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HOW CAN NEW JERSEY GET A NEW CONSTITUTION?

In an article which appeared in this publication three years ago, we undertook to demonstrate that, despite opinions of sundry persons to the contrary, it would be perfectly constitutional for the New Jersey Legislature to call a convention for the purpose of drafting and submitting to the people a new or revised Constitution. We concluded also that it would not be necessary for the Legislature first to obtain the consent of the people for calling such a convention.¹ In 1940, a special committee of the New Jersey Bar Association studied and investigated the desirability and feasibility of holding a convention and produced two reports: a so-called "majority" report, opposing, and a so-called "minority" report, advocating the calling of a convention.² The "majority" report held that a constitutional convention would be unconstitutional. It referred to the opinion to that effect rendered by Attorney-General Edmund Wilson in 1913, as "a most thorough and convincing opinion," by "a brilliant member of our Bar." The "minority," on the other hand, declared that they considered Mr. Wilson's opinion "unsound," and announced that their study of it indicated "that many of the cases which he cited have either been overruled or

1. Bebout and Kass, *The Status of Constitutional Conventions in New Jersey*, III UNIVERSITY OF NEWARK LAW REVIEW 146.

2. Report of Special Committee on a Constitutional Convention, 63 N. J. L. J. 176. It would appear from a separate statement by Adrian M. Unger of the "minority," printed at page 178, that the active and eligible members of the committee were actually evenly divided, four to four.

are actually authority for the convening of a constitutional convention." In other words, the "minority" arrived at the same conclusion which we had expounded in our article. Although the Bar Association then followed the "majority" in opposing a convention, in its 1941 meeting, it reversed itself and apparently having overcome its constitutional scruples, came out for a convention.

This action of the Bar Association, together with the advocacy of a constitutional convention by Governor Edison³ and his Republican election opponent, Mr. Hendrickson,⁴ indicates, we believe, that the power of the Legislature to call a convention may be regarded as settled in this, the last state in which there was any doubt about the matter.⁵ It is, therefore, of vital current interest to investigate other constitutional problems concerning the calling, election, and powers of a constitutional convention. We propose to explore the following questions:

(1) Can a constitutional convention be held without the authorization of the Legislature?

(2) Can a convention be limited with respect to its powers, either by the Legislature or by vote of the people?

(3) What methods of selecting convention delegates are available?

(4) In what form or forms may a convention submit its proposals to the people?

The first quotation has been receiving more and more attention ever since Judge William Clark, now of the U. S. Circuit Court of Appeals, declared in 1934, that the reason for previous failure to secure the calling of a convention lay in the erroneous

3. Governor Charles Edison, *Inaugural Address*, pp. 10-12.

4. *Senate No. 3*, introduced January 27, 1941, by Mr. Hendrickson: "An act providing for the election of delegates to a convention to frame a Constitution for the government of this state, . . ."

5. It is true that there has been journalistic and lay speculation on the constitutional issue; but we think this may be attributed to a kind of cultural lag. See for example page one story in *Newark Evening News* for February 14, 1941.

assumption "that the convention call *must* be made by the existing legislative body and by it alone."⁶ Judge Clark went on to declare his belief that "the *will* of the people can be ascertained in any lawful way. The Governor elected by the people could, for instance, ask his people to advise him by mail."

Later in the same year, Charles R. Erdman, Jr., then Assistant-Professor of Politics at Princeton University, took up Judge Clark's "interesting suggestion" and declared: "This novel experiment would dramatize constitutional revision and direct public attention to the issue. In this, it would perform a service similar to that of his decision on the validity of the Eighteenth Amendment,"⁷ which focused national attention on the convention system of amending the federal Constitution and resulted in the use of that method in the ratification of the Twenty-first Amendment."⁸ Dr. Erdman then went on to say,

The change of front by the Bar Association is reported and explained in a news report and an editorial, 64 N. J. L. J. 21 and 24 (Jan. 16, 1941. More recently Circuit Court Justice Thomas Brown has written an elaborate opinion justifying the right of the legislature to call a convention. He bases this on "the fundamental and inalienable rights of every citizen of our state and their sovereign power to control the organic law of the Commonwealth." He declares that this "power has never been surrendered or delegated, and the exercise of that power rests with them and nowhere else." He distinguishes carefully between revision and amendment, and concludes that "the Constitution of New Jersey can be revised or a new constitution adopted only through a convention." 64 N. J. L. J. 105 ff. (March 6, 1941).

6. Speech entitled "A New Constitution for New Jersey," printed in the April, 1934 number of *Journal of Industry and Finance*, at pp. 7-9.

7. U. S. v. Sprague, 44 Federal (2d) 1967.

8. Charles R. Erdman, Jr., *The New Jersey Constitution, a Barrier to Governmental Efficiency and Economy*, pp. 29-30. The efficacy of Judge Clark's educational work on the merit of constitutional conventions is attested by the record of Hon. Emerson L. Richards. Mr. Richards in 1913 had secured Attorney General Wilson's opinion that a convention to revise the N. J. constitution would be unconstitutional; but in his address as Permanent Chairman of the N. J. Convention to ratify the 21st Amendment, in 1933, he declared that it was good "for us to remember that in the midst of a multitude of governmental experiments we still possess and exercise the greatest weapon for the correction

"It is improbable that any convention will be summoned by the Legislature, unless some such dramatic occurrence directs public opinion to the need for constitutional reform."

It will be observed that Dr. Erdman was a little ambiguous in his endorsement of Judge Clark's proposal. He admitted its propaganda value; but he did not make it clear whether or not he thought the higher courts would give it a better reception than the Supreme Court of the United States gave Judge Clark's opinion in the *Sprague* case,⁹ dealing with the Eighteenth Amendment. However, at a recent meeting of the Bergen County Bar Association, Dr. Erdman, in response to a suggestion that the Governor instead of the Legislature might call a convention, said that it "might be successful," and again likened it to Judge Clark's prohibition decision,¹⁰ Mr. Charles Roemer of Paterson, a member of the law faculty of John Marshall College, has given the same kind of endorsement to the Clark proposal.¹¹

The most enthusiastic advocate of a gubernatorial call for a convention is former Assemblyman Theron McCampbell of Monmouth County, who has, in innumerable speeches, in letters to the newspapers and to individuals, and in his occasional column in some of the local papers,¹² been publicizing Judge Clark's scheme.

An interesting variation on the suggestion that the people,

of the evils of government—the constitutional convention"—From Minutes of the Convention

9. 282 U. S. 716 (1931).

10. *Newark Evening News*, January 29, 1941. The suggestion which elicited Mr. Erdman's statement was made by Miss Evelyn M. Seufert, Chairman of the Constitutional Convention Committee of the New Jersey Women Lawyers' Club, an organization which has for some time been advocating the calling of the convention.

11. Charles Roemer, *The Need of a New Constitution*, JOURNAL OF INDUSTRY AND FINANCE, June, 1940, at pp. 4 and following.

12. See for example his column entitled "The People's Right," on the editorial page of the *Asbury Park Evening Press*, January 11, 1941

with the assistance of the Governor, might call a convention without benefit of legislative cooperation, was recently made by Mr. Arthur Vanderbilt, Chairman of the New Jersey Judicial Council and former President of the American Bar Association. Mr. Vanderbilt intimated that, if the Senate refused to pass a convention bill the sixty members of the Assembly, as the only body truly representative of the people of the State, might alone have the right to call a convention.¹³

The reason for all the interest in the possibility of getting a convention without the assistance of the legislature is not hard to find. It is, of course, the equal representation of the counties in the Senate and the natural reluctance of the small county Senators to become parties to an act which might result in the elimination of the Senate altogether or in placing it on a more representative basis.¹⁴ The fact is that recommendations by seven governors, and the convention bills passed by five assemblies from 1881 to 1913 have come to naught mainly because of the senatorial reluctance to walk the plank.¹⁵

Certain statements in the part of Governor Edison's Inaugural Address dealing with a constitutional convention have intensified the speculation about possible methods of getting around this difficulty. The Governor's reference to the upper house of the Legislature as a "body in which acres are represented rather than people" was reminiscent of a war cry of an earlier constitutional "battle of Trenton," while his statement that, "The existing representative inequality that permits a

13. Suggestion made in a speech before the Rutgers Alumni Association at the Newark Athletic Club, February 8, 1941. This part of the speech does not seem to have been reported in the press. An editorial in the *Newark Sunday Call*, February 23, 1941, however, concludes as follows: "The Senate represents acres. The Governor and the House of Assembly represent people. In the opinion of many able constitutional lawyers, among them Arthur T. Vanderbilt, the Governor and the Assembly have ample power to call a convention to write a new constitution."

14. Clark, *op. cit.*, p. 7; Erdman, *op. cit.*, p. 28.

15. Bebout and Kass, *op. cit.*, pp. 146-147.

majority of the Senate to be formed from the representatives of 15% of the people should be eradicated," raised the specter which has paralyzed one of our legislative arms every time a convention has been proposed.¹⁶ The Governor's words drew immediate response from Senate President Scott of Cape May, and the newspapers indicate continued fear of Senatorial reapportionment.¹⁷

This article, therefore, has a twofold task:

- (1) To discover and evaluate the possible answers to the four constitutional questions listed above;
- (2) To explore the practical aspects of the problem of securing an effective constitutional convention in the peculiar historical, political, and constitutional setting which is New Jersey.

In fact, neither one of these two tasks can be properly performed without the other. This is so because the answers to the constitutional questions depend not only on the law, but also on the surrounding political facts; and the solution of the political problem of getting a convention depends somewhat on constitutional considerations. Moreover, many of the constitutional questions involved in the calling and holding of a convention are on the borderline of what the courts call "political questions." In other words, we shall be dealing in this article to a large extent with questions of constitutional propriety and practicability, rather than with questions of strict constitutional legality. In this class of questions the part that may properly or actually be played by courts is especially dependent upon the judicial reaction to a total situation, in which history, tradition, economics, and politics are more important than the rather nebulous and often contradictory rules of law in terms of which judicial opinions are cast.

16. Governor Edison, *op. cit.*, pp. 11-12.

17. Trenton *Evening Times*, January 21, 1941; Newark *Evening News*, February 19, 1941.

It is therefore necessary to review in some detail the history of attempts to secure revision of the N. J. Constitution by means of a convention, paying particular attention to the political and constitutional sources and effects of the Senate's opposition to such attempts. This investigation will, we think, contribute materially to the solution of the first constitutional problem stated above, and will demonstrate the practical importance of the second. The answers to the third and fourth questions will also derive enhanced significance from some of the episodes in the history, and the answers themselves may be found to have bearing on the discovery of a practicable formula for solving the political problem of securing a convention in the year 1941 or soon thereafter.

POPULAR SOVEREIGNTY

Any discussion of the status, composition, powers, and functions of constitutional conventions should be predicated upon the principle laid down in the second clause of the first article of the New Jersey Constitution: "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." This clause states what might be regarded as the basic doctrine of American constitutionalism, the sovereignty of the people and their right to determine or alter their governments through their control of their constitutions. It is expressed in the Declaration of Independence, in a number of the other state constitutions, and in much of the political writing of the founders of the Republic and of the thinkers from whom they drew inspiration.¹⁸ Notice, for example, the following words of John Locke: "The legislative being only a fiduciary

18. See, for example, quotations and references near end of Chapter I of Professor William S. Carpenter's *The Development of American Political Thought*.

power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them."¹⁹ Later Locke takes note of the common question: "Who shall be judge whether the prince or legislative act contrary to their trust?" He answers, "The people shall be judge . . ."²⁰

If this was sound doctrine for the makers of the Constitution, it is sound doctrine for their successors as long as they hold to republican government. For on the basis of no other doctrine can a government be kept truly republican in a changing world. Any conduct or any rationalization which is designed to keep the people from exercising their "supreme power" "to alter or reform" their government "whenever the public good may require it" is anti-republican and anti-constitutional, no matter what a legalist may say about it. There is a great deal of talk in the books about "legitimate" versus "revolutionary" constitutions. We think the distinction is sometimes unfortunate, particularly in view of the fact that the word "revolutionary" has a less pleasant sound in the ears of many of us than it had in those of our ancestors. All that the distinction really means is this: A "legitimate" constitution is produced in a normal way through operation of the governmental machinery set up under the existing constitution without doing violence to any letter of that instrument; a "revolutionary" constitution is one which is produced by the will of the people, either without the full cooperation of the existing government or in disregard of the provisions of the existing constitution deemed to be inconsistent with the effective exercise of popular sovereignty. This essentially is the distinction made by Judge

19 John Locke, *Second Treatise on Civil Government*, EVERYMAN'S EDITION, p. 192. Professor Carpenter, in his introduction to this edition, remarks that Locke's theories of popular sovereignty "came to America not only to provide the basic ideas put forward in justification of the revolution but also to supply a formula by which written constitutions could be worked out."

20. *Ibid.*, 193.

