THE GOVERNOR'S COMMITTEE ON PREPARATORY RESEARCH

for the

NEW JERSEY CONSTITUTIONAL CONVENTION

THE BILL OF RIGHTS

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1. General Introduction

Constitutional law has been absorbed in three great dramatic struggles in the course of its development in the United States. The first is rooted in the doctrine of separation of powers, which distributes governmental power between three departments -- legislative, executive, and judicial. By devising a system of "checks and balances" the potential tyranny of a dictatorship or an oligarchy was minimized. The second struggle stems from the establishment of the federal system with 48 co-equal states functioning in a Union, and in which great powers have been delegated to a centralized national government. A bitter civil war was not sufficient to solve all the aspects of the problem of dual sovereignty; the clash between "states' rights" and "federal supremacy" is still with us.

However, it is the third struggle which is pertinent in a consideration of a bill of rights. That is the ageless contest between man and his sovereign, whether that sovereign be monarch or democratic state. Does the individual have any rights which organized society must respect? As this society becomes more complex, the issue becomes more taut. In the current wave of totalitarianism and the glorification of the state, once widely accepted maxims relative to the status of the individual have been discarded as obsolescent. The natural, inherent rights of

man which, at the close of the 18th Century, were part of the political philosophy of the leaders in western civilization, are being challenged today. There is confusion as to whether the state exists for man or man for the state. In drafting a bill of rights this confusion must be dissipated.

A bill of rights is a limitation upon the capacity of the sovereign. In a constitution the people confer upon an institution called government the power to rule, but in a bill of rights the ruler is curbed and it is made clear that the people are the master, and the sovereign the servant.

New Jersey's first Constitution did not have a bill of rights, although the rights of trial by jury and freedom of religious worship were included.[1] This deficiency can be attributed to the fact that the document was drafted in the heat of war and was adopted on July 2, 1776, before the Declaration of Independence.[2] There was an urgent need for a skeleton government to replace the ties with Great Britain which were being severed. It is believed, further, that the framers considered the rights of man to be so rooted in the principles of the common law that to state them would be surplusage, particularly at a time when "the fury of a cruel and relentless enemy" was at their gates.[3] It should be recalled that eleven years later, when the United States Constitution was born, no bill of rights was included in the basic document. However, ratification of the Constitution hinged upon an understanding that such a bill of rights would be forthcoming.

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1. New Jersey Constitution of 1776, Articles XVIII and XXII
2. See Charles R. Erdman Jr., The New Jersey Constitution of 1776,(1929)
3. See the Preamble of the N.J. Constitution of 1776

Congress acted in September, 1789, and the first ten amendments went into effect on December 15, 1791. They are considered the equivalent of a formal bill of rights in limiting the powers of the federal sovereign.

In the Constitutional Convention of 1844 which forged our present Constitution, there was grave doubt about the necessity for a bill of rights.[4] The Committee on a Bill of Rights and Privileges brought in a report which was substantially like Article I in the existing document. Mr. William B. Ewing, a delegate, moved to dispense with the entire report and referred to the bill of rights as "abstract propositions which are improper here, and will only serve to confuse the minds of the members." He went on to add that he had no objections to offer to the principles declared but he saw "no necessity for a bill of rights at all."[5]

Chief Justice Hornblower of the New Jersey Supreme Court, and one of the outstanding delegates, was of the same mind. "We have now arrived at a period when we should discard the lesson which we have learned from our ancestors who were compelled to ask crowned heads for a bill of rights. What do we want them for?.... Why shall we tell ourselves what our rights are, or protect ourselves against ourselves?"[6] It was not the argument of the learned jurist which prevailed, but that of James C. Zabriskie, a delegate with foresight and an understanding of human nature. He argued

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4. See Proceedings of the New Jersey Constitutional Convention of 1844, comp. and ed. by N.J. Writers' Project of Works Project Administration 1942, pp.139-148,152-172,409-429,589-592

5. Ibid, p. 139

6. Ibid, p. 169

that: "Although the people may know their rights, to maintain them unimpaired, it is necessary to have them frequently before the mind...By adopting the declaration of rights we will circumscribe the action of the legislature within its legitimate and proper sphere, as well as proclaim those great and fundamental truths which lie at the foundation of civil liberty."[7]

The work of this convention 103 years ago produced a bill of rights which has stood the test of time and which compares favorably with similar provisions in the fundamental laws of our sister states and in the United States Constitution. The revised Constitution submitted to the people of the State by the Legislature in 1944 contained no change in the product of the 1844 Convention.

Each paragraph of the article[8] will be taken up seriatim and its source, judicial interpretations, and any suggested amendments to it will be treated. Upon the completion of this analysis suggested additions to the present bill of rights will be discussed.

2. Natural and Unalienable Rights
Article I, Paragraph 1

> "All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

Source

This paragraph is almost in exactly the same phraseology as reported by the Committee on a Bill of Rights and Privileges of the 1844 Convention.[9] It is interesting to note that the

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7. Ibid, p. 170

8. N. J. Constitution, Art. I, Rights and Privileges

9. Proceedings, op. cit., p. 51

Convention substituted the words "by nature" for the words "born equally". The latter expression was deemed unnecessary and inconsistent with another portion of the Constitution where "all white male citizens" were given the right of suffrage. There was no intent on the part of the framers in 1844 to accord to a slave the rights of a freeman.

Thirty-three other states give similar recognition to the natural rights of persons, although expressed somewhat differently.[10] The Model State Constitution prepared by the Committee on State Government of the National Municipal League adds a sentence stressing the correlative duties of men. "These rights carry with them certain corresponding duties to the state".[11]

Judicial Interpretation

This provision refers to the absolute, inherent rights of

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9. Proceedings, op.cit., p. 51

10. Missouri Constitution of 1945, Art. 1, sec 2: "That all constitutional government is intended to promote the general welfare of the people, that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry, that all persons are created equal and are entitled to equal rights and opportunity under the law, that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design."

    Illinois Constitution, Art. II, par.1: "All men are by nature free and independent, and have certain inherent and inalienable rights-among these are life, liberty, and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed."

    California Constitution, Art. I, sec.1, is almost identical with the New Jersey provision.

11. Partial Revision of 1946, Section 101

the citizen, referred to as natural or human rights. They preceded government and are inherent in the very nature of man himself. They are not given but were rather declared by the Constitution, and are inalienable.[12] The State Government, however, possesses the police power which enables it to act on behalf of the public health, morals, comfort, order, safety and welfare. When the State or its subdivisions are acting in this proper sphere, the individual's life, liberty, or property may be impaired for the public good without violating this provision.[13] When no resultant public benefit flows, the restriction upon the individual falls.[14] The Fourteenth Amendment of the United States Constitution prohibits any State from depriving any person of life, liberty or property without due process of law, and in its effect upon the relation of the individual to the state, closely parallels Art. I, Par. 1 in the New Jersey Constitution.[15]

Among the rights included herein are the right to earn a livlihood,[16] the right to make contracts for the purchase and sale of property and personal services,[17] the right freely to engage in a lawful business or occupation,[17] and the right of privacy.[18]

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12. Mitnick v. Furniture Workers Union, Local No. 66, C. I. O., 124 N.J. Eq. 504

13. Mansfield and Swett, Inc. v. West Orange, 120 N.J.L. 145; State Board of Milk Control v. Newark Milk Co., 118 N.J. Eg. 504

14. State v. Packard-Bamberger & Co., 123 N.J.L. 180

15. State Board of Milk Control v. Newark Milk Co., Supra

16. Carrol v. Local No. 269, 133 N.J.Eq. 144

17. Brennan v. United Hatters of North America, 73 N.J.L. 729

18. McGovern v. Van Riper, 137 N.J.Eq. 24

This latter right does not prevent fingerprinting and photographing in advance of conviction,[19] but does prevent the premature dissemination of the records before conviction.

Suggested Amendments

The inclusion of the words "and women" after the words "all men" in Art. 1, Par. 1, has been advocated in order clearly to emphasize the equality between the sexes.[20] An extension of the enumerated rights, to include the right of every person to have security from want and privation resulting from unemployment, was suggested in the proceedings before the New Jersey Joint Legislative Committee considering a revised Constitution in 1942.[21] The insertion of the word "equal" before the word "natural", as advocated in the 1844 Convention, is still an issue.

3. Political Powers
Article I, Paragraph 2

> "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."

