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## CONSTITUTIONAL REVISION IN PENNSYLVANIA —A CONSUMMATION NOT DEVOUTLY ENOUGH WISHED

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John Marshall's dictum that the Constitution of the United States is an instrument intended to endure for ages to come had no evident influence upon the shaping of the Pennsylvania Constitution of 1874.<sup>1</sup> On the contrary, that instrument is fraught with ephemeral material; one finds in it numerous policy determinations, of which not a few are of a specific character, with respect to the contemporary problems of the time. Particularly incongruous at this day is the provision of Section 27 of Article 3, which forbids the continuance or creation of any state office for the inspection or measuring of any merchandise, manufacture or commodity.<sup>2</sup> Hardly less so is Section 1 of Article 14, which gives constitutional status to no less than thirteen county offices. More fundamentally, there are many troubling questions under the 1874 Constitution as to the basic powers, institutions and processes of state government. It is a dated instrument and the times have far outrun it.

Over the years there have been stirrings of interest in

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1. *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819). It was in the same opinion that Marshall made the following sententious observations about constitutionalism:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. p. 407.

The writer has espoused the organic conception of a constitution in his paper, "The Legal Profession and American Constitutionalism," 12 *The Record of the Association of the Bar of the City of New York* 518 (1957).

2. The provision was aimed at a legislative practice of distributing patronage by legislative appointment of inspectors of merchandise. See VII *Debates Constitutional Convention of Pennsylvania of 1873*. p. 400.

constitutional revision in Pennsylvania, but none has gained the force to achieve results. The subject has lately been brought back in the public view at the instance of former Governor George M. Leader. It was he who took the initiative in the establishment, by legislation, of the Pennsylvania Commission on Constitutional Revision. That body submitted its report to the Governor and to the members of the General Assembly on March 9, 1959.<sup>3</sup>

The legal profession in the state is, no doubt, generally familiar with the existence and work of the Commission, but a brief statement about the organization and the work of the Commission may refresh recollection. The Commission was created by Act 400 of 1957, which became effective on July 15, 1957. It consisted of fifteen citizens of the Commonwealth of whom five were appointed by the Governor, five by the Speaker of the House of Representatives, and five by the President Pro Tempore of the Senate. The mandate of the Commission was set out in Section 3 of the statute as follows:

The Commission shall study the Constitution of the Commonwealth, as amended, in the light of contemporary conditions and the anticipated problems and needs of the people of the Commonwealth. If the Commission finds change in the constitution advisable, it shall consider the best means of effecting such change. If the Commission determines that the best means is by amendment, it shall so recommend and its report shall contain drafts of the proposed amendment or amendments. If the Commission determines that the best means is by general revision, it shall collect, compile and analyze such information as it may deem useful to the delegates at a constitutional convention, and shall make any recommendations relating to the substance of revision as it may consider appropriate.

The statute provided that the Commission should submit its final report not later than one week after the convening of the General Assembly in regular session in 1959. The completion of the process of appointment of members did not take place until the end of the year 1957 and, although

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3. Copies of the printed report are now in scarce supply. The body is identified in the remainder of this paper as the "Commission."

the Commission worked diligently, it was not able to submit its final report until early March, 1959.

The Commission concluded that one hundred twenty-four amendments to the Constitution were desirable.<sup>4</sup> It classified these in terms of need. The Commission recommended thirty-one amendments which it considered critically needed for the efficient conduct of the state government. Twenty-two amendments were put forward as being very desirable in the judgment of the Commission. Seventy-one amendments were suggested as changes which would improve the language and form of the Constitution, but which were not considered of sufficient importance to be recommended for adoption other than as a part of a general revision. The Commission prepared proposed joint resolutions in the proper form for initiation of amendments to effectuate all of the first and second class recommendations. These were duly introduced at the 1959 regular session.

It is already evident from what has been said that the Commission rejected the proposition that general revision of the Constitution was needful. A substantial minority of six members disagreed; it was the position of that group that there should be a constitutional convention looking to general revision. The writer, a member of the minority, points to the number and importance of the changes proposed by the Commission as telling support for revision.

Since the report of the Commission was submitted, the General Assembly has completed a protracted regular session, which extended into the following calendar year. During that session there was opportunity for the General Assembly to consider the recommendations of the Commission and to take such action as it might deem appropriate. It is not too much to say that the opportunity was wasted. Only three Commission proposals were adopted. Of these only one is to be classified as of first-rank importance. That proposal relates to the eligibility of a governor to succeed himself for

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4. For purposes of this count modification or repeal of a section is considered as amendment.

one term.<sup>5</sup> The second would permit cash refunds in the case of over-payment of taxes. The third would permit persons serving as Auditor General and State Treasurer to succeed themselves. None of the significant proposals with respect to the judicial branch, the legislative branch, local government or state and local finance, was embraced. In short, the legislature displayed scant interest in the problem of making the Constitution of the state adequate to enable the state to fulfill its responsibilities in the contemporary world.

