defeat many proposed amendments which would otherwise be adopted. Of the ten amendments submitted in New Hampshire in 1903, five failed because they did not receive a

[140] Lincoln, *Constitutional History of New York*, ii, 576-577.

two-thirds vote, although a majority was cast for their adoption; Rhode Island proposals submitted in 1898 and 1905 received a majority vote, but failed for want of three-fifths.[141]

Still another question with reference to the majority required upon constitutional amendments was raised in Kansas, and was settled by the supreme court of that state, in the following language: "Another argument is based upon the use of the plural in this clause: 'And if a majority of the electors voting on said *amendments* at said election shall adopt the *amendments*, the same shall become a part of the constitution.' Now it is said, that by computing the vote by precincts, it is apparent that more than twice 92,302 voters [142] voted on the two amendments, some on one and some on the other, and that before any one amendment is adopted, it must appear that a majority of all who voted on all the amendments, voted in the affirmative on the one. This does not commend itself to our judgment. A more correct interpretation grammatically of this language would be, that no single amendment could be adopted unless all were, there being no provision for adopting one out of several. But we think the clear intent is, that every amendment submitted shall stand upon its own merits, and that if a majority of those voting upon it is in the affirmative, it becomes a part of the constitution." [143]

[141] For earlier votes in which a similar result was had see Rhode Island Manual, 1909, pp. 134-138, and Colby's *Manual of the Constitution of New Hampshire*, 228, 238.

[142] The vote on the prohibitory amendment was 92,302, with 84,304 against.

[143] Prohibitory Amendment Cases, 24 Kan., 700, 721. See also Bott *v.* Secretary of State, 62 N. J. Law, 127, 129; 63 *ibid.*, 300; and Itasca Independent School District *v.* McElroy, 123 S. W., 117; 124 S. W., 1011 (Texas). The Texas constitution specifically lays down the same rule as that announced by the Kansas court.

Assuming that an amendment has been adopted by the people, when does it become effective as a part of the constitution? A few constitutions provide specifically as to this matter; thus the constitution of Oregon specifically provides that an amendment shall be in force from the date of the governor's proclamation that it has been adopted. In the absence of a constitutional provision, the law or legislative resolution may be considered as controlling, if it specifies anything as to this matter.[144] In the absence of constitutional or legal provision, and where the constitution simply contains a statement that an amendment shall become part of the constitution if it receives the required popular vote, the courts differ as to whether such an amendment becomes effective on the day of the election, at the time when the vote is canvassed, or at the time when the result of the popular vote is made public. A statute becomes effective immediately upon its passage, unless another rule is specified in the constitution or statute, and, reasoning by analogy, it has been argued that an amendment should become effective immediately upon its approval by the people, unless the constitution makes a dif-

[144] Where the constitution lays down one rule it is of course impossible for the legislative resolution to establish another. "Under the constitution, upon the ratification of an amendment, it becomes a part of the constitution, and while the legislature might propose an amendment which in itself provides for the time it would become operative, yet, unless such time is incorporated in the amendment itself, the legislature has no authority to fix a time different from that prescribed by the constitution. In other words, if the amendment in its own terms fixes a time different from the constitution, and it is ratified, then it becomes just as much a part of the constitution as the present provision with reference to the time an amendment ratified should become a part thereof, but in the absence of such time being incorporated in the amendment, the legislature has no power to change the provisions of the constitution." McBee *v.* Brady, 100 Pac., 97, 105. See also Hays *v.* Hays, 5 Ida., 154, and Kingsbury *v.* Nye, 99 Pac., 985.

ferent provision; but this analogy does not hold, for the passage of a statute by the legislature is itself a specific public act, easily known at the time when done, while the result of a popular vote is not known, until the vote has been canvassed and the result made public. The canvass of votes and announcement of the result are necessary and essential steps in the popular adoption of any measure and may be considered parts of such process because necessary parts of the election itself.[145] Unless a constitution specifically provides otherwise, the better rule would seem to be that an amendment does not become effective in any case until the vote has been canvassed and the result announced.[146]

[145] Real *v.* The People, 42 N. Y., 270, 276. "The canvass of the votes cast by the various boards of canvassers as required by law, and announcing the result and certifying the same as required by law, is as much a part of the election as the casting of the votes by the electors. The election is not deemed complete until the result is declared by the canvassers as required by law."

[146] Many of the cases are reviewed in State *v.* Kyle, 166 Mo., 287. See also Wilson *v.* State, 15 Tex. App., 150; *In re* Joslyn's Estate, 117 Mich., 442; People *v.* Supervisors, 100 Ill., 495, and cases cited in Century Digest, x, 1236; Decennial Digest, iv, 1560, and in American and English Encyclopaedia of Law, vi, 909.

It may be well here to refer briefly to the question as to when a complete new constitution becomes effective. Where a proposed constitution is to be submitted to the people for approval it does not, of course, become effective until after such approval has been obtained. State *v.* Mayor, 32 La. Ann., 81. Territory *v.* Parker, 3 Minn., 240. When an established state forms a new constitution for itself, it is usual to provide in the new constitution as to the time when that instrument shall become operative, and as to the details concerning the transition of the state from the old to the new constitution. See Bilbrey *v.* Poston, 63 Tenn., 232. For this reason cases have not arisen with respect to such constitutions, and cases which have arisen have had to do with constitutions framed by territories when seeking admission to the union or by the southern states when seeking readmission under congressional reconstruction acts. With reference to territories the rule would seem to be that, while a territory does not become a state until all forms prescribed by Congress for admission

In Mississippi and South Carolina, as has already been said, the popular vote is not the final step in the amending process, but a subsequent legislative action is necessary. In South Carolina a proposed amendment approved by the people, does not become effective unless "a majority of each branch of the next general assembly shall, after such an election [general election for representatives] and before another, ratify the same amendment or amendments." In Mississippi a proposed amendment adopted by the people "shall be inserted by the next succeeding legislature" as a part of the constitution, and does not become effective unless so inserted. In these two states amendments become effective only after action by the legislature. The

are complied with, yet if a constitution is adopted and acted upon (and admission subsequently obtained), such acts will be considered valid as those of at least a *de facto* government, and the constitution will thus be given effect to as from the date when it was ratified and began to be acted under, although really not a "state" constitution until admission into the union is fully accomplished. Secombe *v.* Kittelson, 29 Minn., 555. Scott *v.* Detroit Young Men's Society's Lessee, 1 Doug. (Mich.), 119. Scott *v.* Jones, 5 How., 343. See an opposing dictum in Myers *v.* Manhattan Bank, 20 Ohio, 283. The congressional acts, under which the southern states were readmitted, required that these states adopt constitutions and that governments organized under such constitutions perform certain acts as a condition precedent to restoration. Hence, although the states had not acquired their full rights as states, and although the constitutions were subject to approval or disapproval by Congress still they did become effective for the purposes of organizing state governments as soon as they were ratified by the people. These constitutions were therefore held to have become effective, for certain purposes at least, at the time when they were ratified by the people; and the opposite contention that they were not effective until after congressional approval was rejected by the courts. *In re* Deckert, 2 Hughes (U. S.), 183. Pemberton *v.* McRae, 75 N. C., 497. Campbell *v.* Fields, 35 Tex., 751. Peak *v.* Swindle, 68 Tex., 242. State *v.* Williams, 49 Miss., 640. See also Foster *v.* Daniels, 39 Ga., 39. See an editorial on this subject in Central Law Journal, vol. 69, pp. 441-443, and discussion in Jameson, *Constitutional Conventions*, 4th ed., 197-200.

legislative function in Mississippi is made mandatory by the constitutional language, and it is a function really ministerial in character, but the legislature's action is, in fact, purely discretionary, because legislative action is not subject to judicial control. Nor is the legislative action upon amendments in these states purely formal. In South Carolina an important amendment, substituting biennial for annual legislative sessions, was approved by the people in November, 1904, but failed because it was not ratified by the succeeding legislature.[147]

An interesting question arose recently in Minnesota as to what text of a proposed amendment should control in case of discrepancies. Here an amendment concerning taxation was proposed by the legislature, and the amendment as passed by the legislature provided that its terms should not apply to "farm land." The proposed amendment as printed in the session laws omitted the word "farm" and this word was not employed in the synopsis of the proposed amendment prepared by the attorney-general for publication. The proposed amendment was referred to simply by title on the ballot. The question was thus raised as to whether the amendment had been adopted with or without the word "farm." Counsel for the state argued that the published text controlled, and that the word "farm" must therefore to taken to have been omitted; on the other hand it was argued that in case of a discrepancy, the enrolled bill prevails in the case of statutes, and that the same rule should apply to amendments. The court, while suggesting that the rule with reference to statutes might not apply, did not pass upon the question, because it found that

[147] It was urged in this case that the amendment had been improperly proposed and would therefore not be a valid amendment even if ratified by the legislature. South Carolina House Journal, 1906, pp. 47-49.

the omission of the word "farm" made no change in the sense or purpose of the amendment. Judge Jaggard, in a concurring opinion, declared that "the enrolled bill controls."[148] It is to be seriously doubted whether the enrolled bill, journal entry, or other evidence of legislative action, should control in such a case. The popular vote is the decisive factor in constitutional change, and if there were any important discrepancy between the enrolled bill and the measure submitted to the people, it would seem, on principle, that the measure which had received popular approval should prevail. The question is not apt to present itself squarely, because if the discrepancy is great it will very probably cause the amendment to be held invalid as violating some specific constitutional requirement.

Somewhat similar in character was a question which arose recently in South Carolina.[149] An amendment regarding municipal debts was submitted and adopted in 1900; as proposed the amendment purported to amend article iv, section 5 of the constitution, but this was an error for article x, section 5. The court declared that it was beyond the judicial power to alter the language of the amendment and to declare that it intended to refer to article x, section 5, but upheld the amendment by saying that it impliedly repealed the conflicting provision of article x, section 5.

Another interesting point is that as to the effect which will be given to two directly contradictory amendments if adopted at the same election. The Nebraska legislature in 1889 proposed two amendments, one providing for prohibition of the sale of liquor, the other providing for a license system. The idea was that these should be in the

[148] State *v.* Twin City Telephone Co., 104 Minn., 270.

[149] Bray *v.* City Council of Florence, 62 S. C., 57 (1901).

nature of alternative provisions, and this method was employed because no constitutional authority existed for the submission of competing measures. But this plan did permit each voter to vote either for or against both propositions, and made it possible that both proposals might be adopted by the people. The legislature for this reason asked the opinion of the state supreme court as to the constitutionality of the plan, and the view of the court was favorable. The court said: "Electors, in casting their ballots for or against a proposition are supposed to be, and as a rule are, governed by principle; hence, if one votes in favor of prohibition, it will be rare indeed that he will also vote in favor of license. So if he votes for license, he will not vote for prohibition. The proposed amendments provide for different and contradictory modes of controlling the liquor traffic, but one of which can be effective if adopted. The propositions being independent, however, an elector may vote for one and against the other, or for or against both. If both should receive a majority of all votes cast, however, the amendments being irreconcilable, both would fail." [150] Both proposed amendments failed, so that the question of conflict never arose. In agreement with the Nebraska opinion is a recent dictum of the Idaho supreme court: "Where a section of the constitution is amended at the same time by two different amendments, and the amendments adopted are directly in conflict, and it is impossible to determine which should stand as a part of the constitution, or to reconcile the same, both must fail." [151] But in this case one of the proposed amendments had already been held invalid because improperly proposed, and

[150] *In re* Senate File No. 31, 25 Neb., 864, 879.

[151] McBee *v.* Brady, 100 Pac., 97; Utter *v.* Moseley, 100 Pac., 1058 (1909).

even had it been validly proposed there was no real conflict between the two amendments, although the court did say that there was irreconcilable conflict. The view expressed by the Nebraska and Idaho courts is clearly correct, should two amendments adopted at the same time be in irreconcilable conflict.

Judicial Control of the Amending Process

In discussing the judicial attitude toward the amending process it may be well to devote brief attention to the question which has been frequently raised whether the proper adoption or rejection of an amendment is not a political question, and as such beyond judicial cognizance. In several cases courts have taken the view that they had no authority to interfere in such matters. This view is very well expressed by Judge Fisher's dictum in Green *v.* Weller: "But he was of opinion, that an amendment of the constitution having been submitted by the legislature to the people, voted upon, and accepted by them, and by the succeeding legislature inserted in the constitution as part of that instrument, there is no tribunal in the government which can revise this action of the respective legislatures, and of the people . . . The question is not in its nature judicial but political, and hence the action of that body to which the power has been specially confided, must be conclusive."[152] In Maryland the constitution provides that "if it shall appear to the governor that a majority of the votes cast . . . on said amendment or amendments, severally, were cast in favor thereof," the governor should issue his proclamation declaring the amendment adopted. This language has been held by the Maryland court to vest in the governor the final decision as to whether the people have adopted or rejected a proposed amendment. In the case

[152] Green *v.* Weller, 32 Miss., 650; 33 Miss., 735 (1856).

of Worman *v.* Hagan the court said: "And on his [the governor's] proclamation that a proposed amendment has received a majority of the votes cast, it becomes *eo instanti* a part of the constitution. There is no reference of the question to any other officer, or to any other department. It is committed to the governor without qualification or reserve, and without appeal to any other authority. Most certainly no jurisdiction is conferred on this court to revise his decision." [153] This decision, it should be pointed out, rests upon the definite language of the Maryland constitution, and related simply to the determination of the result of the popular vote.[154] The New Jersey constitution contains no language similar to that of Maryland, but the supreme court of New Jersey in a late case took the view that the canvass of votes upon a proposed amendment was beyond judicial cognizance. The court said: "The legislature constituted the board of state canvassers the tri-

[153] Worman *v.* Hagan, 78 Md., 152 (1893). See also Miles *v.* Bradford, 22 Md., 170 (1864).

[154] Worman *v.* Hagan was criticized by Judge Elliott in McConaughy *v.* Secretary of State, 106 Minn., 410, where the view is taken that even though a power is expressly conferred by the constitution upon another department or officer, the courts would still retain their control. Judge Elliott said that the courts would not be deprived "of their inherent power to determine the legality of the actions of officers" unless such power is in terms denied by the constitution. But if a power is expressly granted to another department does this not exclude the courts? The courts, it would seem, have no "inherent powers" above the constitution, but derive all power from the constitution just as do other departments of government. The Oregon constitution contains a provision similar to that of Maryland, and would seem also to remove this question from judicial cognizance. The Connecticut and Minnesota constitutions provide that an amendment shall become part of the constitution "if it shall appear, in a manner to be provided by law" that a sufficient popular vote was cast in its favor, and here also this matter would seem to be beyond judicial control, if Worman *v.* Hagan be considered an authority.

bunal by which the result of the election should be ascertained, and vested in it the jurisdiction to determine whether any amendment or amendments proposed had been adopted, and gave to the certificate of the board such force and effect that upon filing the same the amendment or amendments so certified to have been adopted should be and become part of the constitution. . . . The concurrence of the board of state canvassers and the executive department of the government, in their respective official functions, place the subject beyond the cognizance of the judicial department of the government." [155]

The position of the New Jersey supreme court was almost immediately reversed by the court of errors and appeals,[156] and it is now the settled rule that, in the absence of specific and definite constitutional provisions which vest the final decision in some other officer or department, the judicial authority of the state extends over every step in the amending process.[157] The principle here is the same as that which

[155] Bott *v.* Secretary of State, 62 N. J. Law, 107, 130. See also 61 N. J. Law, 163, and State *v.* Swift, 69 Ind., 523, 524. For a similar view with reference to another matter see Dennett's Case, 32 Me., 508 (1851).

[156] Bott *v.* Wurts, 63 N. J. Law, 289.

[157] It may be worth while to trace briefly the growth of judicial control over the amending process. In Luther *v.* Borden, 7 How., 1, 39 (1849), Chief Justice Taney said: "Certainly the question which the plaintiff proposed to raise by the testimony he offered has not heretofore been recognized as a judicial one in any of the state courts. 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." State *v.* McBride, 4 Mo., 303 (1836) was the first case to assert the judicial power to inquire into the validity of proposed amendments, and here the amendment was upheld, as also in Green *v.* Weller, 32 Miss., 650 (1856) and Dayton *v.* St. Paul, 22 Minn., 400 (1876).

lies behind the judicial power to declare laws invalid; it may be stated thus: The constitution is the supreme law and the courts are the especial guardians of that law. Any act, whether it be of legislation, of executive power, or any step in the amending process, which in the opinion of the courts violates the constitution, may be rendered of no effect by the exercise of the judicial authority. The judicial control of the amending process has been discussed somewhat fully in three recent cases, in which the authorities are extensively reviewed.[158]

The Mississippi constitution provides that "if it shall appear that a majority of the qualified electors voting shall have voted for the proposed change, alteration, or amendment, then it shall be inserted by the next succeeding legislature as a part of this constitution." It was argued with

Miles *v.* Bradford, 22 Md., 170 (1864) denied the power. See also Brittle *v.* People, 2 Neb., 198, 214. Collier *v.* Frierson, 24 Ala., 100 (1854) is the only case before 1880 in which an amendment was declared invalid because improperly adopted. Hardly more than a half dozen cases involving the proper adoption of proposed amendments arose before 1880; up to 1890 probably not more than twenty such cases had come before the courts. Since 1890 cases have frequently arisen and the courts have exercised an effective supervision over all steps in the amending process. For the expression of a view that the question here considered is political, not judicial, see remarks by Judge Charles S. Bradley in Report of the American Bar Association, 1883, p. 32.

[158] State *v.* Powell, 77 Miss., 543 (1900). Bott *v.* Wurts, 63 N. J. Law, 289 (1899). McConaughy *v.* Secretary of State, 106 Minn., 392 (1909). See also Koehler *v.* Hill, 60 Ia., 543; Gabbert *v.* R. R. Co., 171 Mo., 84; Kadderly *v.* Portland, 44 Ore., 118; Knight *v.* Shelton, 134 Fed., 423; Rice *v.* Palmer, 78 Ark., 432; Miller *v.* Johnson, 92 Ky., 589; McBee *v.* Brady, 100 Pac., 97 (Idaho). The cases already discussed concerning journal entry, publication, etc., and those cited in the subsequent discussion proceed upon the assumption that courts have authority to enforce the constitutional provisions regarding the amending process, and many of them discuss this subject, but it is deemed unnecessary again to refer to such cases here, especially as they are exhaustively reviewed in the three cases cited above.

much plausibility that this language left the final decision as to popular adoption to the legislature. "It was argued that the rules prescribed by the constitution 'are all for the guidance of the legislature," and from the very nature of the thing the legislature must be the exclusive judge of all questions to be measured or determined by those rules . . . this section of rules, not only of procedure but of final judgment as well, confides to the separate magistracy of the legislative department full power to hear, consider, and adjudge that question. The legislature puts the question to the qualified electors. The qualified electors answer back to the legislature. "If it shall appear" to the legislature that its question has been answered in the affirmative, the amendment is inserted and made a part of the constitution. The governor and the courts have no authority to speak at any stage of this proceeding between the sovereign and the legislature, and when the matter is thus concluded it is closed, and the judiciary is as powerless to interfere as the executive.' But it was held that the question whether the proposition submitted to the voters constituted one, or more than one, amendment, whether the submission was according to the requirements of the constitution, and whether the proposition was in fact adopted, were all judicial, and not political questions."[159] The Mississippi court said: "Whether an amendment has been validly submitted or validly adopted depends upon the fact of compliance or non-compliance with the constitutional directions as to how such amendments shall be submitted and adopted; and whether such compliance has, in fact, been had, must, in the nature of the case, be a judicial question." The amendment which had been inserted into the constitution by the legislature was declared invalid by the court.[160]

[159] 106 Minn., 407; 77 Miss., 551, 552, 567.

[160] A Mississippi proposed amendment of 1902 which failed of adop-

After an exhaustive review of the authorities Judge Elliott of the Minnesota supreme court stated the present rule as follows: "The authorities are thus practically uniform in holding that whether a constitutional amendment has been properly adopted according to the requirements of an existing constitution is a judicial question. There can be little doubt that the consensus of judicial opinion is to the effect that it is the absolute duty of the judiciary to determine whether the constitution has been amended in the manner required by the constitution, unless a special tribunal has been created to determine the question; and even then many of the courts hold that the tribunal cannot be permitted to illegally amend the organic law. There is some authority for the view that when the constitution itself creates a special tribunal, and confides to it the exclusive power to canvass votes and declare the results, and makes the amendment a part of the constitution as a result of such declaration by proclamation or otherwise, the action of such tribunal is final and conclusive. It may be conceded that this is true when it clearly appears that such was the intention of the people when they adopted the constitution." [161] It may be that the latter part of Judge Elliott's statement is too strong, but certain it is that with the courts there is a strong presumption against any construction of constitutional provisions which would deprive them of control over the amending procedure. It is assumed to be the duty of every court so to construe constitutions and laws as to give itself jurisdiction if possible and this rule may, when it seems necessary, be employed with reference to the amending process.

tion sought to amend the language quoted above so as to read "if it shall appear to the legislature." Language similar to that of the present Mississippi constitution will be found in the constitutions of Alabama, Kentucky, Maine, and Texas.

[161] 106 Minn., 409, 410.

It may be said then that the courts exercise supervision over all steps of the amending process which are specified in the constitution of the state. Such supervision would ordinarily be somewhat easy as affects public acts which may be proved by external evidence, as, for example, the questions whether a proper journal entry was made, whether there was sufficient publication, whether a proposed amendment was properly submitted as merely one proposal, or whether the popular vote as canvassed showed a sufficient majority for the adoption of the proposal. But when the canvass itself is questioned and a recount of votes is asked, the question becomes a more difficult one, because involving the exercise of a function not ordinarily performed by courts. But the same principle applies, and in Michigan and Minnesota recounts have been had under judicial supervision.[162]

Assuming then that whether an amendment has been properly proposed or adopted is a judicial question, it will next be well to discuss the attitude of the courts in passing upon such questions. The proper rule would seem to be that stated by the Colorado court in People *v.* Sours: "At the outset it should be stated that every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to the constitution when it is attacked after its ratification by the people." [163] This liberal attitude has usually been taken, although in some cases it has been laid down that the amending process being presumably more important than the ordinary legislative function should have a stricter rule applied to it than

[162] Rich *v.* Board of State Canvassers, 100 Mich., 453 (1894). McConaughy *v.* Secretary of State, 106 Minn., 392 (1909).

[163] 31 Colo., 369, 376, 388, 390. See also Edwards *v.* Lesueur, 132 Mo., 410.

to the passage of ordinary laws.[164] Judge Jameson advocated the policy of strict as opposed to liberal construction,[165] and the supreme court of Iowa has adopted the view that "where the existing constitution prescribes a method for its own amendment, an amendment thereto, to be valid, must be adopted in strict conformity to that method."[166] In Iowa where a proposed amendment is required to be entered on the journals of the two houses, the surpreme court has declared invalid two important amendments which were not entered "in full" although full entry was not specifically required, and thus resolved against the amendments approved by the people the doubt as to the proper meaning of the constitutional requirement.[167] So too the Mississippi court in State *v.* Powell took a strict view as to what constitutes one or more than one amendment,[168] and the Indiana and Wyoming courts have taken a strict view with reference to ambiguous language in the constitutions of those states regarding the popular vote required, although the same language has been construed in a precisely opposite manner by the supreme court of Idaho.[169] So too cases in Nevada and California have taken a very strict view which subjects the amending process to control by ordinary legislation, and which if ad-

[164] State *v.* Foraker, 46 Ohio St., 677. State *v.* Powell, 77 Miss., 576. Bott *v.* Wurts, 63 N. J. Law, 289. State *v.* Rogers, 56 N. J. Law, 480, 619.

[165] Jameson, 617. See also J. W. Garner in American Political Science Review, i, 234.

[166] Koehler *v.* Hill, 60 Iowa, 543.

[167] Koehler *v.* Hill, 60 Iowa, 543; State *v.* Brookhart, 113 Iowa, 250.

[168] State *v.* Powell, 77 Miss., 543.

