Constitutional Revision–Virginia's Approach

A. E. Howard

University of Virginia School of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Constitutional Law Commons

Recommended Citation


This Symposium on Constitutional Revision is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
CONSTITUTIONAL REVISION—VIRGINIA’S APPROACH

A. E. Howard

Just as a preacher has his text, we at the University of Virginia often look to our founder, Mr. Jefferson, for a text. Whatever the subject, Jefferson usually had something relevant to say. He had a good deal to say about state constitutions, and it is somehow typical that what he said sums it up perhaps as well as anyone could. I quote from a letter that Jefferson wrote to a friend in 1816, at a time when Virginia was debating hotly the question whether the first Virginia constitution of 1776 ought to be revised. Jefferson wrote as follows:

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.¹

Jefferson went on to say that each generation had a right to choose for itself the form of government under which it wanted to live—the form of government most conducive to the welfare of that generation. Jefferson, therefore, submitted that the constitution ought to be revised at periodical intervals so that it might “be handed on, with periodical repairs, from generation to generation, to the end of time, if anything human can so long endure.”² Jefferson was striking a very pragmatic note in that letter. He was saying that there is no point in revising for the sake of revision, that you can put up with the things that are moderately bad, but that nevertheless each generation decides for itself what is bad enough to require change. It is the living generation that decides, and not the dead hand of the past. In that spirit, Virginia since 1776 has revised its constitution either by convention or by legislative revision on an

¹Professor and Associate Dean, University of Virginia School of Law; B.A., 1954, University of Richmond; L.L.B., 1961, University of Virginia; M.A., 1965, Oxford University.

²Id. WRITINGS OF THOMAS JEFFERSON 43 (Ford ed. 1892).
average, if you divide it mathematically, of about once every thirty years. If you take once every thirty years to be once a generation, we have been reasonably faithful to Mr. Jefferson's mandate.

Some of Virginia's conventions have been great highlights, not only in the political history of the Commonwealth, but also in the development of political thinking on the American continent. For example, the Virginia convention of 1829-30 included such people as Presidents James Madison and James Monroe, Chief Justice John Marshall, members of the United States Supreme Court, governors past, present, and future of Virginia, and John Randolph of Roanoke—that remarkable, brilliant, but perhaps somewhat demented, orator of his time. It was perhaps the most remarkable collection of talent that has ever been assembled in one debating chamber in this country, with the single exception of the Philadelphia Convention of 1787.3

The last time we revised a constitution by convention was in 1902, a convention called essentially to undo the effects of reconstruction. The then-existing constitution had been adopted by a convention made up mostly of newly freed slaves and people from northern states. The president of that reconstruction convention was, in fact, a judge named Underwood who was a federal district judge, not in Virginia, but in New York. Judge Underwood was at that time best known for having presided over the treason trial of Jefferson Davis, and you can imagine that did not exactly endear him to the hearts and minds of Virginians of that day and time. That constitution became known as the "Underwood Constitution," which, you may infer, was not a label of approbation. Hence, the 1902 Convention met to undo some of the work of the 1867 Convention, notably by instituting the poll tax, which was struck down by the Supreme Court only a few years ago.4

Since 1902, although the constitutional convention has been used for limited purposes, no convention has been called for a general revision of the constitution. Instead, another method has been


used. In 1928 it was decided not to call a convention but rather to have a commission—a study commission—of a kind which I think was then fairly rare but, as Professor Sturm has pointed out, has become fairly common in current usage. This study commission, headed by the Chief Justice of the Virginia Supreme Court of Appeals, forwarded a report to the Legislature, which in turn laid amendments before the people. That revision process of 1928 was a fairly quiet one. It was mostly housekeeping, i.e. taking out a lot of obsolete and unnecessary detail and generally cleaning up the document. But it did furnish something of a model for the revision process we are now undertaking in Virginia.

When the movement for a revision of the constitution began to develop in the last couple of years, there was never any really serious thought about calling a convention. I say no serious thought in the sense that the Democrats did not want a convention. There is a small Republican minority in the Virginia Legislature, and Republican leaders called for a convention—understandably, because Republican proposals for constitutional amendment would likely not get very far in a Legislature which is 90% Democratic. Aside from Republican efforts to have a convention called, the general assumption was that Virginia, as in 1928, would proceed by the constitutional revision route of a study commission, action by the Assembly and vote of the people.

