



1947

# The Constitution Making Process

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## Recommended Citation

Reeves, J. E. (1947) "The Constitution Making Process," *Kentucky Law Journal*: Vol. 36 : Iss. 1 , Article 4.  
Available at: <https://uknowledge.uky.edu/klj/vol36/iss1/4>

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## THE CONSTITUTION MAKING PROCESS

By J. E. REEVES\*

Kentucky is by no means a stranger to the constitution making process. The present constitution is the fourth under which our government has operated. New constitutions were adopted in 1792, 1799, 1850, and 1891. The present one is already older by five years than was the oldest one of the others at the time it was revised.

## LONG CONSTITUTIONS NEED FREQUENT REVISION

We have heard a great deal lately about constitutional principles—what should be in a constitution and what should be left to the legislature. It is not my purpose to examine that phase of constitution making in detail. I do want to say, however, that in my estimation a state constitution serves just two basic purposes (1) it establishes a framework of government, and (2) it allocates and limits the powers of government. Obviously, the important process of constitution making can be approached in either of two ways. First, the framework of government may be established in skeleton form only and the limitations stated in broad general terms. That is what our federal fathers did in 1787. If a constitution is framed on this principle, it may well serve as the basic law for centuries. Secondly, the framework of government may be stated in detail and many specific limitations may be placed on the power and authority of officials.

The latter method has been preferred in the past by the people of Kentucky and most other states. It is probably the preference of the majority of Kentucky voters now, and in a democracy, the will of the majority must rule. A relatively long constitution, containing a good many specific limitations, may not be altogether objectionable, provided we do not lose sight of the fact that as times change and new conditions arise such a constitution will become outmoded and need thorough revision. Indeed, the time may come when future progress in

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a state will depend upon revision. Such a time has come in Kentucky. It is imperative that our state should again exercise the constitution making function.

#### CONSTITUTION MAKING IS CONSTITUTION REVISION

I have chosen, in this paper, to deal with the broad problems of constitution making from the time the need is felt until the process is ended, and with the participation of various groups, rather than with the details of what the process should evolve. But first, briefly, what do we mean by "the constitution making process"? It should be, and to some extent necessarily is, a continuous process. Not only do the original drafters of a constitutional document make a constitution, but the interpreters and users of the document-remake it as do the amenders and revisers. Once a state has established a form of government and written a constitution, there is no such thing as the writing of a totally new one unless there is a total and radical change in the form of government. No state of the American union has ever or can ever experience such change under the Federal Constitution. As a consequence, when a convention is called, the process of constitution making in an American state is, in its narrow sense, the process of constitutional revision because there is a constitution given in the first place and the revisers always work from that. When they have finished, the changes wrought may be, and frequently are, so considerable as to justify calling the document a new constitution.

#### THE PROBLEM OF KEEPING CONSTITUTIONS MODERN

The above statements are made not for the purpose of quibbling over terms but in order that we may clearly see the problem which, simply stated, is that of keeping constitutions up to date. This problem is accentuated by the twin myths in American constitutional doctrine that constitutions deal with basic principles and that they are sacrosanct and capable of serving all needs and all times. If the first were true, the second would be more nearly so. The early state constitutions did deal largely with basic principles, but in that revolutionary era, when the feeling of sanctity had not yet enveloped constitutional documents, the process of revision was comparatively easy

to accomplish despite the fact that frequently no formal provision was made for it. With each revision, legislation needed by that generation was added. Soon an aura of greatness surrounded the framers of the new document and a feeling of reverence attached itself to the constitution. Further change was resisted by making reference to the Federal Constitution, the American Flag, and the Ten Commandments.

Apparently, the ideal way to keep a constitution modern would be to amend particular sections as they become out-moded. This type of change customarily fails to accomplish its purpose partly because it is impossible to put on an educational campaign for each separate amendment, and as time goes on needed changes accumulate. Wholesale revision cannot be accomplished by the regular amendment process. The constitutional convention called for the purpose of rewriting the constitution is a common occurrence in most of our states. There has been a total of about 220 such conventions. Generally, they have been called somewhat belatedly and their work has not always been approved by the voters.

