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IS THERE A NEED FOR A STATE CONSTITUTIONAL CONVENTION?

The most obvious—and the most comprehensive—manner of revising a state constitution is through the work of a constitutional convention. Two Nebraska attorneys, both graduates of the University of Nebraska College of Law and both leaders in state government, express opposing views on the need for calling a convention in the two articles below. Charles Thone, Nebraska Republican State Chairman, states the case for the proponents of the convention method of revision. Former State Senator Ray C. Simmons dissents and states his position that the Legislature is able and will continue to be able to amend the Constitution when and if revision is necessary.

The Editors

A Constitutional Convention: The Best Step For Nebraska

Charles Thone*

Among the hardy political perennials is the question of the need for constitutional revision in Nebraska. Assuming that there is a need for revision, or that there should at least be a thorough reappraisal of our constitution in the light of the state's present day needs, what method should be followed to carry this out? The Nebraska Constitution prescribes three different methods for originating constitutional amendments. Amendments may be originated by act of the legislature,¹ by initiative petition,² or by constitutional convention.³

The best results can be accomplished by means of the constitutional convention.

The principal advantage which recommends this method is

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¹NEB. CONST. art. XVI, § 1.

²NEB. CONST. art. III, § 2.

³NEB. CONST. art. XVI, § 2.

that the convention system is much better adapted to effectuating major revision. This consideration was pointed out by a committee of the Nebraska Legislature which was appointed in 1949 to study the need for constitutional revision. In its 1950 report, the committee recommended that a constitutional convention be called and made the following statement in its "Conclusions and Recommendations":⁴

2. If relatively few changes are required, and if these changes are of a simple nature, they may be effected through specific amendments which could be proposed one or two at a time, either by the legislature or by initiative petition.
3. If the constitution is in need of extensive revision, requiring numerous changes both technical and substantive in character, then the calling of a constitutional convention would appear to be the most satisfactory method by which such revision could be accomplished.

Under the convention system, the constitution can be reviewed as a whole at the time amendments are considered thereby eliminating conflicting or doubtful terminology that might otherwise occur in the amending process. Amendment by legislative action or initiative petition necessarily involves a piecemeal or "patching-up" procedure and should be limited to those instances where relatively minor changes are contemplated.

Keeping in mind the underlying principle that our government derives all of its powers from the consent of the governed, the people have the inherent right to make such changes as they deem fit in the constitution which is the basic instrument by which they have delegated authority to their government. The constitutional convention provides one of the most democratic and representative institutions by which they are able to exercise this right.

The importance of this institution has been recognized in all of the states. The constitutions of all but twelve⁵ states make express provision for the constitutional convention, and in those remaining twelve states the use of the convention has been upheld by judicial decision.

The people of Nebraska have had three previous experiences with the constitutional convention. In 1871 a convention convened and framed a constitution which was rejected by the electorate. Four years later a convention drafted the Constitution of 1875 which was adopted by the people. Nebraska's last constitutional

⁴ Nebraska Legislative Council Committee, *Proposed Changes in the State Constitution*, Comm. Rep. No. 27 at 25 (July 1950).

⁵ Arkansas, Connecticut, Indiana, Louisiana, Massachusetts, Mississippi, New Jersey, North Dakota, Pennsylvania, Rhode Island, Texas, and Vermont.

convention was held during the period from December 1919 until March 1920 and proposed forty-one amendments which were subsequently adopted.

The procedure prescribed by the Nebraska Constitution for amending by constitutional convention may be outlined as follows:⁶

1. Legislature proposes that a convention be called.
2. Electors vote on proposal for calling convention.
3. Legislature provides by law for the calling of the convention.
4. Electors nominate and elect convention delegates.
5. Convention delegates meet and propose constitutional amendments.
6. Electors vote on proposed amendments.

A three-fifths vote of the members of the Legislature is required before the question as to whether or not a convention shall be held can be submitted to the voters. The experience of Nebraska and other states which have similar provisions shows that legislatures do not make these proposals frequently. Legislatures, generally, seem to have a reluctance towards calling conventions. The reasons for this attitude are probably debatable; however, it is no doubt partially due to public indifference. At any rate it should be noted that the initial move toward the calling of a convention must be made by the legislature, and, to that extent, those who desire a convention must first look to the legislature.

Since legislatures are functionally responsive to the will of the people, it is assumed that the legislature will act, once sufficient public interest has been generated. There has been some speculation as to whether or not a proposal for a convention could be presented to the voters by initiative petition; however, this is extremely doubtful since the constitution makes no express provision for this procedure.

The constitution provides that the vote on the proposition to call a convention shall be taken "at the next election of members of the Legislature." At that time a majority of the votes cast on the proposition must be in favor of calling the convention, and such majority vote must comprise not less than thirty-five per cent of the total votes cast at the election.

