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## WHY THE PROPOSED MARYLAND CONSTITUTION WAS NOT APPROVED

THOMAS G. PULLEN, JR.\*

The people of Maryland simply did not want a new constitution so they went to the polls on May 14, 1968, and turned down the proposed constitution by a majority of more than 80,000. The apathy of the voters toward a new constitution was really expressed in the election held on September 13, 1966, when they approved the calling of a constitutional convention by a vote of 166,617 "for" and 31,692 "against," while in a concurrent primary election the vote was 609,747 of a total voter registration of 1,396,060. Obviously, interest in a new constitution was relatively slight.

One of the most serious mistakes made by the proponents of a new constitution was to hold the vote on calling a constitutional convention at the same time as a primary election. The proponents probably thought the people would vote in greater numbers for the constitutional convention if they were at the polls in a popular election; however, the converse was true. Through some legal device, it was ruled that actually these were two separate elections even though they were held simultaneously. But the people were suspicious of the arrangement and undoubtedly expressed their hostility, or lack of interest, by refusing to vote on the issue in any great numbers. In all probability, had there been a single election on the issue of calling a constitutional convention as there was supposed to be, the vote would have been about as adverse numerically as it was upon the final product of the constitutional convention.

Naturally, one asks why the people of Maryland did not want a new constitution. We find the answer, of course, in the thinking of the people. The climate today is not favorable to the entire revamping of state constitutions. The present unfavorable attitude among the people in respect to new constitutions is not peculiar to any part of the nation. Several states have turned down proposed constitutions.

The first reason for the attitude in Maryland was normal resistance to change, especially if the change involves something that has been of great importance for a long time. To argue obsolescence because a document is a hundred years old is not psychologically sound; the Bible

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is two thousand years old. The last Maryland constitution was written in 1867, but the Federal Constitution was written in 1787. Secondly, the people objected to wholesale change. Possibly, proposals for amendments that would have accomplished some proposed changes, including eliminations, would have been acceptable. However, the public feared that it would not have time to understand what had been done in a wholesale proposal until it was too late and then it would be left with the new document for another hundred years. Specious arguments have a way of haunting!

The average citizen did not find too much fault with the present constitution. He did recognize that certain parts needed changing, that there ought to be certain deletions, and that certain provisions, clearly statutory in nature, were in the province of the General Assembly to change; but he could not subscribe to the position that every phase of the document had to be overhauled. Here again, the proponents made another serious mistake; they indicted practically the entire present constitution, which is as untenable as indicting a whole people.

In a democratic society constitutions are considered sacred, and, psychologically, changing one is something like making new translations or interpretations of the Bible to a religious people. Many educated and far-seeing individuals do not understand that what the people think is far more powerful than facts. The place to begin making changes of any consequence, in any field or endeavor, is in ideas; once there is acceptance, the practicalities then follow rather rapidly. Huxley wrote this statement in the preamble to the constitution of UNESCO: “. . . since wars begin in the minds of men, it is in the minds of men that the defenses of peace must be constructed.”<sup>1</sup>

Frequently, legislative and governmental actions move ahead of or contrary to the thinking of the people, and the results are not always pleasant. A constitution for Virginia was written immediately after the Civil War and, as in Maryland and other southern states, under the unsheathed bayonets of federal troops. The Virginia constitution had some good features, yet it did not satisfy the citizenry. Since it was not actually a part of the conquered South, Maryland was more fortunate in its Constitution of 1867. In 1902, thirty-three years after its “decreed” constitution, Virginia held a constitutional convention of its own, whose purpose was to constitutionalize the controls the people of the com-

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1. Huxley, Preamble to the Constitution of UNESCO (1945).

monwealth had regained since Reconstruction. Everyone knew why an entirely new document was to be written and agreed to its need; therefore, the new constitution was approved by the people.

In 1967 there was no such acceptance in Maryland; moreover, despite all the Madison Avenue publicity and pressure, the people did not understand why an entirely new constitution was so urgent and gave no real approval of a wholesale change. The average citizen today is better educated and, while he may not understand all the facts and the technical aspects of government, he is fairly certain that many of the political scientists do not either. He does know how changes affect him. Therefore, he is skeptical and suspicious more than ever of public officials, public institutions, business, and even religion; he has to be shown!

