

THE STATUS OF CONSTITUTIONAL CONVENTIONS IN NEW JERSEY

The New Jersey Constitution will this year become ninety-four years old. It is, in its present form, one of the oldest state constitutions and has been amended on only three occasions.¹ Before this Constitution was thirty years old, Governor Parker in his annual message of 1873 advocated a constitutional convention to propose changes. From time to time since then New Jersey governors have repeated this recommendation.² Numerous constitutional convention bills have been introduced in the Legislature,³ and five such bills have passed the lower house, only to be stopped in the Senate.⁴ The primary reason for the

1. 1875, 1897, 1927.

2. (a) Governor George Ludlow, January 18, 1881. "Of the methods (i.e., as compared with the legislative proposal method) it seems to me that of a convention is the safer and more desirable, * * * for these and other reasons it would seem to me that the better course to provide for amending the Constitution, if at all, is by a convention rather than by specific amendment."

(b) Governor Robert Green's inaugural message of 1886. "How was amendment to be accomplished? The plan of a commission has been tried—it is far from satisfactory. The only method, reading the whole case, is by a constitutional convention." (He again made the same recommendation in 1877, 1888 and 1889.)

(c) Governor Franklin Murphy's message to 1905 session of Legislature. "It is my belief that the time has arrived when a representative constitutional convention should be summoned to give the people the opportunity to revise their fundamental law."

(d) Woodrow Wilson's message to the Legislature, January 14, 1913. "I urge upon you very earnestly indeed, the need and demand for a constitutional convention. * * * I hope that this question will be taken up by the Legislature at once and a constitutional convention arranged for without delay."

(e) Acting Governor James Fielder, Special Message, March 26, 1913.

(f) Governor A. Harry Moore, Annual Messages, 1927 and 1928.

3. The most recent such bill was introduced May 2, 1938, by Mr. Osmer as Assembly, No. 654.

4. Assembly minutes.

(a) 1881—passed Assembly 31 - 25.

(b) 1882—passed Assembly 35 - 15

failure of any of these bills to enlist the approval of the Senate seems to have been the fear that a convention would disturb the equal representation of the counties in that body.⁵ Conventions have also been advocated in a number of party platforms.⁶

The agitation for a constitutional convention may therefore be described as chronic. The current constitutional convention in New York, and the reflection that the New Jersey Constitution is approaching its one hundredth birthday without

(c) 1883—passed Assembly 32 - 26.

(d) 1885—passed Assembly 30 - 25.

In declaring the 1885 bill passed, the speaker of the House (Armstrong) rendered the following decision: " * * * The particular language employed in Art. 4, Sec. 6 of the Constitution, means that no matter how small the number may be composing a House for the time being, a majority of that number is all that is required to pass any bill or joint resolution."

(e) 1913—passed Assembly 38 - 13. (This was the only bill that came to a vote in the Senate. It was defeated 4 - 14.)

Despite statements by Professor Charles Erdman, Jr. (*The New Jersey Constitution—A Barrier to Governmental Efficiency and Economy*, Princeton, 1934, p. 33) and Judge William Clark (*Journal of Industry and Finance*, April, 1934), we can find no record of a constitutional convention bill in the 1907 Assembly. The Assembly Minutes at p. 465 refer to Assembly Concurrent Resolution No. 7 asking for appointment of a committee of three members from each House to report "Before adjournment of the Legislature a bill for the holding of a constitutional convention at an early date." This Resolution was adopted on April 3.

5. See for example:

(a) *Newark Daily Advertiser*, Feb. 16, 1881. "The bill cannot pass the Senate unless some extraordinary means are taken to secure South Jersey support, for the simple reason that no southern man is willing to surrender the present senatorial representation system."

(b) *Newark Evening News*, Feb. 27, 1913, March 27, 1913, and especially editorial of March 28, 1913: "One point, and one point only, brought about the discouragingly decisive defeat of the proposed constitutional convention in the Senate. And this point was the fear of the rural counties that they would be deprived of their hold on the Senate and reduced to a shadowy minimum of representation in both houses. It overbalanced all the sound reasons for a new Constitution."

6. E.g., the Democratic platforms for 1912, 1925, 1926, and 1927.

benefit of a single general revision, (although the 1875 amendments effected a number of important changes) may be expected to accentuate this condition. The New York convention is being held by virtue of a constitutional mandate that the question of holding a convention be submitted to the people every twenty years. The New Jersey Constitution is one of twelve state constitutions which contain no such mandate and, indeed, make no provision whatever for a constitutional convention.⁷ It is, therefore, important to determine the legal status of a constitutional convention in New Jersey.

Specifically:

(a) Can the Legislature call a convention for the purpose of drafting and submitting directly to the people a new or revised constitution?

(b) Must the Legislature first obtain the consent of the people for calling such a convention?

