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**PENNSYLVANIA SHOULD PURSUE THE  
CONVENTION METHOD OF REVISING  
ITS CONSTITUTION**

BY RICHARDSON DILWORTH

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AND

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In 1958, as members of the Pennsylvania Constitutional Revision Commission, we joined in a separate statement, which stressed the need of a constitutional convention. Today, in the light of recent Supreme Court decisions in relation to state legislative apportionment and other developments, the need is so clear and pressing as to call for urgent restatement.

Let us look first to some important general considerations.

1. While there are citizens who think that selective amendment is all that is called for, the need of thorough revision is widely recognized in the state. We do not believe that there is occasion to restate and reargue the case here, as an independent matter. The lively issue is as to the method of achieving revision—shall it be by convention and voter ratification or legislatively initiated amendment subject to voter ratification? In speaking to that issue we shall make appropriate reference to some of the areas where constitutional change should take place.

2. In Pennsylvania and the states generally the convention method has been the traditional way of bringing about constitutional revision. As a matter of fact, we have had no other way of taking an overview of the organic law through a political institution detached from the regular organs of state government.

It is obvious that piecemeal amendment has only aggravated the need for general revision. Such amendments have, commonly, dealt with fairly narrow policy issues in a contemporary perspective, with the result that changes made have not stood the test of time. The Pennsylvania Bar Association's Project Constitution involves an effort to obviate this difficulty by embracing amendment in large pieces. The major divisions of the Constitution are identified as articles. The present articles relate to subject matter as follows: Human rights, the legislature and legislation, the executive, the judiciary, public officers, suffrage and elections, public finance, education, militia, local government, private corporations, railroads and canals and constitutional amendment.

Experience up to this point with the Bar Association approach indicates that it is falling short even in this respect. Compromises have been made presumably in an effort to gain support or at least neutralize objections. For example, there has been inserted in the Local Government Article a provision conditioning annexation upon approval in both of two local governmental units involved in an annexation matter. To imbed such a provision in the constitution at a time when rapidly spreading urbanization is running freely over jurisdictional lines is to turn away from the overwhelming need for flexibility of action in relation to urban problems. Policy governing annexation should be left to the legislature.

3. The Bar Association article-by-article amendment approach is fundamentally faulty in that it does not call for reexamination of the organic law on a truly comprehensive basis by elected representatives of the people. We say this with the cheerful acknowledgment that we see real merit in many of the proposed changes. Private initiators are feeding their large pieces into the legislative mill with the hope that they will go through with little change. The decision-making process at the constitutional level deserves better

than this. That is what it is getting in Rhode Island, which has a constitutional convention in session. Conventions are expected to be held in other neighboring states.

4. Even if the Bar Association drafts amounted, in the aggregate, to a proposal for thorough general revision there is no assurance that all will be embraced either by the General Assembly or the voters. They must be acted upon separately and not as a package. Thus, there is no way to assure that both of two interrelated "revised" articles will be adopted.

5. In purely pragmatic terms the "large" piecemeal approach is not so appealing as its proponents appear to think. Some of them contend that the convention method is hopeless; they remind us that the voters have rejected it a number of times. They assert that somehow their method stands a better chance. We are not persuaded. In the first place, the convention method has worked in the past—it is the only way we have done the job. Admittedly, it is difficult to bring about a convention, but we are currently favored by the strong prod of the Supreme Court decisions on apportionment. The citizens of a great state ought to be able to muster what it takes to do the job right under vigorous leadership supported by the legal profession.

Actually a convention could be called by legislative action without a referendum. This would not be to by-pass the electorate since they would participate both through election of delegates and controlling referendum on what a convention proposed.

We see no "practical" basis for the view that the "large" piecemeal approach will work. Opposition forces can pool their strength in order to achieve their several objectives as to particular amendments. To succeed, moreover, as to only part of the proposals would not be revision. The method is not validated by experience. It is out of harmony with our political experience in shaping the organic law. Thus, what basis is there for belief that it will work?

6. The "Project Constitution" approach is not inspiring. The draft articles do not reflect any clear underlying philosophy of state constitutionalism in the American Federal system. The Bar organization and its procedures are not of a character to enable it to speak for the state as to basic concepts and then articulate them in an organic instrument. The best the active participants in the project could do was to operate largely upon their several private assumptions.

What has just been said is best driven home by reference to the central and critical organ of state government, the legislature. We must rely upon elected representatives. Yet, we as citizens have gone along with a constitutionally expressed philosophy of distrust of the legislature and have not acted to make it a strong, truly representative institution capable of mature policy formulation and decision as to the tremendously complex and demanding problems of our times.

