UNIVERSITY OF RICHMOND

LAW REVIEW

VOLUME 9 FALL 1974 NUMBER 1

CONSTITUTIONAL REVISION: VIRGINIA AND THE NATION†

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"The earth belongs always to the living generation."[1] So said Thomas Jefferson in developing a constitutional theory which included the belief that Virginia's Constitution should be revised at regular intervals "so that it may be handed on, with periodical repairs, from generation to generation . . . ."[2]

Despite such advice, some generations of Americans have shown more interest than others in revising their state constitutions. For about a quarter of a century—from the 1920's into the 1940's—no American state adopted a new constitution. By midcentury, however, interest in revising these fundamental laws had burgeoned. So widespread was the movement for constitutional revision that by 1970 a leading student of the subject commented that there was at that time "more official effort directed toward revising and rewriting state constitutions than at any time in the nation's history with

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The author wishes to acknowledge the assistance of Mr. Michael L. Wells, third-year law student at the University of Virginia, and Mr. Duncan P. Reid, third-year law student at the University of Richmond.

1. Letter of Sept. 6, 1789, to James Madison, in 15 PAPERS OF THOMAS JEFFERSON 395-96 (J. Boyd ed. 1950).

2. Letter of July 12, 1816, to Samuel Kercheval, in 10 WRITINGS OF THOMAS JEFFERSON 43 (P. Ford ed. 1892-99).

the possible exception of the Civil War and Reconstruction era."[3]

Some of these revision efforts were notably successful, for example, the rewriting of the Hawaii Constitution which was approved by the people of the state in November, 1968. Other revisions ended in failure, perhaps the most conspicious instances being those of New York in 1967 and Maryland in 1968. Indeed, in modern times, many states have found it more difficult to secure popular approval of a revised constitution. When Virginians went to the polls in November 1970 to vote on a new constitution for the Commonwealth, those who hoped the result would be favorable had before them the unfortunate experience of a number of sister states. Although some states had succeeded in at least partial revision, since 1967 the voters of New York, Rhode Island, Maryland, New Mexico, Oregon, Arkansas and Idaho had rejected proposed new charters for their states. Yet when Virginia voted on four questions comprising a revised Constitution, each one passed, and by percentages ranging from a low of 63% to a high (on the main body of the Constitution) of 72%.

Why some states have been successful in updating their constitutions and others have failed turns on a complex range of factors. Commonly the reasons for success and failure lie partly in circumstances peculiar to a given state and partly in patterns that tend to emerge whenever constitutions are revised. An example of the latter is the resentment which seems to have been stirred in more than one state where a proposed constitution is put on the ballot as a single, take-it-or-leave-it proposition.

There is a growing body of literature on state constitutional revision. Many of these studies deal with the substance of a state constitution, for example, what provisions one might expect to find in an executive and judicial article.[4] Other studies delve into the experience of specific states. Because the scorecard of constitutional revision is not very good—new constitutions being defeated as often as they are passed—these studies often detail the problems encountered, and the reasons why a document which may have been a very

3. A. STURM, THIRTY YEARS OF STATE CONSTITUTION-MAKING: 1938-1968, (1970). [hereinafter cited as STURM, THIRTY YEARS].

4. *See, e.g.*, SALIENT ISSUES OF CONSTITUTIONAL REVISION (J. Wheeler ed. 1961); STATE CONSTITUTIONAL REVISION (W. Graves ed. 1960).

good constitution failed to secure voter approval at the polls.[5] The present article is a narrative of a constitutional revision that succeeded—that of Virginia. The account seeks to relate the Virginia experience to constitutional revision in other states, on the premise that what has happened in Virginia may be of value to revisors elsewhere. In addition, the article will focus on the salient features of Virginia's new Constitution.

REVISING THE CONSTITUTION OF VIRGINIA

Since the drafting of Virginia's first Constitution at Williamsburg in 1776, the Commonwealth's fundamental law has been revised several times. The most historic revision took place at the Constitutional Convention of 1829-30.[6] Subsequent constitutional conventions were held in 1850-51, 1867-68, and in 1901-02.

When Virginia undertook the constitutional revision which had its successful climax in the voting of November 1970, it had been forty years since the Virginia Constitution had been the subject of any thorough study. Even that previous revision, which took place in 1928, was a limited one, concerned largely with housekeeping changes. In fact, the document, as of 1968, was largely the product of the Constitutional Convention of 1901-02.[7] The Constitution

5. An excellent example of such a study is that by John P. Wheeler, Jr., and Melissa Kinsey of the rejection of a new Constitution for Maryland. J. WHEELER & M. KINSEY, MAGNIFICENT FAILURE: THE MARYLAND CONSTITUTIONAL CONVENTION OF 1967-68 (1970) [hereinafter cited as WHEELER]. Other studies include: R. CONNORS, THE PROCESS OF CONSTITUTIONAL REVISION IN NEW JERSEY: 1940-1947 (1970) [hereinafter cited as CONNORS]; E. CORNWELL & J. GOODMAN, THE POLITICS OF THE RHODE ISLAND CONSTITUTIONAL CONVENTION (1969) [hereinafter cited as CORNWELL]; M. FAUST, CONSTITUTION MAKING IN MISSOURI: THE CONVENTION OF 1943-1944 (1971) [hereinafter cited as FAUST]; N. MELLER, WITH AN UNDERSTANDING HEART: CONSTITUTION MAKING IN HAWAII (1971) [hereinafter cited as MELLER]; W. NUNN & K. COLLETT, POLITICAL PARADOX: CONSTITUTIONAL REVISION IN ARKANSAS (1973) [hereinafter cited as NUNN]; A. STURM, CONSTITUTION-MAKING IN MICHIGAN, 1961-62 (1963) [hereinafter cited as STURM, MICHIGAN]; G. WOLFE, CONSTITUTIONAL REVISION IN PENNSYLVANIA (1969) [hereinafter cited as WOLFE]; McKay, *Constitutional Revision in New York State: Disaster in 1967*, 19 SYRACUSE L. REV. 207 (1968) [hereinafter cited as McKay].

6. The delegates at this convention included two former Presidents, James Madison and James Monroe; a future President, John Tyler; the Chief Justice of the United States, John Marshall; the brilliant and eccentric orator John Randolph of Roanoke; seven past, present, or future United States Senators; and many other notables. For an account of the 1829-30 Convention, see Howard, *"For the Common Benefit": Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816 (1968).

7. On the 1901-02 Convention, see R. MCDANEL, THE VIRGINIA CONSTITUTIONAL CONVENTION OF 1901-1902 (1928); Holt, *The Virginia Constitutional Convention of 1901-1902*, 76 VA. MAG. HIST. & BIOG. 67 (1968).

which that body wrote was heavily influenced by late nineteenth century attitudes tending to produce documents more nearly resembling detailed statutes than constitutions. As a result, by the late 1960's there was a rising realization that the Virginia Constitution was long overdue for updating.

The initiative for revision in 1968 came from Governor Mills E. Godwin, Jr. Realizing the need to bring Virginia's fundamental law into line with the Commonwealth's needs and aspirations, Governor Godwin, in his welcoming address to the General Assembly in January 1968, called attention to the effect of the "inexorable passage of time" on the Virginia Constitution. He therefore proposed that the Assembly authorize him to create a commission to recommend revision.[8]

By joint resolution the Assembly authorized the Governor to create an eleven-member Commission on Constitutional Revision.[9] Governor Godwin forthwith named eleven distinguished Virginians to the Commission, which was chaired by former Governor Albertis S. Harrison, Jr., a Justice of the Supreme Court of Virginia, and was in every sense a "blue-ribbon" body.[10]

Moving promptly to their task, the commissioners appointed an executive director,[11] who, in turn, organized the Commission's staff. The Commission was divided into five subcommittees corresponding roughly, but not precisely, to major areas of the Constitution. Each subcommittee was assigned legal counsel, drawn either from the practicing bar or from one of the law faculties in Virginia.[12]

8. Address of Jan. 10, 1968, S. Doc. No. 1, 1968 Sess. For an evaluation of Governor Godwin's administration, *see* Wilkinson, *The Godwin Years*, THE COMMONWEALTH, Nov. 1969, at 36.

9. H.J. Res. No. 3, Va. Acts of Assembly, 1968, at 1568.

10. The members of the Commission, in addition to Governor Harrison, were Albert V. Bryan, Jr., George M. Cochran, Ted Dalton, Colgate W. Darden, Jr., Hardy Cross Dillard, Alexander M. Harman, Jr., Oliver W. Hill, J. Sloan Kuykendall, Davis Y. Paschall, and Lewis F. Powell, Jr. These included two former governors of Virginia, a past president of the American Bar Association (later to be named to the Supreme Court of the United States), a law school dean (subsequently to become a Justice of the World Court at the Hague), and one of Virginia's leading civil rights lawyers.

11. The executive director was A. E. Dick Howard, a University of Virginia law professor.

12. Counsel to the Commission were Thomas S. Currier, John F. Kay, Jr., Peter W. Low, Andrew W. McThenia, Jr., Hullihen Williams Moore, Jack Spain, Jr., and William F. Swindler.

Further to support the work of the Commission and its subcommittees, various individuals, mostly law students, were engaged to work during the summer of 1968 and produced about 150 research memoranda.

The Commission actively solicited the views of Virginia citizens. In April 1968 a letter signed by the Chairman was distributed widely to individuals and organizations, inviting their ideas on any aspect of the constitution. Announcements of this invitation were given via newspapers, radio stations, and television stations throughout Virginia. Moreover, in June and July a series of five public hearings were held at different locations in the Commonwealth.[13]

Most of the subcommittee work was done during the summer of 1968. The full Commission met with increasing frequency to deliberate proposals coming from the subcommittees, and by late fall a tentative draft for a revised constitution had taken shape. In addition to approving the text of the revisions, the Commission sifted and approved detailed commentaries to explain its proposals to the Governor, the General Assembly, and to the public at large. On January 1, 1969, the Commission concluded its work by delivering to the Governor and Assembly a 542-page report.[14] The Constitution advanced by the Commission[15] was not a "model" constitution, characterized by sweeping departures from the existing document. Nor, on the other hand, were the proposed changes marginal or minor.[16]

13. In Norfolk, Roanoke, Abingdon, Richmond, and Alexandria.

14. For a more detailed discussion of the Commission's work and procedures, *see* COMMISSION ON CONSTITUTIONAL REVISION, THE CONSTITUTION OF VIRGINIA: REPORT (1969) [hereinafter cited as CCR].

15. The Commission's Report adopted as its opening text a letter which Thomas Jefferson wrote to a friend in 1816, on the subject of revising the Virginia Constitution:

> 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 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 discovered, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.

A letter of July 12, 1816, to Samuel Kercheval, in 10 WRITINGS OF THOMAS JEFFERSON 42-43 (P. Ford ed. 1892-99), *quoted in* CCR at 8-9.

16. The Commission's principal recommendations are summarized in CCR 12-23.

Among the Commission's more notable proposals were those which would commit the Commonwealth to quality education for its youth and would include education among the fundamentals recognized in the Bill of Rights. To finance needed capital improvements, the Commission recommended allowing some state borrowing, the ceiling to be tied to the Commonwealth's general fund revenues. For the first time in Virginia's history, a clause forbidding discrimination on the basis of race, color, or national origin would be added to the Bill of Rights. The period of residence required for voting in Virginia would be reduced. Apportionment of seats in Congress and in the General Assembly would be based on population and districts would be contiguous and compact. To remedy a gap in the old Constitution, the Commission proposed a provision (modeled after the twenty-fifth amendment to the Federal Constitution) dealing with problems of a disabled Governor. All cities and those counties over 25,000 population would be able to adopt and amend their own charters and to exercise all powers not denied them by the Constitution, their charters, or statutes enacted by the General Assembly. In keeping with rising concern about environmental quality, the Commission proposed a new conservation article.

In addition to these and other specific recommendations, the Commission overhauled the Constitution in general. Obsolete sections, such as those dealing with dueling and with the poll tax, were deleted. Applying the principle that a constitution embodies fundamental law and that unnecessary detail ought to be left to the statute books, the Commission proposed excising vast amounts of such statutory matter, especially in the lengthy and cumbersome corporations article. The revised Constitution also represented a general reorganization, so that closely related subjects would be dealt with together. Overall, the result was a crisper, more coherent document half the length of the existing Constitution (which was about 35,000 words).

