Magnificent Failure Revisited: Modern Maryland Constitutional Law from 1967 to 1998

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MAGNIFICENT FAILURE REVISITED: MODERN MARYLAND
CONSTITUTIONAL LAW FROM 1967 TO 1998

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It is appropriate that this Article is published in an issue of the Maryland Law Review dedicated as a tribute to Professor Marc Feldman. Marc was my supervisor, mentor, co-author, colleague, and friend, but above all, my teacher. My last conversation with Marc, just two weeks before his untimely death, included his suggestions for the improvement of this Article. Although that conversation was by telephone, I could feel Marc’s hand on my elbow, holding tight, propelling me in the direction he wanted, his face close to mine, urging, prodding, cajoling. I have tried to honor Marc’s comments, not because they were his, but because they were right and they were true. This Article, in some small way, is my tribute to Marc.
The reader should not . . . be misled by the title, Magnificent Failure. The Maryland constitution [of 1967-1968] failed at the polls but that failure was only partial if it teaches.¹

On May 14, 1968, Maryland voters rejected a proposed new state constitution.² In the immediate aftermath, John P. Wheeler, Jr. and Melissa Kinsey analyzed this proposed constitution and described its defeat as a “magnificent failure”; this phrase captures both the extraordinary efforts and visionary proposals of the framers, and the failure of the electorate to approve it.³ Thirty years later, it is appropriate to reassess the proposals, analyze the continuing effects of their rejection, and examine Maryland’s subsequent constitutional developments. This Article assesses the success or failure of the Maryland Constitutional Convention in light of the later adoption—by constitutional amendment, statute, or regulation—of many of the important innovations proposed in the 1967-1968 constitution.

I. MAGNIFICENT FAILURE

The original version of the constitution currently in force in Maryland was drafted in 1867.⁴ Then, as now, the constitution requires that Maryland’s citizens have the opportunity to hold a constitutional convention every twenty years.⁵ In 1930, and again in 1950,
the Maryland electorate voted for a constitutional convention. Both times, however, the General Assembly ignored the demands of the citizens and refused to call a convention.

II. THE PATH TO THE CONVENTION

In 1964, the United States Supreme Court held that the apportionment of representation in the Maryland General Assembly violated the Equal Protection Clause of the United States Constitution. Maryland Governor J. Millard Tawes requested that the 1965 session of the General Assembly call for a constitutional convention both to correct the improper distribution of legislative districts and to correct eight set twenty years as the appropriate interval: Connecticut, Illinois, Maryland, Missouri, Montana, New York, Ohio, and Oklahoma). This may reflect Thomas Jefferson's oft-repeated maxim that governments and constitutions need to be changed every twenty years. See, e.g., Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 15 THE WRITINGS OF THOMAS JEFFERSON 42 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

Under the 1864 Maryland Constitution, a constitutional convention could be convened only upon the recommendation of two-thirds of each branch of the General Assembly and with the approval of the voters. MD. CONST. of 1864, art. XI, § 2. The 1851 Constitution required that the General Assembly ascertain the "sense of the people" about whether a constitutional convention was necessary in the "first session immediately succeeding the returns of every census of the United States." MD. CONST. of 1851, art. XI, § 1.

6. MAGNIFICENT FAILURE, supra note 1, at 13. In 1930, the Maryland General Assembly refused to call a constitutional convention even though a majority of those who voted on the referendum favored a constitutional convention. See Address Before the Senate Committee on Amendments to the Constitution and the House Committee on Ways and Means by Mr. Philip B. Perlman on the Requirement that the General Assembly Call a Constitutional Convention [hereinafter Perlman Address], in CONSTITUTIONAL CONVENTION COMMISSION, REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION, app. at 425, 425 (1967) [hereinafter REPORT]. The 1867 constitutional provision provides that "if a majority of voters at such election ... shall vote for a Convention, the General Assembly, at its next session, shall provide by Law for the assembling of such convention, and for the election of Delegates thereto." MD. CODE ANN., CONST. art. XIV, § 2 (1981) (emphasis added). Although a slim majority of those who actually voted on the issue supported calling a convention, the legislature reasoned that this was "less than a majority of the voters who voted at the general election on all candidates and propositions" and, consequently, refused to call a convention. See Perlman Address, supra, at 425.

7. In 1937, frustrated by the General Assembly's failure to authorize a revision of the Maryland Constitution, H.L. Mencken published a proposal for a new constitution in the Baltimore Sun. See H.L. Mencken, A New Constitution for Maryland, partially reprinted in H.L. MENCKEN, A SECOND MENCKEN CHRESTOMATHY 327, 327 (Terry Teachout ed., 1994). In the introduction to this partial reprint, Mencken wrote, "It got some attention among judges and lawyers throughout the country, and I received some interesting commentaries on it, but in Maryland it went almost unnoticed and none of its innovations has been adopted since, or even discussed." Id. Mencken's cantankerous proposals included a right to privacy; limitations on public debt; old-age pensions for the indigent; a strong executive with a ten-year term of office; a fifteen-member unicameral "legislative counsel"; and a unified and coordinated court system. Id. at 329-39.

other perceived weaknesses in the existing constitution. The legislature again refused to call a constitutional convention. Faced with the General Assembly's intransigence, Governor Tawes appointed a Constitutional Convention Commission anyway, and charged that body with conducting:

an inquiry into the necessity for, and extent and nature of, any amendment, modification or revision of the Constitution of Maryland, with particular respect to whether a Constitutional Convention should be held, the procedures for calling such a Convention, the basis for representation at the Convention and the procedures for the election of the Delegates thereto. The twenty-seven-member commission, popularly known as the Eney Commission, met regularly from July 21, 1965 through June 14, 1967. Within its first two meetings, the Commission determined that a "complete revision of the Constitution of Maryland [was] urgently desirable and necessary" and that this could "best be accomplished by means of a constitutional convention." The Eney Commission, met regularly from July 21, 1965 through June 14, 1967. Within its first two meetings, the Commission determined that a "complete revision of the Constitution of Maryland [was] urgently desirable and necessary" and that this could "best be accomplished by means of a constitutional convention." The Eney Commission, met regularly from July 21, 1965 through June 14, 1967. Within its first two meetings, the Commission determined that a "complete revision of the Constitution of Maryland [was] urgently desirable and necessary" and that this could "best be accomplished by means of a constitutional convention." The Eney Commission, met regularly from July 21, 1965 through June 14, 1967. Within its first two meetings, the Commission determined that a "complete revision of the Constitution of Maryland [was] urgently desirable and necessary" and that this could "best be accomplished by means of a constitutional convention." The Eney Commission, met regularly from July 21, 1965 through June 14, 1967. Within its first two meetings, the Commission determined that a "complete revision of the Constitution of Maryland [was] urgently desirable and necessary" and that this could "best be accomplished by means of a constitutional convention." The Eney Commission, met regularly from July 21, 1965 through June 14, 1967. Within its first two meetings, the Commission determined that a "complete revision of the Constitution of Maryland [was] urgently desirable and necessary" and that this could "best be accomplished by means of a constitutional convention." The Eney Commission, met regularly from July 21, 1965 through June 14, 1967. Within its first two meetings, the Commission determined that a "complete revision of the Constitution of Maryland [was] urgently desirable and necessary" and that this could "best be accomplished by means of a constitutional convention."
Commission eventually produced a draft constitution for Maryland, and compiled a series of source materials for use by the convention delegates.

Members of the 1966 session of the General Assembly finally passed a bill providing for a special referendum to determine the sense of the people on the need for constitutional revision. The referendum was held on September 13, 1966, and the citizens indicated their support for the constitutional convention. A special, nonpartisan election of constitutional convention delegates was held on June 13, 1967. The qualifications, backgrounds, and political views of the delegates have been carefully studied and reported.

Our State Committee, Proposed Constitution 1 (1967) (criticizing the proposed constitution as "quite unrelated to the present Maryland Constitution and departing radically from its provisions").


17. See Study Documents, supra note 4, at ix (discussing the purpose of the compilation). This Article relies heavily on the work of the Eney Commission. Although the Commission was not directly responsible for drafting the proposed constitution that was rejected by the voters, some of the Eney Commission's original proposals have become part of the Constitution of Maryland. See infra notes 67-75 and accompanying text (discussing the subsequent piecemeal enactment of the rejected constitution). See generally Robert F. Williams, Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change, 1 Hofstra L. & Pol'y Symp. 1, 5-6 (1996) (stating that the debates and reports of state constitutional commissions should be considered constitutional history because they often "form the origins of important state constitutional changes").


19. The Eney Commission reported 160,280 votes for the constitutional convention, 31,680 against. See Returns for Statewide Referendum, in Report, supra note 6, app. at 468, 468. The Commission cautioned, however, that these returns "differ[ed] somewhat" from those reported by the Governor. Report, supra note 6, at 14 n.10. The Baltimore Sun reported that the vote was 160,617 for and 31,702 opposed. See The Convention Opens, Balt. Sun, Sept. 12, 1967, at A12.

20. Report, supra note 6, at 17; see also Wayne R. Swanson et al., Politics and Constitutional Reform: The Maryland Experience 1967-1968, at 30 (1970) (arguing that "[t]he nonpartisan election of delegates to the [1967] Constitutional Convention redounded to the advantage of those individuals in high socio economic positions and... reduced the extent to which the convention body reproduced the characteristics of the voting age population").

The delegates were well-educated, reform-minded, and largely apolitical.22

Before the convention, a special, preliminary session was held on July 11, 1967, at which H. Vernon Eney was elected convention president.23 The constitutional convention proper convened in Annapolis on September 12, 1967.24 The convention-enabling legislation provided that the convention should conclude no later than December 12, 1967, although a majority of the elected delegates could extend that date to January 12, 1968.25 The work of the convention required nearly all of the allotted time: the constitution was approved in its final form on January 6 and 8,26 and the formal signing and closing ceremonies were held on January 10, only two days before the January 12, 1968 deadline.27 All but three of the convention delegates voted in favor of the constitution.28 The substance of the constitution that the convention produced is the subject of Part IV of this Article.

22. See Swanson et al., supra note 20, at 28-43. The delegates were largely apolitical in the sense that many had never previously sought or held public office, and many were not particularly affiliated with either major political party. Id. at 35. The election to the constitutional convention was "apolitical" in that the political affiliations of the candidates were not indicated. Id. at 28.


24. Id. at 21. In his keynote address, President Eney told the convention:

And so, we, the citizens of what we proudly call the great free State of Maryland, have, along with our fellow citizens of other states, become cringing, favor-seeking vassals, fawning at the feet of Uncle Sam, grateful for the few crumbs of our own money tossed to us. But that great big, sprawling, bureaucratic colossus sitting astride the Potomac is too big, too far removed from the people, too impersonal to make more than uncertain, feeble, ineffective and oftentimes inept attempts to solve these problems which ought to be solved by state and local governments.

The challenge is clear for us to see; it is written in large bold letters on the walls of this historic State House. We have almost complete freedom in drafting a constitution to submit to our people. So long as it provides for a republican form of government, so long as it does not transgress the rights and liberties of the individual citizen guaranteed and protected by the Constitution of the United States, we, the people of the State of Maryland, can have almost any kind of constitution we choose.

Id. at 24.


27. Id. at 570-71.

28. Id. at 558 (indicating that Albert F. Baumann, Philip H. Dorsey, and Joseph P. Murphy were the only delegates who voted against the constitution). But see Magnificent Failure, supra note 1, at 166 (reporting that only Baumann and Dorsey voted against the constitution).
After its drafting, the proposed constitution was:

[s]upported strongly by all but a handful of convention delegates, . . . endorsed by all living governors, the highest judges, the legislative leaders, party luminaries, the captains of industry, the leaders of labor, the mass media of Baltimore and Washington, unlimited numbers of do-gooders, and various itinerant experts from out of state. Opposition came from a rag-tag band of the pitiful elite—courthouse gangs whose jobs had been excised from constitutional status, the know-nothings of the radical right, a few opportunistic politicians, selective puritans who took an instant dislike to a single provision—and a majority of the voters who turned out on May 14[, 1968].

The final vote was 284,033 in favor of adoption of the proposed constitution and 367,101 opposed. The proposed constitution won a majority of votes only in Prince George's and Montgomery counties, the two Washington, D.C. suburban counties.

III. WHY THE PROPOSED CONSTITUTION WAS REJECTED

Many explanations have been offered to account for the defeat of the proposed Maryland Constitution of 1967-1968. Some commentators have blamed the content of the proposed constitution, suggesting that it was "too liberal" for Maryland. Some have argued that the convention delegates themselves were too intellectual or too liberal to represent the Maryland electorate. Some political scientists point to the fact that the entire constitution was submitted to the voters for a single vote, as a "single package deal," and suggest convincingly that this contributed to the defeat. Still others blame the convention delegates and those responsible for the ratification campaign for their lack of political skill. But all commentators agree that the propo-
nents of the constitution failed to persuade the electorate of the necessity of constitutional revision.  

Robert D. Loevy blames the content of the constitution itself for its failure at the polls: "[A] winning majority [for the constitution] could have been fashioned only by watering down the reforms which were included, making it less liberal, less progressive, and less intellectual in tone. It also would have had to be considerably more palatable to the rural areas . . . ."  

A pamphlet published by the League of Women Voters also places a large measure of blame on the substance of the constitution. For example, the constitution would have eliminated the constitutional status of the offices of many minor political functionaries, although probably not the offices themselves. The League of Women Voters’ pamphlet points out how these changes tended to galvanize opposition to the constitution among the holders of these minor offices and their political organizations.

The criticisms of the substance of the constitution are largely spurious. Loevy’s contention that the proposed constitution was “too intellectual in tone” is puzzling. The proposed constitution was easier to read, more direct, simpler in its use of language, and clearer than the existing Maryland Constitution; it was designed so that the citizens of Maryland could understand it. The existing constitution, by its length, language, and density, must remain the private reserve of the elite: lawyers, politicians, and political scientists. The problem was

36. See Magnificent Failure, supra note 1, at 214 (discussing lessons learned from the failure of the ratification campaign); Alexander, supra note 21, at 411-16 (attributing demographic and political reasons for the failure); Swanson, supra note 21, at 184 (discussing the convention’s failure to proceed incrementally and with sensitivity to the “conservative values inherent in Maryland political culture” as reasons for the constitution’s failure).

37. Loevy, supra note 32, at 522.


39. See Magnificent Failure, supra note 1, at 89-90 (discussing how the positions that would lose their constitutional status likely would be retained by statute).

40. League of Women Voters of Md., supra note 38. Categorizing the convention’s elimination of these offices from the constitution as a political failure, rather than as a substantive choice, is misleading. The delegates to the constitutional convention knew that the holders of these offices would be dissatisfied by their deletion, and that this dissatisfaction could have political implications, but the delegates chose to delete the offices anyway. Magnificent Failure, supra note 1, at 211-12 (giving specific, well-publicized examples of the grievances and threats voiced by holders of offices slated to lose their constitutional status).

41. See Report, supra note 6, at 6 (summarizing and drafting principles of the constitution to ensure “that its meaning would be easily understood by an informed citizen of average intelligence and literacy”).

42. See Magnificent Failure, supra note 1, at 67 (noting that Maryland’s constitution is the ninth longest among the states, and that this length is indicative of archaic and tedious restrictions).
not the substance of the proposed constitution, but the fact that the voting public was persuaded by opponents of the constitution that it was too liberal or too intellectual.\textsuperscript{43}

There was also criticism that the delegates themselves were not representative of the Maryland electorate. One set of commentators has argued that the delegates to the constitutional convention "were far out of step with the mainstream of Maryland political thought" and "more interested in implementing constitutional reform than in fashioning a document which would be acceptable to the voters of Maryland."\textsuperscript{44} The convention delegates were, however, democratically elected representatives chosen from a broad array of candidates. Wheeler and Kinsey report that 739 candidates ran for 142 seats in the constitutional convention, and that one district alone had 63 candidates.\textsuperscript{45} Faced with many choices, the electorate selected those candidates whom they believed would best represent them.\textsuperscript{46}

The "all-or-nothing" nature of the vote on the proposed constitution does provide a compelling, although incomplete, explanation for the electoral defeat. The all-or-nothing vote created a two-fold problem, one rhetorical and one mathematical. Wheeler and Kinsey identified this rhetorical disadvantage:

No delegate was completely happy with everything the convention did, and it is hardly surprising that few citizens were. Everyone could find something to disagree with.

... [Proponents of the Constitution would state]: "There are things in this document that I disagree with and I hope they will be changed later, but these are minor compared to the progressive steps taken in this document."\textsuperscript{47}

The all-or-nothing vote caused proponents to couch their support as qualified or limited, thus allowing opponents the rhetorical advantage. Wheeler and Kinsey noted: "Some... [opponents] were

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\textsuperscript{43} See supra notes 34-36 and accompanying text (discussing political rather than substantive reasons for the failure of the constitution).

\textsuperscript{44} SWANSON ET AL., supra note 20, at 125-26.

\textsuperscript{45} MAGNIFICENT FAILURE, supra note 1, at 29.

\textsuperscript{46} One piece of information that was minimized in voting for convention delegates was party affiliation. See id. at 30 (characterizing the "civic" and "non-political air" that permeated the special election). While party affiliation information may have helped select more "representative" delegates, it would have undermined efforts to create a nonpartisan convention atmosphere. See Peter J. Galie & Christopher Bopst, Changing State Constitutions: Dual Constitutionalism and the Amending Process, 1 Hofstra L. & Pol'y Symp. 27, 37 (1996) (indicating that a "convention's success or failure depends on a number of variables," including a low level of partisanship).

\textsuperscript{47} MAGNIFICENT FAILURE, supra note 1, at 209-10.
not inclined to adhere to the admonition to determine whether the
good outweighed the bad; one apple tainted the whole barrel.\textsuperscript{48}

The all-or-nothing nature of the vote also created a mathematical
problem for the proposed constitution. Wayne Swanson has demon-
strated that even if a majority of the voters approved of a majority of
the innovations of the proposed constitution, the all-or-nothing na-
ture of the vote would have tended to produce a defeat.\textsuperscript{49} Wheeler
and Kinsey made a similar point:

The points in this constitution that aggravated en-
trenched interests were single ones here and there. Yet the
only way to avoid any one was to veto the whole document.
If some way could have been found to isolate these factors
and to provide separate votes upon them, it is conceivable
that all might actually have been adopted. When one adds
the opponents to 19-year-old voting to those local officials
upset by losing their constitutional status and throws in the
politicians agitated by the single-member district imposition
as well as opponents of regional government, the opposition
swells in size.\textsuperscript{50}

Finally, the most common explanation for the defeat of the pro-
posed constitution is simply that the convention delegates failed to
"sell" constitutional reform to the electorate. Some attribute this to
overconfidence.\textsuperscript{51} Others attribute it to a lack of political muscle:

The principal advocates of the reforms in the proposed doc-
ument... possessed the least political power in the [ex-
isting] structure and generally lacked strong local political
organizational support with the resources to mobilize voter
support.... The chief opponents of the reforms... were
standpatters who had close ties with local Democratic organi-
izations, particularly in Baltimore City and County. As office-
holders they were also skilled in the art of influencing the
voter and knew from experience the issues which could pro-
voke a negative voter response...\textsuperscript{52}

\textsuperscript{48} Id. at 209.

\textsuperscript{49} See Swanson, \textit{supra} note 21, at 178 (explaining that with the all-or-nothing ap-
proach, the voter will often "reject the total document despite his favorable reaction to a
majority of the provisions in the constitution").

\textsuperscript{50} \textit{MAGNIFICENT FAILURE}, \textit{supra} note 1, at 210.

