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Constitutional Revision in Maryland--Problems and Procedures

James R. Quimper*

Ladies and gentlemen, it is indeed an honor for me to have been invited to present to you some of my thoughts and experiences concerning the problems of constitutional revision in the State of Maryland, and my opinions on why the movement to write a new constitution for the State of Maryland failed at the popular referendum conducted on May 14, 1968.

I cannot offer you a scientifically verifiable assessment of why the proposed Maryland Constitution of 1968 failed to be approved at the referendum. Such an analysis must await the research of the political and social scientists. Unfortunately, research in higher education being what it is, investigations will be fragmentary and haphazard. I must confess, that were I a doctoral candidate I would not desire to risk defending any synthesis of the factors and events which determined the defeat at the referendum.

I intend to convey through these caveats no derogation of the purpose of this program. Rather, I rely on your good will and our mutual interest in constitutional reform, not as an academic process, but as a most important political process. Acting on this reliance I entrust with humility what is essentially my own opinion to you and proceed to offer it as a lecturer would, in supreme confidence that you will accept it in this light.

During its early history Maryland, like some of the other states, had followed the progressive philosophy of Thomas Jefferson in frequently adopting new constitutions for new generations. Maryland's first constitution was adopted in 1776, its second in 1851 and its third in 1864. Each of these reflected the prevalent philosophy of the times. On September 19, 1867, the citizens of the State adopted its fourth constitution, effectively divesting themselves of the old one of 1864 which had been in effect only thirty-seven months. The new constitution did not differ substantially from its predecessor. Its primary objective was to remove the disabilities which had been imposed on those who had fought for or aided the South. Although

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this may be interpreted as a liberal movement in extending the franchise to southern sympathizers and making them eligible to hold office, nonetheless it still limited the exercise of the franchise to white males above the age of 21.¹

This constitution was typical of those adopted during the mid-nineteenth century. It was extremely lengthy, describing in great detail the many prohibitions on government, restricting thereby both the governor and the legislature.² The Constitution of 1776 contained a declaration of rights of 42 articles and a body of organic law consisting of only 61 sections; that of 1851 had 43 articles in its declaration of rights and a body of 144 sections; that of 1864 had 45 declarations of rights and 177 sections; while the 1867 constitution had 45 declarations of rights and increased the number of sections to an astonishing 201.

Before we criticize our forefathers too strenuously, we perhaps should recall that service in the legislature was very definitely a part-time job, the legislature meeting every other year. They felt it necessary to restrict the government in view of the fact that there was a considerable time when the legislature was not in session and the machinery of government was solely in the hands of the governor.

Yet this document which has so often been described as decrepit, did contain several avant garde provisions. For instance, it was asserted:

That all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public, and, as such accountable for their conduct: Wherefore, whenever the ends of Government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old, or establish a new Government: the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish and destructive of the good and happiness of mankind.³

Maryland's need for constitutional reform has been evident for many years. Pursuant to a provision of the Constitution of the State of Maryland the "sense of the people" is to be taken at 20 year

¹ Md. Const. art I, § 1 (1867).
² Id.
³ Id. art. VI.
intervals on the question of the desirability of calling a Constitutional Convention. This question was on the ballot in 1887 and 1907; however little interest was shown by the electorate in calling a convention, the negatives taking the day by 33,271 and 54,257 respectively. The question appeared again in 1930 and in 1950. A majority of those voting on the specific question in these latter two elections favored the calling of the Constitutional Convention by 14,650 and 143,441 respectively. The then malapportioned legislature, however, desired to avoid the calling of a convention which might result in proposals for its own reapportionment. Accordingly, the legislative leaders sought an opinion from the Attorney General as to the necessity of implementing what was clearly an affirmative vote on the proposition. The opinion—correct though it is—supported the desire of the legislature, holding that an affirmative response to the question obligated the Legislature only where it was an affirmation on the part of a majority of all those voting in the election rather than just of those voting on the question.

As a result of reapportionment, induced by Supreme Court decisions, a considerably less gerrymandered legislature, following the lead of the then Governor J. Millard Tawes, called for a special referendum to be taken on September 13, 1966, on the desirability of calling a Constitutional Convention. They thus avoided the issue of how to calculate a majority, since there was only one question on the ballot. A rather small turnout of voters approved calling of the Constitutional Convention by a vote of 160,280 to 31,680 out of a total registration of nearly two million. It is interesting to note that more people voted and voted favorably in the regularly scheduled election of 1950 than in the special election of 1966.