#### ORIGIN OF CONSTITUTIONAL CONVENTIONS

Both written constitutions and constitutional conventions are of American origin. At the time of the Declaration of Independence and the severance of our ties with Great Britain, the charters granted to the colonies by the mother country were automatically nullified. These charters had established a precedent for operating under a written instrument which set up a framework of government and guaranteed certain rights. When the charters were nullified a need for something to take their place was immediately felt. *De facto* governments were set up and written constitutions established. Some of the states readopted their colonial charters with minor changes to serve as state constitutions.<sup>1</sup> The others adopted constitutions based upon the charters, British constitutional principles, and needs peculiar to America.

The first state constitutions, whether remodeled charters or new documents, were framed by the legislatures or by conventions which were also provisional legislatures and exercised

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<sup>1</sup>Massachusetts, Connecticut, and Rhode Island.

general legislative powers.<sup>2</sup> In three instances these legislative bodies framed and promulgated constitutions without either advance authority from or ratification by the people. In five instances, constitutions were enacted by the legislative bodies after express authorization but were not submitted to the people for approval. In five other cases, the framing of constitutions was authorized by the people and there was formal or informal submission to popular approval.<sup>3</sup>

At the time of the convening of the Federal Constitutional Convention, only two states—Massachusetts and New Hampshire—were operating under constitutions framed by conventions called for that express purpose. They marked the birth of the constitutional convention as we know it, and the work of each of these conventions was approved by popular vote before it became effective.<sup>4</sup>

Six of the early state constitutions provided for no method of amendment or revision. Of those that did make provisions for changes, some provided for amendment by the legislature and some provided for amendment or revision by a convention. None provided for both.<sup>5</sup> At present all states except one provide for amendments to be submitted by the legislature and all except twelve provide for revisions by convention. It also appears that even when no specific provision for a convention is included in a constitution, a convention may be called under the right of the people to “change or alter their government.”<sup>6</sup>

#### CALLING THE CONVENTION

Generally speaking, the steps necessary to authorize a convention are (1) action by the legislature, and (2) an affirmative popular vote. Kentucky is the only state that requires

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ROGER S. HOAR, *CONSTITUTIONAL CONVENTIONS, THEIR NATURE, POWERS, AND LIMITATIONS* (Boston: Little Brown and Company, 1917), p. 4.

<sup>2</sup> VERNON A. O'ROURKE AND DOUGLAS W. CAMPBELL, *CONSTITUTION MAKING IN A DEMOCRACY* (Baltimore: The Johns Hopkins Press, 1943) p. 24 or any standard work on state government.

<sup>3</sup> Hoar, *op. cit.*, pp. 5-6.

<sup>4</sup> *Ibid.*, pp. 8-9.

<sup>5</sup> J. E. Reeves and Kenneth E. Vanlandingham, *Amending and Revising State Constitutions* (1947) 35 KY. LAW JOUR. 125-126. See also *Ibid.*, p. 9.

action by more than one legislative session. Here the general assembly at two consecutive regular sessions must pass a resolution by a majority vote of all members elected to each house. The affirmative popular vote required in Kentucky is a majority of the votes cast on the subject, which majority must be equal to twenty-five per cent of the total number of qualified voters who voted in the last preceding general election. In other states the necessary vote varies all the way from a mere majority to a majority of the votes cast in a general election. These requirements make it exceedingly difficult for Kentucky and some of the other states to revise their constitutions.

It seems proper to consider the campaign and referendum on the calling of a convention in some detail. The Dimocks in their *American Government in Action* have said.