\textsuperscript{51} See Swanson, \textit{supra} note 21, at 175 (suggesting that "[t]he type of detached behav-
ior exhibited by the proponents during the ratification campaign can probably be attrib-
uted to their overconfidence").

\textsuperscript{52} Alexander, \textit{supra} note 21, at 414.
Because of this lack of political power, proponents of the 1967-1968 constitution were ultimately unable to persuade the electorate of the need for constitutional reform.

The same point, that proponents lacked sufficient political power to muster support for the constitution, can also be made in terms of the underlying political theory of the role of state constitutional conventions in the political traditions of the United States. While constitutional conventions are not unique to this country, they took on distinctive characteristics during the American revolution. These features include: (1) a constitutional convention's capacity to create fundamental law that is unalterable by ordinary legislative act; (2) its superiority to the ordinary legislature by virtue of its function and the opportunity it offers for "an extraordinary representation of the people"; and (3) its permanent availability as a means of changing governments. As one commentator has noted, "Mythologically, [the


54. See id. at 309 (discussing the concept of a constitutional convention as a body above direct legislative control, the purpose of which was to determine the fundamental form of government). Even Maryland's first constitution recognized this essential characteristic of a constitution by creating a rudimentary system for constitutional amendment which, although in the hands of the legislature, was also superior to ordinary legislation. The Maryland Constitution of 1776 provided for constitutional revision only upon approval by two consecutive sessions of the Maryland General Assembly. Md. Const. of 1776, art. LIX. Given that elections to the House of Delegates were held annually, Md. Const. of 1776, art. II, the electorate would have had the opportunity to indicate their approval or disapproval of a proposed constitutional amendment before adoption.

55. See wood, supra note 53, at 338 (describing the view of proponents of the Pennsylvania state constitution that a convention is "actually superior in authority to the ordinary legislature" because it conferred this opportunity).

The Maryland Constitution of 1864 exemplifies what happens when constitutional conventions are not representative of the citizenry. That constitution, adopted during the Civil War, was approved only with the support of absentee ballots cast by Maryland Union troops in the field, a novel and perhaps unconstitutional procedure. See Report, supra note 6, at 54-55 (explaining the basis of the narrow majority that ratified the 1864 Constitution). The constitution produced has been described as having two purposes, the freeing of the slaves, and the continuation in political power of the unconditional Union Party. See William StATT Myers, THE SELF-RECONSTRUCTION OF MARYLAND 1864-1867, JOHNS HOPKINS U. STUD. IN HIST. & POL. SCI., Jan.-Feb. 1909, at 9. Because this constitution did not appropriately reflect the political views of the Maryland electorate, it was replaced at the earliest possible opportunity, 1867. See id. at 126.

56. See wood, supra note 53, at 319 (discussing the function of conventions as "permanent continuing institutions, integral parts of [America's] political system, essential for its working, and always available for the people's use"). In this way, constitutional conventions have replaced revolution as the method of altering unsatisfactory governments. See Board of Supervisors of Elections v. Attorney Gen., 246 Md. 417, 432, 229 A.2d 388, 396 (1967) (describing a constitutional convention as "the exercise of the fundamental right of the people to change their constitution" and characterizing this right as one of "peaceful revolution" retained "beyond the constitution").
constitutional convention] is the personification of the sovereign people assembled for the discharge of the solemn duty of framing their fundamental law. It is supposed to be above politics and to have no peer among governmental agencies."\textsuperscript{57} Over time it also has become clear that state constitutional conventions, like the constitutions they create, have become identified with a majoritarian impulse.\textsuperscript{58} With the exception of the first characteristic, the capacity to create fundamental law, state constitutional conventions do not acquire these characteristics merely by their creation. They must earn them.

The 1967-1968 Constitutional Convention failed to achieve its goal of ratification of a new and modern constitution for Maryland because it failed to become the "personification of the sovereign people."\textsuperscript{59} In representational democracy, elected representatives face a constant tension between their role as representatives of the people and their role as leaders.\textsuperscript{60} If the elected representatives are too concerned with the representational aspect, the result is government by...
public opinion poll. On the other hand, if the elected representatives are too concerned with leading, they lose their legitimacy as representatives. When the elected leaders properly negotiate the tension between leadership and representation, they become able to shape public opinion. At this point, leadership becomes easier, because the elected officials have molded public opinion in view of the direction in which they want to lead. Had the constitutional convention took seriously both roles, it could have led public opinion in support of the proposed constitution.

To lead public opinion would have required consistent and constant effort. Before the convention, proponents of the convention should have explained to the public the reasons for a constitutional convention. During the convention, the delegates should have solicited and encouraged public participation, even at the expense of efficiency. After the convention, delegates and other proponents of the constitution should have continued to educate the public and solicit support for the decisions made. In this way elected delegates to the constitutional convention could have shaped public opinion in favor of the proposed constitution and fulfilled their dual duties as representatives and leaders.

IV. MAGNIFICENT FAILURE REVISITED

With the historical background in place, this Part turns to the major proposals contained in the proposed constitution. In each instance, the analysis will include a discussion of the provision (or absence of a provision) under the 1867 Maryland Constitution, as

61. See Hanna Pitkin, Commentary: The Paradox of Representation, in REPRESENTATION 38, 41 (J. Roland Pennock & John W. Chapman eds., 1968) (noting that a representative is a "representative in name only" if he or she simply allows the constituency to decide every issue).

62. See id. (noting that a representative is not truly a representative if he or she constantly acts in opposition to the wishes of the constituency).

63. See Jewell & Patterson, supra note 60, at 70 (explaining that most experienced representatives assume both a "trustee" and "delegate" orientation when dealing with different issues, often following public opinion on an issue when it is overwhelming, but also using their own judgment about their constituency to act in the constituents' best interest).

64. See Swanson et al., supra note 20, at 125-26 (discussing the failure of leadership that occurred in the transition from the constitutional convention to the ratification campaign).

65. Some efforts at post-convention public education were made. See MAGNIFICENT FAILURE, supra note 1, at 191-206; Report, supra note 6, at 12-14 (detailing education efforts that included community seminars, mass mailings, and a motion picture).

66. This analysis discusses only those amendments to the Maryland Constitution with origins in the proposed constitution of 1967-1968 and does not purport to be a comprehensive analysis of all recent constitutional amendments in Maryland.
amended to 1967, a review of the change proposed by the 1967-1968 Constitutional Convention, and the subsequent history of the provision. The analysis reveals that, in some cases, a problem recognized by the 1967-1968 Constitutional Convention was immediately corrected by constitutional amendment. In other cases, deficiencies were corrected over time, either in the manner suggested by the constitutional convention or in some other way. Finally, some problems identified by the 1967-1968 Constitutional Convention remain in the Maryland Constitution.

The proposals of the 1967-1968 Constitutional Convention can be divided into two types of changes: a “structural” group and a “balance of power” group. The structural group includes reforms such as reorganization of courts, removal of salaries from the Constitution, and deletion of obsolete provisions. These reforms could have been, and subsequently were, made with little difficulty. However, elected officials have been unable to muster support for those proposals that would have changed the balance of power among and between the branches of state government—reforms such as strengthening the governor’s power by removing the Board of Public Works, the Comptroller, and the Attorney General.

The largest measure of credit for the modernizations that have occurred belongs to Governor Marvin Mandel and his administration. While his ideas may have been derived from the 1967-1968 Constitutional Convention, Mandel resubmitted portions of the pro-

67. Constitutional amendment in the absence of a constitutional convention requires passage by three-fifths of both houses of the Maryland General Assembly, a vote by the qualified voters of the state, and a proclamation by the governor that the majority of those voting on the proposed amendment favored its enactment. Md. Code Ann., Const. art. XIV, § 1 (1981).

68. See John W. Frece, Tax Proposals Face Hostile World, Balt. Sun, Nov. 25, 1990, at N1 (reporting that the major recommendations of the 1967-1968 Constitutional Convention were subsequently adopted over a period of years); see also Williams, supra note 17, at 16 & n.61 (explaining that the trend to enact constitutional reforms piecemeal—as opposed to wholesale constitutional revision—can be seen in Florida, Minnesota, and Oregon).

69. See infra notes 231-282 and accompanying text (discussing the proposed changes to the Maryland judicial system and their history).

70. See infra notes 359-382 and accompanying text (discussing the positions whose salaries were to be deconstitutionalized and become statutorily enacted).

71. See infra notes 389-393 and accompanying text (discussing the deletion of provisions limiting the vote to white males).

72. This category of “balance of power” reforms includes proposals to delete limits on legislation action and to remove the Board of Public Works. See infra notes 119-127, 173-179 and accompanying text.

posed constitution as amendments, succeeded in getting General Assembly approval, and secured citizen ratification. H. Vernon Eney and the staff to the 1967-1968 Constitutional Convention also deserve a large measure of the credit for the ultimate adoption of many of the proposals. Although most of the official publications produced by the constitutional convention were issued after the electoral defeat, President Eney, believing in the importance of constitutional reform, urged that the documents serve as guidelines for future piecemeal revisions.

A. Declaration of Rights

Historically, the Maryland Declaration of Rights existed as a separate document from the Maryland Constitution. The proposed constitution not only would have changed this arrangement by incorporating the Declaration of Rights as a new Article 1, it also would have substantially changed the format of the rights provisions. The Declaration of Rights, as it existed in 1967, contained forty-five articles, but the draft constitution honed that list to eighteen. The proposed constitution also added three new rights not previously guaranteed by the Maryland Declaration of Rights: freedom from racial discrimination, protection against electronic eavesdropping,

74. See id.

75. See Letter from H. Vernon Eney, President, Constitutional Convention of Maryland of 1967-1968, to Spiro T. Agnew, Governor of Maryland (Nov. 1, 1968), reprinted in CONSTITUTIONAL CONVENTION OF MARYLAND 1967-1968, COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION XI (1968) [hereinafter COMPARISON] ("The consensus of opinion is that there were many provisions of the proposed Constitution which, if presented separately, would have been adopted by the people and the fact remains that the present Constitution is still very much in need of a thoroughgoing revision.").

76. See Dan Friedman, The History, Development, and Interpretation of the Maryland Declaration of Rights, 71 TEMP. L. REV. 637, 677 n.3 (1998).

77. See infra note 384 and accompanying text (noting that the Eney Commission advocated including the Declaration of Rights as part of the constitution).

78. After a reworked preamble, the new declaration of rights provided for: Freedom of Expression (§ 1.01), Freedom of Religion (§ 1.02), Right to Due Process and Equal Protection (§ 1.03), Right to Fair Treatment in Investigations (§ 1.04), Freedom from Unreasonable Searches and Seizures (§ 1.05), Right to Grand Jury Indictment (§ 1.06), Rights of Criminal Accused (§ 1.07), Removal of Criminal Cases (§ 1.08), Right Against Self-Incrimination (§ 1.09), Prohibition Against Double Jeopardy (§ 1.10), Prohibition Against Unusual Punishments (§ 1.11), Prohibition Against Imprisonment for Debt (§ 1.12), Right to Jury Trial in Civil Cases (§ 1.13), Preservation of Habeas Corpus (§ 1.14), Prohibition Against Ex Post Facto Laws (§ 1.15), Eminent Domain (§ 1.16), Continuity of Government During Emergencies (§ 1.17), and Reserved Rights (§ 1.18). See COMPARISON, supra note 75, at 119-24, 133.

79. See id. at 5 (noting section 1.03, which states "[n]o person shall be deprived of life, liberty, or property without due process of law, nor be denied the equal protection of the
and fair treatment in investigations. Each of these rights now has constitutional status, either through legislative or judicial enactment.

The Eney Commission and the constitutional convention itself redesigned the Maryland Declaration of Rights in conscious imitation of the federal Bill of Rights. The language of many of the proposed new rights followed those of the analogous federal rights. Even the order of the proposed Declaration of Rights followed, at least in part,

laws, nor be subject to discrimination by the State because of race, color, religion, or national origin" (emphasis added)).

80. See id. at 6 (proposing in section 1.05 that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches, seizures, interceptions of their communications, or other invasions of their privacy, shall not be violated" (emphasis added)). This proposed protection against electronic interception of communications was also found in the Model State Constitution. See National Mun. League, Model State Constitution 2 (6th ed. 1963) [hereinafter Model State Const.].

81. See Comparison, supra note 75, at 5 (stating in section 1.04 that "[n]o person shall be denied the right to fair and just treatment in any investigation conducted by the State or by any unit of local government, or by any of their departments or agencies").

82. The Court of Appeals of Maryland has held that Article 24 of the Maryland Declaration of Rights provides protection against racial discrimination. See Murphy v. Edmonds, 325 Md. 342, 353, 601 A.2d 102, 107 (1992) ("Although the Maryland Constitution contains no express equal protection clause, it is settled that the Due Process Clause of the Maryland Constitution, contained in Article 24 of the Declaration of Rights, embodies the concept of equal protection of the laws to the same extent as the Equal Protection Clause of the Fourteenth Amendment." (citations omitted)); id. at 356, 601 A.2d at 109 (noting that "[c]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny" (quoting Graham v. Richardson, 403 U.S. 365, 372 (1971))). The same Article also provides a guarantee of fair treatment during investigations. See Maryland State Police v. Zeigler, 330 Md. 540, 559, 625 A.2d 914, 923 (1993) ("Procedural due process, guaranteed to persons in this State by Article 24 of the Maryland Declaration of Rights, requires that administrative agencies performing adjudicatory or quasi-judicial functions observe the basic principles of fairness as to parties appearing before them." (citations omitted)). The Maryland Wiretapping and Electronic Surveillance Act, Md. Code Ann., Cts. & Jud. Proc. §§ 10-401 to 10-4B-05 (1995 & Supp. 1998), requires wiretaps to comply with Fourth Amendment protections. See also Richard P. Gilbert, A Diagnosis, Dissection, and Prognosis of Maryland's New Wiretap and Electronic Surveillance Law, 8 U. Balt. L. Rev. 183, 220-21 (1979) (discussing Maryland's Act and comparing it to federal law).

83. See Report, supra note 6, at 98 (stating that "the [Eney] Commission takes as its model the Bill of Rights in the United States Constitution"). National authorities on state constitutional revision also advocated adopting the language of the federal bill of rights. See Model State Const., supra note 80, at 28 ("The language follows the U.S. Bill of Rights not only because of its excellence but also because its terms have achieved considerable uniformity of meaning through repeated construction in the courts."); Robert S. Rankin, National Mun. League, State Constitutions: The Bill of Rights 2 (1960) (explaining why state constitutions reflect the influence of the federal bill of rights); Milton Greenberg, Civil Liberties, in National Mun. League, Salient Issues of Constitutional Revision 7, 12 (John P. Wheeler, Jr. ed., 1961) [hereinafter Salient Issues] ("State adoption of the language of the national constitution is desirable and would avoid confusion.").
the federal order.84 This proposed "federalization" of Maryland's rights provisions, although not accomplished by constitutional amendment, has been carried out by judicial interpretation. A number of the decisions of the Court of Appeals of Maryland, both prior to and subsequent to the 1967-1968 Constitutional Convention, have ignored the plain language of provisions of the Maryland Declaration of Rights and instead have based their interpretation solely on the language of the analogous federal provision.85 Former Washington Supreme Court Justice Robert F. Utter has called this phenomenon of judicial amendment a virtual rewriting of the state constitution without amendment or consent of the citizens.86 Although the 1967-1968 Constitutional Convention did not start the federalization of the Maryland Declaration of Rights, its proposals, as well as the interpretations of the Court of Appeals of Maryland, are part of a larger trend toward such federalization.

Since the defeat of the proposed constitution, there also have been several important (and some relatively unimportant) textual modifications to the Maryland Declaration of Rights, although none of these are attributable to the 1967-1968 Constitutional Convention. One amendment, passed in 1970, permits religious invocation in state buildings without conflicting with the federal Establishment Clause.87

84. Compare Comparison, supra note 75, at 119 (stating in section 1.01 that, "The people shall have the right peaceably to assemble and to petition the government for a redress of grievances" and "[f]reedom of the press and freedom of speech shall not be abridged, each person remaining responsible for abuse of those rights") with U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). Opponents of the proposed constitution clearly understood that the proposed constitution's rights provisions were to be federalized. See Save Our State Committee, supra note 15, at vi (noting that "in lieu of the articles in the present Declaration of Rights—many having originated in the [Maryland] Constitution of 1776—are substituted provisions in the first eight amendments to the federal Constitution").

85. See Friedman, supra note 76, at 645 ("Maryland's appellate courts traditionally ... have preferred to hold that the provisions of Maryland's fundamental documents are 'in pari materia' with analogous federal constitutional guarantees.").

86. See State v. Smith, 814 P.2d 652, 661 (Wash. 1991) (en banc) (Utter, J., concurring) (explaining that ignoring the difference between the language and history of the federal Equal Protection Clause and the privileges and immunities language in the state constitution is "to rewrite our [state] constitution without benefit of a constitutional convention and to deprive the people of this state of additional rights, which they adopted in our constitutional convention, without their consent").

87. Act of May 5, 1970, ch. 558, 1970 Md. Laws 1625 (ratified Nov. 3, 1970) ("Nothing shall prohibit or require the making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place.") (codified at Md. Code Ann., Decl. of Rts. art. 36 (1981)).
In 1972, the citizens of Maryland ratified an Equal Rights Article (Article 46 of the Maryland Declaration of Rights) prohibiting discrimination based on gender. 88 A series of constitutional amendments passed in 1992 was designed to reduce the burden of jury service. 89 First, the size of the jury was reduced from a panel of twelve to a panel of six jurors. 90 Second, jury trials were made available only for civil suits wherein the amount in controversy exceeds $5000. 91 Finally, the most recent change in the Declaration of Rights is the adoption of a hortatory "Victims' Rights" Article. 92

Other changes to the Declaration of Rights include the deletion of the archaic reference to suffrage for "white men", 93 the clarification that service in the armed forces reserves or in the Maryland National Guard does not violate the prohibition on holding dual offices, 94 and

88. Act of May 26, 1972, ch. 366, 1972 Md. Laws 1225 (ratified Nov. 7, 1972) ("Equality of rights under the law shall not be abridged or denied because of sex.") (codified at Md. CODE ANN., DECL. OF RTS. art. 46 (1981)). For an analysis of the standards of review under the Maryland Equal Rights Article, see Friedman, supra note 76, at 708 n.580 (and sources cited therein). See also Paul Benjamin Linton, State Equal Rights Amendments: Making a Difference or Making a Statement?, 70 TEMP. L. REV. 907, 915 n.15 (1997) (arguing that Maryland cases quite clearly adopted an 'absolutist' position, holding that Article 46...forbids all sex-based discrimination, without exception" (citations omitted)).


93. Act of May 6, 1971, ch. 357, 1971 Md. Laws 760 (ratified Nov. 7, 1972) (codified as amended at Md. CODE ANN., DECL. OF RTS. art. 7 (1981)). This Act, of course, did not confer the franchise on non-Whites or women because the United States Constitution had already so extended it. Instead, it simply eliminated archaic language. See U.S. CONST. amend. XV, § 1 (guaranteeing that the "right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude"); U.S. CONST. amend. XIX (guaranteeing that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex"). Despite these federal amendments, the Maryland change was significant because it is not a minor detail when the fundamental document of a state purports to discriminate against some of its own citizens.

the deletion of obsolete, inaccurate, invalid, unconstitutional, and duplicative provisions.\textsuperscript{95}

B. \textit{Elective Franchise}

The proposed constitution sought to broaden suffrage, both by lowering the voting age and by reducing residency requirements. Most of the proposed changes subsequently have been adopted and indeed have resulted in a broader franchise.