These questions have never been authoritatively determined in New Jersey. However, conflicting responsible opinions exist. The legality of a convention does not seem to have been seriously questioned in connection with the earlier attempts to call conventions; but the matter was extensively debated in 1913.⁸

The most formidable opinion denying the constitutionality of a constitutional convention was rendered by Attorney General Edmund Wilson on February 5th, 1913, to Assemblyman Emerson L. Richards.⁹

Another adverse opinion by Ex-Justice Bennet Van Syckle was published in the press and in the New Jersey Law Jour-

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

8. The question of constitutionality was raised in connection with the Constitutional Convention bill of 1882, but was apparently not given serious attention. See *Newark Daily Advertiser*, Feb. 7, 1882.

9. Copy of opinion on file in Attorney General's office.

nal.¹⁰ The editor of the Law Journal in a note approved Justice Van Syckle's argument.¹¹

Assemblyman Richards, relying in part on the opinion of the Attorney General, argued that "A vote for the proposed convention would violate the members' promise to uphold the present constitution."¹² Senator, later Governor Walter Edge, questioned the constitutionality of the bill when it was under debate in the Senate¹³ and ex-Governor Stokes also argued that a convention would be unconstitutional. Years later, however, Governor Stokes was quoted in the Newark Evening News for September 21, 1927, to the effect that although the present constitution does not contemplate a constitutional convention, it would be possible for the Legislature to provide for a convention, the proposals of which, if adopted by the people, "would become the supreme law of the state." Mr. Stokes did add that "such a procedure would be a revolution, even though it was a peaceful revolution, and would overthrow the present state constitution."

Despite the argument against the constitutionality of the convention in 1913, such eminent lawyers as Senator and Acting Governor James F. Fielder, now Vice-Chancellor,¹⁴ George L. Record, Judge Harry V. Osborne and others in and out of the Legislature, supported the convention bill without any qualms about the constitutional question.¹⁵ Assemblyman Hennessee, the introducer of the convention bill, answered the con-

10. 36 N.J.L.J. 1, 1913.

11. 36 N.J.L.J. 34, 1913.

12. *Newark Evening News*, March 20, 1913.

13. *Newark Evening News*, March 27, 1913.

14. *Senate Journal*, March 26, 1913.

15. *Newark Evening News*, Dec. 3, 1912, Jan. 15, 1913, and March 26, 1913. e.g. Judge Osborne's declaration reported in the *News* for Dec. 3 that the constitutional objection had no weight and that the right of the people to a constitutional convention could not be taken away from them.

stitutional arguments of Mr. Richards and the Attorney General,¹⁶ as he had previously answered similar objections from Van Syckle and Stokes.¹⁷ The News itself also made cogent answer to the Attorney General in its editorial columns.¹⁸

In addition to the opinions already cited against the constitutionality of a convention in New Jersey, the only other one which deserves attention was by Charles A. Boston, later President of the American Bar Association. In a letter to the President of the New Jersey Civic Federation dated December 16, 1907, Mr. Boston assumed, although he admitted that his comments were not based upon extensive research, that the method of amendment provided in the constitution is necessarily exclusive. Further discussion of Mr. Boston's opinion will appear later in this article.

Additional support for the legality of a constitutional convention in New Jersey is to be found in the following:

1. Obiter dictum of Justice Kalisch, Justice Trenchard concurring, in the Supreme Court opinion rendered in *Carpenter v. Cornish*. "The Constitution * * * is the fundamental law of the land until supplanted either by a new Constitution adopted as that was adopted or by amendment in the manner therein provided."¹⁹

2. An address of U. S. District Court Judge William Clark.²⁰

3. Speech by Governor George S. Silzer at State Bar Association Convention, 1925.²¹

16. *Newark Evening News*, Feb. 5, 1913; March 20, 1913.

17. *Newark Evening News*, September 12, 1912.

18. E.g., Feb. 6 and 7, 1913.

19. 83 L. 262, 1912.

20. Judge Clark. *op. cit.*, at pp. 7 to 9, extracts from an address before the Federal Bar Association of New York, New Jersey, and Connecticut, March 26, 1934

21. 48 N.J.L.J. 193.

4. The opinion of Charles R. Erdman, Jr., Assistant Professor of Politics, Princeton University.²²

5. Opinions expressed in the debates of the Constitutional Convention of 1844.

6. Editorial opinion of Edward and George Keasbey, editors of the New Jersey Law Journal.²³

7. Unanimous opinion of text writers.²⁴

Before developing the affirmative case for the legality of a constitutional convention, we will analyze the two most substantial New Jersey opinions contra.

The opinions of both Van Syckle and Wilson are largely

22. Erdman, *op. cit.*, at p. 28. Mr. Erdman after a brief review of the authorities concluded that the legality of a constitutional convention "is well established today and there is no question but that a convention in New Jersey would be upheld by the Courts of this State."

23. 9 N.J.L.J. 100, 1886.

