FIFTEENTH DAY

WEDNESDAY, SEPTEMBER 22, 1875[24]

(The fifteenth day was consumed with the introduction of resolutions, which were referred to the various committees.)

SIXTEENTH DAY

THURSDAY, SEPTEMBER 23, 1875[25]

Postponement of the General Election

On motion of Mr. Stockdale, the Convention proceeded to the special order for 10 A.M., being the majority and minority reports of the special committee on postponing the general election, and the resolution recommended by the former.

MR. MCLEAN raised the point of order that the adoption of the ordinance recommended by the majority could not come properly before the Convention, except on a motion to that effect.

THE PRESIDENT ruled that the fact that the report was taken up from the table took with it the motion to adopt.

MR. MCLEAN then moved that the special order be postponed and made the special order for Monday at 10 o'clock. It was lost.

Mr. West then spoke as follows:[26]

"Mr. President: I am afraid that the remarks I have to make will not justify a change of position from my seat to the front of the Speaker's stand, but I take it as a desire of the Convention to hear all that can be said on this subject from any quarter. As a member of the select committee, who recommended the majority report, it may be proper for me to explain the reasons influencing the committee, as the same reasons may help the Convention in arriving at the same conclusions. The committee has been patient and conscientious in the investigation of the subject. This applies to the members advocating and recommending both reports. I believe the Convention will consider it with the same patience and conscientiousness.

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[24]The proceedings for this day were taken from the *State Gazette* (Austin), September 23, 1875.

[25]The proceedings for this day were taken from the *State Gazette* (Austin), September 24, 1875

[26]This speech was reported *verbatim* in the *State Gazette* (Austin), September 25, 1875.

"The first question that presents itself is, what are the powers of this Convention, and to arrive at a conclusion on that point, we must consider the source of that power, how granted, and the extent of that grant. The source of this power is in that section of the bill of rights to be found in the Constitutions of 1845 and 1866, that constitutes the ground work of every free government and is found in the fact that the people have an indefeasible and an inalienable right to alter or abolish their form of government in such a manner as the people may select. In the exercise of that right, which the people of Texas have in common with other states of the Union, they have at the ballot box and by petition and memorial presented to successive Legislatures, demanded the redress of the grievances under which they labor under the present Constitution. The Legislature, in response to that demand of the people, passed a joint resolution providing for the assembling in this city, on the first Monday of September, 1875, of a convention to frame a new Constitution for the people of Texas and to provide for the submission of the question whether there should or should not be a constitutional convention at that time. The people responded in the affirmative, and in accordance with that vote we are here assembled today in the act of framing a new Constitution for the State. It may be observed, Mr. President, that in the joint resolution providing for the call of this Convention, that there is nothing which provides how or in what manner, or when, or to whom, the results of its deliberations shall be submitted. It will be perceived that there is no clause in it which provides that the people shall pass upon it at all, either to approve or reject. It simply provides that a convention to frame a new Constitution shall assemble at the City of Austin for the purpose of making that instrument. Their work when done is not required to be submitted to the people, and, not being required to be submitted, it necessarily omits to state how, when, in what manner, and to whom it shall be submitted. It left the question to this Convention whether it should be submitted or not, and, if submitted, how, when, and in what manner. This, then, is the grant of power, the grant of power of attorney to this Convention by the people I say by the people, for the Legislature had no power—being itself the creature of the people—to prescribe how or in what manner it should be submitted, had no power to prescribe limits to this Convention or to say how it should sit or what disposition should be made of its labors, and their joint resolution derived its sole vitality, not from its passage by the Legislature, but from the action of the people at the polls breathing life into it, otherwise it would be only so much waste paper. It then becomes the act of the people and we assemble under it with that as the sole guide and the limit of our power. I know that a great deal

has been said and that more will be said to the effect that the language used in the joint resolution does not warrant the conclusions I have drawn from it, that the meaning of the word "frame" is not that the Convention can make or establish a Constitution, but can only draft a plan of a Constitution. I have been at some pains to examine the authorities on this question, and the result is, in my opinion, that the power could not have been more expressly or plainly granted and no word more appropriately selected to clearly convey it, than the word used.

Construing the Meaning of the Joint Resolution

"In Webster's Dictionary, page 478 of the edition of 1864, he says that frame is 'to make' as 'to frame a law.' It is the usual and common form of expression when a law is to be made. One does not say to plan, to devise a law, but to frame, to make a law. Richardson's English Dictionary, volume I, page 845, says that the word 'frame' means 'to make, to effect.' From Beattie's *Judgment of Paris* comes the following line:

'Virtue's fair model *framed* by wisdom's hand.'

"In Soule's *English Synonyms*, page 170, we find that 'to frame' is the synonym for 'to make, to constitute.' Suppose that it should have been said in the joint resolution that we are authorized to *constitute* a new form of government instead of frame one, the term would have been quite accurate and at least the synonym for the word actually used. Suppose the word 'make' had been used, would it not have given us just the same power? But the Legislature preferred to use the word 'frame,' or, in other words, to direct us to constitute a government, meaning that we should be the 'framers,' the 'makers,' the creators. Chatterton in his Christmas Hymn uses the phrase:

'Almighty framer of the skies.'

meaning the *framer* or creator of the skies. I examined Shakespeare on the subject and in *The Two Gentlemen of Verona* one of the characters says:

'Frame some feeling line.'

"In the *Mid-Summer Night's Dream* again he says:

'He hath *framed* a letter.'

and again, in *Henry VI* the line occurs:

'By a nature *framed* to wear a crown;'

and again, in *Richard III*, he says:

'Framed in the prodigality of nature.

"The use of the term in the sense of 'making' or 'creating' is not confined to the poets, but also is used in the same sense by law writers and courts. In Segwick on *Statutes and Constitutional Construction* it is used in the same sense. And in *Cain* v. *The State*, 20 Texas, Judge Wheeler uses it in the same sense. The Legislature, instead of the word 'frame' would have used the words 'provide,'

'plan and submit,' 'propose' to the people, if it had been so intended. I ask our friends of the minority to find any case where it was intended to limit the agent, if the limitations are not specified and expressly mentioned in the power of attorney. I do not say that in many or even in most instances Constitutions are not submitted to the people, but the question here is, what particular power this particular body has on this subject. Soule says that the power to frame is to 'make,' to 'constitute.' If this be the correct definition, we have the power to make, to form a Constitution without submitting it to the people. I not only conclude as much from the ordinary meaning attached to language by eminent authors as well as by common people, but from the experience of other states in framing Constitutions; for in no less than thirty-eight instances where state constitutional conventions have been called together to make or to frame new constitutions, they have done so in each case without submitting them to the people, and nearly as many constitutions have been made in this country without submitting them to the people as have been made by submitting them to the people, therefore, it is nothing novel or strange that this power should be conferred upon us.

The Powers of the Convention

"If, then, we have the power given to us by the people to create an instrument without submitting it to them, we have the power to make a portion of this Constitution absolute and a portion we can submit to the people. If, then, we have the power to reorganize and recreate the entire legislative department of the Government and give it new powers, we can postpone the exercise of its present powers, while this process of reorganization is going on.

"If, Mr. President, I repeat, we have the greater power to form absolutely and to constitute anew the legislative department, I say it necessarily follows that we have the lesser power to suspend temporarily or to change the time of meeting of the legislative branch of the Government. It is a well established principle of law, which will not be disputed on this floor, that the grant of the greater power includes the less. It is a maxim of the law, and I quote the same from Mr. Broom's *Legal Maxims*, a maxim, I believe, ascribed to Lord Coke, that the 'greater always contains the less.' *Omne majus continet in se minus.*

"Just as the power to convey lands includes the power to lease or all the lesser powers combined, so within the greater powers belonging to the Convention there resides or is contained the lesser power, and they can without doubt exercise it. The position of those of favoring the majority report is this, that after examining all the authorities, we are forced to the conclusion that we, having the legislative department of the Government now actually in a process

of reorganization, can postpone for the present its assembly, keeping it as it were in a state of suspended animation, while we correct the evils that exist in that body.

"I know that some, perhaps many, will be found who will claim that these doctrines are new and unfounded in authority, but there never was a greater mistake, for they are as ancient as the republican form of government itself; in this country they are not exceptional, but the usual mode in which this power is exercised.

What the Courts Say about It

"As I said before, in thirty-eight constitutional conventions has it been exercised and the question has again and again been brought before the courts of the country and opinions delivered by the Supreme Courts of the states, and in the majority of instances, both as regards respectability and intelligence, the decisions have been as I have stated. The Constitutional Convention of Massachusetts, which met in 1853, comprising the ablest men of that state, declared in favor of the power.