Constitutional conventions succeed only in so far as a vigilant and unselfish citizenry acting as a rule through civic organizations rather than through political parties, determines to effect needed changes. Frequently the impetus for sweeping constitutional change comes from universities, or bar associations, or leagues of women voters. If we ever lose faith in this source of civic betterment, our democracy will be seriously impaired.

Some recent examples will illustrate the type of campaign that may be conducted. In Missouri the question of calling a convention automatically went to a vote of the people in November, 1942. More than a year before the election, an active campaign for constitutional revision had been started. A state-wide committee was created, local committees were organized, and money was collected for the campaign. Endorsements by and assistance from civic, professional, and other organized groups were sought and obtained. Radio time and press support were secured. Speakers were sent out over the state, and a constitution day was held on which programs, radio time, and newspaper space were devoted to the need for constitutional revision.

In Missouri educators and the League of Women Voters were instrumental in getting the campaign started, and they

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MARSHALL E. DIMOCK AND GLADYS O' DIMOCK, *AMERICAN GOVERNMENT IN ACTION* (New York: Rhinehart and Company, 1946), pp. 89-90.

remained active participants throughout. However, political leaders, on a bi-partisan basis, and civic leaders were soon found in the most prominent positions in the campaign. The Republican party endorsed the call for a convention, and although the Democratic organization failed to do so, sixty prominent Democratic leaders did endorse it.<sup>8</sup>

In New Jersey, where there is no provision for the calling of a convention, the expedient was adopted of having the voters authorize the 1943 Session of the Legislature to act as a convention. A campaign somewhat similar to the Missouri campaign was carried on.<sup>9</sup> An interesting phase of the New Jersey campaign was that it was more successful in the less densely populated areas than in the counties containing large cities. This has been attributed to the difficulty of voting on the voting machines in use in the urban counties. However, the Hague machine is credited with defeating the new constitution after it was framed,<sup>10</sup> and it seems probable that the apathy of the political machines may have been an important factor in the small urban vote to initiate revision.

In Kentucky the 1944 session of the General Assembly passed a resolution to submit the question of calling a convention to a popular vote. This resolution had to be passed again in 1946 before it could go to a vote in 1947. Mindful of the fact that an unsuccessful effort had been made to call a convention in 1931 and that the required vote would have to be larger than is generally cast for constitutional amendments, the proponents of revision began early to try to create interest. In January, 1945, a radio round table was conducted on the subject. The Committee for Kentucky took up the issue and employed Attorney Eli H. Brown, III, to make a study of the constitution. The study was published in May, 1946. Several of the Committee's "Wake Up Kentucky" programs were devoted to the issue.

During the summer of 1945, the Society for the Discussion

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<sup>8</sup> S. L. Morton, *Missouri Wins Constitutional Revision*, (1942) 3 NATIONAL MUNICIPAL REVIEW 552.

<sup>9</sup> John Bebout, *New Jersey Will Vote on Constitutional Revision*, (1943) 32 NATIONAL MUNICIPAL REVIEW 328-29.

<sup>10</sup> There is now a movement on foot to call a New Jersey Constitutional Convention without specific authorization.

of Kentucky's Constitution was created. This organization, composed both of proponents and opponents of a convention, sponsored three formal debates and several panel discussions on the subject. After final legislative action March 5, 1946, the Committee for a New State Constitution was organized. It secured financial support, sought endorsement from statewide organizations, established a speaker's bureau, and has to date sponsored about seven hundred speeches and panel discussions on the need to revise Kentucky's Constitution. In December, 1946, this committee was absorbed into the Campaign for a Kentucky Constitutional Convention. It is anticipated that the Campaign will utilize a yet more extensive speaking program, local organization, radio time, newspaper space, and other types of publicity

#### TIME, PLACE, AND PERSONNEL

In most states a favorable vote of the people on the question of calling a convention directs the legislature to formally call the convention and provide for the election of delegates. The Act calling the convention will specify the time and place of holding the convention unless these are provided for in the Constitution. The Kentucky Constitution does provide that the delegates will meet in Frankfort within ninety days after their time of meeting but the place of the convention is provided in election.<sup>11</sup> In twelve other states<sup>12</sup> provision is made for the time of meeting but the place of the convention is provided in only four other constitutions.<sup>13</sup>

Twenty-one states fix the number of delegates to a constitutional convention or provide a minimum or a maximum number.<sup>14</sup> These provisions vary somewhat but are generally

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<sup>11</sup> Kentucky Constitution, sec. 260.

