"FOR THE COMMON BENEFIT": CONSTITUTIONAL HISTORY IN VIRGINIA AS A CASEBOOK FOR THE MODERN CONSTITUTION-MAKER

A. E. Dick Howard*

This Article, using the early history of the Virginia Constitutions as a model, explores some of the great themes of state constitutional thought in America—among them the nature of a constitution, what values constitutions embody, how constitutions evolve, what scheme of representation they create, what relations they establish among the branches of government, and state constitutions in a federal system. The Article is in two parts. The first part recounts the highlights of Virginia's constitutional development in the early years, with emphasis on the great constitutional convention of 1829-30. The second part analyzes the relevance which this early history has to modern problems in four areas: (1) constitutional theory, (2) suffrage and representation, (3) the frame of government, including the relations among the three branches of government, and (4) comparative state constitutionalism and state constitutions in the federal system.

TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>PART I—A VENTURE IN SELF-GOVERNMENT: CONSTITUTIONAL DEVELOPMENT IN VIRGINIA</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>THE CONVENTION OF 1776</td>
<td>819</td>
</tr>
<tr>
<td>ADOPTING THE DECLARATION OF RIGHTS</td>
<td>822</td>
</tr>
<tr>
<td>STRUCTURING A FRAME OF GOVERNMENT</td>
<td>825</td>
</tr>
<tr>
<td>THE JOINING OF BATTLE FOR REFORM</td>
<td>828</td>
</tr>
</tbody>
</table>

*Associate Dean and Professor of Law, University of Virginia School of Law. B.A., 1954, University of Richmond; LL.B., 1961, University of Virginia; B.A., 1960, M.A., 1965, Oxford University. Professor Howard is Executive Director of the Virginia Commission on Constitutional Revision. The views expressed in this Article are those of the author. The phrase "for the common benefit" which appears in the title is drawn from Section 3 of the Virginia Declaration of Rights of 1776. The author would especially like to thank Professor Merrill D. Peterson of the University of Virginia for kindly reading the manuscript and offering suggestions.
"For the Common Benefit" 817

THE CONSTITUTION OF 1776 AS FUNDAMENTAL LAW 832
GROWING SOCIAL STRESS AND THE REFORM MOVEMENT 838
THE CONVENTION OF 1829-30 848
REFORM ACHIEVED 857

PART II—HISTORY AND MODERN CONSTITUTION-MAKING 859
CONSTITUTIONAL GOVERNMENT 860
The Place of General Principles in Framing Constitutions 860
The Nature and Uses of a Constitution 863

REPRESENTATIVE GOVERNMENT 869
Suffrage 869
Representation 874

THE FRAME OF GOVERNMENT 881
The Separation of Powers 881
The Legislative Branch 883
The Executive 887
The Judiciary 890

VIRGINIA'S GOVERNMENT IN A FEDERAL SYSTEM 894
Virginia's Self-Awareness 894
The Place for Comparative Data 895
The State in the Federal Union 897

CONCLUSION 901
PART I: A VENTURE IN SELF-GOVERNMENT: CONSTITUTIONAL DEVELOPMENT IN VIRGINIA

In April 1776 John Page "snatched a few Moments" from affairs in Williamsburg to write a letter to Thomas Jefferson, then a member from Virginia in the Continental Congress in Philadelphia. Events were rapidly bringing the crisis between the American colonies and Great Britain to a head, and Page thought it well to give Jefferson details of Virginia's "present critical Situation" and steps which ought to be taken by the colony's leaders.\(^1\)

The situation was indeed critical. In December 1775 the Continental Congress had received a letter from the Committee of Northampton County, Virginia, reporting that Lord Dunmore had declared martial law, had called on the slaves to join him, and had taken other steps to put down disaffection in Virginia. Congress had responded by ordering the fitting out of armed vessels to engage Lord Dunmore's ships in Chesapeake Bay and also to put a stop to Tories in lower Virginia from exporting goods in violation of the colonial non-exportation agreement.\(^2\)

Two days later Congress had ordered three companies of Pennsylvania troops into Northampton County, Virginia. Moreover, Congress had resolved that, should Virginia find it necessary to form a new government in place of that existing under royal authority, the Virginia Convention should call a "full and free representation of the people" who might establish "such form of government as in their judgment will best produce the happiness of the people, and most effectually secure peace and good order in the colony, during the continuance of the present dispute between Great Britain and these colonies."\(^3\)

On New Year's Day, 1776, patriots reported the bombardment and burning of the city of Norfolk. This act, together with other "flaming arguments" raining destruction on places like Falmouth (Portsmouth), Maine, heightened the already growing sense of solidarity among the colonies. To emotions thus fired were added the compelling arguments of Thomas Paine, whose *Common Sense* was published that same January. With armed conflict already underway, John Page, in his April letter to Jefferson, wondered how long the people, having submitted to the hardships entailed by the dispute with Great Britain, would continue

---

\(^1\) Letter of April 26, 1776, in 1 PAPERS OF THOMAS JEFFERSON 288 (J. Boyd ed. 1950) [hereinafter cited as JEFFERSON PAPERS (Boyd ed.)].

\(^2\) JOURNALS OF THE CONTINENTAL CONGRESS 395-96 (1775).

\(^3\) Id. at 403-04.
to behave so peaceably and with such restraint even though regular
government was not functioning. Page submitted that "to prevent Dis-
orders in each Colony a Constitution should be formed as nearly resem-
bling the old one as Circumstances, and the Merit of the Constitution
will admit of." 4

The period was one of interregnum. Royal authority was collapsing,
and since August 1774 Virginia had in effect been ruled by a series of
conventions. But the disintegration of royal authority did not mean
that there was a complete break between the way in which Virginia
had been governed before 1774 and the way it would be governed
thereafter. Royal authority, as exercised by the executive in Virginia,
might be rejected, but there was very real continuity in the legislative
process: the members of the first convention, in 1774, were largely the
same people who had sat in the last House of Burgesses before the disso-
lution of that body by the colonial governor.

The Virginia conventions between 1774 and 1776 behaved as the
government of Virginia. They passed non-importation resolutions and
appointed delegates to the Continental Congress. They passed measures
providing for military defense of the colony and its people, and they
acted to ensure consultation and cooperation both among the counties
within Virginia and by the colony with its sister colonies. In July 1775
the members supplied the want of an executive by creating a Committee
of Safety with sweeping powers, especially as to military matters. In
December 1775 the convention, faced with Lord Dunmore's procla-
mation of martial law, attended to the need for the administration of
justice by providing for the appointment of sheriffs by the county
courts. 5

The Convention of 1776

When the convention of May 1776 assembled in Williamsburg, it
contained the colony's best talent, save for those who, like Thomas
Jefferson and Benjamin Harrison, were sitting with the Congress in
Philadelphia. From Hanover County came Patrick Heury, who had
electrified the 1775 convention in Richmond with his "Liberty or

---

4 Letter of April 26, 1776, in 1 JEFFERSON PAPERS 288 (Boyd ed.).
5 Journal of the Convention, March 23, 1775, at 5 (military defense); Ordinances
of the Convention, July, 1775, at 35, 43-44, 46 (Committee of Safety); Journal of the
Convention, December 30, 1775, at 79; in THE PROCEEDINGS OF THE CONVENTIONS OF
DELEGATES FOR THE COUNTIES AND CORPORATIONS IN THE COLONY OF VIRGINIA (1816)
[hereinafter cited as PROCEEDINGS].
Death” speech. Orange County sent young James Madison, then at 25 years of age beginning the long career which would carry him to the presidency. From Williamsburg came Edmund Randolph, at 22 the convention’s youngest member; later he would attend the convention which framed the Federal Constitution in 1787 and then become the new nation’s first Attorney General. These were but some of the notable names in an assembly which, as events would have it, was to leave an indelible mark on the constitutional history of the American continent.

The question uppermost in the minds of the delegates was that of independence, and several resolutions were proposed. Some of them, such as that of Meriwether Smith, would have flatly declared the bond between Great Britain and the colony dissolved. But the resolution finally adopted by the convention looked instead to united action by the colonies. Passed on May 15, 1776, it called on Virginia’s delegates in Congress to move that Congress declare the United Colonies free and independent.

The form of the resolution of May 15 is of special interest in tracing constitutional development of the time. After the recitation of the acts of the British government which brought the convention to seek independence, the document has two resolutions, each agreed to unanimously by the delegates. The first instructs the delegates in Philadelphia to move for independence. The second says that a committee shall be appointed “to prepare a DECLARATION OF RIGHTS, and such a plan of government as will be most likely to maintain peace and order in this colony, and secure substantial and equal liberty to the people.” In short, in the minds of those who drafted and passed the resolutions, to sever relations with one government implied the necessity to provide for another. Moreover, to create a new government required two acts: provision for the structure and powers of government, and a declaration of those rights which should be beyond the reach of government. It is significant that in the actual resolution, provision for a bill of rights precedes mention of a plan of government. Those members of the 1776 convention steeped in Lockean notions of the social contract might well have considered themselves in a “state of nature” upon the dissolution of the bond with Great Britain. Thus, to declare man’s natural rights was a logical step en route to forming a new social compact.

The convention had before it a number of plans for a constitution.

6 2 D. MAYS, EDMUND PENDLETON 106 (1952).
7 1 JEFFERSON PAPERS 290-91 (Boyd ed.).
8 Id.
As early as November 1775, John Adams had offered his ideas on a constitution for Virginia in a letter to Richard Henry Lee, and the letter was followed in January 1776 by Adams' *Thoughts on Government*, written at the request of George Wythe and published by Lee with Adams' consent. Adams' plan was democratic in content and appealed both to Lee and to Patrick Henry. In April 1776 Lee sent Adams' pamphlet to Henry, with the comment, "It is sensible and shows the virtue of the man . . . ."⁹ In May Henry wrote Adams, expressing hope that Adams' plan would be well received by the Virginia convention.¹⁰ A proposal rather like that of Adams was printed in the *Virginia Gazette* for May 10, 1776 (just after the convention had assembled). William Wirt Henry suggests that Lee, drawing heavily on Adams' plan, wrote the *Gazette* proposal and that Patrick Henry was responsible for its being printed.¹¹

Quite another kind of plan was the aristocratic document attributed to Carter Braxton and published under the title *Address to the Convention of the Colony and Ancient Dominion of Virginia . . . By a Native of the Colony*.¹² Braxton apparently believed the British Constitution, in the form it took after the Glorious Revolution of 1688, was the best model for the new Virginia constitution. His proposal was especially obnoxious to Henry, who called it "an affront and disgrace to this country," and to Lee, who dismissed it as "This Contemptible little Tract."¹³

Jefferson too had his ideas. On May 19 he wrote Thomas Nelson from Philadelphia opining that in Virginia's upper counties "nine out of ten people" were for independence and hoping that Nelson would press the Virginia convention for early action on the "great questions of the session," including instructions to the delegates in Philadelphia on independence. Jefferson added the broad hint that should the Virginia convention "propose to establish now a form of government perhaps it might be agreeable to recall for a short time their delegates."¹⁴ In other

---

⁹Letter of April 20, 1776, in 1 Letters of Richard Henry Lee 179 (J. Ballagh ed. 1911).

¹⁰G. Morgan, *Patrick Henry* 263 (1929). The same day Henry wrote Lee, declaring, "I own myself a Democrat on the plan of our admired friend, J. Adams, whose pamphlet I read with great pleasure." Letter of May 20, 1776, in *id*.


¹³1 The Letters of Richard Henry Lee 190 (J. Ballagh ed. 1911); 4 The Works of John Adams 202 (C. Adams ed. 1856).

¹⁴J. Jefferson Papers 292 (Boyd ed.) At the writing of this letter, Jefferson of course
words, if Virginia was going to have a new frame of government, Jefferson wanted to be there to have his say about it.

Jefferson set about giving his political philosophy concrete form in several drafts of a constitution for Virginia. George Wythe, Jefferson's onetime law teacher and a member of the convention, showed the plan which Jefferson had sent him to those working on the proposed constitution. However, as Wythe wrote to Jefferson in July 1776, the work was far enough along and the convention impatient enough for action that only parts of Jefferson's plan were adopted.15

Though the Virginia Constitution of 1776, as evolved in the convention, was not the product of any one hand, its chief architect was the able George Mason. In 1766, ten years before the convention, when the colonies were in an uproar over the Stamp Act and other British policies, Mason had written that the American colonists claimed "nothing but the liberty and privileges of Englishmen, in the same degree, as if we had still continued among our brethren in Great Britain . . . ."16 Mason, through access to his uncle's large library, was well grounded in law and constitutional theory. Among other things, he had firsthand acquaintance with the early Virginia charters and their guarantees to settlers in Virginia of the "liberties, franchises, and immunities" of Englishmen, for he had had occasion in 1773 to study and make extracts from those charters in preparation for a case involving claims to lands in Fincastle County.17 In 1774 Mason had written the Fairfax County Resolves, which had decried the destruction of "our ancient laws and liberty, and the loss of all that is dear to British subjects and freemen" and had resolved to form a militia company in Fairfax County to defend "the principles of the English Constitution."18

Adopting the Declaration of Rights

These years of reflection upon the "liberties, franchises, and immunities" of Englishmen and the heritage of the British Constitution as understood not know that the day before, the Virginia convention had passed its resolutions concerning independence and a new government. In later years, Jefferson was to question the authority of the 1776 convention to make a new constitution, at least one which was superior to an ordinary statute. Whether his later views can be reconciled with what he said and did in 1776 is open to question.

15 Letter of July 27, 1776, in id. at 476-77.
16 Letter to the Committee of Merchants in London, June 6, 1776, in 1 K. ROWLAND, LIFE OF GEORGE MASON 387 (1892).
17 See id. at 393-418.
18 Id. at 427-30.
stood in the American colonies served Mason well when the Virginia convention of 1776 turned to the task of making a constitution. It is not far off the mark to say that the Virginia Declaration of Rights (most of which came from Mason's draft), and the other bills of rights which largely followed it, were in good part "restatement[s] of English principles—the principles of Magna Charta, the Petition of Right, the Commonwealth Parliament, and the Revolution of 1688." 19

As previously noted, the convention had resolved that a statement of the fundamental rights which should be protected from government was thought to be a necessary first step. It is obvious from a reading of the Virginia Declaration of Rights that those who undertook this initial task owed a debt to England's liberty documents.20 Some of the 1776 provisions have exact counterparts in an English document. For example, the Virginia declaration "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" is identical to the tenth section of the English Bill of Rights of 1689.21 Other 1776 provisions draw more generally on British constitutional doctrines. The principle, for example, that the people should not be taxed except with their consent is a doctrine which Englishmen had traced to Magna Carta and had developed over the centuries.22

The Declaration of Rights adopted by the 1776 convention was, however, more than a restatement of the principles of the British Constitution. No Englishman could, for example, have said that the British Constitution of his day was founded on the doctrine, articulated in the 1776 document, that "all power is vested in, and consequently derived from, the people . . . ", nor could he have made the Virginia declaration that when a government be found ineffective to secure the common welfare "a majority of the community hath an indubitable, inalienable, and indefeasible right, to reform, alter, or abolish it . . . ." 23 And it is to the teachings of natural law, rather than to the dictates of the British Constitution, that we owe the first section of the Virginia Declaration of Rights: "That all men are by nature equally free and independent, and

20 See PROCEEDINGS, ORDINANCES OF THE CONVENTION, May 6, 1776 at 3-4 (hereinafter cited as ORDINANCES).
21 1 WM. & MARY, sess. 2, c. 2. For the text of the English Bill of Rights, see SOURCES OF OUR LIBERTIES 245-50 (Perry ed. 1959).
22 For the text of Magna Carta, see A. HOWARD, MAGNA CARTA: TEXT AND COMMENTARY (1964).
23 ORDINANCES No. 2, at 3; id. No. 3, at 3.
have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."  

The process of adoption of the Declaration of Rights gave an opportunity for the airing of fundamental issues of political and constitutional theory. Mason proposed a bill of rights which contained most of the provisions which appear in the final document. Several additions were proposed, some by Mason himself, so that probably fourteen of the sixteen provisions finally approved can be attributed to Mason. When the Declaration was reported out of committee on May 27 for debate by the full convention, the more aristocratic members complained of its egalitarianism. Robert Carter Nicholas, who had been Treasurer of the Colony, thought the declaration that all men were by nature equally free and independent was "the forerunner of pretext or civil convulsion." On June 1 Thomas Ludwell Lee wrote his brother, Richard Henry Lee, that "a certain set of aristocrats, for we have such monsters here," were delaying the approval of such leveling language. But, as Lee noted, a majority wanted the language, and it stayed in the Declaration of Rights. 

The form which a guarantee of religious freedom should take also provoked controversy. Mason's draft, as considered by the committee, provided "that all Men should enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience ...." The emphasis on toleration reflected the views of John Locke in his Letter on Toleration and could be taken to ensure only a limited form of religious liberty: toleration of dissenters in a state where there was an

---

24 Id. No. 1, at 3.
25 1 I. BRANT, JAMES MADISON, THE VIRGINIA REVOLUTIONIST 237 (1941).
26 On the influence of the committe draft of the Virginia Declaration of Rights on the constitutions of other states, see Pittman, Book Review, 68 VA. MAG. HIST. & BIOG. 109, 110-12 (1960).
27 Edmund Randolph's manuscript history of Virginia, in 44 VA. MAG. HIST. & BIOG. 35, 45 (1936). To the argument that slaves could claim the natural right to be free and independent, Randolph noted:

It was answered, perhaps with too great an indifference to futurity, and not without inconsistency, that with arms in our hands, asserting the general rights of man, we ought not to be too nice and too much restricted in the delineation of them; but that slaves not being constituent members of our society could never pretend to any benefit from such a maxim.

Id.
28 1 K. ROWLAND, supra note 16, at 240.
29 1 PAPERS OF JAMES MADISON 172-73 (W. Hutchinson & W. Rachal eds. 1962).
established church. The committee, in reporting out the Declaration of Rights, largely followed Mason's wording.\textsuperscript{30} James Madison believed that stronger language was needed and drafted a substitute declaring that "all men are equally entitled to the full and free exercise" of religion and therefore "that no man or class of men ought, on account of religion to be invested with any peculiar emoluments or privileges . . . ." \textsuperscript{31} Madison's draft, substituting the language of entitlement for that of toleration, sounded more nearly of a natural right than did Mason's version. Moreover, the ban on emoluments or privileges would have disestablished the Anglican Church in Virginia and probably also barred state support of religious sects generally. Thus Madison seems to have drafted a provision having the dual effect associated in federal constitutional law with the First Amendment's guarantee of free exercise of religion and its proscription against the establishment of religion.

Madison, a very junior member of the convention and not an effective speaker, persuaded Patrick Henry to move the amendment. But when Henry was asked whether the motion implied disestablishment, he "disclaimed such an object." \textsuperscript{32} Madison then drafted a second amendment, which retained the language of equal entitlement to the free exercise of religion but dropped the clause suggesting disestablishment.\textsuperscript{33} The essential language of this amendment was brought into the religion article finally approved by the convention,\textsuperscript{34} and the question of disestablishment remained to be settled in 1786 with the passage of Thomas Jefferson's Statute for Religious Freedom.\textsuperscript{35}

\textit{Structuring a Frame of Government}

The Declaration of Rights having been passed on June 12, the convention settled down to serious work on the form of government. An examination of the proposals presented to the convention and the reactions they produced reveals much about both the process of constitution making and the issues that process engenders.

Mason's plan,\textsuperscript{36} laid before the committee in early June, provided that

\textsuperscript{30} Id. at 173.

\textsuperscript{31} Id. at 174.

\textsuperscript{32} Randolph, supra note 27, at 47.

\textsuperscript{33} See 1 PAPERS OF JAMES MADISON, supra note 29, at 174-75.

\textsuperscript{34} Id. at 175. For a fuller account of Madison's role in amending the religion article of the Declaration of Rights, see 1 I. BRANT, supra note 25, at 243-50.

\textsuperscript{35} 2 JEFFERSON PAPERS 545-53 (Boyd ed.). The provisions of the Bill have since been put into the Virginia Constitution. Va. Const. art. IV, § 58.

\textsuperscript{36} George Mason played a key role in the adoption of a frame of government, just
legislative, executive, and judicial branches should be "separate and distinct, so that neither exercise the powers properly belonging to the other." The Legislature would consist of a Lower and an Upper House, the former to be elected directly, the latter to be elected by a kind of electoral college system. The Governor would be elected by joint ballot of the two houses and could exercise his executive powers jointly with the Privy Council. Judges would be appointed by the Legislature, and county courts would be given a considerable hand in the selection of county officers. Suffrage would be restrictive.\(^3\)

The plan of government underwent a number of changes, both in committee and on the floor of the convention. Though the basic model around which the amending process revolved remained Mason's draft, the process gave the opportunity to work in some of Jefferson's ideas, drawn from a draft constitution worked up by Jefferson and sent by him to Williamsburg.\(^8\)

The plans of Adams, Mason, Jefferson, and others circulated in 1776, and the discussion surrounding their evolution towards the final version, reveal interesting areas of consensus and, at the same time, significant points of dispute. Just as there was little difficulty in agreeing on many of the guarantees of individual liberties well known to English law, so in creating a form of government some principles commanded wide assent among people of otherwise varying shades of opinion. Most notable was the agreement, in all the plans put forward, on the principle of the separation of powers. Conceived by Montesquieu to be a cardinal virtue of a good political system, the doctrine of the separation of powers had by the time of the American Revolution become an article of faith with Americans. There is no evidence that there was any serious

---

1 Jefferson Papers 296 (Boyd ed.).

37 For Mason's original plan of government, see id. at 366-69.

38 The Constitution as adopted included a detailed bill of particulars against George III drawn from Jefferson's draft. (It was an earlier Jefferson draft for a Virginia constitution which apparently served as the basis for Jefferson's draft of the Declaration of Independence.) Id. at 332. Some other Jefferson proposals (e.g., relating to western lands) were either incorporated into or influenced the wording of the Constitution as finally adopted by the convention. Id. at 331, 337, 383-86.
question, during the process of adopting the 1776 Constitution, that separation of powers would be built into that document.