"In Virginia, I read from volume I, page 7, of *Virginia Cases* in the case of the *Commonwealth* v. *Dondell*, where the question was raised as to the power of a peoples convention to pass an ordinance punishing the counterfeiting of constitutional money. The convention passed the ordinance. Dondell was tried and convicted and raised the question of the legality of his conviction under the ordinance, raising among other questions in arrest of judgment the following:

"'3. Because the Convention were not delegated, authorized, and empowered by the good citizens of this Commonwealth to *legislate generally* for them, more especially to make penal laws to affect the lives of the citizens' The General Court of Virginia, being then its highest Court of Appeals, decided unanimously that the Convention did have general legislative power, and the judgment of conviction was sustained. That court decided that the Convention had the power to legislate and to make penal laws to protect the rights of the people. I know that it will be represented that this Convention is a revolutionary body. That, in my opinion, is a complete begging of the question at issue The question is, does the power *exist* there? It may be that it had only been *used* in revolutionary times or great public emergencies and should be used only on extraordinary occasions, but that is no answer to the question or to the existence of the power. Whether used in revolutionary or peaceful times, it matters not, the power does exist. Let those who oppose the majority report show that the authority does not exist, and is not exercised if they can. Upon that point I also call the attention of the Convention to a case to which I attach importance—a recent case The respectability and reputation of the

court is beyond question. It is reported in Phillips' *North Carolina Reports,* being the case of the *State v. Sears.* North Carolina is a good old conservative state, and has been justly celebrated for the learning and integrity of its judiciary from its earliest formation to the present time. The names of Gastin, Ruffin, and Pearson are respected and venerated all through the land. Judge Pearson was then Chief Justice and concurred in the opinion delivered. The question arose in this way: The Constitutional Convention assembled in that state had passed an ordinance concerning crimes and punishment. It is not necessary for me to go into the particulars of the case. The ordinance was passed by a constitutional convention. At that time North Carolina had a penal code in full force, and the ordinance was not submitted to the people, and under this ordinance a party was tried and the case decided in his favor and carried to the Supreme Court. This was in 1867. The opinion was written by Judge Reade, but was concurred in by the whole court. The convention, I may observe here, was called by the President's proclamation and was authorized simply to put in operation a state government. The court said: '*We do not admit that the powers of this convention were limited, except by the Constitution of the United States.*' That is the recent decision of a learned and able court, after no doubt having been argued by learned counsel, able to present all the precedents and law on the subject, and yet by this court it was held that the convention, thought called only to frame a constitution, was not limited in its powers, except by the Constitution of the United States. It was in fact, with that exception, without limitation, and was clothed with full and complete powers, although not organized with reference to the special objects in which it legislated.

"I refer you to another case found in the *35th Georgia Reports,* page 28, the case of *Slaughter* v. *Culpepper,* Judge Lumpkin presiding. I presume there is no state in the Union, unless it may be Virginia, South Carolina, or Massachusetts, where the general powers of government, the limits to constitutional authority—and by this I mean the limits to the authority of constitutional conventions and state legislatures—has been more ably discussed than in the State of Georgia. Judge Lumpkin is known wherever English jurisprudence is studied. In 1866 the Constitutional Convention of Georgia provided and made an ordinance on rules of evidence in courts of law, concerning contracts payable in Confederate money, and determined the amount and character of evidence that should be received. The court in passing upon it said: 'The ordinance was intended to do in this matter what we think the Legislature could have done . . . . We hold the legislative power of the Convention as competent to pass such an ordinance as that under consideration.'

"How much further the court would have gone we do not know, but it decided the Convention did have legislative power and that that legislative power extended so far as to define the rules of evidence to be adopted in the trial of civil cases, just as the court of North Carolina decided that it had the right to decide what rule of procedure should govern in criminal cases Hence it seems from the authorities that a constitutional convention has power to act in both civil and criminal cases, has the right to exercise legislative power, just as we claim that this Convention has the right to exercise its power in the adoption of the resolution proposed by the majority report. I have referred to these cases, and many others might be cited, to show that these conventions who have assembled with special limitations in their power are held to possess such powers but much more so have we that power when assembling without limitations or restrictions at all as in our own case. I wish it to be understood distinctly that we hold that it is not at all necessary that we should establish the proposition that this Convention has the powers of the Government in order to sustain our position. In the report it was not deemed necessary to take any such position but if it had been taken it could have been sustained by the higher authorities. Mr. Livingston, of New York, Mr Dallas, of Pennsylvania, and many eminent Southern statesmen have held to the doctrine that these conventions have all sovereign power when assembled and can act as they deem best for the public good. The same doctrine was held by the Conventions of New York, Illinois, and Pennsylvania, and the contrary view has never been maintained in any respectable textbook until after the action of the Secession Convention of 1860 and 1861, when the power was used, and I believe was rightfully used, to pass upon and to inquire into the relations existing between the general Government and the State Government. After that some text writers, since 1866, advanced the theory that the states did not form the Constitution, but that the Constitution formed the states, and held that the states did not form the Constitution but that they derived their power from and by recognition as states under the Constitution, which reverses every theory of the fathers on that subject. A few text-writers, I say, since the war, deeply imbued with that doctrine, have put forth without the support of adjudicated cases, that these conventions have no powers at all, that they can simply propose and have absolutely no other power. In one textbook it has been gravely discussed and solemnly decided that they have not the power to appoint even a Sergeant-at-Arms and in another it is gravely discussed whether they can actually buy postage stamps, paper and stationery!

"These latter day lights look at it from an altogether different standpoint from that of the fathers, and are the only authorities

that can be mustered into service and used to sustain the argument against us. I have referred to the ancient practice of conventions as in force, and the binding effect of thirty-eight conventions, sustained by all the great luminaries of the law, compared to whom the opinions of those who hold to the contrary, as is found in these new books, is as but the light of a tallow candle shining in the light of the glorious sun, when they assert that there is no attribute, no shadow of power in this body further than to merely draft the instrument to be submitted to the people.

"On this question Judge Roberts, of this State, on the first of December, 1860, in a learned address delivered in this hall, made some observations which I consider very valuable and pertinent to this Convention. It is well known that he carefully prepares himself on every public question before addressing the people, and on this occasion, when he had to address the assembled wisdom of the State, it was natural that he should address himself to his task with more than usual preparation. He says:

" 'The Legislature may also provide for a convention of delegates representing the people in their sovereign capacity. Or such convention may be assembled without a call from the Legislature, or from any department of the State Government, by concert among the people themselves. Such has been the mode of making the Constitution in several of the states (Tennessee, Michigan, Arkansas, and New York) which were acquiesced in by the grievously constituted authorities, and went quietly and peacefully into operation. There is no authority specially delegated to any department of the existing government to call into action this high power of the people. Nor is its exercise made dependent upon any will but its own. Nor is there any invariably established mode of evidencing the sovereign will, so that it may be recognized as the fundamental law of the land, otherwise than its being declared and put in force through general acquiesence or by the power of the people. Or in other words, there is, and can be, no artificial test devised for ascertaining where the controlling intellectual and physical strength of a people has manifested its will in any particular instance. Should the pre-existing government fail to recognize the act of a convention, as declaring the will of the sovereign power (because it did not represent the people fairly, or for any other reason which he may assign), there might be a conflict between the old and the new government, which could be decided only by force. *Being a political question, courts of judicature are not competent to decide it.*'

"Judge Roberts said that a convention might assemble without a call from the Legislature or any other department of the State Government. Wisely said, too, for it might happen that the legislative, the executive, and the judicial might determine that there

should not be a convention, and if the modern doctrine is to be established that one cannot be called into existence until it has run the gauntlet of one or all of these departments, then they are masters and the people are their slaves.

"Such has been the mode of making a constitution in New York, Tennessee, and Arkansas. North Carolina hesitated to give the right of government to Tennessee, and the sturdy sons of the mountains got together and called a constitutional convention, created the State of Franklin, and would have formed an independent state. North Carolina then determined to interpose no further opposition to the wishes of a part of her people, but let them go without further interference, and they formed the present State of Tennessee. Regarding the action of a convention, a pure political question, the ordinary courts are not competent to pass upon and set aside their ordinances. Acting upon this opinion, Judge Roberts took his seat in the Constitutional Convention of 1866, surrounded by some of the ablest men that ever adorned the councils of this State. Some of them are living now, and one of them (General Whitfield) is on this floor now and supporting this ordinance. Many of them have gone to their long rest, Judge George W. Smith and others among the number. Judge Roberts acted upon what he held to be right and voted for and passed ordinance after ordinance in the Convention of 1866, providing for the readmission of Texas into the Union; for the relief of Orange County; for the relief of James M. Green, and twenty other ordinances of like character, clearly establishing the doctrine here as laid down in Virginia. In Georgia, North Carolina, and Tennessee, it was held that the constitutional convention was the sole judge of its own powers, and must necessarily be the sole judge of the subjects which shall be touched by it, and there was no power in the state above it to pass upon its powers. I may as well say here as elsewhere a word or two as to the cases supposed to sustain the views of the minority. I believe no stronger case can be presented by them than the recent Rem case. Some of the delegates may not have access to the book, and they will pardon me if I give a brief outline of the case, and I ask my friends who entertain different opinions to correct me if I mistake. I regard it as an authority more in favor of the action proposed by the majority report than as opposed to it. In the year 1871, and on the second of June, the Legislature of Pennsylvania, in response to memorials from the people of that state, asking them to call a constitutional convention, passed an act in guarded terms. My position here is that this Convention derives its powers not from the act itself so much as from its adoption by the people. This is true in all cases where it is not limited, and in our own case it is not limited. In the Pennsylvania case the act reads 'that the question of calling a convention to amend the constitution of the state

shall be submitted to the people in October next.' It provided for no delegates, specified no number, nor when they should assemble. It was purely and simply the calling of a convention to amend.

