

AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 6: Secession, Civil War, and Reconstruction – Federalism

Wells v. Bain, 75 Pa. 39 (PA 1873)

The Pennsylvania state constitution of 1838 made no provision for future constitutional conventions. Article X of that constitution provided only that the constitution could be amended by a majority vote in successive legislatures and a popular ratification in a manner specified by the legislature. By the 1870s, state politics tended to be dominated by a powerful but corrupt political machine. Reform forces turned to constitutional revision as a means of circumventing the machine, and in the summer of 1871 they managed to pass a statute calling for a popular vote to determine whether a constitutional convention should be held. The voters overwhelmingly approved the measure, and in 1872 the legislature passed a statute organizing a convention (carefully structuring an election that would produce a bipartisan assembly). Elections were held to select delegates, and a well-respected group of delegates met in convention in the fall of 1872. The reform-minded convention drafted a dramatically new constitution. The convention ignored the ratification process outlined in the 1872 statute that called the convention and instead directed the secretary of state to organize a ratification vote to be overseen by a special commission, with the voting results to be reviewed by the convention itself.

A group of “citizens and voters” in Philadelphia filed suit directly in the state supreme court to block the election commissioners selected by the constitutional convention from organizing ratification elections. The suit contended that both the 1871 and 1872 statutes calling for a convention violated Article X of the 1838 constitution and that the convention had unconstitutionally sought to insert itself into the electoral system. The supreme court granted the injunctions, arguing that only the people acting through the legislature could amend or alter the constitution and only the legislature could legally submit constitutional changes to the people for their ratification vote. The case was argued on December 2, and the court’s opinion was issued on December 6, as the justices rushed to block the pending ratification election. On December 8, the executive committee of the constitutional convention declared that they would comply with the court’s order, but that they understood that order as involving only which election officials would oversee the Philadelphia polls, not the timing and consequence of the ratification vote itself. The committee asserted that the same act that called the convention into being authorized the convention to see its task to the end, with a vote on ratification. On December 16, 1873, the proposed constitution was ratified in a lopsided popular vote. There were rumors that the political machine was prepared to stuff the ballot box in their home base of Philadelphia in order to stop ratification, but the ratification was supported by such a landslide in Pittsburgh that any such plans were abandoned. On December 27, the convention declared the constitution ratified and adopted resolutions responding to the state supreme court. The convention declared that the people “expressly reserved to themselves the right to alter, reform, or abolish their government” and that it is “not in the power of any department of an existing government to limit or control the powers of a Convention called by a people to reform their Constitution.”¹ Almost a year later, the state supreme court issued another opinion emphasizing that the constitutional convention was constrained by statute while recognizing that the constitution of 1873 had been ratified.

To what extent did the court think that the convention was controlled by the legislature? Who are “the people,” according to the court? Under what circumstances could the convention override its legislative restraints?

¹ *Debates of the Convention to Amend the Constitution of Pennsylvania*, vol. 8 (Harrisburg: Benjamin Singerly, 1873), 742.

Can the court's opinion be reconciled with the actual events of 1873, which saw the constitution ratified in a process dictated by the convention? Given the court's opinion, was it legitimate to hold any ratification vote at all? What would have been the options had the ratification vote overseen by regular (i.e., machine-controlled) election officials failed? Is the convention acting as a legislative body when organizing its own ratification vote? Does such a convention have inherent authority to issue such directives? What would have been the convention's options if the legislature had simply instructed that the proposed constitution be submitted to the legislature for further deliberation? How is the supreme court's argument here different than what the justices wrote in Woods's Appeal (1873)?

AGNEW, CHIEF JUSTICE

Since the Declaration of Independence in 1776, it has been an axiom of the American people, that all just government is founded in the consent of the people. . . . A self-evident corollary is, that an existing lawful government of the people cannot be altered or abolished unless by the consent of the same people, and this consent must be legally gathered or obtained. The people here meant are the whole -- those who constitute the entire state, male and female citizens, infants and adults. A mere majority of those persons who are qualified as electors are not the people, though when authorized to do so, they may represent the whole people.

The words "in such manner as they may think proper," in the declaration of rights, embrace but three known recognized modes by which the whole people, the state, can give their consent to an alteration of an existing lawful frame of government, viz.:

1. The Mode provided in the existing constitution.
2. A law, as the instrumental process of raising the body for revision and conveying to it the powers of the people.
3. A revolution.