Source

As drafted by the Committee on a Bill of Rights and Privileges in the 1844 Convention, this paragraph included the words: "and to abolish one form of government, and establish another" before the word "whenever". The phraseology was attacked as too broad, and it was pointed out that there was no right to substitute an

19. McGovern v. Van Riper, 137 N.J.Eq. 548

20. Record of Proceedings before the Joint Committee...to Ascertain the Sentiment of the People...as to change, 1942, pp. 38-9, and brief, 46-89

21. Ibid, pp 189; and see also 18, 21, 25

autocracy or monarchy for a republic, because the United States Constitution charges the federal government with guaranteeing to every state a republican form of government.[22] With the criticized language deleted the paragraph was adopted upon the insistence of Delegate Moses Jaques, who believed the people were strongly in favor of it. "For my own part, I would not consider it safe to go home after voting to strike out this proposition. The people would pelt me with rotten eggs or brick bats, or anything they could lay their hands on."[23] He was defeated in an effort to include the thought that: "on entering into society, men give up none of their rights; they only adopt new modes, by which they are better secured."[24] The Convention felt that these words were too abstract and not true.

The preamble of the New Jersey Constitution of 1776 enunciated the principle that "all the constitutional authority ever possessed by the kings of Great Britain...was, by compact, delivered from the people, and held of them for the common interest of the whole society..." New Jersey thus early recognized that the state exists for man, not man for the state. Only three states fail to include a provision similar to Art. I, Sec. 2 in

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22. Proceedings, op. cit., p. 140. The reference is to U. S. Constitution Art.IV, Sec. 4

23. Ibid, p. 141

24. Ibid, pp. 409-11

Suggested Amendments

Those who advocate introducing the initiative, referendum and recall into the Constitution suggested that Art. I, Par. 2 be amended so as to specifically contain such provisions.[29]

4. Rights of Conscience; Religious Freedom
Article I, Paragraph 3

> "No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform."

Source

This paragraph closely follows the wording of Article XVIII of the 1776 Constitution. The 1844 Convention found no necessity for changing the earlier language. An amendment was rejected which would have added the qualification "but liberty of conscience is not to be construed to excuse acts of licentiousness, or justify acts inconsistent with the peace and liberty of the State."[30]

All the states except Oklahoma contain safeguards equivalent to those of Par. 3, but in many cases the provisions are

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29. Cf., Report of Proceedings before the Joint Committee...,1942, op. cit., pp. 169-70, 172-3 and 311, where these proposals were advanced in discussing other Articles of the Constitution

30. Proceedings, op cit., pp. 141-42. This qualification does appear in the Constitutions of Missouri, California, New York and Illinois.

shorter and less detailed. The present New Jersey Constitution devotes two separate paragraphs--Pars. 3 and 4--to religious freedom, while many other constitutions combine the material into one.[31]

Judicial Interpretation

A state constitution is not the only bulwark protecting the individual's religious freedom from state encroachment. The Fourteenth Amendment of the United States Constitution has been held to apply, and it is a deprivation of liberty without due process of law for a state to interfere with the religious life of persons within its jurisdiction. Thus, a statute (P.L. 1932, C. 145) requiring pupils in public schools to salute the flag of the United States and repeat an oath of allegiance every school day was sustained under this paragraph in the New Jersey Constitution on the ground that the salute and pledge were not religious rites.[32] The same statute would be invalid today as in violation of the United States Constitution.[33] The United States Supreme Court adopts the view that the inhibition of the First Amendment that Congress shall

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31. The Model State Constitution of the National Municipal League is very terse: "No law shall be passed respecting the establishment of religion, or prohibiting the free exercise thereof." (Sec. 110)

32. Hering v. State Board of Education, 117 N.J.L.455, affirmed 118 N.J.L. 566, appeal dismissed, 302 U.S. 624

33. W. Virginia State Board of Education v. Barnette, 319 U.S. 624, reversing Minersville School District v. Gobitis, 310 U.S. 586. In Morgan v. Civil Service Commission, 131 N.J.L. 410, the New Jersey Supreme Court noted that this paragraph has the same quality and meaning as the Fourteenth Amendment of the U. S. Constitution.

not prohibit the free exercise of religion, secures the individual against adverse state action by virtue of the Fourteenth Amendment.

Under Art. 1, Par. 3 an individual has the right to go from house to house to solicit donations and subscriptions for religious causes, to distribute religious circulars and to preach his religious beliefs without obtaining a permit.[34] The court has refused to compel a husband in a matrimonial dispute to make overtures to induce his absent wife to return to him by acceding to her demands that they be married by the Catholic Church, where the husband was a member of another church. The constitutional inhibitions forbidding legislation based upon religious qualifications extend to decrees of a judicial tribunal.[35]

Recently a statute authorizing school district boards of education to make rules and contracts for the transportation of children to and from schools, including other than public schools, and a resolution of a township board of education providing for transportation of school children to parochial schools as well as public schools, were sustained as valid under this and the succeeding paragraph of the New Jersey Constitution.[36]

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34. Tucker v. Randall, 18 N.J. Mis Rep. 675. This apparently reverses Semansky v. Common Pleas Court of Essex County, 13 N. J. Mis. Rep. 589. The U. S. Supreme Court has repeatedly applied the 14th Amendment to this problem. See Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105

35. Knibb v. Knibb, 94 N.J. Eq. 747, 121A.715 (E. & A.)

36. Everson v. Bd. of Education of Ewing Township, 133 N.J.L. 350. The statute and resolution are also valid under the 14th Amendment of the U. S. Constitution. See Everson v. Board of Education of Ewing Township, 67 S.Ct.504

Suggested Amendments

It has been suggested that the word "right" be substituted for the word "privilege" in the first clause of the paragraph.[37] It was also suggested before the 1942 Joint Legislative Committee that the clause "and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief" be added to Par. 3.[38]

5. No Religious Establishment or Test
Article I, Paragraph 4

> "There shall be no establishment of one religious sect, in preference to another; no religious test shall be required as a qualification for any office or public trust; and no person shall be denied the enjoyment of any civil right, merely on account of his religious principles."

Source

This paragraph was adopted without serious debate in the Convention of 1844 and with only minor changes from the Committee report.[39] The original Constitution of 1776 placed Protestants in a favored position. Article XIX stated:

> "That there shall be no establishment of any one religious sect in this province in preference to another; and that no protestant inhabitant of this colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any protestant sect, who shall demean themselves peaceably under the government as hereby

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37. The Missouri Constitution of 1945 declares: "that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience... that no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher, or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same." Art. I, secs. 5,6

38. Record of Proceedings, op. cit., p. 24

39. The Committee report contained no reference to religious test. Proceedings, op. cit., p. 52

established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of legislature, and shall fully and freely enjoy every privilege and immunity enjoyed by others their fellow-subjects."

Judicial Interpretation

In addition to the cases considered under the previous paragraph, the court has held that the civil right of a person to testify in his own behalf is one that cannot be taken from him because of his belief or disbelief on religious topics. He has a right to testify under an initial solemnity, such as an affirmation binding him to tell the truth.[40]

Suggested Amendments

The present Constitution forbids a religious test as a qualification for any office of public trust. It has been suggested that the prohibition be extended to religious tests for public or private employment. This would be similar to an anti-discrimination provision which will be treated later.

6. Liberty of Speech or of the Press
Article I, Paragraph 5

"Every person may freely speak, write and publish his sentiments on all subjects, being responsible for

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40. State v. Levine, 109 N.J.L. 503. This does not apply to witnesses generally, but only to parties to litigation. Some states have specifically relieved all witnesses from a religious test. Missouri Constitution, Art. I, sec. 5: "No person shall, on account of his religious persuasion or belief, be disqualified from testifying or serving as a juror." California Constitution, Art.I,sec.4: "No person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief." See also New York Constitution, Art.I,sec. 3.

> the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

Source

This paragraph was taken from the 1821 Constitution of New York,[41] without change, by the Convention of 1844 in New Jersey.[42] Every state has similar guarantees, although some of them contain no reference to libel. Congress is prohibited from abridging the freedom of speech, or of the press.[43]

Judicial Interpretation

The rights of free speech and free press are cherished by the American people and have always been jealously guarded. These rights are always put to the test when the utterances or writings are extremely unpopular, but the courts have emphasized that the merest minority may be heard. The New Jersey Court of Chancery went to the heart of the matter in a case involving a pro-Nazi organization:[44]

> "Our law does not prohibit the public expression of unpopular views. It is lawful to advocate, for instance, the establishment of a dictatorship in America, or a soviet form of government or an hereditary monarchy,

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41. Now Art. I, par. 8 of the New York Constitution. See California Constitution, Ar. I, sec. 9.