[169] State *v.* Swift, 69 Ind., 505. *In re* Denny, 156 Ind., 104. State *ex rel.* Blair *v.* Brooks, 99 Pac., 874 (Wyo.). Green *v.* State Board, 5 Ida., 130.

hered to would greatly restrict the legislative power of proposing amendments.[170]

In discussing the strict or liberal interpretation of the amending clause, it should perhaps be said that the same court may at one time be liberal and at another strict. The function of passing upon the validity of laws or proposed amendments is primarily political, not judicial, and where the opinion of a court happens to be opposed to a proposal it is usually not difficult to find some reason for declaring such proposal invalid.[171] Some, at least, of the cases construing strictly the amending clause, may be explained upon this ground.

But, as has already been suggested, the judicial construction of the amending clause has usually been liberal, and has resolved doubts in favor of the validity of amendments approved by the people.[172] This liberal attitude is one with respect to the manner of compliance with constitutional requirements, but substantial compliance with the steps laid down in the constitution is required. If a required step is

[170] Hatch *v.* Stoneman, 66 Cal., 633. State *v.* Davis, 20 Nev., 220. Livermore *v.* Waite, 102 Cal., 113 (1894).

[171] Where the constitutional requirements concerning amendment are numerous and specific, action by a great number of persons is usually necessary, and some flaw in the proceeding may usually be found if a careful search is made. For example, where publication is required in each county of a state it may easily be that through accident or design publication might be improperly made in one or more counties, and if a court desired to be strict this might be held to invalidate the amendment. See Prohibitory Amendment Cases, 24 Kan., 700; State *v.* Winnett, 78 Neb., 379, 387; Lovett *v.* Ferguson, 10 S. D., 56.

[172] This appears clearly in the cases sustaining expedients for avoiding the constitutional provisions requiring a majority of all persons voting. State *ex rel.* Thompson *v.* Winnett, 78 Neb., 379. State *v.* Laylin, 69 Ohio St., 1. May and Thomas Hardware Co. *v.* Birmingham, 123 Ala., 306.

omitted, or is not even in substance complied with, no court has ever upheld the amendment, even though it may have been approved by the people. That is, the constitutional requirements are mandatory, not merely directory,[173] and no court will overlook the entire disregard of even the less important of such requirements. For example, the Alabama constitution of 1819 required proposal by the legislature, publication, a popular vote, and then a subsequent ratification by the legislature. Eight amendments were proposed by the legislature of 1844-45, and were approved by the people, but one of them was by inadvertence omitted in the subsequent ratifying vote of the legislature. The court held that the proposed amendment which had not been ratified was not adopted, and said: "We entertain no doubt, that, to change the constitution in any other mode than by

[173] A note in 10 L. R. A. (N. S.), 149, suggests that the courts sometimes treat immaterial constitutional requirements as directory, but even the most liberal cases have ordinarily declined to go as far as this. There is, however, a dictum to this effect in Commonwealth *v.* Griest, 196 Pa. St., 396, 416: "We think that the provision as to publication three months before the next general election, as prescribed in the first clause of article 18, should be regarded as merely a directory provision, where strict compliance with a time limit is not essential." In Holmberg *v.* Jones, 7 Ida., 752, 758, 759, the court intimated, obiter, that though two-thirds of the members of each house did not vote for a proposed amendment, if the measure had been put on the ticket without objection and approved by the people, an estoppel would operate to prevent a contest of its validity after popular approval, although objection might have been made at an earlier stage of the proceedings. This view is doubted in the later case of McBee *v.* Brady, 100 Pac., 97, 101, 102 (Idaho). For an argument that constitutional requirements with reference to amendment may be legally disregarded in case of necessity (that is, when amendments are urgently needed but the amending process operates with such difficulty as to be practically unworkable) see a pamphlet on *Chicago and the Constitution*, a report made to the Civic Federation of Chicago in 1902 by E. Allen Frost, Robert McMurdy, and Harry S. Mecartney, pp. 51-57. See also a similar suggestion in State *v.* Winnett, 78 Neb., 387.

a convention, every requisition which is demanded by the instrument itself, must be observed, and the omission of any one is fatal to the amendment." [174] Similarly where the requirement of "full entry" on the legislative journals is not complied with,[175] or where an "entry" is required but no reference whatever is made to the proposed amendment in the legislative journals,[176] proposed amendments were held invalid even after approval by the people. Somewhat similar in character was the case of State *v.* Tooker,[177] where a proposed amendment was held invalid where it had been published for only two weeks although the state constitution expressly required publication for three months before the election. It is now so well recognized that a proposed amendment will not be upheld unless all constitutional steps are complied with that it is customary, where some step has through inadvertance been omitted, for the executive officers not to take steps for the popular submission of such a proposal.[178]

[174] Collier *v.* Frierson, 24 Ala., 100 (1854). See also State *v.* McBride, 4 Mo., 303.

[175] Durfee *v.* Harper, 22 Mont., 354 (1899).

[176] State *v.* Tufly, 19 Nev., 391. But see p. 148, note 50.

[177] 15 Mont., 8 (1894). The court in this case refers to the fact that the constituional provisions of Montana are expressly declared to be mandatory except when otherwise specified but the requirements would it seems have been mandatory in any case.

[178] Commonwealth *v.* Griest, 196 Pa. St., 396. State *ex rel.* Morris *v.* Mason, 43 La. Ann., 590. A Mississippi proposed amendment was not submitted to the people in 1908 because it had not been published in conformity with the constitutional provisions. A secretary of state or other ministerial officer may, of course, defeat a proposed amendment by neglecting to comply with the constitutional requirements. But the duty of such officer may be enforced by mandamus. With reference to the Mississippi proposed amendment of 1908 the following quotation is of interest: "Section 273 of the State Constitution requires that public notice be given for ninety days preceding an elec-

But where an effort has been made to comply with the constitutional requirements, and where such compliance has not been complete, the question presents itself to the court whether immaterial errors should be permitted to defeat the popular will as expressed upon an amendment adopted by the people, and upon this question the courts have usually taken a liberal attitude. So in the Kansas Prohibitory Amendment cases,[179] Judge Brewer remarked that "omissions and errors which work no wrong to substantial rights are to be disregarded," and said further that: "The two important, vital elements in any constitutional amendment are the assent of two-thirds of the legislature, and a majority of a popular vote. Beyond these, other provisions are mere machinery and forms. They may not be disregarded, because, by them, certainty as to the essentials is secured. But they are not themselves the essentials." This statement has frequently been quoted with approval. A somewhat similar view was later expressed by the supreme court of South Dakota: "The action of the two houses and the will of the people, as expressed by their vote, should not be set aside or disregarded upon purely technical grounds, when no material requirement of the constitution has been omitted, and where the proceedings taken clearly manifest the intention of those bodies and the people to amend the fundamental law." [180]

tion, at which the qualified electors shall vote directly for or against such change, alteration or amendment. That notice I failed to give. . . . I discovered my error about the 1st of September, but would not at that time attempt to make publication for it would not come within the time required by law. Had I done that the publication would not have been legal." Biennial Report, Secretary of State, 1907-09, p. 7.

[179] 24 Kan., 700, 710 (1881).

[180] Lovett *v.* Ferguson, 10 S. D., 44; State *ex rel.* Adams *v.* Herried, 10 S. D., 109.

In the recent Colorado case of People *v.* Sours,[181] the court took a very liberal attitude, saying that legislative action must be in substantial compliance with the constitutional requirements, but that technical objections would be brushed aside. Here a number of specific objections were made to an amendment approved by the people, of which perhaps the most important was that the constitution required "full entry" of the proposed amendment upon the legislative journals but that the entry upon the house journal did not agree with that on the senate journal. The court sustained the amendment, and said that "the disagreement between the two journals is a mere clerical mistake, that the same bill in fact passed both houses, and that the entering by mistake upon the journal of the house of the half dozen words quoted does not violate the provision of the constitution requiring the proposal to be entered in full upon the journals of both houses." The fact remains, however, that technically there was not a full entry of the proposed amendment on the journal of each house. In this case the Colorado court was also very liberal in its attitude regarding the requirement that each amendment shall be so submitted to the people that it may be voted upon separately.[182]

[181] 31 Colo., 369, 405. See also People *v.* Loomis, 135 Mich., 556 (1904).

[182] As to the liberal attitude of courts see also Trustees of University of N. C. *v.* McIver, 72 N. C., 76 (1875); Bray *v.* City Council of Florence, 62 S. C., 57 (1901); Kadderly *v.* Portland, 44 Ore., 118 (1903); Farrell *v.* Port of Columbia, 50 Ore., 169, 175 (1907). In Kadderly *v.* Portland the constitutional provisions were construed strictly with reference to two proposed amendments which had failed of adoption in order to uphold an amendment which had actually been approved by the people; the decision, which may perhaps appear strict to the casual reader, was actually liberal in effect, and was intended to be so. Chase *v.* Board of Election Commisisoners, 151 Mich., 407

Even where an amendment may have been adopted without substantial compliance with the constitution, long acquiescence in such a change may place it beyond judicial cognizance—the question as to whether an amendment was properly put into effect may have become by lapse of time, a political as distinguished from a judicial question. An amendment to the Colorado constitution was adopted in 1884 extending the legislative sessions from forty to ninety days. In 1894 a case arose in which a law was attacked as invalid because passed more than forty days after the commencement of the legislative session, it being contended that the amendment of 1884 was invalid, and that therefore any legislation after a forty-day term was invalid. The Colorado constitution requires that a proposed amendment be entered in full on the journals of each house, but this requirement seems not to have been even substantially complied with, with reference to the amendment of 1884; the amendment was not correctly entered in full and the house and senate entries did not agree. The court said that constitutional provisions are ordinarily mandatory, but that to overthrow this amendment would practically invalidate all laws passed by the five preceding legislatures, and that such action should not be taken because of the incorrect

(1908), stretched the judicial power to its furthest point; the legislature of 1907 proposed an amendment and provided that it should be submitted to the people at the election of April, 1908, the constitution providing that proposed amendments should be submitted at "the next spring or autumn election" after their proposal, "as the legislature shall direct." The court held that this language referred only to general elections—the spring election in the odd years and the autumn election in even years—and declined to issue mandamus to compel submission in April, 1908. Under these conditions it would seem that the proposal would be entirely ineffective, but the court expressed the view that the proposal should without any further legislative action be submitted at the next regular election; the amendment was submitted to the people in November, 1908, and was adopted.

journal entries.[183] A somewhat similar case arose recently in Nebraska.[184] An amendment submitted to the people in 1886 lengthened the sessions of the legislature, and increased the compensation of members of the two houses. The legislature of 1887 canvassed the vote and declared the amendment lost because not receiving a majority of all votes cast. Shortly afterward, however, the legislature by a special act provided for a recount of votes, and upon the recount the amendment was declared adopted. It was contended that a special act for this purpose was invalid, and that therefore all proceedings under this act were inoperative, but the court held this not to be the case. The court said, in addition, that even if the legislative act were invalid the amendment should be sustained. "It seems to us clear that the question of the adoption, and the consequent validity of this amendment, depends upon the number of votes it received, and that after sixteen years it is too much to ask us to set it aside, not on the ground of any actual lack of votes, but on the ground of irregularity, informality and impropriety in the manner in which the vote was counted and the result declared."

A question of a somewhat similar character arose in the Minnesota case of Secombe *v.* Kittelson.[185] Bonds had been issued under a constitutional amendment of 1858, and it was here sought to restrain the payment of interest on such bonds upon the ground that the amendment was invalid. The amendment was adopted after the constitution had been ratified by the people but before Minnesota was admitted to statehood, and it was contended that the constitution was not in force until admission, and could not therefore have been validly amended. The court said that

[183] Nesbit *v.* People, 19 Colo., 441 (1894).

[184] Weston *v.* Ryan, 70 Neb., 211 (1903).

[185] 29 Minn., 555 (1882).

the theory at the time was that the constitution became operative as soon as adopted, that the government organized under the constitution was a *de facto* government, that the amendment was ratified by the people and acted upon as valid, and that if this amendment were held invalid it would also be necessary to declare invalid all acts passed by the state legislature before the admission of the state into the union. The court declined to inquire too technically into irregularities in the submission of an amendment which had been adopted and acted upon as the fundamental law, and said: "We doubt whether a precedent can be found in the books for the right of a court to declare void a constitution or amendment to a constitution, upon any such ground." The question was held to be closed in this case because: "First, such irregularities, if any, must be regarded as healed by the subsequent act of congress admitting Minnesota into the Union. . . . Second, They must be deemed cured by the recognition and ratification of this amendment, as a part of the constitution, by the State after its admission into the Union." The ratification referred to was a later amendment which repealed the amendment of 1858, but expressly protected all rights acquired under that amendment.

Where an amendment essentially altering the operation or structure of a state government has been adopted and acted upon, the courts would probably in all cases treat the question of the validity of such an amendment as a political question not within judicial cognizance. The regular operations of government must not be interrupted, even though a constitutional alteration may have been improperly made, and the courts find it expedient to avoid the decision of such questions.[186] In Koehler

[186] Luther *v.* Borden, 7 Howard, 1, 40 (1849). See an approving reference to this case in Bott *v.* Secretary of State, 63 N. J. Law, 298, and in 60 Ia., 608, 614.

v. Hill [187] it was said that "it is the duty of courts, in a proper case, when an amendment does not relate to their own powers or functions, to inquire whether, in the adoption of the amendment, the provisions of the existing constitution have been observed, and, if not, to declare the amendment invalid and of no effect." It is difficult to see why the court should have thus distinguished between amendments affecting the courts and other amendments. It is true in fact, perhaps, that the validity of an amendment increasing judicial power would much more easily be sustained by the courts than one decreasing judicial power, but the courts having asserted their complete control over the amending process, such control exists irrespective of the subject to which the amendment may relate.

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 annuling 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.[188] 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

[187] Koehler *v.* Hill, 60 Ia., 543, 616.

[188] Knight *v.* Shelton, 134 Fed., 423 (1905), held invalid an Arkansas amendment of 1892.

having weight in determining the question of constitutionality.

A question of great interest is that as to the attitude of the federal courts toward state constitutional amendments the validity of which may be assailed. This question has been raised in two cases in the inferior federal courts. The case of Smith *v.* Good [189] was an action upon a promissory note given for the purchase of liquors in violation of a prohibition amendment adopted in Rhode Island in 1886. It was contended by the plaintiff that the amendment was not legally adopted because not voted on by town meetings in several of the towns. 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." The action of the state officers in declaring the amendment to be adopted was held to be conclusive, and the validity of the amendment was not inquired into.

A precisely opposite position was taken in the later case of Knight *v.* Shelton.[190] In this case a suit for damages

[189] 34 Fed., 204 (1888).

[190] 134 Fed., 423 (1905). 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

was brought against election judges because of their refusal to receive a vote in the election of a member of the federal house of representatives, and the defendant set up an Arkansas constitutional amendment of 1892, which required the payment of a poll tax in order to qualify a voter. The validity of this amendment was denied, but it had been declared adopted by the proper state authorities, and had never been passed upon by the state court. The federal court held that the amendment had not been adopted, because not approved by a "majority of the electors voting" at the election of 1892 as required by the state constitution.

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,[191] 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 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. The better rule would be, as stated in Smith *v.* Good, to leave the determination of such questions to the state courts, where no federal con-

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. The validity of this amendment depended not upon federal but upon state constitutional grounds. Federal courts have not assumed until recently the power to pass upon the validity of state enactments as tested by state constitutions.

[191] Rice *v.* Palmer, 78 Ark., 432 (1906).

stitutional question is involved, and for the federal courts to follow the state decision. However, the position taken in Knight *v.* Shelton is probably the one which will prevail, for it is in line with the recent attitude of the federal courts in determining the constitutionality of state laws as tested by state constitutional principles, independently of state judicial action.[192]

Perhaps enough has been said to indicate the extent of judicial control over the amending process. It may now be worth while to inquire as to the manner in which such control is exercised. In most of the cases which have come before the courts, the validity of amendments has been denied in cases which have arisen after they have been submitted to the people and have been declared adopted, and it is, of course, always proper to attack an amendment in this manner. But the question has arisen several times as to the extent to which the courts may interfere and prevent the submission to the people of amendments which they consider to have been improperly proposed. It has already been said that the duties of executive officers with respect to publication and submission are ministerial in character and may be enforced by mandamus.[193] These acts are necessary incidents to the amending process, and a mandamus in such cases is an aid to the amending process. But suppose, that upon the hearing for mandamus, the court should find that some essential requisite of a valid amendment had been omitted, may the court decline to issue the writ upon the ground that submission is improper because the amendment would be invalid even if approved by the people; that is, that the popular submis-

[192] Prof. Henry Schofield in Illinois Law Review, iii, 195.

[193] State *ex. rel.* Morris *v.* Mason, 43 La. Ann., 590. Commonwealth *v.* Griest, 196 Pa. St., 396 (1900). Warfield *v.* Vandiver, 101 Md., 78 (1905).

sion would in any case be ineffective? And, under similar circumstances, would it be proper for the courts to enjoin such submission? Under circumstances similar to those just referred to the California supreme court has declined to issue mandamus to compel submission,[194] and in another case the court has actually restrained such submission.[195] In Missouri the court was asked to enjoin the submission of an amendment but declined to do so because it found no reason for taking such action, although its attitude seems to indicate that it considered an injunction to be proper should it have found the proposal defective. The court said: "The power and jurisdiction of the judiciary to declare a proposal for an amendment to the constitution ineffectual, and to arrest its submission to the people, which we are now called upon to exercise, is coupled with far more serious responsibilities" than is the exercise of the power to annul a law.[196] To the same effect is a dictum in the Idaho case of Holmberg *v.* Jones,[197] where the court said: "The only irregularity is that it [the amendment] did not receive the votes of two-thirds of the members of the house. It cannot be questioned but that any voter of the state, by proper proceedings in the district court, or in this

[194] Hatch *v.* Stoneman, 66 Cal., 633 (1885).

[195] Livermore *v.* Waite, 102 Cal., 113 (1894). See also People *v.* Curry, 130 Cal., 82 (1900).

[196] Edwards *v.* Lesueur, 132 Mo., 410, 441 (1896). But the language quoted above should be read in connection with the following statement: "We have not discussed the question whether the remedy by injunction is, in any event, available for the purposes contemplated in this case, because defendant has expressly waived that question, and requested a decision on the broader grounds which we have accordingly considered." For the use of the injunction in connection with the amending process see also State *v.* Laylin, 69 Ohio St., 1 (1903).

[197] Holmberg *v.* Jones, 7 Ida., 752, 758.

court, could have obtained a writ of prohibition restraining the secretary of state from certifying the question of adopting such proposed amendment to the various county auditors. The official ballot could have been protected against the improper submission of such question, and could have been purged of the presence of such question thereon, by proper judicial proceeding."

The California rule has been expressly rejected in South Dakota and Colorado. In the South Dakota case of State *ex rel.* Cranmer v. Thorson,[198] it was sought to restrain the submission to the people of a proposed amendment, upon the ground that the constitutional requirements had not been complied with. The court declined to act and said: "Power to amend the constitution belongs exclusively to the legislature and electors. It is legislation of the most important character. This court has power to determine what such legislation is, what the constitution contains, but not what it should contain. It has power to determine what statutory laws exist, and whether or not they conflict with the constitution, but it cannot say what laws shall or shall not be enacted. It 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." In this case the court also said: "It has not been shown, nor can it

[198] 9 S. D., 149 (1896).

be imagined, in what manner the relator will be injured by the contemplated action of defendant. If the legislature has proceeded properly, and its proposed amendment shall be ratified by the people, the relator will have no legal cause of complaint, because, as a good citizen of the state, he will be bound to cheerfully accept the lawfully expressed will of a majority of its sovereign electors. If, on the other hand, the action of the legislature was such as to render any answer to the question [submitted to the voters] inoperative, the constitution will not be modified, and no one will be affected. Any additional burden which might result to relator, as a taxpayer, by reason of submitting this question at a general election, is too trifling, fanciful and speculative for serious consideration. . . Having failed to show that he will be injured by the intended action of defendant, the relator is not entitled to have it enjoined, or its regularity investigated, in this action." In People *ex rel.* O'Reilly *v.* Mills,[199] it was sought to enjoin the secretary of state of Colorado from publishing a proposed amendment as required by the constitution, before its submission to the people. In declining to issue an injunction the supreme court of Colorado said: "In amending the constitution the voters become the body which finally give vitality to proposed amendments or refuse to make a change by rejecting them. The exercise of this power is as much a step in passing and considering proposed legislation of this character as any the general assembly must take in passing ordinary statute laws. The judicial department can no more interfere with such legislation or the successive steps necessary to be taken to amend the constitution than it can with the general assembly in the passage of other laws, because the judicial cannot interfere with the functions of the legislative department."

[199] 30 Colo., 262 (1902).

The principle announced by the Colorado and South Dakota courts may be stated as follows: The courts have no power to interrupt the process of amendment before it is complete, to restrain a popular vote upon a constitutional proposal, even though they may be clearly of the opinion that the popular vote will be ineffective because of defects already apparent in the method of proposal. They must wait until the amending process is fully completed, and then pass upon the validity of the amendment if this question is properly presented in litigation before them. In accordance with this view it would seem that the courts should compel by mandamus administrative acts incident to the amending process; that is, the administrative acts should be treated as duties commanded by the constitution after the legislative proposal, which may be regarded as presumably valid and not subject to review in an *ex parte* proceeding. Under this view the courts may neither restrain the submission nor decline to compel it, because either of these is a direct interference with legislative action, the one positive in absolutely preventing submission, the other negative in that it does not enforce a purely ministerial duty in aid of the amending process.

Theoretically this view is the better one. 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. The question as to how far the courts shall depart from this principle in controlling the amending process is particularly important in view of the introduction of the referendum on ordinary legislation. In Oregon, for example, a measure may be initiated by the people or by the legislature and then submitted to the people for approval. The submission of laws for popular approval in Oregon and in

several other states makes such a popular vote an integral step in the process of ordinary legislation. But the courts at present decline to interfere with the process of legislation, and wait until the validity of a law is attacked before them. What is likely to be the attitude of the courts with reference to laws (and constitutional amendments) enacted by a popular vote? In theory the courts should not interfere to prevent submission, (even though the proposal be clearly defective and invalid), for this is a legislative act, and under the principle of the separation of powers the courts will not interfere with legislative acts. But heretofore it would have been necessary to interfere with the deliberations of a legislative body in order to restrain legislation, and such an action would be clearly indefensible. But with laws (and amendments) enacted after a referendum, there are several distinct steps in the legislative process, one of which, the act of submission, may be considered purely ministerial and may, in practice, be enjoined without interfering with the action of the ordinary legislative body of the state; that is, under a system of popular legislation it is easy for the courts, without seriously crippling a co-ordinate department of the government, to interfere and prevent a law's being enacted. This practical difference will probably incline the courts to take the view of the California court rather than that held in South Dakota and Colorado. So in the states which have adopted the referendum, it is probable that the courts will restrain the submission of a law if they consider the proposed law defective. For example, if an Oregon law were proposed by initiative petition, but did not comply with the constitutional requirement concerning its title, we may expect that the courts should restrain the submission of the proposal to the people, on the ground that it is invalid, and that the popular vote would in any case be ineffective.

This rule would have the advantage of obtaining a judicial decision upon the validity of a law at the earliest possible moment, but it has the disadvantage of having such a question passed upon in an *ex parte* proceeding, and of extending still further the judicial control over legislation. Yet, as has already been suggested, the judicial control over the processes of amendment and of popular legislation (by the referendum) will probably be established along the lines laid down by the California court.

In Livermore *v.* Waite submission was restrained because, in the opinion of the court, the proposed amendment was invalid in substance. Under this view it would seem that a court might restrain the submission of a referendum law or of a proposed amendment on the ground that it violated the "due process of law" or "equal protection of the laws" clauses of the federal constitution, or upon the ground that the proposal might for any other reason be invalid in substance. But such a judicial position would hardly be taken, and the courts, if restraining submission would probably do so, as a rule, only because of irregularities in the form or process of proposal.

