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SPECIAL STUDY

JUNE, 1958

A REPORT ON
THE CONVENTION OF THE PEOPLE
IN NORTH CAROLINA

1776 - 1958

Prepared for
The North Carolina Constitutional Commission
By
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Assistant Director of the Institute of Government

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INTRODUCTION

The Constitution of North Carolina contains two distinct and alternative procedures for its amendment.¹ Both were first inserted in the Constitution by the Convention of 1835,² and while they have both undergone changes in the intervening years, they retain the same independence of character with which they began.

The first method of constitutional amendment is by a convention of the people, called by the General Assembly (two-thirds of the members of each house concurring) with the approval of the people at the polls.³ While the Constitution does not expressly empower a convention to amend the Constitution--indeed, it grants a convention no powers at all--the principal use to which conventions called under this provision have been put has been the proposal of amendments to the state Constitution.

The second method of constitutional amendment is by initiation of a proposal by the General Assembly, three-fifths of the whole membership of each house concurring, and its ratification by the people at a general election.⁴

The purpose of this report is to examine the first of these methods of constitutional amendment, the convention. The nature and function of the convention of the people will be dealt with briefly. The use of the convention in North Carolina, the methods used in calling conventions in this State, the membership of the several North Carolina conventions (including the apportionment

¹Constitution of North Carolina, Art. XIII, Secs. 1 and 2.

²Amendments of 1835, Art. IV, Sec. I, Cls. 1 and 2.

³Constitution, Art. XIII, Sec. 1.

⁴Constitution, Art. XIII, Sec. 2.

of delegates), and the limitations upon the powers of those conventions will be discussed herein. Substantive matters dealt with by the conventions are not considered here.

In the Appendix to this report will be found all of the provisions of the Constitution of North Carolina which have, from time to time, governed the two methods of constitutional amendment, and all proposals for altering the amendment procedures which have been submitted to but rejected by the people.

THE NATURE OF THE CONVENTION OF THE PEOPLE

By the Declaration of Independence, the thirteen American Colonies absolved themselves of all allegiance to the British Crown, and brought to an end the sovereignty of the Crown within their territories. Immediately the question arose, where should sovereignty thenceforth reside? What should be the source of authority of governmental institutions?

It was entirely consistent with liberal eighteenth century political theory that the Declaration should affirm in answer "That to secure these rights"--life, liberty, and the pursuit of happiness--

"Governments are instituted among Men, deriving their just powers from the consent of the governed; That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundations on such principles, and organizing its powers in such forms, as to them shall seem most likely to effect their Safety and Happiness."

Or, in the less elegant but more forthright language of the opening lines of the North Carolina Declaration of Rights of 1776, "all Political Power is vested in and derived from the people only."¹

The governments initially established by the new states to carry on the governmental functions which had theretofore been performed under the authority of the Crown were revolutionary in nature,

¹Declaration of Rights, 1776, Sec. 1.

and drew their powers directly from the people.² The assemblies which during the Revolutionary period framed the first state constitutions were for the most part the same bodies which carried on the ordinary legislative business; the concept of the constitutional convention as it has since developed was then in its infancy. In some cases these constituent assemblies acted with the express or implied approval of the people they represented in framing and adopting constitutions; in other cases they acted without such approval. The constitutions so framed were generally not submitted to the people for approval, but became effective upon the authority of the assemblies which wrote them.³ But always the constitution-makers acted in the name of, and as delegates of, the sovereign people. "[W]e the Representatives of the Freemen of North Carolina" read the preamble to the North Carolina Constitution of 1776,

"chosen and Assembled in Congress for the Express purpose of framing a Constitution under the Authority of the people, most Conducive to their Happiness and Prosperity do declare that a Government for this State shall be established in manner and form following"⁴

The convention of the people is recognized as a distinctly American contribution to the science of government. It was born of the necessity for some extraordinary political instrumentality whereby the people of each state might exercise their sovereign power to establish and modify the fundamental law and form of

²Walter F. Dodd, The Revision and Amendment of State Constitutions 20-21 (Baltimore: Johns Hopkins Press, 1910).

³Id. at 24-25.

⁴Constitution of North Carolina, 1776, Preamble.

government under which they would live. Such power could not normally be entrusted to the regular legislative body without sacrificing the stability and relative permanence of the fundamental law and system of government which the safety and happiness of the State and its people required. Hence there developed, during and shortly after the Revolution, the concept of the convention of the people, especially convened at infrequent intervals, composed of delegates elected by the people for that particular service, and clothed with the full powers of the sovereign people of the state--"the people in convention assembled."⁵ Because of this peculiar status, the work of such conventions was often not submitted to the voters for their approval, for the people had already expressed their will, through their delegates, upon the matters acted upon in convention.

While the main function and the principal business of the convention has always been the establishment or modification of the fundamental law of the state, yet, being all-powerful, conventions have often acted upon matters apart from the writing and revising of state constitutions. Conventions in North Carolina took this State into the Union, seceded from it, cast her lot with the Confederate States, and then nullified the act of secession and re-established the State as a member of the Union.

It was this concept of the convention as the instrument for the exercise of the sovereignty of the people that was generally understood and accepted by the delegates to the North Carolina Convention of 1835 when they wrote the first provision of our

⁵Dodd, op. cit., supra note 2, chapters 1 and 2.

Constitution relating to conventions. They said:

"No Convention of the People shall be called by the General Assembly, unless by the concurrence of two-thirds of all the members of each House of the General Assembly."⁶

And that is all they said on the subject. They were not granting to the people any new power or privilege. Four conventions (including that of 1835) had written and revised the Constitution of this State before the Constitution itself ever contained a word on the subject of convention. They provided a mechanism for calling a convention, but made no attempt to define or limit the powers of a convention, once assembled. This was proper, for the convention was not the creature of the Constitution; the Constitution was the creation of conventions, and it would have been a vain thing to have bounded the authority of a convention by the terms of an instrument which a convention could alter at its pleasure.

Absent limitations imposed by the people themselves, a convention of the people of North Carolina could completely discard the Constitution of this State and write a new one, rearranging the structure and redistributing the powers of government as it might see fit (subject only to the limitations imposed by the United States Constitution), and promulgate the new Constitution without any opportunity on the part of the people to express their will in the matter, for there is no requirement that the work of a convention be submitted to the people for approval before taking effect.