42. The debate on a motion to strike out the clause giving the juror the right to determine law and fact was of a high order. See Proceedings, op. cit., pp. 142-48

43. U.S. Constitution, First Amendment.

44. American League of Friends of New Germany v. Eastmead 116 N.J. E. 487

> or the abolition of religious freedom, or other changes in our political, economic or social system, no matter how unwise or how shocking. If lawless elements in the community instead of ignoring such propaganda, or meeting it by sound argument, resort to riot, it is the duty of police to protect the lawful assemblage and repress those who unlawfully attack it."

A statute making it a misdemeanor to make any statements inciting, promoting, or advocating hatred, abuse, violence, or hostility against any group of persons by reason of race, color, religion, or manner of worship was held invalid as a curb on freedom of speech.[45]

The rights of free speech and press, like others, are limited by police power of the state when called into action on behalf of the public safety, morals, health or welfare.[46] There must be "a clear and present danger" to the public interest, however, before the individual's rights are sacrificed. That is the standard invoked by the United States Supreme Court when applying

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45. State v. Klapprott, 127 N.J.L. 395

46. State v. Black, 54 N.J.L. 446: "While a man has a right to express his opinions, the exercise of this right, like all other general rights, is the subject of reasonable police regulations. A man cannot rise in church during service and deliver a political harangue, or shout his convictions about public measures at midnight, in the streets of a city, without liability of being arrested as a disorderly person." See also State v. Boyd, 86 N.J.L. 75, where it was said: "....free speech does not mean unbridled license of speech, and that language tending to the violation of the rights of personal security and private property and toward breaches of the public peace is an abuse of the right of free speech, for which by the very constitutional language invoked, the utterer is responsible." Also see State v. O'Donnell, 200 Atl. Rep. 739, holding the Disorderly Persons Act, R.S. 2:202-7, constitutional

the Fourteenth Amendment to state action.[47] Just as in the case of freedom of religious worship, the rights of free speech and press are protected against state abuses by the due process clause of this amendment.[48]

Peaceful picketing in a labor dispute is an exercise of the right of free speech on the part of laborers, who are thereby advising or notifying others of their point of view.[49] This right to picket is not dependent on an immediate employer-employee dispute and it is not essential that the employer's own employees be in controversy with him.[50] When picketing is accompanied by violence, threats, intimidation, or coercion, the state may restrict the laborers' activities.[51]

The distribution of non-commercial circulars on the public streets and in other public places without obtaining a license or permit so to do, is protected by virtue of the Federal Constitution.[52] Public speaking in parks and other public places without first obtaining a permit from a municipal official,

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47. Gitlow v. New York, 268 U.S. 652. See dissent of Mr. Justice Holmes which is now the view of the court. Pennekamp v. Florida, 66 S.Ct 1029. See also State v. Tachin, 92 N.J.L.269.

48. Thomas v. Collins, 323 U.S. 516

49. Westinghouse Electric Corp. v. United E.R. & M. Workers, 139 N.J.Eq. 97

50. Kingston Trap Rock Co. v. International Union, 129 N.J Eq. 570; E. L. Kerns Co. v. Landgraf, 128 N.J. Eq. 441

51. Isolantite, Inc. v. United E. R. & M. Workers, 130 N.J.Eq. 506

52. Lovell v. Griffin, 303 U.S. 444

as required by ordinance, was not protected under the New Jersey Constitution,[53] but would be under the Fourteenth Amendment of the United States Constitution.[54] New Jersey courts have recently held that sound amplification of public speaking is not part of the constitutional guarantee.[55]

The provisions of Art. 1, Par. 5 with respect to libel met firm opposition in the Convention of 1844. Historically, under the common law, the jury decided questions of fact and the court questions of law. Chief Justice Hornblower opposed the provision that the jury have the right in libel trial to decide both the law and the fact. He considered it a departure from common law precedent and argued it would prevent the court from granting a new trial when a defendent was wrongfully convicted by a jury and also would permit the jury to pass on the admissibility of evidence. There was a spirited debate, the provision finally being adopted because of a feeling that courts had abused their powers in this type of action.[56] A complete exposition on the operation under this Paragraph is given by the New Jersey Supreme Court:[57]

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53. Thomas v. Casey, 121 N.J.L. 185

54. Hague v. Committee for Industrial Organization, 307 U.S. 496

55. Kovacs v. Cooper, 135 N.J.L. 64

56. Proceedings, op. cit, pp. 142-48

57. Drake v. State, 53 N.J.L. 23

> "It was not intended to affect the duty of the court to decide all questions of law relating to the admission of testimony and such other matters as are preliminary to the final submission of the case to the jury; nor to affect its duty to instruct the jury with regard to their legitimate province in the decision of the cause, and with regard to those general principles of the criminal law and of the law of libel which are of a technical nature, and with which the jury can scarcely become acquainted, save through the instructions of the court."

The court can express its opinions to the jury touching the character of the particular publication charged as libelous and the motives and ends presented for its justification:

> "But since, upon these topics an intelligent layman may be as competent to judge as an intelligent lawyer, and because the liberty of the press had been thought to be endangered by the peremptory control over them assumed by the courts, the purpose of the provision was to declare and secure the right of the jury to decide for themselves, with proper regard to the views of the court, whether the meaning and tendency of the publications were such as to bring it within the legal definition of a libel, whether it was privileged under the rules of the common law, and whether it was true, and published with motives which to them appeared good and for ends which to them appeared justifiable."

Suggested Amendments

The Missouri Constitution was amended in 1945 so that the provision analogous to Art. I, Par. 5 would apply to slander as well as libel actions, but only in the case of libel does the jury determine the law and the facts.[58] In Missouri as well as in Illinois both civil as well as criminal trials for libel come within the constitutional provisions.[59]

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58. Art. I, par. 8

59. Illinois Constitution, Art. II, Par. 4

7. Searches and Seizures
Article I, Paragraph 6

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized."

Source

This paragraph is practically the same as the Fourth Amendment to the United States Constitution. All of the states except New York and North Carolina have similar provisions in their fundamental law. The Convention of 1844 adopted the paragraph as drafted by its Committee without any debate.

Judicial Interpretation

The excesses of the colonial period, when British army officers acting under writs of assistance invaded the private homes of the people in order to ransack every area, gave birth to constitutional guarantees of this type. The New Jersey courts have differed from the federal courts in determining the admissibility of evidence obtained in violation of this paragraph. Property obtained through an unjustifiable search and seizure is admissible in evidence in this State,[60] but not under the federal rule.[61] Of course, a search with the consent of the accused is not unlawful.[62]

The state courts have defined a search warrant as an order in writing signed by a magistrate, directed to a peace officer, commanding him to search for personal property and bring it before the magistrate.[63] The term "probable cause" in Par. 6

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60. State v. Merra, 103 N.J.L. 361
61. Weeks v. United States, 232 U.S. 383
62. State v. Giberson, 99 N.J.L. 85
63. State v. Best, 8 N.J. Misc.Rep. 271

means reasonable grounds for suspicion, supported by circumstances sufficiently strong in themselves to warrant an ordinarily cautious man in believing that the accused is guilty of the offense with which he is charged.[64] The prosecutor need not necessarily have personal knowledge of the transaction of which he complains; he may rightfully act upon information communicated to him in the ordinary routine of business, where he honestly believes such information to be true and the information is of such a character and is communicated in such a manner that under similar circumstances it would be acted upon by a man of ordinary prudence.

The guarantee by the State against unreasonable searches and seizures is not considered within the scope of the due process clause of the Fourteenth Amendment to the Federal Constitution.[65]

Suggested Amendments

The federal rule as to the non-admissibility of evidence illegally obtained is defended as implementing the constitutional guarantee and attacked as impairing the efficiency of criminal prosecution. If New Jersey is to adopt the federal rule, a provision such as the following is suggested: "No evidence obtained by any officer in violation of this provision shall be admitted

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64. Lane v. Pennsylvania Rarilroad Co., 78 N.J.L. 672

65. Adams v. New York, 192 U.S. 585

in evidence against the accused on the trial of any criminal case."

There is doubt whether this paragraph applies to the tapping of telephones.[66] A suggested addition to deal with this has been urged. It would read: "The right of the people to be secure against unreasonable interception of telephone and telegraphic communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained and identifying the particular means of communication and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

The Federal Constitution and that of most states differ from New Jersey's in the last clause of Par. 6. They read: "and the persons and things to be seized", rather than "and the papers and things to be seized."

