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PROCEDURAL PROBLEMS IN AMENDING NEW MEXICO'S CONSTITUTION

In 1963, the New Mexico Legislature created the Constitutional Revision Commission.¹ The duty of the Commission is to examine the New Mexico Constitution and to recommend any changes that it deems desirable.²

The provisions for the methods of revising and amending the constitution are found in Article 19.³ Section 2 thereof provides for the calling of a constitutional convention to revise or amend the constitution,⁴ and section 1 provides the procedure for proposing and ratifying amendments initiated in the Legislature.⁵

1. N.M. Laws 1963, ch. 223.

2. N.M. Laws 1963, ch. 223, § 3.

3. N.M. Const. art. 19.

4. N.M. Const. art. 19, § 2:

Whenever, during the first twenty-five years after the adoption of this Constitution, the legislature, by a three-fourths vote of the members elected to each house, or, after the expiration of said period of twenty-five years, by a two-thirds vote of the members elected to each house, shall deem it necessary to call a convention to revise or amend this Constitution, they shall submit the question of calling such convention to the electors at the next general election, and if a majority of all the electors voting on such question at said election in the state shall vote in favor of calling a convention the legislature shall, at the next session, provide by law for calling the same. Such convention shall consist of at least as many delegates as there are members of the house of representatives. The Constitution adopted by such convention shall have no validity until it has been submitted to and ratified by the people.

5. N.M. Const. art. 19, § 1:

Any amendment or amendments to this Constitution may be proposed in either house of the legislature at any regular session thereof; and if a majority of all members elected to each of the two houses voting separately shall vote in favor thereof, such proposed amendment or amendments be entered on their respective journals with the yeas and nays thereon.

The secretary of state shall cause any such amendment or amendments to be published in at least one newspaper in every county of the state, where a newspaper is published once each week, for four consecutive weeks, in English and Spanish when newspapers in both of said languages are published in such counties, the last publication to be not more than two weeks prior to the election at which time said amendment or amendments shall be submitted to the electors of the state for their approval or rejection; and the said amendment or amendments shall be voted upon at the next regular election held in said state after the adjournment of the legislature proposing such amendment or amendments, or at such special election to be held not less than six months after the adjournment of said legislature, at such time as said legislature may by law provide. If the same be ratified by a majority of the electors voting thereon such amendment or amendments shall become part of this Constitution. If two or more amendments are proposed, they shall be so submitted as to enable the electors to vote on each of them separately: Provided, That no

The decision as to which method to use, convention or separate amendment procedure, may depend upon the extent of the changes deemed necessary. Under the constitution, the convention procedure is available to revise *or* amend,⁶ but the procedures outlined in section 1 of Article 19 are only for amending the constitution.⁷ Thus, any extensive changes in the constitution as a whole probably would have to be presented to the electorate by calling a convention.⁸ The convention procedure is extremely time consuming. Section 2 requires a two-thirds vote by the members of each house to call a convention. The question is then submitted to the voters in the next general election, and if a majority of the voters favor it, the next legislative session calls the convention. The constitution adopted by the convention is then submitted to the voters for ratification or disapproval.⁹

At present, the plan of the Constitutional Revision Commission is to completely revise the constitution "in case a convention is called."¹⁰ At the same time, it intends to prepare a list of the most necessary amendments which could be submitted separately to the voters.¹¹

In the event that, as a result of the Commission's work, the Legislature wants to propose what it considers to be important and necessary amendments to the constitution for the voters' swift approval, two problems arise. The first problem involves the restrictive effect

amendment shall apply to or affect the provisions of sections one and three of article VII hereof, on elective franchise, and sections eight and ten of article XII hereof, on education, unless it be proposed by vote of three-fourths of the members elected to each house and be ratified by a vote of the people of this state in an election at which at least three-fourths of the electors voting in the whole state and at least two-thirds of those voting in each county in the state shall vote for such amendment.

6. See note 4 *supra*.

7. See note 5 *supra*.

8. In *McFadden v. Jordan*, 32 Cal. 2d 330, 196 P.2d 787 (1948), *cert. denied*, 336 U.S. 918 (1949), a purported amendment to the California Constitution comprised a single new article of 208 sub-sections which would repeal or substantially alter fifteen articles of the existing constitution. It was held that the proposal could not be submitted to the electorate as an "amendment"; it was a revision which must be proposed by convention.

