CHARTER FOR NEW JERSEY

The New Jersey Constitutional Convention of 1947

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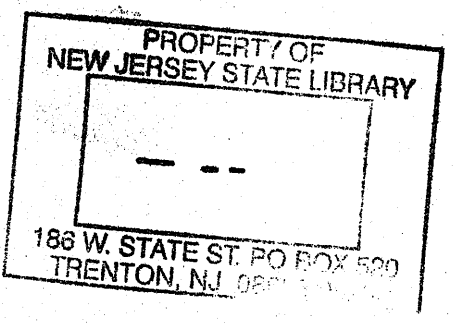

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FOREWORD

The New Jersey Constitutional Convention of 1947 represents one of the very few occasions in our century when a citizenry sought to revise completely a state constitution and succeeded in doing so. The final result was the work of duly elected delegates, broadly representative of all areas of New Jersey life. To their deliberations they brought a sensitive and practical awareness of the needs of a modern state. The new Constitution was not only the product of their collective minds but represented the best thought and considered action of civic-minded leaders who for decades had sought a new charter.

The proceedings of the Constitutional Convention of 1947, unlike those of the Convention of 1844 and the group of men who wrote the first Constitution in the critical days of 1776, were recorded in detail and have been reproduced in printed form. This record represents a rich mine of material on state government in the 20th Century. Here the student and the analyst will find a rewarding store of information which, properly worked, will provide material for many a study.

Richard N. Baisden was one of the research men who served the Convention. Fresh from his course in government at the University of Chicago, he found in New Brunswick in the summer of 1947 an unparalleled opportunity to observe the actual workings of a constitutional assembly. From the information and materials he collected there he fashioned this preliminary study of the work of the Constitutional Convention. Against a background of historical analysis, he has dealt with what he considers the major problem faced by each of the five main committees of the Convention. His monograph is the first of what one hopes will be many studies devoted to the Constitutional Convention of 1947. In good time these will find their way into a definitive work dealing with the outstanding achievement of that body—an achievement which was immediately recognized as setting a pattern and standard for other states interested in making their government more responsible and more responsive to the will of the public.

ALFRED E. DRISCOLL
Governor of New Jersey

March 26, 1952

PREFACE

Throughout the summer of 1947 the author had the good fortune to serve as the research man for the Committee on Public Relations and Information of the New Jersey Constitutional Convention of 1947, and in this capacity to observe every session of the convention in addition to many of the important committee meetings. He was continually impressed by the fact that what took place in New Brunswick could not be understood without a knowledge of New Jersey history. Hence, when the time came for the author to write about some of the events which he had witnessed, it seemed only natural to follow a pattern of historical analysis.

Since any attempt to encompass the entire subject of the convention would have resulted in little more than a description of procedures, it seemed better to examine the convention through the way in which it handled its most difficult assignments. Its ability to come to decisions on controversial problems and, of course, the nature of those decisions are the main criteria by which the success of the New Jersey Constitutional Convention of 1947 will be judged.

The manuscript was prepared during the winter of 1947-48 while the author was a graduate student at the University of Chicago. The author would like to take this opportunity to acknowledge the assistance and encouragement which he received at that time from Mr. Sidney Goldmann, then Head of the Archives and History Bureau of the New Jersey State Library, and from Dr. Avery Leiserson, Department of Political Science of the University of Chicago.

In June 1948, this work was accepted by the Department of Political Science of the University of Chicago as a dissertation for the degree of Master of Arts.

The author also owes a debt of thanks to those who have shown an interest in the publication of this manuscript. These include Governor Alfred E. Driscoll, Dr. John F. Sly, and Mr. Donald W. Rich, Jr.

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Chapter I

INTRODUCTION

As the result of a constitutional convention held in the summer of 1947, New Jersey became the first state to revise its fundamental law in the post-war era. The old constitution had served the state for one hundred and three years and had long since proved itself to be a barrier to economical, efficient and responsible government. The revised document came as the result of many years of increasing dissatisfaction and repeated attempts at constitutional reform.

The operations of that constitutional convention can not be understood without some knowledge of constitutional development in the state. As a result, a brief resumé will be helpful. New Jersey has had three constitutions in its history as a state. The first was written in 1776, the second in 1844, and the third is the document of 1947 with the drafting of which we are concerned.

The Constitution of 1776 was written two days before the signing of the Declaration of Independence. Since its framers had few precedents to follow and since they wrote and approved it in eight hectic days, it is not surprising that they should fail to include a bill of rights and a provision for amendment.[1] Under that document, the governor was elected annually by the bicameral legislature and had little executive power. The theory of the separation of powers was not followed, for the governor was made the chief judicial officer of the state and also the president of the upper house of the legislature. The legislature was composed of two houses, one roughly apportioned among the counties according to population and the other with one representative from each county.[2] The legislature was authorized to appoint all state officials; and the upper house along with the governor acted as the court of appeals.[3]

The second New Jersey Constitution was written in 1844, by a convention of fifty-eight men. It did not constitute a sharp change from its predecessor. Despite the fact that an independent governor was created, the legislature continued to possess much executive power. The old system of representation in the legislature was continued and only a few changes were made in the judicial system. A bill of rights and an amendment provision were included this time, but the latter was so difficult that it was of little value.[4]

Not many decades passed before the weaknesses of this constitution began to make themselves known. As far back as 1873, Governor Joel Parker in his annual message recommended a constitutional convention or commission to make needed changes.[5] The executive branch of the government expanded greatly to carry on the new functions which the state was called upon to per-

1. Charles R. Erdman, Jr., *The New Jersey Constitution of 1776* (Princeton, 1929), p. 47.
2. John Bebout, "Introduction," *Proceedings of the New Jersey State Constitutional Convention of 1844*, ed. by New Jersey Writers' Project, (New Jersey, 1942), pp. xvi-xix.
3. Erdman, *op. cit.*, pp. 61-62.
4. Bebout, *op. cit.*, pp. xcvi-xcvii.
5. *Ibid.*, p. cv.

form, but the governor continued to have almost no control over the administrative organization. As other states revised their constitutions, New Jersey was left the only state which elected members of its legislature annually. The salary of $500 per year awarded to the legislators by the constitution rapidly became inadequate. The antique, costly and inefficient judicial system was still headed by the sixteen-member Court of Errors and Appeals, the largest high court in the country, which was laughingly referred to as "a little bigger than a jury and a little smaller than a mob." Most objectionable was the fact that the very difficult amendment process preserved the charter from appreciable change.[6]

Many efforts were made to amend and revise the old document. A commission set up in 1873 resulted in the adoption of twenty-eight amendments in 1875. In the following seventy-two years, however, only four amendments were made; two of which dealt with gambling, one with a restriction on the appointing power of the governor and one with zoning. Four other constitutional commissions made recommendations to the legislature.[7]

It was not until 1940 that effective pressure began to build up for a thorough revision of the century-old constitution. In previous years, the agitation had been sporadic and unorganized. In the gubernatorial election of 1940, however, both Governor Edison and Robert Hendrickson, his Republican opponent, urged that a constitutional convention be held. In February of 1941, several leading citizens and representatives of important statewide organizations which had long advocated constitutional revision, decided to coordinate their efforts. In order to do this, they formed the New Jersey Committee for Constitutional Convention. This group became the heart of the revision movement. It played a decisive role throughout the seven-year struggle for revision from 1940 to 1947. In 1943, its name was changed to the New Jersey Committee for Constitutional Revision. It was composed of the two largest labor organizations in the state: the State Federation of Labor and the State C.I.O. Council; six women's organizations: The New Jersey League of Women Voters, the American Association of University Women, the State Federation of Women's Clubs, the New Jersey State Federation of Colored Women and the League of Women Shoppers; and three other influential groups: the New Jersey Taxpayers' Association, the New Jersey Association of Real Estate Boards, and the Consumers League of New Jersey. These organizations all recruited their members primarily from urban areas. In fact, most of the pressure for constitutional change had traditionally been found in the urban parts of the state. On the other hand, the resistance to constitutional revision was centered primarily in the rural areas. Since the rural counties, due to their disproportionate strength in the legislature, controlled that body, the reformers had never been able to get the law-makers to call a convention.[8]

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6. *Ibid.*, pp. ci-civ.

7. Charles R. Erdman, Jr., *The New Jersey Constitution—A Barrier to Governmental Efficiency and Economy,* (Princeton, 1934), p. 16.

8. John E. Bebout, "New Task for a Legislature," *National Municipal Review,* XXXIII, No. 1, (January 1944), pp. 17-19.

In 1941, Governor Edison, the Committee for Constitutional Convention and the proponents of revision in the legislature, began to press for the calling of a convention. The legislature at first refused to act, but finally created a seven-member commission to study the problem and make recommendations. In 1942, the Commission on Revision presented a sample draft of a revised constitution to the legislature.[9] The legislature proceeded to appoint a joint committee to hold public hearings on the proposals of the commission. The majority of the committee recommended that the matter of constitutional change be deferred until after the war.[10]

This did not end the matter, for the same civic leaders and organizations in the state continued to compaign for revision. In 1943 they were able to persuade the law-makers to authorize a referendum to determine if the people desired to have the legislature, acting as a constitutional convention, rewrite their fundamental law. The vote was a decisive victory for the revision forces. Governor-elect Edge put all of his influence behind the movement and the legislature went to work to draft a new charter.[11] The proposed revision was presented to the people at the general election of 1944 and was defeated. The adverse vote has been attributed to many things: the war, the speed with which the whole thing was pushed through, the fact that it was done by the legislature, the last minute campaign of violent opposition carried on under the direction of Mayor Frank Hague of Jersey City,[12] the opposition of the Catholic Church, and several other factors.[13]

Despite this setback to the revision movement, Governor Alfred E. Driscoll in his Inaugural Address on January 21, 1947, stated that "the people in 1944 did not vote in favor of our present Constitution of 1844 as much as they voted against the document submitted to them as a whole to replace it." In the same speech, he called upon the legislature to provide for the calling of a constitutional convention.

In response to the Governor's request, the legislature agreed that a referendum should be held to determine the sentiment of the people toward a constitutional convention. This convention was not to be unrestricted, however. The less populous counties had always opposed a convention because of their fear that they would lose the great advantage which they possess due to the equal county representation in the Senate. This system makes it possible for eleven counties with a population of less than one-sixth of the total population of the state to control the upper house. It was clear, therefore, that the *quid pro quo* for getting a constitutional convention was the assurance that no change would be made in the matter of representation in the legislature.[14] Since there was some question of whether or

9. Commission on Revision of the New Jersey Constitution, *Report*, (Trenton, 1942).

10. Joint Committee of the New Jersey Legislature, *Record of Proceedings*, (1942), pp. 868-9.

11. Bebout, *op. cit.*, p. 20.

12. Council of State Governments, *The Book of the States, 1945-46*, Vol. VI, (Chicago, 1945). p. 72.

13. Walter J. Bilder, "Useful Reflections of the Constitutional Election," *New Jersey Law Journal*, 67, (Nov. 1944), p. 389.

14. Bebout, *op. cit.*, p. 17.

not the legislature could instruct a convention, the law-makers acted upon the Governor's suggestion that the question presented to the people at the referendum should be worded in such a way that by an affirmative vote, the people themselves would remove from the convention the power to deal with this inviolable subject.[15] Further to assure the small counties, the legislature provided that the new constitution could not be presented to the people until the Secretary of State had found that the convention had in every way complied with its instructions. Even this did not satisfy the less populous counties. The Governor had suggested that the convention should be comprised of sixty delegates, with each county having the same number of delegates as it had members in the lower house of the legislature; but the small counties insisted that there be eighty-one delegates so that each county would have an additional delegate to correspond with its representation in the Senate.

The legislature further provided that, at the same time that the people expressed their views on a restricted convention, in order that an additional election be avoided, they would also vote for the delegates who would represent their counties. If the response to the referendum was favorable, the delegates were to convene on June 12 and were to conclude their deliberations by September 12. The new document was to be presented to the people at the November general election.[16]

While this was a fairly tight schedule, one should remember that the issue of constitutional revision was an old one in New Jersey and that many of the people active in the convention had also played important parts in previous revision attempts.

Governor Driscoll had asked that the convention be bi-partisan and twelve of the twenty-one counties responded by electing bi-partisan delegations. This permitted the Democratic representation in the convention to be larger than in the legislature. There were contests for election in sixteen of the twenty-one counties, but in only a few cases was there much opposition to the tickets selected by the Republican and Democratic organizations.[17] The party affiliations of the delegates were: fifty-four Republicans, twenty-three Democrats and four Independents. Although hardly a representative group, it was on the whole well qualified for its task. Occupationally lawyers dominated the convention; fifty of the eighty-one delegates being members of that profession. Farmers and labor union men were hard to find since there were but two of the former and one of the latter. Twenty-five of the delegates were or had been members of the state legislature. Businessmen were in the minority with only twelve representatives but the bench was well-represented since twenty of the delgates were or had at one time been judges.[18] Eight women were among those who were to draft a new constitution.

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15. Alfred E. Driscoll, *Inaugural Address to the Legislature*, (January 21, 1947), p. 9.

16. State of New Jersey, Laws, 1947, Ch. 8, State Constitutional Convention, Senate Bill 100, Approved February 17, 1947.

17. *Trenton Evening Times*, June 2, 1947, p. 1.

18. State of New Jersey, Constitutional Convention of 1947, *Biographies of Delegates*, mimeographed.

The convention opened on June 12 in its permanent meeting place, the gymnasium at Rutgers University, New Brunswick, New Jersey. The speed and smoothness with which the convention organized, elected its officers and adopted the rules were a tribute to the careful advance planning of the Driscoll Administration. Dr. Robert C. Clothier, President of Rutgers University, was elected to head the convention by a unanimous vote.

The first, and in many respects the most important thing to be done was the appointment of the committees. The rules provided for nine committees, five of which were to deal with substantive articles of the constitution. The committees were: (1) Rights, Privileges, Amendments and Miscellaneous Provisions; (2) Legislative; (3) Executive, Militia and Civil Officers; (4) Judiciary; (5) Taxation and Finance; (6) Arrangement and Form; (7) Submission and Address to the People; (8) Rules, Organization, and Business Affairs; (9) Credentials, Printing and Authentication of Documents. A tenth committee on Public Relations and Information was added later. The rules provided that the president of the convention should appoint the committees but, realizing that Clothier would need help with this difficult and crucial problem, the Administration had been working on it for some time.[19] After consulting party leaders and the delegates themselves, after considering the experience, points of view, party affiliations and ability of the delegates, after noting the county and section from which the delegates came, the Administration drew up a proposed list and presented it to the president. He studied it, did some research on his own, made some minor changes and then announced the committee assignments.[20]

During the first seven weeks of the convention, with the exception of routine sessions of all the delegates every Tuesday morning, the committees were the centers of all activity. With minor exceptions, the procedure followed by the five drafting committees was to discuss their article, invite experts and interested parties to testify, hold public hearings, publish a tentative report, hold a final public hearing on that tentative report and then draw up their final report.

With the submission of the five reports on July 31, the entire convention began its sessions to discuss them one at a time. Amendments were offered and voted on. The actual debates on the committee reports by the convention as a whole took only twelve days of actual work. In most cases the committee proposals were incorporated into the final document with but few modifications. Due to the excellent leadership furnished by the officers of the convention and the Driscoll Administration, and due to the spirit of cooperation displayed by all of the delegates, the convention completed its work thirteen days before the end of the time allotted.

Throughout the deliberations, the press, aided by the convention's Committee on Public Relations and Information, gave excellent coverage to the activities. The convention authorized a series of six paid advertisements

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19. *Atlantic City Evening Union,* June 9, 1947, p. 2.

20. Interview with James Kerney, Jr., on September 18, 1947.

which appeared in many of the state's newspapers and also provided that a circular summarizing the changes made by the new constitution should be sent to all voters with their sample ballots. The Committee on Constitutional Revision, composed of eleven of the most active organizations in the state, provided speakers, sent out literature, and set up committees in many of the counties to work for ratification. Copies of the new constitution were available to all who wrote for them. Thus, extensive efforts were made to inform the people of the state concerning the new document. No important organization in the state opposed the charter,[21] and most groups gave active support in the drive for ratification. Both political parties enthusiastically endorsed the revision. As a result, it was a foregone conclusion that the new constitution would be ratified by a large majority.

In the light of this hasty resumé of 181 years of constitutional development in New Jersey, we can now examine the most controversial issues faced by the 1947 convention. The five which will concern us are: (1) the powers of the governor, (2) the problem of gambling, (3) the merger of law and equity courts, (4) amendment and revision, and (5) taxation of second class railroad property.

While there naturally were many other issues which brought forth considerable debate, these five have been chosen for several reasons. First, they probably generated more discussion on the floor of the convention, in the committees and in the newspapers than any other problems. Second, each of these five issues was handled by a different one of the five committees dealing with articles of the constitution, thus giving us an opportunity to observe each of these important committees at work. Third, each of these problems has had a long history with roots extending deep into the past. Finally, these five problems are illustrative of different types of issues which face a convention and, as we shall see, the delegates found it necessary to deal with each in a somewhat different fashion.

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21. *Newark Evening News*, October 18, 1947, p. 15.

Chapter II

THE POWERS OF THE GOVERNOR

Of all the controversial issues with which the New Jersey Constitutional Convention of 1947 had to deal, the one on which there was the most agreement, at least in principle, was the problem of increasing the powers of the governor. There was practically no opposition to the general thesis that the office of the chief executive ought to be strengthened. The recent history of New Jersey had proved conclusively that the state could never secure efficient or responsible government as long as the governor was handicapped by the restrictions which the dead hand of the past had placed upon him. The question that faced the delegates to the convention was not whether but rather how much they should increase his powers.

This problem was by no means a new one. As a matter of fact, its roots extended back as far as the days when New Jersey was a colony of Great Britain, for we find that the traditions stemming from that period had considerable influence on the governmental framework of the state, even as late as 1947.

On the whole, the pattern of government of the royal province of New Jersey was typical of that found in most of the colonies in America.[1] The governor was appointed by the king and enjoyed an impressive combination of executive, legislative and judicial powers. Naturally, it was his primary function to promote the interests and carry out the mandates of the king, even if in opposition to the desires of the colonists. On the other hand, the lower house of the legislature was elected by the colonists. It was inevitable that there should be conflicts between the governor and the assembly, especially since the former had an absolute veto on measures passed by the latter.[2] In the period immediately preceding the Revolution, the last royal governor, William Franklin, son of Benjamin Franklin, adhered loyally to the royal cause and did his best to keep New Jersey from cooperating with the other colonies in resisting Great Britain. It was the assembly and later the provincial congress, however, which led the opposition to the oppressive measures of the crown, put an end to the royal government in New Jersey, arrested Governor Franklin and adopted the Constitution of 1776.[3] It is no wonder that the governor should be identified in the minds of the colonists as the agent of a greedy tyrant while the legislature should be looked upon as the champion of the people.

This distrust of the executive resulted in the subordination of the governor to the legislature by the framers of the Constitution of 1776. This was

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1. John Bebout, "Introduction," *Proceedings of the New Jersey Constitutional Convention of 1844.* Edited by the N. J. Writers' Project, (New Jersey: 1942), p. xv.

2. Charles R. Erdman, Jr., *New Jersey Constitution of 1776,* (Princeton, 1929), p. 2.

3. Lucius Q. C. Elmer, "The Constitution and Government of the Province and State of New Jersey," *Collections of the New Jersey Historical Society,* Vol. VII, (Newark: 1872), p. 21.

accomplished by stripping the governor of his veto, of all appointment and removal power, and by requiring that he be elected annually by the legislature. In other respects the office of the royal governor was the model for the new governor as he was to continue to be the chancellor, the presiding officer of the upper house of the legislature, a member of the highest court and commander of the armed forces.[4] Hence, the main duties of the governor were in the legislative and judicial rather than in the executive field.

In spite of the fact that the Constitution of 1776 was designed as a temporary charter to provide a basis for the conduct of affairs after the disposition of the royal governor, efforts to revise it were unsuccessful for sixty-eight years.[5] In the meantime, the federal constitution had been drafted and other state constitutions had been written and rewritten to conform with the doctrine of separation of powers which demanded an independent and powerful executive. The fact that New Jersey did not participate in this movement does not mean that there was no realization of the weaknesses implicit in the Constitution of 1776. Critics of that document echoed the observations of James Madison when, in Number 47 of the Federalist, he described the way in which the New Jersey Constitution "blended the different powers of government." They pointed out that the exercise of the appointive power by the legislature led to corruption and to the pre-occupation of that body with patronage concerns. They also declared that the large volume and variety of duties placed upon the shoulders of the governor had become too much for him to discharge efficiently.[6]

Finally after decades of agitation, a constitutional convention was held in 1844. While one of the main reasons for revising the constitution was to remedy the defects of the office of governor, there was much spirited debate over what changes should be made. It was generally agreed that the governor should be popularly elected and that the duties of chancellor should be removed from his office.[7] Much difference of opinion, however, existed on such subjects as the appointing power, the veto, and the length of the governor's term of office.

One of the most extended debates in the convention of 1844 was over the appointing power. The reformers who pointed to the evils which resulted when the legislature made appointments and who declared that this function naturally belonged to the chief executive were opposed by delegates who declared that it was more democratic to have officials selected by the legislature or elected by the people. This conflict led to a compromise whereby all three methods were used. The people were to elect the governor, the sheriffs, coroners, county clerks, surrogates and justices of the peace; the legislature in joint session was to appoint the treasurer, keeper of the state prison and common pleas judges; and the governor was to appoint, with the advice and consent of the Senate, the justices of the higher courts, the

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4. Erdman, *op. cit.*, p. 21.

5. Hugh McD. Clokie, "Political and Constitutional Development," *New Jersey, A History*, edited by Irving S. Kull, Vol. II, (New York, 1930), p. 576.

6. Bebout, *op. cit.*, p. li.

7. *Ibid.*, p. lxxxviii.

secretary of state, the attorney general, the prosecutors of the pleas, the major generals and "all other officers whose appointments are not otherwise provided by law."[8]

The question of whether or not the governor should have the power to veto acts of the legislature was also the subject of much controversy. Proponents of the veto argued that since the governor was the only officer who represented the state as a whole, he should be in a position to protect the people against the tyranny of the majority or against sectional interests. The veto was opposed as being anti-democratic and as leading to the concentration of too much power in the hands of the chief executive. A proposal to incorporate a provision which would give the governor a veto which could be overridden only by the assent of three-fifths of the legislature was defeated by a tie vote of 27 to 27. The delegates finally agreed to include a veto which could be passed over by a mere majority vote.[9]

A third major issue concerned the term of the governor and his ability to succeed himself. The delegates who felt that New Jersey should follow other states in providing that the term of office should be two years, were defeated by a close vote and a three-year term was agreed upon.[10] Not so close was the decision to forbid the governor to be eligible for immediate reelection. A minority, which declared that the inability of the governor to succeed himself would destroy an incentive to make him govern well and would be an unwarranted restriction on the right of the people to return a pouular man to office, were defeated by those who feared that the governor would use his limited appointment power to secure his reelection.[11]

Thus it was that the defects of the Constitution of 1776 were but imperfectly remedied by the Constitutional Convention of 1844. The delegates had learned to trust the legislature less than their predecessors but they had not come to trust the governor much more. Hence, they failed to put the chief executive on an equal footing with the legislative branch.

> In plain truth, the makers of the 1844 constitution could have entertained no such "theory" of the governor as chief executive, because they did not foresee any need for such an officer. As far as they were concerned, the governorship was necessary to give the state a ceremonial head, to complete the formal balance of three powers, and to provide a more responsible agency than the legislature for the appointment of the higher judges and a few unimportant state officers.[12]

The state, with an annual budget of only about $100,000,[13] had not yet begun to perform expensive public services and most administrative functions were still carried on by the courts or local governments.[14]

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8. *Ibid.*, p. lxxviii.
9. *Ibid.*, pp. lxxvi-lxxvii.
10. *Ibid.*, p. 445.
11. *Ibid.*, p. 216.
12. Bebout, *op. cit.*, p. lxxxvii.
13. Charles R. Erdman, Jr., *The New Jersey Constitution—A Barrier to Governmental Efficiency*, (Princeton: 1934), p. 1.
14. *Bebout*, op. cit., p. liv.

This situation changed after the Civil War with the rapid expansion in the number of functions performed by the state government. One after another the state moved into areas such as highway construction and police protection which formerly were handled exclusively by municipal or county governments. In addition, the government at Trenton began to perform new functions for the public welfare such as safeguarding the public health and regulating labor.[15] These new operations of the state government were necessitated partially as a result of the rapid increase in the population and partially as a result of urbanization and industrialization.

Since the framework of the executive branch set forth in 1844 was by no means fashioned as the basis for large scale government, it would have been difficult at best to weld these new functions into an efficient and integrated administration under the leadership of the governor. Political facts complicated the situation even more. Much of the increase in population in the state had been due to an influx of immigrants who, for the most part, settled in the rapidly-expanding manufacturing centers in North Jersey. Due to their large numbers, they were frequently enabled to assure the election of Democratic governors. On the other hand, because of the over-representation of the rural counties in the legislature, the Republicans usually retained control of that branch of the government.[16] As new functions were added to those already performed by the state, the legislators refused to place their control in the hands of a governor of the opposite political party, and instead created independent boards or commissions to perform them.[17] The traditional distrust of centralized government also contributed to the hesitancy of the legislature to provide for the performance of the new governmental business by departments headed by single officials appointed by the governor. In 1942 the Commission on Revision of the New Jersey Constitution reported that:

> numerous state officers, boards and commissions have been established without any concerted plan of synchronizing their terms of office, their appointment to office, or their functions within a properly co-ordinated and responsible executive department. The result is that the office of Governor has been deprived of real managerial functions and executive responsibility has been scattered among executive agencies and filled by legislative authority.[18]

The chief executive was also greatly handicapped by his lack of appointing power. While the Constitution of 1844 did grant him limited power to select officers, it provided that the terms of the attorney general and the secretary of state should be five years. This meant that governors frequently had to serve out most or all of their terms with the aid of subordinate officials who were appointed by the preceding chief executive, frequently of

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15. Clokie, *op. cit.*, Vol. IV, p. 1142.
16. William Starr Myers, *The Story of New Jersey*, Vol. I, (New York: 1945), p. 255.
17. Erdman, *op. cit.*, p. 4.
18. *Report of the Commission on Revision of the New Jersey Constitution*, (Trenton: 1942), p. 17.

another political party. Speaking of these holdover officials, Governor Edison declared that:

> They are often political opponents of his. Some of them count that day lost when they cannot find some way to use the powers of their offices to embarrass him and bring his administration into disrepute.[19]

As for the appointment of officers and members of governing bodies of administrative agencies established by statute, there was no coherent pattern at all. Some were appointed by the governor alone, others by the governor with the consent of the Senate, others by the Assembly and Senate in joint meeting, others by the governor from recommendations furnished by designated organizations.[20] The terms of office of most of these officials overlapped that of the governor.[21] It almost always followed that a governor, upon his inauguration, was unable to surround himself with men upon whom he could count to carry out policies to which he had committed his party at election, and his short term of three years prevented him from ever doing so.

The situation was made even worse by the fact that the governor lacked the removal power. The constitution accorded him none and the officers named therein could be removed only by impeachment. The governor's power to remove statutory officers was dependent on legislative action but in most cases no such power was afforded.[22]

Other features of the governor's office which tended to keep it weak were the lack of an effective veto power, the shortness of the term of office, the prohibition of any governor succeeding himself immediately, and the lack of constitutional power to investigate the conduct of administrative agencies or to require information in writing from subordinates.

Despite this general tendency toward a weak chief executive and a decentralized administration, there were slight movements in the opposite direction. One took place in 1875 when, acting upon the recommendations of a constitutional commission, the legislature submitted twenty-eight separate amendments to the voters, all of which were approved. Several of these imposed restrictions on the legislature and others granted new powers to the chief executive. One, for example, transferred the appointment of common pleas judges from the legislature to the governor. Another provided for giving him the power to veto specific items in appropriations bills, although the veto could be overridden by a mere majority vote in the legislature.[23] Partial attempts to consolidate the conglomeration of agencies, boards and commissions were made on a few occasions after exhaustive surveys. Despite these efforts, for several decades the number of state administrative agencies

19. Governor Charles Edison, *Speeches on the Constitution of New Jersey,* (1943), p. 22.

20. Leon S. Milmed, "State Administrative Organization and Reorganization," *The Governor's Committee on Preparatory Research for the New Jersey Constitutional Convention,* (May 1947), p. 3.

21. *Ibid.,* p. 4.

22. *Ibid.,* p. 4.

23. Bebout, *op. cit.,* p. cii.

usually ranged in the neighborhood of eighty to one hundred.[24] In 1927, a proposed amendment was submitted to the people which would have extended the term of office of the governor from three years to four. This proposal was defeated due to the opposition of the Democratic Party. The amendment would have made the gubernatorial elections coincide with the elections for president, and the Democrats feared that it would have made it more difficult for them to elect their candidates for governor.[25] The powers of the chief executive were sometimes increased slightly by legislative acts such as those of 1931 and 1941 which granted him the authority to investigate state officials.[26]

In the meantime, support had been gathering for a revision of the old constitution which would correct the weaknesses in the executive article. Men like Governor Woodrow Wilson gave impetus to the movement at an early date but it was not until the 1940's that any real action was secured. Governor Edison made the outmoded executive section one of the principal foundations of his campaign to get a new constitution and in 1942 the Commission on Revision reported that:

> Hampered by whimsical laws and inadequate constitutional authority, the governor of New Jersey suffers as an executive from the multiplicity of offices, commissions, boards, bureaus, and other agencies, and from lack of authority to control his most important departments. Our greatest need to which revision is directed, is to strengthen the executive authority.[27]

Both the recommendation of this commission and the ill-fated revision drafted by the New Jersey Legislature in 1944 would have done much to rectify this situation. While there were minor differences between the two, both provided for a much stronger executive. Both would have increased the governor's term to four years (although still keeping him ineligible for immediate reelection), allocated all executive and administrative agencies within a limited number of principal departments, authorized the governor to appoint most of his official family and provided him with strengthened powers of veto and removal.[28]

The decision of the legislature to strengthen the chief executive in the proposed revision of 1944 did not furnish the basis for much of the opposition to that document.[29] A couple of the specific provisions in the executive article, however, did contribute to its defeat. One of these was the provision that the governor should be empowered to appoint department heads. This brought the opposition of the farm organizations for they feared that it

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24. Milmed, *op. cit.*, p. 2; Clokie, *op. cit.*, p. 1140.

25. Erdman, *op. cit.*, p. 21.

26. Abram S. Freeman, "The Governor—Constitutional Power of Investigation and Removal of Officers," *The Governor's Committee on Preparatory Research for the New Jersey Constitutional Convention,* (May 1947), p. 6.