<sup>12</sup> California, Colorado, Delaware, Florida, Illinois, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York and Ohio; for a discussion of these and other statistics see HARVEY WALKER, *LAW MAKING IN THE UNITED STATES* (New York: Ronald Press, 1934), pp. 69-77.

<sup>13</sup> Delaware, Michigan, Missouri and New York.

<sup>14</sup> California, Colorado, Delaware, Florida, Idaho, Illinois, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Ohio, South Carolina, South Dakota, Utah, Washington, and Wyoming.

based in part, at least, upon representation in one or both houses of the legislature. In Kentucky the number shall be the same as the membership of the lower house of the General Assembly and they shall be elected from the same districts.<sup>15</sup> A constitutional convention is a deliberative body and should be relatively small. At present Kentucky provides for fewer delegates than many of the states, but it is suggested that consideration might be given to making the senate, rather than the house, the basis for representation.

Generally, state constitutions do not fix the qualifications of delegates. Kentucky is one of the five exceptions<sup>16</sup> and provides that the qualifications of members shall be the same as those of members of the lower house of the General Assembly. Kentucky and four other states<sup>17</sup> expressly give to the convention power to act as judges of the election and qualifications of their own members, but such authority can probably be exercised by the convention without express grant.

Only three constitutions fix the compensation of delegates.<sup>18</sup> The Kentucky Constitution requires the legislature to "provide for their compensation."<sup>19</sup> Apparently the \$5000 annual salary limitation applies. A few other states have provisions similar to Kentucky's.

The method of electing delegates varies widely from state to state. For instance, the Missouri provision for one Democratic and one Republican from each senatorial district<sup>20</sup> is to be contrasted with the Kentucky requirement that the legislature shall make provision for the election of a delegate from each district from which a member of the lower house of the General Assembly is elected.<sup>21</sup> The Kentucky Legislature can provide for a partisan or non-partisan ballot. Which plan will be provided will probably depend upon the pressures which are brought to bear upon the legislature.

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<sup>15</sup> Kentucky Constitution, section 259.

<sup>16</sup> The others are California, Colorado, Illinois and Missouri.

<sup>17</sup> Delaware, Michigan, Missouri and New York.

<sup>18</sup> Michigan, Missouri, and New York.

<sup>19</sup> Section 261.

<sup>20</sup> Missouri Constitution, Article XII, section 3.

<sup>21</sup> Kentucky Constitution, section 259.     ---

## PREPARATION FOR THE CONVENTION

W Brooks Graves, an outstanding authority on state constitutions, has said.

In a day when American life was relatively simple and when the tasks imposed upon government were correspondingly few in number and less technical in nature, the work of framing a constitution was not nearly so difficult as it is under modern conditions. Under these conditions it would be impossible for any group of men possessing anything less than omniscient wisdom to deal intelligently and wisely with the multitude of problems confronting them, on the basis of their own information. Consequently it is necessary to prepare, in advance of the meeting of the convention, information and working materials for the members. Until recently such preparation consisted largely in making collections of state constitutions, from which members of the convention might determine how the questions facing them had been handled by the constitution makers of other states. Of late a more thorough and detailed preparation has been necessary.<sup>22</sup>

Elihu Root speaking before a meeting of the Academy of Political Science in New York, just prior to the New York Constitutional Convention of 1915, and referring to the previous convention in 1894, said.