\textit{I. Voting Age.}—Although the Maryland constitutional revision was unsuccessful in lowering the voting age in state elections, federal legislation soon brought about the change.\textsuperscript{96} Title III of the federal Voting Rights Act of 1970\textsuperscript{97} purported to give eighteen- to twenty-year-olds the right to vote in all federal, state, and local elections. When the Supreme Court found that the Act exceeded the scope of Congress's legislative powers,\textsuperscript{98} an amendment to the United States Constitution\textsuperscript{99} accomplished the same goal.\textsuperscript{100} As a result, eighteen- to

\textsuperscript{95} Act of Apr. 26, 1977, ch. 681, 1977 Md. Laws 2743 (ratified Nov. 7, 1978) (codified as amended at Md. Code Ann., Decl. of Rts. arts. 23-24, 46; Const. art. I, §§ 1-11; art. III, §§ 5-6, 9, 11, 13, 15, 19, 37, 41, 53, 59; art. IV, §§ 1, 1A, 3, 4A, 6, 12, 14, 18, 20, 22, 40, 41-I, 44, 45; art. V, §§ 5-7, 11; art. VI, § 1; art. VII, § 1; art. XI-A, §§ 2, 5; art. XI-D, § 1(a); art. XIII, §§ 1, 2; art. XV, §§ 2, 3; art. XVI, §§ 2, 6; art. XVII, §§ 1, 3-9 (1981 & Supp. 1998)). For a discussion of this Act as an overall cleanup of the Maryland Constitution and Declaration of Rights, see infra text accompanying note 394. The impact of this Act on the Declaration of Rights was to create the new Article 23 (which states that a jury is the judge of law and fact in all criminal cases and guarantees the right to civil jury trial); delete old Article 24 (which prohibited reestablishment of slavery but demanded compensation from the federal government for manumission); renumber the former Article 23 (due process) as current Article 24; and delete Article 38 (which restricted gifts to church and clergy).

\textsuperscript{96} For an analysis of the arguments for and against lowering the voting age to 18 years, see Doris W. Jones, \textit{Lowering the Minimum Voting Age to 18 Years: Pro and Con Arguments}, reprinted in \textit{Study Documents}, supra note 4, at 51, 52-59.


\textsuperscript{99} U.S. Const. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

\textsuperscript{100} The traditional explanation for the adoption of the Twenty-Sixth Amendment is the Vietnam War and the social protest it engendered. Eighteen through twenty-one year-olds filled important roles both by serving in the military and in leading social protest against the war. See Akhil Reed Amar, \textit{The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem}, 65 U. Collo. L. Rev. 749, 772 (1994) (opining that "the Twenty-Sixth Amendment extended the vote to young adults on the theory that if they were old enough to bear arms in Vietnam, they were old enough to
twenty-year-olds were not permitted to vote in the 1968 primary or general elections,\textsuperscript{101} and an almost completely new group of eighteen-to twenty-year-olds were prohibited from voting in the 1970 primary and general elections.\textsuperscript{102} One estimate puts the number of eighteen-to twenty-year-olds prevented from gaining the right to vote at 125,000, or approximately six percent of the electorate at that time.\textsuperscript{103}
2. Residency Requirements.—Maryland’s residency requirement to vote under the 1867 Constitution, as it stood in 1967, required one year of residency in the state and six months within the county or legislative district. The proposed constitution would have reduced these requirements to six and three months, respectively, and would have permitted the General Assembly to reduce further these residency requirements for presidential elections. Opponents of the constitution criticized these reduced residency requirements, arguing that:

[The purpose of the residency requirements is to enable the prospective voter to become acquainted with State and local conditions by actual residence in the State and district with a sufficient minimum time to enable the prospective voter to become acquainted with his neighbors, to discuss State and local problems with them and to become established as a genuine member of the community. Only in this way, may the prospective voter be an INTELLIGENT and INFORMED voter as contrasted to a PRO FORMA or UNINFORMED voter.]

With the defeat of the proposed constitution, plans to reduce the residency requirements for voting were not long delayed. In 1969, the General Assembly recommended, and the citizens approved, a constitutional amendment that reduced the residency requirement to six months within the state, and permitted the General Assembly, by law, to reduce further the residency requirements for voting in presidential elections. This reduction in residency requirements presaged the decision by the United States Supreme Court in Dunn v. Blumstein, which invalidated Tennessee’s residency requirements of one year in the state and three months in the county prior to the election on the ground that they constituted an impermissible denial of the fundamental right to vote.
3. Referendum.—The referendum power was added to the Maryland Constitution in 1915.\textsuperscript{110} Originally conceived in the Progressive era as a way to check conservative legislatures, by the 1960s the referendum had become identified largely as a tool of conservatives to oppose progressive legislation.\textsuperscript{111} For example, in 1964, a referendum to repeal an act strengthening state protection against racial discrimination received forty-seven percent of the vote and carried thirteen counties.\textsuperscript{112} With this in mind, the 1967-1968 Constitutional Convention sought to make referenda more difficult by increasing the requirement of petition signatures from three to five percent of the voter turnout.\textsuperscript{113}

The referendum is not one of the areas where the proposals of the 1967-1968 convention have led to subsequent constitutional change. Since 1967, only minor revisions have been made in the referendum power.\textsuperscript{114}

C. Legislative Branch

The 1967-1968 Constitutional Convention considered radically revising the provisions governing the legislative branch, and eventually recommended important changes in the structure and powers of the legislature.\textsuperscript{115} After the defeat of the proposed constitution, none

\textsuperscript{110} Act of Apr. 16, 1914, ch. 673, 1914 Md. Laws 1143 (ratified Nov. 2, 1915) (codified at Md. Code Ann., Const. art. XVI (1981)); see Frank T. Ralabate, Direct Legislation, in Study Documents, supra note 4, at 66, 66-67 (explaining the procedures by which a referendum may be petitioned for under the Maryland Constitution).

\textsuperscript{111} See MAGNIFICENT FAILURE, supra note 1, at 142 (describing the referendum as “a useful veto device by which sufficiently agitated and interested minorities can thwart progressive legislation of increasingly responsible and responsive political leaders”).

\textsuperscript{112} Id.

\textsuperscript{113} See COMPARISON, supra note 75, at 188 (citing section 2.11 of the proposed constitution which increased the percentage over that required by Md. Const. of 1867, art. XVI, § 3).

\textsuperscript{114} Act of Apr. 26, 1977, ch. 681, 1977 Md. Laws 2743 (ratified Nov. 7, 1978) (requiring the “remov[al] or correct[ion of] constitutional provisions which are obsolete, inaccurate, invalid, unconstitutional, or duplicative; generally relating to technical revisions of the Maryland constitution[al]” provision addressing the referendum power) (codified as amended at Md. Code Ann., Decl. of Rts. arts. 23-24, 46; Const. art. I, §§ 1-11; art. III, §§ 5-6, 9, 11, 13, 15, 19, 37, 41, 53, 59; art. IV, §§ 1, 1A, 3, 4A, 6, 12, 14, 18, 20, 22, 40, 41-I, 44, 45; art. V, §§ 5-7, 11; art. VI, § 1; art. VII, § 1; art. XI-A, §§ 2, 5; art. XI-D, § 1(a); art. XIII, §§ 1, 2; art. XV, §§ 2, 3; art. XVI, §§ 2, 6; art. XVII, §§ 1, 3-9 (1981 & Supp. 1998)).

\textsuperscript{115} The most radical measure with respect to the legislative branch of the Maryland state government was the proposal to replace the traditional, bicameral legislature with a “modern” unicameral legislature in accordance with the recommendation of the National Municipal League. Model State Const., supra note 80, § 4.02 & cmt., at 42-44. The Eney Commission carefully considered both alternatives, and in a 13-12 vote, chose to recommend retaining the bicameral model. Report, supra note 6, at 125. Nonetheless, because of the closeness of the vote, the Commission submitted an alternative draft constitution.
of the proposals of the constitutional convention concerning the legislative branch have been brought to fruition. The reason for this seems clear. There has been no constitutional convention since 1967-1968; thus, the only route to constitutional amendment must begin in the legislature and receive the approval of three-fifths of the members of each house. Consequently, change is difficult. If a proposed constitutional amendment would reduce the power and prestige of the legislature, few legislators would support it. Alternatively, if a proposal would increase the power and prestige of the legislature—as many of the proposals of the 1967-1968 constitution would have—other institutions may face a commensurate loss of power. To implement such a proposal, legislators would need to overcome likely gubernatorial opposition and the public perception that such an amendment was a grab for political power.

1. Removing Limitations on the General Assembly.—Under standard American political theory, state legislatures are the repository of all sovereign power. Thus, state legislatures may pass legislation governing any subject matter they select, with the state and federal consti-

Based upon a unicameral legislature. See id. at 143-46; see also John H. Michener, The Structure of the Maryland Legislature, in Study Documents, supra note 4, at 107, 108-09 (discussing arguments for and against unicameralism and bicameralism). The constitutional convention also considered unicameralism, but ultimately decided to retain the traditional bicameral model. See MAGNIFICENT FAILURE, supra note 1, at 70-71.


117. See Gerald Benjamin & Thomas Gais, Constitutional Conventionphobia, 1 HOFSTRA L. & POL'Y SYMP. 53, 71-72 (1996) (suggesting that proposed constitutional revisions “that directly challenge legislative power . . . go nowhere”).

118. During the 1998 session of the General Assembly, two proposals were made that would have expanded legislative power: HB 1156 (proposing the deletion of the limitation on the duration of the session of the General Assembly), and HJ 6 (proposing the formation of a commission to study single-member districting for the General Assembly). The text of the proposals, as well as a report on the legislature’s failure to adopt either measure, are available at Maryland General Assembly Homepage (visited Jan. 23, 1999) <http://mlis.state.md.us/1998rs/billfile/hbl1156.htm> and Maryland General Assembly Homepage (visited Jan. 23, 1999) <http://mlis.state.md.us/1998rs/billfile/hj0006.htm>.

119. See W.F. Dodd, Implied Powers and Implied Limitations in Constitutional Law, 29 YALE L.J. 137, 137-38 (1919) (arguing that the “state legislature has all powers not forbidden to it” by the National and State constitution, and that state constitutional law involves a “broader [than the federal] sphere of powers existing unless they are denied”); Frank P. Grad, The State Constitution: Its Function and Form for Our Time, 54 VA. L. REV. 928, 968 (1968) (noting that “state government is a government of plenary powers, except as limited by the state and federal constitutions”); William F. Swindler, State Constitutions for the 20th Century, 50 NEB. L. REV. 577, 593 (1971) (noting that “[state] legislative power is plenary in the absence of specific constitutional limitations”); Robert F. Williams, State Constitutional Law Processes, 24 WM. & MARY L. REV. 169, 178 (1983) (“When the Union was formed, the states retained almost plenary governmental power exercised primarily by their legislatures.”). See generally THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL
tutions functioning as the sole limitation. The Court of Appeals of


120. There are important exceptions to the general rule that state legislatures possess plenary power and may legislate on any topic not prohibited by the state constitution. A state legislature may not pass laws governing subject matters that are preempted by federal statutory or regulatory law. See Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 247-48 (1984) (explaining that a state law can be preempted by federal law, but only if Congress evidences an intent to occupy a given field or, even if Congress has not entirely displaced state regulation, if the state law conflicts with federal law). The state legislature may not pass a law that impairs interstate commerce. See Southern Pac. Co. v. Arizona, 325 U.S. 761, 770-71 (1945) (noting that a state law can be invalid as an impairment of interstate commerce and setting forth the test to determine if impairment exists). The state legislature may not abolish its republican form of government. U.S. Const. art. IV, § 4; see also Hans A. Linde, When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality, 72 Or. L. Rev. 19, 19 (1993) (opining that a "state's federal obligation [i.e., under U.S. Const. art. IV, § 4] to maintain a republican form of government disqualified [an anti-homosexual rights] proposal from being put to a plebiscite by initiative petitions"). But see Luther v. Borden, 48 U.S. 1, 1 (1849) (holding that the determination whether a state provided a republican form of government is a political question entrusted to the legislative branch of government). State legislatures are prohibited from undertaking national functions. U.S. Const. art. I, § 10. Finally, since the application of the federal bill of rights to the states through the Fourteenth Amendment, the states are prohibited from depriving their respective citizens of most of the guarantees of the federal bill of rights. For a catalog of those rights incorporated against the states, see Friedman, supra note 76, at 677 n.13.


The current membership of the Supreme Court is deeply divided about the nature of this federal-state balance. While both sides of the Court agree that the "people" have given sovereignty to both the states and the national government, the amount and quality of the
Maryland has recognized this basic tenet of state sovereignty, stating that "[t]he delegated legislative powers of the General Assembly are plenary, except as limited by the Federal and State Constitutions."\(^{121}\)

The 1867 Maryland Constitution contains numerous provisions governing legislative action. Some of these provisions prohibit the General Assembly from legislating over a given subject matter.\(^{122}\) Other provisions require the General Assembly to regulate subjects by legislative act.\(^{123}\) The provisions in the first group, preventing the legislature from legislating, are few in number and arcane.\(^{124}\) The more insidious problem arises from provisions that require the General Assembly to legislate in certain areas. Although it has not presented a problem in Maryland, courts can transform such mandates into limitations on legislative power, by the canon of construction *expressio unius est exclusio alterius* (the expression of one is the exclusion of an-

sovereignty delegated remain elusive. Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas, have opined that sovereignty was transferred by the people to the states, which, with the exception of the narrowly defined enumerated powers of the federal government, are the irreducible repositories of sovereignty. Justices Stevens, Souter, Ginsburg, and Breyer have opined that the "undifferentiated" people retain to themselves numerous powers. Justice Kennedy has provided the swing vote. *See* Sullivan, *supra*, at 108 (analyzing the two opposing views on the Court and identifying Justice Kennedy as the "swing vote" in federalism cases); Melvin R. Faraoni, Note, *Printz v. United States: Federalism Revisited or Madison and Hamilton Are at It Again*, 30 AIz. ST. L.J. 491, 503 & n.108 (1998) (same). Obviously, the outcome of the United States Supreme Court's ongoing debate on these "first principles," *Lopez*, 514 U.S. at 552; *U.S. Term Limits*, 514 U.S. at 846 (Thomas, J., dissenting), will influence state supreme courts generally (and the Court of Appeals of Maryland specifically) in their assessments of the limits of state sovereignty and the nature and scope of a state legislature's "plenary" power to legislate.

121. Board of Supervisors of Elections v. Attorney Gen., 246 Md. 417, 428, 229 A.2d 388, 394 (1967); see also Richards Furniture Corp. v. Board of County Comm'rs, 233 Md. 249, 257, 196 A.2d 621, 625 (1963) ("The Maryland Constitution is not a grant of powers to the General Assembly, but a statement of limitations on its otherwise plenary powers.").

122. *See, e.g.*, Md. Const. of 1867, art. III, § 55 (prohibiting suspension of writ of habeas corpus); id. § 59 (prohibiting the establishment of "any general pension system").

123. *See, e.g.*, id. § 42 (requiring the legislature to pass laws governing elections); id. § 43 (mandating that the legislature protect "the property of the wife . . . from the debts of her husband"); id. § 44 (requiring the legislature to pass laws that "protect from execution a reasonable amount of the property of the debtor"); id. § 45 (requiring the legislature to pass laws governing registration of wills); id. § 48 (requiring the legislature to pass laws governing corporate charters); id. § 49 (requiring the legislature to pass laws governing Judges of Elections); id. § 50 (requiring the legislature to pass laws prohibiting bribery); id. § 58 (requiring the legislature to pass laws governing taxation of foreign corporations); id. § 60 (granting the legislature the authority to pass laws governing parole).

As Wheeler and Kinsey write, "So far as the legislature has plenary powers to act in the absence of constitutional restraint, almost any constitutional statement becomes a limitation."126

The 1967-1968 Constitutional Convention sought to eliminate both problems by removing most constitutional limitations on legislative enactment.127 In the thirty years since the defeat of the proposed constitution, no changes have been made to limit the problem of negative implication.

2. Composition of the General Assembly.—The basic unit of representation in the Maryland General Assembly, at least from 1776 to 1968, was the county.128 But after the United States Supreme Court’s

125. See Grad, supra note 119, at 966 (noting that “courts have often given [constitutional grants of legislative power] the full effect of negative implication, relying sometimes on the canon of construction expressio unius est exclusio alterius”); Williams, supra note 119, at 202-04 (explaining that courts have sometimes transformed state constitutional provisions into limitations on legislative power); see also Model State Const., supra note 80, §§ 2.01 & cmt., at 36-38 (noting the problem of “judicial findings of implied limitations which were wholly unintended”).

126. Magnificent Failure, supra note 1, at 70.

127. See Comparison, supra note 75, at 147-50 (citing sections 3.19-.24 of the proposed constitution which reduce limitations on the legislature primarily to procedural requirements and the requirement to pass general laws).

128. The first Maryland Constitution provided for the House of Delegates to be composed of four delegates per county, Md. Const. of 1776, art. II, and two each from Annapolis and “Baltimore town.” Md. Const. of 1776, art. IV, V. The state senate was elected indirectly by two senatorial electors, chosen from each county, and one each from Annapolis and “Baltimore town.” Md. Const. of 1776, art. XIV. The electors then chose fifteen state senators (nine from the western shore, six from the eastern shore). Md. Const. of 1776, art. XV. See John H. Michener, The History of Legislative Apportionment in Maryland, in Study Documents, supra note 4, at 131, 139 & n.47. The 1837 amendments provided for the direct election of state senators (one senator per county and one for Baltimore City) and a “permanent” proportional representation system in the House of Delegates whereby the smallest counties elected three delegates and larger counties elected four, five, or six delegates depending on their population. Study Documents, supra note 4, at 402-08.

The 1851 Maryland Constitution retained the county as the basic unit of representation and retained the direct election of one senator per county and for Baltimore City. Md. Const. of 1851, art. III, § 2. The 1851 Constitution mandated that the House of Delegates reapportion itself according to the population of each county, but that there could be no more than eighty delegates, nor fewer than two delegates per county. Id. § 3.

Under the short-lived 1864 Constitution, Baltimore City was divided into three districts. Md. Const. of 1864, art. III, § 2. Each county, and each of Baltimore’s districts, were permitted one state senator. Id. § 3. A new formula for proportional representation in the House of Delegates was established, id. § 4, but never took effect. See Michener, supra, at 148 n.66. The 1867 Constitution retained the general outlines of the 1864 Constitution’s apportionment, but doubled the representation for the smallest counties and capped the number of delegates permitted to represent Baltimore City. Md. Const. of 1867, art. III, §§ 2, 3. From 1867 until 1967, there were relatively minor adjustments to the inequitable, county-based formula. Act of Apr. 7, 1900, ch. 469, 1900 Md. Laws 750 (ratiﬁed Nov. 5, 1901) (adding a fourth district in Baltimore City) (codiﬁed as amended at Md.
decision in *Baker v. Carr*, the disparity in size between the most populous and least populous counties made representation by county impossible:

"The unpleasant reality which the committee [on the legislative branch] finally had to face was the fact that, for each county to retain at least one delegate, [and conform to the 'one man/one vote' principle], the House of Delegates would have to have [based on demographic trends] 192 members following the reapportionment in 1970 and 227 members following the reapportionment in 1980 . . . ." 