This is, to be sure, a rather extreme statement of the theory

⁶Amendments of 1835, Art. IV, Sec. 1, Cl. 1.

concerning the power of the convention of the people, and as will be pointed out later in this report, the practice in North Carolina seldom has fully conformed to the theory of the omnipotence of the convention. Yet it is necessary to understand the full implications of the theory in order to understand the range of authority conceded by the Constitution of North Carolina to reside in the convention.

THE USE OF THE CONVENTION IN NORTH CAROLINA

There have been eight conventions of the people of North Carolina which have dealt with state constitutional matters.

(1) The Fifth Provincial Congress of North Carolina framed and ratified the Declaration of Rights and Constitution of 1776.

(2) The Convention of 1788 was called primarily to consider ratification of the federal Constitution, but also fixed the seat of government of the State.

(3) The Convention of 1789 was called primarily to reconsider ratification of the federal Constitution, but also adopted one amendment to the state Constitution.

(4) The Convention of 1835 proposed extensive amendments to the Constitution of 1776, which amendments were ratified by the people.

(5) The Convention of 1861-62 took North Carolina out of the Union and into the Confederacy and framed and ratified several amendments to the state Constitution, without submitting any of these matters to the people for ratification.

(6) The Convention of 1865-66 adopted ordinances voiding the secession ordinance and abolishing slavery, both of which were approved by the people; and it drafted and submitted to the people a revised state Constitution, which was rejected.

(7) The Convention of 1868 drafted and submitted to the people the Constitution of 1868, which was ratified by the people.

(8) The Convention of 1875 drafted and submitted to the people several amendments to the Constitution of 1868, which were ratified by the people.

In addition, there have been three conventions proposed by the General Assembly to deal with state constitutional matters, but which never met:

(1) The proposed Convention of 1861 was rejected by the people.

(2) The proposed Convention of 1871 was rejected by the people.

(3) The proposed Convention of 1919 was never voted on by the people.¹

¹There has been one convention proposed to consider ratification of an amendment to the federal Constitution. Public Laws 1933, C. 403 submitted to the people the question, whether a convention should be held in 1933 to consider ratification of the 21st Amendment; the convention proposal was rejected at the polls.

THE METHOD OF CALLING CONVENTIONS

The Constitutional Provision.

Prior to 1835, the Constitution of North Carolina prescribed no method for calling a convention of the people of the State. The Amendments of 1835, Article IV, Section I, Clause 1, provided that no convention shall be called except upon the concurrence of two-thirds of all the members of each house of the General Assembly. No vote of the people on the question of convention or no convention was then required. This provision remained unchanged until 1876, when it was amended to require (in addition to a favorable vote of two-thirds of each house of the legislature) that the holding of a convention be approved by a majority of the votes cast at an election on the proposition, convention or no convention. This provision remains in force today.

The Practice.

While a vote of the people on whether to hold a convention was not required by the Constitution until 1876, the General Assembly has in fact submitted that issue to the voters with regard to every convention proposed by the General Assembly since 1789, with the exception of the Conventions of 1861-62 and 1875. The Convention of 1865-66 and that of 1868 were both called under non-legislative authority, the former by the authority of the President and the latter under the Reconstructions Acts of 1867. Nevertheless the question, convention or no convention, was submitted to and answered affirmatively by the voters with reference to the Convention of 1868.

Fifth Provincial Congress, 1776.

The Fifth Provincial Congress of North Carolina, which wrote and ratified the Declaration of Rights and Constitution of 1776, met according to adjournment of the preceding Congress.¹ The Congress derived its status as a constituent assembly (or constitutional convention) from a resolution of the Council of Safety, adopted 9 August 1776, which advised the people of the State that the representatives whom they would elect to the Fifth Provincial Congress would, in addition to their usual legislative functions, be responsible for framing a constitution for the State.² The vote for members of the Congress was the only vote of the people with respect to this Congress and its work. Neither the question of whether the Congress should write a Constitution, nor the question of whether the Constitution adopted by it should be approved, was submitted directly to the people.

Conventions of 1788 and 1789.

The Constitution of 1776 prescribed no mode for calling a convention of the people, nor was any mode of constitutional amendment set forth in that document. That the power of amending the Constitution resided in the people in convention assembled seems nevertheless to have been the accepted theory. When the General Assembly adopted resolutions calling for the election of delegates to the Conventions of 1788³ and 1789⁴ (called primarily to consider ratification of the United States Constitution), it also

¹The Journal of the Provincial Congress of North Carolina, Held at Halifax, November the Twelfth Day, Anno. Dom. 1776, 10 Colonial Records 913.

²Journal of the Council of Safety, Begun and Held in the Town of Halifax, 21st July, 1776, 9 Aug. 1776, 10 Colonial Records 696.

³Senate--First Journal--1787, 6 Dec. 1787, 20 State Records 371.

⁴Senate Journal--1788, 17 Nov. 1788, 20 State Records 514-515; House Journal--1788, 19 Nov. 1788, 21 State Records 66.

authorized those conventions to act on matters in the nature of amendments to the state Constitution.⁵ The Convention of 1788 fixed the capital of the State⁶ and the Convention of 1789 granted Fayetteville a member in the House of Commons.⁷ There was no direct vote of the people on whether either of these conventions should be held, nor was their work submitted to the people for approval.

Convention of 1835.

The General Assembly of 1834-35, in calling for a vote of the people on whether a convention should be held to propose amendments to the state Constitution, introduced two significant practices in North Carolina: first, that the question of whether a convention should be held should be determined in a popular referendum; and second, that the amendments agreed upon by a convention should be submitted to the people for ratification before becoming effective.⁸ These practices have generally been followed with regard to all subsequent conventions the call for which has been initiated by the General Assembly, although until 1876 there was no constitutional requirement that the question of convention or no convention be submitted to the people and the Constitution has never required popular ratification of the work of a convention. The acts which authorized a vote on the calling of the Convention of 1835 provided

⁵House Journal--1787, 6 Dec. 1787, 20 State Records 197 (authorizing the Convention of 1788 to fix the seat of government); House Journal--1788, 19 Nov. 1788, 21 State Records 68 (authorizing the Convention of 1789 to grant Fayetteville a borough member in the House of Commons).