In truth separation of powers was more a theory than a fact under the 1776 Constitution. All proposals embodied the doctrine, yet all of them, including that of Jefferson, created a weak Governor, elected by the Legislature and hardly coordinate with it in power or dignity. Jefferson’s views in this regard later changed considerably, largely as a result of his own experience as Governor, and in his 1783 proposals for revising the Virginia Constitution Jefferson had a number of ideas for strengthening the executive power.  

If the theory of separation of powers was something people could agree on, the 1776 Constitution carried in it the seeds of divisive controversy on other points. Though the convention of 1776 did not retain Mason’s suffrage proposals, it did provide for a limited suffrage. The constitution’s statement that the right of suffrage “shall remain as exercised at present” meant that, as under existing colonial law, the vote went with the ownership of a specified amount of land. Payment of taxes or fighting in the militia did not, unless one also met the property requirements, confer the right to vote. With a restricted franchise went a system of representation in the Legislature in which seats were not apportioned according to population. Each county, regardless of population, was to have two delegates, while the Senate was to be elected from twenty-four districts. By contrast, Jefferson’s plan, although retaining a modest freehold requirement for the suffrage, required that each county’s or borough’s representatives should be proportioned to the number of its qualified electors.  

Hopes and doubts were expressed about the new constitution by those who were there when it was made. Richard Henry Lee wrote Charles Lee on June 29 from Williamsburg: “The desire of being here at the formation of our new Government brought me from Philadelphia the 13th of this month. I have been in this City a week where I have had the pleasure to see our new plan of Government go on well. This day will put a finishing hand to it. ’Tis very much of the democratic kind . . . .” Lee sketched the main features of the plan of government and concluded, “These are the outlines of our political machine, which I

---

39 Id. at 281.
40 1 id. at 380.
41 Id. at 379.
42 Id. at 358.
hope is sufficiently guarded against the Monster Tyranny.” 43 George Wythe was more dubious. On July 27 he wrote Jefferson to say, “The system agreed to in my opinion requires reformation,” and Wythe expressed his hope that at the October session of the General Assembly Jefferson could effect such reform.44

The Joining of Battle for Reform

Wythe was not alone in hoping that there would be early action to remedy the defects of the just-adopted constitution. The year 1776 was not out before those hoping to revise the 1776 document had fired the first shots in what was to be a war between reformers and defenders of the status quo which lasted over half a century before any formal body was convened to revise the constitution.

In fall of 1776 the inhabitants and freeholders of Albemarle County drafted instructions for their representatives in the General Assembly, which convened on October 7. They found no fault with the Declaration of Rights, terming it “truly a master piece,” but they compiled an impressive list of defects they would remedy in the frame of government. Among the more important points they laid down were (1) that there be some regular method of assembling the people to make major changes in the government, (2) that representatives should be returned to private life at regular intervals, (3) that freemen should have the vote, (4) that representation in the Assembly should be proportionate to the number of electors, and (5) that no one ought to be obliged to contribute to the support of any minister of religion.45 Some of these issues, especially suffrage and representation, were to be central among the disputes of the next half century and more.

The Albemarle Instructions sounded a characteristically Jeffersonian theme in demanding genuinely popular self-government. Once the recommended reforms had been incorporated into a plan, the Instructions called for taking the sense of the people, meeting at their respective courthouses, on the plan: “It is our opinion, that among the rights, of which men cannot deprive, or divest their Posterity, the most important is that of approving, or disapproving, their own laws; which power ought forever to remain with the whole body of the people.” And the Enlightenment ideals of Jefferson appeared quite clearly in the call for

43 1 The Letters of Richard Henry Lee 203 (J. Ballagh ed. 1911).
44 1 Jefferson Papers 477 (Boyd ed.).
45 6 id. at 284-90.
relief from the "piercing thorns" of such relics as entail, prerogative, and the established Church, and in the document's conclusion: "To reduce our wishes to one point, we recommend, that this grand work may be calculated to rule mankind considered in their natural state, free from all prejudices of custom, as the only means to ensure happiness to our Posterity, as far as it lies in the power of men, under a just and lasting Government." 46

Jefferson's own attitude toward the 1776 Constitution was made clear in his famous Notes on the State of Virginia.47 In the Notes Jefferson ranged widely and with remarkable versatility over many topics, one of them being the Constitution of Virginia. In the few pages (Query XIII) which he devoted to the Constitution, Jefferson sketched the outlines of what were to be the principal reform arguments for years to come.

Suffrage and apportionment were special targets of attack—as they were to be even after the convention of 1829-30. Jefferson's indictment of the existing franchise was simple and telling: "The majority of the men in the state, who pay and fight for its support, are unrepresented in the legislature, the roll of freeholders entitled to vote, not including generally the half of those on the roll of the militia, or of the tax-gatherers." And his indictment of the malapportionment in the Legislature was equally vivid: "Among those who share the representation, the shares are very unequal. Thus the county of Warwick, with only one hundred fighting men, has an equal representation with the county of Loudon, which has 1746. So that every man in Warwick has as much influence in the government as 17 men in Loudon." So badly apportioned was the Legislature, Jefferson concluded, that 19,000 men living below the fall line of Virginia's rivers could control the Assembly and give laws to upwards of 30,000 men living in the rest of the State.48

46 Id. at 286-90. Additional instructions from Albemarle were sent soon thereafter, again making the point that maximum power should be left in the people. Id. at 291-94. There are certain striking similarities between the Albemarle Instructions and Jefferson's 1783 draft for a Virginia constitution, and it is likely that his draft was influenced by the 1776 Instructions. However, it has been concluded that there is no evidence for regarding Jefferson as a co-author of the Instructions. See id. at 282.

47 The Notes were prompted by a list of enquiries put by François Marbois, secretary of the French legation at Philadelphia in 1780. Jefferson worked on the Notes from time to time, as other activities permitted, and though not originally intended for publication they were finally printed in 1785, the first of a number of editions. See Notes on the State of Virginia xi-xxv (W. Peden ed. 1955).

48 3 Writings of Thomas Jefferson 222-23 (P. Ford ed. 1892) [hereinafter Writings of Jefferson (Ford ed.)]. The passages quoted here from Jefferson's Notes should
Jefferson's quarrel with the 1776 Constitution was more fundamental even than such basic issues as suffrage and representation. In the first place, he maintained that when the delegates to the 1776 convention were elected the people had neither independence nor the formation of a new government in mind. Therefore that convention, while it might act as a legislature, had no mandate to establish a constitution superior to ordinary statutes. Using that belief as his postulate, Jefferson deduced that the General Assembly could alter the "constitution" at will, that document being no more than any other statute. This being too slender a reed on which to rest the people's rights, Jefferson argued that a convention should be called to draft a proper constitution resting "on a bottom which none will dispute."

Jefferson had another reason to fear the power of the legislative branch: the fact that the theory of the separation of powers was little more than a fond hope in the existing constitution. "All the powers of government, legislative, executive, and judicial," Jefferson submitted, "result to the legislative body. The concentrating of these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one."

In 1783 Jefferson, believing that a convention might be called to revise the 1776 document, tried his hand at drafting a new constitution. His draft proposal in 1776 had been his first effort at reducing his political theories to practical application. That document had reflected many of the fundamental ideas associated with Jefferson: consent as the basis of government, the requirement that the constitution could be amended only by the people, equitable apportionment of representation in the Legislature, freedom of conscience, abolition of prerogative and other unrepublican relics, and encouragement of free landholding. But as Jefferson observed in his Notes on the State of Virginia, the 1776 Constitution was formed "when we were new and inexperienced in the science of government. It was the first, too, which was formed in the

suggest, quite apart from grasp of the subject matter, Jefferson's talent for the incisive use of the English language.

49 But see Letter from Jefferson to Thomas Nelson, May 16, 1776, quoted supra text at note 14.

50 3 WRITINGS OF JEFFERSON 225-29 (Ford ed.).

51 Id. at 223.

52 1 JEFFERSON PAPERS 356-64 (Boyd ed.).
whole United States." Thus Jefferson's own ideas had developed since 1776, especially during his short and unhappy tenure as Governor (1779-81). Accordingly, while some of Jefferson's 1783 proposals were consistent with his thinking in 1776—for example, the need for apportionment based on the number of qualified electors—other provisions were new. Chief among the latter were proposals which would enhance the powers of the Governor and reduce those of the Council of State, hitherto a partner in the executive power.

Leading figures in Virginia debated whether the time—1783, the year of the peace treaty with Great Britain and a somewhat turbulent period at home—was right for the delicate task of constitutional revision. George Mason, the father of the 1776 Constitution, thought that it might be better to defer the question of revision, but as Mr. Justice Clark has remarked, nearly two centuries later in another context, "It has been said that an author is always pleased with his own work." Like Jefferson, James Madison (to whom Jefferson sent a copy of his draft for a new constitution) thought that those who wanted reform should push ahead for a convention. Extant notes in Madison's handwriting record the outline of a speech made by him in the May 1784 session of the General Assembly calling for a convention to revise the constitution. With Jefferson, Madison argued a want of authority in the 1776 convention to create a constitution and preferred that the people have a chance to pass on the document, whether it be to ratify the existing constitution or to adopt a new one. Madison also touched on specific reforms he sought, notably an end to the concentration of powers in the Legislature, lessening of the dependence of the executive and judicial branches on the legislative, and equality in representation. However, when the question of a convention came to a vote in the General Assembly, Richard Henry Lee, who favored the motion, was

---

53 3 *Writings of Jefferson* 222 (Ford ed.).
54 6 *Jefferson Papers* 296 (Boyd ed.).
55 Id. at 298-300.
56 Letter to William Cabell, May 6, 1783, in 2 K. Rowland, *supra* note 16, at 44. Mason also wondered whether the Assembly properly could have a convention revise the Constitution without approval by the people, a concern closer to the views of Jefferson. *Id.*
57 Cox v. Louisiana, 379 U.S. 559, 585 (1965) (dissenting opinion). The question was whether the Court would declare void for vagueness a Louisiana statute which banned certain picketing of courthouses and which was identical to a federal statute protecting federal courts from picketing.
58 See 1 *Letters & Other Writings of James Madison* 82-83 (Lib. of Cong. ed. 1865).
ill and therefore absent, and Patrick Henry was opposed. The convention bill failed.\(^59\)

The years ahead were to be long ones for the forces of reform. What happened in 1784—the defeat of a bill calling for a constitutional convention—was to happen repeatedly over the next four decades until forces built up to the point where a convention was called in 1829. The intervening years were frustrating ones for those who wanted reform, but they did afford ample opportunity for issues to be aired and lines of argument to be developed, both on the side of change and on the side of the status quo. Then, as now, intelligent debate on constitutional revision focused discussion by framing the theoretical and practical issues. Certainly when Virginians in the nineteenth century finally turned to the task of rewriting the 1776 Constitution, there was little doubt in anyone’s mind what the issues would be.

*The Constitution of 1776 as Fundamental Law*

Meanwhile the State lived under the document of 1776. But Jefferson and Madison, among others, had raised the disquieting argument that the Constitution of 1776 was only an ordinance, and they viewed the convention which passed it as having no authority to pass more than ordinary legislation. Today, of course, it is taken for granted that a constitution is fundamental law. Indeed, one of the significant problems facing today’s constitution-maker is to decide just which values are so fundamental as to deserve being part of a constitution, rather than being left to statutes.\(^60\) In 1776 constitutions were already considered fundamental law. Thus the argument that the 1776 document was a mere ordinance was a serious charge against the constitution. Americans, like their cousins in England, had become accustomed to the idea of fundamental law embodied in documents which were treated with a reverence not accorded the ordinary statute. Magna Carta might be in form a statute like other statutes, but through the centuries it had come to be regarded as a super-statute.\(^61\) In the seventeenth and eighteenth centuries, Americans and their legislative representatives had become accustomed to invoking both their own colonial charters and English documents such as Magna Carta against the excesses of royal governors

\(^{59}\) *Journal of the Virginia House of Delegates*, June 21, 1784, at 71 (1828 ed.).

\(^{60}\) See text *infra* at notes 200-13.

and other officials. 62 And from the 1760's to the eve of revolution, they became accustomed to invoking these charters and documents against acts of the government in London and even to speaking of acts being "unconstitutional." 63 Thus by the time of the break with the mother country and the establishment of new governments in the former colonies, the tradition of resting the powers of government and the rights of individuals on a fundamental charter was well established. It was in this tradition that Jefferson called for a constitution resting "on a bottom which none will dispute" 64 and Madison urged that there be a constitution ratified by the people and "secured against the doubts and imputations under which it now labors." 65

Jefferson's and Madison's charge against the Virginia Constitution had interesting echoes on the national scene. After the Philadelphia convention of 1787 had proposed the Federal Constitution to the people of the several states, one of the rallying cries of the antifederalists was the absence in the proposed document of any bill of rights. When the antifederalists pointed to Magna Carta and the English Bill of Rights as models for what was needed in this country, the proponents of the new Constitution often answered by distinguishing between the nature of the English documents and of the American Constitution. In the North Carolina ratifying convention, for example, Governor Samuel Johnston argued:

They have no written constitution in Britain. They have certain fundamental principles and legislative acts, securing the liberty of the people. But these may be altered by their representatives, without violating their constitution, in such manner as they think proper. . . . What is their Magna Charta? It is only an act of parliament. Their parliament can at any time, alter the whole, or any part of it. In short, it is no more binding on the people than any other act which has passed.

This defect, said Johnston, had been remedied in the American Con-

62 E.g., the petition by Robert Child and others in Massachusetts in 1646, the repeated efforts by the Maryland Assembly to ensure to Marylanders the rights of Englishmen, and the complaints in eighteenth-century North Carolina against their Governor. Id. at 41-42, 54-64, 68.
63 E.g., the colonial resolutions against the Stamp Act (1765) and the resolutions against the "Intolerable" Acts (1774). Id. at 142-46, 173-80, 430-47.
64 3 Writings of Jefferson 229 (Ford ed.).
65 1 Letters & Other Works of James Madison 83 (Lib. of Cong. ed. 1865).
stitution. "The powers of congress are all circumscribed, defined, and clearly laid down. So far they may go, but no farther." 66

Other voices in the ratifying conventions argued that England's liberty documents were in fact beyond the reach of Parliament, whatever legal theory might say to the contrary. In the Virginia convention called to ratify the Federal Constitution, George Mason had objected to the lack of any guarantee in the Constitution of right to trial by jury, and John Marshall had argued that if jury trial was secured in the English Constitution, yet there was no part of their constitution which Parliament could not change. 67 William Grayson, answering Marshall, submitted:

I believe the gentleman is mistaken. I believe it [trial by jury] is secured by magna charta and the bill of rights. I believe no act of parliament can affect it, if this principle be true, that a law is not paramount to the constitution. I believe whatever may be said of the mutability of the laws, and the defect of a written, fixed constitution, that it is generally thought by Englishmen, that it is so sacred, that no act of parliament can affect it.68

These arguments reflect the general American attitude of the time that the fundamental principles and values of a political order should be nailed down in a constitution which is beyond the reach of repeal or amendment by ordinary legislative majorities. Americans of the 1780's might argue over whether the English charters and documents were beyond Parliament's reach, but they could agree that the American Constitution ought to be superior to Acts of Congress.

It was this deep-rooted belief in constitutions as super-statutes which made the Jeffersonian charge against the Virginia Constitution of 1776 so grave. In theory, much can be said for Jefferson's view that the 1776 Constitution was no more than an ordinary statute, subject to amendment by the General Assembly. When Wythe wrote Jefferson in July 1776 hoping that Jefferson in the October session of the Legis-

66 4 J. Elliott, Debates of the State Conventions on the Federal Constitution 87 (1836). For like reasoning by James Iredell (later Associate Justice of the U.S. Supreme Court) in the same convention, see id. at 158-59.
67 3 id. at 507.
68 Id. at 516. England, to this day, still has no single document which is called a "constitution." Rather, English constitutional law is a blend of written documents and unwritten conventions in a tradition which, as the saying goes, "broadens down from precedent to precedent." See I. Jennings, Cabinet Government 1-13 (3d ed. 1959).
lature might remedy the defects in the constitution, there is a clear implication that it was within the power of the General Assembly to make such changes in the document as it would. What Wythe may have thought is significant, for few men in America would have been more enlightened on legal and constitutional theory than the man who held the first chair of law in America (established at William and Mary in 1779) and who taught law to Jefferson, Marshall, and Henry. And the Legislature after 1776 did from time to time pass statutes inconsistent with the constitution, such as the act of 1785 reducing the size of freehold required to give one the vote from 100 acres to 50 acres and lessening the period of ownership necessary from one year to six months, notwithstanding the provision of the 1776 Constitution that the suffrage requirements should remain as they had been at colonial law.

Yet as the tradition according Magna Carta and other English documents the status of fundamental law had grown up in England, so the Virginia Constitution was coming to have that status. Whatever Wythe may have thought when he wrote Jefferson in 1776, he was the author of the famous dictum in Commonwealth v. Caton, decided in 1782, on the power of the Court of Appeals to declare an act of legislature unconstitutional. Although the court upheld the Treason Law of 1776 against charges of unconstitutionality, Wythe declared:

Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and hither, shall you go, but no further.

Similarly, the Council sometimes enquired into the constitutionality of a law, as it did in declaring in 1783 that a statute giving the executive the power to investigate the conduct of a magistrate was “contrary to the fundamental principles of our constitution.”

---

69 I Jefferson Papers 477 (Boyd ed.).

70 On Wythe, see O. Shewmake, The Honorable George Wythe (1950). Wythe also had served in the House of Burgesses and in the Continental Congress and in 1776 had worked with Jefferson and Edmund Pendleton to revise the laws of Virginia.


72 8 Va. 5, 8 (1782).

73 6 Jefferson Papers 279-80 (Boyd ed.).
In 1793 the Court of Appeals faced the problem of the status of the 1776 Constitution and decided the central question: whether a court should refuse to give effect to an act of assembly found to be in conflict with that constitution. In Kamper v. Hawkins five judges sat, and each delivered an opinion on the constitutionality of a statute which gave district courts injunctive powers like those then possessed by the high court of chancery. By one route or another, the several judges reached the conclusion that the 1776 document did have the status of a constitution against which legislative acts could be measured and, if found to be in conflict, declared unconstitutional. Judge William Nelson, Jr., answered the question of the validity of the 1776 Constitution somewhat obliquely by saying that, regardless of whether the people had authorized the 1776 convention to adopt a constitution, they had given their assent to that constitution by receiving it and living under it: "The people have felt its operation and acquiesced." 74 St. George Tucker took a more direct approach. The 1776 convention, he said, was not the ordinary legislature since it was not constituted under the existing British government. Rather it was the people assembled. Thus it was "the voice of the people themselves" declaring independence, and their power to declare themselves independent connoted the power to create a new government: "It would therefore have been absurdity in the extreme, in the people of Virginia, to authorize the convention to absolve them from the bonds of one government, without the power to unite them under any other . . . ." 75

When Tucker published his famous commentaries on Blackstone in 1803, he once again took up the Jeffersonian argument—one which Jefferson was to maintain to the end of his life—that the 1776 convention lacked authority to promulgate a constitution superior to statute law. Adverting to Jefferson's Notes on the State of Virginia, Tucker agreed with some of Jefferson's criticisms of certain defects in the Constitution (notably the lack of an effective separation of powers) but repeated his Kamper argument that when the people elected the delegates to the 1776 convention they understood that the convention might vote for independence, that the convention was no ordinary legislature, that the power to declare independence logically implied the power to make a new constitution, and that therefore the 1776 Constitution was an act of the people.76

74 3 Va. 20, 28 (1793).
75 Id. at 69-72 (1793).
76 Appendix to 1 Tucker's Blackstone 83-95 (1803).
One might have expected Kamper v. Hawkins to lay the question to rest, but as late as 1824 Jefferson wrote a correspondent: "To our convention [of 1776] no special authority had been delegated by the people to form a permanent constitution, over which their successors in legislation should have no power of alteration. They had been elected for the ordinary purposes of legislation only, and at a time when the establishment of a new government had not been proposed or contemplated."