Called into special session in March 1969, the General Assembly approved, with some significant changes, the bulk of the Commission's proposals. In some ways the Assembly was more cautious than the Commission, in others bolder. While the legislators agreed that the Commonwealth's capacity to issue general obligation bonds for capital projects should be expanded, they scrapped the Commission's notion that at least part of such a debt might be incurred

without popular referendum. Sensitive to legislative prerogatives, the Assembly rejected a Commission recommendation that the Governor have the authority to initiate administrative reorganization of the executive branch, subject to legislative veto. The Legislature dropped the Commission's approach to greater autonomy for local government.

In other respects the General Assembly went further than had the Commission. Preserving the concept of a commitment to quality education, the legislators put teeth in the education article by way of a mandate on the localities to come up with their share of the cost of supporting public schools. The Assembly recognized that the time had come for annual legislative sessions, a step which the Commission had been unwilling to take. The legislators rewrote and strengthened the new conservation article, took a first step toward limiting the traditional appointing powers of judges, and enhanced the Assembly's control over the sometimes controversial State Corporation Commission.

There were those who had held their breath at the idea of a legislature writing a constitution. Many observers associated the legislative process with lobbying, horsetrading, and the representation of special interest. Some people would have preferred the calling of a constitutional convention, elected for the express purpose of rewriting the Constitution. But when the General Assembly had finished its work, much of the skepticism heard before the session had vanished. *The Washington Post*, for example, which confessed its doubts about the job the Assembly might do, had to admit that the revision, while hardly perfect, was a good one, perhaps even better than the draft which the Commission had submitted. "The General Assembly," concluded the *Post*, "has risen above itself. It has produced a document that, with all its shortcoming, would have been inconceivable in Virginia a decade or even five years ago."[17]

The revisions took the form of amendments to the existing Constitution. To become effective, an amendment must be approved by two sessions of the General Assembly, separated by an election of delegates, and then agreed to by the people in a referendum. Therefore the amendments which passed the 1969 special session were acted upon a second time at the regular legislative session in 1970.

17. Washington Post, Apr. 26, 1969, at A-10, col. 1.

At the 1969 session, steps had been taken to separate questions thought to be more sensitive or controversial into distinct items which could be voted upon individually on the referendum ballot. The 1970 session, therefore, had before it the main body of the Constitution which encompassed the bulk of the revisions, and five separate questions—two involving state borrowing, one which would repeal the constitutional prohibition on lotteries, one which would allow state aid to handicapped children in private schools whether church-related or not, and one which would allow the General Assembly, by special act, to change the boundaries of the Capital City.

The main body of the revisions was readily approved at the 1970 session, as were the questions touching lotteries and, despite some lingering "pay-as-you-go" sentiment, the provisions liberalizing state borrowing. The other two questions—those regarding aid to children in private schools and the Capital City's boundaries—provoked hot debate. Although the school amendment was limited to handicapped children, opponents of broader forms of aid to parochial and other sectarian schools saw this amendment as the "camel's nose under the tent," and the amendment failed to secure the necessary second approval. The Capital City amendment had overtones of race, for some viewed it as a response to rising black political power in Richmond. Moreover, because the amendment allowed Richmond to be treated differently from other Virginia cities, there were charges that the amendment would undermine the principle, established in the Constitution, that boundary changes should take place only by general law, never by special act.[18] At length, the Capital City amendment was also killed. Thus four questions, rather than six, would go on the ballot in November 1970.

The four questions were as follows:

(1) Proposal No. 1, dealing with the main body of the Constitution, included all the revisions save the three proposals being voted on separately. Proposal No. 1 thus embraced the changes affecting education, local government, conservation, taxation, the three branches of state government, corporations, and the Bill of Rights.

(2) Proposal No. 2 asked the voters whether they approved deleting that section of the existing Constitution which forbade

18. VA. CONST. § 63 (1902).

lotteries—an affirmative vote meaning that it would be left to the General Assembly to decide whether to authorize or prohibit lotteries.

(3) Proposal No. 3, dealing with general obligation bonds, asked whether the Constitution should be amended to permit the General Assembly, subject to popular referendum, to authorize general obligation bonds for specific capital projects, subject to both periodic and overall ceilings based on the Commonwealth's revenues from income and sales taxes.

(4) Proposal No. 4, dealing with revenue bonds, asked whether the General Assembly should be permitted, upon a 2/3 vote, to pledge the full faith and credit of the Commonwealth to back revenue bonds issued for revenue-producing projects, subject to a number of procedural and other requirements, and also within a ceiling computed by reference to the Commonwealth's revenues from income and sales taxes.

At the time it approved the Virginia revisions, the General Assembly was aware of recent experience in other states, notably Maryland, where new or revised constitutions had been soundly defeated at the polls.[19] One lesson learned from some of those referenda was the danger of presenting the voters with a take-it-or-leave-it package in which they were obliged to approve or disapprove all the constitutional changes in a single question.[20] The Virginia legislature deemed it wise to have questions thought to be more controversial, especially those regarding state debt, voted on separately. Thus the Virginia voter, in November 1970, would be entitled to vote "yes" or "no" on any or all of the four questions in any combination he saw fit.

The ballot was designed to be simple and straightforward. Each of the four questions had not only a number (as is customary) but also a brief title—"Main Body of the Constitution," "Lotteries," "General Obligation Bonds," and "Revenue Bonds"—making it easier for the press and the public to talk about the propositions individually. The questions on the ballot were drafted so as to avoid legalese and to use instead ordinary English perfectly comprehensi-

19. For a study of the Maryland experience, *see* WHEELER, *supra* note 5.

20. *See* notes 106-113 and accompanying text, *supra*.

ble to the layman. The ballot questions were brief and to the point and simply asked the voter to vote "yes" or "no" on each proposition.

In the spring of 1970, the first steps were taken toward the creation of a committee to inform the people of Virginia about the revisions on which they would vote in November. The committee was designed to be an entirely private effort, funded by private contributions. Governor Linwood Holton asked the author, who had been executive director of the Commission on Constitutional Revision and had served as counsel to the 1969 and 1970 sessions of the General Assembly, to create such a committee. He in turn assembled a staff for what came to be known as "Virginians for the Constitution."

To run an office in Richmond, which would be the nerve center of the campaign, a state coordinator was chosen—Hullihen W. Moore, a Richmond lawyer who had also worked with the revision commission and with the General Assembly. David T. Shufflebarger, a man who combined journalistic experience with political insights gleaned from managing a statewide U.S. Senate race, was named as media coordinator. Four young coordinators—the oldest of them 26—were chosen to work in designated areas of the State and thus to serve as links between the statewide effort and campaign committees in the cities and counties.[21] Since no state money was involved, a fund-raising effort was necessary, and James C. Wheat, a Richmond stockbroker, agreed to chair a finance committee to solicit private contributions.

A referendum campaign is a hybrid animal in the world of politics. In referenda, constitutional or otherwise, issues predominate, at least in theory, but voters in a referendum, like voters in any ordinary election, are moved by feelings and impressions as much as by the issues themselves. Yet in a referendum there is no flesh-and-blood candidate; hence much of the color of the candidate's campaign is lacking.

In the campaign for ratification of the new Constitution, several objects were conceived. First was the task of informing and educating the public about the revisions, making fair and factual information available through pamphlets, the press and media, and whatever other channels might be available. Thus, those who wanted to study the amendments in detail would have full opportunity and encouragement to do so. In addition, on the assumption that many voters would not delve into the specifics of the revisions, admittedly a complex matter, it was thought important to foster a general climate of acceptance. Thusly a voter not completely informed on the details of the revisions, upon seeing the state and local leaders with whom he identified supporting the new Constitution, would have less reason to mistrust the idea of accepting the proposed changes. Finally, it was thought that the campaign should work within the political process. Lest the campaign be too removed from grassroots sentiment, the active support and cooperation of political parties and leaders—Democratic, Republican, and independent—was sought at state and local levels alike.

21. The four were Timothy W. Finchem, Fred D. Smith, Jr., Thomas A. Schultz, and Carl W. Tobias. A fifth coordinator, Sammy Redd, was named to work with minority groups in the campaign.

A statewide steering committee for Virginians for the Constitution was assembled. Symbolizing the broad consensus of support which the revisions enjoyed, former Governor Mills E. Godwin, Jr. (then also active in the reelection campaign of independent U.S. Senator Harry F. Byrd, Jr.) would be honorary chairman, and his Republican successor, Linwood Holton, would be the campaign's chairman. The committee itself was remarkable for the diversity of the people it drew together. Named to the steering committee were all three men who had sought the nomination for Governor in the 1969 Democratic primary—William C. Battle, Henry E. Howell, Jr., and Fred G. Pollard—men thus representing the full sweep of factions in that party. (The Republican candidate, the winner in 1969, was, of course, already represented, as the referendum committee's chairman.) Also named to the steering committee were the Republican and Democratic candidates for Lieutenant Governor and Attorney General in the 1969 general election. Represented also were Democratic and Republican leaders from both houses of the General Assembly.

Joining the politicians were leaders from other walks of life—labor, business, education, youth, black's, civic groups, agriculture, and local government. Named to the committee, for example, were the presidents of such major groups as the Virginia State AFL-CIO, the Virginia Congress of Parents and Teachers, the Virginia Municipal League, the Virginia Association of Counties, the

Virginia Education Association, and the Virginia Federation of Women's Clubs.

The state steering committee came into being essentially to demonstrate the consensus for approval of the new Constitution, a spectrum of support cutting across party and faction lines. The work of day-to-day campaigning, however, had to be done at the local level, and could not be accomplished from Richmond. Hence an early step in organizing the effort of Virginians for the Constitution was the creation of campaign committees in the cities and counties of Virginia.

Just as the state steering committee was meant to reflect the major political and interest groups among Virginia's citizens, so were the local committees intended to mirror the character of the particular locality. The executive director of Virginians for the Constitution or one of the several area coordinators contacted local political and other leaders to initiate a local effort. Special efforts were made to emphasize the nonpartisan character of the pro-constitution campaign. To the fullest extent possible, well-known Republicans, Democrats, and—because of the independent candidacy of Senator Byrd—supporters of Byrd were prominent in each local committee. In addition, the committee reflected the demography of that area, including, as appropriate, farmers, businessmen, ethnic leaders, educators, and other representative persons. Typically state legislators and locally elected officials, such as councilmen, supervisors, and constitutional officers, were either formally on the local committee or publicly associated with it.

Normally a local committee had a chairman or co-chairman who, selected for his stature in the community, might not necessarily do the day-to-day work of organizing the local campaign. Normally a young lawyer, Jaycee, or some other young person was asked to serve as executive director of the local campaign. It was with the local executive director that the state office of Virginians for the Constitution and the area coordinator worked, and to him they looked for the marshaling of local resources.

Some things were best done at the state level, some in the localities. Virginians for the Constitution took the lead in creating themes for the campaign, printing information brochures, producing such paraphernalia as lapel buttons and bumper stickers, securing billboard space, buying television advertising time, and otherwise supplying most of the basic materials of a campaign. The state office looked to the local committees for the more personal effort best undertaken at the grassroots, including working with local civic groups, canvassing voters, arranging local press coverage of events, handling local newspaper and radio advertising, and manning the polls on election day. Of course, there was some overlap; an active local committee might, for example, print informational brochures tailored to local issues, in addition to using the pamphlets supplied by the state office. But overall it was helpful from the outset to have a general understanding of what the local committees could expect the state office to do, and what they should plan to undertake locally.

To assist the local committees, Virginians for the Constitution created a manual giving ideas on local organizing. The manual suggested the creation of committees to be responsible for liaison with local organizations (such as service clubs, women's clubs, trade groups, etc.), for voter contact both before election day (as by mass mailings and door-to-door canvassing) and on election day (as by manning the polls and handing out sample ballots), for furnishing speakers to local groups, for handling local publicity and advertising, and for raising money to cover local campaign expenses. With the manual were included sample spots for radio advertisements, sample news releases, and other guides for local publicity.

At the state level, Virginians for the Constitution set out to reach the voters in a variety of ways. One of the first steps was to establish contact with major statewide organizations, such as the Jaycees, the AFL-CIO, the Retail Merchants, the Virginia Education Association, the Crusade for Voters, the League of Women Voters, the Virginia State Bar Association, and many others. Virtually every major group which was asked for a formal endorsement of the revised Constitution gave such backing, the chief exceptions being those service clubs (such as the Rotarians and Kiwanians) whose policies preclude stands on issues which, even if nonpartisan, are political.