Jameson in his famous treatise on "The Constitutional Convention."²¹ Jameson's book was obviously written to exalt what he called the "*regular*" exercise of sovereignty through a convention legitimately called as against the "*possible* exercise of sovereignty" through "irregular" or "revolutionary" action. He defines "*possible*" as meaning "*possible* only in fact, not *legally possible*." He then goes on to say, "The possibility in fact of such an exercise of sovereignty, however, is a circumstance of vast significance, under all forms of government—it would be well if statesmen kept it constantly in mind. . . . To the sovereign all things are in fact possible; all things may, according to circumstances, become rightful or justifiable . . . on moral grounds," although "irregular or revolutionary." Later Jameson attempted to explain that no legal rights can be drawn from such provisions of our state constitutions as the one quoted above. In order to do this, he insisted that the right to "alter or reform" the government there guaranteed is a right of revolution, not of law. Consequently Jameson was required to exalt that right above the law or the constitution: "This right, the founders of our system were careful to preserve, not as a right *under* but, when necessity demanded its exercise, *over* our constitutions, state and federal." This is the inevitable dilemma of the narrowly legalistic approach to constitutional instruments. It seems to us to be essentially an unrealistic exercise in verbal gymnastics. Although Judge Jameson is evidently devoted to the law, he admits in proper circumstances the superior moral claim of the right of revolution. We think that this attitude was due partly to an exaggerated notion of what he regarded as the inevitable inconvenience and confusion resulting from a procedure not strictly "legitimate." We expect to show that such a procedure, although admittedly requiring careful planning and much labor, might in certain circumstances produce no incon-

21. J. A. Jameson, *The Constitutional Convention: Its History, Powers, and Modes of Proceeding*, First Edition, pp. 57 ff., and 233 ff.

venience and no confusion whatever, and certainly no violence. Although we shall, in deference to the traditional writers, have occasionally to use the words "legitimate," "illegitimate," and "revolutionary," we shall for the most part discuss alternatives in terms of what we call the constitutional proprieties. It may thus become apparent that a procedure regarded by the legalists as legitimate is constitutionally inappropriate, while one which is stigmatized as "irregular" as in fact most appropriate. We shall judge every proposition by the touchstone: Does it conduce to the full and free exercise of the right of the sovereign people to control their government through a constitution satisfactory to themselves? We think that correct conclusions can follow from no other principle.

Not even the extreme *laissez faire* theory that government can do no harm as long as it takes no affirmative action can justify a continued resistance by a minority to a popular demand for a constitutional convention. Constitutional revision is not an exercise of the police power; it is not an act of governmental regulation. Its purpose is to secure to the people of the commonwealth that form of government which will best serve and protect them and their essential liberties. Constitutional revision may be necessary from the *laissez faire* standpoint in order to establish a government which will perform these basic functions for the whole people without subjecting them to unjust positive restraints and exactions demanded by a minority as the price of their cooperation in the whole governmental process. Constitutions have properly been drawn to protect minorities as well as majorities; but it is quite as important to guard against the tyranny of the minority as against that of the majority. We have long since learned that a system of checks and balances carried too far in an age in which considerable positive action by government cannot be avoided often produces extravagant and excessive action rather than economical and limited action. This truth is expressed in the title and developed in the body of Professor Erdman's pamphlet, "The

New Jersey Constitution, A Barrier to Governmental Efficiency and Economy."

We must now turn to our review of the experience of the sovereign people of New Jersey in their attempts to adapt their constitution to their changing conditions. We shall then examine the representativeness of the political organs of their existing government to determine how apt they are to the purpose of securing a "legitimate" constitutional revision. From this examination it will be possible to draw correct deductions concerning the most appropriate means, whether "regular" or "irregular," of implementing the sovereignty of the people. As an incident to this inquiry it will be possible correctly to place responsibility for the "irregularity" of any means which it may appear necessary to employ.

COUNTIES AND CONSTITUTIONAL CHANGE

The equal representation of the counties goes back to the constitution of 1776, which provided in Article III that the Legislative Council or upper house should be composed of one person elected from each county. Like the problem of state representation in the Federal convention of 1787, the question of county representation became the central bone of contention in the convention of 1844. The first discussion of the subject came in the debate in committee of the whole on the article on future amendments. Mr. Child, of Morris County, raised the issue when he said that he would not object to a two-thirds vote of the Legislature on amendments if he were sure that the upper house would be established on the basis of population. He pointed out that representatives of one-fifth of the people could prevent an amendment receiving a two-thirds vote of the Council as then composed.²² Chief Justice Hornblower, of Essex,

22. *Newark Daily Advertiser*, Report of Debate for May 22. In this and subsequent references to the newspaper reports of the debate, we shall give the

also opposing the two-thirds rule, suggested that without it an amendment might be adopted in a few years "substituting for the county representation in Council, a representation on the basis of population. If we yield this point now, we yield it forever." Mr. Stokes, of Burlington, (which was then the third largest county) advocated the two-thirds principle as a necessary and proper protection for the rights of small counties "for instance, against excessive taxes . . ." Mr. Browning, of the small county of Camden, supported the two-thirds principle, arguing that: "The majority ought not always to govern; they might be collected in large cities and might seek to advance some interest peculiar to themselves at the sacrifice of the agricultural or other interests . . ." Mr. Ewing, of Cumberland, spoke for the two-thirds rule on account of the great importance of equal county representation, which he found analagous to the equality of the states in the Senate and to the existing New Jersey custom of giving equal representation to townships in the county boards of freeholders.²³ Mr. R. P. Thompson, of Salem, speaking of himself as a small county man, declared that "he would not answer for the consequences to the instrument in West Jersey," if equal representation of the counties were disturbed.²⁴ Mr. Ogden, of Passaic, although a small county man, did not fear that the convention would disturb the equality of representation in the upper house, and did not object to the majority principle for amendments, pointing out that in Council "the smaller counties always have had and will have the power there to protect themselves against the encroachments

date of the debate rather than the date of the paper, which is usually one or two days later. We are indebted for these references to the text of the debates collated from the several contemporary newspaper accounts by the N. J. branch of the Federal Writers' Project. This text will be indispensable to all persons interested in revision of the Constitution by convention or otherwise. Provision should therefore be made for its immediate publication.

23. *Newark Daily Advertiser* and *Trenton State Gazette*, Debate of May 23.

24. *Trenton State Gazette*, Debate of May 23.

of the larger ones."²⁵ Mr. Green, of Mercer, later showed that the nine small counties had about 121,000 population to 251,000 in the nine larger counties, and that under the simple majority principle a bare majority of the 121,000 might prevent action desired by the vast majority of the rest of the state. These latter considerations, together with the adoption of the provision that no amendment or amendments might be submitted more frequently than once in five years, finally overcame the fears of enough small county men to prevent the adoption of the two-thirds rule on amendments.²⁶

The problem of county representation would not down, however. When the committee of the whole began to discuss the report of the committee on the legislative article, Mr. Condit introduced an amendment to provide for a Senate of fifteen members to be elected from five equal three-member constituencies.²⁷ Mr. R. P. Thompson responded immediately, "It is out of the question, sir, to suppose that a man from West Jersey will consent to the adoption of a provision which will deprive his constituents of political power." He added emphatically, "Sir, there can be no compromise on this question." That Mr. Thompson sounded the keynote of the embattled small county men from that day to this will become apparent as we unfold the story.

Somewhat more serious attempt to justify the small county position was made by Mr. Allen, of Burlington, and Mr. Vroom, of Somerset. Mr. Allen argued that other principles than population should prevail in one house and declared that New Jersey was different from other states in that "in New Jersey the counties were all, or nearly all, old." He argued that the population of a manufacturing district differs from that of an agricultural district: "The one was floating, having no permanent interest in

25. *Newark Daily Advertiser*, Debate of May 23.

26. *Bebout and Kass, op. cit.*, pp. 163-164.

27. *Newark Daily Advertiser*, Debate of June 7.

the prosperity of the state and its institutions—the other closely wedded to them . . . ” Mr. Allen clinched the point by remarking that although perhaps not half of the men of the manufacturing districts were entitled to vote, all were classed as population for purposes of representation. Mr. Vroom suggested that the manufacturing interest would enjoy advantage in the assembly and possibly some advantage in the election of the governor. He felt that something was due to those who bear the greater burden of taxes: “It is the landed interest which supports the government, and ought it not to have some influence in carrying it on?” He then pointed out that his own county, which was perhaps the most purely agricultural county in the state, paid an annual tax of \$2,500 and had three representatives, whereas Essex, paying only \$3,500, sent seven members to the assembly. Moreover, if Essex paid as great a tax in proportion to population as Somerset, he contended that it should be paying \$5,852. This small county fear of an unfair tax burden was again referred to in the debate on the tax clause by Mr. Naar, of Essex, who said that he had gathered from many statements that the small counties looked “to this unequal representation as the only protection against further invasion of their rights.”²⁸

The composition of the Senate figured also in the debate on the appointing power. Mr. Condit argued that the system of county representation made it improper to give the Senate control over appointments, quoting population figures and concluding “that if the Senate should decide upon nominations by a political caucus, six Senators from the smallest counties might control the action of the whole body.”²⁹

When the convention took final action on the legislative article, an amendment by Mr. Connolly, of Monmouth, the second largest county in the state, to substitute Mr. Condit's fifteen-member Senate was defeated fifteen to thirty-seven. All of Mon-

28. *Ibid.*, Debate of June 14.

29. *Ibid.*, Debate of June 12.

mouth's five delegates voted "Yea," but the other large county delegations were split.³⁰ A proposal by Mr. Condit to give Essex County two senators was voted down much more decisively.

There was also an attempt to limit the right of the legislature to create new counties. The purpose was "to prevent the state being cut up into small counties, and giving these small counties the preponderance of representation in the upper house." This was urged especially because of the part played by the senate in making appointments. Proposals to this effect were voted down by close margins in a sparsely attended session.³¹

Mr. Condit finally rang down the curtain on this controversy, when he became the only member of the convention to refuse to endorse the new constitution. In a speech explaining his action, he admitted that some improvements had been made, but felt that the perpetuation of the equal representation of the counties in the upper house did such great injustice to some parts of the state as to be "an insuperable obstacle" to his voting for the instrument. Mr. Hornblower concurred in Mr. Condit's declaration, but "he had brought his mind reluctantly to consent to vote in the affirmative."³²

The next period at which there was much discussion of the composition of the senate was in the 'eighties. There was a great deal of agitation for constitutional revision, and four convention bills passed the Assembly between 1881 and 1885, never to come to a final vote in the senate.

That the peculiar composition of the Senate had not passed unnoticed during the preceding years, however, is indicated by an editorial which appeared in the *Newark Daily Advertiser*, in 1873, lamenting the defeat of a railroad bill in the Senate. The *Advertiser* said:

30. *Official Journal of Proceedings* for June 21.

31. *Newark Daily Advertiser* and *Official Journal*, proceedings of June 22.

32. *Trenton State Gazette, Debate* of June 28.

The pine-barrens have beaten the populace. Ten gentlemen, representing the wealth, power, honor and good sense of the State of New Jersey, representing also the bulk of its population and its true will and purpose, yesterday voted for a competing railroad between New York and Philadelphia. Eleven other men, whose title is Senator, representing an innumerable host of stunted pines, growing on sand-barrens, voted the bill down—You can't make pine trees vote nor endow them with a conscience.³³

The part played by the composition of the Senate in determining the defeat of the convention bill of 1881 was forecast in a Trenton dispatch in the *Newark Daily Advertiser*:

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.³⁴

In a *post mortem* entitled "The Late Legislature," the *Advertiser*, commenting on the passing of a constitutional commission bill in place of the convention bill, remarked that the latter "would have suited better to be sure, but it is impracticable unless the southern counties will yield their preponderance in the senate—which is impossible."³⁵

History repeated itself in 1882. The Assembly passed the bill after some debate. The proponents of the measure answered the objection that a convention would be unconstitutional by appealing to the sovereignty of the people, and also answered

33 Quoted in Essay on Government in "New Jersey, a Guide to Its Present and Past," compiled by the Federal Writers Project.

34. *Newark Daily Advertiser*, February 16, 1881. It is interesting to observe that, whereas they spoke of "West Jersey" in the convention 1844, the talk is now beginning to be in terms of "South Jersey."

35 *Ibid*, April 4, 1881

objections raised by the small county men. Speaker Dunn, after declaring that the great increase in population demanded a new constitution, expressed the belief that "The State would never vote to give any county more than one Senator. The bugaboo to the contrary was only a ghost story."³⁶ The *Advertiser* accurately forecast the result, however, when it declared "There will be sufficient opposition by the South Jersey Senators to defeat it, . . ."³⁷

The 1885 convention bill met the same fate and for the same reason, although it finally "passed" the assembly by a questionable vote of 30-25.³⁸ The advocates of the measure expressed willingness to compromise with the county interest by providing that there should be one member from each assembly district and each county, and five from the state at large. One member declared that he would be willing to agree to an amendment "to protect the present senatorial representation, sooner than have no convention at all."³⁹

The death of the 1885 convention bill ended serious agitation on the matter for some time, although Governor Green, in his third annual message, recommended for the fourth time the calling of a constitutional convention and played up what he regarded as the unjust senatorial representation as an important reason. He said in part:

There is no similarity in the case of the United States,

36. *Ibid.*, February 7, 1882.

37. *Ibid.*, March 16, 1882.