27. Report of the Commission on Revision, *op. cit.*, p. 17.

28. *Ibid.*, p. 16; State of New Jersey, *Revised Constitution for the State*, (1944).

29. Walter Bilder, "Useful Reflections on the Constitutional Election," 67 *New Jersey Law Journal* 397.

would put an end to the existing system whereby they could themselves in actual practice name the members of the Board of Agriculture. In addition, the Democrats opposed the provision whereby Republican Governor Edge would be authorized to appoint a whole new set of justices in the highest courts.

Although the revision movement was temporarily halted by the defeat of the proposed constitution of 1944, the attempt at least served the purpose of being a potent educational force. Numerous speeches had been made by public officials, informational programs had been carried on by civic organizations, especially the New Jersey Committee for Constitutional Revision, and countless articles had appeared in newspapers. The whole campaign, while failing to secure the adoption of the proposed revision, had at least accomplished the worthwhile objective of teaching the people of the state that their governor was powerless to enforce good government and that drastic changes in the outmoded executive article were essential.[30] It was a foregone conclusion, therefore, that when the New Jersey Constitutional Convention of 1947 met, it would greatly augment the powers of the governor. The question as to how far it would go did, nevertheless, turn upon political considerations because, generally speaking, support for a strong executive was much more evident in urban areas than in rural sections. Since the governor was elected by the state as a whole, the urban voters could elect the governor. The rural sections, while admitting the need for changes, were inclined to favor a strong legislature since they could control that body. The Democrats, due to their success in filling the gubernatorial office, were inclined to go along with the urban Republicans in supporting a greatly strengthened chief executive.

The Committee on the Executive which had the primary responsibility of writing the new executive article was rather heavily weighted in favor of the advocates of a strong executive. It included only two delegates, State Senators Farley of Atlantic and Young of Morris, who could be classified as coming from small counties. On the other hand, six members, a majority, were drawn from the three largest counties, Essex, Hudson and Bergen, while the other three members were from medium-sized counties. The chairman of the committee was the able Senator from Bergen, David Van Alstyne.

The committee started out by inviting Governor Driscoll and all living ex-governors to come before it and give their recommendations. Governor Driscoll, former Governors Larson, Hoffman and Moore appeared in person while Edison and Edge sent in briefs. They all agreed that the power of the chief executive should be greatly increased. All would extend his term to four years, increase the strength of his veto, and provide him with extensive appointing power. While they were in substantial agreement on most other matters, one exception stood out most sharply. Former Governor Edge, who had been the state's chief executive from 1944-46 and still had a large following in the state, very vigorously opposed permitting the governor to

30. *Ibid.*, p. 399.

succeed himself immediately in office. He pointed out that with the increased powers which the convention was likely to give to the governor of New Jersey, he "will be by far the most powerful chief executive of any state in the union." Edge then went on to ask,

> Is there any member of this committee who thinks for one minute that a governor, who has served four years with the tremendous amount of power he will have, would have any difficulty nominating himself in a party primary regardless of whether he had been what we call a "good" governor or not?[31]

Such a position was a new one for the former governor. In 1944 when the legislature was drafting the revised constitution, Edge had taken no stand on the issue and was reported to have felt that there were arguments on both sides.[32] But he was governor then. There were those who maintained that his change of heart was due to the fact that he was at odds with the Driscoll Administration in several respects and did not wish to see Driscoll run for a second term in 1949.[33] The other former governors either agreed with Governor Driscoll that the chief executive should be permitted to succeed himself once or advised unlimited succession.

The succession controversy immediately attracted much attention in the state as the first "hot potato" to be handled by the convention. Edge had served notice that he would "go all the way" in seeking to limit chief executives to single four-year terms.[34] Driscoll attempted to remove the personal element by declaring that he would not seek a second term as governor even if the convention should decide to permit it.[35] Now, having read Edge's brief, he immediately sent a letter to the Executive Committee in which he opposed his predecessor's recommendation and reaffirmed his advocacy of allowing succession. This conflict of opinion between two party leaders placed many top figures in the Republican Party, both in and out of the convention, in a rather embarrassing position.[36] Most members of Driscoll's official family were holdovers from Edge's Administration and while two of them sided publicly with Edge, most either supported Driscoll or remained silent.[37]

The governors were not the only ones, however, who made their opinions known to the Committee on the Executive. The Committee for Constitutional Revision, composed of important statewide labor, business, civic and women's organizations had long advocated a strong governor, and it sent several speakers before the committee to uphold its program. Three of its member organizations, the State Federation of Labor, the State C.I.O. Council and the League of Women Voters also sent representatives. These speakers agreed wholeheartedly with the recommendations of the governors. Mr. Edge re-

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31. *Newark Evening News,* July 8, 1947, p. 1.
32. *Ibid.*
33. *Jersey Journal,* July 7, 1947, p. 18.
34. *Daily Home News,* July 7, 1947, p. 1.
35. *Newark Evening News,* July 8, 1947, p. 1.
36. *Trenton Evening Times,* June 22, 1947, p. 1.
37. *Philadelphia Inquirer,* July 7, 1947, p. A.

ceived no support from this group since all advocated that the chief executive be permitted to succeed himself once and the A. F. of L. supported unlimited succession.[38] The only other group of organizations to advise the committee on the major powers of the governor were the farm organizations. They apparently had but one main interest in the executive office and that was to insure the continuance of the existing method of naming members of the State Board of Agriculture and the Secretary of Agriculture. By this system a yearly convention of representatives of state agricultural interests meets and nominates two men who, upon receiving the assent of the governor, become members of the State Board of Agriculture. The Board, in turn, with the concurrence of the governor, nominates the Secretary of Agriculture. Needless to say, the agricultural leaders are very proud of this system by which they can name their own officials and can insure that "this department is kept absolutely divorced from politics."[39] They desired to have the committee include a provision in the executive article which would make possible the continuance of this system.

In the main, the report of the Committee on the Executive conformed to the desires of the proponents of a strong governor. There were three main issues, however, which caused some division in the committee. They were the proposals to strengthen the chief executive's veto, to place a single department head appointed by the governor at the head of each principal department and, of course, the succession question. Although a veto power which would require a two-thirds vote to be overridden was finally adopted by a vote of 7 — 4, it was over the objections of the members from the smaller counties.

There was some support in the committee for a provision that each of the principal departments into which all executive and administrative agencies were to be allocated should be under the control of a single executive to be appointed by the governor. The members who took this position felt that only in this way could the governor be insured real control over the departments. This position was defeated by delegates who pointed out that departments such as Agriculture and Institutions and Agencies which were headed by boards had been undeniably well-run and that in the case of such departments of a "non-political" nature it was better that they be insulated somewhat from the governor. In addition, political expediency dictated the exception of certain departments since the farming and social welfare groups were recognized as potent forces at the polls.[40] The agricultural organizations had already intimated that they would be tempted to oppose the new constitution if their control over the Department of Agriculture were tampered with. As a result, it was agreed that the committee would recommend that the head of each principal department be a single executive *unless otherwise provided by law* and that when a board should be the head of a department,

38. Committee on the Executive, Militia and Civil Officers, *Minutes of Hearings*, New Jersey Constitutional Convention of 1947, mimeographed, p. C3-4-(1-67).

39. *Ibid.*, p. C3-5-5.

40. *Newark Evening News*, July 3, 1947, p. 6.

it might appoint a director *when authorized by law.* However, both the board members and the executive directors had to be approved by the governor.

The problem of succession caused the Committee on the Executive the most trouble. After much discussion, the committee did agree unanimously that the governor should be permitted to succeed himself once.[41] However, the members split 5 to 5 on the motion that the chief executive be allowed to succeed himself indefinitely.[42] It was a question of the members from the large counties lining up against those from the smaller ones. The two Hudson County Democrats on the committee, Mayor Eggers and Judge Hansen, argued strongly for indefinite succession. Being thus deadlocked, there was some talk of recommending that this question be submitted to the people separately in the form of alternatives. Two days later, however, when a vote was taken again, four of those who had backed unlimited succession were now willing to settle for a two-term limit and it was so decided.[43]

The tentative draft proposal of the Executive Committee was greeted with praise. Newspaper comment was overwhelming in its agreement with the article generally, and with the solution of the difficult succession problem in particular. The same was true of the opinions expressed by the witnesses who appeared at the public hearing on the proposal. James Kerney, President of the Committee for Constitutional Revision, declared that "We are in complete agreement with the basic changes you have made."[44] Experts in political science appearing before the committee also complimented the delegates on their proposal. According to Chairman Van Alstyne, only one objection was heard to the committee's decision on succession.[45] That came from Essex County Republican leader Arthur T. Vanderbilt. Referring to the success of the Democratic Party in electing its candidates for governor, he wrote that he could see:

> every possible reason why the proposal . . . would appeal to one political organization. I can see no reason, however, why either the independent voters of the state, or the other political organization, if their memories are sound, should vote for it.[46]

The executive article was the first one to be taken up by the convention as a whole. The rural-urban conflict which had gone on during the committee stage was continued on the floor of the convention. Rural delegates offered amendments to the committee proposal which were calculated to reduce the power of the governor. The first was an amendment which would prohibit the governor from succeeding himself. The main argument of the proponents of this amendment was that with all of the additional powers now accorded to the chief executive, he would have no difficulty in getting re-elected if the constitution were to allow it. Senator Lewis spoke for many when he de-

41. Committee on the Executive, *op. cit.*, p. C3-7-15B.
42. *Ibid.*, p. C3-7-27B.
43. *Ibid.*, p. C3-8-71A.
44. *Ibid.*, p. C3-9-6A.
45. *Daily Home News*, July 31, 1947, p. 1.
46. *Ibid.*, July 28, 1947, p. 1.

clared that he did not find the other new powers granted objectionable just so long as the governor could not "take advantage of these powers in order to succeed himself."[47] Delegates who opposed this amendment argued that the people should not be denied the opportunity of returning to office a governor whose policies they approved. Second, it was pointed out that the governor should have the right to put the record of his four years in office to the test of public sentiment and that the opportunity to succeed himself would serve as an incentive to make him govern well. A third argument was that a chief executive would be able to get better men to serve in his administration when they knew that he, and therefore they, had a chance of remaining in office for eight years. Fourth, it was pointed out that the inability of the governor to succeed himself had not deterred the growth of political machines controlling the state in the past. A fifth argument was that such a limitation on the chief executive was a relic of the old fear of the royal governors and that the modern trend in the states had been toward unlimited succession. Finally, it was mentioned that it ordinarily takes more than one term for a governor to carry out his program and that when everyone knows that he cannot succeed himself, no one pays any attention to him in the latter portion of his term. The amendment to prohibit the chief executive from succeeding himself was defeated by a vote of 53 to 21.[48] Twelve of the twenty-one votes were cast by delegates from small counties and only two were cast by Democrats.[49]

The next attempts by some of the delegates from the small counties to reduce the power of the governor were through amendments seeking to reduce the strength of his veto so that it could be overridden first by a majority vote and second by a vote of three-fifths in each house of the legislature. Many rural delegates favored either of these provisions rather than the committee's recommendation of two-thirds vote because they felt that it would be almost impossible for the small counties to secure a total of 40 out of 60 votes in the House of Assembly to repass bills over the governor's veto. Small county delegates pointed out that the negative votes of the representatives of two or three large counties would be sufficient to prevent such a move.[50] This is especially true since legislators from each large county usually vote in a bloc. Proponents of these amendments also condemned the veto as an encroachment by the executive upon the powers of the legislature.[51] On the other hand, delegates who upheld the strong veto power argued that since the governor was the only official who was elected by the state as a whole, it was necessary that he have a strong veto to protect the state from sectional interests in the legislature. It was admitted that representatives from two coun-

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47. New Jersey Constitutional Convention of 1947, *Proceedings,* mimeographed, p. 10-33B.

48. *Ibid.*, p. 10-51B.

49. Small counties have been considered as those with only one or two representatives in the House of Assembly.

50. *Newark Evening News*, August 10, 1947, p. 14.
New Jersey Constitutional Convention, *op. cit.*, p. 10-58B.

51. *Ibid.*, p. 10-53B.

ties could prevent the legislature from overriding the governor's veto, but it was pointed out that those two counties, Hudson and Essex, contained 35.8 per cent of the state's population.[52] Finally, it was argued that most of those who had appeared before the Executive Committee had asked that the veto be overridden by nothing less than a two-thirds vote and that such a provision was in accord with the federal and most state constitutions.[53] The amendment that the veto be overridden by a majority of the legislature was defeated by a vote of 64 to 8.[54] Five of the eight were delegates from small counties. The vote on the second amendment requiring a three-fifths vote to override was 25 to 48 against the amendment. Seventeen of the twenty-five were small county delegates.[55]

The determination of the convention to give the governor control over the administration is shown by its vote on an amendment providing that single heads of departments should serve only at the pleasure of the governor and hence could be removed by him without cause. Despite the warning by one delegate that the "gubernatorial cup already runneth over," the delegates assented to the amendment by an overwhelming vote of 66 to 3.[56] To the same end, the convention upheld a provision granting the governor the power to enforce compliance with or restrain violations of any constitutional or legislative mandate by appropriate action in the courts.[57] However, they did agree with Mayor Eggers of Jersey City that this power should not be exercised against an officer or agency of the political subdivisions.[58]

With this, the debate on the executive article was concluded. The proposals of the Committee on the Executive had come through practically without a scratch. Far-reaching changes had been made in the executive department as outlined in 1844, and most of them had been accepted without even a struggle. This was a real tribute to the educational program which had been carried on by those who had fought for revision.

The new executive article was very much similar to that which had been refused by the voters in 1944. The new document, however, went even further in providing for a strong executive since the revision of 1944 had forbidden the governor to succeed himself and had permitted the legislature to override his veto by a three-fifths vote.

The major changes in the powers of the governor made by the Constitutional Convention of 1947 are:

1. The governor's term is extended to four years and he is permitted to succeed himself in office once.

2. The governor may call upon the courts to enforce the execution of the laws.

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52. *Ibid.*, p. 10-59B.
53. *Ibid.*, p. 10-(59B-61B).
54. *Ibid.*, p. 10-57B.
55. *Ibid.*, p. 10-64B.
56. *Ibid.*, p. 11-47A.
57. *Ibid.*, p. 12-19.
58. *Ibid.*, p. 12-96.

3. The veto power is strengthened both in regard to general legislation and items in appropriations bills so that the governor's negative can be overridden only by a two-thirds vote of both houses of the legislature. In addition to vetoing items in appropriations bills, the governor can also reduce them. However, the pocket veto is eliminated since forty-five days after the legislative session ends, the law-makers must reconvene to consider vetoed legislation.

4. All of the eighty-odd governmental agencies are required to be allocated by law within not more than twenty principal departments.

5. The governor is given the power to appoint, with the advice and consent of the Senate, the heads of all principal departments, whether they be a single executive or a board or commission. Where a board or commission heading a department is authorized by law to appoint a principal executive officer, such appointment shall require the approval of the governor.

6. The terms of all single department heads are to coincide with that of the governor.

7. The governor's power of removal is strengthened by providing that single executive heads of principal departments serve at his pleasure and by providing that principal executive officers appointed by a board or commission shall be removable by the governor upon notice and opportunity to be heard.

8. The legislature is specifically forbidden to elect or appoint any executive, administrative or judicial officer except the state auditor.

9. The governor has the power to investigate and to require information in writing from executive officers who receive their compensation from the state.

It would certainly seem from the above changes that the convention achieved its purpose, as outlined by the Executive Committee, "to provide for a centralization of authority and power in the office of the governor under reasonable checks and balances, so that the chief executive may be truly responsible to the people for the conduct of the executive branch of the government."

Throughout the campaign for the adoption of the new constitution, scarcely a voice was heard anywhere in the state in opposition to the new powers accorded to the governor. Even those who had previously expressed displeasure gave the document their support. Arthur Vanderbilt announced his support "without reservation"[59] and former Governor Edge, while repeating that certain provisions did not meet with his approval, decided that "The charter contains so many desirable features that I trust the non-partisan and patient efforts of the delegates and the earnest support of the administration will not have been in vain."[60]

The drafting of the executive article saw the convention working at its best. Here a clear-cut set of problems was presented, to all of which expert

59. *Trenton Evening Times*, September 10, 1947, p. 1.
60. *Ibid.*, September 9, 1947, p. 1.

solutions were available. The convention heard all points of view, debated the alternatives thoroughly and then in most cases took the advice of the experts. This could be done because there was sufficient unanimity of opinion, both in and out of the convention, so that little compromise with principle was necessary. What minor concessions to tradition and to expediency were made could hardly be condemned. The issue at no time caused splits along party lines. The divisions were rather based on rural-urban or liberal-conservative conflicts. The adherents of former Governor Edge and the protectors of the small counties were never able to make much of a threat. Thus, while the changes made in the powers of the executive were among the most important and far-reaching agreed to by the convention, they were also among the easiest to make.

Chapter III

THE PROBLEM OF GAMBLING

The problem of gambling generated more public interest than any other issue faced by the constitutional convention. While it is a troublesome question in most states, it is especially so in New Jersey where it has had a very stormy history. One of the reasons for this is rooted in economic matters. The seashore resort business is one of the most important industries in the state and gambling which attracts tourists has always received strong support in certain parts of the commonwealth. A second factor is geographical. Since New Jersey is sandwiched between the populous centers of New York and Philadelphia, there has frequently been pressure to relax the gambling laws in order to entice dollars across the Hudson and Delaware Rivers. A third reason for the intensity of the controversy may be traced to the nature of the state's population. New Jersey's inhabitants, being a highly diversified group, often find themselves in basic disagreement on such matters as gambling which generate highly emotional conflicts.

The two types of gambling which caused the most trouble in the 18th and 19th centuries were lotteries and betting at race tracks. Lotteries were popular even in colonial days and furnished an important source of revenue for various activities. They were used for the purpose of raising money to finance educational institutions and churches, and to erect public buildings and bridges. Although some legislation was usually on the books prohibiting lotteries, the legislature frequently was prevailed upon to make exceptions in the case of worthy enterprises.[1] Although the Constitution of 1776 had no gambling provision, the framers of the Constitution of 1844 inserted a statement which read:

> No lottery shall be authorized by this state, and no ticket in any lottery not authorized by a law of this state shall be bought or sold within the state.[2]

Horse racing had been fashionable in the state ever since pre-revolutionary times and, although betting on the races was prohibited by law, the prohibition was by no means scrupulously observed.[3] The Monmouth track, located near Long Branch, was very popular, and by the 1880's had become one of the most famous in the United States.[4] Since this track brought much trade to the state's seashore resorts, the state officials were not inclined to enforce the state gambling laws during the summer season at Monmouth. In fact, the legislature was prevailed upon to allow little loopholes in the laws

1. William Starr Myers, *The Story of New Jersey*, (New York, 1945), p. 445.
2. New Jersey Constitution of 1844, Art. IV, Sec. VII, Par. 2.
3. Carl R. Woodward, *Ploughs and Politicks*, (New Brunswick, 1941), p. 83.
4. Edwin P. Conklin, "The Last Half Century in New Jersey Politics," *New Jersey, A History*, (Irving S. Kull, ed.), Vol. III, (New York, 1930), p. 976.

to exempt Monmouth. In the 1880's, enterprising men in other parts of the state decided that there was no reason why Monmouth should have a monopoly, and opened tracks which were operated all year around. The heavy gambling which soon became the rule at these new tracks resulted in the withdrawal of all the legislative countenance which had been extended to betting during the mid-summer meets at Monmouth. The Monmouth track was forced to close, but the newer tracks, which had by this time gained control of the local authorities, were able to continue in operation in open defiance of the law without fear of strict enforcement by the local officials.[5] This situation was naturally not to the liking of the people of Monmouth, so in 1890 they succeeded in getting the legislature to pass an act which would take the race track betting booths out of the category of "disorderly houses," which, as the law read, were subject to being raided and the inmates jailed and fined.[6] Hearing of this, opponents of gambling formed an Anti-Race Track League and persauded the governor to veto the bill.[7]

In 1892, the proponents of gambling saw an opportunity to get race track betting legalized. In the election of that year, they devoted their energies to electing a legislature favorable to their interests. They had gained control of the Democratic Party in the state and they realized that the personal popularity in New Jersey of the presidential candidate, Grover Cleveland, would be sufficient to insure the election of whomever that party chose to run for the legislature. As a result,

> Everything that was uncanny in Democratic politics had been tossed into the bosom of the flood, and the legislative salvage of the sweeping tide was as unsavory as it could be. The gangs that controlled the cities, the upstart bosses who ruled counties, the public plotters, schemers and corruptionists, had seen their opportunity, and launched their confederates and henchmen and fellow-conspirators on the stream with the assurance that the drift would safely bear them to port.[8]

Sure enough, an impressive Democratic majority was elected to the state offices, and in 1893 what came to be known as the "Jockey Legislature" or "Horsey Legislature" met and organized. A race track starter was elected Speaker of the Assembly and the law-makers at once set to work to abolish the ban on betting at horse races. Three bills were rushed through the legislature. One permitted the authorities of a county or municipality to license a race track located within its limits, a second provided that race tracks where bets were made did not come under the category of disorderly houses, and a third imposed the lightest of fines upon those who violated the anti-gambling laws then on the statute books. All three of these bills being vetoed by the governor, the legislature quickly re-enacted the bills over his veto before the anti-gambling forces had an opportunity to protest. The owners

5. William E. Sackett, *Modern Battles of Trenton,* (Trenton, 1895), p. 384.

6. *Ibid.,* p. 386.

7. Conklin, *op. cit.,* p. 977.

8. Sackett, *op. cit.,* p. 440.

of the tracks immediately secured licenses from the local authorities so that gambling could be carried on virtually without restraint.[9]

The opponents of gambling, led by Protestant ministers, now began to organize. Anti-gambling leagues were formed all over the state which urged repeal of the laws. In a demonstration held in Trenton, five thousand persons marched to the State House and took possession of the Assembly chamber. Despite their efforts, the law-makers stood fast and refused to make any concessions.[10] In the meantime, the dishonesty at the tracks and the incident immorality and political corruption turned the public more and more against gambling. By the time the 1893 election came up, public resentment over the "Horsey Legislature" had reached tremendous proportions. The Democratic victory of 1892 was nothing compared with the Republican landslide of 1893. Never in the history of the state have the voters so overwhelmingly repudiated their legislators. In the House of Assembly where the entire membership was elected each year, the proportion of 39 Democrats to 21 Republicans was now exactly reversed. In the Senate, where only one-third faced election yearly, there was a change from 16 Democrats and 5 Republicans to 10 Democrats and 11 Republicans.[11]

The "Horsey Legislature" was not to be turned out of power that easily, however. When the day came for the Legislature of 1894 to meet, the Democratic members of the Senate who were holdovers from the previous session decided on a scheme whereby they could refuse to permit the newly-elected Republicans to take their seats. They contended that since the Senate was a continuous body, the holdover members could pass on the eligibility of the new members. Hence, eight of the Democratic holdovers met a bit earlier than usual, organized, and informed the Democratic Governor that the Senate was in session. He turned his annual message over to them. At the usual hour, the Republicans arrived only to find that a committee on credentials was to be named which would examine the credentials of the new men and that they would be barred from taking their seats until such time as the committee cared to make a report. Undaunted, the Republicans went into another room and organized themselves. Thus, "to the amusement of the world at large, Jersey was compelled to sit and twiddle her thumbs while two Senates, one of which had the recognition of the Governor, and the other of the Assembly, argued as to which was the lawful body."[12] Finally after a couple of months, the State Court of Errors and Appeals held that the Senate was not a continuous body and that the new members were entitled to their seats.[13] One of the first acts of the Republican-dominated legislature was to repeal the race track legislation passed the year before.

Not satisfied with mere legislative repeal, the opponents of gambling resolved that a drastic anti-gambling provision should be inserted in the con-

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9. Conklin, *op. cit.*, p. 977-8.
10. Sackett, *op. cit.*, p. 450.
11. Conklin, *op. cit.*, p. 978.
12. *Ibid.*, pp. 979-980.
13. Myers, *op. cit.*, p. 281.

stitution. After being passed by two successive legislatures, a proposed amendment was submitted to the people in 1897. Despite the strong support given to the amendment by the churches, and with neither party daring to oppose it, the provision was still only approved by a scant majority of 801 in a total vote of 140,000.[14] The amendment read:

> No lottery shall be authorized by the legislature or otherwise in this state, and no ticket in any lottery shall be bought or sold within this state, nor shall pool-selling, book-making or gambling of any kind be authorized or allowed within this state, nor shall any gambling device, practice, or game of chance now prohibited by law be legalized or the remedy, penalty, or punishment now provided therefor be in any way diminished.[15]

This provision remained in the constitution until 1939 and, although it was not strictly enforced and in fact some kinds of gambling continued "under cover and on a grand scale,"[16] it did have the effect of dampening the gambling controversy for over three decades. When that controversy again broke out in the 1930's, it became as entangled with the dispute between the major political parties as it had in the 1890's. Thus, if we are to understand the recent history of the gambling controversy, it is imperative that we review the political scene as it existed in 1930.

Mayor Frank Hague of Jersey City, who was also the leader of the Democratic Party in New Jersey, was at the peak of his power in the early 1930's. He had frequently been successful in getting Democrats elected as governor and had even managed to get along pretty well with Republican incumbents. Finally, in 1934, a group of Republicans in Essex County, the largest county in the state, broke with the regular Republicans. Under the name of the Clean Government Group, they charged that collusion existed between the leaders of their party and the Democrats. They were lead by the Rev. Dr. Lester H. Clee, a Newark clergyman and Arthur T. Vanderbilt, who was one of the leading attorneys in the state, the Essex County Republican leader and Dean of the New York University Law School. During the next three years, they openly criticised Republican Governor Hoffman who led the Old Guard Republicans in opposing their movement. They accused the governor of joining forces with Mayor Hague in passing an ill-fated sales tax and of other undercover deals. By 1937, the Clean Government Group had become sufficiently strong to secure the selection of Clee in the Republican primaries as candidate for governor. However, Clee was defeated by his Democratic opponent, A. Harry Moore, in the general election.[17]

In 1937 the Democrats in the legislature had, with the aid of the old guard Republicans succeeded in passing a resolution for a constitutional amendment, which would modify the anti-gambling article inserted in 1897,

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14. Conklin, *op. cit.*, p. 978.

15. New Jersey Constitution of 1844 as amended in 1897, Article IV, Section VII, Paragraph 2.

16. *New York Times*, June 22, 1939, p. 22.

17. *Ibid.*, February 18, 1940, IV, p. 6.

so as to permit pari-mutuel betting at race tracks within the state. This was passed over the opposition of the Clean Government legislators and their allies.[18] The resolution was again passed in 1938,[19] and having received the approval of two successive legislatures, was now to be set before the voters of the state at a special election in 1939.

This election proved to be one of the most hotly-contested in the history of the state. As was inevitable, the question of whether or not pari-mutuel betting should be authorized was completely entangled with the political controversies then raging. Mayor Hague and the Democratic leaders reinforced by the Hoffman Republicans—especially those from resort areas—put themselves at the head of the campaign to secure the adoption of the amendment. To drum up enthusiasim in Hudson County, they held an enormous rally at which 20,000 spectators were entertained by a band, an orchestra, singers, dancers, a fireworks display and speeches. Hague's arguments in favor of the amendment received wide publicity within the state. He declared that New Jersey would gain about $5,000,000 annually from the pari-mutuel machines as the state's portion of the "take." He predicted that the tracks would provide work for 6,000 unemployed, that real estate values would be doubled in communities having tracks, and that business would be stimulated since hundreds of thousands of people would be attracted to the state; in short, pari-mutuel betting would be a panacea for whatever ailed the state.[20] Probably his most telling argument was that if the new revenue which pari-mutuel could bring to the state treasury were not secured, the danger that the state would be forced to impose an income tax "becomes greater and greater."[21]

Leading the opposition to the amendment was Hague's arch-enemy, the Rev. Dr. Clee and the Clean Government Republicans. They incorporated the State Association to Defeat the Race Track Gambling Amendment[22] and rallied to their support ministers, Protestant church groups[23] and such other organizations as the State Chamber of Commerce, the Grange, the New Jersey Federation of Women's Clubs, the New Jersey Council of Parents and Teachers and the League of Women Voters. Clee contended that he wanted to save the state from the recurrence of the race track scandals of the 1890's and that approval of the amendment would "give Mayor Hague new dictatorial powers" and would "place him in complete and absolute control of a new gambling industry." Clee charged that Hague's talk of an income tax was "an attempt to intimidate business men into support" of the amendment.[24] Other opponents of pari-mutuel objected to Hague's inflated predictions of possible revenue for the state and of increases in employment and real estate values. They also declared that business generally with the

18. *Ibid.*, February 25, 1937, p. 8; March 23, 1937, p. 26.
19. *Ibid.*, May 24, 1938, p. 1.
20. *Ibid.*, January 10, 1939, p. 36.
21. *Ibid.*, June 16, 1939, p. 14.
22. *Ibid.*, January 19, 1939, p. 11.
23. In general the Catholic clergy did not take a stand on this issue.
24. *New York Times*, June 18, 1939, p. 9.

exception of restaurants and hotels would suffer from the adoption of the amendment.[25]

Thus the gambling issue was clouded by the personal contest between the Hague and Clee forces. Hague charged that his opponent was using the issue to further his ambition to secure the gubernatorial nomination again in 1940. He further declared that the people backing Clee were the ones who "forced prohibition upon us" and that defeat of the amendment would be used as an "opening wedge for a concerted drive to again impose prohibition upon this country." Clee retorted that "it is the fight of the masses of independent free men and women against the racing crowd and the Jersey City mayor." As the day approached for the referendum, the *New York Times* found that the issue was so confused with politics that the referendum was to be a "veritable preview of the gubernatorial contest of 1940."[26]

Despite the bittnerness of the contest, the vote at the special election was comparatively light. Pari-mutuel betting at race tracks was approved by a vote of roughly 3 to 2. The results were disappointing to the opponents of the amendment even in counties where Hague's influence counted for little. The *New York Times* after studying the returns found that despite the extraneous factors that entered into the contest, the final vote showed that "plainly more people are coming to believe that a social practice which cannot be successfully prohibited should be regulated by the state under the most honest methods that can be devised."[27] The Democrats regarded the referendum as a victory for their party and Mayor Hague couldn't resist the temptation to retort, "It is evident from the result that the people of this state want the church to remain out of politics."[28]

The amendment added to the old gambling provision of the constitution these words:

> It shall be lawful to hold, carry on, and operate in this State race meetings whereat the trotting, running or steeplechase racing of horses only may be conducted between the hours of sunrise and sunset on weekdays only and in duly legalized race tracks, at which the pari-mutuel system of betting shall be permitted.[29]

The hope that the insertion of this provision in the fundamental law of the state would end the gambling controversy for a time was not realized. It was now necessary to set up a state racing commission before tracks could be approved and constructed. This task became entangled in the gubernatorial contest of 1940. The Clean Government Group, still smarting from its defeat at the hands of the coalition of Democrats and Old Guard Republicans in the referendum, again selected its own candidates for governor, Robert C.