"The succeeding year (in April, 1872), in response to that vote of the people, the Legislature of Pennsylvania passed a remarkable act, providing that a convention should be held to make a constitution for the people, and they provided that delegates should be elected in a mode never before known in that state or any other. In determining the case the Supreme Court of Pennsylvania held that they had not been properly elected so as to represent the sovereignty of Pennsylvania, and that they were not elected in a manner in which the voice of the people of that good old commonwealth could be heard. For instance, it provided that the people should not vote in some counties for more than fourteen out of twenty-eight candidates, and that the twenty-eight receiving the highest number of votes should be declared elected. In other counties the voters could vote for no more than four candidates and the six highest were to be declared elected; and in this manner the whole ninety-nine delegates were elected. When they met all sorts of limits were placed, the act of the Legislature calling them together, upon their powers, one of which was in the following words: 'And the said convention shall submit all its amendments to the people to be voted on.' Another restriction was that on a vote of one-third of all the members any amendment should be submitted to the people separately; another was that they should make no change whatever in the bill of rights, nor establish any court of equity, and that the convention should submit the amendments in such manner and no other, as the Legislature prescribed. The convention, when it met, found this act of the Legislature in its way, as we today find the election laws of this State, though we are clothed with far more and different powers, and they also found in their way a corrupt and hostile Legislature sitting at Harrisburg They assumed that the right way of submitting their Constitution was by fairly and fully putting it to a free vote of the people of Pennsylvania, but the election law of Pennsylvania stood in their way, and they could not do so under its provisions, and I tell you, gentlemen, that if there were a law today on our statute books which opened wide the doors to corruption, bribery, and fraud, so that the voice of the free people of Texas could not be heard on this subject, that I for one would advocate its being swept from the statute books by this body, so that we could give the people a free and fair election to the end that their voices might be heard fully upon this question. The Convention of Pennsylvania set aside a part of this election law relating to the City of Philadelphia, and the bold officers interested in keeping the old law in full force applied to the judges for relief, and they granted an injunction, and

the Supreme Court held that the convention had no power to pass the act with reference to the election in the City of Philadelphia. The convention was still in session when the case was decided. Some of the ablest men in the state, some whose reputations were far more widely extended and more justly lauded than those on the supreme bench, men of national reputation, examined impartially all the precedents on the subject and reported to the convention to the effect 'that the convention still had the power,' notwithstanding the decision of the court to the contrary, but did not insist upon its exercise, as they did not desire to come into conflict with any part of the state government. They therefore agreed that the election, as far as Philadelphia was concerned, should be held under the law as passed by the Legislature, but elsewhere as they directed. I think this case, when considered clearly, becomes an authority for our position. It was said by the court that the constitutional convention was limited in its powers by the act which created it, and, in addition to that, that they were not elected by the people, but in some unusual and irregular way. The court said so. It said 'the voters did not elect the delegates,' and of the 133 members elected less than one hundred were elected by the people. Some of the delegates never received a single vote, but were appointed by men who were themselves not elected. These facts must be taken into consideration when the opinion of the court is considered and cited against us. The court goes on to say further that the convention, in passing that act, deliberately refused to obey the law as to the submission of the judiciary clause in the Constitution to the people. The question came up in that case, as to their action on the judiciary clause, whether the courts could control the convention or not, and it was held that the question was a political one, and that they could not. I may refer to this case further hereafter in my remarks. The simple question in that case was whether a convention *not elected* by the people could exercise these extraordinary powers. I will say further that when the matter last came up before the convention, after the decision of the court, they solemnly appointed a committee to inquire into the subject further, although it was no longer a matter of importance to them whether the court was with them or not. They knew that the great mass of the people of Pennsylvania were at their backs and willing for them to regulate the affairs of the state. The committee reported that both on precedent and principle it was beyond the power of the Legislature to put a limit on the power of the convention. The report was signed by Governor Curtin, Governor Bigely, Senator Buckalew and others. By a vote of 66 to 13 in that convention, they decided that the power was with them. That is the history of the Pennsylvania case. I hold, then, that both on precept and principle, that inasmuch as the act assembling us together put no

limitation on our powers, and failed even to provide for the submission of our works to the people, that under the well recognized powers belonging to conventions of this character whenever the right to adopt absolutely the Constitution exists in them that it necessarily carries with it the lesser power to temporarily suspend one branch of the State Government, the Legislature, for instance, or to act upon a portion of it at once and make it final and not submit it to the people at all. But if it be true that we have only as it were to plan, to sketch, to draft a plan of government according to the opinions expressed in the minority report, if we have that power only, I think it is quite certain, unless all these authorities are wrong, that the power to pass this ordinance still exists in us and for this reason. The joint resolution leaves this Convention free and untrammeled as to how, when, and at what time this Convention shall submit its work to the people, or whether it will submit it at all. It is clear and admitted on all hands that we have the power to provide the mode and manner, terms, time and place of submitting the Constitution to the people. This power necessarily carries with it the power to make all provisions necessary, in our judgment, however erroneous that judgment may be. If we honestly believe that the election in December and the meeting of the Legislature in the January following, will tend to embarrass and in a measure prevent a full and free vote on this question—no matter how much others may differ with us on that point—then it is within the scope of our power to guard against this trouble. Upon that point I referred you to the Supreme Court of Pennsylvania, whose decision was made because that convention in Pennsylvania deliberately refused to submit the judiciary clause of their Constitution to the people. I referred to this case lest capital should be attempted to be made out of the decision. If we make a mistake in this matter confided to our judgment, and it is not necessary to a fair election, no appeal can be taken to the courts by us, and the error can be corrected only by the people themselves, in whom all power resides. So here we are to decide and determine this matter. We cannot put our consciences into commission, we must decide for ourselves. The question is, does the power exist in this Convention to put in force this ordinance, which is nothing more nor less than an ordinance concerning the submission of the Constitution to the people. I think without doubt it does.

"I contend, then, first: That the terms of the joint resolution calling this Convention into existence give it, in the lauguage of Soule to other lexicographers, the power to constitute, to form, to make a Constitution, and being entirely silent upon the question of submission to the people, this Convention can submit it or not, as they think best and wisest.

"Secondly: That if we are wrong as to the power of the Convention in that respect, then the power is certainly in us to submit our action to the people, and we can provide the time, mode, and manner, so that the people may vote fairly on it. This gives us the power to remove such obstacles as may exist in the way of the people, so that they may pass upon our work as fairly as possible. Before leaving this question I wish to draw attention to the fallacious idea that it was not the intention of the people to give us this power absolutely; that they intended that we should submit our work to them, and that although it is not stated in the law nor in the charter of our power, anywhere either by direction or by implication, that we are bound to follow it. I was surprised to hear the question mooted, and for the reason that there is no way of ascertaining the meaning of a statute or Constitution, except from the statute itself. The people were not likely to speak in an uncertain voice on so important a matter. It was a great grant of power, and with the full cognizance of its importance when they voted on that joint resolution, they made it, and it alone, the measure of our power. Mr. Sedgwick on *Statutory Construction* says: 'The intent of the Legislature is to be found in the statute itself, and there *only* are the judges to look for it.' How would gentlemen propose to ascertain the intent of voters except by their vote? At Galveston, for instance, there was no canvass, no expression of opinion. In other places the Convention was discussed; the question was never raised in many places whether they would or would not have the Constitution submitted to them. The question may have occurred to individuals during the canvass, but I deny that it was a question in the canvass in this State; and even if it had been, you could not go back into the canvass to get at our power from stump speeches. If any gentleman desires to make that inquiry, I tell him in advance that the universal public sentiment was averse to having any more legislatures meet under the present instrument. They wanted no more $8 a day men to assemble in this State, and we were sent here to stop that business; at least such was a part of my instructions, and for one I intend to discharge it in all its length, breadth, and thickness, and take all reasonable methods of carrying out, the will of those who sent me here to do their will. Sedgwick says that the legislative interest must be taken by the word of the statute; and no words are used to put all these limitations in our laws. I hold that in respect to an act of the Legislature the courts are compelled to seek for the meaning of it in its words, and that they are not at liberty to suppose that they meant something other than what they have said. Here we are told to make a Constitution and not one word is said about submitting it to the people; and upon all the rules of statutory and

constitutive construction, and by all laws governing the interpretation of instruments of this character, we have the power necessary to put this instrument into force. Just one word more. If we have the power I do not hesitate to say it is our duty to exercise it. The people expect us to exercise it. If we do not exercise it the majority report shows that first and foremost as likely to result from our refusal to act will be the dual election of United States Senators, and we may have two Senators applying for the same seat. This ordinance proposes a plan to avoid this, it proposes a means of avoiding all the unnecessary expenses of an election. If an election is held in December the result will be the election of ninety new members of the lower House and twenty new Senators. The Senators will be elected for six years; and members of the lower House for two years. There will spring into life from that election a band of fresh and hungry office-holders in every county in this State to show the people what a beautiful Constitution this $8 a day instrument is. They will tell the people what a miserable failure we have made in forming a Constitution, and that the salvation of the country depends upon their holding office for the next two and six years. They will embarrass us with mere personal questions. If we fail to do our whole duty we are not worthy to represent the breed of men who sent us here. I hope no one will hesitate. I believe the power is clear to do what we have proposed to do, but if I believed the power was doubtful I would give the people the benefit of the doubt and save the confusion and expense resulting from our failure to discharge our duty." (Applause.)