4 Id. art. XIV, § 2.
5 OFFICE OF THE SECRETARY OF STATE, REPORT OF THE CONSTITUTIONAL CONVENTION COMMITTEE 65 (1967), hereinafter cited as REPORT.
6 Id.
7 Id. at 425-40.
8 Maryland Committee for Fair Representation v. Tawes, 228 Md. 412, 180 A.2d 656 (1962). Maryland Committee for Fair Representation v. Tawes, 229 Md. 406, 184 A.2d 715 (1962), holding that the State Senate need not be apportioned by population, was invalidated by the United States Supreme Court in Baker v. Carr, 369 U.S. 186 (1962). Reapportionment legislation was confirmed by the Maryland Court of Appeals in Hughes v. Maryland Committee for Fair Representation, 241 Md. 471, 217 A.2d 273 (1966).
10 REPORT 468.
Perhaps the time of the idea had come and gone. The Convention was to assemble on September 12, 1967.\textsuperscript{11}

Even prior to the special referendum on the calling of the Constitutional Convention, Governor Tawes had appointed a Constitutional Convention Commission and named as its chairman the Honorable H. Vernon Eney, a distinguished lawyer and former judge.\textsuperscript{12} The duties of this Commission were multi-purpose in nature: to draft a Constitutional Convention Enabling Act which would provide for the selection of the delegates, to make specific proposals for a revision of the Constitution, and to make recommendations for the procedures to be followed during the Convention—all of which was designed to have the Convention, if approved, operate in an expeditious and efficient a manner as possible.\textsuperscript{13} As a result of the Enabling Act, there were to be as many delegates to the Constitutional Convention as there were representatives per district in the House of Delegates of the General Assembly.\textsuperscript{14} The Legislature had also established June 13, 1967, for the selection of these delegates at a special state-wide election.\textsuperscript{15} We shall return later to the selection of these delegates.

The other members of the Commission were noted lawyers and political scientists from various institutions of higher education within the State of Maryland. It is primarily with respect to this Commission and its work that I propose to deal today.

Early in its deliberations, the Commission determined that it was the better part of wisdom to start afresh, drafting a wholly new Constitution rather than to attempt specific amendments. Considering that the Maryland Constitution had by that time been amended 203 times, I am not at all prepared to say that this judgement was in error. The Commission also determined that the proposed constitution be submitted to the voters to be voted on as a whole. Having made this decision, however, the Commission in effect launched itself on a course which resulted in the abortion of the fruit of their labor, since it was just this and other rather superficially innocuous decisions which, combining with the myriad single proposals, both major and minor, certain historical accidents, and

\textsuperscript{12} \textit{REPORT\ 1}.
\textsuperscript{13} \textit{Id.} at 2-4.
\textsuperscript{14} Acts of the General Assembly ch. 4 (1967).
\textsuperscript{15} \textit{Id.}
the Commission's rather stunning guilelessness conspired to defeat
the Constitution.

I have mentioned the various minor and major proposals, acci-
dents of history, and guilelessness. I propose that we give brief
consideration to each of these factors.

I suppose that an excellent doctoral dissertation will someday be
written on the process of constitutional reform in Maryland in the
1960's. Its title may well be "Constitutional Reform in Maryland in
the 1960's—A Case Study in Naivete: How The Legal Profession,
Politicians, and Educators Forgot What the Political Process Was
All About." For, in the writing and adoption of any Constitution—
under our system—the people are engaging themselves in the quintes-
sence of the political process. There is no more important exercise of
a man's political rights than when he assists in the formulation of
that organic law which is to govern his daily life. At the key point
in this process the people of Maryland voted blindly; and I hasten
to add that the point was not at the referendum, but in my opinion,
rather at the selection of the delegates. Completely over-looking
the fundamental principle that the electorate needs to be informed
and involved in the entire formulation of the Constitution, the mem-
bers of the legal profession and the educators on the Constitutional
Convention Commission recommended to the politicians in the
Legislature that they provide by law for the delegates to be selected
on a non-partisan basis. This in and of itself is appropriate. Non-
partisanship, however, was equated with non-controversiality. The
candidates for delegate to the Constitutional Convention knew very
little, prior to and even on the date of June 13, 1967, about the sub-
stantive proposals which the Commission was to make. Under a
grant from Title I of the Higher Education Act of 1965, a two-day
seminar was held for candidates for delegate on May 4 and 5, 1967,
just a month prior to their election.16 In my opinion this was
insufficient time to digest the minute details of the proposal. Futher,
the report of the Constitutional Convention Commission was not
published until August 25, 1967. This report should have been avail-
able prior to the filing deadline for candidates. Small wonder, then,
that the proposals, both major and minor, were not fully debated
until after the adoption of the proposed Constitution of January 10,
1968, and just prior to the referendum on May 14, 1968.