This meeting is something which twenty years ago never had a parallel. The members of that convention evolved out of their inner consciousness the provisions which seemed to them good for the state.<sup>23</sup>

We in Kentucky, might say that 57 years ago, even 16 years ago, this series of seminar discussions never had a parallel. Such a series 16 years ago and the action that probably would have followed might have helped to create the necessary interest to bring about the calling of a convention. Such a series, had it been possible, 57 years ago might have created sufficient interest to result in some improvement in the constitution of 1891.

Without condemning any particular constitution as being inadequate for its time, we can probably say that the constitutions framed between about 1870 and 1910 were relatively poor

<sup>22</sup> GRAVES, W. B., *AMERICAN STATE GOVERNMENT*, (D. C. Heath and Co., Boston, 1945) p. 86.

<sup>23</sup> ROOT, ELIHU, *The Principles and Practice of Constitutional Revision*, THE REVISION OF THE STATE CONSTITUTION. (The New York State Constitutional Convention Commission, 1915) p. 2.

documents. They were of poor quality largely because there were few if any discussions such as this, and the conventions had little or no technical assistance. In that era, government was becoming complicated, social and governmental needs were beginning to change rapidly, but the need of such assistance had not yet been realized—the social scientist had not yet come into his own, and the major efforts of constitutional lawyers were devoted to the fields of practice and teaching.

The social scientists of Kentucky (including the constitutional lawyers) must not cease their efforts with the close of this series of discussions. They must proceed to prepare the best acceptable recommendations on all phases of the constitution and see to it that they are ably and attractively presented to the public and to the convention. In doing so they will be acting in accordance with what has now become an established tradition, followed, at least to some extent, in every state which has had a convention since 1915.

There are several channels through which social scientists can help in preparing for the convention. In the first place if we in Kentucky are to have a constitutional convention in 1949, there may be an official study commission established by the 1948 session of the legislature. Perhaps one of the first steps of social scientists should be to examine the need for such a commission and present the results to the 1948 legislature. Such an agency, if established, will require technical assistance from those skilled in the various fields of social study and should be provided with sufficient funds to pay them.

There may be an unofficial citizens group, similar to the Constitution Foundation of New Jersey, which was active in the recent attempt to revise that state's constitution.<sup>24</sup> Such an organization would also require the services of social scientists on a salaried basis. Commissions, both official and unofficial, should and probably would seek the unpaid assistance of social scientists. And, since scholars generally expect to do a certain amount of research for which there is no direct pecuniary reward, such an arrangement has its advantages as well as its disadvantages.

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<sup>24</sup> BEBOUT, *op. cit.*, *supra*, n. 9, at 329.

There will probably be innumerable pressure groups ranging all the way from the League of Women Voters to the National Manufacturers Association and the Congress of Industrial Organizations which will seek to influence the convention. They, too, will need technical assistance, and if a social scientist approves the aims of such a group there seems to be no reason why he should not assist it in relation to constitutional revision.

There can be no request for technical aid in preparing information for the convention until we know there will be one, but if social scientists are going to wield the influence that they should in the constitution making process they ought to be preparing now. Their efforts will not be lost even if we lose the election in November, for it is generally conceded that some changes must be made. If we do not have a convention they must be made by amendment. I believe, however, that there will be a convention, and the major part of the burden of preparing for the convention must fall upon social scientists. They should be careful not to shirk the job.

#### WORK OF THE CONVENTION

The General Assembly must provide for the exact date of the assembling of the convention, which, under the provisions of the present Kentucky Constitution, is to meet in Frankfort within ninety days after the election of the delegates.

The convention will choose its own officers and make its own rules. Who will preside until a president is elected may be a minor problem of some consequence. In 1890, Governor Simon Boliver Buckner was a delegate to the convention, and it was unanimously agreed that he should preside until a temporary chairman was chosen, and George Washington, a delegate from Campbell County, was chosen temporary chairman. Whether we will again have two such distinguished gentlemen to turn to is problematic.