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25. *Ibid.*
26. *Ibid.*
27. *Ibid.*, June 22, 1939, p. 22.
28. *Ibid.*, June 21, 1939, p. 1.
29. New Jersey Constitution of 1844, as amended in 1939, Art. IV, Sec. VII, Par. 2.

Hendrickson. Hendrickson soon indicated that he intended to make "Hague-Hoffmanism" a major campaign issue.[30]

This feud manifested itself in the legislature with each side proposing its own plan for a racing commission. The Clean Government organization sponsored a bill which would provide a commission composed of three Republicans and two Democrats to be selected by the Republican Legislature. The Hoffman Republicans and the Democrats favored a bi-partisan commission of four members to be selected by the Democratic Governor. Finally the day came for the Assembly to vote on the two proposals. The Clean Government bill was voted on first and was defeated. Then, rather than go ahead and hold a vote on the Hoffman-Hague plan, the Speaker of the Assembly, a Clean Government man, ordered a recess, went back to his office and staged a four hour sit-down strike. At 1:00 A. M. the Speaker then returned to the Assembly room and declared an adjournment. This move so enraged the Democrats and Hoffman Republicans, who numbered one more than a quorum of thirty-one, that after the Clean Government legislators had left the Assembly room, they elected a temporary speaker and held an all-night rump session. This rump session passed the bill providing for a bi-partisan commission on first and second reading and voted to make its consideration on third and final reading the special order of business at the next meeting, "any rulings by the regular speaker to the contrary notwithstanding."[31] This action assured the passage of the bill, and another round in the gambling bout was ended.

Within the next few years four race tracks at which pari-mutuel betting was authorized were established in the state. They proved very popular and in the year 1947, over 1,700,000 fans bet more than $158,000,000 during the state's racing season. In addition, racing rapidly grew to become an important source of revenue for the state treasury. In 1947 over $7,500,000 accrued to the state to bring the total since 1941 to nearly $23,000,000.[32] This revenue was made even more popular by the fact that at the end of World War II, it was pledged to the retirement of state bonds issued to finance veterans housing projects. During the years from 1941 to 1947 controversies frequently arose concerning what percentages of the "take"[33] and the "breakage"[34] should go to the state. The original division of the ten per cent "take" so that the state received four per cent while the tracks took six per cent was soon deemed unsatisfactory and was changed in 1947. Although there was much objection to the fact that the tracks had been permitted to keep the breakage during the first years of their operation,[35] efforts to alter this situation were partially frustrated by the nimble footwork

30. *New York Times,* February 18, 1940, IV, p. 6.

31. *Ibid.,* February 14, 1940, p. 17.

32. *Atlantic City Evening Union,* December 31, 1947, p. 1.

33. "Take" or "takeout" is the percentage of each dollar bet by race-goers which is kept by the track and the state.

34. "Breakage" is an effort to avoid the trouble of paying off in odd cents by rounding off the figure for convenience.

35. *Atlantic City Evening Union,* April 16, 1947, p. 1.

of friends of the tracks in the legislature.[36] Many protests were heard especially in the spring of 1947 when it was reported by North Jersey newspapers that Senator Frank S. Farley of Atlantic County had received $20,000 from the Atlantic County Racing Association for his successful effort to defeat a legislative measure which would have turned the bulk of the 1947 "breakage" over to the state.[37] One paper voiced the concern of many observers when it reported that:

> After only a few years of operation, the race track interests are so deeply intrenched that they are the masters of the situation. The history of the last legislative session has proved this to be the case.[38]

In the meantime, there had been considerable controversy over types of gambling other than betting at horse races. The courts had ruled that under the gambling provision of the constitution, bingo, raffles and other games of chance were unlawful. After 1939 this put the state in the incongruous position of legalizing horse race betting, and taking a large share of the proceeds therefrom while at the same time prohibiting games of chance sponsored by religious and fraternal organizations for charitable purposes. Naturally the prohibition was honored more in the breach than in the observance, and usually with the full knowledge of law enforcement officials. Nevertheless, many organizations disliked the fact that they were frequently put in the position of being lawbreakers and were most anxious to get the constitutional ban lifted. Protestant ministers, on the other hand, opposed this desire and frequently complained to the local authorities about the violations.

This was the status of the gambling controversy when the New Jersey Constitutional Convention of 1947 set about revising the state's fundamental law. It was obvious that gambling was slated to be one of the most difficult issues with which the delegates would have to deal. From the standpoint of fundamental law, gambling is theoretically not of much importance and, indeed, there are a great many who say that the subject has no place at all in a constitution. The "model" constitutions do not mention it. This did not, however, alter the fact that gambling had long been an important constitutional issue in New Jersey and had been the subject of two of the four amendments to the state's constitution between 1875 and 1947. Thus, whether it was a constitutional matter or not, the situation in New Jersey in 1947 was such, and the feeling connected with the gambling controversy was so intense that the way in which the convention dealt with the issue could very easily have harmful effects on the success of the whole revision effort.

For this reason, the Committee on the Legislative was not overjoyed to hear that it would have to wrestle with the problem. The committee was fairly evenly balanced as between various points of view on gambling. The chairman was the able state senator from Hudson County, Edward J. O'Mara.

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36. *Trenton Evening Times*, June 18, 1947, p. 10.
37. *Atlantic City Evening Union*, April 19, 1947, p. 2.
38. *Trenton Evening Times*, July 29, 1947, p. 6.

As a member of the Hague machine which had sponsored the pari-mutuel amendment and as a delegate from Hudson County where the pressure for bingo playing sponsored by the Catholic Church was great,[39] it was easy to see where the Senator's inclinations would lie. The secretary of the committee, Leon Leonard, was from Atlantic County and shared the lenient attitude toward gambling usually held by officials from that county. On the other hand, the more conservative position on gambling received strong support from other equally able members of the committee, so it was certain that whatever decision the committee arrived at, it was sure to be the result of much thought, discussion and debate.

More public interest was aroused by this issue than any other before the convention. This was proved to the committee by the fact that about thirty witnesses came before it to give their views in the public hearings. Approximately half of the witnesses wanted the gambling provisions liberalized while the others desired that gambling be further restricted or eliminated altogether. The newspapers referred to the controversy as the battle between the Protestant ministers and the veterans, charitable and fraternal organizations.

Most of those who asked to have the gambling provision made more liberal were the representatives of organizations which had been accustomed to making money by holding bingo parties, raffles, carnivals and lotteries. They included such veterans organizations as the Veterans of Foreign Wars, the Disabled American Veterans Department and the Catholic War Vets.[40] Representatives of the Catholic organization, the Holy Name Society, also appeared. They were supported by such fraternal groups as the Loyal Order of the Moose, the Elks and the Fraternal Order of the Eagles. Spokesmen for all of these groups held that gambling is not morally wrong. They insisted that their organizations were dependent upon various forms of gambling as an important source of revenue, and pointed to the fact that their income was often spent for charitable purposes. Often stressed by them was the hypocrisy of allowing such big time gambling as betting at horse races while at the same time prohibiting gambling for charitable purposes. On the whole this group favored having the problem settled by a constitutional provision but were willing to have the question of what provision should be incorporated presented to the people in a referendum.[41]

Most of those who appeared before the committee to oppose this view were Protestant ministers or representatives of Protestant church organizations. On the whole, they took the position that any type of gambling is morally wrong and that it is not any the less bad because it is connected with a church or charity. While they were agreed on what they wanted, they were divided on how it should be attained. Some said that gambling was not a proper subject for inclusion in the constitution and hence the

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39. *Ibid.*, July 17, 1947, p. 1.

40. Other veterans organizations sent resolutions to the committee.

41. Commitee on the Legislative, *Record of Hearings*, p. C2-5-(1B-16B), p. C2-6-(10B-28B).

whole matter should be placed in the hands of the legislature. Others took the position that all gambling should be outlawed by constitutional mandate.[42]

These two types of organizations were the only ones whose views on gambling were presented to the committee. Most of the rest of the interest groups in the state took no stand on the issue. This was true of the New Jersey Committee for Constitutional Revision which was composed of some of the most active groups in the state.[43] The racing associations apparently were confident that their interests would be well safeguarded as they sent no representatives to speak for them and distributed no literature to the delegates. Their overt lobbying activities were restricted to sending free track passes to the delegates.

Both the groups which favored and those which opposed gambling were large and powerful. Since they both took the matter very seriously, the successful passage of the new constitution could be endangered if either side were alienated. It was a difficult decision for the committee to make. There were five main alternatives from which it could choose. First, it could follow the recommendation of many Protestant groups and insert a clause prohibiting all gambling. This, however, would incur the displeasure of friends of the race tracks and of the veterans, Catholic and fraternal organizations which wanted the legalization of games of chance for charitable purposes. The majority of the committee opposed this possibility due to the fact that only eight years before in 1939 the people had shown that they wanted pari-mutuel betting and it did not seem reasonable to disregard this mandate,[44] especially since it was generally agreed that there was no widespread demand for the elimination of pari-mutuel betting.

A second possibility which the committee could adopt was that, as some Protestant groups asked, gambling be left out of the constitution completely. The majority did not accept this because it was felt that since a gambling provision had been inserted in the state's fundamental law for so long, people might think that eliminating it now could be a go-ahead signal for the legislature to legalize all kinds of commercial gambling.[45]

Third, the suggestion of those who favored the legalization of games of chance for charitable purposes could have been acted upon by liberalizing the old gambling clause to permit bingo playing, raffles, etc. The inclusion of this suggestion would have resulted in the opposition to the constitution by many Protestants.

A fourth alternative would have been to retain the present provision. This would have continued a situation which was to say the least, ambiguous.

Fifth, the committee could have adopted some method whereby the convention would not have to make the final decision but could permit the voters to decide this controversial issue.

In view of the sharp conflict between the opposing positions and the realization that any definite stand taken by the convention would incur the

42. *Ibid.*, p. C2-5-(27A-22B), p. C2-6-(7B-33B).
43. *Ibid.*, p. C2-5-43B.
44. Committee on Legislative, *Report*, p. 9.
45. *Ibid.*, p. 9.

displeasure of powerful groups in the state, it is no wonder that the Committee chose the fifth course of action. In its tentative draft of its report to the convention, it proposed that two alternatives be presented to the voters apart from the main body of the constitution, and that at the same time that the people voted on the constitution, they be permitted to approve of either of the two alternatives. The alternative which received the most votes would become the gambling provision of the new constitution. Alternative "A" was the same clause as existed in the old constitution, banning all gambling but pari-mutuel betting. Alternative "B" liberalized the old clause by providing that "the legislature may authorize and regulate the conduct of games of chance by bona fide charitable, religious, fraternal or veterans associations or organizations."[46] Senator O'Mara explained that the committee favored the submission of alternative proposals instead of recommending one clause because "we realized that many thousands of people would cast their votes one way or the other on the question of the adoption of this constitution on the gambling clause alone" and thus a plan was desired "which would allow the people to vote on the constitution on its merits regardless of their views on gambling" and then have a separate referendum on this issue.[47]

The public reception of this tentative proposal of the committee was not very favorable. While almost everyone praised the theory of submitting alternatives to the voters as the most practical solution, there were two main objections which were made to these particular alternatives. The first was that the alternatives as phrased gave the voters the option of voting either for "legalized gambling" or "more legalized gambling."[48] Some political leaders, many newspapers and the Protestant clergy asserted that if alternatives were to be presented, the public should at least be able to vote against all gambling also. The second objection, which was almost unanimously voiced, was that the alternative "B" as worded was too vague. The Attorney General of the State declared that "the adoption of this alternative with the verbiage which is in here now will be nothing more or less than the opening of the doors for wide open, legalized, commercialized gambling." He based this conclusion on the broad interpretation which might be made of the phrases "games of chance" and "bona fide charitable . . . organization."[49]

This unfavorable reaction to the proposal of the committee left that group in a quandary. The storm which their suggestion had created at least re-emphasized the intensity of the feeling on this issue. Governor Driscoll noticed the same thing and he began to fear that the dispute might wreck the revision effort. As a result, he called on both sides in the controversy to "isolate this emotional issue so that it may be considered on its merits in another election." He favored the retention of the old gambling provision for the first year until the voters could be permitted to decide on whether or not they desired to liberalize it by means of a constitutional amendment.[50]

46. Committee on the Legislative. Tentative Draft of Legislative Article, p. 10.
47. Proceedings of the N. J. Constitutional Convention of 1947, mimeographed, p. 14-47.
48. *Newark Evening News*, July 28, 1947, p. 1.
49. Committee on the Legislative, *Record of Hearings*, p. C2-7-(2A-8A).
50. *Atlantic City Evening Union*. July 31, 1947, p. 1.

After much discussion, the committee decided to keep the same two alternatives but with some modifications in alternative "B." It now stated that the legislature could authorize and regulate "specified games of chance" provided that the proceeds should inure entirely to the benefit of the sponsoring organizations. It also provided for local option before the games of chance could lawfully be carried on in any municipality.[51] With this as the final proposal of the committee, the gambling problem was now taken up by the convention as a whole.

As the time drew near for the convention to debate the issue, a new obstacle arose to the submission of alternatives. The act of the legislature which authorized the holding of a convention and set forth its procedure and limitations, stated that:

> The convention may frame a constitution to be submitted as a whole to the people for adoption or rejection; or it may frame one or more parts of a constitution, each to be so submitted to the people that they may adopt or reject any part and, if the convention so determines, it may also frame one or mort parts to be submitted in the alternative in order that the people may adopt any of the alternatives or reject any or all of them.[52]

The Attorney General notified the convention that it was his opinion that according to this part of the act, alternatives might not be submitted to the people unless the proposed constitution were submitted in parts. While there was much disagreement with this interpretation, many delegates did not want to risk having the new constitution become entangled in the courts because of an alleged violation of the enabling act.[53]

The gambling issue received more debate on the floor of the convention than any other single provision of the constitution. The first amendment to be offered to the committee proposal was one introduced by the vice president of the convention, Amos Dixon. This amendment would remove all mention of gambling from the constitution and would leave the whole matter in the hands of the legislature. Mr. Dixon said that his amendment was supported by the State Federation of Churches and the New Jersey farm organizations.[54] Supporters of this amendment were of the opinion that gambling was not a proper subject to be mentioned in the constitution and that the legislature could be trusted to deal with it capably. They opposed the alternatives as proposed by the committee because they felt that with them the people who opposed all gambling had no alternative other than to vote against the constitution as a whole.[55]

There was considerable opposition to this amendment. It is rather amusing to examine the reasons given for this opposition. The Hudson County Democrats, led by Senator O'Mara and Mayor Eggers declared that it was

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51. N. J. Constitutional Convention, Committee Proposal No. 2-2.
52. State of New Jersey, Laws 1947, Ch. 8, Special, State Constitutional Convention, par. 23.
53. Proceedings, *op. cit.*, p. 11-23B.
54. *Ibid.*, p. 11-11B.
55. *Ibid.*, p. 13-(9A-22A).

dangerous to leave this problem exclusively in the hands of the legislature. They pointed to the possibility that there might be a recurrence of the scandals of 1893[56] and Senator O'Mara in an impassioned speech prophesied that if

> the legislature were subjected year in and year out, as they would be, to all kinds of pressure with regard to gambling, there would be nothing to prevent some legislature twenty years from now or thirty years from now from making of New Jersey an American Monte Carlo.[57]

Thus, the reason that they gave for opposing the Dixon Amendment was that the legislature might be too liberal in meeting the demands of the gambling fraternity. Actually, however, they opposed it because they feared that the legislature would not be liberal enough to authorize the charity gambling for which the people of Hudson were "clamoring." Senater Farley of Atlantic County was also at the forefront of the opposition to the Dixon Amendment. Pointing out that the revenue derived from race tracks was pledged to the retirement of veterans housing bonds, he argued that deletion of the constitutional authorization of pari-mutuel would impair the security of the bonds and invite "vexatious litigation."[58] It was obvious to all that what vexed the Senator was that the racing interests would lose their constitutional security if the whole matter were placed in the hands of the legislature. Farley pointed out that "the people who have been bitterly opposing any type of gambling have been the sponsors of this amendment."[59]

The Dixon Amendment was decisively defeated. Its main support came from the delegates from Essex County, where the Clean Government Group had retained its opposition to gambling in any form. This would seem to indicate that they had confidence that the legislature could be counted on to be responsive to the wishes of the opponents of gambling.

In the meantime many delegates were beginning to look with favor on an amendment introduced by Senator Arthur Lewis. This amendment would substitute in place of the two alternates proposed by the committee the phrase:

> No gambling of any kind shall be authorized by the legislature unless the specific kind and control thereof has been heretofore submitted to and authorized by a majority of the votes cast by the people at a general election.[60]

The Lewis Amendment was quickly recognized to be a compromise which could be accepted by all sides. Its proponents pointed out that while not mentioning pari-mutuel betting specifically, it clearly continued constitutional countenance of that form of gambling. It did not itself liberalize the

56. *Ibid.*, p. 13-15A.
57. *Ibid.*, p. 11-14B.
58. *Ibid.*, p. 13-46A.
59. *Ibid.*, p. 13-51A.
60. Amendment No. 15 to Committee Proposal 2-1.

gambling restriction to permit charity gambling so that it would not alienate the Protestant groups. It did, however, provide a method whereby new games of chance could be permitted so that bingo proponents were offered a ray of hope. It complied with the request of the Driscoll Administration to put off the final decision on the controversial issue until another election, and finally got around the confusion and legal difficulties inherent in the committee's plan to submit alternatives. Finally, it met the fears that the legislature could be corrupted by making the people the final judge of how far the gambling laws should be relaxed. Senator Lewis summed up the arguments by saying:

> This proposal would make possible the submission of our proposed constitution to the people without alternatives or controversial provisions relating to the subject of gambling, and without requiring the people to vote for gambling or more gambling, and without fear that the legislature may in itself extend or permit gambling.[61]

Those who had favored the Dixon Amendment now transferred their support to this compromise. The only opposition to it came from some of the Democrats. The Hudson County leaders were not optimistic about the willingness of the legislature even to give the people an opportunity to vote on the legalization of bingo and other games of chance.[62] In addition, they pointed out that while the committee's plan to submit alternatives would permit authorization of bingo in the November election, under the Lewis proposal there would be at best a year's delay before the people would have a chance to vote.[63]

The Lewis Amendment was adopted by a vote of 66-12. All of those who opposed were Democrats. Apparently, however, the Hudson County leaders did not take their defeat too seriously for shortly thereafter Senator O'Mara commented that he was satisfied with the work of the convention thus far.[64] In an attempt at least to get the convention on record as favoring the submission to the people of a proposal for permitting charity gambling, Mayor Eggers proposed a memorial requesting the legislature to consider the enactment of legislation permitting the playing of games of chance or bingo by specified organizations and to submit such legislation to the people at the general election of 1948. This memorial was adopted unanimously by the convention.[65]

This compromise by the convention was generally received with a feeling of relief on all sides that such a difficult issue had been so successfully evaded. It was indeed a clever way to keep from being impaled on either horn of the dilemma. The Protestant Church groups gave their support to the new constitution,[66] as did the Hudson County Democrats and the charity

61. Proceedings, *op. cit.*, p. 14-30.
62. *Ibid.*, p. 14-38.
63. *New York Times,* August 15, 1947, p. 36.
64. *Newark Star Ledger,* August 16, 1947, p. 1.
65. Proceedings, *op. cit.*, p. 15-90.
66. *Newark Evening News*, September 20, 1947, p. 6.

gambling proponents. Nowhere were there any violent objections raised to the new gambling provision.

The fact that this decision by the delegates was just a mere truce in the battle was shown by the declaration by the Essex County Clean Government organization that while supporting the constitution, it would not be bound by the memorials[67] and in particular would oppose legislation permitting a bingo referendum to go on the ballot.[68]

From many different standpoints the treatment of the gambling problem is an interesting study. Undoubtedly there were a great many other issues relative to good government in the state that were far more important. Few of the other issues, however, had so many aspects. To the Protestant churchmen, it was a moral issue which ought to be decided on moral grounds. To others it was an economic matter of how best to finance fraternal organizations, secure the success of the race tracks, furnish revenue for the state and pay off the veterans housing bonds. To others it was simply a matter of logic and fair play that the hyprocrisy of banning charity gambling while permitting horse race betting be eliminated. However, for those who realized the intensity of feeling on the issue and who were primarily interested in the success of the convention—and most of the delegates were—it was above all a political problem. While a constitutional convention is capable of making a decision on most such problems, gambling is one for which it is singularly unsuited. The extent to which gambling should be permitted can not be set forth by any expert opinion. The gambling problem in New Jersey is unique in that nearly every citizen has a firm conviction in connection with it and compromise is difficult as between those who consider it a moral issue and those who do not. A temporary solution can only be found as the result of a contest between the comparative emotions of the people of the state and from the standpoint of the success of the constitutional convention, those emotions should not be brought into play in connection with the referendum over the adoption of a new constitution. Thus it was that the delegates accepted neither the moral arguments of the Protestant ministers, the logical arguments of the realists who decried the hypocrisy of the present gambling situation, nor the economic arguments of the fraternal and church organizations, and instead resorted to the old political technique known as "passing the buck."

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67. *Ibid.*, September 10, 1947, p. 5.

68. *Ibid.*, October 14, 1947, p. 2.

Chapter IV

THE MERGER OF LAW AND EQUITY COURTS

As Governor Driscoll pointed out while the Constitutional Convention of 1947 was in progress, "Historically, the crux of constitutional reform in New Jersey is judicial reform."[1] Another student of New Jersey government, speaking of the state's judicial system declared, "This department has been under indictment more often and for a longer time than either of the others."[2] Despite this fact, reformers never seemed to be able to agree on what alterations should be made in the judicial system. Differences were most apparent when the question of merging law and equity courts was broached.

The controversial problem of what should be done with the Court of Chancery has a longer history than either the problem of the powers of the governor or the gambling question. It really has its origin in medieval England. When the colony of New Jersey was first established, the system of courts that was set up was patterned after the judicial organization of Britain. As a result, a dual system of courts, common law and equity, took root in New Jersey.[3] The actual foundation for the state's judicial system was laid by the first royal governor, Lord Cornbury, in 1704. A chief justice and two associate justices were placed at the top of an organization of courts hearing actions at common law, although appeals might be made to the governor and his council in important cases. An equity court was also recognized as an essential element in the judicial structure. Just as the king of England, and later his chancellor, had given relief upon an equitable basis when the rigidities of common law did not permit justice to be done, so according to Cornbury's ordinance, the governor and any three of the council could constitute a court of chancery to hear and determine causes according to the usage and custom of the English equity courts. In 1770, William Franklin, the last royal governor, constituted himself as chancellor and was empowered to appoint such assistants and to make such rules for the carrying on of equity business as were necessary.[4]

The Constitution of 1776 provided that the governor should continue to be the chancellor and that he and the upper house of the legislature should be the court of appeals in last resort in all causes of law.[5] It was assumed that the old judicial system would remain in effect despite the overthrow of the royal government. The only alteration made by the revolution involved

1. *Daily Home News*, July 31, 1947, p. 1.
2. Charles R. Erdman, Jr., *The New Jersey Constitution—A Barrier to Governmental Efficiency* (Princeton, 1943), p. 14.
3. Hugh McD Clokie, "Political and Constitutional Development," *New Jersey, A History*, ed. by Irving S. Kull (New York, 1930), II, p. 456.
4. Lucius Q. C. Elmer, "The Constitution and Government of the Province and State of New Jersey," *Collections of the New Jersey Historical Society*, III, (Newark, 1872), pp. 8-10.
5. New Jersey Constitution of 1776, Section VIII.

a shift in the personnel of the courts, for the old structure was retained by legislative enactment.[6] In 1799, the legislature vested the court of appeals with appellate jurisdiction over equity causes.[7]

As the state grew, the amount of equity cases increased so rapidly that in 1840, Governor Pennington recommended that due to the increase of business before the Court of Chancery, the constitution should be revised in order to provide for a chancellor who could devote his whole time to equity work.[8] Thus, one of the most urgent duties which the Constitutional Convention of 1844 had to fulfill was to separate the offices of governor and chancellor.[9] Despite the fact that the federal court system had been established without any separate equity courts, the delegates to the convention in New Jersey refused to consider the merger of the Court of Chancery with the law courts. A proposal to permit the same judges to dispense both types of justice received only the vote of its sponsor.[10] Another motion that the legislature might provide for vice-chancellors as the need for them arose or might vest part of the equity powers in law courts was defeated.[11] Hence, the structure of the court system was left substantially as it had been in colonial times. The equity jurisdiction formerly exercised by the governor was placed in the hands of the chancellor and the common law courts were still to culminate in a Supreme Court. Appeals from both were to go to a Court of Errors and Appeals. This court of last resort was to be composed of the justices of the Supreme Court, the chancellor and six lay judges. All were to be appointed by the governor with the advice and consent of the Senate. The term of office of the chancellor was to be seven years in length. He became by virtue of his many duties the chief judicial officer of the state but was barred by the constitution from sitting as a member of the Court of Errors and Appeals during the hearing of any appeal from a decision of the Court of Chancery.[12]

Two years after this revision of the New Jersey Constitution, New York merged its law and equity courts and established a system similar to that of the federal government. New York was followed by many other states.[13] Even in England, where the Court of Chancery originated, the Judicature Act of 1873 provided for the merger of the existing law and equity courts into a single court with law, chancery and appellate divisions. Most of the British dominions followed suit.[14]

These changes did not go unnoticed in New Jersey, where agitation for court reform began a few decades after the adoption of the Constitution of 1844. In 1885, a plan based upon the new English system was introduced

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6. Charles R. Erdman, Jr., *The New Jersey Constitution of 1776* (Princeton, 1929), p. 66.
7. Walter J. Bidder, *The Case Against a Separate Court of Chancery*, p. 14.
8. Erdman, *op. cit.*, p. 122.
9. John Bebout, "Introduction," *Proceedings of the New Jersey State Constitutional Convention of 1844*, ed. by New Jersey Writers' Project, (New Jersey, 1942), p. lxxxviii.
10. New Jersey Writers' Project, *Proceedings of the New Jersey State Constitutional Convention of 1844*, (New Jersey, 1942), p. 239.
11. *Ibid.*, p. 241.
12. New Jersey Constitution of 1844, Article VI, Section II.
13. Special Committee of Essex County Bar Association, *Report Concerning Constitutional Revision of Judicial Article* (1947), p. 15.
14. *Ibid.*, p. 15.

into the legislature but nothing was done. Similar efforts in the 1890's were of no avail.[15] The situation in 1897 was such that one reformer could report, "that no judicial amendments are to be submitted is not because the bar of the state and the legislature that have considered the subject do not believe that the present system needs revising, but because the lawyers have not been able to agree among themselves upon a new plan."[16]

Meanwhile, by 1870 the business of the Court of Chancery had so expanded that the chancellor could no longer conduct it alone. Since the framers of the constitution had decided against giving the legislature the power to create vice-chancellors, it was now decided that this did not preclude the chancellor from appointing such officers if they acted only in his name.[17]

In 1900 the State Bar Association adopted a plan that later developed into an amendment submitted to the voters in 1903. This would have retained the separate Court of Chancery but would have permitted the governor to appoint vice-chancellors who would be able to exercise the jurisdiction of the court in their own right.[18] This amendment was defeated but due more to political considerations than any dislike of the proposal.[19] In 1906, a commission on revision of the judicial system proposed the merger of the law and equity courts into a single court with appellate, law and chancery divisions.[20] In 1909, this plan was submitted to the voters but was defeated along with two amendments when the Democratic Party opposed them.[21] This rejection of the 1909 amendment dealt a blow to the movement for judicial reform from which it did not recover for over thirty years.

During those years, the Court of Chancery grew rapidly to meet the requirements of the increased business. The chancellor found it necessary to appoint ten vice-chancellors to aid him. In 1933 he also appointed twelve advisory masters to handle matrimonial litigation. All of these men were answerable only to the chancellor and served at his pleasure.[22] Technically, they advised him as to what his judgment should be in the cases referred to them; actually, they heard and decided those matters themselves and without juries.[23] In addition to the vice-chancellors and advisory masters the chancellor also possessed a sizable amount of patronage through his authority to name receivers and trustees and to allow counsel fees.[24] In addition to being the head of this important system of equity jurisdiction, the chancellor was also the chief of the Prerogative Court as ordinary or surrogate general

15. William W. Evans, "Constitutional Reform in New Jersey," *University of Newark Law Review,* VII, (December, 1941), pp. 7-8.

16. *Newark Evening News,* August 7, 1947, p. 4.

17. Israel B. Greene, "The Courts of New Jersey—Part III (A) Chancery in a Unified Court System," *The Governor's Committee on Preparatory Research for the New Jersey Constitutional Convention,* (1947), p. 2.

18. Evans, *op. cit.,* p. 10.

19. Alfred C. Clapp, "Chancery as a Section of a Unified Court," 64 *New Jersey Law Journal,* pp. 355.

20. Evans, *op. cit.,* p. 10.

21. Bilder, *op. cit.,* p. 22.

22. Greene, *op. cit.,* p. 3.

23. Joseph Harrison, "The Courts of New Jersey—Part I, The Present System." *The Governor's Committee on Preparatory Research for the New Jersey Constitutional Convention,* (1947), p. 5.

24. Clapp, *op. cit.,* p. 22.

and had important duties as a member of the Court of Errors and Appeals and the Court of Pardons.

The jurisdiction exercised by the Courf of Chancery was extensive. It had the authority to restrain wrongdoers from continuing to commit wrongs for which there was no adequate remedy at law. In this capacity it could issue injunctions, bills to restrain infringements of easements, boundaries and copyrights or to abate nuisances. It had jurisdiction over all matters arising out of marital relationships such as divorce and custody of children. It handled all actions where a number of different persons asserted a right against a specific fund of money such as mortgage and tax foreclosures and liquidation of insolvent corporations. The court also had jurisdiction over trust matters and construction of wills. While this summary gives a general idea of the type of actions handled by the Court of Chancery, it includes only a small portion of them.[25]

The fact that this multitude of important functions was vested in a completely separate court often caused complications. First, the dividing line between the jurisdiction of the law courts and the equity courts was not always clear and, as a result, jurisdictional questions often arose concerning which court a litigant should apply to for relief. Second, while the majority of the disputes could be disposed of in their entirety in either one court or another, cases frequently arose where the full relief to which a litigant was entitled could be secured only by resort to both law and equity courts. An example frequently used to illustrate this situation is the case where a trespasser has damaged a man's property. The latter has a right to two types of relief—compensation for past damages and an injunction against further trespassing. Damages can only be secured from law courts while the injunction can be issued exclusively by the Court of Chancery. Thus the plaintiff must have his case heard by two different courts.