Thus, it was impossible to retain the county as the basic unit of representation in the General Assembly. To avoid this quagmire, the constitutional convention determined that reapportionment would be best left to the General Assembly itself, subject to two important restrictions: (1) that the membership in the House of Delegates not exceed 120 members and the Senate not exceed 40 members; and (2) that each delegate represent a single district. The mechanism by which the General Assembly would undertake redistricting was somewhat novel and originated at the Convention. The drafters proposed a nine-member "Redistricting Commission" and charged it with creating a redistricting plan. The plan would be submitted to the govern-

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*Even after the United States Supreme Court applied the principle of "one person/one vote" to state legislatures in *Baker v. Carr*, 369 U.S. 186 (1962), the Maryland General Assembly attempted to retain the county as the basic unit of representation. *Md. Ann. Code*, art. 40, § 42 (1962). For a complete history of legislative reapportionment in Maryland from 1635 to 1967, see Michener, *supra*, at 131. *See also Bell & Spencer, supra* note 124, at 11-28.*

129. 369 U.S. 186 (1962).

130. *Magnificent Failure, supra* note 1, at 74 (quoting Committee Memorandum, LB-1, November 1, 1967).

131. *See Comparison, supra* note 75, at 141-42 (§§ 3.03-06); *see also Magnificent Failure, supra* note 1, at 71-73 (describing the substance of the proposed single-member district change); *id.* at 176-81 (explaining the divisiveness of the proposed single-member district change).

132. *Comparison, supra* note 75, at 142 (§ 3.05). The proposed membership of the Redistricting Committee consisted of two appointees from the presiding officer and minority leader in each house, plus one gubernatorial appointee to serve as chairperson. The Redistricting Commission also served a similar function with respect to congressional redistricting. *Id.* at 143 (§ 3.08).
nor, who then would introduce the plan to the General Assembly. The General Assembly was then free to adopt the Commission plan or another of its own design. The proposed constitution provided that the Court of Appeals would have original review of the adopted redistricting plan.

Upon the defeat of the proposed constitution, it was still necessary to reorganize the General Assembly according to the “one person/one vote” principle, which was enshrined in the Maryland Constitution by a 1969 amendment.

Following the 1970 census, a more substantial change was adopted that remains in effect today. Under this system, the governor is charged with creating a redistricting plan after the census. The governor then causes the plan to be introduced in the General Assembly. If the General Assembly fails to adopt an alternative plan, the governor’s plan becomes law.

The new system, like that proposed by the Constitutional Convention of 1967-1968, provides for original jurisdiction in the Court of Appeals of Maryland for challenges to the redistricting plan adopted.

133. The governor’s role in receiving the redistricting plan from the commission and transmitting the plan to the General Assembly appears to have been merely ceremonial, and not an opportunity for the governor to intervene in the redistricting process. Although the convention had among its materials a model state constitution, which proposed a more active role for the governor, the convention rejected this model in favor of a system with no active gubernatorial involvement. Garrett Power, Extraordinary Powers of the Governor, in Study Documents, supra note 4, at 151, 152-53.

134. Id.

135. Id.

136. Id.

137. Act of May 21, 1969, ch. 785, 1969 Md. Laws 1684, 1685 (ratified Nov. 3, 1970) ("The ratio of the number of senators to population shall be substantially the same in each legislative district; the ratio of the number of delegates to population shall be substantially the same in each legislative district.") (codified as amended at Md. Code Ann., Const. art. III, §§ 2-6 (1981 & Supp. 1998)).


140. Id.


In summary, after the United States Supreme Court mandated that state legislatures conform to the principle of “one man/one vote,” nothing could be done to retain representation in the General Assembly by county. Over time, demographic change has required that legislative districts cross county lines more and more frequently. With respect to the mechanism for redistricting, it is unclear if the 1972 system requiring the governor to commence the redistricting process was adopted in response to the proposals of the Constitutional Convention of 1967-1968, or out of the General Assembly’s understandable frustration that resulted from redistricting the state and its own members so many times in a short period of time. In either case, the constitutional amendment created a workable system for reapportioning the legislature in compliance with federal law.

3. Retention of the Executive Budget System.—In 1916, an executive budget system was adopted in Maryland. Under this system, the governor drafts and submits the budget bill to the General Assembly

143. For a history of the legislative apportionment in Maryland during the 1960s, see Michener, supra note 128.

It was customary, under the former method, for the Governor to appear in person before a joint meeting of the members of the House of Delegates and the Senate, at the beginning of every regular session of the Legislature, and to address them on “the condition of the State,”—in the course of which he was expected to direct their attention to the essential needs of the State, and to specifically recommend to their consideration such measures as he judged necessary. Having thus discharged the responsibility imposed upon him by the Constitution, the Governor must thereafter await the final disposition of his recommendations by the Legislature, whose members were free to adopt, alter or entirely ignore any or all of them, except in so far as the Governor, by virtue of his prestige and his influence with the members of the Legislature, might affect the course of his recommendations through the Legislature.

It is true, the Governor then had the “power to disapprove of any item or items of Bills making appropriations of money” and to thus void the items which he disapproved. However, his use of this veto power on individual items had to be exercised with rare discrimination and with an intimate understanding of the temper of the Legislature, to avoid the danger of antagonizing powerful groups in the Legislature, and thereby jeopardize all of his recommended measures. Consequently, he was ever conscious of the fact that, in addition to the complete discretion vested in the Legislature in its consideration of his proposals, it also could “proceed to reconsider” and repass, any of the vetoed items, by the affirmative vote of “three-fifths of the members elected” to each “House,” viz: The House of Delegates and the Senate.

The power to fix the fiscal policies and determine the course of the fiscal operations of the State was, therefore, exclusively vested in the Legislature, subject only to the mild restraint of the limited veto powers of the Governor, and
This system reverses the traditional legislative process, wherein bills originate in the General Assembly and proceed to the governor for approval. The advantage is that it allows the governor greater control of the budget under which his or her administration will operate. Of course, the governor's additional power to propose the state budget comes at the expense of the legislative branch, which is deprived of that traditional power. The delegates to the 1967-1968 Constitutional Convention proposed retaining the executive budget system, and in the intervening thirty years, there has been no formal proposal to return to the previous legislative budget system.

A subsequent correction in the allocation of the balance of power between the executive and legislative branches with respect to the budget process was made in the late 1970s. Around this time, the General Assembly began passing bills mandating funding levels for certain programs. In effect, these minimum funding bills limited whatever power of persuasion he might be capable of exercising with individual members of the Legislature.

The old method often witnessed "logrolling" or "you help me and I'll help you" tactics among many of the members of the Legislature in their efforts to insure passage of the particular appropriations in which they had some selfish or political interest. It was not unusual for excessive appropriations to result from such tactics and also from the pressure of political and professional lobbyists; and, almost as frequently, some of the most important activities or needs of the State were either overlooked or sadly neglected in what was commonly termed, the "Pork Barrel" scramble.

The present Budget System, which is technically known as the "State Executive Budget System," was designed to correct these conditions, and to impose upon the Governor the primary responsibility of controlling the fiscal policies and operations of the State.

Hooper S. Miles, The Maryland Executive Budget System and a Review of its Administration: 1916-1941, at 8-10 (1942) (citation omitted); see also McKeldin v. Steedman, 203 Md. 89, 96-103, 98 A.2d 561, 536-67 (1953) (examining Maryland's executive budgetary system and considering the events that led to its adoption); George C. Doub, Jr., The Budget Amendment, in Study Documents, supra note 4, at 231, 231 (explaining how Maryland, by enacting the 1916 constitutional amendment, "became one of the first states to adopt an executive budget system" as a remedy to a "piecemeal" appropriations process).

145. See Doub, supra note 144, at 231-37 (comparing the traditional legislative process to the executive budget system).

146. See id. at 233.

147. See Comparison, supra note 75, at 198 (§ 6.09).

148. See infra notes 152-153 and accompanying text (examining the allocation of power between the executive and legislative branches in the budget process).

149. See, e.g., Act of May 31, 1974, ch. 867, 1974 Md. Laws 2896 (establishing minimum rates for certain types of foster care in terms of a percentage of other types of foster care) (repealed 1984); see also Maryland Action for Foster Children, Inc. v. State, 279 Md. 133, 136, 367 A.2d 491, 493 (1977) (citing this enactment).
the governor’s freedom to create the budget as he saw fit. In 1977, the Court of Appeals of Maryland held that the Maryland Constitution prohibited the General Assembly from mandating minimum funding of certain programs. The General Assembly responded immediately by amending the constitution to permit minimum funding mandates. In this manner, the balance of power has reached a point of equilibrium: the legislature can mandate minimum funding for programs it deems important; the governor must include those projects in the budget the governor prepares for submission to the General Assembly; and the General Assembly then approves the governor’s budget.

4. Shared Power with Local Government.—The 1967-1968 Constitutional Convention sought to reduce the General Assembly’s role in local affairs by removing the responsibility to pass local legislation. The hope was that this change would strengthen both the General Assembly and the local governments. The mechanics of the proposed changes are dealt with in Part IV.F.

5. Legislative Sessions.—The proposed constitution called for a lengthening of the sessions of the General Assembly. Under the 1867

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150. See Maryland Action, 279 Md. at 151, 367 A.2d at 499 (“The Legislature, by enacting statutes specifying minimum spending limits, cannot deprive the Governor of the discretion which the Constitution explicitly vests in him.”).

151. Id. at 152-53, 367 A.2d at 501-02.


WHEREAS, The Court of Appeals of Maryland, in Maryland Action for Foster Children, Inc. v. State, 279 Md. 133[, 367 A.2d 491] (1977), has held that Section 52 of Article III of the Constitution of Maryland does not authorize the General Assembly to enact legislation (other than an appropriation bill) which requires the Governor, in the preparation of the annual budget, to provide for the funding of specified programs at specified levels; and

WHEREAS, The inability of the General Assembly to mandate minimum funding levels of State programs so emasculates the policy-making function of the legislative branch that it is imperative that the Constitution of Maryland be amended so as to authorize the General Assembly to enact legislation (other than an appropriation bill) requiring the Governor, in the preparation of the annual State budget, to provide for the funding of specified programs at specified levels, contrary to the holding of the majority opinion and consistent with the holdings of the minority opinions in that case . . . .

Id. at 2812.


154. See infra notes 283-308 and accompanying text (discussing the relationship between the state and local governments).
Constitution as it existed in 1967, legislative sessions were limited to seventy days per year.\textsuperscript{155} The proposed constitution would have allowed a ninety-day session with two possible thirty-day extensions.\textsuperscript{156} After the defeat of the proposed constitution, the legislature proposed, and the electorate adopted, a constitutional amendment to extend the legislative session to ninety days.\textsuperscript{157}

The lengthening of the session has not had the desired effect. Wheeler and Kinsey's description of the end of a legislative session as a "last minute log-jam of legislation when dozens of bills pass one house or the other at fantastic rates of speed with at best the formalities touched upon"\textsuperscript{158} is still accurate. It may be that legislation can only overcome the general inertia of a legislative body when some significant force is applied. This force may come in the form of constituent outcry, media criticism, or the pressure exerted by fellow members of the legislature. The shortness of time at the end of a session, with the impending constitutional deadline, serves to magnify these forces. So long as Maryland continues to employ a part-time legislature, the end of a session, regardless of whether it is a seventy-day, ninety-day, or one hundred twenty-day session, will bring an end-of-session rush to adopt legislation.\textsuperscript{159}

\textsuperscript{155} As originally framed, the 1867 Constitution provided for biennial, 90-day sessions. Md. Const. of 1867, art. III, § 14 ("The General Assembly shall meet on the first Wednesday of January, eighteen hundred and sixty-eight, and on the same day in every second year thereafter . . ."); id. § 15 ("The General Assembly may continue its Session so long as, in its judgment the public interest may require, for a period not longer than ninety days . . ."). In 1948, a limited 30-day session was added during alternate years. Act of Apr. 16, 1947, ch. 497, 1947 Md. Laws 887 (ratified Nov. 2, 1948) (codified as amended at Md. Code Ann., Const. art. III, § 14.15.52 (1981 & Supp. 1998)). In 1964, the constitution was amended to create an annual 70-day session. Act of Apr. 7, 1964, ch. 161, 1964 Md. Laws 413 (ratified Nov. 3, 1964) (codified as amended at Md. Code Ann., Const. art. II, §§ 1, 3, 13; art. III, §§ 14, 15, 27, 52(3) (1981 & Supp. 1998)). See generally Bell & Spencer, supra note 124, at 34-35 (discussing the limitations on the number and duration of legislative sessions in Maryland).

\textsuperscript{156} See Comparison, supra note 75, at 146 (§ 3.15).


\textsuperscript{158} Magnificent Failure, supra note 1, at 74; see also Bell & Spencer, supra note 124, at 68-69.

\textsuperscript{159} Even if Maryland were to adopt a full-time legislature, it is improbable that the problem of end-of-session logjams would abate. One frequently hears of the United States Congress rushing to pass a bill before its summer or winter recess. Perhaps this waiting until the deadline is an instinctive part of human nature and cannot be controlled by constitutional reform.
D. Executive Branch

1. Gubernatorial Control of Executive Branch.—Granting the governor of Maryland greater control of the executive branch was a clear goal of the Constitutional Convention of 1967-1968.\(^{160}\) The convention sought to accomplish this goal by reducing the number of statewide officials\(^{161}\) (in order that the governor would be the only state official elected on a statewide basis), reducing the power of the Board of Public Works,\(^{162}\) and granting the governor increased power to reorganize the executive branch and cabinet officers.\(^{163}\)

   a. Comptroller and Attorney General.—One of the most contentious battles in the constitutional convention was caused by the proposal to eliminate, as statewide elective offices, the positions of attorney general\(^{164}\) and comptroller of the treasury.\(^{165}\) Currently,
neither the comptroller \textsuperscript{166} nor the attorney general \textsuperscript{167} is dependent on the governor for his or her position. Because each of these elected officials has his or her own constituency, the attorney general and comptroller have every reason to act independently, and little impetus to follow the governor. \textsuperscript{168} Similarly, the state treasurer is elected by the General Assembly and is not dependent upon the governor for support. \textsuperscript{169} Finally, the comptroller of the treasury, the state treasurer, and the governor together comprise the Maryland Board of Public Works. \textsuperscript{170}

The Eney Commission had recommended the complete excision of the office of the comptroller from the constitution. \textsuperscript{171} At the constitutional convention, the move to delete the comptroller became extremely political, and the votes were very close. \textsuperscript{172} Finally, a compromise was reached to retain the office of comptroller as a constitutionally recognized office, but to strip the office of most of its powers and duties. \textsuperscript{173} Since the defeat of the proposed constitution of

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the modern, elected office of attorney general, Md. Const. of 1864, art. V, § 1, and the 1867 Maryland Constitution retained this office, Md. Const. of 1867, art. V, § 1.

165. The office of the comptroller of the treasury was created as an elective office by the Maryland Constitution of 1851. Md. Const. of 1851, art. VI, § 1. The 1864 Maryland Constitution shortened the term of office from four years to two. Md. Const. of 1864, art. VI, § 1. The 1867 Constitution subsequently re-extended the term to four years. Md. Const. of 1867, art. VI, § 1.

166. The comptroller is chosen by the qualified electors of the state for a four-year term. Md. Code Ann., Const. art. VI, § 1 (1981). If the office becomes vacant, the governor, by and with the consent of the Senate, fills the vacancy by appointment, to continue until another election and until the qualification of the successor. \textit{Id.}

167. The attorney general is elected by voters of the State for a four-year term. Md. Code Ann., Const. art. V, § 1 (1981). If the office becomes vacant, the governor appoints a person to the office for the remainder of the term. \textit{Id.} § 5.

168. \textit{See Report, supra} note 6, at 147 n.82 ("The greatest single impediment to executive unity lies in the constitutional designation of top officials who obtain office by popular election or by legislative election." (quoting \textsc{Bennet M. Rich, State Constitutions: The Governor 13} (National Mun. League ed., 1960))).

169. Md. Code Ann., Const. art. VI, § 1 (1981). The General Assembly has elected the treasurer since the adoption of the first Maryland Constitution. Md. Const. of 1776, art. XIII. Originally, there was a treasurer from both the Eastern and Western Shores. \textit{Id.} The office of the treasurer of the Eastern Shore was abolished in 1843, and the duties transferred to the treasurer of the Western Shore. Act of 1841, ch. 200 (passed Mar. 3, 1842). The 1851 Constitution created a single, statewide office of the treasurer. Md. Const. of 1851, art. VI, § 1. This position has been retained through the Constitutions of 1864 and 1867. \textit{See Md. Const. of 1864, art. VI, §§ 1, 2; Md. Const. of 1867, art. VI, § 1.}


171. \textit{Report, supra} note 6, at 150.

172. \textsc{Magnificent Failure, supra} note 1, at 167-73 (describing the proposal to abolish the comptroller as one of the three issues that was so "sharply divisive" that it "threatened to wreck the convention").

173. \textit{Id.} at 173-75.
1967-1968, there have been no constitutional changes made in the offices of the comptroller or attorney general.

b. Board of Public Works.—The name of the Board of Public Works is largely insufficient to describe the central role that the Board plays in Maryland government. In many ways, the Board of Public Works is the executive branch of Maryland’s government. Although the constitutional duties of the Board are limited, and reflect the original role as overseer of the State’s investments in railroad and canal companies, today the functions of the Board are set largely by statute. They include the authority to sell bonds and determine their rates of interest; to let state contracts; to approve leases of and the purchase and sale of state property; and to promulgate rules and regulations for state agencies. In this way, many of the most important executive branch decisions are made by the Board of Public Works. Of the three votes on the Board, the governor controls only one.

Both the Eney Commission and the 1967-1968 proposed constitution sought to eliminate the Board of Public Works and concentrate its executive decision-making authority in the chief executive of the state, the governor. Since the electoral defeat of the proposed constitution, however, there have been no further attempts to eliminate the Board of Public Works.

c. Reorganizing the Executive Branch.—Under the Maryland Constitution as it existed in 1967, the structure and organization of the executive branch was under the exclusive control of the legislative


175. See Magnificent Failure, supra note 1, at 78 (stating that “[t]he board . . . originally was set up to watch over state investments in railroad and canal companies”); Report, supra note 6, at 152 (stating that the “principal constitutional function of the Board of Public Works was that of safeguarding and protecting these investments [in private corporations engaged in building railroads, canals, and other public works] of the state”).

176. Report, supra note 6, at 152.

177. Id. (describing the Board as “a three-man board, two of the members of which are to the same degree, at least, independent of the governor”).

178. See id. at 153 (“omitting . . . one reference to the Board of Public Works”); see also Comparison, supra note 75, at 160 (proposing in section 4.25 a new Board of Review of restricted scope); Magnificent Failure, supra note 1, at 79 (remarking that “[s]trong pressures developed both in the commission and the convention for significantly changing this arrangement [of the Board] and centralizing in the governor control over the executive branch”).

branch. A gubernatorial commission appointed to study the executive branch described it as follows:

Maryland constitutional and statutory provisions permit only a single avenue for executive reorganization. This avenue requires that all proposals for executive reorganization formally originate in the legislature; that they be considered by each house, where they may be modified or tabled; and that they be approved by each house and transmitted to the Governor for his approval, if they are to become law.

By 1967, the legislature had used its authority to create over 240 boards, departments, and commissions. Moreover, the governor's control of these executive agencies was weak. Although the governor had (and continues to have) broad appointment powers subject to senatorial confirmation, the governor's removal power was limited to circumstances of "incompetency or misconduct," but not for political disobedience. The terms of office of the heads of executive departments were not necessarily coterminous with that of the governor, thus permitting carry-over appointees from a previous gubernatorial administration to exercise substantial executive authority. Finally, many of the executive departments, as they were constituted in 1967, were directed by boards or commissions, rather than by a single department head. Each of these factors tended to weaken the governor's control over the executive branch.