The court said that amending and revising constitutions are separate procedures, each having a substantial field of application, and not merely alternative procedures in the same field. 196 P.2d at 797.

9. N.M. Const. art. 19, § 2.

10. Letter from Assistant Attorney General Oliver E. Payne, legal advisor to the Commission, to Helene Simson, February 4, 1964.

11. *Ibid*.

of the single amendment clause in section 1 of Article 19.¹² The second concerns the difficulty of changing section 1 in view of the provisions of section 5 of Article 19 prohibiting any changes in section 1 except by a constitutional convention.¹³

I

EFFECT OF THE RESTRICTIVE SINGLE AMENDMENT

CLAUSE IN ARTICLE 19, SECTION 1

Article 19, section 1 contains the provision that "if two or more amendments are proposed, they shall be so submitted as to enable the electors to vote on each of them separately . . ." ¹⁴ Such a provision is generally included in a constitution to prevent "logrolling," ¹⁵ the practice of submitting several inconsistent or conflicting propositions to the voters in one amendment. "Logrolling" requires the voter to approve or reject the amendment as a whole. Thus, in order to secure the passage of a proposition he considers worthwhile and important, he is forced also to vote for others of which he might disapprove. The clause is a recognition of the seriousness of making changes in the fundamental law, and "logrolling" has been considered a vicious practice, especially when "constitutional changes, far-reaching in their effect, are to be submitted to the voters."¹⁶

The question of determining what constitutes two or more amendments within the contemplation of a single amendment constitutional provision, such as New Mexico's, has given rise to much judicial discussion.¹⁷ One of the earliest states to consider the question was Wisconsin, in *State ex rel. Hudd v. Timme*.¹⁸ In this often cited case, the proposed constitutional amendment was to change the legislative sessions from annual to biennial sessions. The court held that the proposals were properly submitted as a single amendment, even

12. See note 5 *supra*.

13. N.M. Const. art. 19, § 5:

The provisions of section one of this article shall not be changed, altered, or abrogated in any manner except through a general convention called to revise this Constitution as herein provided.

14. N.M. Const. art. 19, § 1.

15. *Keenan v. Price*, 68 Idaho 423, 195 P.2d 662 (1948); *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N.W. 785 (1882).

16. *Kerby v. Luhrs*, 44 Ariz. 208, 215, 36 P.2d 549, 552 (1934).

17. See generally *Keenan v. Price*, 68 Idaho 423, 195 P.2d 662 (1948), and cases cited therein; Annot., 94 A.L.R. 1510 (1935).

18. 54 Wis. 318, 11 N.W. 785 (1882).

though there were provisions for increased compensation, for necessary changes of tenure, and of the time and method of election of the senators and representatives for the biennial sessions.¹⁹ If the single amendment constitutional provision were construed strictly, so that any proposal for an amendment which changed or abolished any existing provision or added anything to an existing provision must be submitted separately, it would be practically impossible to amend the constitution.²⁰ The court said that the test of what constitutes two amendments which must be submitted separately is whether the propositions submitted "relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other."²¹ Later cases have approved and developed this test.²²

More recently, the courts have attempted to state the test in the affirmative, in terms of the liberal construction of the provision. One amendment may change several articles or sections if "all these changes are germane to a single controlling purpose,"²³ or if, "logically speaking, they should stand or fall as a whole."²⁴ The single amendment may cover several propositions if they are "not distinct or essentially unrelated."²⁵ In general, it is now held that the restrictive clause does not prohibit the voters from adopting an amendment merely because the proposal would affect more than one article or section of the existing constitution.²⁶

However, although embracing this liberal construction of the single amendment provision, courts will not allow several amendments to be submitted as one when they believe that the proposal does, in fact, present more than one question, making it impossible for the voter to express his will as to each.²⁷

In *Mathews v. Turner*,²⁸ the proposed amendment provided for the creation of a 100,000,000 dollar state indebtedness to improve certain roads and for a fund to take up outstanding county primary

19. *State ex rel. Hudd v. Timme*, 54 Wis. 318, 325, 11 N.W. 785 (1882).