Between the years 1909 and 1941 various plans for the revision of the court system were suggested but none was ever submitted to the voters.[26] In the latter year, however, the reform movement was revitalized. Governor Edison and the New Jersey Committee for Constitutional Convention made the abolition of the separate Court of Chancery one of the planks of their platform of constitutional revision. Dean Rosco Pound of the Harvard Law School, in a much-publicized speech before the New Jersey Bar Association, on "Organization of the Courts," suggested a plan whereby all judicial power would be concentrated in one court and the Court of Chancery would become an equity division of that court.[27] The editor of the New Jersey Law Journal, Alfred C. Clapp, then constructed a proposed judicial article along the lines suggested by Pound.[28]

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25. Committee on the Judiciary, *Proceedings,* Constitutional Convention of 1947, mimeographed, p. C4-9-2A.

26. G. Dixon Speakman, "The Courts of New Jersey—Part III, (C) Law Courts in a Unified Judicial System," *The Governor's Committee on Preparatory Research for the New Jersey Constitutional Convention,* (1947), p. 1.

27. Roscoe Pound, "Organization of Courts," *The Governor's Committee on Preparatory Research for the New Jersey Constitutional Convention,* (1947), p. 10.

28. Evans, *op. cit.,* p. 33.

These suggestions received prominent consideration in connection with the drafting of the proposed new constitution by the Commission on Revision of the New Jersey Constitution in 1942.[29] The report of that Commission stated that

> another matter in which the courts of New Jersey have lagged has been in the tradition of separate courts of law and equity, resulting frequently in resorting to two trial courts to dispose of a single controversy . . . A merger of law and equity in this state would tend to bring our practice in line with that of the Federal courts and other American jurisdictions.[30]

The report of the 1942 Commission and the proposed constitution drafted by the legislature and submitted to the people in 1944 were similar in their treatment of the Court of Chancery. In both, the judicial power was vested in a Supreme Court, a Superior Court and inferior courts to be established by law. The Superior Court, which was to have original general jurisdiction throughout the state in all cases was to be divided into appellate divisions, a law section and an equity section. Each section was permitted to exercise the jurisdiction of the other when the ends of justice required it in order that litigants would no longer be forced to take their case into two courts. The governor was authorized to appoint all judges with the advice and consent of the Senate so that the chancellor would no longer be able to pick his subordinates. The chief justice was authorized annually to assign the judges of the Superior Court to sections of that court and to transfer them as needed.[31]

The bar was divided on the desirability of these proposals. A referendum held within the New Jersey Bar Association showed that 492 members favored the retention of the separate Court of Chancery while 273 members opposed.[32] A committee of the Association which was given the task of examining the 1944 proposal came to the conclusion that the integration of law and equity was carried too far. While it agreed that the Chancery Court should be made a section within a state-wide court of original jurisdiction, it held that the chief justice should not be given the power to transfer judges from one section to another and that judges should be permanently assigned to a section of the court so that they would become specialists in either equity or law.[33]

While the Democrats made the merger of law and equity one of the grounds upon which they fought the revision in the legislature,[34] this was really not one of the major causes of the defeat of the 1944 proposal. In fact, "the desirability of the new judicial system was uncontroverted even

29. Speakman, *op. cit.*, p. 3.
30. Commission on Revision of the New Jersey Constitution, *Report,* (Trenton, 1942), p. 20.
31. *Ibid.*, Article V, Sec. V and VI. *Revised Constitution for the State of New Jersey,* (1944), Art. V, Sec. IV, V, and VI.
32. *Atlantic City Evening Union,* June 10, 1947, p. 1.
33. *New Jersey Law Journal,* January 20, 1944, p. 1.
34. *New York Times,* March 4, 1944, p. 15.

by a single voice or upon a single occasion during the entire pre-election campaign.[35]

Thus it was that after over half a century of agitating for a reorganization of the judicial system, the reformers still had not succeeded. This may seem curious because throughout that whole period, all who were acquainted with the subject, laymen and lawyers alike, were generally agreed that some changes were desirable.[36] This was especially true with respect to the replacement of the old Court of Errors and Appeals, most of whose members, sixteen in number, had important judicial duties elsewhere, by a smaller court whose members had no duties other than their appellate work. There were several reasons why the changes were never made. First, the question of judicial reform frequently became involved with extraneous political issues which had the result of blocking the efforts of the reformers. Second, due to the complexity of the problem, the impetus and the program for reform had to come from within the legal profession. However, the lawyers were badly divided on the question of how radical the revision should be, especially in the matter of the merger of law and equity. Third, since the subject of judicial reform was so technical, the great majority of the citizens never became sufficiently interested in the movement to overcome the minority who, for one reason or another opposed the changes. Finally, since it was necessary for the members of the bench and the bar to take the initiative in bringing about any changes, the laymen often suspected them of selfish motives and refused to support their proposals.

Despite these obstacles, Governor Driscoll listed judicial reform as one of the reasons for urging the calling of a constitutional convention. Declaring that "New Jersey's judicial system probably is the most complicated in the world," the Governor went on record at the outset as favoring the abolition of the separate Court of Chancery.[37] He was vigorously supported in this by Essex County Republican leader Arthur Vanderbilt who, as a former President of the American Bar Association, had much influence in the legal profession. He was also backed by the *New Jersey Law Journal* under the editorship of Alfred C. Clapp. This periodical, which had wide circulation among lawyers of the state featured a series of editorials advocating an integrated judiciary. Nevertheless, the difficulties which had for decades haunted the reform movement, soon began to pop up. The highest judicial officer in the state, Chancellor A. Dayton Oliphant, who in 1944 before he had been named to that high office had favored the merger of law and equity courts,[38] now began to make speeches in which he called for the retention of the Court of Chancery in virtually its old form.[39] To add to the difficulties, former Governor Edge, who as Governor during the 1944 revision had supported integration, now felt that conditions in the Court of Chancery had so

35. Walter Bilder, "Useful Reflections on the Constitutional Convention," 67 *New Jersey Law Journal* 397.

36. Speakman, *op. cit.*, p. 11.

37. *Trenton Evening Times*, May 18, 1947, p. 1.

38. *New Jersey Law Journal*, May 11, 1944, p. 3.

39. *Trenton Evening Times*, June 22, 1947, p. 1.

improved since his appointee, Oliphant, had taken over that now he was less enthusiastic and asked instead for a "proper compromise" of the differences between Oliphant and Vanderbilt.[40] The *New Jersey Law Journal* aptly summed up the situation by saying, "shall our Court of Chancery remain a separate court, or be constituted as part of a unified system—this question promises to be one of the most controversial issues before the forthcoming constitutional convention."[41]

The legal profession was well represented at the convention. In fact, fifty of the eighty-one delegates were lawyers and of them, twenty were or had at one time been judges. Many of them had very definite opinions on what form the new judicial article should take. Thus the choice of delegates for the Committee on the Judiciary was of vital importance. Since the judicial article of a constitution is somewhat more complex than the other sections, the recommendations of the Committee on the Judiciary were bound to have great weight with the rest of the delegates. The Driscoll Administration was determined to overcome the suspicion of the laymen by providing a place for some of them on the Committee. When, prior to the assembling of the convention, the Administration began to sound out the delegates to see who desired to be on what committee, it found that on the one hand, practically all of the fifty lawyers and judges clamored to be placed on the Judiciary Committee while, on the other hand, none of the laymen had the temerity to ask for that assignment. When the Committee appointments were announced and the lawyers learned that only six of their number had been named along with five laymen, there was some acrimony.[42] The inclusion of five laymen was in itself a blow to the hopes of those who favored a separate Court of Chancery because non-lawyers could hardly be expected to be impressed by the traditions of the equity branch but would rather incline toward a desire to simplfy the court structure as much as possible. The Chancery supporters were in for another jolt, for the chairman of the Committee was Frank H. Sommer, Dean Emeritus of the New York University Law School and long-time exponent of a merger of law and equity in New Jersey. Since Sommer's health was not robust, the position of vice-chairman was also important. That was filled by Nathan Jacobs whose agreement with Sommer must have been known to the Administration since Jacobs had served as counsel to the State Department of Alcoholic Beverage Control at the same time that Driscoll was Commissioner.[43] Mrs. Miller, one of the laymen, was also on record as favoring the abolition of the separate Court of Chancery.[44] On the other hand, Walter Winne, President of the New Jersey Bar Association, who was counted among those who would vote to retain an independent Chancery Court[45] was given a place on the Committee as was the former Chief Justice of the New Jersey Supreme Court, Thomas J. Brogan. Brogan was a Demo-

40. *Newark Evening News,* July 2, 1947, p. 6.
41. *New Jersey Law Journal,* May 15, 1947, p. 1.
42. *Newark Evening News,* August 4, 1947, p. 10.
43. *Trenton Evening Times,* June 18, 1947, p. 1.
44. *Sunday Times Advertiser,* June 1, 1947, Sec. II, p. 1.
45. *Trenton Evening Times,* August 3, 1947, p. 1.

crat from Hudson County and was considered as being the spokesman for the Democratic Party in matters concerning the judicial system. It was generally expected that the Democrats would work to retain the independence of the equity court.[46] The only other Democrat on the Committee was a judge from Union County. All things considered, the independent Court of Chancery could expect rough handling from this group.

Although certain members of the legal profession voiced disapproval, the committee appointments were generally greeted with acclaim. The inclusion of so many laymen was especially approved. An editorial in the *New Jersey Law Journal* declared that although "among lawyers it is sometimes felt that only lawyers are qualified to deal with the structure of our courts, the five non-lawyer members of the Committee, in our view, can perform an inestimable service in giving to the Committee and to the convention a really disinterested point of view."[47] The *Newark Evening News* found that "it was the evident intention to bring to this task an objective point of view by plain citizens who, as much as lawyers, have a great stake in efficient and effective courts."[48]

The Committee on the Judiciary labored diligently. The members listened to the testimony given by representatives of bar associations; state-wide organizations such as the Committee for Constitutional Revision, the State C.I.O., the League of Women Voters and the New Jersey Bankers' Association; individual lawyers and judges such as Chief Justice Case and Chancellor Oliphant, legal experts such as Dean Roscoe Pound, Judge Learned Hand of the Federal Circuit Court of Appeals, Dean Harris of the Rutgers Law School and political leaders such as Robert Hendrickson and Governor Driscoll. In all, forty witnesses gave their views on the question of what should be the fate of the Court of Chancery. Seventeen favored retaining it in much its old form while twenty-three advocated some type of integration. All of the first group were lawyers or judges while on the other side, an equal number of members of the legal profession favoring merger were joined by the representatives of the Committee for Constitutional Revision and its constituent organizations such as the C.I.O. and the League of Women Voters.

The highest judges of the state courts were generally in favor of retaining the status quo. It has already been mentioned that Chancellor Oliphant reversed the stand which he had taken in 1944. In discussing this before the Committee, the Chancellor stated that:

> at that time [1944] I had been on the Circuit Court bench for eighteen years and did not know the problem as I now think I do . . . And, of course, we are all entitled to change our minds . . .[49]

Chief Justice Case, speaking for all of the Supreme Court Justices but one, declared that "we are not convinced of the need of abolishing the individ-

46. *Newark Evening News*, August 12, 1947, p. 1.
47. 70 *New Jersey Law Journal* 220.
48. *Newark Evening News*, June 19, 1947, p. 10.
49. Committee on the Judiciary, *op. cit.*, p. C4-9-1A.

uality of the Court of Chancery, which has added such lustre to the interpretation and application of the principles of equity."[50]

Seven of the thirteen bar associations which either appeared before or communicated with the Committee opposed any changes in the Court of Chancery. Only three favored integration while the others were badly divided. The two largest, the New Jersey Bar Association and the Essex County Bar Association, were in the latter category. In the case of Essex, a committee appointed to consider the question made a carefully thought out report favoring the transferral of the Court of Chancery to an equity division of a unified court with the judges subject to assignment and transferral by the chief justice.[51] The Committee on Law Reform of the New Jersey State Bar Association advocated a similar plan but preferred that the judges be permanently assigned to either the equity or law division.[52] After a lengthy debate over this proposal, a referendum of the membership of the state association was authorized.[53] In a choice between retaining a separate Court of Chancery and the proposal of the Committee on Law Reform, the membership split 583 to 549.[54]

The seven bar associations, the judges and the lawyers that advocated the retention of the status quo were criticized rather caustically; frequently by other members of the legal profession. This was in part induced by the arbitrary attitude of some Chancery supporters who were not above threats to the effect that "it is entirely possible that the Ocean County lawyers will go out as a group and endeavor to prevent the adoption of this constitution if the abolition of the Court of Chancery is rammed down their throats."[55] The charge that some lawyers prefer a complicated court structure was induced by statements similar to these: "As far as the laity not understanding our court procedure, that's understandable because the legal profession is a profession and they're not expected to understand it,"[56] and

> There has been some talk particularly by lay members or rather lay representatives before the Committee about the great expense of litigation. I think the law members of this Committee, and the lawyers who have testified here this morning, will agree with me that it makes very little difference just what system of justice is adopted . . . the lawyers . . . have to live.[57]

In connection with the conservatism of the Chancery supporters, such as that expressed by the Chief Justice when he said, "We know what we have, but we don't know just what we shall get in the way of errors and mishaps,"[58] one witness declared:

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50. *Ibid.*, p. C4-4-32A.
51. *Ibid.*, p. C4-3-6A.
52. *Ibid.*, p. C4-2-14B.
53. 70 *New Jersey Law Journal* 201.
54. Committee on the Judiciary, *op. cit.*, p. C4-Supp.-26.
55. *Ibid.*, p. C4-12-60A.
56. *Ibid.*, p. C-4-6-1B.
57. *Ibid.*, p. C4-12-27A.
58. *Ibid.*, p. C4-4-32B.

> Lawyers are by nature and training conservatives. Those who come before you and urge the retention of the Court of Chancery . . . are responding almost automatically to an affection that has been bred through years of practice in the Court of Chancery . . . It doesn't affect him as a lawyer to have to go from the Court of Chancery to one of the law courts and from one of the law courts to the Court of Chancery in conducting litigation to its ultimate end. It does affect the litigant . . . Therefore, I say, this is a lay revolution against the lawyers.[59]

The Dean of Rutgers Law School declared:

> I don't put much faith in judges or lawyers. Every time you have to go back to another court, it is so much money in the lawyer's pocket. They like to play ring-around-the-rosy with the litigant's money and the taxpayer's money.[60]

An indication that the bar associations should not be taken too seriously was given by one prominent lawyer who remarked that:

> I have been chagrined and disappointed by the actions of a number of our local bar associations, county bar associations which have appeared before this Committee and spoken against an integrated court and for an entirely separate Court of Chancery. I know of my own knowledge that in some cases, at least, this decision was made by a close vote of the members of the bar in that county and in a number of cases, without any chance for discussion and comment by those who might have thought otherwise.[61]

From the statements made by some of the witnesses, it would seem that the older members of the bar were the backbone of the conservative group while the younger members tended to favor a unified court.[62] As on speaker remarked, "many lawyers, particularly the old-time practitioners, who are comfortably established in their positions in the profession, say it would be a difficult thing to start from scratch and learn a new system."[63]

The arguments of the witnesses who favored the abolition of the separate Court of Chancery were very capably summed up by this statement:

> The maintenance of a separate equity system results, in many instances, in delay, piecemeal litigation, jurisdictional disputes, and duplication of effort and expense. It also encourages shunting cases from court to court until the parties are exhausted, and sometimes, the rights of the parties are lost in the shuffle.[64]

Witness after witness placed before the Committee lists of cases where the litigants had to drag their suits through court after court in order to get the justice to which they were entitled and, of course, then only after costly delays.

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59. *Ibid.*, p. C4-12-66A.
60. *Ibid.*, p. C4-5-33.
61. *Ibid.*, p. C4-12-44A.
62. *Ibid.*, p C4-3-4B ; C4-12-52.
63. *Ibid.*, p. C4-6-33.
64. 70 *New Jersey Law Journal* 157.

The difficulty encountered in one category of such cases was usually referred to as piecemeal litigation. One judge called it "double litigation" but added, "it runs into double, triple, quadruple, quintuple, sextuple and septuple litigation."[65] This situation came as a result of a divided system where the courts of law, on one hand, were forbidden to grant equitable relief, and the Court of Chancery, on the other hand, was unable to handle questions of law. The result of this was that the litigant could not get full justice in the first court so he would be forced to resort to another to supplement the relief granted by the first. Lawyers testified that in such cases they often advised their clients to take either equitable or legal relief to avoid all of the difficulty of instituting two separate actions. Speakers favoring the integration of law and equity courts pointed out that only by such a merger could a litigant be able to take his case to one court and get the full relief to which he was entitled.

Another type of cases, closely related to the first, involved problems of jurisdiction. Since the dividing line between law and equity was not clear, litigants often failed to obtain relief because they instituted proceedings in the wrong court. Even the most experienced lawyers admitted that sometimes they would be unable to determine whether a case belonged in law or equity. But worst of all, often the judges themselves were in the same predicament. In a survey of the latest volume of the New Jersey Equity Reports, the Committee of the Essex County Bar Association found that "one out of every three of these reported cases illustrates the persistent, recurring and ineradicable conflict between the Court of Chancery and the various law courts."[66] Those who urged the abolition of the separate Court of Chancery pointed out that such jurisdictional controversies could be eliminated in a unified court.

They also stressed the saving in judicial expense and in manpower. They pointed out that if the Court of Chancery was eliminated as a separate unit, there would be a saving in the amount of clerical work and red tape. Also, if the cases of jurisdictional disputes and the instances of piecemeal litigation could be eliminated, it might permit a reduction in the number of judges. With all judges being members of a single court, they could be moved around as needed so that one judge would not be overworked while another had nothing to do. In addition, if the chief justice were permitted to transfer judges, he could see that they did the type of work for which they were best suited.

The Chancery opponents pointed out that the trend for over a century had been away from the separate equity court until in 1947, New Jersey, Delaware and Tennessee were the only states to retain this institution. After all, they said, the states which changed over must have been satisfied or they would have changed back again.

Those who desired to merge the courts favored removing the chancellor's appointing power and most of them advocated permitting the governor to make all judicial appointments with the advice and consent of the Senate.

65. Committee on the Judiciary, *op. cit.*, p. C4-4-36.
66. Special Committee of Essex County Bar Association, *op. cit.*, p. 24.

they charged that there was no reason why equity judges should be named by the chancellor and declared that it was decidedly undemocratic.

The argument most frequently heard from those who wished the retention of the separate Court of Chancery was that when law and equity were administered by different judges, those judges could become specialists in one or the other. They often compared law to medicine where doctors by specializing became very proficient at one thing, and declared that judges could not be expected to handle all types of cases and do it well.

Judge Learned Hand stoutly opposed this view by remarking, "I don't think it is beyond the comprehension of a single individual of ordinary competence to be familiar with both sides."[67] Other proponents of integration pointed out that under a system where the Court of Chancery is made an equity division of a unified court, it is still possible to get the benefits of specialization since the chief justice would naturally keep those competent at administering equity in the equity division. It was also shown that lawyers generally handle cases in both types of courts so that there was no reason why judges could not preside over both. Also mentioned was the fact that men who became Chancery judges were not specialists in equity prior to their selection but were usually law judges or lawyers. In connection with this, members of the committee asked those who declared that it took a long period of specialization before a man could become a good equity judge, just how long it did take. Needless to say, they never got an answer.[68]

A second argument of the Chancery adherents ran along much the same lines as the first. It started with an assertion similar to that made by the Chancellor: "I am firmly convinced that we have in this state the finest and best system of equity jurisprudence in this country, perhaps in the whole world."[69] It was then claimed that this was true only because equity was administered separately, and that if it were administered as part of an integrated court, it would result in the "deterioration of equity jurisprudence."[70] and the reputation of New Jersey equity would be impaired.

Dean Roscoe Pound answered this contention by stating,

> Now, I taught equity for a great many years, and the New Jersey Equity Reports were a joy forever to a teacher of equity . . . I should feel very badly if I thought that any judicial organization which you might work out here would result in any diminution of that splendid development of equity that is going on here . . . but, after all, I don't believe it is necessary to have a separate, independent court of equity to achieve that.[71]

In a more humorous vein, Judge Hand remarked that "by calling a man a law judge you don't give him arteriosclerosis and by calling him an equity judge you don't make him one of the flying disks which people see flying around."[72]

67. Committee on the Judiciary, *op. cit.*, p. C4-9-36A.
68. *Ibid.*, p. C4-11-24A, C4-9-28A.
69. *Ibid.*, p. C4-9-3A.
70. *Ibid.*, p. C4-9-9A.
71. *Ibid.*, p. C4-4-12.
72. *Ibid.*, p. C4-9-34A.

Other witnesses pointed out that, after all, the main goal was not to insure the renown of New Jersey equity but to give swift and inexpensive justice to the litigants since "law is made for the man, not man for the law." It was also mentioned that the equity decisions for which New Jersey was famous were not written by equity specialists but instead were penned by members of the Court of Errors and Appeals, which is composed entirely of law judges—since the Chancellor is required to retire whenever an equity appeal is being considered. Finally, the witnesses were of the opinion that New Jersey equity had been great, not because it was separated from law, but because the state had been blessed with some very able justices.

The appointing power of the chancellor was justified on several different grounds. First, it was alleged that this method of appointment kept the court out of politics. Witnesses also asserted that the chancellor would know better than anyone else who would make a good equity judge. A final argument was to the effect that:

> the Court of Chancery is a court of conscience and obviously that conscience must reside in one person, the chancellor. He must have absolute control over his vice-chancellors and they must be responsible to him alone.[73]

Otherwise, it was feared that there would no longer be a uniformity of decisions.

Opposing the continuation of the appointing power of the chancellor were those who felt that it was undemocratic. The representative of the C.I.O. declared that, "I don't believe there is another judicial officer in the country with the personal power of the chancellor, or another judicial officer in the country so far removed from the people."[74] As far as the arguments that the court was the conscience of the chancellor were concerned, it was contended that the conception was "pure nonsense" and was a carry-over from the Middle Ages when the conscience of the chancellor did govern. Now, it was argued, equity is based on a settled body of principles or customs.[75] Even if the chancellor did desire to coordinate the decisions of the judges under his direction, it was pointed out that he was so burdened with administrative detail that the old practice of reviewing opinions rendered by the vice-chancellors no longer prevailed as a rule,[76] and that, therefore, equity decisions were the individual consciences of advisory masters, vice-chancellors and special masters regulated by precedent and principle.[77] One witness declared that he knew of someone who had seen the conscience of the chancellor. This lucky person

> came down to the Chancery office a little early and there in the office outside the Chancellor's office was a beautiful blond lady and she had piled up on one side about that high (indicating) all the letters sent in

73. *Ibid.*, p. C4-9-9A.
74. *Ibid.*, p. C4-8-17A.
75. *Ibid.*, p. C4-12-2B.
76. *Ibid.*, p. C4-11-30.
77. *Ibid.*, p. C4-12-4B.

> in the mail by the Vice Chancellors, the Advisory Masters, and the Special Masters all ready for the Chancellor's signature. The Chancellor's signature was supplied by a great big rubber stamp and a right hand. She was going this way (indicating the use of a hand stamp) right through that pile of letters. "There, gentlemen," he said, "is the conscience of the court at work."[78]

The witness whose testimony in favor of the retention of the Court of Chancery created the most attention was Chancellor A. Dayton Oliphant. His testimony was made even more interesting by the fact that he was followed immediately by Judge Learned Hand. Oliphant expressed the fear that:

> there are going to be any number of technical difficulties, let alone legal difficulties in the change over. If there is any change, we're going to have to, somebody is going to have to, rewrite half of the statutes, it's going to take months to formulate new rules, and after you get the rules, you're going to spend thousands of dollars and many years in determining what they're all about.[79]

Judge Hand was of the opinion that while it might take the state some time to get accustomed to a new system, "I should say that was one of the penalties of your long delay."[80]

Oliphant declared that in judicial systems where law and equity were fused, there was as a result a tendency toward the abolition of the right to trial by jury.[81] Since the Chancellor intimated that this might be the case in the federal courts, Hand was quick to remark that:

> the criticism is not quite fair that under the federal rules you are in danger of losing your jury. I felt perhaps sensitive when I heard the Chancellor say that we might be insensitive to the right of trial by jury.[82]

The statement by the Chancellor which caused the most criticism was one which was apparently made in an effort to gain the support of the Catholic Church:

> Unfortunately I have discovered that many who would demolish the Court of Chancery are actuated by the desire to make divorces more expeditiously and inexpensively obtainable. They feel that marriage is nothing more than a convenient compact entered in the public records and that the dissolution of marriages ought to be delegated somewhere other than to a court which has such strict supervision over them.[83]

This accusation was answered immediately by James Kerney, Jr., President of the Committee for Constitutional Revision in a letter to the Chairman of the Judicial Committee:

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78. *Ibid.*, p. C4-12-4B.
79. *Ibid.*, p. C4-9-24A.
80. *Ibid.*, p. C4-9-36A.
81. *Ibid.*, p. C4-9-16A; C4-9-25A.
82. *Ibid.*, p. C4-9-35A.
83. *Ibid.*, p. C4-9-7A.

> The Committee for Constitutional Revision deeply regrets that some advocates of the Chancery Court saw fit to raise issues which are not germane to the discussions of an integrated court. No one has testified to the need for any change in the principles or practices of our divorce courts except advocates of the Chancery Court who charged that an integrated court was proposed as an effort to "liberalize" divorces. To the best of our knowledge, none of the advocates of an integrated court system propose anything but complete retention of the present divorce practices in the new court structure. We are confident that you and the members of your committee will not be swayed by any effort to raise religious questions for demagogic purposes.[84]

The Judiciary Committee had its choice among five main alternatives in deciding the fate of the Chancery Court. First, it could have provided for complete integration so that law and equity would not even be administered by different divisions of the same court. This is the system used in the Federal courts and in New York where the same judges handle all types of cases. The attitude of the Committee on this was probably summed up by one witness when he said, "there is such a strong tradition for the Court of Chancery in the State of New Jersey, that in my judgment it would be well to maintain a separate equitable branch."[85] A second alternative would have been to provide for a single court with equity and law divisions, but permitting the chief justice to transfer judges from one division to another and permitting each division to exercise the powers and functions of the other when the ends of justice required it. This was the provision adopted in 1942 and in 1944, and was finally accepted by the Committee. A third alternative was similar to the second except that the judges would be permanently assigned to one division. This was the proposal of the Committee on Law Reform of the New Jersey Bar Association. A fourth alternative would have kept a separate Court of Chancery but permitted the governor to appoint the judges and would have allowed the Court of Chancery to exercise jurisdiction over law questions and the law courts to administer equity when necessary to the completion of a case. The fifth alternative would have been to retain the Chancery Court without change.

All of the members of the Judiciary Committee signed the report in which the second alternative was accepted. Mr. Walter Winne, who had started his work on the Committee as a proponent of the separate Court of Chancery, reported that he found no support for that position among the rest of the members and as the hearings progressed, he himself changed his mind.[86] The Democratic spokesman, former Chief Justice Brogan, seemed to lose touch with the rest of the Committee toward the end of the hearings[87] and it was known that he preferred the third alternative whereby judges would be permanently assigned to either the equity or law division.[88]

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84. *Ibid.*, p. C4-Supp.-35.
85. *Ibid.*, p. C4-4-53B.
86. New Jersey Constitutional Convention, *Proceedings*, (1947), mimeographed, p. 15-11B.
87. *Newark Evening News*, July 31, 1947, p. 17.
88. New Jersey Constitutional Convention, *op. cit.*, p. 16-4A.

At the public hearings held on the Committee's report, the advocates of integration praised the decision, while the proponents of a separate Chancery found much to criticize. No new material was introduced. The press generally favored the report.

As the time came for the convention as a whole to consider the judicial article, the problem of the separate Court of Chancery was settled. Not a member of the Committee had given a separate court his support and no amendments were offered on the floor of the convention which would even bring the problem under discussion. Chancery supporters had been looking to the Democrats under the leadership of Chief Justice Brogan to make such an amendment but even he disappointed them. Instead, he introduced an entirely new judicial article, thirteen pages in length, which, as far as Chancery was concerned, only provided that judges should be permanently assigned to a division of a unified court and made a few changes in nomenclature. This completely extinguished the hope of the proponents of the separate equity court.

As the debate on the judicial article proposed by the Committee began, Chancellor Oliphant sent a letter to the Committee in which, after admitting defeat, he made a few minor suggestions and then, reversing himself for the second time, gave his blessing to the Committee report by saying that "the article as now proposed will, I believe, give the people of this state a workable, efficient court system."[89] The Chancellor found that he still couldn't please everyone for former U. S. Senator John Milton wisecracked that:

> one of these judicial gentlemen occupies a unique distinction. I may be wrong once with respect to this judicial article; he's been wrong twice. In the mind of the Committee, he was wrong when he came before it to advocate the retention of the Court of Chancery and in the minds of Chief Justice Brogan, his associates, including me, he's wrong when he now advocates a unified court.[90]

The convention debated the Brogan amendment, which Dean Sommer referred to as "a sadly belated minority report,"[91] for almost an entire day. The main issue involved was whether the judges of the unified court should be permanently assigned to the divisions of that court. The arguments pro and con were largely repetitious of those which had been heard before the Committee on the Judiciary. The proponents of the amendment declared that if the chief justice were permitted to transfer the judges as he saw fit, the judges could not specialize and there would result a deterioration of equity. It was feared that chief justices might be chosen who would make "indiscriminate assignments"[92] and would rotate the judges to serve certain interests.[93]

Those who supported the Committee proposal scoffed at the possibility

89. *Daily Home News*, August 15, p. 1.
90. New Jersey Constitutional Convention, *op. cit.*, p. 15-30B.
91. *Ibid.*, p. 15-33B.
92. *Ibid.*, p. 15-10A.
93. *Ibid.*, p. 15-35B.

that a chief justice would assign indiscriminately and held that it would be to his best interest to place judges where they would do their best work. It was pointed out that it violated principles of good administration to say that a judge would be forced to stay where he was first assigned, whether qualified for that work or not.[94] Finally, it was argued that one of the goals of the revision was to create a flexible judicial structure, and that permanent assignment was the opposite of flexibility.