38. Bebout and Kass, *op. cit.*, p. 147.

39. *Newark Daily Advertiser*, March 5, 1885. The *Advertiser* remarked on March 17 that the bill had been reported back "amended so that each assembly district and county is entitled to representation. It is useless to waste time over the measure." On March 25, according to a report in the *Advertiser* of March 26, Mr. Corbin, speaking for the bill, recalled that the opposition "always set up the argument that a blow was aimed at present senatorial representation." He then asked, "If the present representation was just, why should they be always on the defense?"

for in the United States Senate states are equally represented as equal sovereignties. Counties have no such character, but are merely municipal divisions of the State, subject to legislative control and change.⁴⁰

We next begin to hear about the iniquities of county representation in the senate from North Jersey progressives and "New Idea" Republicans in the early part of the century. For example, Assemblyman Martin, speaking with Senator Everett Colby at a Lincoln birthday dinner in Roseville, pointed out that Essex, Hudson and Passaic counties, with more than one-half of the population of the state had only three senators, or one-seventh of the senatorial body. He concluded:

It is our duty to secure a constitutional convention with delegates elected on the basis of population, and backed up by the people. We have many ridiculous things in our Constitution.⁴¹

Soon thereafter the New Jersey State Civic Federation started working for constitutional revision.⁴² This "New Idea" agitation for a new constitution was given its chance, along with other reform proposals, during the Governorship of the Democrat, Woodrow Wilson. Governor Wilson did not propose constitutional revision until his second and last annual message. In this message Governor Wilson, declaring that the state had outgrown its old constitution, said:

Powers of corrupt control have an enormous and abiding advantage under our constitutional arrangements as they

40. Governor Robert Green's Third Annual Message, Jan. 8, 1889.

41. Newark *Evening News*, February 13, 1906.

42. 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.

stand. We shall not be free from them until we get a different system of representation and a different system of official responsibility.⁴³

Assemblyman Hennessy of Bergen County introduced a bill to carry out the convention pledge in the 1912 Democratic platform. It provided a convention of sixty delegates apportioned among the counties in the same manner as members of the assembly.⁴⁴ This bill passed the assembly, but was defeated in the senate by a vote of 14 to 4. The first paragraph of an editorial in the Newark *Evening News*, fairly states the cause:

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 be reduced to a shadowy minimum of representation in both houses. It overbalanced all the sound reasons for a new Constitution.⁴⁵

This contemporary judgment has been confirmed by history. Mr. Edwin T. Conklin, largely on the basis of materials and notes turned over to him by the late James Kerney, declared that Wilson's inclusion of the idea of reforming the Senate "foreordained his effort at reconstruction of the state constitution to defeat. Since constitutional legislation had to go through the senate, the millenium had not been reached, when Senators could be expected to cut their own throats."⁴⁶

An equally vigorous judgment to the same effect was expressed by William E. Sackett in his "Modern Battles of Trenton":

43. Governor Wilson's Second Annual Message, January 13, 1913.

44. Newark *Evening News*, January 15, 1913.

45. *Ibid.*, March 28, 1913.

46. From Mr. Conklin's Chapter, "Wilson Upon the Political Stage," in Vol.

Not excepting Sewell and Abbett, Governor Wilson is the most masterful force that has ever come into state affairs. But if his arm had been ten times as powerful, it would yet have lacked the strength to batter down this ancient refuge of the minority counties.⁴⁷

The story of this fiasco is the story of failure to find any compromise which would satisfy or reassure the small county men. As we have said, the State Civic Federation had already taken the lead in attempting to secure a revision of the Constitution. A constitutional conference was held under the auspices of the Federation in the City Hall in Jersey City, on December 2, 1912, for the purpose of promoting the calling of a convention. Mr. Roeder, president of the Federation, declared that the chief objections to the Constitution had to do with the judiciary, the five year restriction on the submission of constitutional amendments, and the interference of the Constitution with local home rule. A letter from State Senator Isaac T. Nichols, of Cumberland County, was read, declaring that he would not favor a convention unless there were "a proviso in the act which will retain for smaller counties the representation in the State Senate, which has come down to us from the fathers of the Republic."⁴⁸ He admitted, however, that there were many other things in the Constitution which needed revision. Members of the conference were reported as being in practical agreement that the composition of the Senate "was not a prime evil and there was no particular need for change." Mr. George L. Record said that "In the old days, when the railroads used the small counties as rotten boroughs, the basis of representation made a difference, but with the passing of that condition," was not so important. "Throw that dog to the wolves," said Mr. Record. He then re-

III of *New Jersey, A History*, pp. 1060-1062; I. S. Kull, editor.

47. William E. Sackett, *Modern Battles of Trenton*, Vol. II, p. 379.

48. *Newark Evening News*, Dec. 2, 1912.

marked that, if we added the initiative and referendum to the direct primary, it would not be long before we got rid of one senator from each county by having no senators at all.⁴⁹ There was discussion of the possibility of issuing the convention call "in such a way as to take away from the constitutional convention the right to change the senate apportionment. But it was pointed out that it was not only unwise, but probably impossible to restrict the power of a constitutional convention in any such way." Mr. Edmund B. Osborne of Montclair tried to meet this difficulty by suggesting "that assurances of the kind that prevailed among men of honor could be given that the Senate representation would not be changed."⁵⁰

As we have already pointed out, Assemblyman Hennessey introduced a convention bill in the legislature, in the drafting of which he had the help of representatives of the Civic Federation. The fact that this bill based the convention on population caused a storm which broke in a conference between Governor Wilson and the Democratic members of the legislature, on January 28, 1913. The *News* reported that the temper of the conference indicated that the Hennessey bill would have rough going in the senate, unless a safeguard in the interest of that body were added. Speaker Taylor of the Assembly even moved that the convention be composed of one delegate from each county. The governor told the conference that the democratic way would be to make the convention representative of population, but that he felt that the question should not be allowed to stand in the way of having a convention.⁵¹

The *News*, in an editorial, denounced the proposal to conciliate the small counties by basing representation on anything but population. On the other hand the *News* felt that, because of the serious cleavage between agricultural and manufacturing

49. *Ibid.*, Dec. 3, 1912.

50. *Loc. cit.*

51. *Ibid.*, Jan. 29, 1913, p. 2.

sections and because of the heterogeneity of the population of the state, "some compromise ought to be possible that would give to these diverse sectional interests their fair share of representation in the senate." The *News* went on to suggest that one objection to the influence of the Senate could be obviated if the convention drafted "a liberal home rule provision," applying alike to large and small municipalities. In short, the *News* felt that, if a convention, truly representative of the people of the state would approach the problem in a constructive spirit, it would be possible to obtain "many democratic reforms without making any change in the basis of senatorial representation."⁵²

In the course of time, a compromise was worked out by the Democrats of both houses, in conference with the governor. This compromise provided that, in voting on questions of representation in the legislature, the convention must vote by counties, the majority of the delegates of each county casting its single vote. The arrangement was to be made more binding by a special oath, to be taken by the delegates to insure their adherence to the rule. This compromise blew up in the Assembly on February 25, when Mr. Hennessey withdrew the compromise amendments to his bill. He justified this by saying that he had received information that the small county men had practically decided to oppose the compromise on the ground that the oath would be unconstitutional and, therefore, not binding on the delegates.⁵³

Another hot debate occurred in the assembly on March 11, over an attempt to amend the Hennessey bill to give each county just two delegates to the convention. The proposal was denounced as unprecedented and undemocratic and elicited an exchange of compliments between rural and urban members. Mr. Mathews of Essex, resenting derogatory remarks by Mr. Richards of Atlantic concerning the morals of cities as compared with those of the farm, declared that the real contest had

⁵² *Ibid.*, Feb 1, 1913

⁵³ *Ibid.*, Feb 27, 1913, p 4

been expressed in a phrase which he had heard: "Acres against men." This elicited the response from Mr. Cates of Camden that "Constitutions are not made for the majority; they are made for the protection of the minority as against the majority." Mr. Ackley of Cumberland "expressed pride in the acres of his county, which produced men of ability."⁵⁴ The bill finally passed the assembly on March 19, after a stormy debate, by a vote of 40-17. The keynote of the opposition was expressed by Mr. Beekman of Somerset, who declared that he was opposing the bill "because it was intended to permit the big counties to swallow up the little ones."⁵⁵

The proponents then turned their attention to the senate. Acting Governor Fielder sent a special message declaring that he had found "a very strong public sentiment throughout the State, in favor of this particular legislation, which sentiment is becoming exceedingly impatient at the delay in reaching the desired result."⁵⁶ A delegation of Essex County men, accompanied by George L. Record and Cornelius Ford, president of the State Federation of Labor, appeared to urge the Governor to "get out a big stick" and wield it without fear or favor in the senate. Mr. Ford, agreeing with Mr. Record's dictum that the small counties were always troublesome, declared that the senate had always proved an obstacle to labor legislation because the small county representatives did not come in contact with the conditions prevailing in the industrial centres.⁵⁷ Nevertheless, the bill was defeated in the senate on the 26th of March by

54. *Ibid.*, March 11, 1913, p. 2.

55. *Ibid.*, March 20, 1913.

56. *Ibid.*, March 26, 1913.

57. *Ibid.*, March 26, 1913. Record's denunciation of the rule of the small counties sounds inconsistent with his statement at the December constitutional conference, that the state had not been suffering in recent years from misrepresentation in the senate. The change of front may probably be attributed to the fact that, in December he was trying to be conciliatory, while in March, he was expressing irritation resulting from the behavior of the small county representatives in the assembly.

14 to 4, the only senators voting "Yes" being those from Essex, Morris, Bergen and Passaic.⁵⁸ Hudson was represented by acting Governor Fielder who would have, of course, voted "Yes," if he had been in attendance. The senators from Warren and Middlesex were not voting. Adding the population of Hudson to that of the four counties whose senators voted for the convention, we find that senators representing 1,478,725, or four-sevenths of the population of the state, were definitely on record in favor of the bill, while senators representing less than 1,000,000 people, actually, voted against it. The small county senators were very frank about their reasons for voting against the bill. Majority leader Davis, of Salem County, declared "that there was no question that the chief objection to the bill had to do with the basis of senatorial representation." He intimated that if the compromise amendments had been left in the house bill, that would have insured its passage in the senate. He suggested further that if the upper house were to be organized on the basis of population, it would be foolish to continue the two house system. One small county senator took the trouble to deny the allegation that corporate control in the legislature rested upon the representation of the smaller counties. It is reasonable to doubt the accuracy of Senator Davis' claim that the senate would have passed the bill with the compromise amendments. After all, the newspaper accounts seem to indicate that those amendments were really sabotaged by the small county assemblymen. This view is confirmed by Sackett.⁵⁹

We have already quoted from the *Newark News* editorial of March 28, attributing the defeat of the bill to fear of the rural counties. This editorial went on to charge that this fear had been stimulated by those who could "see nothing in democratic government except numerical representation in both houses." The *News* blamed Messrs. Record and Ford for having stressed

58 *Ibid*, March 27, 1913

59 Sackett, *op cit*, p 383

this point in their last conference with the Governor. It concluded sadly that "Unless some mutual compromise is made we are probably doomed to worry along with our seventy year old document, except for such palliatives as can be introduced by the rather unsatisfactory process of amendment, until either the rural counties get populous enough to lose their fear of the manufacturing sections, or the latter display such appreciation of the farmers' contentions, that small counties are willing to trust them."

DOES THE LEGISLATURE REPRESENT THE PEOPLE OF NEW JERSEY?

As we have seen, some of the delegates from the large counties in the Convention of 1844, fearing that the senate might become a serious obstacle to government by and for the people of the State of New Jersey as a whole, tried to reform the upper house. Sackett explains that in general the large county men were not more insistent on reform because, "The subject was not of such large importance in that time because none of the counties was overlarge; they were a family of little communities. And the charter builders readily agreed to the proposition that each county should have one, and only one, seat in the senate."⁶⁰ A glance at the following table will explain a great deal of history since 1790.

EFFECT OF POPULATION CHANGES ON RELATIVE SIZE OF COUNTIES

| | 1790 (13 Counties) | | 1840 (18 Counties) | | 1880 (21 Counties) | |
|----------------|-----------------------|---------|-----------------------|---------|-----------------------|-----------|
| 1. State ----- | | 184,239 | | 372,859 | | 1,131,116 |
| 2. Largest --- | Hunterdon | 20,253 | Essex | 44,512 | Essex | 189,929 |
| 3. Top | | | | | | |
| Middle ---- | Essex | 17,785 | Morris | 25,777 | Union | 55,571 |
| 4. Median --- | Middlesex | 15,956 | Mercer | 21,498 | Hunterdon | 38,570 |
| | | | Warren | 20,342 | | |

60. Sackett, *op. cit.*, p. 380.

| | | 1790 | | 1840 | | 1880 | |
|-----------------|------------|---------------|-----------|---------------|------------|---------------|--|
| 5. Bottom | | | | | | | |
| Middle ---- | Somerset | 12,296 | Cumb'land | 14,322 | Gloucester | 25,886 | |
| 6. Smallest --- | Cape May | 2,571 | Cape May | 5,324 | Cape May | 9,768 | |
| | Ratios | | | | | | |
| | 2-1 | 1:9 | | 1:8½ | | 1:6 | |
| | 6-2 | 1:8 | | 1:8¼ | | 1:19 | |
| | 4-2 | 1:1¼ | | 1:2 | | 1:5 | |
| | 5-3 | 1:1½ | | 1:1¼ | | 1:2¼ | |
| | | | | | | | |
| | | 1910 | | 1930 | | 1940 | |
| | | (21 Counties) | | (21 Counties) | | (21 Counties) | |
| 1. State ----- | | 2,587,167 | | 4,041,334 | | 4,148,562 | |
| 2. Largest --- | Hudson | 537,231 | Essex | 833,513 | Essex | 835,272 | |
| 3. Top | | | | | | | |
| Middle ---- | Bergen | 138,002 | Camden | 252,312 | Camden | 255,867 | |
| 4. Median --- | Atlantic | 71,894 | Morris | 110,445 | Atlantic | 124,079 | |
| 5. Bottom | | | | | | | |
| Middle ---- | Gloucester | 37,368 | Warren | 49,319 | Warren | 50,098 | |
| 6. Smallest --- | Cape May | 19,745 | Sussex | 27,830 | Cape May | 28,560 | |
| | Ratios | | | | | | |
| | 2-1 | 1:4¾ | | 1:4¾ | | 1:5 | |
| | 6-2 | 1:27 | | 1:30 | | 1:29 | |
| | 4-2 | 1:7¼ | | 1:7½ | | 1:7¾ | |
| | 5-3 | 1:3¾ | | 1:5 | | 1:5 | |

Explanation: The "Top Middle" and "Bottom Middle" counties are respectively the largest and smallest counties in the middle-sized group of counties which constitute a majority. The ratios in each column are between the populations given on the lines indicated by the numbers 1 to 6; *e. g.*, ratio 2-1 is between the population of the largest county and that of the state.

The following are some of the obvious implications of the above table:

(1) Equal representation of the counties at the time of the adoption of the Constitution of 1776 did not produce a seriously unrepresentative result. This, of course, was particularly true in view of the essentially rural character of the whole state and of the fact that neither large nor small counties were concentrated in any part of the state.

