Supplementary Material

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

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Woods's Appeal, 75 Pa. 59 (PA 1874)

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 for 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 state secretary of state to organize a ratification vote to be overseen by a special commission, with the voting results reviewed by the convention itself.

A group of "citizens and taxpayers" filed suit in county court in Pittsburgh to block the secretary of state from organizing ratification elections. The suit contended that both the 1871 and 1872 statutes calling for a convention violated Article X of the 1838 state constitution and that the convention had unconstitutionally sought to exercise legislative powers by directing government officials to call a ratification vote. The county court dismissed the suit, arguing that implicit in the American system of government was a power to alter constitutions by popular convention and that such "quasi-revolutionary" conventions had "absolute power" to pursue their mandate "untrammeled by mere legislative limitations." In December 1873, the proposed constitution was ratified in a lopsided popular vote. Almost a year later, the state supreme court issued a unanimous opinion on the appeal of the county court's decision. Though the case was mooted by the adoption of the constitution of 1873, the justices wrote to denounce aspects of the lower court's opinion. In particular, the justices emphasized that the constitutional convention was constrained by legislative statute and could not give legal force to its decisions prior to popular ratification of its proposals. Of special note to the justices was that the legislature had instructed the convention not to alter the bill of rights, and yet the constitution of 1873 did modify the earlier constitution's bill of rights.

Was the state supreme court justified in issuing an opinion in this case? To what extent did the court think that the convention was controlled by the legislature? Under what circumstances could the convention override its legislative restraints? 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? How is the supreme court's argument here different than what the justices wrote in Wells v. Bain *(1873)?*

AGNEW, CHIEF JUSTICE

The change made by the people in their political institutions, by the adoption of the proposed Constitution since this decree, forbids an inquiry into the merits of this case. The question is no longer judicial, but in affirming the decree we must not seem to sanction any doctrine in the opinion, dangerous

to the liberties of the people. The claim for absolute sovereignty in the convention, apparently sustained in the opinion, is of such magnitude and overwhelming importance to the people themselves, it cannot be passed unnoticed. In defense of their just rights, we are bound to show that it is unsound and dangerous. . . .

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There is no subject more momentous or deeply interesting to the people of this state than an assumption of absolute power by their servants. The claim of a body of mere deputies to exercise all their sovereignty, absolutely, instantly, and without ratification, is so full of peril to a free people . . . that they will pause before they allow the claim and inquire how they delegated this fearful power and how they are thus absolutely bound and can be controlled by persons appointed to a special service. . . .

A convention has no inherent rights; it exercises powers only. Delegated power defines itself. To be delegated it must come in some adopted manner to convey in by some defined means. This adopted manner therefore becomes the measure of the power conferred. The right of the people is absolute in the language of the bill of rights, "to alter, reform or abolish their government in such manner as they may think proper." This right being theirs, they may impart so much or so little of it as they shall deem expedient. . . . Hence the argument which imputes sovereignty to a convention, because of the reservation in the bill of rights, is utterly illogical and unsound. The bill of rights is a reservation of rights out of the general powers of government to themselves, but is no delegation of power to a convention. It defines no manner or mode in which the people shall proceed to exercise their right, but leaves that to their after choice. . . . If, by a mere determination of the people to call a convention whether it be by a vote or otherwise, the entire sovereignty of the people passes ipso facto into a body of deputies or attorneys, so that these deputies can without ratification, alter a government and abolish its bill of rights at pleasure, and impose at will a new government upon the people without restraints upon the governing power, no true liberty remains. Then the servants sit above their masters by the merest imputation, and a people's welfare must always rest upon the transient circumstances of the hour, which produce the convention and the accidental character of the majority which controls it. . . .

. . . . [W]hat clearer non sequitur is it than to affirm, because a people vote to call a convention, they therefore strip themselves of their most essential power to ratify or reject the work of their delegates? The inference is the very reverse, for a vote for a convention, which must be called afterwards by law, from its very nature refers the constitution and powers of a convention so to be called, to the law, which the people use to accomplish their purpose. . . . Did the people, when they voted to call a convention, intend to strip themselves of the power to ratify or reject the work of their servants? If so, where is the evidence of this intent? . . .

The people have the same right to limit the powers of their delegates that they have to bound the power of their representatives. Each are representatives, but only in a different sphere. It is simply evasive to affirm that the legislature cannot limit the right of the people to alter or reform their government. Certainly it cannot. The question is not upon the power of the legislature to restrain the people, but upon the right of the people, by the instrumentality of the law, to limit their delegates. Law is the highest form of a people's will in a state of peaceful government. . . . The idea which lies at the root of the fallacy, that a convention cannot be controlled by law is, that the convention and the people are identical. But when the question to be determined is between the people and the convention, the fallacy is obvious. . . . The calling of a convention, and regulating its action by law, is not forbidden in the constitution. It is a conceded manner, through which the people may exercise the right reserved in the bill of rights. It falls, therefore, within the protection of the bill of rights as a very manner in which the people may proceed to amend their constitution, and delegate the only powers they intend to confer, and as the means whereby they may, by limitation, defend themselves against those who are called in to exercise their powers. The legislature may not confer powers by law inconsistent with the rights, safety and liberties of the people, because no consent to do this can be implied, but they may pass limitations in favor of the essential rights of the people. The right of the people to restrain their delegates by law cannot

be denied, unless the power to call a convention by law, and the right of self-protection, be also denied. It is, therefore, the right of the people and not of the legislature to be put by law above the convention, and to require the delegates to submit their work for ratification or disapproval.

. . . . When it is conceded that a convention can be called and organized by law, the number and qualifications of the delegates prescribed, their districts defined, their mode of selection or appointment determined, their time and place of meeting fixed, and their compensation declared by law, the binding force of law must be conceded. The convention was a creation of law, and its members the offspring of law . . . . How, then, can the power of law be denied? Without it no delegates had existed, and no power had been transmitted to them. It is a solecism and a fallacy to assert that a law has the power to transmit the authority of the people, and yet is a nullity in the terms of its transmission. If the authority of the people passes to the convention outside of the law, the people are left without the means of self-protection, except by revolution. Then the singular spectacle is presented of the absolute sovereignty of the people being vested in a body of agents without any known means of transmission or of limitation. But clearly this cannot be when the fundamental rights of the people are at stake. . . .

No argument for the implied power of absolute sovereignty in a convention can be drawn from revolutionary times, when necessity begets a new government. Governments thus accepted and ratified by silent submission afford no precedents for the power of a convention in a time of profound tranquility, and for a people living under self-established, safe institutions. . . . Limits must be set to power. Liberty demands absolute security. No people can be safe in the presence of a divine right to rule or of self-imputed sovereignty in their servants to bind them without ratification.

Nor is the improbability of a wrong use, or an abuse of power, a sound argument in the light of our own knowledge. . . . In our day, conventions, imputing sovereignty to themselves, have ordained secession, dragged states into rebellion against the well-known wishes of their quiet people, and erected in the midst of the nation alien state governments and a Southern Confederacy. . . . Who can foretell the next subject of agitation? The times abound in contests. Labor and capital are in strife. Agriculture wars on transportation. Communism, internationalism, and other forms of agitation excite the world. Let conventions in such seasons possess, by mere imputation, all the powers of the people, and what security is there for their fundamental rights? . . . The fundamental rights of the people, the true principles of civil liberty, the nature of delegated power, and the liability of the people to temporary commotion, all rise up in earnest protest against such a doctrine of imputed sovereignty in the mere servants of the people.

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Decree *affirmed*.