Let Joseph R. L. Sterne, one of the more able and astute of the reporters of *The Baltimore Sun*, explain what is happening in the thinking of people regarding public affairs:

There is little doubt that from the vantage point of future history, the scholars will decide that the arch-antagonists of 1968 occupied a certain amount of common ground. Both are thoroughly disillusioned with the two major parties, which they feel are unresponsive to immediate needs and pressures. Both distrust the intellectual establishment, with the "new left" loathing the educational administrators as fervently as the "new right" distrusts the professors. Both remain suspicious of the news media, of the business community, of the government bureaucracy.<sup>2</sup>

The people are not going to support "tampering" with the instrument of their freedoms, rights, and liberties, even by individuals for whom they have respect and in whom they have confidence and whom they believe to be sympathetic to the problems of all citizens. Sidney Smith spoke of the good judge as being ". . . well inclined to the popular institutions of his country. . . ." <sup>3</sup> People want political leaders who are well disposed to the common and comprehensive good, not those who preach simple governmental efficiency, which is often accomplished only by autocratic power and meticulous judicial interpretations.

Neither race nor religion played too large a part in the people's thoughts about the proposed Maryland constitution. People who had

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2. Stan, *Wallace and the Other Candidates*, *Baltimore Sun*, Oct. 13, 1968 (Sunday supplement "Perspective"). Used by author with permission of the publishers of the *Baltimore Sun*.

3. S. SMITH, *THE JUDGE WHO SMITES AGAINST THE LAW*.

moved to the suburbs generally objected to annexation by a larger and financially needy unit and to the combining of units of unequal taxability; let the state, they suggested, make the necessary financial adjustment where it is needed locally. Race may have played a part in the objection to easy annexation and to the combining of local governmental units for certain functions; actually, the people feared that political units combined for certain functions would become organic political units.

It is possible that the attributing of the defeat of the proposed New York Constitution to its very liberal provisions for financial aid to religious and other nonpublic schools had an effect upon the Maryland constitutional convention regarding the religious issue, but this is doubtful. Maryland is a highly civilized community and a more homogeneous unit than New York, and the relationship among the various religions and between the public and nonpublic school systems over the years helped to avoid a public issue on this point. There was general agreement among the public and nonpublic school officials as to the method of handling the situation. It is true, I believe, that blockbusting and the possible pushing of minority groups out into the suburbs had a bearing on the thinking respecting the local government issue.

Let us look a bit more closely at this distrust of the people of government, business, industry, education, and religion. The Supreme Court decisions involving race; the right of the individual as related to due process; the involvement of government in business, not only with the consent but with the connivance of business; the marriage of higher education and government after the Kennedy administration; the generally liberal attitude of the Court respecting the accused as against the victim (the dissension among lawyers and even among judges as to judicial actions); violence and mayhem in the streets and a general breakdown of law and order attributed to the liberalism or weakness of the judiciary or charges of laxity or brutality of the police, whichever position you may wish to take; the methods of handling the news; and the building up of non-whites into figures of prominence by the news media, have all played a part in developing the distrust of which Mr. Sterne speaks.

Back in the mind of the average citizen everywhere there is a feeling that politicians, especially the ones in the higher brackets, are striving to gather power unto themselves by the simple expedient of controlling legislation and the budget and to establish a dynasty. Let Mr. Jefferson speak upon this point:

It would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights; . . . confidence is everywhere the parent of despotism—free government is founded in jealousy, not in confidence; it is jealousy and not confidence which prescribes limited Constitutions, to bind down those whom we are obliged to trust with power . . . our Constitution has accordingly fixed the limits to which, and no further, our confidence may go.<sup>4</sup>

Twice before, within the last two or three decades, Maryland citizens voted to hold a constitutional convention, but in each case their expression was thwarted by the legislature. In each case, however, the vote was comparable with the latest expression, that is, it apparently did not register the will of the great majority of the voters but only a majority of those voting in the election.

In brief, then, the desire for a new constitution in Maryland was not of the people; it had no wide support, and its sponsors represented special interests in the minds of the people. Who were its strongest proponents? The answer is: the newspapers generally; the chambers of commerce; certain governmental organizations within and without the state, such as the National Municipal League; the League of Women Voters and other such groups which had no special or vested interest; and groups of so-called liberals. The politicians were not interested as a rule—actually antagonistic when expressing themselves privately—and the majority of the population was apathetic or hostile. The idea of any necessity did not take root, and so the proposed constitution failed in passage.