JUDGE BALLINGER replied in favor of the minority report on postponement of the election. He denied that the Convention had the power to pass the ordinance recommended by the majority report, and said the only legal way to have the ordinance put into effect was to do so after submitting it to the people. He thought that whatever the expense incurred might be, it would be as nothing compared to the danger arising from a bad precedent, and to the evils likely to arise from conflicting powers of government. The speaker said he had wished the matter might be settled without any speech from him; he had considered it in an honest, conscientious way, and only desired to do his duty to the country. He had decided the matter in a manner which he believed would stand the tests of time. He declared that all political power is inherent in the people to alter, abolish, or reform their governments, and that such power was not vested in a convention or any other power than the people themselves. Had the people delegated that power to the

Convention? He said there was no necessity of the Legislature having provided that the work of the Convention should be submitted to the people, as it was always understood as a matter of law that the work of a convention should be submitted to the people. The people, when they elected these delegates, of course, supposed that they would submit their action back to them, and did not for a moment suppose that this body would arrogate to themselves the power to make the results of their labors a finality. He said the people had sent them there to make a Constitution, not to pass ordinances to suit their own fancy. He quoted from the decision of the Supreme Court of Texas, where had presided some of the State's greatest men, some of whom had helped to make the Constitution of 1845, to prove that the Convention had no authority to do otherwise than make a Constitution, and that said Constitution should be ratified by the people before it had any legality. The Constitutional Convention of 1866 had passed ordinances which had always been considered matters of doubtful legality, and in proof of this decision be quoted from the Supreme Court of Texas when that court consisted of Judges Moore, Coke, Donnelly, and Willie.[27]

JUDGE REAGAN followed in support of the majority report. He cited the leading cases in Texas judicial history, as well as the activities of many state constitutional conventions, to substantiate his arguments.[28]

MR. DOHONEY succeeded Judge Reagan, and spoke in favor of the minority report. He prophesied anarchy and confusion if the majority report were accepted by the Convention, and referred to the possibility of conflict with the executive. The Governor, he said, was bound by his oath to support the existing Constitution, and this oath was binding upon him until the new Constitution was submitted and ratified by the people. He quoted Jemison and Cooley in support of his position.

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[27]Judge Ballinger was one of the most capable men of the Convention. It is a matter of great regret that his full speech was not printed by any of the papers.

[28]The *Austin Statesman*, September 24, 1875, promised its readers a full summary of the speeches of Judge Reagan and Mr Dohoney, but did not print them.

Mr. Wright, colleague of Mr. Dohoney, from Lamar, spoke next and advocated adoption of the majority report and resolution.[29]

He said: "I shall have to ask the kindest consideration of the Convention while I give very briefly the reasons and views that will control me in my vote upon this question. The question, I admit very freely, is one of great gravity and importance because it involves the responsibility of the present executive in executing a plain law under a plain provision of the present Constitution, and the duty and action of the Convention exercising its sovereign power and authority in preventing a useless and improper thing.

"It is impossible not to realize the delicacy of the question. The executive of the present Government, having taken an oath to support the Constitution, and the laws thereunder to execute, finds upon the statute books a law which requires him, under that Constitution, to issue a writ of election, in order that a Legislature may be elected and convened under the present Constitution for the purpose of taking into consideration the wants and necessities of the people.

"Indeed, Mr. President, this is in fact and in truth a delicate question looked at from every standpoint, but I take it for granted that the executive of this State is a man of sense and capacity, fully able to comprehend this question in all of its scope and meaning, and who will not rashly and unwisely throw himself against the wishes of the people as expressed by this Convention, and hence I have no trouble in coming to a conclusion easy and peaceable in the solution of this question. It has been said with great dignity and gravity that the passage of this ordinance will be the exercise on the part of this Convention of a revolutionary power and authority which cannot be justified on any ground or state of circumstances.

"Mr. President, I would like to ask where do gentlemen find the power in the present Constitution to call this Convention? Can you find it in your Constitution? You find provisions there for amending the Constitution, but nothing else; but you must go outside of the Constitution for the authority and power to have a convention to frame a Constitution, and that outside are the people in all their majesty as sovereigns."

MR. BALLINGER: "If the gentleman will permit me, I will state, in answer to this, that if I understand the organization of our Government, and the constitutional powers of the Legislature, that it has all power, except what is prohibited by the Constitution of the United States."

MR. WRIGHT: "The gentleman throws himself somewhat against an opinion of the Supreme Court of the United States, in which it asserts that the Legislature is restricted and limited in its power.

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[29]Mr Wright's speech was printed *verbatim* by the *State Gazette* (Austin), September 26, 1875.

I know the old rule of construction was that the Legislature could do anything that was not prohibited, while on the other hand, the executive and other departments of the Government could do only what was delegated to them. But recently this idea has been somewhat modified, and I think very justly and properly, and now Legislatures are restricted and limited, though not limited in the organic law. For instance, they have no right to donate the money of the people to corporations or any one else, though there may be no restrictions on this in a Constitution. Members of the Legislature are elected and come here and swear that they will support the Constitutions of the United States and of the State of Texas, and then turn round, and with a muffled dagger stab the very instrument they swore to uphold and defend, by voting for the joint resolution calling a constitutional convention, in order to get rid of the very instrument they pledged themselves to each other and the country to nurture and protect. Now, what is this but a peaceable revolution? Yet gentlemen say that this Convention has been convened according to law, and that the Legislature had a right to call it. Yes, I say that the Legislature had a right to call it at the instance of the people; that is, the people by their sovereign will called it, and we stand here today as the representatives of their power and sovereignty. Thus we find we must go back to the first principles, the first of which is the principle of self-government. The right of the people to change their organic law whenever they see fit, is fixed in the center of the American principles of popular rights, and I trust that these great principles, written in blood upon their hearts will stand and endure.

'When wrapt in flames the realms of ether glow,
And Heaven's last thunder shakes the world below.'

"In the passage of the joint resolution calling this Convention, we have the members of the Senate and the House taking an oath to support the Constitution one moment and the next moment assasinating it. The reason for this is that the great principle is recognized that the voice of the people is heard in their meetings, in the manufacture of public sentiment by writers, speakers, and the press. This is what took place in the last general election, when they warned the Legislature by meetings and the manufacture of public sentiment by their speakers and the newspapers, that they were tired of the existing Constitution. The Legislature finally agreed to acceed to their wishes, and submitted the proposition to call this Convention. Do gentleman call this revolution? I say that every change in government at all is revolution. It may not be at the point of the bayonet. No blood may flow, and it may be without the violation of the existing forms of the law, but the revolution goes on all the same. I am glad to see that the Legislative Committee of this Convention, in their report, place the power where it

rightly belongs—with the people, so that there may be no more dispute on that question. The terms of our Constitution are to the effect that you may amend it; and yet when you come to change it, it is revolution, because you have no right to do things men have sworn not to do. Yet the Legislature, acting in their aggregate capacity, passed the joint resolution to cut this instrument down, and did it in obedience to the will of the people, which was heard in their murmurs of discontent and fell upon the ears of their legislators like the voice of mighty waters.

"The Legislature passed the act and submitted it to the people whether they would have a convention or not. The people said that they would have it, and at the same election at which they determined it in the affirmative, they then and there elected delegates to go and carry out their will in the matter. What was this will? Why, to frame, that is, to make, to create, a Constitution for them representing their sentiments and wishes as to the form of government they desired. The Legislature had no right or authority to call a convention to make a Constitution, but they did not submit to the people the question or proposition as to whether or not they would have a convention. The resolution thus passed was simply an act to get the voice of the people in their sovereign capacity as to the fact of a change of government. And what else? Why to do whatever was necessary and proper in order to frame and put in motion and operation this change of government from an old to a new government.

"Is it true that the Convention cannot make a Constitution which will be valid and binding without its submission back to the people for their approval? Not at all; though I am in favor of submitting it back, because it was so understood in the canvass. But though we do this it is not necessary, for we have the authority to frame—that is to make—a Constitution which will and should be as binding and valid as though the people had ratified it at the ballot box. But if we fail to carry out their wishes, they may then call another convention and get rid of our work. What constitutes a state? The men, women, and children in it and nothing else, but they have vested in the electors the power to represent their will and to fix it as a representative fact in their organic law. This is the uniform rule, the recognized rule, for the people to declare at the ballot box their united action, what they desire in the matter, and not as was done in the Rhode Island case by unauthorized meetings here and there, and without a general rule for their action. If we mean by organized action, such as was had at the ballot box on this act of the Legislature, this was done completely when the people conferred upon their delegates the power to frame and make a Constitution.