(2) Even in 1840 the equal representation of the counties

did not produce in comparison with modern conditions a spectacularly unrepresentative result.

(3) The serious effects of equal county representation became apparent as a result of the revolutionary population changes between 1840 and 1880; a fact which accounts in part for the agitation of the 80's for constitutional revision.

(4) The trend which was clearly established by 1880 continued unabated until 1930 to produce a progressively disproportionate representation of the people of the smaller counties. This is indicated most clearly by the widening of the ratios between the median county and the largest county and the ratios between the bottom middle and the top middle counties.

(5) The 1940 census shows a slight reversal in trend, but the change is not great enough and the prospect future of population shifts is not strong enough to justify the hope that natural processes will in this generation or the next restore even the degree of representativeness which existed in 1880.

It is true that New Jersey is now predominantly industrial and urban; but our constitution gives the control of the senate to eleven counties which according to the 1940 census, have a population of only 663,615, or less than one-sixth of the total population of the state. These eleven counties together have less than either Essex or Hudson, each of which has only one senator. Four counties, Bergen, Essex, Hudson, and Union, with more than half the population, have only four senators. It should perhaps be added that even in the assembly, due to the accidents of apportionment, the small counties had according to the 1930 census, more than their fair share of weight. The eleven smallest counties, with less than one-sixth of the population of the state, sent twelve, or one-fifth, of the assemblymen. They had an average of one assemblyman to 51,756 persons, whereas the four largest counties had an average of one assemblyman to each 70,788 persons.⁶¹

61. Bebout, *Documents and Readings in New Jersey Government*, p. 64;

That this condition has more meaning than the merely mathematical statement of the facts would indicate is shown by a comparison between population figures and other social and economic data. A study shows that, according to 1930 census data, all but two of the eleven largest counties ranked among the eleven counties highest in a combination of factors representing the conditions which go with urbanism and industrialism. In like manner, all but one of the eleven smallest counties ranked among the eleven counties highest in conditions characteristic of rural and agricultural areas. The political significance of this fact is enhanced by geographical sectionalism. Of the eleven smallest counties, according to the census of 1940, seven are in south Jersey, three are in west Jersey along the Delaware, and one, Somerset, is in the middle of the state. Of the eleven largest counties, six are in north Jersey, only two are in south Jersey, two are in middle Jersey, and one, Monmouth, is in the north Jersey coast region. We therefore have a definite set of sectional interests which, for the most part, are bolstered by an economic and social pattern not characteristic of the state as a whole, firmly entrenched in the State Senate. There are obvious political reasons why the urban south Jersey counties tend to join in a bloc with their more numerous rustic neighbors.⁶²

McKean, *Pressures on the Legislature of New Jersey*, pp. 38-39.

62 The census figures given in the preceding analysis were taken from the N. J. *Legislative Manual* and the 1941 *World Almanac*. The rankings of counties on combinations of social and economic factors representing urban-industrial conditions on the one hand and rural-agricultural conditions on the other were taken from an unpublished thesis by Mr. Bebout, entitled, "Party Alignment in New Jersey, Especially Since 1925." The rankings are to be found in Tables XI and XII and are explained at pp. 87 ff. The first set of factors included dentistry, foreign born and persons of foreign or mixed parentage (%), wage earners in manufacturing (%), and tenant families (%). The second set included native white population (%), owner families (%), farm population (%), and negro population (%). The concentration of most of the industrial activity of the state in the large north and middle Jersey counties is obvious to the most casual observer and is confirmed by such official statistics as the regular reports

Confirmation of the effects of sectional differences on problems of government in New Jersey is provided by a 1931 report of the so-called Tax Survey Commission. The report points out that "Although New Jersey is a small state in the geographical sense, it presents wide extremes of economic conditions." It then divides the state up on the basis of county lines into five areas, as follows:⁶³

1. New York Metropolitan—Bergen, Passaic, Hudson, Essex, Union.
2. Highland—Sussex, Warren, Hunterdon, Morris.
3. Central—Middlesex, Somerset, Mercer.
4. Seashore—Monmouth, Ocean, Atlantic, Cape May.
5. Southwestern—Burlington, Camden, Gloucester, Salem, Cumberland.

The 1930 Census shows that the five metropolitan counties, with five, or less than one-quarter of the senators, had almost five-eighths of the population of the state. The southwestern region, with only a little more than one-eighth of the population, had the same number of senators as the metropolitan region. The report did, however, point out that if the population movement into parts of Middlesex, Somerset, Morris, and Monmouth counties continued, these counties might eventually join the group in which the Metropolitan problem was already appar-

of the Department of Labor on *Employment and Payrolls*. See to the same effect, McKean, *op. cit.*, p. 21, and especially 1934 Report of State Planning Board there cited.

That New Jersey people believe that this cleavage as crystallized in the composition of the Senate is politically important is indicated by the tenacity of the small county men and by such editorial expressions as the following from North Jersey: "They (the majority of the Senators) wield on behalf of their rural constituencies a disproportionate influence in the state legislature and use their power to fatten their counties at the expense of the taxpayers and consumers in urban counties." *Sunday Call*, *loc. cit.*

63. The Commission to Investigate County and Municipal Taxation and Expenditures, *Report No. 1*, "The Organization, Functions, and Expenditures of Local Government in New Jersey," Chapter II.

ent. The trend has continued and the one hope for ever achieving a working majority of the senate as presently constituted, in harmony with the dominant industrial and urban interests of the state, rests in this fact. If these four-border line counties, together with the urban industrial counties of Mercer and Camden, would join with the five Metropolitan counties, they would command a bare majority of the senate. Another possible recruit to this group might be Warren, which, although it is sixteenth in size, ranks eighth in the set of factors denoting an urban industrial pattern. Moreover, it is separated geographically from the south Jersey area. It remains to be seen how soon, if at all, such a coalition can be effected. It would require real statesmanship on the part of the senators from all of the smallest counties in this group to go along with a project which might result in the loss of numerical representation for their counties, even though it might increase the effective representation of the dominant interests in their counties.

How does the New Jersey legislature rank among the legislatures of the several states in its unrepresentativeness of the state as a whole? We cannot say definitely that it is "tops," because there is keen competition for the place, but, thanks to the senate, the New Jersey body is well up among the leaders in unrepresentativeness and in the importance thereof. The only other states with equal representation of all counties in the senate are Idaho, Montana, and South Carolina.⁶⁴ The effect of the composition of the senate is mitigated in Idaho, however, by the existence of the initiative and the referendum, and in Montana, by the referendum. There is no such mitigating circumstance in the case of South Carolina, but the range in size of the South Carolina counties is not anything like as great

64. Bromage, A W, *State Government and Administration in the United States*, p 202. The most recent available compilation of state constitutions is that put out by the New York State Constitutional Convention Committee, 1938 All references to state constitutions in this article are, unless otherwise specified, to the texts in that volume.

as that in New Jersey. In Montana, moreover, the twenty-nine smallest counties, which can just control the senate, have a larger proportion of the population of the state than do the eleven smallest New Jersey counties.

A number of other state constitutions (*e. g.*, California, Iowa, Texas) allow no more than one senator to a county; but combine the smaller counties into senatorial districts. This does give California a senate statistically even more out of proportion to population than that of New Jersey, because the counties of Los Angeles and San Francisco, with about one-half the population of the state, have only two of the forty senators. However, the curse is largely taken off this fact because California has constitutional home rule, initiative, referendum, and recall, and also has the initiative for proposing amendments to the Constitution. One writer, attempting to assess the unrepresentativeness of American legislatures, has classed the states as Class A, Class B, Class C, and Class D, "rotten borough states." He puts Rhode Island, Georgia, and Washington in Class A, and lists as Class B states "only a little less extreme," Connecticut, New Jersey, Delaware, and Maryland.⁶⁵ Since this classification was made, both the Georgia and Rhode Island senates have been reformed by constitutional amendment, although in both cases the reform was considerably less than a halfway measure. The effect of the Washington legislative apportionment is mitigated by the initiative and referendum. There is, of course, nothing to be said in favor of the "rotten borough" system, by which the small towns in Connecticut enjoy an overwhelming advantage in the assembly.

The under-representation of the Wilmington region in the Delaware senate is not as serious statistically as that of the populous counties in the New Jersey senate. In like manner,

65. Orville A. Welsh, *Progressive Hopes and Rotten Boroughs*, reprinted from the *NATION*, January 7, 1925, in F. G. Crawford, *Readings in American Government*, p. 482. For population of states by counties, see 1941 *World Almanac*.

representation in the Maryland senate is not quite so disproportionate as in the New Jersey senate. Moreover, the Maryland constitution provides for a referendum on acts of the legislature, and requires the legislature to submit the question of holding a constitutional convention to the people every twenty years.

New York, Ohio, Michigan, and Illinois were listed as Class C, "rotten borough states" in which "the urban majority population is outvoted by rural counties over-represented." Many other states show varying, but less serious, degrees of unrepresentativeness. In many of these the difficulty is partly constitutional, but it is commonly accentuated by the failure of the legislature to perform the duty of keeping apportionment up to date.⁶⁶ In consequence, there are a number of states with much less representative lower chambers than our assembly, although the effect of this is frequently mitigated by provisions for direct legislation and constitutional revision. Moreover, in most states with seriously unrepresentative legislatures, the popularly elected governor has more legislative power than in New Jersey. Of the states near the top of the "rotten borough" list, New Jersey and Connecticut are the only ones in which a special two-thirds or three-fifths majority is not required to override a veto. The three year term, coupled with ineligibility to self succession, also seriously weakens the governor of New Jersey in his dealings with the legislature. No other governor is so handicapped. Even the governor of Georgia, who after two terms of two years each must wait four years before running again, is better off.⁶⁷

66. C. W. Shull, *Reapportionment: A Chronic Problem*, in February, 1941, number, NATIONAL MUNICIPAL REVIEW, p. 73.

67. At least two New Jersey governors, Wilson and Larson, have testified to the handicap under which this places the governor as the representative of the people. As Wilson said, the entrenched politicians "cynically" wait "for the inevitable end of his term to take their chances with his successor." *Bebout, op cit*, pp 166-167.

We can now make a summary statement concerning the representative character of the New Jersey legislature. Although the requirement that each county must have at least one assemblyman results in giving the small counties somewhat more representation per capita than the large ones, the assembly is, as American lower houses run, fairly representative of the population of the state. The peculiar composition of the senate, however, puts New Jersey very high among the "rotten borough states." The importance of this position is enhanced because of other features of the New Jersey constitution such as the lack of any provision for direct legislation or an automatic vote on holding a constitutional convention, the relative impotence of the governor as a legislator, and the difficulty of the amending process. Thus, comparison of state constitutions, analysis of legislative apportionment in the light of population statistics and social and economic change, and the history of previous attempts to secure a constitutional convention—all indicate that *the people* of New Jersey are grievously misrepresented, as a result of an innocent decision in 1776 and an improvident decision in 1844.

Are we to assume that the people are to be forever estopped from overhauling their constitution as a result of those decisions of their forbears? If so, New Jersey government is not even a "necrocracy," or government by the dead; but rather a government by the unavoidable errors of the dead. Could the people of one age, by exercising the people's right to make their own constitution, forever deprive the overwhelming majority of their successors at some remote epoch of the right to rid themselves of a system which the unconscious processes of time have rendered wholly inadequate to their needs? If they could, popular sovereignty would have been the unique privilege of that generation which first thought to make itself a constitution.

HOW MAY THE PEOPLE CALL A CONVENTION?

Now who are "the people" referred to in the Bill of Rights of the New Jersey Constitution? There can be no question but that they are the people of the state, not the people of the several counties or other local units. The states rights school of constitutional thought, while denying the sovereignty of the people of the United States as a whole, placed original sovereignty in the people of the *states*, not of the lesser communities which had from the beginning been subject to control by the colonial legislature. Certainly no believer in national sovereignty could argue for what would amount to county sovereignty.⁶⁸ It is unnecessary to pile up authorities to the effect that the state constitutions are unlike the Federal Constitution. This doctrine was clearly stated by Chief Justice Hornblower in debate on the amending clause, in the constitutional convention of 1844. He spoke as follows:

Each of the states is sovereign and might or might not assent to the Constitution and come into the Federation. But our counties have not that privilege. Our State is but one territory, one people, one municipality. We are, in fact, only making a municipal law to govern the State. There is, therefore, no similarity between the Constitution of the Federal Union, of an Empire, and that of a sovereign State."⁶⁹

Of course it must be remembered that Justice Hornblower

68. Judge Jameson, for instance; *op. cit.*, pp. 51 ff.

69. Newark *Daily Advertiser*, Debate of May 22, 1844. Innumerable judicial dicta to the same effect can be found in cases of this and other jurisdictions. See, for example, *Booth v. McGuinness*, 78 N.J.L. 346 (1910), in which the court of Errors and Appeals unanimously upheld the constitutionality of the Civil Service law as applied to local (county and municipal) units. It pointed out, at p. 352, that there was no constitutional guarantee of the right of local self government.

was speaking before the Civil War and made a rather stronger statement concerning state sovereignty than would be generally approved today. However, his distinction between the federal character of the United States and the unitary character of each state is a basic principle of the American constitutional system. If the people of the state, therefore, want a constitutional convention, as the only effective and appropriate means of altering or reforming their government, they are entitled to have it, regardless of the preferences of any majority in the state senate, as presently constituted.