Those delegates who still favored the retention of the separate Chancery Court, offered their support to the Brogan amendment as the next best thing. A few of them took some parting shots at the reformers. An example is this statement by former Senator Milton:

> I hope in a very few minutes and in a very simple way to debunk this movement for judicial reform which is the child of propaganda and nothing else.
>
> My own view and concept is that the people at large have little if any interest in this alleged demand for court reform. I don't think they care a hoot whether there is a separate Court of Chancery or whether equitable principles are to be administered by a uniform court.[95]

In answer to this, Dean Sommer declared that:

> I am not a victim of propaganda nor are the members of this Committee the victims of propaganda. I want to state that the reference to debunking the movement for judicial reform which is said to proceed from propaganda is wholly without foundation.[96]

Apparently the convention agreed with him for the Brogan amendment was defeated by a vote of 63-15. Twelve of the fifteen were Democrats and the other three were Republicans from small counties.[97] Another amendment which was intended to provide for permanent assignment of judges was defeated by a voice vote.[98]

As finally adopted, the judiciary article provided for the establishment below the new Supreme Court of a Superior Court with original general jurisdiction throughout the state in all causes. That court was to have law, chancery and appellate divisions to which judges were to be assigned by the chief justice, subject to being transferred by him. The law and chancery divisions were each to exercise the powers and functions of the other so that all matters in controversy between the parties might be completely determined.

Once the decision was made, little opposition was heard to the new judicial article. The Democrats fell in line and Chief Justice Brogan described the new system as "overwhelmingly superior" to the present one.[99] The

94. *Ibid.*, p. 15-66A.
95. *Ibid.*, p. 15-22B.
96. *Ibid.*, p. 15-34B.
97. *Ibid.*, p. 15-40B.
98. *Ibid.*, p. 16-11A.
99. *Newark Evening News*, October 29, 1947, p. 10.

integration undoubtedly went further than the Democrats would have liked but, as in the case of many others, the new constitution offered them too much for them to oppose it on this basis.

It was in this way that the long fight by the reformers to abolish the separate Court of Chancery was finally won. The enemies had been the conservatism of certain portions of the legal profession, the suspicion and indifference of the laymen, the constant pressure of those judges and lawyers with vested interests in the old system and, of course, tradition. Although merger of the law and equity courts had proven to be a highly political issue, the reformers found that compromise was virtually unnecessary. Although the Chancery supporters were a vocal group, they were few in number and were unable to enlist outside support. The enemies of reform went down fighting but seventy-five-year-old Dean Sommer, a veteran of many campaigns for reform, sagely advised the delegates to:

> have no fear of the dire results that are prophesied from the proposed changes in the judicial structure. In every step that I have taken in judicial reform, I have found the same dire prophesies coming from certain members of the bar, and those phophesies have not proved verities.[100]

100. New Jersey Constitutional Convention, *op. cit.*, p. 15-34B.

Chapter V

AMENDMENT AND REVISION

The constitutional history of New Jersey affords a remarkable example of Thomas Jefferson's statement that:

> Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment.

In fact, the development of that concept in the state can be clearly traced in the years immediately following the Revolutionary War. The hesitancy of the people of New Jersey in more recent times to amend or revise their fundamental law is evidence of the continuing validity of that principal. The following account of the subject of amendment and revision by the Constitutional Convention of 1947 will be enriched by an examination of the historical background of that controversial issue in New Jersey.

Apparently it was generally agreed within the state at the time that New Jersey won her independence that the legislature itself, by an ordinary act, could alter the constitution. The state's first constitution was written by a temporary legislature, or, to be more precise, by the Fourth Provincial Congress of New Jersey, which had been elected in 1776 to replace the Royal Assembly; and not for the particular purpose of framing an instrument of government.[1] Nevertheless, the Provincial Congress assumed its right to do so for, in recognition of the request of the Continental Congress that each of the colonies "adopt for itself such government as should secure its own happiness and safety and the well-being of America in general,"[2] in compliance with petitions from the people, together with the sense of the body itself as to the necessity of the measure, it appointed a committee of 10 "to prepare the draught of a constitution." After deliberating for two days, the committee presented a proposed draft to the Congress. This was considered by the assembly, sitting as a committee of the whole, for the better part of two and one-half days, and then was finally adopted after additional debate lasting one day.[3] Thus, on July 2, 1776, this Provincial Congress, elected by a minority of the people,[4] formally adopted a constitution by a vote of twenty-six to nine with only thirty-five of the original seventy-five members present.[5] A few days later, it was proclaimed throughout the state in conjunction with the Declaration of Independence and was apparently greeted with acclama-

1. Isaac S. Mulford. *A Civil and Political History of New Jersey,* (Camden, 1851), p. 415.
2. Francis B. Lee, *New Jersey as a Colony and as a State,* (New York, 1902), II, p. 409.
3. Hugh McD. Clokie, "Political and Constitutional Development," *New Jersey, A History,* ed. by Irving S. Kull, (New York, 1930), II, p. 141.
4. Lee, *op. cit.,* p. 364.
5. Clokie, *op. cit.,* p. 441.

tion.[6] This failure to submit the document to the people for their approval was consistent with the practice of the other states at that time, for not one of the original state constitutions was so submitted.[7]

Since the charter was drawn up in great haste and inasmuch as its framers had little to rely on in the form of precedent except their own experience, it is understandable that as little change was made from the colonial form of government as was consistent with changed conditions.[8] The constitution of 1776 contained no bill of rights and no provision for amendment. The only restrictions on the legislature were enumerated in the oath which members were required to take, in which they promised to refrain from any vote "injurious to the public welfare" or annulling the specific provisions guaranteeing religious liberty, trial by jury and annual election of legislators.[9] It was generally accepted that the wording of this oath implied that the legislators could alter the frame of government in every other respect.[10] The colonists were familiar with the British theory of the omnipotence of the Parliament and it was argued that when the sovereignty of England had been cast off, the legislature replaced the Parliament as the unfettered lawmaker.[11] It would seem that the framers of the constitution of 1776 put their faith in annual elections as the guarantor of their liberties, rather than in any specific limitations upon the legislative power as set forth in the fundamental law.[12] Thus by the terms of the constitution, the only restriction upon the power of the legislature was the moral sanction of an oath.

On the other hand, the people of New Jersey had long been accustomed to a body of fundamental law which the colonial legislatures could not alter. The "Concessions" of 1664-1665, the Charter of West Jersey (1676) and the Constitution of East Jersey (1683) all restricted the scope of the power of the elected representatives of the people. In addition, the "Commissions" and "Instructions" issued to the various royal governors between 1702 and 1776 contained restraints upon the colonial assembly.[13]

Resolution of the question of the "Supremacy of law" versus "legislative absolutism" came about over the issue as to the binding power of the legislator's oath. The test came in 1780 when in the case of *Holmes* v. *Walton*, the New Jersey Supreme Court held that an act of the legislature, which provided that persons caught trading with the enemy could be tried by a jury of six men, was invalid. The reason given was that it violated the provisions of the oath requiring legislators not to abridge the right of trial by jury. While there was some opposition to the decision, a newly-elected legislature ratified the action of the court by passing an act requiring a jury of

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6. Lee, *op. cit.*, p. 412.
7. John Bebout, "Introduction," *Proceedings of the New Jersey State Constitutional Convention of 1844*, New Jersey Writers' Project, (New Jersey, 1942), p. xvi.
8. Clokie, *op. cit.*, p. 448.
9. New Jersey Constitution of 1776, Article XXIII.
10. Clokie, *op. cit.*, p. 451.
11. Charles R. Erdman, Jr., *"The New Jersey Constitution of 1776,"* (Princeton, 1929), p. 59.
12. *Ibid.*, p. 57.
13. *Ibid.*, p. 59.

twelve.[14] This decision became known as the "New Jersey Precedent" because it was the first case in which an act of a state legislature was declared unconstitutional.[15]

In *Holmes* v. *Walton*, the state Supreme Court relied on an unalterable guarantee in the legislative oath. The supremacy of the constitution was asserted on more general grounds in the case of *State* v. *Parkhurst* in 1804. In his opinion, the chief justice held that the document of 1776 must be treated "as a constitution, if not framed, yet established by common consent." He declared that "to say that the legislature can alter or change such a constitution, that they can do away with that very principle which at the same time gives and limits their power, is in my view a perfect absurdity."[16]

Nevertheless, the question of whether or not the legislature had the power to amend the constitution by an ordinary act was one which was never really decided. It is possible to quote dicta from New Jersey decisions on both sides of the issue. The view that the legislators were restricted only by the provisions of the oath was held as late as 1844 by some influential men. On the other hand, an increasing number of people after 1780 began to look upon the constitution as a body of fundamental law,[17] and by 1798 one informed writer was able to observe that that view was generally accepted.[18] It would seem that the growth of this doctrine was due to the changing political ideas of the time. The framing of the federal constitution as well as other state constitutions had focused the people's interest upon political theories, such as the separation of powers and the supremacy of the constitution.[19] With the growth in popularity of such doctrines, the old belief in legislative omnipotence was bound to be incompatible; and thus it was that popular pressure and the threat of judicial review kept the legislature from overtly amending or violating even as imperfect a document as the constitution of 1776.

This development left only two ways in which the constitution could be altered. The first was by legislative enactments "interpreting" the provisions of the constitution and the second was by amendment or revision with popular approval.

In several instances, the legislature resorted to the legal fiction of altering the constitution by "explanatory statutes." In 1799 a law was passed granting appeals from the chancellor to the Court of Appeals. There was much opposition to this on the ground that it violated the constitution.[20] The legislature practically rewrote the suffrage provision which had stated that all "inhabitants" who met certain designated residence and property requirements could vote. Since this led to voting by aliens, women and Negroes, in 1807 the legislature passed a law restricting suffrage to "free, white, male citizens of the state." Objections to the property requirements led to an act stating

14. Austin Scott, *"Holmes v. Walton; the New Jersey Precedent,"* *American Historical Review*, Vol. IV, 1898-1899, p. 463.
15. Clokie, *op. cit.*, p. 458.
16. Bebout, *op. cit.*, p. xli.
17. Erdman, *op. cit.*, p. 72.
18. Bebout, *op. cit.*, *p. xl.*
19. Erdman, *op. cit.*, p. 77.
20. *Ibid.*, p. 81.

that any person whose name appeared on the tax lists should be deemed to be worth the necessary sum. In answer to the objections that such laws were unconstitutional, their proponents declared that they merely interpreted the constitution.[21]

The only other available method of altering the constitution—by amendment or revision with popular approval—proved completely unsuccessful for sixty-eight years, and after the hastily-drafted document had become the oldest constitution in the country. The first attempt to revise it by a specially elected convention was made in 1790, but the attempt was blocked on the grounds that bad as the constitution could be proved to be, it was possible to make it worse. The same thing happened in 1797; and, in 1800, a referendum on the question became so entangled in the party strife between the Federalists and the Republicans that it went down to defeat.[22] In 1819 the only specific amendment ever to be put before the voters under the constitution of 1776 was rejected by a vote of 12 to 1, even though there was general approval of the subject matter of the amendment. The main objection rested with the method of proposal for, by this time, the constitution was regarded as so sacred that amendments to it could only be proposed by a convention.[23] An unofficial "convention" of prominent men from nine counties met in 1827 and produced a memorial asking the legislature to call a convention, but the request was buried by the legislative committee to which it was referred.[24] The beginning of the end of the constitution of 1776 did not come until 1840 when, in his annual message to the legislature, Governor Pennington asked that the Governor be relieved of his judicial duties. At the same time, he warned that "alterations in the constitution of government under which a people have lived long and happily should be made with caution and jealousy." In 1841, a committee was appointed to consider the problem, but it concluded that a few simple amendments would suffice. It was not until the political unrest of the Jacksonian period had resulted in the election of a Democratic governor in 1844 that the legislature finally passed an act providing for the election of delegates to a constitutional convention.[25]

It is interesting to speculate on the reasons why it took sixty-eight years to get a revision of the "temporary" constitution of 1776. The spirit of reform which led many states to rewrite their constitutions before the end of the 18th Century was felt in New Jersey.[26] The revision movement was not lacking in able supporters, nor was the charter lacking in defects. The critics of the document frequently called the people's attention to the respects in which it violated the principle of the separation of powers, they warned that liberties were insecure without a bill of rights, and pointed out that

21. Bebout, *op. cit.*, p. lxi.

22. Walter R. Fee, *The Transition from Aristocracy to Democracy in New Jersey, 1789-1829*, (Somerville, 1933), p. 115.

23. Erdman, *op. cit.*, p. 80.

24. Bebout, *op. cit.*, p. xxxvii.

25. Clokie, *op. cit.*, p. 577.

26. Lee, *op. cit.*, p. 261.

certain provisions, such as the one providing property qualifications for voting, were now outdated. The trouble seemed to be that the supporters of the revision movement had great difficulty in persuading enough people that the admitted "theoretic errors" were productive enough of "actual evils" to justify the hazard of a change.[27] The people of the state had come to look upon their constitution with a mixture of indifference and awe, and were easily swayed by the arguments of those who stood to lose vested interests by change. On the whole, the high officials who had served during this period had been capable men who had made the government work in spite of a defective instrument of government.[28] Thus, the people, while freely admitting the absurdities and defects of their constitution, were content to retain it as long as the state continued to prosper.

It will be noted that, during those sixty-eight years, the notion of the exercise by the people of the state of their sovereign power to establish governments had undergone a great change. In 1776 a Provincial Congress, not elected for the specific purpose of drafting a constitution, assumed its right to do so and then to proclaim it as fundamental law. By 1844 the tradition that the framing of a constitution should be in the hands of a specially elected assembly had become so firmly established in the state that we find Governor Haines asserting in his inaugural address that "the formation or alteration of the fundamental law of a state is the province of the people in their highest sovereign capacity, and not the duty of the legislators, who are delegated to act in obedience to that fundamental law. The same voice that asks a change of the constitution, asks that change through the medium of a convention."[29]

That this opinion was held by the delegates to the convention of 1844 is evident to anyone who reads the record of the debates. The amendment provision which was finally adopted contained a restriction on the power of the legislature even to submit amendments to the people at referendums. This required the approval of a proposed change by a majority of each of the two houses of the legislature. Then, after being published in at least one newspaper in each county, the amendment would be referred to the next legislature. If passed by a majority of each house the second time, the amendment then had to be submitted to the people at a special election held for that purpose only. If more than one amendment was to be submitted, it was to be done in such a way that the people could vote on each separately and no amendment or amendments were to be submitted to the people by the legislature oftener than once in five years.[30]

Although this is a difficult system of amendment, most of the other methods discussed by the delegates to the convention were even less flexible. There was virtually no opposition to the most restrictive feature—that the amendments must be passed by two successive legislatures. The purpose of

27. Bebout, *op. cit.*, p. xxxvii.
28. Lee, *op. cit.*, p. 275.
29. Mulford, *op. cit.*, p. 494.
30. New Jersey Constitution of 1844, Article IX.

this was to permit the people to check the legislature in submitting amendments for a referendum. Since the members of the lower house were elected annually, they were forced to answer to the voters between the time that they passed a proposed change for the first time and the time that they had to make their second decision. In addition, it was argued that such a provision would give the people a whole year to discuss the amendment before the referendum.[31]

As if this feature would not make the procedure difficult enough, it was only by a vote of 27 to 27 that a requirement that a proposed amendment must gain the assent of two-thirds of each house at one of the succesive polls of the legislature, was defeated. The argument on this proposal was very heated and cut directly across party lines. The proponents of this additional safeguard felt that it was necessary to prevent frequent amendment. They also contended that the purpose of a constitution is to protect minorities and, therefore, a simple majority should not be sufficient to propose a change in the charter. The main argument, and one which has been heard ever since, was that a difficult amending process was required to protect the interests of the small counties. Those who argued this point referred particularly to the desire of the larger counties to change the system of equal county representation in the upper house of the legislature, a factor which resulted in the possession by the less populous counties of much more strength than they were entitled to according to population. Those opposing the two-thirds requirement argued that it was not necessary as a check on frequent amendment, for the past history of the state had shown the hesitancy of the people to amend their fundamental law. Indeed, they felt that such a provision would make amendment impossible. They declared that it was undemocratic to permit such a small minority to prevent the majority from making changes. The delegates from the large counties felt that such a provision would make it impossible for the representation in the upper house ever to be altered, since the representatives of the small counties in that body would never vote themselves out of office.[32]

Another proposal backed by the more conservative delegates was that, in order to be adopted by the people at a special election, the proposed amendment must receive a number of votes equal to a majority of the votes cast at the preceding gubernatorial election. The delegates who favored this argued that special elections might not draw a large number of voters, and that an amendment should not be adopted by a minority of the people. The opposition who declared that such a provision would make all amendment impossible finally won their point.[33]

The provision that an amendment must be voted on at a special election was not strongly opposed. The proponents, while admitting that it would involve extra expense, felt that it would allow more opportunity for consideration of the question without its becoming involved in the political issues

31. New Jersey Writers' Project, *Proceedings of the New Jersey State Constitutional Convention of 1844*, (New Jersey, 1942), pp. 54-68.

32. *Ibid.*, pp. 54-75.

33. *Ibid.*, pp. 74-75, 575-577.

which arise at all general elections. Opponents warned that rural people would not deem the special elections important enough to go to all the inconvenience of voting, while city people, who could get to the polls more easily, would vote in large numbers.[34]

Thus, while the amendment process which was finally adopted was a difficult one, it was as easy as could be expected from an age which had learned to distrust legislatures and to look upon constitutions as sacred instruments which should be altered only with the greatest difficulty.

Although the question of having a provision which would provide a means of revising the document was considered, no such provision was included. A proposal was adopted in the committee of the whole that not oftener than once in ten years, a majority of both houses should be permitted to submit to the people the question of whether or not they desired a convention to revise the constitution. It was argued in support of this scheme that the people should have the right to express their opinion on calling a convention. It was also pointed out that since there was an amendment provision included in the document, it might be interpreted as excluding any other method of altering the charter. The opposing argument, which was supported by the then Chief Justice of the Supreme Court, contended that the legislature could submit the question of revision to the people at any time, even without a section on revision. As a result, no such provision was included.[35]

That the provision made by the 1844 constitutional convention for altering the state's fundamental law to meet changing conditions was inadequate, is shown by the fact that one hundred and three years later in 1947, the document was in most essential respects unaltered. There were many other reasons for this other than the difficulty of the amending article. Among them were the conservatism of the people, their indifference, and several other factors including political, religious and sectional rivalries. However, a brief examination of the numerous attempts to amend and revise the constitution during its more than a century of existence will show that the provision made therein for change was defective in many respects.

The first real attempt to alter the constitution came in 1873. At that time, Governor Parker asked for either a convention or a commission to deal with certain evils which had turned up. The Senate vetoed the former but found a commission acceptable, since nothing could be submitted to the people under that system without the consent of the upper house.[36] The commission made recommendations on a variety of subjects, some of which were incorporated into twenty-eight amendments which easily passed two successive legislatures. The referendum in 1875 was influenced by many other considerations than the merits of the proposed changes. The Catholic Church objected to four of the twenty-eight amendments, but, not trusting their parishioners to pick out the offending features, some church officials asked

34. *Ibid.*, pp. 573-574.
35. *Ibid.*, pp. 69, 74, 577-579.
36. William E. Sackett, *Modern Battles of Trenton*, (Trenton, 1895), pp. 94-97.

the defeat of all twenty-eight. This had an electric effect on many other elements of the society of the state. After an unusually large vote had been counted, it was found that the amendments had all won by large majorities.[37]

Between 1875 and 1947, little actual change was made in the state's fundamental law. Twenty-three amendments were presented to the people at referendums but only four were adopted at the sparsely attended special elections.[38] Examples of the way in which these proposed amendments tended to become entangled with external issues were furnished in 1915 and 1927. In 1915, two virtually unopposed changes were carried down to defeat by the negative vote cast against a third proposal which would have granted suffrage to women.[39] In 1927 when the fourth amendment out of five on the ballot was opposed by the Democrats, the leaders of that party, in order not to take any chances, urged the defeat of all but the top amendment. The stand of the Republicans on the same referendum was apparently due more to a desire to oppose the Democrats, than to any enthusiasm for the amendments themselves. Nevertheless, the superior organization of the Democratic Party in Hudson County, with less than one-sixth of the registered voters in the state, polled one-third of the votes in the special election and won.[40]

Between 1875 and 1947, the legislature set up four constitutional commissions. In at least two of these instances, the legislature used the commission as a convenient method to side-step the issue of revision, for no action was taken on the reports.[41] The last commission was formed in 1941. It reported that it was impractical to use the amending process provided in the constitution for "the great number of interdependent changes which under this article would have to be submitted to the people separately should not be torn apart by piece-meal acceptance if we are to have a workable constitution. As a result, it presented a completely revised document. The Commission on Revision suggested that the legislature, at the next primary election, should request authority from the people to submit a revised constitution at the next general election.[42] A joint committee of the legislature then held hearings throughout the summer to ascertain the sentiment of the people on constitutional revision in general and the report of the commission in particular. After three months of hearings and discussion, the majority of the joint committee recommended that "no further action for change in the New Jersey State Constitution be taken until after the termination of the present war." They based this decision on the absence of servicemen from the state, the lack of interest in elections in war time and the fear that the issue would detract from the "all out" war effort and cause disunity.[43]

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37. *Ibid.*, pp. 114-117.

38. Bebout, *op. cit.*, p. cvii.

39. Charles R. Erdman, Jr., *The New Jersey Constitution—A Barrier to Governmental Efficiency*, (Princeton, 1934), p. 20.

40. *Ibid.*, pp. 21-22.

41. *Ibid.*, p. 16.

42. *Report of the Commission on Revision of the New Jersey Constitution*, (Trenton, 1942), p. 9.

43. New Jersey Legislature, *Record of Proceedings Before the New Jersey Joint Legislative Committee . . . to Ascertain the Sentiment of the People as to Change in the New Jersey Constitution*, (Trenton, 1942), p. 869.

For quite some time, sentiment for a constitutional convention had been gaining strength. However, authority for a constitutional convention was not an easy thing to secure from New Jersey Legislatures. The main reason was that the representatives of the small counties who control the Senate have, ever since 1846, resolutely opposed any such proposition because of a fear that the populous counties would be able to remedy the disproportionate system of representation.[44] Due to the fact that in 1844 none of the counties was overlarge, the delegates from urban areas were not insistent on reform of the Senate at that time.[45] With the growth in urban population, the situation grew progressively worse until, in 1944, one voter in Cape May County had twenty-nine times the weight of one voter in Essex County in the Senate.[46] Those who opposed a convention did not all deny that changes were needed, but they insisted that any changes should be made by the regular amending process, so that the Senate could always refuse to submit any objectionable amendment to the people. Of course, these watchdogs of vested interest rationalized their position by objecting that a convention was illegal as well as by the use of many other excuses. They relied on an opinion of the state's attorney general in 1913 and on a decision by the Rhode Island Supreme Court in 1883, both of which held that when one method of altering a constitution was provided, all other methods were excluded. Even though other states with similar provisions had subsequently held conventions, and, in fact, the Rhode Island decision had been reversed in 1935,[47] there were still those as late as 1943 who asked, "Why resort to a possibly illegal method, when a known legal procedure is available?"[48] One observer, who after listening to this "legalistic and complex reasoning" for many years, concluded that "there is more than a suspicion" that those who use such reasoning "have suited their contentions to preconceived notions or conclusions . . . When the sovereignty of a free people must be extricated from a maze of conflicting legalisms in order to give it expression, something is wrong."[49]

Following the recommendation by Governor Parker in 1873 that a convention be called, the next really important attempt to get a complete revision came during the administration of Governor Woodrow Wilson. In his annual message of 1913, Wilson pointed out the weaknesses of the document of 1844 and expressed the hope that, "this question will be taken up by the legislature at once and a constitutional convention arranged without delay." The Assembly complied with his request but the Senate, although Democratic by a safe majority, defeated the proposal by a vote of 14 to 4.[50] After that time, nearly every governor gave his support to the revision move-

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44. Sackett, *op. cit.*, p. 94.

45. Bebout, *op. cit.*, p. xcii.

46. John E. Bebout, "New Task for a Legislature," *National Municipal Review*, Vol. XXXIII, No. 1, January 1944, p. 17.

47. Charles R. Erdman, Jr., "The Constitution Should Be Changed by Revision," *New Jersey Municipalities*, Vol. XX, No. 6, (June 1943), p. 11.

48. Wesley L. Lance, "The Constitution Should Be Changed by Amendment," *New Jersey Municipalities*, XX, 6, (June 1943), p. 10.

49. Minority Report of Dominic Cavicchia, New Jersey Legislature, *op. cit.*, p. 874.

50. Charles R. Erdman, Jr., *The New Jersey Constitution—A Barrier to Governmental Efficiency*, (Princeton, 1934), pp. 28-29.

ment. In 1941 a New Jersey Committee for Constitutional Convention was formed as a medium through which representatives of many important statewide organizations were to cooperate in a drive to bring about the calling of a convention.[51]

Finally, in 1942, the leaders of the revision movement concluded that the only way to get around the legislative roadblock was to get the legislature itself to do the revising. After much difficulty, a bill was finally passed which enabled the people at the 1943 election to authorize the 1944 legislature to act as a constitutional convention. The referendum resulted in a decisive victory for the revision forces,[52] and the legislature set to work under the watchful eye of Governor Edge. The proposed revised constitution was submitted to the voters at the general election of 1944 and was defeated.[53] While we need not here outline the numerous reasons for this defeat, suffice it to say that an important objection was the method used; that is, that the proposed document was the handiwork of a legislature and not of a constitutional convention.[54] It should also be noted that dissatisfaction with the amendment clause proposed by that document contributed to its defeat. It provided that an amendment should be submitted to the people after receiving a three-fifths vote of each house of the legislature. This was opposed by labor as being too difficult and by the rural areas as being too easy.

Even this setback did not daunt the proponents of revision. One of these men was Alfred E. Driscoll, who, in 1946, was elected as Governor of New Jersey. In his inaugural address on January 21, 1947, he declared that, "the present constitution is hopelessly out of step with the requirements of our modern industrialized age," and urged that "the legislature proceed to provide for the calling of a constitutional convention, the work of which shall be submitted to the people at the general election next November." Driscoll had a plan which he hoped would gain the support of the Senate. The convention which he proposed was to be restricted in such a way that it "would not disturb the present basis of legislative representation." While he doubted the ability of the legislature to restrict the convention, he saw no reason why the people could not do so. He suggested, that, in order to avoid separate elections, the election at which the delegates to the convention would be chosen be likewise used to submit a preliminary question, such as, "Do you favor the calling of a constitutional convention to revise the state constitution provided that no change shall be made in the present basis of legislative representation?"[55] The legislature found this proposition acceptable and on June 3, 1947, the referendum was held. A favorable vote was recorded and finally, after 103 years, a convention met in the State of New Jersey to discuss the fundamental law.

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51. Bebout. "New Task for a Legislature," *op. cit.*, p. 20.

52. *Ibid.*, p. 21.

53. Council of State Governments, *The Book of the States, 1945-1946,* (Chicago, 1945), p. 72.

54. Walter Bilder, "Useful Reflections on the Constitutional Election," 67 *New Jersey Law Journal,* p. 397.

55. Alfred E. Driscoll, Governor of New Jersey, *Inaugural Address to the Legislature,* January 21, 1947, pp. 6-10.

The document which the delegates met to revise in 1947 was virtually the same as that which had been adopted by their predecessors. It would not be in accord with the facts to blame this lack of flexibility in the constitution of 1844 entirely on the inadequacy of the provision for amendment and the total lack of any mention of revision. Nevertheless, it is possible to point to certain defects in the reasoning of the framers which showed up during the 103 years.

It seems clear that the amending process was too cumbersome and difficult. Certainly, one reason for this was the necessity of getting an amendment through two successive legislatures. It was no easy task to keep the law-makers interested in any one subject that long. Although the framers did include the measure to guard against hasty and frequent amendment, perhaps they would have felt that they were too successful if they realized that between 1875 and 1947 only twenty-three amendments were to be submitted to the people and of those only four were to be adopted. A second defect was the requirement that amendments be submitted at special elections. An obvious disadvantage of this feature was the expense, which amounted to more than $700,000 per election. The framers thought that as such elections would be divorced from partisan considerations, they were worth the additional expense. Actually, we have seen that special elections were very definitely swayed by issues other than the merits of the amendments voted on. In addition, the special elections were poorly attended and it became very easy for political machines to control them.[56] The restriction on submitting any amendment or amendments oftener than once in five years was completely unnecessary. Finally, the provision that each amendment had to be submitted separately ruled out any possibility of effective constitutional revision by the use of the amending process, for the necessity to vote on a great number of questions at once would confuse the voter, and interdependent changes should not be torn apart by piecemeal acceptance.

While the lack of any provision for revision in the constitution certainly would not have stood in the way of the legislature had they really wanted to have the old document rewritten, it did furnish a legalistic excuse behind which the opponents of change could hide. It is worth noting that a favorable response greeted both referendums in which the question of whether or not the constitution should be revised was placed before the people. This indicates that a requirement that this question be placed before the voters periodically would have resulted in revision at an earlier date.

These then were the lessons which the history of the past 103 years offered to the delegates meeting in 1947. Certainly the question of how to make the new document flexible enough so that it could be altered to meet the changes of a fast-moving world was one of the most important problems facing that convention. As we have seen from our examination of the history of the state, it was also one of the most controversial.

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56. Erdman, *New Jersey Constitution—A Barrier to Governmental Efficiency, op. cit.*, pp. 19-21.

The revision of the amendment clause was placed in the hands of the Committee on Rights, Privileges, Amendments and Miscellaneous Provisions. If the men who were given the task of assigning delegates to the respective committees were desirous of seeing a flexible amendment and revision clause inserted in the new constitution, and there is every reason to believe that they were, their choices for that committee were not well-made. For chairman they chose John F. Schenk, a man who turned out to be one of the strongest champions of the interests of the small counties at the convention.[57] Seventy-five-year-old Robert Carey, a vigorous conservative from Hudson County, was named vice-chairman. Chairman Schenk promptly appointed Lawrence N. Park, delegate from the small county of Gloucester, as Secretary. Two of the other members of the committee were also small county men. This meant that the five most active members of the committee of eleven were certain votes against a liberal provision for changing the fundamental law. Other members of the committee were Oliver Randolph, the only Negro in the convention and Wesley Taylor, the only labor representative. Neither of these men was particularly active except in the fields of anti-discrimination and labor's rights respectively. The other members of the committee were either inclined to be conservative or at least were not aggressive persons who would take the initiative in oppossing the conservative wing. Actually the only member who did so was Mrs. Marie Katzenbach, but she was quickly silenced by the others.