As to the argument that the people's acquiescence had supplied the want of original authority, Jefferson thought it a dangerous doctrine to say to the people, "whenever your functionaries exercise unlawful authority over you, if you do not go into actual resistance, it will be deemed acquiescence and confirmation." 77

Like the Notes of forty years before, the 1824 letter not only argued a want of authority in the 1776 convention but also recounted specific defects (notably the suffrage and representation provisions) in the 1776 Constitution. Jefferson, like any good lawyer, pitched his attack against the document on more than one level. It is obviously unrealistic, in weighing the validity of Jefferson's argument against the authority of the 1776 convention, to suppose that his views on this point were unaffected by his strong objections to the actual provisions of the constitution. In the convention debates of 1829-30, Benjamin Watkins Leigh, a defender of the old order, charged Jefferson with inconsistency:

At what period Mr. Jefferson discovered the incompetency of the Convention of '76, it were vain to conjecture—but I apprehend, it was not during the session of that body—for I know that Mr. J. himself prepared a Constitution for Virginia, and sent it to Williamsburg that it might be proposed to the Convention . . . . But, Sir, the validity of the Constitution, as such, has been maintained by Pendleton, Wythe, Roane, by the whole Commonwealth for fifty-four years. 78

To the extent that court decisions, acquiescence, and the passage of time settle such philosophical issues, the Commonwealth at large had indeed accepted the Constitution of 1776 as the fundamental law under which it would live. 79 Yet although the specific question of the 1776

---

77 Letter from Jefferson to John Hambden Pleasants, April 19, 1824, in 10 Writings of Jefferson 302 (Ford ed.).
78 Proceedings and Debates of the Virginia State Convention of 1829-30, at 160 (1830) [hereinafter cited as 1829-30 Debates].
79 Compare the problem of deciding the de facto validity of acts taken by the Rhodesian regime of Ian Smith after the unilateral declaration of independence from
convention's authority is now largely one of history, a careful exami-
nation of the credentials of any body which makes or revises a constitution
is still a relevant inquiry.90 Furthermore, resolution of this issue did not
put to rest the arguments as to the merits of the 1776 Constitution. On
the claim that the constitution had defects which cried out to be reme-
died, Jefferson had ample and growing company—though the reformers
would not gain concrete results for many years.

Growing Social Stress and the Reform Movement

The early decades of the nineteenth century were trying times for
the Commonwealth. Even though the “Virginia Dynasty” was in the
White House during much of this time, already Virginia was beginning
to lose its onetime preeminence in national councils. Once the wealthiest
and most populous State, Virginia by the 1820’s found both its relative
wealth and population declining. The causes of this decline were largely
economic, and they in turn produced important shifts in the State's social
structure.

In the late eighteenth century the landed gentry of eastern Virginia
utilized the abundant slave labor and the navigable waterways of the
Potomac, Rappahannock, York, James, and Roanoke rivers to build a
concentrated tobacco growing region.81 But the plantation owners
neglected until well after 1830 to use scientific methods, such as crop

Great Britain in 1965. Persons detained under regulations made after the adoption
of the 1965 Constitution challenged the legitimacy of that Constitution and of the
orders made under it. Counsel on the Rhodesian Government's side admitted the
illegality of the unilateral declaration of independence but argued that the continuing
effectiveness of the Smith regime had cured the illegality, citing among other authori-
ties American precedents. The High Court of Rhodesia declared that the 1965 Con-
stitution is indeed illegal but that administrative measures framed under it would
nevertheless be recognized on grounds of necessity. See Dias, The U.D.I. Case: The
Grundnorm in Travail, 1967 CAMB. L.J. 5. Dias remarks that the judgments in the case
are so impressive that they “deserve to rank with the classics.” Id. at 6. Extensive and
scholarly opinions were written in the Appellate Division of the High Court. Chief
Justice Beadle accorded de facto status to the Smith government but held that the
1965 constitution was not Rhodesia's de jure constitution and that the legality of
governmental acts must be judged by the 1961 constitution. Madzimpamudo v.
Lardner-Burke, Judgment No. A.D. 1/68 (Rhodesia, High Court, App. Div., Jan. 29,
1968), at 89. For the conclusions of the other four judges, see id. at 109, 160-61, 169,
196-97. Appeal to the Privy Council was refused in March 1968. Judgment No. A.D.
27/68 March 1, 1968.

80 See Note, State Constitutional Change: The Constitutional Convention, 54 VA. L. REV.
995, 1012-16 (1968).

81 J. ROBERT, TOBACCO KINGDOM: PLANTATION, MARKET, AND FACTORY IN VIRGINIA
rotation and diversification, to halt soil erosion and exhaustion.\textsuperscript{82} As a result the soil deteriorated and land prices fell; this, together with a drop in value of staple crop exports after the panic of 1819, led to an economic decline in the Piedmont and Tidewater areas.\textsuperscript{83} Furthermore, new tobacco producers in Kentucky, Tennessee, Missouri, and Ohio presented Virginians with strong competition in this time of trouble.\textsuperscript{84}

Virginia's agricultural economy also suffered from the lack of an adequate transportation system,\textsuperscript{85} for the State's efforts at creating internal improvements were small compared to the projects undertaken elsewhere. For example, there was nothing in Virginia to compare with New York's Erie Canal, begun in 1817 and completed in 1825. In fact, by 1830 Virginia had made "slower progress in internal improvements than any other state in the Union possessing equal population and internal resources."\textsuperscript{86}

This economic decline had a social effect upon the planters of the East. Since agriculture could not support their way of life, many easterners were forced to turn to other non-agricultural professions or move westward to more fertile soil.\textsuperscript{87} A mid-century census disclosed that 388,059 Virginians had moved westward,\textsuperscript{88} and this migration has been characterized as a "principal factor" in the depression which marred the first third of Virginia's nineteenth century.\textsuperscript{89} As soil exhaustion and erosion took their toll, the western movement meant that there were few buyers for land in the east. And more important, it contributed to the bisection of opinion in Virginia.

Unlike the East, the western part of the State prospered, for it had not experienced a severe economic depression,\textsuperscript{90} and its population grew much faster. Increasingly the two sections developed different economic interests, and the West became more and more restive over the failure of the State's government, in the hands of easterners, to build the internal improvements so desired by the West to promote their trade and com-

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{82} Id. at 24.
  \item \textsuperscript{83} A. CRAVEN, \textit{Soil Exhaustion as a Factor in the Agricultural History of Virginia and Maryland} 1606-1860 at 115-16 (1926).
  \item \textsuperscript{84} Id.
  \item \textsuperscript{85} C. AMBLER, \textit{Sectionalism in Virginia} 1776-1861 at 22, 46-48, 123-27 (1910).
  \item \textsuperscript{86} G. STARNES, \textit{Sixty Years of Branch Banking in Virginia} 73 (1931).
  \item \textsuperscript{88} A. CRAVEN, \textit{supra} note 83 at 123.
  \item \textsuperscript{89} M. ANDREWS, \textit{Virginia: The Old Dominion} 443 (1937).
  \item \textsuperscript{90} C. AMBLER, \textit{Thomas Ritchie: A Study in Virginia Politics} 65-66 (1913).
\end{itemize}
\end{footnotesize}
merce. When all parts of the State began to agree that internal improvements were necessary, the East and West could not agree on the proper regional allocation of the improvements.\textsuperscript{91} Socially there was contrast between East and West, with old families exercising their traditional hegemony in the East, and a more fluid social structure obtaining in the West.

Virginia's fundamental law, however, had not been adjusted to meet these changing conditions. Independence and the adoption of the Constitution of 1776 had of course totally altered Virginia's external ties; instead of the allegiance to the Crown, Virginia now took its place with other states in the American Union. But the events of 1776 had less impact on the way in which Virginia was governed internally. The people who had furnished the State's leadership before 1776 largely comprised its leadership afterwards.\textsuperscript{92} Freehold suffrage continued under the 1776 constitution as it had in colonial times. Representation in the House of Delegates was based on the rule of two members per county just as had been the case with the House of Burgesses. The system of county courts, great sources of local power, was essentially the same after independence as before. Except for the significant changes in the position of the executive, politics and government in Virginia were not all that different from what they had been before 1776.

As the West grew in population and resources, it was natural that it should become more vocal in challenging this constitutional order, which so favored the landed classes of eastern Virginia. Hence those grievances against the 1776 Constitution which Jefferson and others like him had voiced from the start increasingly became the platform of reformers in Virginia, most of them men of the western counties, though with scattered support in other parts of the State.

Virginia was by no means alone in being the arena of conflict over

\textsuperscript{91} Richmond Enquirer, Dec. 14, 1816.

\textsuperscript{92} On the aristocratic tradition in Virginia politics after the Revolution, see C. SYDNOR, GENTLEMEN FREEHOLDERS: POLITICAL PRACTICES IN WASHINGTON'S VIRGINIA (1952); Malone, The Great Generation, 23 VA. Q. REV. 108 (1947).

A modern study by Robert and Katherine Brown reappraises the extent to which Virginia at the time of the Revolution was governed by an aristocracy and concludes that colonial Virginia "was far more democratic than we have been led to believe in the past" and that "what now passes in this country as middle-class, representative democracy was well-entrenched in the Old Dominion long before the American Revolution." R. BROWN & K. BROWN, VIRGINIA 1705-1786: DEMOCRACY OR ARISTOCRACY? 307, 308 (1964).
the State's constitution. In a number of states changing financial, industrial, and economic conditions after 1800 brought about clashes over the extension of the suffrage, public education, representation, internal improvements, the use of public credit, powers of the legislative branch, and other problems. Especially marked was the struggle over one of the most basic questions of government: where the power of government should reside. Since the first constitutions favored tidewater interests in a number of states, the struggle over the locus of political power often took on the nature, as to some extent it did in Virginia, of a sectional conflict.

In all parts of the land, the spirit of reform was in the air. The first state constitutions, forged in days of dire necessity by men who had little in the way of concrete precedents for the drawing of actual social compacts, were after 1800 undergoing close scrutiny. New states were entering the Union, and their constitutions were typically more democratic (for example, in suffrage provisions) than those of the older states. With Jacksonian democracy and other forces at work in the country, the constitutions of the original states could not be expected to remain unchanged. Constitutional conventions were called in a number of states, and, as Merrill Peterson has noted, these conventions were "unsurpassed arenas of ideological encounter and potent instruments of reform." Massachusetts called a convention in 1820-21, in which Daniel Webster and Joseph Story, though probably representing a minority view in the convention, succeeded through brilliant maneuvering in preserving such existing institutions as a pecuniary qualification for the franchise, a property qualification for state senators, and government support of religion. By contrast, in New York a convention met in 1821 and produced far-reaching reforms, among them a franchise approaching universal white manhood suffrage.

From the opening of the nineteenth century onward, hardly a session of the Virginia Legislature went by without an effort to call a convention to revise the State's constitution. Rebuffed in their efforts to revise the constitution in the first few years after 1776, those who wanted a more democratic structure were given new heart by the political revo-

93 F. Green, Constitutional Development in the South Atlantic States, 1776-1860 at 161-62 (1930).
94 Id. at 162. Regarding sectional conflict in general, see C. Ambler, supra note 85.
96 Id. at 6-7, 141.
lution of 1800, which brought Jefferson and his party into power not only in the Federal Government but also in many state governments. In 1804 young Thomas Ritchie founded the Richmond Enquirer to expound Republican philosophies in a town with considerable Federalist sentiments. In 1805 the new newspaper added an eastern voice to those in the West calling for constitutional reform, Ritchie noting in particular the need for extension of the suffrage and equalization of representation in the Legislature. When the Assembly met in December 1805, petitions were lodged seeking a convention. John Minor summed up the feelings of those in opposition:

The present constitution, Mr. Speaker, has served us well for thirty years; it has borne us thro' a difficult and perilous war, and has served us through a long and prosperous peace; let us not, then, without the wish of the great body of the people, on the ill supported petition of two or three counties, jeopardize this valuable instrument, by setting it afloat on a sea of uncertainty. We are well, so let us remain, and not imitate him, who being well, wished to be better, took physic and died.

By a substantial vote the question was postponed until the spring of 1806. In session after session, this was the story. Petitions for a constitutional convention were lodged with the General Assembly, and just as regularly rejected.

In July 1816 Thomas Jefferson wrote a letter to Samuel Kercheval which made it clear that he felt as strongly as ever about the need for reform of the State's constitution. Jefferson did not intend the letter to be circulated widely, but copies quickly found their way into many hands. The letter is of special interest because it expresses so succinctly the principal objects of those who wanted reform. Indeed it anticipated most of the issues which became the focal points of the debates in the 1829-30 convention.

Jefferson stated seven objects of his hoped-for amendments: “1. Gen-

---

97 Richmond Enquirer, May 31, 1805, at 3, col. 2. On Ritchie, see C. AMBLER, THOMAS RITCHIE: A STUDY IN VIRGINIA POLITICS (1913).
98 Richmond Enquirer, Feb. 1, 1806, at 3, col. 4.
99 Id., Feb. 8, 1806, at 3, col. 2.
100 See, e.g., id., Jan. 6, 1807, at 3, col. 3; id., Jan. 31, 1811, at 3, col. 3.
101 Letter of July 12, 1816, in 10 WRITINGS OF JEFFERSON 37 (Ford ed.).
102 In two subsequent letters to Kercheval, Jefferson voiced his concern at the wide circulation his letter of July was having and repeated his wish that Kercheval not allow its widespread use. Letters of Sept. 5, 1816 and Oct. 8, 1916, in id. at 45 n.1.

At every turn in the existing constitution, Jefferson found the principles of republican government violated. Jefferson believed he had a simple test: “For let it be agreed that a government is republican in proportion as every member composing it has his equal voice in the direction of its concerns . . . by representatives chosen by himself, and responsible to him at short periods, and let us bring to the test of the canon every branch of our constitution.” When he applied this standard to Virginia’s constitution, what did Jefferson find? A lower house “chosen by less than half the people, and not at all in proportion to those who do choose.” A Senate even more badly apportioned. A Governor “entirely independent of the choice of the people, and of their control” and a Council likewise beyond their control. Judges “dependent on none but themselves.” County courts whose judges “are self-chosen, are for life, and perpetuate their own body in succession forever . . . .”

Jefferson, of course, would have changed all this, for he could not reconcile the reverence for the 1776 Constitution expressed by John Minor in the 1805 General Assembly with his own philosophy. Jefferson believed that the earth belonged to the living generation, that human laws and institutions had to keep pace with changing times. In a passage from his letter to Kercheval so characteristic that it deserves generous quotation, Jefferson clearly established that he applied this general philosophy as much to the Virginia Constitution as to any other area of law and government.

Some men look at constitutions with sanctimonious reverence, and deem them like the arc of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead. I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once

103 10 Writings of Jefferson 41 (Ford ed.).
104 Id. at 38.
known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.\textsuperscript{105}

To give this sentiment concrete form, Jefferson proposed that the constitution provide for revision at stated periodic intervals. He reckoned that by European tables of mortality, a majority of the adults living at any given time would be dead in 19 years; in that time a new majority, or new generation, would have come into being and should have, like earlier generations, "a right to choose for itself the form of government it believes most promotive of its own happiness."\textsuperscript{106} By Jefferson's test, a constitution then forty years old was obviously overdue for revision.

Jefferson spoke for many people in airing the issues which he thought should be resolved by reform. After repeated rebuffs in the General Assembly, tempers in the West began to grow shorter, and westerners sought more forceful ways of putting their demands before the rest of the State. In August 1816 delegates from thirty-three counties, mostly western, met at Staunton. They adopted a memorial to the General Assembly in which the convention resolved that, although Virginia claimed to have a republican form of government, the State did not have the "first and fundamental principle of republicanism"—majority rule. Therefore the convention asked the Legislature to recommend to the people of Virginia the calling of a convention.\textsuperscript{107}

When the General Assembly met in November 1816, the memorial of the Staunton convention was referred to a special committee of the House of Delegates. The committee report was favorable to the calling of a convention; it proposed resolutions authorizing a popular referendum on the question of holding a convention and provided for the

\textsuperscript{105}Id. at 42-43.

\textsuperscript{106}Id. at 43. In 1789 Jefferson had developed in a letter to James Madison the theme, "The earth belongs always to the living generation," a theme which Jefferson explicitly applied to constitutional theory. Letter of Sept. 6, 1789, in 15 \textit{Jefferson Papers} 395-96 (Boyd ed.). For Madison's development of the idea, see Letter to Thomas Jefferson, Feb. 4, 1790, in 16 id. at 146-54.

\textsuperscript{107}Niles' Weekly Register 20-21 (1816).
selection of delegates to a convention should the referendum vote be affirmative. Eastern delegates, led by Littleton W. Tazewell, a Norfolk delegate later to be a U. S. Senator and Governor of Virginia, opposed calling a convention, but the resolution passed the House by a margin of sixty-three votes. When the question came to a vote in the Senate, however, it went down to defeat by a vote of twelve to nine.

Although the 1816-17 Assembly blocked the calling of a convention, it did make some concession to the demands for reform by taking five Senate seats from the East and giving them to the West. This was only partial satisfaction of the reformers' demands, and while it did moderate the urgency of the calls for reform it did not end the protests altogether. In a few years time, calls for constitutional revision were once again vocal. In 1824 the aged Jefferson once again attacked both the power of the 1776 convention to make a permanent constitution and the failure of the constitution itself to establish a true government by the people. The exclusion of a majority of the State's freemen from the franchise Jefferson called "an usurpation of the minority over the majority." On the inequality in representation, he said, "Upon which principle of right or reason can any one justify the giving to every citizen of Warwick as much weight in the government as to twenty-two equal citizens in Loudon . . .?" Public meetings held in Richmond, Staunton, and elsewhere in the State revealed strong revisionist sentiment, and at the session beginning in December 1825 the General

108 JOURNAL OF THE VIRGINIA HOUSE OF DELEGATES, 1816-17, at 86-87; Richmond Enquirer, Dec. 14, 1816, at 3, col. 3.
109 Richmond Enquirer, Jan. 25, 1817, at 3, col. 5; id., Feb. 13, 1817, at 3, col. 1. For a commentary on Tazewell's three-hour speech, see id., Jan. 23, 1817, at 3, col. 4; for a subsequent sketch, see id., Jan. 28, 1817, at 1, col. 6 through 3, col. 1. Tazewell, a man of strong states' rights views, was U.S. Senator at the time of the 1829-30 convention and later was Governor of Virginia. See the sketch of Tazewell in 18 DICTIONARY OF AMERICAN BIOGRAPHY 355 (1936).
111 Although the 1776 constitution required two representatives for every county in the House of Delegates, it simply said that the Senate should be based on 24 districts, thus giving power to the Assembly to redraw Senate district lines as it did in 1816-17. See 1 JEFFERSON PAPERS 379 (Boyd ed.).
112 Letter to John Hamden Pleasants, April 19, 1824, in 10 WRITINGS OF JEFFERSON 302-03 (Ford ed.).
113 Id. Warwick, one of the oldest and smallest of Virginia counties, has since been merged into the city of Newport News.
114 An open meeting of the freeholders of Richmond adopted a motion proposed by editor Thomas Ritchie declaring it to be "the opinion of this meeting, that the present Constitution of Virginia is defective and requires amendment." Richmond
Assembly found 45 pro-convention petitions put before the members. Still, at both the sessions of 1825-26 and 1826-27 convention bills were defeated.

Reactions were angry, and threats of resort to extra-legal remedies were heard. This was the hint conveyed by a resolution passed in Frederick County which called upon the county's delegates to "ask and demand for the last time, that facilities be afforded, by law, for the assembling of a full and free convention of the good people of this commonwealth, with a view to the establishment of a representative democracy on the ruins of the allegoric tyranny which now prevails." A meeting in Hardy County was more direct; it sought to "express to the General Assembly, the determination of the people of this county upon ulterior methods, should this, their last appeal, be disregarded."

Conservatives, having delayed successfully for so long, began to have second thoughts about opposing a convention still longer. In 1830 a new census would no doubt show an even more pronounced shift of white population to western counties and thereby give added strength to the reform movement. Though some opponents of a convention continued to hold out, both houses of the Assembly in the 1827-28 session agreed to a referendum of the people on whether there should be a convention. Perhaps the balance was tipped by the attitude which led the English parliamentarian Macaulay shortly thereafter to say, in

Enquirer, April 13, 1824, at 3, col. 6. The meeting in Staunton resulted in a memorial calling for revision of the basis of representation in the Legislature. See id., Aug. 11, 1825, at 3, col. 2-6.


116 Journal of the Virginia House of Delegates, 1825-26, appendix (1828); id., Jan. 26, 1827 at 112.

117 Richmond Enquirer, March 15, 1827, at 2, cols. 5-6.

118 Id., April 3, 1827, at 3, col. 3.

119 In the period around 1820 Virginia politics were dominated by the "Richmond Junto," composed of a small group of wealthy and socially prominent men (notably Spencer Roane). The Junto's influence extended to all branches of the State's government, as well as to the State's economy (it controlled, for example, the three great banks of Richmond). Primarily an eastern group, the Junto's policies regularly clashed with the interests of the West, including the movement for constitutional reform. See Ammon, The Richmond Junto, 1800-1824, 61 Va. Mag. Hist. & Biog. 395 (1953); Beach, Spencer Roane and the Richmond Junto, 22 Wm. & Mary Q. (2d ser.) 1 (1942).