180. See Magnificent Failure, supra note 1, at 80 (stating that "[t]he administrative structure [of executive agencies] is at present wholly determined by the General Assembly").

181. Commission for the Modernization of the Executive Branch of the Maryland Government, Modernizing the Executive Branch of the Maryland Government 5-6 (1967).

182. Magnificent Failure, supra note 1, at 80.

183. Md. Const. of 1867, art. II, § 10 (stating that "[the governor] shall nominate, and by and with the advice and consent of the Senate, appoint all civil and military officers of the State, whose appointment or election is not otherwise herein provided for; unless a different mode of appointment be prescribed by the Law creating the office").

184. Id. § 15 (applying this removal provision to "all civil officers who received appointment from the Executive for a term of years").

185. See Magnificent Failure, supra note 1, at 81 (explaining that executive department heads were given "a significant degree of independence" because "the terms of such officials are set by law and are not coterminous with the term of the governor").

186. See id. at 82 (noting that the convention generally opposed multi-headed departments in favor of a principal department headed by a single executive).

187. Id. at 81 (noting that "[t]his sprawling bureaucracy . . . prevents the governor from functioning as chief executive").
The Constitutional Convention of 1967-1968 sought to strengthen the governor's power over the executive branch. First, the convention proposed to assign all executive powers, duties, and functions to no more than twenty principal departments. Second, although the General Assembly would be allowed to make the initial allocation of functions among the twenty departments, either the General Assembly or the governor could propose subsequent reorganization. Reorganizations proposed by the governor would become effective unless rejected by the legislature. Finally, the convention proposed that most departments would be directed by a single department head, serving at the pleasure of the governor. For those departments that were permitted to retain a governing board, including the State Board of Education, the convention proposed that the governor appoint half of the board's membership upon assuming office.

Once the proposed constitution of 1967-1968 was rejected, this fertile area for constitutional reform was not forgotten. Governor Marvin Mandel proposed, the General Assembly adopted, and the voters of Maryland approved legislation granting the governor the power to reorganize the executive branch.

188. See Report, supra note 6, at 147 (stating that "primary attention [should] be given to strengthening the office of governor"); infra note 160 (discussing the constitutional convention's emphasis on strengthening the office of the governor).
189. See Magnificent Failure, supra note 1, at 81 (discussing this proposal).
190. Id.
191. Comparison, supra note 75, at 162 (setting forth section 4.27, which states that "[t]he General Assembly from time to time by law may reallocate offices, agencies, and instrumentalities among principal departments" and "the governor may make changes in the organization of the executive branch").
192. Id.
193. See id. (referring to section 4.28, which states that "[t]he head of each principal department of the executive branch shall be a single executive unless otherwise prescribed by the General Assembly by law or by the process of executive reorganization"); id. at 163 (noting section 4.30, which requires that "[e]ach person serving as the head of a principal department . . . shall serve at the pleasure of the governor").
194. Id. at 163 (stating in section 4.30 that "the governor, immediately upon taking office following his election, may appoint at least one-half of the members of each board and commission").
A recent amendment to the Maryland Constitution served to reinforce the governor's right to control the executive branch. In response to several "midnight appointments" by "lame duck" Governor William Donald Schaefer, the General Assembly passed a constitutional amendment to prohibit last-minute appointments by outgoing governors.196

2. Lieutenant Governor.—Even before the constitutional convention, it was assumed that the new constitution would reestablish the office of lieutenant governor. The short-lived Maryland Constitution of 1864 provided for a lieutenant governor, but the office was abolished upon the adoption of the 1867 Constitution.197 Wheeler and

196. Act of Apr. 13, 1995, ch. 114, 1995 Md. Laws 1497 (ratified Nov. 5, 1996) (codified at Md. CODE ANN., CONST. art. II, § 10A (Supp. 1998)). For a history of former Governor William Donald Schaefer's "midnight appointments," see John W. Frece & Marina Sarris, Schaefer Gave Friends 11th-hour Appointments, BALT. SUN, Jan. 21, 1995, at A1, available in 1995 WL 2418464 (describing seven long-time supporters of the governor appointed to positions in the last week of Schaefer's term); Peter Jensen, Schaefer Appointee Declines 2 Posts Amid Criticisms, BALT. SUN, Jan. 27, 1995, at B2, available in 1995 WL 2422242 (stating that "a top aide in the Schaefer administration [Robert A. Pascal] said . . . that he is no longer a candidate for two state jobs to which he was recently appointed[,]" and that he was "unhappy that his and dozens of other appointments made in the final weeks of Mr. Schaefer's term are being viewed as improper"); Marina Sarris, Glendening Rejects Nomination, BALT. SUN, Jan. 26, 1995, at A1, available in 1995 WL 2421954 ("Unhappy with dozens of last-minute appointments by his predecessor, Gov. Parris N. Glendening flatly rejected one of them yesterday, and said he is delaying many others for further review."); Marina Sarris, Six Proposed Amendments Will Be on Maryland Ballot, BALT. SUN, Oct. 31, 1996, at B2, available in 1996 WL 6644482 (noting that a proposed constitutional amendment would "limit the power of a departing governor to make last minute appointments").

197. Compare Md. CONST. of 1864, art. II, § 6 (stating that "[a] Lieutenant Governor shall be chosen at every regular election for Governor") with Md. CONST. of 1867, art. II, § 6 (omitting all references to the office of lieutenant governor and establishing new procedures for filling a vacancy in the office of the governor). The story of the first lieutenant governor of Maryland, Christopher C. Cox, is an interesting one. The newly adopted constitution of 1864 provided, for the first time, for a lieutenant governor. Md. CONST. of 1864, art. II, § 6. Elections were held on November 8, 1964, and as part of a Union party sweep, Thomas Swann of Baltimore City was elected governor, and Cox, a Talbot County dentist, was elected lieutenant governor. See Myers, supra note 55, at 14. Under the express terms of the constitution, however, Swann was not permitted to assume the governorship until the expiration of the term of his predecessor, Augustus Bradford. Md. CONST. of 1864, art. II, § 1 (providing that "the Governor chosen at the first election under this Constitution of 1864, and as part of a Union party sweep, Thomas Swann of Baltimore City was elected governor, and Cox, a Talbot County dentist, was elected lieutenant governor. See Myers, supra note 55, at 14. Under the express terms of the constitution, however, Swann was not permitted to assume the governorship until the expiration of the term of his predecessor, Augustus Bradford. Md. CONST. of 1864, art. II, § 1 (providing that "the Governor chosen at the first election under this Constitution shall not enter upon the discharge of the duties of the office until the expiration of the term for which the present incumbent was elected"). Governor Swann assumed his office on January 10, 1866. See 1 ARCHIVES OF MARYLAND, supra note 101, at 16; Myers, supra note 55, at 40. By this time, the Union party had begun to fragment, both in Maryland, id, at 39, and in the country at large. See generally Eric Foner, A SHORT HISTORY OF RECONSTRUCTION 1863-1877, at 104-22 (1990). From the time of Governor Swann's assumption of power, it became obvious that he and lieutenant governor Cox did not agree politically; Cox sided with the "Radical Republican" faction of the Union party, while Swann led the faction of the Union party that would soon break away to form the "Democratic-Conserva-
Kinsey report that the decision to create an office of lieutenant governor was uncontroversial at the 1967-1968 Convention.198

Ironically, the need for a lieutenant governor quickly became apparent after the defeat of the proposed 1967-1968 Constitution. In the 100 years between the adoption of the 1867 Constitution and the start of the 1967-1968 Constitutional Convention, only three governors were unable to complete their terms of office: Governor William Pinkney Whyte, who resigned on March 4, 1874, in preparation for accepting a seat in the United States Senate;199 Governor Robert M. McLane, who resigned on March 27, 1885, to become United States Minister to France;200 and Governor Herbert R. O'Conor, who resigned to accept a seat in the United States Senate on January 3, 1947.201 In each case, a replacement from the resigning governor's
own party was elected by the General Assembly to complete the term: Governor James Black Groome,202 Governor Henry Lloyd,203 and Governor William Preston Lane, Jr.,204 respectively. But less than eight months after the rejection of the 1967-1968 constitution, Governor Spiro T. Agnew, a member of the Republican Party, was elected vice president of the United States. When Agnew resigned as Governor on January 7, 1969 to become vice president, the General Assembly elected Marvin Mandel, the Speaker of the House of Delegates, and a Democrat, to fill Agnew's unexpired term.205

The constitution was amended in 1970 to create the office of lieutenant governor.206 The need for such a position was reinforced shortly thereafter when Governor Mandel, under investigation by the United States Attorney's Office for alleged corruption, elevated his Lieutenant Governor, Blair Lee, III to serve as acting Governor.207 Lee served in that capacity from June 4, 1977, until January 15, 1979,

and because of the constitutional prohibition against dual office holding, O'Connor resigned five days before the expiration of his second term. The General Assembly elected Governor-elect Lane to serve out the remaining five days of O'Connor's term before being sworn in again to serve his own term. See id. at 280-81.

202. Governor Groome was a member of the House of Delegates from Cecil County when elected to serve out the remainder of Governor Whyte's term. See id. at 185-86.

203. For an account of Governor Lloyd, see id. at 207-09.

204. For an account of Governor Lane, see id. at 279-83.

205. See BRUGGER, supra note 73, at 630 (discussing the contenders for Agnew's vacancy); BRADFORD JACOBS, THIMBLERIGGERS: THE LAW V. GOVERNOR MARVIN MANDEL 85-86 (1984) (noting that Mandel was elected to fill Agnew's vacancy by the General Assembly, where Mandel was a commanding figure and where he was not hampered by the ethnic prejudice against him that could affect the ordinary electorate).


207. 1 ARCHIVES OF MARYLAND, supra note 101, at 18 (stating that "[b]y letter dated June 4, 1977, Governor Mandel notified Lieutenant Governor Blair Lee III that Lee would serve as acting governor until further notice"). Although Governor Mandel was convicted, disbarred, and eventually jailed, the District Court of Maryland subsequently overturned his conviction. See Attorney Grievance Comm'n v. Mandel, 294 Md. 560, 562, 451 A.2d 910, 911 (1982) (imposing the "ultimate sanction of disbarment" on Mandel for his mail fraud conviction); see also United States v. Mandel, 672 F. Supp. 864, 871, 879 (D. Md. 1987) (noting that Governor Mandel served 19 months of his 4-year sentence, with the remainder commuted, and setting aside his convictions for mail fraud and racketeering), aff'd, 862 F.2d 1067 (4th Cir. 1988); Joel McCord, Mandel and Son Win Back Right to Practice Law, BALT. SUN, June 30, 1989, at D1. Moreover, the Court of Appeals of Maryland reinstated Mandel as a member of the bar.
and again briefly on January 16, 1979. There has been no subsequent need for a lieutenant governor to replace the governor.

3. The Veto.—The gubernatorial veto was first authorized in Maryland by the 1867 Constitution. As the veto power was initially constituted, the governor had six days after being presented with a legislative act either to sign the bill, veto it, or refuse to act on the bill ("pocket" it). The effect of the governor’s refusal to act was determined by the action or inaction of the General Assembly:

If any bill shall not be returned by the Governor within six days (Sundays excepted), after it shall be presented to him, the same shall be a Law in like manner as if he signed it, unless the General Assembly shall, by adjournment, prevent its return, in which case it shall not be a Law.

Apparently, the drafters of this provision hoped that it would persuade the General Assembly to pass important legislation throughout the legislative session, rather than waiting for the end-of-session rush.

One question that the text of the veto provision left open was the validity of post-adjournment approval and signature by the governor. The Court of Appeals of Maryland upheld post-adjournment sign-

208. 1 ARCHIVES OF MARYLAND, supra note 101, at 18 n.20 (noting that Lee served on January 16, 1979, for the purpose of presiding at the installation of Rita C. Davidson as a judge of the Court of Appeals of Maryland).

209. MD. CONST. of 1867, art. II, § 17 (requiring that all bills be presented to the governor "to guard against hasty or partial Legislation"). Professor Garrett Power has identified the impetus for adoption of an executive veto:

In deciding to write an executive veto into the Constitution, Conservative Democrats serving as delegates were undoubtedly swayed by their hostility toward the Radical Republican legislatures that had controlled Maryland during the Civil War and by their sympathies for President Andrew Johnson in his then current difficulties with the federal Congress.

Garrett Power, The Veto Power of the Governor, in STUDY DOCUMENTS, supra note 4, at 156, 156.

210. The 1867 Constitution did not use the word "veto." Instead, the constitution provided that the governor shall "return [a bill of which he disapproves] with his objections to the House in which it originated." MD. CONST. of 1867, art. II, § 17. The word "veto" did not enter the constitution until an 1890 amendment creating the "line-item" veto. Act of Mar. 27, 1890, ch. 194, 1890 Mo. Laws 211 (ratified Nov. 3, 1891) (stating that "the item or items of appropriations disapproved shall be void unless repassed according to the rules or limitations prescribed for the passage of other bills over the executive veto") (codified as amended at MD. CODE ANN., CONST. art. II, § 17 (1981 & Supp. 1998)).

211. MD. CONST. of 1867, art. II, § 17.

212. See Power, supra note 209, at 157 (suggesting that "one reason for this provision was to compel the legislature to pass laws throughout the session rather than saving all important legislation until the end"). For a discussion of the problem of the end-of-session rush, see supra notes 155-159.
ing, but left open the question of whether the signature must be affixed within the six-day period.

A more important problem with the veto power as set forth in the 1867 Constitution was the governor’s ability to manipulate the veto’s timing to prevent a vote to override the veto. The manipulation worked as follows. If a governor vetoed a bill during the session, that bill was immediately returned to the General Assembly for an override vote. If a Governor vetoed a bill after the adjournment, that bill would be returned to the General Assembly during its next session. When permitted to expire by pocket veto after adjournment, however, there was no method for legislative reconsideration. Obviously, preferring not to face override votes, governors learned to manipulate the date of presentment, delaying it in order to force the six-day period to expire after the adjournment of the General Assembly. By manipulating the date of presentment, governors could avoid an override vote altogether.

In 1950, a constitutional amendment partially closed this loophole by requiring that all bills vetoed or pocket vetoed after adjournment be returned to the next session of the General Assembly for consideration of an override. In 1960, this again was modified so that no bills would be returned to the legislature if there had been an

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213. Robey v. Broersma, 181 Md. 325, 341, 29 A.2d 827, 830 (1943) (reaffirming that “a bill could be presented to the Governor after the Legislature had adjourned”); Lankford v. County Comm’rs, 73 Md. 105, 114, 20 A. 1017, 1019 (1890) (holding that a bill “can be constitutionally presented to the Governor and signed by him, after the session of the Legislature has closed . . . provided [that] the bill [is] signed by the Governor within six days from the time it is actually presented to him for his approval”).

214. See Richards Furniture Corp. v. Board of County Comm’rs, 233 Md. 249, 262 n.2, 196 A.2d 621, 628 n.2 (1963) (noting that “[i]t is not necessary, under the circumstances of this case, to determine whether the Governor had only six days after March 12 within which to sign the Bill . . . even if it had been formally presented to him on that date”).

215. MD. CONST. of 1867, art. II, § 17 (requiring a three-fifths vote in each House to override a veto).

216. See Power, supra note 209, at 156. By the language of MD. CONST. of 1867, art. II, § 17, presentation of a bill to the governor begins the six-day time clock. Presentation is not mere delivery, but involves affixing the great seal and a ceremonial delivery by specified legislative officers. See Robey, 181 Md. at 339, 29 A.2d at 829 (“To put into effect a valid law, it is necessary in the first instance for the Legislature to pass the bill; to have it sealed with the Great Seal of the State; and to present it to the Governor.”). Although presentation was required to be made as soon as practicable after passage, the Court of Appeals has construed this in favor of the governor. See id. at 341, 29 A.2d at 830 (stating that “‘practicable’ did not mean practicable for the officials of the Legislature, but practicable for the proper consideration by the Governor”).

intervening election between the pocket veto and the possible return of the bill for override.\textsuperscript{218}

The Maryland Constitution also provides for a limited "line-item" veto.\textsuperscript{219} This line-item veto originally permitted the governor to strike out any portion of an appropriation bill. This changed in 1916, when Maryland adopted the executive budget system.\textsuperscript{220} Under the system, the governor (rather than the General Assembly) originates the budget process by introducing a budget bill; this bill was excepted from the line-item veto.\textsuperscript{221} Therefore, as the constitution stood in 1967, the line-item veto applied only to supplemental appropriation bills originating in the General Assembly.\textsuperscript{222}

The proposed constitution of 1967-1968 retained the general executive veto, but eliminated the pocket veto. Under the proposed constitution, the governor would have been required to sign or veto an act within twenty days of presentment if the General Assembly was in session, or within thirty days if it had adjourned.\textsuperscript{223} The governor's failure to act within these time limits would result in the bill becoming law without the governor's signature.\textsuperscript{224} The convention hoped that these changes, along with lengthening the legislative session from seventy to ninety days,\textsuperscript{225} and permitting the General Assembly to call itself into special session,\textsuperscript{226} would result in a more orderly and timely legislative process.\textsuperscript{227} The constitutional convention also proposed expanding the line-item veto to permit the governor not only to

\textsuperscript{220} See supra notes 144-153.
\textsuperscript{222} Power, supra note 209, at 159 (stating that "the [line] item veto applies only to supplementary appropriation bills").
\textsuperscript{223} See COMPARISON, supra note 75, at 155 (§ 4.15).
\textsuperscript{224} Id.
\textsuperscript{225} See supra notes 155-159.
\textsuperscript{226} Commentators have suggested that the avoidance of override votes is a primary reason that governors have refused to call the General Assembly into special session. See BELL & SPENCER, supra note 124, at 73 (stating that "the provisions regarding the return of vetoed bills are probably a major deterrent to the calling of special sessions for any purpose").
\textsuperscript{227} See MAGNIFICENT FAILURE, supra note 1, at 85 (suggesting that "[t]hese actions [including the longer regular legislative session and a provision for a special session], coupled with the assumption that a restructured legislature would proceed at a more orderly and systematic pace, offered hope of achieving a proper balance between legislative and executive powers").
strike, but also to reduce, an item in a supplementary appropriation.\textsuperscript{228} Since the rejection of the 1967-1968 proposed constitution, two amendments to this provision were adopted. A 1974 amendment eliminated the pocket veto, as recommended by the 1967-1968 Convention.\textsuperscript{229} For the administrative convenience of the General Assembly, the voters in 1988 approved a veto calendar which eliminated the constitutional requirement of three "readings" for the consideration of vetoed bills.\textsuperscript{230}

E. Judicial Branch

1. Organization of Court System.—The Maryland judiciary had long been a source of dissatisfaction. An account contemporaneous to the convention described the Maryland judiciary as follows:

Maryland’s court system is very complex, and unnecessarily so. There are no less than 16 different types of courts, with little uniformity from one community to another. A lawyer from one county venturing into another is likely to feel almost as bewildered as if he had gone into another state with an entirely different system of courts. A case which would be handled in the people’s court of one county is handled by a trial magistrate in another, by the municipal court in another, and by the circuit court in still another . . . \textsuperscript{231}

Reorganizing and streamlining this confusing system was a high priority on the eve of the constitutional convention,\textsuperscript{232} and the proposed changes were the self-described greatest accomplishment of the

\textsuperscript{228} See Comparison, supra note 75, at 155 (stating in section 4.14 that “[t]he governor may reduce or strike out any item in a supplementary appropriation bill”).


\textsuperscript{231} See Magnificent Failure, supra note 1, at 86 (quoting The Institute of Judicial Administration, Survey of the Judicial System of Maryland (N.Y. 1967)); see also Elbert M. Byrd, Jr., The Judicial Process in Maryland 19-37 (1961) (tracing the history, jurisdiction, and authority of the various Maryland courts).