#### FEARS OF THE VOTERS

What were the specific aims of the proponents of a new constitution? In this discussion I shall refer not only to the pre-convention fears of the people, but shall refer to certain actions of the convention that proved the reasons for these fears.

There was a feeling that certain interests, specifically business, the press, and some socially-minded groups, wished speedy social, economic, and business changes in government and, therefore, sought to establish the office of an all-powerful chief executive, who would bring about the changes they desired almost by edict. Maryland, thanks to the

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4. Kentucky Resolution (1798).

powerful Governor Ritchie, established constitutionally an extreme executive budget, constitutionalized it, and made it the most effective instrument of control by a governor of any state in the nation. To illustrate, under the constitution of Maryland, the governor can personally control, in effect, the salary of every top state administrative official, except that of some elected ones; moreover, he can cut the budget of practically any agency, including all public higher education, to the minimum. Literally, the governor has the power to destroy certain governmental functions. The General Assembly can only cut the Governor's budget; if it wishes to increase it for any reason, it has to pass an act providing new taxes to pay the increase desired—an almost impossible task. The only agencies protected against such arbitrary action by the governor are the legislative, the judicial, and the public schools, thanks to an intelligent constitutional provision. The present Maryland constitution provides that the chief executive must accept the estimates of the State Board of Education for the support of public schools, in accordance with the laws of the state, and put these estimates into the budget without revision; furthermore, the budget, when passed by the General Assembly, shall become law without the signature of the governor. This provision irks most governors, especially the inept ones, and also some legislators who would like to cut the public school budget. But the governor can cut the budget of the State Department of Education as well as those of the University of Maryland and of the state colleges, the departments which render social services, and all others. Again, the governor of Maryland under a constitutional amendment can cut every departmental budget up to twenty-five per cent in a state of emergency, except those of the public schools, the legislature, and the judiciary.

In addition to his budgetary powers, the governor of Maryland generally appoints most judges and all sorts of other officials. In the thinking of the public, there was the fear that the governor would be given even greater power by the proposed constitution and would consolidate state departments, hire innumerable assistants, and take on the characteristics of a dictator. While the proponents did not emphasize this point, it was obvious from the beginning that the attempt to create a more powerful chief executive was one of their major aims, and the popular reaction was not favorable.

The philosophy of certain political scientists that we need strong executives is an absurdity to many who have had experience in the

practicalities of government. If our governmental executives were selected by competent men for their executive ability, the situation would be different; but to assume for one moment that an individual elected to high office immediately becomes a capable executive is quite another thing. The administrative ineptitude of too many elected officials at all levels is apparent even to the least educated layman.

The second great fear of the Maryland voters involved the judiciary. Unfortunately, several attempts had been made in the General Assembly in years past to bring about changes in the judiciary that were probably sound, but the efforts were unsuccessful. The major focal point in the constitutional convention concerned judiciary changes. Unfortunately, in the constitutional convention, to gain the point desired, serious attacks were made upon the competence of the judiciary, including the specific qualifications of some of the judges. A major part of the entire convention was consumed in this battle, with many hard feelings.

In the legal profession, as in most professions, there is a major battle going on over the control of the profession. Control is sought by indirection in some cases. The struggle in the legal profession is between the practicing lawyers (the American Bar Association and other groups) and a relatively small number of law schools for the control of teaching the law. The Association of American Law Schools is attempting to eliminate all but highly restricted law schools with limited enrollment, to abolish night law schools, and to make the law an intellectual discipline. There is a feeling, especially in Maryland in the legal profession, that a few prominent law firms, organized somewhat along corporation lines, wish to control the profession within the state and that, if the present system of selecting judges is changed as was proposed, the average practitioner would never have a chance to be a judge. This feeling was possibly not justified, but it unquestionably existed to a great degree and had a decided effect upon the vote in the constitutional convention and even more in the general election on the constitution.

An attempt was made to professionalize the entire judiciary by abolishing the magistrates court and setting up courts administered by lawyers, but the veil of suspicion was cast over the entire matter because of other provisions, including too much power for the chief judge of the court of appeals. I suspect that many lawyers, judging from my wide acquaintance among them, voted against the constitution because of the judiciary provisions.