Governor Godwin in 1968 called for the creation of a Commission on Constitutional Revision. Such a commission was authorized by the Assembly and then appointed by the Governor. The Commission came into being in March of last year, headed by a former Governor of Virginia, Albertis S. Harrison, Jr., now an associate justice of the State Supreme Court. The membership of the Commission included another former Governor, Colgate Darden, who perhaps is one of the towering figures of Virginia's recent political history, especially in the field of education, and also included other men of distinct standing in the public life of Virginia. There was—you might call this "token integration"—one Republican on the Commission, a onetime gubernatorial candidate. There was also one of the leading N.A.A.C.P. leaders in Virginia. There were not—and we have been hounded by this fact for some time now—any women on the Commission. Apparently, the political leaders of the state thought it more important to hear from the Republican and Negro minorities in the state than to placate that half of the popula-
tion which is female—not, I would have thought, a very politic move. The stature of the Commission was significant. It was in a very real sense a political commission. It was not a commission made up only of civic leaders who had not held public office. Although no current members of the Legislature sat on the Commission, probably half of the Commission had held fairly high public office, at least as members of the Legislature; as I pointed out, two had been governors, and the Republican had run for the governorship only six years ago. The calibre of the Commission was striking: a college president, a law school dean, two state judges, one federal judge and a past president of the American Bar Association were among the members. But it is important that this was a commission composed of men with not only intellectual stature, awareness, knowledge and capabilities, but a commission of men who had insights into the political process in Virginia. That this was so was a very wise move at the outset.

In setting about its work, the Commission hired an executive director. The Commission broke itself down into five committees to study major areas of the constitution. Each of those committees had legal counsel to assist in drafting and research. In addition, the Commission hired some twelve to fifteen students, mostly law students or recent law graduates, to work during the summer of 1968. This research team, mostly working at Charlottesville, turned out 140 memoranda, ranging from a few pages to 200 pages, on a range of subjects touching on the state constitution. We found, as is so often the case, there simply was no decent reliable material in existence bearing on many of our problems in Virginia; so we had to create our own.

We also had advice from a number of people of Virginia. We tried to collect views from experts around the State—lawyers, educators and other people who advised our subcommittees. Moreover, in the course of the summer, the Commission held a series of public hearings at various points throughout Virginia.

During the summer, the subcommittees did ground work and reported back to the full Commission. By midsummer, there was an outline of what a revised constitution might look like. By fall of 1968, there was actually a draft document. The Commission met

---

For a list of the Commission's research memoranda, see THE CONSTITUTION OF VIRGINIA: REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 527-32 (1969) [hereinafter REPORT].
successively at a number of meetings to debate the reports of its subcommittees, and by October had made most of the substantive decisions. At that point, the writing of commentary began. The Commission was persuaded that the substantive proposals would not mean much without persuasive commentary behind them. The Commission, therefore, produced a 542 page report in which each proposal is discussed with regard to the history of the relevant section in Virginia, to the practices of other states, to the thinking of experts including political scientists and lawyers, and, in general, to whatever arguments might be brought to bear on the problems at hand. The Commission met its deadline of January, 1969, although it had had only about ten months to do the whole job, and submitted its report to the Governor and the Assembly.

Concerning the appropriate approach to constitution-making, the Commission adhered, I think, in great measure to the kinds of drafting principles which Professor Sturm has ably described in his writings. It was clear to the Commission that as a starting point it should adopt the principle that a constitution does, in fact, embody fundamental law. It is not a book of statues; not a code of laws; not a repository for all the clutter of detail of the kind that you find in legislation. Therefore, the Commission, in revising the Virginia constitution, cut the document almost exactly in half—from about 35,000 words to about 18,000 words. Nothing of real substance was lost in the process. Cutting meant, for the most part, simply the deletion of things which ought to be in the Code of Virginia, rather than in the constitution. There was also an effort to use clear, simple, direct language. I think the revised constitution is one which a layman could pick up, read, and basically grasp without having to carry it to his attorney to interpret for him.