\textsuperscript{232} Jonathan Cottin, Maryland Takes a Giant Constitutional Step, BALT. SUN, Sept. 10, 1967, at D3 (stating that the constitutional convention’s early draft recommended a “thorough overhaul of the judiciary”); Leaders Get Cool Response to Call for Convention Vote, BALT. SUN, Sept. 11, 1967, at 26 (noting that delegates to the convention would decide “[w]hether the entire courts system of Maryland shall be overhauled”).
The plan, as endorsed by the constitutional convention, was to create a unified, four-tiered court system with a Court of Appeals, an Intermediate Appellate Court, a Superior Court, and a District Court.

Upon the rejection of the proposed constitution, a constitutional amendment was rapidly passed that created a unified, statewide district court. Although the circuit courts have yet to be unified, a constitutional amendment was adopted in 1980 unifying the Supreme Bench of Baltimore City (formerly composed of the Superior Court of Baltimore City, Court of Common Pleas, the Baltimore City Court, Circuit Court of Baltimore City, Circuit Court No. 2, and the Criminal Court of Baltimore) into the single, unified, consolidated Circuit Court for Baltimore City.

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233. See Swanson et al., supra note 20, at 62 (listing the delegates' post-convention perception of the most important issues, first of which was "reorganization of [the] court system").


235. See Comparison, supra note 75, at 167 (§ 5.01). The Eney Commission had proposed a similar four-tiered system, but had suggested naming the courts the Supreme Court, the Appellate Court, the Superior Court, and the District Court. See Report, supra note 6, at 184. Although the constitutional convention eventually rejected the Eney Commission's suggestion of changing the name of the Court of Appeals of Maryland to the "Supreme Court of Maryland," legislators are still interested in changing the name. During the 1998 session of the Maryland General Assembly, the House of Delegates approved a bill that would have made the change. See H.B. 187, 412th Leg., 1st Reg. Sess. (Md. 1998). The Senate did not act on the bill before adjournment of the 1998 session. See Maryland General Assembly Homepage (visited Jan. 15, 1999) <http://mlis.state.md.us.1998rs/billfile/bh0187.htm>.


237. See John Carroll Byrnes, Evolution of the Circuit Court for Baltimore City 1632-1997, in Histories of the Bench & Bar of Baltimore City 1, 24-25 (John Carroll Byrnes ed., 1997) (describing jurisdiction granted to Baltimore City Courts under the 1867 Constitution); id. at 30 (describing the 1971 grant of appellate jurisdiction to the Criminal Court of Baltimore and the Baltimore City Court); see also Byrd, supra note 231, at 67-78 (tracing the history, jurisdiction, and authority of the various courts).

Some of the constitutional convention's and the proposed constitution's sound proposals with respect to the state court system have yet to be adopted. For example, Orphans' Courts, with elected lay judges, still probate contested wills in most counties in the State of Maryland. \(^{239}\) An even more egregious example is the failure to create a unified, statewide circuit court system. In 1995, the General Assembly appointed a commission to study the future of the Maryland court system. \(^{240}\) This commission recommended the creation of a statewide, unified circuit court \(^{241}\) as well as the abolition of the Orphans' Court system. \(^{242}\) So far, no action has been taken, although the commission itself urged a delay of any proposed constitutional amendment until the Maryland General Assembly meets for its session in the year 2000. \(^{243}\)

The proposed constitution also recognized that the cost of operating the state's judicial system should be borne by the state as a whole. \(^{244}\) With the rejection of the proposed constitution, the former system, by which the county governments are required to fund their own circuit courts, was retained. To remedy this problem Baltimore City has long sought state funding for the city's circuit court. \(^{245}\

\(\text{BALT. SUN, Oct. 27, 1980, at C1 (discussing the movement to consolidate Baltimore City's courts).}\)

\(239.\) The two exceptions are Montgomery and Harford counties, where Circuit Court judges sit as Orphans' Court judges. See \textit{MD. CODE ANN., CONST. art. IV, § 20(b) (1981)}; see also \textit{Act of Apr. 28, 1998, ch. 323, 1998 Md. Laws 1674 (pending ratification)} (permitting retired circuit court judges to act as Orphans' Court judges in Montgomery and Harford Counties).


\(241.\) \textit{THE COMMISSION ON THE FUTURE OF MARYLAND COURTS, FINAL REPORT 27 (1996)} (proposing the unification of the existing Circuit Courts, state funding for these courts, and that the chief judge have administrative supervision over the whole system).

\(242.\) \textit{Id. at 43 (indicating that the Orphans' Courts' "jurisdiction and operations should be transferred to the Circuit Court and administered through a probate division of that court").}

\(243.\) The commission's final report proposed postponing constitutional amendment until the 1998 session of the General Assembly. \textit{Id. at 78}. During the 1998 session of the General Assembly, however, the executive board of the Commission recommended that constitutional amendments regarding court structure be delayed again until 2000, a nongubernatorial election year. Telephone Interview with James J. Cromwell, Esquire, Chairman, Commission on the Future of Maryland Courts (June 2, 1998).

\(244.\) \textit{See COMPARISON, supra note 75, at 191 (stating in section 5.32 that "[t]he cost of the operation and administration of the judicial branch shall be borne exclusively by the State").}

2. Judicial Selection and Tenure.—Under the 1867 Constitution, as it existed in 1967, the governor had the power to appoint judges to serve on the Court of Appeals of Maryland and on the respective circuit courts. After being appointed, the selected judge was to serve for approximately one year, until the next general election; at this election, the appointed judge could seek election to a fifteen-year term by running in a potentially contested primary and general election.

Judges of the courts of limited jurisdiction were selected in a variety of ways, each prescribed by the Constitution. Orphans’ Court judges were popularly elected to four-year terms. People’s Court judges in Baltimore City, after initial gubernatorial appointment, stood for popular election to eight-year terms. People’s Court judges in other parts of the state were selected different ways in different counties. Municipal Court judges in Baltimore City, after initial gubernatorial appointment, stood for popular election to ten-year terms. The governor was responsible for the appointment of trial magistrates and committing magistrates, but in practice, state senators generally controlled these appointments.

This system was criticized for being too political and not sufficiently capable of picking excellent judges. Former Judge Emory H. Niles had, since his retirement in 1962, advocated the adoption of a new system of judicial selection “referred to generally in this country as the Missouri Plan and in Maryland as the Niles Plan.” Under the Niles Plan, the governor would have appointed all judges from lists of three to five eligible people recommended by judicial nominating commissions; after two years, and every eight years thereafter, a judge would have been required to stand for reelection in a non-contested,
retention election. 254 Although the General Assembly had rejected this plan at five consecutive sessions, reformers hoped to implement it in the new state constitution. 255 Eventually both the Eney Commission and the 1967-1968 Constitutional Convention endorsed the Niles Plan. 256

Subsequent to the defeat of the 1967-1968 proposed constitution, many of the reforms advocated by Emory Niles have been adopted, both by constitutional amendment and by executive order. Governor Marvin Mandel instituted the current judicial nominations system by an executive order. 257 Each subsequent governor has maintained and followed this general guideline while updating it as appropriate. 258 The judicial nominations system as it exists today creates a seventeen-member Appellate Judicial Nominating Commission and sixteen separate Trial Court Judicial Nominating Commissions. 259 When a vacancy occurs, the appropriate commission seeks and interviews potential candidates and submits a list of qualified persons to the governor. 260 The governor then selects a person to fill the judicial vacancy from among those listed by the commission. 261

The Niles plan also sought to remove judges from the rigors of electoral politics; 262 this goal has been accomplished at three of the four levels of Maryland courts. The 1969 constitutional amendment that created the statewide district court system 263 abolished the old patchwork system for electing judges of courts of limited jurisdiction. The new provisions required that district court judges be appointed by the governor, subject to confirmation by the state senate, for terms of ten years. 264 In 1976, another constitutional amendment abolished

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254. See COMPARISON, supra note 75, at 176-79 (§§ 5.15-.22); MAGNIFICENT FAILURE, supra note 1, at 87-88.
255. Id.
256. See COMPARISON, supra note 75, at 176-79 (§§ 5.15-.22); REPORT, supra note 6, at 195-96.
258. Exec. Order No. 01.01.1995.10, 22 MD. REG. 769, 769 (1995) (stating that Executive Order 01.01.1974.23 "has been revised eight times and has provided a system which is both effective and of material assistance in assuring the appointment of qualified persons in the Judiciary of Maryland").
259. Id. at 769-70.
260. Id. at 771.
261. Id.
262. See MAGNIFICENT FAILURE, supra note 1, at 87-88 (noting that, under the Niles plan, the election of judges was not contested, but was intended to register voter approval or disapproval for continuing in office).
263. See supra note 236 and accompanying text.
the requirement that appellate judges stand in a contested election.\textsuperscript{265} Appellate judges now must run in non-contested, retention elections for terms of ten years.\textsuperscript{266} As a result of these changes, now only circuit court judges are required to stand for popular election.\textsuperscript{267}

3. Judicial Disabilities.—The desire to maintain and increase the independence of judges—to remove them from the influence of the executive branch and the vicissitudes of public opinion—has been an important, longstanding concern in Maryland and elsewhere. The initial Maryland Declaration of Rights of 1776 provided:

That the independency and uprightness of Judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people; wherefore the Chancellor and all Judges ought to hold commissions during good behavior; and the said Chancellor and Judges shall be removed for misbehavior, on conviction in a court of law, and may be removed by the Governor, upon the address of the General Assembly; \textit{Provided}, That two thirds of all the members of each House concur in such address.\textsuperscript{268}

This language remained virtually intact until the adoption of the Maryland Constitution of 1867.\textsuperscript{269} In this constitution, the Declaration of Rights was changed to provide that "[j]udges shall not be removed, except in the manner, and for the causes, provided in this Constitution."\textsuperscript{270} This constitution provided for the political impeachment of judges found to be unable to discharge their duties with effi-

\begin{footnotes}
\footnote{judge of the District Court whenever for any reason a vacancy shall exist in the office. \ldots Each judge appointed by the Governor and confirmed by the Senate shall hold the office for a term of ten years \ldots \ldots ) (cодified as amended at Md. Code Ann., Decl. of Rts. art. 23; Const. art. IV, §§1, 2, 4A, 4B, 18, 41A-I (1981 & Supp. 1998)).}
\footnote{266. Md. Code Ann., Const. art. IV, § 5A (1981).}
\footnote{267. \textit{See id. § 5.} Repeated proposals to eliminate contested elections for Circuit Court judges have been defeated. \textit{See, e.g.,} Robert Barnes, \textit{Md. Proposal Would End Contested Elections for Judges}, WASH. POST, Feb. 26, 1988, \textit{available in} 1988 WL 2070136 (reporting that "[t]wo governors before Schaefer have tried to enact the proposal, only to see the judiciary committee turn it down").}
\footnote{268. Md. Const. of 1776, Decl. of Rts. art. XXX.}
\footnote{269. For a chart setting forth the exact language of this provision over time, see Friedman, \textit{supra} note 76, at 663.}
\footnote{270. Md. Const. of 1867, Decl. of Rts. art. 33.}
\end{footnotes}
ciency "by reason of continued sickness, or of physical or mental infirmity." 271

A 1966 constitutional amendment created a commission on judicial disabilities, the function of which was to investigate claims of judicial disability and make recommendations to the General Assembly. 272 The General Assembly then would vote on whether to retain the judge, or, by a two-thirds vote of each House, remove the judge from office. 273 The Eney Commission recommended deleting the judicial disabilities commission from the constitution and transferring the final removal authority to the state supreme court. 274 The constitutional convention retained the constitutional status of the judicial disabilities commission, but agreed with the Eney Commission that final removal power should rest with the Court of Appeals of Maryland. 275

With the defeat of the proposed constitution, the General Assembly retained its voice in judicial removal until 1970 when, by constitutional amendment, the authority to remove judges was transferred from the General Assembly to the Court of Appeals of Maryland. 276

4. Judicial Administration.—By a 1943 constitutional amendment, the Chief Judge of the Court of Appeals of Maryland was desig-

271. Md. Const. of 1867, art. IV, § 3.
273. Id.
274. See Report, supra note 6, at 205 (proposing to vest the power to remove judges in the supreme court, and allowing the judicial disabilities commission to be established by a rule of the supreme court).
276. Act of May 24, 1969, ch. 789, 1969 Md. Laws 1696, 1699 (ratified Nov. 3, 1970) (indicating that, when removal is recommended by the Commission on Judicial Disabilities, and after a hearing, the Court of Appeals may remove a judge for misconduct, failure to perform his duties, or serious disability) (codified as amended at Md. Code Ann., Decl. of Rts. art. 23; Const. art. IV, §§ 1, 2, 4A, 4B, 18, 41A-I (1981 & Supp. 1998)). In his 1973 State of the Judiciary Address, Chief Judge Robert C. Murphy proposed amending the constitution to reduce the confidentiality of judicial disabilities proceedings. See Report on the State of the Judiciary to the Legislature of Maryland by Robert C. Murphy, Chief Judge of the Court of Appeals of Maryland (Jan. 31, 1973), 279 Md. XXXVI, XLVII-XLVIII (suggesting that "our Constitution mandates too much confidentiality [in this area]; [and] that an amendment to the Constitution should be proposed . . . whereby the Commission would be empowered . . . [to] disclose the details of its investigation"). This change was accomplished the next year. Act of May 31, 1974, ch. 886, 1974 Md. Laws 2961, 2962 (ratified Nov. 5, 1974) (permitting the Court of Appeals of Maryland to regulate by rule the confidentiality of judicial disabilities proceedings) (codified as amended at Md. Code Ann., Const. art. IV, § 4B (1981 & Supp. 1998)).
nated the "administrative head of the judicial system of the State." This power permits the chief judge to reassign any judge (except judges of the Orphans' Court) to sit temporarily in any other court in order to relieve accumulated work or to fill a vacancy. The Eney Commission proposed retaining and expanding the chief judge's administrative powers.

Since the defeat of the proposed constitution, the preexistent system has been retained. There have been minor changes, but the constitutional provision remains virtually intact. However, there have been monumental changes in judicial administration in Maryland due largely to the personality of former chief judge, Robert C. Murphy. Aiding the chief judge in his administrative duties is an administrative office of the courts, first established by statute in 1955.

F. Local Government

By divesting the General Assembly of its local lawmaking function, and granting this function to the counties, the Constitutional


279. See Report, supra note 6, at 206 (proposing to give "complete administrative rule-making power to the highest court for the first time, [so that] the chief judge will be ensured [of] having the necessary tools for effective judicial administration").


281. See Dennis M. Sweeney, The Murphy Years: A View from the Trial Court, 56 Md. L. Rev. 636, 643 (1997) (stating that Murphy "jumped into the then-nascent field of judicial administration"); Alan M. Wilner, A Humble Giant, 56 Md. L. Rev. 631, 634 (1997) (noting that the chief judge's function as administrative head was only "fully implemented" under Judge Murphy).

Convention of 1967-1968 hoped to revitalize and energize both the local and state levels of government. To accomplish this goal, the proposed constitution mandated local home rule for Maryland counties and Baltimore City; required that all laws passed by the General Assembly apply generally throughout the state; and empowered the General Assembly to create “Multi-County Governmental Units.”

Prior to 1967, although the Maryland Constitution permitted some local legislative autonomy through charter home rule, only four counties had adopted such a charter. Moreover, these counties were permitted to legislate only about those subjects permitted to them by the General Assembly. By constitutional amendment in 1966, the General Assembly authorized a second class of local rule called “code home rule.” Under this system, a non-charter county

283. See MAGNIFICENT FAILURE, supra note 1, at 70 (noting the convention’s “endorsement of the ‘shared powers’ concept for local home rule”).

284. See COMPARISON, supra note 75, at 201-10 (§§ 7.01-.04).

285. Id. at 148-49 (stating in section 3.22 that “[t]he General Assembly shall enact no public laws except general laws”).

286. Id. at 215 (§ 7.08).

287. The 1851 Constitution gave Baltimore City limited home rule. See MAGNIFICENT FAILURE, supra note 1, at 98. The other counties gained the right to adopt a charter form of government by Act of Apr. 16, 1914, ch. 416, 1914 Md. Laws 657, 658 (ratified Nov. 2, 1915) (mandating that “[t]he General Assembly . . . shall by public general law provide a grant of express powers for such County or Counties as may thereafter form a charter under the provisions of this Article”) (codified as amended at Md. CODE ANN., CONST. art. XI-A, §§ 1-7 (1981 & Supp. 1998)). See generally JEAN A. SPENCER, CONTEMPORARY LOCAL GOVERNMENT IN MARYLAND 19-26 (1965) (tracing the history of charter home rule in Maryland).

288. The following counties adopted charter home rule: Anne Arundel County in 1964, Baltimore County in 1956, Montgomery County in 1948, Wicomico County in 1964. See REPORT, supra note 6, at 244 n.235.

289. See MAGNIFICENT FAILURE, supra note 1, at 98-99 (stating that “the existing home rule provision [in 1967] . . . permit[ted] the legislature to determine what matters [would] be included in such express powers” of the counties); see also Md. CODE ANN., CONST. art. XI-A, § 2 (1981) (establishing that at its first session after a county votes to form a charter, the General Assembly is to “provide a grant of express powers for such County”). The charter counties are further hampered by the application of “Dillon’s Rule,” a rule of judicial construction that states:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable.

JOHN F. DILLON, I THE LAW OF MUNICIPAL CORPORATIONS § 89, at 115 (3d ed. 1881).

can be granted limited home rule powers.\textsuperscript{291} When the constitutional convention convened in 1967, however, not a single county had yet adopted the new code home rule form of local government.\textsuperscript{292}

With such limited local governance, the Maryland General Assembly historically took an active role in legislating for local governments. As one study found:

The consideration of local legislation requires a substantial share of the time and energies of members of the General Assembly. In this respect Maryland occupies almost a unique position among states, for its legislature gives perhaps more attention to the details of local government than does the legislature of any other state in the Union.\textsuperscript{293}

Wheeler and Kinsey noted that this system has provided great legislative flexibility and has not led to severe abuse.\textsuperscript{294} They also stated, however, that “[i]f there was a central drive in the convention, it was to get the legislative branch out of the business of legislating for specific localities and force the local governments to govern locally.”\textsuperscript{295}

The constitutional convention sought to recast the local-state relationship in its entirety. First, it proposed that all counties be required to adopt their own home rule charters.\textsuperscript{296} Under these charters, counties could legislate as they saw fit in any subject area that

\begin{footnotesize}
\footnotesize 291. See id. at 696 (empowering a noncharter county to “enact, amend, or repeal a public local law of that county” with certain exceptions); see also Spencer, supra note 287, at 28-29 (discussing code home rule).


293. Report, supra note 6, at 244 (quoting Carl Everstine, Local Government: A Comparative Study 1 (1944)); see Bell & Spencer, supra note 124, at 5 (“The time burden on the legislature, the necessary attention of legislators to local issues, [and] the placing of responsibility for local legislation in the State House rather than in the county . . . have all occasioned discussion and examination [as problems of local legislation]”); Mester, supra note 124, at 74 (observing that “[t]he problem of local legislation in Maryland has been one of major proportions for many years”).