One of the greatest fears of the public was the possible breakdown of the separation of powers of government, which obviously would happen if the powers of any one of the three branches of government were unduly strengthened or lessened. The constitutional convention conveniently accommodated this fear, as did the draft commission. They strengthened the power of the chief executive (the General Assembly which, in my judgment, should have received the most support for greater power had the least) and the powers and the authority of the judiciary. The Governor, for example, under the proposed constitution, upon assuming office, could have changed every appointed board controlling an agency of the state, except those dealing with public education, and the latter would have been included except for strong opposition. Every administrative state board would have become entirely political. In any civilized state the intelligent people do not want the politicians to control the education of their children or, for that matter, any function of government that concerns their well-being. Political rapacity, however, knows no limits except the power and authority of an aroused public.

The convention's position on the separation of powers offered the greatest opportunity for attack from the strongest opponents of the proposed constitution, the Save Our State Committee, headed by the wife of a judge of the court of appeals of the state.

Further, the people generally feared the elimination of certain local officials whose offices have long since become impotent, but for whom the people could vote locally. Here again the constitutional convention disregarded the thinking of the people. They eliminated the magistrates and certain other local and minor officials in the name of efficiency, and these officials and their friends rebelled strenuously against the action. The officials in themselves were not so important, but they represented a concept of government; that is, the doctrine of locally elected officials. There could have been a far more graceful and effective method of liquidation, but the constitutional convention did not find it.

In the elimination of offices, the great fight in the constitutional convention occurred over the offices of attorney general and state comptroller. It is useless to go into a discussion as to whether the attorney general of a state or commonwealth and the fiscal officer should be elected or appointed by the governor. The debate on this question was one of the most useless of all discussions in the entire convention.

The question was simple: Is the attorney general the representative of the people's interests or is he the "governor's man" as certain proponents stated? The convention could not quite accept the idea that the attorney general should be the "governor's man," and his office was kept elective. The comptroller was not so fortunate; his office was retained but with reduced powers. A major change was the assigning of his auditing powers to the legislature.

The attorney general and the comptroller are popular men. Their offices are considered public offices accountable to the people rather than adjuncts of the governor's office; therefore, the attempt of the proponents to eliminate these offices must have had quite an adverse effect upon the vote on the constitution.

There were other fears—some important, some not so important. One fear, never answered satisfactorily, was whether or not new language and a new constitution would open up entirely new litigation on the whole constitution. If so, some opponents said, it would take another hundred years to know exactly what the new constitution means.

#### REASONS FOR DEFEAT OF THE PROPOSED CONSTITUTION

The constitutional convention as a whole was a well-organized, well-regulated, and well-directed enterprise. Committee chairmen were selected for their willingness to cooperate with the "establishment". The technical aspects of the convention were beautifully run. It was apparent that the convention was geared to pass the draft constitution in as near its original form as possible. The closely knit overall organization was so well developed and so rigidly run that some of the committees were not as effective as they should have been. My own committee was a good example of this procedure. The convention was managed as rigidly and efficiently, as far as approval of proposals was concerned, as a meeting of the chamber of commerce or a Bible class. It was a beautiful operation, but the patient died!

What were some of the mistakes of the constitutional convention as a body that led to defeat of the proposed constitution? First of all, it passed too many controversial matters by too small a majority. The work of the constitutional convention was divided among eight committees: Committee on Personal Rights and the Preamble; Committee on Suffrage and Elections; Committee on the Legislative Branch; Committee on the Executive Branch; Committee on the Judicial Branch; Committee on Local Government; Committee on State Finance and

Taxation; and Committee on General Provisions. Each section of each article was voted upon separately, and then the entire article was voted upon as a whole. In each of the major articles there were some very controversial points, such as the power of the governor to assume control of all administrative boards as soon as he came into office, the right of negotiation, the organization of the courts, the referendum, and many others.

Several very controversial issues were decided by a bare majority vote. When the entire article was voted upon, however, those in the minority on the controversial issues voted for the entire article. But every controversial section won by a narrow margin cost many votes in the general election!