20. *Id.* at 335, 11 N.W. at 790.

21. *Id.* at 336, 11 N.W. at 791.

22. *Kerby v. Luhrs*, 44 Ariz. 208, 36 P.2d 549 (1934); *Keenan v. Price*, 68 Idaho 423, 195 P.2d 662 (1948); *State ex rel. Hay v. Alderson*, 49 Mont. 387, 142 Pac. 210 (1914); *Gottstein v. Lister*, 88 Wash. 462, 153 Pac. 595 (1915).

23. *Moore v. Brown*, 350 Mo. 256, 267, 165 S.W.2d 657, 662 (1942).

24. *Kerby v. Luhrs*, 44 Ariz. 208, 221, 36 P.2d 549, 554 (1934).

25. *Funk v. Fielder*, 243 S.W.2d 474, 478 (Ky. 1951).

26. *Baum v. Newbry*, 200 Ore. 576, 267 P.2d 220 (1954).

27. *Kerby v. Luhrs*, 44 Ariz. 208, 36 P.2d 549 (1934); *Mathews v. Turner*, 212 Iowa 424, 236 N.W. 412 (1931).

28. 212 Iowa 424, 236 N.W. 412 (1931).

road bonds. It also provided that when the state bonds were issued, the authority of the counties to issue road bonds would cease. The Iowa court held that the proposed amendment violated its constitutional provision for single amendments.²⁹

In *Kerby v. Luhrs*,³⁰ the proposed amendment would add three sections to an existing article. One concerned the method of taxing copper mines; the second, the method of taxing public utility corporations; and the third established the tax commission as a constitutional body. It was held by the Arizona court that although the three sections concerned taxation generally, they were three distinct propositions, no two of which were necessary for the proper operation of the third. Thus, the amendment violated the single amendment provision of the Arizona Constitution.³¹

It is conceivable that any proposed amendment which changes in any way more than one section of one article could provide the question for the New Mexico courts as to whether the proposed amendment does in fact violate the restrictive clause in section 1 of Article 19. Moreover, when the Legislature is drafting an amendment and seeking to avoid violating the clause, it would be virtually impossible to find support in a case from any jurisdiction construing exactly the same group of proposals.

The fact that the Legislature established the Constitutional Revision Commission, in itself, assumes a recognition of the need for a thorough study of the constitution as a whole and the desirability of recommendations for an over-all program of possible changes. The use of the required single item amendment procedure runs the risk that some amendments on a given subject would pass and others fail. This could mean that key portions of a desirable program would be lost. It could also lead to the danger of an inconsistent over-all result arising from a conflict between the new amendments that passed and the old provisions that were not changed.

In view of these problems, it might be desirable to amend Article 19, section 1, to change the single amendment provision at least to

29. *Mathews v. Turner*, 212 Iowa 424, 435, 236 N.W. 412, 417 (1931).

The dissent felt that the proposal was valid as a single amendment since all the provisions were germane to the main purpose and object of the change. *Id.* at 437, 236 N.W. at 417-18 (dissenting opinion).

In any given situation it could be a very close question.

30. 44 Ariz. 208, 36 P.2d 549 (1934).

31. *Kerby v. Luhrs*, 44 Ariz. 208, 221-22, 36 P.2d 549, 554-55 (1934). In fact, the court felt that such an amendment was "logrolling" of the worst type. *Id.* at 222, 36 P.2d at 555.

the extent that an entire article could be rewritten and submitted to the electorate as a single amendment.

However, section 5 of Article 19 does not allow any changes in section 1 except through the long procedure of a constitutional convention.³² Only if section 5 can be repealed by a simple amendment is the way open for a subsequent amendment of section 1.

II

CAN SECTION 5 OF ARTICLE 19 BE REPEALED?

