

WORKING PAPERS MISSING :

#s 1, 2, 3, 10,

15 is my last one

Minutes: Blue marks indicate those filed

August 25, 1966
Sept. 8, 1966
Sept. 29, 1966
Oct. 27, 1966
Nov. 10, 1966
Dec. 1, 1966
Dec. 16, 1966
Dec. 26, 1966

non
filed
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None filed for

1966

Also filed:

11/19/68

3/4/69

3/5/69

3/12/69

Feb. 15, 1967 ✓
~~Mar. 23, 1967~~
July 21, 1967 ✓
Sept 15, 1967 ✓
Sept 16, 1967 ✓
Oct. 6, 1967 ✓
Oct. 7, 1967 ✓
Oct. 27, 1967 ✓
Nov. 17, 1967 ✓
Dec. 28, 1967 (jud.) ✓
Dec. 29, 1967 ✓
Jan 19, 1968 ✓
Jan 24, 1968 ✓
Feb 6, 1968 ✓
April 17, 1968 Dec. 19, 1968

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PREAMBLE AND DECLARATION OF RIGHTS

Prepared for the S. C. Constitutional Revision Committee
By the Staff Consultant

CONSTITUTION OF THE STATE OF SOUTH CAROLINA

Preamble

We, the people of the State of South Carolina, in Convention assembled, grateful to God for our liberties, do ordain and establish this Constitution for the preservation and perpetuation of the same.

This preamble is very simple and it may be desirable to broaden its scope by adding a statement concerning the purpose of the Constitution and the basic liberties of citizens.

ARTICLE I

Declaration of Rights

Section 1. Political power in people.—All political power is vested in and derived from the people only, therefore they have the right at all times to modify their form of government.

See Const. 1868, I, 1.

Many constitutions have a similar introductory statement. There appears to be no particular reason to change this. If some change is thought wise, the following are some examples from other constitutions:

Michigan: "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection."

Maryland Proposed Draft: "All political power originates in the people and all government is instituted for their liberty, security, benefit, and protection."

Alaska: "This Constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State."

Section 2. Apportionment of Representatives.—Representatives in the House of Representatives shall be apportioned according to population.

See Const. 1868, I, 34.

This section is really not needed, but actually does no harm. Should not this section be included as part of the legislative article if continued?

Section 3. Meeting of General Assembly.—The General Assembly ought frequently to assemble for the redress of grievances and for making new laws, as the common good may require.

See Const. 1868, I, 27.

This section is really not needed, but actually does no harm. Should not this section be included under the section on the General Assembly if continued?

Section 4. Religious worship—freedom of speech—petition.—The General Assembly 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 General Assembly or any Dept. thereof for a redress of grievances.

The S. C. wording is also almost identical with the wording of the U. S. Constitution.

Model Constitution has almost the exact wording as this.

Proposed Maryland Constitution includes this statement: No person shall be disqualified from holding public office or be rendered incompetent as a witness or juror because of his opinion on matters of religious belief. After studying the discussion on religious freedom in the study for the N. Y. Convention, it appears that the historic wording of the S. C. Constitution is the best and permits proper interpretation for years to come as events change. It would seem that the phrase "prohibiting the free exercise thereof" is broad enough to cover such matters as being disqualified from holding public office or being rendered incompetent as

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being a witness. Any statement which may be needed to regulate use of governmental funds for various purposes controlled by religious organizations should be treated under the Article on Taxation.

Section 5. Privileges and immunities—protection of laws.—The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws.

See Const. 1868, I, 12.

Statement of like nature is included in most constitutions.

The Model Constitution has a similar wording except for the following:

"Nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof because of race, national origin, religion or ancestry."

The Maryland proposed Constitution also uses the phrase "because of religion, race, color, or national origin."

A fuller statement similar to the Model and the Maryland Draft may have appeal to many of the State's citizens. From the current court interpretations, there does not seem to be any real need to expand on "equal protection of the laws," since this clause would outlaw discrimination of any type by governments. The study for the N. Y. Convention explains the equal protection clause in the present S. C. Constitution as a positive statement preventing discrimination on the part of the State.

It is suggested that Section 5 remain as it is unless a fuller statement on discrimination is desired.

Section 6. Taxation.—All property subject to taxation shall be taxed in proportion to its value.

See Const. 1868, I, 36.

This section should be covered in the section on property taxes or eliminated.

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Parish 7. Home*

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Section 7. No tax without consent.—No tax, subsidy, charge, impost tax or duties shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled.

See Const. 1868, I, 37.

This protection can be ensured in the Article on Taxation. A spot check of five other state constitutions did not reveal similar sections. Neither does the Model have such a section. The section does no harm and could be retained if it is thought that deletion would disturb the electorate.

Section 8. Attainder—ex post facto law.—No bill of attainder, *ex post facto* law, law impairing the obligation of contracts, nor law granting any title of nobility or hereditary emolument, shall be passed, and no conviction shall work corruption of blood or forfeiture of estate.

See Const. 1868, I, 4, 21.

The rights in this section are actually guaranteed by the U. S. Constitution and the section being in a state constitution has no real value except that most citizens would expect such a section.

Both the Proposed Maryland and Proposed Kentucky constitutions contained similar sections.