The preceding discussion has related to the control of the courts over the form and process of amendment, and it will be well now to discuss the subject of judicial control over the substance and content of amendments. In the case of Livermore *v.* Waite [200] the supreme court of California restrained the submission of an amendment changing the seat of government to San José, on condition that a capitol site and one million dollars should be donated by the new seat of government, and providing that the governor, secretary of state, and attorney-general should approve the site. In restraining the submission of this proposal the court said

[200] 102 Cal., 113 (1894).

that the legislature had no authority to propose an amendment which did not become effective immediately upon its adoption by the people, without being dependent upon the will of other persons. This restriction upon the amending process was one discovered by the California court and was not based upon any provision of either state or federal constitutions. In a precisely parallel case which arose in Missouri only two years after the California decision, the Missouri court took the opposite view that whether the amendment became effective immediately upon popular ratification was immaterial.[201] The California decision is indefensible; it cannot be justified and can be explained only upon the view that the court had determined to prevent the submission of the amendment for removing the capitol, and could find no better reason to present for its action. The California decision aside, it may be stated somewhat broadly that, except as tested by specific limitations in state and federal constitutions, an amendment is not subject to judicial control as to its substance and content,—the courts have no right to determine what a constitution shall contain or the character of the amendments which may be enacted.[202] The federal constitution is, of course, superior to a state constitution, and any amendment conflicting with the federal instrument is invalid. So too as to any specific limitations in state constitutions upon the subject matter of amendments. However, in the present state constitutions there are practically no restrictions [203] upon the char-

[201] Edwards *v.* Lesueur, 132 Mo., 410 (1896).

[202] See also People *v.* Sours, 31 Colo., 387-388; State *ex rel.* Cranmer *v.* Thorson, 9 S. D., 149.

[203] Such restrictions as there are really do not limit the amending process to any material extent. In Alabama "Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendment." In Michigan the amending clause of the constitution cannot be changed by an amendment initiated by popular petition.

acter of proposed amendments, although such restrictions were more common in some of the earlier instruments, as in the Delaware constitution of 1776, the Arkansas constitution of 1836,[204] and the Mississippi constitution of 1868. Where, for example, a constitution expressly specified that its bill of rights should not be subject to amendment, such a restriction while unwise in policy, would properly be subject to enforcement by the courts. "There can be no doubt that any amendment proposed in violation of these provisions would be declared by the courts to be void, for neither would the legislature have the power to propose nor the people to adopt them. To decide otherwise would be to hold that the legislature can constitutionally do an act expressly forbidden by the constitution; and that the people by an unauthorized vote, a vote recommended in violation of the constitution . . . can enact a valid constitutional amendment."[205] 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.[206]

[204] State *v.* Cox, 8 Ark., 436 (1848), overruled by Eason *v.* State, 11 Ark., 482 (1851). See a discussion of these cases in Jameson, *Constitutional Conventions,* 4th ed., 581-586.

[205] Jameson, *Constitutional Conventions,* 4th ed., 581.

[206] See dictum in Louisiana Ry. and Navigation Co. *v.* Madere, 50 So., 609 (Louisiana, 1909). Judge Jameson suggests (*Constitutional Conventions,* 4th ed., 429-430) that where legislative details have been inserted into a constitution, the courts might treat this as an infringement upon the regular legislative functions and hold such provisions invalid because not fundamental in character. Judge Jame-

Constitutional Amendments and Ordinary Legislation

It may be said therefore that in their method of enactment amendments are subject to judicial control as tested by the specific provisions of the state constitutions, and that in their content they are subject to a similar control as tested by the federal constitution. Ordinary statutes, on the other hand, while subject to the same control in their content, as tested by the federal constitution, are subject to state constitutional provisions both as to the method of their enactment [207] and as to their content.[208] Amendments are,

son expressed his view against any such position because "it would be in effect to permit our judiciary to annul the charters under which they act, under the pretext of striking from them provisions not properly fundamental," and Oberholtzer (*Referendum in America*, pp. 89-90) takes the same view. The position suggested by Judge Jameson, if assumed, would vest in the courts arbitrary and unregulated discretion to control the substance of both constitutions and statutes, for under it a constitutional provision might be declared invalid as not truly fundamental in character, and laws might be annuled because in the opinion of the court they contained provisions which should properly be inserted into the constitution. Such a doctrine has no chance of being accepted; it has nothing to be said in its favor, and the power of the courts has already been pushed as far as it is apt to be pushed at present. In this connection it is interesting to note that the Missouri court in the recent case of State *ex rel.* Johnson *v.* Chicago, Burlington, and Quincy Railroad Company, 195 Mo., 228 (1905), actually discussed the question as to whether a validly adopted state constitutional amendment might not be held invalid as in violation of the state constitution. The court however held the amendment invalid on specious federal grounds. In People *v.* Sours, 31 Colo., 371, 391-394, the point was raised that a constitutional amendment must be an alteration of some existing provision of the constitution and must not add entirely new matter to the constitution. The court properly declined to limit in this manner the legislative power to propose amendments.

[207] It may be well to suggest that as to method of enactment ordinary laws are subject to many more restrictions than are constitutional amendments, as, with reference to title, reading, passage, etc. There are more pitfalls to be avoided in passing a law which

therefore, not subject to judicial control to as great an extent as statutes. In fact most of the state statutes which are declared invalid by state courts are declared to be so because repugnant to state constitutional restrictions which do not apply at all to amendments—that is, upon restrictions as to the content of legislation, as tested by state constitutional provisions, or upon the specific restrictions as to the methods of ordinary legislation.

The amending process is a process of superior state legislation. If a law is declared invalid by the state court, as in violation of the state constitution, the people may, if they are sufficiently interested, overrule the court by placing the substance of the invalidated law in the state constitution, either by an amendment or in connection with a general revision of the constitution.[209] A tendency to overrule judicial decisions by constitutional alterations has been apparent in recent years. Thus in 1899 the supreme court of Colorado, upon arguments that are at least questionable, held invalid as in violation of the constitution of that state a legislative act limiting a day's labor in mines and smelters to eight hours. In 1902 a constitutional amendment was adopted by the people of Colorado fixing eight hours as a working day in mines.[210] Montana in 1904 and Oklahoma in 1907 introduced into their constitu-

courts will uphold than in enacting a valid constitutional amendment, that is, in matter of form.

[208] The state constitutions are filled with restrictions upon the character of legislation which may be passed by legislatures, as with respect to special legislation, etc. The amending process is now almost entirely free from such restrictions.

[209] Some of the matter in this and several succeeding paragraphs is taken from an article published by the present writer in the Political Science Quarterly, xxiv, 193.

[210] *In re* Morgan, 26 Colo., 415. See also Freund's *Police Power*, sec. 155.

tions provisions limiting a day's labor in mines to eight hours. A series of decisions by the New York Court of Appeals, beginning in 1901, held unconstitutional state statutes regulating hours and conditions of labor on state and municipal public works.[211] An amendment to the constitution of New York, adopted in 1905, provides that the legislature shall have power to " regulate and fix the wages or salaries, the hours of work or labor, and make provision for the protection, welfare and safety of persons employed " by the state or any civil division thereof, or on public contracts. California in 1902, Montana in 1904, and Oklahoma in 1907 adopted constitutional provisions establishing an eight-hour day upon state and municipal public works. California, after three unsuccessful attempts of its legislature to enact a primary election law which would meet judicial approval, in 1899 adopted a constitutional amendment upon this subect in order to overcome difficulties raised by the court." [212] Michigan in 1902 by constitutional amendment authorized its legislature to provide by law for indeterminate sentences, thus overcoming a decision of the supreme court of that state declaring such a law unconstitutional.[213] New Hampshire in 1903 adopted a constitutional amendment specifically authorizing the taxation of franchises and inheritances, in order to overcome decisions of the supreme court of that state declaring such

[211] People *v.* Coler, 166 N. Y., 1; People *v.* Orange County Road Construction Company, 175 N. Y., 84; People *v.* Grout, 179 N. Y., 417. See also Cleveland *v.* Construction Company, 67 Ohio St., 197 (1902).

[212] E. C. Meyer, *Nominating Systems*, pp. 196, 354. Marsh *v.* Hanley, 111 Cal., 368; Spier *v.* Baker, 120 Cal., 370; Britton *v* Board, 129 Cal., 337.

[213] People *v.* Cummings, 88 Mich., 249; *In re* Campbell, 138 Mich., 597; *In re* Manaca, 146 Mich., 697.

taxes unconstitutional.[214] This development will probably go further than it has yet gone, and we may reasonably expect provisions to be introduced into state constitutions regarding employers' liability, hours of labor, payment of wages, and other matters affecting social and industrial relations, where such provisions may be thought necessary to overcome judicial decisions of the states or may be thought desirable as measures of precaution against decisions which the courts might otherwise render. The narrow and illiberal attitude of the courts in interpreting constitutional provisions has done something, and if continued will probably do more, toward turning our constitutions "from fundamental frames of government into statutory codes." [215]

[214] State *v.* United States and Canada Express Company, 60 N. H., 219; Curry *v.* Spencer, 61 N. H., 624. Journal of the New Hampshire Constitutional Convention of 1902, p. 596.

[215] Learned Hand in Harvard Law Review, vol. xxi, p. 500. That this fact is coming to be appreciated may be seen from a quotation from a recent article in a popular magazine: "However, just now the people are finding a way around the legislative veto of the courts. . . . The voters are taking two methods of circumventing the legislative veto of the courts: First, by amending their state constitutions, or making new constitutions, and, second, by direct legislation or the modification of it known as the initiative and referendum. State courts are elective and therefore are afraid of majorities. They cannot declare constitutional amendments unconstitutional, and they handle laws adopted by a direct vote of the people with great care." William Allen White in American Magazine, vol. 67 (1909), p. 412. Attention should be called to the fact that the discussion above relates simply to cases in which laws have been declared unconstitutional where their repugnance to the constitution is not clearly apparent. Many cases of course arise in which specific restrictions imposed by one constitution are later deemed unwise and are removed either by amendment or constitutional revision, but such cases are not in point here. The above discussion relates only to state cases, but a good illustration of the same condition is presented by the federal income tax situation. An income tax law, not clearly unconstitutional and perhaps almost clearly constitutional, was held invalid by the federal Supreme Court, and now an attempt is being made to overrule that

State constitutional amendments of this character, made necessary by judicial decisions, are of course binding upon state courts only as regards the power of these courts to declare laws invalid as in violation of state constitutions. The state courts are still free to declare state laws or state constitutional provisions invalid as in violation of the federal constitution; and if bound by definite provisions in state constitutions they are apt to base such decisions upon the federal constitution. If the highest court of a state declares a state statute or a state constitutional provision invalid, as a violation of the federal constitution, its decision is final, for there is no appeal to the United States Supreme Court from a state decision invalidating a state enactment as repugnant to the constitution or laws of the United States. The state courts may on this account limit the powers of the states to a very great extent, in matters not already passed upon by the Supreme Court of the United States, and from their decisions there is now no appeal, although, of course, it is possible for the United States by act of Congress to permit appeals to the federal Supreme Court in such cases.

In matters with which the Supreme Court of the United States has had occasion to deal, the state courts are in legal theory bound by the interpretation which the federal tribunal has placed upon the federal constitution. States may, therefore, without fear of being overruled by their courts, enact into their constitutions any provisions which the federal Supreme Court has in its wisdom held proper and expedient, for if such a provision has been enacted in accordance with the proper forms, it can then properly be annuled neither upon federal nor upon state constitutional

decision by the cumbersome process of amending the federal constitution, and the attempt is apt to prove unsuccessful because of the cumbersomeness of the amending machinery.

grounds. Thus the states may, if they find it necessary to overcome state judicial decisions, insert into their constitutions provisions establishing an eight hour day on public works,[216] or in mines," [217] a ten-hour day for females in laundries,[218] but not a ten-hour day for both males and females in bakeries,[219] or a truck act applying to all employers.[220]

The point which I wish to make is that if the highest state court declares a state law invalid as in violation of the state constitution such a decision is final. If, however, legislation upon the matter in question is then introduced into the state constitution, the state court, if it again holds the enactment invalid, must declare it to be so because of its repugnance to the federal constitution, and in the latter case the state court is in theory bound by the decisions of the Supreme Court of the United States interpreting the federal constitution with reference to the matter under consideration; the hands of the state court are tied if a similar enactment has already been upheld by the federal tribunal. For example, if an act establishing an eight-hour day in mines were held invalid as violating a state constitution, such legislation might then be introduced by amendment into the state constitution itself. The state court cannot then properly declare the eight-hour law for mines invalid as a violation of the federal constitution, because the Supreme Court of the United States has already held such a law not to be unconstitutional." [221]

[216] Atkin *v.* Kansas, 191 U. S., 207.

[217] Holden *v.* Hardy, 169 U. S., 366.

[218] Muller *v.* Oregon, 208 U. S.,412.

[219] Lochner *v.* New York, 198 U. S., 45.

[220] Knoxville Iron Company *v.* Harbison, 183 U. S., 13.

[221] The above example is an actual one. See *In re* Morgan, 26 Colo., 415; Holden *v.* Hardy, 169 U. S., 366; and Freund's *Police Power*,

The state courts thus possess what is practically an absolute veto on state statutory legislation, and on state constitutional provisions which have not already been approved in substance by the Supreme Court of the United States. By introducing legislation into their constitutions the states will, however, be free to act in the fields within which legislation has already been upheld by the Supreme Court of the United States. Only legislation which has been passed upon by the highest federal court may be safely introduced into state constitutions for the purpose of overcoming state judicial decisions.

Because of the fact that the amending process is free from many of the restrictions imposed upon ordinary legislation, and, to a certain extent also, because they have been directly approved by the people, amendments are less apt to be annuled by the state courts than are ordinary laws. Too much weight, however, must not be given to this distinction. The distinction between state statutes and state constitutions has already broken down to a very great extent, and state courts are practically as free to declare state constitutional provisions invalid, because repugnant to the federal constitution or to the state constitutional provisions regarding form of adoption, as are state and federal courts to declare state statutes invalid as repugnant either to the state or federal constitutions.

The function of annuling statutory or constitutional provisions is, it should be repeated, primarily a political and not a judicial function, and in many cases the result reached by the court depends more upon the opinion of the judges as to the wisdom of the measure under consideration than

sec. 155. But the state court still has power to declare the law invalid on federal grounds, and there is now no appeal from its decision.

upon specific constitutional limitations. As a rule it would seem that courts have found reasons, sufficient at least for themselves, for annuling practically any constitutional amendment which they strongly desired to defeat. This result has ordinarily been accomplished either by the strict construction of the state constitutional provisions concerning the form of enactment, or by a strict construction of federal constitutional provisions,[222] but the California court in Livermore *v.* Waite accomplished the same result in the absence of either state or federal restrictions.

Summarizing briefly the position of statutes and constitutional provisions before the courts, we may say that the judicial veto upon state legislation may be exercised: (1) By the federal courts, in declaring state statutes or constitutional provisions invalid as violating the federal constitution; a decision of this character by the highest federal court is conclusive upon the states, both as to statutes and constitutional provisions. (2) By the state courts, in declaring invalid a state law as in violation of the state constitution. Such a decision may be overcome by a state constitutional amendment adopted in accordance with all the forms prescribed by the particular state constitutions.[223]

[222] The extent to which a court may go in declaring an amendment invalid as in violation of the federal constitution is shown in State *ex rel.* Johnson *v.* C. B. & Q. R. R. Co., 195 Mo., 228. See also Russell *v.* Croy, 164 Mo., 69.

[223] Overlooking for the present the control by state courts over the form of amendment, and assuming amendments to have been validly adopted.

It may be well to discuss somewhat more fully the relations between the federal and state judicial powers to annul state legislation. Where a federal question is involved the power is possessed by both state and federal courts. If a state law or constitutional amendment is contested on federal grounds, and is sustained by a state court, an appeal may then be taken to the federal court and the law or amendment may there be annuled. Upon federal questions there are

(3) By the state courts, in declaring state statutes or constitutional provisions invalid as in violation of the federal constitution; and it is in precisely these latter cases that the state courts have the greatest control over state constitutional provisions, because a state decision adverse to a state enactment in such a case is final, there being no appeal to the Supreme Court of the United States. On this account the state courts should resolve every doubt in favor of a state enactment in such a case, and permit a final decision of the question of federal constitutional construction by the highest federal court. Professor Thayer stated very clearly the rule which should be followed in such cases: "As to

thus two grades of judicial supervision. With reference to state constitutional restrictions, such as those relating to the form of legislation, special legislation, taxing power, form of amendments, etc., there is ordinarily only one series of courts which exercises the judicial veto; the federal courts do not ordinarily hold state enactments invalid because of repugnance to state constitutions although this has been done in some cases. See Knight *v.* Shelton, 134 Fed., 423. Ordinarily it may be said then that if an enactment is contested on state constitutional grounds and is sustained by the state court such a decision would be conclusive; if contested in the state court on federal grounds and sustained, there may be an appeal to the federal court and a possible reversal of the state court's decision. Where a contest is on federal grounds there are two judicial checks, if a decision is favorable in a state court; where the contest is on state constitutional grounds, there is only one judicial check, the state courts, but the supervision exercised over legislation by state courts is stricter than that exercised by federal courts. However, with reference to the general guaranties of life, liberty and property, similar provisions will usually be found in both the state and federal constitutions. These state guaranties have, since the adoption of the fourteenth amendment, become mere surplusage, except in so far as they retard uniform judicial action by being interpreted more strictly by the state courts than similar federal provisions are interpreted by the federal courts. The need of state power to declare laws invalid on state constitutional grounds, as depriving of life, liberty, or property, or as depriving individuals of the equal protection of the laws, has entirely disappeared.

how the state judiciary should treat a question of the conformity of an act of their own legislature to the paramount constitution, it has been plausibly said that they should be governed by the same rule that the federal courts would apply. Since an appeal lies to the federal courts, these two tribunals, it has been said, should proceed on the same rule, as being parts of one system. But under the Judiciary Act an appeal does not lie from every decision; it only lies when the state law is *sustained* below. It would perhaps be sound on general principles, even if an appeal were allowed in all cases, here also to adhere to the general rule that judges should follow any permissable view which the co-ordinate legislature has adopted. At any rate, under existing legislation it seems proper in the state court to do this, for the practical reason that this is necessary in order to preserve the right of appeal." [224]

Actually, however, we find many of the state courts in such cases construing the federal constitutional provisions more strictly than does the federal Supreme Court, and limiting the action of the states so as often seriously to cripple them in the exercise of legislative powers clearly belonging to the states. Where the highest federal court has not spoken state courts are legally free to take as arbitrary a view as they may wish in the interpretation of the federal constitution. Where the federal Supreme Court has spoken the state courts are legally bound to follow it in their interpretation of the federal constitution, but there is no way by which this legal duty may be enforced in favor of state enactments, because no appeal lies to the United States Supreme Court if state enactments are declared invalid by the state court. In fact, state courts do not always follow the federal Supreme Court in their interpretation of the pro-

[224] Thayer, *Legal Essays*, 37-38.

visions of the federal constitution. Then, too, no two acts are apt to be precisely alike and a state court may hold invalid an act or constitutional provision if it varies in the slightest degree from a similar enactment upheld by the United States Supreme Court. Professor Schofield has stated the situation clearly: " *De facto* the highest courts of the several states are, within the borders of their respective states, ultimate judicial expounders of the constitution and laws of the United States, and as such they have the *de facto*, though not the *de jure*, power to shut their eyes to, refuse to follow, and go directly against, decisions of the federal Supreme Court expounding the constitution and laws of the United States, subject to this important limitation however, namely: That, in the exercise of this *de facto* power, the courts of the several states confine their activity to pressing the screws of the limitations of the constitution and laws of the United States down on to their respective states tighter than the federal Supreme Court does." [225] State courts are therefore, in practice, free to construe the federal constitution as they please so long as they exercise their power to invalidate rather than to sustain state laws or constitutional provisions. They have absolute and final power to annul any state constitutional amendment or provision on any federal ground which they may assign. Under these conditions it may well be expected that if a court is overruled by a constitutional amendment, such an amendment would then be held invalid on federal grounds, if the court cared to go to such lengths to defeat it. Certain it is that under the conditions just referred to the judicial control over amendments is almost as broad as over state statutes, the only

[225] Illinois Law Review, iii, 303. See Professor Schofield's note for Illinois cases of the character referred to. See also *In re* Morgan, 26 Colo., 415, and People *v.* Williams, 189 N. Y., 131.

difference being that decisions with reference to the substance of amendments must be based on federal grounds. What a court has lost through being overruled on state constitutional grounds may easily be regained by a decision on federal grounds. What a court would do, of course, if it feared being overruled by popular vote, would be to base its decision on federal grounds in the first place and thus completely tie the hands of the state.[226] The absolute veto which state courts may exercise upon constitutional amendments has in at least one case been employed unwisely if not arbitrarily.[227]

[226] The only remedy for the state in this matter would be the amendment of the judiciary act so as to permit appeals from state courts where the decisions of such courts are against the validity of state acts attacked as opposed to the federal constitution.

[227] State *ex rel.* Johnson *v.* Chicago, Burlington, and Quincy R. R. Co., 195 Mo., 228. It is unthinkable to suppose that the amendment here under discussion would have been held invalid by the federal Supreme Court on the federal grounds assigned by the state court for its decision. Before the fourteenth amendment state courts seem to have followed the rule laid down by Professor Thayer and to have taken a view favorable to state powers when such powers were questioned on federal grounds. The strict attitude of the state courts has developed since the Supreme Court of the United States acquired under the fourteenth amendment a wide control over state legislation. No court likes to be overruled on appeal, and a state court, in case of doubt may often prefer to decide against a state law, thus settling the question finally rather than to decide in favor of the law and run the risk of being overruled on appeal by the United States Supreme Court. Some recent New York decisions are precisely in point. In State *v.* Lochner, 177 N. Y., 145, the state court of appeals took a very liberal attitude toward legislation regulating hours of labor in bakeries and upheld the legislation, but was overruled by the Supreme Court of the United States in Lochner *v.* New York, 198 U. S., 45. In a later case of People *v.* Williams, 189 N. Y. (1907), 131, the state court took an extremely strict view and annuled state legislation regarding the hours of labor of women, while the federal Supreme Court in Muller *v.* Oregon, 208 U. S., 412 (1908), decided but a short time afterward, took a broader view and held somewhat similar

Perhaps enough has been said to indicate the present position of the courts with reference to state statutory and constitutional enactments. It will now be well to discuss briefly some recent developments with reference to the manner of enacting these two forms of state legislation. The distinction *in substance* between state constitutions and state statutes has to a large extent disappeared through the practice of embodying detailed legislative enactments in the constitution.[228] There is now quite a decided tendency in some states to break down the *formal* distinction between constitutions and statutes by employing the same methods for the enactment of state laws and the adoption of constitutional amendments.

Since 1818 the really fundamental distinction between statutes and constitutional amendments has been that amendments were required to be voted on by the people, while statutes were infrequently submitted to a popular referendum. But the Delaware constitution of 1897 does not require proposed amendments to be submitted to a popular vote. Virginia (1902) and Oklahoma (1907) have made important provisions of their constitutions subject to amendment by legislative act,[229] and similar provisions have not been uncommon in other constitutions. In fact a feeling is beginning to develop that when constitutions contain so much of legislative detail, which requires frequent change, alteration in such matters should be left to the legislature

state legislation valid. State courts cannot go beyond the United States Supreme Court in liberality toward state enactments and this almost necessarily means that they will be too cautious in order to avoid decisions which may later be overruled on appeal.

[228] Oberholtzer, *Referendum in America*, chap iii. Dealey, *Our State Constitutions*, p. 9.

[229] Virginia, secs. 155, 156 *l.* Oklahoma, Art. ix, sec. 35; Art. xii, sec. 3; Art xx, sec. 2. Such alterations will, without doubt, be dealt with by the courts merely as ordinary statutes.

and not be submitted to the people. Dr. Whitten has said: "If it seems desirable to include matters of detail in the constitution, special provision should be made for their amendment by a two-thirds vote of the legislature or by two suceeding legislatures without submission to the people . . . the compulsory referendum on all amendments to the constitution is most objectionable, since it burdens our elections with votes on questions in which the people have no interest." [230]

But as yet there is little tendency to reduce the popular participation in the amendment of state constitutions, and the distinction in form of enactment between constitutions and statutes is disappearing largely through the increased popular participation in ordinary legislation—through the use of the referendum upon ordinary statutes. South Dakota in 1898, Utah in 1900,[231] Oregon in 1902 and 1906, Nevada in 1904, Montana in 1906, Oklahoma in 1907, and Maine and Missouri in 1908 have adopted the referendum for ordinary legislation. Nevada did not adopt the initiative at all; Maine and Montana adopted the initiative for ordinary legislation, but specifically provided that it should not apply to constitutional amendments, and the South Dakota initiative also does not apply to constitutional amendments. Maine, Montana, and South Dakota therefore give less popular participation in the amendment of their constitutions than they do in the enactment of ordinary legislation. Maine and Montana make the proposal of amendments to the people more difficult than that of laws by requiring a two-thirds vote of the legislature for the submission of amendments, and South Dakota by requiring "a

[230] N. Y. State Library, *Review of Legislation*, 1901, p. 29. For a further discussion of this subject see below, p. 289.

