

discarding the Commonwealth's 1902 Constitution (a classic post-Reconstruction document that institutionalized both the poll tax and school segregation), Virginia was on the verge of a new and more promising path. Still other commission members could be mentioned, but these several examples surely suggest that the revisors of Virginia's Constitution were no ordinary lot.

By the time the proposed new Constitution went to referendum in 1970, Virginia had elected its first Republican government since Reconstruction, Linwood Holton. Holton brought a special brand of decency to the Governor's Mansion. Declining to fight federal court school desegregation orders, Holton made front-page news throughout the nation when he escorted his thirteen-year-old daughter to a predominantly black Richmond high school. The repudiation of massive resistance could not have been more clear. J. Harvie Wilkinson III (later a federal court of appeals judge) summed up Holton's contributions: "a new air of openness in state government, two-party democracy in action, and, above all, racial understanding through personal tolerance and good will."¹²⁸ It is fitting that it was Holton who asked Professor Howard to organize the committee that campaigned successfully for the new Constitution's ratification.

The leaders who coalesced around the proposed Constitution of Virginia were not giants. Their era was not some kind of golden age. Those years saw more than enough political venality, petty politics, and social dislocations to go around. But that era did prove to be a propitious moment for constitutional change, and the Commonwealth's leaders seized that moment. Decades later, could Virginians do it again? Virginia does not lack for leadership, either in the public or private sector. But reviewing the special qualities that came to the fore during the 1969–70 constitutional revision effort, one can see that it would be no small challenge to bring together such a talented and dedicated team.

In sum, anyone who sets out today to revise Virginia's Constitution—or that of any other state—must ponder the considerable challenges. Those include partisanship, single-issue politics, the difficulty of finding common ground, the power of money, popular discontents and distrust, and the need for inspired leadership. The lesson of 1970 is that, given the right combination of circumstances, it can be done. The cautionary note sounded by the events of the years since 1970 is that it would not be easy.

NOTES

1. Jefferson to James Madison, September 6, 1789, *The Papers of Thomas Jefferson*, vol. 15, ed. Julian P. Boyd (Princeton: Princeton University Press, 1950), 395–96.
2. Jefferson to Samuel Kercheval, July 12, 1816, *The Writings of Thomas Jefferson*, vol. 10, ed. Paul Leicester Ford (New York: G. P. Putnam's Sons, 1892–1899), 43.
3. Albert L. Sturm, *Thirty Years of State Constitution-Making, 1938–1968* (New York: National Municipal League, 1970).
4. On the 1901–1902 Convention, see Ralph C. McDanel, *The Virginia Constitutional Convention of 1901–1902* (Baltimore: The Johns Hopkins University Press, 1928); Wythe W. Holt, Jr., “The Virginia Constitutional Convention of 1901–1902,” *Virginia Magazine of History and Biography* 76 (1968): 67–102. Earlier revisions took place as a result of constitutional conventions in 1829–30, 1850–51, and 1867–68. For an account of the 1829–30 Convention, see A. E. Dick Howard, “‘For the Common Benefit’: Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker,” *Virginia Law Review* 54 (1968): 816–902.
5. Mills E. Godwin, Governor of Virginia, Address to the General Assembly, 10 January 1968, S. Doc. No. 1. 1968 Sess. For an evaluation of Governor Godwin's administration, see J. Harvie Wilkinson, “The Godwin Years,” *The Commonwealth* (November 1969): 36.
6. H. J. Res. No. 3, 1968 Virginia Acts of Assembly, 1568.
7. 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, 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.
8. For a more detailed discussion of the Commission's work and procedures, see Commission on Constitutional Revision, *The Constitution of Virginia: Report* (Richmond, 1969).
9. Editorial, *Washington Post*, 26 April 1969, sec. A, p. 10.
10. For a study of the Maryland experience, see John P. Wheeler, Jr., and Melissa Kinsey, *Magnificent Failure: The Maryland Constitutional Convention of 1967–1968* (New York: National Municipal League, 1970).
11. See notes 88–91 and accompanying text.
12. Editorial, *Farmville Herald*, 7 October 1970.
13. Editorial, *Richmond Times-Dispatch*, 28 October 1970, sec. A, p. 10.
14. Editorial, *Roanoke Times*, 18 October 1970, sec. A, p. 6.
15. Editorial, *Evening Star* (Washington), 27 October 1970, sec. A, p. 12.

16. Questions No. 3 and 4, the proposals dealing with general obligation bonds and revenue bonds respectively, were approved by 66 percent and 65 percent of the voters. Proposal No. 2, to delete the prohibition on lotteries, was affirmed by 63 percent of the voters.

17. For a superb example of a study from this era, see John P. Wheeler, Jr., and Melissa Kinsey of the rejection of a new Constitution for Maryland. J. Wheeler and 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 and 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 and 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 Law Review* 207 (1968) [hereinafter cited as McKay].