"The question then is that there exists on the statute book a law which requires the executive to issue his proclamation for an election

of members of the Legislature on the first Tuesday in December next. If this takes place, it will necessarily and unavoidably retard and obstruct the Convention from making a Constitution and submitting it back to the people. Now then, have we the power, under the circumstances, of preventing a large amount of the people's money from being expended to no purpose, and of interfering and preventing an obstruction of the work which we were sent here to perform. I think so, clearly; for the power to make conveys with it the incidental power to do whatever may be necessary and proper to effectuate and accomplish that object. Those of us who represent and believe the majority report to be right think that unless the executive is restrained in his action that it will retard the usefulness and action of this Convention, and will burden the State with a large and unnecessary debt. What we want is, that this election may be postponed until the Constitution we are preparing may be submitted to the people and a full and fair expression of the people at the ballot box may be had upon it. But it is said that this is revolutionary. Revolutionary in what? What do you mean by revolution? That the people have not the right to change their organic law? That they cannot give the power to a convention to carry out their wishes? Then let it be revolution. As I understand the principles of self-government, the power lies with the people, and when they accord the power to a convention the power is there, and if the Governor, or any other department of this Government, undertakes to interfere with the convention by obstructing the great objects which they came here to perform, they would have the right, as they did in 1861, to put the man or his authority aside. I say that the people did right in General Houston's case, did right to put him aside, because he refused to obey his oath and subscribe to what the people wanted who elected him to office. He was an obstructionist. If the executive of the State were to do as he did—were to obstruct in its mode of action this Convention—it is within the power of this Convention to take charge of the matter and defend itself from assault. As far as he goes, he is the executive of the State, and represents, when the House and Senate are not in session, the department in seeing that the laws are faithfully executed, and nothing more. I trust that nothing of this kind will occur, and I apprehend no danger. The Convention has original power and the right to remove all who obstruct its path. If this is revolution, let it be so; it is the voice of the people. The Governor, no doubt, thinks it his duty to issue his proclamation ordering an election of members of the Legislature, and if this Convention regard it as an obstruction in their way in making or framing a Constitution and submitting it to the people, then they have the right to pass an ordinance checking the executive and suspending the election law until such time as they may think proper."

Jemison and Cooley

"My colleague (Mr. Dohoney), from Lamar, read a good deal from Jemison and Judge Cooley in support of the position he took. I am not deeply impressed with those authorities. I am convinced that my reading and learning, small as it is, on government has not been caught from such writers as Mr. Jemison and others who wrote for an object. Take it and read it, and you will find that the book was written and published to carry out the views of the North against the Southern States and to stigmatize them as traitors and revolutionists for presuming to judge on the merits of the old state rights theory of government. I say in all calmness that because we were opposed to the North on this subject, because we stood up in support of our idea of government, we are made to figure on the annals of time as rebels to society and to the country. It was a stronger power that conquered us. Brains never fought the principles involved in our late unhappy struggle; intellect never fought it, and the great questions of the people, the rights of the American people, and the rights of self-government, were decided by the sword and the bayonet rather than by reason and argument. Mr. President, could we of the South have had our case tried in an enlightened court of nations, what a different fate would have been ours! The great question of states' rights can never be broken down or obliterated in the Southern heart and mind. It is part of our history, and a part of our object and the purest and best form of government, for the purpose of protecting the rights of citizens and of the states, that was ever conceived. This book—Jemison's—was written to make the Southern States odious, to make their acts revolutionary; it was intended to create the impression that the people of the South never did have any idea of civil government, civil rights, or anything else. But I trust that the South will yet, by her representatives in Congress, and by her public men representing the true type of her manhood and statesmanship, stamp the book as a lie and a slander upon our people. The country may be flooded with written and printed books in the garb of law books for the purpose of injuring and discrediting us in the public mind (and such is Mr. Jemison's work), and they may be used by our own people against us on occasions when the rights of the people are at stake and involved in controversy; but such authors can never change the great heart of the American people from correct principles of self-government to fallacies and errors involved in glittering generalities that mean absolutely nothing but unsurpation and oppression. The book seems to have been written to defend the North in her actions in the Kansas troubles and to assail and misrepresent the action of the South. Why, Mr. President, Mr. Jemison maintains the monstrous and startling proposition that

Congress has the power to abolish states and state lines, and to establish a grand consolidated government, perhaps to be presided over by a sceptre and a crown. And this is the book from which my friend reads in support of his republican views. I, for one, cannot take and swallow these terrible teachings, for they are at war with every principle of free government I have learned during life. Such teachings and doctrines have no charms for me, though Judge Cooley may in his work on *Constitutional Limitations,* in soft and honeyed sentences, declare that Mr. Jemison's work was exhaustive on the subject treated. Yes, it is indeed exhaustive; it not only exhausts the subject, but obliterates, destroys the rights and liberties of the people. What? Take these works to guide us on fundamental principles involving the right of self-government? Never! Never! The principles it inculcates, I do not believe and never shall, and the objects for which the work was written was mean and ungenerous, and I despise and spit upon it with unutterable contempt.

"As I have said before, Mr. President, I regard it as right and proper to submit our work and labor to the judgment of the people and let them examine it thoroughly and critically in the aggregate, and then scan every provision with an eagle eye, and if it meets their unqualified approbation approve it, and if not reject it at once. Therefore let us do our whole duty, and when we have done this we can do no more. And in doing our duty, let us remove any obstruction that may hinder or delay us in acting in obedience to the wishes of the people in carrying out these great objects. If this be revolution, as the minority report would indicate, let it be so. In obedience to these convictions, I shall vote for the ordinance to suspend the election law." (Applause.)

MR. HENRY, of Smith, followed Mr. Wright, speaking in opposition to the majority report, and contended that the nearness of the meeting of the Legislature and the meeting itself should in no way interfere with the work of the Constitutional Convention. A convention had been held in Virginia in 1829, with James Monroe as President, and with some of the brightest intellects in the state in attendance. A Legislature was in session at the time. Was that convention afraid of the Legislature then in session? Not at all. The convention held its sessions in the Baptist Church of the capital city, and the Legislature in their usual place. The members of the constitutional convention had no right to say that the next Legislature would do anything wrong it was an assumption they had no right whatever to make. The convention had no right to usurp all the powers of government—legislative, executive, and judicial.

They were simply a convention to frame a Constitution, and not a legislative body at all. They were not there to strike down the departments of government; the state had an executive, a legislative, and a judicial department, all in good working order, and it did not become the convention, nor did they have the power, to interfere with their functions. Suppose the ordinance were passed and the people then refused to adopt the Constitution submitted to them. The whole state would be in confusion and anarchy. If the convention had power to prolong the tenure of office of incumbent officials for three months it could do it for all time. He thought delegates should pause and consider before they assumed such a stretch of power; he asked them to be calm, wise, and prudent, and to exercise no more power than was necessary to carry out the objects of their assemblage, to-wit, the framing of a Constitution.

MR. STOCKDALE, former Lieutenant-Governor, a delegate from Calhoun, followed Mr. Smith, speaking for the majority report.[30]

He said: "Mr. President, notwithstanding the great difficulties presented by the gentleman from Smith (Mr. Henry), I believe, sir, that no action which may be resolved upon by this Convention in the course of its deliberations, will be received with greater satisfaction, will be approved with more hearty approbation, than the passage of this ordinance. Not only, sir, because it will be in pursuance of the designs they had in calling this Convention, and in accordance with the duties devolving upon us, not only because there is no evil precedent involved in it, but because it is an announcement definite and certain that, notwithstanding the disposition of any part of the Government, the people are supreme. Its power is supreme, not because we are the people, but because the people are supreme and we are their delegates, not because we are the body of the people, but because the people only can act, under any circumstances, as has been plainly demonstrated by the delegate from Smith. The people can act only through their delegates. We are the delegates of the people, empowered by their voice, and not by the Legislature, to do their will. If I doubted as to their will, I should certainly doubt as to my own power and duty; but not doubting as to what the will of the people on this subject is, I do not hesitate or doubt as to what shall be my own action. I am, sir, no revolutionist, and there is no revolution in what is proposed to be done by the majority of the committee. The distinguished delegate

[30]This speech was reported *verbatim* by the *State Gazette* (Austin), September 28, 1875.

from Smith, for whom I have profound respect, has said that notwithstanding what might be contained in the Constitution of this State or what may be contained in the common law of the politics of this country, that we cannot proceed in this manner without an act of the Legislature I deny it in toto. We can proceed without an act of the Legislature, and I mean the people can proceed when I use the term 'we.' We can proceed without an act of the Legislature, and I assert it as a true doctrine and will sustain it by the highest authorities, judicial and political, that are known to the people south of Mason's and Dixon's line, that the only purpose, the only object of an act of the Legislature, is to command the officer of the Government, to have an election for the Convention and to direct the holding of the election, as the people may demand. Gentlemen say this is revolutionary power, and can only be exercised by revolution. If the powper is written in the Constitution in words that are not subject to any such discussion as that which has arisen with regard to the word 'frame,' there should be no further question about it. It is so written in the Constitution, written, I believe, originally by that very George Mason of Virginia, in that very Constitution which has been referred to by Jemison, as being revolutionary. It will be found in the bill of rights of the Government of the Republic of Texas, and also in the Constitution of 1845. The Government of the State of Texas had no power over this subject, but that power was by that Constitution recognized as being in the people, and by the declaration in that Constitution inviolable forever.