24. JOHN ALEXANDER JAMESON, CONSTITUTIONAL CONVENTIONS (4th ed.) 1887, Callaghan & Co.; THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS (7th ed.), Little, Brown & Co., 1903, p. 60; WALTER F. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS, John Hopkins Press, 1910, p. 40, and STATE GOVERNMENT, Century Co., 1928, p. 94; ROGER SHERMAN HOAR, CONSTITUTIONAL CONVENTIONS, Little, Brown & Co., 1917, p. 38; ARTHUR N. HOLCOMBE, STATE GOVERNMENT IN U. S., MacMillan Co., 1931, pp. 97 and 98; AUSTIN F. MACDONALD, AMERICAN STATE GOVERNMENT AND ADMINISTRATION, Thomas Y. Crowell, 1934, p. 88; ARTHUR W. BROMAGE, STATE GOVERNMENT AND ADMINISTRATION IN THE UNITED STATES, Harper and Brothers, 1936, p. 84; CHARLES C. ROHLFING, AMENDMENT AND REVISION OF STATE CONSTITUTIONS, in The Annals of the American Academy of Political and Social Science, September 1935, p. 182; HARVEY WALKER, LAW MAKING IN THE UNITED STATES, Ronald Press, 1934, pp. 66 and 67; W. S. CARPENTER and P. T. STAFFORD, STATE AND LOCAL GOVERNMENT IN THE UNITED STATES, Crofts, 1936, p. 30. Professors Carpenter and Stafford, both of Princeton University, declared that "It is undoubtedly within the power of the Legislature to provide for the calling of a convention," in all the states except Rhode Island. JOHN M. MATTHEWS, AMERICAN STATE GOVERNMENT, Appleton-Century, Revised Edition 1934, p. 117; FRANK G. BATES and OLIVER P. FIELD, STATE GOVERNMENT, Harper and Brothers, 1928, p. 84; CLARENCE G. SHENTON, AMENDING THE PENNSYLVANIA CONSTITUTION, paper prepared for meeting of the Constitution Club, Phila., Nov. 15, 1934, revised draft, Feb. 13, 1935. Mimeographed.

based upon an advisory opinion of the Rhode Island Supreme Court delivered in 1883.²⁵ In 1935, however, that advisory opinion was repudiated by the Rhode Island Supreme Court in another advisory opinion.²⁶

The Rhode Island Supreme Court, *inter alia*, refused to follow the earlier decision and called attention to the fact that that opinion had been delivered only six days after it had been requested. The court then continued:

“The whole opinion indicates that it was ill-considered and hastily prepared. It is not only not binding on us as a precedent, but is also entitled to little or no weight, in spite of the ability and character of the men who joined in it ”

A fortiori, the same criticism can be leveled at the opinion of Attorney General Wilson. The request for an opinion came from Emerson Richards, a member of the House of Assembly, on February 4, 1913. Next day, the Attorney General responded in a lengthy opinion which attempted to cover the subject in all its phases. In view of the fact that both were members of the Republican party, and that pressure for a constitutional convention was then coming from Governor Wilson, at that time Democratic President-elect, and the further fact that the Legislature was Democratic (one of those rare occasions), it is perfectly fair to question the bona fides of the opinion as well as its legal soundness. As we shall see later, this question becomes even more pointed in the light of the palpable misuse or misinterpretation of the precedents by the writer of the opinion. We feel that the Attorney General had stepped out of his role as

25. *In re* the Constitutional Convention, 14 R.I. 649.

26. *In re* Opinion to the Governor, 178 Atl. 433.

the legal advisor to the State and was appearing as a private advocate writing a brief to maintain a client's position. As a matter of fact, the opinion of Wilson met with wide disapproval.²⁷

Attorney General Wilson's reasons for holding the proposed convention unconstitutional boil down to the proposition that since the constitution does provide a method of amendment, no other method of constitutional change is permissible. He attempted to support this idea, first, by what we shall show is the unfounded claim that the exclusive character of the amending process had never been seriously questioned in this state, and, second, by a citation of cases from other jurisdictions.

Let us first examine the cases upon which he relied.

As we have already pointed out the Rhode Island case upon which the Attorney General principally relied has since been over-ruled. Moreover the case has never been followed by the courts of any other state.

The opinion of Wilson also rested heavily upon an opinion

27. *Newark Evening News*, February 6, 1913. "Considerable criticism is being leveled at Attorney General Wilson as a result of his actions in giving to minority leader Richards an opinion on the constitutionality of the bill by Assemblyman Hennessey to hold a constitutional convention. Some of the Democrats have expressed the opinion that the action was discourteous and could be properly construed as an attempt to influence pending legislation.

"Comparison was made of the Attorney General's act with that of some of his predecessors, especially John P. Stockton and Samuel H. Grey. It was stated by old-timers around the State House that both of those men had been asked for opinion upon pending matters while they were Attorney Generals and that both refused to render opinions unless requested by a majority of one of the legislative bodies.

"It was stated that one year, when there was a coal combine measure in the Legislature, Mr. Grey was asked by the Committee to which the bill had been referred, to give an opinion upon its legality, but that he refused on the ground that unless the opinion was requested by a majority of the House, compliance might be considered an attempt to influence pending legislation."

of Chief Justice Shaw of Massachusetts.²⁸ An analysis of that case shows that its holding can not be construed in the manner that Wilson attempted. The Constitution of Massachusetts provided a mode by which "specific and particular amendments" might be made through the legislative method. The question put to the Judges was whether "Any specific and particular amendment or amendments could be made in any other manner than that provided in the Constitution." It is obvious that a negative answer to this question does not determine the validity of a general revision by convention. This opinion is directly in line with the holdings of other cases which we shall later discuss. The most recent opinion of the Rhode Island Court said of it:

"We are fully convinced that the Massachusetts opinion does not support in the slightest degree the opinion of our judges."