294. Magnificent Failure, supra note 1, at 96. One result of state involvement in local legislation, however, is reduced accountability. See Alexander, supra note 21, at 213 n.11 (noting that “the citizen has difficulty in placing responsibility for a piece of legislation or a lack of a particular piece of legislation” when the fault might belong either to the state or local government). Moreover, the dual sources of legislation leads to a proliferation of laws and sources of law. For example, the landlord-tenant relationship in Baltimore City is governed by the Real Property Article of the Maryland Annotated Code, Md. Code Ann., Real Prop. §§ 8-101 to -501 (1996 & Supp. 1998), the Public Local Laws for Baltimore City, Public Local Laws of Baltimore City §§ 9-1 to -83 (1980 & Supp. 1991), and the Baltimore City Code, Baltimore City Code §§ 13-46 to -57 (1983 & Supp. 1995).

295. Magnificent Failure, supra note 1, at 101.

296. See Comparison, supra note 75, at 204 (§ 7.02).
\end{footnotesize}
the county deemed appropriate, unless the General Assembly denied by law this power.297 Second, the General Assembly was prohibited from enacting legislation that did not have general application throughout the state.298 Finally, the constitutional convention proposed the possibility of "Multi-County Governmental Units."299 This last proposal eventually became one of the most divisive issues of the campaign for ratification, because the opponents of the proposed constitution used this proposal to play on racist fears that Baltimore City, with its African-American majority, would annex the mostly white suburban areas.300 Indeed, Wheeler and Kinsey identified the discus-

297. Id. at 210 (§ 7.40). This reversed the traditional "Dillon's Rule." See supra note 289.  
298. See COMPARISON, supra note 75, at 148-49 (§ 3.22).  
300. The authors of Magnificent Failure speak to this phenomenon: 
Confronted with all of the pressing problems of central cities—vast fiscal needs, increasing Negro population, rising crime rate, inadequate public services, Baltimore City was pictured by county opponents of the proposed constitution as poised to strike the suburbs once the new constitution presented the opportunity. . . . [It was suggested that] Baltimore City officials would move immediately to absorb Anne Arundel County . . . .  
MAGNIFICENT FAILURE, supra note 1, at 204. Ironically, the General Assembly, under its plenary powers, had already created multi-county agencies, see supra note 299, and the new proposal gave no additional powers to the General Assembly. 
One commentator has disputed the claim that opposition to multi-county governmental units played on racist fears. See Thomas G. Pullen, Jr., Why the Proposed Maryland Consti-
sion of regional government directly with racial issues; "[w]hen some said ‘regional government,’ they were communicating ‘race.’" 301

After the defeat of the proposed constitution, few changes have been made in the relationship between state and local governments. 302 Few additional counties have chosen to adopt a charter form of government. 303 The General Assembly continues to pass legislation of purely local application.

tution Was Not Approved, 10 WM. & MARY L. Rev. 378, 380 (1968) ("Neither race nor religion played too large a part in the people’s thoughts about the proposed Maryland constitution.").

301. MAGNIFICENT FAILURE, supra note 1, at 207.


303. The following Maryland counties have adopted charter home rule since 1967: Harford County (1972); Howard County (1968); Prince George’s County (1970); and Talbot County (1973). See MARYLAND MANUAL, supra note 292, at 782, 787, 805, 829. On May 2, 1998, Carroll County voters considered adopting charter home rule, with strong editorial endorsement by the Baltimore Sun. See Carroll County Needs Home-Rule Powers, BALT. SUN, Apr. 26, 1998, at L2 (arguing that charter home rule government would be “better equipped to manage affairs into the 21st century” and that “home rule offers a clear division of powers and accountability”); One Head is Better Than Three, BALT. SUN, Apr. 27, 1998, at A8 (suggesting that a charter home rule government would be one of “increased accountability and responsibility, more firmly built on local control [and] is the one Carroll countians should choose”); What Is Local Control Worth?, BALT. SUN, Apr. 28, 1998, at A10 (opining that charter government would not create bigger government and higher taxes in Carroll County because “political reality, more than the structure of government, [would]
Regional planning for the Baltimore metropolitan area has long been attempted, with varying degrees of success. The Baltimore Regional Planning Council was established in 1956 as part of the State Planning Department. In 1963, the Baltimore Regional Planning Council was replaced by the Regional Planning Council. The Regional Planning Council became an independent agency in 1984. In 1989, the name was changed to the Baltimore Regional Council of Governments. Finally, in 1992, it became the Baltimore Metropolitan Council.

There is a renewed interest in regional governments in the Baltimore metropolitan area. David Rusk has identified a city's relative "elasticity"—its ability to expand its borders to reduce population density—as a key component of that city's ability to thrive economically. Rusk notes that a 1948 constitutional amendment prevents Baltimore City from expanding through annexation without approval of the voters in the area to be annexed. Because Rusk believes such approval (or repeal of the constitutional provision) is impossible, he recommends establishing a "Metropolitan Municipality" as the upper tier of a two-tiered system of local government in Baltimore City, and Baltimore, Anne Arundel, Carroll, Harford, Howard, and Queen Anne's counties. This metropolitan government would be respon-
sible for providing low cost housing on a regional basis and normalizing taxing disparities between the jurisdictions. If such proposals are successful in gathering support, it will be interesting to see if the same arguments will be made against regional government that were made in 1967-1968. It will also be interesting to see how the state constitution is involved in favor of, and in opposition to, these ideas.

G. Finance and Taxation

The provisions governing finance and taxation, although spread throughout the 1867 Maryland Constitution, are mostly found in Article III (Legislative Department). The 1967-1968 Constitutional Convention proposed creating a separate article (Article 6) to deal with the issues of state government finance, including the state budget process and bonding authority.

1. The State Budget Process.—The 1967-1968 Constitutional Convention proposed retaining the executive budget system that had existed successfully in Maryland since 1916. A discussion of the Maryland executive budget system and the decision to retain that system is included in Part IV.C.3.

2. Bond Financing.—The constitutional provisions governing state debt in the 1867 Maryland Constitution, as it existed in 1967, were an anachronistic and restrictive remnant of poor financial choices made in the first half of the nineteenth century. These ex-

314. Id. at 108-19.
315. Id. at 122-23.
316. See REPORT, supra note 6, at 229 (“The Commission’s inquiry into the concept and operation of the present executive budget system has convinced it that the system is fundamentally sound, both in theory and practice.”); see also Act of Mar. 28, 1916, ch. 159, 1916 Md. Laws 268 (ratified Nov. 7, 1916) (establishing the current executive budget system) (codified as amended at MD. CODE ANN., CONST. art. III, § 52 (1981 & Supp. 1998)).
317. See supra notes 144-153.
318. See MAGNIFICENT FAILURE, supra note 1, at 116 (noting that, after the difficult experience Maryland had in fulfilling its debt responsibilities in the nineteenth century, “[t]he constitutional convention of 1850 produced stringent restrictions on the state’s power to incur debt”); ALFRED S. NILES, MARYLAND CONSTITUTIONAL LAW 187-88 (1915) (noting that the struggle the state had to pay its debt obligation after making a number of disastrous loans during the early nineteenth century was “fresh in the minds of the framers of the Constitution of 1851 and the [provisions relating to debt in the Constitution were] adopted by them to prevent the repetition of [those] bitter experiences”); REPORT, supra note 6, at 214-15 (“The [provisions of the 1867 Maryland Constitution relating to state debt] were the product of public reaction against the nearly disastrous extent to which the General Assembly had loaned the credit of the State . . . from 1820 to 1850.”).

The problem began with the rush of westward development in the early nineteenth century. Maryland, like many other states, sought to encourage internal developments by
pensive and embarrassing financial mistakes clearly influenced the
delegates to the Maryland Constitutional Convention of 1850.\textsuperscript{319} To
avoid a repetition, severe restrictions were placed on the issuance of
state bonds.\textsuperscript{320} First, each bond issuance was required to be accompa-
nied by the levying of a tax sufficient to pay interest as it came due and
principal within fifteen years.\textsuperscript{321} A total debt ceiling of $100,000 was
installed, with the possibility of an emergency $50,000 limit on bor-
rowing for temporary deficiencies.\textsuperscript{322} Finally, the credit of the state
could not be given or loaned to any individual, association, or
corporation.\textsuperscript{323}

The tight controls on incurring debt were slightly modified in the
Maryland Constitution of 1864,\textsuperscript{324} and were modified again slightly in
the 1867 version.\textsuperscript{325} The provision was amended in 1924 to permit
the credit of the state to be pledged to raise money for veterans' bo-
nuses,\textsuperscript{326} and again in 1960, to permit tax anticipation borrowing and

assisting and subsidizing such companies as the Chesapeake & Ohio Canal Co. and the
Baltimore & Ohio Railroad. The state government subscribed to the stock of these com-
panies to finance their construction projects. In order to finance the stock purchases, the
state issued long-term bonds backed by the full faith and credit of the state. By 1840, the
state had incurred almost $15 million in state debt to finance the construction projects
undertaken by these private companies. The internal improvements, principally the Ches-
apake & Ohio Canal, failed to produce expected revenues. The entire obligation was
thrown upon the state, which had failed to appropriate any money for repaying the bonds.
The state tried to sell its interest in the railroad and canal companies, but there were no
investors. Finally, in 1846, in order to save the state's credit, the General Assembly was
forced to pass a substantial tax increase on both real and personal property. \textit{Id.} Of course,
many other states engaged in such risky financial behavior during this time period, leading
generally to similar results. See Fletcher M. Green, \textit{Constitutional Development in the
South Atlantic States, 1776-1860: A Study in the Evolution of Democracy} 255-56 (Da
Capo Press Reprint 1971) (1930) (explaining that because of the heavy debts incurred by
many state governments, "[t]he people found themselves burdened with heavy taxes just
when they were least able to pay... [and] began to demand that constitutional restrictions
be placed upon state indebtedness and the loaning of state credit to private
corporations").

\textsuperscript{319} See I Debates and Proceedings of the Maryland Reform Convention to Revise
the State Constitution 338-57, 369, 375-79, 411, 414-49 (1851) (reporting delegates' concerns about state financing of internal improvements); II Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution 389-47 (1851)
(same).

\textsuperscript{320} Md. Const. of 1851, art. III, § 22.

\textsuperscript{321} Id.

\textsuperscript{322} Id.

\textsuperscript{323} Id.

\textsuperscript{324} See Md. Const. of 1864, art. III, § 33 (eliminating the $100,000 ceiling).

\textsuperscript{325} Md. Const. of 1867, art. III, § 34 (exempting St. Mary's, Charles, and Calvert counties from the prohibition on bond-financed internal improvements).

to enable the state treasurer to borrow to cover temporary emergencies.\textsuperscript{327}

This restrictive regime forced the state to find creative ways to finance necessary improvements. The Court of Appeals of Maryland assisted in this enterprise by stretching the words of restrictive constitutional provisions beyond their normal meanings.\textsuperscript{328} As the Eney Commission found, "Frequent litigation has been essential and the words 'debt,' 'credit,' and 'works of internal improvement,' as used in


\textsuperscript{328} See Maryland Indus. Dev. Fin. Auth. v. Meadow-Croft, 243 Md. 515, 525, 221 A.2d 632, 638 (1966) (finding that a statute, although purporting to pledge the faith and credit of the state in violation of article III, section 34 of the Maryland Constitution, did not actually do so, and was therefore constitutional); Lacher v. Board of Trustees, 243 Md. 500, 512, 221 A.2d 625, 631 (1966) (holding that the use of revenues collected from existing buildings of two state colleges to pay the interest and principal of bonds to be sold to create additional facilities at those colleges did not create a debt of the state, as described in article II, section 34 of the Maryland Constitution); Lerch v. Maryland Port Auth., 240 Md. 438, 462, 214 A.2d 761, 774 (1965) (holding that the Maryland Port Authority's issuance of revenue bonds for the creation of an international trade center did not constitute a debt under article III, section 34 of the Maryland Constitution because there was no pledge of existing property and only cash was used from the general funds of the Authority); Melvin v. Board of County Comm'r's, 199 Md. 402, 405, 86 A.2d 902, 903-04 (1952) (holding that Anne Arundel County's sale of bonds and remittance of the funds to a local hospital did not constitute a loan of credit to the County, as prohibited by article III, section 54 of the Maryland Constitution); Johns Hopkins Univ. v. Williams, 199 Md. 382, 401, 86 A.2d 892, 901-02 (1952) (holding that article III, section 34 of the Maryland Constitution did not prohibit the state from borrowing money and giving the proceeds as a gift to an educational institution); Castle Farms Dairy Stores, Inc. v. Lexington Mkt. Auth., 193 Md. 472, 483-84, 67 A.2d 490, 494 (1949) (holding that an Act authorizing the Lexington Market Authority to issue revenue bonds did not constitute a debt of Baltimore City, or a pledge of its faith and credit, as prohibited by article XI, section 7 of the Maryland Constitution, because they were to be secured only by the revenues of the market and not a mortgage of it); Wyatt v. Beall, 175 Md. 258, 266, 1 A.2d 619, 622-23 (1938) (holding that revenue bonds issued by the state to finance the construction of highway bridges did not constitute a debt of the state, as prohibited by article III, section 34 of the Maryland Constitution, because there was no pledge of existing property, but only a pledge of property that would come into existence as a result of the issuance of the bonds); Welch v. Coglan, 126 Md. 1, 8, 94 A. 384, 387 (1915) (holding that an Act authorizing the state Board of Health to require counties and cities to establish sewer and drainage systems did not violate the constitutional prohibition against state involvement in works of internal improvement); Bonsal v. Yellott, 100 Md. 481, 508, 60 A. 593, 597 (1905) (holding that an Act authorizing state aid for the construction of roads by counties did not conflict with the constitutional provision prohibiting state involvement in works of internal improvement). But see Baltimore & Drum Point R.R. Co. v. Pumphrey, 74 Md. 86, 111-12, 21 A. 559, 562 (1891) (holding that the issuance of railroad negotiable bonds by the County Commissioners of Anne Arundel County, in payment for a subscription to the stock of that railroad company, violated Article III, § 54 of the Maryland Constitution, which prohibited a loan of the credit of a county).
this part of the Constitution have taken on highly specialized meanings, understood only by the initiated.”

The Eney Commission and the 1967-1968 Constitutional Convention decided both to scrap this archaic system and to adopt a provision patterned on the New York Constitution. This provision would have provided that:

If at any time the General Assembly shall have failed to appropriate and to make available sufficient funds to provide for the timely payment of the interest and principal then due upon all state indebtedness, it shall be the duty of the comptroller to pay, or to make available for payment, to the holders of such indebtedness from the first revenues thereafter received applicable to the general funds of the State, a sum equal to such interest and principal.

While this proposed change created little controversy, there was a great deal of concern about a second recommendation: to extend the maturity period for state bonds from fifteen to twenty-five years. Although delegates were concerned that the longer maturity might negatively affect the state’s bond rating, they eventually adopted the longer maturity period. Finally, the proposed constitution would have permitted the credit of the state to be loaned to private institutions if the loan served a public purpose.

Upon the defeat of the proposed constitution, the preceding status quo prevailed. In 1972, a constitutional amendment modified the requirement that each issuance of state debt be matched to the imposition of a tax to fund repayment. Under this amendment, the requirement to levy a tax does not apply “in the event that sufficient funds to pay the principal and interest on the debt are appropriated for this purpose in the annual state budget.” In 1976, the historic prohibition against pledging the state’s faith and credit for internal

329. REPORT, supra note 6, at 220.
330. Id. at 221. The New York Constitution requires that when the legislature fails to appropriate sufficient funds for the service of a particular debt, the comptroller must designate money sufficient to service the debt from the general fund. See N.Y. CONST. art. VII, § 16.
331. COMPARISON, supra note 75, at 196 (§ 6.06).
332. See MAGNIFICENT FAILURE, supra note 1, at 116 (noting that, with respect to the acquisition of debt, the proposal to extend the maturity period caused “the greatest concern”).
333. See id. at 117-18.
334. See COMPARISON, supra note 75, at 197 (§ 6.07).
336. Id. at 1233.
improvements was removed. 337 Finally, in 1982, the constitution was amended again to permit the treasurer to issue short-term notes in anticipation of revenue, including bond revenues. 338

The review of the current provisions governing state bond financing is decidedly mixed. The constitutional language is archaic and difficult to understand. The words of the provision still have "highly specialized meanings, understood only by the initiated." 339 On the other hand, Maryland has maintained its enviable credit rating, 340 and the provision no longer hampers the ability of state government to raise capital or to fund internal improvements.

3. Post Audit.—The 1867 Maryland Constitution has, at all times, conferred auditing authority on the Maryland House of Delegates. 341 By 1967, however, the audit function was in fact performed by a member of the executive branch, the state auditor. 342 The state auditor was appointed by the governor and worked under the supervision of the comptroller. 343 This arrangement of the executive branch auditing itself runs counter to good fiscal practice, and both the Eney Commission and the 1967-1968 Constitutional Convention proposed to return the audit function to the legislative branch. 344 Wheeler and Kinsey note that, even before the proposed constitution was submitted to the voters, the General Assembly had returned the post-audit function to its constitutionally assigned role under the direction of the


339. Report, supra note 6, at 220.

340. See JoAnna Daemmrich, Goldstein is Missed at Bond Sale; Maryland Event Occurs for First Time in 40 Years Without the Comptroller, Balt. Sun, July 9, 1998, at B2, available in 1998 WL 4974979 ("The interest rate [on Maryland General Obligation bonds] is relatively low chiefly because Maryland—one of only eight such states—has a AAA bond rating . . . ").


343. See Magnificent Failure, supra note 1, at 118-19.

344. See Report, supra note 6, at 149 ("[R]eason would seem to dictate that, if the post-audit review function is to be separately performed, it should be performed by a person either appointed or elected by, and responsible only to the legislative branch."); see also Comparison, supra note 75, at 150 (proposing in section 3.24 that the General Assembly require post audit of the state finances to be done by an agency of the General Assembly).
legislature. Today, the Maryland Code fixes the office of the Legislative Auditor as an officer of the legislative branch.

4. Lotteries.—The decision to continue the constitutional prohibition on lotteries was a source of great controversy both before and after the constitutional convention. The Eney Commission recommended eliminating the constitutional prohibition against the lottery. At the convention, the prediction that the lottery provisions would be controversial proved to be true:

The process of reaching the decision to [retain a ban on state lotteries] . . . in the draft constitution took up more time of the convention and produced more debate—at times acrimonious—than any other matter relating to state finance and taxation. Indeed the matter was not settled until the closing hours of the convention when on third reading after the convention could muster only 68 of the 72 votes needed to include the provision in the draft, it agreed to reconsider and finally produced the needed votes.

Eventually the convention decided to retain the constitutional ban on state-run lotteries. That ban had existed in the same form since the Constitution of 1851. Although the convention proposed modernizing the language, the proposed constitution retained the same concept.

After the defeat of the proposed constitution, the ban on lotteries from the 1867 Constitution remained in effect. In 1972, the citizens of Maryland voted to eliminate the prohibition on state-run lotteries.

