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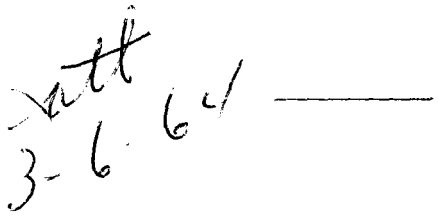

JOSEPH M. FIRST, *Editor*

# TWO POINTS OF VIEW REGARDING WHAT A STATE CONSTITUTION SHOULD CONTAIN

## I

### One Point of View

BY

Harris C. Arnold
of Lancaster

The discussions on Project Constitution at the final session of the Assembly of the June meeting of the Pennsylvania Bar Association focused attention on a fundamental cleavage of thought and purpose which exists among those who are interested in constitutional reform in Pennsylvania. In the course of debate on the report of a particular sub-committee, several members spoke in broad terms on behalf of what, for lack of a more definite term, I shall call the new philosophy of drafting a constitution. (I have been told that it is not really new, but if it should now prevail in reforming our Constitution, its application, at least, would be new to Pennsylvania). These speakers were applauded, but because of the approach of the hour for adjournment, and the number of unfinished matters on the agenda, members present who are not in accord with this new philosophy, did not take the floor to reply. I believe it would be very unfortunate if the record so made should be construed as an indication of unanimity on this matter, even among the comparatively few members who were present at the meeting.

This new philosophy is to the general effect that a State constitution should not contain limitations of, or restrictions on, the legislature, but should leave the legislature completely untrammeled. Dean Fordham, who was among the speakers at the meeting, used the expression that constitutions should be designed only "to distribute powers to the government." The followers of this philosophy attack the present Constitution of Pennsylvania, and constitutions of its type, as having been conceived in distrust of the legislature, an accusation which they consider completely damning. Consequently they insist that our Constitution of 1873 is not simply outworn by time, but is, basically unsound, and always has been so.

This, of course, leads to their demand that the present Constitution be scrapped, and that an entirely new one be adopted.

The speakers for this view couple with their arguments on the basic question, assertions that a constitution should be written in broad general terms, and should not attempt to prescribe administrative or legislative detail. That is really a quite different, or at least a subordinate point, on which there may be much less disagreement—but its discussion should not be allowed to confuse the basic issue of granting unlimited powers to the legislature.

This new philosophy ignores history. It ignores the very basis on which written constitutions were first created in America, and on which, they have continued to exist to the present time. Our Federal Constitution and our early State constitutions were all drafted in the light of abuses of Parliaments as well as of kings.

Constitutions are much more than documents for the distribution of powers. They are the very source of the powers granted to this thing we call the Government, and, as such, they must embody the definitions of those powers. Definition necessarily implies the marking out of the limits of the thing defined. Constitutions are designed to say to Government—to legislatures as well as to executives and judges—not only "These shall by your powers," but also, "Thus far you may go, but no further; what lies beyond is reserved to the people, and you shall not trespass there."

Critics who condemn our Constitution of 1873 as originally and basically unsound, attempt to draw distinctions between it and the Federal Constitution on this subject. The Federal Constitution was drawn with the definite purpose of protecting rights and liberties for which the colonies had fought, and against abuses which they had suffered at the hands of tyrannical legislative bodies as well as kings. The Federal Constitution is full of restraints and limitations on government. Witness the Bill of Rights, the slavery provisions of Article I, Section 9, the prohibitions against bills of attainder, ex post facto laws, and the suspension of the writ of habeas corpus; and, in the field of taxation—the prohibition against direct taxes unless levied in proportion to the census, the prohibition against export taxes, and the requirement that import and excise taxes must be uniform.

The Pennsylvania Constitution was drawn when the legislature had indulged in abuses of power not dreamed of in

1787, but which were very real in 1873. It is just as appropriate and necessary now as it was in 1787 or 1873, that the people, in defining the powers of government, should place limitations on the legislature as well as on other branches of government, especially in basic matters such as the extent and manner of taxation, and the protection of the right to own and enjoy property, and the general concepts of fairness and justice, as well as in the realm of the popular personal liberties, which are now so especially emphasized and extended. There is no more reason why unlimited power should be handed over to the legislature now than there was in 1787 or 1874. There is no reason to believe that legislative bodies are wiser than the people. Unbridled power can be as despotic in the hands of a popular majority as in the hands of a czar. The rights of minorities and the rights of individuals in many fields are as important today, as they were long ago; they are probably in greater need of protection now, because today we have forces within our own society that are definitely and deliberately endeavoring to erode or destroy many of those rights.