16 Report 12.
As lawyers you ladies and gentlemen are conversant, certainly more than I, with that balancing of principles and policies which every trial judge must make before instructing the jury, the appellate justice before rendering decision and indeed, which every lawyer must make before advising his client. About these principles even reasonable men may differ. How much more so will an unsophisticated electorate raise to the level of major principles, items which to the learned appear to be picayune. And that is what happened in Maryland. Admittedly, the Commission had held public hearings throughout; but at no time were the results of the Commission’s investigations and conclusions made fully known to the public. The Commission alleges that ten flyers on the substantive issues were produced during the period from August, 1966 to August, 1967. But I submit that a careful reading of these flyers will show that they are in reality a series of statements as to the need for reform, and various questions as to how reform might be implemented. They are not statements of the Commission’s position or recommendations to be implemented.\textsuperscript{17}

When the proposed Constitution was submitted to the electorate it contained a provision to reduce the minimum voting age from 21 to 19;\textsuperscript{18} provisions reorganizing and reordering the courts of justice;\textsuperscript{19} requirements that counties adopt charter forms of government.\textsuperscript{20} Deleted from the Constitution as constitutional offices were sheriffs, clerks of court, and registrars of wills. Deleted also was the provision disabling ordained ministers and priests from serving in the Legislature. Other areas of controversy revolved around the retention of both the Attorney General and the Comptroller as elective offices,\textsuperscript{21} the effect of the proposed constitution on municipalities,\textsuperscript{22} the defeat in the convention of a proposal to allow state employees to organize, the eschewing of a lottery to finance the purposes of government.\textsuperscript{23} The Attorney General and the Comptroller had sufficient power to defeat the Commission’s recommendation that these offices be made appointive.\textsuperscript{24} Thus the stage was set for the

\textsuperscript{17} Id. at 575-94.  
\textsuperscript{18} Proposed Maryland Constitution § 2.01 (1968).  
\textsuperscript{19} Id. art. 5.  
\textsuperscript{20} Id. §§ 7.02-.03.  
\textsuperscript{21} Id. §§ 7.05-.07.  
\textsuperscript{22} Id. §§ 7.05-.07.  
\textsuperscript{23} Id. § 6.17.  
\textsuperscript{24} OFFICE OF THE SECRETARY OF STATE, CONSTITUTIONAL REVISION STUDY DOCUMENTS 170 (1968), hereinafter cited as STUDY.
referendum. And it is at this point, and only at this point, that the grass roots political process began.

Two other aspects of the proposed constitution generated considerable and heated discussion. A provision was inserted in the proposed constitution requiring the General Assembly to provide by law for a lesser residence requirement to qualify to vote for President and Vice-President of the United States. An additional provision extended the franchise to residents of federal enclaves. The obvious opinions contrary to these two provisions revolved around the enfranchisement of people fairly certain to be liberal in their outlook; and, from the economic viewpoint the permitting of these people to vote on bond issues.

In Maryland, at least, the aforementioned minor officers of sheriff, clerk of court and registrar of wills are extremely powerful at the grass roots level of politics. Threatened, these minor office-holders conducted a bumper sticker, door to door campaign to save their positions. In doing so they associated themselves with the reactionaries who were against any change. These latter individuals are opposed to the activities of the National Municipal League in supporting the Model State Constitution. Everyone with an axe to grind jumped on the anti-constitution bandwagon. Perhaps this hostility was reinforced by the traditional antipathy towards lawyers and their virtual monopoly of state legislatures in general.

If the opposition was united at all, it was on the issue of cost. It was alleged that someone in the Office of the Comptroller leaked to the press a report that the cost of implementing the government would double or triple. This was immediately denied; but the tide of popular disenchantment had started to rise. Like King Canute the leaders could not reverse it. Certainly the defeat of the proposed constitution represented a slap in the face of the establishment. Our leaders who so strongly urged adoption of the proposal were shown not to be leaders.

Other subtle factors perhaps influenced the outcome. The constitution was presented as a liberal document, though in fact, at least

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25 Proposed Maryland Constitution § 2.02 (1968).
26 Id. § 2.04.
in the terms of the New Left, it was not. No one yet knows the influence of the April riots in Baltimore and Washington on the electorate. We cannot say at this point what was the adverse effect of the student take-over of Columbia University. These historical incidents, which closely preceded the referendum, must certainly have operated on some of the fence-sitters. Later investigators operating, we hope, without the passion which familiarity and closeness excites will have to perform this task.

The constitution went down in a crushing defeat. Over 651,000 people voted, or 45% of the electorate; and these were nearly 31,000 more than turned out for the gubernatorial primaries—the one of "your home is your castle—protect it" fame. In favor of the constitution were 284,033 votes. But against it were 367,101—a difference of 83,068.28

We are, therefore, left with these not-mutually-exclusive questions. Was there a real failure to implement from the very beginning the full political process? Was the political process subrogated to the interests of speed and efficiency? To what extent did the historical incidents of youth and racial violence affect the final decision of the hitherto uncommitted voter? I have no ready answers capable of proof. I strongly suspect that all of these were operative. I have no specific recommendations to make with the firm knowledge that West Virginia could avoid the same result. If what has been presented is sustainable as a point of view; if you operate on the thesis that everything must be done to inform and involve the whole populous in the controversy over what a constitution should embody; and, finally, if the time is right, West Virginia might succeed in breaking out into the twenty-first century.

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28 Study IX.