

# NEW JERSEY CONSTITUTIONAL REFORM

## BACKGROUND PAPER #7

### **The Law of Limited State Constitutional Conventions**

Center for State Constitutional Studies

Rutgers, The State University of New Jersey, at Camden

411 Cooper St.  
Camden, NJ 08102  
856-225-6625 (phone)  
856-225-6628 (fax)  
[cscs@camden.rutgers.edu](mailto:cscs@camden.rutgers.edu)

## The Law of Limited State Constitutional Conventions

By Robert F. Williams<sup>\*</sup>  
and G. Alan Tarr<sup>\*\*</sup>

This Background Paper explores the procedures for, and legal arguments supporting, limited state constitutional conventions. Limitations may take two forms: First, the convention may be limited *to consider only* certain subjects; and second, the convention may be limited *from considering* certain subjects. It is clear from the New Jersey experience with the 1947 Constitutional Convention<sup>1</sup> that limiting a state constitutional convention can serve to take

---

<sup>\*</sup>Distinguished Professor of Law, Rutgers University School of Law; Associate Director, Rutgers Center for State Constitutional Studies.

<sup>\*\*</sup>Distinguished Professor of Political Science, Rutgers University, Camden; Director, Rutgers Center for State Constitutional Studies.

<sup>1</sup>Robert J. Martin, *Calling in Heavy Artillery to Assault Politics as Usual: Past and Prospective Deployment of Constitutional Conventions in New Jersey*, 29 RUTGERS L.J. 963, 972 (1998); Robert F. Williams, *The New Jersey State Constitution: A Reference Guide 16* (Rev. ed 1997). For the argument in favor of a limited convention *prior* to the 1947 Convention see John Bebout and Julius Kass, *How Can New Jersey Get a New Constitution?* 6 U. NEWARK L. REV. 1,

certain politically-charged topics “off the table” and to calm fears about the convention’s otherwise unlimited mandate to consider all topics of state constitutionalism.<sup>2</sup> However, some modern commentators criticize the idea of a limited convention:

---

49-53 (1941).

<sup>2</sup>Gerald Benjamin and Tom Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL’Y SYMPOSIUM 53, 72-73 (1996) (“The limited convention allays the ‘Pandora’s Box’ fear . . .”).

[S]uddenly, around 1920, the tradition of activist popular sovereignty was first diminished and then corrupted. Between 1926 and 1950, there were only nine state constitutional conventions, whereas in each of the preceding twenty-five year periods there had been at least twenty. Moreover, many of these conventions operated within circumscribed limits.... In the mid-decades of the twentieth century, the “limited convention” became the method of choice for revising, or rather, for limiting the extent of fundamental changes, in state constitutions. In some states, such as in New Jersey in 1947, the legislative act establishing the constitutional convention explicitly prohibited the delegates from considering the politically explosive issue of reapportionment.<sup>3</sup>

According to another commentator:

Limited conventions also have been opposed on more practical grounds. Professor Graves has advanced the theory that the limited convention is a tool of various interest groups seeking to block substantive reform:

To those who do not want general revision and who do not really believe in the democratic process anyway, it provides a made-to-order means of avoiding the opening up of the whole array of constitutional problems for general discussion. ...More than that, it makes readily available a tool by which powerful special interest groups may, with a high degree of certainty, protect whatever type of sacred cow I which they happen to be interested.

Some who favor limited conventions suggest that those ostensibly opposed only to limited conventions in fact look with disfavor upon the convention mechanism generally. These opponents argue against limited conventions, the theory claims, because they know many people fear that an unlimited convention might become a “runaway” and tamper with basic constitutional guarantees. If a limited convention can be blocked, these strategists count on public sentiment against unlimited conventions to complete the plan and assure that no convention will be

---

<sup>3</sup>James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 829-30 (1991).

called.<sup>4</sup>

---

<sup>4</sup>Henry D. Levine, Note, *Limited Federal Constitutional Conventions: Implications of the State Experience*, 11 HARV. J. LEG. 127, 138 (1973), quoting Graves, *Current Trends in State Constitutional Revision*, 40 NEB. L. REV. 560, 570 (1961).