This experience in the 1959 regular session of the General Assembly documents the conclusion that general revision is the only effective way to get Pennsylvania the quality of organic law that it should have. The prospect for making the constitution of the state adequate to the state's needs through piecemeal amendment is practically nil.

In view of the disappointing experience thus far with the effectuation of the recommendations of the Commission, it is all the more important to the welfare of Pennsylvania that the efforts to achieve constitutional revision be continued and strengthened. The need for revision has been entirely out of proportion to our vision and our zeal to render the institutions and the processes of state and local government adequate to the occasion. The challenge is to keep the problem of constitutional revision in the public mind and somehow develop both the public understanding and the leadership to come to grips with it.

#### REEXAMINATION OF THE ROLE OF THE STATE

The Commission on Constitutional Revision did a pretty good job within the many limitations within which it had to work. This is not to say, however, that either the approach or the groundwork of the Commission was adequate. The basic thing is the approach. In the Commission some effort was made to lift the inquiry above an article-by-article and

5. The proposed two-term limitation would tend to make the incumbent a lame duck in his second term. It is ill-conceived.

section-by-section reexamination of the existing instrument, but without genuine success. It would be unrealistic to suggest that we should detach ourselves from the context of constitutional development in the state and undertake to produce an ideal organic law, but one can say, with the utmost emphasis, that a thorough consideration of the constitutional framework in a state should be guided by a sense of purpose.

The Commission did not undertake to assess the situation of the state in the total governmental complex nor to redefine its role with the aid of such an assessment. It operated on the basis of largely unarticulated assumptions. This is not enough. It is obvious that a state cannot, by operation bootstrap, change the constitutional distribution of power in the Federal system, but there is much room in the fields of state and concurrent jurisdiction for clarification of the state's role. It must be remembered that what is often decried as Federal aggrandizement of power may be response to public need in default of state action.

It is not possible, nor is it desirable, for present purposes, to try to cover the whole ground, but illustrations of what might be considered in reexamining the role of the state may readily and properly be put forward. It is clear that we still look to the state for the bulk of our private law and this with respect both to the judicial and legislative development of the law and to the administration of the law. This is an important area of state responsibility and, if it is to remain so, any reexamination of a state constitution should take into account very thoroughly the adequacy of the constitutional framework for the shaping and application of policy in the realm of private law. Consider, for example, the situation of the General Assembly of Pennsylvania when it was confronted with the proposed Uniform Commercial Code. The lawyers of the state knew that the legislature was not up to digesting and evaluating this major piece of legislation governing civil relationships.

Problems of governmental organization make up a

major area of state concern. They are becoming increasingly acute in medium-sized and large urban areas. Traditionally, the states have borne the primary responsibility for the organization and administration of local government. Units of local government are creatures of state policy. As we all know, for a good many years now local units have been looking more and more to Washington for financial assistance. It is still true, however, that the states have the political responsibility for local government. The situation is not one of exclusively state jurisdiction because of the authority of the national government with respect to interstate and foreign commerce, to navigable waters, to Federal enclaves and to interstate arrangements. Much of our metropolitan life overlaps state lines.

What is to be the role of the states in the years ahead with respect to our enormously expanding urban life? If it is to be one of primary responsibility for organization, powers, administration and finance, what should be done to a state constitution to render the state equal to the task?

Consider the field of education, which certainly remains, to this point, preeminently an area of state responsibility. What should be the state role in the years ahead? What changes in the organic law are needful to enable a state to do the job well?

The states have primary responsibility in the realm of social welfare, even though the Federal Government pours a great deal of money into this area and influences state policy. The constitution of Pennsylvania ought to be reexamined with particular reference to the distribution of responsibility as between the national and state governments with respect to social welfare. It ought to be examined further in terms of whether it provides the authority and the framework which may be needed.

There is one very interesting and rather special aspect of this area of the larger subject which this writer brought to the attention of the Commission. The reference is to the matter of distribution of risk of personal injury, death and

property damage in connection with the operation of motor vehicles. Section 21 of Article 3 of the Pennsylvania Constitution of 1874 forbade the legislature to limit the amount to be recovered for injuries resulting in death or for injuries to person or property. It was necessary to modify this in 1915 in order to pave the way for workmen's compensation. If the legislature were persuaded today that some form of socialization of risk in the motor vehicle cases were desirable, it could not act to embrace such a policy because it could not impose limitations on liability.