In the past, conventions in this and other states have generally followed the practice of adopting the rules of one of the houses of the General Assembly with such changes as seem desirable or expedient.

Committees are usually appointed to study and prepare drafts on various phases of the constitution. Here social scientists should again have an opportunity. Studies and recommendations that have been previously prepared should be submitted to these committees. Additional information may be requested and you may be asked to appear before committees to explain desired changes and estimate their effect.

The drafting of provisions will require specialized legal talent, but other social scientists interested in the adoption of new constitutional provisions with certain specific meanings must carefully watch the wording of such provisions. The first thing to note is that the reading of no section of the constitution should be changed, unless it is desired to change the meaning. Otherwise the courts may read new meaning into a revised statement. An unnecessary change of wording is exemplified by the Illinois Convention of 1870 which added to the guarantee of the right of trial by jury the phrase "as heretofore enjoyed." A possible interpretation of this provision would have been that no subsequent changes in the statutory law relative to jury trial could be made. The state courts demed that result, but held that legislation affecting jury trial was permitted, provided such legislation had been in force in that state at some time prior to 1870.<sup>25</sup>

Care should be used not to give a technical meaning to simple words contrary to the actual desires of the framers. Ambiguous use of words like "and" "or" "shall" and "can" may cause misunderstanding.

Details put in a constitution may make it subject to unintended interpretations, this, needless to say, is not the greatest evil arising from detailed constitutions, but it is one to guard against. It is unlikely that the framers of the Kentucky constitution of 1891 intended to prevent compulsory workmen's compensation or to make mandatory a state tax on real estate. Indeed, they probably would have approved the contrary in one or both of these cases. The prohibition of compulsory workmen's compensation was based upon Section 54 of the Kentucky constitution which reads "The General Assembly shall

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<sup>25</sup> Illinois Legislative Reference Bureau, Constitutional Convention Bulletins, Springfield (1920) p. 16, and cases there cited.

have no power to limit the amount to be recovered for injuries resulting in death or for injuries to person or property” To a certain extent, this partakes of the nature of an implied limitation, but a better illustration of the latter is taken from the Nebraska constitution of 1876. The legislature was authorized to establish a school or schools for the “safe keeping, education, employment, and reformation of all (delinquent) children under the age of 16 years.” Later the legislature sought to extend the age to 18 years, but the court held that legislative power was limited to making such provisions for children under 16.<sup>26</sup> Had the constitution said nothing whatever on the point, the legislature, under its police power, probably could have made any reasonable provision.

It is sometimes necessary, however, to make specific provision for the exercise of certain powers, since otherwise limitations on their exercise may be implied from the Bill of Rights or other sources. But care should be taken to make any statement of a grant of power in general terms. Minute details in specific grants of power or other provisions prevent future progress and lead to endless litigation. For these reasons, social scientists, particularly scholars in the field of law, should watch carefully the work of the convention and help in the effort to prevent hidden meanings or implied limitations.

A drafting committee or an editorial committee, whose function it should be to make constitutional provisions mean what is intended and only that, should receive early attention from the convention or its chairman, and the committee's work should be carefully scrutinized by all intelligent citizens, especially those whose professions give them more than ordinary interest.

#### POLITICAL PARTIES

Party politics may play a greater or a lesser role in a constitutional convention. That the parties will make their influence felt is certain. The method of choosing delegates may determine the intensity of partisan influences. Delegates to the New York convention of 1938 were elected on a partisan basis and partisanship and factionalism were evident at every crucial

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<sup>26</sup> Scott v. Flowers, 61 Neb. 621 (1901).

point.<sup>27</sup> By constitutional provision, delegates to the Missouri convention of 1943 were approximately evenly divided between the two parties. An anti-New Deal Democrat was chosen as chairman, and partisanship, while present, was much less evident than in New York.