"After it is so written that the people may do these things, then it is constitutional power, not revolutionary power, as has been asserted. In the written fundamental law of the State, that power is retained in the hands and control of the State. But while it is a power that rests with the people, it is said that the mode and manner of its exercise are under the control of the Government. The language of the Constitution gives authoritative contradiction to the assertion. The Constitution of the Republic of Texas and that of the State of Texas say: 'This declaration of rights is declared to be a part of the Constitution, and shall never be violated on any pretense whatever. Power is reserved to the people.' And in the second clause it is affirmed that 'all power is inherent in the people, and every government is founded upon their authority and instituted for their benefit,' and 'that they have at all times the inalienable right to alter their government.' How? In accordance with the dictation of a Legislature? No, sir, that it not the declaration, but 'to alter their government in such manner as they think proper,' and in the Constitution of 1845, 'in the mode and manner in which they think proper.' The mode is not to be prescribed by the Government, as was said by my distinguished friend from Galveston (Judge

Ballinger), on the authority of Mr. Calhoun, his authority being recognized as sufficient on this subject, but the mode which is to be adopted is to be determined by the people; they, and not the legislative department of the Government, are the judges. Then, sir, what is the object, the purpose, for which the act of the Legislature is designed? It is simply to do that which the gentleman from Smith indicated, to prevent a conflict, which might invite Federal interference, and to provide for holding the election.

"With reference to the power with which the legislative department is invested, I am very much obliged to my friend from Lamar for introducing John Randolph as an authority into this debate. The gentleman from Galveston (Judge Ballinger) referred to the Convention of 1829–1830 in Virginia as authority. What was the debate there in which John Randolph used the words which have been garbled by Mr. Jemison for his own purposes? It occurred in a debate on the Constitution of 1830, as to whether it should be submitted to the freeholders or to those who were vested with the power of voting upon that Constitution. In that convention were assembled some of the greatest lights of Virginia.

"Under the Constitution of 1776, made by a convention of the greatest of Virginia's sons, and which continued in force until superseded by that of 1830, notwithstanding the fact that Mr. Jefferson said that they had no power to make it, and it was never submitted to the people. Only freeholders could vote. The Legislature had submitted the question to the freeholders whether they would have a convention; they declared in favor of it, and the next Legislature directed the election of delegates by the freeholders, and provided that the Legislature might submit its work not only to the freeholders, but if it chose to all who might be vested with the elective franchise by the new Constitution if adopted by the people.

"The convention proposed to submit its work to all white men over 21 years old. and Mr. Randolph thereupon offered a resolution providing that the Constitution should be submitted to the freeholders alone. On this resolution he said:

" 'No gentleman who hears me will deny that the provision with respect to the right of suffrage is among the most important parts of the Constitution. Now with regard to all the other parts of it the action of the House is held to be advisory and initiatory only. On every other subject we are merely advisors; but if the construction of the act be good, which is here contended for, we are not, as respects this particular thing, advisors at all. We do not advise, we decree. Is it possible there can be anyone so obtuse as to preceive the distinction? *Decrevinus*—we have decreed. Sir, if we have the right to decree with respect to the right of suffrage, why not with respect to the apportionment of representation? I would thank any gentleman to take me out of the difficulty—or himself rather. I

ask again, if we may decree with respect to this question, why not with respect to all questions? Sir, the right cannot be denied.'

"Randolph's logic is perfect and irresistible. Suffrage is the whole foundation upon which the very structure of representative government is built. If a convention may decree as to the right of suffrage, definitively, without a popular vote, then where is the limit of its power?

"On all hands in the debate it was admitted that the only power of the Legislature of Virginia was to order the officers of the State to hold an election, that it had no power to direct or control the convention when assembled. So upon Mr. Randolph's resolution, it was a naked question of power in the convention to act definitively on the right of suffrage. The resolution was defeated, the body thus affirming its power. And, sir, I have said in courts of justice more than once that of all the judges who wrote and spoke English that it was a question as to which was the greatest, John Marshall or Lord Mansfield, and I am inclined to the opinion that John Marshall was superior. As a conservative lawyer, as one who was not disposed to stretch the powers of a convention of the people or any other political body, he is almost without a peer. Yet when this question came up on Mr. Randolph's resolution after various debates in which some of the most distinguished men of Virginia, including Mr. Johnson, of Augusta, one of the greatest lawyers of that day, it decided that it was only within the power of the Legislature to see to it that provisions were made for carrying out the will of the people; that the powers of the Legislature were only mandatory on the officers of the State Government; that the power under the bill of rights resided in the people, the Legislature having only the power to initiate the action of the people, while the officers of the government were only known for the ascertainment of the will of the people.

"James M. Mason and John Y. Mason and Mr. Johnson and Mr. Thompson had all engaged in the debate, all admitting that the Legislature had no power over the subject, but that the people had. This was agreed to on all hands, some proposing to submit it to the voters who had arrived at a certain age, while others contended that it should be submitted to freeholders only. Not only did John Marshall vote in the negative on Mr. Randolph's motion, but so did James Madison, James Barbour, John Tyler, and others, so by a vote of 66 to 28 the convention decided to exercise the power of extending the suffrage definitely in advance of the adoption of the Constitution by the people. They decided that they had the power, and that they could exercise it without a vote of the people.

"So I say, that if this great Convention of 1829, filled as it was with judicial and political wisdom, for there were not only judges, but two ex-Presidents, Senators and members of Congress, the

Governor of the state, several ex-Governors, and one who afterwards became President; if they decided that they could successfully determine upon that fundamental question of suffrage, it is pretty clear that they did not think that there was any legislative restriction upon their power to do that which they thought essential to do for the common weal without submitting it to the people of Virginia.

"But, sir, it is said and represented here that the proposition is revolutionary. Now what is revolution? The ordinance presented by the majority of the committee has been analyzed by the gentleman from Smith, and he says we may have no legislative department if the ordinance is passed. Sir, the ordinance is intended to cure that defect. I say that the State should never be without a legislative department. Its powers, except when it assemblies under the law, are in abeyance, but the State should never be without a legislative department, because it can never be told when its powers may be required for the good of the State, so their terms are extended in this ordinance until there is an election under the ordinance, and all the other officers of the State are continued until their successors are elected or superseded by the establishment of a new Constitution.

"There can be no derangement in the functions of the Government, except under the happening of that contingency which cannot be provided for by any government The gentleman from Smith inquires, 'If we should pass this ordinance and afterwards break up without making a Constitution, in what condition should we be?' I can present another case. Suppose the next Legislature is elected in December; it assembles in this building. The Governor and other State officers hold offices in this building; an earthquake comes and shakes the building down on their heads, and the whole executive and legislative departments are destroyed. The Lieutenant-Governor is in the building, and he is destroyed with it. The Senate, which might have elected an officer to fill the vacancy in the executive department, is destroyed; and thus the Government is literally annihilated, there being no one to order an election, or to call a Senate, and there is no legislative department.

"It is just as reasonable to suppose this, as it is to suppose that this body will break up without having performed its duties, or that it will be destroyed in any way. That is a contingency, in the language of my friend from Galveston, altogether imaginary, while the advantages indicated in the majority report, and to result from the passage of the ordinance, are real, and all of them will be fulfilled.

"I say, Mr President, that while we are not the people, we are the delegates of the people; and I am reminded in saying this of what was said by my friend from Smith with regard to the question of agents. While we are not the people, we are the delegates and agents of the people, and we are here to frame a Constitution.

There is no restriction, admitting the legislative resolution to be the letter of our attorney; we are not restricted by it any further than by the construction made upon the word 'frame.' There is no direction in the resolution that we shall submit our work to the people; no directions with regard to the subject at all, for it affords us power in utmost amplitude, unless a restriction can be found in the word 'frame.' We are not called to amend the Constitution, to reform it, but called as a convention to frame a new Constitution for the State of Texas. There are no words of restriction in this, unless it be in the word 'frame,' and on that subject I am perfectly willing to leave the question where my friend from Travis (Mr. West) left it.