⁶Papers of the Convention of 1788, p. 90, MS in State Department of Archives and History, Raleigh.

⁷Journal of the Convention of N.C., 1789, 21 Nov. 1789, 22 State Records 50-51.

⁸Laws 1834-35, C. 1.

that all persons entitled to vote for members of the House of Commons--the largest group of electors in the State--were entitled to vote on the question.

The Convention of 1835 adopted and the people ratified a procedure for calling conventions which remained unchanged until 1876. It read as follows:

"No Convention of the People shall be called by the General Assembly, unless by the concurrence of two-thirds of all the members of each House of the General Assembly."⁹

A procedure for legislative initiation and popular ratification of constitutional amendments was also adopted in 1835;¹⁰ this procedure, however, was wholly independent of the convention process, which did not require popular approval of amendments adopted by a convention. The apparent reason for this difference between the two processes lies in the fact that a convention is, in theory, the people of the State in convention assembled and unless otherwise limited, is vested with the whole political power of the people. Hence there is no need for further referral to the people of matters which they have already, through their delegates, acted upon. On the other hand, the General Assembly is a body of limited powers and is not entrusted with the power to amend the Constitution without further reference to the will of the people.

⁹ Amendments of 1835, Art. IV, Sec. 1, Cl. 1.

¹⁰ Amendments of 1835, Art. IV, Sec. I, Cl. 2.

Proposed Convention of 1861.

In early 1861, with the threat of civil conflict lowering, the General Assembly authorized a popular vote on whether to call a convention of the people "to consider all grievances affecting North Carolina as a member of the Confederacy [Union]. . . ." ¹¹ The people rejected the proposed Convention of 1861 by a narrow margin.

Convention of 1861-62.

Shortly thereafter, an extra session of the General Assembly exercised its power to call a convention without holding a popular referendum on the issue; furthermore, the act calling the convention did not require that any constitutional amendments it might adopt be submitted to the people for ratification. ¹²

Convention of 1865-66.

As a part of the presidential plan of reconstruction, President Johnson appointed a Provisional Governor of North Carolina and directed him to convene a convention of the people of the State to amend the Constitution and to take such other action as might be necessary to restore the relationship of North Carolina to the Union. ¹³ Upon this authority, the Provisional Governor issued his proclamation, calling for the election of delegates to the Convention of 1865-66, without submitting to the people the question whether a convention should be held. ¹⁴

¹¹Public Laws 1860-61, C. 17.

¹²Public Laws 1861 (1st Extra Session), C. 9.

¹³Proclamation by President Andrew Johnson, 29 May 1865, 7 Richardson, Messages and Papers of the Presidents 3510-3512 (c. 1921 ed.).

¹⁴Proclamation by Provisional Governor W. W. Holden, 8 Aug. 1865, William W. Holden, Record Book Relative to the Provisional Government, 1865, 132-137, MS in State Department of Archives and History.

The Convention of 1865-66, convened under this authority, drafted and submitted to the people the proposed Constitution of 1866, which would have eliminated the power of the General Assembly to initiate amendments and would have revised the section relating to conventions to read as follows:

"No Convention of the people shall be called otherwise than by the General Assembly, and then only by the concurrence of two thirds of all the members of each House of the General Assembly. No part of the Constitution of the State shall be amended, unless by a Convention, the delegates whereof shall consist of the same number as the members of the House of Commons and be chosen by the qualified voters for members of such house."¹⁵

Upon submission to the people, the proposed Constitution of 1866 was rejected.

Convention of 1868.

One year later, as a part of the Congressional plan of Reconstruction, the Commanding General of the Second Military District issued an order calling for a vote of the people on the question of holding a convention to revise the Constitution of the State.¹⁶ The people approved, and the Convention of 1868 thereupon met and proposed the Constitution of 1868, which the people ratified. That Constitution brought forward without significant change the 1835 provisions concerning conventions and the amendment process.¹⁷

¹⁵Proposed Constitution of North Carolina, 1866, Art. VIII.

¹⁶General Orders No. 101, 18 Oct. 1867, Jonathan Worth Letter Book, 1865-1867, 637-640, MS in State Department of Archives and History.

¹⁷Constitution of North Carolina, 1868, Art. XIII, Secs. 1 and 2.

Proposed Convention of 1871.

In 1871, the General Assembly proposed that a convention be held to amend the state Constitution,¹⁸ but the voters rejected the proposal.

Convention of 1875.

Four years later the General Assembly called the Convention of 1875 without a vote of the people on the issue.¹⁹ Among the amendments adopted by the Convention of 1875 and subsequently ratified by the people of the State was a revision of Article XII, Section 1, which reads as follows:

"No Convention of the people of this State shall ever be called by the General Assembly unless by the concurrence of two-thirds of all the members of each House of the General Assembly, and except the proposition, Convention or No Convention, be first submitted to the qualified voters of the whole State, at the next general election, in a manner to be prescribed by law. And should a majority of the votes cast be in favor of said Convention it shall assemble on such day as may be prescribed by the General Assembly."

This section has not been amended since 1876.

Proposed Convention of 1919.

Only once since 1875 has the General Assembly proposed the calling of a convention to consider state constitutional matters. In 1917 an act was adopted providing for a vote of the people

¹⁸Public Laws 1870-71, C. 211.

¹⁹Public Laws 1874-75, C. 222.

in 1918 on whether a convention should be held in 1919.²⁰ As a result of the entry of the United States into World War One, the issue was left off the 1918 ballot, and therefore the will of the people was never expressed on the matter.²¹

Proposed Constitution of 1933.

The Proposed Constitution of 1933, as approved by the General Assembly, would have continued the section concerning conventions unchanged except in two respects: the question on convention or no convention would no longer have been required to be submitted at the next general election following adoption by the General Assembly of a convention act, but would have been submitted "in a manner to be prescribed by law"; and thereafter a convention, if called, would have consisted of 120 delegates, "elected upon basis of the membership in the House of Representatives."²²

Proposed Convention of 1933.

