Is a Referendum on a Federal Amendment Constitutional?

This question will be before the courts in several states in the near future, because of the proposed referendum to the 18th amendment in fourteen states.

Article V of the federal constitution provided:

"The congress, whenever two-thirds of both houses deem it necessary, shall propose amendments to this constitution, or on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one of the other mode of ratification may be proposed by the congress."

This provides two methods for proposing amendments. One, by congress and the other a convention upon the application of the legislatures of two-thirds of the states. In either case the proposed amendment must be ratified by the state legislatures or a state convention as congress specifies. No other method is outlined or provided in the federal constitution.

It is clear that a proposal of a referendum imposes a limitation and a restriction, unauthorized, and hence contrary to Article V. This article provides that all amendments shall be valid to all intents and purposes WHEN RATIFIED BY THE LEGISLATURES of three-fourths of the states . . . . . The proposition to refer to the people means that such amendment shall not be valid when ratified by the legislatures but that such ratification by the legislature shall in no event be effective until a certain number of days after it has been adopted, and that if a petition asking that it be referred is filed within a certain time, that "SAID AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES SHALL NOT GO INTO EFFECT UNTIL AND UNLESS APPROVED BY A MAJORITY OF THOSE VOTING UPON THE SAME." It would be hard to imagine a more direct interference with a provision of the constitution of the United States. The attempt to change the method of ratifying amendments has been made on many occasions. In every instance it has failed because the conclusion invariably reached was that the federal constitution itself must be amended before any new plan to ratify an amendment could be adopted.

EACH STATE ACCEPTED THE PROVISION RELATING TO RATIFICATION IN THE FEDERAL AMENDMENT

When a state became a part of the federal government it agreed to accept the provisions in the federal constitution. One of those provisions is that an amendment may be adopted to the federal constitution by the legislatures of three-fourths of the states. There was no provision referring to the acceptance or rejection of the amendment to the people. A state cannot prescribe a different method for amending the constitution than that which is found in the federal constitution. Any referendum on the ratification resolution is unauthorized, unprecedented and a meaningless plebiscite to delay the operation of the date when the federal amendment will go into effect.

RATIFICATION IS NOT A LEGISLATIVE ACT CONTEMPLATED BY A CONSTITUTION

The ratification of a federal amendment is not a legislative act involving legislative power subject to a referendum. It involves no legislative discretion as to form, penalty or substance of the amendment. It is the act of a delegated body to accept or reject the amendment just as nominations of a governor are accepted or rejected. Referendums are applicable only to legislative acts. The case of Ohio vs. Hildebrandt, 94 O. S. 154, quoted by the advocates of a referendum, is not in point. That case involved the congressional Gerrymander Act. Article 1, section 4, of the federal constitution provides:

"The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislatures; but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators."

Under this authority the Ohio constitution and the legislature provided for a referendum on an act adopted by the legislature. The Gerrymander Act was a legislative act. The federal constitution gave the legislature this specific authority to provide the time, place and manner of holding elections. The only limitation on this power was the authority of congress to alter these regulations except as to the place of choosing senators. In 1911 congress amended the federal act to specifically provide for just such a contingency as was used. It amended the law so that the redistricting in a state "might be made in the manner provided by the laws thereof." There is no such provision authorizing a referendum on the action of the legislature ratifying a federal amendment. The federal constitution simply provides that the amendment "shall be valid to all intents and purposes, when ratified by the legislatures of three-fourths of the several states."

There is no provision that the legislature may provide the time, place or manner of conducting an election relating to ratification. Nor has congress provided that ratification may be completed in the manner provided by the laws thereof. It simply points out one method of ratification, to wit: the legislature itself. Any referendum or any other method which the legislature might choose as a means of ascertaining the sentiment of the people, would have no binding effect. The legislature has this duty impressed upon it by the federal constitution. It cannot side-step, equivocate or shirk the responsibility. Until the federal constitution is changed, the legislature must act and no other authority can be substituted for it. The United States supreme court, in the case of McPherson vs. Blacker, 146 U. S. 1, in referring to article 1, section 4, above mentioned, quoted with approval the action of the committee holding that the word "legislature" did not mean legislative power.

This construction of the law is corroborated by the opinion of the Attorney General of Ohio in 1917, after the decision of the case relied upon by the liquor interests:

"Wherever a 'state legislature' is referred to in the federal constitution merely as descriptive of a body of public officers, or wherever powers or privileges not essentially legislative are conferred in terms upon a 'state legislature' the presumption does not apply."