18. See Sturm, *Thirty Years*, 98.

19. *Ibid.* at 103. Discussions of the New York experience include McKay, “Constitutional Revision in New York State: Disaster in 1967,” 19 *Syracuse Law Review* 207 (1968); Fuld, *The Court of Appeals and the 1967 Constitutional Convention*, 38 *NYSBJ* 327 (1966); Kaden, *The People No! Some Observations on the 1967 New York Constitutional Convention*, 5 *Harvard Journal on Legislation*. 343 (1968); Nunez, *New York State Constitutional Reform—Past Political Battles in Constitutional Language*, 10 *William & Mary Law Review* 366 (1968); Sherry, *The New York Constitutional Convention: An Opportunity for Further Court Structural and Constitutional Reform*, 18 *Syracuse Law Review* 542 (1967); Vanden Heuvel, *Reflections on Con-Con*, 40 *NYSBJ* 261 (1968).

20. Sturm, *Thirty Years*, 103; Cornwell, 80; McKay, 215–16, 220–21.

21. See Robert B. Dishman, *State Constitutions: The Shape of the Document* (New York: National Municipal League, 1968), 47–49. 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.”

22. *Ibid.*, 49.

23. Wheeler, 202.

24. *Ibid.*, 5.

25. *Ibid.*, 202–03.

26. *Ibid.*

27. *Ibid.*, 231, 234.

28. *Ibid.*, 5. Sturm, *Thirty Years*, 115. The Maryland Convention has captured the imagination of many writers. In addition to Wheeler, see, for example, Robert J. Martineau, "Maryland's 1967-68 Constitutional Convention: Some Lessons for Reformers," *Iowa Law Review* 55 (1970): 1196-1232; Thomas G. Pullen, Jr., "Why the Proposed Maryland Constitution Was Not Approved," *William and Mary Law Review* 10 (1968): 378-92.

29. Wheeler, 231.

30. Editorial, *Washington Post*, 26 April 1969, sec. A, p. 10.

31. Meller, 142.

32. Sturm, *Thirty Years*, 92.

33. *Ibid.*, 92-93.

34. Connors, 88-89, 110-11.

35. Wheeler, 6, 51, 156-57. Wheeler cites the failure to compromise with political reality as a major reason for the defeat. *Ibid.*, 214-15.

36. See Charles Thone, "A Constitutional Convention: The Best Step for Nebraska," *Nebraska Law Review* 40 (1961): 596, 602.

37. Sturm, *Thirty Years*, 94.

38. Sturm, *Michigan*, 54.

39. *Ibid.*, 251. For discussions of the Michigan experience, see Melvin Nord, "The Michigan Constitution of 1963," *Wayne Law Review* 10 (1964): 309-67; "The Proposed Constitution: The Prose and Cons of It," *Michigan State Bar Journal* 42 (1963): 10-19.

40. Sturm, *Thirty Years*, 97-98.

41. Wolfe, 30, 56.

42. Connors, 193.

43. Meller, 79.

44. Wolfe, 30. For another discussion of the Pennsylvania Convention, see M. Nelson McGeary, "Pennsylvania's Constitutional Convention in Perspective," *Pennsylvania Bar Association Quarterly* 41 (1970): 175-88.

45. Connors, 200; Meller, 53-55; Wolfe, 38, 56.

46. McKay, 214.

47. Faust, 164-66.

48. Wolfe, 42, 55-56.

49. Meller, 143.

50. See text at notes 33-34, 38.

51. Compare Wheeler, 6-7.

52. Connors, 200.

53. Editorial, *Roanoke Times*, 1 November 1970, sec. A, p. 6.

54. Nunn, 118. Democrats, however, were not enthusiastic.
55. Wheeler, 3.
56. Sturm, *Michigan*, 251–52.
57. Meller, 129.
58. *Ibid.*, 114.
59. Cornwell, 79.
60. McKay, 216.
61. Connors, 89–91.
62. Sturm, *Thirty Years*, 115. The proposed New Mexico Constitution is discussed in “Student Symposium—The New Mexico Constitutional Convention 1969,” *Natural Resources Journal* 9 (1969): 422–29.
63. McKay, 221.
64. Cornwell, 80; Sturm, *Thirty Years*, 98.
65. In the one suburban area in Virginia whose local government was hostile, Chesterfield County, the referendum just barely passed.
66. Sturm, *Thirty Years*, 98 (Rhode Island), 115 (New Mexico); Robert W. Meriwether, “The Proposed Arkansas Constitution of 1970,” *Nebraska Law Review* 50 (1971): 600, 620.
67. Wheeler, 141, 194.
68. *Ibid.*, 214.
69. Meller, 128; Sturm, *Thirty Years*, 96–97.
70. Sturm, *Thirty Years*, 92; Thone, “A Constitutional Convention,” 596, 601–02
71. 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, 214. See Nunn, 116.
72. Nunn, 174. See also Meriwether, “The Proposed Arkansas Constitution,” 600, 621. Other accounts of Arkansas’ ill-fated constitutional revision include Walter H. Nunn, “The Commission Route to Constitutional Reform: The Arkansas Experience,” *Arkansas Law Review* 22 (1968): 317–39; Robert Al Leflar, “Constitutional Revision in Arkansas,” *Arkansas Law Review* 24 (1970): 155–61.
73. Nunn, 156–58. For example, one “objection” was that the new constitution did not specify the meeting place of the legislature. *Ibid.*, 157.
74. *Ibid.*, 159–60.
75. *Ibid.*, 158–59.
76. Wheeler, 202.
77. *Ibid.*, 198–200.
78. *Ibid.*, 201.