In addition to giving endorsements, many of the statewide organizations took an active part in the campaign to inform the voters, by using their newsletters and other means to get information about the new Constitution to their own membership. Active support of

the revised Constitution often came after action by an executive committee authorized to take such action, by vote of a statewide convention, or occasionally by a referendum within the organization statewide. An instance of such a poll was the vote taken by Jaycee chapters in Virginia; more than 92% of the Jaycees voting endorsed the main body of the Constitution, while slightly lower percentages endorsed the three separate questions.

The role of the press and media in informing the public was obvious. During the summer of 1970 the executive director of Virginians for the Constitution traveled throughout the state, visiting the editors and staff members of Virginia newspapers. At sessions sometimes lasting half a day, information was conveyed and questions answered, so that local papers could help voters evaluate the revised Constitution. Near the end of the campaign, in October, at the request of the *Richmond News Leader*, a series of ten signed articles was prepared for publication in that newspaper and appeared as well in papers in several other Virginia cities.

Virginians for the Constitution created a speaker's bureau. Any local group, such as a service club, which wanted a speaker on the Constitution could contact the Virginians' Richmond Office, and a speaker would be supplied. The roster of speakers included legislators, lawyers, college presidents, and many others. Approximately a thousand speaking engagements were filled in response to requests received at the Richmond office. Countless other talks were given by speakers arranged for by local campaign committees. To assist the speakers, Virginians for the Constitution prepared a package of speakers' notes, supplemented by fact sheets on specific questions which tended to arise in question-and-answer periods.

Yet another vehicle for reaching and informing the public was brochures which were distributed in large quantities to local committees to be mailed out, left at doorsteps, and used at public meetings. Virginians for the Constitution produced an attractive red-white-and blue brochure which explained how the four questions would appear on the ballot and summed up the highlights of the proposed changes. Probably 500,000 of these brochures were printed and distributed. For those people who might want a more detailed analysis of the revisions, several publications were available: the full text of the Constitution, an article-by-article summary of the revised Constitution, and a factual question-and-answer sheet published by the Extension Service at Virginia Polytechnic Institute and State University.

In addition to conveying specific information about the Constitution through such vehicles as speakers and publications, it was deemed essential to create a general climate of awareness that there was in fact a revision underway and that the people would be asked to vote on it in November. The greatest misfortune would be for large numbers of voters to arrive at the polls in November and, on being handed a ballot, for the first time discover that constitutional amendments were being voted on. Since constitutional revision lacks the popular impact of a candidate's race, Virginians for the Constitution undertook to use a variety of means to stimulate general awareness so that voters would be in a position to make informed judgments at the polls. The animating spirit of the campaign was that apathy and indifference would likely be more formidable problems than hostility and opposition.

A positive theme had to be evolved which people would identify with the new Constitution. Working with a Richmond advertising agency, Virginians for the Constitution evolved a "yes" theme—a red-white and blue "yes" with stars and stripes suggesting a Fourth of July spirit. This "yes" logo was used throughout the campaign —on brochures, lapel buttons, bumper stickers, billboards, window cards, and wherever visual identification was important. (Some girls who wore the "yes" button reported that not everyone who saw the button realized that it was limited to consitutional revision.)

In reaching particular groups of voters, special committees were created. A 53-member group known as Rural Virginians for the Constitution was formed from distinguished citizens well known in the rural areas, such as past presidents of Ruritan International and former presidents of such organizations as the Future Farmers of America in Virginia. On the theory that many voters regularly read the sports page, whatever else they may read, there was formed Sportsmen for the Constitution, including tennis star Arthur Ashe, football pro Ken Willard, golfer Vinnie Giles, stock car driver "Runt" Harris, and all of the players on both the Virginia Squires basketball team and the Richmond Braves baseball team.

The campaign was scheduled for early summer through election day. The summer was spent largely laying the groundwork by creating a staff, establishing contact with statewide organizations, pre-

paring copy for brochures, and making initial contact with people who might carry forward with the creation of local committees. Public campaigning before Labor Day, such as speech-making and advertising, would have been wasted effort, being simply too far ahead of the actual election date. It was agreed that the major effort at reaching and informing voters should take place during September and October, so that the campaign, like any other campaign, would not "peak" too early and thus be dissipated by election day.

The formal kickoff took place just after Labor Day, with a luncheon at the Governor's Mansion. Present were political enemies who might disagree on most public issues but were still able to get together on supporting the new Constitution. With such a galaxy of political stars present—Godwin, Holton, Howell, Battle, and a number of others made up a gathering of a group of people not likely to break bread together very often—there was excellent press and media coverage which served to get the campaign off to an affirmative start.

Throughout there was emphasis on the non-partisan nature of the revision effort. Governors Godwin and Holton, for example, appeared together in early October at a luncheon session arranged by the Virginia Council on Legislation. The climate of consensus for the new Constitution was heightened by the frequent appearances of well-known political leaders of every ideological hue—all in accord on the merit of the revisions. An especially poignant moment in the campaign came when the popular Lieutenant Governor J. Sargeant Reynolds, who had been hospitalized for treatment of a brain tumor, used his first public appearance to urge Virginians to vote in favor of the revisions.

As the campaign progressed, themes began to emerge. At first, Virginians for the Constitution had been using the rather bland appeal, "For a better Constitution, vote 'yes'." As the Virginians' executive director and others began to go on the hustings to speak to local audiences, they frequently encountered a spirit of disenchantment with government at all levels—local and state as well as federal—engendered by the feeling that governmental decisions were increasingly being taken out of the hands of the people. Because the new Constitution would in a number of ways enhance popular government, the proponents of the Constitution fashioned a new theme: "Bring government closer to the people; vote 'yes'."

This theme was picked up widely, in speeches, on editorial pages, and elsewhere. It came as close as any one statement which emerged in the campaign to capturing the spirit of the new Constitution.

The proponents used a number of affirmative arguments. Speakers could quote Jefferson to the effect that each generation should review and revise the Constitution; if a generation be taken to be 30 years, a speaker could readily establish that a constitution not thoroughly overhauled since 1902 was long overdue for revision, or that the Constitution would repose more trust in the political and legislative process and thus be a more popular and democratic document. Advances in education, in the capacity to finance the state's capital needs, in protection for the environment, in recognizing consumer interests, in streamlining and enhancing the responsiveness of government were merits which were adduced. Moreover, there were provisions of special interest to specific groups, for example, the prospect of tax relief for the elderly, and assessment of farmland based on use rather than fair market value to discourage development from gobbling up open space.

Organized opposition to the new Constitution was most vocal in Northern Virginia and in the Richmond suburbs, but resistance to constitutional change probably ran deeper in Southside Virginia. There the two debt proposals ran into long-held views about the virtues of a "pay-as-you-go" approach to state services. While most of the changes embraced in Proposal No. 1 (the main body of the Constitution) provoked no general opposition, the greater focus on the state's role (vis-a-vis the localities) in public education did stir resentment and apprehension. *The Farmville Herald*, for example, said that whatever the merit of the other changes it thought that under the Constitution the state could "prescribe the curriculum, the textbooks, the teachers, the schools, and take complete control of the schools and your child." Hence the *Herald* editorial writer intended to vote "no" on Proposal No. 1.[22]

Much of the Southside opposition was attributable to traditional conservatism. In the suburban areas of Richmond and Northern Virginia, however, there appeared a small, but vocal band of opponents rather like those who have appeared in constitutional referenda in Maryland and other states. These opponents entertained

22. Farmville Herald, Oct. 7, 1970.

what may be called the "conspiracy" theory of government—that the new Constitution was a socialist plot designed to strip the people of Virginia of their rights. As one opposition pamphlet put it: "Why are these ruthless exploiters disguising more debt, more taxes, big bureaucracy, and approaching serfdom of individuals as needed constitutional change?" Over and over, opposition literature hammered away at the "conspiracy" theme—that the Constitution had been changed through "stealth and trickery," that the process of revision had been unconstitutional and a "transparent fraud," that the revisions were being sold through a campaign of "deception and misrepresentation." These opponents labeled it a "mail-order" constitution, drafted (depending on which opponent was speaking) in Chicago by the Council of State Governments, in Washington by the Department of Health, Education, and Welfare, or in New York by the United Nations.

Chief among the issues aired by these opponents of the revised Constitution was the charge that the document would foist regional government on the people. The opposition sought to stir popular resentment about the busing of school children by arguing that adoption of the revisions would mean more busing, even to and from the District of Columbia. The borrowing provisions were attacked as leading to a "mortgage on the property of all citizens." And because the revision took the form of amendments proposed by the General Assembly, rather than having emanated from a constitutional convention, it was argued that the new Constitution was in fact unconstitutional.

To counter such arguments, Virginians for the Constitution prepared "fact sheets" which, in parallel columns, set out the opposition charges and the pro-ratification rebuttals. In many cases, the charge could be turned to the advantage of the Constitution's proponents. For example, when charged that the new Constitution would bring about regional governments, the proponents argued that in fact the new Constitution gave local citizens a right which they never had under the old Constitution, namely, the right to vote on whether or not they wanted their locality to be part of a regional government. In a more general fashion, the proponents were able to appeal to conservative opinion by having at the fore of the campaign, state and local, unimpeachable conservatives, many of them active at the same time in the Byrd campaign. An amusing moment

came when the chairman of the "Save Our State Committee" of Northern Virginia, an opposition group, challenged the revision proponents to a debate. The challenge was accepted, and when the debate took place the affirmative case for the so-called "socialist constitution" was put by no less prominent a conservative than James J. Kilpatrick, the nationally syndicated columnist.

A less visible, but potentially more troublesome source of concern than the formal opposition was the lingering possibility that, despite all the effort to educate the public, many voters would be confused and unsure as to just what the amendments added up to and would therefore take the safe course and vote "no." It was always possible that voters upset about some extraneous issue such as the busing of school children might likewise respond with a "no" vote. Moreover, there is always a built-in negative vote to any proposition on the ballot. And while most Virginians of note had taken a stand on the Constitution, Senator Byrd, running for reelection, had steadfastly refused to state his position publicly—although he was reported to have said privately that he was for it. The danger arising from Byrd's silence was alleviated somewhat, however, by the active and visible work being done on behalf of the Constitution by such Byrd supporters as Governor Godwin.

By the close of the campaign, endorsement for the new Constitution was overwhelming. Prominent political leaders of both major parties had lent their support. Almost all important statewide organizations backed its ratification, and while a few newspapers had voiced doubts about or opposition to the revisions, editorial support on a statewide basis was resounding. The *Richmond Times-Dispatch*, for example, declared that "Virginians who want to provide their state with a strong governmental framework on which to build for progress in the latter third of the 20th century will vote 'Yes' in the constitutional referendum next Tuesday."[23] The *Roanoke Times* called passage of the new Constitution "absolutely essential."[24] The *Washington Evening Star* urged its readers across the river to "[r]ally to this cause in the coming week, lest a priceless opportunity for advancement be lost."[25]

On November 3, the new Constitution was overwhelmingly

23. Richmond Times-Dispatch, Oct. 28, 1970, at A-10, col. 1.
24. Roanoke Times, Oct. 18, 1970, at A-6, col. 1.
25. Evening Star (Washington), Oct. 27, 1970, at A-12, col. 1.

adopted. All four propositions were approved. The largest margin of approval went to Proposal No. 1, the main body of the Constitution, which received the assent of 72% of those who voted. Questions No. 3 and 4, the proposals dealing with general obligation bonds and revenue bonds respectively, were approved by 66% and 65% of the voters. Proposal No. 2, to delete the prohibition on lotteries, was affirmed by 63% of the voters.

Support for the Constitution was especially strong in Northern Virginia and in Tidewater. In Alexandria, for example, Proposal No. 1 carried by 84% of the vote, in Fairfax County, by 82%. In Tidewater the picture was similar; in Norfolk 82% of the voters approved Proposal No. 1. Such a strong showing at the two ends of Virginia's urban corridor was not surprising. What was perhaps more unexpected was the high margins in the traditionally more conservative Valley of Virginia, where Proposal No. 1 garnered 85% of the vote in Harrisonburg and a remarkable 91% in Lexington.