"It seems to me to be synonymous with the word 'constitute,' but having the power to frame a Constitution and submit to the people, I say that it is our duty and the policy of this body as agents of the people, to do those things which are incidental to the other and to perfect and accomplish all their will, and that this is the power accorded to every agent. If I am invested with the care of a man's property and unforeseen exigencies arise after it is put in my hands he had not thought of, I am authorized by my power as agent and it is within the scope of my powers and duty to do whatever is necessary to preserve it. If I am advised to accomplish certain results, all the incidents to it are implied in the letter of attorney conferring the agency. And so it is with this Convention in respect to confining its powers to framing a Constitution, or as the gentleman from Galveston insists, of forming and submitting a Constitution to the people, and that we are bound to see that they have their will in safely, freely, perfectly determining that question without impediment. It is said that the Legislature would be no impediment. It is seen from the argument of the majority report that it is an impediment, that it is in the way of accomplishing the results, that it can accomplish no good but may occasion great evil to the State Shall we under those circumstances hesitate to exercise those powers that were given us even under that restrictive construction of the legislative resolution, hesitate to do that which is so necessary to the performance of our duties to the State and to the will of the people who delegated to us this power? My friend from Galveston stated in the course of his remarks that the only authorities we had presented—presented by the delegate from Travis—were directly in collision with the opinions of the Supreme Court of Texas with reference to the ordinance that was adopted by the Convention of 1845. In that case the court decided that it is only necessary for it to decide so far and that it is not necessary for us to do more than to see that the ordinance has the sanction of organic law, having been adopted by the Convention and ratified by the people, and the court declined to go any further. They had no business to go

further, and it would have been what the lawyers call *obiter dictum* and would have been of no value. In the case alluded to, in *28th Texas,* they again decided that it is not necessary to go further. They decided in favor of the party who rested on the ordinance of the Convention, and went no further, as they ought not to have done, and decided questions not involved in the case. The decisions of the Supreme Court of North Carolina were slighted by my friend from Galveston, when, as I conceive, a proper understanding of those cases is conclusive that there were no serious restrictions on the powers of this Convention, according to the judgment of this responsible court, the court which has been the subject of eulogy on both sides of this question. These two decisions when taken together are conclusive on the question of the power to do what we propose to do in this ordinance. The judges say, after going into the reconstruction acts, that the Convention not being called by the people and not by the Constitution of North Carolina, which authorizes the calling of the same under particular circumstances—it never could have been called under the forms of the Constitution—the Convention could not have been called at all except by the President of the United States, by whom it was called. It was contended in this case that its acts were revolutionary and not valid and that the Convention itself had no power to pass an act, to adopt ordinances which fixed penalties for criminal offenses. This, I believe, was the question involved in one of the cases alluded to. What did the court say? The court goes over the whole ground and says: 'The act of the President, so far from being a usurpation, was the discharge of a duty in the mildest form, and the people of this state did accordingly avail themselves of the opportunity thus presented, and did elect delegates to the convention; *it follows that their assembly was a rightful convention of the people.*'

"Under the proclamation of the President there was no authority to pass laws, but simply to make a new Constitution for the State of North Carolina. The proclamation ordered the people to elect delegates to the convention; and the court says, 'It follows that their assembly was a rightful convention of the people.'

"In the second case, in North Carolina, decided by the same judges, so highly commended by our opponents, it is said: 'But without pursuing the argument, we do not admit that the powers of the convention were limited, except by the Constitution of the United States.'

"The two cases taken together, decided by a responsible court having jurisdiction on the subject, establish, first, that the convention called without legislative authority but sanctioned by the people is a rightful convention, and not revolutionary; and second, that its powers are limited only by the Constitution of the United States.

"So we have judicial authority for the action which the majority propose in passing this ordinance from the old conservative State of North Carolina.

"My friend from Lamar (Mr. Dohoney), said that in the ordinance we assume to be a convention of the people. If he will read the ordinances of conventions generally, he will see that this is the common form of enacting clauses, not that the people are bodily here in the House, but that they are here by their delegates. In a deed made by one holding a power of attorney, the name of the principal, not of the attorney, appears. This is in accordance with the plain maxim of law, that what a man does by another, he does by himself.

"Then, sir, we have the determination of the judicial tribunal of last resource in North Carolina, the most conservative of states, that the power which a convention has when it assembled can exercise powers that are limited only by the Constitution of the United States. But it is said that the case from Virginia, urged by my friend from Travis, were acts of legislation by a convention of Virginia, which convention established a Constitution without submitting it to a vote of the people, and which Mr. Jefferson said was not delegated with such authority, but because it had been a convention organized under a condition of affairs which prevented the ordinary course being adopted, that its acts would hold good. The Government of the King of Great Britain had been driven away, and his troops had taken refuge in their ships, and the convention was called by a meeting assembled in the old Raleigh Tavern in Williamsburg. That convention not only made a Constitution which lasted for more than fifty years, but also passed acts of legislation which the courts confirmed, as read by my friend from Travis, although said acts inflicted punishments by imprisonment and other severe penalties. My friend from Galveston gives no weight to these authorities, who were judicially and politically responsible for their opinions and action. Among them were men as careful as James Madison, men understanding the law like John Marshall, men of the highest authority; all these are deemed by my friend from Galveston as nothing, and as gravely ignored by Judge Cooley. For Judge Cooley I have great respect; for his intellect, for his attachment to constitutional principles, and for his great research, but he is but one man, and I take it that the people of the State of Texas cannot be deprived of their powers in the only way they can exercise them; of the rights which are guaranteed them in the Bill of Rights of the Constitution of 1845, and of the Constitution of 1866, by the simple irresponsible opinion of Judge Cooley. The idea that this body will gravely hesitate to exercise powers that are vested in it as delegates of the people, to do that which is essential to their welfare, because Judge Cooley, of Michigan, writes a book and says it is not regular to do it, not

regular for this Convention to pass an ordinance in this way, this is simply preposterous. I take it that if there is danger of the people being deprived of their liberties, that that would be a pretty good way to do it. Will you let this irresponsible man say what are your rights, whether you will perform an act by yourself or by others, and that his word will weigh more than the decisions of the courts on this question, courts composed of the greatest men that ever lived in this country, men responsible for their action, and not expressing mere abstract opinions. I do not believe this Convention will so decide.

"It has been said by my friend from Lamar, and repeated by my friend from Smith, that these precedents were not made in times of peace. The case in point in Virginia in 1829, in which the greatest power that can be exercised at all was exercised by men like James Madison, John Marshall, and John Tyler, men who have been supposed to be devoted to liberty and constitutional government. They would not hesitate, with their high character, then shall we hesitate on Cooley's opinion, or Jemison's? Jemison, a man who actually doubts whether we can do anything but write out a Constitution and submit it to the people; who says that if a man from the outside comes in and disturbs this Convention we may arrest him, if we can do it without a breach of the peace, and turn him over to a civil officer, but otherwise not; is this the man whose opinion should control us? Why, a town meeting would have power to arrest in such a case, and yet it is gravely doubted if a convention could do it. Jemison also gravely says that we might buy ink, pen, and paper, but that we cannot go outside the members of the Convention to do anything toward defending the dignity or the powers of this body.

"The thing is absurd in itself, and as was said by the delegate from Lamar, Mr. Wright, this book was written with a purpose. I do not say to slander the people of the South, but to maintain as regular everything that was done by those who agreed with him in political opinions, and to deny everything emanating from those who differed from him. He found it perfectly regular for two or three counties to sever themselves from the grand old State of Virginia in order to make West Virginia. That was perfectly regular, and yet nineteen-twentieths of the people of that state were not represented in the convention that achieved that division, for it was held at a period when they could not be represented. I say that his opinions are utterly unworthy of any weight at all, but, as my friend from Lamar said, utterly to be despised, because, instead of being written with a judicial mind, they were written with a settled purpose, and they have about as much authority as that of a lawyer, who is writing a brief in a very bad case. Lay these opinions aside and the whole argument of the minority passes away except as it depends upon their own reasoning. I am perfectly willing to put this

question where it should be, and that is to stand or fall upon the principles involved in it. We say that the people are sovereign. All agree as to that. We say, both my friend from Smith and I, that the people cannot exercise that sovereignty directly. In Athens and other cities of Greece, where there was virtually an aristocracy, the whole of the citizens could assemble in the market place, to be addressed by their orators, and to record their will. But Athens was was not much larger than Austin, and Greece was not much larger than some Texas counties.