It should be noted furthermore, that a convention was called by the Legislature of Massachusetts in 1853, twenty years after the Shaw opinion, and a constitution was prepared and submitted to the people of Massachusetts by that convention.

Wilson also relied upon the cases of *Koehler and Lange v. Hill*,²⁹ *State v. Powell*,³⁰ and *Ellingham v. Dye*.³¹ However, a careful analysis of these cases shows that they also do not justify the conclusion of Mr. Wilson.

The case of *Koehler and Lange v. Hill* involved the question of whether an amendment could be validly adopted without complying fully with the provisions of the amending clause.

28. OPINION OF JUSTICES, 6 Cushing 573.

29. 60 Ia. 616.

30. 77 Miss. 543.

31. 178 Ind. 335.

The court necessarily held that it could not; but this decision has no bearing on the validity of a convention.

The Koehler case was based upon an earlier decision of the Alabama court in *Collier v. Frierson*,³² wherein the same question was at issue. The Alabama Constitution contained a declaration of rights similar to that contained in Article 1, Sec. 2 of the New Jersey Constitution. There also was no reference to a convention in the constitution. The court said:

“The Constitution can be amended in but two ways; either by the people, who originally framed it or, in the mode prescribed by the instrument itself. * * * We entertain no doubt that to change the Constitution *in any other mode than by a convention*, every requisite that is demanded by the instrument itself must be observed and that the omission of any one is fatal to the amendment.”

The holding in the Powell case was similar to that in the Koehler case, and also does not bear on the legality of a convention.

In the Indiana case of *Ellingham v. Dye*, the court, holding that the Legislature could not under the guise of amending the constitution in specific instances frame a new constitution, enjoined the officials from submitting the new constitution. The Indiana Constitution included no provision for a convention, but contained a provision with reference to rights and privileges similar to the one contained in our Article 1, Sec. 2. The court said:

“On the other hand, the long established usage has settled the principal that a general grant of legislative power carries with it the authority to call conventions for

32. 24 Ala. 108.

the amendment or revision of the constitution; and even where the only method provided in the constitution for its own modification is by legislative submission of amendments, the *better doctrine* seems to be that such provisions, unless in terms restrictive, are permissive only and do not preclude the calling of a constitutional convention under the implied power of the legislative department."

Mr. Wilson's own authorities thus turn out upon examination to be against him.

Wilson also briefly alluded in passing to the authority which he said might be cited in opposition to the view which he expressed. He intimated that his opinion was the general view. The cases that he thus attempted to represent as standing for the "minority" view are *Wells v. Bains*³³ and *Collier v. Frierson*. He also referred to the works of Jameson, but made no mention of the case of *Woods Appeal*,³⁴ which is directly in point.

Van Syckle also held that Article IX prescribes the only permissible method for changing the Constitution. He attempted, like the Attorney General, to distinguish the revision of the Constitution of 1776 from revision of the present Constitution by pointing out that the earlier document contained nothing at all about amendment. He said, speaking of the Constitution of 1776:

"From the absence of any provision for a change the inference was inevitable that the distinguished men who framed it did not intend that it be so ironclad that it could never be altered or amended when changed conditions and the experience of the future indisputably

33. 75 Pa. 39.

34. *Woods Appeal*, 75 Pa. 59.

proved that some alteration was essential to the well being of the people of the state.”³⁵

Justice Van Syckle also relied upon the Rhode Island case of 1883. The Judge did not overlook the provisions of Article 1, Sec. 2, of our Constitution which reserves to the people the power to alter or reform their government. He felt, however, that the exercise of this power by the people must be accomplished through the method laid down in the Constitution and that if the people want to change their Constitution they must proceed in the manner prescribed by the amending article. The unsoundness of this position will be demonstrated later in this article.

Let us now summarize the case for the legality of a constitutional convention in New Jersey. We have first, the language of the Constitution itself, which must in the absence of serious ambiguity be controlling. Article IX begins, “Any specific amendment or amendments to the Constitution may be proposed in the Senate or General Assembly * * * .” The clause then provides in detail for the passage of proposed amendments by a majority of the members of both houses, publication and adoption by a majority of both houses of the Legislature next chosen, and ratification by the people at a special election held for the purpose. The Article concludes “ * * * provided, that if more than one amendment be submitted, they shall be submitted in such manner and form that the people may vote for, or against each amendment separately and distinctly; but no amendment or amendments shall be submitted to the people by the Legislature oftener than once in five years.”

The amending clause should be read in the light of Article 1, Sec. 2, which reads:

35. 36 N.J.L.J. 7.

"All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people and they have the right at all times to alter or reform the same whenever the public good may require it."