120 Journal of the Virginia House of Delegates, Dec. 14, 1827, at 33-34 (passed House of Delegates); id., Feb. 1, 1828, at 131 (House received communication from Senate that the bill had passed).
response to the charge that the Reform Bill of 1832 was too radical, "Reform, that you may preserve." 121 The reformers in Virginia would get their chance, for in the referendum in 1828 the people voted 21,875 to 16,645 for a convention.122

Before a convention could meet, one more question had to be fought out: the basis of election of delegates to the convention. Western counties naturally favored using white population as the basis for electing delegates. Tidewater interests wanted counties as the basis, while the Piedmont favored using congressional districts.123 Obviously, the way in which seats in the convention were apportioned would have a direct bearing on what the convention would recommend. The issue was hotly contested in the 1828-29 Assembly, and after the consideration of a number of proposals and compromises the House agreed to a Senate bill which would base representation in the convention on the existing senatorial districts, four convention delegates to each district.124 Such an arrangement hardly favored the West, which would have 36 of the convention's 96 delegates. Also important was the question of eligibility to vote for members of the convention. Those of more democratic bent wanted freemen to participate, whether they owned land or not, but the bill as adopted restricted voting for convention delegates to freeholders. The freeholders could, however, choose delegates without regard to the delegates' property or residence.125

The elections for delegates to the convention foreshadowed the issues which would mark the convention itself. "A Freeholder of Louisa" addressed an open letter to the Richmond Enquirer demanding that James Madison and other potential delegates say where they stood on constitutional issues.126 Madison made no public reply, but he wrote his brother William that he hoped to see a "spirit of compromise" prevail in the convention.127 After the history of the preceding fifty years, it was a bit optimistic to suppose that issues like suffrage and representation, which had provoked so much division, would be resolved at the convention in an atmosphere of charity and tolerance.

121 2 Parl. Deb. (3d ser.) 1203 (1932) [1830-1837].
122 Richmond Enquirer, Sept. 12, 1828, at 3, col. 3.
123 Id., Dec. 6, 1828, at 3, col. 5; id., Dec. 23, 1828, at 3, col. 1.
124 Id., Feb. 3, 1829, at 3, col. 1; id., Feb. 7, 1829, at 3, col. 5; id., Feb. 10, 1829, at 3, col. 4; id., Feb. 12, 1829, at 3, col. 1.
125 Id., Feb. 12, 1829, at 2, col. 1.
126 Id., March 6, 1829, at 3, col. 2; id., March 7, 1829, at 3, col. 2; id., March 31, 1829, at 3, col. 1.
127 Letter of March 25, 1829, in 6 I. Brant, supra note 25 at 462.
The Convention of 1829-30

Probably no state constitutional convention in American history has stirred so much national interest as did the Virginia convention of 1829-30. The Democrat of Huntsville, Alabama, anticipating the assembling of the convention delegates in Richmond, commented, "The Congress of '76 was undoubtedly, the most interesting and important assemblage of men ever convened upon the face of the earth, and the Virginia Convention ranks next in dignity." Another Alabama paper, the Huntsville Advocate, believed it should not apologize for the space it was devoting to the Virginia Convention. "In whatever light the Virginia Convention can be viewed, it must be regarded by Americans, at least, with feelings of deepest interest." 128

People within and without Virginia had good reason to anticipate a convention of talent with few equals in American history. Among its members were two former Presidents, James Madison and James Monroe; a future President, John Tyler; the Chief Justice of the United States, John Marshall; Philip P. Barbour, at one time the Speaker of the Federal House of Representatives and later to sit on the U. S. Supreme Court; the unrivaled and eccentric orator John Randolph of Roanoke; two past or future Governors of Virginia, as well as the incumbent Governor, William Branch Giles; seven past, present, or future U. S. Senators; eleven incumbent and fifteen past or future Congressmen; James M. Mason, later to become famous as one of the Confederate emissaries involved in the Trent affair; and numberless other judges and officeholders. 129 Merrill Peterson has rightly called the 1829 convention "the last of the great constituent assemblies in American history. As an arena of ideological encounter it was unexcelled. It was a seemingly inexhaustible exercise in political erudition—the last gasp of Jeffersonian America's passion for political disputation." 130 The proceedings and

128 Quoted in Richmond Enquirer, Nov. 5, 1829, at 3, cols. 1-3. Delegates themselves were aware of such interest in other states. Alexander Campbell, of Brooke County, commented during the debates, "All eyes have been turned to Virginia: all these United States are looking with intense interest to Virginia." 1829-30 Debates 384.

129 For a list of the delegates, see 1829-30 Debates 3-5. George Catlin's portrait of the delegates is reproduced at the beginning of this article.

130 M. Peterson, Democracy, Liberty, and Property: The State Constitutional Conventions of the 1820's 271 (1966). The convention assembled on October 5, 1829, in the State Capitol. James Monroe was elected chairman, and after a preliminary report on procedure, four committees were appointed: one on each of the three branches of government—legislative, executive, and judicial—and one on the Bill of Rights and other matters. 1829-30 Debates 1, 22-23.
debates of the convention fill 895 closely printed pages with fascinating insights, not only into the constitutional and political ideas of that generation of Americans, but also into the recurring questions of civil society which trouble every generation of Americans faced by the task of writing or revising a constitution. There were few delegates to the convention who were not aware what the main issues would be. Philip Doddridge, a delegate from Brooke County in western Virginia whose eloquence and forcefulness made him one of the commanding figures in the convention, summed up at one point in the debates the objectives of those who had sought the calling of the convention:

first, an equal apportionment of Representation among white population; second, an extension of the Right of Suffrage to all who pay taxes; third, a total abolition of the Executive Council; fourth, a single Executive Head, or Governor, to be elected by the people and responsible to them; fifth, future apportionments to keep representation equal among the people; sixth, a provision for future amendments.

If this list sounds like a repetition of the points made by Jefferson in arguing for constitutional revision, the debt was acknowledged by Doddridge: “Every principle for which we contend, is supported by the deliberate opinions of Mr. Jefferson . . . .” 131

Equitable representation, a wider franchise, a popularly elected and more independent Governor—these were among the demands of the reformers. Such specific issues reflected a general philosophy which was expressed repeatedly by reform delegates: a belief in popular sovereignty, equality of men, and majority rule. John M. Mason, of Frederick County, declared that other objects desired by those who sought the convention were “as a feather in the scale” compared to the overriding object “to place the Government where of right it ought to be, in the hands of the majority of the political community . . . .” 132

What some saw as reform other members saw at best as unnecessary change, at worst as a destructive force which if unleashed would uproot ancient values. John Randolph, in his usual colorful fashion, lashed out against the “lust of innovation”; again and again he rose in the chamber to declare that “change is not reform.” As for popular sovereignty and majority rule, Randolph wanted no part of it: “I would not live under King Numbers. I would not be his steward—nor make him my task-

131 1829-30 DEBATES 476.
132 Id. at 687.
master. I would obey the principle of self-preservation—a principle we find even in the brute creation, in flying from this mischief.”

At first developments in the convention looked favorable to the forces of reform. Although the delegates from the West were in a distinct minority, they hoped for support from reform-minded members from other areas, especially the Piedmont. Thus in the Legislative Committee, where the key issues of suffrage and representation were being studied, James Madison, the committee’s chairman, helped produce a 13 to 11 majority in favor of a report recommending that representation in the House of Delegates be based on “white population exclusively”—a recommendation which if accepted by the convention would effect a marked shift in political power in the State. But as the weeks passed, the momentum for reform weakened, and on representation, as on most other major issues before the convention, the conservatives were largely to have their way.

As soon as the question of representation was on the floor of the convention (which at that stage was sitting as a committee of the whole), some western delegates argued that white population should be the basis of representation in both houses, while John W. Green, moving in the opposite direction, introduced a resolution to base representation in the lower house on population and taxation combined. One by one, a spectrum of plans emerged; delegates had before them plans which would base representation, in the House of Delegates or the Senate or both, on white population, white population and taxation together, Federal Numbers (white population plus three-fifths of slaves), and other bases.

To the extent that taxes or slaves or property in any form became part of the basis of representation in the Legislature, the final plan would favor the eastern part of the State, where property (including slaves)

\[\text{\textsuperscript{133}Id. at 492, 790, 321. Russell Kirk has painted this portrait of Randolph:}
\]

Of Randolph’s alternating ferocity and compassion, his duels, his beautiful letters, his entrancing extemporaneous eloquence, his fits of madness, his sardonic wit, his outbreaks of prophecy and his visions of devils, his brandy and his opium, his passionate Christianity, his lonely plantation life, his quixotic opposition to the great political and economic powers of the day—everyone who reads American history knows something. Randolph would have done credit to the pages of Byron or Disraeli.


\[\text{\textsuperscript{134}The report of the Legislative Committee is in 1829-30 DEBATES 39-40. On Madison’s part in the convention, see 6 I. BRANDT, supra note 25 at 462.}
\]

\[\text{\textsuperscript{135}1829-30 DEBATES 41, 43-44.}
\]

\[\text{\textsuperscript{136}Id. at 53.}
\]
was of more substantial proportions and where tax revenues were higher, over the areas west of the mountains. But a mixed basis of representation would also favor the middle counties; hence delegates from the Piedmont wavered and at length deserted the white basis so strongly supported by transmontane delegates.\(^\text{187}\) When Philip Doddridge insisted that the West must have the white basis in the House of Delegates, his amendment to that effect was voted down 44 to 49.\(^\text{188}\) With the West insisting on the white basis and the East equally adamant that property must be represented as well as people, William F. Gordon, a delegate from Albemarle, proposed a compromise based on no explicit principle at all. Gordon's plan would arbitrarily apportion representation in both House and Senate so that representation would be more equitable than under the existing arrangement but the East would retain a majority in both houses.\(^\text{189}\) The delegates agreed to Gordon's plan by a six-vote margin, and though the question of representation was aired further in the debates it was the Gordon compromise which emerged as the convention's final action on the issue.\(^\text{190}\)

On the question of suffrage, as on the related question of representation, the convention saw a number of proposals laid before it. The report of the Legislative Committee called for a limited franchise including only freeholders and householders.\(^\text{191}\) Reformers among the delegates wanted much more; they proposed universal white manhood suffrage or, at the least, suffrage for all who paid taxes. At the opposite pole, conservative members stood by the freehold franchise. Debates on the suffrage stirred vivid imagery, especially on the part of conservative delegates defending the existing freehold franchise against any expansion of the vote. Philip N. Nicholas, a Richmond banker of considerable substance, declared that "if there are any chosen people of God, they are the cultivators of the soil."\(^\text{192}\) Benjamin Watkins Leigh, an articulate spokesman for the East in the convention, told his fellow delegates that "in Virginia, the great mass of intelligence and virtue resides in that stout and generous yeomanry, the freeholders of this land . . ." and proceeded to paint a picture of the yeoman—his dignity, his modesty, his

\(^{187}\) For a comparison of the effects of several of the proposals, see id. at 547 (Leigh), 549 (Cooke).
\(^{188}\) Id. at 571, 574.
\(^{189}\) For Gordon's resolution, see id. at 455.
\(^{190}\) Id. at 574, 704-05.
\(^{191}\) Id. at 39-40.
\(^{192}\) Id. at 366.
hospitality, his independence—which marks a high point of effusiveness even in a century in which hyperbole was the norm.\textsuperscript{143}

Reformers countered with the argument that the freehold franchise excluded a majority of the white population, even though they might have to pay taxes for the support of their government and fight for the State’s defense in time of peril. Alexander Campbell recalled how in 1814 the people west of the mountains sent their militia to the aid of the East, when the perils of war threatened the lives and property of easterners. Yet of the 74 men who marched from Culpeper Court House, only two were entitled to the vote.\textsuperscript{144} As for virtue, the reformers submitted, freeholders had no monopoly. Richard Henderson of Loudoun County spoke for the common man: \textsuperscript{145}

After all, Sir, what it required of the voter? Simply the capacity and the will to choose good public agents. . . . Sir, the “peasantry” are competent to the performance of this duty. All who know men, and are versed in their concerns, in the various walks of life, are aware that

\textsuperscript{143} Of the freeholder, Leigh said:

I still say—and I appeal to every man who hears me, whether or no I say the truth—that, in Virginia, the great mass of intelligence and virtue resides in that stout and generous yeomanry, the freeholders of this land; that to them belongs not only all the real property of the Commonwealth, but almost all of the personal property also; that they are the class, who feed, who clothe, who educate all classes; who hold the greatest stake in society; who are the only persons who have any stake that may not be withdrawn at pleasure, in the twinkling of an eye; who, therefore, have, and actually take, the deepest interest in the public welfare. They alone support Government, constantly in peace, as well as occasionally in war—they fight as well as pay—and they feed and clothe and pay all who do fight. It has been my lot to mix, a great deal, in the society of these freeholders—aye, Sir, with the very poorest of them. I think I know the character of our poor freeholder perfectly. Look at him—modest, unobtrusive, and unassuming, in his manners and deportment, almost to humility, the idea has never entered into his head, that he is a nobleman—the limb of a great aristocracy: on the contrary, the first impression of a stranger would be, that he is not sensible of his dignity as a freeman. But try him—go to his house, and you will find him, and especially his wife, hospitable to the utmost of their means—trust him, and you will find him proudly faithful to his trust—appeal to him in any distress that may befall you; you will find his heart warm with generous sympathy, and his hand ready to aid you—Do him a service or a kindness, he will remember it to the latest hour of his life; and if ever opportunity occurs, he will pay it back to you, or after your death, to your children, with interest—he knows as well as the wisest, how to seek and obtain redress—insult him, and he will fight you. I copy the portrait, Sir, from the picture of the original painted on my own heart. I can hardly imagine a higher degree of virtue, public or private, than that of the great body of the freeholders of Virginia. \textit{ld.} at 399.

\textsuperscript{144} \textit{ld.} at 123.

\textsuperscript{145} \textit{ld.} at 356-57.
individuals of limited education, observe character, with eyes at once
steady and clear; unengrossed by books, wide awake to the world
around them, they acquire and digest that every-day knowledge, that
prevailing and discriminating common sense, which enable them to
select their public functionaries with judgment.

Argue as they would, the reformers had not quite the strength to have
their way. A motion by Eugenius Wilson, from far western Mononga-
lia County, to give the vote to free white male taxpaying citizens 21
years of age failed by a tie vote of 47 to 47,146 and a like fate befell other
efforts to base the vote on taxpaying in one form or another.147 Con-
servatives repeatedly expressed their concern at the “rage” for what
appeared to them to be universal suffrage,148 and the convention’s ulti-
mate action—adding householdersto the franchise—fell well short of
being universal suffrage.

The reformers were on the whole no more successful in their efforts
to introduce popular control of the executive branch of government.
The convention’s Committee on the Executive Department, chaired by
Governor Giles, recommended the abolition of the Council (with which
the Governor had to share what powers he had) but did not embrace
the reformers’ hope for a popularly elected Governor. As Jefferson had
done, the reformers argued that making the Governor dependent upon
the Legislature violated the separation of powers doctrine. Henderson
quoted Jefferson’s Notes on the State of Virginia,149 and Alfred Powell
of Frederick labelled the Governor “but a cypher—a bye-word at home—
an object of ridicule abroad; the mere creature of the Legislature, with-
out a solitary, substantive, independent power . . . .”150

Conservatives replied by rekindling old fears of monarchy. To create
an independent executive was, in Leigh’s judgment, “to mingle a spice of
monarchy in the Constitution.” The ideal executive for Leigh was one
“possessing the smallest degree of power consistent with the due execu-
tion of the laws.”151 Giles agreed with Leigh, adding to the image of
monarchy the spectre of the Federal Executive “with energies enough
to destroy the liberties of this nation” and declared that the difference
between the Federal Executive and that of Virginia “was in fact the

146 Id. at 641, 647.
147 Id. at 650, 651-52.
148 E.g., id. at 642 (Fitzhugh), 648 (Stanard), 651 (Giles).
149 Id. at 471.
150 Id. at 578.
151 Id. at 590.
difference between Monarchy and Republicanism." 152 Torn between the opposing arguments, the convention veered back and forth, rejecting in committee of the whole (by vote of 46 to 46) Doddridge's motion for popular election of the Governor, then passing in convention (50 to 46) Charles Mercer's amendment for popular election, yet finally agreeing (by 50 to 46) to Gordon's motion to have the Governor elected by joint vote of the General Assembly.153 The convention's indecision on a popularly elected Governor was paralleled by their changes of heart about the Council. Having first agreed to abolish the Council altogether, the delegates voted in the last week of the convention to retain the Council as an advisory body.154

In the debates on the judiciary, the chief focus of criticism was the system of county courts. This debate was one over local government, for the county courts were indeed the governing bodies of the counties. Perpetuated by the 1776 Constitution, the courts had multiple powers: the appointment of the sheriff and of civil officers in the counties, the appointment of most military officers, the levying of county taxes, the maintenance of roads, supervision of the police, the administration of justice, and other powers. Recalling Jefferson's charge that the county courts were "the most afflicting of tyrannies,"155 Thomas M. Bayly, a delegate from the Eastern Shore, moved to take the county courts out of the constitution and to leave them, like other inferior courts, subject to the power of the General Assembly.156 Alexander Campbell, referring to the self-perpetuating character of the county courts, declared, "Now, Sir, the citizens of any county in this Commonwealth, have no more control over these tribunals, than they have over the Government of France or England."157 Others added their censure against the county courts,158 but it was the defenders of the status quo, led by Chief Justice John Marshall,159 who carried the day. After all had been said on the question, the convention voted to retain constitutional status for the county courts.160

152 Id. at 718.
153 Id. at 485, 709, 822.
154 Id. at 596, 856.
155 Letter from Jefferson to John Taylot, July 21, 1816, 10 WRITINGS OF JEFFERSON 53 (Ford ed.).
156 1829-30 DEBATES 502.
157 Id. at 526.
158 E.g., id. at 505 (Joynes), 513 (Henderson), 523 (Doddridge), 626 (Summers).
159 E.g., id. at 504, 524.
160 Id. at 724.
By fits and starts the convention proceeded to the completion of its work. Mark Alexander commented in December on the body's erratic behavior: "On one day propositions that have been maturely considered, are deliberately decided upon; and the very next day the decision is wholly reversed." Repeatedly tempers wore thin, and delegates openly hinted at division of the State if their demands were not met. In the debate on representation, Samuel McDowell Moore from Rockbridge County told the convention that "if the controversy must come to be settled at Bannockburn, they would all be there . . . ." and Benjamin Watkins Leigh promptly responded that "if he brings us to Bannockburn, he will find that Old Virginia is as little disposed to submit to injustice as New Virginia." Briscoe Baldwin, a delegate from Augusta, observed how often members from both East and West had raised the possibility of a division of the State. This, he urged, would be a calamity:

Separate Virginia! Shall she be shorn of her strength, her influence, and her glory? Shall her voice of command, of persuasion, and reproof, be no longer heard in the National Councils? . . . . Break in twain the most precious jewel, and the separated parts are comparatively worthless. Divide Virginia, and both the East and the West will sink into insignificance, neglect and contempt.

The strain felt by the members is evident from the debates. Chapman Johnson put his finger on the ultimate source of the strain:

We are engaged, Mr. Chairman, in a contest for power—disguise it as you will—call it a discussion of the rights of man, natural or social—call it an inquiry into political expediency—imagine yourself, if you please, presiding over a school of philosophers, discoursing on the doctrines of political law, for the instruction of mankind, and the improvement of all human institutions—bring the question to the test of principle, or of practical utility—still, Sir, all our metaphysical reasoning and our practical rules, all our scholastic learning and political wisdom, are but the arms employed in a contest, which involves the great and agitating question whether the sceptre shall pass away from Judah . . . .

---

161 Id. at 715.
162 Id. at 542.
163 Id. at 543. At Bannockburn the Scots, led by Robert the Bruce, defeated the English in 1314.
164 Id. at 566.
165 Id. at 257. On Johnson, see Steele, *Chapman Johnson*, 35 VA. MAG. HIST. & BIOG. 161, 246 (1927).
With the stakes so high, and the margin of votes on most major questions so thin, John Randolph spoke of the convention's "lean, staggering, rickety majority" and urged the convention to adjourn as an admission that it could not command the confidence of the people with such thin majorities.\textsuperscript{166} Leigh remarked on the "very extraordinary situation" when "the members of a single district (that of Albemarle) held the fate of every measure in their hands, and by inclining to one side or the other of the House, could give an affirmative or negative vote of the convention at their pleasure." \textsuperscript{167} John B. George, a reformer from Tazewell, was more caustic; in January he rose "to congratulate the gentleman from Albemarle [Gordon] on his happy disposition, which enabled him with such perfect ease to change his sentiments to suit every new posture of affairs." \textsuperscript{168} Gordon denied the charge of inconsistency,\textsuperscript{169} but a few days later he expressed his own disenchantment with the way the convention had gone about its business:\textsuperscript{170}

He came there resolved to advance the cause of popular rights: and what had he found? That all were engaged in a violent struggle to promote the interests of their own section of the country, and in no other design. His philanthropic views of men and of theoretical liberty had received a lesson which he should not soon forget. He had seen how easily principles could be forgotten, as soon as it were found to come in conflict with particular interests.