345. See Magnificent Failure, supra note 1, at 119.
347. See Md. Const. of 1867, art. III, § 36 (providing that “[n]o Lottery grant shall ever hereafter be authorized by the General Assembly”).
348. See Cottin, supra note 232 (predicting that the proposed elimination of the constitutional ban on state lotteries would be among the most debated proposals).
349. See Report, supra note 6, at 323 (indicating that the commission’s draft constitution omitted the prohibition of lotteries found in the Maryland Constitution of 1867, article III, section 36, as it then existed).
350. Magnificent Failure, supra note 1, at 110-11.
351. See Comparison, supra note 75, at 201 (retaining the ban in section 6.17).
352. See Md. Const. of 1867, art. III, § 36; Md. Const. of 1864, art. III, § 35; Md. Const. of 1851, art. III, § 37.
353. See Comparison, supra note 75, at 201 (§ 6.17) (“Neither the State nor any unit of local government shall operate or authorize a lottery for the purpose of financing any expenses of government.”).
and to create the Maryland Lottery.\footnote{354} Today, the Maryland Lottery provides a small but significant percentage of state revenues.\footnote{355}

5. **The Balanced Budget Amendment.**—One of the most important recent innovations in Maryland state government finance was not recommended by the 1967-1968 Constitutional Convention. In 1973, Maryland adopted a balanced budget amendment.\footnote{356} This amendment requires that total estimated revenues exceed total estimated appropriations.\footnote{357} Moreover, in the process of amending the budget bill, the General Assembly cannot cause appropriations to exceed revenues.\footnote{358}

\footnote{354. See Act of May 26, 1972, ch. 364, 1972 Md. Laws 1218 (ratified Nov. 7, 1972) (codified at Md. Code Ann., Const. art. III, § 36 (1981)); see also A Legal Lottery Is a Bad Tax, Balt. Sun, Oct. 18, 1972, at A12 (arguing that a legalized lottery would be “no more than a taxing gimmick”). In ending the constitutional ban, Maryland was part of a national trend toward establishing state-run lotteries in the early 1970s. See Ronald J. Rychlack, Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling, 34 B.C. L. Rev. 11, 45 (1992) (explaining that by 1974, 11 states had established lotteries). Professor Rychlack’s article also provides cogent criticism of state run lotteries, based on promotional techniques employed, \textit{id.} at 62-63, compulsive gambling, \textit{id.} at 64-69, effect on children, \textit{id.} at 69-70, impact on crime, \textit{id.} at 70-71, and disproportionate effect on the poorest people, \textit{id.} at 71-74. Professor Rychlack concludes that state run lotteries have generally accomplished their goals of raising revenues, but that to minimize negative social consequences, states should adopt severe limitations on lottery advertising including, “[a]t the minimum: 1) advertisements should not be misleading; 2) advertisements should not compare the lottery to secure financial investments; 3) advertisers should not target low-income markets, and; 4) television advertising should be restricted to time slots where children are less likely to be watching.” \textit{id.} at 80.}

\footnote{355. It is estimated that the lottery will produce revenues of $408.6 million in fiscal year 1999. \textit{Report of the Maryland Board of Revenue Estimates on Estimated Maryland Revenues: Fiscal Years Ending June 30, 1998 and June 30, 1999} (Submitted to Governor Parris N. Glendening, Dec. 15, 1997), Table 9, at 35. After $32 million is provided to the Maryland Stadium Authority, $376.6 million will be available to General Funds. \textit{id.} This represents 4.65% of all State revenues. \textit{id.} Table 4, at 21.}


\footnote{358. \textit{id.}}
H. Other Issues

1. Salaries.—The 1867 Maryland Constitution provided set salaries for the governor, attorney general, treasurer, comptroller, members of the General Assembly, appellate judges, trial judges outside of Baltimore City, and trial judges in Baltimore City. Additionally, the constitution provided that, except in cases specifically provided in the constitution, no constitutional office could receive an annual salary greater than $3000. Inflation eroded the value of these set salaries between 1867 and 1967. Over this hundred-year period, this problem had been recognized, and constitutional amendments modified the set salaries. For the attorney general, the set salary was replaced by the provision that “he shall receive for his services an annual salary of three thousand dollars, or such annual salary as the General Assembly may from time to time by law prescribe.” Judicial salaries also were removed from the constitution and placed in the discretion of the legislature, with the sole requirement that a judge’s salary “shall not be diminished during his continuance in office.” The cap of $3000 annual salary for constitutional offices for which no salary was listed in the constitution was also removed.

359. Md. Const. of 1867, art. II, § 21 (setting the governor’s salary at $4500 annually).
360. Md. Const. of 1867, art. V, § 3 (setting the attorney general’s salary at $3000 annually).
361. Md. Const. of 1867, art. VI, § 1 (setting the treasurer’s salary at $2500 annually).
362. Id. (setting the comptroller’s salary at $2500 annually).
363. Md. Const. of 1867, art. III, § 15 (paying members of the General Assembly $5 per day).
364. Md. Const. of 1867, art. IV, § 24 (setting the salary of appellate judges at $3500 annually).
365. Id. (setting the salaries of trial judges not serving in Baltimore City at $2800 annually).
366. Id. § 31 (setting the salaries of Baltimore City trial judges at $3500 annually).
368. The set salary of the treasurer was deleted from the constitution and instead was allowed to be prescribed by law. Act of Apr. 29, 1966, ch. 428, 1966 Md. Laws 725 (ratified Nov. 8, 1966) (codified as amended at Md. Code Ann., Const. art. VI, § 1 (1981 & Supp. 1998)). This Act proves false the claim made by Jonathan Cottin that “the State treasurer, who disburses $1,000,000,000 a year, can be paid only $2,500 under terms of the constitution.” See Cottin, supra note 232.
371. Id. at 269.
With respect to the governor and members of the General Assembly, although some modification in salary had been made, the root problem remained. The governor’s salary had been adjusted, but to a new fixed figure.\textsuperscript{372} The salaries of the members of the General Assembly had been increased to $2400 annually,\textsuperscript{373} and voters rejected a 1966 proposal to permit the General Assembly to set its own salary.\textsuperscript{374}

With respect to the executive branch, the proposed constitution of 1967-1968 provided that:

The salary of the governor, of the lieutenant governor, of the attorney general, and of the comptroller shall be prescribed by law, and shall neither be increased nor decreased during the term for which each was elected.\textsuperscript{375}

Similarly, with respect to the legislative branch, the proposed constitution stated that:

A member of the General Assembly shall receive the salary and allowances prescribed by law. A salary increase enacted during one term of office shall not become effective before the next term. No senator or delegate shall be paid daily living expenses during regular sessions of the General Assembly.\textsuperscript{376}

Obviously, this proposal of the 1967-1968 Convention was nearly identical to a proposal that the voters rejected merely a year before.\textsuperscript{377} The Maryland electorate was not willing to trust the General Assembly to set its own salaries directly.

Upon the defeat of the proposed constitution, the problem of fixed salaries for the governor and members of the General Assembly continued until the development of an innovative solution: the Governor’s Salary Commission\textsuperscript{378} and the General Assembly Compensation.


\textsuperscript{375} COMPARISON, supra note 75, at 20 (§ 4.24). The office of treasurer is not listed because the proposed constitution would have abolished it. See id. at 81 (§ 4.20).

\textsuperscript{376} Id. at 26 (§ 3.12).

\textsuperscript{377} See supra note 374 and accompanying text.

\textsuperscript{378} See Act of May 17, 1976, ch. 543, 1976 Md. Laws 1431 (ratified Nov. 2, 1976) (codified at Md. Code Ann., Const. art. II, §§ 1A, 21-21A (1981)); see also The Sun’s Position on 21 State Questions, supra note 265 (supporting the initiative to remove the provision in the constitution setting the governor’s salary and instead to create a compensation commission to recommend to the General Assembly the governor’s salary).
Each of these commissions is independently appointed and makes a recommendation to the General Assembly as to appropriate salary adjustments. Upon receipt of the recommendations, the General Assembly may accept or reduce the amount recommended, but cannot increase the proposed salary change. Any change in salary made does not become effective until the next term of office. In this manner, a thorny problem that the 1967-1968 Constitutional Convention was unable to solve has now been resolved.

2. Streamlining and Simplifying.—One common and accurate criticism of the 1867 Constitution is that it is too long and too complicated. The Eney Commission correctly saw this as a major defect and adopted the following drafting principles aimed at curing this problem:

1. To the greatest possible extent the language used should be terse, plain and simple, so that its meaning would be easily understood by an informed citizen of average intelligence and literacy.

2. The organization of the draft should be simple and clear and the arrangement logical.

3. The constitution should provide only for the structure of government and should provide no more detail than absolutely necessary.

4. The language should be plain and direct and, where necessary, mandatory and not merely exhortatory.

5. The style and language should be in accord with modern usage and, where change in language was thought desirable to accomplish this purpose even though no change in substance was intended, the change should be made.

6. Where through court decisions language has obtained a special and well-understood constitutional meaning, it should be retained, if possible, where no change in sub-


382. Id.

383. See Tawes, supra note 9, at vii (asserting that the present Maryland Constitution was “very restrictive to the successful operation of an efficient state government and entirely too clumsy and ineffective as a document of basic law”).
stance is intended; but archaic, obsolete or outmoded language should not be retained merely because its meaning has been the subject of court decisions, and "words of art," the precise meaning of which is known only to those skilled in the art, should be avoided.

7. The constitution should be divided into articles and sections and, if possible, a numbering system adopted which would facilitate the incorporation in the proper place of any future amendments.

8. The Declaration of Rights should be a part of the constitution and not a separate document.\(^{384}\)

Similarly, the constitutional convention took the issue of streamlining seriously. Delegate Howard R. Penniman from Montgomery County, a professor of political science at Georgetown University, was appointed to chair a committee on style, drafting, and arrangement.\(^{385}\) The *Baltimore Sun* described this committee's function: "The committee on style has the duty of making sure each and every word in the final draft of the document is necessary, and that the sum total means what the convention wants it to mean."\(^{386}\) The result of these careful efforts was a better-organized, logical, and succinct constitution. Wheeler and Kinsey noted that the proposed constitution contained 14,000 words, a reduction from the 42,000 that existed in the 1867 Constitution at that time.\(^{387}\)

Upon the rejection of the proposed constitution of 1967-1968, hopes for a better-organized and more streamlined constitution largely have gone by the wayside.\(^{388}\) Whatever updates have occurred subsequently have been minor in scope. For example, until an amendment in 1971,\(^{389}\) Article 7 of the Declaration of Rights provided that "every white male citizen . . . ought to have the right of suf-

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\(^{384}\) Report, *supra* note 6, at 6-7.

\(^{385}\) See *Magnificent Failure*, *supra* note 1, at 57.


\(^{387}\) Id. at 120. An additional proposal to streamline the constitution, which ultimately raised a lot of opposition, was to delete minor offices from constitutional status. See id. at 89-90 (noting how sheriffs, registers of wills, and other minor offices were no longer provided for under the draft constitution); id. at 120 (explaining how the draft constitution did not mandate the existence of a commissioner of the land office, a state librarian, elisors, and notaries public); id. at 210-12 (discussing the opposition to these proposals).

\(^{388}\) Cf. id. at 6 ("The principal question that lingers from the entire Maryland experience is whether the democratic process will permit extensive, one-shot confrontation of broad problems of government, or only patchwork, half-way pragmatic solutions to specific problems as they arise.").

The 1971 constitutional amendment corrected this single glaring anachronism, but did not undertake more. In 1972, the detailed description of those persons ineligible to vote was removed and replaced by a simple statement that the General Assembly could regulate voter eligibility. In 1976, an amendment deleted the last overtly racist provision of the Maryland Constitution, which dealt with the necessary white population for the creation of new counties. The most comprehensive attempt to clean up the constitution was a constitutional amendment approved by the voters in 1977. The stated purpose of this amendment was the “remov[al] or correct[ion of] constitutional provisions which are obsolete, inaccurate, invalid, un-constitutional, or duplicative; generally relating to technical revisions of the Maryland Constitution.” Although nonsubstantive by its own terms, this amendment at least removed some difficulties in the 1867 Constitution. Finally, an amendment in 1982 replaced a gender-specific reference with a gender-neutral reference, and thus permitted civil and criminal contempt for the failure of both men and women to pay alimony and child support.

Although each of these amendments corrected grievous failings in the 1867 Constitution, none could accomplish the overarching goal of streamlining and simplifying the constitution.

3. Constitutional Amendment.—The creation of written constitutions, more fundamental than the positive law enacted by the legislature, is a uniquely American contribution to the science of

390. Md. Const. of 1867, Decl. of Rts. art. 7.
391. See Md. Const. of 1867, art. I, § 2 (“No person above the age of twenty-one years, convicted of larceny or other infamous crime, unless pardoned by the Governor, shall ever thereafter, be entitled to vote at any election in this State; and no person under guardianship, as a lunatic, or as a person non compos mentis, shall be entitled to vote.”).
394. Act of Apr. 26, 1977, ch. 681, 1977 Md. Laws 2743, 2743 (ratified Nov. 7, 1978) codified as amended at Md. Code Ann., Decl. of Rts. arts. 23-24, 46; Const. art. I, §§ 1-11; art. III, §§ 5-6, 9, 11, 13, 15, 19, 37, 41, 53, 59; art. IV, §§ 1, 1A, 3, 4A, 6, 12, 14, 18, 20, 22, 40, 41-I, 44, 45; art. V, §§ 5-7, 11; art. VI, § 1; art. VII, § 1; art. XI-A, §§ 2, 5; art. XI-D, § 1(a); art. XIII, §§ 1, 2; art. XV, §§ 2, 3; art. XVI, §§ 2, 6; art. XVII, §§ 1, 3-9 (1981 & Supp. 1998)).
Maryland's constitutions have always recognized the supremacy of constitutional law. The first Maryland Constitution permitted the legislature to amend the constitution, but only if the General Assembly passed the amendment at two consecutive sessions. By the 1851 constitution, a second route of constitutional change, the constitutional convention, was established.

The 1967-1968 Constitutional Convention proposed retaining the two routes of constitutional revision, convention or amendment. To confirm that the General Assembly had the inherent power to call a constitutional convention at any time, the proposed constitution stated this power explicitly. Wheeler and Kinsey reported that the convention draft was predicated on two assumptions:

It was assumed the kind of constitution proposed would not require frequent amendment. Because of the significant shift from a highly detailed constitution to a short one dealing largely with fundamentals, constitutional change to meet changing conditions would be far less necessary. Therefore, there was no reason to make easier the process of amendment. A second assumption resulted from reapportionment. Legislative obstacles created by a malapportioned General Assembly fearing results of constitutional change would no longer be a problem. The legislature would now represent—in theory at least—the majority, so there was less need for bypassing it [by constitutional revision].

In this way, the proposed constitution did little, and the delegates saw little need, to adjust the method of constitutional amendment.

The defeat of the 1967-1968 proposed constitution at the polls therefore had little effect on the methods of constitutional revision.

396. See Wood, supra note 53, at 273-82 (discussing the American idea of a constitution as “[f]undamental law”).
397. See Md. Const. of 1776, art. LIX.
398. See supra note 5 and accompanying text (discussing the history of the constitutional provisions governing the calling of a constitutional convention); supra note 56 (discussing Maryland's history of constitutional conventions).
399. See Comparison, supra note 75, at 224 (stating in section 10.04 that “[t]he General Assembly by law may call a constitutional convention at any time or may submit the question of calling a constitutional convention to the voters of the State at any time”).
400. Magnificent Failure, supra note 1, at 150.
401. Critics saw the proposals of the constitutional convention in a different light. The Save Our State Committee argued that the proposal made calling a constitutional convention too easy and possibly too frequent. Save Our State Committee, supra note 15, at 111 (“[T]he best interest of the public requires that Constitutional Conventions be held only if a real majority of the electorate desires this and only at stated periods. Otherwise, there is the likelihood of frequent changes in the fundamental law of the State with its attendant legal and other dislocations.”).
Two avenues remain open: constitutional convention or amendment proposed by three-fifths of each house of the General Assembly.

A minor change in the method of amending the constitution was made in 1972, by relaxing the requirement that each proposed constitutional amendment be embraced in a separate bill.402 This amendment permitted the general clean-up of the constitution in 1977.408

CONCLUSION

This Article begins with a quote from John P. Wheeler, Jr. and Melissa Kinsey's book, Magnificent Failure: The Maryland Constitutional Convention of 1967-1968.404 The authors stated their belief that the Constitutional Convention of 1967-1968 would not be an unmitigated failure if appropriate lessons could be drawn.405 The historical record indicates that important lessons indeed have been learned. First and foremost are the substantive lessons. In many of the areas discussed above, the work of the Eney commission and the constitutional convention itself led directly to important reforms of the Maryland Constitution.

There is no meaningful method to quantify the number of the changes in the Maryland Constitution that were proposed by the 1967-1968 Constitutional Convention that have subsequently made their way into the constitution.406 Important changes, such as the reorgani-

402. Act of May 26, 1972, ch. 367, 1972 Md. Laws 1226, 1226 (ratified Nov. 7, 1972) (proposing that this requirement not be construed to prevent the General Assembly from proposing multiple amendments in one bill for the purpose of correcting obsolete language, or from embodying multiple articles of the constitution in a single amendment if they concern a single subject) (codified as amended at Md. CODE ANN., CONST. art. XIV, § 1 (1981)).
403. See supra notes 394-395 and accompanying text.
404. See supra note 1 and accompanying text.
405. A similar view is expressed by convention delegate Dr. Thomas J. Pullen, Jr.:
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 discussion 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.

... 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.

Pullen, supra note 300, at 390-91.
406. I leave for the political scientists the task of counting proposals, subsequent adoptions, and computing a percentage of success. That is why I left political science.
zation of the court system, have been adopted. On the whole, the Maryland Constitution has been significantly modernized in the thirty years since the rejection of the proposed constitution of 1967-1968. Yet, other important suggestions remain unimplemented. Some of these may be addressed in the future, but most are now unlikely to be implemented. For those ideas, the only hope of resurrection is another constitutional convention.

There are also lessons of process to be learned. The lesson of the 1967-1968 Constitutional Convention is not to aspire to a lesser constitution or to accept something lesser for and from Marylanders. The lesson is that courting public opinion is the responsibility of the proponents as well as the opponents of reform. Voter education should begin early and should emphasize the need for constitutional reform. It should continue during the convention and encourage public participation in the convention. The process of education must continue after the convention, by explaining the reasons for the choices made.

Finally, one might infer from the failure of the proposed constitution, and by the subsequent success of many of the proposals, that a piecemeal approach to constitutional revision is best. I am reluctant to embrace this view. The piecemeal, incremental approach, by its nature, works in the absence of a constitutional convention. By eschewing the use of a constitutional convention, we reduce the possibility of substantial citizen activity in the creation of their fundamental documents. We also lose the possibility of a holistic approach to revision.

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408. Maryland voters refused to authorize a new state constitutional convention in 1990. See Constitutional Convention Question is Rejected, BALT. EVENING SUN, Nov. 7, 1990, available in 1990 WL 4108712 (noting that “[s]omewhere 60 percent of the state voters were against the question that would have mandated a state constitutional convention”); Do We Need a Constitutional Convention?, BALT. EVENING SUN, Oct. 24, 1990, available in 1990 WL 4105529 (providing arguments both for and against authorizing a constitutional convention); John W. Frece, Ballot Question Will Decide Fate of Constitution, BALT. SUN, Oct. 28, 1990, available in 1990 WL 4106393 (predicting that a new constitutional convention would not be authorized because it would require approval by a majority of voters who vote in the entire election, and few voters were aware that the question would appear on the ballot); State Questions, BALT. SUN, Nov. 1, 1990, at A22 (arguing that because the process of amending the state constitution has worked reasonably well, there is no need to call a constitutional convention).

409. While I cannot deny that some of my desire for constitutional revision is aesthetic (and that I think that the proposed constitution of 1967-1968 was a beautiful document), it is also true that a simpler, cleaner, better organized constitution, written in positive simple language, would have many benefits beyond the aesthetic. It would make government
I look forward to the elections of 2010, when the citizens of Maryland will again be asked if they would like to convene a constitutional convention. I hope we say yes.

more understandable and accessible to citizens; it would make it easier for students to study the Maryland Constitution; it would make the job of writing laws easier for the General Assembly; it would make the job of evaluating the constitutionality of laws easier for judges.

410. This is provided, of course, that there is no change in the present mechanism for calling a constitutional convention. See Md. Code Ann., Const. art. XIV, § 2 (1981).