In the Richmond area, all four questions carried readily, but without the striking margins recorded in Northern Virginia and Tidewater. In the Richmond suburbs, for example, Proposal No. 1 carried Henrico County by a two-to-one margin and Chesterfield County—where the county board of supervisors was the only local governing body in Virginia to pass a resolution opposing the new Constitution—by a margin of a little over 500 votes out of slightly under 14,000 cast.

The areas of greatest weaknesses were some of the largely rural areas of Southside Virginia. Lunenburg County, for example, buried Proposal No. 1 with an almost two-to-one "no" vote, and the two debt questions fared even worse. Statewide, only nine counties and one city (Danville) rejected Proposal No. 1, and of these all save two of the counties (Accomac, on the Eastern Shore, and Nelson, in the Piedmont, where Proposal No. 1 lost by 14 votes of 1644 cast) were Southside localities.

Localities which rejected one or another of the second, third, or fourth proposals were more widely distributed than those few jurisdictions which voted down Proposal No. 1. In some areas, repealing the ban on lotteries apparently was a moral issue. In Franklin County, for example, Proposal No. 1 was approved handsomely and Proposals No. 3 and 4 agreed to by adequate margins, but Proposal

No. 2 lost by a vote of 1,684 to 1,896. In other areas, "pay-as-you-go" sentiment was sufficient to reject the two bond questions even while approving the main body of the Constitution and the repeal of the ban on lotteries. The voters of Louisa and Madison counties, for example, approved the first two proposals but rejected both the bond questions.

As the statewide vote of 66% and 65% on Proposals No. 3 and 4 suggest, the voters tended not to make much distinction between the two bond questions. If they were troubled by borrowing, they seemed not to care much what form it took. If they were not troubled, they tended to approve either kind, general obligation bonds or full-faith-and-credit backing for revenue bonds. Nor did it seem to make much difference whether the bonds could only be issued after referendum (Proposal No. 3) or without such a vote (Proposal No. 4). To the extent that voters did draw a distinction Proposal No. 4 met with slightly less favor than did No. 3; with but few exceptions the vote in any given locality against Proposal No. 4 was slightly higher than against Proposal No. 3.

The full measure of the success of the campaign for ratification is underscored when one tallies the results by congressional districts. With four questions on the ballot in ten congressional districts—a total of forty possible vote combinations—only one question lost in only one district, Proposal No. 4 lost in the Fifth Congressional District (a Southside district).

Successes and Failures Among the States: The Comparative Experience

That Virginia's voters would approve a new constitution was not a foregone conclusion. Defeats of new constitutions in other states—perhaps the most publicized being that in Maryland in 1968—would make one cautious about predicting the success of any constitutional revision. That major political and civic leaders had endorsed Virginia's new Constitution was no guarantee; the backing of a "who's who" of such leaders in Maryland had not saved the proposed Maryland Constitution. The new Virginia charter was attacked on many of the same grounds, including regional government and governmental spending, which had been used in Maryland. One opposition pamphlet reminded its Virginia readers, "Marylanders have done it . . . Virginians can do it too." Moreover, if Maryland's

proposed Constitution was hurt by extraneous events—notably the riots of April 1968 in Washington and Baltimore—Virginia's political climate in 1970 was hardly uneventful, especially when there was a U.S. Senate race without precedent, featuring Senator Byrd running as an independent against nominees of the two major political parties. And while enough private money was raised to run a respectable informational campaign, money was tight enough that some important items had to be cut—there was, for example, no television advertising in Northern Virginia.

Despite the problems, the final vote was overwhelmingly "yes." A number of factors played a part in producing the highly successful outcome, and Virginia's experience may usefully be compared with that of other states to shed some light on reasons why constitutional revisions succeed or fail.

To begin with, how the groundwork for revision is laid, and by whom, is a significant factor. Constitutional revision in Virginia was, from start to finish, a highly deliberative process. Having the groundwork laid by a blue-ribbon study commission meant that when the General Assembly met, the issues which it would debate had already been sharply defined by the Commission's report and commentary. Conscientious preparation may seem a simple enough goal to achieve,[26] yet in New York and Rhode Island a lack of planning and issue-sharpening have been suggested as reasons for defeat of revised constitutions. The New York study commission lacked neither funding nor talent nor time,[27] but it failed to produce sharply drawn issues and recommendations for the New York convention to focus on. Instead the New York Commission provided large quantities of information and arguments on both sides of the issues, even when it had to strain to find arguments on one side and even when it had to avoid analysis in order to appear neutral. As a result the delegates were bewildered by the vast amount of information con-

26. *See generally* STURM, THIRTY YEARS, *supra* note 3, at 98.

27. McKay, *supra* note 5, at 213. Other discussions of the New York experience include Fuld, *The Court of Appeals and the 1967 Constitutional Convention*, 38 N.Y.S.B.J. 327 (1966); Kaden, *The People No! Some Observations on the 1967 New York Constitutional Convention*, 5 HARV. J. LEGIS. 343 (1968); Nunez, *New York State Constitutional Reform—Past Political Battles in Constitutional Language*, 10 WM. & MARY L. REV. 366 (1968); Sherry, *The New York Constitutional Convention: An Opportunity for Further Court Structural and Constitutional Reform*, 18 SYRACUSE L. REV. 542 (1967); Vanden Heuvel, *Reflections on Con-Con*, 40 N.Y.S.B.J. 261 (1968).

fronting them. The task of lobbyists for special interests—who were always ready to supply answers even if the Commission was not—was thus made easier.[28] In Rhode Island the convention got bogged down in discussion of trivial issues to the neglect of larger ones,[29] and in both states, the poor image that resulted, in part from the lack of planning and organization, hurt the ratification effort.[30] In addition, both conventions had an image of being dominated by politicians.[31] Those who comprised the Virginia commission, on the other hand, were widely recognized as among the most talented, respected, and nonpartisan figures in the Commonwealth. Their prestige helped to put the General Assembly in an affirmative and responsive frame of mind when the legislators received the Commission's report.

There are two major methods by which states typically revise a constitution—by constitutional convention[32] or by the state legislature. Either vehicle is usually preceded by a study commission.[33] Whichever means, convention or legislature, is used, a keynote of the revision process must be political realism. One of the lessons to be gleaned from a study of constitutional revision among the states is that a new constitution can be killed by an overdose of partisan politics—partisanship that divides the revisors and voters alike. Equally a new constitution can be killed by too little politics—a process which, through an excess of idealism or naivete, can be insulated from political reality.

One of the simplest lessons the Virginia revisors learned was that

28. McKay, *supra* note 5, at 218-20.

29. STURM, THIRTY YEARS, *supra* note 3, at 98.

30. *Id.* at 103.

31. *Id.*; CORNWELL, *supra* note 5, at 80; McKay, *supra* note 5, at 215-16, 220-21.

32. Voluminous literature exists on the subject of state and (speculatively) federal constitutional conventions. *See, e.g.*, Feerick, *Amending the Constitution Through a Convention*, 60 A.B.A.J. 285 (1974); Gilliam, *Constitutional Conventions: Precedents, Problems, and Proposals*, 16 ST. LOUIS L.J. 46 (1971); Rhoades, *The Limited Federal Constitutional Convention*, 26 U. FLA. L. REV. 1 (1973); Thane, *A Constitutional Convention: The Best Step for Nebraska*, 40 NEB. L. REV. 596 (1961); Note, *Limited Federal Constitutional Conventions: Implications of the State Experience*, 11 HARV. J. LEGIS. 127 (1973); Note, *State Constitutional Change — The Constitutional Convention*, 54 VA. L. REV. 995 (1968).

33. For a discussion of constitutional revision through commissions and the legislature, *see* A. STURM, TRENDS IN STATE CONSTITUTION-MAKING 1966-1972 at 27-41 (1973). The new Florida Constitution provides for submission of constitutional revisions to the people by a commission created every ten years without approval of the revisions by the legislature. FLA. CONST. art. XI.

it was dangerous to make unnecessary enemies. A proposed change should be weighed to be sure that the benefits to be derived sufficiently outweigh the cost in terms of alienation of those who may oppose the change. A change of largely theoretical value may not be worth the electoral price paid for making it. For example, many state constitutions contain unenforceable, hortatory language in their bills of rights.[34] Reformers often scoff at such language and urge that it be removed.[35] The reformers who comprised the Maryland convention did excise the hortatory language of Maryland's Declaration of Rights. Having done so, they found themselves saddled with the opposition charge that the rights of Marylanders were being taken away.[36] It is hard to conclude that the change—of theoretical value at best (and even that can be argued)—was worth the cost.

Another rule often found in the textbooks is that only policy-making offices should be filled through popular election. Following this precept, the Maryland revisors stripped many of that state's constitutional officers, such as the clerks and the registrars of wills, of their constitutional status. It is doubtful that this step was worth the price of creating a vigorous and vocal source of opposition to the new Maryland charter in every courthouse in Maryland.[37] Not only did the local officials oppose the Constitution, but many citizens, in rural areas especially, considered it important that such officers be elected rather than be appointed by other politicans.[38]

Another costly move by the Maryland convention was the decision not to require that a local referendum be held before legislative creation of regional governments.[39] There are valid policy reasons why regional government should not invariably be subject to local veto, but it is evident that the Maryland convention's decision

34. *See generally* R. DISHMAN, STATE CONSTITUTIONS: THE SHAPE OF THE DOCUMENT 47-49 (1968). An example of such language is article I of the Maryland Constitution:

> That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole, and they have at all times the inalienable right to alter, reform or abolish their form of government in such manner as they may deem expedient.

35. *Id.* at 49.
36. WHEELER, *supra* note 5, at 202.
37. *Id.* at 5.
38. *Id.* at 202-03.
39. *Id.*

badly hurt the revision effort in Baltimore County.[40] The regional government provision made it easy for opponents to appeal to racial fears in the area around Baltimore City, and the resulting negative vote in the county has been termed by one demographic analyst to be a principal cause of the statewide rejection.[41] Ordinarily these suburbanites could have been relied on to support the constitution, just as did those in the Washington suburban counties of Montgomery and Prince George's.[42]

In Virginia, by contrast, the revisors retained the philosophical language of the Bill of Rights, they avoided any direct assault on the constitutional status of local officers such as sheriffs and clerks (though making it possible through local referendum to abolish or alter such offices), and, while recognizing the concept of regional government, they wrote in a requirement of referendum in the localities affected. As the *Washington Post* observed at the close of Virginia's 1969 legislative session, "The political realism so painfully missing in retrospect in Maryland a year ago and so prominent in Virginia's new effort gives the proposals a healthy chance of survival."[43]

How are the prospects for success in constitutional revision affected by the form the revision process takes? Specifically, are there reasons to prefer a convention on the one hand, or legislative revision on the other? Having a prestigious study commission prepare a draft and then having the legislature refine the document in the perspective of their own understanding of the political process was one of the greatest strengths of the approach to revision in Virginia. But Virginia's experience may or may not be the best guide for other states.

Much has been written on the relative merits of having revisions undertaken by conventions or having legislatures tackle the job.[44]

40. *Id.* at 231, 234.
41. *Id.* at 5. STURM, THIRTY YEARS, *supra* note 3, at 115. The Maryland Convention has captured the imagination of many writers. In addition to WHEELER, *supra* note 5; *see, e.g.*, Martineau, *Maryland's 1967-68 Constitutional Convention: Some Lessons for Reformers*, 55 IOWA L. REV. 1196 (1970); Pullen, *Why the Proposed Maryland Constitution Was Not Approved*, 10 WM. & MARY L. REV. 378 (1968).
42. WHEELER, *supra* note 5, at 231.
43. Washington Post, Apr. 26, 1969, at A-10, col. 1.
44. *See, e.g.*, CONNORS, *supra* note 5, at 200; STURM, THIRTY YEARS, *supra* note 3, at 33-80. *See generally* sources cited *supra* at notes 32-33.

Conventions are thought to be more representative of the people, are frequently composed of highly able, civic-minded citizens, are less political (because they are less highly structured than are legislatures),[45] are more focused on the task of constitutional revision (because they are called into being for that specific task), and are likely to be more willing to make fundamental changes.[46] On the other hand, they may be out of touch with political reality or may be dominated by ambitious politicians. Commissions, being smaller, may be able to work faster, and they may have more expert talent because they can be appointed from among the state's ablest citizens. Commissions are commonly more acceptable to legislatures than wide-open conventions because their proposals can be vetoed by the legislature if it wishes.[47] When the legislature, composed of politicians, has the final say, there is the risk, however, that the majority party will seek advantage for itself,[48] or at least that the legislators as a body will try to gain advantage over other branches of government.