Section 9.—Suffrage.—The right of suffrage, as regulated in this Constitution, shall be protected by law regulating elections and prohibiting, under adequate penalties, all undue influences from power, bribery, tumult or improper conduct.

Section 10.—Elections free and open.—All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office.

See Const. 1868, I, 31.

Section 11. Property qualifications—term of office—dueling.—No property qualification, unless prescribed in this Constitution, shall be necessary for an election to or the holding of any office. No person shall be elected or appointed to office in this State for life or during good behavior, but the terms of all officers shall be for some specified period, ~~except Notaries Public and officers in the militia.~~ After the adoption of this Constitution any person who shall fight a duel or send or accept a challenge for that purpose, or be an aider or abettor in fighting a duel, shall be deprived of holding any office of honor or trust in this State, and shall be otherwise punished as the law shall prescribe.

See Const. 1868, I, 32.

Sections 9, 10, and 11 deal with basic rules related to the election process, however, Article II of the present Constitution contains

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essentially the same things. Provisions pertaining to electors and elections would be better listed under Elections so that a clear statement could be made.

In the Declaration of Rights, a simple, clear statement on free and secret elections may be needed. It may be wise to leave Section 10 as now listed as a part of the Declaration of Rights and to adjust the Article on Elections to cover pertinent parts of Sections 9 and 11. See Article II, Sections 1 and 2.

Particular attention is called to Section 11.

(a) If all electors are qualified for office except for age restrictions, then is not "no property qualification" redundant?

(b) Set terms for office -- Is such a statement needed? If so, should it not be in the Article on Elections?

(c) The portion of the section on dueling should be deleted.

Section 12. Residence.—Temporary absence from the State shall not forfeit a residence once obtained.

See Const. 1868, I, 35.

This section is not needed, but does no harm.

Section 13. Suspension of laws.—The power of ~~suspending~~ the laws or the execution of the laws shall only be exercised by the General Assembly or by its authority in particular cases expressly provided for by it.

See Const. 1868, I, 24.

This section listed in a number of constitutions and is a safeguard that should remain. Certainly it does no harm.

Section 14. Departments separate.—In the government of this State the legislative, executive and judicial powers of the Government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

See Const. 1868, I, 26.

This section on the separation of powers is needed as a statement outlining our three branches of government and reaffirming this principal as being effective in our state government.

Some believe that this principal is important enough to be listed as a

separate article of government entitled "General Powers of Government."

This reasoning is based on the belief that a clear statement in a separate article will help to make each branch of government live within its proper sphere.

As pointed out such a statement is needed. The question is, Where shall it be placed?

Section 15. Courts—remedy.—All Courts shall be public, and every person shall have speedy remedy therein for wrongs sustained.

See Const. 1868, I, 15.

Leave

Most constitutions refer to courts being "public" in relationship to criminal prosecutions, with no particular mention of civil cases. Some state that civil cases shall be heard as established in common law. Some research has been devoted to understanding the word "public" as used here and in Section 17. Standard references do not help. As used in this section, could the word "public" interfere with the current procedures for hearing cases in Juvenile and Domestic Relations Courts? It is assumed that many proceedings in Juvenile Courts, especially, should not be public in the usual sense of the word.

Section 16. Searches and seizures.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

See Const. 1868, I, 22.

is there a better word than interception how about in case

Used the May 1961 section + ask att Gen for his comments

This type of section and in substantially the same wording is used in almost every state constitution and certainly should be continued.

The Model Constitution uses language which is substantially identical. A new concept on oral communications and protection against electronic devices is now being advocated by most people revising state constitutions. The existing N. Y. Constitution contains a section on court ordered wiretapping; otherwise present Constitutions are generally silent on the subject.

The Model Constitution used the following language in suggesting that privacy should be protected:

(b) The right of the people to be secure against unreasonable interception of telephone, telegraph and other electronic means of communication /, and against unreasonable interception of oral and other communications by electric or electronic methods, / shall not be violated, and no orders and warrants for such interceptions shall issue but upon probable cause supported by oath or affirmation that evidence of crime may be thus obtained, and particularly identifying the means of communication and the person or persons whose communications are to be intercepted.

The proposed Maryland Constitution uses the following (combining this type of protection with the existing Constitutional language on searches and seizures).

Section 1.08. Search and Seizure.

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and in their oral or other communications against unreasonable interceptions shall not be violated. No search warrant shall be issued except upon probable cause supported by oath or affirmation, and the place to be searched, the persons or things to be seized, or the communications sought to be intercepted shall be particularly described in the warrant.

Kentucky proposed the following:

28. Interception of Communications.

The people shall be secure in their persons, houses, papers and possessions from interception of telegraphic, telephonic, and other communications by electric, electronic or mechanical means.

New York proposes the following as one alternative:

"The right of the people to be secure from unreasonable invasions of privacy shall not be violated."

A discussion included in the N. Y. studies on the advantages and disadvantages of the right of privacy is attached as Appendix A. These points should be carefully weighed.

Section 17. Presentment of grand jury—not tried twice—private property.—No person shall be held to answer for any crime where the punishment exceeds a fine of two hundred dollars or imprisonment for thirty days, ~~with or without hard labor~~, unless on a presentment or indictment of a grand jury of the County where the crime shall have been committed, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or liberty, nor shall be compelled in any criminal case to be a witness against himself. Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor.