79. *Ibid.*, 207.

80. *Ibid.*, 192, 214.

81. Nunn, 145–47.

82. Meller, 131. At the 1969 special session of Virginia's General Assembly, a proposal to put the question of voting at age eighteen 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 nineteen to twenty.

83. Wheeler, 201.

84. *Ibid.*, 207–08.

85. Nunn, 140.

86. Wolfe, 54. See generally Sturm, *Thirty Years*, 103–04.

87. Wheeler, 193.

88. McKay, 221.

89. *Ibid.*, 213.

90. Editorial, *New York Times*, 27 September 1967, p. 42.

91. Sturm, *Thirty Years*, 103.

92. *Virginia Statistical Abstract* (Charlottesville, VA: University of Virginia Center for Public Service, 2000).

93. V. O. Key, *Southern Politics* (New York: Alfred A. Knopf, 1949), 19.

94. See Michael D. Shear, "Incumbents Face Foes Who Stress Core Republicanism," *Washington Post*, June 5, 2002.

95. Federalist No. 10.

96. John T. Whelan, "Virginia: A New Look for the 'Political Museum Piece,'" in Ronald J. Hrebennar and Clive S. Thomas, eds., *Interest Group Politics in Southern States* (Tuscaloosa: University of Alabama Press, 1992), 92.

97. For an interesting account of how an array of special interests undermined an attempt at constitutional revision, see Gerald Benjamin, "The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context," 65 *Albany Law Review* 1017 (2002): 1042.

98. Larry Sabato, *Virginia Votes, 1975–78* (Charlottesville, Va.: University of Virginia Institute of Government, 1979), 71.

99. Larry J. Sabato, *Virginia Votes: 2001 Gubernatorial Elections in Virginia: The Return of Two Party Competition* (Charlottesville, Va.: Center for Governmental Studies, 2001), table 26.

100. R. H. Melton, "Fundraiser by Warner Breaks Record," *Washington Post*, June 18, 2003.

101. Michelle Boorstein, "Race Points Up GOP Divisions," *Washington Post*, June 5, 2003.

102. Bob Gibson, "Bell Takes Lead in Fund Raising," *Daily Progress* (Charlottesville), June 5, 2003. The Virginia Public Access Project reported that a total of \$14,786,406 was spent by candidates in the general election for members of the House of Delegates in 2001. See VAPA's database at www.vapa.org.

103. R. H. Melton, "Campaign Costs Soar, Prompting Va. Power PACs," *Washington Post*, June 2, 2003.

104. *Ibid.*

105. *Ibid.*

106. Elizabeth Garrett and Elisabeth Gerber, "Money in the Initiative and Referendum Process: Evidence of Its Effects and Prospects for Reform," in M. Dane Waters, ed., *The Battle Over Citizen Lawmaking* (Durham, N.C.: Carolina Academic Press, 2000), 73.

107. *Ibid.*, 79.

108. A successful venture capital businessman, Mark Warner was elected as Governor of Virginia in 2001. A former Secretary of the Navy, John Warner was elected in 1996 to his fourth term in the U.S. Senate. In addition to leadership roles as a member of Congress, Tom Davis was elected in 1998 as chairman of the National Republican Congressional Committee.

109. Larry J. Sabato, "The 2002 Elections, Virginia: Eye of the Hurricane" (unpublished), 9.

110. *Ibid.*

111. R. H. Melton, "N. Va. Rejects Rise in Sales Tax," *Washington Post*, November 6, 2002. In Northern Virginia, the sales tax proposal was defeated by 55 percent to 45 percent. See Commonwealth of Virginia, "November 5th, 2002 General Election," sbe.vip-net.org/nov2002/c_13_UUU.htm. In Hampton Roads, the referendum was defeated by a nearly 2-to-1 margin. Louis Hansen, "Voters Turn Transit Plan into Road Kill," *Virginian-Pilot* (Norfolk), November 6, 2002.