A visitor to the galleries voiced like disenchantment. William Barton Rogers, then on the faculty at William and Mary and later, after a time at the University of Virginia, to be the founder and first president of the Massachusetts Institute of Technology, wrote his brother, Henry, in January 1830, recounting William's impressions of the Virginia convention: "I arrived in Richmond filled with the idea of the important objects for which all the eminent talents of Virginia had thus as it were been constellated together—hungry with impatience to be present at their discussion, and rejoicing with anticipated delight over the feast of eloquence and argument of which I was to partake." Yet Rogers, on attending the debates, found himself "greatly disappointed." Instead of pursuing truth and knowledge, the delegates were devoting themselves,
“with all the energy of selfish passions” to the pursuit of “local interests, and local prejudices.”

Perhaps Rogers expected too much disinterest in what, after all, was a political body. Moreover, the more illuminating enquiries into political theory had taken place in the earlier part of the session, and by the closing weeks (when Rogers attended) much of the glow had gone out of the debates. But Rogers’ sense of disappointment was widely shared in many parts of the State, especially the West, when the convention presented the new constitution to the State for ratification. On the final day of the convention, Lucas Thompson of Amherst said he would recommend the new document to his constituents as being some improvement over the existing constitution, but only with great reluctance. He was reluctant “because representation had not been based at the present and in all future time upon free white population, the only true basis; because the election of Governor was not referred to the people; because an Executive Council was retained, the Right of Suffrage not sufficiently extended, and the County Court system in its organization and powers left unreformed.”

For all the excitement which the calling of the convention had provoked and all the expectations it had aroused, it made almost no substantial changes in the existing order. The old counties, where power had lain under the 1776 Constitution, had little to complain of under the new. Thus when the proposed constitution went to referendum, heavy favorable majorities were rolled up in Tidewater. Sussex County, for example, went for the new constitution by a vote of 259 to 2, and Southampton did the same by 347 to 8. Piedmont returns were equally favorable; Albemarle, for instance, voted 626 to 7 for the proposed constitution. On the other hand, western counties were just as strongly opposed. Harrison County went against the new constitution by a vote of 1,112 to 8, and Lewis was against, 546 to 10. The Valley was more divided in opinion. Augusta split almost evenly, 285 for, 270 against; in Frederick, the margin was 451 in favor, 438 opposed. Statewide the constitution was approved by a total vote of 26,055 to 15,563.

Reform Achieved

Obviously, the issues which had brought about the convention of 1829-30 remained unresolved. That pressure for far-reaching reform

172 1829-30 Debates 886.
173 Id. at 903.
would continue was evident above all from the continued shift in white population to the western parts of Virginia. The East saw its population grow from 275,000 in 1830 to 395,00 in 1850, but the West's population went from 318,000 to 534,000 in the same period. Whether another constitutional convention should be called was debated regularly in the legislative sessions of the 1840's. Governor after Governor included in his opening address to the Assembly a recommendation that plans for a new convention be gotten underway. At the opening of the 1849-50 session, Governor Floyd thought a convention call to be "now inevitable, and certainly nothing short of a thorough constitution will satisfy the demands of the people. The sooner this is accomplished, the better for all the interests of the Commonwealth."

The result was the convention of 1850-51. Although this convention lacked the great names which had made the 1829-30 convention such a noteworthy event, the gathering of 1850-51 wrought a far greater change in the State's political system. Nearly all of the objectives which the reformers sought but could not have in 1829-30 they accomplished in 1850-51. Representation was brought more nearly in line with population, the suffrage was extended to free white males over 21 years of age with two years' residence in the State, and the Governor was to be elected by the people. The Richmond Enquirer supported ratification of the proposed constitution:

with all its faults, we shall sustain it as the work of the representatives of the people of Virginia, and shall appeal to that people to give it their sanction. . . . [A]lthough the East may not have obtained as satisfactory an adjustment [of representation] as she might have done—yet in view of the abundant protection thrown around her property by guarantees against undue taxation of her slave property and against any extravagant system of Internal Improvements, and the depreciation of State credit, we cannot doubt that, to secure the important and beneficial reforms provided for in the Constitution, the reformers, both East and West, will rally around this new charter of our rights and liber-

174 Virginia Constitutional Convention of 1850 Documents, Appendix on Census.
176 See, e.g., id., 1845-46, at 14-15 (message of Governor McDowell); id., 1848-49, at 29 (message of Governor Smith).
178 Va. Const. (1851) art. IV, §§ 2-5 (representation apportioned); art. III, § 1 (suffrage); art. V, § 2 (election of governor).
179 Richmond Enquirer, Aug. 1, 1851, at 2, col. 6.
ties, and, by an overwhelming vote, will make it the organic law of the land.

The new constitution was indeed approved, 75,748 votes in favor, 11,063 votes against, a far more enthusiastic margin than that which had greeted the document laid before the electorate in 1830. Thus, three-quarters of a century after Virginia's first experimentation with constitutional self-government, a constitution was adopted which embodied many of the democratic and popular features for which Jefferson had striven with little success during his lifetime. Much of the struggle had been between advocates of popular rule and defenders of property in its various forms. With the reforms of 1850-51, this struggle by no means ceased. Rather it took new forms. Now that functions of the Legislature and Executive were more directly expressions of popular will, attention shifted to the limits which the State's constitution ought to put on the exercise of those functions. In Virginia as in other states one dominant feature of constitutional development in the middle and late nineteenth century would be an inquiry into which of these limits (such as the curbs on aid to internal improvements and on lending the credit of the State which removed the Richmond Enquirer's doubts about the 1851 Constitution) should operate as a check on legislative majorities.

PART II: HISTORY AND MODERN CONSTITUTION-MAKING

To ponder the constitutional history of Virginia's first decades is to turn a mirror to our own times. Much of what concerned them concerns us now. Like the delegates at the convention of 1829-30, we still debate certain recurrent issues: who should have the vote, to what extent popular majorities should be checked by constitutional limitations, the place of property in a democratic society, the relations among the three branches of government, the structure of local government, what a State should do and what should be left for individuals to do, what ought to go into a State's fundamental document and what ought to be left to the statute books.

Many of the specific issues have changed, of course. Amendments to the Federal Constitution have settled some questions, such as slavery.

---

180 Richmond Whig, Nov. 24, 1851.
Federal court decisions now control others, such as apportionment of representation in state legislatures. Federal statutes, such as the Voting Rights Act of 1965, shape yet others. Some issues, such as whether there shall be state aid to canal projects, have disappeared with changing technology. Yet in all these instances the old issues reappear in new forms. If slavery is outlawed by the Thirteenth Amendment, yet we are heir to all the problems, constitutional, legal, and other, which surround the effort to define the Negro's place in American society. The Supreme Court's mandate of the principle of "one man, one vote" does not dispose of the question, which so troubled the delegates of 1829-30, as to how interests other than people themselves, such as property, should be represented or protected in civil society. And so on.

The leaders of Virginia's first fifty years or so were no more infallible than are their present-day descendants. For all their ability, the delegates at the 1829-30 convention produced a constitution flawed enough that another convention had to be convened in only twenty years' time to create what had been needed in 1830. Yet those men of early Virginia did have an unusual talent for airing the basic issues of constitutional theory. This is why the debates of 1829-30 and other documents of that era are among the enduring documents of constitutionalism. And the way those men were able to expose some of the basic questions (even if they did not always have the answers) suggests the usefulness of seeking in their views insights into our own problems.

In the pages which follow, a few ideas are explored relating to the following: the concept of a constitution, the nature of representative government, the frame of government, and Virginia's government in the context of a federal system.

**Constitutional Government**

*The Place of General Principles in Framing Constitutions*

To what extent should those who make constitutions resolve specific problems against the backdrop of more general or abstract principles? In drafting or revising constitutions, as in drafting other documents, it sometimes happens that issues are dealt with in an ad hoc fashion, no reference being had to larger questions of philosophy or values which may serve to give unity to the document. Jefferson realized the value of having in mind underlying principles which would serve as a standard against which to judge specific parts of a constitution. Thus, in his 1816
letter to Samuel Kercheval, he postulated the object of constitution-making in America to be republican government and the "mother principle" to be that "governments are republican only in proportion as they embody the will of their people, and execute it." This gave Jefferson a test by which he could judge "every branch of our constitution," which he proceeded to do.  

One might, of course, postulate some other ultimate value than republicanism. It might be, as with Plato, justice; it might be, as with the utilitarians, the greatest happiness of the greatest number; it might be something else. In any event, though it might not yield ready answers to any particular problem (e.g., whether the popular will is better expressed by a long ballot or a short one), and much empirical data may be required quite apart from the initial philosophical judgment, still to postulate some ultimate value is a reminder that decisions on individual issues have implications beyond each such issue.

The problem of the relevance and utility of general or abstract principles was aired in the 1829-30 convention debates. In general, it was the reformers in the convention who appealed to general principles, since it was the abstract sentiments of the Declaration of Rights which seemed to provide the best support for their particular views of suffrage and representation, among other objects. Their conservative opponents were more apt to dismiss theory and appeal to the test of practicality. In this vein Philip Barbour (later to be elected chairman of the convention upon the resignation of Monroe) argued for the test of "practical utility" and declared, "If I am right, we must discard mere theory, adopt nothing on the ground of mere speculation, but proceed to men and things as they are. In the language of Solon, we must establish not the best possible, but the best practicable Government." Since the reformers were appealing especially to the ideas of Jefferson, John Randolph took pains to dismiss the man of Monticello as a visionary: "I have no hesitation to say, that on a subject like this [the house was debating county courts], I have not much deference for the opinion of Mr. Jefferson. We all know he was very confident in his theories but I am a practical man and have no confidence a priori in the theories of Mr. Jefferson, or of any other man under the sun." For Randolph,

182 10 Writings of Jefferson 37-38 (Ford ed.).
183 See, e.g., 1829-30 Debates 52 (Taylor), 259-60 (Johnson).
184 Id. at 94.
185 Id. at 532. Randolph recalled Jefferson's design for a plough which was mathematically proved to have least resistance; yet another, more awkward looking plough beat Jefferson's "as common sense will always beat theory and reveries." Id. at 533.
as for Edmund Burke (who much influenced Randolph’s thinking), the only reliable standard was experience.

Delegates quarreled in particular about theories of natural rights. The Declaration of Rights, drafted in 1776, had of course a healthy dose of natural rights philosophy, recognizing the inherent rights retained by man in a state of society. Reformers at the 1829-30 convention often invoked natural rights philosophers like John Locke and drew heavily upon the social compact theory to support their arguments. Chapman Johnson believed that the declarations of equality and of inherent rights in the Bill of Rights were “deduced by reason, from the known character and condition of man” and were “natural rights” and the “gift of nature,” therefore not dependent on positive laws.\textsuperscript{186}

Other delegates ridiculed the philosophy of natural rights as a guide to action. Benjamin Watkins Leigh reminded the delegates that they were “employed in forming a Government for civilized man, not for a horde of savages just emerging from an imaginary state of nature.” \textsuperscript{187} And Abel P. Upshur summed up the case against the abstractions of natural law: \textsuperscript{188}

In truth, Mr. Chairman, there are no original principles of Government at all. . . . There are no original principles, existing in the nature of things and independent of agreement, to which Government must of necessity conform, in order to be either legitimate or philosophical. The principles of Government, are those principles only, which the people who form the Government, choose to adopt and apply to themselves.

Twentieth-century Americans sometimes still debate public policy in terms of natural law.\textsuperscript{189} In any event, they do debate values. After all,
men like Leigh and Upshur were not saying that there was no place for value judgments; they were simply taking the positivistic view that the judgments were made by men in society, not discovered in the laws of nature. And while it may be academic to argue whether there ever was such a thing as a "state of nature," still it is very much to the point to decide, in drafting a constitution, what basic postulates and assumptions underlie such a document. The act of drafting a fundamental law necessarily involves making judgments about what a society considers to be fundamental. For example, John P. Wheeler, Jr., delineates the essential functions of a constitution as the protection of civil liberties, the definition of the powers of government, and the establishment of the more important institutions of government. Even though there may be disagreement over a particular catalogue of values, any analysis of constitution-making should include a conscious effort to formulate the purposes for which one draws up a constitution.

The Nature and Uses of a Constitution

One of the dilemmas of constitutional theory is the need to strike a balance between putting fundamental principles beyond easy repeal by transient popular majorities and allowing evolving needs of a society to be reflected in that society's basic document. The idea of a constitution superior to ordinary statutes and not subject to amendment by simple legislation took centuries to evolve. Its roots lie at least as far back as the conventions which developed concerning Magna Carta as something above the ordinary act of Parliament. The idea was well developed by the time of the American Revolution, but as already noted there was considerable reason to wonder whether the constitution adopted by the Virginia convention of 1776 and never submitted to the people was in fact more than ordinary legislation. Repeatedly Jefferson argued that the first Virginia Constitution did not enjoy the dignity of fundamental law, but practice and finally the decision of the Virginia Court of Appeals in Kamper v. Hawkins gave that status to the 1776 constitution. On one thing Jefferson, on the one side, and those on the other side (like St. George Tucker) arguing that the 1776 consti-

---

190 Wheeler, Salient Issues xii.

191 See text at note 73 supra.
stitution was fundamental law, agreed: a constitution ought to be beyond the reach of legislative majorities.

Agreeing that constitutions should be difficult to tamper with proved easier than agreeing whether they should ever be tampered with. Jefferson, in his 1816 letter to Kercheval, observed that human institutions must keep pace with the time, that each generation had the right to choose its own form of government, and that therefore a constitution should provide for periodic revision. In the 1829-30 convention, Alexander Campbell expressed his “admiration and gratitude” to the founders of 1776 for the work they had done but believed that even those “sages, great and wise, and good, as they were” could not have written a constitution which could endure without change. And Philip Doddridge reminded the delegates that reform—even if it be labelled (as some in the convention were doing) as “revolution”—did not always lead to anarchy or despotism; recall, he said, the advances made in the “revolutions” producing Magna Carta, the Glorious Revolution of 1688, and American Independence.

Others were far less willing to see change as a good thing. John Randolph denied that he was “unwilling, under any circumstances” to alter the constitution, but he made it clear that nothing anyone had said at the convention had made him ready to see changes in the document under which he had been born and under which “I had hoped to be carried to my grave.” Crying out against the “lust of innovation,” Randolph declared, “For my share, this is the first Convention in which I ever had a seat; and I trust in God, it will be the last. I never had any taste for Conventions; or for new Constitutions, made per order, or kept ready made, to suit casual customers.” Indeed Randolph went so far as to oppose any provision for amending the new constitution, just as he had preferred not changing the old one. To allow amendments, said Randolph, was to introduce a state of “perpetual uncertainty” into the constitution, rather like “introducing into a marriage contract a provision for divorce.” And he closed with this peroration:

---

192 See text at note 105 supra.
193 1829-30 DEBATES 384.
194 Id. at 425-27.
195 Id. at 313, 492, 320.
196 Id. at 789-90.
197 Id. at 791. In the same speech, Randolph said, “Sir, I am not a prophet or a seer; but I will venture to predict, that your new Constitution, if it shall be adopted—does not last twenty years.” Id. at 790. Randolph was a prophet: the convention of 1850-51 convened 20 years and 9 months after the adjournment of the convention of 1829-30.
They who love change—who delight in public confusion—who wish to feed the cauldron and make it bubble—may vote if they please for future changes. But by what spell—by what formula are you going to bind the people to all future time? *Quis custodiet custodes?* The days of Lycurgus are gone by, when he could swear the people not to alter the Constitution until he should return—*animo non revertendi*. You may make what entries upon parchment you please. Give me a Constitution that will last for half a century—that is all I wish for. No Constitution that you can make will last the one-half of half a century. Sir, I will stake anything short of my salvation, that those who are malcontent now will be more malcontent three years hence than they are at this day. I have no favour for this Constitution. I shall vote against its adoption, and I shall advise all the people of my district to set their faces—aye—and their shoulders against it. But if we are to have it—let us not have it with its death warrant in its very face: with the *facies hypocratia*—the Sardonic grin of death upon its countenance.

Randolph took his seat, and the convention, without further debate voted 68 to 25 against making any provision in the new constitution for a process of amendment.\(^{198}\) It was not until the Reconstruction era convention which met in 1867-68 that an amending process was for the first time placed in the Virginia Constitution.\(^{199}\)

Whether one welcomed change, as did Jefferson, or resisted it, with Randolph, Virginia's constitution has seen its share of change through the years. One change in particular relates to the observation which began this section, namely, that on one thing most observers can agree: a constitution is meant to embody fundamental law.\(^{200}\) If a constitution is intended to state the fundamentals of a society—above all its frame of government, its limits on power, and its individual liberties—then the change which might occasion close study is the change in the direction of making today's constitutions, Virginia's included, far longer and more detailed documents than they were originally. In 1776 Virginia's constitution was but 1500 words; today it is about 23,000 words. Some states still have short constitutions—at least a half-dozen states have documents of fewer than 10,000 words—but constitutions as long as or longer than Virginia's are common.\(^{201}\)

\(^{198}\) *Id.* at 791.

\(^{199}\) Va. Const. (1868) art. XII.

\(^{200}\) Frank P. Grad suggests that the criteria of inclusion and exclusion in a constitution are rather more elusive than use of the word "fundamental" might imply. See his article in this issue of the *Review*, infra page 945.

\(^{201}\) Constitutions shorter than 10,000 words are those of Connecticut (6,750), Indiana
The reasons for the growth of detail in American state constitutions are many: the rising distrust in the nineteenth century of legislatures, increasingly complex social and economic problems, the creation of new administrative agencies, and the success of interest groups in having their particular objectives written into the fundamental law, among others. Whatever the reasons for the great length and detail of the typical state constitution, commentators speak with one voice when they submit that such detail is simply not compatible with the traditional assumption that a constitution is properly the repository of the fundamental ordering principles of society, and that all else should be left to the statute books. John P. Wheeler, Jr., emphasizes that it is "a constitution which is being prepared, not a code of laws," and believes that few contemporary state constitutions approximate the ideal of brevity and exclusion of statutory matters. Other constitutional scholars, such as Paul Kauper and W. Brooke Graves, have made the same point. It is interesting that even back in 1829-30, when the Virginia constitution had not attained its present length or detail, delegates were drawing this distinction between the fundamentals which properly belong in a constitution and matters which should be left to general laws. As expressed by Richard Henderson, a delegate from Loudoun:

The organic law ought to be simple; it should establish and sanctify great principles . . . embracing details only so far as may be necessary to carry those principles into action. All the rest is a fair and proper subject for the operation of public opinion and the public interests, as new lights, or varying circumstances demand modifications or changes.

In deciding what is "fundamental" and therefore belongs in a state's constitution, the delegates of 1829-30 debated a point of special modern

(7,816), Kansas (8,052), New Hampshire (8,800), Rhode Island (6,780), Tennessee (8,220), and Vermont (4,840). Among the longer state constitutions are those of Louisiana (236,000), followed by Alabama (80,000), California (70,000), Oklahoma (70,000), and New York (45,000). Book of the States at 1966-67, 10 (1966). The Federal Constitution, by contrast, numbers only about 6,000 words (only one state, Vermont, has a shorter constitution) and remains today a model of compactness, logical arrangement, and internal coherence.

203 Wheeler, Salient Issues xii.
205 1829-30 Debates 521. For like views expressed by delegate Thomas Joynes, of Accomac, see id. at 506.
relevance: whether the objects of government, especially as spelled out in a constitution, are largely negative (such as protecting persons and property from injury, enforcing contracts, etc.) or whether the objects embrace affirmative duties on the state, such as a duty to promote the people's well-being and prosperity. An editorial in a Charlottesville newspaper not long before the 1829-30 convention put the case for a more positive state:

It is time that the government of our state had done something for its people, besides reminding them of the glory of their ancestry, and indulging in visions of mere speculative advantage . . . . The doctrine of *laissez nous faire* does not extinguish the obligation of government to husband the resources, and advance the welfare of the citizens, by every practical expedient.

In the convention Randolph and Giles, among others, expressed fears of an active government, Randolph believing that nothing threatened liberty more than too much legislation, and Giles holding passive government to be the best government. Perhaps Giles' clearest statement of his view is found in a statement made elsewhere than the convention, in the third of his "Political Disquisitions":

That the only rightful purpose of Government, was to secure to man two great objects, which man in his natural state could not secure to himself—safety and justice. The safety of the people, against violence from without, and from within. Justice, impartial justice to all; against the violence, or wrong of any. After effecting these great objects, the less Government has to do in human affairs, the better. Almost all governmental intermeddling, beyond the safety of the people, and the distribution of justice amongst them is governmental usurpation and mischief.

The debate over whether government should be "negative" or "positive," be limited to essentially peace-keeping functions (internal and external) or be a "service" state, was an active one in the nineteenth century and engaged the minds of such thinkers as Lord Acton and Herbert Spencer. It is an even livelier topic in the twentieth century. Modern national constitutions, especially those of newer countries, often

---

206 Virginia Advocate (Charlottesville), Dec. 1, 1827.
207 1829-30 DEBATES 802, 243.
208 W. GILES, Political Disquisitions—No. III, in POLITICAL MISCELLANIES 4 (1829).
pledge the government to the promotion of the citizens' social and economic welfare, often including an affirmative duty on the government to pursue such objects as a living wage and a decent standard of living; security against unemployment, old age, and sickness; free and compulsory education; etc. In 1959 the International Conference of Jurists, in the Declaration of Delhi, took the interesting step of defining the "rule of law" to include not only traditional individual rights such as freedom of speech, but also social and economic welfare.