Even a casual reading of Article IX by itself suggests that it was not intended to provide the only method by which the Constitution could be revised. In fact, the use of the language "any specific amendment or amendments * * * may be proposed in the Senate or General Assembly * * * " would suggest that the purpose is to provide in this Article not for a general revision but for alterations of detail. This interpretation is strengthened by the last part of the Article which provides that such amendments must be submitted in such a way "that the people may vote for, or against each amendment separately and distinctly * * * ." Such a requirement imposes a very serious handicap on extensive constitutional revision by the amending process. An illustration is to be found in the experience of the state with the amendment submitted to the people in 1927 for the extension of the terms of the Legislature and Governor. After the amendment had been passed by two successive legislatures, it was pointed out that embarrassment might result from the elimination of the annual elections of Assemblymen because of unaltered provisions in Article VII, Sec. 2, for the election of County Clerks, Surrogates, Sheriffs, and Coroners "at the annual elections for members of the General Assembly." Since Clerks and Surrogates have five year terms and Sheriffs and Coroners three year terms, it is apparent that the elimination of annual elections for the General Assembly would have caused legal difficulties. The Newark Evening News called attention to this situation as constituting a valid objection to the adoption of the amendment. The News added

that "Republican members of the Legislature were aware of the possible clash of constitutional provisions when the amendment was pending, but they stated the situation could be met by making early changes in the Constitution in case the time limitation amendment should be adopted."³⁶ This was obviously a lame answer, especially in view of the fact that no one could be sure that "the time-limitation amendment," an amendment to permit the submission of proposed constitutional changes more often than once in five years, would be passed even if the others were. In fact, the answer only tends to emphasize the unsatisfactory nature of the process of piecemeal amendment of the Constitution in important respects.

Only a convention charged with the responsibility for constitutional revision can be expected to give the document the thorough scrutiny required when important or far reaching changes are contemplated. It is equally clear that submission of specific amendments in such a way that the people can vote for or against each one separately runs the risk of producing a chaotic if not a completely unworkable result. Professor Erdman has called attention to another objection to the legislative proposal of specific amendments by showing that in the special elections of 1875, 1890, 1915, and 1927 the electorate showed its inability to distinguish between separate amendments on unrelated subjects; and thus either accepted questionable amendments indiscriminately with non-controversial ones, or rejected non-controversial ones because of objections to others.³⁷ An amusing illustration of this weakness is to be seen in the fact that both in 1890 and in 1927, the voters rejected an amendment to eliminate the obsolete provision in Article VII of the Constitution for the election of Judges of the Court of Common Pleas by the Legislature. Because of such considerations, the

36. *Newark Evening News*, Sept. 7, 1927.

37. Erdman, *op. cit.*, at pp. 19 ff.

recognized authorities make a clear distinction between the functions of amendment and revision, and point out the superiority of the convention for the purpose of revision.³⁸

It should also be borne in mind that of the twelve states without provision for a constitutional convention, New Jersey and Massachusetts are the only ones in which the amending clause makes use of the words "*specific amendment*."³⁹ In other words, the argument for a constitutional convention as the appropriate instrument for a general revision is stronger in New Jersey than in most other states lacking provisions for a constitutional convention. If the question were ever raised, a strict construction of the language of the Constitution would indeed limit the application of Article IX to specific amendments. It may, therefore, some time develop that a convention is the *only* method available to the people of New Jersey for a general revision.

38. E.g. Jameson (*op. cit.* p. 60) draws the distinction between specific amendments and a general revision in a statement which is quoted with approval by the recent Rhode Island Supreme Court decision, as follows: "Where a few particular amendments only are desired, if the Constitution provides for both modes, the legislative mode should be employed; but if a revision is or may be desired, the mode by convention *only* is appropriate, or as we expect to show, permissible."

Ellingham v. Dye, (*op. cit.*) "We are convinced * * * that there is a real distinction between an amendment or amendments as used in Constitutions, and a revision or a new constitution, though it may be difficult in some cases to draw a clear line of demarcation between them."

Opinion of Attorney General William Langer (State of North Dakota, Opinions of the Attorney General, p. 321):

"A revised constitution, * * * is a constitution, altered in part or changed completely, but in form a complete document and to be submitted as a whole and standing or falling as a whole. Amendments relate to particular sections and are submitted as such to be voted upon separately. It is the submission of a document as an organic whole which distinguishes a revised and new constitution from mere amendments."

See also DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS p. 258.

39. KETTLERBOROUGH, THE STATE CONSTITUTIONS, 1918.

If the provision of Article 1, Sec. 2, quoted above, declaring the right of the people "at all times to alter or reform their government whenever the public good may require it" is more than a rhetorical flourish, it is clearly inconsistent with the contention that Article IX provides the only method for changing the constitution. In addition to the difficulty, if not the impossibility, of securing a general revision by the amending process as already indicated, the five year limitation creates a situation in which there might occasionally be periods of five years during which a constitutional change could not be effected, no matter how much the "public good" might "require it." Mr. Boston, in the letter already cited as one of the opinions against the constitutionality of a convention in New Jersey, actually stated the necessity for the view which we have expressed without apparently realizing its necessary implications. Mr. Boston deplored the provisions which make for delay in securing "desired or imperative changes" and pointed out that the requirement that amendments "must be so submitted as to enable each elector to vote against each amendment separately and distinctly * * * precludes an intelligent revision of the entire Constitution." He continued,

"It is unnecessary for me to picture the combinations and permutations under this arrangement by which desired or imperative changes might be indefinitely postponed. It might be done, if two legislatures disagreed in an unimportant particular, or if the two houses of one legislature disagreed over a word, or if a wholly unimportant amendment were rejected by the people. The people cannot even provide within five years a satisfactory substitute for a rejected amendment. It seems to me that, if the constitution is so construed * * * then the constitution itself sets the people in bondage both to its Legislature and to an arbitrary period of time."