Secondly, the leaders gave the impression to some of the members and to the public that the proposed document was a "holy vessel;" that it was being prepared by the elect and should not be defiled in any way; and that it was the result of a great crusade by valiant warriors inspired by very lofty ideals, a conquest of good over evil! Psychologically, it is quite likely that a sort of paternalistic attitude, which became almost patronizing on the part of the convention, had as much to do with the adverse vote on the constitution as any other factor. This was most unfortunate as the members of the constitutional convention were about as fine a group of citizens as I have ever known. However, for the most part they were inexperienced in the ways of politicians and legislators, and consequently they lived on a very high plane, so high at times they were not conscious of the realities of political sanction.

Thirdly, too much effort was expended in trying to preserve the draft constitution, not a particularly well-devised document. The authors of this document were a group appointed by the governor to draft a statement to expedite the work of the constitutional convention. It generated needless controversy in the convention. It was no coincidence that the chairman of the draft commission became head of the constitutional convention. A man of ability and integrity, high standing in his profession, the chairman was possibly too committed to passage of the draft constitution, which became apparent a brief time after the opening of the constitutional convention. It was unfortunate that the machinery of the convention was set up to accomplish this purpose. Committee chairmen obviously were selected for their loyalty to the convention authorities, and, although in the main they were competent

individuals, they demonstrated too often their loyalty to a predetermined plan, frequently by voting alike.

My own committee was disorganized most of the time by the loyalty of our chairman who kept close to the establishment. Our committee was able to come out with a report only because one night several of the members got together, wrote on a blackboard every proposal that had been made by any member of the committee, voted upon each one, and finally came up with a majority report. It was not entirely satisfactory, but it was the best we could get. Of the fifteen members of the committee, only nine were left at the end of the meeting. When our report was made to the constitutional convention, it had to be presented by the vice-chairman of the committee, as the chairman would not go against what he thought was the position of the leaders of the constitutional convention in respect to our report.

In the discussion of the proposals of our committee, largely dealing with education, the chairman requested that we limit our discussion to two hours and limit every speaker to two questions (the lawyers had debated for weeks on the judiciary). Our minority report was presented by the committee member who reported regularly to the chairman. I objected on the floor to the unseemly haste and unfair decision to limit debate on this important matter, and the late night session was closed with a date set for full consideration. In the interim, a compromise was worked out. The important point here is that leaders had preconceived ideas as to what should come out of the constitutional convention and endeavored to accomplish their purpose; a constitutional convention must be unlimited and deliberate in its discussions. No constitutional convention should go into deliberations with preconceived ends in view. There should be free, unlimited, and uninhibited debate as well as a clear-cut resolution on every point.

Fourthly, another mistake of the constitutional convention, which was reflected in the adverse vote at the polls, was the unwillingness to place a clear-cut, definitive line between what is constitutional and what is statutory. This was especially obvious in the deliberations of the committee on the judiciary, which was the chief offender in this respect until it rescinded several of its acts with the consent of the constitutional convention at the last moment. The first judiciary proposals which were approved spelled out salaries, pensions of judges and even the pensions of widows, and many details that anyone could see were not constitutional in nature. The reason, of course, was that the judiciary feels,

improperly in my opinion, that it cannot get justice in the General Assembly. The proponents overlooked the fact that most of the members of the General Assembly are lawyers, most of whom hope to be judges, and they are anxious to make their future as attractive as possible. Of course, there are always some frustrated legislators who have been passed over for the judgeships, and they inveigh and work against fair pay and retirement.

I am no lawyer, but I am confident that a large per cent of the proposals of our constitutional convention could have been provided by statute; possibly fifty to sixty per cent of the total.

To give an idea of the attention paid to the various articles of the constitutional convention, I am citing the number of pages devoted to each:

Article 1 Rights	3;
Article 2 Suffrage and elections	3;
Article 3 Legislative	7;
Article 4 Executive	10;
Article 5 Judiciary	9;
Article 6 Finance	5;
Article 7 Local Government	3;
Article 8 Education	½;
Article 9 General Provisions	3; and
Article 10 Effect and Amendment of Constitution	2½.

In spite of the final large majority of the numbers voting for the proposed constitution in the constitutional convention, I suspect that at least one-third of them did not vote for it in the election. The odor of sanctity was so pervading in the convention hall that few dared to defile the temple by obstructionism!