If the electors vote in favor of a constitutional convention, it becomes the duty of the legislature at its next session to provide by

⁶ NEB. CONST. art. XVI, § 2.

law for the calling of the convention. As for the details of the convention, the constitution sets out only two requirements. The total number of delegates must not exceed one hundred, and they must meet within three months after their election.

The statutes provide that the convention delegates shall be elected at a nonpartisan special election to be held on “. . . the first Tuesday after the first Monday in November in the year following the year the electors voted to call a constitutional convention.”⁷ Two delegates are chosen from each legislative district.⁸

Candidates are nominated by nominating petitions which must be filed with the secretary of state not earlier than July 1 and not later than August 1 of the year in which the election of delegates is to be held.⁹ The nominating petitions must be signed by not less than five per cent of the qualified electors of the legislative district and must contain a minimum of one hundred signatures.¹⁰ The statutes also prescribe the type of information which shall be contained on the petitions and provide that the secretary of state shall prepare suitable forms which shall be furnished the several county clerks.¹¹ If more than four persons are nominated in any legislative district, a nonpartisan primary must be held in that district on the third Tuesday after the first Monday in September before the special election of delegates; each elector is entitled to vote for two candidates, and the four candidates receiving the greatest number of votes are deemed nominated.¹²

The primary and special elections for the selection of delegates are conducted and their results certified in the same manner as provided by law for the election of members of the legislature.¹³ The manner of filling vacancies is also the same as that which is prescribed for filling vacancies in the legislature.¹⁴

The statutes provide that the delegates shall convene in the legislative chamber at Lincoln at twelve o'clock noon on the first Tuesday in December following their election and that the convention shall be called to order by the secretary of state.¹⁵ Each

⁷ NEB. REV. STAT. § 49-212 (Reissue 1960).

⁸ *Ibid.*

⁹ NEB. REV. STAT. § 49-219 (Reissue 1960).

¹⁰ NEB. REV. STAT. § 49-214 (Reissue 1960).

¹¹ NEB. REV. STAT. §§ 49-215 to -218 (Reissue 1960).

¹² NEB. REV. STAT. § 49-220 (Reissue 1960).

¹³ NEB. REV. STAT. §§ 49-213, -221 (Reissue 1960).

¹⁴ NEB. REV. STAT. § 49-223 (Reissue 1960).

¹⁵ NEB. REV. STAT. § 49-222 (Reissue 1960).

delegate receives \$1200 compensation plus the same mileage allowance which is received by members of the legislature.¹⁶

Once convened, the convention:¹⁷

... shall have authority to (1) determine its own rules and proceedings; (2) elect such officers as it may deem necessary for the proper and convenient transaction of the business of the convention and prescribe their duties; (3) make provisions for the publication of its proceedings or any part thereof; and (4) provide for the securing of a copyright of any such publication for the state.

As for the actual workings of the convention, we can get a good picture of the general pattern of procedure which has been followed in other states from the following observations of Professor Albert L. Sturm:¹⁸

When a convention assembles, it normally follows the steps for initial or temporary organization covered in the convention act. A chairman or president is selected and a number of vice-presidents (or vice-chairmen) and other officers designated, rules are adopted and committees are appointed. In both organization and procedure, constitutional conventions are similar to the lower houses of legislative assemblies. * * *

The number of committees established by conventions is usually small. As a rule, each committee is assigned an article of the constitution for special study, or some other major subject involved in the work of the body. Most of the early weeks are devoted to extensive hearings, research and study of proposals, some of which have been introduced by delegates and others originated by the committees.

When committee reports have been submitted, their respective recommendations are debated and considered carefully in plenary session. Proposals may be accepted, amended, or otherwise modified, or rejected. Tentative approval by the convention in committee of the whole is followed by the submission to a special committee on arrangement and style which prepares the draft for final consideration by the convention. * * *

When the business of the convention has been completed, it usually adjourns sine die.

Because of the magnitude of their work and the fact that the delegates will not be familiar with many of the issues which will be raised in the convention, it is important that a research program be carried on prior to the time the convention convenes. The vast amount of information which is available to the convention can thereby be digested and presented to the delegates in useable form. Having this research material ready for the delegates will enable

¹⁶ NEB. REV. STAT. § 49-230 (Reissue 1960).

¹⁷ NEB. REV. STAT. § 49-225 (Reissue 1960).

¹⁸ STURM, METHODS OF STATE CONSTITUTIONAL REFORM 99 (1954).

them to conserve time and carry out their duties more effectively. In Nebraska provision has been made for the appointment of a committee to carry on such a research program:¹⁹

For the purpose of aiding the convention in the discharge of its duties, the Supreme Court of the State of Nebraska shall, within thirty days after the proclamation of the Governor that the calling of a constitutional convention has been approved by the electors of this state, appoint a preliminary survey committee to consist of five members. The committee shall compile and tabulate information relating to the constitution of the different states or of other constitutional governments and such other information as the committee shall deem pertinent to the problems to be dealt with by the constitutional convention.