He then concluded,

" * * * It would seem that no constitution should be so bound by arbitrary methods of amending it that such methods should stand in the way of an amendment by the people through the medium of a constitutional convention."⁴⁰

Mr. Boston was right in pointing out that "No constitution should be so bound by arbitrary methods of amending;" but he should have recognized that, in fact, no constitution *can* be so bound.

The foregoing discussion must be read in the light of the opinion of Attorney General David Wilentz given to the House of Assembly March 29, 1938, in response to a request for an interpretation of the clause reading "no amendment or amendments shall be submitted to the people by the Legislature oftener than once in five years."⁴¹ The Attorney General, relying on the language of the article and on a recent Pennsylvania Supreme Court case construing the similar provision of the Pennsylvania Constitution,⁴² advised "that if an amendment or amendments to the Constitution have once been submitted to the people, the same amendment or amendments may not again be submitted to the people until the lapse of five years has occurred from the time of submission, and that the provision of the Constitution in question has no relation whatever to an amendment or amendments of the Constitution not so submitted to the people."

40. Quotations from Mr. Boston's letter printed at pages 24-5 of the SPECIAL REPORT OF THE NEW JERSEY STATE CIVIC FEDERATION, entitled *The Constitution of the State of New Jersey and the Calling of a Constitutional Conference*, published at Orange, 1908.

41. Opinion on file in Attorney-General's office.

42. *Commonwealth v. Lawrence*, 183 Atl. 46, 1937.

If this opinion is good law, (and we are inclined to agree with it), it relaxes somewhat a restriction on the amending process, the nature of which had apparently never before been seriously questioned either by the Legislature or by any commentator on our Constitution. We think it necessary, however, to call attention to the fact that the opinion of the Attorney General does not settle the matter; and it is entirely possible that the New Jersey courts will accept the practical interpretation which has been given to the clause ever since 1844, and which had been adopted by the Pennsylvania Supreme Court in an earlier case.⁴³

Although the debates in the Convention of 1844 as reported in the press do not tell precisely what the members of the Convention meant by the clause in question, such indications as there are seem to support the conclusion that the delegates thought they were adopting a provision which would prevent "a constant agitation" over the amendment of the Constitution. The desirability of achieving such a result was alluded to repeatedly during the debates on the amending clause; and when Mr. Parsons offered the five-year limitation as an amendment to the original amending clause, he was reported to have done so "for the purpose of preventing a constant agitation which appeared to be so much dreaded, * * * ."⁴⁴ It is apparent from the debates that the five-year limitation was thought of by a number of the delegates as an alternative to requiring a two-thirds or three-fifths vote in the Legislature for the purpose of increasing the difficulty of submitting amendments to the people.⁴⁵ Remarks by Mr. Vroom on the afternoon of June 25 indicate that he too apparently thought that the time limitation

43. *Armstrong v. King*, 126 Atl. 263, 1924.

44. *Newark Daily Advertiser*, May 24, 1844.

45. See, for example, remarks of Mr. Randolph reported in the *Newark Daily Advertiser*, May 24, 1844.

provision applied to all amendments.⁴⁶ It is true that debates in convention, even if more conclusive than this, are not controlling; but we fear that they might be persuasive, especially in view of the general acceptance, for so long a period, of the point of view represented. The courts might also be influenced by the fact that amendments to remove the time limitation have twice been rejected by the people.⁴⁷

If, however, the courts agree that the five-year clause does not prevent the submission of different amendments at more frequent intervals, the clause still remains as a limitation of more or less uncertain severity on the right of the people by amendment to "alter or reform" the Constitution. In the first place, it is not clear how far the limitation would still extend. The Pennsylvania Supreme Court, in the case relied upon by the Attorney General, spoke as follows: "Thus understood it means that after a particular amendment, or amendments, has been once submitted another like amendment, or one similar in substance, to the same article cannot be proposed or submitted within five years." The Court later remarked that the limitation meant only "that after an amendment had been once submitted, it or *one substantially related* could not again be submitted until a period of five years has elapsed." (Italics ours.) It is obvious that there is considerable room for doubt as to when an amendment is "similar in substance" or "substantially related" to an amendment submitted within less than five years. It is entirely possible that an important amendment might be rejected because of a particular objectionable feature which could be corrected by a change in only a word or two. Any attempt to resubmit such an amendment after correction would become a subject of interpretation and probable litigation, with doubtful results. Moreover, as we have already pointed out,

46. *Newark Daily Advertiser*, June 27, 1844.

47. 1915 and 1927.

when a number of amendments are submitted together, it commonly happens that strong objection to one or two of the amendments results in the defeat of all, however meritorious or important some may be. Yet, even under the most lenient interpretation of the five-year clause, it would be impossible to resubmit any such rejected amendments for five years.