On June 20, 1910, Congress passed the Enabling Act³³ providing for the admission of New Mexico and Arizona into the Union as states. On August 21, 1911, a Joint Congressional Resolution was passed³⁴ requiring, as conditions precedent to their admission, certain changes in the constitutions that New Mexico and Arizona had adopted. Congress required that New Mexico adopt Article 19 of the New Mexico Constitution as it reads today before the proclamation of the President admitting the state would issue.³⁵ The required amendment was adopted by the people of New Mexico on November 7, 1911.³⁶ Therefore, the question is: since Article 19, section 5 was required by Congress as a prerequisite to admission as a state, may it be repealed without the consent of Congress?

The provisions of the Enabling Act³⁷ are contained in Article 21 of the New Mexico Constitution.³⁸ *This* compact is irrevocable without the consent of Congress.³⁹ When the United States has consented to an amendment of that article, section 4 of Article 19 provides the procedure to be followed.⁴⁰ When the validity of the section of the Enabling Act prohibiting intoxicating liquor on Pueblo Indian land⁴¹ was challenged,⁴² the United States Supreme Court held that so long as Congress had the power to regulate the subject matter of the provision in the Enabling Act, it had the power to make the state's assent to the provision a condition of admission.⁴³

32. N.M. Const. art. 19, § 5, quoted in note 13 *supra*.

33. 36 Stat. 557 (1910).

34. 37 Stat. 39 (1911).

35. *Ibid.*

36. See annotation to N.M. Const. art 19, contained in N.M. Stat. Ann. vol. 1.

37. 36 Stat. 557 (1910).

38. N.M. Const. art. 21.

39. N.M. Const. art. 21, § 10.

40. N.M. Const. art. 19, § 4.

41. 36 Stat. 557 (1910).

42. *United States v. Sandoval*, 231 U.S. 28 (1913).

43. *Id.* at 38.

In New Mexico, any acts of the Legislature attempting to circumvent provisions of the Enabling Act have been struck down as unconstitutional and void.⁴⁴

Wyoming has held that the compact between the United States and Wyoming is "unalterable and obligatory".⁴⁵

The provisions of the act of admission had the same effect, we think, as an independent act of Congress enacting the provisions of our constitution⁴⁶

Washington has held that after the state had accepted the terms of the Enabling Act by framing and passing the constitution, and Congress had approved the Washington Constitution, both the United States and Washington were bound by the provisions of the act.⁴⁷ Arizona has held that the Arizona Constitution cannot be inconsistent with the Enabling Act.⁴⁸ And the constitution "cannot be altered, changed, amended, or disregarded without an act of Congress."⁴⁹

Thus, it would seem that section 5 of Article 19 cannot be repealed without the consent of Congress if the Joint Congressional Resolution requiring that provision has the same force and effect as the Enabling Act.

However, it is submitted that section 5 of Article 19 may be repealed without congressional consent because (1) *that* section was not a prerequisite of Congress for admission, and (2) even if it were, the Joint Resolution does not have the same status as the Enabling Act.

It might be said that section 5 of Article 19 was not a requirement of Congress as a prerequisite for admission, since that section was not changed by Congress. The people of New Mexico submitted to Congress that section of the article in the same form as it is today.⁵⁰ A comparison of the article on constitutional amendments of the

44. *Regents of Univ. of N.M. v. Graham*, 33 N.M. 214, 264 Pac. 953 (1928); *State v. Llewellyn*, 23 N.M. 43, 167 Pac. 414 (1917), *cert. denied*, 245 U.S. 666 (1918); *State v. Marron*, 18 N.M. 426, 137 Pac. 845 (1913); see also *Ervien v. United States*, 251 U.S. 41 (1919).

45. *Merrill v. Bishop*, 74 Wyo. 298, 287 P.2d 620, 625 (1955).

46. 287 P.2d at 624.

47. *Boeing Aircraft Co. v. Reconstruction Fin. Corp.*, 25 Wash. 2d 652, 171 P.2d 838, 842 (1946).

48. *Murphy v. State*, 65 Ariz. 338, 181 P.2d 336 (1947).

49. 181 P.2d at 340.