That the leading members of the convention of 1844 thought that the people could and would exercise the right guaranteed in Article I, sec. 2 "to call a convention whenever they chose," is clear from the debate on a provision for the periodic submission of the question of holding a convention. The proposal was warmly advocated "*because Mr. Jefferson had recommended it, inasmuch as a new generation comes upon the stage about once in twenty years, and every generation ought to have an opportunity to pass upon their fundamental law.*"⁷⁰ The scheme was rejected partly because of the fear that a specific provision on the subject might be taken to limit the inherent right to a convention.⁷¹

On the other hand, it is also clear that they thought that the right would be exercised through the normal medium of initial action by the legislature. In like manner, all the authorities speak of a legislative call as the appropriate method of initiating a constitutional convention,⁷² and they all hold that any other method would be "illegitimate" or "revolutionary." Legal

70. *Official Journal of Proceedings* and *Trenton State Gazette*, debate of June 25.

71. *Bebout and Kass, op. cit.*, p. 168.

72. *Dodd, Revision and Amendment of State Constitutions*, p. 44; *Jameson, op. cit.*, pp. 103 ff., especially p. 109; *Hoar, Constitutional Conventions*, Chapter V. *In re* opinion to the Governor, 178 Atlantic 433, Supreme Court of Rhode Island, 1935.

theory naturally abhors a legal vacuum and deplores any obvious break in the continuity of these institutions through which law is pronounced. The legislature, except in states having the initiative or in states whose constitutions provide automatically for conventions, is the only agency from a strictly legal point of view qualified to set in motion the legal machinery required to generate a convention. Practically there are inconveniences in proceeding in any other fashion. This thought was expressed by the *Newark News* in a 1912 editorial dealing with the constitutional right of the people to have a convention:

"It would be possible, of course, for them to meet by common consent in a mass meeting and there initiate and adopt a new constitution. But the carrying out of such a plan would be unnatural and rather revolutionary in character. . . . There must be, however, some system provided for the choosing of . . . representatives and empowering them to act for the people. The only natural way in which this can be done is through legislative enactment."⁷³

It seems to be an inevitable deduction from these premises that if the people want a convention it is the duty of the legislature to take the necessary steps to give it to them.^{73a} The desire

73. *Newark Evening News*, December 26, 1912.

73a. Governor Haines, in his message advising the legislature to call the constitutional convention of 1844, invoked the doctrine that the legislature has a duty to call a convention when the people wish it. These were his words (*Italics ours*):

"You will allow me to remind you that the formation or alteration of the fundamental law of a State is the province of the people in their highest sovereign capacity, and not the duty of the Legislature, who are delegated to act in obedience to that fundamental law. *The same voice that asks a change of the Constitution, asks that change through the medium of a convention; and instructs us to fix by law the time, place, and manner of forming it. A law . . . calling a convention of a suitable number of delegates at as short a time and little expense as the importance of the measure will justify, I believe to be both proper and necessary.*

of the people may, of course, be expressed in any convincing manner: through resolutions adopted by public meetings or civic associations, through petitions to the governor or the legislature, or through any of the usual methods by which legislators are made aware of the wishes of their constituents. If the legislature is not satisfied that it has a clear expression of the will of the people by these informal methods, it can, and should if in doubt, give the people an opportunity by a referendum vote to instruct them. This has, in fact, become a common, although not a necessary, preliminary to the calling of conventions.⁷⁴ It is our opinion that the legislature should not resort to such a referendum for the purpose of delaying the calling of a convention if it seems evident that the outcome of such a vote would surely be in favor of it. If the legislature, or specifically, if one house of the legislature, refuses to perform this constitutional duty, however, there is no legal method of requiring it to do its duty, since it is a well established rule that the courts will not mandamus a legislative body.⁷⁵ The practical reasons for this judicial self-restraint are obvious. In other words, the courts pass up the enforcement of the constitutional duties of the political branches of the government as "political questions" and indicate that the only sanctions are political sanctions. This being so, it would seem that the courts must also refrain from interfering with the application of any political sanctions which the people may find necessary to enforce a legally unenforceable constitutional duty. Of course, the courts are usually thinking

If the will of the people has been misunderstood, they can so express it by instruction to their delegates."

(Quoted in J. O. Raum, *The History of New Jersey*, Vol. II, pp. 198-9, 1877)

74. *Bebout and Kass, op. cit.*, pp. 170 ff.

75. *Story v. Jersey City and Bergen Point Plank Road Company*, 16 N.J.Eq. 13 (1863), opinion of the Chancellor, who said, "The legislature can neither be restrained from legislating upon any subject, nor from exercising their authority to obtain information about any matter of legislation." It has been held in other states that legislatures may not be required by mandamus to perform a constitutional duty to reapportion their membership. See Charles W. Shull, *op. cit.*

of the "political" devices of the petition and the next election. These are the normal political sanctions in the possession of the people, and should, of course, be wielded with the utmost vigor and determination before resort is had to any other. If, however, like King George III, an unrepresentative legislative body persistently ignores petitions and, because of its composition, is beyond the reach of the people of the state as a whole, the doctrine of popular sovereignty becomes an absurdity if the people may not *legitimately* or *appropriately* resort to a more effective procedure.

This is what the people of Rhode Island did in 1841 after repeated attempts of a less drastic nature had been made to secure a revision of the thoroughly outmoded colonial charter which was still the constitution of the state. Associations were formed, and an extra-constitutional system was set up by virtue of which a convention was elected and held. The resulting document, known as the "people's constitution," was approved by the voters rather than the so-called "freemen's constitution" drawn up by an official convention acting quickly in an attempt to head off the "popular" movement. Everyone is familiar with the resulting conflict which was settled finally by the intervention of President Tyler in answer to the request of the "legitimate" or charter government. The President acted under the Federal guarantee to the states of a republican form of government, and the Supreme Court of the United States refused to pass on the decision of the President, holding that the determination of what was the legitimate government in a state was a "political" one.⁷⁶ Chief Justice Taney, who delivered the opinion in this famous case, declared:

"No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and

76. *Luther v. Borden*, 7 Howard 1, (1849).

that they may alter and change their form of government at their own pleasure. But whether they have changed it or not, by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it."

The state courts naturally took the position that they could not inquire into the legitimacy of the government of which they were a part. Mowrey, the leading writer on the subject, concludes that the so-called "Dorr rebellion" was not justifiable.⁷⁷

77. The best general account of this Rhode Island episode is *The Dorr War*, by Arthur M. Mowry. President Tyler explained his course in a message to the House of Representatives, supported by numerous letters and documents printed in Richardson, *Messages and Papers of the Presidents*, Volume IV, p. 283 ff. Interesting contemporary accounts written to prove that the Dorr movement was a necessary and proper expression of popular sovereignty are: Dan King, *The Life and Times of Thomas Wilson Dorr*, published in Boston, 1859; and a book published in Providence in 1844, entitled *Might and Right*, by an author who preferred to be known as "a Rhode Islander." This book was dedicated "To Thomas Wilson Dorr, the true and tried patriot, the fearless defender of human rights." Both of these books, as well as Mowry's treatise, include essential documents. Although the courts evaded the issue of legitimacy by resort to the doctrine of "political questions," opposing counsel in *Luther v. Borden*; Daniel Webster for the charter government, and Mr. Benjamin F. Hallett for the representatives of the Dorr government presented extensive and able legal arguments on the merits. These arguments are well summarized by Jameson, *op. cit.*, pp. 225 ff. Jameson contrasted Mr. Hallett's "ingenious defense of anarchical principles" with Webster's "masterly statement of the principles of the American system of government," and could not forbear to make additional answers to Mr. Hallett's argument. The reasoning of Mr. Webster and Mr. Jameson concerning this case may be taken as the complete and final formulation of the purely legalistic argument against popular conventions unauthorized by the existing government. Although most judicial dicta dealing directly with the legality of spontaneous popular conventions naturally take the same position as Jameson (*e.g.*, *Wells v. Bain*, 75 Pa. 39, 1872), Hoar, *op. cit.*, p. 23, cites the following dictum to the contrary: "It may well be questioned whether, had the legislature refused to make provision for calling a convention, the people in their sovereign capacity would not have had the right to have taken such measures for framing and adopting a constitution as to them seemed meet." Quoted from Goodrich v. Moore, 2 Minn. 61, 66 (1858).

There can be no quarrel with his statement that the appeal to arms turned the revolution into "a mere rebellion." He does admit, however, that "a revolution which causes no loss of life and no bloodshed may be proper when an armed movement would be a crime."⁷⁸ If it had not been necessary to appeal to arms, the author still thinks that the Dorr movement would not have been justified because he doubts whether "agitation, pure and simple," had been pushed as far as it might have been before resort was had to extra-constitutional methods. This, of course, is merely a matter of opinion, and amounts to a recommendation of extreme caution in reaching the conclusion that the uses of petition and persuasion have been exhausted. Considerations of convenience alone should be enough to induce such caution, and we are inclined to suspect for this reason that the supporters of the Dorr movement were probably justified in initiating the "people's convention." The fact is that the liberalization of the constitution of Rhode Island came after, not before, the opponents of the charter government had moved beyond the stage of mere "agitation," and writers usually assume that the time relationship in this case signalized a cause and effect relationship.⁷⁹ If this is correct, the holding of the "people's convention" was a perfectly appropriate means of meeting the recalcitrancy of the charter government. We shall now try to show that a somewhat different procedure, which can not possibly run into the practical difficulties of the Dorr movement, is available to the people of New Jersey.

As we have already pointed out, Judge Clark and others have suggested that the governor, as the representative of all the people, might appropriately lead a popular movement to outflank a recalcitrant state senate. He suggested two methods by which the governor might get the approval of the people for a slate of delegates to a convention and for a constitution drawn

78. Mowry, *op. cit.*, pp 298 ff.

79. E.g. G. P. Garrison's volume in *The American Nation series*, "Westward Extension," p. 7.

up by such a convention. The first is a post card poll; the second is by getting the people to write on their ballots at one general election to signify their approval or disapproval of the convention slate and at the next to signify their acceptance or rejection of a revised constitution. Unfortunately we doubt the practicability of the former method and both the legality and the practicability of the second. The election law and the election machinery are the creatures of the legislature, and election officers are limited by the election law. They could certainly not be required to pay respectful attention to unauthorized writing on the ballots. Since the time has not yet come when a Gallup poll would be accepted as an authentic expression of the sovereign will, we think the most practicable method for carrying out Judge Clark's proposal is that of forming throughout the state voluntary associations and setting up an *ad hoc* popular election system after the manner of the Dorr party in Rhode Island. This would admittedly be a burdensome enterprise, but if the people were determined to have a new constitution it would be the most impressive demonstration of the fact. The task could undoubtedly be lightened in many parts of the state by securing the voluntary cooperation of the election boards, and it has the merit of being consistent with the traditional methods of American democracy.

It is probably desirable here to point out why it would be appropriate for the governor to assume the leadership of a popular movement for a convention. The doctrine that the chief executive is in a peculiar sense the one representative of the whole people, and that it is part of his function to protect them against the results of misrepresentation in other branches of the government, has a long and respectable history in American constitutional theory and practice. We may go back to Locke's conception of prerogative as "a power in the hands of the prince to provide for the public good in such cases which, depending upon unforeseen and uncertain occurrences, certain and unal-

terable laws could not safely direct.”⁸⁰ It is interesting to observe that this quotation is from the end of a long sentence in which Locke suggests the propriety of action by the executive to rectify a rotten borough system in the legislature “which succession of time had insensibly as well as inevitably introduced; for it being the interest as well as intention of the people to have a fair and equal representative, whoever brings it nearest to that is an undoubted friend to and establisher of the government, and cannot miss the consent and approbation of the community.” In the next chapter Locke speaks of prerogative as “nothing but the people’s permitting their rulers to do several things of their own free choice where the law was silent, and sometimes, too, against the direct will of the law, for the public good, and their acquiescing when so done.”

Some of the framers of the Constitution of the United States had a clear sense of the importance of this representative function of the executive,—for instance, Gouverneur Morris:

“It is necessary then that the executive magistrate should be the guardian of the people, even of the lower classes, against legislative tyranny, against the great and the wealthy who in the course of things will necessarily compose the legislative body.”⁸¹

James Wilson had a similar view of the importance of an independent executive who ought to be “the man of the people.”⁸² Alexander Hamilton also told the New York Convention that “the President of the United States will be himself the representative of the people,” and that he “will be induced to protect their rights, whenever they are invaded by either branch.”⁸³

80. Locke, *op. cit.*, p. 198.

81. C. C. Tansill, Editor, *Documents Illustrative of the Formation of the Union of the American States*, p. 409.

82. *Ibid.*, p. 674.

83. Quoted in W. S. Carpenter, *Democracy and Representation*, p. 62.

Some of the members of the New Jersey Convention of 1844 entertained a similar view of the function of the governor. For example, Mr. Field argued for a strong veto on the ground that "the great danger to which we are exposed is from the tyranny of a majority of the legislature."⁸⁴ Mr. Zabriskie in the debate on the appointing power argued that "the Governor is the only direct representative of the people. He will be elected by a majority of the whole people of the state."⁸⁵ Mr. Zabriskie was influenced by his admiration for the vigorous presidential leadership of Andrew Jackson.

The theory and practice of executive action as the peculiar representative of the people has, however, developed greatly in recent years. Two of the most important contributors to this development have been New York's Theodore Roosevelt, both as Governor and as President, and New Jersey's Woodrow Wilson in the same two capacities. Theodore Roosevelt in his "Autobiography" expounded his theories of the executive office in terms reminiscent of Locke. He developed a theory of the executive as "a steward of the people bound actively and affirmatively to do all he could for the people, . . ." unless "prevented by direct constitutional or legislative prohibition . . ."⁸⁶ President Wilson used New Jersey as a proving ground for his notions concerning the duty of the chief executive as the representative of the whole people. Wilson was quoted as having said while he was still Governor that the people were "clamoring for leadership," and that consequently "a new role, which to many persons seems little less than unconstitutional, is thrust upon our executives. The people . . . are impatient of a Governor who will not exercise energetic leadership who will not make his appeals directly to public opinion and insist that the dictates of

84. Newark *Daily Advertiser*, Debate of June 3, 1844.

85. *Ibid.*, Debate of June 12.