The advocates of this new philosophy are not consistent. As I have talked to them I have not found one who would go so far as to suggest that the Bill of Rights should be discarded, and that the matters contained in the Bill should be left to the judgment or the whim of the legislature. On the other hand, we find these same people in the forefront of those who demand that teeth be put into the constitutional provisions concerning legislative apportionments—to compel the legislature to act or be deprived of its power to do so. There *they* mistrust the legislature and want to have it disciplined. Thus it would seem to be not unfair to conclude that the advocates of this new philosophy are not interested so much in principle as in removing particular limitations on the legislature which they regard as obstructing their favorite social reforms. They would leave untouched, and even increase, restrictions on the legislature which accord with their own social views. Of course basic social changes and reforms are always in order if the people want them; but let us accomplish them with the consent of the people, by specific constitutional provisions, on which the people are given an opportunity of choice.

Let us not confuse this fundamental issue of an unrestricted legislature with the quite different and subordinate question of how much administrative and legislative detail should be

included in a constitution. Undoubtedly, parts of our present constitution, as well as some of the revision proposals, deal with details which are clearly administrative and should not have the permanence of constitutional provisions. For example, a number of the detailed requirements for the issuance of public bonds in the Woodside report would seem to be in this class. (I understand that the Association's committee on Article IX is prepared to recommend that they be eliminated). I thoroughly agree that the legislature should not be hampered by undue restrictions in the field of administrative detail. However, on fundamental subjects, as for example the basic rights of persons and property, and the powers and subjects of taxation, there must be limitations—and detailed limitations, where appropriate.

Therefore, I most earnestly urge that this so-called new philosophy should not dominate the work of our Association in recommending the revision of the constitution. The people must not surrender basic controls of the fundamentals to the legislature or any other agency. The legislature must be the servant of the people—not the master. The constitution must reserve that control, and stand as a bulwark of the people against that ever-increasing grasp for power which we see in all governmental departments, and a bulwark against the tyranny of the majority, particularly in times of excitement and social unrest.

## II

### Another Point of View

BY

Jefferson B. Fordham
of Philadelphia

This is an affirmative restatement of position, not a reply to the statement of my respected friend, Harris Arnold, about constitutional revision in Pennsylvania. His statement is a vigorous attack upon what he conceives to be the philosophy of state constitutional revision which I and others embrace. He attributes to us a belief that the Pennsylvania legislature should be left completely untrammelled and quotes me as saying that constitutions should be designed only "to distribute powers to the government." He is, of course, free to try to identify the views of others which he considers subject to criticism. In undertaking this, however, he has badly

misconceived my views, at least, and done little more than set up a strawman for his disposal. I have not and do not advocate a completely unrestricted legislature, nor do I embrace the preposterous notion that the distribution of powers to government is the sole function of a constitution. What follows is a brief affirmative statement of my views which I am prepared to let stand on its own footing.

As I said in 1957 in the Sixteenth Annual Benjamin N. Cardozo Lecture (a copy of which I sent to Mr. Arnold in the summer of 1962):

"A written constitution for a democratic society, which pursues its political ends through representative government, needs but four elements: 1. Provision of the basic framework of government; 2. Distribution broadly of governmental powers within the designed framework, with secondary power-devolution left to the legislative arm; 3. Substantive and procedural guaranties to the individual against the arbitrary exercise of governmental authority—a bill of rights; and 4. Provision of machinery for change in the Constitution."

There is nothing ultimate about any constitution; it is a politico-legal instrument, of great importance it is true, which is fashioned by men to serve group and individual values and interests through political organization of society. It is a charter of government, which is subject to particular modification or thorough revision as may be needful to render it adequate for its great purposes.

While I am convinced, on the basis of considerable inquiry and reflection, that the deficiencies of the Pennsylvania constitution are so great that only thorough revision will render it equal to the needs of contemporary society, I do note that up to this time a basic step in what I would consider a thorough reexamination of the present instrument has not been taken. I refer to systematic reexamination of the role of the state in the larger governmental scheme of things within the Federal system in the light of the evolution of American society, of the problems that exist today and of the problems which we can to some extent anticipate. Thus, while I have no doubt that a constitutional convention is needed, I do assert that it should be fortified in its work by competent, objective studies of various problem areas with which state or local government, or both, might well be concerned.