The General Assembly of 1933 desired to propose a convention to consider ratification or rejection of the 21st Amendment to the United States Constitution, repealing the prohibition amendment. Donflicting opinions were held by legislators as to the mode in which the convention should be called and the time the issue of convention or no convention should be submitted to the people, if it should be submitted at all. An advisory opinion was sought from the members of the Supreme Court with respect to two pending bills.

²⁰Public Laws 1917, C. 60.

²¹Dillard S. Gardner, The Proposed Constitution for North Carolina 7 (Chapel Hill: The Institute of Government, 1934).

²²Proposed Constitution of North Carolina, 1933, Art. XII, Sec. 1. This Constitution was never voted on by the people, and so never became effective.

The Justices advised that the question was one of federal law, and so could not be answered authoritatively by them. Nevertheless they agreed that a convention called under Article XIII, Section 1 of the state Constitution would be authorized to act upon the proposed federal constitutional amendment. A majority thought a convention called by the legislature without first submitting to the people the issue of convention or no convention would not be valid for any purpose.²³

Another request was made by the General Assembly for the opinion of the Justices as to whether the legislature could call for a vote of the people on the convention question at a special election in November 1933. A majority of the Justices concluded that a convention called in this way would be valid for the purpose contemplated.²⁴ Chief Justice Stacy agreed, and went on to point out that in providing for the calling of a convention for the purpose of acting on a federal constitutional amendment, the General Assembly may proceed under Article XIII, Section 1, "or it may call such convention in the exercise of its plenary powers without regard to the provisions of said section."²⁵ The convention question was accordingly submitted to the people in November 1933,²⁶ and the proposed convention was rejected by a substantial majority.

²³Opinions of the Justices in the Matter of Calling a Convention, 204 N.C. 806 (1933).

²⁴Id. at 811-817.

²⁵Id. at 814.

²⁶Public Laws 1933, C. 403.

LIMITATIONS UPON THE POWERS OF CONVENTIONS

As has been noted, theory holds that the convention is possessed of all the political power of the people, and so cannot be limited by action of the ordinary agencies of government in its exercise of that power. Yet the practice in North Carolina has seldom allowed conventions the full range of authority which theory claims for them.

Whether, and by what means, the powers of a convention of the people can be restricted by the act of the legislature calling (or proposing that the people call) a convention has long been a subject to delight the heart of the political theorist, and has at times posed very practical political and judicial problems in some other states. In North Carolina, however, no serious difficulties have arisen in this respect, for the various conventions have followed the instructions and limitations imposed on them by the convention acts under which they were called into being, where those acts were ratified by action of the people in voting for a convention. With time, the practice in this State has hardened into a practical modification of the theory of the unlimited convention, so that it is now generally accepted that if the proper devices be used, the powers of a convention can be limited by the terms of the convention act, approved by the people in voting for convention.¹

To understand how the concept of the limited convention has developed in North Carolina, it is necessary to examine briefly the

¹See Advisory Opinion of Stacy, C. J., in Opinions of the Justices in the Matter of Calling a Convention, 204 N. C. 806 at 812 (1933).

limitations which have been imposed on each of the conventions held in this State since 1776.

Fifth Provincial Congress, 1776.

The resolution of the Council of Safety of 9 August 1776, impliedly approved by the people in casting their votes for delegates to the Fifth Provincial Congress, conferred on the Congress the powers of a constituent assembly. That resolution stated simply that the Congress would "form a Constitution for this State."² There was no further limitation placed on the powers of that Congress.

Convention of 1788.

The Convention of 1788 was called by the General Assembly for the purpose of deliberating and determining on the Constitution of the United States.³ By legislative resolution, it was recommended to the people that they also direct their convention delegates "to fix on the place for. . . the unalterable Seat of Government for this State."⁴ No other constitutional matter was acted upon by that convention.

Convention of 1789.

The Convention of 1789, which was also called by the General Assembly "for the purpose of deliberating and determining on the proposed Federal Constitution,"⁵ was further authorized by the General Assembly to consider the propriety of granting the Town of Fayetteville a borough member in the House of Commons,⁶ a privilege

²Journal of the Council of Safety, Begun and Held in the Town of Halifax, 21st July, 1776, 9 Aug. 1776, 10 Colonial Records 696.

³Senate--First Journal--1787, 6 Dec. 1787, 20 State Records 371.

⁴House Journal--1787, 6 Dec. 1787, 20 State Records 197.

⁵Senate Journal--1788, 17 Nov. 1788, 20 State Records 514-515; House Journal--1788, 19 Nov. 1788, 21 State Records 66.

⁶House Journal--1788, 19 Nov. 1788, 21 State Records 68.

which had been granted by the Constitution of 1776 to six other borough towns.⁷

Convention of 1835.

The Convention of 1835 was proposed by the legislature for the primary purpose of revising the system of representation in the General Assembly so as to give greater weight to the increasingly populous Piedmont and West. The legislatively predominant East would not agree to call a convention except under very strict limitations upon its power with respect to changes in the representation basis. Accordingly, the act⁸ which put to the people the question of convention or no convention embodied the compromise which made the convention possible: that the Senators should be elected from districts laid off by counties in proportion to the public taxes paid to the State by the residents of the respective counties; and that the House of Commons should be apportioned one member to each county, with the surplus distributed among the counties in proportion to their federal population. It was left to the convention to fix the number of Senators at not less than 34 nor more than 50, and the number of Commoners at not less than 90 nor more than 120, and to draft amendments based on the compromise. The Convention was also authorized (but not required) to devise amendments (1) abolishing the right of suffrage among free Negroes, (2) abolishing borough representation, (3) modifying the dual office holding prohibition, (4) equalizing the poll tax on slaves and free

⁷Constitution of North Carolina, 1776, Sec. 3

⁸Laws 1834-35, C. 1, C. 2.

white polls, (5) providing for biennial instead of annual sessions of the General Assembly, (6) providing for popular election of the Governor, (7) amending the section of the Constitution of 1776 imposing a religious test for office holders, (8) providing procedures for the removal of certain state officers for disability or misconduct, (9) providing a procedure for the amendment of the Constitution in future, and (10) with respect to several other topics.