86. Roosevelt, *Autobiography*, p. 357.

public opinion be carried out in definite legal reforms, of his own suggestion."⁸⁷

We conclude, therefore, that it is not only appropriate, but that it may yet become the duty of the Governor, as the representative of all the people, to assist them to get a new constitution despite the opposition of an unrepresentative legislature. In this he might, as Mr. Vanderbilt has suggested, have the assistance of the one popular branch of the legislature. Although the Governor and the assembly cannot enact a complete law under the constitution, they have, in addition to their peculiar right to represent the people in the political sense, certain constitutional prerogatives which would be of material assistance. There would have been no display of force, consequently no "rebellion," and consequently no intervention by the President of the United States if the existing Charter government of Rhode Island had not in 1842 undertaken to oppose by force the pretensions of the Dorr Government. The governor is the commander-in-chief of the militia. If neither the governor nor the legislature requests the aid of the president, no intervention from him need be feared in order to defend a government supported only by senators representing a minority of the people of the state. Neither would the courts be competent to interfere

87. Hester E. Hosford, *Woodrow Wilson and New Jersey Made Over*, p. 73, G. P. Putnam's Sons, 1912. For illustrations of effective executive leadership in arousing public opinion in New Jersey, see newspaper stories of activities of Governors Wilson and Silzer; Bebout, *Documents and Readings*, pp. 191-198; Professor Carpenter, *op. cit.*, has traced this development of popular representation through the executive, particularly the President. He observes (p. 71) that "the principle of representation was adopted in the United States to give effect to the sovereignty of the people." He then concludes that "the absorption of power by the executive indicates merely that the popular will finds a better means of expression in the President than in Congress." Another account of the growth of executive leadership, particularly in the field of legislation, is to be found in H. C. Black, *The Relation of the Executive Power to Legislation*, Princeton University Press, 1919. The enhancement of the position of the Governor is developed more fully in Leslie Lipson's *The American Governor from Figurehead to Leader*, University of Chicago Press, 1939.

with the establishment of such a government. The doctrine of "political questions" laid down in the *Dorr* case has been specifically approved by the New Jersey courts. For example, the Court of Errors and Appeals said: "The courts do not undertake to determine so fundamental a political question as the existence of the government they serve."⁸⁸ To be sure, in this opinion the court was stating the grounds for its refusal to go into the question of the legality of the government under the Constitution of 1844, because to do so might be to discover that the court itself had no existence. It is conceivable that a court under an old constitution might try to continue to exercise jurisdiction after a new government was in operation. Its judgments, however, would be futile in the face of a complete new government including an executive and courts actually exercising authority in concert. Moreover, any danger of clash might be disposed of by the simple expedient of appointing to the highest court under the new government a majority of the old Court of Errors and Appeals, thus depriving the latter of its quorum.

Ex-Governor George S. Silzer has described the power of revising the constitution as "apart from any provision, or any legislative act whatever," and as being "in the hands of the people." He concluded that as a practical proposition "It is certain, and quite clear, that if the people ever make up their minds that they want to exercise political power by amending the con-

88. *Carpenter v. Cornish*, 83 N.J.L. 696, 698, Court of Errors and Appeals, 1912. Justice Kalisch, speaking for the Supreme Court in the same case (83 L. 254, 262) had specifically denied that the constitutional revision of 1844 "could only be justified by constitutional authority." He declared: "It required no constitutional authority. It was the exercise of the sovereign power of the people." The Court of Errors and Appeals cited *Luther v. Borden*, as had the same Court in an earlier (1899) case dealing with the amending power (*Bott v. Secretary of State*), 63 N.J.L. 289, 298). In the last case the Court declared that "the difference between a court's investigation into the legality of the government of which the court is a branch, and its investigation into the legality of a procedure which in no way involves the legality of the government or of itself, is too plain to require elucidation."

stitution, they will do so, irrespective of any legislative or any constitutional provision."⁸⁹ This testimony from one who during his lifetime occupied with distinction positions in all three branches of the New Jersey state government fairly and succinctly states this part of our case.

We have already commented on the adverse or doubtful views of most of the "authorities." The fact is that the "authorities" generally speak from what is essentially a legalistic and theoretical point of view. Furthermore, they speak without benefit of a single historic case which is precisely in point, because the situation which we have assumed has never occurred. The writers cite in addition to the Rhode Island case a convention in Maryland elected by reformers "without any authorization from the legal government." Dodd adds that "the convention took no action because the most important of the proposed reforms were adopted as constitutional amendments by the legislature of the state."⁹⁰ They also cite the case of an irregular "popular" convention in the territory of Michigan the work of which was accepted by Congress by admitting the territory to the Union. They conclude in consequence that actions of irregular territorial conventions may be validated by subsequent act of Congress. But Dodd holds that in view of the Rhode Island case it seems unlikely that a constitution might be adopted in a state "independently of or in opposition to the existing" government, although he recognizes that in certain cases such revolutionary procedure might "be amply justified." He bases his conclusion on "the relations between federal and state governments."⁹¹ Another of the leading authorities, Mr. Hoar, is not quite so pessimistic about the possibilities in such a people's movement as that led by Mr. Dorr in Rhode Island. He points out that President Tyler supported a fellow Whig in coming to the aid

89 George S. Silzer, *The Government of a State*, p. 4

90 Dodd, *op cit*, p. 61, Hoar, *op cit*, p. 20

91 Dodd, *op cit*, p. 62

of the Charter government. He attributes the Whig defeat at the next national election in part to "this partisan action." He then contrasts the action of President Tyler in this case with that of President Lincoln in recognizing the "revolutionary pro-Union government, which was set up in the state of Virginia shortly after the outbreak of the Civil War."⁹² The moral of the comparison, of course, is that the Federal authorities can in the last analysis determine the status of factional state governments. Under the principle of Federal supremacy, once the government of a state has been recognized by the President and/or Congress, all local resistance to its authority necessarily becomes unlawful and utterly futile.

Hoar points out later that the Governor of a state "can assume a very important role, in case the legitimacy of the convention or of any of its actions comes into dispute." He wisely concludes that "the recognition or non-recognition of the constitution by the governor may be the deciding point in determining its validity or invalidity." Since the President of the United States has no power to interfere in the internal affairs of a state "except upon the request of someone claiming to be the state government," it would follow that if the governor and one house of the legislature acquiesce in a new constitution, there is no basis for Federal interference.⁹³ The concluding chapter of Mr. Hoar's treatise is entitled "The Doctrine of Acquiescence," the final paragraph of which reads as follows:

"On the whole, we may conclude that acquiescence will validate an illegal constitution and non-acquiescence will

92. Hoar, *op. cit.*, pp. 21-23 Roger Sherman Hoar was one time Assistant Attorney General and member of Commission to compile information for the Massachusetts Convention of 1917. His treatise is the most recent and most practical comprehensive treatment of constitutional conventions. His conclusions, with which we generally agree, are conveniently summarized in Chapter XVIII, which is a sort of digest of the law and practice of conventions

93. *Ibid*, pp 93-95.

invalidate a legal constitution. Thus we revert in the end to fundamental principles, particularly the principle that all governments derive their just powers from the consent of the governed, rather than from any compliance with legal formalities."⁹⁴

In other words, "popular and governmental acquiescence will cure almost any informality."⁹⁵

Jameson, in spite of his strict legal morality, has to admit in the end that "a constitution, or an amendment to a constitution originating in a convention stigmatized as illegitimate, may, notwithstanding its origin, become valid as a fundamental law."⁹⁶

What, therefore, would be the state of affairs in New Jersey if a governor with the blessing of the lower house of the legislature had undertaken to help the people secure revision of their constitution through a convention called without the aid of the legislature as a whole? In view of the foregoing, it seems clear that such a proceeding would without disorder or serious inconvenience, result in a valid new constitution. However, the Maryland case cited above, and the fact that the Dorr movement was actually followed by reform at the hands of the "constitutional" authorities, suggest the possibility of a "legitimate" or non-"revolutionary" result, satisfactory even to the most squeamish legalist, following upon the holding of a popular convention lacking senatorial approval. This might come about by an act of the whole legislature, curing any possible defect in the legal basis of the convention before its proposals were submitted to the people. Or a "legitimate" convention, called by the legislature, might meet and propose an acceptable substitute for the constitution prepared by the popular convention. The former

94. *Ibid.*, p. 219.

95. *Ibid.*, p. 232.

96. Quoted by Hoar, p. 218.

action would occur if the popular convention had prepared a document which was so acceptable to the people as a whole and so easy on the sensibilities of the senate that it would feel either obliged or glad to accept paternity; the latter result might follow if the senate were unwilling to accept the new constitution *in toto* but could persuade the supporters of the popular convention to hold up the submission of their document. It should be noted that it would be unnecessary for any one to commit a single illegal act, from the first agitation for a convention through the vote of the people on the proposals of the convention, whether authorized or not. The activities of the people would come within the constitutional guarantees of freedom of petition, speech, and assembly. It would be the duty of the governor to protect them against molestation. And the lower house of the legislature might adopt a perfectly constitutional resolution in support of the whole proceeding as a proper method of obtaining necessary information to aid it in performing its own legislative and constituent functions.⁹⁷ If the senate also heeded the "information" so obtained, we might thus achieve constitutional revision through legislative investigation!

CAN THE POWERS OF A CONSTITUTIONAL CONVENTION BE LIMITED?

The "minority" of the constitutional convention committee of the State Bar Association in 1940 advised that "the present system of senatorial representation should be retained and that delegates to any constitutional convention . . . should be so limited by the terms of their appointment and so instructed and committed." The committee did not say how this could be done, except by a constitutional amendment, which they suggested should be adopted in order to clarify the whole question of the power to revise the constitution by means of a convention. We

97. See Footnote 75.

have already noted proposals to protect the senate by putting restrictions in the law calling a convention in 1885 and 1913. Were the friends of the senate right in thinking that such limitations would have no legally binding force?

The generally accepted doctrine on this point has been summed up by the Supreme Court of Rhode Island in an advisory opinion which deals with a great number of the legal problems connected with the holding of a convention. The court declared that if the legislature itself calls a convention, it has no power to impose any "rule or restraints of any kind that will interfere with the performance of its proper functions." If the legislature were permitted to do so, it would be "to exalt the legislature, the agent, above its principal, the people. This cannot be."⁹⁸

Jameson naturally took the contrary view that a convention is subject to control with respect to its procedure and the scope of its power to propose revision of the constitution by the legislature. Both Dodd and Hoar, however, pointing out that Judge Jameson's book was written very largely to demonstrate the subordination of the convention to the existing government, reject his view and pretty thoroughly demolish his position.⁹⁹ Hoar points out that the apparent contradictions among legal opinions on the subject can be resolved in most instances by recognizing that usually when courts have sustained limitations on the power of a convention, the limitations have received some semblance of popular approval. He also points out that "where conventions have acceded to legislative restrictions, this merely proved that the restrictions seemed reasonable, not that they were binding." It necessarily follows from these propositions that the legislature may not require members of the convention to take oath to observe limitations which the legislature has no power to impose upon them.

⁹⁸ *In Re Opinion to the Governor*, 178 Atl 433, 452, Supreme Court of Rhode Island, 1935

⁹⁹ Hoar, *op cit*, Chapter IX and p 226, Dodd, *op cit*, Chapter III

On the other hand, as the Rhode Island court has pointed out, there seems to be agreement that if the question of holding a convention "is submitted to the people and the act of the General Assembly prescribing rules for organization and conduct of the convention is brought to their notice before voting on the question," such act would be binding upon the delegates because it would be the people, not the legislature, that were acting. This view is approved by Dodd and Hoar. It should be noticed that the Rhode Island court emphasized the necessity for care in bringing the proposed limitations to the notice of the voters. The catch in this proposition from the standpoint of popular sovereignty is the fact that if the legislature submits the question of holding a convention to the people in only one form, that form calling for a drastic limitation on the powers of the convention, the people have no choice in the matter. This might, in fact, give the legislature the power of restriction. Hoar quotes an article in the *Harvard Law Review* which points this out, and cites judicial opinions which admit it.¹⁰⁰ It is our contention, therefore, that the only proper way for the legislature to submit the question of limiting a convention to the people is to do so in such a manner that the people may freely choose between a convention with limitations and a convention without limitations. Otherwise, under the circumstances which exist in New Jersey, the theory of popular sovereignty might be honored in form and completely disregarded in fact. Since it is our view that the legislature cannot constitutionally keep the people from having a convention, we hold *a fortiori* that the legislature may not limit the scope of the popular power to revise the constitution through a convention. Therefore, even if a convention were held under a limiting act voted by the people without an opportunity to vote on the convention without limitations, it would be perfectly proper for the convention to ignore such limitations and it would be beyond the proper power of the

100. Hoar, *op. cit.*, p. 123.

courts to interfere with the popular ratification and ultimate promulgation of a resulting constitution. After all, the people have the final check when they vote on the work of the convention. They don't need the protection of the courts against themselves.