Generalization about the relative merits of conventions or legislatures as revisors is difficult, because an examination of the behavior of conventions and legislatures in a number of states indicates that the circumstances of the particular state are crucial. In Maryland, to be sure, the convention operated in a political vacuum,[49] producing a document that took insufficient account of what the people or the interest groups would think of their work. Though they produced an excellent model constitution, they lacked that very closeness to the people which is considered one of the major advantages of using a convention.[50] The same tendency was present in the Connecticut convention, but more realistic delegates managed to curb the reformers and achieve a reasonable document which the voters accepted.[51]

45. MELLER, *supra* note 5, at 142.
46. STURM, THIRTY YEARS, *supra* note 3, at 92.
47. *Id.* at 92-93.
48. CONNORS, *supra* note 5, at 88-89, 110-11.
49. WHEELER, *supra* note 5, at 6, 51, 156-57. Wheeler cites the failure to compromise with political reality as a major reason for the defeat. *Id.* at 214-15.
50. *See* Thane, *A Constitutional Convention: The Best Step for Nebraska*, 40 NEB. L. REV. 596, 602 (1961).
51. STURM, THIRTY YEARS, *supra* note 3, at 94.

In other states' conventions, there has been the danger of partisanship. In Michigan, though the convention began in a bipartisan spirit,[52] it ended with the Republicans, who formed a majority of convention delegates, agreeing among themselves on a constitution and producing a straight partyline vote on the document.[53] Though that document was approved, partisan conventions in New York and Rhode Island found the people repelled by their behavior.[54] On the other hand, in such diverse states as Pennsylvania,[55] New Jersey,[56] and Hawaii,[57] conventions have met in a bipartisan spirit, recognized the need to compromise in order to achieve success, and produced documents which satisfied the major interests in those states. Indeed, in Pennsylvania, though the Republicans controlled the convention, the Republican president insisted upon equal representation for Democrats on all convention committees.[58] Strong, conciliatory leadership has been suggested as one reason compromise was possible in some of these states;[59] conversely, weak leadership was a factor in producing a convention that bogged down in partisan wrongdoing.[60] The representativeness of the delegates, their responsiveness to the constituency, and their willingness to compromise their own wishes and those of their parties in order to win others over to the revisions have also been factors in successful revision efforts by conventions in Missouri,[61] Pennsylvania,[62] and Hawaii.[63] These revisions stand in contrast to the unrepresentative character and consequent unresponsiveness of the Maryland con-

52. STURM, MICHIGAN, *supra* note 5, at 54.
53. *Id.* at 251. For discussions of the Michigan experience, see Nard, *The Michigan Constitution of 1963*, 10 WAYNE L. REV. 309 (1964); Norris, *The Case Against Approval of the Proposed Constitution*, 31 DET. L.J. 15 (1963); *Proposed Constitution: The Pros and Cons of It*, 42 MICH. S.B.J. 10 (1963).
54. STURM, THIRTY YEARS, *supra* note 3, at 97-98.
55. WOLFE, *supra* note 5, at 30, 56.
56. CONNORS, *supra* note 5, at 193.
57. MELLER, *supra* note 5, at 79.
58. WOLFE, *supra* note 5, at 30. For another discussion of the Pennsylvania Convention, see McGeary, *Pennsylvania's Constitutional Convention in Perspective*, 41 PA. B.A.Q. 175 (1970).
59. CONNORS, *supra* note 5, at 200; MELLER, *supra* note 5, at 53-55; WOLFE, *supra* note 4, at 38, 56.
60. McKay, *supra* note 5, at 214.
61. FAUST, *supra* note 5, at 164-66.
62. WOLFE, *supra* note 5, at 42, 55-56.
63. MELLER, *supra* note 5, at 143.

vention and the partisanship displayed by New York and Rhode Island delegates.[64]

In Virginia the General Assembly proved that a legislature is not incapable of reform.[65] It did not fall prey to the evils of partisanship. It put its understanding of the citizenry into the effort, deciding, after much debate, to eliminate the potentially devisive handicapped children and Capital City boundary amendments, which could have provoked sectarian and racial feelings respectively. The legislators restrained themselves from using the Constitution to reflect the desires of the lawmakers' favorite interest groups. The General Assembly approached its task with an understanding of the difference between constitution-making and ordinary legislating.

It seems, then, that given favorable conditions either a convention or a legislature can undertake a successful constitutional revision. Equally, given the wrong conditions, either can fail. As one observer has noted:

> With favorable prevailing winds and strong cooperative leadership, each structure appears capable of performing successfully in both the drafting and marketing stages . . . . Theoretical advantages, in brief, do not appear to have the political muscle that would make an extended comparative analysis of these structures very meaningful.[66]

The comparative lessons to be learned from other states' revisions seem to lie not so much in the particular method chosen (though this can be crucial in a particular state) as in factors of leadership, both within the body that shapes the revision and in the state at large when the proposals are laid before the people.

Political realism and a spirit of bipartisanship are important in creating an atmosphere of consensus. The absence of emotionally charged issues in Virginia made possible a consensus of political leadership backing the new Constitution. This spectrum of support was a key factor in the document's success at the polls. Not within memory have political leaders of such divergent views—indeed, often the bitterest of enemies in the political arena—combined so cordially and publicly in a common political undertaking. The sym-

64. *See* text at notes 49-50, 54 *supra*. Of course, partisanship is at least as likely to spawn controversial provisions and partisan opposition when a legislature does the job. CONNORS, *supra* note 5, at 110-12.

65. *Compare* WHEELER, *supra* note 5, at 6-7.

66. CONNORS, *supra* note 5, at 200.

bolism of the liberal, moderate, and conservative factions of both major parties uniting behind the revised Constitution could not be lost on anyone with even a passing understanding of Virginia's political scene. As the *Roanoke Times* commented on the eve of election in 1970, "Surely if such arch political foes as Henry Howell and Mills Godwin can agree that constitutional changes are worthwhile, the rest of us can be certain that a yes vote is a vote for good government."[67]

Support by the political leadership of both major parties is not a guarantee of success. The leaders of the major parties supported the reform effort in Arkansas[68] and Maryland,[69] yet the effort failed for other reasons. Nor is a consensus of support absolutely essential to victory. In Michigan, for example, the state's Democrats strongly opposed the new Constitution for a number of reasons; for instance, because the Republican-dominated convention had apportioned the legislature so as to keep themselves in power.[70] The neutrality of the Republicans in Hawaii,[71] probably induced by such factors as provisions for collective bargaining by state employees,[72] did not lead to defeat of that Constitution or even of that provision. In Michigan leadership in the ratification drive by the popular new Governor, and convention vice-president, George Romney, may have overcome Democratic hostility. In Hawaii the form of the ballot and the generally conciliatory nature of the convention may have offset any ill effects of the lack of general political consensus. Still, the lack of bipartisan support has undoubtedly influenced the vote in some states. For example, Republicans helped defeat the products of the Rhode Island[73] and New York conventions,[74] and the Democrats campaigned strongly against the ill-fated constitution drafted by the Republican-dominated legislature in New Jersey in 1944.[75]

Factors like bipartisan and grass roots political support, the endorsement of major newspapers of such disparate philosophy as the

67. Roanoke Times, Nov. 1, 1970, at A-6, col. 1.

68. NUNN, *supra* note 5, at 118. Democrats, however, were not enthusiastic.

69. WHEELER, *supra* note 5, at 3.

70. STURM, MICHIGAN, *supra* note 5, at 251-52.

71. MELLER, *supra* note 5, at 129.

72. *Id.* at 114.

73. CORNWELL, *supra* note 5, at 79.

74. McKay, *supra* note 5, at 216.

75. CONNORS, *supra* note 5, at 89-91.

Washington Post and the *Richmond Times-Dispatch*, and the deletion of disruptive controversial issues indicate that the compromises made by the Virginia constitution-makers were widely accepted. Proposed constitutions in some states have been defeated because of the opposition of important blocs of voters whose interests were not protected. Experiences of other states have shown that offending one of the major parties can hurt, and that local officeholders can have an important impact as well. Conservation groups (New Mexico),[76] the Civil Liberties Union (New York),[77] and civic leaders and newspapers alienated by the self-interest shown by legislative draftsmen (Rhode Island)[78] have also been instrumental in the defeat of new constitutions. Of course, the political and economic interests of a state have much to do with who takes part in drafting a constitution, and the relative strengths of each no doubt have an effect on whether compromises are made.

The support of political leadership at the local level is an important consideration in seeking electoral approval of a revised constitution. In Virginia, all five associations of constitutional officers—the clerks, the sheriffs and sergeants, the Commonwealth's attorneys, the commissioners of revenue, and the treasurers—all went on record in support of the new Constitution. Other local officials, such as councilmen, mayors, and supervisors, were often publicly active in support of the revisions. Added to these political voices were those of civic, business, labor, and other leaders, again not only at the state level but also in the counties and cities across the state. The result was a climate of support which tended to resolve, in favor of voting "yes," the voters' natural hesitations about constitutional revision.[79] The value of grassroots support in Virginia contrasts not only with the Maryland experience, but also with the unsuccessful revision efforts in Arkansas, Rhode Island, and New Mexico, which appear to have been damaged by the lack

76. STURM, THIRTY YEARS, *supra* note 3, at 115. The proposed New Mexico Constitution is discussed in *Student Symposium—the New Mexico Constitutional Convention*, 9 NAT'L RESOURCES J. 422 (1969).

77. McKay, *supra* note 5, at 221.

78. CORNWELL, *supra* note 5, at 80; STURM, THIRTY YEARS, *supra* note 3, at 98.

79. In the one suburban area in Virginia whose local government was hostile, Chesterfield County, the referendum just barely passed.

of support of civil groups, local government officials, and government workers.[80]

An aggressive campaign for ratification was another important factor in the result in Virginia. An observer of the Maryland experience has noted that the campaign there tended to be intellectual and sober,[81] not the sort of campaign likely to roll away the ennui with which most voters will regard a constitutional referendum.[82] The Virginia proponents set out, like those in Hawaii,[83] in the spirit that ignorance and apathy were likely in the end to be greater enemies than overt opposition. This was particularly a problem in Virginia because a commission and the legislature, rather than a more highly publicized convention, had drafted the document.[84] An early start,[85] organized along the lines of a statewide gubernatorial or senatorial campaign, and adequate (though by the standards of a statewide race for office, laughably modest) funding were components of the successful campaign in Virginia.

A catalyst of Virginia's referendum effort was the superb work of the local campaign committees. In some communities, one or more individuals were the spark plugs. In others, a local organization—oftentimes the League of Women Voters or the Jaycees—made the local campaign go. Some of the variation in votes from one community to another turned on predictable demographic characteristics, but in many cases a highly favorable vote in a community (especially in areas thought less receptive to innovation) was in good measure a function of an active local committee.

The Virginia campaign also succeeded in getting more usable information before the voters than is customary in a referendum effort. Not only was such a massive educational campaign probably without precedent in Virginia, a special effort was made throughout

80. STURM, THIRTY YEARS, *supra* note 3, at 98 (Rhode Island), at 115 (New Mexico); Meriwether, *The Proposed Arkansas Constitution of 1970*, 50 NEB. L. REV. 600, 620 (1971).

81. WHEELER, *supra* note 5, at 141, 194.

82. *Id.* at 214.

83. MELLER, *supra* note 5, at 128; STURM, THIRTY YEARS, *supra* note 3, at 96-97.

84. STURM, THIRTY YEARS, *supra* note 3, at 92; Thane, *A Constitutional Convention: The Best Step for Nebraska*, 40 NEB. L. REV. 596, 601-02 (1961).