The function of the legislature in ratifying constitutional amendments is not a legislative function. It is the executive act, as a designated agent of the people of the state, in consenting to an amendment framed and submitted by congress. The legislature has no power to control the form of the proposed amendment. It may ratify it in the exact form in which it has been proposed by congress, or it may fail to ratify it. Such a function is not legislative. It is similar to the power of the legislature to accept or reject a nomination of an appointee by the governor.

The ratification by the legislature has never taken even the form of legislation. The practice has been for the houses of the legislature to ratify by joint resolution. The requirements as to the reading, printing, etc., of the proposal, absolutely essential in legislation, have never been insisted upon. See Mathews Legislative and Judicial History of the 15th Amendment, p. 68. The joint resolution, when passed, has never been submitted to the governor to accord him the veto power. This practice, the legality of which has never been, and is not now disputed, is conclusive of the case, for if the word "legislature," as used in Article V, United States constitution, was meant to include all those who do and may exercise any control over state legislation, when the failure to accord the governor the veto power over these resolutions has been illegal and not a single amendment of the United States constitution has been unconstitutionally adopted.

ARTICLE FIVE — SIMILAR TO ORIGINAL SECTION THREE, ARTICLE ONE

The power given to the legislature by Article Five is just as complete as that formerly given to the legislature by Section Three of Article One of the United States constitution, with reference to the election of senators, which is as follows:

"Section 3. The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote."

It was admitted by every one that it was necessary to amend the constitution of the United States, and not the constitution of the various states, in order to provide for the direct election of senators. And the amendment to the constitution of the United States so providing was adopted by the legislature of Ohio after the initiative and referendum was in effect in this state. If the theory which is relied upon by opposing counsel is correct, then the ratification of this amendment by the legislature was entirely unnecessary.

If any authority outside of the constitution of the United States itself is needed in support of the proposition that the word "legislature" as used in Article 5, and Section 3 of Article 1, meant the legislature of the state composed of the senate and house of representatives as distinct and separate from the people and the popular vote, an examination of the Federalist alone will produce it. It is unneccessary to refer to special papers, for it clearly appears from the Federalist as a whole that the constitution makers fully considered the advisability of vesting the power of action in certain matters with the people as a whole, to be exercised by direct vote, or with the legislature as the body representing the people; and that by express design the power to choose senators was vested not in the people but in the legislature; it is equally apparent that Article 5 which vests the complete power as to ratifying amendments in the legislature was advisedly and designedly vested in the legislature to the exclusion of any direct participation by the people except as the people ratify or take part in the election of the legislature.

The only way a referendum can be legally secured is to offer an amendment to the federal constitution in the manner provided in the constitution. It is an interesting fact that years ago a resolution was proposed in congress to provide for a referendum of federal amendments. It was defeated by the states that are now most desirous of the referendum. Any proposal for a referendum on the 18th Amendment before the constitution itself is amended is as abortive an attempt to nullify the constitution as was made by South Carolina in 1863.

A referendum on a federal amendment is unprecedented and unauthorized. It would be a Bolshevist attack on the federal constitution overriding reason and the orderly precedure by which the government alone is given stability and worth.

WAYNE B. WHEELER.

HEARTILY INDORSES CONSTRUCTIVE PROGRAM

O. W. Newman, Idaho: You have my hearty indorsement on all the paragraphs in your reconstruction program. As you have led the reforms for moral and good government in the past, I do hope you will continue to lead in the future. Some one will have to lead the forces of righteousness and truth against the cursed monster that caused this awful war, namely militarism. There is a movement on foot in this country trying to convert our nation to a war machine. Woe be to us and the rest of the world if that policy carries. If we are to take over Germany's militaris and England's navalism then all our sacrifices in the war are lost, and our sons and brothers have bled and died in vain.

In the great fight for true democracy and for peace and good will among the people on earth, in the name of God I'll stand by you to the last ounce of my ability.

SINE DIE ADJOURNMENT IN HONOR OF MR. BRYAN

The Texas state senate concurrent resolution by Senator McNealus providing that when the legislature adjourns sine die at 6 p. m., March 19, that it do so in honor of the 59th birthday of William Jennings Bryan, was adopted unanimously by the senate. William Jennings Bryan spent his 59th birthday, quietly with Mrs. Bryan at their hotel, in Baltimore.—The Dallas Democrat.

LET FARMER BOYS OUT

The farmers boys who want to return to the farm should be given the preference in the muster out. Food comes first.