The Commission deleted obsolete passages; for example, the provisions dealing with dueling. I suppose we do run a risk in taking those sections out. There was a time at the University of Virginia, prior to the Civil War when a professor was shot dead by a student. The students do not pack side arms now, but with news from Cornell, they may once again. Possibly the Commission may have been precipitous taking that provision out. Still, whether you consider a little dueling a healthy thing or not, and whatever you

\[\text{Id.}\]
\[\text{See A. Sturm, Methods of State Constitutional Reform (1954); A. Sturm, The Need for Constitutional Revision in West Virginia (1950).}\]
may wish to do about dueling, one will look to legislation; the
constitution will not address itself to the problem.

Of course, there was the need to bring the constitution into line
with federal law. School segregation decisions, the poll tax decision,
reapportionment cases—all these had rendered obsolete a number
of sections of the Virginia constitution, and, as a result, the proposed
one is very much in line with relevant decisions of the Supreme
Court.

Finally, with respect to drafting, there was a general reorganiza-
tion of the document. For example, there is a section buried in the
legislative article of the Virginia constitution which is taken from
Thomas Jefferson's Bill for Establishing Religious Liberties—one
of the great declarations of religious freedom in American political
thought. But, because it is so well hidden, too few people know it
is there. The Commission proposed to take this section, intact, and
put it into the Bill of Rights, where it belongs, and where people
can find it. The section takes on new dignity by being placed next to
a section written by James Madison dealing also with religious lib-
erty. Thus are brought together the classic statements by Madison
and Jefferson of some of the fundamental tenets of religious liberty.
This is, in a sense, simply good drafting; but it also packs a punch,
I think, that the present document does not.8

The Commission, in its approach to constitution-writing, did
not confine its work to reorganization and good drafting. Its report
also is underpinned by a philosophy about the kind of government
which the commissioners thought Virginians would like to see cre-
ated in their state. Many of the proposals of the Commission are
characterized by a belief in viable and responsive government—a
belief that government ought to have the power to deal with the
kind of problems that we are beginning to see increasingly in the
second half of the twentieth century. This belief is reflected
in the Commission's proposals for, among other things, a healthy
executive, capacity to meet the state's capital needs through bonds,
strong local government, and a freer franchise.

Secondly, there was, by way of philosophy of the Commission,
a basic trust in the legislative and political process. This is a
corollary of a short constitution. The shorter you make the docu-
ment, the more detail you must take out, thus the more decisions

8See Report 100-01.
you leave to the Legislature. The Commission believed that once a constitution has addressed the fundamental problems, the rest ought to be left to the Legislature for decision.

A third principle which the Commission endorsed—yet one more corollary of short, fundamental constitution—is that the document ought not to be rigid or susceptible to early obsolescence. At the risk of provoking rebuttal from the member of the panel who will talk about the Maryland experience, I think the Virginia Commission avoided some of the mistakes made by the Maryland revisors; that is, the Virginia Commissioners did not attempt to write into the Constitution their own concepts of what is reform in constitutional law. This is a very difficult problem to deal with because there is a general assumption that in revising constitutions, you not only deal with the drafting problems, but also make certain substantive determinations.

Up to a point, you do indeed make such determinations—else why have a constitution?—but beyond that point, it may be argued that the more reforms you build into the document, the more points there are at which that document can become more quickly out of date. For example, the Virginia Commission decided to write a very simple judicial article. The only court named in the revised judicial article is the Supreme Court of Appeals of Virginia. No other court is required. The Legislature is given the power to create such other courts, inferior to the Supreme Court of Appeals, as it will. The assumption is that the Legislature will, by statute, create a judicial system similar to the one we now have; in fact, the one we have now remains intact unless changed by statute. But what courts, other than the Supreme Court, will exist is a matter for legislative determination.