1963 (53) 38.

See-Const. 1868, I, 18, 23.

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This section includes three major sections in one. Each must be treated separately. For clarity, it is suggested that the current Section 17 be divided into three sections, even if there should be no change in content. The three sections would be: the grand jury and indictment, double jeopardy and witnessing against oneself, and private property.

Grand jury and indictment. The S. C. Constitution was amended in 1963 to require grand jury indictments for all crimes carrying a punishment in excess of \$200 or 30 days in prison. The limit had previously been \$100.

This was necessitated by constitutional changes to Article V granting certain powers over magistrates' courts to the General Assembly which had been previously defined in the Constitution.

Throughout the literature on the rights of the accused, more and more studies are raising questions about the constitutional requirement of the grand jury for all major types of indictments. Although many questions are raised, the writers do not agree on the position that should be taken.

In South Carolina constitutional development, the right of the grand jury for indictment is also related to the jurisdiction of magistrates courts. Consideration of both go hand in hand and the break-off point for required grand jury indictment will have a bearing on the jurisdiction of inferior courts whatever they may be called. If one equates the monetary value of a punishment, then the \$100 in the original 1895 Constitution could be raised to a figure much more substantial than the \$200 set by the 1963 amendment.

The N. Y. studies evaluate the grand jury indictment only from the standpoint of felonies and not lesser crimes which is still required by this State. For retention of the Grand Jury for felonies, the following may be listed as arguments for:

- a) Grand jury screening protects the individual from unjust prosecution by the state.
- b) Grand jury screening protects the community from abuses in which professional prosecutors might engage.
- c) Grand jury screening reflects the essence of our democracy; laymen decide who is, and who is not, to be charged with serious crime.
- d) The investigative and screening powers of the grand jury, properly utilized by a sophisticated prosecutor, makes for improved law enforcement.

Arguments favoring the abolition of grand jury screening of felony charges are:

a) Grand jury screening is illusory in the protection it affords the individual.

b) Grand juries, because of their composition, tend to be unfair towards members of lower income groups, and at times intolerant, with unequal justice resulting.

c) Grand jury secrecy and its one-sidedness is unfair to the accused in our adversary system.

d) Screening all cases in the grand jury causes delays and needless expenses.

Permitting the defendant to waive the grand jury indictment. Some states let the defendant decide if waiver should be made. Ohio and Illinois in the last 10 years have adopted this procedure. The N. Y. court has ruled that unless the Constitution permits a waiver that it cannot be done since the right of the grand jury indictment embodied in the state's constitution, expresses public policy and is not a personal privilege that could be waived by the accused. State v. Hann, 196 S.C.211 (1940), holds that an indictment is necessary in South Carolina except for certain minor cases. Arguments presented to let the defendant waive the indictment by the grand jury are:

(a) Waiver would save considerable time and expense; (b) Waiver would decrease the percentage of routine cases heard by grand juries, rendering their overall work more meaningful; (c) Waiver may aid the defendant in some cases because the case would be "at rest" until the trial. Witnesses may die, memories fade, etc. Arguments against letting the defendant waive grand jury action are: (a) Grand jury investigations and indictment often aid the defendant, especially helping to eliminate pressures on the defendant by promises of leniency, breaks, etc; (b) Indictment is so fundamental that it should be preserved inviolate; (c) In lesser cases defendant is apt to waive the indictment, thus denying the grand jury the experience it needs in handling indictments for serious cases.

Permitting the prosecutor to decide if he will proceed by information or by grand jury indictment. A dual system letting the prosecutor decide is the practice in 22 states. These are: Arizona, California, Colorado, Connecticut, Florida, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, Oklahoma, South Dakota, Utah, Washington, and Wyoming. However, Florida and Louisiana require indictment by the grand jury in all capital offenses; Vermont and Connecticut require it whenever punishment may be by life imprisonment or death; Indiana requires indictment in murder and treason cases, and Minnesota requires it whenever the crime is punishable by more than 10 years imprisonment.

The Alaska Constitution of 1956 has this provision:

No person shall be held to answer for a capital, or otherwise infamous crime (felony) unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in time of war or public danger. Indictment may be waived by the accused. In that case the prosecution shall be by information.

The Model Constitution omits the question by stating only:

In prosecutions for felony, the accused shall also enjoy the right of trial by an impartial jury of the county (or other appropriate political subdivision of the state) wherein the crime shall have been committed, or of another county, if a change of venue has been granted.

Committee members may wish to consider a position similar to this:

Retention of grand jury indictments for felonies as a constitutional position, with a waiver clause, and permitting the General Assembly the right to require a grand jury indictment for lesser crimes if it wishes to do so. It may well be that if grand jury indictments are only required in the Constitution for major crimes, the General Assembly could expand this right without constitutional authority. But it could be interpreted that

since the Constitution makes a statement this statement forecloses additional action by the General Assembly in so far as grand jury action is concerned.

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Section 17. "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or liberty, nor shall be compelled in any criminal case to be a witness against himself."