#### CONCLUSION

In closing I should like to make a few gratuitous comments about constitutional changes, based upon my limited experience as a member of the Constitutional Convention of Maryland from the First Legislative District of Baltimore County:

1. It is a waste of time, effort, and money to hold a convention to draft a new constitution unless the great majority of the people want it and have had a chance to express this approval by voting on the issue by itself.

2. The people will not accept the idea of a new constitution unless it has proper sponsorship, which must be representative of all segments of the population. Sponsorship by certain vested interests may get temporary approval of a convention but not of a constitution. The opponents of any new constitution in Maryland did not become vocal until after the proposed constitution was published, although there were considerable rumblings after the draft constitution was made public.

3. In trying to "sell" the idea of a new constitution *do not*:

a. argue that a constitution is obsolete merely because it is a hundred years old;

b. plead for an entirely new constitution because there is some reference to dueling and similar trivialities in the old one;

c. employ young "experts" from out of the state to present such arguments—use local public leaders whose opinions the people respect;

d. bring in too many outside professional organization workers with ready-made reports on every phase of government, model constitutions, model statutes, and advice as to methods that have been successful in some states, especially in those states whose level of civilization or sophistication does not rate "triple A" in the local state (at times, from the arguments, I felt as though I was voting on an issue in Missouri, Texas, or some other state);

e. confine leadership in the campaign to a few segments of the population or only a few businesses and professions (after all, a constitution is the one aspect of government that is supposed to be the common element for every citizen, and everyone should share in its preparation);

f. have a draft constitution prepared by an appointed group and then submit it to an elected group for consideration; if you should make this mistake, do not permit the drafters to be of the elected group (obviously, if there is a carry-over of personnel, you have a ready-made controversy to begin with!);

g. fail to make entirely clear to the voters the basic reasons why a new constitution is needed—be specific as to what changes you propose.

4. Some positive suggestions:

a. It is probable that an entirely new constitution is not needed, only some important amendments. Make all changes by amendments rather than by complete constitutional change if possible. If the desired amendments are sound, the people will accept them. People can

understand needed changes even if they cannot comprehend the technical details, but they become suspicious when a whole document is toyed with.

b. In talking about a new constitution, make clear and definite the changes desired. Uncertainty as to what was intended helped to turn the people of Maryland against a new constitution even before the convention met.

c. Have supporters broadly representative of all segments and facets of the population and enterprises.

d. Have the draft proposals prepared by a committee of the elected constitutional convention—not by others. Recess the convention for months if necessary to await a draft proposal. The psychology of drafting by others than elective members is bad.

e. Allow the constitutional convention plenty of time to deliberate.

f. By all means, allow each committee of the constitutional convention equal time to debate if equal time is necessary.

g. Define clearly and unequivocally what is constitutional and what is statutory and allow no exceptions. The proposed Maryland constitution was possibly fifty per cent statutory in nature.

h. By all means avoid giving the public the idea that the constitutional convention considers its documents a holy thing—a *sine qua non*. State that what is proposed is an improvement, a better working document, not earth-shaking but sound. And this is what the proposed Maryland constitution was!

i. The constitutional commission, appointed to advise as to the advisability of a constitutional convention, should clearly define the points to be covered, the constitutional changes that are desirable, and then clearly indicate what is statutory or constitutional. If the constitutional changes recommended can be achieved by amendments, they can be recommended to the legislature for referral to the people in the form of constitutional amendments. If they are statutory, they can be referred to the legislature for action. It is quite possible that a constitutional convention is not necessary to accomplish all the desirable constitutional changes.

One hopeful observation: I am confident that many of the constitutional changes proposed in our convention will be put into effect as statutes enacted by the General Assembly of Maryland. The serious need for some of these changes was clearly demonstrated by the discussions in the constitutional convention, and in time the people will want

them. When the people really want them, the General Assembly will act and as expeditiously as the people desire.

Out of my very pleasant experience as a member, I feel confident that the Constitutional Convention of Maryland of 1967-68 justified itself by throwing into bold relief, for the people of Maryland, problems and suggested solutions in respect to state and local government. The issues were clear cut. Within a reasonable time, I am confident that these problems will be settled by the General Assembly either through statutes or by referral of constitutional amendments to the people.