The statute expressly provided

"that if a majority of voters, at the election first directed to be held by this act, shall be found for convention, it shall be considered and understood, that the people by their vote as aforesaid, have conferred on the delegates to said Convention, the power and authority, to make alterations and amendments in the existing Constitution of the State, in the particulars herein enumerated or any of them, but in no others."⁹

To clinch the matter, every delegate to the convention was required, before taking his seat, to swear that he would not, "either directly or indirectly evade or disregard, the duties enjoined or the limits fixed to this convention, by the people of North Carolina as set forth in the act of the General Assembly" providing for the calling of the convention. Finally, it was required that the amendments proposed by the convention be submitted to the people for their ratification before becoming effective.

Immediately the delegates to the Convention of 1835 assembled

⁹Laws 1834-35, C. 1, Sec. 14.

and before they took the oath of office, a question was raised, "whether the Legislature had a right to impose the oath prescribed."¹⁰ After some desultory comments by others, Mr. Justice William Gaston, a delegate, made answer in a speech which settled the issue, and which still constitutes the clearest exposition upon the subject in its North Carolina context:

"The State Legislature had indeed no authority to impose an oath upon the members of the Convention, but the People had ratified the Act of the Legislature, by choosing Delegates under it. According to the theory of our Government, all political power was derived from the People, and when they choose to make a grant of power, they might make a plenary or a restricted grant, might give it all or in part. The Legislature by the Act proposed to the People a Convention, with the powers, restrictions and limitations set forth in the Act. It was, as it came from the Legislature, no more than a proposition or recommendation. It must originate somewhere, and with no body could it have originated with so much propriety as in that which represented the people for legislative purposes. The proposition having been sanctioned, it became an act of the people; but it has been sanctioned precisely as it was proposed. Such a Convention as it proposed in the Act of Assembly, and no

¹⁰Journal of the Convention Called by the Freemen of North Carolina. . . 1835, 4, 4 June 1835 (Raleigh: J. Gales & Son, 1836).

other, has been called; and therefore that Act, so sanctioned, must be regarded as our power of attorney. If we transcend the limits, or refuse obedience to the conditions therein provided, we are not the Convention called by the people, but a self-constituted body."¹¹

Whereupon the delegates voted 86 to 22 to take the prescribed oath and organize the Convention of 1835.¹²

Proposed Convention of 1861.

On 1 January 1861, the General Assembly voted to submit to the people the question of whether a convention should be held with "power to consider all grievances affecting North Carolina as member of the Confederacy [Union]. . . ," and to exercise various powers with respect to its own organization, the qualifications of its members, etc.¹³ No further limitations or instructions were embodied in the legislative act, and no requirement was imposed that any constitutional amendment which the convention might adopt should be submitted to the people for approval. The people rejected the proposed convention by a margin of 661 votes.

Convention of 1861-62.

With the actual outbreak of civil hostilities, a special session of the General Assembly exercised its constitutional authority and called for the election of delegates to a convention without a prior vote of the people on the issue of convention or no convention.¹⁴

¹¹Id. at 7, 4 June 1835.

¹²Id. at 8, 4 June 1835.

¹³Public Laws 1860-61, C. 17.

¹⁴Public Laws 1861 (1st Extra Session), C. 9.

This act included no limitation upon or instruction to the Convention of 1861-62, except with respect to minor matters of convention organization and the pay and mileage of delegates. The Convention of 1861-62 exercised its authority by taking North Carolina out of the Union, ratifying the Constitution of the Confederate States, and adopting a dozen amendments to the State Constitution which went into effect without being submitted to the people for ratification.¹⁵

During the year of its existence, the Convention of 1861-62 held four sessions. In addition to the transaction of business appropriate to a convention, it granted divorces, chartered private corporations, and generally exercised legislative authority, although a session of the legislature was held in the meantime.

Convention of 1865-66.

Immediately following the close of the Civil War, as an initial phase of his program of reconstruction, President Johnson on 29 May 1865 appointed a Provisional Governor of the State and authorized him to convene

"a convention composed of delegates to be chosen by that portion of the people of said State who are loyal to the United States, and no others, for the purpose of altering or amending the constitution thereof, 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

¹⁵Ordinances and Resolutions Passed by the State Convention . . . 1861-62 (Raleigh: Jno. W. Syme, 1862).

North Carolina to restore said State to its constitutional relations to the Federal Government and to present such a republican form of State government as will entitle the State to the guaranty of the United States therefor and its people to protection by the United States against invasion, insurrection, and domestic violence. . . ."¹⁶

The Provisional Governor then issued his proclamation, calling for the election of 120 delegates to the Convention of 1865-66 and apportioning them among the counties.¹⁷ The convention at its 1865 session voided the 1861 ordinance of secession and abolished slavery within the State;¹⁸ these ordinances were submitted to the people and ratified by them. At its 1866 session, the convention revised the entire state Constitution and submitted it to the voters,¹⁹ who rejected it. The submission of the constitution to the voters was required under an earlier proclamation issued by the provisional governor with respect to the convention.²⁰

Convention of 1868.

One year later, as a part of the Congressional plan of reconstruction, the Commanding General of the Second Military District (composed of North and South Carolina) acting under the authority of the Reconstruction Acts of 1867, called for an election of the people of the State in November 1867 on the question, convention

¹⁶ Richardson, Messages and Papers of the Presidents 3510-3512 (c. 1921 ed.).

¹⁷ Proclamation by Provisional Governor W. W. Holden, 8 Aug. 1865, William W. Holden, Record Book Relative to the Provisional Government, 1865, 132-137, MS in State Department of Archives and History.

¹⁸ Ordinances and Resolutions Passed by the North Carolina State Convention, First Session, 1865, 39-40, in Executive Documents, Convention, Session 1865 (Raleigh: Cannon & Holden, 1865).

¹⁹ Proposed Constitution of North Carolina, 1866.