Partisanship, in so far as it manifests itself in a convention, will be interested primarily in jobs and position, in the promotion of policies which will attract votes to the party, and in the placation of interest groups. The question of who get the jobs and the honors concerns the general welfare only in so far as it influences policy determination. The policies adopted by the convention are of vital concern to all. It is then as the party controls the policy activities of delegates, that it becomes important in the process of constitution making. Our major parties seldom differ on basic principles, and it would be better if most matters over which they do differ were left to the discretion of the legislature. In the early stages, members of both parties have been working together harmoniously in Kentucky. It is hoped that they will continue to do so.

To this end, non-partisan election of delegates would seem preferable. This is not to say that partisan influence can be eliminated from the convention, but perhaps it can be minimized. There is also the possibility that a few outstanding individuals without close party connections may be chosen, if the election is non-partisan.

#### PRESSURE GROUPS

Pressure groups have been described by the authors of *Constitution Making in a Democracy* as "an inevitable concomitant of representative democracy."<sup>28</sup> The same authors have also said "Pressure groups are too strongly established as forces in the democratic process to be expected to go into hiding when constitutional conventions begin their work."<sup>29</sup>

Many of the proposals which pressure groups will want adopted by a constitutional convention should also be left to the discretion of the legislature, but some pressure groups are

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<sup>27</sup> O'Rourke, *op. cit. supra*, n. 3, Ch. IV & V

<sup>28</sup> *Ibid.*, p. 156.

<sup>29</sup> *Ibid.*, p. 157.

interested in fundamental principles, which have a place in a constitution, and may differ with other groups in relation to them. For instance labor groups will want to protect the right to bargain collectively, and business groups will want to protect property rights. These groups may oppose each other on matters related to these rights, and each should be allowed to present its viewpoint.

In addition to possible differences on basic principles, pressure groups perform valuable services for the convention. They make studies and prepare reports, they appear before committees and give the members the advantage of their information, some of it technical in nature. They give the convention members some indication of how large segments of the public may react to certain proposed constitutional provisions. This is not to say that the influence of pressure groups should be maximized rather than minimized, it is to say that pressure groups are entitled to exert influence for the protection of their basic rights, and that their influence is in part very desirable. It may be said parenthetically that to fear a convention because of pressure groups is no more logical than to fear the submission of amendments by the legislature.

#### CONTROVERSIAL ISSUES

Political parties and pressure groups cannot be eliminated from convention councils. For this and other reasons controversy will exist in plenty in relation to convention proposals, but it is desirable to keep highly controversial provisions out of a revised constitution. As a matter of fact, many proposed revisions which were excellent in most respects, have been defeated at the polls because of the controversial nature of some of the provisions. Examples are revisions submitted by the New York convention of 1915 and the Illinois convention of 1920-22.

When a constitution has become so seriously outmoded as to bring about the calling of a constitutional convention there will be a large number of changes on which a vast majority of the people can agree—particularly if a concerted effort is made, through a prolonged educational campaign, to convince them of the desirability of such changes. Modernizing the machinery of government, bringing the tax systems up to date, and providing

adequately for accepted social and educational services can be listed as largely noncontroversial issues. At least these are issues on which a safe majority can probably agree after an educational campaign. However, if we have grouped in opposition to a revised constitution all opponents of revision as such and opponents of a few highly controversial provisions like prohibition, a unicameral legislature, and anti-labor measures, revision would surely lose at the polls, and all of the controversial sections would go down to defeat with it.