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66. In Olmstead v. United States, 277 U.S. 438, the U. S. Supreme Court refused to extend the scope of the Fourth Amendment's protection to include the secret tapping of telephone wires for the purpose of procuring evidence.

8. Trial by Jury
Article I, Paragraph 7

"The right of trial by Jury shall remain inviolate; but the legislature may authorize the trial of civil suits, when the matter in dispute does not exceed fifty dollars, by a jury of six men.

Source

The right of trial by jury is one of the great tenets of the common law and was firmly recognized in the New Jersey Constitution of 1776.[67] The Committee on a Bill of Rights and Privileges in the 1844 Convention reported this paragraph without the qualification following the semicolon in Par. 7, which was added on the floor of the Convention. The Paragraph received brief debate.

Judicial Interpretation

The courts have held that both the 1776 and 1844 Constitutions do not enlarge, but merely secure, the right of trial by jury.[68]

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67. Art XXII: "... and that the inestimable right of trial by jury shall remain confirmed, as a part of the law of this colony, without repeal, forever." See Seventh Amendment of the U.S. Const.: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...."

68. Carter Bros. v. Camden District Court, 49 N.J.L. 600; Stizza v. Essex County Juvenile and Domestic Relations Court, 132 N.J.L. 406.

9. Rights of Persons Accused of Crime Article I, Paragraph 8

"In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defence."

Source

The Constitution of 1776 was less comprehensive on this subject. It provided merely "That all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to."[72] The present paragraph is substantially identical with the Sixth Amendment to the United States Constitution.

Judicial Interpretation

The jury required by this provision is one of twelve persons, as at common law, but the qualifications of the jurors can be set by the Legislature where no discrimination is practised.[73] The trial by jury can be waived.[74] It is not required in petty criminal offenses, where summary trial without a jury before a magistrate was recognized at the time of the adoption of the Constitution.[74] The Legislature may require a jury trial in a murder case even though the prisoner pleads guilty.[75]

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72. Art. XVI.

73. State v. James, 96 N.J.L. 132

74. State v. Stevens, 84 N.J.L. 561.

74. Katz v. Eldredge, 96 N.J.L. 382; reversed on other grounds, 97 N.J.L. 123, 98 N.J.L. 125.

75. State v. Genz, 57 N.J.L. 459.

Although a public trial is required, a court can exclude a part of the audience from the courtroom where the defendant is not prejudiced nor deprived of the presence of any person who might be of advantage to him.[76]

A defendant is entitled to an arraignment, where a formal opportunity is given to him to be informed of the nature and cause of the accusation against him. This right may be waived by participation of the defendant's counsel in the selection of jurors, presentation of proofs, and summation of the case to the jury.[77] An indictment must be certain in its allegations, so that it can be seen upon inspection not merely what the nature of the crime is, but what particular crime is intended to be charged.[78] The mere recital of non-descriptive words from a statute will not constitute a reasonably complete statement of the offense.[79]

The accused has the right to be confronted with the witnesses against him, but the trial of a person for a crime, not a capital offense, commenced in his presence, may be continued in his absence.[80] It is not error to re-read a portion of the testimony or a portion of the judge's charge in the temporary absence of the defendant.[80]

The accused must be reasonably diligent in employing counsel and can not indefinitely postpone trial.[81]

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76. State v. Genese, 102 N.J.L. 134.

77. State v. O'Toole, 115 N.J.L. 205; certiorari denied, 296 U.S. 613; rehearing denied, 296 U.S. 662.

78. State v. Borg, 9 N.J. Misc. Rep. 59.

79. State v. Schmidt, 57 N.J.L. 625.

80. State v. Nardella, 108 N.J.L.148,154A.834(E&A)

Where an offense was not criminal at common law it is a fit subject for prosecution and punishment in summary proceedings without action by a grand jury.[84] However, if the crime was indictable at common law a person cannot be tried, convicted, and punished in a summary proceeding.[85] The effect of making an indictable common law crime punishable and abatable in the Court of Chancery has been held to violate this provision.[86]

The Legislature cannot authorize an amendment in substance which will change an indictment found by a grand jury so as to substitute one crime for another charged therein.[87] A statute is valid which permits an amendment of an indictment when the name of any person injured is misstated, if the court considers the defendant is not prejudiced.[88]

Under this paragraph a person has no right to have a particular set of men constitute a grand jury as long as the jury is impartial.[89] The right set forth in the provision being a personal one, it can be waived by the individual.[90]

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84. State v. Murzda, 116 N.J.L. 219.

85. Richardson v. State Bd. of Control of Institutions and Agencies, 99 N.J.L. 516.

86. Hedden v. Hand, 90 N.J.Eq. 583.

87. State v. Cohen, 105 N.J.L. 529; State v. Sing Lee, 94 N.J.L. 266.

88. State v. Tolla, 72 N.J.L. 515.

89. State v. Egan, 82 N.J.L. 317, affirmed 84 N.J.L. 701.

90. Edwards v. State, 45 N.J.L. 419.

Suggested Amendments

The Commission on Revision of the New Jersey Constitution in 1942 urged that this provision be amended to read "a capital or other infamous crime," instead of "a criminal offense." This would decrease the scope of the guarantee, but it has been advocated on the theory that the individual benefits when minor crimes are speedily disposed of by a competent committing magistrate in the local community. The advocated amendment would bring New Jersey into line with the Federal Constitution.[91] The Commission further advocated the removal of the words "or in cases cognizable by justices of the peace," inasmuch as justices of the peace had been abolished as constitutional officers in the revised constitution proposed by it.

11. Double Jeopardy; Bail
Article I, Paragraph 10

> "No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or presumption great."

Source

In the Convention of 1844 the Committee on the Bill of Rights worded the first sentence of this provision differently: "No person shall be twice put in danger of punishment for the same offense..."[92]

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91. U.S. Const., Fifth Amend; see also New York Const., Art. I, par. 6.

92. Proceedings, op. cit., p. 53.

Chief Justice Hornblower pointed out that this might prevent a second trial after a conviction had been set aside as based on error. He also feared that a second trial would be precluded when the jury failed to reach an agreement or there was a mistrial. He persisted in pressing his argument against spirited opposition, with the result that the present phraseology was finally adopted.[93] The Federal Constitution follows the original wording.[94] The constitutions of some states are even more specific than that of New Jersey.[95]

Judicial Interpretation

The courts have adhered to the views of Chief Justice Hornblower and under this provision where a conviction is reversed, a new trial can be had.[96] In like vein, a mistrial does not involve the element of double jeopardy.[97]

Early recognition of double jeopardy as a common law maxim appears in the reports. The New Jersey courts have indicated that they would have recognized it and acted upon it without the constitutional provision:[98]

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93. Ibid, pp. 152-57, 412-14 - and see p. 590.

94. U.S. Constitution, 5th Amend.

95. Missouri Const., Art. I, par 19: "....nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; but if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court; and if judgment be arrested after a verdict of guilty on a defective indictment or information, or if judgment on a verdict of guilty be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to the law."

96. State v. Silver, 101 N.J.L. 232.

97. State v. Block, 119 N.J.L. 277, affirmed 121 N.J.L. 73.

It was not intended to aid a wrongdoer. The immunity does not extend to tort actions,[130] to penalties for offenses that involve injury to the public,[131] to allowances for alimony,[132] or to contract actions tainted by fraud. The fraud which destroys the immunity is not confined to fraud in the creation of the debt, but extends to subsequent fraudulent conduct of the debtor, for the purpose of defeating his creditor in the recovery of the debt by due process of law.[133] Malice is not a necessary element of the fraud.[134] The judicial officer ordering the arrest must, however, adjudge that the fraud exists based upon satisfactory proof.[135]

19. Right of Assembly and to Petition
Article I, Paragraph 18

"The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances."

Source and Interpretation

This paragraph is similar to the restriction placed on Congress by the Federal Constitution.[136]

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130. Duro Co. v. Wishnevsky, 126 N.J.L. 7.

131. Lowrie v. State Bd. of Registration, etc., 90 N.J.L. 54.

132. Adams v. Adams, 80 N.J.E.175.

133. Ex Parte Clark, 20 N.J.L. 648.

134. In re Hardon, 99 N.J. Eq. 719.

135. Kulich v. Kertacy, 12 N.J. Misc. Rep. 743.

136. U.S. Const., First Amend.

It is qualified in some, in order that laws may be passed to punish those who carry concealed weapons.

(b) Protection against Self-Incrimination

"No person shall be compelled to testify against himself in a criminal cause."