At this point, it may also be worth while to call attention to another circumstance which may in all probability soon increase the delay attendant upon the amending process. We refer to the likelihood that the terms of members of the Assembly may be extended to two years. This was done in Pennsylvania in 1873 and, as Mr. Shenton pointed out, "It measurably increased the time necessary to amend the Constitution."⁴⁸

As Professor Erdman showed,⁴⁹ the amending clause of the New Jersey Constitution was based on that of the Pennsylvania document of 1838. Moreover, the clause in the "Declaration of Rights" in the Pennsylvania Constitution, corresponding to Article 1, Sec. 2, of the New Jersey Constitution, affirms the "inalienable and indefeasible right (of the people) to alter, reform, or abolish their government in such manner as they may think proper." The opinion of the Supreme Court of Pennsylvania, declaring that a constitutional convention in Pennsylvania was constitutional, should therefore have great weight in this state.

The Pennsylvania Court said:

"The calling of a convention and regulating its action by law, is not forbidden in the Constitution. It is a conceded *manner* through which the people may exercise the right reserved in the Bill of Rights. It falls, therefore, within the protection of the Bill of Rights as a very man-

48. Shenton, *op. cit.*

49. Erdman, *op. cit.*, at pp. 26-27.

ner in which the people may proceed to amend their constitution. * * *⁵⁰

This argument is rendered even stronger in New Jersey by reason of the only significant difference between the amending clause in the Pennsylvania Constitution and that in the New Jersey Constitution; namely, the insertion before the word "amendment" of the qualifying word, "specific," in the New Jersey document, despite its absence in the Pennsylvania Constitution. (See above.)

The debates on the amending clause in the New Jersey Constitutional Convention of 1844 throw some light on what the makers of the Constitution themselves intended concerning revision by convention. An attempt was made to secure the adoption of a specific provision for a constitutional convention. On May 23, 1844,⁵¹ Mr. Green proposed an amendment to the effect that "no convention to alter or amend the constitution shall be called but by authority of the people." Mr. Green's amendment included an elaborate method for ascertaining the will of the people by ballot at their town meetings every fifth year. This proposal led to an extended debate during the course of which Mr. Condit asked if the Legislature would not "retain the power to call a convention as has been done in this instance?" The Chief Justice, Mr. Hornblower, answered the question as follows:

"* * * I have been thinking on that subject and am of the opinion that this report only provides a mode in which specific amendments may be made, but the legislature will still retain the power to call a convention to revise the constitution."

50. Woods Appeal, *op. cit.*, at p. 72.

51. *Newark Daily Advertiser*, May 24, 1844.

Mr. Green then remarked that he had assumed

“that if the constitution provides a method of making amendments, the power of the legislature is restricted by that constitution. I am not disposed, however, to argue that question with the Chief Justice. But if that power still will remain in the legislature, I should prefer that it be specifically restricted.”

Upon Mr. Hornblower's objection that Mr. Green's amendment required “too much machinery” the amendment was defeated. Mr. Hornblower thereupon offered a substitute to the effect that “by a vote of a majority of both houses, the legislature may submit a question to the people, (not oftener than once in ten years) whether there shall be a convention to revise the constitution.” Mr. Hornblower declared that “he was not tenacious as to this amendment” but that he would like to see it adopted because “he was unwilling to have it a debatable matter whether the legislature will have a right to provide for any other mode of amendment than that proposed in the report.” Mr. Hornblower's amendment was adopted by the committee of the whole. After somewhat confusing debate in regular session of the convention on June 25, 1844,⁵² Mr. Hornblower's amendment was struck out and consequently the constitution was finally adopted without any specific provision for a convention. In the course of the debate, Mr. Halsted, who moved to strike out the convention clause, contended that it was unnecessary since a method of making amendments was provided. Mr. Vroom declared “that if we adopt a mode in this Constitution for future amendments, the legislature are bound by it *except in cases of emergency*.” Mr. Hornblower reiterated his contention that regardless of the lack of a specific constitu-

52. *Newark Daily Advertiser*, June 27, 1844.

tional authorization, the Legislature would have the right to submit a proposition to call a constitutional convention to the people. He declared that if the contrary view was correct, it was "entirely at war with the article in our Bill of Rights that we have made such parade about, that the people are sovereign, and may change their form of government when they choose." Mr. Ryerson hoped that the section on the calling of a convention would be stricken out because of the provision in it limiting the right to submit the question to once in every ten years. He contended that it was "anti-republican, and that it was the inalienable right of the people to change their form of government whenever they choose * * * ." Mr. Naar opposed striking it out because he wanted "to control the action, not of the people, but of the legislature." Before the final vote, Mr. Allen again asked if the legislature would still have the power to submit a proposal to call a convention to the people if the article were stricken out, and Mr. Hornblower again replied affirmatively.