#### FINANCING STATE AND LOCAL GOVERNMENT

Once the state's responsibilities had been redefined, one would confront the question as to how to finance the work of state and local government. This is a subject which deserves much more intensive consideration in Pennsylvania than it has thus far been accorded.

On the revenue side, both the state and local governments presently must operate within the limitations of the very strictly interpreted constitutional requirement that all taxes be uniform.<sup>6</sup> In many states the uniformity clause is confined to ad valorem taxation.<sup>7</sup> It is not so in Pennsylvania. Here, the clause applies to all forms of taxation, except special assessments imposed on a benefit theory,<sup>8</sup> and is so rigidly interpreted by the Supreme Court that a personal exemption under a municipal flat-rate wage tax does not get by.<sup>9</sup> This is something pretty close to a strait jacket, which greatly confines the General Assembly in shaping a tax policy, calculated both to produce adequate revenue and to distribute the burden on a basis which takes into account both benefit and ability to pay.

It is, of course, a matter of common understanding that fear of a graduated income tax has been a major obstacle to

6. Pa. Const. Art. IX, § 1.

7. See, for example, Ohio Const. Art. XII, § 2.

8. *Supervisors of Manheim Township, Lancaster County, v. Workman*, 350 Pa. 168, 38 A.2d 273 (1944).

9. *Butcher v. City of Philadelphia*, 333 Pa. 497, 6 A.2d 298 (1938).



the calling of a constitutional convention with a view to revision of the constitution. One should not be insensitive to this factor, but it does not control the merits. To fix tax policy in the constitution is not sound constitutionalism. There is as much justification for erecting a constitutional bar to a retail sales tax or a flat-rate income tax as there is to a graduated income tax. In either case a broad-based type of taxation, which has substantial support in American experience, would be excluded from the range of legislative consideration in adopting an overall tax policy. In this area of decision-making, as well as in others, the positive way to seek improvement is to take steps to strengthen representative government rather than to remove policy matters from the realm of legislative action. The uniformity clause ought to be confined to ad valorem taxation and until this is done there is not much prospect that Pennsylvania will have a fair and balanced tax system. Meanwhile, the majority in the Commission have opposed modification of the uniformity clause.

The pressures of the automobile age have brought about a constitutional amendment which violates the principle that the appropriation of public revenues be a responsibility of the elected representatives of the people. The amendment dedicates motor vehicle revenues to highway purposes.<sup>10</sup> That policy making as to the disposition of public revenues should be done at the legislative level is becoming increasingly evident as to the very class of revenue to which the amendment relates. The unitary character of the circulatory system of the larger community is now widely appreciated; it does not bespeak an inflexible allocation of public revenue to any particular part of the system.

On the borrowing side of public finance, an effort was made in the Commission to bring about important changes at both the state and the local level. The legislature, as we all know, has no real general obligation borrowing power at

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10. Pa. Const. Art. IX, § 18 (Amendment of Nov. 6, 1945).

the present time.<sup>11</sup> It takes a constitutional amendment to pave the way for the issuance of general obligation bonds. The debt limitation policy has been evaded, however, through the so-called authority mechanism. Hundreds of millions of dollars of state authority bonds, debt service on which is paid from state revenues, have been issued. The debt limitation hurdle has been cleared by having an authority (with corporate capacity) issue bonds and construct a project and by providing funds to cover debt service on the authority bonds by rental payments under a lease of a facility to the state. The rental payments are classified as a current expense, as they are paid from year to year, rather than as installment payments on bonds or on the purchase price of the facility. Funds to cover rental payments come, of course, from state appropriations. A parallel development has taken place at the local level, particularly with respect to public school financing.

The Commission proposal would permit general obligation borrowing by the state, but only with electoral approval, and it would permit genuine revenue bond financing of self-liquidating facilities but would ban authority financing depending on state funds under a lease arrangement or otherwise. The Commission draft on state debt is affected by the same disease which afflicted the 1874 Constitution from the outset; it embodies a good deal of detail which should be left to legislative determination. For example, it flatly requires that all state bonds be serial bonds and sets a maximum maturity. Such elements in financing do not relate to major policy, but rather to good financial practice as to terms of payment and the legislature ought to be competent to deal with them on a basis which is responsive to the pertinent factors at a given time.