The minutes of the early meetings of this committee are not available in verbatim form. Mr. Schenk was the only committee chairman who insisted upon editing the minutes of his committee, and it is not at all certain that the written record furnishes a full and complete account of what took place.

It was obvious that most of the members of the committee had made up their minds on the amendment and revision issue at the outset. It was also obvious that four members, including the chairman and vice chairman, would have been happy to retain the old amendment provision with only the abolition of the requirement for special elections.[58] As a matter of fact, the vice chairman made it clear early in the proceedings that he would file a minority report if anything else was adopted by the committee.[59] Neither the amendment or revision issue received nearly the consideration that such important questions deserved and the latter was hardly even mentioned. The vote was taken on both questions at the fourth meeting of the committee, even before the main public hearings by the committee were held. The committee turned down a proposal that any proposed change could be submitted to the people after receiving a majority vote in both houses of the legislature. The majority of the members did, however, agree to a change whereby if a proposed amendment received a three-fifths vote of all the members of each of the two houses, it should be presented to the governor. Upon receiving his approval,

57. *Newark Evening News*, August 17, 1947, p. 17.

58. Minutes of the Committee on Rights, Privileges, Amendments and Miscellaneous Provisions, mimeographed, p. C1-10-17.

59. *Ibid.*, p. C1-4-12.

the amendment would then be submitted to the people at a general election. If the governor vetoed it, the proposed change could be submitted to the people only after receiving a two-thirds vote of all the members of each house.[60] This system did not represent much of a concession on the part of the small counties for they could confidently expect to control at least two-fifths of all the members of the Senate. At the same time that this amending provision was adopted, the minutes show that by a unanimous vote the committee decided against any provision for a periodic referendum on the question of revision. However, at least one member of the committee had no recollection of such a vote and would not have voted in the affirmative in any case.[61]

Although the public hearings held by the committee had no effect upon its final decision, it is possible to discover from them the opinions of the more important groups in the state on the subject of amendment and revision. We shall first discuss the groups which advocated a more flexible method of altering the constitution, and then shall look at the segments of the community which favored keeping a provision similar to the old one.

The main pressure for a simplified amendment process and a method of periodic revision came from the group of organizations which banded together under the name of the Committee for Constitutional Revision. The Committee was composed of the two main labor organizations in the state: the State Federation of Labor and the State C.I.O. Council; six women's organizations: the New Jersey League of Women Voters, the American Association of University Women, the State Federation of Women's Clubs, the National Council of Jewish Women, the New Jersey State Federation of Colored Women, and the New Jersey League of Women Shoppers; and three other influential groups: The New Jersey Taxpayers' Association, The New Jersey Association of Real Estate Boards, and the Consumers' League of New Jersey. The President of the Committee, Mr. James Kerney, stated that the Committee felt that the amending clause needed to be revised more than any other article in the constitution. The method of amendment suggested by this group would permit a proposed change to be submitted to the people at a general election after receiving a simple majority vote in the legislature and the approval of the governor. The Committee also recommended an automatic referendum every twenty years to determine whether or not the voters wanted a revision of the constitution.[62] The representatives of the State C.I.O. expressed to the committee their opposition to any provision requiring a three-fifths vote by the legislature and declared that a provision to this effect in the proposed constitution of 1944 was the "controlling factor" in the decision of the C.I.O. to oppose that document.[63] They declared that a three-fifths requirement would put the heavily populated industrial areas at a considerable disadvantage and would allow nine Senators representing a little over 10.6 percent of the population of the state to keep

60. *Ibid.*, p. C1-4-(12-14).
61. *Ibid.*, p. C1-4-14.
62. *Ibid.*, p. C1-6-(29A-33A)
63. *Ibid.*, p. C1-4-5.

any amendment or proposal for revision from being submitted to the voters.[64] The C.I.O. joined with the A. F. of L. in requesting that the people have the right to initiate amendments[65] and even suggested that the governor be allowed to submit an amendment to the people if it passed one house of the legislature and not the other.[66]

However, many powerful agricultural and business organizations were strongly opposed to a liberal method of changing the constitution. Both the New Jersey Farm Bureau and the State Grange went on record as favoring the amendment method as provided in the constitution of 1844. They liked the requirement that amendments should be passed by two successive legislatures. They felt that in order that the rural minorities might be protected, it was necessary that the method of equal county representation in the Senate be continued and safeguarded. The President of the New Jersey Farm Bureau declared that "the urban people will make the mistake of tearing down our two house system if you make the constitution too easily amended."[67] The agricultural people did agree that amendments should be submitted at general elections. Business organizations also opposed liberal provision for change in the constitution. In a letter to all delegates, the President of the New Jersey State Chamber of Commerce urged that the amendment provision in the constitution of 1844 be continued and advised against any provision for revision. A representative of the Small Business Association of New Jersey voiced the small businessmen's approval of a difficult amending process because "most of them are conservative people." He approved of the committee proposal for a three-fifths vote by the legislature.[68]

The difference of opinion on the amendment and revision issue cut across party lines. The dispute followed sectional, ideological, and vocational lines; urban versus rural, liberal versus conservative and labor versus farmer and business. There had been general agreement by all groups that special elections were undesirable. Although the desirability of allowing the people themselves to initiate amendments by petitions bearing 100,000 names was urged by labor organizations and in proposals submitted to the committee by two of the delegates,[69] such a scheme received the support of only one member of the committee.[70]

When the final report of the Committee on Rights, Privileges, Amendments and Miscellaneous Provisions was submitted to the convention, it contained an amendment article providing that a three-fifths vote by each house of the legislature would send a proposed amendment to the governor. The latter could either submit it to the people at a general election or veto it. If he elected to follow the latter course, the legislature could repass it by a two-thirds vote, and submit it themselves. Amendments were to be presented at

64. *Ibid.*, p. C1-13-8A.
65. *Ibid.*, p. C1-13-10B.
66. *Ibid.*, p. C1-4-(6-7).
67. *Ibid.*, p. C1-13-(52B-55B).
68. *Ibid.*, p. C1-13-47B.
69. Proposals Nos. 7 and 37.
70. Minutes, *op. cit.*, p. C1-4-12.

general elections, they were to be submitted separately and distinctly and if not approved of by the people, could not be submitted again before the third general election thereafter. There was no mention of revision. Vice Chairman Carey submitted a minority report opposing any serious changes. He stated that he had been advised by "several of the members of the committee" that they were in accord with his conclusions. Said Carey, "The system of amendment provided in our present constitution has been in operation over one hundred years and has always been found easy enough for any amendment purposes."[71]

This committee had decided not to follow the procedure of the others, whereby they would have held a final public hearing after the committee report had been circulated. Nevertheless, after pressure had been applied by the convention officers, the committee changed its mind and went through the motions of a final public hearing. The witnesses might as well have saved their breath because the committee never even met afterwards to discuss the opinions expressed.[72]

When the time came for the amendment provision to be debated on the floor of the convention, the expected fight never materialized. As a matter of fact, the entire discussion lasted less than half an hour and the record of it in the minutes takes up only seven pages.[73] Five amendments had been previously submitted which would change the amendment provision proposed by the committee. Two would make the process more difficult and three were directed at simplification.[74] However, when the time came to debate these amendments, the sponsors of four of them withdrew in favor of the fifth. One of the sponsors who had offered two amendments stated that "the section to which those amendments are directed is being changed to my satisfaction. I, therefore, withdraw both of those amendments." It was obvious that the issue had been settled off the floor of the convention. The man who introduced the compromise measure was the personal friend and advisor of the governor and it was generally recognized that he often spoke for the administration. What had happened was frankly stated by him in speaking for his amendment. "As far as I personally am concerned, I was satisfied to have it a mere majority of the two houses. However, in listening to the various delegates, particularly those from our smaller counties, I realized that my view was rather extreme, and very frankly this amendment is an attempt to compromise and reconcile the two views."[75]

The "compromise" consisted of a combination of the 1844 system of amendment and that proposed by the committee. It provided that if a proposed amendment should be adopted by a three-fifths vote in each house of the legislature, it should be submitted to the people. On the other hand, if a proposed amendment should be adopted by less than three-fifths but more

71. Report and Proposal of the Committee on Rights, Privileges, Amendments and Miscellaneous Provisions, July 31, 1947.

72. *Newark Evening News*, August 10, 1947, p. 14.

73. Proceedings of the New Jersey State Constitutional Convention of 1947, mimeographed p. 18-(3A-10A).

74. Amendments to Committee Proposal No. 1-1, Nos. 4, 8, 10, 17, 18, 22.

75. Proceedings, *op. cit.*, p. 18-5A.

than a majority, it should be referred to the legislature the following year; and if it passed by at least a majority, the second time, it would then be submitted to the people at the next general election. If more than one amendment was submitted, each had to be presented separately and distinctly and any amendment not approved by the people could not be submitted before the third general election thereafter.[76] The spokesmen for the small counties apparently felt that they could control things under this arrangement, for two of them praised it very highly.[77] A third, however, pointed out that the principle of the two successive legislatures passing by a majority vote was no longer so meaningful since annual elections were no longer to be held and the same men could pass the amendment both times.[78] Then, without further ado, the delegates proceeded to adopt the amendment by a unanimous vote.[79]

The real fight was about to come a few minutes later when the delegates turned their attention to the next amendment, which was a proposal by Senator Van Alstyne of populous Bergen County, providing that "the legislature must submit to the people at least once every twenty-five years the question as to whether or not there shall be a convention to prepare and submit a revision to the constitution; provided, that when submitting the question to the people, the legislature shall by law limit the convention so as to prevent changes in the basis of representation in the Senate and General Assembly or in the geographical boundaries of counties, unless otherwise provided in the law submitting the question to the people."[80] The fact that even this restriction was not enough to satisfy the small counties was shown by Van Alstyne's first remark that "since I have offered this amendment, from certain conversation that has come to me from certain delegates, you would think that it is my solemn and determined vow . . . to carve the little counties limb from limb."[81] A warning of things to come was furnished a few moments later when a member of the Hudson County delegation stated that the two leaders of that delegation (one of whom was Mayor Eggers of Jersey City) "are keenly interested in the proposition submitted in this proposed amendment. As they are presently engaged in conference in the building, and will be here shortly, I am going to ask in the light of that circumstance, that further consideration of this matter be deferred until they are on the floor."[82]

When the question of the revision amendment was again taken up, Senator Van Alstyne stated his reasons for introducing it. He declared that the people, at least once every generation, should be able to say whether or not they desired to have their constitution fully revised. He felt that in this rapidly changing age, the question should be considered at least every

76. *Constitution of New Jersey (1947)*, Article IX.
77. Proceedings, *op. cit.*, p. 18-(5A-8A).
78. *Ibid.*, p. 18-9A.
79. *Ibid.*, p. 18-10A.
80. Amendment No. 18 to Committee Proposal No. 1-1.
81. Proceedings, *op. cit.*, p. 18-11A.
82. *Ibid.*, p. 18-13A.

twenty-five years. He also felt that the provision that the legislature could restrict any future convention from changing the method of representation was more than enough to safeguard the small counties. He was followed by Mr. Schenk who opposed the amendment as a spokesman for the small counties. Carefully neglecting to express his major premises, he argued that a constitution contains fundamentals and therefore there is "no need in the foreseeable future for automatic review of the question of revision." He went on to say that a constitution "should not be an experimental document" and feared that the people would allow themselves to be stirred up to such an extent by pressure groups that they would vote for a revision whether it was needed or not. He also stated that he could find little precedent for a periodic revision, and finally ended up by using the same argument expressed by the 1844 convention that the legislature could always call a convention and "nothing else is needed."[83] The next speaker, however, pointed out that Mr. Schenk had neglected to mention 103 years of experience which showed that 'the legislature has not always seen fit to take the initiative to call a constitutional convention or to provide some other method of completing the revision of the constitution."[84]

What the small county people really wanted was made clear by the amendment to the amendment which was presented by the next speaker. This small county spokesman proposed that as a further restriction on any future convention which might be held under the proposed provision, the revision article should also include the statement that "such convention shall consist of eighty-one delegates and each county shall have the same number of delegates as representatives in the Legislature."[85] Here was a real "compromise"! The small counties were willing to permit the rest of the state to have its periodic opportunity for revision—on condition, that is, that in any future convention, the small counties' control of the legislature be safeguarded from attempts to change the system of representation, and, on condition that they have the benefit of their disproportionate strength in any future convention as well as in the legislature.

This dispute about the number of delegates which should attend a convention as representing each county was not a new one to the state. At the convention of 1844, each county had the same number of delegates as they had members in the lower house of the legislature; and thus, the delegations were based on population. Even then there were objections by the small counties, fearing that they would be mistreated by the more populous areas.[86] The same controversy arose in 1947 when the new administration began to plan for this convention. In his inaugural address, Governor Driscoll had suggested that the convention "be composed of sixty members elected from the counties, with each county to have the same number of delegates as it has members in the House of Assembly."[87] The uncompromising attitude of

83. *Ibid.*, p. 18-(5B-8B).
84. *Ibid.*, p. 18-(8B-9B).
85. *Ibid.*, p. 18-11B.
86. Bebout. "Introduction." *op. cit.*, p. lxiv.
87. Driscoll, *op. cit.*, p. 10.

the small counties, however, convinced the administration that there would be no convention in 1947 unless they could gain the benefit of their over-representation in the Senate. Thus the convention consisted of a delegate for each member of the House of Assembly plus an extra delegate from each of the twenty-one counties—eighty-one delegates in all.

So here was the same issue again. The delegates from the small counties wanted desperately to win this point. But they also knew that on the basis of large county delegates versus small county delegates they did not have a chance. They were sure of this since, throughout the earlier part of the convention, they had been constantly demanding roll call votes on all issues affecting the less populous counties in order to discover exactly which delegates had the cause of the small counties closest to their hearts.[88] In the legislature, however, the small counties often found a way to get around their lack of votes. Their method was to make deals with the representatives from Democratic Hudson County, which is the second largest in the state. The Democrats from Hudson often had found such deals to their advantage for their party had usually been in the minority in the legislature. From such combinations of the Hudson Democrats with the small county Republicans against the large county Republicans comes the nick-name "Hague Republicans."[89]

It was only natural that the small county politicians should carry their legislative habits into a constitutional convention and apply the same techniques in similar circumstances. As it turned out, the combination of small county votes and those from Hudson County was just enough. Forty-one votes were necessary for the adoption of an amendment at the convention and the record of the roll call on the small county amendment showed exactly forty-one votes in the affirmative.[90]

88. *Newark Evening News*, August 17, 1947, p. 17.
89. Roger Hinds, "Whose New Constitution?," *N. J. Compass*, (August 1947), p. 17.
90. Proceedings, *op. cit.*, p. 18-13B.

Examination of the results of this vote shows how clearly the division was between the large and small counties on this issue.

	Yes	*No*
Small Counties (those with 2 or 3 delegates)	25	2
Medium-Sized Counties (those with 4 delegates)	4	7
Large Counties (except Hudson)	3	26
Hudson County	9	1
Total	41	36

It is also interesting to note how completely this issue cut across party lines.

	Yes	*No*
Republicans	24	26
Democrats	15	8
Independents	2	2
Total	41	36

This was too much for Senator Van Alstyne, so he decided to drop the whole matter. He stated disgustedly that, "I really feel that that last amendment frankly puts this thing in such—I don't want to use too strong a word—but such an absurd light to think that we will sit here deliberately and vote to tell the Legislature twenty-five years from now exactly how and what type of representation they will have in a convention. I would like to withdraw my original amendment."[91] Thus ended all debate on the questions of revision and amendment.

How, then, did the public receive these decisions by the convention? Did this triumph by the rural counties cause a wave of resentment among the

91. *Ibid.*, p. 18-16B.

people in the populous areas? To say that it caused a ripple would be an exaggeration. The only organization which apparently objected publicly at the time was the State C.I.O., which termed the amendment clause "entirely unsatisfactory."[92] The newspapers scarcely even mentioned these important decisions when they were made; and yet, the press had given excellent coverage to the convention from the beginning. The papers had been full of the debates on the gambling issue, the powers of the governor, labor's rights, the judicial system, bus transportation for parochial school students, and taxation. Throughout the whole convention, there was probably no important issue which received less press coverage than that of amendment and revision. The historian or researcher will search in vain for more than a couple of editorials on the subject.

Apparently the reason was that the papers knew that most of their readers neither knew anything about, nor had any interest in amendment and revision. These issues were of no immediate importance. They were concerned with things which would happen ten or twenty-five years in the future. There was no news value here. They were not like the other issues which were of immediate consequence such as gambling which affected the people's morals, such as the school bus issue which stirred up religious prejudices, such as labor's rights which touched upon class conflicts, and such as taxation which involved the pocketbook—here were issues which aroused the people's interest. Few of the special interest groups showed much enthusiasm over the subject of amendment and revision. They were more interested in immediate and special concerns. Labor leaders did see the importance of the issue to the industrial population, but it is doubtful that much rank and file enthusiasm was aroused. The unions did get many things they wanted in the new constitution, so that both the A. F. of L. and the C.I.O. ended up by supporting the document.[93] Their attitude was expressed by the one labor union man at the convention when he summed things up with the statement, "Although we did not get what we wanted, we got more than we expected."[94] The other organizations, which, as members of the Committee for Constitutional Revision had asked that a flexible provision for amending and revising the constitution be accepted, found themselves in much the same situation and endorsed the product of the convention of 1947.

Thus the newspaper reading public and the special interest groups in effect let the politicians fight it out among themselves. After all, it was above all else a power struggle between two groups of political leaders, both of whom knew exactly what they wanted. Such issues could only be settled by the political method of compromise. They could not be settled by theoreticians. It was not a question of what would be the ideal provision for altering and revising the constitution. The question was what compromise could be devised which, while pleasing no one, would displease no group to the extent of endangering the adoption of the entire document.

92. *Newark Evening News*, August 22, 1947, p. 2.
93. *Trenton Evening Times*, September 23, 1947, p. 1.
94. *Newark Evening News*, September 25, 1947, p. 13.

The rural areas had most of the high cards. It was the urban areas which had wanted the convention in the first place, not the rural sections. The latter had what they wanted most before the convention even started. As a matter of fact, the representatives from the large counties had their way on most of the other issues, and they had too much to gain from the adoption of the new constitution to risk its defeat by alienating rural votes on this issue. The governor apparently realized this, for although he was on record as favoring the submission of amendments by a simple majority of each house,[95] it was his spokesman who introduced the compromise. Also, on the revision vote, it was just possible that the large counties were a bit too confident and that the last maneuver by the well-organized minority caught them napping.

The decision of the convention on the amendment and revision issue was a temporary truce in a struggle which had gone on ever since 1776. It was a compromise consistent with the times and the power situation in the state, if not with the numerical count of the population or with the "model" or "ideal" solution. Future years will bring new conditions which will make inevitable new changes. Judging from the conservative tradition of the state, however, we may expect a long wait. Needed amendments will continue to be defeated by the indifference of the voters and by their accidental connection with external matters. Without a provision for automatic revision, proposals to rewrite the document of 1947 will continue to meet strong resistance. Opponents of change will continue to point to the fundamental law as a sacred document which none but the wicked dare to touch, to dream up legalistic reasons why the "sovereign" people can not alter their instrument of government, or to admit the need for change but question the advisability of undertaking the project at that time. If conditions are good, they will say that one should not "rock the boat." If conditions are bad, they will warn that changes should never be made when men are preoccupied with other matters. These reasons, as Governor Edison pointed out, are often used to camouflage real reasons which will not bear public scrutiny. "If one were to be guided by these prophets of disaster, there never would be a proper time to revise a constitution, and the task would never be undertaken."[96]

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95. *Atlantic City Evening Union*, May 22, 1947, p 5.

96. Council of State Governments, *Book of the States, 1945-1946*, (Chicago, 1945), p. 73.

Chapter VI

TAXATION OF SECOND CLASS RAILROAD PROPERTY

New Jersey, due to its geographical position between New York and Philadelphia, ever since colonial days has been a major highway for commerce and travellers. It is not surprising, therefore, that railroads should play an important role in the economic and political life of the state. New Jersey ranks first in the nation in the amount of trackage per square mile of land and there are few places in the world which have as great a concentration of railway terminal facilities, passenger stations, railroad repair shops, roundhouses, huge warehouses and vast freight yards.[1]

In view of these facts, it is understandable that the problem of taxing this important industry has for the last century been one of the most controversial issues in the state. It was true one hundred years ago when the state government was almost completely financed by revenue received from the railroads, and it was true in 1947 when railroad taxes contributed over ten percent of the total revenues for the state general treasury.[2]

When the railroads first began to appear in the state after 1830, they were taxed according to terms laid down in charters granted by the legislature. Since New Jersey was sandwiched between the two rapidly-growing communities, New York and Philadelphia, her development was slow. Feeling that the establishment of railroads in the state would aid her growth, legislators were ready to make any concessions to tempt the enterprises. There was no tax clause in the Constitution of 1776, so the law-makers were unrestricted in their ability to grant privileges and exemptions. The first railroad in the state was operated by the Camden and Amboy Railroad Co.[3] In 1832, exclusive privileges amounting to a monopoly of all railroad transportation between New York and Philadelphia were granted to that company by the legislature. In return, the Camden and Amboy assigned some of its stock to the state and paid a transit tax on each passenger and each ton of freight.[4] The Delaware and Raritan Canal Company was soon consolidated with the railroad and by 1860 the revenue annually received from the Joint Companies, as they were called, was enough to meet the ordinary expenses of the state government. This monopoly, by allying itself with other railroad companies, gradually extended its control over the entire state and grew into a wealthy and powerful corporation.[5]

> Its early alliance with the legislature of the state, and the popular enthusiasm with which its coming had been hailed . . . made it arro-

1. New Jersey Writer's Project, "The Railroad Industry," *Stories of New Jersey*, Bulletin No. 1, 1941-1942 Series, p. 1.

2. Governor Alfred E. Driscoll, Budget Message for the Fiscal Year Ending June 30, 1948, February 10, 1947.

3. William E. Sackett, *Modern Battles of Trenton*, (Trenton, 1895), p. 7.

4. Charles M. Knapp, "Civil War and Reconstruction Period," *New Jersey, A History*, (Irving S. Kull, editor), Vol. III, (New York, 1930), p. 811.

5. William Starr Myers, *The Story of New Jersey*, Vol. I, (New York, 1945), p. 233.

gant and aggressive, and it soon came to be recognized as the power behind the throne in the control of the affairs of the commonwealth. It went into the counties, picked out its own nominees for places in the Senate and Assembly and secured their election to the seats for which they stood . . . it selected the Governors of the State, picked out the men who were to go to Congress and named the U. S. Senators.[6]

When the Constitutional Convention of 1844 met in Trenton, there was no apparent desire on the part of the delegates to curb the railroads. Apparently, they were fearful of depriving the state of investments of capital and, besides, they could not forget the importance of the railroads in providing revenue to the state.[7] Although there was some discussion of the inclusion of a tax provision providing that all property should be taxed equally, this proposal was defeated.[8] As a result, the new constitution adopted in 1844 had no clause dealing with taxation.

Several circumstances finally resulted in breaking the monopoly of the Joint Companies and in forcing them to relax the tight grip in which they held the state. There was a continuous struggle which had gone on in the state legislature since the 1840's due to the fact that rival railroad interests kept trying to break the Camden and Amboy's monopoly of the New York to Philadelphia route. The Camden and Amboy managed to fight off all such challengers until 1869 when its legal monopoly expired.[9] Finally in 1871, that company executed a lease for 999 years whereby its holdings were turned over to the Pennsylvania Railroad. The fact that the favorite Camden and Amboy was now leased by a "foreign corporation," reinforced by the rising public sentiment against the exorbitant rates of the monopoly, against uncurbed corporate powers and against special charters led to the passage of a general railroad act in 1873. This act gave all competitors the right to build their lines across the state.[10]

Several circumstances, in addition to those above, also contributed to a drastic revision of the system of railroad taxation which took place in the same year. In the years following the Civil War, the costs of government began to rise rapidly and soon it was found that the amount of taxes paid by the railroads according to the terms of their charters was becoming disproportionate to the value of property held by them. In their rapid expansion, the companies absorbed property of great value and, by taking it out of ratables, increased the tax burdens of the communities from which it was withdrawn.[11] For a time the legislature was blocked in its efforts to rectify the situation for, while some of the charters contained provisions stating that they were subject to amendment and repeal, others did not so provide and were held to constitute irrepealable contracts between the state and the rail-

6. Sackett, *op. cit.*, p. 17.

7. John Bebout, "Introduction," *Proceedings of the N. J. State Constitutional Convention of 1844*, N. J. Writers' Project, p. xciv.

8. New Jersey Writers' Project, *Proceedings of the New Jersey State Constitutional Convention of 1844*, (New Jersey, 1942), pp. 343-4, 366, 400, 571.

9. Charles M. Knapp, *op. cit.*, p. 812.

10. Edwin P. Conklin, "The Last Half Century in New Jersey Politics," *New Jersey, A History*, ed. by Irving S. Kull, (New York, 1930), III, p. 946.

11. Sackett, *op. cit.*, p. 18.

road companies.[12] Finally, in 1873 a general tax law was passed which provided that the state could tax all railroad property at the rate of ½ of one percent and which authorized local sub-divisions to tax real property, except track and roadbed not exceeding 100 feet in width, at local rates but not in excess of one percent. All assessments were to be made by the Commissioner of Railroad Taxation.[13]

The same situation which led to the passage of these general railroad laws in 1873 also resulted in a recommendation by Governor Parker in that year for either a constitutional convention or commission to deal with certain defects in the fundamental law. One of these was the lack of any constitutional provision forbidding legislatures to make irrevocable grants of special privileges to companies, such as those made to the Camden and Amboy monopoly. The Governor also desired a requirement for equal taxation. The legislature responded by authorizing the Governor to appoint a special commission to propose amendments to the constitution. The report of the commission contained several recommendations which were clearly aimed at eliminating special privileges and prohibiting the legislature from granting them in the future.[14] One proposed amendment stated that:

> Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value in money . . . No law shall be enacted or contract entered into by which the exercise of the power of taxation shall be restricted, impaired or impeded. The legislature may provide by law for taking away from any person or persons, natural or artificial now possessing or entitled to same, any right of exemption from taxation which cannot be revoked without compensation, and for paying to such person or persons a just compensation for the right so taken away.

The legislature, however, approved only the first sentence exclusive of the phrase "in money." All attempts to limit the power of the legislature to grant exemptions were unsuccessful.[15] The abbreviated sentence was approved by the people in 1875 and thus, for the first time, the state had a tax clause in its constitution. This sentence, "Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value," served as the only constitutional limitation on the collection of revenues in the state until 1947. Other amendments adopted at the same referendum restricted the right of the legislature to grant exclusive privileges and to make donations of land or money to corporations, associations or individuals.[16]

Meanwhile, the costs of government in the state continued to increase. Soon the railroad tax legislation of 1873 was felt to be unsatisfactory and pressure again grew to increase railroad taxes. In 1884, legislation was

12. *Ibid.*, p. 243.
13. Harley L. Lutz, *The Taxation of Railroads in New Jersey*, (Princeton, 1940), p. 5.
14. Sackett, *op. cit.*, p. 96.
15. Aaron K. Neeld, *Taxation—The Tax Clause*, The Governor's Committee on Preparatory Research for the N. J. Constitutional Convention, May 1947, pp. 13-14.
16. New Jersey Constitution of 1844, Article IV, Section VII, Par. 12; Article I, Par. 20; Article IV, Section VII, Par. 11.

passed with the support of Governor Abbett which made several changes.[17] The new laws imposed a tax of ½ of one percent upon the franchises of the companies. They also provided for the appointment by the Governor of a State Board of Assessors which was to evaluate the railroads and collect the taxes. In addition, the legislature outlined a classification system for railroad property which has lasted until the present time. Accordingly, main stem property, including the roadbed and right of way not exceeding one hundred feet in width, was classified as Class I. All other real property used for railroad purposes including freight stations and passenger depots was designated as Class II. Class III was to include all rolling stock and other personal property while Class IV contained the value of the remaining property including the franchise.[18] Under the legislation of 1884, all classes of property continued to be taxable for state purposes at ½ of one percent and Class II property continued to be taxable by the municipalities in which it was located at the local rates, not in excess of one percent. The new tax on franchises and the higher assessments which the new assessment board was expected to make were counted on to bring increased revenue.[19]

This legislation by no means satisfied the proponents of more railroad taxes. With the tax rates on non-railroad property mounting ever higher, their goal now became to repeal the old ceilings of one or ½ of one percent and to force the railroads to pay according to the same rates as the owners of all other property. The support for this change came especially from the municipalities in North New Jersey opposite New York. Due to the fact that New Jersey was the gateway to New York from the South and the West, there was a rapid growth in the amount of property in these municipalities which was devoted to use for terminal facilities, freight yards, etc. By 1903, railroad holdings had increased to nearly 30 percent of all property in Jersey City and every new acquisition meant a further withdrawal from the city's tax rolls. Since other cities in Hudson County were in much the same situation, a constant cry for "equal taxation" had gone up from that county's delegation to the legislature for many years.[20] In 1897, the state gave up its ½ of one percent tax on Class II property in favor of the municipalities but even a rate of 1½ percent did not satisfy them[21] when the average rate for other property was approximately 2.2 percent.[22]

Shortly after the turn of the century, the battle was taken up by a band of progressives in North Jersey which came to be known as the "New Idea" group. These men began to agitate for many progressive reforms after 1900.[23] One of their main goals, to force the railroads to pay taxes the same as other property, was by no means easy to achieve. The railroad corporations still wielded considerable power in the state and had many strong political con-

17. Conklin, *op. cit.*, pp. 960-962.
18. Lutz, *op. cit.*, pp. 5-6.
19. *Ibid.*, pp. 31-3.
20. Ransom E. Noble, Jr., *New Jersey Progressivism before Wilson*, (Princeton, 1946), p. 21.
21. Lutz, *op. cit.*, pp. 32-3.
22. Noble, *op. cit.*, p. 7.
23. Conklin, *op. cit.*, p. 1023.

nections. In 1903, the Chief Justice of the Supreme Court, the Attorney General, the State Comptroller, the Commissioner of Banking and Insurance, and a member of the State Board of Taxation were all drawn from the ranks of railroad officers and counsel. In addition, the railroad lobby had much influence in legislative circles.[24] Nevertheless, the New Idea group was able to stir up so much support that in the election of 1904, both parties embraced the equal taxation slogan.[25] The progressive campaign culminated in the important railroad tax laws of 1905 and 1906 which increased the rates which the carriers were to pay on both second class and main stem property. The legislation provided that Class II property should be taxed at full local rates instead of the previous rate of 1½ percent. However, this gain was nullified by a second act which limited municipal tax rates to exactly that 1½ percent. This second law proved so unpopular that it was soon modified to permit higher rates. Main stem property, which had been taxed at ½ of one percent for state purposes, was also required to bear a heavier tax load. The laws of 1906 provided that main stem or Class I property should be taxed at the average tax rate of the state. The railroad sympathizers countered this move by pushing through a bill creating county boards for the equalization of taxes. It was believed that the real purpose of these boards was to force local assessors to raise valuations on private property and thus lower the average tax rate at which railroads would pay.[26]

Therefore, with the legislation of 1905 and 1906 on the books, the old system that provided for the taxation of railroad property according to a separate specific rate had been superseded by the new policy that Class II property should be taxed according to local rates and the other three classes should pay the average state rate. This system prevailed right up until 1941 without any basic changes.[27] The additional revenue from the increased rate on Class II property was gratefully received by the cities in the northern part of the state and the increase in revenue accruing to the state government as the result of the increase in taxes on other classes of property belonging to the carriers proved very popular since, after the usual ½ of one percent had been deducted for general state purposes, the remainder was devoted to educational purposes.[28]

While the dispute concerning the rates at which the railroads were to be taxed was now settled, a battle was soon being waged over the problem of assessment. The railroads attacked the new legislation on the grounds that since local assessors were evaluating non-railroad property at much less than its "true value" despite the constitutional requirement, the railroads, whose property was assessed by the State Board of Assessors on the basis of "true value," should not be required to pay at the high average state rate. The courts did not sustain this argument, so the railroads tried to get the average state tax rate lowered by the appointment of county tax boards,

24. Noble, *op. cit.*, p. 6.
25. Conklin, *op. cit.*, p. 1023.
26. Noble, *op. cit.*, p. 29.
27. Lutz, *op. cit.*, p. 24.
28. Conklin, *op. cit.*, p. 1029.

whose ostensible purpose was to equalize the valuations made by local assessors and thereby raise the assessments nearer to "true value."[29] This attempt to equalize assessments met with little success.[30]

The opponents of the carriers, on the other hand, charged that the valuations placed upon the railroad property by the State Board of Assessors were low and that since the Board was dependent upon reports of the companies for their assessments, the railroads virtually made their own valuations.[31] Hence, the progressives insisted that the railroads be assessed on a par with other property owners. In 1909, the legislature responded by setting up a committee to investigate the Board. The appraisers reported that the assessments were much too low and as a result, they were soon raised.[32] By 1910, therefore, the tax privileges which had been enjoyed by the carriers were completely destroyed,[33] and they were now taxed more or less on a par with other property owners.[34]

The railroad tax problem which had held the center of the political stage for over half a century now seemed to be solved. No great objections were made to the system which was now in operation and few changes were made in it. The average tax rate in the state rose from 1.9 percent in 1911 to 4.06 percent in 1930, the valuations at which the railroad property was assessed continued to rise and, as a result, the companies during this period made sizable contributions to the municipal and state governments in the form of taxes.