Only ten other states fail to add this safeguard in their constitutions. It is recognized in the Federal Constitution as a limitation upon the Federal Government.[141]

(c) Equal Protection of the Laws; Anti-Discrimination Clause

"No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

This provision appears as Article I, paragraph 11 in the New York Constitution of 1938. The Fourteenth Amendment of the Federal Constitution prohibits any state from denying to any person within its jurisdiction the equal protection of the laws; this prohibition applies to agents and subdivisions of the state but not to private persons, firms, or corporations. An anti-discrimination amendment was strongly urged by certain persons and groups before the 1942 Joint Legislative Committee.[142]

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141. U.S. Const., Fifth Amend.

142. Record of Proceedings, op. cit., pp. 24, 41, 90-1, 258, 391.

(d) Equality of the Sexes

"No citizen shall be deprived of any rights, privileges or responsibility because of sex or marital status." [143]

(e) Rights of Labor

"Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed. Employees shall have the right to organize and to bargain collectively through representatives of their own choosing."

This provision appears as Article I, paragraph 17 in the New York Constitution of 1938. The Commission on Revision of the New Jersey Constitution in 1942 included the right of labor to organize and bargain collectively in Article III, Section VII, paragraph 2, of its draft Constitution. [144]

(f) Testing Constitutional Questions

"Any citizen or taxpayer may restrain the violation of any provision of this constitution by a suit with leave of Superior Court upon notice to the Attorney-General."

The Commission on Revision of the New Jersey Constitution in 1942 recommended this provision. The Commission stated:

"Any citizen who believes an act of the Legislature authorizing an expenditure of public money violates the constitution cannot now prevent the expenditure, unless he can show that the injury to him is different in kind and degree from what every other citizen suffers. The new provision wipes out this legal impediment and brings the State Government under effective public scrutiny and control." [145]

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143. Ibid, pp. 38, 42, 46-89 for 1942 proponents.

144. Ibid. pp. 18, 21, 25, 41, 178 for proponents.

145. Report of The Commission, 1942, p. 15.

Bill of Rights

EFFECT OF PROVISION FOR PERIODIC VOTE ON CALLING CONSTITUTIONAL CONVENTION

Automatic Conventions

Eight state constitutions have provisions intended to require periodic submission to the voters of the question of whether or not to hold a constitutional convention; New Hampshire, every seven years; Iowa, every ten years; Michigan, every sixteen years; Maryland, Missouri, New York, Ohio and Oklahoma, every twenty years.

An analysis of the history of constitutional revision in these states demonstrates the fact that the number of conventions does not increase in direct proportion to the facility with which conventions can be called.

1. New York. The 1846 New York constitution contained the provision for a periodic revision every twenty years if the question were approved by the voters. The question was submitted in 1866, 1886, 1914 (by virtue of legislative action) and automatically in 1936. The reason for the gap after 1886, when the question was submitted automatically, and 1914, when it was submitted by order of the legislature, was that the convention following the 1886 submission was delayed until 1894 due to a dispute between the governor and the legislature as to the method of electing delegates. Thus the next mandatory date would have been 1916. But the legislature anticipated it by two years.

On each of these occasions, 1866, 1886, 1914 and 1936, the people voted for the convention. However, the people rejected the constitution proposed by the 1867 convention except for the judiciary article which was submitted separately. The people approved the constitution proposed by the convention of 1894. The constitution of 1915 was rejected and the convention of 1938 resulted in the adoption of some and rejection of other comprehensive amendments. According to leaders of civic organizations, the vote on the 1938 proposals was a very discriminating job.

At any rate, as far as New York State is concerned, while the people voted for a convention each time they had an opportunity, they were quite selective or discriminating in voting on the products of the conventions.

2. Ohio. The automatic vote provision was incorporated in the Ohio constitution in 1912. The people voted against the convention in 1932 in spite of the fact that conservative civic organizations like the Citizens League of Cleveland urged an affirmative vote. The vote will next occur in 1952. Civic forces in Ohio are already beginning to plan the careful campaign which they think will be necessary to induce the people to vote for the convention at that time.

3. Michigan. The Michigan constitution of 1850 authorized referenda on the question of holding a constitutional convention, both by legislative action at any time, and, as a result of a mandatory provision calling for a referendum, at 16-year intervals. There have been eight referenda - four as a result of each method. Only two conventions resulted from the eight votes. On three of the six other occasions, the vote for a convention exceeded that against, but fell short of the required majority of the total vote cast at the election. Of the five constitutions submitted to the voters during the life of the state, three were approved, two rejected.

The following letter from Professor Arthur Bromage shows that the last two proposals were defeated by substantial majorities of the people voting on the question.

UNIVERSITY OF MICHIGAN
Department of Political Science

Ann Arbor

July 26, 1947

Dear Bebout:

I have your letter of July 23 in which you raise questions about the periodic vote requirements for a constitutional convention in Michigan. As to the record since the constitution of 1909, there have been two votes under the automatic provision. In 1926 the people rejected a call of a convention by a vote of Yes--119,491 and No--285,252. Again in 1942 the people rejected the call of a convention by a vote of Yes--408,188 and No--468,506.

I believe that objections to the automatic vote are not well taken. There are so many interests protected by modern state constitutions that there seems to be a natural tendency against the call of a constitutional convention. Certainly the people have the good judgment to turn down the call of a convention if they deem the time to be inappropriate. The great problem in Michigan has been in arousing the people with the need for constitutional revision.

Sincerely yours,

/s/ Arthur W. Bromage

Arthur W. Bromage

AWB:nw

4. Missouri. Two Missouri conventions have been held as a result of the automatic vote on revision provided for by a popularly initiated amendment adopted in 1920. The first submission of the convention question in accordance with the mandate of the amendment was in 1921, and the question was again submitted in 1942 (one year late). The people voted to call the convention both times. They rejected most of the work of the 1922-1923 convention while they adopted the constitution proposed by the 1943-1944 convention. Both the favorable vote on the revision question in 1942 and the adoption of the constitution in 1945 were the result of vigorous, well-organized campaigns by cross-section citizen organizations.

5. and 6. Iowa and Maryland. Iowa has had a provision requiring submission of the question of constitutional revision ever since 1867. Yet neither state has had a constitutional convention since, due generally to the popular habit of voting "No" when the question comes up.

Note the following statements by Professor Herman H. Trachsel of the State University of Iowa and Professor Joseph Ray of the University of Maryland.

THE STATE UNIVERSITY OF IOWA
Department of Political Science

Iowa City

July 26, 1947

Dear Mr. Bebout:

In accordance with the constitutional convention provision of the Iowa constitution, the question of calling a convention "to revise the Constitution, and amend the same" was first submitted to a vote of the people in 1870, and then every ten years thereafter. In 1870, 1880, 1890, 1900, 1910, 1930, and 1940 a majority of those who voted on the question opposed the calling of a convention.

The vote of the people in 1920 was 279,652 for and 221,763 against calling a convention. On January 20, 1921, a bill was introduced into the House of Representatives making provision "for a convention to revise and amend the constitution, naming the number of delegates and districts;..." This bill passed the House on March 15 and was messaged to the Senate on the following day. On March 30 it passed the Senate with amendments which the House refused to accept. A conference committee was appointed; but the House rejected its report on April 8, which was the last day of the session. Thus the General Assembly adjourned without making any provision for a constitutional convention.

In support of the position taken by the General Assembly, some of the members and others insisted that there was no popular demand for a revision of the constitution. One representative, however, did not believe the General Assembly "should override the wishes of the people." Another said the "people expressed a wish for the convention and it is for the assembly to make necessary machinery for it." However, nothing was done and there has been no constitutional convention since 1857. Every ten years the question is submitted to the voters on a separate ballot.

Although no general revision of the constitution of 1857 has been made through the process of a constitutional convention, amendments adopted since 1857 have effected substantial changes in the document. Nineteen amendments have been added, five in 1868, one in 1880, one in 1882, four in 1884, two in 1904, and one each in 1908, 1916, 1926, 1928, 1936, and 1942.

Very sincerely,

/s/ Herman H. Trachsel

Herman H. Trachsel

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EFFECT OF PROVISION IN MARYLAND CONSTITUTION
FOR VOTE EVERY 20 YEARS ON QUESTION OF
CALLING A CONSTITUTIONAL CONVENTION

So far as I know the constitutional provision requiring a referendum on the question of calling a convention has been religiously observed by the Maryland legislature. I have not investigated the matter thoroughly but it is my definite impression that the vote has been taken each time when it was due and that the voters themselves have rejected the proposition.