It is not to be supposed from what we have said that a convention is without any limitations. A constitutional convention is the representative of the sovereign people for a specific purpose—the proposal of changes in the basic law. It is not competent to substitute itself for the constitutional public authorities in the conduct of the routine public business the enactment of ordinary legislation, the levying of taxes, or the appropriation of public money.¹⁰¹ Apparently exceptions to this proposition may be accounted for in different ways. Some conventions have necessarily operated, as in the time of the Revolution, as provisional governments. Other conventions have formulated ordinary legislation and secured its adoption by *vote of the people*, either as part of the constitution or as separate ordinances. In either case, it is the people who do the legislating.¹⁰² Only a few conventions (since the first ones of Revolutionary days), mostly in the South, and in most instances by virtue of the act calling them, have promulgated constitutions without submitting them to the people.¹⁰³ The circumstances which gave rise to these acts do not prevail in New Jersey, however, and the weight of opinion has been against the legitimacy and propriety of such acts, at least when not authorized in advance. In any event, a convention could not successfully avoid submitting any of its work to the vote of the people unless the political branches of the existing government acquiesced. This will be clear from what we have already said about the ability of the governor to determine the fate of the work of an "irregular"

101. Dodd, *op. cit.*, pp. 103 ff; Hoar, *op. cit.*, pp. 177-178; Bromage, *op. cit.*, pp. 90-91.

102. Hoar, *op. cit.*, pp. 140 ff; Dodd, *op. cit.*, pp. 108-117.

103. Hoar, *op. cit.*, pp. 112, 194; Dodd, *op. cit.*, pp. 62 ff.

convention. The governor would be in the same position with respect to an "irregular" act of a "legitimate" convention, and the courts would certainly not order compliance with an "irregular" act.¹⁰⁴

The substance of the preceding paragraphs can be summarized as follows. A convention has all the rights and powers that are necessary or incidental to the performance of its essential function, which is to propose changes in the state constitution. It can be limited in any of these matters only by express vote of the people, given under conditions which permit the people a real choice of alternatives. A convention may not, however, exercise purely governmental powers which are not necessary to carry out its proper function. Although the legislature will ordinarily prescribe the method by which the proposals of the convention will be submitted to the people, if in the course of its work a convention discovers that that method would prevent a thorough study of the problem, or might prevent the people from expressing an intelligent opinion on its work, the convention could undoubtedly choose more appropriate means for securing ratification. For example, it could postpone the date of submission to the people; but it could not put a constitution into effect without such submission.

COMPOSITION AND ELECTION OF CONVENTION

The third set of constitutional questions which we have to consider has to do with the composition of the convention and the selection of delegates. The call for the convention necessarily predetermines some of the most important characteristics which the convention will display. Among the matters so determined may be

104. *Dodd, op. cit.*, p. 92; *Hoar, op. cit.*, pp. 158 ff. The Rhode Island Supreme Court, *op. cit.*, p. 453, held that "reference to the people for their approval or disapproval is a necessary and final step without which the work of the convention is lacking legality."

- 1() The apportionment of delegates;
- (2) The qualifications of delegates;
- (3) The manner of nomination and election of delegates.

Since the New Jersey constitution, unlike the constitution of Michigan, for example, makes no provision concerning the composition of a convention, the apportionment of delegates must be settled by the act providing for their election. The common practice of the legislatures of other states has been summarized as follows: "Usually the delegates are nominated and elected under the general primary and election laws. . . . The state Representative or Senatorial district is the customary territorial basis for the election of delegates. Since these districts in state after state favor the rural against the urban areas, constitutional conventions have reflected the rural dominance of state governments."¹⁰⁵ In view of the figures on legislative apportionment that we have given, it is apparent that any convention based on county units in New Jersey would be similarly weighted in favor of the rural interest. This would be true to a slight degree if the precedents of the Convention of 1844 and if the Hennessy Bill of 1913 were followed and the members apportioned among the counties on the same basis as the assembly.¹⁰⁶ The over-representation of the rural sections would be still greater if the present Hendrickson Bill providing that the convention should have the same composition as a joint meeting of the legislature were to be adopted. Either one of these plans, however, would give a majority of the convention to representatives of the dominant urban and industrial sections of the state, and neither would provide so spectacularly unrepresentative a convention as would have resulted from giving each county equal representation, as the small county men proposed in 1913. We have already noted an 1885 proposal which would have, like the Hendrickson Bill, given each county an extra delegate for

105 Bromage, *op cit*, p. 86

106 Charles R. Erdman, Jr., *The New Jersey Constitution of 1776*, p. 139.

its senator, while partly balancing this concession to the rural interest by providing for the election of five delegates from the state at large.¹⁰⁷

In view of the fundamental proposition upon which the constitutional convention rests, namely, the sovereignty of the people of the state as a whole, it would seem that any allocation of delegates which grossly misrepresented that population, or at least the enfranchised population, would be a serious violation of the constitutional proprieties. If unrepresentativeness were carried too far, it is a question whether it would not deprive a body—whatever its title—of the right to the status of a constitutional convention. It is our opinion that such would certainly be the case of a "convention," like our senate, in which representatives of less than one-sixth of the population enjoyed a majority. As we have seen, it would be within the powers of the governor, especially if he had the cooperation of the secretary of state, to destroy the effectiveness of such an irregular body. This does not mean, however, that the people of the state as a whole may not willingly recognize in the composition of a convention the propriety of giving some special weight to what would otherwise be hopelessly feeble minority interests or sections. This is essentially a question of policy, and the essential point is that its determination should be in accordance with the uncoerced judgment of the people of the whole state.

The next question is, what can the convention act do by way of determining the qualifications of delegates. A review of the literature indicates that it is probably legitimate to make almost any reasonable requirement.^{107a} Jameson could find no case in

107. Bromage, *loc. cit.*, points out that, "The presence of some delegates elected at large in various states has not been sufficient to offset" the rural advantage.

107a. The Supreme Judicial Court of Maine, in an advisory opinion dealing with the holding of a convention to ratify the XXIst Amendment, spoke on this point as follows:

"The Legislature has the right to make reasonable requirements relative to the nomination of candidates and may prescribe proper restrictions so

which any person had ever been elected to a convention "who was not a citizen-elect, resident in the state." He pointed out, however, that some authorities hold that even these restrictions are not necessary.¹⁰⁸ The membership of the New Jersey convention of 1844 included the Attorney General and the Chief Justice, and there is no constitutional objection to officers in any part of the government holding seats in a convention. On the other hand, there would appear to be no reason why the convention act might not disqualify certain classes of public functionaries (e. g. legislators) from seeking election, especially if the convention were to meet at such a time as to make it impossible for them to perform both their regular and special duties properly.

This leads us to a consideration of the available methods of selecting members of the convention. As we have just pointed out, delegates are usually nominated and elected under the general primary and election laws of the state. This is not necessarily the case, however; and in New Jersey the manner of electing the members of the convention of 1844 provides the strongest precedent for the right of the legislature to select any reasonable method for securing a fair expression of the will of the people. The 1844 convention act disregarded the existing tax-paying qualification for voters and changed the residence requirement, thus materially broadening the electoral base both for the election of delegates and for the approval of the new constitution.¹⁰⁹ Jameson does not approve of tampering with existing electoral requirements, but Hoar cites several examples like the New Jersey precedent and considers them valid on the basis of their "uniform success."¹¹⁰

that those elected as delegates shall be qualified to do the work which they are called on to perform."

(*In Re Opinion of the Justices*, 167 Atl. 176, 180: 1933)

108. Jameson, *op. cit.*, p. 262

109. Erdman, *op. cit.*, p. 139.

110. Hoar, *op. cit.*, p. 211. See also Dodd, *op. cit.*, p. 58 and especially Lobin-

The nomination and election of delegates to the 1844 Convention was greatly simplified by an unusual agreement of the two political parties—the Whigs and the Democrats—to avoid party contests by splitting the county delegations equally between them, an agreement which was carried out loyally by all except the Monmouth County Democrats. This is referred to by Jameson as “a very remarkable exhibition of moderation.” He adds: “It is impossible to commend too highly an example which must have sprung solely from a view to the public good.”¹¹¹ This amiable conclusion may have been justified at the time, but in view of the more recent New Jersey history of bi-partisanship, it is doubtful whether the plan would be looked upon with such favor today.

If nominations are to be put on some other basis than the party, and the hit or miss scramble among a multiplicity of candidates nominated by petition, is to be avoided, some special device must certainly be found. Such a device might be worked out extra-legally by the voluntary cooperation of civic organizations; but the diverse methods of nominating candidates for the conventions which ratified the XXIst Amendment suggest the possibility of finding a legal formula for providing a representative slate of candidates for which the electorate might vote with some degree of confidence. In twenty-five states nominations were made by petition, but nominating methods in the other states included the following: mass conventions, primary election, personal action of the individual, and action by party state executive committees and various *ex officio* nominating committees. The nominating committees show considerable variety: in Maryland, a committee of twenty-nine, selected by the legislature and representing each county and legislative district; in Massachusetts, a committee consisting of the Governor, Lieu-

gier, *The People's Law*, pp. 219-223, 241-243, and 247, for discussion of acts widening the suffrage in Virginia, New York, and New Jersey.

111. Jameson, *op. cit.*, p. 264.

tenant Governor, Councillors, State Secretary, State Treasurer, Attorney General and State Auditor; in Michigan, county boards consisting of Probate Judges, County Clerks, and Prosecuting Attorney; in Virginia, a committee composed of the Governor, Lieutenant Governor, Speaker of the House of Delegates, and two others selected by the Governor.¹¹² To be sure, the task of a convention on the XX1st amendment was very simple compared to that of a state constitutional convention, and if any official nominating mechanism were set up, it would be necessary to select it with great care and to operate it with even greater care in order to satisfy all legitimate interests in the state that its sole purpose was to assist the people in securing a truly representative convention. If an official nominating committee is created, charged with the responsibility of offering a slate of delegates, it would probably be desirable to provide, as a supplementary method, for nomination by petition bearing a substantial, but not an inordinate number of signers. This would have the double advantage of putting the official committee on its mettle and of giving all elements in the community the assurance that they were free by their own action to secure the nomination of acceptable candidates. Whether the law provided for it or not, it would certainly be desirable for the nominating committee to consult freely with the various civic organizations and interest groups which are necessarily concerned in the composition of the convention. If a well selected committee did a good job, it would seem likely that its nominees would generally be elected by substantial majorities and that the state would enjoy the benefits which would accrue from having a convention elected by proportional representation without having to embark on the experiment of actually using the Hare system.

Mr. Walter Millard, Field Representative of the National

¹¹² E S Brown, *Ratification of the XX1st Amendment of the Constitution of the United States*, pp 516-517 The texts of all the convention bills, together with the journals of the conventions and the lists of delegates, are included in this volume

Municipal League, has suggested another method of achieving some of the benefits of proportional representation. Mr. Millard proposed that in addition to the elected delegates, there be a number of delegates appointed either by the governor or by some public authority, with a view to insuring the presence in the convention of a number of persons who, because of training or of leadership in certain civic organizations, would improve the caliber and actual representativeness of the body.¹¹³ Although we applaud the purpose of Mr. Millard's proposal, we are constrained to question its constitutional propriety.¹¹⁴ The only case which has been called to our attention in which attempt was made to include appointed delegates in a convention was in Pennsylvania in 1921. The Pennsylvania legislature had provided for a twenty-five member "commission on constitutional amendment and revision" appointed by the governor to study the constitution. It then asked the people to approve an act calling a convention which should include twenty-five appointees of the governor—"an attempt to insure places in the convention for the members of the commission." Mr. Clarence G. Shenton, Assistant Director of the Philadelphia Bureau of Municipal Research, characterized this as "a peculiar and perhaps unwise provision." The convention was voted down, however.¹¹⁵

There might be no serious objection to, and therefore no at-

113. Walter J. Millard, in an address before the New Jersey League of Women Voters, in Newark, February 5, 1941.

114. There is no reason, however, why members of a representative expert commission such as was appointed under the chairmanship of Mr. Poletti to prepare materials for the New York constitutional convention of 1938 could not be given seats without vote in the convention, included at least as advisory members on committees, and allowed to participate in debate on the floor of the convention. It is reported that a very close working relationship between a similar commission and the committees of the Massachusetts convention of 1917-1919 produced excellent results, although apparently the arrangement did not go so far as our present suggestion.

115. Clarence G. Shenton, "Amending the Pennsylvania Constitution," a paper prepared for meeting of the Constitutional Club, Philadelphia, November 15, 1934; revised draft, February 13, 1935.

tack on, the appointment of a very limited number of convention delegates, particularly if they were well chosen. The difficulty seems to be to find a place to draw the line between a constitutional convention and a constitutional commission. New Jersey has had four constitutional commissions appointed by the governor in accordance with joint resolutions for the purpose of proposing to the legislature constitutional changes which might then be put through the legal amending process. Dr. Erdman has pointed out that "theoretically the commission method of revision offers an opportunity for securing the services of the state's most talented individuals who would prescribe the cure for constitutional ills." He then points out that the discouraging fate of commission proposals at the hands of the legislature has reduced the prestige of this device and suggests that if the proposals of the commission could be submitted directly to the electorate, "more authority and prestige would accompany its findings and it would in fact become a small constitutional convention. But this has never been tried in any state, and its legality is questionable."¹¹⁶ We think it must be conceded that a constitutional commission is not a convention. Jameson denounces as "particularly obnoxious to censure" the election of the Georgia Convention of 1788 by the legislature, a proceeding which made the convention "a mere committee" of the legislature.¹¹⁷ The Rhode Island Advisory Opinion holds categorically that delegates to a convention must "come from the people who choose them . . . They cannot be imposed upon the convention by any other authority. Neither the legislature nor any other department of the government has the power to select delegates to such a convention. The delegates elected by and from the people, and only such delegates, may and of right have either a void or a vote therein."¹¹⁸ Nevertheless, if the legislature, in

116. Erdman, *The New Jersey Constitution: A Barrier to Governmental Efficiency and Economy*

117. Jameson, *op cit*, p. 260

118. *In Re Opinion to the Governor, op cit*, p. 452 The Court admits that

agreement with the governor, were to provide for the appointment of a commission or for the creation of a body partly elected and partly appointed with the proviso that its proposals should be submitted directly to the people, and this act were approved by the people in advance of the meeting of the commission or commission-convention, we think it would be a very bold court indeed that undertook to deny that this was a legitimate method by which the people might exercise their constitutional right to alter or reform their government.