85. In contrast to Maryland and Arkansas, where planning the campaign for ratification only began after the convention, "which delayed the Maryland campaign and gave the opposition the uncontested field for too long a time." WHEELER, *supra* note 4, at 214. *See* NUNN, *supra* note 5, at 116.

the campaign to translate the rather dry abstractions of constitutional revision into issues which touched the lives of individual citizens—education, environmental quality, consumer protection, and taxes. And there is reason to think that the central theme which evolved in the campaign—"Bring government closer to the people"—struck a responsive chord in citizens. In contrast, the Arkansas proponents never successfully translated the dry abstractions dealing with the structure of state and local government into terms the voters could understand. They never made the voters see that the new Constitution would mean something to them personally. Observers have assigned this as a major reason for the defeat in that state.[86]

Not only did the proponents in Virginia mount an effective campaign, but the opponents of the revision never developed much popular support. One reason for this is that, unlike Maryland, the Virginia revisions did not include provisions which would unnecessarily fuel opposition. But even without such provisions, the Virginia opponents would seemingly have had greater hopes of appealing to racial prejudice and fear of big government in conservative Virginia than in Maryland. In conservative Arkansas, the opposition was successful in confusing the voters with technical and insubstantial criticisms[87] and in convincing them that the increased flexibility of government would lead to increases in taxes.[88] Proponents committed the fatal error of responding defensively to the charges rather than explaining the benefits to be derived from the new document.[89]

Opponents in Virginia tried similar tactics, but they did not succeed. One reason is that the proponents were prepared to meet and rebut opposition attacks. Exposing half-truths requires, of course, an effective way to get the message to the people. In Maryland, the opponents could charge that rights had been eliminated when they had merely been rearranged,[90] or that the new Constitution would

86. NUNN, *supra* note 5, at 174. *See also* Meriwether, *The Proposed Arkansas Constitution of 1970*, 50 NEB. L. REV. 600, 621 (1971). Other accounts of Arkansas' ill-fated constitutional revision include Nunn, *The Commission Route to Constitutional Reform: The Arkansas Experience*, 22 ARK. L. REV. 317 (1968); *Symposium: Comments on the Proposed Arkansas Constitution*, 24 ARK. L. REV. 155 (1970).

87. NUNN, *supra* note 5, at 156-58. For example, one "objection" was that the new constitution did not specify the meeting place of the legislature. *Id.* at 157.

88. *Id.* at 159-60.

89. *Id.* at 158-59.

90. WHEELER, *supra* note 5, at 202.

cost a lot of money[91] when realistic estimates showed it would cost just a fraction of what they claimed,[92] or that the new Constitution would enfranchise D.C. residents to vote in Maryland elections when an examination of the document would reveal the contrary.[93] They made effective use of such charges because of the inability of the proponents rapidly to respond.[94] In Virginia, by contrast, the proponents met opposition charges with fact sheets and other materials promptly put in the hands of local campaign committees, speakers, editors, and others, to rebut the attacks.

The Maryland opponents were also able to wrap themselves in a cloak of conservatism without fear of contradiction by conservative state leaders, since few Maryland leaders had unquestioned conservative credentials. In Arkansas, the conservative American Independent Party opposed the new document. This not only drained off support from the far right but also led many moderately conservative Democrats to tone down their support in order to avoid losing votes to AIP candidates.[95]

In Virginia, on the other hand, "conservative" opponents of the "socialistic" Constitution were confronted by men like Mills Godwin and James J. Kilpatrick, men with whom conservative voters could readily identify. While Maryland opponents could charge that the proposed Constitution was a document backed by the state's elitist leadership and therefore benefiting the "establishment" to the detriment of the "little man,"[96] Henry Howell's support of the Virginia Constitution made such a charge difficult to maintain in Virginia. Finally, the opponents' credibility was not enhanced by their claim—central to the opposition campaign—that it was unconstitutional to "revise" the Virginia Constitution by using the amending process. To make this charge was to ignore the precedent set in 1928 by no less a figure than Governor Harry F. Byrd when revisions were undertaken by way of constitutional amendments,

91. *Id.* at 198-200.

92. *Id.* at 201.

93. *Id.* at 207.

94. *Id.* at 192, 214.

95. NUNN, *supra* note 5, at 145-47.

96. WHEELER, *supra* note 5, at 196. One subtle disadvantage faced by Maryland reformers was the television stations' decision to allot equal time to proponents and opponents. This decision apparently raised the opponents' status in the minds of many voters. *Id.* at 193-94.

and equally to ignore the explicit approval of that method of revision in a 1945 decision of Virginia's highest court.[97]

Timing has been cited as an important factor in the success or failure of a number of recent revisions. Hostility over student uprisings at the University of Hawaii is thought to be one reason the 18-year old vote failed adoption in that state,[98] while the first collection of a newly imposed income tax[99] and riots in Washington and Baltimore following Martin Luther King's death have been considered important ingredients in the Maryland debacle.[100] The proposed Arkansas Constitution faced a particularly fortuitous and lethal circumstance when labor campaigned heavily against repeal of a full-crew law which appeared on the ballot with the new Constitution. Labor voters were likely told to vote "No" on all the propositions of the complex ballot, with the result that not only the full-crew law but also an unopposed, widely supported franchise tax measure was defeated overwhelmingly.[101] By contrast, in Michigan, timing the campaign so that the popular new Governor Romney could rally voters to the new Constitution in the first months of his incumbency was undoubtedly an important factor in the success of the referendum in that state.

The length of time between completion of the document and the vote has sometimes been thought significant. One observer states that the two-month period in Pennsylvania meant that opponents had no time to organize, while the four-month period in Maryland enabled them to mount a more sophisticated effort.[102] Such conclusions ought to be regarded with caution. The opposition in Maryland was never well organized, though their arguments were effective.[103] And the short period of time (March 25 to April 16) between final convention ratification in Rhode Island and the referendum

97. Staples v. Gilmer, 183 Va. 613, 629-30, 33 S.E.2d 49, 56 (1945).

98. MELLER, *supra* note 5, at 131. At the 1969 special session of Virginia's General Assembly, a proposal to put the question of voting at age 18 on the ballot came close to being adopted. But after some college students picketed the State Capitol on an unrelated matter, Vote-18 failed in the Senate by a vote of 19 to 20.

99. WHEELER, *supra* note 5, at 201.

100. *Id.* at 207-08.

101. NUNN, *supra* note 5, at 140.

102. WOLFE, *supra* note 5, at 54. *See generally* STURM, THIRTY YEARS, *supra* note 3, at 103-04.

103. WHEELER, *supra* note 5, at 193.

has been suggested as one reason proponents failed to inform the people well enough to capture their votes.[104] The lapse of time between drafting a constitution and having the people vote on it can be to the advantage of either proponents or opponents, depending on who makes the best use of the time.

In Virginia, the proponents of the new Constitution were spared the impact of such unhappy events as urban riots, but they had reason to worry about the fact that in the fall elections there was a three-way Senate race, with Senator Byrd running as an independent, and that Byrd refused to take any public position on the proposed revisions. Having the Senator silent on a document which was at odds with his father's "pay-as-you-go" philosophy naturally made the proponents uneasy.

Supporters of a new Constitution in Arkansas faced a similar problem. The most conservative candidate for governor, Walter Carruth of the American Independent Party, not only did not lend his support, but he actively campaigned against it.[105] His opposition made it difficult for his prominent supporters to endorse the document or for his followers to vote for it. The backers of the new Virginia Constitution, however, were successful in enlisting prominent Byrd supporters to endorse it, both on the statewide level (where Byrd's campaign chairman, Mills Godwin, was also honorary chairman of the constitutional referendum campaign), and at the local level (where local constitutional campaign committees often had a Democrat, a Republican, and a Byrd supporter as co-chairmen). Thus the coincidence of the constitutional referendum with fortuitous external events had little harmful effect in Virginia. The other aspect of timing—the long lapse between legislative approval in the spring of 1970 (a *second* approval, for the legislature had given its first approval in the spring of 1969) and the vote in November — the proponents turned to their advantage by using the summer months to lay a careful groundwork and the weeks after Labor Day to campaign aggressively.

The form of the ballot was unquestionably a factor in the outcome in Virginia. There is general agreement that putting a revised constitution on the ballot as a single question was a central factor in

104. CORNWELL, *supra* note 5, at 76.

105. NUNN, *supra* note 5, at 145.

the defeat of both those proposed in New York and Maryland. One of the less well-known bits of political lore about former Vice President Spiro Agnew is that, while still Governor of Maryland, he told the Southern Governors' Conference in 1968 that the "principal difficulty" which brought about the defeat in Maryland was the submission of the revised Constitution to the people on a "take it or leave it" basis.[106]

In New York, Anthony Travia, president of the New York convention, insisted that aid to parochial schools be included and that the document be voted on as a single question on the ballot. He argued that the parochial school aid provision alone would capture 40% of the vote.[107] So controversial was the aid provision, however, that that issue is generally acknowledged to have hurt more than any other.[108] The *New York Times* reflected what proved to be the prevailing view when, before that state's referendum on the revised charter, it carried an editorial entitled, "Take It or Leave It: We Leave It." The editorial explained:[109]

> As virtually its final act, the Constitutional Convention decided last night to offer New Yorkers the new Constitution on a take-it-or-leave-it basis. The voter must accept it or reject it in its entirety. To our regret, the considerable improvements this document does make in the existing constitution are insufficient in importance to offset a few features so highly objectionable that we can only recommend that the proposed constitution be rejected at the polls in November.

In Virginia, by contrast, the General Assembly sought to identify those questions—five of them as of the time of the 1969 session—which might be most controversial and to make it possible for the people to vote separately on them. This action meant that a voter would not have to vote against the entire Constitution if his disapproval was confined to one of the questions posed separately. Moreover, separating the questions on the ballot avoided the "take-it-or-leave-it" stigma and thus made it less likely that the voters would approach the revisions in general in a mood of distrust or apprehension.

106. Notes on the speech in CCR Files. *See also* WHEELER, *supra* note 5, at 209-10.
107. McKay, *supra* note 5, at 221 and note 29.
108. *Id.* at 213.
109. New York Times, Sept. 27, 1967, at 42, col. 1.

Take-it-or-leave-it ballots have met with occasional success, as shown in Michigan, where voters approved a constitution submitted in that form in 1963. But the experience of New York, Maryland, and Rhode Island indicates that many citizens are likely to vote against an entire constitution when they dislike a particular provision rather than vote for it because of the things they like. Not only in Virginia but also in Florida, Hawaii, Pennsylvania, and Connecticut, submission of more than one question led to adoption of most or all of the revisions.[110]

Some observers have suggested that submission of a series of proposals rather than a single package tends to confuse the voters and leads to an incoherent constitution if some but not all of the proposals are adopted.[111] If the number of proposals is very large, this argument may have merit, but when, as in Virginia, there are only four separate questions on the ballot, or, as in Connecticut, where only one controversial issue was separated (and defeated),[112] the possibility of confusion does not appear great.[113]

The road to constitutional revision is rarely without its perils. To some extent the lessons learned in one state are of value in another, yet every state has its own unique political climate which calls for a tailored approach. Revisors will want to consider the form which the revision process will take (convention or legislature), which changes are really worth fighting for, how the revision will appear on the ballot, how the state's leadership and political forces can be enlisted in seeking ratification, how a campaign should be organized to reach the grass roots level, how to combat the twin evils of voter apathy and opposition distortions, and how, when all is said and done, to ensure that a state's fundamental law is revised and presented in such a way that in reality it reflects the best aspirations of the state's citizenry.

110. STURM, THIRTY YEARS, *supra* note 3, at 103.
111. FAUST, *supra* note 5, at 170. It has also been suggested that submission of controversial issues in a document offered as a whole might divert attention from them. NUNN, *supra* note 5, at 123.
112. STURM, THIRTY YEARS, *supra* note 3, at 95.
113. Hawaii's reformers used a complicated ballot and the confusion it engendered worked to their own advantage. Voters were allowed to vote for the entire constitution, against it, or against individual provisions. These latter were counted as votes for the rest of the document. Thus, voters who thought they could express distaste for some provisions and neutrality toward others were disappointed. This tactic has been strongly criticised. MELLER, *supra* note 5, at 131-34.

A Look at Virginia's Constitution

Constitutional revision is, of course, not an end in itself. It would be witless to be so preoccupied with avoiding political pitfalls to produce a document which is not a marked improvement over the one it replaces. A narrative of constitutional revision in Virginia, therefore, is not complete without a look at the substance of the new Constitution, its merits and its limitations.