This statement on double jeopardy and not being a witness against oneself is standard in most constitutions and is fundamental to liberty. The South Carolina wording is essentially the same as the Model and many other constitutions.

Section 17. "Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor."

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This clause is contained in most state constitutions.

The Model does not contain such a statement, apparently feeling that the due process of law clause covers the subject.

Some consideration may need to be given to the definition of public use as used in this clause. The South Carolina Supreme Court has ruled that urban renewal type projects cannot be justified as public use when property is resold to private individuals. In Edens v. City of Columbia Housing Authority, 228 S.C. 563 (1956), The South Carolina Supreme Court ruled thusly:

Edens v. City of Columbia Housing Authority
228 S. C. 563, 91 S. E. 2d 280 (1956)

In some states the constitutions of them have been amended for the very purpose of public housing and redevelopment.

Section 17 of Article I of our State Constitution provides that "Private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation...." Our controlling decisions are to the effect that "public use" means just that and private property cannot be taken except for public use, without the consent of the owner. Some of the decisions of other courts that are contrary to our view, which are not distinguishable upon different constitutional provisions or former judicial interpretations, proceed upon the theory that a public use is accomplished by the seizure and destruction of slum or "blighted" areas and the disposition of the land thereafter to private owners for private purposes is merely incidental. We think that this would be a strained view of the facts in this case and we cannot follow it. The purpose here is not to provide better, low-cost housing to the present occupants...., but to transform it from predominantly low-class residential area to a commercial and industrial area.

The court is in no doubt of the unconstitutionality of the exercise of the power of eminent domain for the execution of the plan before us in the case at bar. It might, of course, be authorized by an enabling amendment of the Constitution, Article XVI, which is the course followed in some other states.

In the 1966 election, 7 constitutional amendments providing a means to get around the court opinion were submitted to the voters. The amendments for Spartanburg and York Counties were approved. The Spartanburg amendment reads:

Provided, the General Assembly may provide by law that any incorporated municipality in Spartanburg County, or any housing or redevelopment authority now existing or hereafter established to function in Spartanburg County, may undertake and carry out slum clearance and redevelopment work in areas which are predominately slum or blighted, the preparation of such areas for re-use, and the sale or other disposition of such areas to private enterprise for private uses or to public bodies for public uses and to that end the General Assembly may delegate to such incorporated municipalities in Spartanburg County, or to such authorities, the right to exercise the power of eminent domain as to any property essential to the plan of slum clearance and redevelopment.

The York amendment is a more detailed statement of the same principle.

If the present constitution is left intact, then naturally these two amendments would be a part of this section. If this section should be changed in the future by the adoption of a new constitution, then the

rights granted to these two counties would continue since rights existing under the old would be valid. Of course, the voters in these two counties would have to understand this.

Looking toward the future, it appears evident that political leaders in many South Carolina communities will be submitting amendments similar to the one approved for Spartanburg. Thus, the amendment process begins again which is not necessarily bad.

The questions for the committee are: 1) Leave the section as amended as it now stands. 2) Rewrite the section in a manner to recognize both the affirmative and negative votes of the last election. 3) Define public use so that urban renewal may be permitted.

If point 2 just mentioned is followed, then the preparation of a section expressing this is extremely difficult to do. Some possibilities are: letting the General Assembly define public purpose by law and authorizing local option. Both possibilities have major shortcomings.

If consideration is given to point three, then this section of the N. J. Constitution is helpful:

SECTION III

1. The clearance, replanning, development or redevelopment of blighted areas shall be a public purpose and public use, for which private property may be taken or acquired. Municipal, public or private corporations may be authorized by law to undertake such clearance, replanning, development or redevelopment; and improvements made for these purposes and uses, or for any of them, may be exempted from taxation, in whole or in part, for a limited period of time during which the profits of and dividends payable by any private corporation enjoying such tax exemption shall be limited by law. The conditions of use, ownership, management and control of such improvements shall be regulated by law.

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Section 18. Trial by jury—witnesses.—In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, and to be fully informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both. DR

See Const. 1868, I, 13.

The wording of the South Carolina Constitution is substantially the same as many other state constitutions, except that most modern drafts contain a fuller statement on the right to counsel. For example, the Model Constitution states:

The accused shall enjoy the right . . . to have the assistance of counsel for his defense, and to the assignment of counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel.

The Proposed Maryland Constitution states that:

A person accused of crime shall have the right to be informed of the charge against him in time to prepare his defense, to have the assistance of counsel in his defense

Authorities point out that the Miranda Case (Miranda v. Arizona) would apply to state processes even if the state constitution did not provide for the rights of the accused. According to the Supreme Court in the Miranda Case, the following warnings must be given: 1) The suspect "must be informed in clear and unequivocal terms that he has the right to remain silent." 2) "The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court." 3) "The accused must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation" 4) "It is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him." (Summarized in the N.Y. study).

It hardly seems feasible to change a state constitution to specifically spell out the conditions required by the Miranda Case, especially since the U. S. Supreme Court will enforce its conditions anyway. Yet, the thinking seems to be that a statement which is quite clear on the full right to counsel should be included.