²⁰ Proclamation by Provisional Governor W. W. Holden, 12 June 1865, William W. Holden, Record Book Relative to the Provisional Government, 1865, 5-10, MS in the State Department of Archives and History.

or no convention, and for the election of 120 convention delegates.²¹
 The people approved the holding of the Convention of 1868, the chief business of which was the revision of the state Constitution.

The limitations upon and instructions to the Convention of 1868 are to be found in the Reconstruction Acts.²² The principal requirements were that the new Constitution had to be "in conformity with the Constitution of the United States in all respects", and had not only to be ratified by a majority of those voting thereon, but had to be approved by Congress as well.²³ The Constitution of 1868, drafted and proposed by this Convention, was ratified by the people and approved by Congress.²⁴

Proposed Convention of 1871.

In 1871 the General Assembly submitted to the people the question of convention or no convention, which the people rejected.²⁵
 The convention act authorized that convention, if held, "to consider and propose all necessary amendments and alterations to the constitution not inconsistent with the constitution of the United States", except for designated matters over which the convention would have no authority whatever, including: the existing constitutional homestead and personal property exemptions; the rights guaranteed by the 13th, 14th, and 15th Amendments to the federal Constitution; and the constitutional provision for a mechanics'

²¹General Orders No. 101, 18 Oct. 1867, Jonathan Worth Letter Book, 1865-1867, 637-640, MS in State Department of Archives and History.

²²14 Stat. 428 (1867), C. 153; 15 Stat. 2 (1867), C. 6; 15 Stat. 14 (1867), C. 30.

²³14 Stat. 428 (1867), C. 153, Sec. 5.

²⁴15 Stat. 73 (1868), C. 70.

²⁵Public Laws 1870-71, C. 211.

lien law. Furthermore, the convention was forbidden to pass ordinances of a legislative character. It was required that any amendments adopted by the convention be submitted to the people for their approval before becoming effective. As in 1835, it was required of the delegates that they take an oath to abide by the limitations placed upon them by the convention act and adopted by the people in voting for convention.

Convention of 1875.

Four years later, in 1875, the General Assembly exercised its constitutional power to call a convention on its own authority, without a vote of the people.²⁶ The convention act, however, forbade the convention to consider or propose any amendment which would have affected the homestead and personal property exemptions, the mechanics's and laborers' lien, or the rights of married women; the legislature's taxing power or the debt limitation; or the ratio between poll and property taxes established in the Constitution. No term of office could be cut off by an amendment abolishing the office, nor could compensation be allowed the owners of emancipated slaves. No educational qualification for voting or office holding could be imposed. No ordinary legislative business could be handled by convention ordinance. "The Constitution, as amended," was required to be submitted to the people for ratification or rejection.

The delegates were required to take an oath not to evade "the duties enjoined nor the restrictions imposed upon the Convention by the act of the General Assembly authorizing" their election.

²⁶Public Laws 1874-75, C. 222.

Note that here there was no vote of the people on whether the convention should be held, and thus the concept could not be invoked that the people had, by approving the holding of the convention, given their sanction to the limitations imposed on the convention by the convention act. At the outset of the Convention of 1875, a group of 25 delegates formally protested against the requirement that the delegates take the oath, but the convention as a whole viewed the matter otherwise, took the oath, and abided by most of the limitations placed upon them by the convention act.²⁷

It is perhaps significant in this connection that the Convention of 1875 proposed an amendment to the convention section of the Constitution, requiring that as to all future conventions, in addition to a two-thirds favorable vote in each house of the General Assembly, the question of convention or no convention must be submitted to the people at the next general election, and the proposed convention must be approved by "a majority of the votes cast" in such election.²⁸ This provision not only requires an expression by the voters on whether a convention will be held; it also insures that whenever the General Assembly chooses to impose restrictions on a convention by means of a convention act those restrictions will perforce be adopted by the voters who cast their ballots in favor of a convention and will thus be binding on the convention, if held.

It should be noted that while the convention act expressly

²⁷Journal of the Constitutional Convention of the State of North Carolina, Held in 1875, 3-4, 6 Sept. 1875 (Raleigh: Josiah Turner, 1875).

²⁸Constitution of North Carolina, Art. XIII, Sec. 1.

directed the Convention of 1875 to submit "The Constitution, as amended," to the people for ratification or rejection,²⁹ the convention in fact determined

"That the amendments to the Constitution of this State, adopted by this Convention at any time during its session, shall be submitted to the people for ratification

or rejection, as a whole, at the general election. . ." of 1876.³⁰

It therefore appears that the Convention of 1875 clearly acted contrary to the instruction contained in the convention act in submitting amendments rather than a revised Constitution. However, as the people had not had an opportunity to vote on the question of convention or no convention and so had not bound the convention to the terms of the convention act, and as they did ratify the amendments submitted to them by the convention, no question could be successfully raised as to the validity of the amendments proposed by the Convention of 1875.

Proposed Convention of 1919.

Since 1875, the General Assembly has only twice put to the voters the question of convention or no convention. In 1917, a convention act was adopted calling for a vote on the issue at the general elections of November 1918, the convention (if approved) to be held in 1919.³¹ The act authorized the convention, if called, "to consider, debate, propose, and adopt any amendment to the existing Constitution, except such as would be in conflict with the Constitution of the United States." There was no requirement in the act that the amendments proposed by this convention be submitted to the people for ratification or rejection. A unique feature of

²⁹Public Laws 1874-75, C. 222, Sec. 5.

³⁰Amendments to the Constitution of North Carolina, Proposed by the Constitutional Convention of 1875. . . , 67-70 (Raleigh: Josiah Turner, 1875).

³¹Public Laws 1917. C. 60.

the proposed convention of 1919 was that an initial session of not more than 30 days would have been held at which proposals for amendments would have been received. Then an adjournment would have been taken for 60 days, following which the delegates would have reconvened to consider and adopt amendments previously offered. The total time allowed for the sitting of the convention (apparently including the initial session) would have been limited to 60 days.

Due to the involvement of the United States in World War One, the convention issue was left off the 1918 ballot, and so the people never had a chance to vote on the question.

Proposed Convention of 1933.