112. Louis Hansen and Debbie Messina, "Referendum Defeated by 2-to-1 Margin," *Virginian-Pilot* (Norfolk), November 6, 2002.

113. R. H. Melton, "Voters' Real Message Was a Call for Smart Solutions," *Washington Post*, November 14, 2002.

114. Nearly 73 percent of those who voted favored the bond issue for higher education, and nearly 69 percent voted "yes" for bonds for state parks. See sbe.state.va.us/web_docs/election/results/2002/nov/. Proponents, calling themselves Foundation 2002, included the political elite of both parties, as well as business and education leaders. See Jeff E. Schapiro, "Bond-Issue Vote Critical to Colleges," *Richmond Times-Dispatch*, October 27, 2002.

115. The proposed amendment was approved by almost 73 percent of those voting. See website cited in note 114, *supra*.

116. Of 45 proposed constitutional amendments placed on the ballot since 1970, thirty-seven have been approved, and eight defeated. State Board of Elections, "Official Election Results: Proposed Amendments to the Constitution of Virginia" (revised June 17, 2003).

117. James L. Bugg, Jr., "Mills E. Godwin, Jr.," in Edward Younger, ed., *The Governors of Virginia: 1860–1978* (Charlottesville, VA: University of Virginia, 1982), 373.

118. *Ibid.* 377. On Godwin's career, see M. Carl Andrews, *No Higher Honor: The Story of Mills E. Godwin, Jr.* (Richmond, Va.: Dietz Press, 1970).

119. See J. Y. Smith, "Ex-Va. Governor, University Head Colgate W. Darden, Jr., 84, Dies," *Washington Post*, June 10, 1981.

120. In World War I, Darden volunteered for the French Ambulance Corps. and received the Croix de Guerre for valor. He later served as a U.S. Marine Corps pilot, nearly losing his life in a crash. See Stuart I. Rochester and Jonathan J. Wolfe, "Colgate W. Darden, Jr.," in Younger, *Governors of Virginia*, 291–93.

121. Sandra Day O'Connor, "A Tribute to Justice Lewis F. Powell, Jr.," 101 *Harvard Law Review* 395 (1987).

122. John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* (New York: Charles Scribner's Sons, 1994), xi.

123. Richard H. Fallon, Jr., "A Tribute to Justice Lewis F. Powell, Jr.," 101 *Harvard Law Review* 399, 401 (1987).

124. See A. E. Dick Howard, "Mr. Justice Powell and the Emerging Nixon Majority," 70 *Michigan Law Review* 445 (1972). For a superb account of the life and jurisprudence of Powell, see Jeffries, *Justice Lewis F. Powell, Jr.*

125. See A. E. Dick Howard, "Hardy Cross Dillard: Life Upon the Wicked Stage," 56 *Virginia Law Review* 10 (1970): 11.

126. George Clemon Freeman, Jr., "Hardy Cross Dillard, 1902–1982," 69 *Virginia Law Review* 809 (1983): 810.

127. Warren Fiske, "President Bestows Freedom Accolade on Civil Rights Lawyer Oliver W. Hill," *Virginian-Pilot* (Norfolk), August 12, 1999.

128. J. Harvie Wilkinson, III, "Linwood Holton," in Younger, *Governors of Virginia*, 407.

Part II

Putting Constitutional Reform
on the Agenda

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Constitutional Reform in Alabama

A Long Time in Coming

H. Bailey Thomson

On January 31, 2003, Alabama's new Republican governor, Bob Riley, convened a diverse group of citizens in Montgomery to begin deliberating changes he proposed for the state's 1901 Constitution. Thus he fulfilled his promise that constitutional reform would be the first item on his agenda to make Alabama more competitive for jobs and its government more efficient. In creating by executive order the Alabama Citizens' Constitution Commission, he gave the group ninety days to draft five changes he wanted to propose during the 2003 legislative session: providing "limited" home rule for counties on a local option basis, lessening reliance on designating revenues for particular purposes, strengthening the governor's veto power, recompiling the 1901 Constitution to remove amended language, and requiring a three-fifths majority of the legislature to impose new statewide taxes. Riley said he would ask the commission members to look at other areas of the 1901 Constitution as reform moved forward.

Riley argued, as have many other Alabamians, that the 1901 Constitution's restrictions and antiquated provisions hinder efforts to reform government and improve the economy. As a result, Alabama fares poorly in comparisons with neighboring states. In particular, Riley has pointed to North Carolina's economic success to show the connection between progressive government and concrete results. By contrast, one would be hard pressed to find a politician from another state who held up Alabama as an inspiration. The U.S. Census Bureau reported, for example, that Alabama lost 12,200 people in 2001–02. Yet the state is the geographical heart of a booming region. Why are people going elsewhere? Analysts and business leaders attributed the trend to declining prospects for good jobs.