There has been an argument in Virginia concerning whether we should have intermediate appellate courts between the trial courts and the Supreme Court of Appeals. Intermediate courts are something which the Commission could well have provided for in the constitution. To do so would have been very tempting. The Commission could readily have said, "Yes, this is what we need, and we are going to put it in." Instead, the Commission, wisely I think, said, we will leave that to legislation. If the Assembly decides it wants intermediate courts, it can create them. If the Assembly creates such courts and they do not work well, they can be abolished. If
they work well, they can be kept. In any event there will be no need to amend the constitution to restructure Virginia's judicial system to meet changing case loads and changing requirements. This, in my judgment, is the way to write a constitution. It is reform of a kind, yes, but a kind which leaves answers to many of the specific questions to the legislative process, to evolve with experience and added insight.

It might be added that this is a politically useful approach. When the revised constitution goes to the people next year, no one has to take issue with the question of intermediate courts. It can be said, "Whether Virginia will have intermediate Courts is not answered here; that is something the Legislature is going to deal with."

So the people who are against intermediate courts—and many lawyers are against them—will not have to vote against the proposed Constitution to vote against intermediate courts. So I suggest to you that you can avoid some unnecessary political repercussions by leaving at least some questions unanswered in the fundamental document.

Finally, and I think I have in effect suggested this assumption already, one of the Commission's philosophical assumptions was that it was not convened to propose an "ideal" document, that it was not met to write a "model" constitution for Virginia. What the Commission took as its charge was to revise the existing document in such a way that it would meet the state's needs and at the same time be politically saleable. In other words, the Commission had a sense of the politically possible. That sense, as will be suggested in a moment, was an assumption which served the Commission's report well when it came to be considered by the General Assembly.

I am going to skip over the specific substantive recommendations of the Commission. Let me turn instead to what happened in the Legislature, which is one of the more fascinating parts of the story. I went down to Richmond for the special session of the Legislature, carrying my report under my arm, expecting to come back with both myself and the report threadbare and in tatters. I was cynical enough to think that the legislators, representing special interests and being accustomed to looking out for the boys back home, would, likely as not, go to Richmond and cut our document to pieces. Yet, with the session behind us, I can report that the Assembly in fact not only did not weaken or water down the Com-
mission's proposals; on balance they improved them. About half-way through the session I did not expect to feel this way. I was running around, trying to keep up with legislative committees; I was watching floor amendments being drafted on the backs of envelopes; I was seeing the whole thing dissolve before my eyes, and I was feeling a little bit frantic. I tended to agree with the Republican member who went back to southwest Virginia and told his constituents what the Assembly was doing. He said, "You know, they're revising the state constitution; the trouble is, they have got the thing taken apart and they don't know how to put it back together again."

This story suggests the picture of an amateur trying to take a Swiss watch apart: he has all the pieces laid out, and they do not make the least bit of sense to him. Well, although I agreed with that Republican member at that point, somehow they got the pieces back together. I grant there were one or two pieces left over when they finished, but the watch runs all the same.

I think that there are some morals to be drawn from the fact that, between them, the Commission and the Legislature have done so well. In the first place, there was a thoroughly prepared ground laid for the Assembly's work. I cannot conceive in this day and age that either a convention or a legislature could attempt to revise a constitution without having before it a report by a study commission of the kind that we had in Virginia or of the kind that the Maryland Convention had in that state. Moreover, the Virginia report carried the stamp of approval of men of the stature of former Governors Colgate Darden and Albertis Harrison. This made it likely that the legislators would be responsive to the report, thinking it to have been well thought through and not apt to be markedly beyond what Virginia was prepared to accept. Moreover, there was the advantage that the press coverage had been not only marvelous in terms of scope and extent, but also very favorable in terms of editorial reaction. This further helped to prepare the groundwork for the Assembly.

That the Commission laid before the Assembly not only proposals, but also extensive commentary helped focus the Assembly's debates. During the session the Commission's report was often invoked on both sides of a debate. On major questions, at least, whichever way the Commission had gone, it had laid out the pros
and cons, had argued the question on both sides and then had come to a conclusion. I think this gave the Commission's report more stature in the Assembly's eyes.

The Commission's report was helpful to the Assembly also in that it had done the necessary housekeeping. The reorganization of the constitution, the deletion of obsolete sections, the clarification of language—all those things which are basically good drafting had been done. The Assembly was not obliged to do that work; instead, it could confine itself to debating the merits of serious questions; thus more of the Assembly's time was used for the most productive ends.