This situation continued until the arrival of the depression. Then, the companies faced with sharp declines in their revenues, found that they were expected to pay much the same amount of taxes. Comparison of the gross revenues of the railroads and the amounts of their assessments in the year 1926 with those in 1936 shows that while the revenues were cut approximately in half, the assessments remained about the same.[35] As a result, all of the important railroads in the state, except those operated as part of the Pennsylvania Railroad system, failed to pay in full the taxes assessed against them, beginning with the year 1932. From the years 1932 to 1938, they withheld approximately 40 percent of their taxes[36] and by 1941 the amount of unpaid taxes exceeded $34,000,000. In addition, interest and penalties had been piling up until they totaled nearly $24,000,000.[37] Two of the railroads became bankrupt and two others were on the verge of bankruptcy.

The period from 1932 to 1941 was one of continuous litigation between the railroads and the state. The former contended that the method of assessment was invalid. They declared that their tax problem was wholly different from that of real property generally[38] and that the earnings of the railroads

29. *Ibid.*, p. 1030.
30. Lutz, *op. cit.*, p. 24.
31. Noble, *op. cit.*, p. 113.
32. *Ibid.*, p. 114.
33. *Ibid.*, p. 119.
34. Conklin, *op. cit.*, p. 1032.
35. Lutz, *op. cit.*, p. 109.
36. *Ibid.*, p. 47.
37. Myers, op. cit., p. 357.
38. Associated Railroads of N. J., *This Railroad Tax Question—What About it?*, (1939), p. 13.

should be reflected in the valuations. Hence they suggested that the assessments should be determined not by a physical valuation of the property but rather by either a capitalization of earnings or an analysis of stock and bond valuations.[39] The carriers charged that instead,

> The State Tax Department, however, continued to assess the railroad properties in New Jersey at higher levels of value than were applied ten years ago. The result is that the taxes exceeded the railroad's ability to pay and are, therefore, clearly uncollectible.[40]

They also asserted that the value of a railroad must be determined for the system as a whole regardless of state lines, and then a portion of the total sum should be allocated to the state.[41] After a long period of litigation, the United States Circuit Court of Appeals in 1940 upheld New Jersey's system of railroad taxation by saying that "A court is bridled in determining value, or interposing its own judgment for that of the taxing authorities."[42] In 1941, the United States Supreme Court denied a petition for review.[43]

Special messages on the subject of the railroad situation were addressed to the legislature by Governor Moore in 1933 and 1934 and again by Governor Hoffman in 1936. Committees were set up to study the problem in 1934, 1938 and 1939.[44] The committee of 1939 finally reached the decision that 25 percent of the back taxes should be cancelled and that the delinquent roads should be allowed seven years in which to pay the remaining 75 percent. This suggestion was approved by the Senate but did not get through the Assembly.[45]

The railroad tax issue was one of the main problems facing Governor Edison when he took office in 1941. He felt that the situation was urgent for several reasons. Having just resigned as Secretary of the Navy, he realized that war was in prospect in the near future and that "without adequate railroads a nation is helpless." However, "In order to meet even part of their tax bills, the railroads were compelled to allow their physical property to run down." He also desired to see the problem settled because "New Jersey is a highly industrialized state, and its industries depend for their prosperity upon adequate railroad facilities." Finally, the state and the municipal governments needed a settlement of the controversy in order to get what money they could.[46]

While previous proposed solutions for the tax issue had been confined to the problem of the back taxes owed to the state, Governor Edison felt that something should also be done about the entire system of railroad taxation. He was of the opinion that "beyond any question, New Jersey taxed railroads much too heavily . . . and taxed them in a way that took almost no

39. Central Railroad Company of New Jersey v. Martin, 30 Fed. Supp. 41.
40. Asso. Railroads of N. J., *op. cit.*, p. 13.
41. 30 Fed. Supp. 41, *op. cit.*
42. *Ibid.*
43. *New York Times*, April 29, 1941, p. 27.
44. Associated Railroads of N. J., *op. cit.*, pp. 2-6.
45. Governor Charles Edison, *The New Taxes of Railroads in New Jersey*, September 1943, p. 5.
46. Edison, *op. cit.*, p. 7.

account of their earnings—or lack of earnings." A report of the Interstate Commerce Commission showed that in 1940 the tax accrual per mile of track in New Jersey was $10,395 while the average figure for all the states was $1,899. New York was second with $3,276. Edison's conclusion was that:

> The real fact was that New Jersey took advantage of its geographical position to impose upon the railroads that were compelled to cross it tax burdens that either bankrupted them—if most of their trackage was in New Jersey—or that had to be passed to the consumers of railroad services in other states. We "stood at the gates of commerce and took toll of all who passed."[47]

Edison at once appointed a committee of four citizens to study the matter. It was composed of a lawyer, a businessman, a labor leader and a tax expert. This committee, with the assistance of the Princeton Surveys, submitted a comprehensive report.[48] The recommendations were incorporated into bills and presented to the legislature. The problem of the delinquent back taxes was to be solved by a compromise whereby the railroads would be required to pay in full the $34,000,000 in unpaid taxes but be relieved of paying the interest and penalties thereon in the amount of $24,000,000. In addition, the proposed legislation provided for radical changes in the state's railroad tax laws. It would fix the tax rate of all second class property at $3 per $100 valuation instead of at the local rate as heretofore. Proceeds were to continue to be devoted to the uses of the municipalities wherein the property was situated. The $3 rate was also applied to main stem property instead of the average state rate which in 1941 was $4.84. Finally, a franchise tax was imposed which was based upon the net operating income of the railroads in lieu of the prior law providing for the taxation of railroad franchises on an *ad valorem* basis.[49]

Proponents of the bills pointed out that while the new system would take account of the ability of the railroads to pay by making the franchise tax fluctuate with the income of the companies, the three percent property tax would provide a floor below which the taxes could never drop. They also contended that the compromise on back taxes was the best that could be expected. The bills were supported by Governor Edison, a Democrat, most of the Republicans and several Independent Democrats.[50]

On the other hand, the proposed legislation met with furious opposition from Mayor Hague of Jersey City and the Hudson County delegation. As we have seen before, the railroads took over much property on the Jersey side of the Hudson River across from New York for use as terminal facilities, freight yards, etc. The bulk of this was in Hudson County. In 1940, the proportion of the assessment of Class II railroad property to the total property assessment in Hudson was 12.8 percent, while in Jersey City the pro-

47. *Ibid.*, p. 4.
48. *New York Times*, June 24, 1941, p. 13.
49. *Ibid.*, July 12, 1941, p. 23.
50. Myers, *op. cit.*, p. 358.

portion was 16.7 percent.[51] This meant that any reduction in rates paid by the railroad companies on second class property would mean a sizable increase in the already high rates at which other property owners in that county were taxed. That the Class II problem was one which primarily concerned Hudson County is shown by the fact that approximately 78 percent of the total valuation of such property in the state was concentrated there.[52] It is no wonder, therefore, that Mayor Hague and the Hudson Democrats should strongly oppose bills which would cancel $24,000,000 in penalties and limit the rate at which Class II property could be taxed for local purposes to three percent.

Of course, Mayor Hague's opposition was undoubtedly motivated by political as well as economic considerations. Since the legislators who most favored the bill were Republicans, Hague suspected them of attempting to strike at his political power through the impoverishment of Jersey City, while at the same time, making the railroads pay higher franchise taxes into the treasury of the predominantly Republican state government. Although Governor Edison was a Democrat, and had been elected in 1940 by virtue of the enormous majority of votes rolled up in his behalf in Hudson County, his relations with Mayor Hague had gone rapidly from bad to worse each time he had refused to comply with the wishes of the Mayor.[53] When Edison gave vigorous support to the tax bills, the break between the two was brought into the open.

Mayor Hague opened a virulent state-wide advertising campaign against the compromise bills and "filled press and billboards with his piercing protests."[54] In all, he spent approximately $75,000 of Jersey City's money on this campaign.[55] He charged that Governor Edison's company, Thomas A. Edison, Inc., did millions of dollars of business annually with the railroads and hence he had no right to take part in the controversy. He accused the legislators who sponsored the bills of doing the bidding of "the powerful railroad lobby."[56]

Despite this furor, the legislature enacted the legislation by a large majority, and the Hudson County Democrats were practically alone in their opposition. This did not end the matter. Beaten in the legislature, Hague decided to renew the battle in the courts. He continued to snipe at Edison with charges that the Governor had traded judicial appointments for votes. He attributed his defeat to the fact that "the railroad doughbag was too heavy for me; I could not match that."[57] Edison countered by intimating that Hague opposed the bills in order to punish him for appointing a Supreme Court Justice whom the Mayor opposed.[58] The Governor also accused Hague of giving Jersey City an extravagant government and then trying to shift the blame for the excessive tax burden to the railroads.[59]

51. Lutz, *op. cit.*, p. 58.
52. *Ibid.*, p. 58.
53. *New York Times*, July 27, 1941, IV, p. 8.
54. *Ibid.*, July 24, 1941, p. 16.
55. *Ibid.*, November 15, 1941, p. 23.
56. *Ibid.*, July 24, 1941, p. 13.
57. *Ibid.*, July 23, 1941, p. 1.
58. *Ibid.*, July 24, 1941, p. 16.
59. *Ibid.*, July 23, 1941, p. 1.

Mayor Hague's threat to fight the new laws in the courts soon materialized. No sooner had the Governor signed the legislation than an unusual action occurred. The Attorney General of the state, David Wilentz, an appointee of Edison's predecessor and long-time political ally of Mayor Hague, took legal measures to prevent state officials from waiving the payment of the tax penalty. The Governor objected to these tactics and declared, "I have taken the view that the Attorney General is part of the Government of New Jersey, not independent of it and that his role is to defend the acts of that Government, not to defeat them." Wilentz replied that it was the duty of the Attorney General to have an act tested in the courts "when the rights of the whole people of the state are threatened with injury from the operation of a statute of doubtful constitutional validity."[60] The attack of the Attorney General was based chiefly upon the allegation that by cancelling the penalties, the legislature made a donation of money to a corporation in violation of Article I, Paragraph 20 of the New Jersey Constitution. This contention was upheld by the Court of Errors and Appeals in 1944, and the railroads were required to pay the penalties.[61] Mayor Hague described the decision as "the greatest victory ever won by the people of any state in the union."[62]

At the same time that the litigation over the cancellation of the penalties was going on, the new tax formula was also being tested. It was not until 1946 that this dispute was ended with a decision by the Court of Errors and Appeals upholding the new system.[63] Thus Mayor Hague emerged from the courts with a batting average of .500.

The struggle was not confined to arguments in courtrooms. The railroad tax issue was made one of the major points of debate in the gubernatorial campaign of 1943. The Democratic Party pledged itself to fight for outright repeal of the laws[64] and candidate Murphy charged that Republican candidate Edge had made a deal with the railroad interests.[65]

With the dispute continuing to be so bitter, it was inevitable that it should affect the attempts to revise the state's constitution in the years from 1941 to 1944. Hague had consistently opposed all of these attempts which were made during the terms of Governors Edison and Edge. He charged that the railroads were behind the revision movement and that those who were most active in the enterprise were representatives or pawns of the railroad lobby. He frequently paid for full-page advertisements in the newspapers of the state in which he made these assertions. When in 1944, despite his opposition, the legislature began to revise the fundamental law, the Hudson County Democrats did all in their power to disrupt the process.[66] One could not expect the Mayor to look with any favor on a new document which was being drafted by a Republican legislature, in many respects the same one which had adopted the 1941 laws. A few weeks before the referendum at

60. *Ibid.*, August 30, 1941, p. 15.
61. *Ibid.*, June 23, 1941, p. 22.
62. *Ibid.*, July 21, 1943, p. 2.
63. *Ibid.*, May 4, 1946, p. 17.
64. *Ibid.*, October 2, 1943, p. 9.
65. *Ibid.*, October 19, 1943, p. 11.
66. *Ibid.*, May 4, 1944, p. 15.

which the new constitution was to be presented to the voters, Mayor Hague led a frenzied campaign against its adoption, in which charges of all kinds were hurled at the document and its drafters. It will be remembered that at this time the new tax laws were still being fought out in the courts. The Hudson Democrats and their allies declared that the railroad sympathizers desired to revise the constitution so that they could, by altering the judicial structure, name a "hand-picked court which will, in future tax controversies, favor the railroads as against the people of the state of New Jersey." Another argument frequently heard was that the new tax clause in the proposed revision "opens the door for special privileges and eventual freedom from taxation to the railroads and vested corporate interests."[67] While there is no evidence to support this contention and actually, the changed tax clause was sponsored by the New Jersey Association of Real Estate Boards and the New Jersey State League of Municipalities,[68] enough voters were impressed or at least confused by such tactics so that the proposed revision failed to receive a majority of the votes.[69]

The railroad tax controversy was injected into the gubernatorial election of 1946 by the Democrats. Their platform again pledged the repeal of the offending preferential rates and Hague promised that if candidate Hansen were elected, the railroads would "pay the same taxes you people pay."[70] The dispute was made more acrimonious by the fact that the Republican candidate for governor, Alfred E. Driscoll, had been floor leader of the Republican majority in the state Senate in 1941 and had strongly championed the tax laws. At that time, Hague had named him as one of those who did the bidding of the "railroad lobby" and Driscoll had replied that Hague was a man "whose name is synonymous with bad government in this state."[71] Hague now criticized Driscoll's actions in 1941 and charged that he was counsel for the railroads at the same time that he was supporting the laws.[72]

This brings us to the Constitutional Convention of 1947. Before we examine the way in which the issue was handled by the delegates, it will perhaps be well to make a short summary of the situation as it now stood. We have seen that during the first fifty years of railroad taxation in the state, the railroads were very powerful and were able to exact and defend privileges of all kinds. However, in the last decades of the 19th and the first ten years of the 20th century, a constantly growing movement was slowly able to strip the carriers of their privileges and exemptions so that by 1910, railroad property was taxed more or less on a par with other property. This policy prevailed from 1910 until 1941; although, during the depression years, many observers had begun to question the fairness of such a system. The railroads then sought relief in the courts and in the legislature from

67. Committee against the New Constitution, *Vote No*. Pamphlet distributed by the opponents of the 1944 revision.

68. Neeld, *op. cit.*, p. 22.

69. Walter Bilder, "Useful Reflections on the Constitutional Election," 67 *New Jersey Law Journal* 397.

70. *New York Times*, November 4, 1946, p. 4.

71. *Ibid.*, June 24, 1941, p. 13.

72. *Ibid.*, June 14, 1946, p. 17.

what they and many others considered an unjust tax burden. In 1941, relief was granted, but to a large extent at the expense of the municipalities of Hudson County. It is not surprising that Mayor Hague should feel that this was a move by a Republican legislature to strike at his political power through the impoverishment of Jersey City. Whether or not this purpose was in the minds of the proponents of the legislation of 1941, the fact remains that railroad taxation became the dominant political issue in the state and was fought out in the courts, the legislature, and in every political campaign.

The subject of railroad taxation is an extremely complex one and involves a number of highly technical questions. Among them are the problems of determining the value of railroad property, deciding on a rate at which the property should be taxed which will be fair to both the companies and the taxing agency, providing for the division of the taxes between the state and the municipalities in which the property is located, evaluating the franchise of the companies, and deciding how much consideration should be given to such factors as earnings and market values of securities. No doubt there are those who would maintain that such technical problems should be solved by experts in the field of taxation. It has been clear, however, that in over a century of railroad taxation in the state, the political aspects of the issue have invariably overshadowed the technical aspects. For many decades, the issue has been one of the most controversial in the state and has played an important part in the political picture. The final decisions on railroad taxation have emerged as the products of the struggles between political parties, between progressives and champions of corporate privilege, between municipalities and the state and between countless other contending forces.

Many observers picked this issue as the reef on which the Constitutional Convention of 1947 was most likely to be wrecked, particularly since as recently as 1944 a similar attempt had been defeated primarily through the efforts of the mayor of Jersey City. This time, however, he appeared to be a bit more cooperative. By now, the final decisions on the 1941 tax laws had been made by the courts and the Democrats could expect no more aid from that quarter. Appeals made to the legislature and to the electorate between 1941 and 1947 had been of no avail. However, the new Governor had indicated that he might have changed his attitude on taxation since 1941, for in his inaugural address, Driscoll had expressed his sympathy for the plight of the municipalities and had advocated "tax adjustments that would assure full coverage and equality of treatment."[73] As a result of these and many other factors, Hague must have felt that he had everything to gain and nothing to lose, for he joined the Governor in urging the people to authorize a constitutional convention in 1947. Hudson County voted 15 to 1 in the affirmative and Jersey City responded with an overwhelming vote of 30 to 1.[74]

73. Alfred E. Driscoll, *Inaugural Address to the Legislature*, January 21, 1947, p. 29.
74. *Trenton Evening Times*, June 4, 1947, p. 1.

Another hopeful sign came a few days before the convention met for the first time with the announcement that Frank Hague intended to resign as mayor of Jersey City. He handpicked his nephew, Frank Hague Eggers, as his successor, saying, "After I brought up this lad—Judge Eggers—I thought I ought to give him a chance to get some experience as mayor."[75] Hague continued on as leader of the Democratic Party in the state, and even though it was obvious that he would remain as the power behind the throne,[76] at least Eggers as a delegate to the convention was a man with whom the Republicans could deal without the intrusion of so many bitter memories.

Proponents of revision had early singled out the tax clause as one of the features of the old constitution which most needed to be changed. The purpose of a tax clause in a constitution is to set the basic rule governing all taxation, both by the municipalities and by the state. Although railroad taxation is only a small part of the total state revenue, it was clear that underlying the writing of a new tax clause would be the old political dispute over railroad taxes. Since that is the issue in which we are primarily interested, we shall examine the process of writing a new tax clause from that angle and will, of necessity, leave out much of the overall revenue picture.

The task of framing the tax clause for the new constitution was given to the Committee on Taxation and Finance. As in the case of amendment and revision, we shall examine the work of the committee, not because of any influence which it had on the final decision of the convention, but because its hearings serve to bring out the conflicting interests so that we may examine them.

The Committee on Taxation and Finance was composed of eleven delegates, of whom eight were Republicans and three were Democrats. One of the latter was former United States Senator John Milton from Jersey City, a friend and advisor of Mayor Hague. His was the responsibility of promoting the interests of Hudson County before the committee and he once declared that his chief concern was "to get more money for Jersey City."[77] With the exception of the chairman, who had held the office of State Treasurer, and the vice chairman, who had been the State Comptroller, the members of the committee were not conspicuous for their knowledge of the subject of taxation. Another fact worthy of note was that none of the Republicans was particularly high in the ranks of his party or close to the administration. It may not have been by coincidence that none of the members had been in the legislature in 1941 when the tax laws were passed.

There were three proposed tax provisions which were advocated by speakers before the committee. One was the provision in the old constitution which contained the controversial "true value" clause. A second was supported by those groups which wanted to increase railroad taxation and provided that all non-exempt real property should bear an equal burden of taxation. A third proposal was advocated by the Driscoll Administration and

75. *Trenton Evening Times*, June 5, 1947, p. 6.
76. *Newark Evening News*, June 18, 1947, p. 4.
77. *Daily Home News*, July 30, 1947, p. 1.

would scrap the "true value" formula for assessing property and give to the legislature the right to establish standards of value and classifications of property for taxation.

It will be remembered that the old tax provision was inserted in 1875 by an amendment which stated that "Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value." The proponents of increased railroad taxes were opposed to preserving this provision without some changes or additions since under it the preferential three percent tax rate had been sustained. Several tax experts from the state government testified before the committee. They stressed the need for a flexible tax provision in order that the $50,000,000 per year shortage expected in the near future might be dealt with.[78] These speakers either advocated the retention of the old clause or failed on the whole to make a very convincing case against it. Objections to it were that "true value" was an "almost impossible yardstick" to apply, that probably none of the 565 assessors in the state complied with it and that each municipality had its own percentage of assessment in relation to "true value." This led to great inequalities in assessments but the courts had refused to grant relief in cases of unfair valuations. In addition, there was doubt about the extent of the ability of the legislature to classify property for the purposes of taxation. Finally, there was considerable uncertainty concerning the constitutionality of a progressive income tax under the old provision. Nevertheless, several of the state's tax authorities did leave the impression that there was very little that could not be done under that provision,[79] that it was not to blame "for the unjust burden of taxation which real property presently bears in this state,"[80] and that they would almost rather retain the old provision than take a chance on an untried one, the meaning of which was not too certain.[81] The State Chamber of Commerce was the only organization appearing before the committee which supported the old tax article.[82]

The second taxation article which was advocated by witnesses appearing before the committee kept the old sentence intact and added thereto, "the burden of direct taxation upon all real property not exempted shall be equal." This provision received the support of all those who were interested in increasing the taxes paid by the railroads on Class II property, including the Democrats and several organizations. Since they had lost out in their attempt to get the 1941 laws repealed or voided in both the courts and in the legislature, they were now carrying the fight to the constitutional convention. Their main desire was to get the convention to approve a tax clause which would make the preferential rates unconstitutional. The "equal burden" provision, which was designed to do just that, was first advocated by the State League of Municipalities.[83] Since there was some Class II railroad

78. Committee on Taxation and Finance, Record of Proceedings, State of New Jersey Constitutional Convention, C5-2-9.
79. Neeld, *op. cit.*, p. 27.
80. Committee on Taxation and Finance, *op. cit.*, p. C5-2-10.
81. *Ibid.*, p. C5-7-4A.
82. *Ibid.*, p. C5-2-12.
83. *Ibid.*, p. C5-3-23A.

property in over 400 municipalities in the state, they were all interested in the extra revenue which they would receive if they could again tax that property at the local rates. Their position was supported by the State Federation of District Boards of Education. This group was interested in abolishing the preferential railroad tax rates because the money from main stem taxes, after a deduction of approximately 16 percent for general state purposes, was devoted to the support of seventeen specified state agencies of an educational nature and anything remaining was distributed to the local school districts. Since the reduction in main stem taxes as a result of the preferential rate, the revenue received was not even sufficient to meet the requirements of the seventeen agencies and nothing was left over for the school districts. They also opposed the preferential rates on Class II property since such rates undermined the principal support of the school system: the direct contributions by the local municipalities.[84]

The speakers supporting this provision argued that since real property had to bear most of the tax burden, the burden should at least be equally distributed on all classes of real estate, and the legislature should be forbidden to allow any taxpayers a preferential rate.[85] They argued that if the railroad property was not so used, it would be taxed at the local rate; and there was no municipality in the state with a substantial amount of railroad real property, where the local rates were as low as three percent. In several cities the rates were in the neighborhood of six or seven percent.[86] It was calculated that if the railroads were taxed in 1947 under the old laws instead of according to the legislation of 1941, they would have to pay an additional $11,000,000.

Strong objections were made to this "equal burden" proposal. It would place a stringent restriction on the legislature since it would not permit classification of real property for taxation purposes.[87] The State Commissioner of Taxation and Finance declared that it "would lock the taxing powers of the state in a vise, and should not even be considered."[88]

The third proposal which was seriously urged before the committee deleted the "true value" formula from the old tax article and stated instead that "Property shall be assessed for taxes under general laws, and by uniform rules, according to classifications and standards of value to be established by law." This proposal was first submitted in behalf of the New Jersey Committee for Constitutional Revision, which, as we have seen before, was composed of labor and women's organizations, the New Jersey Association of Real Estate Boards and the New Jersey Taxpayers Association. This provision soon received the support of the Driscoll Administration. The first indication of this came as the result of the testimony of Dr. John Sly who was Chairman of the State Commission on Tax Policy and a close advisor of the

84. *Ibid.*, p. C-5-30A.
85. *Ibid.*, p. C5-3-23A.
86. *Ibid.*, p. C5-3-27A.
87. *Newark Evening News*, July 20, 1947, p. 10.
88. Committee on Taxation and Finance, *op. cit.*, p. C5-7-3A.

Governor on matters of finance.[89] He condemned the old tax clause with the statement that "I know of no state that raises so much money so inequitably as New Jersey, and it is in part due to the restrictions of these constitutional provisions."[90] He described the "equal burden" proposal as "vague"[91] and then proceeded to support the third suggested provision. On the same day, Governor Driscoll permitted the report that he also favored its inclusion in the tax article,[92] and a few days later Commissioner of Taxation and Finance Zink gave a similar recommendation.[93] Proponents of this administration proposal argued that it left no doubt that property could be classified by the legislature for taxing purposes and that the legislature could use other standards of value than "true value."[94] It was a flexible provision which would keep all tax doors open to the lawmakers, including a graduated income tax.[95] On the other hand, those groups which desired to change the railroad tax laws opposed this administration recommendation since there was no doubt but that it would permit preferential rates as set up by the 1941 laws.

It is interesting to note that in all of the testimony before the committee, not a single good word was uttered for the 1941 laws, although they were frequently condemned. The franchise tax, which was calculated by the framers of that legislation to make up for the preferential rate on property of $3 per $100, had dropped from $11,070,476 in 1943 to $1,799,389 in 1947; and at a time when the state was badly in need of revenue.[96] Even Commissioner Zink, who as a member of the legislature in 1941 had supported the tax bills, agreed that the railroads were not paying enough taxes.[97] However, he proposed to make them pay more by raising the floor of the franchise tax,[98] rather than by forcing them to pay local rates on Class II property. Editorial opinion in the newspapers of the state was also predominantly in favor of some change in the preferential laws in order that the railroads should be made to pay more taxes. It is interesting to note that no representatives of the railroads ever appeared before the committee nor was their case even presented to the committee by circulars or letters.

The committee was, therefore, faced with three proposals. The "equal burden" clause received the support of the Democrats while the Driscoll Administration had thrown its weight behind the "classifications and standards of value" provision. There was some talk of submitting the tax problem to the voters as a separate referendum since there seemed no way to compromise the two points of view. Nevertheless, the committee voted down the "equal burden" tax clause by a vote of 8 to 2 (one Democrat was absent) and by another vote of 8 to 2 tentatively decided to keep the old "true value"

89. *Newark Evening News*, July 11, 1947, p. 10.
90. Committee on Taxation and Finance, *op. cit.*, p. C5-5-16A.
91. *Ibid.*, p. C5-5-19A.
92. *Philadelphia Inquirer*, July 12, 1947, p. 2.
93. Committee on Taxation and Finance, *op. cit.*, p. C5-7-(1A-7A).
94. *Ibid.*, p. C5-5-18A.
95. *Ibid.*, p. C6-7-7A.
96. *Newark Evening News*, November 1947, p. 2.
97. *Philadelphia Inquirer*, July 16, 1947, p. 1.
98. *Daily Home News*, July 23, 1947, p. 1.

provision.[99] This decision disturbed Governor Driscoll so much that he interrupted his vacation to appear before the committee to urge the acceptance of the administration proposal. Despite his condemnation of the "viciousness of our present system,"[100] the committee on July 29 voted down the Governor's recommendation by a vote of 8 to 3.[101] The Democrats voted with the majority against this proposal. Apparently they cast their votes for the retention of the old "true value" clause not so much because they favored it but rather because knowing how much Driscoll and his advisors desired to get rid of it, they felt that the administration would make concessions in their favor in order to do so. It was probable that several of the committee majority, since they were uncertain of the effect of the other proposals, preferred "to risk the continuance of existing inequalities in real estate assessments in order to avoid other and unknown pitfalls."[102] Another factor was undoubtedly their dislike of a progressive income tax, which would be made possible by the adoption of the administration proposal. One member felt that "The elasticity of the clause could result in giving us all devious types of taxation and I think that is opening up the sluice gates."[103] The Democrats were displeased with the decision of the committee but decided to fight for an amendment on the floor of the convention.[104] The committee's decision was, therefore, one which was acceptable to no one.