50. *Proceedings of the Constitutional Convention of the Proposed State of New Mexico* 247 (Albuquerque Journal Press 1910).

constitution framed at the convention in 1910⁵¹ and Article 19 of the New Mexico Constitution reveals that Congress required certain changes in sections 1 and 2 of that article, and left sections 3, 4, and 5 as the constitutional convention submitted them for Congressional approval. Thus, although Congress wrote the whole of Article 19 into the Joint Resolution,⁵² the changes that it required were only in sections 1 and 2. Therefore, it can be said that the adoption of section 5 was not a prerequisite for admission, but was the original expression of the desires of the people of New Mexico; and it can be amended or repealed in the ordinary manner without the consent of Congress.

Section 1 of Article 19, as originally drafted by the constitutional convention of 1910, provided that two-thirds of the members of both houses of the Legislature must favor a proposed amendment.⁵³ Congress changed the required number to a majority.⁵⁴ The original section 1 also included a provision that not more than three amendments shall be submitted at one election.⁵⁵ Congress eliminated this provision completely.⁵⁶ Congress changed section 2 so that only a majority of those voting in the election could call a constitutional convention,⁵⁷ instead of a majority of electors in the state "and in at least one-half of the counties thereof."⁵⁸ These changes indicate that the intent of Congress probably was to make amending the New Mexico Constitution *easier* than the people of the state originally planned.

Moreover, it is submitted that the Joint Resolution of August 21, 1911, does not have the same status as the Enabling Act. The Joint Resolution applied to both New Mexico and Arizona.⁵⁹ Congress required that Arizona change Article 8, section 1 of its constitution and exempt members of the judiciary from being subject to recall by popular vote, as are other public officers.⁶⁰ This seems to have been the chief reason for the disapproval of the original constitutions.⁶¹

51. *Id.* at 246-47.

52. 37 Stat. 39 (1911).

53. Proceedings, *op. cit. supra* note 50, at 246.

54. N.M. Const. art. 19, § 1, quoted in note 5 *supra*.

55. Proceedings, *op. cit. supra* note 50, at 246.

56. N.M. Const. art. 19, § 1, quoted in note 5 *supra*.

57. N.M. Const. art. 19, § 2, quoted in note 4 *supra*.

58. Proceedings, *op. cit. supra* note 50, at 247.

59. 37 Stat. 39 (1911).

60. *Ibid.*

61. The House and Senate debates on the Joint Resolution were concerned almost entirely with the Arizona recall provision. See 47 Cong. Rec. 4118-41, 4217-43 (1911).

However, in 1912, shortly after admission to the Union, Arizona amended that section of its constitution so that every public officer is again subject to recall.⁶² The 1912 amendment restored the section to its original form by deleting the exception in favor of the judiciary⁶³ which Congress had required as a prerequisite for admission in the Joint Congressional Resolution.

No evidence has been found that the right of the Legislature and electorate of Arizona so to amend their constitution has ever been challenged. Supreme Court Justice William O. Douglas may have given recognition to this right in an address before the Pima County Bar Association:

Arizona, as a state, has often been an innovator. She has trod a rather lonely way. When the joint resolution admitting her to statehood was sent to the White House, President Taft vetoed it because Arizona's first constitution contained a provision for the recall of judges by popular vote. This provision collided with Taft's notion of an independent judiciary. Arizona changed her constitution to meet Taft's objections. But once admitted she restored the provision; and it exists to this day in Article VIII, Section 1, of the Arizona Constitution.⁶⁴

CONCLUSION

Section 5 of Article 19 probably can be repealed without the consent of Congress since that section was not an actual requirement of Congress before New Mexico could be admitted as a state. Moreover, Arizona amended the section of its constitution that Congress actually *had* required for admission, and that action has not been challenged.

Repeal of section 5 would allow an amendment of Article 19, section 1, changing the restrictive single amendment clause, so that an entire article of the constitution could be rewritten and submitted to the voters as a single amendment. This would greatly simplify the use of the amendment procedures and insure a more consistent result in the event that, as a result of the work of the Constitutional Revision Commission, an over-all program of changes in the New Mexico Constitution is presented to the voters for approval.

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62. Ariz. Laws 1912, ch. 9.

63. Ariz. Const. art. 8, § 1.

64. Douglas, *Arizona's New Judicial Article*, 2 Ariz. L. Rev. 159 (1960).