Only one convention of the people of this State has been proposed to consider ratification of an amendment to the federal Constitution, that of 1933, which the people rejected at the polls. The act calling for a vote of the people on whether this convention should be held specifically limited its authority to the one subject at hand: consideration of and action on the 21st Amendment.³²

Provisions as to Miscellaneous Matters.

In addition to the instructions and limitations which the convention acts have contained with respect to the substantive matters to be considered or eschewed by conventions, each of these acts has usually included provisions governing the qualifications and mode of election of delegates; the mode of submitting to the people the question of convention or no convention; the

³²Public Laws 1933, C. 403.

procedure for making return of the votes cast and certifying the delegates-elect; the time and place for the assembling of the delegates; who should preside at the opening session of the convention; the organization of the convention, including election of officers, employment of clerks and other personnel, and supplying of vacancies in the convention; and the per diem and mileage of delegates.

Summary.

As the foregoing review shows, while the phraseology of the North Carolina Constitution has always contemplated the convention as the omnipotent instrument of the sovereign people, it is nevertheless clear that as a practical matter there has been but one entirely unlimited convention in the history of North Carolina, that of 1861-62. The practical considerations as well as the theory of the limited convention were well summed up in a dictum by the late Chief Justice Stacy:

"[W]hile the Constitution apparently contains no specific authority for limiting the powers of a convention called under this section, nevertheless the people themselves in voting upon the proposition, 'Convention or No Convention,' may perforce, in terms of its submission, limit the authority of the convention, for, in this way, upon such condition of limitation alone will the call for the convention be approved by a majority of the qualified voters of the State."³³

³³Opinions of the Justices in the Matter of Calling a Convention,
204 N.C. 806 at 812 (1933).

MEMBERSHIP OF CONVENTIONS

Generally speaking, the total membership of conventions and the qualifications and apportionment of convention delegates among the counties of the State have closely followed those of the lower house of the General Assembly. These factors have in every case been governed by the statute or other official act calling (or authorizing a vote by the people on calling) a convention. The Constitution has never fixed the number of delegates of which a convention should consist or the method of their apportionment. The proposed Constitutions of 1866¹ and 1933² would have fixed total convention membership at 120 and have apportioned the delegates under the House apportionment formula in every case, but both of those constitutions were rejected by the people.

The unicameral Provincial Congress was a state legislative body which functioned from 1774 until the end of 1776. The Fifth Provincial Congress, meeting in November and December, 1776, framed and ratified the Declaration of Rights and Constitution of 1776. In that Congress, following the prevailing system of apportionment, each of the 35 counties was allowed five members and each of the nine borough towns was allowed one member.³

In calling the Conventions of 1788 and 1789, the General Assembly provided that each county should elect five delegates and each of the six borough towns should elect one delegate.⁴

¹Proposed Constitution of North Carolina, 1866, Art. VIII.

²Proposed Constitution of North Carolina, 1933, Art. XII, Sec. 1.

³The Journal of the Provincial Congress of North Carolina, Held at Halifax, November the Twelfth Day, Anno. Dom. 1776, 12 Nov. 1776, 10 Colonial Records 913-915.

⁴Senate--First Journal--1787, 6 Dec. 1787, 20 State Records 371; Senate Journal--1788, 17 Nov. 1788, 20 State Records 514-515; House Journal--1788, 19 Nov. 1788, 21 State Records 66.

(From 1776 until 1835, the House of Commons consisted of two members from each county, plus one member from each of the six--after 1789, seven--borough towns.)⁵

The act calling the Convention of 1835 limited each county to two members (the same representation each then had in the House of Commons), but denied the seven borough towns the right of representation which they then enjoyed in the House of Commons.⁶ The Amendments of 1835, which wrote into the Constitution for the first time a method of calling a convention, made no provision as to the total number of delegates who would compose future conventions, nor was a system of apportioning members prescribed.⁷

The acts calling, or authorizing a vote of the people on calling, the Conventions of 1861,⁸ 1861-62,⁹ 1875,¹⁰ and 1919¹¹ each provided that the convention should consist of 120 delegates, each county being allowed the same number of delegates as it had members of the House of Commons or House of Representatives under the prevailing apportionment. The proposed Convention of 1871 would have consisted of 121 delegates, one being allotted to the newly-formed County of Dare, and the other 120 being apportioned as was the House of Representatives at the time.¹²

The Convention of 1865-66 was called by proclamation of the Provisional Governor under presidential authorization, and the Provisional Governor fixed the number of delegates at 120 and

⁵Constitution of North Carolina, 1776, Sec. 3.

⁶Laws 1834-35, C. 1, Sec. 8.

⁷Amendments of 1835, Art. IV, Sec. I, Cl. 1.

⁸Public Laws 1860-61, C. 17, Sec. 6.

⁹Public Laws 1861 (1st Extra Session), C. 9, Sec. 4.

¹⁰Public Laws 1874-75, C. 222, Sec. 2.

¹¹Public Laws 1917, C. 60, Sec. 2.

¹²Public Laws 1870-71, C. 211, Sec. 8.

prescribed his own scheme of apportionment.¹³ The Convention of 1868 was called by vote of the people in an election called by the Commanding General of the Second Military District, who apportioned the 120 delegates (the number having been fixed by act of Congress) according to the voter registration in the several counties.¹⁴

With the single exception of 1835, the election on the question of convention or no convention (if submitted to the people) and the election for delegates to the convention (if called) have been held at the same time.

While precedent exhibits a clear pattern of legislative preference in the matter of the size and mode of apportionment of conventions in North Carolina, this is still a matter for determination by the General Assembly. There is nothing to prevent the legislature from proposing a convention composed of one delegate per county, or of 50 delegates elected from Senatorial districts, or of any other number of delegates chosen on any other representation basis it might deem expedient.

¹³Proclamation by Provisional Governor W. W. Holden, 8 August 1865, William W. Holden, Record Book Relative to the Provisional Government, 1865, 132-137, MS in State Department of Archives and History.

¹⁴General Orders No. 101, 18 Oct. 1867, Jonathan Worth Letter Book, 1865-1867, 637-642, MS in State Department of Archives and History.

AMENDMENTS TO THE
CONSTITUTION OF NORTH CAROLINA

1835

"ARTICLE IV.

"Section I.