The first two are peaceful means through which the consent of the people to alteration is obtained, and by which the existing government consents to be displaced without revolution. The government gives its consent, either by pursuing the mode provided in the constitution, or by passing a law to call a convention. If consent be not so given by the existing government the remedy of the people is in the third mode -- revolution.

When a law becomes the instrumental process of amendment, it is not because the legislature possesses any inherent power to change the existing constitution through a convention, but because it is the only means through which an authorized consent of the whole people, the entire state, can be lawfully obtained in a state of peace. Irregular action, whereby a certain number of the people assume to act for the whole, is evidently revolutionary. . . . It is only when an election is authorized by law, the electors, who represent the state or whole people, are bound to attend, and if they do not, can be bound by the expression of the will of those who do attend. The electors who can pronounce the voice of the people are those alone who possess the qualifications sanctioned by the people in order to represent them, otherwise they speak for themselves only, and do not represent the people.

The people, having reserved the right to alter or abolish their form of government, have, in the same declaration of their rights, reserved the means of procuring a law as the instrumental process of so doing. . . .

It is not pretended that the late convention sat as a revolutionary body, or in defiance of the existing government, and it did not proceed in the mode provided for amendment in the constitution, that being a legislative proceeding only. It was, therefore, the off-spring of law. It had no other source of existence. . . . A law is the only form in which the legislature, the body invested with the powers of government, can act, and thereby its own consent be given and revolution avoided. The people having adopted a proceeding by law as the means of executing their will, having acted under it and chosen their delegates by virtue of its authority, submitted themselves to it, as their own selected and approved means

of carrying out peacefully their purpose of amendment. The law, being thus the instrument of their own choice to express their will, necessarily became the channel of their authority. . . .

It will not do to assert that the whole original power of the people was conferred by the election. This election itself was a part of the instrumental process of the law, the means provided by this very law, of selecting the delegates. The law was the warrant for their election, and expressed the very terms chosen and adopted by the people, under which they delegated their power to these agents. The delegates possess no inherent power, and when convened by the law at the time and place fixed in it, sit and act under it, as their letter of attorney from the people themselves. . . .

. . . . To make this more distinct, let us suppose a voluntary election unauthorized by law, and delegates elected. It is plain a convention composed of such delegates would possess no power to displace the existing government, and impose a new constitution on the whole people. Those voting at the unauthorized election had no power to represent or to bind those who did not choose to vote. A majority of the adult males having the qualifications of electors can bind the whole people only when they have authority to do so.

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The next inquiry is -- What powers of the people were conferred upon the late convention? . . .

. . . . There is no principle of sound interpretation which can extend the voice of the elector or the sum total of those voices, beyond the question each was called to answer [in the election of 1871]. The result of that vote, therefore, was that the legislature might call a convention. It was not in itself a call, nor did it declare when, how, or on what terms the call should be made. That, the very answer to the question proposed to the electors, necessarily left to those who asked their judgment on the propriety of making the call.

It was not even a mandate, further than the moral force contained in an expressed desire of the people. It is very evident, had the matter dropped there, and the legislature had made no call, no convention and no terms would ever have existed. . . . Did the people by this act, without an expressed intent, and by mere inference, intend to abdicate all their own power, their rights, their interests, and their duty to each other in favor of a body of mere agents, and to confer upon them, by a blank warrant, the absolute power to dictate their institutions, and to determine finally upon all their most cherished interests? . . . If by an ordinance under a power derived from this Act of 1871, the delegates can set aside the lawfully-existing election laws for Philadelphia, where shall their power end? Can they draw money from the treasury to pay their own salaries? Can they seize and condemn a hall for their own use under the power of eminent domain? It is not possible, by any sound rule of interpretation, natural or civil, we can attribute to the Act of 1871, such an enormous, fearful, portentous delegation of power, founded on a vote upon the mere question of calling a convention. . . . When the people called in legislative aid to procure the call of a convention, they knew, therefore, that a law could be the only instrumental process the legislature could give; and a law being invoked, they knew that the power to legislate carried with it the power to frame the terms of the law. . . .