Central among the strengths of the revision process in Virginia was the fact that the Assemblymen are politicians, that they have to stand for office and be re-elected. Now, while purists might call this a drawback, it is really an advantage, because it means that the Assembly will not try to do too much. I think our Constitution will pass the popular referendum next year, and one of the reasons it will pass is that it has been run through a thoroughly political wringer in getting to the voters. I am persuaded that one of the great handicaps under which the defeated constitution in Maryland labored was the fact that a convention of remarkably able, well-educated, civic-minded people were for the most part not politicians, and, as a result, overshot the mark. They made proposals which they probably need not have made and which helped beat the constitution when the time came.

The proposed Virginia constitution is not without controversy. There are some changes which numbers of people do not like, but at least the changes are being made with full awareness of what the political implications are. This is an advantage.

This is not all that I have learned about the place of politics in constitution-making. Among the surprises of the special session in Virginia to this observer, who had never sat in or worked closely with the legislative body, was the fact that things which ought to have been handicaps were not. For example, I would have thought a bicameral body was the worst possible place to write a constitution. One imagines the two bodies, with their usual rivalries, being in conflict and pulling apart at the seams. In fact, in Virginia's constitutional session it did not work that way. The committees of the respective houses held joint hearings; they often met
jointly themselves to do their work; and they generally worked rather closely together in producing the revised constitution. Moreover, the fact of bicameralism gave the textbook opportunity to work out problems, such as bad drafting produced by haste. There was the opportunity to get at those problems, created in one house, before the same article was passed by the other house. There was also a committee of conference, which presented one more chance to work out bad drafting. As a result, the revised constitution is a far more intelligible and coherent document than one might have expected from the hands of a legislative body.

Among other expected disadvantages in the Assembly which did not materialize was a legislature’s tendency to legislate. Somehow the Commission’s premise that a constitution is not the place to promulgate statutory law got through to the members of the Assembly. Many times in the debates in the two houses, one heard members get up to object to other members’ proposals on the ground that they were essentially legislative in character and did not belong in the constitution. Granted, this was sometimes a convenient way of saying, “I do not like your proposal, period.” But the fact that the argument was made over and over again suggests that the members understood its merit. I am not saying that the revised constitution is entirely free of legislation, but it is, in the main, free of the kind of legislation I expected. There is also a great deal less special-interest pleading in the document than one might have expected—fewer cases than I anticipated in which a section was included strictly to take care of some particular economic or social interest.

There were some problems in revising the constitution in the legislative body. I have mentioned the fact that the drafting was often times rather hasty. The committee system was sometimes a bit chaotic, especially when various committees were meeting contemporaneously. One of my problems was to try to keep up with what each committee was doing. What one committee was doing with one article sometimes had collateral effects on what another committee was doing with yet another article, and there was the need to try to keep the changes more or less in tandem with each other. Still, as I have noted, what the Assembly did well outweighs, in my judgment, what it did poorly.

I am happy to report that the general thrust of the Commission’s report, i.e. its recommendations and proposals, was adopted
and endorsed by the Assembly. The document looks, in terms of organization and outline, almost exactly like what the Commission proposed. There are roughly seventeen thousand words that the Commission deleted, and I would say that only about a hundred of them were put back in by the Assembly. Of all the deleted sections, only two were reinserted by the Assembly. The great majority of the substantive proposals of the Commission were adopted by the Legislature; they touch every part of the Constitution, including the Bill of Rights, which some Virginians think is rather like the Mosaic Tablets and therefore beyond being touched by any living man.

The Assembly did make a number of substantive changes, the most significant one probably being the adoption of annual sessions. I made my own box score of the changes. Leaving aside the Commission’s proposals which were left unchanged by the Assembly, I just looked at the ones which the Assembly had changed in significant degree and tried to decide for myself whether I thought the changes were improvements or were for the worse. My conclusion was that there were about twelve or thirteen changes of substance which I thought were for the better, and only three or four that I thought were for the worse. That is a box score of three to one in the Assembly’s favor—one of the most remarkable footnotes to be drawn from the recent special session. In short, we came up smelling like roses in Virginia as a result of this special session. How much was just plain luck, I am still not sure, but I have suggested what I think are some of the reasons.