(H) needed as bar witnesses

Section 19. Excessive bail—corporal punishment-contempt.—Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted, nor shall witnesses be unreasonably detained. Corporal punishment shall not be inflicted. The power to punish for contempt shall not in any case extend to imprisonment in the State penitentiary.

See Const. 1868, I, 38.

The wording of the first sentence to this section is substantially the same as in most other state constitutions and the Model. The last two sentences dealing with Corporal punishment and contempt are protections not found in most constitutions. There seems to be no reason to delete these two sentences and there is no available explanation why they were included. State Penitentiary is no longer the terminology used to describe state prisons and probably should be changed to a more general term such as state prisons. It is assumed that for contempt one may be confined in a county jail.

In addition the Alaska Constitution adds this sentence: "Penal administration shall be based on the principle of reformation and upon the need for protecting the public."

Delete

Section 20. Right of bail—Sureties.—All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.

See Const. 1868, I, 16.

This is also a standard statement in most constitutions and it is recommended that it remain unchanged. Better style would have this section follow sentence one in Section 19, but continuous legal history would suggest leaving it as a separate section.

Section 21. Libel.—In all indictments or prosecutions for libel, the truth of the alleged libel may be given in evidence, and the jury shall be the judges of the law and the facts.

See Const. 1868, I, 8.

Other constitutions contemporary to the S. C. Constitution contain a similar statement. Newer constitutions do not. The State Supreme Court has ruled that this section does not apply to civil cases.

Section 22. Treason.—Treason against the State shall consist alone in levying war or in giving aid and comfort to enemies against the State. No person shall be held guilty of treason, except upon testimony of at least two witnesses to the same overt act, or upon confession in open Court.

This is a classic statement on treason against the State. The Model, the Kentucky Draft, and the Maryland Draft do not contain this section. The constitutions of Michigan, N. J., and Alaska, however, do. Note that the wording is against the State and therefore is different from the wording of the U. S. Constitution.

This is substantially the same statement as used in all state constitutions.

Section 23. Habeas corpus.—The privilege of the writ of *habeas corpus* shall not be suspended unless when, in case of insurrection, rebellion or invasion, the public safety may require it.

See Const. 1868, I, 17.

This is substantially the same statement as used in all state constitutions. Certainly, it should remain.

Section 24. Imprisonment for debt.—No person shall be imprisoned for debt except in cases of fraud.

See Const. 1868, I, 20.

This statement is included in a great many state constitutions. Protection against imprisonment for debt is not ensured by an outright statement in the federal constitution.

Section 25. Trial by jury.—The right of trial by jury shall be preserved inviolate.

Essential and a standard statement. Note, however this only ensures jury trial for cases required at time of constitution. Hence quo warranto proceeding can not involve the jury.

Section 26. Keep and bear arms—General Assembly may maintain armies—how soldiers quartered.—A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed. As, in times of peace, armies are dangerous to liberty, they shall not be maintained without the consent of the General Assembly. The military power of the State shall always be held in subordination to the civil authority and be governed by it. No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in the manner to be prescribed by law.

See Const. 1868, I, 28, 29.

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This statement is traditional and almost identical statements are found in the N. J., Michigan, and Alaska Constitutions. The Maryland Draft and the Model do not include this section. Removing the section could really cause a controversy.

Section 27. Marital law.—No person shall in any case be subject to martial law or to any pains or penalties by virtue of that law, except those employed in the army and navy of the United States, and except the militia in actual service, but by the authority of the General Assembly.

See Const. 1868, I, 25.

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A spot check of other state constitutions does not reveal a similar section. The section, however, does provide basic protection.

Section 28. Navigable waters free—no tax for use of wharf.—All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed; and no tax, toll, impost or wharfage shall be imposed, demanded or received from the owners of any merchandise or commodity for the use of the shores or any wharf erected on the shores or in or over the waters of any navigable stream unless the same be authorized by the General Assembly.

See Const. 1868, I, 40.

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Navigable waters are really regulated under the federal constitution.

Should not this section be deleted? Our courts have said that this section is merely a restatement of common law rights.

Section 29. Provisions of Constitution mandatory.—The provisions of the Constitution shall be taken, deemed and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissive by its own terms.

OR

This section does no harm even though the courts are likely to interpret the constitution in this manner anyway.

Additional Thoughts

The Committee may wish to consider some of the ideas found in the Declaration of Rights of other state constitutions. Some of the sections most often found are discussed below.

1. Reserved Rights. Many state constitutions contain a section similar to this: "This enumeration of rights shall not be construed to impair or deny others retained by the people." *Print*

This is a good basic statement to have in a Constitution even though what it guarantees would probably be applicable without the statement.

2. Detention of Witnesses. A number of constitutions authorize the detention of witnesses but also grant them protection. The Kentucky Draft uses this language: "No person who may be a material witness in a criminal proceeding may be imprisoned on that ground, but he may be detained for a reasonable period of time for questioning." *2nd*

3. Collectively Bargaining. Some states grant employees in private companies the constitutional right of organizing and bargaining collectively. *70*

4. Thought is being given to protecting citizens against arbitrary administrative action especially since the size of governmental bureaucracy is increasing so rapidly and it is necessary for the General Assembly to delegate broad responsibilities to a number of agencies. The Kentucky Draft included a section of this nature in the Article on the Executive, but the Maryland Draft does not include such a section. For your information, the Kentucky Draft is reproduced on the following page.