Joseph M. Ray
Professor of Government and Politics
University of Maryland - July 25, 1947

7. Oklahoma. The 1907 constitution provided for a vote every twenty years. There has been no convention since. The provision, which is not self-executing, orders the legislature to submit the question. The 1947 legislature passed the required bill; but the bill was vetoed and could not muster enough votes for repassage.

8. New Hampshire. The New Hampshire constitution is unique in that a constitutional convention is the only method for submitting any amendment or change. Yet, the provision for an automatic vote in town meetings every seven years on the question of holding a convention has resulted in only eight conventions since the provision was written into the constitution of 1784. Two complete revisions have been submitted, only to be rejected by the people. Six conventions have submitted partial revisions by a large number of amendments which were only partly adopted. The people this year voted for a convention which will be elected in 1948.

CONCLUSIONS:

A total of 191 conventions of one sort or another had been called or held by the several states through 1943. Of these, only 23 were held in the present century. Louisiana, with no provision for calling conventions, has had 10 meetings; Mississippi, with no provision, has had 7; similarly, Arkansas has had 6; Alabama, requiring a majority vote of the legislature and a vote by the people, has had 6; Virginia, with the same provision, has had 8; while New York, with the same requirement plus a mandatory provision calling for a popular referendum every twenty years, has had 8.

The record simply does not bear out the claim that the people vote for revision every chance they get. Indeed our own New Jersey experience should indicate that. As a matter of fact the people generally do not vote for revision either by calling a convention or approving a product thereof unless there is a well-organized campaign conducted by some sort of cross section of citizen interests and organizations.

The fact is that Americans are pretty conservative about their constitutions and the people are prone to vote against change unless they feel they have an affirmative reason for voting for it. When in doubt on anything as complicated as constitutional revision they are inclined to vote "No". This is especially so in times of stress, when people are preoccupied with other matters which touch them more personally. The rejection of the proposition to hold a convention in Michigan in 1942 was based on the argument, specious in our opinion, that they should not undertake such revision during the war. It whould be noted that the people of Ohio voted "No" on a convention proposal in 1932, at the depth of the depression.

The following paragraphs by W. Brooke Graves, one of the leading authorities on state governments and constitutions, and Irving J. Zipin, member of the Philadelphia Bar, appeared in the Book of the States, 1943-1944 and 1945-1946. These paragraphs indicate that the real problem is to get the public to undertake revision, not to keep the public from voting for revision without good cause.

"Whenever a proposal is made to revise a state constitution, it is always in danger of defeat from supposed friends who admit the need of revision but question the advisability of undertaking the project at the time. If business conditions are good, they favor postponement for fear of "rocking the boat". If times are bad, they fear that so important a venture should not be undertaken when men are worried and their minds disturbed. These reasons, as Governor Edison of New Jersey pointed out, are often used to camouflage real reasons which would not bear public scrutiny. If one were to be guided by these prophets of disaster, there would never be a proper time to revise a constitution, and the task would never be undertaken.

"It is to be hoped that the electorate of the several states will not be misled by any such arguments. Constitutional revision is urgently needed, not in one state but in many, and the time to act is now, in preparation for the new era, the coming of which we confidently await at the conclusion of the war. Our armed forces are fighting in distant parts of the world to preserve the democratic way of life. We do not want to save democracy in faraway lands only to discover that we have failed to preserve it at home. We shall not strengthen the democratic tradition by declaring a moratorium on progress in state and local government affairs for the duration."

John E. Bebout

July 31, 1947.

Bill of Rights

STATE OF NEW JERSEY

CONVENTION TO REVISE THE CONSTITUTION

PROPOSED AMENDMENTS

to

Bill of Rights (Article I)

Tax Provision (Article IX)

and

MEMORANDUM IN SUPPORT THEREOF

Submitted by
Joint Committee on Constitutional Bill of Rights
In behalf of Affiliated Organizations & Individuals

Leo Pfeffer
General Counse

July 8, 1947

In behalf of its affiliated organizations and individuals, the Joint Committee on Constitutional Bill of Rights respectfully submits to this Convention the following proposed amendments to Article I and Article IV of the present constitution: *

ARTICLE I.

Sec. 4. There shall be no establishment of one religious sect in preference to another; no religious test shall be required as a qualification for any office or public trust; and no person shall be denied the enjoyment of any civil right because of his race, color, religion or national origin.

Sec. 5a. (New) No person shall be denied the equal protection of the laws of this state or any political subdivision or agency thereof, nor shall any person be deprived of life, liberty, or property without due process of law. Neither the state nor any political subdivision or agency thereof, nor any person, group, association, corporation, or institution shall subject any person, because of race, color, religion, or national origin to discrimination in the enjoyment of any civil rights; and any writing, agreement, or practice in violation hereof shall be void and unenforceable. Such civil rights shall include, in addition to the rights and privileges enumerated in this article, the right to be free from discrimination, because of race, color, religion, or national origin in obtaining employment or education by other than religious corporations or associations, in obtaining public accommodations, in acquiring or enjoying any property, and in engaging in any business, trade, or profession, or otherwise pursuing a livelihood; and such other civil rights as may be recognized by statute or common law.

Sec. 16. Private property shall not be taken for public use without just compensation; but land may be taken for public highways as heretofore until the Legislature shall direct compensation to be made. Property taken for public use shall be enjoyed without discrimination because of race, color, religion, or national origin.

Sec. 19a. (New) The right of workers to organize and bargain collectively shall not be impaired.

*Underlined matter added; Sections 5a and 19a are new.

ARTICLE IV.
Sec. 7(12). Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value. Exemption from taxation may be granted by law, but no exemption shall be enjoyed by any charitable or educational institution, other than a religious or sectarian institution, which denies to any person the use or enjoyment of its facilities because of race, color, religion, or national origin.

1.

It is particularly appropriate that the State of New Jersey should be revising its constitution and re-examing its Bill of Rights at the same time that the United Nations is engaged in drafting an International Bill of Human Rights for all humanity. The American people may well be proud that its original contribution to the evolution of constitutional government - a bill guaranteeing basic human rights - has been adopted by the United Nations. The State of New Jersey has special reason to be proud, for its Bill of Rights is unquestionably one of the finest among all of the State constitutions, and many of its provisions are included in the various proposals now being submitted to the Drafting Committee of the United Nations Commission on Human Rights.

2.

The constitution which now governs the State of New Jersey was agreed upon by the delegates of the people in convention at Trenton between May 14 and June 29th, 1844 and was ratified at an election held August 13, 1844. This constitution is the second in the history of the States, the first having been promulgated at a constitutional convention on July 3, 1776, the day before this country declared its independence of Great Britain.

The Convention now assembled is entrusted with the duty of re-examining the provisions of the 1844 constitution in the light of the century which has elapsed and of recasting and revising that constitution so that it more closely corresponds to the needs of today.

While the administrative relations between a government and the people which has created that government must develop and and change to remain in harmony with the development and change of a dynamic society, the basic human values which constitutions declare and protect are unchanging. The premises underlying our present constitution (set forth in sections 1 and 2 of Article I), that "All men are by nature free and independent, and have certain natural and inalienable rights", and that "All political power is inherent in the people", are as valid today as they were when first declared. Indeed, we have but recently engaged in a tragic world conflict to test the validity of these premises, and the adoption of those premises by the federation of nations which arose out of that conflict establishes their validity for all time.

For this reason we do not propose that this Convention alter in even the slightest the present provisions of Article I of the 1844 constitution. Indeed, we urge strongly that nothing shall be detracted from that article. Nevertheless, we do believe that the rapid evolution and development of our economic and social system during the past century requires certain additions to give particular twentieth-century meaning to the basic truths.

In 1844, a threat to the basic truth of equality existed in the possibility that by reason of difference in the forms whereby people worship their Creator, some people might be denied political rights. The Constitution therefore guaranteed (Article I, section 3) that "no religious test shall be required as a qualification for any office or public trust." A century later, impairment of the basic truth of equality manifested itself in the undemocratic practice of many employers to refuse employment to persons of certain racial or religious groups. Recognizing that the truth of equality is as valid today as in 1844, our Legislature enacted the Law Against Discrimination (Chapter 169 of the Laws of 1945) even though no provision of the 1844 constitution expressly authorizes such legislation. Today, the principal threats to the truth of equality are found in practices of discriminations because of race, color, religion or national origin in the fields of employment, education, enjoyment of property and pursuit of a livelihood in a business, trade or profession. The purpose of the proposed amendments to the 1844 Constitution which we respectfully submit for the consideration of this Convention is to recognize and declare that the basic truth of equality is as valid in these areas as in the political area.

3.