Beyond the behavior of the Assembly one should observe another of the positive factors in Virginia’s picture, the fact that the state is genuinely ready for constitutional revision. This is a factor which may or may not be present in another state, such as West Virginia. I think had we in Virginia tried to revise the constitution as recently as five years ago, it might, in the first place, not have gotten off the ground at all; and, in the second place, if it had gotten off the ground it probably would have been badly done and even have been retrogressive.

Virginia is only ten years from the days of massive resistance, and only five years from the initial impact of the reapportionment decisions. During that period of the late fifties and the early sixties, I think that the Virginian state of mind might not have been recep-
tive to the writing of a good constitution. Something has happened in the last several years in Virginia, in its politics, in its education, and in its civic spirit that augurs very well, I think, for constitutional reform.

Two things in particular are worthy of mention. The first is that Virginia is getting into education in a really big way; we are putting a lot of money into it. This has not always been true in Virginia. The second is that there is a changing attitude toward state finance. In November, we passed the first general obligation bonds issued by the state under the present constitution. We had bonds in the nineteenth century such as those we invited you in West Virginia to take with you when you left us. But Virginia had a history of bad experiences in underwriting railroads and canal companies, many of which went down the drain such as the James River and Kanawha Canal, which never got to the Kanawha, though it did get up the James River a little way. Virginia went through decades of being against bonds, and many Virginians are still against bonds. Nevertheless, in November, the people of Virginia, by a rather overwhelming vote, authorized the issuance of eighty-one million dollars worth of bonds. That vote exhausted the capacity for issuing bonds under the present Virginia constitution, but it does mean that, given the right kind of selling campaign and the right kind of will, you can get state-wide bond issues approved in Virginia.

New thinking on education and finance is one of the political factors that I think has influenced the present revision process and gotten it this far.

Now, where do we stand at the moment? We have gone through two very significant steps in Virginia, and we are roughly halfway through the process. The Commission has improved the present constitution and the Assembly on balance has improved even the Commission's version. We have two more steps. The General Assembly at its regular session in 1970 is to approve or disapprove for the second time what was adopted at the special session. The choices available to the 1970 session are limited: they either accept what the 1969 session did or dismiss it altogether. They cannot amend it, which is good. Basically, the battles have now been fought. Assuming the Assembly again approves the documents, there will be a referendum in 1970.
Two comments are in order on the referendum. In the first place, I do not see any substantial organized hostility which is likely to be formed against the proposed constitution. Nevertheless, the lessons of other states, notably New York, Maryland, Rhode Island and Kentucky, suggest that one cannot take chances. One cannot sit back and hope for the best. I think what we will require in Virginia is a well-financed, well-organized campaign by a blue ribbon citizens committee, hopefully headed up by people of the same stature as the people who composed the Commission. I think these people ought to engage in a wide-spread educational campaign, one which I hope would not be too cerebral. I think one can make the mistake of aiming all the literature and propaganda at that two percent of the people who are looked upon as the intellectual leadership of the state. Even if those two percent are for the constitution, it is the others who can make or break it. To reach the mass of voters in Virginia, I am unorthodox enough to be prepared to do almost anything—use television, radio, put it in the form of classics comics if you must—anything that will get across the point that you, the voter, are going to be asked to vote on the revised constitution, that we think it is a good revision, and you should go out and vote for it. Basically that is the message which needs to be put across with as much explanation as is needed.

Also important is how the revisions appear on the ballot. Here Virginia has drawn on the experience of other states. Recent experience suggests that one of the most dangerous things you can do, in revising an entire constitution, is to put the document on the ballot as a single question. This happened in Maryland and New York. The constitution was put on the ballot, and the voter was told, here it is, one question, yes or no, take it or leave it. *The New York Times*, being faced with that choice, headlined its editorial "Take it or Leave it—We Leave it." And that is exactly what the voters in New York did. Specifically, it can be argued that one question, that of church and state—the proposed repeal of the Blaine amendment—was as responsible as any other single question for the defeat of the New York constitution.