Of one thing we are quite sure—that it would be a serious violation of the constitutional proprieties and of constitutional law for the legislature to attempt to resolve itself into a convention, at least unless such an act were ratified in advance by the people.¹¹⁹ The act of the Fourth Provincial Congress of New Jersey in resolving itself into a convention for the purpose of drafting the Constitution of 1776 is not an adequate precedent. In the first place, the conditions of revolutionary times justified an informality which would have been inappropriate after the Revolution, and especially after the further development of the convention as the regular means for the popular revision of constitutions. In the second place, the strict legality or legitimacy of the procedure of 1776 has been questioned, and it has been held that the validity of New Jersey's first constitution rests not on the circumstances of its origin, but rather on the acquiescence of the people.¹²⁰

When it comes to the actual election of delegates, there are three basic plans to choose from:

- (1) Election by plurality in single member constituencies;
- (2) Election by plurality in multi-member constituencies;

the convention may invite non-members "to address it or give it counsel."

119. R. S. Hoar, *Constitutional Conventions*, pp. 83-84; *Ellingham v. Dye*, 178 Ind. L. 336, 349. The court declared in this case, "The legislature is not authorized to assume the function of a constitutional convention, and propose for adoption by the people a revision of the entire constitution under the form of amendment."

120. Erdman, *The New Jersey Constitution of 1776*, p. 37-38.

(3) Election by proportional representation.

If either of the first two plans is used, it is important that serious thought be given to the nominating method in order to make it as likely as possible that the pluralities be actual majorities rather than relatively small minorities resulting from the splitting of votes among a great number of candidates. A primary or a runoff election could be resorted to, but it is by no means a sure method of securing a majority rule. We think there are more hopeful possibilities in some of the devices that we have already described. As between single member constituencies and multi-member constituencies the advantage seems to be with the former. Various writers have pointed to the disproportionate representation usually enjoyed by the Republican Party in the assembly because of the election of assemblymen at large in the counties.¹²¹ Single member constituencies, however, do not guarantee fair representation, particularly if they are manipulated by gerrymandering. It was gerrymandering which resulted in the judicial disapproval of assembly districts by the New Jersey Supreme Court in 1893. Moreover, Assemblyman Hennessy's 1913 convention bill met with apparently justifiable objections on the ground of unfair delimitation of district lines in certain counties.¹²²

A helpful compromise between the single member and the county-wide constituency might be to set up districts of one, two, or three members, depending on the local situation. This would make it easier to use existing ward, municipal, and county boundaries without departing widely from the basic popula-

121. H. McD. Clokie, "New Jersey's Present Government," Chapter 51 of *New Jersey: A History*, Volume IV, I. S. Kull, Editor. Because of this condition, several Democratic platforms and Democratic governors have advocated constitutional amendment to permit assembly districts, which were declared unconstitutional by the Supreme Court in *State v. Wrightson*, 56 N.J.L. 126.

122. Newark *Evening News*, March 17, 1913, a story demonstrating the inequality of Essex County districts. See also fight over districts in Atlantic County reported in the Newark *Evening News*, March 20, 1913

tion quota per delegate. It would not be anything like as difficult a task for elections to vote wisely to fill two or three places as it would be for them to fill the large county-wide delegations which the Hendrickson bill provides.

Of course, all these problems would melt away if it were deemed possible to use the Hare system of proportional representation.¹²³ Doubts have been expressed about the constitutionality of a convention elected by proportional representation. It is true that legislation providing for a limited vote, a crude device designed to secure minority representation, was declared unconstitutional as applied to the election of local excise commissions in this state.¹²⁴ The objection to this law was based upon the judicial interpretation of Article II of the constitution which declares that "every male citizen . . . shall be entitled to vote for *all officers* that are now, or hereafter may be elected by the people." (Italics ours.) The courts held that excise commissioners were officers within the meaning of the constitution, and that the provision that each voter could vote for only three out of five to be elected was a deprivation of his constitutional rights as an elector. We have already referred to the decision of the Supreme Court which declared assembly districts unconstitutional.¹²⁵ In a long opinion by Justice Depue, the judges decided for election of assembly dele-

123. Walter Millard, *op. cit.*, spoke of the Hare system as the ideal method, although he doubted that the legislature could be induced to provide for it. Mr. McCampbell has been rooting for it consistently—see, for example, his article entitled "Second Battle of Trenton," in *Asbury Park Evening Press*, January 4, 1941. The *Sunday Call* of Newark, February 16, 1941, reports at page 6 that the Democratic minority leader, Senator Bowers, is drafting a convention bill and has so far resisted the pressure brought for P. R. by "its enthusiastic backers." The *Call* reports Senator Bowers as follows: "Proportional representation is a fine thing in theory and would assure a fair distribution of delegates. But, after all, we can't expect to get everything in this bill. As now set up, the convention . . . should be out of the politicians' control."

124. *McArdle v. Jersey City*, 66 N.J.L. 590 (1901); *State v. Bedell*, 68 N.J.L. 451 (1902); and *Smith v. Perth Amboy*, 70 N.J.L. 194 (1903).

125. *State v. Wrightson*, *op. cit.*, at p. 202.

gations at large by the voters of each county on the basis of the language of the suffrage article and of Article IV, Section 3, which provides that "the General Assembly shall be composed of members annually elected by the legal voters of the counties . . ." It was the court's view that in the light of history these provisions gave all the voters of each county the right to vote for all the assemblymen from the county. In the course of reasoning, the court referred to what might be taken as a crude description of the essence of the method of voting under the Hare system: "An act of the legislature providing that each qualified voter of the county should vote for only one of the members apportioned to this county, would be plainly unconstitutional. The assembly district system differs only in form. It segregates the qualified voters of the county into classes and allows each qualified voter of the class to vote for only one of the members apportioned to the county."

Without going into the soundness of the conclusions in the New Jersey cases cited—and we hold that the decisions are open to most serious objection—it seems clear that they have no bearing on the question of the validity of P. R. as a method of electing members of a constitutional convention. In the first place, the specific provision of the constitution concerning election of the members of the assembly is irrelevant. In the second place, as we have already pointed out, the legislature is not bound in providing for a convention, by the suffrage and electoral arrangements prevailing under the existing constitution and laws, and we have judicial approval of the New Jersey precedent of 1844 in support of this contention.¹²⁶ In the third place, it is questionable whether members of a constitutional convention are public officers or, in any event, officers within the meaning of the constitution. If this is true, the words, "all officers," in the suffrage article, which so impressed the courts

126. *Carpenter v. Cornish*, 83 N.J.L. 254, 262, opinion of Supreme Court; and 83 N.J.L. 696, Court of Errors and Appeals.

in deciding against limited voting could certainly have no bearing on the election of convention delegates.¹²⁷ In any event, no one could claim a constitutional right to vote on all of the delegates for a convention from each county since such a claim would be at complete variance with the fundamental principle that a constitutional convention represents the people of the state, not the people of the counties. Only the state-wide constituency could have any peculiar claim on principle. Since this is too unwieldy to be practicable, the legislature may choose any appropriate means for securing a fair representation of the people. As we have already seen, election from properly bounded single member districts would produce a fairer result than election at large by counties. Proportional representation would produce still more accurate representation of the people and practically guarantee control of the convention by the majority—a result which can be approximated by no other electoral system. It is, therefore, the most *appropriate* method of election which the legislature could designate.¹²⁸

It will be apparent from the preceding paragraphs that in drafting the legislation for a constitutional convention the legislature has a wide choice of means at its disposal. With proper care it should be possible to lay the groundwork for a highly

127. Hoar, *op. cit.*, p. 5. Mr. Hoar concludes at page 190, "From all the foregoing we see that convention delegates are not officers under the existing constitution, even in the case of a convention apparently authorized by that instrument, and that it would be extremely anomalous for them to take an oath to support the state constitution. . ." After all, a member of a convention is not "invested with any portion of political power partaking in any degree in the administration of civil government," to quote the language of Chief Justice Green descriptive of the essence of public office in *Hoboken v. Gear*, 27 N.J.L. 265, 278, Supreme Court 1859. With this concept of office in mind, Attorney General Attwill, of Massachusetts, in 1917, concluded "that the position of delegate in the convention is not an office of the commonwealth." (Quoted by Hoar at p. 186.)

128. For a thorough exposition of P. R., with numerous illustrations from experience, see Hallett, *Proportional Representation—The Key to Democracy*, Second edition, 1940, published by National Municipal League; and Hoag and Hallett, *Proportional Representation*.

satisfactory outcome. Furthermore, in the selection of means, it should be possible for statesmanship to allay many of the fears which the prospect of throwing the constitution open to a general revision naturally arouses.

HOW MAY THE WORK OF A CONVENTION BE SUBMITTED TO THE PEOPLE?

We now come to the fourth question raised at the beginning of this article: in what form or forms may a convention submit its proposals to the people? What we have already said indicates that whatever the legislature might say about the matter in a convention statute, the convention would be free to choose any appropriate form in which to submit its proposals. There are in fact three possible forms:

(1) A single and complete revised constitution which the people must accept or reject *in toto*, simply by voting "Yes" or "No."

(2) A series of specific amendments to the existing constitution, which the people might vote on separately, accepting some, rejecting others.

(3) A complete new or revised constitution, to be voted on as a whole, together with one or more separate proposals. Such separate proposals, which may be accepted or rejected individually, may be in the nature either of additional clauses or of clauses alternative to specific provisions in the general revision.¹²⁹

The submission of the present New Jersey Constitution in 1844 is an example of the first method. The New York Constitutional Convention of 1938, submitted its proposals in the form of nine separate amendments, although the first one was a sort of catch-all amendment which included changes in seventeen

129. Dodd, *op. cit.*, p. 258; Hoar, *op. cit.*, pp. 204-205; Bromage, *op. cit.*, 89, Shenton, *op. cit.*

articles of the state constitution.¹³⁰ What is meant by the third method may be illustrated by the device used by the New York City Charter Revision Commission in 1936, to avoid endangering the charter as a whole, by including proportional representation as an inseparable part of it. As will be remembered, the provision for proportional representation was submitted as a separate chapter which, if approved (as, indeed, it was), would take the place of the orthodox method of electing members of the Council provided for in the complete charter.¹³¹

It seems to be the general belief that what the New Jersey Constitution needs is an overhauling in many of its parts. In view of the interdependence of widely separated parts of the present constitution, and in view of the illogical organization of the constitution as it now stands, it seems to us that the second method of submitting a series of separate amendments would not serve the needs of the state at this time.¹³² On the other hand, one cannot help sympathizing with advice given to the State Civic Federation in 1912 by the former President of an Ohio State Constitutional Convention. "Don't submit the new constitution to the voters as one proposition, but divide the subjects for separate submission, so that, if one is lost, all will not be lost."¹³³

We conclude, therefore, that in our present circumstances the third method of submission would probably be found most sat-

130. "What's In the Proposed Constitution?" A summary of the amendments submitted by the New York State Constitutional Convention of 1938, distributed by the National Municipal League.

131. New York City Charter Revision Commission. Proposed charter for the City of New York and Report of the New York City Charter Revision Commission, 1936.

132. Bebout and Kass, *op. cit.*, pp. 158 ff.

133. Newark *Evening News*, December 3, 1912. The speaker, Mr. Bigelow, based his advice on the then recent experience in Ohio, where the people had been given an opportunity to pick and choose among 42 separate propositions, of which 33 were approved. This advice was taken to heart because the Hennessey bill was drawn with a proviso that separate suggestions should be included, and submitted in separate articles for acceptance or rejection.

isfactory. In fact this device seems to have become very popular during the last few years, because a good many of the more recently adopted state constitutions were submitted together with one or more separate provisions, articles, or "ordinances," which were in some cases practically the same as separate articles. For example, separate prohibition articles were submitted with the Ohio Constitution of 1851 and the Oklahoma Constitution of 1907. Prohibition was defeated in the first instance and approved in the second. Eight separate provisions were submitted and approved at the same time as the Illinois Constitution of 1870.¹³⁴

One of the great advantages of this arrangement, in New Jersey, would be the possibility that it might be made the part of a compromise between the large and small county interests. It might, for instance, be understood that any change in legislative apportionment would be submitted separately.

CONCLUSION

Can the people of New Jersey obtain a new constitution? We are convinced that they can if a substantial majority of them are sufficiently determined to have it. We believe, furthermore, that they can obtain it if necessary without ever converting a majority of both houses of the legislature to the project. But there are almost innumerable and infinitely variable factors, political and constitutional, which may be adjusted and shaped into a formula containing elements desirable, or at least acceptable to all sections and interests in the state. It should be possible for patience, goodwill, and statesmanship to find a way to have the convention without subjecting an important minority section of the state to the humiliation of a revolution, however peaceful and however justifiable it may be. If such a form-

¹³⁴ See texts of these and other state constitutions in compilation of New York Constitutional Convention Commission, 1938

ula is found, however, leaders both of the majority and minority interests must meet and work together in a spirit which has never characterized their dealings heretofore when the question of constitutional revision by convention has been raised.

The introduction of a convention bill by a Republican from a small south Jersey county with important rural interests, in a year in which a Democratic Governor from the largest urban county is advocating a convention, seems to us to furnish a better prognosis than the platform pledge of the Democratic majority in 1912. The fact that Governor Wilson had left office before the final vote on the convention bill in 1913 removed one of the most important sources of strength for the project in that year. The fact that Governor Edison is only commencing his first year in office and has already displayed qualities of vigorous leadership is another point in favor of the prospects of the present movement. A few years ago it was a favorite pastime of the speakeasy political philosopher to demonstrate with figures and ineluctible logic that the XVIIIth Amendment could never be repealed. A revision of the New Jersey constitution looks no more improbable in prospect than did the repeal of the XVIIIth Amendment before the depression. Democracy today is on the march on many fronts. Who is there to say that it cannot strengthen its position in New Jersey through the exercise of the original democratic right of constitution making?

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