1891 Constitution

1966 Revision

vision of present Section 108 allowing the General Assembly to abolish the office of Commonwealth's Attorney or reduce the term is retained. The provisions of present Section 98 are replaced by a new clause providing for annual compensation of the Commonwealth's Attorney to be fixed by law to eliminate reference to a fee system of compensation. The Assembly in its draft placed the Commonwealth's Attorney in Article V to emphasize the position that the office is a state office elected from local districts rather than an office of local government or a district.

§ 21. Administrative Procedure. (1)

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same official for both prosecution and adjudication nor be deprived of liberty or property unless by a prescribed mode of procedure nor shall he be denied the benefit of technical assistance in preparing a defense.

(2) All final decisions, findings, rules and orders of any department, commission, board, bureau or other administrative agency or officer existing under the Constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; and such review shall include the determination whether the same are authorized by law, and in cases in which a hearing is required by law, whether the same are supported by competent and substantial evidence upon the whole record.

Comment: The Revision adds this section to the Constitution. Its inclusion was debated at great length by the Assembly. It was added as an additional personal guarantee against arbitrary administrative action by executive agencies. The guarantee seeks to set up procedural safeguards against arbitrary administrative action, to insure adequate counsel, to secure the right of review of administrative action by the courts, to insure that the same administrative official will not sit as both prosecutor and judge in an administrative case.

The Assembly added this section because of increasing importance of administrative regulations in governing the activities of individuals and of groups. The Assembly felt that safeguards against abuses by administrative action have as much validity, if not more, than safeguards against arbitrary legislative action.

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good
Phenanth
James Lindsey
White Reeves*

5. The complete Declaration of Right as proposed by the Maryland Committee is given in Appendix B.

APPENDIX A

electronic surveillance of a public telephone by means of microphones concealed on the outside of the booth violates the Fourth Amendment.³¹⁹

IV. THE RIGHT OF PRIVACY

A. THE EMERGENCE OF A "RIGHT OF PRIVACY"

The "right of privacy," as one commentator has observed, has become one of the "warmest" phrases in the contemporary language of law and politics.³²⁰ The proliferation in recent years of books, articles and editorials describing the private and public exploitation of technological advances in electronic surveillance³²¹ along with recent disclosures concerning F.B.I. wiretapping and bugging³²² have created considerable concern about the adequacy of legal controls for the preservation of individual privacy and dignity.

The notion that there should be some protection from governmental intrusion into the private "zones" of a person's life, however, is no recent innovation in the law. It has been part of "the staple fare of constitutional litigation for many decades."³²³ Perhaps the most celebrated judicial statement of the privacy protection thought to be implicit in the federal constitution is that contained in the dissenting opinion of Justice Brandeis in *Olmstead v. United States*.³²⁴

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs,

³¹⁹ *Katz v. United States*, cert. granted, 35 U.S.L. Week 3322 (Dkt. No. 895, Mar. 14, 1967). Argument has been scheduled for the October, 1967, term of the court. N. Y. Times, March 14, 1967, p. 27, col. 1.

³²⁰ Dixon, "The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy," 64 Mich. L. Rev. 197, 199 (1964).

³²¹ See, e.g., Packard, *The Naked Society* (1964); Brenton, *The Privacy Invaders* (1964); Dash, Knowlton & Schwartz, *The Eavesdroppers* (1959); Ruebhausen & Brim, "Privacy and Behavioral Research," 65 Colum. L. Rev. 1184 (1965).

³²² See Cipes, "The Wiretap War," *The New Republic*, Dec. 24, 1966, p. 16; Barth, "Lawless Lawmen," *The New Republic*, July 30, 1966, p. 19; N.Y. Times, Dec. 11, 1966, pp. 1, 84; N.Y. Post, Dec. 13, 1966, p. 5.

³²³ Beane, "The Constitutional Right to Privacy in the Supreme Court," 1962 *Sup. Ct. Rev.* 212.

³²⁴ 277 U.S. 438, 478 (1928).

their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be left alone—the most comprehensive of rights and the right most valued by civilized men."

A comprehensive study of the judicial evolution of the concept of privacy is beyond the scope of this study.³²⁵ In the pages that follow, however, an effort has been made to identify some of the more salient developments in the constitutional law of privacy and to suggest some of its implications for the criminal process, with a view toward evaluating the arguments for and against creating a "right of privacy" as a separate guarantee in the New York Constitution.

A celebrated essay by Brandeis and Warren, published in 1890,³²⁶ is frequently cited as the wellspring of the modern law of privacy. Its treatment of the subject, however, was limited to the private or tort law significance of privacy,³²⁷ and did not purport to deal with the public law problem of adjusting the competing interests of the individual and the state.

The recognition of privacy interests as against the claims of governmental action have emerged primarily in cases decided under the First, Fourth and Fifth Amendments, and most recently under the Ninth Amendment of the federal constitution.