"In that country the people could assemble and directly exercise their authority, but it is impossible in the nature of things to do so in a state like this, where we have 200,000 voters. They can only exercise their sovereign power through agencies or delegates, and when they assemble in convention they represent their sovereign power, not to injure their sovereign any more than a minister of the Czar of Russia would seek to strike down his sovereign in order to exercise the will of the sovereign in his name. That is the power this Convention possesses—to exercise the will of the sovereign in his name. Jemison decides that this is a very dangerous power. Yes, sir, it would be a dangerous power if it did not depend upon the fact that we are responsible to our sovereign for the manner in which we exercise the power that has been delegated to us, and if we adopt a Constitution and put it in force, and it should strike out any of the rights of the people, they have the power, according to the construction of our authority, to supersede us and put others in our places; or, if we have gone hence, to send others here to repair the damage we have done. I said in some part of my remarks that the disposition has always been in government to assume power and extend it by construction, and if acquiesced in, to continue to extend it by construction, and the safety of the people is in the first section of the bill of rights, which was superseded by military power in this State, because it was the helmet and defense of the people. That which stands in its place now in our present Constitution was put there for the purpose of denying to this people the rights they had received by the declaration in the Constitution of 1866, which was adopted at Washington, I believe, without submission to the people. It was to deprive them of their rights which were recognized as inherent to them by the Constitution of 1845, to deprive them of the right of dethroning men who had usurped their sovereignty. The people have, by their action in the late election, resumed their authority. It was their right; it was inherent in them; but there had been an attempt to deprive them of it, and they had never recovered it or actually attempted to exercise it until last August, and this Convention assembled here on the sixth of this month. They have resumed their authority and are now in the exercise of it. I would not involve this Convention or the people of

Texas in anything which would bring them into conflict with the United States. We know the Constitution, and we can so conform our work to it that there can be no conflict with the Government of the United States or its statutory authorities or the Constitution of the United States. We are not here to assert any authority as to this people that has passed away from this people, either under the original Government of the United States or since, but are here within the limits of the Constitution of the United States, to remove from the shoulders of this people that which has so much oppressed them. We propose to do this in the safest and surest mode, and not to allow the organization of a force hostile in interest to our work.

"In order that this shall be done, it is essential to preserve harmony on all that we are called upon to execute. It is said that the Legislature cannot meet in January if we pass this ordinance. It is not necessary that it should. The appropriation bills were all passed at the last session and will extend until the last day of August. There is no necessity for greasing the wheels of the Government; the courts are in operation and the judges are paid. The executive department is in operation, and the officers paid by the appropriations made this year. There is no use on earth for the Legislature to meet in January except for private legislation. Then why should they assemble? It would cost a considerable sum if they merely met and adjourned. Their mileage last session was between fifteen and twenty thousand dollars. It will cost at least a few days' pay and their mileage, and who can say what they might not do if they once assemble? I distrust the body no more than I do other such bodies, but none can tell what the expense may be, and we should have to go through the formula of an election of ten Senators for six years. There are holding over ten for four years and ten for two, and we elect ninety members of the House for two years. These would be incited to the extent of their ambition and the pay there is in it, except so far as their chances might be good under the new Constitution for reëlection and, to the extent of their ambition and their fears of disappointment, would engage in organizing their friends against the adoption of the new Constitution. What more? We elect officers for the county for four years and they too become an organized electioneering force against the Constitution. Do the people want the Constitution? If they do and we fall short in this manner we shall awaken that most effective electioneering force—the whole government—against it. I was in the states of Pennsylvania and New York pending the last presidential election, and it was nothing but the electioneering power of the officers of the Government of the United States that beat Greeley for President. They all had their orders and were very willing to obey them. These had their friends and they tried very hard to induce others to vote on their side, and not only that, but they made great efforts

to induce others to vote on their side who were not entitled to vote at all. But no opposition on the authority of Judge Cooley, which is the only authority except Jemison's, will influence me, and I venture to say that the House thinks far more of the opinions of any friends who oppose us in this matter, for we know that the motives that influence them are true and pure. They act in accordance with what they conceive to be their duty and upon their responsibility as delegates and their opinions influence us a thousand times more than those they have cited, which are mere abstract opinions. But I set in opposition to their opinions the opinion of the judges of North Carolina in very much the language of the last convention in Pennsylvania, that convinces me they are in error. The Pennsylvania Convention was not organized in a state of war, in a state of profound peace, where judges are eulogized because of the conservatism of the state, for it is a very conservative people. The people of Pennsylvania I regard as the most conservative of all the states of the North. In that convention the issue was first made upon legislation which prohibited any alteration of the bill of rights, that this should stand just as it had been, without any alteration whatsoever. It came up on a proposition to create a committee on a bill of rights, and it was created by a very large favorable vote. I mention as one who voted in favor of it, William M. Meredith. He died during the session of the convention. He was an old Whig, an old lawyer, second only to Horace Binney in his great reputation as a lawyer and a conservative statesman. He utterly denied by his vote, while president of the convention, the power of the Legislature to put limits upon the convention.

"The convention acted in defiance of the legislative resolution, and did amend the bill of rights; Mr. Meredith voted that notwithstanding the restrictions placed by the Legislature on the convention, that they had the power to act on the bill of rights, though it changed and altered it, cut out the first section, and altered it in other respects. The restriction was made through the courts, as referred to by my friend from Galveston. When the Constitution had been adopted by them, when there was no longer anything to be accomplished except to establish a principle, they submitted the question to a committee, and they reported unanimously, with one exception, in recognition of the principle that the convention had power over the bill of rights, despite the restrictions sought to be placed upon it. I will read only just so far as concerns authority of the people. I will read only the second resolution:

" '2. *Resolved,* that the Constitution of the State is the only recognized form of its government, and the people having expressly reserved to themselves the right to alter, reform, or abolish their government in such manner as they think proper, and having in distinct terms excepted this right out of the general powers of

government, and declared that such right shall ever remain inviolate, this Convention deems it to be its duty to declare that it is not in the power of any department of the existing government to limit or control the powers of a convention called by the people to reform their Constitution; and that the convention, subject only to the Constitution of the United States, is answerable only to the people from whom it derived its power.'

"This is the same doctrine announced by the judges of North Carolina. The report of the committee in the Pennsylvania case was adopted by a vote of 66 to 13 and supported by the whole body of the convention, only a few members voting against it and they because it was useless to adopt it, the labors of the convention having been completed. So we have the precedents both of law and and politics and in view of the exigencies of the circumstances before us, our duty to this people to relieve them of that odious Constitution which has cut out of the bill of rights the principle for which we contend, is plain. In view of the fact that the will of the people should be fully and fairly expressed without impediment of any kind, it appears to us, that both in law and politics we are safe in passing this ordinance recommended by the majority of the committee. But my friend from Galveston, when asked the question as to the authority on the Constitution for the Legislature to call a convention, asserted that the authority was vested in the Legislature under its general power. Well, I say, on this subject, that their power is restricted and that they had no power to do more than the distinguished men from Virginia said they had a right to do, direct the officers of the government to register the people's will. But it has been decided by the Supreme Court of this State—and there are other precedents—that where the Constitution expresses the mode in which a thing may be done by the Legislature, it may pursue that mode and no other. So it was in the tax cases. The Constitution allowed a proceeding *in rem*; no other could be used in collecting the land tax.

"So when we talk about the meaning of the Constitution vesting authority in the Legislature, we say that there was a way provided by the Legislature, plain in every respect, and that was by proposing amendments to the Constitution. They did propose some amendments, but they did not propose the amendments the people required and they demanded that they direct their officers to put the machinery in operation by which their sovereign will might be exercised. So I say there can be no doubt, in view of the fact that we, as the delegates of the people, are restrained only by the Constitution of the United States in exercising the will of the people. And our responsibility to our sovereign is direct. I have given considerable attention to the subject, and have been impressed by the researches of the gentleman from Travis, that in all those researches he has

found no authority to show that we are not able to pass this ordinance, and I am persuaded that there is no danger of a collision with the Government of the State. As was well said by the gentleman from Anderson (Judge Reagan), this question of a constitutional convention was voted on in the election that elected Richard Coke. It was a principle for which he contended in the platform of principles on which he stood, together with his solid worth and honest defense of those principles, that caused his majority of 50,000. It was the demand of the people that a convention of the people should reform and remodel their Constitution. It was a decree of the people to the Legislature that they should arrange for a convention, and the Legislature had only the right to hold that matter in abeyance for reasons which were of the most imperative character. My judgment was then—though I was told that it was because I did not understand the situation—that as soon as the government was in the hands of the officers we had elected, that it was their duty, and within the scope of their power of attorney, for the Legislature to move in the matter, so that the people might have again and without delay have resumed their sovereignty, which is their inheritance, and which it is not within the power of any government existing through them to deprive them of. We are in no dread, at all events, as to the course of Richard Coke, who is still a patriot, and owns his fealty to that sovereign power. He will make no discord in consequence of our act. As to the judiciary itself, there is no fear to be had from that quarter. My friend, the gentleman from Travis, delivered the well considered declarations of the Chief Justice on this subject, and he would be well supported by these authorities, and under these we have the power to suspend the election, and when suspended under this ordinance, it is good. The idea that a sheriff shall set himself up as an authority against this Convention, and expect such tribunals as we now have to sustain his power is absurd. There will be very few who will try it, I apprehend. And if they choose to create disturbance, let them do it. There is power enough in the organization of the government to proceed without a sheriff, if he cuts up about going out of office six months later than he would go out in any event, and so it is with all other officers who may come under this description The argument of the committee was logical. It was of no use to consult questions of expediency until we decided the question of power. We came to the conclusion in the committee that we had the power, as you have heard from my friend from Travis and the other gentlemen who have spoken for the majority report, and I believe there are very few of the members of the Convention who doubt its expediency."