Questions always arise about whether state constitutional conventions can actually be limited, or whether there is a possibility of a “runaway” state constitutional convention. These are, of course, legitimate questions but the law in the United States seems to be clear that if the proper procedures are followed to impose limitations on a state constitutional convention those limits will be legally enforceable. About fifteen percent of all state constitutional conventions have been substantially limited, and the proportion has been increasing since World War II.<sup>5</sup>

### Background

There has, of course, been a major debate about whether a *federal* constitutional convention can be limited so as to consider only certain subjects, or to exclude certain subjects from its consideration.<sup>6</sup> It is very important to recognize that this debate about a limited *federal* constitutional convention is quite separate from, is based on different legal materials, and involves very different considerations from the discussion of limited *state* constitutional

---

<sup>5</sup> Levine, *supra* note 4, at 133 n. 32.

<sup>6</sup> RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION (1988); SENATE REPORT 98-594, CONSTITUTIONAL CONVENTION IMPLEMENTATION ACT OF 1984, p. 25 (August 6, 1984); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677 (1993).

conventions. The question about limiting a federal constitutional convention remains open, with no definitive answer by the United States Supreme Court while in the states there have been a number of litigated cases which serve to outline the nature of the debate and to provide relatively authoritative legal answers.

In New Jersey the last two constitutional conventions have been limited. First, the 1947 constitutional convention was limited *from* considering the method of apportionment in the senate. Then, in 1966, the constitutional convention was restricted *to* considering questions of apportionment of the legislative branch after the United States Supreme Court's one-person one-vote decisions.<sup>7</sup> Yet, we have never had a litigated case about either of these two state constitutional conventions overstepping their limitations because that simply did not take place. Therefore, we must rely on the law that has been developed in other states.

Initially, it is very important to point out that the New Jersey constitution, unlike those in most states,<sup>8</sup> contains no provisions whatsoever concerning constitutional conventions. There are no requirements and there are no restrictions. This leaves maximum flexibility to the legislature and the people. The few states that have judicial rulings prohibiting limited state

---

<sup>7</sup> Levine, *supra* note 4, at 134, uses New Jersey to illustrate the distinction.

<sup>8</sup> Michael G. Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1479 n. 34 (1987) (41 state constitutions contain provisions). The absence of any provisions in a state constitution concerning conventions further supports the theory that the legislature's plenary power may be used to propose limits that may be adopted by the voters. Francis H. Heller, *Limiting a Constitutional Convention: The State Precedents*, 3 CARDOZO L. REV. 563, 564, 567 (1982); Walter F. Dodd, *State Constitutional Conventions and State Legislative Power*, 2 VAND. L. REV. 27, 29-34 (1948) (referring to New Jersey's 1947 Convention as a favorable example); Note, *State Constitutional Conventions: Limitations on their Powers*, 55 IOWA L. REV. 244, 264 (1969).

constitutional conventions reflect the enforcement of constitutional restrictions on the way conventions take place.

### The Early Debate

Around the turn of the last century, respected authors of legal treatises on state constitutional conventions actually disagreed about whether limitations could be placed upon such conventions.<sup>9</sup> This was a debate that was separate and distinct from the debate on whether state constitutional conventions approved by the people but which did not conform to the constitutional requirements for conventions were valid.<sup>10</sup> The crux of this debate concerned the question whether the legislature *itself* could limit a state constitutional convention. When the question was reformulated to ask whether the *voters* could by referendum, adopt limitations suggested by the legislature, on what their elected delegates could do at a state constitutional convention the consensus emerged that this was a valid and legally-enforceable limit.<sup>11</sup> The current view has been expressed by Professor A.E. “Dick” Howard:

The prevailing view. . . treats a convention as the agent of the people who have called it. Thus, where the people must vote to approve the calling of a convention . . . the people are seen to have given their implicit approval to limitations on the convention’s power contained in the enabling legislation that put the question of calling a convention to the people.<sup>12</sup>

### The State Cases

---

<sup>9</sup>Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 347-48 (1994); Heller *supra* note 8, at 565.

<sup>10</sup>Colantuono, *supra* note 8.

<sup>11</sup> Schlam, *supra* note 9, at 347-48.

<sup>12</sup> 2. A.E. “DICK” HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1182-83 (1974).