We in Virginia are very much aware of the problems of a take-it-or-leave-it vote. Therefore, what was proposed in Virginia, and

---

*On the judicial article, see Report 181 passim.  
what the legislature has agreed to do, is put the body of the constitution on the ballot as one question, but split off from it as separate questions five issues, which are sensitive ones in Virginia. They include issues which, if included in the body of the Constitution on the ballot, could jeopardize its chances.

One such issue is what some see as the abandonment of “pay-as-you-go” finance. We have not really been paying as we have gone in Virginia. We have nearly two billion dollars worth of local, authority, special district and other kinds of debts, but they are, at least in theory, not state debts. We are proposing to make the fact known that we are very much in the business of issuing bonds, and go ahead and let the state do it. This is a wrench to the political nerves of a lot of people in Virginia who like the idea of the pay-as-you-go philosophy, so this proposal to allow the state to start issuing general obligation bonds on a larger scale than has been possible heretofore will be a separate question on the ballot. We also have a tuition grant question with overtones of church and state, and while it ought not to be that controversial, my guess is that it may be. Therefore, this is a separate question. There is a proposal to delete the constitutional prohibition on lotteries. You have one like it in the West Virginia constitution. This will bring people out of the woodwork faster than anything else I know except liquor by the drink. We have liquor by the drink in Virginia now, thus leaving only one last great 19th century moral bout, i.e. the fight over lotteries. Accordingly, that too is a separate question.

The point of all this is to let people fuss and feud over these separate questions and vote them up or down as they will, but at the same time allow them to vote for the body of the revised constitution. It is true that the body of that document does include significant substantive changes, for example, going to annual sessions, providing a method for the removal of disabled judges and providing for dealing with a disabled governor. Across the board there are dozens of major changes, but none of them, at least in the Legislature’s judgment, rise to the level of dividing the people of Virginia down the middle as church and state may do, as lotteries may do and as bonded-indebteness may do. The point I am trying to get across is that it seems to me that one need not run the risk of lumping everything into the package when it is possible to split off these sensitive questions as we have done.
Let me wrap this up by summing up some of the assumptions that we have made in the process of revising the Virginia constitution. I am not dogmatic enough to think that these assumptions necessarily apply in West Virginia or elsewhere, but they do characterize the Virginia approach to the making of a constitution. They are, if you like, a middle course. It falls somewhere between simply tinkering with a document on the one hand, brushing it up and cleaning it up; and, on the other hand, throwing out the existing constitution and revolutionizing the whole document.

The first assumption, from the day that the Commission started its work to the present moment, has been that the revision is just that: a revision. The people must understand that we are taking the present document, keeping as much of it as we think we can and revising what we must. We are not writing a brand new constitution. To this extent, the document is left less than perfect; it is not as pretty a thing as it might be if we had just started from scratch and written it in a beautifully symmetrical fashion. But this is, I think, a small compromise with literary perfection that ought to go a long way in helping to sell the constitution at the polls.

Secondly, the revision process has emphasized evolution. People in Virginia are not a very revolutionary breed of people. They do not like changes which are too fast and too many. I think we can in intellectual honesty say that the revised constitution draws upon Virginia's ancient constitutional heritage. This is true even of some of the language we used. For example, when we put education in the Bill of Rights, we took language adapted from Thomas Jefferson's "Bill for the More General Diffusion of Knowledge." We can point back to the writings of that Founding Father and say that this is the source of the idea, and we are drawing from this ancient tradition. Contrary to those who might think this to be window dressing, I think actually it has a philosophical appeal which serves the twin purposes of giving life to the constitution and also helping us sell the document.

Thirdly, the whole revision process in Virginia has been infused with a sense of politics, politics in its best sense, namely to know what is possible and what you can do and what you cannot do. An intrinsic part of this sense of the possible is to use not a constitutional convention, which may go off on its own head, but to use the most political body you have, namely the legislature. If the legisla-
ture will approve it, the chances of the people approving it are, in my judgment, far better. This can be carried too far, of course. Politics can become utter partisanship. If you get to that point, which can happen in legislatures or in conventions, you can blow the whole thing apart just as readily as if you were non-political. There is a middle station.