The one-man, one-vote decisions of the Supreme Court are a wonderful stimulus for positive action to improve state legislatures. Instead of responding to this prod and the reapportionment decision of the state Supreme Court, Project Constitution has put aside the substantive issues of redistricting and apportionment. This has been done despite the fact that the state constitutional provision guaranteeing each county a seat in the lower house plainly violates the Federal Constitution as authoritatively interpreted by the Supreme Court of the United States. Perhaps there is a lingering notion that the Constitution of the United States will be so amended as to overcome the Court's decisions at least as to one house of a bicameral legislature. In our view the part of statesmanship in Pennsylvania is to utilize the impetus the Court has given us and convene a constitutional convention in which the legislative institution could be accorded the attention it merits.

People continue to shudder at a bugaboo which should have been laid low many years ago. We refer to the fear of a graduated income tax. The state Supreme Court has so

interpreted the constitutional provision requiring uniformity in taxation as to make a graduated income tax and even personal exemption and deductions for dependents under a flat-rate income tax impermissible. It is perfectly clear to us that sound policy dictates that a legislature be left by a state constitution with wide discretion as to taxation in order that there may be established a system of state and local taxation which will produce the needed revenue and distribute the burden fairly. Congress and most state legislatures have the authority to take ability to pay into account, but not the General Assembly of Pennsylvania. Instead, this state's mainstay as a broad-based tax is a five per centum sales tax, an impost which adds \$100 to the cost of a low-price automobile.

We are not urging that the state have a graduated income tax. We urge rather that the power of decision be given the legislature. We say at the same time that people need not be fearful of a state income tax. In most states maximum rates are low (less than 10%) and, of course, taxes are deductible in computing one's Federal income tax (as is the state sales tax). Compare them with the Pennsylvania intangibles tax which imposes a flat rate on securities based upon market value, whether they have any yield or not, and payment of which, one gathers, is widely evaded.

There is another dubious restriction upon legislative power which Project Constitution would preserve. We refer to the provision forbidding the legislature to impose any limitation upon the amount of recovery for personal injury, property damage, or wrongful death. This had to be modified by amendment to make way for a workmen's compensation system. It stands in the way of any legislation which would establish a system similar to workmen's compensation for automobile cases involving personal injury or death. Why should not the legislature have that policy choice open to it? Project Constitution lays enormous store by improving the state judicial system. The objective is highly laudable, but why leave the legislature materially restricted

as to choice of social policy as to the very class of civil cases which clog the judicial machinery?

Project Constitution, like the work of the Commission on Constitutional Revision, has made a substantial contribution to the thinking on constitutional revision in Pennsylvania. Its reports and proposals would be helpful material for a constitutional convention.

## A CONSTITUTIONAL CONVENTION IS NOT THE ANSWER AT THE PRESENT TIME

*A Reply to Messrs. Dilworth and Fordham\**

BY GUSTAVE G. AMSTERDAM

Vice President; A Modern Constitution for Pennsylvania, Inc.

If the proposals in Project Constitution are not without flaw, they are surely not without merit. As long as democratic processes prevail, those who seek a more perfect government under a more modern state constitution will find they are more effective working with, rather than against, a majority.

Richardson Dilworth and Jefferson B. Fordham have criticized Project Constitution for its lack of pragmatic appeal. They may be proven right in time. However, that time is not now.

There are only three accepted, orderly procedures for modernizing Pennsylvania's Constitution:

1. By piecemeal amendment;
2. By constitutional convention;
3. By article-by-article amendment.

Efforts to modernize the constitution by piecemeal amendment reached a climax with the recommendations of the Woodside Commission in 1959. Legislators that year began a flood of amendments which has never let up.

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\*In the October, 1965, Pennsylvania Bar Association Quarterly, Richardson Dilworth and Jefferson B. Fordham opposed current efforts to modernize the Constitution of 1873 by any means other than a constitutional convention.

With the General Assembly then considering nine article-by-article amendments which had been drafted and endorsed by the Pennsylvania Bar Association, the Dilworth-Fordham paper required immediate response. Therefore, when Gustave G. Amsterdam wrote a rebuttal, and invited Messrs. Dilworth and Fordham to take more effective steps toward constitutional revision by joining their colleagues throughout Pennsylvania in support of Project Constitution, the Pennsylvania Bar Association provided copies for all members.

The above is the text of Mr. Amsterdam's paper, slightly revised to conform with the current situation.



Almost 450 constitutional amendments have been introduced in the General Assembly since the start of the 1959 session. Three-fourths of them were to affect only single sections. Many would have changed only a word or two. There was no discernible plan; 64 unrelated amendments were proposed to a single 209-word section. Only 8 of the 450 have been adopted.

This method of modernizing our Constitution of 1874 can surely be written off as a failure, one offering no possible hope of future relief.