[231] But the Utah amendment required legislation to put it into operation, and such legislation has not been enacted.

majority of the members elected to each of the two houses." [232] In Nevada the legislative proposal of amendments to the people is made more difficult than that of ordinary laws by the requirement that amendments be adopted by two successive legislatures before being submitted to the people. But these slight differences do not obscure the fundamental fact that both laws and amendments are subjected to the same form of popular referendum.

The three states of Oregon, Missouri, and Oklahoma apply both the initiative and referendum to ordinary statutes and constitutional amendments. The initiative and referendum amendments of Oregon (1902) and Missouri (1908) permit the adoption of constitutional amendments and of statutes in precisely the same manner; both amendments and statutes may be proposed by the same number of initiative petitioners, and adopted by the same number of popular votes. In these states a measure may be called either a constitutional amendment or a law, at the discretion of those who propose it. The Oklahoma (1907) initiative and referendum provisions make a distinction between constitutional amendments and statutes by requiring a petition of fifteen per cent of the legal voters to initiate a constitutional amendment, while only eight per cent is required to propose measures of ordinary legislation; [233] and by requiring upon constitutional amendments a vote of a majority of all the electors voting at the election,[234] while laws passed

[232] There are similar distinctions with reference to the legislative submission of amendments and proposed laws in Oregon, Oklahoma, and Missouri.

[233] A proposed amendment which was rejected by Missouri in 1904 made a similar distinction between constitutional amendments and laws, by requiring a larger popular petition for the proposal of amendments.

[234] The same rule applies to measures of ordinary legislation initiated by popular petition; the popular initiative, and the amend-

by the legislature which are submitted to a popular referendum become effective "when approved by a majority of the votes cast thereon."

It is clear, then, that a long step has already been taken toward employing the same methods for enacting both ordinary statutes and constitutional amendments. What is apt to be the attitude of the state courts under these new conditions? Suppose, for example, that a measure should in Oregon be initiated by popular petition and approved by the people as a law although it might as well have been submitted as an amendment, would the state court be justified in declaring such a law invalid as in violation of limitations contained in the state constitution? Such an attitude of the state court could of course be circumvented by calling all initiated measures (and all measures submitted to the people by the legislature), amendments, and if the courts preserved a strict attitude toward legislation, a great body of ordinary legislation might well be adopted as constitutional amendments. Again, the distinction in fact having

ing process, are therefore practically worthless in Oklahoma. See pp. 188-190.

In Lozier *v.* Alexander Drug Co., 99 Pac., 808, was involved an effort on the part of the Oklahoma legislature to submit a measure at the same time both as referendum law and as proposed amendment. If the measure received a sufficient vote it was to become a part of the constitution; if it received a majority of the votes cast upon its adoption or rejection it would have been continued in force simply as a law; and if a majority of the votes cast upon the measure were against its adoption it was to be repealed as law. The court held that such submission was improper and that the adverse vote actually cast therefor did not repeal the measure as a law, or have any effect whatever. The syllabus written by the court says: "While a proposition to amend the prohibition article of the constitution . . . and a proposition for the approval or rejection or repeal of article 1 of the enforcing act . . . may be submitted at the same election, the two cannot be united in one proposition, so as to have one expression of the voter answer both propositions."

disappeared, if the state judicial power over measures called laws really hindered popular action, the result would probably be a constitutional amendment altogether denying such power to the courts. And this is what may naturally be expected in the states adopting the initiative and referendum, unless the courts treat laws approved by the people with great respect. This possibility was pointed out somewhat clearly by Mr. A. Lawrence Lowell some years ago. He said: "Our whole political system rests on the distinction between constitutional and other laws. The former are the solemn principles laid down by the people in its ultimate sovereignty; the latter are regulations made by its representatives within the limits of their authority, and the courts can hold unauthorized and void any act which exceeds those limits. The courts can do this because they are maintaining against the legislature the fundamental principles which the people themselves have determined to support, and they can do it only so long as the people feel that the constitution is something more sacred and enduring than ordinary laws, something that derives its force from a higher authority. Now, if all laws received their sanction from a direct popular vote, this distinction would disappear. There would cease to be any reason for considering one law more sacred than another, and hence our courts would soon lose their power to pass upon the constitutionality of statutes. The courts have in general no such power in Switzerland, where indeed the distinction between constitutional and other laws is not so clearly marked as in America." [235]

In general one may agree with President Lowell, but it is hardly possible to assent to the statement that the distinction between state statutes and state constitutions forms the

[235] *Governments and Parties in Continental Europe*, ii, 296-297; International Journal of Ethics, vi, 59 (1895-96).

"keystone of our system" of government. In fact such a distinction has already been to a large extent destroyed by the state courts themselves. Then too, by the fourteenth amendment we have placed private rights under the protection of the federal courts, and have to a large extent done away with any advantage which may have been derived from the state judicial power to declare state laws invalid upon either state or federal constitutional grounds.[236] The power of state courts, in the protection of private rights, to annul state constitutional and statutory enactments may under present conditions be likened to a fifth wheel on the governmental coach—it performs no useful function in protecting substantial rights, which is not already performed by the federal courts, and serves simply to retard a final and uniform settlement of questions of federal constitutional law, in so far as they affect the powers of the states. The judicial control over legislation is not in any case an unmixed blessing, because it decreases legislative efficiency and as employed to the present time has often checked for many years needed reforms which the courts have been forced to accept in the end, but the state judicial power over legislation when employed as frequently and as irresponsibly as

[236] The statement here is one with reference to the broader guaranties of life, liberty, and property, which the courts have construed so as to give themselves discretionary control over all social and industrial legislation. State constitutional guaranties of this character have been of no value since the fourteenth amendment. State restrictions regarding the passage of laws, special legislation, tax and debt limitations, etc., are sufficiently definite not to afford the courts a wide range of discretion in declaring laws invalid. So too as to the provision in some constitutions that special laws shall not be employed when general laws can be made applicable, and that this question shall be one for the courts; the provision is a definite one which grants to the courts a certain amount of legislative power, and must be judged by its results, but it gives the courts no discretionary control over legislation of a general character.

during the past thirty years, can hardly be considered an instrument of very great value.[237] In fact the referendum has in some cases been advocated because of the belief that it will weaken or destroy this very power.[238]

But we should not infer from what has been said that the enactment of laws by the referendum will entirely destroy state judicial control over legislation, even when such control is based upon state constitutional limitations.[239] It has already been shown that amendments are subject to state constitutional provisions regarding the procedure of the amending process, and would be subject to limitations, if there were any, as to the substance of amendments. Now with reference to legislation there are numerous constitutional restrictions both as to form and substance, which will for some time at least probably be enforced by the courts against referendum laws just as against laws enacted by the

[237] "The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that." Thayer's *John Marshall* (1901), p. 107. When the courts assume the power to prevent or retard reforms of a social or industrial character, and thus to interfere in questions of policy, which have become more or less political in character, they necessarily lose in popular respect, and such has been the case in recent years.

[238] "And the issue should be met candidly and the friends of the movement for direct legislation should admit frankly that the purpose of their cause is two-fold: First, to compel legislatures to act quickly and without evasion, and Second, to circumvent the veto of such courts as are elective, and hence dependent upon popular majorities, and to put whatever righteousness there is in a definitely registered expression of popular will before such courts as are not elective to stay them in their vetoes. For the veto power of the American courts over legislation—under the assumed right to declare legislation "unconstitutional"—is one of the most cruel and ruthless checks upon democracy permitted by any civilized people." William Allen White in American Magazine, vol. 67, p. 412 (Feb., 1909).

[239] Unregulated and unrestrained state judicial control upon federal grounds remains in any case unless the judiciary act be amended.

legislature, although as President Lowell has said the actual distinction upon which the judicial power is based has largely disappeared. Such, for example, with reference to form are those regarding title, reading of bills, etc.,[240] and with reference to substance, those concerning special legislation, limitations upon the taxing power and indebtedness, etc. Where, as in Missouri and Oregon, the same processes may be used either for ordinary legislation or for amendments, these restrictions may be avoided by calling every measure an amendment, but the judicial control under state constitutional restrictions will be just as strong as before where the amending process is different from and more difficult than that for ordinary legislation.

We may, it would seem, in such cases, expect the courts to take the view already assumed with reference to amendments, that every specific constitutional requirement must be complied with, but that such requirements should be construed liberally.[241] A case which arose in Oregon in 1906 shows pretty clearly that the state courts will inquire into the validity of referendum laws. In State *v.* Richardson [242] a local option law initiated by petition and approved

[240] Similar to those regarding method of amendment but usually more numerous.

[241] William Allen White in the article above referred to (American Magazine, vol. 67, p. 413) says: "The Supreme Court of South Dakota, where the initiative and referendum prevails, upon petition for opinion as to the referred laws has always held that mere technical errors in non-compliance with the formulae of the statute do not hide the obvious intention of the people and have in consequence always held these referred laws valid." The present writer knows of no cases in which this question has squarely arisen in South Dakota. Mr. White evidently had in mind State *v.* Thorson, 9 S. D., 149; Lovett *v.* Ferguson, 10 S. D., 44, and State *v.* Herried, 10 S. D., 109, where the court said that amendments would not be set aside on technical grounds. The same view would undoubtedly apply to referred laws.

[242] 48 Ore., 309, 319 (1906). Stevens *v.* Benson, 50 Ore., 269, and

by the people was attacked as invalid because violating certain provisions of the state constitution with respect to local legislation and to the requirement that every act should embrace but one subject, and that such subject should be expressed in its title. The court upheld the law as valid but said: "The validity of laws adopted at the polls must be determined like enactments by the legislative assembly, by the test of the constitution as modified by the amendment thereto. . . . We think the assertion may safely be ventured that it is only the few persons who earnestly favor or zealously oppose the passage of a proposed law initiated by petition who have attentively studied its contents and know how it will probably affect their private interests. The greater number of voters do not possess this information and usually derive their knowledge of the contents of a proposed law from an inspection of the title thereof, which is sometimes secured only from the very meager details afforded by a ballot which is examined in an election booth preparatory to exercising the right of suffrage. It is important, therefore, that the title of laws proposed in the manner indicated should strictly comply with the constitutional requirements." But the requirement would not have applied at all had the measure been called a constitutional amendment, as it might well have been. The reason for judical control had ceased but the judicial control remained.

Palmer *v.* Benson, 50 Ore., 277 (1907) can hardly be considered cases in which the Oregon court has shown especial tenderness toward the initiative and referendum. Both decisions were favorable, but could hardly have been otherwise. In Stevens *v.* Benson, for example, the law provided a certain form for initiative petitions, and this form had not been fully complied with. But the statute itself expressly stated that its terms in this respect were not mandatory, and the statute had been passed simply in aid of the right of popular initiation, which existed by virtue of a self-executing constitutional provision independently of the statute.

The power of the courts over laws approved by the people may cease at some time, as President Lowell has suggested, but certainly this power will not be surrendered in the near future. For a while at least we may expect that judicial control over laws approved by the people will be almost if not as strict as over laws passed by legislative bodies—certainly the control will be as strict as, if not stricter than, that now exercised over constitutional amendments approved by the people. But it must be said that the courts have probably now stretched to its furthest limit their power over legislation, and that there may soon come a saner and more reasonable judicial attitude toward state enactments. The approval of laws by the people may have some influence in making courts more cautious, and in bringing them back more nearly to their true function as interpreters rather than as makers of laws.

The Amending Process and Revision by Constitutional Conventions

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.[243] In the state of New

[243] It lies within the discretion of a convention ordinarily as to whether its action shall be substituted (1) in the form of separate amendments, or (2) as a complete new constitution, or (3) as a new constitution but with separate provisions which may be voted upon independently. As between the first and second plans it may be said that the second is to be preferred if the changes are so great as to make submission as separate amendments confusing, or if the proposed

Hampshire specific amendments may only be proposed by a convention. However, where only a few changes are 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 ab-

changes are such as to make it undesirable that some should be approved and others rejected. The New Hampshire convention of 1791-1792 first divided its proposals into a number of subjects "which were submitted separately to the approval of the citizens. Unfortunately the list of these subjects was far from short, there being seventy-two of them. Upon the vote twenty-six were rejected, forty-six were adopted. Of the latter, several were in contradiction with those provisions of the old constitution which still remained in force because of the rejection of the former, and the convention was compelled to do what it had thought possible to avoid. It took up again the work so badly mutilated by the people, removed its inconsistencies, and was finally paid for its trouble by a popular vote which gave the constitution the required two-thirds majority." Borgeaud, 143, 144. The submission of a complete constitution is the more customary procedure followed by conventions. See Jameson, 4th ed., 531-533; Borgeaud, 155-160; Oberholtzer, 118-120. The third method has been frequently employed where it was thought proper that some measure should be submitted independently of the whole constitution, and was used by North Dakota, South Dakota, and Washington in 1889, and by Oklahoma in 1907. See Arie *v.* State, 100 Pac., 23 (Okla., 1909). The Illinois convention of 1870 submitted eight propositions to the people, besides the question as to whether they approved the proposed new constitution. The Michigan constitution of 1850 was so worded as to present "a question of grave doubt as to whether a constitutional convention called under it had a right to submit a complete instrument and also at the same time, separate amendments embodying distinct issues which, upon adoption by the people, may become a part of such instrument." The convention clause of the constitution of 1908 was on this account so worded as "to provide a method for submitting special questions each presenting vital issues about which there might be great conflict of opinion to a vote of the electors, separate and apart from the instrument embodying the usual subjects regulated in a state constitution." Pamphlet submitting constitution of 1908, p. 66. For a discussion of the ordinance power of conventions see pp. 104-117.

sence 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.[244]

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,[245] 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 con-

[244] Where a constitution contains no provision for the legislative proposal of amendments it is well established that no such power exists. No effort has ever been made, so far as is known, upon the part of a legislature to submit a proposed amendment to the people unless such action was expressly authorized by constitutional provision, but the judicial attitude toward the amending process seems clearly to indicate that such action would not be given effect to by the courts. "The power to propose amendments . . . must be authorized by a special provision of the constitution. And when no such provision can be pointed out the power does not exist." Jameson, 4th ed., p. 622.

[245] See pp. 132, 178 for a discussion of such restrictions. The procedure above referred to may not be employed in New Jersey where the legislature may only propose "any specific amendment or amendments." Nor would it seem that complete constitutions may be proposed by the legislatures of any of the states whose constitutions require that each proposed amendment shall be submitted so that it may be voted upon separately. For dicta that legislatures may not propose complete constitutions see Livermore *v.* Waite, 102 Cal., 118, and Carton *v.* Secretary of State, 151 Mich., 340. The statement in the California case is clearly right as a construction of the California constitutional provisions, but under the Michigan constitution of 1850 the case was not so clear, and as suggested above, a complete constitutional revision was submitted to the people of Michigan by the legislature in 1874.

stitution in 1874, and the Rhode Island legislature submitted the same instrument twice, in two successive years, 1898 and 1899.[246]

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." [247] 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. With reference to this latter point, it may be argued, however, that if a constitution specifically provides two methods of alteration, the language employed with reference to the proposal of amendments by the legislative method may, when read with that concerning the convention method, often be construed as an implied prohibition of complete constitutional revision by the legislative method.[248] Leaving aside the constitutional question, it would seem clearly preferable that when possible complete revisions or even alterations of a very thorough character

[246] A revised constitution in the form of an amendment was submitted to and rejected by the people of Connecticut in 1907, but the revision so submitted was primarily a textual one, and is not precisely in point here though it may be cited as an example of the procedure referred to above. The Vermont constitutional commission in its report in 1910 submitted to the legislature a complete textual revision of the constitution, for its approval and submission to the people.

[247] Jameson 4th ed., 562.

[248] Jameson, 4th ed., 573-574.

should be made by conventions expressly chosen for that purpose. Legislatures will usually have their time taken up with other matters and be unable to devote sufficient time to this subject, and the election of a body for the one purpose concentrates public attention upon questions of a constitutional character. The convention will ordinarily be able to do better work than the legislature because its attention will be confined to the one task of framing a constitution. Moreover, it has as a rule been possible to obtain for membership in conventions a higher grade of men [249] than may usually be found in the ordinary legislative bodies, and this constitutes a practical reason of very great importance for not weakening the functions of conventions.

State legislatures have, in a number of cases, realized their defects as bodies to give careful consideration to proposed constitutional alterations of an important character, and have created independent commissions, to consider and propose drafts of constitutional changes for the legislative consideration. This plan was followed in New Jersey in 1852, 1854, 1873, 1881, and 1894; in New York in 1872-73, and 1890; in Michigan in 1873; in Maine in 1875; in Rhode Island in 1897 and in Vermont in 1908-1910. The commissions in Michigan and Rhode Island prepared complete constitutional revisions, which were approved by the respective legislatures, but rejected by the people in each state. Constitutional amendments were actually brought about through the recommendations of the New Jersey commission of 1876, the New York commission of 1872-73, and the Maine commission of 1875.[250]

[249] Bryce, *American Commonwealth*, 3d ed., i, 475, 667-670. Oberholtzer, 97-98. Jameson, 4th ed., 561. Dealey, *Our State Constitutions*, p. 9.

[250] In 1894 a joint committee of the two houses of the Louisiana legislature drafted a number of amendments, which were rejected by

It may be worth while to discuss a little more fully the New York constitutional commissions of 1872-73 and 1890, as illustrating the use of commissions to aid legislative action in the proposal of amendments. The New York commission of 1872-73 was authorized by legislative act and was composed of thirty-two members, four appointed from each judicial district by the governor with the consent of the senate, "for the purpose of proposing to the legislature, at its next session, amendments to the constitution." The next session of the legislature agreed to the proposals in substance, they were submitted to the people, and the greater part of them were approved. The commission of 1890 was brought about by a deadlock between the governor and legislature as to the calling of a constitutional convention which had been ordered by a vote of the people in 1886. The question of judicial reorganization was a pressing one, and an act was passed referring this question to a commission constituted in a manner very similar to that of 1872. The commission's report was not considered by the legislature, because of the calling of a convention by legislative act in 1892, but was used by the constitutional convention of 1894.[251]

Commissions of this character are, of course, mere ad-

the people in 1896 (Senate Journal, 1894, p. 111); and in 1901 a joint committee of the Georgia house and senate was appointed to prepare amendments to the constitution of that state (Georgia laws, 1901, p. 756), but these were merely legislative committees and not commissions acting independently of the legislative bodies even in drafting proposals.

[251] Lincoln, *Constitutional History of New York*, ii, 469-473, 683-725. For discussions of the use of commissions see Jameson, pp. 570-575. Oberholtzer, 93-94; Dealey, 17-18. See also N. J. Laws, 1852, p. 546; 1854, p. 544; 1873, p. 844; 1881, p. 187; 1894, p. 556; Report of the Commission to Revise the Constitution of Rhode Island (Providence, 1898); Report of Vermont Constitutional Commission (1910).

visory bodies, constituted for the purpose of giving counsel to the legislature, and have no independent power of action. As a joint committee of the two houses of the legislature of New York said in 1873: "The responsibility of [for] the adoption or rejection of the amendments rests with the legislature, and not with the Commission that proposed them." [252] To this statement should be added that of Mr. Lincoln with reference to the New York commission of 1890: "It should not be forgotten that the commission could do nothing directly to affect the constitution; for its work was subject to review and amendment by the legislature, and could not possibly reach the people until it had been approved by two legislatures." [253]

Judge Jameson makes the following objection to the use of constitutional commissions: "In no case, so far, has the report of a commission been adopted by the legislature without material modification. This dilemma, therefore, always arises: The report of the commission must be exactly pursued by the legislature, or the benefit of their supposed superior wisdom and ability is lost; but if the legislature is bound by the commission's report and to submit it to the electors without change, the function of the former would be merely a ministerial one; it would not be itself but the commission, that would recommend,—a transfer of function which the constitution certainly would not warrant. If it be supposed that the legislature has a constitutional right to discuss and to modify the amendment or system of amendments reported by the commission, the whole question of amending or of revising the constitution would be relegated to the body supposed, by the very act of appointing the commission, to be unfitted for that work." [254] Stated in

[252] Lincoln, *Constitutional History of New York*, ii, 469-473.
[253] *Ibid.*, ii, 683-725. [254] Jameson, 4th ed., 574.

different language Judge Jameson's criticism amounts to this: By seeking advice the legislature confesses its incompetency to act, and advice is useless in such a case because the legislature has discretion to accept it wholly or in part, or to reject it. Stated in this way Judge Jameson's objection seems hardly to require an answer. The constitutional commission is useful under proper limitations as an adviser of the legislative bodies, but should not be employed, as was attempted in Michigan, to make a complete constitutional revision through legislative proposal, although even this procedure may be considered more proper in a state like Rhode Island, so long as the view is held that a constitutional convention may not be convened.[255]

[255] The Vermont constitutional commission in its report to the legislature in January, 1910, said: "In the first place, although the wording of the resolution [creating the commission] is broad enough to permit us to make any proposals we choose, in fact its spirit did not contemplate that we were to attempt any general revision of the constitution. A general revision should be the work, if not of a constitutional convention, at least of a commission of general and very representative character, and embodying the result of full, deliberate and open public discussion." This commission submitted to the legislature several specific amendments, and a complete textual revision of the constitution.

CHAPTER V

The Working of the Constitutional Referendum [1]

Attention has already been called to the fact that the submission of proposed amendments is much more frequent in some states than in others.[2] This is due in part to restrictions upon the amending process. During the period 1899-1908, for example, no proposed amendments were submitted in Vermont, and the year 1900 was the only one in which a submission could have been had; so the con-

[1] The discussion here is based mainly upon the experience of the states during the ten-year period, 1899-1908; it is not a study of the referendum in general, but simply an attempt to discover something as to the working of the compulsory referendum on constitutional questions. In an appendix are printed tables giving, so far as information has been obtainable, the results of popular votes upon constitutional questions from 1899 to 1908. For some states information is available covering longer periods: the New York Red Book for 1910, pp. 317-319, gives the popular votes in New York from 1845 to 1905; the Michigan Manual for 1909, pp. 552-557, gives the votes for that state from 1850 to 1908; Dr. Edward M. Hartwell has collected in the Monthly Bulletin of the Statistics Department of the city of Boston, vol. xi, pp. 158-160, a complete record of constitutional referenda in Massachusetts from 1780 to 1907; in the Political Science Quarterly, vol. xiii, pp. 1-18, Mr. Samuel E. Moffett gives a statement of constitutional referenda in California from 1879 to 1896, and the record in this state for 1898 may be found in the California Blue Book for 1899, pp. 244, 245. The Rhode Island Manual for 1909, pp. 130-140 gives votes upon all constitutional questions submitted to the people of Rhode Island; Colby's *Manual of the Constitution of New Hampshire* (1902), and the Official Vote of South Dakota, 1889-1908 (1908), give the votes in these states upon constitutional questions.

[2] It should be repeated here that in Delaware constitutional amendments are not submitted to a vote of the people.

stitutional requirements of Pennsylvania, New Jersey, and Tennessee that proposals shall be submitted only at certain intervals, and the New Hampshire plan of permitting proposals only by means of a convention, cause a rather infrequent proposal of amendments in these states. So too, in a number of the states where the adoption of amendments is rendered difficult by the popular majority required, amendments are not frequently proposed to a vote of the people, because of a feeling that such proposal is useless. This is probably the reason for rather infrequent proposals in Illinois, Indiana, and Wyoming. But that amendments are proposed more frequently in some states than in others cannot be explained by the relative ease or difficulty of adopting amendments. In Illinois, Indiana, and Wyoming few amendments were proposed during the period from 1899 to 1908, but during the same period thirteen amendments were proposed in Minnesota, whose constitution is equally as difficult to amend. During the same period only one amendment was proposed in Massachusetts and but four in Iowa, while fourteen were proposed in New York, whose amending procedure is equally as difficult as that of Iowa and Massachusetts.