Regarding the writing of state constitutions, it is sometimes argued that the duty to pursue certain social and economic objectives should be imposed on state governments just as they are obliged to protect more traditional rights such as freedom of expression. While state governments obviously perform many more functions than they did in the nineteenth century, efforts to elevate to the status of constitutional rights some of the social and economic services of state governments have generally been rebuffed. For one thing, "rights" such as a right to employment or a minimum standard of living, even if inserted into a constitution, are simply not the sort of thing which (unlike the more familiar rights like freedom of speech) are susceptible of judicial enforcement. Thus to write such social and economic policies into a constitution as a

209 E.g., Part IV of the Constitution of India, which contains a list of "Directive Principles of State Policy." While these provisions are not enforceable in the courts, Part IV makes it "the duty of the State to apply these principles in making laws." Among the principles enunciated are protection of children against exploitation; public assistance for the unemployed, the aged, the sick, and the disabled; and "a decent standard of life and full enjoyment of leisure and social and cultural opportunities."


Of the 89 nations' constitutions included in the second edition (1956) of Peaslee's Constitutions of Nations, a higher percentage (80% or more) had guarantees of such traditional rights as fair legal process, freedom of speech and press, and rights of conscience and religion, than the percentage having guarantees of newer "positive" rights such as social security (51%) and health and motherhood (47%).

211 See also the United Nations' Universal Declaration of Human Rights (1948), which states both traditional liberties such as property and expression as well as such newer rights as an adequate standard of living, medical care, and other social services. See J. Green, The United Nations and Human Rights 26-37 (1956); H. Lauterpacht, International Law and Human Rights 394-434 (1950).

212 From the United Auto Workers has come a proposal that an "Economic Bill of Rights" be added to the Federal Constitution. This proposal would establish as constitutional rights the rights to a job, a decent standard of living, a guaranteed annual income for those unable to work, cradle-to-grave medical care, a "good house in a good neighborhood," and free education through the first two years of college. Washington Post, May 8, 1968, at A2, col. 6.

duty of government is to create little more than some advice to the Legislature, not an enforceable "right." Moreover, constitutions are ideally products of consensus, and there is in most states far more consensus on such values as free speech or freedom of religion than there is on social and economic policy (such as a guarantee of the right to bargain collectively, which appears in the constitutions of some states). Thus the Model State Constitution of the National Municipal League omits such social and economic goals. Virginia's Constitution, like that of most states, contains few affirmative declarations of duties upon the Legislature to implement given social or economic policies. A notable exception is the requirement in section 129 that the General Assembly "shall establish and maintain an efficient system of public free schools throughout the State." That education appears in Virginia's fundamental law reflects a judgment that education should take its place alongside more ancient values such as freedom of speech and due process of law.

Representative Government

Suffrage

To decide who should have the vote is to decide essentially where power in a political society should reside. Hence no single question (save that of representation, a related problem) has been more hotly disputed in Virginia's constitutional development. One reads with surprise the statement of Edmund Randolph, in his manuscript history of Virginia, that when it was proposed at the 1776 convention that suffrage in the new State be restricted to freeholders, as it had been in colonial times, "It is not recollected that a hint was uttered in contravention of this principle." Perhaps the exigencies of war led the members of that convention to avoid a potentially troublesome issue, or perhaps as freeholders they were agreed on the virtues of freehold suffrage, but certainly 1776 was the last time in Virginia's history when the extent of the suffrage did not provoke a fight. The first Virginia Constitution was still very young when Jefferson was arguing, in his Notes on the State of


214 One student of suffrage in America has observed that historically the resolution of this question has been as much a product of state conditions as of national forces. C. Williamson, American Suffrage: From Property to Democracy, 1760-1860 viii (1960).

Virginia and on other occasions, that those who pay taxes and fight for their State should have the vote.216

Suffrage was a great issue at the 1829-30 convention. Arguments for a wider franchise were supported in several ways. Some members, like Lucas Thompson, of Amherst, invoked a natural rights philosophy. Not only was the vote the means whereby man signified his consent to be bound by the social compact, it was the "substratum, the paramount right" upon which the natural rights of life, liberty, and property (recognized as rights by his opponents in the convention) rested.217 Others favoring a wider franchise followed the line of attack laid down by Jefferson: that those who fought in the State’s defense surely ought to be able to vote for its lawmakers.218 Another argument was comparative in nature: that of the twenty-four American states then in being, only Virginia retained the freehold suffrage throughout, other states’ restriction being mainly those of age, residence, or taxpaying or some combination of these factors.219 And the reformers saw the limited franchise as the source of many of Virginia’s ills, which Richard Henderson portrayed in this dark picture of Virginia’s general condition:220

What is the general condition of the Commonwealth? A commerce inferior to that of the little State of Rhode Island, an agriculture languishing, the mechanic arts in a state of depression and thriftlessness, and provision made for the education of about one-eighth of the children annually educated by the small State of Connecticut. Yes, Sir, and they are not half so well educated.

Those who defended the existing franchise at the 1829-30 convention were ready with their arguments. Benjamin Watkins Leigh asked how the vote could be a natural right when it could not have existed (unlike life, for example) until society came into being.221 Nicholas, Leigh, and Randolph eulogized the tillers of the soil as the most virtuous of men and added that, anyway, land was readily available in Virginia for those who

216 Supra note 47.
217 1829-30 Debates 412.
218 Id. at 123 (Campbell), 360 (Henderson). See also the Memorial of the Non-Freeholders of the City of Richmond, id. at 27-28.
219 Id. at 356 (Henderson), 379-81 (Morgan). North Carolina retained the freehold requirement for voting for one house of its legislature. Id. at 380.
220 Id. at 359. Another argument, advanced by Gordon, was that increased white votes were needed to “counteract the effects of the increase of the black population in Virginia.” Id. at 145.
221 Id. at 399. See the like argument of Philip N. Nicholas, id. at 363.
wished to become freeholders and thus have the vote. And the spokes-
men for the freehold franchise raised the spectre of the corruption and
bribery which would follow when the vote was given to men who, not
owning land, were not independent and above such temptations.

General white male suffrage, having eluded the grasp of the reformers
in 1829-30, came about with the convention of 1850-51. Francis
Pendleton Gaines has suggested a number of reasons for the convention's
having agreed to take this step: the belief of both the Whigs and
Democrats that they would be the beneficiary of a wider suffrage, the
impact of Jacksonian democracy, the example of reform in other states,
and others. One Richmond newspaper, the Whig, regretted the con-
vention's action:

From the moment it was known that universal suffrage was inevitable,
demagogues vied with each other for power . . . . Each one argued
that it was the tendency of the age and that any attempt to stem the
current of radicalism would be to overwhelm it in its waters . . . .
It is useless to give way to any feeling of regret at what has been done.
The result was inevitable.

But the Richmond Enquirer thought Virginians more than ready for the
expanded franchise:

It is remarkable that the people of this commonwealth, more capable
of self-government, by their intelligence, social condition, distin-
guishing traits of character, habits and manners, than any other people

---

222 Id. at 366 (Nicholas); 399-402, 438 (Leigh); 429-30 (Randolph).
223 Id. at 310-11 (Stanard), 367 (Nicholas). To give effect to general suffrage,
William B. Giles predicted great expenditures of time, money, and whiskey: "Upon
a moderate allowance of every election day, for getting drunk; and two days after-
wards for getting sober, there would be almost, as great a waste of labor, and a greater
waste of whiskey and of morals, than is required by the ceremonials of the Catholic
Church in Mexico." Giles, Political Disquisition No. II in Political Miscellanies 9
(1829).
224 Gaines, The Virginia Constitutional Convention of 1850-1851 (doctoral disserta-
tion, U.Va. Library, 1950). The hope of the respective parties to be the chief
beneficiaries recalls the hopes, destined to be frustrated, of the Conservative Party in
England that they would get the credit for having enlarged the electorate in the second
Reform Bill (1867). The sweeping victory of Gladstone's Liberals in 1868 dashed
these hopes. See L. Woodward, The Age of Reform: 1815-1870 at 190 (1962). Oddly,
during the campaign Disraeli made little effort to appeal to the very class he had been
instrumental in enfranchising. See R. Blake, Disraeli 512 (1967).
225 Richmond Whig, Aug. 1, 1851.
226 Richmond Enquirer, Aug. 15, 1851, at 2, col. 1.
in the American Union, or in the world, should be among the last of the people of the States to assume the supreme authority . . . . We have no fear for the enfranchisement of the people. Least of all do we apprehend danger from enfranchising the Virginia people.

But the process of enfranchisement was not complete. There were yet considerable groups of would-be voters, among them Negroes and women. Within 20 years after Virginia had given the vote to white males over 21, the Civil War and the Reconstruction Amendments to the Constitution had made free men of the former black slaves and made them equally entitled with white men to share in the franchise. At the Virginia convention of 1867-68 the shoe was on the other foot: it seemed likely that white Virginians would be disenfranchised wholesale. Virginia, now "Military District No. 1," had to make a constitution which would satisfy the Republican Congress, in order that Virginia might be readmitted to the Union.227 Those who had held office under the Confederacy or in any way had supported it were, of course, excluded from voting for or being delegates to the constitutional convention,228 and when the convention met, radicals (many of them Northerners or from other countries) were in the substantial majority. John Curtiss Underwood, the New Yorker and federal district judge who had conducted the trial of Jefferson Davis, was elected president of the convention.229

The franchise question proved to be the 1867-68 convention's major battle ground. There was, to begin with, the necessity, under federal pressure, to enfranchise the Negro; this led some of the delegates to engage in a debate—a faint shadow of the learned discourse of 1829-30—on whether the vote was an "inherent right."230 The more serious fight was over who should be denied the right, for the radicals proposed to disenfranchise the mass of white Virginians who had, in one way or another, supported the Confederate cause. The radical majority produced two clauses—the so-called "disenfranchisement" clause and the "test-oath" clause—which would have effectively denied either the vote or public office to the vast majority of white Virginians who might

229 See the conservative descriptions of the convention members in the Richmond Dispatch, April 20, 1868, at 1.
otherwise have exercised political power in the State. But General Schofield, Virginia's military commander, was opposed to the two "obnoxious" clauses, and some adroit maneuvering in Washington produced a recommendation to Congress by President Grant that when the proposed Underwood Constitution was submitted to the people, the two clauses be voted on separately. This was done, and while the body of the new constitution was approved overwhelmingly, both the disenfranchisement clause and the test-oath were voted down.

By the turn of the century, the Negro vote was once again a key issue, and the constitutional convention of 1901-02 produced the poll tax, a device which resulted in the large-scale disenfranchisement of the Negro. Sixty-four years later the Supreme Court invalidated Virginia's poll tax as a prerequisite to voting in state elections on the ground that it violated the equal protection clause of the Fourteenth Amendment for a state to make the "payment of any fee an electoral standard."

Those who draft state constitutions must still deal, as did their forebears, with the question, who shall have the vote. Options are open to a state as to many of the qualifications of voters, such as age and residence. But federal law, constitutional and statutory, plays a far more significant role in placing outer limits on what states may do in defining

---

232 The vote on the constitution was 210,285 for ratification, and 9,136 for rejection, whereas the disfranchisement clause was rejected by the vote of 124,360 to 84,410, and the test-oath clause was rejected by a vote of 124,715 to 83,458. J. Chandler, Representation in Virginia 79 n.7 (1896).
233 One student of the 1901-02 convention has concluded, "It should be reasonably clear to the most casual reader of the Debates that the pervading issue at the Convention was disfranchisement of the Negro." Holt, The Virginia Constitutional Convention of 1901, 76 Va. Mag. Hist. & Biog. 67, 94 (1968). See also R. McDaniell, The Virginia Constitutional Convention of 1901-02 at 25-58 (1928). See generally Ogden, The Poll Tax in the South (1958).
235 See Piccard, Citizen Control of Government, in Wheeler, Salient Issues at 23-31. Query the extent to which federal courts might hold that the equal protection, due process, or other clauses limit a state's power to set up any age or residence requirement it might like. Cf. recent decisions striking down residence requirements (e.g., one year) as prerequisites to receiving welfare assistance. Harrell v. Tobriner, 36 U.S.L.W. 2283 (General Nov. 8, 1967); Thompson v. Shapiro, 270 F. Supp. 331 (1967); Green v. Department of Pub. Welfare, 270 F. Supp. 173 (1967).
the franchise than was the case when the delegates of 1829-30 explored the philosophical basis of the right to vote. To begin with, there are amendments to the Federal Constitution explicitly dealing with the vote: the Fifteenth Amendment's prohibition of discriminating in the franchise on account of race or color, the Seventeenth's provision for the direct election of U. S. Senators, the Nineteenth's proscription of sex as a reason for denying the vote, and the Twenty-fourth's striking of the poll tax as a prerequisite to voting in federal elections. Then there are federal court decisions interpreting the general language of the equal protection clause of the Fourteenth Amendment in such a way as to outlaw the "white primary," to knock out the poll tax in state elections, and to limit a state's power to presume that members of the armed forces moving into the state do not intend to become residents of that state. Finally, the Supreme Court has, in opinions reminiscent of the sweeping language of John Marshall's "necessary and proper" decisions, given broad approval to the powers of Congress to pass statutes (such as the Voting Rights Act of 1965) superceding a variety of the normal features of state voting laws even in situations where the Court has not found (and said it need not find) any direct violation of the Fourteenth or Fifteenth Amendments as such. The delegates at the Virginia convention of 1829-30, in dealing with the franchise, were operating in territory virtually untouched by federal law in any form. They would hardly recognize the landscape today.

Representation

Equally with suffrage, the apportionment of representation in the Legislature determines where political power in a state shall lie. Just as suffrage remained under the 1776 Constitution what it had been in the Colony, so representation, unequal as it was, was not disturbed. Both decisions—on suffrage and representation—left power in the landed classes of the older counties in the East. It may be thought paradoxical that people who had been protesting so vehemently their lack of repre-


sentation in the British Parliament should, in structuring their own government, perpetuate glaring inequalities. Aware of the paradox, Edmund Randolph said that in the midst of a struggle for independence it was too risky a business to irritate the eastern counties by reducing their power and that therefore it was "tacitly understood" that their power would be undisturbed. But the issue could not be long buried, and from the return of peace onwards representation was as burning an issue as suffrage—indeed, an issue which burned ever brighter as the West steadily outstripped the East in growth of population.

Jefferson and St. George Tucker articulated the respective views of representation which in one form or another have persisted to our own day. Jefferson's position quite simply was that it was wrong for a smaller number of men to be able, because of their property or tax payments or place of residence, to make the laws for a larger number of men. For Jefferson, representation meant representation of people, not other interests. Tucker disputed Jefferson's allegation of inequality in Virginia's system of legislative representation by arguing that numbers alone are not the proper basis for representation. The pecuniary burdens of government had to be taken into account, too, with the result that the basis of representation would be a mixed one: numbers plus tax revenues.

At the convention of 1829-30 the battle over representation in the General Assembly was fought along similar lines. On the one side the argument was essentially one for popular sovereignty. Early in the debates, John R. Cooke, replying to the charge that the reformers' ideal of majority rule was a metaphysical vision, looked to the Declaration of Rights of Virginia as support:

I say, then Sir, with a confidence inspired by a deep conviction of the truth of what I advance, that the principles of the sovereignty of the people, the equality of men, and the right of the majority, set forth in the "Declaration of the Rights of the people of Virginia," so far from being "wild and visionary," so far from being "abstractions and metaphysical subtleties," are the very principles which alone give a distinctive character to our institutions, are the principles which have...
had the practical effect in Virginia, of abolishing kingly power, and aristocratic privilege, substituting for them an elective magistracy, deriving their power from the people, and responsible to the people.

Majority rule was what the reformers wanted. "Government in the hands of the few," said Philip Doddridge, "is always despotic." To the eastern delegates, Doddridge declared that the people of the West "are a majority of individual units in the State, and your equals in intelligence and virtue, moral and political. Yet you say we must obey you." 245

Opposing representation based on white population, Abel P. Upshur denied that the principle of majority rule could be found either in the law of nature or in the Constitution of 1776. 248 Philip P. Barbour observed that frequently a minority is allowed to check the wishes of a simple majority, for example, the requirement of the Federal Constitution that a two-thirds vote in Congress be had to override a presidential veto or in the Senate to ratify a treaty, and the fact that one man on a jury can block the will of the other eleven jurors. 247 To the voices of repeated opposition to majority rule was voiced in the 1829-30 convention by conservatives such as John Randolph: 248

But, all this, I suppose, is in obedience to the all-prevailing principle, that vox populi vox dei; aye, Sir the all-prevailing principle, that Numbers and Numbers alone, are to regulate all things in political society, in the very teeth of those abstract natural rights of man, which constitute the only shadow of claim to exercise this monstrous tyranny.

As an alternative to the numbers basis of representation, 249 the conservatives developed a theory of representation of interests. Littleton

245 Id. at 86, 88. Speaking of the Virginia Company's ordinances of 1621 for the colony of Virginia, delegate John R. Cooke noted that the assembly at that time was directed to be elected by the "inhabitants" of the colony and said that, although the ordinance did not explicitly require equal representation for equal numbers of people, "yet, as equal representation, where there is a representation of the people, is the most obvious, and natural idea, it is to be presumed, that the company contemplated a representation substantially equal." Id. at 337. Cooke anticipated by 135 years the theory of Justice Black in Wesberry v. Sanders, 376 U.S. 1 (1964), that the language of Article 1, § 2, of the Constitution, saying that Representatives should be chosen "by the People," meant essentially one man, one vote in the creation of congressional districts.

247 Id. at 93-94.
248 Id. at 313.
249 Id. at 321.
Waller Tazewell developed the theory at some length during the debates. Tracing representation in Virginia from 1619 to his own time, Tazewell held that "every important interest in the society should have its particular representative." The most important interests, he thought, were capital and labor, and the object of a good government was to adjust these interests so that not too much influence is given to either.\footnote{\textit{Id.} at 329-31. \textit{Cf.} the theory of "mixed government" in English political thought. See Hinton, \textit{English Constitutional Theories from Sir John Eliot}, 75 Eng. Hist. Rev. 410 (1960); Weston, \textit{The Theory of Mixed Monarchy Under Charles I and After}, 75 Eng. Hist. Rev. 426 (1960).}

Various kinds of interests could be criteria of representation. It could be argued, for example, that particular regions (Tazewell mentioned the Eastern Shore of Virginia) have their special interests, or that small counties should have their own representation, even if this meant deviation from population figures.\footnote{Augustine Neale pleaded for express representation for "ancient and honourable" (but not very populous) counties like Charles City and New Kent. 1829-30 \textit{Debates} 840.} But the interest uppermost in conservative minds as a candidate for representation was property. Much of the record of the 1829-30 debates reflects the property owner's concern for what the multitudes would do with other men's property if those multitudes found themselves in power. Benjamin Watkins Leigh traced the downfall of Rome and Athens to placing the control of property in hands other than those of the owners of property. Neither the people of western Virginia, Leigh submitted, "nor any other body of men on earth, are honest enough to be entrusted with dominion over the property of others . . . ."\footnote{\textit{Id.} at 168.}

It is the first time in my life, that I ever heard of a Government, which was to divorce property from power. Yet, this is seriously and soberly proposed to us. Sir, I know it is practicable, but it can be done only by a violent convulsion, as in France—but the moment you have separated the two, that very moment property will go in search of power, and power in search of property.

The conservatives elevated this concern for property into a theory of government. Conservative Philip P. Barbour, borrowing the social compact analysis so often invoked by the reformers, submitted that men entering into the social compact brought into civil society not only their
persons, but also their property. Abel P. Upshur picked up the same theme:

"What, Sir, are the constituent elements of society? Persons and property. What are the subjects of Legislation? Persons and property. Was there ever a society seen on earth, which consisted only of men, women, and children? The very idea of society, carries with it the idea of property, as its necessary and inseparable attendant. . . . Society cannot exist without property; it constitutes the full half of its being. Take away all protection from property, and our next business is to cut each other's throat. All experience proves this. The safety of men depends on the safety of property; the rights of persons must mingle in the ruin of the rights of property. And shall it not then be protected? Sir, your Government cannot move an inch without property.

