

Constitutional Corner – A Brief History of Virginia’s State Constitution

If you want an introduction to the philosophy of government as understood by America’s Founders, don’t read the U.S. Constitution, instead read a Declaration of Rights from one of the original thirteen states, especially those of Virginia, Pennsylvania or Maryland. Instead of first laying out a plan of government, as the U.S. Constitution does and as the state constitutions eventually do, these state Declarations of Rights explain “why” we have government and what its true goals should be. Reading these will be time well spent.

As dismal is the typical American’s knowledge of the U.S. Constitution, greater still is their ignorance of their state’s constitution. Yet, at one point in our country’s history the state constitutions were all that governed Americans. For five years, from 1776 to 1781, the Articles of Confederation remained unratified; Maryland refused to complete the unanimous consent required to put them into effect. Finally, France threatened to pull out of a treaty and Maryland finally relented. Even in 1781, however, the thought of a truly national constitution was still a misty dream in the minds of a select few men.

From its founding in 1607 up to 1776, Virginia was governed by a series of proprietary and then royal charters. In 1619, Virginia’s House of Burgesses was established, creating the first representative government in the colonies and "the oldest continuous law-making body in the New World."¹ The House of Burgesses would operate over the next 157 years, governing the people of Virginia until the call for independence went out.

Virginia’s Declaration of Rights was also the first in our nation’s history. Both New Hampshire and South Carolina adopted Constitutions before Virginia, in early 1776, but those documents were published, at least initially, without Declarations of Rights. The Virginia Declaration of Rights was adopted June 12, 1776, and the new Constitution followed on June 29. This original declaration of rights, with a few additions, still forms Article 1 of Virginia’s Constitution today.

It begins with these words:

“That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”

Isn’t that a beautiful paragraph? Don’t you wish the U.S. Constitution began with something similar? So did James Madison.

Madison tried unsuccessfully to add something similar to this wonderful proclamation to the preamble of the U.S. Constitution as he drafted what would become the new Bill of Rights. Unfortunately, this introduction was left on the cutting room floor. Madison knew the paragraph well; he had been

¹ https://en.wikipedia.org/wiki/Virginia_General_Assembly#History

appointed to represent Orange County at the convention in Williamsburg and had worked on George Mason's drafting committee, where he made a major contribution to religious liberty by insisting on a change to one of the later articles (that we'll discuss in a moment). The only quibble I have with this paragraph is Mason's choice of the word "inherent." "Inherent" can be construed to mean "part of the human condition," and this meaning avoids assigning these rights to a transcendent source, i.e. God. In the Declaration of Independence, Thomas Jefferson framed these "inherent" rights much better, as an inalienable endowment of our "Creator." Jefferson's construction comports better with the thoughts of Locke, Blackstone and others.

Speaking of Jefferson, had he been given the choice, he would have opted to remain in Williamsburg writing Virginia's Constitution rather than represent his state at the Continental Congress in Philadelphia. But I believe history confirms that the Virginia Assembly made the right choice in sending him northward. As proof that his heart was still in Williamsburg, after arriving in Philadelphia, Jefferson sent his ideas for the new state constitution down to Williamsburg. Unfortunately, they arrived too late to be incorporated. But part of what he sent was used; if you read Virginia's original preamble to their Declaration of Rights it is clear that what Jefferson sent them included a copy of at least the "complaints" section of his draft Declaration of Independence. Virginia's version closely follows Jefferson's draft. At that time in our history, plagiarism was considered a sincere form of flattery.

Another of my favorite passages in Virginia's Declaration, one I've written about on numerous occasions, is Section 15:

"That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles."

America is a nation with amnesia. We have forgotten our rich history of self-government and individual freedom. We are being pushed and prodded instead towards collectivism and socialism. Do you want America to survive as a free republic? easy; have everyone frequently review our nation's "fundamental principles." I've written about these principles in numerous essays; they can be found in the Declaration of Independence, the Constitution, even in the Articles of Confederation and the Northwest Ordinance of 1787. By an act of Congress, these four documents form our country's "Organic Law," so it behooves us to know what they say, what principles they contain, and how these principles should inform our actions as a self-governing people.