There is, however, some relationship between the frequency of proposed amendments and the age of the constitution under which a state is living. The proposal of amendments is comparatively infrequent in the New England States and in several states of the Middle West, and this, while due in part to the difficulty of amendment, may also be partly attributed to the conservatism of these states and to the fact that their constituions are older and less elaborate than the instruments adopted by other states in recent years; they contain fewer details of a legislative character, which require frequent alteration. The use of the amending process is more common in the states with newer

constitutions, and particularly in those whose constitutions cover a wide range of details not of a fundamental character. The state of California has been busily altering its constitution almost from the time when that instrument was adopted in 1879. Louisiana adopted a new and very elaborate constitution in 1898, and two years later began a process of frequent and almost continuous amendment. Oklahoma adopted in 1907 a constitution which exceeds that of any other state in elaborate detail, and in 1908 began efforts to amend this instrument—efforts which were unsuccessful because of the cumbersome amending procedure adopted by this state. But although the frequency with which amendments are proposed in the several states bears some close relation both to the relative ease or difficulty of adopting amendments, and to the simplicity or elaborateness of the instrument sought to be amended, yet the fact is that of two states seemingly under similar conditions in these respects, proposals of amendment will be more frequent in one than in another.

In many states there is frequent resort to the use of the amending process. During the decade, 1899-1908, four hundred and seventy-two constitutional questions were submitted to the people of the several states. Of these fifty-one were submitted in California, fifty in Louisiana, thirty in Missouri, twenty-two each in Oregon and Michigan, twenty-one in Florida, and seventeen each in Colorado and Texas. Ten or more amendments were submitted in each of the states of Georgia, Idaho, Kansas, Minnesota, New York, New Hampshire, Ohio, South Carolina, and South Dakota. That is, there was an average of one or more constitutional questions each year submitted in each of these states.[3] North Dakota and Utah, each with nine proposed

[3] Reference has already been made to the fact that most amend-

amendments during this period; Wisconsin and New Jersey with eight; Montana, Tennessee, and West Virginia with seven; Connecticut, Rhode Island, and Washington, each with six, complete the list of states which made anything like frequent use of the amending procedure. The proposal of numerous constitutional amendments has been to a large extent a development of the past twenty years, but the amending process has been used most frequently during the last decade.[4] Yet in some states the proposal of amendments has been common before the decade here more immediately under consideration. In California thirty-five proposed amendments were submitted to the people between 1883 and 1898. Between the years 1860 and 1898 sixty-two constitutional questions were submitted to the voters of Michigan. In New York thirty-eight such votes were had between the years 1854 and 1896. During the period, 1780-1907, fifty-nine constitutional referenda were had in Massachusetts.

It has already been suggested that most of our state constitutions have come to be filled with legislative details which require frequent alteration. The amending process is the only means by which such alterations may be made. For this reason we find that the great body of proposed amendments relate to matters of detail, in which the public at large is not and cannot be very much interested. Of the four hundred and seventy-two questions submitted to the people during the decade, 1899-1908, perhaps not more than

ments are now submitted at general elections in even-numbered years. Some are submitted at state elections in odd years, as in New York, but this is the less usual procedure.

[4] J. B. Phillips, *Recent State Constitution-Making*, Yale Review, xii, 389. J. W. Garner in American Political Science Review, i. 245-247. See also a paper by the present writer in Proceedings of the American Political Science Association, 1908, p. 149.

sixty were fundamental in character, and a very large number were of not more than purely local interest. Many of the proposals were local and special legislation of the worst type.

A popular vote upon proposed amendments is of little value (1) if the questions are so trivial or so local in character as not to be of interest to those to whom they are submitted, or (2) if the questions are so complicated and technical that the average voter has no means of informing himself regarding them, or (3) if the questions are submitted in such great numbers that the voter, even if he might possibly render a satisfactory judgment upon any one of them, cannot inform himself regarding the merits of all the measures upon which he must pass.

Thanks to the rather strict constitutional provisions in many states, proposed amendments are not usually complicated in character, because each distinct proposal must be submitted separately.[5] But many proposals are of a decidedly trivial character. In California, Louisiana, Michigan, and South Carolina, for example, a number of the amendments proposed during the ten years under consideration were of purely local interest. The exemption of particular educational institutions from taxation in California and questions concerning the government and debts of New Orleans are not matters calculated to arouse great popular interest throughout the states of California and Louisiana. Nor was it to be expected that the people of Michigan should become at all excited over the establishment of a board of auditors for Genesee county or over increasing the salary of the circuit judge of that county. In South

[5] See pp. 178-183. Issues of a somewhat complex character may, of course, be raised by the submission of complete constitutions to the people, but usually the question of adopting or rejecting a new constitution gives rise to issues of a rather distinct character.

Carolina between 1899 and 1908, four of the nine proposed amendments submitted to the people related to the extension of the debt limit of particular towns and cities; the people of the state at large could hardly be expected to have an opinion worth expressing as to whether the cities of Greenville and Bennettsville, and the town of Gaffney, should be permitted to borrow more money than they were permitted to borrow by existing constitutional limitations. The voters of Missouri can hardly have had satisfactory basis for the decision that cities having more than one hundred thousand inhabitants should not be permitted to incur additional indebtedness for the construction of subways. In North Dakota the voters of the state have been called upon to pass on such important questions as that of establishing an institution for the feeble-minded, and of changing the name of the state school for the deaf and dumb. Some of these cases are extreme ones, but a study of amendments proposed during the past ten years will show that they do not give a greatly exaggerated view of the present situation.

When the proposals are not only local or trivial in character but are also submitted in great numbers the difficulties of a voter are very much increased, if he should wish to express an intelligent judgment upon such questions. In 1906 the voters of California were asked to pass upon fourteen constitutional questions, and in 1908 upon fifteen questions. In Louisiana twelve proposals were submitted in 1906 and fifteen [6] in 1908. In 1908 the voters of Missouri passed upon eight proposed amendments, and ten such proposals were submitted to the people of Oregon.[7] The

[6] But five were submitted at one election and ten at another. In 1896 twenty proposals were submitted in Louisiana and twelve in Nebraska.

[7] The voters of Oregon, in addition, passed upon nine laws, which were submitted at the same time.

submission of questions in this manner would not impress itself as so important a fact were such action had infrequently. Were the people called upon to pass on constitutional questions only at long intervals greater popular interest would be aroused, but when numerous measures are submitted at each biennial election the great body of voters must necessarily come to take less interest in them. The popular voting upon constitutional questions ceases to have the merit of novelty. Important questions are often submitted but the public interest is dissipated, and the questions of importance are lost in the mass of trivial proposals.

For the making of numerous proposals the state legislatures cannot be held entirely responsible. It is true, as Dr. Oberholtzer suggests, that legislatures sometimes submit as proposed amendments questions upon which they might themselves finally pass, and thus seek to evade responsibility for measures of a purely legislative character;[8] but this influence may be easily exaggerated. The principal reason for the frequent submission of such proposals is that our state constitutions are so detailed in their restrictions upon legislative action that a change in these details is often necessary to adjust governmental powers to new conditions. As Mr. Moffett has said with respect to California, the powers of the regular legislative organs have come to be so bound up by restrictions that the process of amendment is often the only means of enacting much legislation which is desired. "An end that would be reached in another state by an act of the legislature would be attained in California by tinkering the constitution."[9] Once the plan was inau-

[8] Oberholtzer, *Referendum in America*, 158-163.

[9] Samuel E. Moffett in Political Science Quarterly, xiii, 4. The constitutional referendum has come to be a referendum upon measures properly of a legislative character, and to a large extent upon unimportant details of legislation. Many of the laws submitted under the

gurated of proposing amendments frequently, it came to be realized in many states how easily constitutional changes can be made, and the practice has grown more and more common.[10] Amendments are easily proposed in the legislature, and their submission at regular general elections involves little additional expense.

But in the proposal of amendments legislatures do not labor under a heavy burden of responsibility. The questions are left for the people to decide, and legislators do not feel that their influence or standing are involved in the character of measures proposed. Mr. Bryce and others[11] have spoken of the superior character, both in form and substance, of constitutional legislation as compared with ordinary statutes, and there is still some basis for this statement as regards constitutions drafted by conventions; but neither in form nor substance can amendments proposed by legislatures be said to be superior to ordinary statutes. In many cases legislative action upon such proposals seems to be undertaken with less feeling of responsibility than is shown in the enactment of ordinary legislation. This is apt to be the case. In proposing amendments legislatures do not have upon them the responsibility for final action, and if a proposed amendment is adopted and works badly the blame can easily be shifted to the people who approved

referendum in Oregon are more important measures than those submitted as constitutional amendments in other states.

[10] "If the practice of recasting or amending state constitutions were to grow common, one of the advantages of direct legislation by the people would disappear, for the sense of permanence would be gone, and the same mutability which is now possible in ordinary statutes would become possible in the provisions of the fundamental law." Bryce, *American Commonwealth*, 3d ed., i, 473.

[11] *American Commonwealth*, 3d ed., i, 475-76. Oberholtzer, chap. iii. Dealey, *Our State Constitutions*, 9, 13, 14. Godkin, *Unforeseen Tendencies of Democracy*, 141-144.

it by their votes.[12] Then, too, ordinary legislation is subject to the check of executive disapproval, which does not apply to the proposal of amendments.[13]

In many cases, therefore, it may be said that proposals of amendment are made without careful legislative consideration, and relate to matters of comparatively slight importance. These considerations are sufficient to explain the fact that proposed amendments ordinarily attract little public attention. Usually there is almost no newspaper discussion of such proposals. The voter hardly knows that there are amendments to be voted upon until he reaches the polls, and after the election is over the result is hardly of sufficient interest to be reported. These statements do not, of course, hold true with reference to the few important measures which are submitted, but apply to the great bulk of proposed amendments. In some states plans have been devised during the past few years to make voters more familiar with such proposals, by distributing to each voter some time before the election, the text of proposed measures; or the text together with arguments or explanations.[14] In Oregon this plan has, it seems, provoked a much greater public interest, but it must be remembered that many of the measures submitted in this state during recent years were important ones, which would in any case have attracted public attention. The officially prepared arguments distributed in Oklahoma in 1908 were not of much value as

[12] A proposed amendment concerning mortgage taxation was adopted by the people of Missouri in 1900, although it seems not to have been discussed either by the legislature or by the people. In 1902 an amendment was submitted to the people and adopted repealing the amendment of 1900. The amendment of 1900 had, however, already been declared invalid by the court. Russell *v.* Croy, 164 Mo., 69.

[13] As to this matter see statement of Governor Gage, of California. New York State Library Bulletin, *Governors' Messages,* 1903, p. 28.

[14] See pp. 167-176.

a guide to the voters. The plan of placing the text of measures, together with arguments, directly in the hands of each voter may, however, be expected to accomplish something toward arousing greater interest in proposed amendments. But for measures of great importance such methods are not badly needed, and it must be questioned whether any method of informing voters will prove effective with reference to questions which are of too trivial or too local a character to be of any general interest.

Under the conditions just described it is to be expected that the popular vote upon proposed amendments should be small.[15] During the ten-year period from 1899 to 1908 the average vote upon proposed amendments was less than fifty per cent of that upon candidates.[16] Important meas-

[15] For discussions of the popular vote upon proposed amendments see Oberholtzer, 166-169; J. W. Garner in American Political Science Review, i, 242-247, and in Proceedings of the American Political Science Association, 1907, p. 171. The Direct Legislation Record for March, 1897, contains a rather full account of popular votes on proposed amendments in 1896.

[16] The basis of comparison used here is that with the vote for candidates (for state offices where possible) at the same election or at the election immediately preceding the one at which the proposed amendments are submitted. Another comparison which is of some value is that between the total vote on measures and the whole number of qualified voters in the state at the time. In California, for example, the number of persons voting at the election of 1906 was 311,175, while the total number of registered voters was 425,691. In Louisiana in 1902, there were 109,254 registered voters, with but 26,265 votes cast for candidates; in 1904 there were 108,079 registered voters with but 54,222 persons voting; in 1906 there were 107,731 registered voters with but 37,366 persons voting for candidates; and in 1908 there were 154,142 registered voters with 68,932 persons voting for candidates; if fifty per cent of those voting for candidates voted on proposed amendments this would mean that in 1902 less than one-eighth and in 1906 slightly more than one-sixth of the qualified voters voted on proposed amendments, and in 1904 and 1908 about one-fourth of the registered voters expressed themselves upon measures submitted to a

ures usually polled large votes. The new constitutions of Alabama, Oklahoma, and Michigan; the suffrage amendments of North Carolina, Texas, Georgia, and Maryland; the biennial amendment of Iowa; the initiative and referendum amendments of Montana and Oregon, and other questions of similar importance brought out a vote sufficient to show a real popular judgment upon the measures submitted.[17] In some states also large popular votes were polled upon almost all questions submitted during this period.[18] Upon many questions of small importance it is rather remarkable that so many voters should have expressed themselves—in South Carolina, for example, nearly two-thirds of those voting at the election of 1904 expressed

popular vote. In Louisiana, Florida, and Mississippi, and in some of the other southern states the real contest for office is in the democratic primaries, and the vote at general elections is therefore slight. As a rule, in all of the states a larger proportion of the qualified voters vote in presidential election years than at any other time, but this, while affecting the proportion of qualified electors voting upon amendments, does not affect the relation between the number actually voting at the election and the number voting upon measures. Proposals submitted at special elections held for that purpose usually receive a very small vote, as in New Jersey in 1903 and 1909, but a comparatively satisfactory vote was obtained at special elections in New Jersey in 1897 and in Texas in 1907. See Oberholtzer, 165-167.

[17] The proposed constitution of Connecticut was very unsatisfactory and brought out a small vote. The Rhode Island proposed constitution received a rather heavy vote in 1898, but comparatively few electors voted when it was submitted again in 1899. Even on important questions the vote is often small, as on the initiative and referendum amendments in Missouri, Nevada, and Utah.

[18] Alabama, Arkansas, Idaho (1906, 1908), Illinois, Iowa, Kansas, Minnesota, Mississippi, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota. For a partial explanation of the vote in Idaho and South Dakota, see p. 279. The large vote obtained in Nebraska in 1906 and 1908, and in Ohio in 1903 and 1905, were obtained by counting straight party votes for the proposed amendments. See p. 194.

themselves upon the question of exempting the city of Greenville from the municipal debt limit. In a number of other cases more than fifty per cent of those taking part in the election voted upon local or trivial questions in which they could have had no personal interest and upon which they could have had no real opinion of value.[19] Yet in most cases the popular vote was small and upon many measures ridiculously so.

About the same result is shown by the popular votes in Michigan between 1860 and 1908, and in New York between 1846 and 1907. Upon constitutional referenda in Massachusetts between 1780 and 1907 a somewhat better showing is made, but here also many measures received but a small percentage of the vote cast for governor, and two amendments were adopted in 1860 by 3.3 per cent of those voting for governor in the same year.[20] In California between 1884 and 1896 a fairly large popular vote was obtained upon proposals submitted to the people;[21] the popular vote fell in 1898, rose again in 1900, declined much below fifty per cent in 1902, 1904, and 1906, but rose again

[19] It is a noticeable fact that when important and unimportant measures are submitted at the same election, the large vote brought out upon the one will often have an influence in producing a similar vote upon the other, and this may explain, to some extent at least, the fact referred to above.

[20] Reference has already been made to the fact that, where a majority of those voting upon a measure are sufficient to carry it, any measure not strongly opposed will be adopted. Amendments were carried in Colorado and Montana in 1900, in Virginia in 1901, in Washington in 1904, and in Connecticut in 1905, although less than twenty per cent of the voters expressed themselves. Under such conditions the amending process becomes little less than a farce, although the requirement of a larger popular majority to carry measures would make it practically impossible to change many of the detailed provisions in the state constitutions.

[21] Except in 1890 when one amendment was submitted and was practically unopposed.

slightly in 1908. This variation in the popular vote seemingly bore no very close relation to the character of the measures submitted. In Oregon in recent years the proportion of electors expressing themselves upon constitutional questions has been large, and this in spite of the fact that a great number of propositions have been submitted to the people.[22] This is, it would seem, attributable partly to the fact that many of the questions submitted have been ones of great importance, and partly to the novelty of experiments which Oregon has been making with the initiative and referendum and with methods of bringing the merits of proposals to the attention of the voters. Different results may perhaps be expected when the novelty has worn off, and when less important measures are submitted to the judgment of the people.

Popular interest in candidates will, under ordinary circumstances, be greater than that in measures. Except upon questions of very great importance it cannot be expected that a vote will be obtained equal to or greater than that upon candidates at the same election, but if a measure is important enough to be submitted to the people it should be possible to get a vote sufficient to represent a real popular judgment, but this is not obtained upon proposed amendments under present conditions.[23]

Having referred briefly to the proportion of votes upon proposed amendments it may now be worth while to call

[22] For the experience of Oregon see papers by W. S. U'Ren and George A. Thacher in Proceedings of the American Political Science Association, 1907, and by Joseph N. Teal in Proceedings of the National Municipal League, 1909.

[23] It is not necessary that such a popular judgment be represented by a majority of all persons voting at a general election or by a majority of all the electors of a state, but requirements of this character would be much less burdensome if only measures of a fundamental character were submitted to a popular vote.

attention to the character of the popular vote. Perhaps the most striking thing is the mental inertia of the elector who actually casts his vote upon questions with reference to which he has no real opinion. Both the proportion of votes cast and the character of such votes are determined to a large extent by this mental inertia. When proposed amendments are printed upon the official ballot, together with the names of candidates, they are overlooked by many voters, but attract the attention of others who will express themselves upon such measures, even though they may not have known until seeing the ballot that amendments were being submitted and may have formed no judgment either for or against them except the snap judgment formed when marking the ballot. Much voting upon unimportant measures is thus to a large extent planless and unintelligent.

Where a separate ballot is employed for constitutional questions the attention of voters is attracted to a much greater extent. This fact is clearly brought out by the experience of Idaho; in the elections of 1900, 1902, and 1904 proposed amendments were printed at the bottom of the official ballots where they were easily overlooked; in the elections of 1906 and 1908 proposed amendments were printed upon separate ballots, copies of which were handed to each elector; having the ballot in his hand the elector naturally has suggested to him that something should be done with it, and the result is a larger vote; by this mechanical device Idaho almost doubled the proportion of the popular vote upon proposed amendments. South Dakota adopted the separate ballot in 1899, and since that time has been able to obtain upon such measures a much larger proportion of the popular vote.[24] Votes obtained in this

[24] But New York has had the separate ballot upon proposed amendments since 1896, and seemingly this has had no effect upon the popular vote cast on constitutional questions.

way are not entirely unintelligent because the voter, when his attention is attracted, may have a basis for intelligent action. But certainly the voting is more or less mechanical. With the one ballot for both candidates and measures a certain amount of inertia must have been overcome to vote upon the measures; with the separate ballot for amendments, the fact that there is a ballot suggests voting and overcomes the mental inertia simply by a mechanical device, but there is no assurance of intelligent action as a result of the suggestion which has been given. Many of the votes are simply meaningless counters, just as are a number of the votes cast upon amendments under the Nebraska plan of counting straight party votes for or against proposed amendments.

Another indication of popular inertia is the fact that, when several proposals of amendment are submitted to the people at the same time, all of such measures are apt to stand or fall together. An unpopular proposal will frequently carry down to defeat proposals which if submitted alone, might easily have been adopted; and a popular proposal will aid others submitted at the same time. Dr. Oberholtzer, writing in 1900, said upon this subject:

"It is a strange result which has often been remarked upon, not only with us, but in Switzerland also, that when several propositions are voted on at the same time, they will all be treated alike, that is, approved in bulk, or rejected in the same way. The experience in Minnesota in 1898, when four amendments were submitted to the people, is more or less that of the entire country, when it appeared, to quote the rather picturesque language of a Western newspaper, 'that most of the voters either let the whole batch slide, or voted for all four.' We have the case, too, of Texas in August, 1887 . . . when six separate amendments were referred to the people, one among them being

a proposition to prohibit the manufacture, sale or trade in intoxicating liquors. All together were carried down with the prohibitory law, against which there was a very large majority. Perhaps the other five, or four of them at least, would have been quite to the people's mind under other circumstances.[25] In Pennsylvania in 1889, when two amendments were submitted, one to prohibit the liquor traffic and the other to make some harmless and apparently beneficial change in the conditions regulating the exercise of the suffrage, both were voted down by very large majorities. In Louisiana in 1896, when the legislature attempted to amend the constitution of that state, by the method afterward adopted by the convention of 1898, practically disfranchising the negroes, the people rejected not only this one amendment affecting the suffrage, but some twenty others as well, without reason or discrimination, and in Nebraska in 1896, the people disposed of ten amendments in the same thorough fashion. In this case the concrete thing at which they were trying to vent their disgust was a proposition of the legislature, that it should itself fix the rates of salaries of the various executive officers of the state, and otherwise enlarge its own powers. The honorarium of these officials hitherto had been definitely limited by the constitution.[26] In 1898 in California, when seven amendments and a proposition to call a convention were submitted to popular vote, only one amendment and

[25] In several cases during the past ten years proposals submitted at one election and defeated in California and Louisiana have been submitted again and adopted, although apparently there were no reasons for a change in the popular opinion.

[26] Dr. Oberholtzer was mistaken as to the facts concerning the Nebraska election of 1896. Twelve proposals were submitted and all of them received a majority of the popular vote cast upon the question of their adoption or rejection, but were lost because not receiving a majority of all votes cast at the election.

that a very important measure in reference to the executive department, was saved from the general *débâcle*. . . ."

"In some instances this tendency produces quite a contrary result. Thus a measure having popularity with the electors will sometimes exert an influence to help through a proposition to the passage of which the people are indifferent, or perhaps really hostile. In South Dakota in 1896, when a proposal was made to repeal a 'prohibition' clause which had earlier been inserted in the constitution of the state, three other amendments were carried along, which, although of rather a colorless character, might not have fared so well had it been a question of enacting rather than rescinding the prohibitory liquor law. Some such influence would seem to have been at work, too, in Minnesota, in 1896, when it was proposed to tax the property of sleeping, drawing room and parlor car companies, telegraph and telephone companies, express companies, and insurance companies doing business within the state. The people were so much elated with the idea of getting a revenue out of these corporations, which earlier had seemed to be escaping the tax gatherer, that five other propositions were approved at the same election, though by much smaller majorities." [27]

Five amendments submitted to the people of Oregon in 1900 were rejected, among which was a harmless proposal repealing a provision of the constitution which excluded free negroes from the state; this proposal was defeated evidently not on its merits but because of the company in which it was found. Mr. F. N. Judson, speaking of the Missouri mortgage tax amendment of 1900, said: "There was little discussion in the state during the campaign over the merits of the amendment and it seems to have been

[27] Oberholtzer, 169-171.

carried on account of the vigorous campaign for certain other amendments submitted at the same election." [28] Speaking with reference to the Missouri initiative and referendum amendment of 1908, a supporter of that measure said: "The powers that fought us relied on the idiosyncrasies of the voters this time. When they found that our amendment was likely to be submitted by the legislature, they hurriedly passed a very unpopular amendment to increase the salaries of the members of the legislature first, so as to have it at the head of the constitutional amendments and the first one the voter would see. Then they denounced this unmercifully as a salary grab by the legislature, thinking the voters would get started to vote No and would vote No all the way down the line—and I have no doubt that it had a powerful influence in the country in cutting down our majorities." [29]

But although there is a tendency for popular or unpopular proposals to carry other measures with them to success or defeat, too much emphasis should not be laid upon this fact. As Dr. Oberholtzer says: "Nevertheless, it would convey an erroneous impression were we to leave the subject without calling attention to the many cases in which the people can say yes and no at the same breath and really with a knowledge, it would appear, of what those words mean. In November, 1898, three amendments were referred to popular vote in South Dakota, all of first-rate importance, one to introduce into the state's political system the Swiss referendum and initiative (23,816 for, and 16,483 against), another to confer suffrage on women (19,698 for, and 22,983 against), a third to introduce a dispensary system by which the state would take charge of the liquor business

[28] New York State Library *Review of Legislation*, 1901, p. 63.

[29] Equity vol. xi, p. 23 (Jan., 1909).