By way of illustration, I point to the extraordinarily demanding problems of expanding American urban life. What

is to be the role of the states of the Union in this area in the years ahead? Units of local government, it will be remembered, are creatures of state policy. It is clear, at the same time, that there is national interest in urban problems, both by reason of Federal jurisdiction with respect to interstate and foreign commerce, to navigable waters, to Federal enclaves and to interstate arrangements and of the broad general welfare concern supported by the spending power. We are already preponderantly, as a national characteristic, a metropolitan civilization. One ventures to say that this is not a problem area in which there will be any sharp compartmentalization of decision-making. All three levels of government are likely to play significant roles. What should that of the state be and what changes in the constitution of Pennsylvania would be needful to enable a state to play its role effectively within the Federal scheme of things?

I think it is helpful to consider state constitutional revision from various points of view, one of which has to do with levels of decision-making. The immediate concern is with levels within the state milieu. The ultimate political authority in the state resides in the electors. If the electors want to have it that way, they can go to great lengths in making policy decisions in the organic law. An extraordinary example is a recently adopted amendment to the Constitution of Arizona, which was originated by initiative petition, the thrust of which is to make it legal for licensed real estate brokers and salesmen to draft or fill out or complete deeds and various other types of legal instruments in connection with their work as brokers or salesmen. The amendment was designed to overcome a state supreme court decision which treated such activity by real estate folk as unauthorized practice of the law. While things like this are within the power of the electorate and do come about sometimes, the need for delegation of decision-making to representatives of the people is much greater today than it was when Congress was charged by the original Constitution of the United States to guarantee to each state a republican (shall we say, representative) form of government. In a populous, complex and fast-changing society, we have to act, for the most part, through representatives. I certainly think that this is the case and that it calls for a strong state legislative institution equipped to bear the great responsibility of decision-making by representative action. I am supported in this by the Commission on Intergovern-

mental Relations, which reported to President Eisenhower in June 1962, and by the National Municipal League in its proposed revision (sixth edition) of the Model State Constitution.

From the beginning in this country we have been committed to the theory that the legislative power of a state legislature should be plenary except as limited by the Federal Constitution, the state constitution or restrictions implicit in the Federal system. The early state constitutions, apart from bills or declarations of rights, did not impose many limitations upon the legislatures. Since the Jacksonian period things have been different. Constitutional restrictions both as to legislative substance and legislative procedure have been proliferated to the point that a constitution like the Pennsylvania Constitution of 1874 stands as a declaration of distrust of representative government.

What we need is a strong legislature in the state with few restrictions on its powers beyond the vital safeguards for the individual provided in the state declaration of rights and in the Federal Constitution, as amended. Our situation is enormously different from that which obtained in 1874. In the case of local finance, for example, Nineteenth Century constitutional limitations on local debt are crude and outmoded in a day of considerable maturity in fiscal planning, decision-making and administration. It is better to leave state policy-making on such matters to the legislature, as is done in Ohio.

We need a fresh start, as a matter of structure. The way to encourage deliberate and responsible political and institutional action is to fix responsibility in a simple unicameral legislature. I am not impressed by the charge that this is impractical. In terms of the cause of good government what could be less practical and less effective than to continue as we have with a weak divided legislature that is the object of public distrust as an institution?

There is not space to develop here the need for revision of the Constitution of Pennsylvania in respects other than the provisions relating to the legislative institution and process. (I have dealt with the subject in an article in the June 1960 number of the *Pennsylvania Bar Association Quarterly.*) Let me simply mention several important areas where the need is great.

We are hampered in getting strong executive leadership because the constitution, by denying a governor eligibility to succeed himself, makes a governor a lame duck almost from

the start. There are several elective offices in the executive branch which do violence to the proposition that responsibility should be centered in the chief executive.

A strong case has been made in the legal profession for thorough overhaul of the judiciary article. In parts of the state, at least, the minor judiciary is incredibly bad and, at higher levels, there is far too much politics in judicial selection and serious diffusion of responsibility for judicial administration. Here again we need a sharp break from an unhappy situation—one affording some hope that we can develop a strong tradition of detachment, independence, quality and efficiency in our courts.

In the realm of state and local finance the Constitution is ante-diluvian (pre-Johnstown, at least). It does not permit state general obligation funded debt, but is no bar to unlimited authority-type financing at higher net interest costs. As interpreted, it is so restrictive as to taxation that there cannot be a personal exemption under a flat-rate income tax, let alone a graduated income tax. Reference has already been made to restrictions on local borrowing.

In the realm of local government the constitution is conspicuously archaic as to county government. It diffuses responsibility among a considerable number of constitutionally ordained elective officers and does violence to the principle of unified executive responsibility in public administration.

Surely Pennsylvanians should be able to muster enough confidence in themselves and in traditional American political processes to proceed forcefully with the business of making the state constitution an adequate charter of government in these crucial times.