

The 1971 Virginia Constitution: Promoting the common benefit

By A.E. Dick Howard

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Editor's note: *Next year marks the 50th anniversary of the current Virginia Constitution, which went into effect in 1971. A.E. Dick Howard, the Warner-Booker Distinguished Professor of Law at University of Virginia School of Law, led the revision of the modern-day Constitution. It largely repudiated the white supremacy legacy of the 1902 Constitution.*

In 1968, Gov. Mills E. Godwin Jr. appointed a Commission on Constitutional Revision. Howard served as the commission's executive director, and then was counsel to the General Assembly when it reviewed the commission's report. The proposed constitution went before Virginia voters in 1970, and Howard directed the successful referendum campaign. He also is the author of the two-volume "Commentaries on the Constitution of Virginia."

This is the second of a two-part series about the development of the 1971 Constitution. The previous installment was published on Sun., Dec. 20.

George Mason's famous Declaration of Rights for Virginia (1776) highlights the idea of community. That document declares that government is "instituted for the common benefit, protection, and security of the people, nation, or community."

But when the declaration turns to the question of who in that community should have the vote, it is more qualified. To have the right of suffrage, men must have "sufficient evidence of permanent common interest with, and attachment to, the community." In Mason's day, that meant property owners.

The declaration's standard, turning on "permanent common interest" and "attachment," was sufficiently open-ended to allow later generations to debate just how broad the franchise should be. In the early 19th century — the era of Jeffersonian and Jacksonian democracy — reformers, especially in the Piedmont and the Valley of Virginia, filed petition after petition asking for a convention to revise the 1776 Constitution.

Finally, a convention was held in 1829-30, making only modest reforms. Then, in 1850-51, another convention brought about essentially universal white male suffrage.

The Civil War and Reconstruction brought yet more voters to the rolls — former slaves and other Blacks who now would be enfranchised. But this was not to last. The progressive Constitution of 1870, which also created Virginia's first statewide system of public education, was overturned by the constitutional convention of 1901-02.

For the first time since the founding era, the trajectory was not an enlarged electorate. Instead, the Constitution of 1902 was an instrument of disenfranchisement, both of blacks and poor whites.

A key question of constitutional design is the question of what is meant by the creation of a political community. Who belongs, who does not? Who counts, who does not?

Reformers like Thomas Jefferson, an outspoken critic of limiting the franchise to property holders, thought it inadmissible that men who had risked their lives for their country could not vote if they owned no property. Reformers after the Civil War wanted Black Virginians to have the full benefits of citizenship, including the franchise.

The question of who belongs and who does not is not limited to deciding who gets to vote. There are other clear signals as to who is on the outside. Thus the 1902 Constitution mandated that public schools must be segregated. Jim Crow laws made it even more clear who was a true member of the community and who was not. And so life continued in Virginia for the next half-century and more.

The 1960s were a time of upheaval. John F. Kennedy, Robert F. Kennedy and the Rev. Martin Luther King Jr. were assassinated. There were massive protests against the Vietnam War. Cities were in flame. Cries for social justice brought the Civil Rights Act of 1964 and the Voting Rights Act of 1965. The U.S. Supreme Court decreed that legislative seats must be apportioned on the basis of population. The poll tax was declared unconstitutional.

In such an era, Virginia's 1902 Constitution increasingly was a relic. In 1968, Gov. Mills E. Godwin Jr. appointed members of the Virginia Commission on Constitutional Revision. They were an uncommonly talented group of Virginians. They included Lewis F. Powell, Jr., soon to be a justice on the U.S. Supreme Court; Oliver W. Hill, Virginia's leading civil rights attorney; former governor Colgate Darden; and Hardy C. Dillard, later to serve on the World Court at the Hague. To watch these men debate what a new

constitution should be like was to see grand ideas of government and society meet practical issues of policy and implementation.

The commission handed its recommendations to the governor and General Assembly on Jan. 1, 1969. The legislators rose to the occasion. They accepted nearly all the commission's recommendations. When they did not, there was usually measured judgment for taking a different course.

In 1970, a referendum was held. A privately funded group, Virginians for the Constitution, organized a campaign to educate the public on the proposed constitution. When the ballots were cast, 72% of the voters said "yes" to the constitution. It took effect on July 1, 1971.

The revisors' idea of the political community was light years away from the notions that permeated the 1902 document. For the first time, the Constitution of Virginia includes a prohibition on governmental discrimination based on race, color, national origin or sex.

Where the old constitution had been interpreted to allow counties and cities to close their schools to avoid integration — Massive Resistance at work — the new Constitution mandates the General Assembly to provide a statewide system of public education for all school-age children. Further, the Constitution places an enforceable duty on localities to put up their share of school funding once the General Assembly has crafted a funding formula.

The revisors understood the link between education and civic virtue. Drawing on language from Jefferson's "A Bill for the More General Diffusion of Knowledge," education now takes its place in Virginia's Bill of Rights alongside traditional rights such as expression and religion. The Constitution's education article gives primacy to the Board of Education in fashioning standards of quality, subject to the ultimate authority of the General Assembly.

In 2021, 50 years will have passed since the present Constitution took effect. Does the Constitution continue to promote the "common benefit"? Does it strengthen the sense of an inclusive political community? What issues invite our attention?

The Commission on Constitutional Revision added a requirement that legislative districts be contiguous and compact. In cases brought since 1971, Virginia's Supreme Court has been unduly deferential to the legislature in these cases, fearing, no doubt, to enter what U.S. Supreme Court Justice Felix Frankfurter once called a "political thicket."

In 2020, the voters resoundingly approved a constitutional amendment to create a bipartisan commission to draw district lines. The commission, made up of legislators and citizens, is a watered-down version of the original proposal, which would have created a citizens' commission. We shall see whether the commission is able to take us beyond the evils of partisan gerrymandering.

Virginia has one of the country's strictest constitutional barriers to restoring the vote to former felons. The Constitution requires that the governor act to restore the franchise to former offenders. The Supreme Court of Virginia has read the Constitution's language narrowly, requiring the governor to act on individual cases rather than on former felons as a class. Having the right to vote is a signal aspect of any effort to bring former felons back into the community. Is it time to make the Constitution's path to full citizenship easier?

The Commission on Constitutional Revision proposed to abandon Dillon's Rule. That canon of construction dictates that local governments have only those powers expressly given them by the General Assembly. The General Assembly, however, decided that Dillon's Rule ought to stay. In a commonwealth where government close to the people is thought to be a virtue, should we loosen the constitutional bond on local governments?

Any informed reader of this paper can no doubt think of other issues worth mulling. Whatever the specific issue, the 50th anniversary invites us to take the occasion to ponder what it is we expect the Constitution to be. Virginia's Declaration of Rights reminds us that "no free government, nor the blessing of liberty, can be preserved to any people, but...by frequent recurrence to fundamental principles."

We live in an age when liberal constitutional democracy seems to be under siege in so many countries. A state constitution is the place where a people write many of their hopes and aspirations. How can we employ the Constitution of Virginia to nurture self-government by a free people in a way that is just and inclusive?

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