(22,170 for, and 20,557 against). The returns show therefore that the people accepted two of the amendments, but rejected that one in reference to woman suffrage. Although only about one-half of the persons voting for candidates at this election chose to vote upon the amendments, of those so doing there is a fair presumption that they recorded their wishes with respect to the different subjects submitted to them. The people of California in 1894 voted on ten different amendments, approving of seven and disapproving of three, among the latter being a foolish proposition to move the capital of the state, and a proposition to increase the salaries of the members of the legislature, a project, as I have already noted, for which the people rarely evince any enthusiasm. In a word, not a little evidence is at hand to show that there is method often in what at first sight the casual onlooker might be tempted to call pure madness." [30]

Although it would be impossible to say that the people always show wisdom in the proposals which they adopt or reject, still we must admit that they frequently show discrimination even upon relatively unimportant measures. It is the rule, rather than the exception, that when several proposals are submitted some are adopted and some rejected. In the Missouri election of 1908, for example, the initiative and referendum amendment was adopted by a majority of about forty thousand, and the proposed amendment increasing the compensation of members of the legislature was rejected by a similar majority; of the eight proposals submitted at this election two were adopted and six rejected. Similar cases occur at most of the elections at which several proposals are submitted.

The people of the states have come to distrust their legis-

[30] Oberholtzer, 171-172.

latures, and any proposals to increase the compensation of members of these bodies are usually voted down; such proposals are frequently submitted. The same attitude is ordinarily taken toward the increase of salaries of state officers. In California amendments increasing the salaries of legislators and of state officers were adopted after several proposals of a similar character had been rejected, and in Louisiana the salaries of several state officers were increased between 1899 and 1908. But the voters of Florida in 1906 rejected an amendment increasing the salaries of supreme and circuit judges, although such an increase seemed necessary in order to induce able lawyers to accept these positions. In 1897 the voters of Michigan declined to increase the salary of the attorney-general of that state although the compensation of eight hundred dollars fixed by the constitution was notoriously inadequate; and the voters of South Dakota in 1904 and 1908 declined to increase the annual salary of their attorney-general beyond one thousand dollars. Proposed amendments increasing the salaries of the governor and lieutenant-governor were rejected by the voters of Texas in 1908. It is a well-known fact that large salaries are opposed by voters when they have an opportunity to express themselves, and the judgment of a rural voter as to what is a large salary for executive or other governmental work is frequently not in agreement with that of persons better informed as to such matters. It is true, of course, that the efforts of legislators to increase their salaries have not in many cases been efforts which should succeed, and they were perhaps wisely checked by the electors. But the popular control over the salaries of state officers has often been exercised in a short-sighted manner, by refusing compensation sufficient to obtain efficient men for the service of the state.

In summing up our experience with the constitutional

referendum, what shall be said of its effectiveness as an instrument of government? Dr. Edward M. Hartwell, after a careful study of constitutional referenda in Massachusetts has said recently: "I must confess that the evidence that the voters of Massachusetts have shown wisdom, intelligence and discrimination in their votes on referenda is much more ample and convincing than I anticipated when I began this study. To my mind the conclusion of the whole matter is: that the referendum has proved to be a reasonably effective instrument for determining the mind and will of the voters of Massachusetts upon constitutional questions." [31] Mr. Samuel E. Moffett, after discussing the constitutional referendum in California from 1884 to 1896, is much more enthusiastic in his conclusions: He says: "The suspicious vigilance of the people never tolerates anything that appears to cover a 'job.' Repeated efforts have been made to increase the pay and privileges of members of the legislature and other public servants, but always without success. The Southern Pacific Company, which always controls the legislature when it seems to be worth while, undertook in 1885 to secure a change in the methods of taxation, by which it would be taxed on its income instead of on its property. There was no trouble in getting a two-thirds vote of each house of the legislature in favor of the necessary amendment; but when the measure came before the people, only 9992 citizens, or just about the number of the employees of the corporation, voted in its favor, while 123,173 voted against it. . . Impatient reformers become disheartened because everything is not accomplished at once, but no general election passes, without the correction of some abuse in government or the achievement of some posi-

[31] *Referenda in Massachusetts*, 1776-1907, National Municipal League Proceedings, 1909, pp. 352-353. See Political Science Quarterly, xx. 449.

tive advance. When the harness chafes long enough at any particular point to make the annoyance seriously felt, the people alter it until it is comfortable; and as no good piece of work of this sort is ever undone, the ultimate achievement of a perfect fit is only a question of time." [32]

But the perfect fit has not yet been achieved, and the constitutional referendum in California has not worked as well since 1896 as Mr. Moffett found it to have worked before that date. Perhaps all that can be said with reference to its use in the several states, is that the constitutional referendum has in most cases proven a fairly effective instrument for the expression of popular judgment upon important questions, and that the people have often, if not usually, defeated measures, even though relatively unimportant, which should have been defeated. It would be impossible to say that they have always acted wisely or even intelligently in adopting or rejecting measures submitted to them. And under present conditions the amending process is to a large extent ineffective because of the trivial character of many proposals submitted to the people.

Governor Hughes in his annual message to the legislature of New York on January 5, 1910, said: "Our experience at the last election with regard to the constitutional amendments submitted for adoption shows a lamentable lack of sense of responsibility on the part of our citizens with respect to changes in the fundamental law." A somewhat similar statement was made by Governor Gage of California in his message to the legislature of that state in 1903: "Constitutional amendments are easily passed at each session of the legislature, for, unlike laws, the governor has neither the power of approval or of disapproval. When

[32] *The Constitutional Referendum in California*, Political Science Quarterly, xiii, 17, 18.

passed by resolution of the senate and assembly and submitted to the people, comparatively few voters really understand the character and purpose of these amendments, when appearing by title and number on the ballot; hence, as a rule, the electors vote on them in a very perfunctory manner." [33] The supreme court of Colorado in People *v.* Sours [34] said: "It is hard to account for the apparent indifference of the people on the occasion of submission to them of changes in their organic law. The indifference which prevails in Colorado prevails in other states, and it rarely occurs that a proposed amendment to the constitution receives the attention of more than one-half of those who vote for candidates for office." Similar statements may be made with reference to almost all of the states in which frequent use is made of the amending procedure.

The fact has come to be pretty clearly recognized that the constitutional referendum is working badly under present conditions, and methods of improving it are being suggested and tried. Oregon and several other states have undertaken to inform the voters more fully regarding measures upon which they should vote, and this plan promises well, because the methods of informing voters are now extremely defective. Nebraska, who must get a majority of all persons voting at a general election in order to carry any amendment, has adopted the plan of party endorsement, which is merely a mechanical devise for counting the votes of those who really do not care to express themselves upon proposed measures. Idaho and some other states have adopted the separate ballot for constitutional proposals, and thus bring out a larger vote.

[33] New York State Library, *Digest of Governors Messages*, 1903, p. 28.

[34] 31 Colo., 388.

Of these methods, the plan of informing voters more thoroughly strikes somewhere near the root of the matter, and may accomplish something. But the difficulty lies still deeper. Any system is wrong which expects to obtain a popular judgment upon questions which are too trivial or too local for the voters to have any real opinion upon the matters submitted to them. The amending procedure in its operation has in many cases become a mere farce because of the triviality and multiplicity of questions submitted. Upon unimportant matters a popular verdict is obtained which is worth little or nothing, and the amending procedure is so cumbered with unimportant questions that matters of importance—matters upon which the people may have a real judgment — are obscured. The present system is defective. It cannot be expected that even important measures, when submitted in such a manner as to be understood by the people, should as a rule receive a vote equal to that of candidates in a hotly-contested election, because the personal interests of voters cannot be aroused to such an extent upon proposed measures. All that can be hoped for is that the people be not overburdened, that the purpose of measures be well understood, and that the result of the popular voting be fairly representative of a real public opinion. These results are not obtained through the present operation of the amending procedure.

What should be done to better the present situation? Speaking of the Alabama constitution of 1901, Dr. Robert H. Whitten said several years ago: "In a constitution so detailed in many parts there will be frequent need for amendments. In most of these the voters will have no interest and cannot be expected to vote on them intelligently, yet each amendment will have to receive a three-fifths vote of the Legislature, and a majority vote of all electors voting at the election. This will cumber the election machinery

with votes on questions that might better be left to the legislature and will often prevent much needed changes. If it seems desirable to include matters of detail in the constitution, special provision should be made for their amendment by a two-thirds vote of the legislature or of two succeeding legislatures without submission to the people." [35] It has not been unusual for constitutions to contain provisions which were specifically made subject to alteration by state legislatures, at certain times or under certain conditions,[36] and what Dr. Whitten proposes is an extension of this practice.

But if a provision is considered of sufficient importance to be inserted into the constitution, it may be thought undesirable to have such a provision alterable merely at the discretion of the legislature, even though that body be acting by an increased majority. Some popular control should be maintained even over unimportant changes in the constitution. What may well be done, however, is to provide that unimportant constitutional changes may be made by a two-thirds vote of the legislature, but to permit a popular referendum upon such legislative action if a petition is presented signed by a sufficient number of voters. A popular check upon legislative action would thus be retained, but the alteration of constitutional details would be made simpler and easier; the electorate would be freed from the burden of passing upon such changes, except in cases where there was assurance of rather wide popular interest in the matter.[37]

[35] New York State Library, *Review of Legislation*, 1901, p. 29.

[36] As, for example, the Virginia constitution of 1902, secs. 155, 156*l*; the Oklahoma constitution of 1907, Art. ix, sec. 35, Art. xii, sec. 3, Art. xx, sec. 2; Maryland constitution of 1867, Art. xi.

[37] If this were done there would be introduced a class of legislation somewhat intermediate between the constitution and ordinary statutes,

Putting in concrete form the suggestions for obtaining more effective popular action through the amending process, we may say:

(1) Measures of fundamental importance—measures of a real constitutional character—should, as at present, in every case be subject to a popular vote. Upon such measures the people should pass, and upon them they may be presumed to have a real opinion. The compulsory referendum should be retained for all such constitutional proposals.

(2) Upon matters of detail the legislature should be permitted to act by an increased majority, subject however to a popular vote should a sufficient number of the electors petition for such action.[38] Upon matters of small importance the optional referendum is a sufficient check on legislative action, and the less frequent votes upon trivial matters will enable the electors to express a more intelligent judgment upon measures of real importance. Matters of purely local importance, which bear little or no relation to the policy of the state as a whole, should, of course, not be decided either by the legislature or by a state referendum. A number of questions submitted to the people of California, Louisiana, Missouri, and South Carolina during the past ten years might much better have been left to the particular cities or local districts directly concerned.

and an interesting question would be raised as to the attitude of the courts toward such legislation, but as has already been suggested, the courts have already largely broken down the distinction between state constitutions and state statutes.

[38] The distinction between important and relatively unimportant constitutional questions could in most cases be made without great difficulty. The compulsory popular vote might well be made the usual method of altering constitutions, and there could then be an enumeration of specific constitutional provisions which might be changed without a popular vote unless such vote was petitioned for.

(3) Popular control over the proposal of amendments should be extended. Legislatures are not always responsive to the desires of the people in this respect, and it should be possible to initiate proposed amendments by popular petition. The popular initiative has already been introduced in several states, and its extension with respect to constitutional questions is desirable. The popular initiative is open to many objections, both theoretical and practical, but the people should have power independently of the legislature, to force changes in their constitutions when such changes are desired. Perhaps the greatest value which the initiative will have is not in the direct results which may come from its use, but in its influence in causing legislatures to act upon matters upon which action is desired by the people.

(4) The plan of distributing the text of measures to each voter should be employed in preference to that of publication in newspapers. The separate ballot for constitutional questions also has advantages in that it separates the voting upon measures rather distinctly from that upon candidates. These things however are but machinery, and are of little value unless the questions submitted to the people are of sufficient importance to attract the attention of the voters.

The suggestions made above do not involve a decrease in popular influence upon constitutional changes. They do involve an attempt to concentrate attention upon fewer and more important measures, so that the popular vote may represent a real judgment and not merely an unintelligent and haphazard action.

APPENDIX

POPULAR VOTES UPON CONSTITUTIONAL QUESTIONS, 1899–1908

The votes upon amendments given in the following list have been obtained by correspondence with state officials or taken from official state publications. The list of amendments proposed has been checked with the annual lists given in the bulletins of the New York State Library, and with the statutes of the several states, and is probably complete for the period covered. Acknowledgment is made to the secretaries of state who have been kind enough to send information. Of the four hundred and seventy-two questions listed below, the popular vote has been obtained upon all but twenty-two. It has been impossible to obtain the popular votes upon three amendments submitted in Colorado in 1904 and 1906, and upon two proposals voted on in Kentucky in 1905 and 1907. The secretary of state of Georgia declined to furnish information regarding ten amendments submitted in that state, and the votes are not available in print; in Tennessee only the affirmative vote is returned, as no proposal is adopted unless the affirmative vote is more than one-half of the whole vote cast, so that upon the seven Tennessee proposals complete information is not available.

The total state vote used for comparison with the vote upon amendments is, where possible, the vote cast for the highest state officer chosen at the election when the proposed amendment is submitted; where no state officer is chosen at such an election the vote for President of the United States or for members of the national house of representatives is sometimes used; where the amendments were submitted at special elections the vote used for comparison has been that at the nearest general election (in most cases that at the nearest preced-

ing election). With the varying vote at different elections this necessary shifting of the basis of comparison vitiates the results to a certain extent, but mainly on the side of enlarging rather than diminishing the proportion of votes on constitutional questions; it was first planned to indicate for each item in this table the precise total vote (whether for governor, president, etc.) used as a basis for comparison, but this was found not to be feasible. The total votes used have been taken from official reports where possible, but in some cases from the World Almanac, although votes taken from unofficial sources have been examined in the effort to assure accuracy. The term "not adopted" is used in the table below with reference to proposals which received a majority of the votes cast upon their adoption or rejection, but which were not carried because of constitutional requirements of a larger vote. See pp. 185–188.

ALABAMA

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
April 23, 1901. Vote on question of holding constitutional convention	Adopted	70,305	45,505	115,810	162,550	.712
November 11, 1901. Vote on new constitution.	Adopted	108,613	81,734	190,347	162,550	1.171
November 3, 1908. Good roads amendment...	Not adopted [1]	45,794	25,806	71,600	103,399	.692
November 3, 1908. Biennial legislative sessions.	Rejected	27,915	37,351	65,266	"	.631
November 3, 1908. New counties	Rejected	40,379	45,281	85,660	"	.828

ARKANSAS

September 3, 1900, Official bonds by bonding companies	Adopted	65,825	23,032	88,857	132,979	.668
September 1, 1902. Pay and mileage of members of general assembly	Not adopted [1]	45,598	43,982	89,580	119,741	.748
September 5, 1904. Judicial reorganization. Supreme court to consist of two divisions	Rejected	43,850	44,987	88,837	149,780	.593
September 5, 1904. Loan of credit by city, county or state forbidden—issuance of local bonds	Not adopted [1]	45,198	44,378	89,576	149,780	.598
September 3, 1906. School tax—poll tax for school purposes	Adopted	92,969	47,368	140,337	151,848	.924
September 14, 1908. Residence and payment of poll tax as qualifications for voting	Adopted	88,386	46,835	135,221	163,674	.826
September 14, 1908. Loan of credit by city, county or state	Rejected	39,368	95,304	134,672	"	.822

[1] Did not receive constitutional majority, although majority of votes cast on question.

CALIFORNIA

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 6, 1900. Exempting church property from taxation	Adopted	115,851	102,564	218,415	302,941	.720
November 6, 1900. Leland Stanford University —exemption from taxation, etc	Adopted	137,607	67,737	205,344	"	.677
November 6, 1900. Exempting from taxation property of California School of Mechanical Arts	Adopted	111,892	70,264	182,156	"	.601
November 6, 1900. Exempting state, county and municipal bonds from taxation	Rejected	75,280	92,923	168,203	"	.555
November 6, 1900. Authorizing legislature to enact a primary election law	Adopted	106,733	51,519	158,252	"	.522
November 6, 1900. Compensation of judges—method of payment—court stenographers	Rejected	60,754	85,472	146,226	"	.482
November 6, 1900. Permitting certain cities to make provision for the payment of their debts.	Adopted	85,461	62,993	148,454	"	.490
November 6, 1900. Creating district courts of appeal—reorganization of judicial system	Rejected	69,997	79,354	149,351	"	.493
November 4, 1902. Authorizing further taxation for school purposes	Adopted	89,947	60,861	150,808	304,473	.495
November 4, 1902. Dividing state into fish and game districts—fish and game protection	Adopted	88,622	54,930	143,552	"	.471
November 4, 1902. Exempting state, county and municipal bonds from taxation	Adopted	74,526	66,132	140,658	"	.461

CALIFORNIA—*Continued*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 4, 1902. Popular initiative for the amendment of municipal charters	Adopted	70,748	53,182	123,930	304,473	.407
November 4, 1902. Labor on public works limited to eight hours a day	Adopted	114,972	33,752	148,724	"	.488
November 4, 1902. Permitting the use of voting machines	Adopted	83,966	43,127	127,093	"	.417
November 4, 1902. Establishing system of state highways, and permitting state aid to county highways	Adopted	78,479	59,632	138,111	"	.453
November 4, 1902. Creation of a state commission to regulate rates of public service corporations	Rejected	31,474	118,791	150,265	"	.493
November 4, 1902. Use of grand jury made unnecessary	Rejected	56,222	72,153	128,375	"	.421
November 8, 1904. Judicial department—establishing court of appeals	Adopted	93,306	36,277	129,583	331,768	.390
November 8, 1904. Tax exemption of California Academy of Sciences	Adopted	73,207	62,275	135,482	"	.408
November 8, 1904. Exempting shipping from taxation	Rejected	48,983	81,857	130,840	"	.394
November 8, 1904. Legislative session—compensation of members—introduction of bills, etc.	Rejected	62,792	63,983	126,775	"	.382
November 8, 1904. Exempting from taxation $100 personal property of every householder	Adopted	74,437	45,221	119,658	"	.360

CALIFORNIA—*Continued*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 8, 1904. Permitting revision of codes by single acts	Rejected	59,050	59,933	118,983	331,768	.358
November 6, 1906. Tax exemption of Cogswell Polytechnical College	Adopted	65,250	43,327	108,577	311,175	.348
November 6, 1906. Salaries of judges—increase, etc.	Adopted	50,957	49,905	100,862	"	.324
November 6, 1906. Increasing compensation of state officers	Rejected	31,063	71,435	102,498	"	.329
November 6, 1906. Public bonds may be made payable at any place in the United States	Adopted	69,305	32,384	101,689	"	.326
November 6, 1906. Cities under home rule charters may adopt new charters	Adopted	49,327	48,391	97,718	"	.314
November 6, 1906. Terms of officers whose terms not otherwise provided for by constitution or laws (Recall)	Adopted	53,307	43,200	96,507	"	.310
November 6, 1906. Increase of salary and duties of lieutenant-governor	Rejected	31,556	64,944	96,500	"	.310
November 6, 1906. Permitting fifty-year extension of corporation's existence by action of stockholders	Rejected	37,098	65,982	103,080	"	.331
November 6, 1906. Permitting state, county and municipal funds to be deposited in state and national banks	Adopted	62,767	35,213	97,980	"	.314

CALIFORNIA—*Continued*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 6, 1906. Increased compensation to members of legislature—introduction of bills, etc.	Rejected	37,360	57,785	95,145	311,175	.305
November 6, 1906. Acquisition of streets, parks, etc., by San Francisco	Rejected	35,649	58,042	93,691	"	.301
November 6, 1906. Permitting San Francisco and San Jose to amend their charters without submitting them to legislature	Rejected	31,867	58,254	90,121	"	.288
November 6, 1906. Repealing provision that debtor may not contract to pay tax on mortgages, etc	Adopted	54,894	39,876	94,770	"	.304
November 6, 1906. Sinking fund for debts contracted by San Francisco, San Jose, and Santa Clara	Adopted	48,221	43,629	91,850	"	.295
November 3, 1908. Governor may sign bills within thirty days after legislative adjournment.	Adopted	122,362	50,979	173,341	386,597	.448
November 3, 1908. Repealing provision regarding mortgage tax	Rejected	90,061	90,896	180,957	"	.468
November 3, 1908. Reorganization of state board of education	Rejected	67,497	107,613	175,110	"	.452
November 3, 1908. Increased compensation for state officers	Adopted	92,558	92,556	185,114	"	.478
November 3, 1908. Permitting extension to corporate charters	Adopted	115,412	81,849	197,261	"	.510

CALIFORNIA—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 3, 1908. Compensation of grand and trial jurors	Adopted	107,244	69,479	176,723	386,597	.457
November 3, 1908. Increasing compensation of members of legislature—introduction of bills, etc.	Adopted	116,600	68,902	185,502	"	.479
November 3, 1908. Expense for legislative employees limited to $500 a day for regular sessions—$200 for special sessions	Adopted	135,113	48,144	183,257	"	.474
November 3, 1908. Lotteries forbidden—contracts relating to stock speculation void	Adopted	96,235	84,778	181,013	"	.468
November 3, 1908. Legislature required to enact direct primary law, which may be made mandatory	Adopted	152,853	46,772	199,625	"	.516
November 3, 1908. Relating to public school system—includes night schools in system	Adopted	97,763	87,584	175,347	"	.453
November 3, 1908. Loans made by state to be repaid within 75 years—formerly 20 years	Adopted	97,237	63,465	160,702	"	.415
November 3, 1908. Double liability of corporate stockholders not applicable to international exposition companies	Adopted	103,025	70,575	173,600	"	.449
November 3, 1908. Separation of state and local taxation—corporate taxation	Rejected	87,977	114,104	202,081	"	.522

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November, 1900. Permitting amendment to six articles of constitution to be proposed at one time	Adopted	31,471	11,568	43,039	218,634	.196
November, 1902. Eight-hour day in mines, smelters, etc	Adopted	72,980	26,266	99,246	186,820	.531
November, 1902. Election and term of district attorneys	Adopted	45,191	25,243	70,434	"	.377
November, 1902. Election and term of county judges	Adopted	44,856	25,326	70,182	"	.375
November, 1902. Qualification of voters—United States citizenship required	Adopted	44,769	27,077	71,846	"	.384
November, 1902. Permitting counties to exempt personal property and improvements on land from taxation	Rejected	32,710	72,370	105,080	"	.562
November, 1902. State taxes—complementary to amendment above	Rejected	31,527	69,741	101,268	"	.542
November, 1902. Term and organization of county commissioners	Adopted	49,646	26,559	76,205	"	.407
November, 1902. Term, salary, etc., of county officers	Adopted	48,944	26,140	75,084	"	.401
November, 1902. Justices of the peace and constables—term, etc	Adopted	48,682	26,082	74,764	"	.400
November, 1902. Home rule for cities—city and county of Denver	Adopted	59,750	25,767	85,517	"	.457

COLORADO—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November, 1904. Supreme court—reorganization of judicial system	Adopted	....	....	....	244,030	....
November, 1904. Uniform taxation—exemption of $200 of personal property—taxation of irrigation ditches and canals	Adopted	....	....	....	"	....
November, 1906. Permitting use of voting machines	Adopted	....	....	....	184,096	....
November, 1908. Increasing salaries of governor and judges	Rejected	16,088	37,753	53,841	247,730	.217
November, 1908. Permitting state to borrow money in order to fund debt	Rejected	26,254	27,352	53,606	"	.216
November, 1908. Extending legislative power over fixing of salaries and fees—local salaries not required to be paid from fees	Rejected	18,558	29,022	47,580	"	.192

CONNECTICUT

October, 1901. Vote on question of holding convention	Adopted	47,317	26,745	74,062	180,744	.409
October, 1901. State officers to be elected by plurality rather than by majority vote	Adopted	49,887	14,196	64,083	180,744	.354

CONNECTICUT—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
October, 1901. Senatorial reapportionment, and increase in number of senators	Adopted	42,804	17,811	60,615	180,744	.335
June, 1902. Proposed constitution	Rejected	10,320	21,291	31,611	159,913	.197
October, 1905. Election of town officers may be either annual or biennial	Adopted	21,832	13,299	35,131	190,831	.184
October, 1905. Permits use of voting machines at elections	Adopted	22,518	13,280	35,798	190,831	.187
October, 1907. Amendment in form of revised constitution	Rejected	15,597	20,054	35,651	161,193	.221

FLORIDA

November, 1900. Senatorial districts—temporary increase in house of representatives when new county created	Adopted	5,947	4,184	10,131	36,120	.280
November, 1900. General laws required for chartering of private corporations	Adopted	5,650	4,118	9,768	"	.270
November, 1900. County commissioners to be elected by people, not appointed by governor	Adopted	8,243	3,408	11,651	"	.322
November, 1900. State seal—state flag adopted.	Adopted	5,088	3,819	8,907	"	.246
November, 1902. Increase of members of supreme court—may sit in two divisions	Adopted	5,515	3,147	8,662	16,428	.527

FLORIDA—*Continued*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November, 1902. Increasing number of circuit judges	Adopted	5,170	3,053	8,223	16,428	.500
November, 1904. Extending terms of certain county officers to four years	Rejected	4,983	5,791	10,774	36,598	.294
November, 1904. County school tax of 3 to 7 mills—formerly 5 mills	Adopted	5,933	5,346	11,279	"	.308
November, 1904. County judge to be an attorney at law	Rejected	3,750	6,023	9,773	"	.267
November, 1904. Municipal authorities may exempt manufacturing enterprises from taxation for fifteen years	Rejected	3,140	6,050	9,190	"	.251
November, 1904. Decisions of supreme court not to take effect until opinions filed with clerk.	Rejected	3,840	4,685	8,525	"	.232
November, 1904. Courts—county court of record to replace existing county and criminal courts	Rejected	2,534	5,897	8,431	"	.230
November, 1904. Restricting legislature's power of special legislation respecting cities and counties	Rejected	3,438	4,758	8,196	"	.223
November, 1906. Drainage—drainage board and drainage districts—taxation	Rejected	8,787	14,771	23,558	22,954	1.026
November, 1906. Increasing salaries of supreme and circuit judges	Rejected	6,752	10,830	17,582	"	.765
November, 1906. Judges of criminal courts to be paid salaries graded with reference to population of counties	Rejected	6,265	9,729	15,994	"	.696

FLORIDA—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November, 1906. Establishing court of record in Escambia county	Rejected	5,577	8,806	14,383	22,954	.626
November, 1906. Constitutional amendments to be published one month instead of three before election—amendment effective when adopted	Rejected	5,322	9,436	14,758	"	.642
November, 1908. Giving legislature power to fix salaries of supreme, circuit and criminal judges	Rejected	6,835	7,469	14,304	41,917	.341
November, 1908. Establishing state tax for certain institutions of learning	Rejected	6,961	7,477	14,438	"	.344
November, 1908. Authorizing legislature to establish new judicial circuits	Rejected	6,150	6,850	13,000	"	.310
GEORGIA						
October, 1900. Confederate pensions—widows pensionable	Adopted	....	....	....	113,680	....
October, 1904. Permitting legislature to levy annual ad valorem tax of five mills on dollar	Adopted	....	....	....	67,523	....
October, 1904. Counties, school districts, etc., may maintain public schools by local taxation, after popular vote	Adopted	....	....	....	"	....