Virginia's new Constitution has much to recommend it. In the first place, it adheres in large measure to the basic precept that constitutions embody fundamental law. The unnecessary detail, much of it statutory in nature, that so cluttered the 1902 Constitution was deleted in the 1969 revision. The result is a constitution which, at 18,000 words, is about half the length of the old charter.[114]

Moreover, the 1971 Constitution follows such simple drafting principles—so often lacking in state constitutions—as coherence, good organization, simple language, and brevity of expression. In particular, a number of articles and sections of the old Constitution were reorganized or relocated to produce a logically flowing, more comprehensible document.[115]

More important than the technical improvements are the significant substantive gains which emerge from the process of revision. One of the recurring themes of the new constitutions is that of responsible government. Constitutions, standing by themselves, rarely solve such social problems as air pollution or social unrest; that takes legislation, money, manpower, and other resources. But too often an archaic constitution—typically conceived out of nineteenth century notions of constitution-making—stands in the way of solutions. The revisors and legislators who produced Virginia's new Constitution wisely resisted the temptation to write into the document their own notions of what all the answers should be to problems that can be answered only through experience. Instead

114. There is general agreement among students of state constitutions that constitutions should not become codes of law. *See, e.g.*, Kauper, The State Constitution: Its Nature and Purpose 12-15 (1961); Major Problems in State Constitutional Revision 137-46 (W. Graves ed. 1960); Salient Issues of Constitutional Revision xi-xiv (J. Wheeler ed. 1961).

115. For example, the religious liberty and anti-establishment sections of the 1902 Constitution, which had appeared respectively as section 16 (in the Bill of Rights) and as section 58 (in the legislative article), now appear together in Article I, section 16 of the new Constitution.

they created a document reflecting a trust in recourse to the political and legislative processes to solve today's and tomorrow's problems.

Moreover, the Virginia Constitution creates the capacity to deal with problems that are being forced upon the Commonwealth and its citizens at an increasing pace. For example, the General Assembly now meets annually rather than biennially,[116] and is freer than it was before to create a wider range of options for the people of individual cities and counties to have the form of local government which best meets local needs.[117] The court system is no longer tied to old concepts but can be shaped to meet the evolving demands placed upon it.[118] The means for achieving high quality education are placed at the disposal of the General Assembly,[119] and the Commonwealth has enlarged capabilities for financing its capital needs.[120]

Throughout the Constitution, one senses a note of responsiveness to current problems. Governmental discrimination on the basis of race, color, national origin, sex, or political conviction is banned in the Bill of Rights.[121] Citizens are reminded that respect for orderly legal processes, and observance of rights accorded by due process of law, are related concepts.[122] Education takes its place among the fundamentals enumerated in the Bill of Rights.[123] A new article on conservation proclaims that it shall be the policy of the Commonwealth to conserve and develop its natural resources, public lands,

116. Va. Const art. IV, § 6. *Compare* Fla. Const. art. III, § 3(b); Ill. Const. art IV, § 5; Pa. Const. art. II, § 4.

117. Va. Const. art. VII, § 2. *Compare* Ill. Const. art. VII, § 2; N.C. Const. art. VII, § 3.

118. Va. Const. art. VI, § 1. Other states also reformed the judiciary article. *See, e.g.*, Fla. Const. art. V; Hawaii Const. art. V. *See also* Cedarquist, *Court Reform: A Challenge to the 1970 Illinois Constitutional Convention*, 58 Ill. B.J. 598 (1970).

119. Va. Const. art. VIII, § 2.

120. Va. Const. art. X, §§ 9(b), 9(c).

121. Va. Const. art. I, § 11. In its first case interpreting section 11's sex discrimination provision, the Supreme Court of Virginia gave a very weak reading to that provision. *See* Archer v. Mayes, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973). For a fuller discussion of section 11's anti-discrimination clause, see A. Howard, Commentaries on the Constitution of Virginia 229-43 (1974). For discussions of revisions in the Bills of Rights in other states, see E. Gertz, The Bill of Rights in the Illinois Constitutional Convention (1972); Note, *Efforts to Revise the Minnesota Bill of Rights*, 58 Minn. L. Rev. 157 (1973). *See also* Coats, *Pennsylvania Bill of Rights: Revisions Needed*, 42 Pa. B.A.Q. 428 (1971).

122. Va. Const. art. I, § 15.

123. *Id.* § 1.

and historical sites to the end that the people shall have clean air, pure water, and opportunities for recreation.[124] The need for consumer protection is reflected in another section, perhaps the first of its kind in a state constitution.[125]

Several areas of Virginia's new Constitution deserve particular comment. In education, drawing upon Thomas Jefferson's advocacy of a Bill for the More General Diffusion of Knowledge,[126] the Bill of Rights now makes a declaration of faith in the Commonwealth's support of education that is surely unsurpassed by any other state constitution in the nation.[127] And that declaration is matched by the means of making it effective, notably by the assurance that neither the Commonwealth nor a locality will be free to opt out of meaningful support for public schools.[128]

Under the old Constitution, as interpreted by the State courts, whether the state or localities even operated public schools was largely a matter of discretion.[129] The new Constitution places a mandate upon the General Assembly to provide for a system of free public elementary and secondary schools throughout the Commonwealth.[130] Localities must contribute their share of the cost of operating public schools as determined by the Legislature.[131]

The potential effect on education is greatest in the poorer and more rural areas of the State. The General Assembly has ultimate authority, by overseeing the actions of the Board of Education, to determine standards of quality for the schools.[132] Once those standards have been determined, implicit in the constitutional plan is the duty of the Assembly to appropriate sufficient money to meet the standards in those localities lacking resources to do the job themselves.[133] The net effect should be to lessen the handicap which a child may suffer in his education because he may happen to live in a poor locality rather than a wealthy one. Now that the United States Supreme Court, in its decision in *San Antonio Independent School District v. Rodriguez*,[134] has rejected fourteenth amendment challenges to state systems of school financing that rely heavily on property taxes and that result in substantial disparities from one school district to another, the ball, in effect, is passed back to the states, and the Virginia Constitution's approach to equalizing educational opportunity assumes new importance.[135]

Also of major import are the new Constitution's provisions for state finance. Beginning in the 1920's, a visible tenet of public policy in Virginia was "pay as you go"—the principle that state needs would be financed out of current revenues, without the issuance of state bonds.[136] In actuality, as the years passed, "pay as you go" became more theory than fact. The old Constitution's prohibitions on state indebtedness required recourse to such techniques as the creation of special districts, a device that has proved expensive for Virginia, since interest rates are invariably higher on revenue bonds not backed by the state than on a state's general obligation bonds.[137] A key motivation that moved Governor Godwin to call for constitutional revision in 1968 was his recognition that Virginia's constitutional debt limits were standing in the way of any realistic effort to meet the state's capital needs.[138]

124. VA. CONST. art. XI, § 1.
125. VA. CONST. art. IX, § 2.
126. *See* T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 148 (W. Peden ed. 1955), where Jefferson describes his bill.
127. VA. CONST. art. I, § 15.
128. VA. CONST. art. VIII, §§ 1, 2. *Compare* the proposed Maryland provision in WHEELER, *supra* note 5, at 122.
129. *See* County School Bd. v. Griffin, 204 Va. 650, 133 S.E.2d 565 (1963). The decision arose out of the closing of the public schools in Prince Edward County. In 1964, the United States Supreme Court ruled that closing the public schools and giving tuition grants for attendance at private, segregated academies violated the fourteenth amendment's equal protection clause. Griffin v. County School Bd., 377 U.S. 218 (1964). For accounts of Virginia's responses to federal desegregation orders, see R. GATES, THE MAKING OF MASSIVE RESISTANCE (1964); J. WILKINSON, HARRY BYRD AND THE CHANGING FACE OF VIRGINIA POLITICS, 1945-1966, at 113-54 (1968).
130. VA. CONST. art. VII, § 1.
131. *Id.* § 2.
132. *Id.*
133. *Id.*
134. 411 U.S. 1 (1973).
135. For a fuller discussion of the operation of art. VIII, §§ 1 and 2, and legislative implementation thereof, *see* A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 886-907 (1974). *See also* Moore, *In Aid of Public Education: An Analysis of the Education Article of the Virginia Constitution of 1971*, 5 U. RICH. L. REV. 263 (1971).
136. "Pay as you go" was "the chief issue" in the gubernatorial campaign of 1925. *See* A MOGER, VIRGINIA: BOURBONISM TO BYRD, 1870-1925, 342 (1925). In 1928 a section was added to the Virginia Constitution (section 184-a) authorizing borrowing for capital purposes, but such borrowing required popular referendum and the aggregate amount of debt outstanding at any one time could not exceed an amount equal to 1% of the assessed value of taxable real estate in the Commonwealth.
137. *See* A. HEINS, CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT 36-81 (1963); J. MAXWELL, FINANCING STATE AND LOCAL GOVERNMENT 205 (rev. ed. 1969); R. ROBINSON, POSTWAR MARKET FOR STATE AND LOCAL GOVERNMENT SECURITIES 210-12 (1960).
138. *See* Address to the General Assembly, Jan. 10, 1968, S. Doc. No. 1, 1968 Sess., 3.

The new Constitution responds in two ways to these financial needs. One section enlarges the state's capacity to issue general obligation bonds, subject to public referendum, to finance capital projects such as new college and hospital buildings.[139] Another section permits the General Assembly to put the full faith and credit of the Commonwealth behind certain selected revenue bond issues for self-liquidating capital projects such as college dormitories.[140] The purpose of this provision is to lower interest rates, achieving savings which can be passed on to the users of the facilities financed with the bonds.

The General Assembly has already put this provision to good use. At its 1971 session, the Assembly authorized putting the Commonwealth's full faith and credit behind $23.6 million of bonds for projects at state colleges and universities.[141] The State Treasurer estimated that this use of the state's credit will save $6.5 million to $10 million in interest costs over the life of these bonds.[142] Even larger savings are anticipated from the use of the new Constitutional provision giving the Commonwealth's backing to revenue bonds for the widening of the Richmond-Petersburg Turnpike.[143]

Environmentalists should find Article XI of Virginia's Constitution a useful tool. The new conservation article, the first in any Virginia constitution, proclaims the public policy of the state to be the protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit and welfare of the people.[144] This declaration is a mandate to agencies and courts in Virginia to construe statutes and other governmental acts in the light of their impact on the environment. For example, a regulatory agency deciding whether to license an electric power plant must take into account the project's likely effect on the environment. Should the agency fail to consider this aspect, a court could require that it do so. The general language of Article XI does not itself say how a conflict between environmental and other values will be resolved, but it does require that the environment be considered when decisions are made.[145]

These areas—education, finance, and environmental quality—are simply illustrative of the changes which adoption of the 1971 Constitution has brought about. The revisions affect a wide range of state activities, blending much that is traditional with much that is new. The revisors decided to retain the long-standing ban on a Governor's running to succeed himself, but they borrowed from the example set by the twenty-fifth amendment to the Federal Constitution to create a new mechanism for dealing with gubernatorial incapacity or disability.[146] Similarly, they mandated the creation of a commission charged with investigating claims against judges alleged to be unfit or disabled.[147] The revisors made the franchise more accessible (for example, by reducing durational residence requirements) and made the ballot less subject to abuse.[148] The sometimes controversial State Corporation Commission—created with constitutional status in 1902 to keep it out of the control of the powerful railroad interests—was in 1969 left in the Constitution, but the General Assembly was given a greater voice in the Commission's jurisdiction and activities.[149]

139. VA. CONST. art. X, § 9(b).

140. VA. CONST. art. X, § 9(c). Other states have also felt the need to liberalize borrowing provisions. *See, e.g.*, MONT. CONST. art. VIII, §§ 8, 10. *See generally* STURM, TRENDS IN STATE CONSTITUTION-MAKING 1966-1972 at 72-76 (1973). Some revisions have limited previously unchecked borrowing authority. *See* MELLER, *supra* note 5, at 110 (Hawaii), WOLFE, *supra* note 5, at 44 (Pennsylvania). For a discussion of the revised revenue article in Illinois, see Young, *The Revenue Article of the Illinois Constitution of 1970—an analysis and appraisal*, 1972 U. ILL. L. F. 312 (1972).

141. Va. Acts of Assembly, 1971 Ex. Sess., ch. 147, at 251.

142. Memorandum from Walter W. Craigie, Jr., State Treasurer, to W. Roy Smith, Chairman, House Appropriations Committee, dated Jan. 25, 1971.

143. State Treasurer Craigie estimated that using 9(c) bonds, rather than bonds issued by the Turnpike Authority, would effect a saving of $20 million on the project. Richmond Times-Dispatch, Feb. 2, 1973, at 1. For enabling legislation authorizing the 9(c) bonds, *see* Va. Acts of Assembly, 1973, ch. 230, and for legislation dissolving the Authority and transferring its powers and obligations to the State Highway Commission (since 9(c) bonds may not be used for projects of authorities independent of the Commonwealth's executive department), *see id.*, ch. 202.