. . . . On what principle of interpretation of human action can the servant now set himself up against the condition of his master and say the condition is void? Who made it void? Not the electors; they voted upon it. The people required the law, as the act of the existing government, to which they had appealed under the Bill of Rights, to furnish them legal process to raise a convention for revision of their fundamental compact, and without which legal process the act of no one man could bind another. This law, being unrepealed, and being acted upon by the people, became their own delegation of authority -- the chart of the delegates to guide and control them in the duties they were elected to perform as the servants of the people. . . .

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In considering this question of delegated power some are apt to forget that the people are already under a constitution and an existing frame of government instituted by themselves, which stand as barriers to the exercise of the original powers of the people, unless in an authorized form. They glide

insensibly into the domain of abstract rights, and clothe mere agents with primordial power. . . . The great error of the argument of those who claim to be the people, or the delegates of the people, is in the use of the word people. Who are the people? Not so many as choose to assemble in a county, or a city, or a district, of their own mere will, and to say -- we the people. Who gave them power to represent all others who stay away? . . . The voice of the people can be heard only through an authorized form, for, as we have seen, without this authority a part cannot speak for the whole, and this brings us back to a law as the only authority by which the will of the whole people, the body politic called the state, can be collected under an existing lawful government. . . .

. . . . The power claimed for the convention is, by ordinance, to raise a commission to direct the election upon the amended constitution, in the city of Philadelphia, and to confer power on this commission to make a registration of voters, and furnish the lists so made to the election officers of each precinct; to appoint a judge and two inspectors for each division, by whom the election therein shall be conducted. This ordinance further claims the power to regulate the qualifications of the officers thus appointed to hold the election and to control the general returns of the election. It is clear, therefore, that the ordinance assumes a present power to displace the election officers now in office under the election laws for the city, to substitute officers appointed under the authority of the convention, and to set aside these election laws so far as relates to the qualification of the officers and the manner in which the general returns shall be made, and in other respects not necessary to be noticed. . . .

. . . . Thus the legislature said to the convention in these three sections -- You shall have power to propose your work in three forms; you shall have power to determine the time and the manner in which these propositions shall be submitted; but the election by the citizens shall be conducted as the law itself directs as to general elections. The [1872 statute], as to how the election on the propositions submitted shall be conducted is mandatory, and is so for the best of reasons -- it is the only legally authorized means of taking the sense of the people upon adoption of the amendments which can bind the whole people. In this way only can a majority of voters, who are not a majority of the people, bind them as the body politic or state. The legislature intended that the election should be conducted by known officers legally elected, and should be governed by a known system of laws with which the people are familiar, and thereby that they should both know and respect the authority under which the election should be held. . . . It is, therefore, clear to our minds that the ordinance [issued by the constitutional convention organizing the ratification election] relating to the election in the city of Philadelphia is flatly opposed to the Act of 1872, and is therefore illegal and void. . . .

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The question of jurisdiction has been reserved for the conclusion. The first remark to be made is, that all the departments of government are yet in full life and vigor, not being displaced by any authorized act of the people. As a court we are still bound to administer justice as heretofore. If the acts complained of in these bills are invasions of rights without authority, we must exercise our lawful jurisdiction to restrain them. One of our equity powers is the prevention or restraint of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community or the rights of individuals. . . . Here the court is asked to restrain a body of men attempting to proceed contrary to law -- to set aside the lawful election system of the city, and substitute an unlawful system in its place. Their acts are not only contrary to law, but are prejudicial to the interests of the community, by endangering the rights of all the electors, through means of an illegal election held by unauthorized officers. . . .

The convention is not a co-ordinate branch of the government. It exercises no governmental power, but is a body raised by law, in aid of the popular desire to discuss and propose amendments, which have no governing force so long as they remain propositions. While it acts within the scope of its delegated powers, it is not amenable for its acts, but when it assumes to legislate, to repeal and displace existing institutions before they are displaced by the adoption of its propositions, it acts without authority, and the citizens injured thereby are entitled, under the declaration of rights, to an open court and to redress at our hands.

In conclusion, we regret that the nature of the case requires prompt, instant action, and that the circumstances under which we act demand a written expression of our views. We gladly would have had more time for discussion among ourselves, and for the preparation of the opinion. As it is, we have given to the subject all our most anxious thoughts and labor, and have arrived at the best conclusions honest convictions can reach.

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... [I]t is now ordered and decreed that a special injunction be issued. . . .



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