As soon as it became evident that the committee was going to recommend the retention of the old tax provision, the negotiations were completely removed from the committee room—indeed, from the convention itself—and were placed in the hands of the leaders of the two political parties in the hope of reaching a compromise acceptable to both sides. Both Hudson County and Driscoll Administration leaders had indicated their willingness to compromise.[105] Mayor Eggers pointed out that if an agreement could not be reached, he favored submitting the tax problem to the voters as a separate proposal so that it would not endanger the work of the convention as a whole.[106] However, his uncle made a statement to the press in order to refresh the memory of the delegates concerning what had happened in 1944 when there was an attempt to force upon the people "a railroad dominated constitution" and warned that there was "great danger that this issue will influence the people to reject the constitution in its entirety."[107] Administration leaders, on the other hand, at first went on record as approving higher railroad taxes. Later, Governor Driscoll made it clear that if he could get his tax provision passed by the convention, he would use his influence to persuade the legislature to make tax adjustments acceptable to the Demo-

99. *Ibid.*, July 23, 1947, p. 1.
100. Committee on Taxation and Finance, *op. cit.*, p. C5-8-16.
101. *Daily Home News*, July 30, 1947, p. 1.
102. *Newark Evening News* (Editorial), August 4, 1947, p. 6.
103. Committee on Taxation and Finance, *op. cit.*, p. C5-9-40.
104. *Atlantic City Evening Union*, July 24, 1947, p. 1.
105. *Newark Evening News*, July 17, 1947, p. 10.
106. *Philadelphia Inquirer*, July 16, 1947, p. 1.
107. *Daily Home News*, July 5, 1947, p. 1.

crats.[108] This was not enough to satify Hudson County leaders as they continued to insist upon a constitutional provision which would make the 1941 laws unconstitutional.[109] Thus by the time a week had elapsed since the committee report, the Governor was conferring with his tax advisors, Dr. Sly and Commissioner Zink, concerning the possibility of drafting "constitutional language which will channel taxes from railroad real estate to the municipalities without going into legislative details."[110]

In the meantime, realizing that the "equal burden" proposal had no chance of acceptance, Mayor Eggers introduced a provision on the floor of the convention which was to be used for bargaining purposes. It kept the old "true value" sentence and added thereto a specific requirement that Class II property should be taxed at the local rate with the proceeds being paid to the municipality in which it was located.[111] In the middle of August, Governor Driscoll and Dr. Sly met with Democratic leaders. The Governor pointed out his opposition to the Eggers amendment since it was too detailed and would freeze one sector of taxation beyond legislative recourse. It was agreed that Dr. Sly should try to work out in general language what Eggers sought in specific language.[112]

A couple of days later, a proposal was introduced in the convention by Delegate Feller. It was just about half way between the two extreme positions. Although it was denied, some thought that Feller had given his name to the administration compromise. It kept the old tax provision except for the words "according to true value" and added the sentence, "All real property taxable for local purposes shall be assessed and taxed at uniform rates within each taxing district."[113] Both sides agreed that this suggestion was a step in the right direction [114] but Hudson County leaders pointed out that, although, if this amendment were adopted, the 1941 laws would be unconstitutional, there would be nothing to stop the legislature from at any time declaring railroad property as not taxable for local purposes. They also reiterated their desire for the retention of the "true value" clause.[115]

Another meeting took place between Republican and Democratic leaders approximately a week after this. The administration refused to give in any further so no compromise was reached. On the following day, Mayor Eggers submitted a second proposal to the Governor but did not even bother to introduce it on the floor of the convention. This was very similar to his first, although phrased in more general terms. The administration again refused on the ground that it was too rigid and would remove forever from the legislature the right to determine how second class railroad property should be taxed and the proceeds distributed.[116]

108. *Philadelphia Inquirer*, July 30, 1947, p. 2.
109. *Ibid*,. August 25, 1947, p. 16.
110. *Daily Home News*, August 8, 1947, p. 1.
111. Amendment Number 5 to Committee Proposal No. 5-1.
112. *Newark Sunday News*, September 7, 1947, p. 1.
113. Amendment No. 10 to Committee Proposal No. 5-1.
114. *Philadelphia Inquirer*, August 22, 1947, p. 16.
115. *Newark Evening News*, August 14, 1947, p. 1.
116. *Ibid.*, August 21, 1947, p. 1.

Administration leaders now concentrated on trying to persuade Mayor Eggers to support the Feller Amendment, and, since a basis for agreement had now been drawn up, the Governor met with convention leaders, outlined to them in general terms the way in which matters stood and then returned to Trenton to await developments.[117]

It now seemed certain that unless something out of the ordinary happened, some sort of a compromise would be made which would invalidate the 1941 laws. Although the railroad people had taken no active part in the convention, they were watching developments very closely. Presumably they did not expect that the administration would compromise to this extent. When, however, they saw what was happening, they printed a statement which they circulated around the convention on August 19. In it they pointed to the additional tax burden which would be imposed on them if they were forced to pay taxes at local rates. They asked that this matter be left up to the legislature as they, no doubt, expected better treatment there.[118] On the same day, newspaper reporters recognized at least five of the railroads' legislative agents, who were seen each year at the State House during the legislature's sessions, at the convention and noticed that they talked to delegates.[119]

Discussion of the Taxation and Finance Article had been put off until last, and by the end of the session on Thursday, August 21, everything else had been settled with the exception of the tax provision which as yet had not even been mentioned on the floor of the convention. Several meetings had been held between the leaders of the two factions but no compromise had been reached. Many Republicans on that afternoon were impatient to finish up and, since they were confident that they had enough support to pass a modified version of the Feller amendment, desired a vote on the tax issue. However, administration forces were still hopeful that an agreement could be consummated with the Democrats and decided to put the discussion of the issue off until the next meeting on the following Tuesday.[120] The tension was high that afternoon, and just before the adjournment for the weekend, an incident occurred which caused the most acrimonious outburst of the convention. It was usual for convention President Clothier to permit the page boys to distribute literature which was printed up by the various interest groups, since it was felt that all groups should have the opportunity to place their views before the delegates. A few minutes before the end of this session, the page boys were seen passing out photostatic copies of editorials from newspapers which supported the original administration proposal. As soon as Mayor Eggers saw them, he jumped to his feet and with his face flushed with anger demanded to know who was responsible for their distribution. He declared that:

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117. *Trenton Evening Times*, August 20, 1947, p. 1.

118. Associated Railroads of New Jersey, *Information Concerning the General Tax Clause of the New Constitution for New Jersey.*

119. *Newark Evening News*. August 22, 1947, p. 1.

120. *Trenton Evening Times*, August 22, 1947, p. 2.

> They are editorials which are designed to accomplish a purpose which is at variance to what we are trying to accomplish here . . . There have been some characters found here the last few days that have been working, and they have not been working for the success of the convention.[121]

The next day he made a statement to the press that "the greatest danger to the harmonious conclusion of the constitutional convention lies in the intrusion of the railroad interests."[122]

All efforts to reach a compromise over the weekend failed and it looked as though the issue would have to be fought out on the floor of the convention on Tuesday morning. However, President Clothier called a final meeting on Monday night which was attended by Mayor Eggers and Senator O'Mara for the Democrats and Senators Barton and Van Alstyne for the Republicans. This meeting resulted in an eleventh hour agreement.[123]

The next morning, Senator Van Alstyne gave copies of the proposal to Committee Chairman Read and the Taxation and Finance Committee met to discuss it. A few members of the committee were unenthusiastic about the compromise so after a short time they decided to introduce it on the floor of the convention without the committee's support. President Clothier then called the delegates to order and gave them a short pep talk, part of which concerned Hudson County.

> So, in our discussion on the tax proposal this morning, may I urge all of us to remember one of the basic principles with which we started? That is that we are constructing a constitution for all the people of the state, not just the people of our own county. This means we must remember that New Jersey has twenty-one counties, not twenty, and that we must have the best interests of the twenty-first county in mind as well as that of the other twenty.[124]

His plea was followed by Chairman Read, who introduced the two amendments which incorporated the compromise, although at the same time pointing out that "I may not advocate them with enthusiasm, and certainly will not attack them with any too much vigor."[125] He then called upon Senator Van Alstyne to explain the compromise. The Senator made a few general statements and was followed by a number of speakers who complimented each other for their "tolerant spirit," "statesmanlike job," and "valiant efforts." It was obvious that the great majority of the delegates were so glad to have the issue settled and to see that the political leaders were in agreement, that they were willing to accept almost anything. As one delegate said a few days later, "We were being so genial and pleasant and non-partisan that I think somebody could have slipped me a lead franc for a quarter

121. Proceedings of the New Jersey Constitutional Convention of 1947, mimeographed, p. 18-(52B-53B).
122. *Newark Evening News*, August 22, 1947, p. 1.
123. *Newark Sunday News*, September 7, 1947, p. 1.
124. Proceedings, *op. cit.*, p. 19-9A.
125. *Ibid.*, p. 19-10A.

and I would have taken it."[126] Although most of the delegates had only just seen the proposal for the first time and none could be certain of what it meant—in fact, different interpretations were given by the speakers—only three of the delegates asked questions. Only one delegate spoke against the amendment, declaring:

> This is an amendment which in general language, when boiled down, amounts to nothing more than an attempt by the constitutional convention to amend the present 1941 Railroad Tax Act as to the taxation of second class railroad property . . . It freezes the taxation of all local real estate . . . and prevents classification of real property.[127]

Less than two hours after the proposal was first introduced, it was passed by the overwhelming majority of 72 to 4.[128] All other proposals for a tax provision which had been placed before the convention, including that of the committee, were immediately withdrawn.[129] This was followed by the unanimous adoption of a memorial to the Governor and the legislature requesting them "to reconsider the entire railroad tax law in the interest of financial stability and efficient service of these vital public utilities."[130]

The taxation provision as finally adopted by the convention stated that:

> Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the state for allotment and payment to taxing districts shall be assessed according to the same standards of value; and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district.[131]

Actually, this provision was a modification of the Feller amendment, spelling it out in greater detail. It very clearly overruled the 1941 preferential tax rate by its provision that real estate taxed for local purposes had to be taxed at the local rate. Nevertheless, it did not remove the subject from legislative control, for the law-makers could at any time provide that Class II railroad property should no longer be taxed for local purposes. There seemed to be little likelihood that this would ever happen, however, for it would take a brave legislature to strip over 400 municipalities of this source of revenue,[132] especially since many of them would be Republican-controlled. The net result of the new provision was that the railroads would thereafter be forced to pay several million dollars more to the municipalities, the lion's share of which would go to Jersey City. The Governor announced that the state would revamp the railroad tax laws in such a way as to grant the railroads credit on their state taxes for increased amounts paid to municipalities,

126. *Ibid.*, p. 20-7A.
127. *Ibid.*, p. 19-32A.
128. *Ibid.*, p. 19-40A.
129. *Ibid.*, p. 19-42A.
130. *Ibid.*, p. 19-43A.
131. New Jersey Constitution of 1947, Article VIII, Sec. I, par. 1.
132. *Trenton Evening Times*, August 27, 1947, p. 1.

but, nevertheless, it was almost certain that the railroads would be called upon to pay additional taxes.[133]

It would be very difficult to say which side received the better of the bargain. The Republican Administration compromised on its desire for constitutional authorization to classify property for tax purposes and witnessed the shift of revenue from the Republican-controlled state treasury into the coffers of Democratic Hudson County. On the other hand, they were able to effect the deletion of the "true value" clause and to continue a kind of theoretical dominance by the legislature over Class II railroad property. For the Democrats, the profit and loss statement was just the reverse.

The public reaction to the compromise was mixed. The *Newark Evening News* was highly critical both of the provision, which it found to be "heavily weighted in favor of what Mr. Hague wanted with regard to railroad taxation," and its method of adoption, by which "it was precipitately whipped through the convention as part of one brief morning's work by the delegates most of whom did not know the scope and significance of their action."[134] Naturally there was great rejoicing in Jersey City. Frank Hague described the new charter as "one of the greatest documents ever offered to the people in the state's history" and declared "with this new constitution, we forgive everyone—because we won."[135] Such cries of glee from the enemy's camp did not warm the hearts of some of the Old Guard Republicans. Former Governor Edge warned, "Again as a practical Republican, I can only say that if Hague feels the Democratic Party has won through the proposed new constitution initiated by Republicans, we must be doubly on our guard."[136] He condemned the "Kris Kringle" policy of Governor Driscoll and stated that the taxation article was "an invitation to perpetuate the extraordinary expensive governments, which, in notable cases use the public treasury principally for the support of highly organized political machines."[137] Edge's voice was but faintly heard above the praise which generally greeted the new document, and he at last gave it his grudging support. Even former Governor Edison, who had sponsored the 1941 tax laws, issued a statement praising the charter.[138]

This narrative still leaves several fundamental questions unanswered. Why was it that Hudson County was able to get the objectionable laws voided by the constitutional convention when six years of fighting in the courts and in the state legislature had proven unsuccessful? The answer is certainly not to be attributed to any change of personnel, for the actual negotiations were carried on by the same men who dominated the legislature. Neither is the reason to be ascribed to the bi-partisan spirit of the convention nor to the fundamental nature of the constitutional decision, for the same partisan political considerations were controlling, although subdued,

133. *Newark Evening News*, August 28, 1947, p. 1.
134. *Ibid.*, August 27, 1947, p. 6.
135. *Ibid.*, October 31, 1947, p. 9.
136. *Ibid.*, October 30, 1947, p. 6.
137. *Ibid.*, September 5, 1947, p. 1.
138. *Ibid.*, September 26, 1947, p. 6.

and the decision was not of a fundamental nature but was purely legislative. It seems clear that the main reason that the Republican leaders compromised on this issue was that, above all else, they wanted to draft a new constitution which would be adopted by the people. The administration had been very successful in having most of its recommendations incorporated into the new document and the Democrats had given in several times on issues like gambling and the judiciary. However, it was obvious that the taxation issue was where the Democrats drew the line. In 1944, Hague had proved himself to be very proficient at defeating constitutions and the Republicans were not anxious to test his skill again. After all, it was not much of a concession; almost everyone agreed that the railroads should be paying more taxes.

Why, then, did the delegates acquiesce so willingly in the compromise which the political leaders handed to them on the morning of August 26? It was evident that the majority of the delegates realized that the taxation issue was too complex and too much of a "hot potato" for them to handle effectively. Issues such as the powers of the governor were more simple and could be more easily grasped; but here was something that could not be handled by debate. Most of the delegates were only too glad to have the issue solved for them. After all, they had worked hard through nearly three hot summer months; the last thing that they wanted was to see the success of their project threatened by the final issue to be faced by the convention. And so, when the delegates saw that a compromise had been reached, they settled back in their chairs with a sigh of relief and shouted out a hearty "aye" when their names were called.

Thus, we see that the controversial issue of railroad taxation was handled by the Constitutional Convention of 1947 as a political problem and it was disposed of by the political methods of compromise and negotiation. Two days after the final decision was reached, Governor Driscoll remarked, "I am hopeful that this controversial subject will be lifted by the constitution out of the realm of politics into that of economics."[139] In view of the history of this issue, it seems most unlikely that the Governor's wish will be realized. Every time the issue of railroad taxation has come up, attempts to solve it in a "realm of economics" insulated from political realities have been academic at best. In retrospect, it seems clear that the delegates of the convention were wise to permit the decision on the problem of taxation of second class railroad property to be made in the "realm of politics."

139. *New York Times*, August 28, 1947, p. 15.

Chapter VII

CONCLUSION

The New Jersey Constitutional Convention of 1947 was an interesting example of constitution-making in a democracy. We have examined the way in which it disposed of five of the most difficult issues with which it was faced. Using these studies as a basis, perhaps it will now be useful to try to discover what elements were most responsible for the convention's success. There are two general considerations involved in such an investigation. The first is the overall environment within which the convention operated. The second is the more specific problem of how the delegates resolved the conflicts of opinion which arose over proposed changes.

Naturally it is impossible to give an inclusive picture of the general situation in New Jersey in the summer of 1947. It is possible, however, to single out some of the factors which had the most direct bearing on making the convention a success.

One factor which must be mentioned is that New Jersey was ripe for constitutional revision. Agitation for a new charter had been increasing for over half a century and the seven years since 1940 had witnessed an almost continuous drive for revision. The publicity and educational campaigns which accompanied the revision attempts of 1942 and 1944, while failing to secure the acceptance of those particular documents, did sell the idea that revision was needed.

A second condition contributing to the success of the convention was the fact that the time was favorable. The war had ended, conditions were prosperous, reconversion was well under way but men were still looking ahead to see what the post-war world had in store for them. In a period of uncertainty, the opening of an atomic age, the leaders of the state were acutely aware of the need to revise the state's fundamental law so that it would best be able to meet the requirements of an unknown future.

A third consideration was the political picture within the state. The convention occurred at a time when the ordinarily heated conflict between the political parties had cooled down. There existed no burning controversies outside the convention itself which threatened to engulf it. The fervor of the election of 1946 had died down and the contest of 1948 was still far off. The election of 1946 had resulted in a resounding victory for the Republicans and they controlled the state. The Republicans had long advocated revision and they welcomed this opportunity to carry it out. The party leadership also realized that it had a definite responsibility to make a success of this convention and that failure to do so would hurt the party politically. This acceptance by the party in power of the responsibility for the successful conclusion of

the revision was of inestimable benefit. The lack of this condition is one of the bad features of a constitutional provision which provides that the question of revision be automatically presented to the voters every twenty or twenty-five years. In such a case, a convention may become an unwanted infant placed upon the doorstep of the party in power, resulting in an attempt by that party to dodge the responsibility for its care. Fortunately, this was not the case in New Jersey. The Republicans realized that their prestige would be greatly enhanced by the carrying through of a successful revision. It was also fortunate that the Democrats had much to gain from a revision. Their main goal was to invalidate the railroad tax laws. They had failed in the courts and in the legislature; so their last hope was a constitutional convention. Although the Democrats were greatly in the minority, they did not need to fear that the Republicans would ride over them roughshod. The memory of the defeat of 1944 was sufficient to make the Republicans think twice before incurring the displeasure of the Hudson County leaders.

A fourth element in the overall picture was the excellent leadership given to the movement by the Driscoll Administration. Just how much the success of the convention was due to the behind-the-scenes operations of the Governor and his associates will probably never be known. It can be definitely stated that their work was often helpful and at times vital. At the time that the convention was meeting, Governor Driscoll's prestige was at its peak. He had been elected just a few months before and was the acknowledged leader of his party. Young, vigorous and capable, he was also an adroit politician. In his inaugural address, he named revision of the Constitution of 1844 as the number one goal of his administration and, in the minds of many, the success of his administration would be determined by the outcome of the convention. Driscoll and his assistants did much to pave the way for the convention and to make it function smoothly after it had begun. Under his direction, leaders in all parts of the state were consulted, conciliated and enlisted in the cause, the rules of the convention were drawn up in advance, agreement was reached on who would be the officers of the convention, a tentative list of committee members was made and the aid of students of government was secured in order that a valuable body of preparatory research would be ready for the use of the delegates. After the convention had begun, the Governor was always in the background, wielding his influence in such a way as to help the delegates over the roughspots.

A fifth factor contributing to the success of the convention was the non-partisan spirit displayed by the delegates. Although only thirteen of the twenty-one counties complied with the Governor's request to send bi-partisan delegations, the delegates did, on the whole, lay aside partisan considerations. They were aided in this by the selection of a convention president who was not actively engaged in politics, by the fact that no party caucuses were held, that the delegates were not seated according to party and that no party floor leaders were ever appointed. The non-partisan spirit was promoted by the committee appointments, for the number of Democrats on the main committees was roughly proportionate to their actual strength in the convention and

the chairmanship of one of the five main committees was awarded to a Democrat. Another factor which tended to get the convention off on the right foot was that no patronage jobs were available since most of the staff for the convention was borrowed from the state civil service. The generous sprinkling of non-politicians among the delegates also added to the non-partisan character of the convention. While they often did not know what was going on, they were not people who would blindly follow political leaders. A final consideration which helps explain the virtual absence of partisan disputes was that in only a few of the issues was the division of opinion along party lines. The basic differences developed on ideological grounds or out of the deep cleavage of interest between rural and urban counties.

A sixth consideration which contributed to the success of the convention was the fact that the most controversial issue, the one which could have come nearest to breaking up the convention, was completely taken out of the hands of the delegates as the result of a pre-convention decision. This was the problem of rural representation in the legislature. Whether or not the convention could have withstood the shock of a battle over representation is a matter for speculation. However, it is certain that such a conflict would have done much to impair the restraint with which the delegates handled their most difficult assignments.

A final condition which had direct bearing on the success of the convention was the attitude taken by the delegates themselves. It was summed up by one of them with the statement that "I suppose like everyone of the eighty-one delegates to this convention, I'm not so much interested in proving that I'm right on any particular subject as I am in being part of a convention that writes a constitution to be adopted by the people of the State of New Jersey in November."[1] It is an honor to be a member of a convention which writes a constitution. It also can be hard work. No one likes to give up his summer vacation, incur economic losses (the delegates received no compensation with the exception of their expenses), and spend three months of hard work on a document, only to witness that document's defeat at the polls. This accounts in part for the delegates' willingness to compromise their own views or even to accept the outright defeat of their proposals when the good of the convention demanded it. The delegates were all agreed that the old constitution needed to be changed. While they had different opinions on what alterations should be made, they demonstrated over and over again their willingness to subordinate their personal views to the success of the revision.

This resume, while incomplete, gives some indication of the general environment within which the convention worked. It will now be fitting to examine briefly the process by which the delegates made their decisions on the issues which confronted them.

One factor which the delegates kept constantly before them in their deliberations was the need for a short, flexible, simple document which would be restricted to the incorporation of fundamental principles. The desirability

1. New Jersey Constitutional Convention, *op. cit.*, p. 15-10B.

of these characteristics was impressed on them very frequently by the Governor, the President of the convention, and witnesses who came before the committees. The delegates had learned a lesson from constitutions of other states which were long, incorporated much legislative material and hence proved inflexible. In his opening address to the convention, Governor Driscoll asked that any proposals which the delegates might have that were legislative in character, should not be included in the constitution but should be incorporated in a supplemental report to the Governor, to be presented by him in turn to the legislature. This procedure was followed in several instances and, on the whole, not much legislative material found its way into the new constitution.

In revising the Constitution of 1844, the convention did not disregard the old document and begin writing a new constitution from start to finish. It rather used the old document as a starting point. Many of its sections had withstood the test of time and were retained virtually without change. But other sections, due to population growth, technological invention, social, economic and political development, had come to be out of step with the needs of a new century. It was with these provisions of the old document which time had shown to be defective, inadequate or inconsistent with current ideas or conditions that the convention concerned itself.

It was the duty of the five committees of the convention to which sections of the constitution had been assigned to study that document and to discern what provisions needed to be altered. In their study, the committees had the benefit of much work done by others. They had the report on the Commission on Revision of the New Jersey Constitution in 1942, the record of the public hearings on that report, the record of the hearings conducted by the legislative convention in 1944 and the proposed constitution drafted by the legislature in 1944. They also had use of the monographs written for the convention by students of government in the state, each of which dealt with one of the more difficult provisions of the constitution. To gain further information about what changes should be made in the old document, the committees invited organizations and individuals to present either written or oral opinions.

The convention, as we have noted, was urban-inspired. In fact, the whole revision movement was mainly the result of the agitation of certain individuals and organizations principally in urban areas that wanted the constitution brought up to date. These individuals and organizations formed the New Jersey Committee for Constitutional Revision, first, as the instrument whereby they could get the movement under way and, second, as the mouthpiece through which they could funnel their program for revision. Since the convention was mainly the result of their demand, it was up to them to present a positive program for revision. This they did, and very capably. While the constituent organizations and individuals had widely divergent interests, they were able to agree on a minimum program of constitutional reform which encompassed almost every provision in the constitution. Although the President of the N. J. Commission for Constitutional Revision referred to his

organization as a "people's lobby," we must remember that it looked at problems from the standpoint of the liberal urbanite. At the same time, its program coincided with that advocated by the experts in government. As a result, the Committee was eager to sponsor the testimony of many such experts as Roscoe Pound, Learned Hand, political scientists and political leaders. Most effective of all, was the fact that its representatives and those of its constituent organizations appeared frequently before the convention committees and made it known that the opinions of the experts had the backing of some of the strongest groups in the state. The delegates were impressed by such tactics, and the recommendations of the N. J. Committee for Constitutional Revision had much influence. This was especially true since the liberal delegates from urban counties were almost always in accord with those recommendations and, in general, the Driscoll Administration gave its support to the program of the Committee.

As opposed to this comprehensive, positive program offered by the Revision Committee, the proponents of the status quo, composed mostly of conservative and rural elements, restricted themselves to trying to keep the convention from tampering with certain provisions of the old document which they considered vital. They were in agreement with the reform elements on the need for some change. They did not agree, however, with certain major recommendations of the Revision Committee. This group had many representatives in the convention who were sure to oppose the reformers on such issues.

While this basic division in the convention between the rural-conservative and urban-progressive delegates does not describe the alignment on every issue, it did occur very frequently. Its result, in many instances, was that a wide divergence would appear immediately between these two groups over what provision should be included in the constitution, while a third fairly large group would be left in the middle without taking either side at first. This alignment characterized the conflicts over the powers of the governor and the question of amendment and revision.

A different situation existed in the gambling, Court of Chancery and taxation controversies. In the case of gambling, the division of opinion was on moral grounds and the reformers had no "expert" solution to offer. Nevertheless, there still existed one group which advocated liberalized gambling and another which held that all gambling should be prohibited on moral grounds, with the bulk of the delegates taking neither side. The split over the merger of equity and law courts found the reformers being opposed by the conservative members of the bench and bar and by the Hudson County Democrats. The division over the problem of railroad taxation was still different for here it was strictly along partisan political lines, with the majority of the delegates remaining out of the controversy while the Democratic and Republican leaders fought it out.

Thus, although the elements which constituted the contending groups varied with the issues involved, in the case of each dispute, these immediate divergencies between two opposed groups did spring up while a third group

of the delegates remained neutral. The essence of the problem of decision-making at the convention is concerned with how, out of two opposed positions, a final solution was reached.

In the case of certain of the powers of the governor, such as a strong veto and extensive appointing power, the conservative-rural delegates were really not united or determined in their opposition. Some small county representatives did put up a token resistance, but because it was so weak, no compromise was necessary and the reformers got what they wanted. In two instances, however, compromise was necessary and was made in the Executive Committee. One was over whether each department should be headed by a single appointee of the governor. Here the farm organizations made it plain that they would oppose the new constitution if the Board of Agriculture were discontinued. Since the Board had not worked badly in the past and since the committee members did not wish to incur the opposition of an important segment of the population, they gave in. The second conflict over the powers of the governor in which compromise was necessary was in the matter of gubernatorial succession. Here again, the rural-conservative group proved determined. They did, however, offer a compromise in committee of allowing two consecutive terms and the reformers accepted and did not press for unlimited succession.

In the disagreement over provisions for amendment and revision, the rural-conservatives were again willing to compromise to a certain extent but no further. Realizing this, the reform elements took what they could get as the result of an off-the-floor compromise, and gave up completely on the issue of revision rather than accept the compromise offered. The revision settlement was unusual in that it had to be worked out on the floor of the convention on the basis of a show of strength.

In making its decision on the Chancery Court issue, the Judiciary Committee discounted the recommendations of the conservative members of the legal profession, since it saw that an equal number of lawyers favored merger. In addition, it took a chance that the Hudson County Democrats were really not very determined, and that assumption proved correct. Undoubtedly, the convention went further in merging the courts than the Democrats desired, but they were far more interested in the railroad taxation question which had not yet been settled, and perhaps they felt that by giving in on Chancery, they would get a bit more consideration on the more important issue.

The Taxation and Finance Committee found itself completely helpless in dealing with the dispute over railroad taxation. Hence, it was necessary that it be settled by direct negotiation between those most directly concerned, the Republican and Democratic leaders. In reaching an agreement, both sides compromised. The Republicans were willing to compromise for they feared that if the Democrats were not satisfied, the latter might cause the defeat of the new constitution at the polls. The Democrats were forced to compromise because the new constitution was their last resort in an attempt to get the 1941

tax laws invalidated. Half a loaf from the convention was better than nothing at all.

In each of these issues, therefore, decisions were arrived at on the basis of the existing power situation. When the groups which opposed the "expert" recommendations of the reformers seemed so weak that their opposition would not endanger the adoption of the new constitution, the committees adopted the reform proposals and were upheld by the convention. This happened in the case of the Chancery dispute where no compromise was deemed necessary. Where, on the other hand, the opposition appeared to be both powerful and determined, compromise was called for. Compromise was possible because in each case, the disputants were more interested in seeing the convention complete a successful revision which would be acceptable to the people of the state than they were in forcing the complete acceptance of their views. The compromise was made in the committee in the case of the powers of the governor, in an off-the-floor agreement in the case of the amendment provision, on the floor of the convention in the case of revision and completely outside the convention in the case of railroad taxation. The compromises over the most controversial issues were made as a result of negotiation between the leaders of the two opposing elements. The delegates who did not take sides immediately on the issues were quick to realize that the compromises reached were the best that could be expected and invariably gave their support.

The gambling controversy was the only one which could not be settled by compromise between the contending forces. The differences were so sharp that no middle ground was found that would satisfy both sides. The Committee could not find a solution so it proposed the submission of alternatives. The delegates instead decided that it would even be better to postpone the issue entirely rather than endanger the whole constitution because of it.

This is sufficient to show that the convention proved very adaptable. It had wise leadership both from its own officers and from the Driscoll Administration which kept a paternal eye on it from start to finish. The leaders were wise enough to realize that different problems demanded different methods of solution and the delegates holding the balance of power on different issues were wise enough to take the advice of those leaders.

The Driscoll Administration played a dual role in the decision-making process. At the beginning of the convention, it devoted itself to supporting the program of the New Jersey Committee for Constitutional Revision. This it did through appearances before the committees of the convention and by conciliating certain dissident individuals and organizations. In the later stages of the convention, the Administration's role was to point out the danger spots, propose compromises and, in the case of taxation, to play an actual part in the negotiations.

Perhaps in this convention, as in that of 1844, "most of the major decisions of the convention were predestined before the delegates assembled."[2] It could have at least been predicted the general trend of changes would be in

2. Bebout, "Introduction," *op. cit.*, p. ix.

the direction of the program proposed by the New Jersey Committee for Constitutional Revision. No one could have determined exactly how much of that program would be adopted. This had to be worked out on the spot after all considerations had been explored and on the basis of the power situation in the state as it existed as of the summer of 1947.

In the long-run perspective, perhaps the political decisions made by constitutional conventions are really temporary truces in a never-ending conflict between social, economic, political and sectional forces in the state. In 1947 these forces were in general agreement that the truces agreed upon in New Jersey in 1844 were largely anachronisms in the urbanized New Jersey of 1947. The truces made in 1947 are by no means permanent solutions.

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