"1. No Convention of the People shall be called by the General Assembly, unless by the concurrence of two-thirds of all the members of each House of the General Assembly.

"2. No part of the Constitution of this State shall be altered, unless a Bill to alter the same shall have been read three times in each House of the General Assembly, and agreed to by three-fifths of the whole number of members of each House respectively; nor shall any alteration take place until the bill so agreed to shall have been published six months previous to a new election of members to the General Assembly. If, after such publication, the alteration proposed by the preceding General Assembly, shall be agreed to in the first session thereafter, by two-thirds of the whole Representation in each House of the General Assembly, after the same shall have been read three times on three several days, in each House, then the said General Assembly shall prescribe a mode by which the Amendment or Amendments may be submitted to the qualified voters of the House of Commons throughout the State; and if, upon comparing the votes given in the whole State, it shall appear that a majority of the voters have approved thereof, then, and not otherwise, the same shall become a part of the Constitution."¹

¹Journal of the Convention. . . 1835, 100 (Raleigh: J. Gales & Son, 1835).

PROPOSED CONSTITUTION OF 1866

"Article VIII.

"Conventions.

"No Convention of the people shall be called otherwise than by the General Assembly, and then only by the concurrence of two thirds of all the members of each House of the General Assembly. No part of the Constitution of the State shall be amended, unless by a Convention, the delegates whereof shall consist of the same number as the members of the House of Commons and be chosen by the qualified voters for members of such house."¹

¹Enrolled Constitution of North Carolina, 1866, MS in Secretary of State's Office. This proposed constitution was rejected by the people of the State at an election held in August 1866. It would have eliminated the power of the General Assembly to initiate and submit amendments to the people.

CONSTITUTION OF NORTH CAROLINA

1868

"Article XIII.

"Amendments

"Section 1. No Convention of the people shall be called by the General Assembly unless by the concurrence of two thirds of all the members of each House of the General Assembly

"Sec. 2. No part of the Constitution of this State shall be altered, unless a bill to alter the same shall have been read three times in each house of the General Assembly and agreed to by three fifths of the whole number of members of each House, respectively; nor shall any alteration take place until the bill, so agreed to, shall have been published six months previous to a new election of members to the General Assembly. If after such publication the alteration proposed by the preceding General Assembly shall be agreed to, in the first session thereafter by two thirds of the whole representation in each house of the General Assembly, after the same shall have been read three times on three several days, in each House, then the said General Assembly shall prescribe a mode by which the amendment or amendments may be submitted to the qualified voters of the house of Representatives throughout the State; and if, upon comparing the votes given in the whole State, it shall appear that a majority of the voters voting thereon, have approved thereof, then, and not otherwise, the same shall become a part of the Constitution."¹

¹Enrolled Constitution of North Carolina, 1868, MS in Secretary of State's Office.

CONSTITUTION OF NORTH CAROLINA

As Amended by the
Convention of 1875

"Article XIII.

"Amendments

"Section 1. No Convention of the people of this State shall ever be called by the General Assembly unless by the concurrence of two-thirds of all the members of each House of the General Assembly, and except the proposition, Convention or No Convention, be first submitted to the qualified voters of the whole State, at the next general election, in a manner to be prescribed by law. And should a majority of the votes cast be in favor of said Convention, it shall assemble on such day as may be prescribed by the General Assembly.

"Sec. 2. No part of the Constitution of this State shall be altered unless a bill to alter the same shall have been agreed to by three-fifths of each House of the General Assembly. And the amendment or amendments so agreed to shall be submitted at the next general election to the qualified voters of the whole State, in such manner as may be prescribed by law. And in the event of their adoption by a majority of the votes cast, such amendment or amendments shall become a part of the Constitution of this State."¹

¹Amendments to the Constitution of North Carolina, Proposed by the Constitutional Convention of 1875. . . , C. 29, pp. 25-26 (Raleigh: Josiah Turner, 1875). These amendments were ratified by the people at an election held in November 1876.

PROPOSED AMENDMENT OF ARTICLE XIII, SECTION 2
OF THE CONSTITUTION OF NORTH CAROLINA
[Public Laws 1931, C. 104]

"SECTION 2. HOW THE CONSTITUTION MAY BE AMENDED. No part of the Constitution of this State shall be altered unless the bill to alter the same shall have been agreed to by three-fifths of each House of the General Assembly. And the amendment or amendments, so agreed to, shall be submitted either at the next general election, or at a special election to be called for the purpose, as the General Assembly may determine, to the qualified voters of the whole State, in such manner as may be prescribed by law. And in event of their adoption by a majority of the votes cast, such amendment or amendments shall become a part of the Constitution of this State."¹

¹Enrolled act in Laws of North Carolina, 1931, file no. 385, MS in Secretary of State's Office. This proposed amendment was rejected by the people in November 1932 by a vote of 226,252 to 162,598. 1933 Manual 122-123. It would have made no change in section 1, concerning conventions.

PROPOSED CONSTITUTION OF NORTH CAROLINA

1933

"ARTICLE XII

"AMENDMENTS, EXISTING LAWS AND OFFICES

"Section 1. Constitutional Convention. No convention of the people of this State shall ever be called by the General Assembly, unless by the concurrence of two-thirds of all the members of each House of the General Assembly, and except the proposition, Convention or No Convention, be first submitted to the qualified voters of the whole State in a manner to be prescribed by law. And should a majority of the votes cast be in favor of said convention, it shall assemble on such day as may be prescribed by the General Assembly. A convention, when called, shall be limited to 120 delegates and such delegates shall be elected upon basis of the membership in the House of Representatives.

"Sec. 2. Amendment of the Constitution. No part of the Constitution of this State shall be altered unless a bill to alter the same shall have been agreed to by three-fifths of each House of the General Assembly. And the amendment or amendments so agreed to shall be submitted at the next general election to the qualified voters of the whole State, in such manner as may be prescribed by law. And in the event of their adoption by a majority of the votes cast, such amendment or amendments shall become a part of the Constitution of this State."¹

¹Enrolled act in Laws of North Carolina, 1933, file no. 1011, MS in Secretary of State's Office. This proposed constitution was never submitted to the people and thus never became effective.