Fourthly, I would submit, and we tried to follow this in Virginia, that, in revising a constitution, one should not make changes which are simply of theoretical advantage—unnecessary theoretical changes. For example, it is often argued by political scientists that you should take out of a bill of rights all the hortatory language—the declarations about the rights of man, and the fountainhead of liberty, and all the rest. As a lawyer, I know perfectly well that such phrases are not operative language; you cannot go into a court of law and get a judgment based on them. Therefore, the argument is made that they should be removed, that you should keep only those sections which actually do something. Well, I understand this theoretical argument, but I think it runs an unnecessary apolitical risk. Again to revert to the Maryland experience, the Maryland revisors took out the hortatory language, and the argument was very effectively made by the opponents of the revised constitution, “Look, they are taking some of the people’s rights; look at the rights they have eliminated.” That is a very tough argument to refute in the thick of a political campaign, and I do not see why one has to run that risk. We left every one of those hortatory words in the Bill of Rights of the Virginia Constitution. In fact, I, for one, believe they belong there on principle. A bill of rights is not simply a legal document, it is also a document of aspiration. You can put in hortatory language goals to which the people and their government aspire. To the extent that the voters feel this way—and in Maryland they seemed to—it is also good politics.27

Fifthly, it seems to me as to the merits of questions, one should in each instance weigh heavily the substantive improvement of a change as against the political handicap. For example, in Maryland, the revisors abolished the constitutional status of various locally elected officials, such as registers of wills. We have local officers of

28Compare Report 88 with the approach of National Municipal League, Model State Constitution 27 (6th ed. 1963), and Report of the Maryland Constitutional Convention Commission 98 (1967), both of which would strip a state constitution of all language which is not judicially enforceable.
constitutional status provided for in Virginia's constitution; you have them in the West Virginia constitution; most state constitutions have them. Academically, I would think they do not belong in a constitution; such offices ought to be provided for by statute. Moreover, in many cases, they ought not to be elected; they ought to be appointed. The Maryland people recognized this and therefore made their proposal. By making that proposal they automatically created a center of opposition to the revised constitution in every county in Maryland. Local officials got out and fought against the new constitution very effectively. They did not always argue about their own status, but they found other things to argue about, such as the purported cost of the new constitution.

In the Virginia revision, the Commission talked briefly about this point, recognizing that perhaps these constitutional officers were unnecessary in the constitution. Still the Commission concluded, I think wisely, not to touch their status at all. This probably entails some loss of efficiency. At the same time—take, for example, the register of wills in Maryland—who really cares, except the register of wills, whether he is elected or appointed? But he cares! You take his job out of the constitution and he is unhappy. He has friends, relatives and the general public that he can make unhappy. Leave him in and he is happy, and you have not really lost very much. So, I think this was a case in which we in Virginia thought it likely that the slight loss of leaving these officers in was far outweighed by the very political reality of not disturbing the status quo. If it was a compromise, however, it was a very useful one.

The sixth assumption we have made, and to which I have previously alluded, is not to give the new constitution to the people on a take-it-or-leave it basis, i.e. not to use the single package, but instead to split off the separate questions which are most sensitive.

The seventh assumption has been the recognition of the need at every stage in the revision process to draw on the stature of accepted state leadership. I admit that in Virginia there is more of a tradition of looking to such leadership than there may be in some other states, but I think that to the extent one can draw on the prestige of people of state-wide stature this can be helpful. The Virginia Commission itself worked with that advantage. The prestige of the incumbent Governor has helped, and I hope that the refer-
endum campaign, when it gets underway, will again draw on this kind of leadership.

What I have just described to you is a process which, I like to think, is a halfway station between how you would revise a constitution in a classroom and how you would revise a constitution in gutter politics. This is a middle way. Too much theory or too much political reality is harmful to the health of constitution. Virginia has tried to produce, and I think it is succeeding so far in producing, a revised constitution which embraces important substantive reforms in a variety of areas. Yet while the revised constitution represents a tremendous advance over the present document, it is, at the same time, a revision which is within the realm of what can be accepted in Virginia politics and by the people of the Commonwealth.