Our first suggested amendment seeks to add "race", "color" and "national origin" to the prohibition contained in section 4 of Article I against denial of any civil right because of religious principles. For the purpose of uniformity we suggest that the

word "religion" be substituted for "religious principles". The terms are synonymous, but the former is generally used in constitutions and statutes and is stylistacally preferable in combination with race, color and national origin. The section as amended in accordance with our suggestion would therefore read as follows:

"There shall be no establishment of one religious sect in preference to another; no religious test shall be required as a qualification for any office or public trust; and no person shall be denied the enjoyment of any civil right <u>because of his race, color, religion or national origin.</u>"

The substance of the amendment is discussed hereafter in relation to our suggested new section.

4.

The heart of our proposed amendment is a new section, which we have designated section 5a, to follow section 5 of Article I of the present constitution. The proposed new section reads as follows:

"No person shall be denied the equal protection of the laws of this state of any political subdivision or agency thereof, nor shall any person be deprived of life, liberty, or property without due process of law. Neither the state nor any political subdivision or agency thereof, nor any person, group, association, corporation, or institution shall subject any person, because of race, color, religion, or national origin to discrimination in the enjoyment of any civil rights; and any writing, agreement, or practice in violation hereof shall be void and unenforceable. Such civil rights shall include, in addition to the right to be free from discrimination, because of race, color, religion, or national origin in obtaining employment or education by other than religious corporations or associations, in obtaining public accommodations, in acquiring or enjoying any property, and in engaging in any business, trade, or profession, or otherwise pursuing a livelihood; and such other civil rights as may be recognized by statute or common law."

Before analyzing the specific provisions of this section, its underlying philosophy should be briefly considered. The

section rests upon the "self evident truth" declared in our Declaration of Independence that "all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty and the pursuit of Hapiness." A similar provision is contained in our present State constitution (Article 1, section 1). These "inalienable rights", more specifically detailed, are recognized and guaranteed in the Bill of Rights sections of our Federal and State constitution, and are generally designated as "civil" rights. Anything less than complete equality in the "pursuit of Hapiness" and enjoyment of civil rights is completely inconsistent with our National and State policy and is repugnant to our democratic concepts. Distinctions based on race, color, religion or national origin are abhorrent to our spiritual and political conscience.

These truths have been recognized by all branches of our Federal and State governments, in the international as well as domestic arenas. Our Supreme Court, speaking through the late Chief Justice Stone stated it thus:

"Distinctions between citizens solely because of their ancestry are by their very nature odious to free people whose institutions are founded upon the doctrine of equality" (Hirabayshi v. United States, 320 U.S. 81, 100 /1943/).

Justice Murphy, concurring in the same case stated:

"Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that for centuries the Old World has been torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups" (pp. 110-111).

The validity of this principle has been recognized by our government in the international field. The relationship among the various racial, religious and ethnic groups which make up a nation is a matter of international as well as national concern. The United States Government has made representation to foreign governments in respect to their treatment of minority nationals. Treaties concluding both world wars contain provisions requiring the signatories not to discriminate against their national and racial minorities. The Charter of the United Nations, ratified by the Senate of the United States and signed by the President (August 8, 1945) imposesupon all signatories the duty to "promote...uniform respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, and religion." (Article 55c)

To sum up, it may be said, again in the words of Chief Justice Stone, that distinctions based on race, color, religion or national origin are "irrelevant and invidious" (Steele v. Louisville & N.R. Co., 323 U.S. 192 /1944/). As will be indicated in our analysis of the specific provisions of our proposed amendment, substantial recognition of this principle has been given by the Legislature of our State. Here we need mention only the statement of our State Supreme Court, that "the dignities, equalities and rights of citizenship cannot be legally denied to members" of any particular race. (Bullock v. Wooding, 123 N.J.L. 176 /1939/).

5.

The first sentence of our proposed amendment reads:

"No person shall be denied the equal protection of the laws of this state or any political subdivision or agency thereof, nor shall any person be deprived of life, liberty or property without due process of law."

This provision, taken from the Fourteenth Amendment of the Federal Constitution, requires little discussion. Its absence from the present State constitution is explained by the fact that the State constitution antedated the Fourteenth Amendment. In slightly varying forms, this prvision is contained in the constitutions of most of the States.

6.

The provision in our proposed new section that "Neither the state nor any political subdivision or any agency thereof, nor any person, group, association, corporation, or institution shall subject any person, because of race, color, religion, or national origin to discrimination in the enjoyment of any civil right..." constitutes a limitation on both State and private action.

The prohibition against discriminatory action by a State or its subdivisions is merely a codification of existing case law under the Fourteenth Amendment. The United States Supreme Court has consistently invalidated action by States or municipalities which attempted to give legal effect to the irrelevancy of race, color or religion. It would unduly extend the scope of this memorandum to discuss in detail the decisions in which States or municipalities were restrained from such discriminatory action. A few may be mentioned as illustrative.

In Yick Wo v. Hopkins (118 U.S. 356 /1886/) the Court invalidated a municipal practice of refusing to persons of Chinese descent permits to engage in the laundry business, the Court holding that the administration of a municipal ordinance for the carrying on of a lawful business violates the Fourteenth Amendment if it makes arbitrary discriminations founded on differences in race. In Buchanan v. Warley, (245 U.S. 60 /1916/) the Court invalidated a racial zoning ordinance. In State ex rel Gaines v. University of Missouri, (305 U.S. 337 /1928/) the Court held that a State could not deny to Negroes professional educational opportunities offered to persons of the white race. These as well as other cases which may be cited constitute the basis of our proposed provision forbidding discriminatory action by "the state or any political subdivision or agency thereof."

The restraint on the part of similar action by "any person, group, association, or corporation or institution" is necessitated by the holding in the Civil Rights Cases (109 U.S. 3 /1883/) that the Fourteenth Amendment prohibits only State or municipal action and not by private individuals or groups. It is the duty of the State to guarantee that racial or religious discrimination shall not be practiced by non-governmental agencies. The Supreme Court on another occasion expressed it thus:

"The equality of the rights of citizens is a principle of republicanism. Every republican government is duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there." (U.S. v. Cruikshank, 92 U.S. 592 /1875/).

Our neighbor, the State of New York, acknowledged this duty in its 1938 constitution, declaring that:

"No person shall, because of race, color , creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation or institution, or by the State or any agency or subdivision of the state." (Article I, section 11)

As will be indicated hereafter, our Legislature has in numerous specific instances recognized this principle. It is the purpose of our proposed amendment to make this recognition universally applicable and to accord it a constitutional basis.

7.

The proposed provision that "any writing, agreement, or practice in violation hereof shall be void and unenforceable" codifies fundamental contract law. Since the constitution is the supreme law of the State, any agreement or practice in violation of its letter or spirit is unenforceable (13 Corp. Juris p. 424). Nevertheless, the question occasionally arises as to whether a particular constitutional provision is or is not self-executing (see e.g. Groves v. Slaughter, 15 Pet. [U.S.] 449, 452); for that reason, it is desirable that the constitution specifically set forth the consequence of violation.

Such a provision is by no means unprecedented. The Fourteenth Amendment itself provides that "all debts, obligations and claims" growing out of the Civil War or out of the institution of slavery "shall be held illegal and void". Many State constitutions prohibit agreements or practices in violation of constitutional provisions which protect the rights of laborers and expresly provide that such contracts or agreements shall be void and

unenforcible (see e.g. Arizona, Constitution [1912] Article XVIII section 3.) It is submitted that, the convention should clearly and expressly declare in the constitution that agreements or practices in violation of the Bill of Rights shall be void and unenforcible.

8.

Our proposed new section seeks to specify certain particular civil rights which are the principal object of its protection. These, as will be shown, have already been impliedly recognized by our National and State legislatures and courts. The purpose of our amendment is to accord to these specifications the constitutional dignity to which they are entitled.

Our proposed new section states first that the "rights and privileges" already "enumerated in this article" shall constitute civil rights protected from discrimination for reasons of race, color or religion. These rights and privileges include freedom of worship (section 3), of speech and press (section 5), of security from unreasonable searches and seizures (section 6) and of assembly (section 18), as well as the right of trial by jury (section 7) and a fair and speedy prosecution of criminal charges (section 8). Any action by the State or a subdivision or agency thereof, or even by a private individual or group which would tend toward racial or religious discrimination in the exercise of these rights would be violative of the constitution and void.

9.