It is apparent from the debate that the members of the convention were not unanimous in their opinions concerning the constitutionality of a convention in the absence of a specific provision therefor. However, of those who spoke directly to the point, the weight seems to have been definitely on the side of Justice Hornblower's position and it is significant that among those who opposed Justice Hornblower's amendment were apparently persons, like Ryerson, who did not wish even to limit what they regarded as the inherent right to a constitutional convention. In the absence of a clear indication to the contrary, it is a legitimate assumption that the majority of the convention accepted Mr. Hornblower's opinion even though they did turn down his amendment. A reading of the reports of the debates throughout the convention indicates clearly the very high esteem in which Mr. Hornblower's opinions on legal questions

were held by his colleagues. It is to be noted that even Mr. Vroom, although he held that in "ordinary cases" the legislature and the people would be bound by the amending clause, admitted the possibility of "cases of emergency" in which they would not be so bound.

To the authority of the opinion of the members of the convention should be added the weight of the years of tacit acceptance of the right of the Legislature to provide for a constitutional convention indicated by the repeated recommendations of Governors and the action of the Legislature on constitutional convention proposals from 1873 to 1913, cited in the beginning of this article.

Further indication of the great strength of the inherent right of the people to alter their constitutions by the convention method is to be found in three precedents cited by Dodd as follows:

"In fact in Delaware where the constitution of 1776 provided that the constitution should not be 'altered, changed or diminished, without the consent of five parts in seven of the assembly, and seven members of the legislative council,' the legislature of that state in 1791 called a constitutional convention in spite of the provision that the constitution should be altered in only one way. So also the Maryland legislature called the convention of 1850, although the constitution of 1776 specifically provided that the constitution should be altered only by a bill passed by two successive general assemblies of that state. The Georgia constitution of 1798 contained a provision with respect to amendment similar to that in the Maryland constitution of 1776, but in this state also conventions were nevertheless held."⁵³

53. THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS, p. 44.

Another precedent can be found in the adoption of the Constitution of the United States in direct violation of Article XIII of the Articles of Confederation which read as follows:

“The Articles of this * * * Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.”

In conclusion then, we contend that a constitutional convention properly called would unquestionably be a constitutional method for proposing to the people a revision of the New Jersey Constitution. This position is supported by:

1. The language and nature of the Constitution itself.
2. The understanding of the intent of that language in the minds of the makers of the constitution.
3. The long continued acceptance of the proposition by the Governor, the Legislature, and the people.
4. Precedents and authoritative judicial opinions in other states with similar constitutional arrangements, especially Pennsylvania and Rhode Island.
5. The overwhelming weight of competent opinion both in this state and among the recognized national authorities.

Having determined that a constitutional convention would be constitutional, we now come to the question: must the Legislature first obtain the consent of the people for calling such a convention or may it simply enact a law providing for the election of delegates? The debates in the convention of 1844 as reported do not clearly indicate a definite or considered opinion on this subject. The method of calling the convention of 1844 itself, without first asking the permission of the people, is, however, a persuasive precedent in favor of the right of the Legis-

lature to act with or without such prior consent.⁵⁴ Furthermore, none of the bills for constitutional conventions which passed the Assembly contained any provision for securing authorization from the people before the holding of the election for convention delegates.

It would be hard, in the absence of a specific constitutional requirement, to spell out a legal obligation on the Legislature to submit to the people any particular question with which it is at all competent to deal. The New Jersey Constitution does require the submission to referendum vote of all constitutional amendments and of any proposition to create a state debt in excess of one hundred thousand dollars. We do not see how this list can be expanded by mere inference. It is hardly necessary to protect the right of the people to control their own constitution, because in the election of the delegates to the convention and in the ultimate passing on the work of the convention, the people have two effective checks.

This question was considered by the Rhode Island Supreme Court in its 1935 decision. Although not one of the questions originally submitted for its opinion, the court felt that it was important enough to warrant an answer on its own initiative. The court came to the conclusion that the legislature clearly had the power to call a constitutional convention without obtaining the approval of the people. Justice Baker dissented on this point although he agreed with the rest of the opinion. In addition, the text authorities, although scant on this subject, incline to the view that it is discretionary with the legislature whether or not the question should be submitted to the people. Hoar says, "There is a growing tendency toward the view that the legislature has no power to call a convention without first

54. See opinion of N. J. Supreme Court in *Chas. Bott et al v. The Secretary of State*, 62 L. 107.

obtaining permission from the people."⁵⁵ Dodd says:

"The practice of obtaining the popular approval for the calling of a convention may be said to have become almost a settled rule."⁵⁶

Dodd, however, says:

"When no provision is contained in a state constitution regarding the calling of a convention, it would seem to be *within the discretion of the legislature* as to whether the question should be submitted to the people."⁵⁷

The Louisiana Supreme Court has said that where a constitution is silent on the subject of conventions, and the legislature calls a convention based upon its inherent power, the silence of the organic law leaves the question of calling such convention to the representatives of the people in legislative sessions convened.⁵⁸

It is our conclusion, therefore, that despite the tendency to favor asking the people for authority to call a convention, the New Jersey Legislature has an unquestionable legal right to dispense with this formality.

JOHN E. BEBOUT
JULIUS KASS

55. Hoar, *op. cit.*, p. 68.

56. Dodd, *op. cit.*, p. 51.

57. *Ibid.*, p. 46.

58. State v. American Sugar Refining Co., 137 La. 407.