In the First Amendment area, a right of "associational privacy" has been articulated in cases invalidating membership disclosure requirements imposed by certain states upon "unpopular" organizations.³²⁸ A notion of "political privacy" has emerged in connection with pertinency requirements for congressional investigations.³²⁹ A "right to anonymity" has acquired prominence in

³²⁵ An extensive and thoughtful study of the subject is contained in a two part article by Professor Allen Westin of Columbia University, "Science, Privacy, and Freedom: Issues and Proposals for the 1970's" (Parts I and II), 66 *Colum. L. Rev.* 1003, 1205 (1966).

³²⁶ "The Right to Privacy," 4 *Harv. L. Rev.* 193 (1890).

³²⁷ Dean Prosser has analyzed the private law concept of "privacy" into four separate torts: (1) intrusion on physical solitude or seclusion; (2) publication of unpleasant, although non-defamatory, information about a person; (3) placing of a person in a false but not necessarily defamatory position in the public eye, and (4) unauthorized commercial use of a person's name or picture. See Dixon, *op. cit. supra* note 320, at 199-200.

³²⁸ E.g., *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *NAACP v. Alabama*, 357 U.S. 449 (1958).

³²⁹ *De Gregory v. Attorney General*, 383 U.S. 825, 829 (1966); *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (concurring opinion); *Watkins v. United States*, 354 U.S. 178, 198-99 (1957).

rulings by the Supreme Court on identification requirements for distribution of handbills³³⁰ and the receipt of political propaganda.³³¹ And a "right to silence" may be implicit in Supreme Court rulings on compulsory flag salute requirements³³² and Bible readings in the public schools.³³³

While the First Amendment has been applied to secure the right of privacy in the realm of ideas, religious conscience and political association, the Fourth Amendment has operated to protect the sanctity of the home and the person from physical intrusions and searches. And it was in the context of the Fourth Amendment that the Supreme Court held that "the security of one's privacy against arbitrary intrusion by the police" was applicable to the states.³³⁴

The Fourth Amendment also has been applied to protect the privacy of oral communications from surreptitious interception by electronic devices.³³⁵ However, the constitutional protection operates only when the eavesdropping is accomplished by means of a physical trespass. Wiretapping and many of the more sophisticated surveillance techniques are not subject to existing federal constitutional limitations.

Another source of constitutional control of governmental invasion of individual privacy is the Fifth Amendment privilege against self-incrimination. Although the privilege traditionally has been confined to prohibit only the compulsion of testimonial communications from an accused,³³⁶ several justices of the Supreme Court have expressed the opinion that the Fifth Amendment, together with the Fourth, covers all private communications with a cloak of privacy that immunizes them from interception by all electronic eavesdropping devices.³³⁷

In 1965, the United States Supreme Court, in *Griswold v.*

³³⁰ *Talley v. California*, 362 U.S. 60 (1960).

³³¹ *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

³³² *West Virginia Bd. of Educ. v. Barnett*, 319 U.S. 624, 642 (1943). See Westin, II *Privacy* 1238.

³³³ See *School Dist. v. Schempp*, 374 U.S. 203, 319 (1963) (Stewart, J. dissenting).

³³⁴ *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

³³⁵ See generally Part III of this chapter.

³³⁶ See *Schmerber v. California*, 384 U.S. 757 (1966).

³³⁷ See, e.g., *Osborn v. United States*, 385 U.S. 323, 340-54 (1966) (Douglas, J., dissenting); *Lopez v. United States*, 373 U.S. 427, 463-71 (1963) (Brennan, J., dissenting) (would confine prohibition to electronic listening devices used to intercept communications in private places).

Connecticut,³³⁸ identified a federal constitutional "right of privacy" independent of the enumerated guarantees of the Bill of Rights. In holding unconstitutional a Connecticut statute making it a crime for married couples to use contraceptive devices, the court spoke of a right of "marital privacy"³³⁹ and, more generally, of "rights of 'privacy and repose'" and of "zones of privacy" that "emanate" from the "penumbras" of the various provisions of the Bill of Rights, including the First, Third, Fourth, Fifth and Ninth Amendments.³⁴⁰ Although the court did not clearly articulate a constitutional theory of privacy outside the realm of marital intimacies, one commentator has suggested that the rationale of *Griswold* "could be advanced to establish that 'emanations' from the Bill of Rights forbid wiretapping and electronic eavesdropping."³⁴¹

The concept of privacy, however, has not always functioned unqualifiably as a vehicle for libertarian ideals. The Supreme Court, for example, has invoked the right of the householder to be free from intrusions upon his privacy by raucous sound trucks³⁴² and door-to-door salesmen³⁴³ as a limitation upon the First Amendment freedom of expression. Nor, as one commentator has suggested, is the concept of "privacy" a purely benevolent symbol, for in one sense it suggests "secrecy," with its sinister connotations of "forbidden conspiracies and its hostility to 'the stand up and be counted' slogan . . . of a robust and fearless society."³⁴⁴ And in a recent opinion,³⁴⁵ the Supreme Court made it clear that the interest in preserving individual privacy may, in certain instances, be subordinate to other values protected by the constitution; that "exposure of the self to others in varying degrees is a concomitant of life in a civilized community."³⁴⁶

³³⁸ 381 U.S. 479 (1965).

³³⁹ *Id.* at 486.

³⁴⁰ *Id.* at 484-85.