GEORGIA—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
October, 1904. Permitting creation of additional counties	Adopted	....	....	....	67,523	....
October, 1904. Permits increase of 8 in membership of house of representatives	Adopted	....	....	....	"	....
October, 1906. Court of appeals established—jurisdiction of supreme court altered, etc.	Adopted	....	....	....	94,321	....
October, 1906. Creating new county	Adopted	....	....	....	"	....
October, 1906. Legislature may increase or reduce number of judges of superior courts	Adopted	....	....	....	"	....
October, 1908. Suffrage restrictions	Adopted	79,968	40,260	120,228	125,967	.954
October, 1908. Increasing number of house of representatives by one member	Adopted	96,677	6,900	103,577	"	.822
October, 1908. Authorizing tax for pensions for confederate veterans and widows	Adopted	....	....	....	"	....
October, 1908. Authorizing counties to levy tax for police and sanitation	Adopted	....	....	....	"	....

IDAHO

November, 1900. Permitting loan of state school funds under certain conditions	Adopted	8,535	3,576	12,111	56,373	.214
November, 1902. Eight-hour day on state and municipal work—labor in factories, mines, etc.	Adopted	20,096	835	20,931	59,823	.349

IDAHO—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November, 1904. Extending term of county commissioners from 2 to 4 years.	Rejected	7,486	9,284	16,770	71,238	.235
November, 1906. State tax rate limited to 1 per cent of assessed value of property, unless popular vote	Adopted	20,441	20,284	40,725	73,519	.553
November, 1906. County commissioners to be elected for four years	Rejected	17,324	24,628	41,952	"	.570
November, 1906. Empowering legislature by general laws to provide for county, township and precinct officers.	Rejected	17,328	20,859	38,187	"	.519
November, 1906. Railways hereafter constructed may be exempted from taxation for ten years	Rejected	10,674	29,554	40,228	"	.547
November, 1906. Permitting local divisions of state to vote bonds in aid of railroads, etc.	Rejected	14,634	22,840	37,474	"	.509
November, 1906. Local divisions of state may incur indebtedness after popular vote	Rejected	17,212	23,129	40,341	"	.548
November, 1908. Regulation of local offices by uniform laws—deputies, etc	Adopted	33,443	26,837	60,280	95,029	.634
November, 1908. Abolishing probate court—extending jurisdiction of district court, etc.	Adopted	28,051	25,508	53,559	"	.563

ILLINOIS

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 8, 1904. Permitting special legislation for Chicago, subject to local vote	Adopted	678,393	94,038	772,431	1,089,458	.709
November 3, 1908. Authorizing $20,000,000 bond issue for deep waterway	Adopted	692,522	195,177	887,699	1,169,330	.759

INDIANA

November 6, 1900. Authorizing legislature to prescribe qualifications for admission to the bar [1]	Not adopted	240,031	144,072	384,103	655,965	.585
November 6, 1900. Permitting increase in number of supreme court judges [1]	Not adopted	314,710	178,960	493,670	"	.752
November, 1906. Authorizing legislature to prescribe qualifications for admission to the bar [2]	Not adopted	39,061	12,128	51,189	589,044	.086

[1] See In re Denny, 156 Ind. 104. [2] To be submitted again in 1910.

IOWA

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November, 1900. Sessions of legislature to be biennial	Adopted [1]	186,105	155,506	341,611	528,200	.646
November, 1900. Vote on question of holding convention.	Rejected	176,337	176,892	353,229	"	.668
November 8, 1904. Resubmission of 1900 amendment	Adopted	198,974	176,251	375,225	485,703	.772
November 8, 1904. Reapportionment of representation in legislature, etc.	Adopted	171,382	165,076	336,458	"	.692
November 3, 1908. Providing for organization of drainage districts, etc	Adopted	194,261	105,720	299,981	499,298	.600

KANSAS

November 6, 1900. Increasing number of justices of supreme court	Adopted	123,721	35,474	159,195	348,159	.457
November 4, 1902. Increasing compensation of members of legislature.	Rejected	92,090	140,768	232,858	287,16S	.810
November 4, 1902. Biennial township elections, etc	Adopted	144,776	78,190	222,966	"	.776

[1] Declared invalid in State vs. Brookhart, 113 Iowa, 250.

KANSAS—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 8, 1904. Popular election of state printer	Adopted[1]	162,057	60,148	222,205	322,408	.689
November 8, 1904. Governor may veto items of appropriation bills	Adopted[1]	169,620	52,363	221,983	"	.688
November, 1906. Abolishing double liability of corporation stockholders	Adopted[1]	110,266	67,409	177,675	315,379	.563
November, 1906. Court given authority to determine when legislature violates restrictions upon special legislation	Adopted[1]	107,974	70,730	178,704	"	.566
November, 1906. Permitting legislature to provide for judge pro tem. in absence of probate judge	Adopted[1]	110,021	63,485	173,506	"	.549
November, 1908. Increasing compensation of members of legislature	Rejected[1]	104,554	150,576	255,130	374,706	.680
November, 1908. Abolishing limitation upon amount of judicial salaries—ineligibility of judges to other offices	Rejected[1]	102,156	135,745	237,901	"	.634

[1] In secretary of state's reports these votes are so stated that it is not certain as to which votes in 1904, 1906 and 1908 apply to the respective amendments voted on in each of these years. Votes proportionately similar, so that this does not alter results.

KENTUCKY

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November, 1903. Permitting general assembly to enact legislation for local taxation of personal property otherwise than by valuation	Adopted	60,019	41,282	101,301	439,267	.230
November, 1905. Substituting *viva voce* voting for secret ballot	Rejected	....	....	....	435,765	....
November, 1907. Requiring payment of all taxes due in order to vote, etc.	Rejected	....	....	....	410,909	....

LOUISIANA

November 6, 1900. New Orleans public improvements tax	Adopted	32,137	1,434	33,571	76,870	.436
November 6, 1900. Pensions for Confederate soldiers	Adopted	31,320	1,440	32,760	"	.426
November 4, 1902. Ratifying contracts made by New Orleans for public improvements	Adopted	7,906	4,646	12,552	26,265	.477
November 4, 1902. Judicial amendment—enlarging jurisdiction of lower courts	Rejected	3,886	9,239	13,125	"	.499
November 4, 1902. Judicial expense fund of New Orleans	Adopted	6,221	5,502	11,723	"	.446
November 4, 1902. Repealing requirement that person to vote shall have paid poll tax 2 preceding years	Rejected	5,811	10,052	15,863	"	.603

LOUISIANA—*Continued*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 4, 1902. Organization of state board of appraisers	Adopted	5,929	5,784	11,713	26,265	.445
November 4, 1902. Exempting parsonages from taxation	Adopted	7,884	5,290	13,174	"	.501
November 8, 1904. One million dollar bond issue in aid of state school system	Rejected	13,110	20,929	34,039	54,222	.627
November 8, 1904. Reorganizing courts of appeal—limitation of salaries removed	Rejected	10,594	12,800	23,394	"	.431
November 8, 1904. Exemption from taxation for 10 years of railroads constructed after 1905	Adopted	14,141	12,336	26,477	"	.488
November 8, 1904. Increasing salary of attorney-general	Rejected	9,481	12,230	21,711	"	.400
November 8, 1904. Increasing salary of superintendent of public education	Rejected	8,937	13,073	22,010	"	.405
November 8, 1904. District courts—additional judge, etc	Rejected	9,821	10,599	20,420	"	.376
November 8, 1904. Pensions for confederate soldiers—increasing limit upon annual appropriation	Adopted	24,755	4,823	29,578	"	.545
November 8, 1904. Removing limitation upon annual appropriation to state university	Adopted	11,961	10,420	22,381	"	.412
November 8, 1904. Removing limitation upon appropriation to Louisiana Industrial Institute	Rejected	10,308	10,989	21,297	"	.392

LOUISIANA—*Continued*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 8, 1904. Judges of supreme court to be elected rather than appointed	Adopted	15,102	8,538	23,640	54,222	.435
November 8, 1904. Vacancies in office of sheriff to be filled by special election rather than by appointment	Adopted	19,179	5,252	24,431	"	.450
November 8, 1904. Same as to district judges	Adopted	18,951	5,195	24,146	"	.445
November 8, 1904. Same as to district attorneys.	Adopted	18,460	5,292	23,752	"	.438
November 8, 1904. Election to fill vacancies in office of clerk of district courts	Adopted	18,391	5,200	23,591	"	.435
November 8, 1904. Creation of municipal sewerage districts	Adopted	11,589	7,763	19,352	"	.356
November 6, 1906. Authorizing New Orleans to issue $8,000,000 of bonds for public improvements	Adopted	21,513	3,046	24,559	37,366	.657
November 6, 1906. Authorizing New Orleans to issue $200,000 school teachers' salary bonds	Adopted	21,237	3,308	24,545	"	.656
November 6, 1906. Increasing salary of attorney-general to $5000	Adopted	18,998	4,693	23,691	"	.634
November 6, 1906. Tax assessors and collectors for New Orleans made elective	Adopted	21,066	2,894	23,960	"	.641
November 6, 1906. New Orleans criminal court —jurisdiction, etc	Adopted	19,728	3,111	22,839	"	.611

LOUISIANA—*Continued*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 6, 1906. School, sewerage, etc., districts authorized to issue bonds for public improvements	Adopted	19,999	3,116	23,115	37,366	.618
November 6, 1906. District courts—additional judge—election to fill vacancies	Adopted	21,233	3,511	24,744	"	.662
November 6, 1906. Creating courts of appeal, etc	Adopted	20,027	4,363	24,390	"	.652
November 6, 1906. Making salaries uniform for judges of district courts	Adopted	19,195	4,690	23,885	"	.639
November 6, 1906. Exempting mortgages from taxation and withdrawing exemption of parsonages	Rejected	3,566	24,997	28,563	"	.764
November 6, 1906. Removing limitation on appropriation to Louisiana Industrial Institute	Adopted	20,527	3,743	24,270	"	.649
November 6, 1906. Permitting appointment of female factory inspectors	Adopted	21,052	2,893	23,945	"	.640
April 21, 1908. Salary of Secretary of State, $5,000.	Adopted	41,951	3,667	45,618	68,932	.661
April 21, 1908. Forbidding removal of suits to federal courts by foreign corporations	Adopted	40,634	3,647	44,281	"	.642
April 21, 1908. Penalties for violating orders of Railroad Commission	Adopted	41,067	3,043	44,110	"	.639
April 21, 1908. Permitting general assembly to increase powers of Railroad Commission	Adopted	40,228	2,960	43,188	"	.626

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
April 21, 1908. City tax collector of New Orleans	Adopted	25,247	23,536	48,783	68,932	.707
November 3, 1908. Permitting New Orleans public improvement bonds to be sold at a discount	Adopted	33,232	5,793	39,025	75,146	.519
November 3, 1908. Authorizing issuance of $3,500,000 New Orleans port improvement bonds	Adopted	33,228	5,920	39,148	"	.520
November 3, 1908. Issuance of $2,000,000 in bonds for public belt railroad in New Orleans	Adopted	32,777	5,942	38,719	"	.515
November 3, 1908. Mortgages, etc., exempted from taxation	Adopted	37,028	5,797	42,825	"	.569
November 3, 1908. Salary of state superintendent of public instruction, $5000	Adopted	31,150	11,401	42,551	"	.566
November 3. 1908. Salary of state auditor, $5000; of state treasurer, $4000	Adopted	31,426	8,537	39,963	"	.531
November 3, 1908. Increasing annual appropriation for pensions to confederate veterans	Adopted	43,643	3,418	47,061	"	.626
November 3, 1908. Providing for the erection of juvenile courts	Adopted	38,984	4,030	43,014	"	.572
November 3, 1908. Allotment of cases in civil district court, parish of Orleans	Adopted	32,897	4,905	37,802	"	.503
November 3, 1908. Issuance of public improvement bonds by local government areas	Adopted	34,335	5,362	39,697	"	.528

MAINE

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
September 14, 1908. Initiative and referendum.	Adopted	53,785	24,543	78,328	142,658	.549
September 14, 1908. Proposed constitutional amendments to be voted on 2d Monday in September following proposal.	Adopted	47,981	23,132	71,113	"	.498

MARYLAND

November, 1899. Authorizing Baltimore to pay additional salary to supreme judges of Baltimore city	Rejected	12,630	42,927	55,557	251,183	.221
November, 1901. Salaries of state's attorneys	Adopted	31,326	21,731	53,057	197,247	.268
November, 1901. Reapportionment of representatives	Adopted	33,479	18,156	51,635	"	.261
November, 1901. Increasing senatorial representation of Baltimore	Adopted	35,705	17,118	52,823	"	.267
November 7, 1905. Suffrage restriction	Rejected	70,227	104,286	174,513	186,381	.936
November 7, 1905. Permitting legislature to apportion annual amount to city and counties for highways	Rejected	60,607	93,107	152,714	"	.824
November, 1907. Vote on question of holding convention	Rejected	32,778	87,035	119,813	201,437	.594

MASSACHUSETTS

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November, 1907. Authorizing governor, with consent of council, to remove justices of the peace and notaries public	Adopted	178,005	35,989	213,994	363,705	.588

MICHIGAN

April 3, 1899. Permitting counties to incur road and bridge debt without vote of people—altering powers of township commissioners and overseers of highways	Adopted	130,416	93,442	223,858	421,164	.531
April 3, 1899. Additional circuit judges in St. Clair county	Adopted	108,197	104,884	213,081	"	.505
April 3, 1899. Creating intermediate court between circuit and supreme courts	Rejected	99,391	102,269	201,660	"	.478
April 3, 1899. Establishment of a state printing office	Rejected	105,711	108,317	214,028	"	.508
November 6, 1900. State board of assessors for taxation of corporations	Adopted	442,728	54,757	497,485	548,214	.907
April 1, 1901. Increasing compensation of members of legislature	Rejected	112,883	187,615	300,498	"	.548
April 1, 1901. Additional circuit judges for certain counties	Rejected	110,855	130,108	240,963	"	.439

MICHIGAN—*Continued*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 4, 1902. Repealing requirement that general laws be published in newspapers	Adopted	155,837	105,241	261,078	402,226	.649
November 4, 1902. Permitting indeterminate sentences	Adopted	146,265	78,338	224,603	"	.558
April 6, 1903. Payment of circuit judges in certain counties	Adopted	105,618	83,048	188,666	"	.469
April 6, 1903. Establishing boards of county auditors in certain counties	Adopted	108,889	84,636	193,525	"	.481
November 8, 1904. Repealing time limitation upon introduction of bills in legislature.	Adopted	180,157	98,657	278,814	524,721	.531
November 8, 1904. Vote on question of holding convention.	Not adopted[1]	165,123	120,018	285,141	"	.543
April 3, 1905. State may aid in improvement of public wagon roads	Adopted	205,750	63,506	269,256	"	.513
April 3, 1905. Establishing county board of auditors for Genesee county.	Adopted	94,860	64,825	159,685	"	.304
April 3, 1905. Compensation of circuit judge in Genesee county	Adopted	91,994	63,590	155,584	"	.296
April 2, 1906. Vote on question of holding convention.	Adopted	196,780	127,189	323,969	372,586	.869
April 1, 1907. Compensation of circuit judges in certain counties	Adopted	94,585	61,550	156,135	"	.419

[1] Did not receive a majority of the total vote cast.

MICHIGAN—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
April 1, 1907. Providing boards of county auditors for certain counties	Adopted	98,259	62,008	160,267	372,586	.430
April 1, 1907. Convicts not to be taught trades, products of which are produced in state	Adopted	167,163	84,831	251,994	"	.676
November 3, 1908. Assessment and taxation of property of public service corporations	Adopted	227,899	137,500	365,399	541,748	.674
November 3, 1908. Constitution of 1908	Adopted	244,705	130,783	375,488	"	.693

MINNESOTA

November 6, 1900. Permitting school funds to be invested in municipal and other local bonds.	Not adopted	108,681	30,160	138,841	314,181	.441
November 4, 1902. Permitting school funds to be invested in municipal and other bonds	Not adopted	116,766	20,777	137,543	270,888	.507
November 4, 1902. State road and bridge fund, and state tax for same purpose	Not adopted	114,969	23,948	138,917	"	.512
November 4, 1902. Franchise and income taxation, etc	Not adopted	124,584	21,251	145,835	"	.538
November 8, 1904. Permitting school funds to be invested in municipal and other local bonds.	Adopted	190,718	39,334	230,052	303,802	.757

MINNESOTA—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 8, 1904. Repealing requirement of indictment by grand jury	Adopted	164,555	52,152	216,707	303,802	.713
November 6, 1906. Taxation, tax exemptions, etc.	Adopted	156,051	46,982	203,033	284,366	.713
November 6, 1906. State road and bridge fund and tax for same purpose	Not adopted	141,870	49,432	191,302	"	.672
November 6, 1906. Anyone may without license peddle garden or farm products raised by himself	Adopted	190,897	34,094	224,991	"	.791
November 3, 1908. Taxation, tax exemptions, etc. Resubmission of amendment of 1906[1]	Not adopted	134,141	65,776	199,917	342,330	.583
November 3, 1908. State road and bridge fund and tax for same purpose	Not adopted	154,226	56,557	210,783	"	.615
November 3, 1908. Insurance against hail storms	Not adopted	137,710	61,084	198,794	"	.580
November 3, 1908. Educational qualification for superintendent of schools	Not adopted	169,785	42,114	211,899	"	.618

[1] Amendment of 1906 was at time contested in the courts, and was upheld in January, 1909. McConaughy v. Secretary of State, 106 Minn. 392. The 1908 vote is therefore of no effect, submission being simply a precautionary measure.

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 7, 1899. Election of judges substituted for executive appointment	Not adopted[1]	21,169	8,643	29,812	48,370	.616
November 6, 1900. Apportionment of state school fund	Adopted	43,128	7,733	50,861	59,103	.860
November 6, 1900. Legislative reapportionment.	Adopted	32,295	6,914	39,209	"	.663
November, 1902. County, city or town may be authorized to aid railroad company	Not adopted	7,665	7,464	15,129	18,058	.837
November, 1902. Biennial regular legislative sessions	Not adopted	8,088	6,602	14,690	"	.813
November, 1902. Majority vote to carry constitutional amendment—amendment to be inserted in constitution at next session—legislative decision final	Rejected	7,354	7,427	14,781	"	.818
November, 1904. Repealing requirement of decennial state census	Adopted	34,235	7,276	41,511	53,337	.778
November, 1906. Donation or gratuity requires vote of two-thirds of members elected to legislature	Adopted	15,425	1,267	16,692	29,552	.564

[1] See State *v.* Powell, 77 Miss., 543.

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November, 1900. Repeals requirement of indictment in criminal cases	Adopted	147,868	102,667	250,535	684,294	.366
November, 1900. Counties authorized to levy taxes for roads and bridges	Adopted	161,970	108,275	270,245	"	.394
November, 1900. Taxation of mortgages	Adopted	172,159	108,841	281,000	"	.410
November, 1900. Authorizing St. Louis to issue bonds in aid of exposition	Adopted	275,448	68,952	344,400	"	.503
November, 1900. Authorizing state to appropriate $1,000,000 in aid of Louisiana Purchase exposition	Adopted	249,285	85,401	334,686	"	.489
November, 1900. Grand jury to convene only on order of a judge who has power to try felonies	Adopted	164,910	94,430	259,340	"	.378
November, 1900. In civil cases verdict may be rendered by two-thirds of jury in court not of record, and by three-fourths in court of record.	Adopted	158,425	103,379	261,804	"	.382
November, 1902. Repealing amendment of 1900 regarding mortgage taxation[1]	Adopted	117,066	80,839	197,905	517,928	.382
November, 1902. Changing vote required for adoption of township organization by county	Adopted	121,856	72,753	194,609	"	.375
November, 1902. Authorizing St. Louis to frame new charter	Adopted	117,354	72,251	189,605	"	.366

[1] This amendment had already been declared invalid in Russell v. Croy, 164 Mo. 69.

MISSOURI—*Continued*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November, 1902. Authorizing St. Louis to levy additional taxes.	Adopted	113,649	74,461	188,110	517,928	.363
November, 1902. Authorizing levy of increased school tax in school districts of more than 100,000 inhabitants	Adopted	121,650	68,345	189,995	"	.366
November, 1902. Exempting waterworks bonds of St. Louis and Kansas City from debt limit	Adopted	108,523	76,585	185,108	"	.357
November, 1902. State's certificates of indebtedness to school fund declared obligations of the state	Adopted	126,928	103,347	230,275	"	.444
November, 1902. Increasing debt limit of cities of 2,000 to 30,000 inhabitants, for purchase or construction of waterworks and light plants.	Adopted	109,143	73,444	182,587	"	.352
November, 1904. Police pensions in cities having 100,000 inhabitants or more.	Rejected	113,542	188,796	302,338	643,969	.469
November, 1904. Initiative and referendum	Rejected	115,741	169,281	285,022	"	.442
November, 1904. Free school text-books	Rejected	129,565	182,766	312,331	"	.485
November, 1904. Free railroad transportation to state officials	Rejected	86,351	209,910	296,261	"	.460
November, 1904. Tax for erection of new state capitol.	Rejected	91,912	205,822	297,734	"	.462
November, 1906. Permitting counties to incur debts for construction of roads	Adopted	156,662	104,750	261,412	593,038	.440

MISSOURI—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November, 1906. Extending terms of coroners and sheriffs, etc	Adopted	144,151	111,443	255,594	593,038	.430
November, 1908. Increasing compensation of members of general assembly, etc	Rejected	147,679	176,766	324,445	715,618	.453
November, 1908. Towns and counties permitted to levy special road tax[1]	Adopted	178,861	159,271	338,132	"	.472
November, 1908. Initiative and referendum	Adopted	177,615	147,290	324,905	"	.454
November, 1908. Increasing number of judges of supreme court; new division of court; increased salaries, etc	Rejected	142,790	171,658	314,448	"	.439
November, 1908. Separation of sources of state and local taxation, etc	Rejected	133,682	172,508	306,190	"	.427
November, 1908. Extending debt limit of towns of 2000 to 30,000 for construction of waterways and lighting plants	Rejected	136,464	159,554	296,018	"	.413
November, 1908. State tax for roads and highways	Rejected	142,787	167,478	310,265	"	.433
November, 1908. Authorizing cities of more than 100,000 to incur additional debt for construction of subway	Rejected	127,276	165,388	292,664	"	.408

[1] Adopted to replace amendment of 1900, which was declared invalid in State v. C. B. & Q. R. R. Co., 195 Mo. 228.