It will be recalled that the existing constitutional limitations on local debt place a ceiling of two per centum of assessed values on the local debt incurred without electoral

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11. Pa. Const. Art. IX, § 4. Up to \$1,000,000 of debt may be created to supply casual deficiencies of revenue.

approval and of seven per centum with electoral approval.<sup>12</sup> Such valuations have been generally far below market value and do not have a very realistic relationship to the economic base underlying general obligation bonds. It was proposed by the Commission, accordingly, that the two per centum rate applicable to so-called councilmanic debt be changed to two per centum of the market value of taxable property within the taxing unit. This idea, if embraced, would necessitate legislation directed to provision of an effective means of determining market value for debt limitation purposes. The Commission went further; it proposed that so far as debt enjoying electoral approval was concerned, there should be no set constitutional limitation, but did recommend that the General Assembly be empowered to impose additional restrictions as well as to provide for the apportionment among political subdivisions of borrowing power within general limitations.

There are states like Ohio which have done very well without constitutional limitations upon local debt and the writer is inclined to believe that the constitutional policy of leaving the matter to the legislature is a sound one. The Commission proposal for Pennsylvania is, however, a good step in the right direction.

The Commission recommendation as to local debt, like that with respect to state debt, has a provision designed to put the quietus on authority-type borrowing, which depends upon provision for debt service out of general revenues. It grants express recognition, at the same time, to genuine revenue bond financing. It is noteworthy in this connection that the state Supreme Court recently embraced a liberal view as to revenue bond financing under the present constitutional provisions; the court adopted what amounted to the so-called broad special fund theory under which the net revenues of existing income-producing properties may be pledged to debt service on revenue bonds to make improvements and

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12. Pa. Const. Art. IX, § 8. There is a special Philadelphia maximum of thirteen and one-half per centum. See also the special provisions of Pa. Const. Art. IX, § 15, as to counties and other municipalities.

extensions without creating debt in the constitutional debt limitation sense.<sup>13</sup> Under this decision, general function units of government, like cities, may act directly to finance public improvements on a revenue bond basis without having to resort to the authority device. This is a very significant development in Pennsylvania.

#### STATE POLITICO-LEGAL INSTITUTIONS

After the role of state and local government in the total scheme of things had been thoroughly reexamined and redefined, there would remain the highly significant business of examining politico-legal institutions upon which we must depend in the unfolding of the drama. The focal institution in the state framework is the state legislature. It is the key organ within the constitutional system for the formulaion of policy and for the distribution of governmental responsibility within the basic pattern set by the constitution. Since this is so and in view of the necessity in a populous and complex society, in which government belongs to the people, of making most policy decisions through representatives, it patently behooves a state to give the legislature the strength and the trust to match the great responsibilities of representative government. That we emphatically have not done. The writer has made this point so often in recent years that he is fearful of being wearisome.<sup>14</sup> For this occasion he will say once again that with respect to power, to structure, and to procedure, the General Assembly of Pennsylvania, like the legislatures of many other states, is greatly circumscribed by the state constitution and works in an atmosphere of popular distrust.

We should do something bold and dramatic to change this situation. The fact that we are playing for keeps in the international community with respect to the very survival of the race ought to have a significantly jarring impact to enable us to reexamine with flexibility traditional notions about state governmental arrangements. If we really believe

13. *Beam v. Borough of Ephrata*, 395 Pa. 348, 149 A.2d 431 (1959).

14. Fordham, *The State Legislative Institution, passim* (1959).

in representative government, why should we not reexamine the very structure of state legislative institutions with the object of changing it, if need be, to make it at once both a more representative, responsive and responsible policy-making organ. Thus, the commitment to the bicameral form at the state level invites reconsideration. The historical basis for it has scant vitality in the contemporary situation. In Pennsylvania it often produces stalemate and negation. The unicameral form would, at the least, provide the framework for decisive action on a program with respect to which political responsibility would be clearly fixed.

Internally, the legislative institution is weak. One illustration will be given. It is a function of the standing committees to do the real spadework in the process of informed and mature decision-making, yet the committee process in Pennsylvania is so meager that there are neither regular hearings on bills nor textual reports on bills which are reported favorably. These things could be changed without constitutional amendment or revision, but it is in order to mention them here because they are symptomatic of the general condition of an institution that we have not nurtured.