The first of the civil rights expressly enumerated in our proposed new section is the right to be free from racial or religious discrimination in obtaining employment. That this is a fundamental right is too patent to be gainsaid. As stated by the Temporary Commission Against Discrimination which drafted the New York Law Against Discrimination:

> "The right to life, the most primary of all civil rights, can have no fulfillment without the right to work."

Our own Court of Errors and Appeals declared that denial or curtailment of the

right to work by reason of race, color, religion or national origin deprives minorities "of the constitutional right to earn a livelihood" (Carroll v Local 269, 133 NJ Eq. 144, 147). Our Legislature has declared that such discrimination is

> "a matter of concern to the government of the State, and... threatens not only the rights and proper privileges of the inhabitants of the State, but menaces the institutions and foundation of a free democratic State." (Chapter 169, P.L. 1945, section 3).

Accordingly, our Legislature stated that:

> "The opportunity to obtain employment without discrimination because of race, creed, color, national origin or ancestry is recognized as and declared to be a civil right." (ibid, section 4).

Partial effect had been given to this principle in the statute forbidding employment discrimination in defense industries (P.L. 1942 Chapter 114), public works (Rev. Stats. section 10:1-10) and State, County and Municipal civil service (ibid, section XI: 22-11, XI: 17). Practically complete effect was given by the enactment in 1945 of the Law Against Discrimination (Chapter 169, P.L. 1945). Our amendment seeks to create an express constitutional basis for these and similar legislative enactments, thus eliminating any possible doubts of constitutionality, no matter how ill founded.

10.

It is of vital significance that, in respect to the provisions relating to employment and education contained in our proposed amendment, religious corporations or associations are expressly excluded. Freedom of religion is a basic component of democracy, and true freedom of religion is impossible if the State were to possess power to control or regulate the internal affairs of religious bodies. Our nation and our State are founded on the rock of religion, uncontrolled and undominated by government. The manner whereby a man worships his Creator is a matter for regulation by his own conscience; it is not subject to dictation by parliaments of men. It is not our intention to weaken in the slightest the command of the 1944 constitution that:

"No person shall be deprived of the inestimble privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience." (Article I, section 3).

For these reasons we have been careful to exclude religious bodies from the operation of the provisions relating to discrimination in employment and education.

11.

In the twentieth century, equality of opportunity in employment cannot exist without a co-equality of opportunity in education. Our complex economy demands educational training for its responsible positions. It is unrealistic and ineffectual, if not hypocritical to guarantee to persons of all races and religions the right to practise medicine or engineering or law without guaranteeing them the right to be free from racial or religious discrimination in obtaining admission to medical or engineering or law schools so as to acquire the training which would enable them to practice those professions

But it is not only because equality of employment opportunity requires a concommitant equality of educational opportunity that we have included freedom from discrimination in education as a civil right entitled to constitutional protection. It is our earnest conviction that the "pursuit of happiness" guaranteed by our 1844 constitution (Article I, section 1) is impossible of attainment without complete equality of educational opportunity. Rarely can supreme happiness be attained by the uneducated and the illiterate. The treasury of joy found in poetry and drama, in music and in art, is denied to them. This is recognized by our people, as evidenced by the fact - of which we can well be proud.- that our State expends more per child annually for public school education than any other State in the Union (Report of National Education Association cited in Statement by Rabbi Stephen S. Wise to the United States Senate Committee on Labor and Public Welfare, April 25, 1947). Freedom from racial or religious discrimination in education is entitled to

governmental protection. Our State Legislature has recognized by enacting section 18:14-2 of the Revised Statutes, which provides, in part:

> "No child between the ages of four and twenty years shall be excluded from any public school on account of his race, creed, color, national origin or ancestry."

The importance which our Legislature ascribed to equality of educational opportunity is attested by the penalty imposed for its deprivation. The balance of the section reads as follows:

> "A member of any board of education who shall vote to exclude from any public school any child, on account of his race, creed, color, national origin, or ancestry shall be guilty of a misdemeanor, and punished by a fine of not less than fifty dollars ($50.00) nor more than two hundred fifty dollars ($250.00), or by imprisonment in the county jail, workhouse, or penitentiary of the county in which the offense has been committed, for not less than thirty days nor more than six months, or by both such fine and imprisonment in the discretion of the court."

Nor has recognition that equality of educational opportunity is a civil right entitled to governmental protection been limited to public school education. Our Civil Rights Act declares it a misdemeanor for "any . . . public library, kindergarten, primary and secondary school, high school, academy, college and university, or any educational institution under the supervision of the regents of the state of New Jersey" to deny admission to any person because of race, creed or color. (Rev. Stats, section 10:1-5). Here, as in the case of employment, the purpose of our proposed new section is to accord constitutional sanction to existing legislative policy.

12.

While our proposed amendment of subdivision 12, section 7, Article IV of the 1844 constitution is not technically included in the Bill of Rights, it is impliedly part of our proposed new section and should logically be dis-

cussed here. Our suggested amendment reads as follows:

> "Exemption from taxation may be granted by law, but no exemption shall be enjoyed by any charitable or educational institution, other than a religious or sectarian institution, which denies to any person the use or enjoyment of its facilities because of race, color, religion, or national origin."

Little need be said in support of this amendment. To us and, we believe, to all men of good will, its fairness and justness are patent. Exemption from taxation is in effect a public subsidy - a grant of funds raised by taxing all the public. A non-sectarian educational institution which closes its doors to a portion of the people should not receive the financial aid of a government representing all of the people. Taxation without sharing the benefits of taxation is no less tyrany than taxation without representation.

13.

Nor does our proposed inclusion of equality in obtaining public accommodation require much discussion. Our Civil Rights Law already forbids racial or religious discrimination in the denial of access to places of public accommodation (Rev. Stats, section 10:1-5). Such discrimination is declared to be a misdemeanor and in addition gives rise to a right to bring a civil action (ibid, section 10:1-7). That this action is brought " in the name of the state of New Jersey" indicates that our Legislature deems that it is the people, even more than the discriminated individual, which is aggrieved by such anti-democratic practices. Here, too, we seek constitutional recognition of legislatively declared policy.

14.

Our proposed new section declares that freedom from racial or rel-

igious discrimination "in acquiring or enjoying any property" is a civil right accorded constitutional protection. This is far from a novel proposition. The very first sentence of the 1844 constitution states:

> "All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property and pursuing and obtaining safety and happiness."

Some two decades after this declaration, the Congress of the United States enacted the Civil Rights Law which provides, in part:

> "All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property." (8 United States Code, section 42).

It is our proposal that this principle be expressly protected by the new constitution against Legislative and private infringement, and we have therefore included it in our suggested new section.

15.

What has been said heretofore establishes clearly that freedom from racial and religious discrimination "in engaging in any business, trade, or profession, or otherwise pursuing a livelihood" is and should be a civil right, and we need, therefore, say nothing further to justify its inclusion in our proposed new section.

Our proposed new section does not limit the civil rights subject to its protection to those specifically enumerated therein. Its concluding phrase expressly authorizes recognition of other civil rights "by statute or common law." The purpose of this clause is to provide for the further evolution and development of our social, political and economic society in its progress toward the achievement of equality and brotherhood.

16.

Our proposal includes an amendment to Article I, section 16 of the 1844 constitution by the addition of the following sentence:

> "Property taken for public use shall be enjoyed without discrimination because of race, color, religion or national origin."

What we said in respect to tax exemption applies with equal force here. "Public use" means use by all the public, not parts thereof selected on the basis of race or religion. If property is seized under the power of eminent domain for use as a library or a railroad or a hospital, that library, railroad or hospital must be open to all the people without racial or religious discrimination.

The justice of this principle is self-evident. Its legality is equally clear. (Connecticut College v. Calvert, 87 Conn. 421 /1913/ University of Southern California v. Robbins, 37 Pac. 2d 163 - Calif. App.,1924. We urge its recognition in the new constitution.

17.

The final provision of our proposed amendment is a new section to be added to Article I reading:

> "The right of workers to organize and bargain collectively shall not be impaired."

Collective bargaining by labor accords with our National and State public policy. The proposed new section accords express constitutional recognition to that policy. This provision does not, nor is it intended to restrict legislative action aimed at eliminating or curbing any labor union abuses which may manifest themselves and which require corrective legislative action.

This is a moment of deep significance in the history of our State. This convention is faced with an opportunity to make a great step forward in the continuing progress and development of American constitutional democracy. Adoption of the amendments which we propose will, we believe, breathe a new vitality and meaning into our revered Bill of Rights. It will be a guiding torch for other States to follow. Respectfully we commend it for the deliberations of this convention.

Respectfully submitted,

Herbert H. Tate, Chairman
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