144. VA. CONST. art. XI, § 1. For example of other states' environmental provisions, *see* ILL. CONST. art. XI, § 1; MONT. CONST. art. IX; PA. CONST. art. I, § 28.

145. For a fuller discussion of Article XI's operation, see A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1139-61 (1974); Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 205-29 (1972).

146. VA. CONST. art. V, §§ 1, 16. *Compare* S. C. CONST. art. IV, § 12; S. D. CONST. art. IV, § 12; DEL. CONST. art. III, § 20.

147. VA. CONST. art. VI, § 10. Other states have established similar commissions. *See, e.g.*, IOWA CONST. art. V, § 19.

148. VA. CONST. art. II, §§ 1-4. *Compare* ILL. CONST. art. III, § 1; PA. CONST. art. VII, § 1; S.D. CONST. art. VII, § 1.

149. VA. CONST. art. IX, §§ 1,2. South Carolina adopted a similar provision. S.C. CONST. art IX, § 2.

The new Virginia Constitution is by no means a model document. Like most which are hammered out in the political process, it reflects much that is compromise. For example, a good case can be made that the legislature should be able to issue at least some general obligation bonds without the necessity of a public referendum. The requirement of referendum introduces the temptation to load up a bond issue with projects calculated to give the proposal popular appeal in all geographical parts of the state, rather than tackling priorities according to need. Moreover, the awkwardness of the referendum requirement arguably makes it more difficult to borrow at just the moment when interest rates may be most advantageous. Nevertheless, the General Assembly, in approving the constitutional revisions, made a judgment that to sell the people on the demise of "pay as you go" there would have to be some popular voice in future general obligation bond issues.[150]

Similarly, the General Assembly was cautious in its approach to one of the perennial hot potatoes, local government. Where the Commission on Constitutional Revision introduced into its draft the recognition of regional governments, the Assembly added the requirement that no regional government could come into being save on the vote of the people in the localities affected.[151] Where the Commission would have overturned the so-called Dillon's Rule (a canon of construction strictly construing state grants of powers to local governments), the Assembly saw fit to reject that recommendation.[152]

In general, the legislators, in shaping the 1969 revisions, were quicker to enhance legislative capacities than those of other branches or agencies of government. An unwillingness to see the enlargement of executive power was one of the reasons for the Assembly's refusal to accept the recommendation of the Commission

150. *See* VA. CONST. art. X, § 9(b).

151. VA. CONST. art. VII, § 2.

152. *See* CCR 228-30. Florida's 1968 Constitution, art. VIII, § 2, permits counties and municipalities to "exercise any power for municipal purposes except as otherwise provided by law."

For a detailed description of the differences between the Commission version and the General Assembly version, as well as a compendium of the localities' powers under the new Constitution, *see* Spain, *The General Assembly and Local Government: Constitutional Legislation 1969-1970*, 8 U. RICH. L. REV. 387 (1974).

on Constitutional Revision that the Governor should be authorized to initiate administrative reorganization, subject to legislative veto.[153] In the area of local government, the Assembly's refusal to topple Dillon's Rule left initiatives in local government more in legislative hands than would have been true of the Commission's approach.[154] And, as regards future changes in the Constitution itself, while the Assembly took the very laudable step of assuring that a constitutional convention cannot simply promulgate a new constitution without popular approval[155]—as the Convention of 1901-02 did in promulgating the 1902 Constitution[156]—no provision was made for popular initiation of either constitutional amendments or of conventions; both must be initiated by the Assembly.[157]

One may debate the merits and flaws of particular provisions of the new Constitution, of compromises forced by the realities of politics, of tough issues not squarely faced or insufficiently resolved. But the commissioners who made the initial recommendations and the legislators who laid the new document before the people understood the realities with which they had to work. Faced with the unhappy examples of New York and Maryland, the revisors set out to make important changes in Virginia's fundamental law and yet do so in a way that would be accepted by the people at the polls.

The revitalization of Virginia's Constitution comes at an oppor-

153. *See* CCR 170. The truncated remnant of the Commission's proposal appears as art. V, § 9. Other states have given the governor this power. *See, e.g.*, ILL. CONST. art. V, § 11; N.C. CONST. art. III, § 5(10). *See also* Kamin, *Executive Article: Proposals for the New Illinois Constitution*, 51 CHI. B. REC. 252 (1970); Netch, *"Governor Shall . . ." Observations on the Executive Article of the Illinois Constitution*, 50 CHI. B. REC. 28 (1968).

154. *See* text at note 152 *supra*.

155. VA. CONST. art. XII, § 2.

156. *See* R. MCDANEL, THE VIRGINIA CONSTITUTIONAL CONVENTION OF 1901-1902, 113-15 (1928). The validity of the 1902 Constitution was acknowledged in Taylor v. Commonwealth, 101 Va. 829, 44 S.E. 754 (1903).

157. VA. CONST. art. XII, §§ 1, 2. Albert L. Sturm has observed, "Serious questions may be raised about the propriety of vesting in a department of government which itself is subject to constitutional mandates and restraints the *sole power to propose alterations in the basic law*." Sturm, *The 1971 Revised Virginia Constitution and Recent Constitution Making*, 44 STATE GOVERNMENT 166, 172 (1971) (emphasis in original). *In contrast*, ILL. CONST. art. XIV, § 3 provides for popular initiative in calling a convention to reform the legislative branch, and HAWAII CONST. art. XV, § 2 provides that the question whether to have a convention must be on the ballot every ten years. *See also* Note, *Convening a Con-Con in Washington Through the Use of the Popular Initiative*, 115 WASH. L. REV. 535 (1970); Martineau, *Mandatory Referendum in Calling a State Constitutional Convention: Enforcing the People's Right to Reform Their Government*, 31 OHIO ST. L.J. 421 (1970).

tune time. Much of the heady optimism of American politics—the era of Camelot and the New Frontier—has given way to the malaise stirred in the late '60s by Vietnam and by campus unrest and subsequently made more bitter by all the events associated with the label "Watergate." As periodically happens, people turn to state and local governments for at least some of the solutions to current problems.

Concurrently with these political events has come a shift in the courts which once again brings state constitutions into greater prominence. In the 1960's the Supreme Court, under Chief Justice Warren, nationalized in many areas of American law that had previously been left to the states. Under Warren's leadership, the Court laid down a rule of one man, one vote in state legislatures,[158] decreed the desegregation of public schools,[159] and federalized state criminal procedure by applying to the states most of the guarantees of the Bill of Rights.[160] With four of President Nixon's appointees now on the Court, there is an obvious slackening of the momentum toward imposing uniform standards to the states. Justice Powell's decision in *Rodriguez*,[161] refusing to make the states justify their systems of school financing under a "compelling state interest" standard, is a case in point, as are the Burger Court limitations on the *Miranda* opinion[162] and the opinions markedly relaxing standards in search and seizure cases.[163]

These trends of the 1970's serve as reminders of the important role that state constitutions continue to play even in an age grown accustomed to the activism of the Federal Government. States are free to write into their own charters guarantees which federal laws do not offer. Virginia, for example, has a long tradition of separation of church and state, as exemplified by Jefferson's Bill for Religious Freedom[164] and Madison's Memorial and Remonstrance against Religious Assessments.[165] As a result, the religious liberty guarantees of Virginia's Constitution are longer and more inclusive than their federal counterpart and have, on occasion, been applied with even more strictness than the first amendment of the United States Constitution.[166] Another example is education, which *Rodriguez* held not to be "fundamental" for the purposes of the fourteenth amendment's equal protection clause,[167] but which the Virginia Constitution places as one of the "fundamentals" of Virginia's Bill of Rights, alongside such traditional values as free speech and free exercise of religion.[168]

A state constitution is more than a legal document; it is a repository of cardinal ideals and goals toward which a state's citizenry aspire. It embodies the tradition of the social contract developed by philosophers such as John Locke and given application by American constitution-makers, among them the men who met at Williamsburg in 1776 to draft Virginia's first Constitution.

"Reform, that you may preserve," said the British statesman Macauley in urging passage of the Reform Bill of 1832.[169] That advice may be apt for constitution-makers. The experience of one state is, of course, no sure guide for another. But Virginia's success in pursuing constitutional revision may have some useful implications for those setting out to revise the constitutions of other states. The

158. Reynolds v. Sims, 377 U.S. 533 (1964).

159. Brown v. Board of Educ., 347 U.S. 483 (1954).

160. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (sixth amendment right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment bar on unreasonable search and seizure).

161. 411 U.S. 1 (1973).

162. *Compare* Miranda v. Arizona, 384 U.S. 486 (1966) (holding that before an in-custody interrogation can take place, an accused must be informed of his rights, including the right to remain silent and to have a lawyer—court-appointed if the accused is indigent—present during police questioning), *with* Harris v. New York, 401 U.S. 222 (1971) (holding that statements otherwise inadmissible under *Miranda* are admissible for the purpose of impeaching the accused's testimony in court). *See also* Michigan v. Tucker, 42 U.S.L.W. 4887 (U.S. June 10, 1974).

163. *See, e.g.*, Cardwell v. Lewis, 42 U.S.L.W. 4928 (U.S. June 17, 1974); United States v. Edwards, 94 S. Ct. 1234 (1974); United States v. Robinson, 414 U.S. 218 (1973); Cady v. Dombrowski, 413 U.S. 433 (1973).

164. 12 Hening 84 (1785).

165. J. MADISON, 8 PAPERS 295 (W. Hutchinson & W. Rachel ed. 1962-73).

166. *Compare* Everson v. Board of Educ., 330 U.S. 1 (1947) (allowing New Jersey to provide school bus transportation to parochial school students), *with* Almond v. Day, 197 Va. 419, 89 S.E.2d 851 (1955) (forbidding tuition grants and other aid to children of persons disabled or killed in one of the world wars on the grounds that where the children were attending sectarian schools the aid would violate the religion clauses of the Virginia Constitution). The Attorney General of Virginia subsequently ruled that *Almond* would forbid the use of public funds to transport pupils attending private sectarian schools. 1966-67 OPS. VA. ATT'Y GEN. 264.

167. 411 U.S. 1, 35-37 (1973).

168. VA. CONST. art. I, § 15.

169. HANSARD'S PARLIAMENTARY DEBATES (3d ser., II) 1203 (1831) (speech of March 2, 1831).

ability of American states to adopt fundamental law which permits effective responses to contemporary and future needs is, after all, one test of the viability of the states in the federal system.

NEW LOOKS AT AN ANCIENT WRIT: HABEAS CORPUS REEXAMINED

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> [T]he traditional characterization of the writ of habeas corpus as an original . . . civil remedy for the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom . . . cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review. Brennan, J.[1]

> [I]t is difficult to explain why a system of criminal justice deserves respect which allows repetitive reviews of convictions long since held to have been final at the end of the normal process of trial and appeal where the basis for re-examination is not even that the convicted defendant was innocent. There has been a halo about the "Great Writ" that no one would wish to dim. Yet one must wonder whether the stretching of its use far beyond any justifiable purpose will not in the end weaken rather than strengthen the writ's vitality. Powell, J.[2]

These decade-spanning statements regarding the appropriate role for federal habeas corpus in the collateral review of state criminal convictions represent far more than a shift in judicial philosophy[3] from the "Warren Court" to the "Burger Court."[4] They typify the

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1. Fay v. Noia, 372 U.S. 391, 423-24 (1963) (footnotes omitted).

2. Schneckloth v. Bustamonte, 412 U.S. 218, 275 (1973) (concurring opinion).

3. For an article expounding the thesis that the dissension often evident in fourth amendment cases is indicative of a profound disagreement among the Justices about fundamental principles, *see* Irons, *The Burger Court: Discord in Search and Seizure*, 8 U. RICH. L. REV. 433 (1973).

4. For the purposes of this article, the period of time during which the Supreme Court of the United States may be viewed and aptly described as the "Warren Court" runs from October 5, 1953 to June 23, 1969, the period of time when Earl Warren served as Chief Justice. The ascendancy of the "Burger Court" may be argued as beginning on December 15, 1971, when Justice William H. Rehnquist was sworn in. The Court then consisted of four Nixon appointees—Chief Justice Warren Burger and Associate Justices Harry A. Blackmun, Lewis