An unfortunate development of November, 1959, was the adoption of a constitutional amendment, which provides for annual regular sessions of the legislature with the sessions in the even-numbered years being confined, so far as lawmaking, at least, is concerned, to laws raising revenue and laws making appropriations.<sup>15</sup> This amendment had

15. Pa. Const. Art. II, § 4. The amendment ordains that at regular sessions convening in even-numbered years "the General Assembly shall not enact any laws, except laws raising revenue and laws making appropriations." This presents some interesting legal questions. For example, may the legislature in a limited regular session initiate constitutional amendments? It is understood that the Attorney General is of the opinion that it may. Does the provision preclude relevant substantive material in appropriation bills?

There was an interesting discrepancy between the language of the proposed amendment and the proposition put to the voters. The latter described the projected limited sessions as "limited solely to the enactment of laws raising revenue and laws making appropriations." Did this vary so from the language of the proposed amendment as to raise a serious question as to whether the electors were voting on something materially different from the amendment as proposed by the legislature? If not, it is suggested that the election proposition would not control interpretation.

already been initiated at the time the Commission came forward with its proposal of unlimited annual sessions. The Commission's proposal has, of course, gone by the board. The amendment is a further illustration of the lack of confidence which has characterized the treatment of the state legislature for over a century. When the legislature is in session, either regular or special, it should have its full constitutional authority in order that the elected representatives may act with adequate scope in dealing with the problems of the Commonwealth.

The Commission made modest proposals with respect to the judicial institution. The key constitutional problems here have to do with the extent to which judicial structure is to be left to legislative determination, the system of election of judges, the whole establishment as to the minor judiciary and the extent of integration of the judicial system that may be desirable to improve judicial administration. The Pennsylvania Constitution, in sharp contrast with the Constitution of the United States, gives constitutional status even to the minor judiciary. Instead of moving along the line of the Federal philosophy, the Commission would add another constitutional court, namely, the Superior Court. Nor would it take the minor judiciary out of the constitution, nor exact that the members of the minor judiciary be learned in the law. Such modest proposals as it did make got nowhere in the 1959 session of the General Assembly. A proposal that justices of the peace be placed on a salary basis was badly beaten.

As the late Chief Justice Arthur Vanderbilt of New Jersey observed, people concerned with reform in our legal institutions should be long-winded. It will take a great deal of study, public education and tough-minded persistence over a period of years, to effect significant changes in the Pennsylvania judicial system. This is certainly an appropriate area for Pennsylvania Bar Association leadership.

The constitutional context of local government invites a long look in a time of great and rapid change. The relation

of the state government, and particularly the legislature, to urban life is a matter of real urgency in view of the tremendous increase in urbanization. A good many years ago the avid proponents of municipal home rule took the position that life is too short to try to improve the situation of the cities with respect to power and structure by appealing to the legislature—that the only hope for the cities was direct constitutional devolution of power to them. Meanwhile, the great proliferation of jurisdictions at the local level and the complex and changing character of urban life have brought more and more people to a recognition of the proposition that broad constitutional home rule is not the answer.<sup>16</sup> It tends toward rigidity and toward decision-making on a basis narrower than the problem context, when what is needed is adaptability and ultimate decision-making on a footing as broad as the problem area. In short, the problem, from the standpoint of constitutional revision, is to achieve a system of state-local relations under which there is generous recognition of local autonomy, as distinguished from local self-determination, which is not beyond legislative control as to governmental powers and functions. The Commission put forward a home rule proposal which was designed to meet this problem.<sup>17</sup> The recommendation has not attracted the support it deserves. The subject is a difficult one and leadership education, let alone general public education, with respect to it, is a large assignment.

The Pennsylvania Constitution is extraordinarily backward with respect to county government. Instead of leaving the legislature in a position to provide for changes and

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16. At this very writing the pertinent provisions of the National Municipal League's Model State Constitution are undergoing careful reexamination by thoughtful students of state and local government with this caveat very much in mind.

17. It was based upon the American Municipal Association's "Model Constitutional Provisions for Municipal Home Rule," published in 1953. The writer was the draftsman of the model provisions. He must acknowledge that they are open to the charge that they contain legislative detail. All that can be said in explanation is that some detail as to procedure is necessary if the home rule grant is to be self-executing, that is, not dependent upon enabling legislation.

improvements in county government, in keeping with developments in the larger community, the Constitution diffuses responsibility among commissioners and ten other constitutional elective officers. The Commission made a very constructive proposal that this system give way to one under which the General Assembly would have the power to provide for the organization of county government and to that end to make available optional forms of county government, one of which would be the existing form.

#### CONCLUSION

The short of the matter is this: Pennsylvania needs constitutional revision. A dated Reconstruction-period organic instrument is thoroughly inadequate for the problems and responsibilities of the contemporary world. In the larger sense, the political life of the Commonwealth is undernourished. We can change this, if we but will.