If, however, there should develop an insistent demand for the submission of one or more highly controversial provisions, there is a way of handling the situation which has proved highly satisfactory on a number of occasions. Several states, including Ohio in 1851 and New York in 1938, have submitted complete revisions of their constitutions to be voted on as one question and have, in addition, submitted one or more proposals, considered highly controversial in nature, to be voted on separately

#### CONSTITUTION MAKING BY COMMISSION

So far we have discussed the constitutional convention as if it were the only instrument by which complete revision could be brought about. Conceivably, the legislature, if not prevented by provisions such as our two amendment limit, could submit an omnibus amendment or a series of amendments which would attempt to cure all of the major imperfections in the existing constitution. This would mean, however, that the legislature, an agency chosen primarily for the performance of other duties, would be asked to study and propose revisions covering the entire constitutional document. A thorough and satisfactory job could not be expected unless the legislature had expert assistance. In an effort to provide such assistance, a Constitutional Revision Commission has been created in several states to study the constitution and recommend changes, or a new document to the legislature. Since this approach would be in effect to have the legislature serve as a constitutional convention, it would probably require approval by the people, and the process would be approximately as long as that of calling a convention. It would be less democratic since there would

be no delegates chosen for the particular purpose of preparing constitutional revisions for submission to the people. A further objection often advanced against the commission-legislature method of revision is that it gives the administration in power too much influence in shaping the fundamental law.<sup>30</sup> A study commission to prepare information for the convention would give the administration less power largely because the delegates would have time to study and adopt, change, or reject the recommendations of the commission.

#### SUBMISSION TO THE PEOPLE

Ordinarily, before a proposed constitution can become the basic law of a state, it must be approved by the people. Thirty-six state constitutions so provide. In the other twelve, of which Kentucky is one, presumably a convention could be called and a constitution framed and promulgated as the fundamental law without submission to a popular referendum. In Virginia this was done in 1902, even in the face of a provision in the law calling the convention which purported to require such submission, and the new constitution was held valid by the state's highest court.<sup>31</sup> The Kentucky court upheld the constitution of 1891, framed under similar circumstances, and changed in certain respects by the convention after approval by the people.<sup>32</sup>

In each of these cases, however, the people had approved the calling of a convention before the legislature provided that its work must be submitted to the people. The resolution submitting the convention call to a referendum in 1947, provides that the convention's work must be submitted to a popular vote. This previously enacted limitation will bind the convention.<sup>33</sup>

When a revised constitution is submitted to popular vote, there will again be a campaign to convince the people of its superiority over the old document. Pressure groups will line up for and against, political parties may take positions, and public

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<sup>30</sup> Saye, Albert B., *Georgia's Proposed New Constitution* (1945) 39 AMERICAN POLITICAL SCIENCE REVIEW 460.

<sup>31</sup> *Taylor v. Commonwealth*, 101 Va. 829 (1903).

<sup>32</sup> *Miller v. Johnson*, 92 Ky 589 (1892).

<sup>33</sup> See HOAR, *op. cit.*, *supra*, n. 2, Chapter X, and cases and articles there cited, especially *Woods Appeal*, 75 Pa., 59 (1874) at 72-74.

spirited citizens will take to the lecture platform and the public presses. It is hoped that the peoples' knowledge of state government and fundamental law will thereby be enhanced.

#### A JOB FOR ALL

Constitution making is thus seen to be a process where the final product can best be created by a convention called by the people, with its work approved by the people. But because of the technical nature of the work and the prominent part played by the general public, it is a process for which no single group can receive or justifiably claim all of the credit. There is work for all in constitution making and the work of scholars in the fields of law and the other social sciences should by no means be overlooked. They may point to the need in the first place. They can help in the campaign for popular approval of the convention, at least by pointing out the weaknesses of the old document, they can recommend provisions or even drafts to the convention. They can criticize its work and point out the strength and weaknesses of the product of the convention.

# KENTUCKY LAW JOURNAL

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Volume XXXVI

November, 1947

Number 1

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Published in November, January, March and May by the College of Law, University of Kentucky, Lexington, Kentucky Entered as second-class matter October 12, 1927, at the post office, at Lexington, Kentucky, under the act of March 3, 1879.

SUBSCRIPTION PRICE \$2.50 PER YEAR

\$1.00 PER NUMBER

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