Members of the preliminary survey committee are paid their traveling expenses and actual expenses for food and lodging while away from home.²⁰

The experience of other states leads to the conclusion that an effective research program is almost indispensable to the success of the modern day convention. The preliminary survey committee would be an important part of the Nebraska constitutional convention. It is also likely that independent civic groups and certain governmental organizations will assist the convention by preparing helpful materials on those issues in which they are interested.

If, upon completion of its work, the convention concludes that the constitution should be revised or amended, any changes which it suggests must be approved by the electors. The convention's proposals may be submitted to the electorate in the form of a new constitution to be voted on as a single measure, or its proposals may be submitted in a form which requires a vote on each separate amendment. All proposed amendments which are adopted by a majority of those voting on the question then becomes the law of the state.

The convention system has the decided advantage that the delegates are able to devote all of their time and effort to the single task of revising the constitution. Obviously, the legislature which only meets biennially and is already burdened with its many other responsibilities, would not be able to concentrate its attention on the sole question of constitutional revision and would be hard pressed to find the time which is needed to study and deliberate the many aspects of constitutional revision.

It has also been pointed out that constitutional revision should

¹⁹ NEB. REV. STAT. § 49-232 (Reissue 1960).

²⁰ NEB. REV. STAT. § 49-233 (Reissue 1960).

be as free as possible from political overtones and that by its very nature the convention is less subject to political pressures than the legislature. Not having to stand for re-election when their job is completed, the delegates are likely to feel a greater amount of independence in their work.

Another distinct advantage of the constitutional convention is that it serves to educate the public. The attention which is focused upon the convention will naturally tend to arouse the public's interest in the activities of the convention. By following the reported hearings and debates of the convention, the people can become familiar with the issues and will be able to vote more intelligently. Delegates upon returning to their home districts can continue discussions and thereby create interest. Since public indifference has always been a stumbling block to constitutional reform, the element of public relations is an important consideration.

The convention system has proven itself an effective and efficient instrument of constitutional revision. It has been evaluated as follows:²¹

The constitutional convention continues to be the most efficacious method of conducting thoroughgoing constitutional reform. Preparatory research for and public participation in recent conventions have undoubtedly enhanced their effectiveness. The conventions themselves served as examples of "democracy in theory and practice" and added to popular understanding of basic American constitutional theory. Fears of radical departures from previous practice proved to be groundless; the conventions submitted modernized, somewhat stronger versions of their previous fundamental laws. State constitutional revision by the convention method continues to be but a part of the continuing evolution of American government, an evolution essential to a dynamic society.

It has now been forty-one years since a constitutional convention was held in Nebraska. Of course, the passage of time alone would not dictate the need for change. However, we do know that by reason of growth and the changes that have occurred in many areas of state activities, problems have arisen which could not have been foreseen by those who drafted our present constitution. In this connection, it has been observed that:²²

A state constitution restricts the powers of state government. If such restrictions are specific and therefore meaningful, they are

²¹ PUBLIC ADMINISTRATION SERVICE, MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 51 (1960).
Revision 51 (1960).

²² 11 KEN. S.B.J. 148 (1947).

necessarily inflexible, and unless changed to meet new conditions, they impede the progress of the state.

Many of the provisions of the Nebraska Constitution could be improved and revised. The decision as to whether changes will be made or how far reaching any changes should be rests ultimately with the people.

Patchwork and piecemeal amendment is not the solution—especially after forty-one years. In 1960 eight amendments were passed. At least five constitutional changes are likely to be on the 1962 ballot. This hit and miss system leaves much to be desired and is partially the reason for the obsolete, confusing and redundant sections found in the constitution.

Matters of purely legislative import have found their way into our state's basic law. This influx has the undesirable effect of eliminating flexibility in areas legislative by nature. Modern solutions to modern problems are halted by constitutional roadblocks. The opportunity for democratic-representative action in plotting our future course is inhibited by an accumulation of constitutional dead timber.

The following questions, in the opinion of this writer, illustrate areas in which constitutional revision should be considered:

Should the executive branch be improved by reorganizing or abolishing certain existing agencies and placing all subordinate bodies under more direct control of the governor?

Should the item veto of appropriations be spelled out?

Should terms of office be increased and other executive-branch reforms be considered?

Should changes be made in the tenure and manner of selecting judges?

Should existing constitutional provisions restricting needed improvement in our tax system be revised?

Should the Board of Pardons be revamped?

Should the responsibility for education be defined?

Should budget administration and budget procedure be outlined?

Should legislators be elected on a partisan basis? Should membership and terms be increased?

Should there be compulsory reapportionment of legislative districts?