³⁴¹ McKay, "The Right of Privacy: Emanations and Intimations," 64 *Mich. L. Rev.* 259, 278 (1965). "If there is a right to marital privacy in the home, why should there not be as well a right of privacy in the home or place of business against the unwelcome intrusion of uninvited participants in conversations intended to be private?" *Ibid.*

³⁴² *Kovacs v. Cooper*, 336 U.S. 77 (1949).

³⁴³ *Breard v. Alexander*, 341 U.S. 622 (1951).

³⁴⁴ Dixon, *op. cit. supra* note 320, at 201-03.

³⁴⁵ *Time, Inc. v. Hill*, 379 U.S. 149 (1964).

³⁴⁶ *Id.* at 542. *Time* involved a suit under the New York "right of privacy" statute (Civil Rights Law, §§50-51) which prohibits the appropriation and use in advertising or to promote the sale of goods, of another's name, portrait or picture without his consent. It has been more broadly construed to authorize a remedy

APPENDIX B

I

STATE of MARYLAND

Draft Constitution

ARTICLE I. DECLARATION OF RIGHTS

Section 1.01. Purpose of Government.

All political power originates in the people and all government is instituted for their liberty, security, benefit and protection.

Section 1.02. Freedom of Expression.

The people shall have the right peaceably to assemble and to petition the government for the redress of grievances. Freedom of the press and freedom of speech shall not be abridged, each person remaining responsible for abuse of those rights.

Section 1.03. Freedom of Religion.

No law shall be enacted respecting an establishment of religion. Every person shall have the right to worship or not to worship as he thinks most acceptable, and no person shall be disqualified from holding public office or be rendered incompetent as a witness or juror because of his opinion on matters of religious belief.

Section 1.04. Due Process.

No person shall be deprived of life, liberty or property without due process of law, or be denied the equal protection of the laws, or be subject to discrimination by law or other governmental action because of religion, race, color, or national origin.

Section 1.05. Eminent Domain.

Private property shall not be taken for public use without just compensation.

Section 1.06. Jury Trial in Civil Cases.

Every person shall have the right of trial by jury of issues of fact in civil proceedings at law in the courts of this State in which the amount or value in controversy exceeds such minimum as may be fixed by law.

CONSTITUTIONAL CONVENTION COMMISSION

Section 1.07. Legal Limitations.

No bill of attainder, or *ex post facto* law, or law impairing the obligation of contracts shall be enacted, nor shall any conviction of crime work corruption of blood or forfeiture of estate.

Section 1.08. Search and Seizure.

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and in their oral or other communications against unreasonable interceptions shall not be violated. No search warrant shall be issued except upon probable cause supported by oath or affirmation, and the place to be searched, the persons or things to be seized, or the communications sought to be intercepted shall be particularly described in the warrant.

Section 1.09. Rights of Accused.

A person accused of crime shall have the right to be informed of the charge against him in time to prepare his defense, to have the assistance of counsel in his defense, to be confronted with and to examine under oath or affirmation the witnesses against him, to have compulsory process for obtaining witnesses and to have a speedy and public trial in the jurisdiction where the crime is alleged to have been committed and before an impartial jury, without whose unanimous consent he shall not be adjudged guilty.

Section 1.10. Double Jeopardy; Self-Incrimination.

No person shall be twice put in jeopardy of criminal punishment for the same offense or be compelled in any criminal case to be a witness against himself.

Section 1.11. Unusual Punishment.

Excessive bail shall not be required. Neither excessive fines nor cruel and unusual punishment shall be provided by law or be imposed by the courts.

Section 1.12. Habeas Corpus.

The privilege of the writ of habeas corpus shall not be suspended and the provisions of this Constitution shall apply both in time of war and in time of peace.

Section 1.13. Reserved Rights.

This enumeration of rights shall not be construed to impair or deny others retained by the people.

ARTICLE II. SUFFRAGE AND ELECTIONS

VOTERS

Section 2.01. Eligible Voters.

Every citizen of the United States who has attained the age of twenty-one years, who has been a resident of this State for six months and of the House of Delegates district in which he offers to vote for three months next preceding an election, and

Possible New Article to the Constitution

Many students of state Constitutions feel that stronger emphasis should be given to the Powers of the State Government and the Division of these Powers among the three branches of government. In order to do this, they suggest that a new article be created. This new article would not really do anything different or actually give additional powers. It would simply give emphasis.

In the case of South Carolina, this would mean transferring the section on the separation of powers from the Declaration of Rights to the New Article and adding another section embracing the ideas contained in the 10th Amendment of the U. S. Constitution.

The Proposed Kentucky Constitution did this and the Model Constitution suggests a separate Article pertaining to powers of government.

The following sections show the wording of the new Article carrying out this reasoning:

ARTICLE II ????

Powers of the State

Section 1. Powers of Government. The enumeration in this Constitution of specified powers and functions shall be construed neither as a grant nor as a limitation of the powers of state government but the state government shall have all of the powers not denied by this constitution or by or under the Constitution of the United States. (Based on the Model Constitution.)

Section 2. Departments of Government Separate. In the government of this State the legislative, executive, and judicial powers of the Government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other. (Article I, section 14, of the present S. C. Constitution.)