The reformers countered with arguments on at least two levels: first, that property already enjoyed ample protection (in fact, that the problem was how to restrain property from having too much power, not how better to protect it), and second, that if property should be represented then why not other interests such as intelligence and ability? On the first point, William McCoy, of Pendleton County, said "It is my belief that wealth will always take care of itself: and that it has too much interest and influence in controlling society already, without giving it more by Constitutional provision." On the second point, Alexander Campbell argued that the theory of representing interests would logically lead to representing "talent, physical strength, scientific skill, and general literature," since these qualities were "all more valuable than money, and as useful to the State. A Robert Fulton, a General Jackson, a Joseph Lancaster, a Benjamin Franklin, are as useful to the State, as a whole district of mere slave-holders." If the arguments of 1829-30 over the nature of representation sound familiar to the modern reader, they should. The theories of representation which Virginians (and other Americans) of that early time debated so heatedly have their very distinct modern echo in the reapportionment cases decided by the Supreme Court in the 1960's. In Reynolds v. Sims, decided in 1964, Chief Justice Earl Warren advanced a proposition that

254 Id. at 95.
255 Id. at 70.
266 Id. at 686. For a like argument by Alfred H. Powell, of Frederick, see id. at 107.
257 Id. at 119. See also the argument of Briscoe G. Baldwin, of Augusta, id. at 101.
Philip Doddridge and others in the 1829-30 convention would have well understood: that the "fundamental principle of representative government in this country is one of equal representation for equal numbers of people . . . . Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." Dissenting Justices (again sounding a note which would have been familiar to the men of 1829-30) were not so ready to dismiss the need to consider interests in creating a system of representation in a state legislature. Justice Harlan asserted that:

Legislators can represent their electors only by speaking for their interests—economic, social, political—many of which do not reflect the place where the electors live. The Court does not establish, or indeed even attempt to make a case for the proposition that conflicting interests within a State can only be adjusted by disregarding them when voters are grouped for purposes of representation.

Justice Stewart agreed, observing that representative government was a "process of accommodating group interests," and its function to channel those interests in the making of a State's public policies. Therefore, while Justice Stewart felt that there must be "effective majority rule," the principle of apportionment according to population might be departed from to some degree to achieve "fair, effective, and balanced representation of the regional, social, and economic interests within a State."

The "one man, one vote" decisions in the Reapportionment Cases should not be taken to mean that we have arrived at an age of unrestrained majoritarian rule. A check on popular majorities by means of having a "mixed" basis of representation in legislative bodies is but one of many checks which historically have operated to restrain majority will in America. The very idea of a constitution as fundamental law embodies a check on popular majorities. The separation of powers among the three branches of government, the theory of checks and balances among those branches, the provision (in state and federal constitutions) for special majorities to amend a constitution, the substantive provisions of the Bill of Rights and their enforcement through the mechanism of judicial review—these and others are among the checks

259 Id. at 623-24.
on legislative majorities. Many of these checks operate to protect personal rights, such as the right to procedural guarantees in a court of law or the right freely to express one's views. But there are checks operating in protection of property, too: for example, the inclusion of property among those subjects protected by the due process clauses of federal and state constitutions, and the right to just compensation for property taken for public uses.

Cases like the reapportionment decisions do not end the need to wrestle with the nature of representation. *Reynolds v. Sims* makes it constitutionally impossible to submerge population as a standard for legislative districts. But the reapportionment decisions do not outlaw the use of multimember districts in one house of a State's legislature and single-member districts in the other. One house can be made up of a small number of members, from large districts, and the other house, of many members, from small districts.\(^{261}\) For those who share Justices Harlan's and Stewart's view that the representation of interests is part of the object of the legislative process, such variables provide a means of reflecting the conflicting demands of different social, economic, and other groups in society. We are therefore, since 1964, no freer of the obligation to ask what representation is all about than were the delegates of 1829-30.

Likewise the centrality of property interests to the representation question suggests another question which remains current: to ponder the place of property in our society and to consider the nature and extent of constitutional protection which it should receive. Indeed not only the reapportionment cases but also Supreme Court decisions regarding due process of law and eminent domain raise the question of property's place in the constitutional galaxy quite starkly. Whereas once the due process clause of the Fourteenth Amendment was used regularly to strike down state legislation thought unreasonably to restrict the use of property,\(^{262}\) it is well known that not since 1937 has a state statute regulating economic matters been struck down on grounds of substantive due process.\(^{263}\) Likewise students of the Supreme Court


\(^{262}\) See, e.g., Coppage v. Kansas, 236 U.S. 1 (1915); Lochner v. New York, 198 U.S. 45 (1905).

cases in which it is alleged that a "regulation" of property has in fact amounted to a "taking" of property, for which compensation ought to be paid, cannot but note the increasing likelihood that even sweeping regulations which make economical use of a piece of property virtually impossible will not be held by the Court to rise to the level of a "taking" in the constitutional sense.264 There are those who wonder whether the Court has not in fact abdicated a function which it ought to be exercising.265 And some current observers, like some of the delegates of 1829-30, find a relation between property rights and other rights, the argument being that a laxity in the protection of one may lead to a comparable decline in the other.266 Whichever way one feels about federal judicial protection of property, states remain free, in their constitutions and in state court decisions interpreting those constitutions, to create more substantial barriers around rights of property, if they choose.267 Federal court decisions interpreting the due process and equal protection clauses and other parts of the Constitution in no way absolve the people of the states from making value judgments about representation, property, and other problems and from deciding in what way their state constitutions should speak to those problems.

The Frame of Government

The Separation of Powers

Montesquieu did his work well. Few political theorists were more highly regarded or more often cited by Americans in the founding days of the American Republic.268 And none of his ideas had greater influence in America than his theory of the separation of powers. Every plan of government talked of at the time of the Virginia convention of 1776, from the conservative instrument of Carter Braxton to the more democratic one of Jefferson, included as a fundamental postulate that there must be a separation of the powers of government among its principal branches.269 The constitution actually agreed upon by the con-

268 See P. Spurlin, Montesquieu in America, 1760-1801 (1940).
269 See supra at 826-27.
vention incorporated the doctrine, and it is interesting that a chief complaint of Jefferson against the 1776 Constitution was that it violated the principle of the separation of powers in more than one way.\textsuperscript{270} St. George Tucker, who disagreed with Jefferson on a number of points, was at one with him in believing in the separation of powers.\textsuperscript{271}

At the convention of 1829-30, much was said about the separation of powers and the allegation that the 1776 Constitution violated the principle. It was on this ground that legislative appointment of the Governor was denounced,\textsuperscript{272} and that allowing county judges to sit in the Legislature was opposed.\textsuperscript{273} Delegates who defended these practices did so, not by denying the doctrine of the separation of powers, but by contending that these practices did not actually offend the principle or that, after all, there was never a perfect instance of the separation of powers.\textsuperscript{274}

In the present-day Constitution of Virginia, the principle remains; indeed, it carries the unusual dignity of being an article to itself, having but one section:

\begin{quote}
Except as hereinafter provided, the legislature, executive and judicial departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time.
\end{quote}

The proviso "except as hereinafter provided" is an interesting one, for it is a reminder that we live in an age in which, at state and federal levels alike, we are accustomed to agencies which are neither fish nor fowl, neither strictly executive, legislative, or judicial, but have some of the attributes of all three branches of government.\textsuperscript{275} The distinction

\textsuperscript{270} See text at note 51 supra.
\textsuperscript{271} See text at note 76 supra.
\textsuperscript{272} 1829-30 DEBATES 466 (Doddridge), 471-72 (Henderson), 578 (Powell).
\textsuperscript{273} Id. at 528 (Campbell).
\textsuperscript{274} Id. at 481 (Monroe), 509-10 (Giles), 591 (Leigh).
\textsuperscript{275} VA. CONST. art. III, § 39. The doctrine of separation of powers is also enunciated in VA. CONST. art. I, § 5.
\textsuperscript{276} On the historical development of regulatory agencies, see K. DAVIS, ADMINISTRATIVE LAW § 1.04 (1958). These agencies are often criticized on the ground that they are grand jury, prosecutor, and judge rolled into one. For proposals by Louis J. Hector and Newton N. Minow to separate federal agencies’ rule-making functions from adjudication, and for the “vigorous dissent” of William L. Cary, see W. CARY, POLITICS AND THE REGULATORY AGENCIES 125-34 (1967); see also W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 1018-29 (4th ed. 1960). On separation of powers and delegation of
between executive, legislative, and judicial functions, which seemed clear enough to political thinkers of the eighteenth century, is much blurred today. The separation of powers, especially at the federal level, still conditions much of our constitutional theory and judicial decisions—in the doctrine of “political questions,” for example. At the state level, however, more fuss is apt to be kicked up over what powers to give, and in what way to structure, one or another of the three traditional branches, without reference to classical arguments over separation of powers.

The Legislative Branch

In Virginia, as in other states, the first constitutions contained virtually no limitations on the powers of the legislative branch, save for the specific limitations of the bills of rights. There was, for example, nothing written into the constitution to prevent the Legislature from amending or rewriting the constitution at will—a fact which gave Jefferson special anxiety. Even in 1829-30, the convention then meeting was little concerned about the powers of the legislative branch. The convention did create a number of new restrictions, including a ban on ex post facto laws or laws impairing the obligation of contracts, an eminent domain clause, a prohibition against religious tests (based on Jefferson’s Bill for Religious Freedom), and a ban on the Legislature’s increasing its members’ salary for the term to which they were elected.278

It was the convention of 1850-51 which, as one observer has put it, “started in earnest the practice of circumscribing the powers of the general assembly which reached its climax in the Convention of 1901 . . . .” 279 Among the limits placed on the Legislature were those relating to its power to create new counties, to grant divorces, to pledge the faith of the State, and to incur state debts.280 Willard Hurst has commented that “the persistent theme” of the limitations on government power written into state constitutions after the 1840’s was “the desire to

---

279 J. Pate, Constitutional Revision in Virginia Affecting the General Assembly 144 (1930).
280 Va. Const. (1850) art. IV, §§ 28 (pledging faith of the State), 29 (sinking fund), 31 (life of a debt), 34 (counties), 35 (divorces).
The attitude of alarm and distrust which led in Virginia to the notable limits on the Legislature's power to borrow and spend written into the 1851 Constitution was reflected in the statement of C. J. Faulkner, a delegate from Berkeley County (and later prominent in the West Virginia constitutional convention of 1872):

I allude to that predominant sense of shame and alarm in the public mind at the reckless and wasteful expenditure of public treasure, and which has prepared so large a portion of this commonwealth—residing both east and west—to impose upon the debt creating and taxing power of the government all such wise and judicious limitations as may guard them from abuse in the future.

Born of such mid-nineteenth-century experience, restrictions on legislative powers, notably in the areas of taxation and finance, are very much the subject of present-day debate. In general, constitutional restrictions on what a legislature may do are most noticeable in the area of fiscal policy. Nearly all states have some form of limit on the power of the legislature to incur debt; for example, the Virginia Constitution imposes a rather strict "pay-as-you-go" check on legislative spending. Thus it is in this area which, in Virginia or elsewhere, one might expect an especially lively debate over the oft-expressed view that "much of the work of constitutional revision so far as the legislature is concerned is . . . a matter of determining not what should be added to the constitution but what might properly be taken out of it."

While curbs on legislative power are the subject of much discussion, the relation between the two houses of the legislature is not the burning issue it once was. When the drafters of 1776 set out to create a legislative branch for Virginia, they were naturally aware of the British Parliament as a model (for either emulation or rejection). In Parliament the House of Commons and the House of Lords represented vastly different constituencies and both wielded considerable power. The statesmen of 1776 had also the example of colonial assemblies, in which

282 Quoted in F. Green, Constitutional Development in the South Atlantic States, 1776-1860 at 293 (1966).
284 Kresky, Taxation and Finance, in Wheeler, Salient Issues 136, 139.
285 VA. Const. art. XIII, § 184, 1849.
the upper houses were seen to stand for privilege and the lower houses were thought more nearly to be popular branches. Thus it would have been natural for the draftsmen of a new state constitution to assume that among the checks and balances (another pervasive theory, along with the separation of powers) would be the creation of two houses of a legislature, different in significant respects. Thus when George Mason drew up the initial draft of a plan of government for the 1776 convention, it provided such differences between the two houses as the mode of election (direct election by freeholders for the lower house, and a kind of electoral college for the upper), the requirement that all bills originate in the lower house, and the inability of the upper house to amend a money bill. The Constitution as adopted by the convention dropped Mason's novel electoral college but provided different constituencies for the two houses (the House of Delegates to be elected from the counties, and the Senate to be elected from twenty-four districts) and retained the provision as to the origin of bills and the amendment of money bills.

Jefferson, in his Notes on the State of Virginia, not only wanted to strengthen the separation of powers but also thought checks and balances between the two houses insufficient. "The purpose of establishing different houses of legislation is to introduce the influence of different interests or different principles," he said, citing the instance of the House of Commons and the House of Lords. The Virginia Senate, he thought, was too homogenous with the House of Delegates. In a like vein, Madison, in commenting on Jefferson's 1783 draft of a constitution for Virginia, said that the term of office of state senators ought to be six years rather than two on the ground that it should be able to "withstand the occasional impetuosities of the more numerous branch."

In the convention of 1829-30, the reformers, having realized that they would not have the strength in the convention to achieve their aim of a Legislature both houses of which would be based on white population, offered a compromise: that the House of Delegates be apportioned according to white population, and the Senate have a mixed basis. James Monroe, seeing such a plan as a middle ground between the reform and conservative positions, thought that the white population basis, being a principle "corresponding with the Bill of Rights," should

---

287 1 Jefferson Papers 366-67 (Boyd ed.).
288 Id. at 379-80.
289 3 Writings of Jefferson 223 (Ford ed.).
290 6 Jefferson Papers 308 (Boyd ed). See 1 L. Brant, supra note 25, at 266-67.
be used for the House of Delegates, but that a mixed basis could be used for the Senate, to which resort could be had to check the "hasty decision" of the lower branch. The conservatives were not persuaded. Leigh charged that the westerners knew perfectly well that "if they get the white basis in the Lower House, it is a matter of no sort of consequence what basis you adopt in the Senate . . . ." Referring to a contest between the two houses over, say, a money bill, Leigh asked:

Which of these two bodies, think you, will prevail in such a contest? The Senate—a small body of men elected for four years—or the House of Delegates, a large body of men, and elected but for a single year? Has any body heard of a solitary case where the Senate has stood out and defeated the Lower House any where?

Randolph went even further; for his part, he would rather have both houses on the white basis (as distasteful as that obviously would have been to him) than pit one house against the other, numbers against property.

He would prefer having both branches on the white basis, to the Manichean plan, of a good and evil principle, in which, as in the Manichean system, the evil principle was the stronger, and was always in the end sure to prevail. . . . He would sooner throw himself upon the generosity, he might almost say, the charity of the West, than take a fallacious security—not the Balkan—but a mound of sand—something with which to cheat his constituents, crying to them peace, peace, when there was no peace, and never could be any.

Obviously, from these quotes one can infer that in 1829 bicameralism in Virginia was much closer to the British system of an aristocratic house and a democratic house than is the case today. From 1829 to the present day, the paths have diverged. In Britain the House of Lords has remained an aristocratic body, and especially after its rejection of the Budget Bill of 1909, its powers have been progressively shorn until today it has but a shadow of its former power, and even that shadow (the power only to delay a bill, not including money bills, and only for a year) is under attack from Labourites. In Virginia, the two houses

291 1829-30 DEBATES 325. To the same effect see id. at 291 (Johnson).
292 Id. at 545.
293 Id. at 556.
294 The House of Lords, in rejecting Lloyd George's budget of 1909, had taken a
have become more alike, and both have been made more popular. Though today their terms of office differ (two years in the House, and four years in the Senate), they are elected out of the same body of voters, and they are genuinely coequal partners in the legislative process. Virginia's retention of bicameralism remains the rule in other American states, the sole exception being Nebraska, which in 1937 created a unicameral legislature. Since that time unicameralism has been often proposed in one state or another, but never adopted.295

The Executive

Of the changes effected in Virginia's government by the transition from Colony to Commonwealth, none (save the fact of independence itself) was more notable than the relegation of the executive to a position of total dependence. To the men of 1776, executives meant kings such as King George III (whom they were then indicting in the Virginia Declaration of Rights), and governors such as Lord Dunmore, whose ships and men had laid waste to Norfolk in January 1776 and were, as the Virginia convention met in Williamsburg, a constant military threat to the Virginia leaders. Hence, as Edmund Randolph noted in his manuscript history of Virginia, the convention "gave way to their horror of a powerful chief magistrate without waiting to reflect, how
much stronger a governor might be made, for the benefit of the people, and yet be held with a republican bridle." The Governor was to be elected by the Legislature and was to be dependent on them for his salary. Moreover, he was, as Randolph put it, "clogged with a council of state, who were to be elected by that assembly, and to court them for their favor . . . ."

James Madison believed that "our executive is the worst part of a bad Constitution," and St. George Tucker thought that no feature of the Constitution of 1776 cried out more sharply for reform than the executive. Though the Constitution professed to make the departments of government independent of each other, yet the executive

is chosen, paid, directed, and removed, by the legislative. It possesses not a single feature of independence . . . . If the union of these powers [executive and legislative] in the same men or body of men be dangerous to the state, is that union less dangerous when the legislature has the executive at its devotion, than when the executive dictates to an obedient legislature?

The delegates at the convention of 1829-30 thoroughly aired the case for and against a stronger executive. Philip N. Nicholas recalled that the "inordinate authority" of the monarch was one of the causes of separation from Great Britain and protested the creation of a "splendid Executive" in Virginia. He proposed to give the Governor—"a citizen called upon, temporarily, to execute the laws"—as little power as possible and check that power through the instrument of the Executive Council.

Other delegates including Benjamin Watkins Leigh and William Branch Giles agreed with Nicholas, arguing for an executive with as little power as possible, lest Virginia's Governor take on the trappings of monarchy or the authority of the Federal Executive. In our own age where mass communications media have such impact in the making and unmaking of candidates for high office (as in the Kennedy-Nixon television debates of 1960) there is special interest in the

296 44 VA. MAG. HIST. & BIOG. 35, 48, 105 (1936).
297 Letter from James Madison to Caleb Wallace, Aug. 23, 1785, in 2 WRITINGS OF MADISON 166 (G. Hunt ed. 1900-10).
298 Appendix to 1 TUCKER'S BLACKSTONE 119-20 (1803).
299 1829-30 DEBATES 468.
300 Id. at 589-94 (Leigh), 718 (Giles).
dire prophesies by Leigh of a kind of government by newspaper should the Governor be given any independence.

And the first effect of that change will be, that every newspaper in the Commonwealth will be filled with what they call discussions of the merits of the several candidates for the office. . . . Sir, it was the saying of a very wise man, that the Government of these United States was of a kind never yet described; that it was a newspaper Government. The newspapers not only claim to discuss the merits of all public measures, and all competitors for office, but to dictate measures, and to direct our elections. . . . I am, Sir, particularly anxious to avoid all newspaper agency in the election of the Chief Magistrate of Virginia; and, with that view (among others) to reduce the power and patronage of that office to the lowest point I possibly can.

Those who wanted a stronger executive argued both theory and expediency. Quoting from Jefferson’s Notes on the State of Virginia and from the views of Madison in the Federalist, Richard Henderson declared “Many tyrants are not more tolerable than one. It is against the principle of tyranny that I struggle with, in its details.”

Alfred Powell stated the same principle: that above all, “one department should not owe its very existence to another.”

To theory Henderson and Powell added the ominous prevision, thirty-two years before the fact, of the kind of executive Virginia might need should the Union be divided. Said Henderson, “The day may come, when Virginia may be compelled to take her rank amongst the nations of the earth. Suppose a scene of turmoil, of peril, is there a man of sense in the Commonwealth, who would rest securely, at such a crisis, on an Executive constructed like ours?”

The nearly century and a half since 1830 has seen a great change, in Virginia as elsewhere, in the position of the Governor. Just as Great Britain has evolved from parliamentary government to Cabinet government to leadership by a Prime Minister whose position is more nearly that of an American President, so the office of Governor has evolved from total dependence to a role second to none in the governmental

---

301 Id. at 592-93.
302 Id. at 471.
303 Id. at 578.
304 Id. at 473. Powell hinted more obliquely at “evil times” which might require a strong Executive. Id. at 578.
process. William H. Young describes the progression as having been one "from detested minion of Royal power, to stepson of legislative domination, to popular figurehead, to effective executive." Given an executive considered coequal with the Legislature, the typical modern issues involving the role of a state Governor include the constitutional ability of the Governor to succeed himself, the extent to which he is the effective head of the State's administration, his veto power over legislation, and his role in budgetary and fiscal matters.

The Judiciary

Article III of the United States Constitution begins with the simple statement that the judicial power of the United States "shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." State constitutions are usually far more detailed in their provisions for the structure of a state judiciary. The opening provision (section 87) of Virginia's judicial article is more specific than Article III of the Federal Constitution but by no means as detailed as some state constitutions:

The judicial power of the State shall be vested in a Supreme Court of Appeals, circuit courts, city courts, and such other courts, inferior to the Supreme Court of Appeals, as are hereinafter authorized, or as may be hereafter established by law. The jurisdiction of these tribunals, and of the judges thereof, except so far as conferred by this Constitution, shall be regulated by law.

On its face, this section is not vastly different from the first sentence of Article III, save that the inferior courts (circuit courts and city courts) are specified, rather than a general power being given to such "inferior" courts as may be appropriate. The significant difference appears in the sections which follow Section 87 in the Virginia Constitution, for those sections deal in considerable detail with the jurisdiction and procedure of the Supreme Court of Appeals and with circuit courts, corporation courts, hustings courts, and other courts (Sections 88-105).