MONTANA

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November, 1900. Permitting district judge to act in supreme court when judge of latter court disqualified	Adopted	8,918	3,425	12,343	63,503	.194
November, 1902. Extending term of county commissioners	Adopted	11,126	8,622	19,748	55,360	.356
November, 1904. Children under sixteen not to be employed in mines	Adopted	28,631	3,742	32,373	65,765	.492
November, 1904. Eight-hour day for public works and in mines	Adopted	29,237	2,394	31,631	"	.480
November, 1906. Initiative and referendum	Adopted	36,374	6,616	42,990	56,041	.767
November, 1908. Creating state depository board to care for public moneys	Adopted	29,273	10,653	39,926	68,186	.585
November, 1908. Increasing tax levy	Rejected	14,184	25,706	39,890	"	.585

NEBRASKA

November, 1906. Creating state railway commission to regulate rates and service of common carriers	Adopted	147,472	8,896	156,368	194,692	.803
November, 1908. Investment of school funds in local school bonds	Adopted	213,000	14,395	227,395	262,739	.865
November, 1908. Increasing number of supreme court judges	Adopted	214,208	16,271	230,479	"	.877

NEVADA

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 4, 1902. Patented mining claims taxed $10 per acre	Adopted	3,945	614	4,559	11,318	.402
November 8, 1904. Initiative and referendum	Adopted	4,393	792	5,185	12,050	.430
November 6, 1906. Taxation of patented mines.	Adopted	5,450	1,359	6,809	14,837	.458

NEW HAMPSHIRE

November, 1900. Vote on question of holding convention	Adopted	10,571	3,287	13,858	90,793	.152
March, 1903. Ability to read and write qualification for voting and holding office	Adopted	28,601	8,205	36,806	79,173	.464
March, 1903. Examination for appointment as officers in militia	Adopted	23,228	7,377	30,605	"	.386
March, 1903. Repealing requirement that commissary-general be chosen by legislature	Not adopted [1]	17,951	10,082	28,033	"	.354
March, 1903. Permitting franchise and inheritance taxes	Adopted	20,917	10,306	31,223	"	.394
March, 1903. Criminal jurisdiction of police courts.	Not adopted [1]	19,736	11,289	31,025	"	.391

[1] Did not receive two-thirds of votes cast.

NEW HAMPSHIRE—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
March, 1903. Repealing provision authorizing towns to support churches, etc.	Not adopted [1]	16,611	15,727	32,338	79,173	.408
March, 1903. Female suffrage	Rejected	13,089	21,788	34,877	"	.440
March, 1903. Prohibiting trusts and monopolies; fictitious capitalization forbidden	Adopted	23,732	8,659	32,391	"	.409
March, 1903. Reapportionment of representatives	Not adopted [1]	20,295	13,069	33,364	"	.421
March, 1903. Permitting additional polling places in towns	Not adopted [1]	16,747	13,391	30,138	"	.380
NEW JERSEY						
September 22, 1903. Altering composition of pardoning board	Rejected	18,883	20,551	39,434	323,651	.121
September 22, 1903. Judicial reorganization; separation of supreme court and court of errors and appeals	Rejected	17,771	20,480	38,251	"	.118
September 22, 1903. Judicial reorganization; court of chancery	Rejected	18,313	20,973	39,286	"	.121
September 22, 1903. Judicial reorganization; permitting supreme court to sit in divisions	Rejected	18,268	20,831	39,099	"	.120

[1] Did not receive two-thirds of votes cast.

NEW JERSEY—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
September 22, 1903, Judicial reorganization—abolishing writs of error from circuit to supreme court	Rejected	18,269	20,831	39,100	323,651	.120
September, 22, 1903. Judicial reorganization—constitution of courts of common pleas left to legislature	Rejected	18,381	20,837	39,218	"	.121
September 22, 1903. Judicial reorganization—appointment of judges	Rejected	18,534	20,853	39,387	"	.121
September 22, 1903. Judges of courts of common pleas no longer to be elected by legislature	Rejected	18,536	20,849	39,385	"	.121

NEW YORK

November 7, 1899. In city which includes whole county powers of county supervisors exercised by city government	Adopted	325,182	144,667	469,849	1,349,974	.348
November 7, 1899. Designation of justices to serve in appellate division	Adopted	283,880	137,408	421,288	"	.312
November 7, 1899. Designation of supreme court justices to court of appeals	Adopted	279,469	132,064	411,533	"	.304
November 7, 1899. When city includes county, county debt not to be reckoned as part of city debt	Adopted	315,475	145,450	460,925	"	.341

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 5, 1901. Forbidding legislature to grant tax exemptions by special laws.	Adopted	354,881	309,245	664,126	1,548,551	.428
November 7, 1905. Debt of New York City for water supply exempted from debt limit, etc....	Adopted	363,117	129,424	492,541	1,617,786	.304
November 7, 1905. State debt, sinking fund, etc. Payment of debt without levy of special tax ...	Adopted	307,768	134,773	442,541	"	.273
November 7, 1905. Permitting legislature to increase number of judges in judicial districts ...	Adopted	297,893	133,999	431,892	"	.266
November 7, 1905. Authorizing legislature to regulate hours and conditions of labor on public work	Adopted	338,570	133,606	472,176	"	.290
November 7, 1905. Improvement of highways—contraction of debt for, etc.....	Adopted	383,188	117,181	500,369	"	.309
November 7, 1905. Payment of state debt within 50 [formerly 18] years.	Adopted	293,552	127,364	420,916	"	.260
November 7, 1905. Permitting justice of appellate division to act in supreme court.....	Adopted	288,227	125,649	413,876	"	.255
November 5, 1907. Debts incurred by cities of second class for water supply not within debt limit	Adopted	352,905	137,721	490,626	1,482,467	.330
November 5, 1907. Reclassification of cities....	Adopted	309,159	123,919	433,078	"	.292

NORTH CAROLINA

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
August, 1900. Suffrage restrictions	Adopted	182,217	128,285	310,502	313,304	.991

NORTH DAKOTA

November 6, 1900. Creation of board of pardons.	Adopted	33,260	8,153	41,413	57,525	.719
November 6, 1900. State assessment for taxation of telephone, telegraph, sleeping car, etc., companies	Adopted	32,674	6,947	39,621	"	.688
November 8, 1904. Taxation of grain in elevators.	Adopted	37,468	15,707	53,175	67,918	.782
November 8, 1904. Establishing an institution for feeble-minded	Adopted	36,015	12,608	48,623	"	.715
November 8, 1904. Changing name of school for deaf and dumb	Adopted	35,609	10,572	46,181	"	.679
November 6, 1906. Public school funds may be invested in local bonds or mortgages, etc.	Adopted	45,515	9,519	55,034	64,711	.850
November 3, 1908. Increasing number of judges of supreme court	Adopted	47,732	20,584	68,316	96,737	.706
November 3, 1908, Sale of state land—minimum price, etc.	Adopted	50,001	15,903	65,904	"	.681
November 3, 1908. Permitting school funds to be invested in drainage bonds and in bonds of states which have not repudiated debts	Adopted	50,793	13,952	64,745	"	.669

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 3, 1903. Conferring veto power upon governor	Adopted	458,681	338,317	796,998	877,203	.908
November 3, 1903. Representation of counties in legislature	Adopted	757,505	26,497	784,002	"	.893
November 3, 1903. Abolishing double liability of stockholders of corporations	Adopted	751,783	29,383	781,166	"	.890
November 3, 1903. Separation of sources of state and local taxation, etc.	Not adopted [1]	322,622	43,563	366,185	"	.417
November 3, 1903. Classification of cities	Rejected	21,664	32,110	53,774	"	.061
November 7, 1905. Extending term of state officers to four years; state elections on even years, etc.	Adopted	702,699	90,762	793,461	961,505	.825
November 7, 1905. Exemption of public bonds from taxation	Adopted	655,508	139,062	794,570	"	.826
November 3, 1908. Removing limitation upon legislature's taxing power	Not adopted [1]	339,747	95,867	435,614	1,136,525	.383
November 3, 1908. General assembly to meet first Monday in January after it is chosen	Not adopted [1]	328,362	63,006	391,368	"	.344
November 3, 1908. Repassage of bills after governor veto	Not adopted [1]	323,770	61,754	385,524	"	.339

[1] Did not receive majority of vote cast.

OKLAHOMA

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
September 17, 1907. Constitution of 1907	Adopted	180,333	73,059	253,392	257,267	.984
November 3, 1908. Authorizing establishment of Torrens land system	Not adopted[1]	114,394	83,888	198,282	254,693	.778
November 3, 1908. State agency for handling and sale of liquors	Rejected	105,392	121,573	226,965	"	.891
November 3, 1908. Permanent capital to be selected by majority vote of people	Not adopted[1]	120,352	71,933	192,285	"	.754

OREGON

June, 1900. Increasing debt limit of municipal corporations	Rejected	16,147	26,575	42,722	81,650	.523
June, 1900. Increasing number of supreme court justices, etc.	Rejected	15,208	26,262	41,470	"	.507
June, 1900. Subjecting irrigation works to public control, etc.	Rejected	16,346	25,324	41,670	"	.510
June, 1900. Repealing provision excluding free negroes from state	Rejected	19,074	19,999	39,073	"	.478
June, 1900. Woman's suffrage	Rejected	26,265	28,402	54,667	"	.669
June 2, 1902. Initiative and referendum	Adopted	62,024	5,668	67,692	90,692	.746

[1] Was not favored by "majority of all electors voting at such election."

OREGON—*Continued*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
June 6, 1904. Repealing requirement that state printer be popularly elected	Not adopted[1]	45,334	14,031	59,365	99,315	.597
June 4, 1906. Womans' suffrage	Rejected	36,902	47,075	83,977	99,445	.844
June 4, 1906. Method of amending and revising constitution	Adopted	47,661	18,751	66,412	"	.667 .728
June 4, 1906. Enactment and amending of city charters by cities themselves	Adopted	52,567	19,852	72,419	"	.737
June 4, 1906. Election of state printer, etc.	Adopted	63,749	9,571	73,320	"	
June 4, 1906. Local initiative and referendum	Adopted	47,678	16,735	64,413	"	.647
June 1, 1908. Increasing compensation of members of legislature	Rejected	19,691	68,892	88,583	116,614	.759
June 1, 1908. Permitting location of state institutions elsewhere than at state capital	Adopted	41,975	40,868	82,843	"	.710
June 1, 1908. Increasing number of supreme court judges, county courts, etc	Rejected	30,243	50,591	80,834	"	.693
June 1, 1908. Changing regular biennial elections from June to November	Adopted	65,728	18,590	84,318	"	.723
June 1, 1908. Woman's suffrage	Rejected	36,858	58,670	95,528	"	.819
June 1, 1908. Empowering cities to control theaters, race tracks, sale of liquors, etc.	Rejected	39,442	52,346	91,788	"	.787
June 1, 1908. Exemption of improvements on land from taxation	Rejected	32,066	60,871	92,937	"	.796

[1] Did not receive majority of all votes cast, as required before 1906.

OREGON—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
June 1, 1908. Recall of elective officers	Adopted	58,381	31,002	89,383	116,614	.766
June 1, 1908. Proportional representation	Adopted	48,868	34,128	82,996	"	.711
June 1, 1908. Requiring indictment by grand jury before a criminal trial	Adopted	52,214	28,487	80,701	"	.692
PENNSYLVANIA						
November 5, 1901. Qualifications for voting	Adopted	214,798	45,601	260,399	845,491	.307
November 5, 1901. Voting by other method than ballot permitted (voting machine)	Adopted	194,053	41,203	235,256	"	.278
November 5, 1901. Permitting registration laws for cities	Adopted	180,521	48,634	229,155	"	.271
RHODE ISLAND						
June 20, 1899. Revised constitution	Rejected	4,097	12,742	16,839	43,130	.390
November 6, 1900. Annual sessions of legislature at Providence, etc.	Adopted	24,351	11,959	36,310	47,933	.757
November 4, 1902. Representation of Providence in general assembly	Rejected	17,266	20,504	37,770	59,793	.631

RHODE ISLAND—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 4, 1902. Governor not to preside over Senate	Rejected	18,949	20,769	39,718	59,793	.664
November 3, 1903. Jurisdiction of supreme court; advice to governor and general assembly.	Adopted	23,344	7,821	31,165	62,035	.502
November 7, 1905. Reapportionment of representatives, etc.	Not adopted [1]	20,167	19,530	39,697	58,740	.675
SOUTH CAROLINA						
November 6, 1900. Five cities exempted from municipal debt limitation	Adopted	22,530	8,108	30,638	50,814	.602
November 6, 1900. Granting powers to general assembly for drainage of swamp lands	Adopted	21,339	9,917	31,256	"	.615
November, 1902. Abolishing several townships.	Adopted	26,454	1,365	27,819	31,817	.874
November, 1904. Sessions of legislature to be biennial after 1906	Adopted [2]	25,265	14,491	39,756	51,907	.765
November, 1904. Excepting city of Greenville from municipal debt limit	Adopted	21,682	11,016	32,698	"	.629
November, 1904. Permitting legislature to enact special laws regarding highways and drainage.	Adopted	26,452	11,242	37,694	"	.726

[1] Did not receive three-fifths of vote cast.
[2] Adopted by people but not ratified by legislature and did not go into effect.

SOUTH CAROLINA—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November, 1904. Repealing restrictions upon local legislation regarding roads	Adopted	20,086	12,024	32,110	51,907	.618
November, 1906. Exempting city of Bennettsville from municipal debt limit	Adopted	9,064	6,918	15,982	30,283	.527
November 3, 1908. Exempting town of Gaffney from municipal debt limit	Adopted	21,482	11,067	32,549	61,060	.533
November 3, 1908. Changing title of adjutant-general	Adopted[1]	22,326	10,752	33,078	"	.541
SOUTH DAKOTA						
November, 1900. Repealing provision that state should have exclusive control of manufacture and sale of liquors	Adopted	48,673	33,927	82,600	95,541	.864
November, 1900. Permitting investment of school funds in public bonds or farm mortgages	Adopted	49,989	15,653	65,642	"	.687
November, 1902. Vote required for changing location of county seats	Adopted	36,436	14,612	51,048	74,457	.685
November, 1902. Extending municipal debt limit.	Adopted	32,810	13,599	46,409	"	.623
November, 1902. Permitting loan of school funds at 5 per cent	Adopted	46,472	9,001	55,473	"	.745

[1] Adopted but not ratified by legislature.

SOUTH DAKOTA—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November, 1904. Changing seat of state government	Rejected	41,155	58,617	99,772	100,391	.993
November, 1904. Salary of attorney-general increased	Rejected	32,328	43,974	76,302	"	.760
November, 1904. Regulating loan of school funds on mortgage securities	Adopted	38,681	21,424	60,105	"	.598
November, 1906. Authorizing qualifications to be prescribed for superintendent of schools	Adopted	35,806	15,971	51,777	74,572	.694
November, 1906. Permitting establishment of municipal courts	Adopted	29,417	18,755	48,172	"	.645
November, 1906. Permitting organization of drainage districts, etc	Adopted	31,151	18,799	49,950	"	.669
November, 1906. Providing for establishment of twine and cordage plant at state penitentiary	Adopted	33,285	19,895	53,180	"	.713
November, 1908. Revision of article relating to revenue and finance	Rejected	34,915	47,732	82,647	113,904	.725
November, 1908. Increase of salary of attorney-general	Rejected	43,908	52,437	96,345	"	.845

TENNESSEE

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November, 1904. Extending governor's term from two to four years	Not adopted [1]	57,834	....	....	236,021	....
November, 1904. Making secretary of state popularly elective	"	58,975	....	....	"	....
November, 1904. Extending term of county officers from two to four years.	"	57,363	....	....	"	....
November, 1904. Treasurer and comptroller to be popularly elected and for four-year terms.	"	57,747	....	....	"	....
November, 1904. Power given to legislature to enact laws concerning roads, domestic animals, fencing, etc.	"	56,290	....	....	"	....
November, 1904. Permitting cities and counties to exempt manufacturing concerns from taxation for ten years	"	52,517	....	....	"	....
November, 1904. Limitation upon municipal indebtedness	"	50,353	....	....	"	....

TEXAS

November 6, 1900. To permit formation of irrigation districts in West Texas.	Rejected	92,661	147,437	240,098	449,339	.534

[1] Did not receive a majority of all votes cast at election for representatives.

TEXAS—*Continued*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 4, 1902. Payment of poll tax and holding of receipt requisite for voting	Adopted	200,650	107,748	308,398	309,150	.997
November 8, 1904. Legislature may permit local government areas to issue bonds in aid of roads, irrigation work, and improvement of streams	Adopted	66,003	59,373	125,376	280,241	.447
November 8, 1904. Permitting legislature to authorize incorporation of banks	Adopted	70,056	54,160	124,216	280,241	.443
November 8, 1904. Increasing appropriation for Confederate veterans	Adopted	90,042	42,035	132,077	280,241	.471
November 6, 1906. Permitting exemption from taxation of endowment funds of religious and educational institutions	Adopted	58,125	31,674	89,799	183,704	.488
November 6, 1906. Permitting levy of local tax to pay jurors	Adopted	44,936	42,144	87,080	"	.474
November 6, 1906. Increasing compensation of members of legislature	Rejected	27,354	55,804	83,158	"	.452
August, 1907 (special election). Authorizing grant in aid of home for wives and widows of Confederate soldiers	Rejected	41,079	43,732	84,811	"	.461
August, 1907. Establishing department of agriculture and bureau of labor	Rejected	19,736	60,733	80,469	"	.438
August, 1907. Increasing compensation of members of legislature	Rejected	9,517	71,970	81,487	"	.443

TEXAS—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
August, 1907. Permitting establishment of local improvement districts in cities of more than 5000	Rejected	18,909	61,208	80,117	183,704	.436
August, 1907. Permitting regulation by law concerning stationery, supplies, printing, etc.	Rejected	16,043	63,708	79,751	"	.434
August, 1907. Permitting local tax or bond issue for improvement of roads	Rejected	24,539	57,493	82,032	"	.446
November 3, 1908, Permitting increased school tax by school districts	Adopted	130,402	52,077	182,479	300,743	.606
November 3, 1908. Permitting legislature to provide for redistricting counties into commissioners' precincts	Rejected	69,380	74,479	143,859	"	.478
November 3, 1908. Increasing salaries of governor and lieutenant-governor	Rejected	47,396	112,430	159,826	"	.531

UTAH

November 6, 1900. Initiative and referendum	Adopted	19,219	7,786	27,005	92,980	.290
November 6, 1900. Maintenance of city schools	Adopted	26,949	13,758	40,707	"	.437
November 6, 1900. Taxation—remittance of taxes of poor persons	Adopted	29,730	9,519	39,249	"	.422
November 6, 1906. State aid to city high schools	Adopted	19,402	9,684	29,086	80,922	.358

UTAH—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 6, 1906. Exempting mortgages from taxation	Adopted	19,713	6,852	26,565	80,922	.328
November 6, 1906. Authorizing income, franchise and stamp taxes	Adopted	19,605	6,853	26,458	80,922	.326
November 3, 1908. Taxation of mines, mining claims, etc.	Adopted	15,882	13,282	29,164	111,509	.261
November 3, 1908. Permitting maintenance of increased tax rate	Rejected	13,282	13,457	26,739	111,509	.239
November 3, 1908. Permitting legislature to create new counties and to change county boundaries.	Rejected	9,770	16,222	25,992	111,509	.233
VIRGINIA						
May, 1900. Vote on question of holding convention.	Adopted	77,362	60,375	137,737	264,095	.521
November, 1901. County and district elections to be in November	Adopted	15,139	7,652	22,791	200,509	.113
November, 1901. Taxation of oyster industry.	Adopted	12,220	8,259	20,479	"	.102

WASHINGTON

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November, 1900. Empowering legislature to exempt from taxation $300 of personal property of each head of family	Adopted	35,398	8,975	44,373	106,420	.416
November 8, 1904. Empowering legislature to appoint chaplains for state penal and reformatory institutions	Adopted	17,060	11,571	28,631	144,699	.197
November 6, 1906. Use of waters for removal of timber declared a public use	Rejected	18,462	20,258	38,720	111,120	.348
November 6, 1906. Eminent domain may be exercised in interest of lumbering business	Rejected	15,257	20,984	36,241	"	.326
November 3, 1908. Taxation, and property exempt from taxation	Rejected	23,371	60,244	83,615	176,141	.474
November 3, 1908. Exercise of eminent domain for benefit of lumbering interests	Rejected	26,849	52,721	79,570	"	.451

WEST VIRGINIA

November 4, 1902. Office of secretary of state made elective, etc	Adopted	59,509	22,022	81,531	188,573	.432
November 4, 1902, Permitting legislature to fix salaries of state officers	Adopted	56,280	23,513	79,793	"	.423

WEST VIRGINIA—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 4, 1902. Increasing number of judges of supreme court	Adopted	54,676	24,710	79,386	188,573	.420
November 4, 1902. Accumulation of school fund to stop at $1,000,000	Adopted	56,694	24,763	81,457	"	.431
November 4, 1902. Authorizing legislature to enact laws for the registration of voters	Adopted	55,196	25,379	80,575	"	.427
November 3, 1908. Permitting appointment to office of persons not citizens entitled to vote	Rejected	39,162	40,626	79,788	257,991	.309
November 3, 1908. Substituting county commissioners for existing county organization	Rejected	31,059	51,445	82,504	257,991	.319

WISCONSIN

November 4, 1902. Election of state superintendent of public instruction, etc. Permits increase in salary	Adopted	71,550	57,411	128,961	365,676	.352
November 4, 1902. Permitting legislature to enact a general banking law	Adopted	64,836	44,620	109,456	365,676	.299
November 4, 1902. Forbids granting of passes to state officers	Adopted	67,781	40,697	108,478	"	.296
April 9, 1903. Increasing number of judges of supreme court, etc.	Adopted	51,377	39,857	91,234	"	.249

WISCONSIN—*Concluded*

Proposed Amendment	Adopted or Rejected	Vote for	Vote against	Total Vote on Amendment	Total Vote at Election	Proportion of Vote on Amendment to Total Vote
November 3, 1908. Requiring citizenship as a qualification for right to vote	Adopted	85,838	36,733	122,571	449,656	.272
November 3, 1908. Extending from three to six days time within which governor may veto bills.	Adopted	85,958	27,270	113,228	"	.251
November 3, 1908. Permitting progressive income tax	Adopted	85,696	37,729	123,425	"	.274
November 3, 1908. Permitting the appropriation of state money for the improvement of public highways	Adopted	116,421	46,739	163,160	"	.362
WYOMING						
November 6, 1900. Permitting counties to refund indebtedness in excess of constitutional limitation	Not adopted[1]	5,435	2,170	7,605	25,459	.298
November, 1904. Fixing salaries of judges by constitutional provision—increasing salaries	Rejected	5,126	11,135	16,261	30,909	.526
November 3, 1908. Providing that state board of equalization should be composed of chairmen of boards of county commissioners	Not adopted[1]	2,160	1,363	13,523	37,561	.360

[1] Did not receive majority of votes cast at election.

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