Historically, Pennsylvania's device for rewriting its constitution has always been the constitutional convention. Like most devices, this is useful only when it works when it is needed. In Pennsylvania, it worked in 1776, 1790, 1838 and 1873. But since 1891, the voters of Pennsylvania have been given the opportunity of calling a constitutional convention on six different occasions, and they have rejected it each time. The latest referendum was in November, 1963.

The Dilworth-Fordham paper did not touch, as it might have, on the reasons for the defeat of the 1963 referendum.

The first reason was a blind fear of the graduated income tax. It is neither necessary nor helpful to discuss here the merits of such a tax, nor the General Assembly's need for constitutional authority to set tax policies. The fact is that voters by the thousands rejected a constitutional convention because they would not believe that a graduated income tax would not automatically ensue.

It was just that simple. Nothing has happened since 1963 to abate that fear, nor its impact on the voters.

The second reason not only prevails to this day, but is gaining in importance all the time. There were additional thousands of voters who ardently favored revising and modernizing the Constitution but who nevertheless opposed the convention because (as was never true in preceding constitutional convention referenda) they were simulta-

neously confronted with a more acceptable alternative—the Pennsylvania Bar Association's "Project Constitution."

Project Constitution had appeal for voters who recognized the inadequacy of the Constitution, yet had reservations and fears concerning a popularly elected convention. Political partisans had visions of their opponents dominating the writing of a constitution. Conservatives worried about radicals taking over the convention. Urban voters were suspicious of unwarranted rural influences, and *vice versa*. But all factions saw an opportunity in Project Constitution to safeguard what was most precious to each of them, and at the same time to achieve a sweeping revision of the entire document.

These, more than any others, were the reasons for the defeat of the 1963 referendum. They were enough to tilt the balance against the uncertainties of a convention. Until the uncertainties can be cleared away, the scales cannot swing back.

It will be helpful, at this point, to review the headway and current status of Project Constitution.

Eleven article-by-article amendments were drafted by the Pennsylvania Bar Association and introduced and acted on in the 1965 session of the General Assembly. Two of the amendments, having been passed by both houses in 1964, were passed again in 1965 for the required second time, and will go before the voters in referenda this year, one in May, one in November. Four others were passed for the first time in 1965, and will be reintroduced in 1967 after the election of a new General Assembly.

Five which passed the Senate in 1965, but failed to pass the House of Representatives, are (as this is being written) waiting to be reintroduced in 1966. The package will be complete with three additional amendments, not introduced in 1965, which have been drafted by the project Constitution Committee and transmitted to the leadership of both parties in the Legislature. One of these amendments deals with

legislative reapportionment; two of them with judicial reform. Hopefully, these will also be among the amendments to be considered and passed on by the 1966 General Assembly; they and the entire Project Constitution might well be reconsidered, repassed, and approved by the voters in 1967 or 1968, so as to provide Pennsylvania with a modernized and more appropriate constitution well before the end of the 1960's.

Much discussion has taken place between the leadership of both parties in the Legislature, and the Bar Association's Committee on Project Constitution. It is likely that the amendments still awaiting favorable action for the first time will all undergo some degree of change at the hands of the General Assembly before they are passed. Such change would not necessarily be incompatible with the best principles of good government and effective constitutional revision.

Since Messrs. Dilworth and Fordham recorded their opposition to Project Constitution last Fall, its chances of ultimate success have substantially brightened.

It must be conceded that Project Constitution may yet fail for lack of what Dilworth and Fordham define as pragmatic appeal. Yet, by mere process of elimination, Project Constitution remains the last best hope of achieving a modern Constitution for Pennsylvania in this decade.

There are signs that the public understands this fact far more clearly than Messrs. Dilworth and Fordham. Most, if not all, of the statewide membership organizations which advocated a constitutional convention in 1963 now are on record in favor of Project Constitution. No organization of significant state-wide membership or status is known to oppose Project Constitution in principle today.

Many newspapers advocated a convention in 1963, but none is known to take this position today; editorial support for Project Constitution approaches 100%.

Even members of the General Assembly, always sensitive (if not completely responsive) to public opinion, realize

the untimeliness of the Dilworth-Fordham position. In the year-long 1965 session, only one bill calling for a constitutional convention was introduced. Even that got short shrift: it was referred to committee, and there it died.

As to those in high places who persist in advocating a constitutional convention, they could be more effective in bringing about constitutional revision if they supported Project Constitution, particularly by using their influence with those in the General Assembly.

The pragmatic fact is that there is no justification for continued agitation on behalf of a constitutional convention until Project Constitution has been given every chance to prove itself.

The day when Project Constitution is decisively defeated, if that day ever occurs, will be the time when the Pennsylvania Bar and all other advocates of responsible modern government will again take up the cudgels for a constitutional convention.