How much detail there should be in the judicial article of Virginia's Constitution was the subject of much comment in the State's early

years. Edmund Randolph commented, with respect to the Constitution of 1776, "Instead of permitting to the assembly the power of instituting and abolishing courts of law according to the calls of the times; they were improvidently trammelled in respect to their reforms, by inserting in the constitution as a species of favorite courts of special denomination." James Madison, commenting on Jefferson's 1783 draft for a constitution, took a like view that "much detail" ought to be avoided in the judicial article. The question which concerned Randolph and Madison is as topical today as it was then. It is common to read in current literature on the subject of the state judiciary an examination of the question of how detailed ought the judicial article to be. The case for a detailed judicial article may arise from concern lest the Legislature too readily tamper with the judiciary; the case against detail may reflect the wish to avoid putting unnecessary roadblocks in the path of adjusting the court structure to current needs. Some states such as Hawaii have taken the approach of adopting a provision quite similar to that of the Federal Constitution's Article III.

Another question debated by early constitutional theorists in Virginia was the extent to which the judiciary should be independent of popular will, either directly (the question of an elective judiciary) or as it operated through the Legislature. The issue of the judge and the people found Thomas Jefferson on one side and St. George Tucker and John Marshall on the other. In his 1816 letter to Samuel Kercheval, Jefferson complained that the judges of the courts were "dependent on none but themselves." He understood why in England, where kingly misrule was to be feared, judges had been made independent of the executive. But in a government founded on popular will, Jefferson thought it wrong that judges were free of that will.

Tucker, Marshall, and others supplied an answer. Tucker, in his commentaries on Blackstone, believed there were "two indispensable qualifications in a judge": integrity, and knowledge of his country's constitution, laws, and the rights of the people. To secure the judge's

---

308 6 Jefferson Papers 313 (Boyd ed.).
310 Art. V, § 1, of the Hawaii Constitution provides:
   The judicial power of the State shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. The several courts shall have original and appellate jurisdiction as provided by law.
311 10 Writings of Jefferson 38 (Ford ed.).
integrity, Tucker submitted, "he must be placed above the reach of every species of temptation; he must be without hopes and without fears, as far as relates to the tenure of his office and the continuance of his salary." Moreover, want of independence would equally affect the quality of judges: men of talent could not be expected to resign a good law practice for an uncertain judgeship.  

Among the questions debated at the convention of 1829-30 was the extent to which the Legislature should be empowered to abolish a judge's office. In the course of that debate, John Marshall expressed himself on the importance of judicial independence:

The Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or controul him but God and his conscience?

Later in the debate Marshall added, "I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people, was an ignorant, a corrupt, or a dependent Judiciary."  

Marshall's disagreement with Jefferson was more than philosophical. In 1801, with the Republicans about to assume control of both the executive and legislative branches of the Federal Government, the Federalist Congress passed an act creating sixteen Circuit Court judgeships. Outgoing President Adams, in making his famous lame duck judicial appointments (including Justice of the Peace William Marbury, of Marbury v. Madison fame), of course named Federalists to the new judgeships. Once in office, the Jeffersonian majority in Congress in 1802 repealed the Circuit Court Act of 1801, thereby making short work of the Federalist effort to entrench themselves in the federal judiciary.

Near the end of the 1829-30 debates at the Virginia convention, when it was wondered what precedent for construing any Virginia provision on the subject of legislative power over judgeships might be found in the Act of Congress of 1802, Marshall said that so far in the debates he had been reluctant to express any opinion on the Act of 1802. He would go so

---

312 Appendix to 1 TUCKER'S BLACKSTONE 135-37 (1803).
313 1829-30 DEBATES 616, 619.
far, however, to say "that he did not conceive the Constitution to have been at all definitively expounded by a single act of Congress." And how he felt about that statute could perhaps be inferred from his oblique suggestion that it had been passed in "times of high political and party excitement." 315

Over the years the judiciary, federal and state, has played an increasingly active role. The power of judicial review, the power of a court to void a statute found to be against the constitution, was early declared by the federal judiciary in Marbury v. Madison316 and by the Virginia bench in Kamper v. Hawkins.317 The significance of what courts do, in public and private litigation, has given rise to debate over a number of questions through the years. Direct election of judges, which was debated at the Virginia convention of 1901-02,318 is found in many states, despite what one commentator calls "the almost universal opposition of both the bar and the bench." 319 An especially pressing problem, in both federal and state courts, has been the increasing caseload and the difficulty of keeping court calendars current so as to administer justice in keeping with the ancient admonition that justice should be neither denied nor delayed.320 Thus the American Bar Association, state judicial conferences, local bar associations, and other groups are taking an increasing interest in the structure and administration of the courts.321

Another recurring issue in recent years has been the viability of existing methods for the removal and discipline of judges who are unfit to perform the duties of judicial office fairly and efficiently. Several states322 have recently supplemented impeachment and other traditional disciplinary mechanisms with a variety of schemes designed to police the judiciary more effectively without sacrificing public confidence in the

315 1829-30 Debates 871-72.
316 5 U.S. (1 Cranch) 137 (1803).
317 3 Va. 20 (1793).
320 See Magna Carta (1215), ch. 40.
321 Among the relevant literature, see American Bar Ass'n, Section of Judicial Administration, The Improvement of the Administration of Justice (4th ed. 1961); Report of the Constitutional Convention Commission of Maryland 175-212 (1967); Romani, supra note 309, at 115-30.
courts, the independence of the judiciary, or the legitimate interests of an accused judge. Such a system has recently been proposed for Virginia, and the issues it raises indicate that although the demands of judicial office may be unprecedented, many of the policy considerations involved are far from new.

Virginia's Government in a Federal System

Virginia's Self-Awareness

Virginians have always had a sense of Virginia's uniqueness. They have also traditionally had a special sense of their past and their heritage. Such self-awareness can be a virtue, or it can be a handicap. It is, of course, a handicap if it leads a people to sink into self-satisfaction and an oblivion to what is to be learned by looking around them. But it is a virtue when it leads a people to compare their present with their past in order to take stock of where they are going and when it brings them to compare their own lot with that of other states or other societies, the better to make an eclectic selection among the best of their own traditions and the best features seen elsewhere.

Virtue or handicap, this self-awareness is a Virginian trait. It is interesting that at the convention of 1829-30, delegates often spoke of the "Virginia way" or the "Virginia character" and, depending on which side of the aisle they found themselves, were able to argue that Virginians should keep what they had or should feel confident to move to newer things. William Branch Giles spoke of the "Virginia character":

The State, as we all believe, has some celebrity: there is such a thing known in the United States as the Virginia character. Whence has it been derived? From our Government; from the happy operation of those fundamental laws under which we have lived and prospered for fifty-four years. Should we continue for fifty-four years more under the same state of things, we shall become yet more distinguished than we now are: but once strike down these bulwarks of the public peace and happiness, and nothing will ever be heard again of the Virginia character. . . . There is nothing in this Virginia character but a regard to morality, public and private. This it is that has won you


324 1829-30 DEBATES 510.
the respect you enjoy. It is this which makes men who are bargaining and trafficking in Congress, say to each other, It is no use to go to him: he is a Virginian.

John Randolph recounted his correspondence and conversations with men of other states and said, "I never heard from any of them, but one expression of opinion as it related to us in Virginia. . . . They advise us with one voice, 'Stick to what you have got . . . .'" 325

With so much being said at the convention about natural law and abstract principles, conservatives were quick to brand the reformers as visionaries and to remind them that the convention was there to frame a workable constitution for an actual State, Virginia, not to make a government for a Utopia or for some other place. Reformers were obliged to agree that the constitution the convention produced had to be right for Virginia. As Thomas R. Joynes said, "A Constitution, to be of any value, must be adapted to the particular circumstances and situation of the country for which it is intended. That Government which would be best for one country might be worst for another." 326

But the reformers argued that, precisely because they were making a constitution for Virginia, the proposed reforms were the right ones. Postulating that the object of the convention should be "to conform the Government to the character of the people," Alfred H. Powell submitted that, if Virginians did not have the virtues requisite for a republican government, then no people did. 327

The Place for Comparative Data

In shaping a constitution for Virginia, speakers at the convention were ready with allusions to historical experience, ancient and modern, and with comparisons to governments of other states and nations. Indeed the richness of the allusions, especially to classical times, is ample evidence of the classical orientation of education in that period. Of special interest are the allusions to historical experience of modern times, especially events in England and France. Conservatives at the convention showed a special distaste for ideas associated with the French Revolution and were quick to accuse the reformers of trying to intro-

325 Id. at 320. On the South's self-awareness during this same period, see J. Carpenter, THE SOUTH AS A CONSCIOUS MINORITY, 1789-1861 (1930).

326 1829-30 DEBATES 206.

327 Id. at 104.
duce into Virginia "the French philosophy of the perfectibility of man" and "demented French jacobinism." 328

Benjamin Watkins Leigh, who wanted "no French liberty," 329 preferred liberty on the English model: "Give me liberty in the English sense—liberty founded on law, and protected by law—no liberty held at the will of demagogue or tyrant (for I have no choice between them)—no liberty for me to prey on others—no liberty for others to prey on me." 330 Chapman Johnson, a reformer who agreed with Leigh on little else, could agree on the appositeness of the English experience for those making an American constitution: 331

To the experience of England, Mr. Chairman, the American Statesman may in general safely refer. We are better acquainted with her history, more familiar with her institutions, than with those of any other foreign country. From her common law, her jury trial, habeas corpus and magna charta, we learn the most valuable lessons of jurisprudence, and from these our ancestors imbibed their love of civil liberty, their respect for the rights of persons and the rights of property.

The delegates of 1829-30 were also aware, of course, of the experience of their sister states. Comparisons or contrasts with the constitutions and governments of other American states were common in the debates. Charles F. Mercer, for example, read at length from the bills of rights of a number of states, the better to sustain the "natural equality of man and the rights of a majority." 332 In the debate on representation, Chapman Johnson, finding analogies to ancient republics or modern Europe (save England) not very instructive, enquired in detail into the representation provisions of the constitutions of other American states. 333 Sometimes the comparisons were striking, as when Richard H. Hen-

328 Id. at 250 (Giles), 161 (Leigh).
329 I want no French liberty—none; a liberty which first attacked property, then the lives of its foes, then those of its friends; which prostrated all religion and morals; set up nature and reason, as Goddesses to be worshipped; afterwards condescended to decree, that there is a God; and, at last, embraced iron despotism as its heaven-destined spouse.
330 Id. at 157.
331 Id. In the debate on the freehold suffrage, Leigh urged that an institution be judged on its merits and not be rejected simply because of English origins. Id. at 398.
332 Id. at 273. On the influence of English constitutional doctrines and documents on American constitutional thought, see generally A. Howard, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1968).
333 1829-30 Debates 194-97.
334 Id. at 273, 277-78.
derson pointed out that, of the twenty-four American states then in being, only Virginia retained the freehold suffrage throughout.\textsuperscript{384}

Today we are accustomed to making use of comparative data in the study of state constitutions. The Council of State Governments, the National Municipal League, the President's Advisory Commission on Intergovernmental Relations—to name but a few examples from a number of interested groups—compile far more complete comparative data on what the states are doing than was available to the delegates of 1829-30.\textsuperscript{333} It is natural, of course, to make use of this comparative data in assessing the strengths and weaknesses of a state constitution. In so doing, one is simply following a practice which—to take Virginia as an example—dates back to the very beginning, when Virginians had before them, among other plans, the thinking of John Adams of Massachusetts on a constitution for Virginia. Americans in 1776, for reasons military, political, economic, and fraternal, stayed in close touch with what their brethren were doing in other states. The practice still flourishes today.

\textit{The State in the Federal Union}

Many of the 1829-30 delegates were not very complementary to the Federal Government or its Constitution. Benjamin Cabell, of Pittsylvania, reflecting near the end of the debates on what he had heard said in the convention, said, "I have seen with regret, in the progress of our session, various propositions made with a design to introduce into our organic law, several of the features of the Constitution of the United States; one of the very last Constitutions which I would select, as a model fit for our imitation."\textsuperscript{336} Others did not always express themselves in such strong terms about the virtues of the Federal Constitution as such, but conservative members frequently rejected such analogies as might be drawn, for example, between the Virginia Executive and the Federal Executive. Thus the Federal Executive was rejected as a model on the ground that its functions were dissimilar to those of the Governor (the latter not conducting war or foreign relations),\textsuperscript{337} as well as on the

\textsuperscript{384} \textit{Id.} at 356.

\textsuperscript{333} Representative of the available data are the publications which comprise the State Constitutional Studies Project of the National Municipal League, and \textit{The Book of the States} of the Council of State Government.

\textsuperscript{336} \textit{1829-30 Debates} 859.

\textsuperscript{337} \textit{Id.} at 589-90 (Leigh).
more philosophical ground that the powers of the American presidency
smacked of monarchy.338

Reformers in the convention were more apt to pay tribute to the
Federal Constitution—Chapman Johnson called it “one of the happiest
efforts of human wisdom, prudence and foresight” 339—as well as to
suggest one or another of its provisions as a model for a suggested pro-
vision in the Virginia Constitution.340 That Virginians in the 1829-30
convention were so divided in their attitude toward the Federal Con-
stitution suggests an interesting parallel to the Virginia convention of
1788, at which the merits and demerits of the proposed Federal Con-
stitution were so hotly debated and which approved that instrument by
a rather close margin. And the views aired in 1829-30 must have been
of special interest to delegate James Madison, who forty years before
had had as much to do with the shape of the Federal Constitution as
any one American of any period.

The power and activity of the Federal Government itself was of far
more concern to the conservatives at the 1829-30 convention than was
the question whether its Constitution might serve as a model for that
of Virginia. If westerners at the convention were the heirs of Jefferson
the exponent of popular rule and natural rights, then easterners were
the heirs of his states’ rights views. Leigh charged that the West, be-
cause of its passion for internal improvements, sought to “overturn the
doctrine of State Rights, of which Virginia has been the very pillar, and
to remove the barrier she has opposed to the interference of the Federal
Government in that same work of Internal Improvement, by so re-or-
organizing the Legislature, that Virginia too may be hitched to the
Federal car.” 341 During the debate on barring federal officeholders
from also holding state office, John Coalter, of Stafford, argued for the
restriction and expressed a strict constructionist’s concern about the
expansive tendencies of federal power: “No man could tell how far the
Federal Government, by a construction of the Constitution, or by
amendments to it, might come to operate on the local concerns of the
States. . . . He did not know, for his part, how far the General Gov-
ernment might be disposed to extend its hands into their houses, and

338 Id. at 591 (Leigh), 718 (Giles).
339 Id. at 275.
340 See id. at 506 (proposal by Joynes to give the General Assembly the same power
over inferior state courts as Congress has over inferior federal courts under the
Federal Constitution).
341 Id. at 154.
their bed-chambers, and their kneading-troughs, and every where else.”

The growth of federal power since 1830 is evident. But ours is still not a unitary system, and thoughtful people today are as concerned with the problem of making federalism work as were our ancestors a century and a half ago. Federal power operates on the domain of the states in two ways above all: the exercise by a branch of the Federal Government of powers granted it under the Constitution (such as Congress’ exercise of the commerce power), and restrictions placed by the Federal Constitution or federal law upon the states’ exercise of their powers (such as the limits imposed by the Fourteenth Amendment on state action). Leigh and Coalter, in the debates just quoted, were basically concerned with the first kind of federal impingement on the states: that which comes about when the Federal Government is active is the exercise of an affirmative power. They were looking to the State’s Constitution as one vehicle, among others, for making Virginia, in the language of John Randolph, a “counterpoise and check on the usurpations of the Federal Government . . .”

Today the state constitution-maker will find himself more concerned with the other kind of federal impingement on the states: that kind which effects direct restrictions on what states may do in their exercise of their power. To begin with, he must know something of the ways in which the Federal Constitution in terms or by court decision restrains the states. In John Randolph’s day, the drafters of a state constitution did not have to be concerned with the Federal Bill of Rights’ having any effect on state power; three years after the 1829-30 convention adjourned, the U. S. Supreme Court decided in Barron v. Baltimore that the Bill of Rights operated only on the United States, not on the several states. Since that time, of course, the Fourteenth Amendment, especially its due process and equal protection clauses, have brought every piece of state legislation within the range of potential constitutional challenge. The process of selective “incorporation” has applied to the states many of the guarantees of the Bill of Rights, including the First Amendment’s protection of religious liberty and of freedom of expression, and many of the procedural requirements of the Bill of Rights.

---

342 Id. at 623.
343 Id. at 315.
In addition, the state constitution-maker must know something of the body of due process and equal protection case law, quite apart from decisions applying the Bill of Rights. For example, *Brown v. Board of Education*\(^4\) makes nugatory any state constitutional provision segregating the races in public schools, and *Harper v. Virginia Board of Elections*\(^5\) bars a poll tax as a prerequisite to voting.

Quite apart from the effect which the Federal Constitution, on its face or as interpreted in judicial decisions, will have of its own force on state law, the drafter of a state constitution will need to have a sense for the extent to which federal statutes affect what goes into a state's constitution. A state literacy test, for instance, may pass muster under the Fourteenth and Fifteenth Amendments and yet be felled by a federal statute such as the Voting Rights Act of 1965. Once he appreciates this form of federal power, the draftsman realizes that federal statutes can operate in at least two essential ways to confine a state's options as to its public policies. The first kind of statute, a more traditional and better-known vehicle, is that which Congress passes in the exercise of the commerce or some other power enumerated in Article I, section 8, and which explicitly or by construction "pre-empts" an area of legislative concern by operation of the Supremacy Clause. *Gibbons v. Ogden*\(^3\) is an early example of this kind of case. The other kind of federal statute is one rested on the "enforcement" clause of provisions such as the Fourteenth or Fifteenth Amendment. Here, rather than exercising a traditional granted power, Congress is invoking what seems to be simply the implementation clause of a negative prohibition (such as the prohibition against a state's denying persons the equal protection of the laws) and yet this has been treated as a positive grant of power the exercise of which does not depend on any preliminary finding that a state has violated another section of the amendment. *Katzenbach v. Mor-*


The pre-emption cases arising from Congress’ exercise of an enumerated Article I power, and the cases flowing from its legislation under section 5 of the Fourteenth Amendment or section 2 of the Fifteenth Amendment, typically involve an effect on state statutory law. But the fact that it is state statutes which are usually the kind of state law affected by federal statutes does not mean that the drafters of a state constitution can ignore the problem. State constitutions, as well as state statutes and other actions, are subject to the Supremacy Clause. In brief, makers of state constitutions must be as concerned as state legislators with the possible effect, of the Federal Constitution, federal court decisions, and federal statutes on state law, be it constitutional or statutory.

What has just been said should not be taken to imply that the only reason to be aware of federal constitutional and statutory law is to be able to write provisions in state constitutions which will pass muster in the event of a judicial attack on them. States do, after all, cooperate with the Federal Government in many programs, and what is put into a state constitution, for example, concerning the powers of the Legislature, may well affect the extent to which a state can, if it chooses, participate in such federal programs. Moreover, even when the concern is with prohibitions (such as those of the Bill of Rights as applied through the Fourteenth Amendment) on state governments’ actions, a state is certainly free to have higher standards, if it so wills. For example, a state may choose to extend the right to counsel beyond what is required by federal decisions, or to draw a stricter line between church and state than obtains under the First Amendment, or in other ways to express its own values, its own ideas of liberty or justice.

**Conclusion**

As a will must be drawn to meet the needs of a particular testator, and not testators in general, so a constitution must be fashioned in light of the circumstances of the society which it is to govern. Similarly, just as the will which suited a man in his youth will likely not reflect his needs in his old age, so a state’s constitution from one era may well not be suited to that same state in a later time. Therefore it would be asking too much

---

of history for one to read the documents of 1776 or the debates of 1829-30 and to expect to find the formulae to solve the modern problems of Virginia or any other state.

Yet what our ancestors said about their constitutional problems is instructive, especially when they were as articulate as were the shapers of early Virginia constitutions. Technologies may change, but basic issues of philosophy or values have a way of surviving such change. Whether we like it or not, we are obliged today to reckon with most of the fundamental questions which beset earlier constitution-makers. Among other things, like our forebears we want to decide just what a constitution is meant to do: what questions are so fundamental as to be resolved in that document, what interests in society it should protect, whether it presupposes an active or a passive government, and so on. Today, as yesterday, we must be concerned with the distribution of political power, of who shall vote and for whom. Having inherited a basically tripartite system of government, we are never quit of the problem of what we expect our executives, legislators, and judges to do. And, living in a federal system, we increasingly must, in structuring our own State, regard what the Federal Government and the other states do.

In many ways, of course, the options open to makers of state constitutions today are restricted in ways many of which were perhaps undreamed of a century and a half ago. Federal Supreme Court decisions, federal legislation, and decrees of the Federal Executive have obvious impact in some of the most vital areas of state interest, notably suffrage and representation. But once all has been said about the Federal Constitution and all other factors which may in some way affect what a state can put into its constitution, those who create that constitution are no more free of making choices, of giving voice to a society’s basic values, than were the men who met in Williamsburg in 1776 to give Virginia its first constitution. To make a constitution is one of the ultimate exercises in self-government, and as long as self-government has any meaning, then a free society must, in adopting its fundamental law, make hard choices and be held accountable for the choices it makes.