The majority view seems to be that of the Virginia Supreme Court, expressed as follows

in 1945:

[W]here the legislature, in the performance of its representative function, asks the electors if they desire a convention to amend or revise a certain part of the Constitution but not the whole Constitution, an affirmative vote of the people on such a question would have the binding effect of the people themselves limiting the scope of the convention to the very portion of the Constitution suggested to them by the legislature. The wishes of the people are supreme.<sup>13</sup>

The Pennsylvania Supreme Court had stated a similar position, as early as 1874:

The people have the same right to limit the powers of their delegates that they have to bound the power of their representatives. Each are representatives, but only in a different sphere. It is simply evasive to affirm that the legislature cannot limit the right of the people to alter or reform their government. Certainly it cannot. The question is not upon the power of the legislature to restrain the *people*, but upon the right of the people, by the instrumentality of the law, to limit their delegates . . . . When a people act through a law the act is theirs, and the fact that they used the legislature as their instrument to confer their powers makes them the superiors and not the legislature.<sup>14</sup>

---

<sup>13</sup>Staples v. Gilmer, 33 S.E.2d 49, 55 (Va. 1945). This case, together with others, is discussed extensively in Heller, *supra* note 8, at 570-72. See also R.K. Gooch, *The Recent Limited Constitutional Convention in Virginia*, 31 VA. L. REV. 708 (1945). See also In re Opinion to the Governor, 178 A. 433, 452 (R.I. 1935).

<sup>14</sup>Woods' Appeal, 75 Pa. 59, 71-72 (1874) (emphasis added). See also Quinlan J. Honston & T.C. Ry., 34 S.W. 738, 744 (Tx. 1896).

In an important 1947 decision, the Kentucky Supreme Court, relying on the fact that the state constitution did not limit the legislature's authority, upheld a "limit" on a constitutional convention that required it to submit its proposed revisions to the electorate for ratification.<sup>15</sup> The court relied on both the legislature's plenary authority and the directions of the voters to their delegates.<sup>16</sup> The Supreme Court of Tennessee reached a similar result in 1949, concluding that it was "The people themselves who by their vote under the terms of this act limit the scope of the convention."<sup>17</sup>

One of the leading modern commentators summed up the majority rule, based on these and many other cases, as follows:

The state rule, broadly speaking, is that the citizens of a state may limit a convention's agenda by approving limitations in a popular vote. The argument in support of the rule is that the citizens of a state are sovereign, and the sovereign has the power to amend the basic principles by which it has chosen to be governed. Since by definition the sovereign's amending power cannot be limited, the sovereign may delegate its entire amending power to a suitable agent, such as a convention. It follows that the sovereign may validly delegate only a portion of its amending power.<sup>18</sup>

---

<sup>15</sup> Gaines J. O'Connell, 204 S.W. 2d 425 (Ky. 1947); Heller, *supra*, note 8, at 572-574.

<sup>16</sup> Gaines, 204 S.W. 2d at 431-32.

<sup>17</sup> Cummings v. Beeler, 223 S.W. 2d 913, 921 (Tenn. 1949); Heller, *supra* note 8, at 574-75; Note, *The Limited Constitutional Convention*, 21 TENN. L. REV. 867 (1951).

<sup>18</sup> Heller, *supra* note 8, at 575-76. Both this article and Levine, *supra* note 4, provide cites to many more cases.

This point of view is certainly supported by Article I, ¶ 2 of the New Jersey Constitution:

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

The 1947 legislation that authorized the constitutional convention utilized an entire array of mechanisms to provide real limits.<sup>19</sup> First, the limitation was expressed in the Title of the Act. Next, in the legislative findings, the authority for the limitation was expressed.<sup>20</sup> Then, the bill imposed a statutory restriction on the powers of the convention.<sup>21</sup> The legislation then specified that the public question that would be presented to the voters would contain within it the limitation,<sup>22</sup> and required the Secretary of State to review the proposals, for conformity with the limitation before submission to the voters.<sup>23</sup> Further, the legislation specified that the delegates' oath would include their commitment to abide by the limitation.<sup>24</sup>

A future Background Paper will discuss the mechanisms available for enforcing limits imposed on state constitutional conventions. These are important matters because, for example, the Rhode Island Supreme Court ruled in 1975 that despite the valid limits on a constitutional

---

<sup>19</sup> Ch. 8, Laws of New Jersey 1947.

<sup>20</sup> *Id.* “WHEREAS, The people in the exercise of their sovereign power may commit their delegates to binding restrictions on the scope and subject matter of such a constituent assembly . . .”

<sup>21</sup> *Id.*, at §2. *See also* §§ 26, 30.

<sup>22</sup> *Id.*, at §13.

<sup>23</sup> *Id.*, at §24.

<sup>24</sup> *Id.*, at §21.

convention that were proposed by the legislature and adopted by the voters, it was too late for judicial enforcement after the voters had ratified the convention's proposals that exceeded the limit.<sup>25</sup>

---

<sup>25</sup> *Malinou v. Powers*, 333 A. 2d 420 (R.I. 1975).