A final passage from the Declaration of Rights that I should discuss is Article 16:

"That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity toward each other."

This passage interests me for several reasons. First, my favorite Founder, James Madison played an important role in “tweaking” the wording of this section to provide for greater religious freedom in the state. Mason’s original draft called for “toleration” of religious views; Madison argued that did not go far enough and his wording was adopted instead. Second, as you see, according to our Constitution, Virginians of all faiths have a “mutual duty” to practice Christian forbearance, love and charity towards each other. Kind of neat, huh?

When they ratified the U.S. Constitution in June of 1788, Virginia sent Congress a copy of their Declaration of Rights and suggested it help form a new Bill of Rights for the Constitution. In March of 1789, newly elected James Madison, representing Virginia’s Fifth Congressional District, took his seat in the Congress. He found Virginia’s suggestions for a Bill of Rights waiting his arrival, along with those of several other states.

Of the approximately twenty-six separate rights secured in the ten Amendments that eventually made up the U.S. Bill of Rights, Virginia’s 1776 declaration covered seventeen of them. Notably absent from Virginia’s declaration were:

- Any prohibition of an established state religion. What became the First Amendment only prevented Congress from declaring a national religion, state religions were OK and most states had one. The Church of England was the established church in Virginia. It would eventually be disestablished and the prohibition against an established state church would be added to the Virginia’s Declaration of Rights in 1830 and expanded in 1971.
- Any protection of free speech. This would not be added to the Virginia’s Constitution until 1971, as would freedom of assembly, and the right to keep and bear arms.
- Virginians from 1776-1791 (when the Bill of Rights went into effect) had no right of due process and no right of the assistance of counsel. These would also be added later.
- The only glaring deficiency of the present Virginia Constitution when compared with the U.S. Bill of Rights is that there is, to this day, no assurance of a grand jury indictment when charged with a capital crime. Virginians are of course assured of such an indictment today by virtue of the U.S. Bill of Rights and the Constitution’s Supremacy Clause.

Standing opposite these omissions, Virginia’s Declaration of Rights includes several statements which indicate Mason’s drafters were a cautious lot who understood the danger of a too-powerful government; they added statements nowhere to be found in the U.S. Constitution or its Bill of Rights. They include:

- That all power is vested in, and consequently derived from, the people (it’s nice to be reminded of this).
- That magistrates should at all times be amenable to the people (i.e., willing to accept suggestions).

- That government is instituted for the common benefit, protection, and security of the people, nation or community (how easily this is forgotten today).
- That a majority of the community has a right to reform, alter or abolish their government (and they have from time to time).
- That no individual or group is entitled to exclusive or separate benefits or privileges from the community (a later amendment was added to Virginia's Declaration which would seem to do precisely that. See the 2010 amendment discussed below).
- That citizens should evidence a permanent common interest in, and attachment to, their community before being allowed to vote (although no legislation was ever passed to put this into action).
- That citizens are not bound by any law to which they have not assented through their representatives or which is not for the public good.
- That citizens have duties as well as rights.
- That there should be an effective system of public education (I wonder if today's system qualifies as "effective?")
- That no government separate from, or independent of, the government of Virginia, ought to be erected within the state. (Review the creation of West Virginia)
- That the state has no power to suspend the execution of laws without the people's consent.

As you can see, there many protections found in Virginia's Constitution that are missing from the U.S. Bill of Rights.

In 1783, Jefferson sent his friend "Jemmy" a draft of a new state constitution in which he proposed "fixes" for the weaknesses he saw in the 1776 version. One of those weaknesses lay in limiting the right to vote to property owners, which essentially meant only men of wealth could vote.

This limitation proved a perpetual irritant, as did discordant representation of the western counties, whose thinner populations left them under-represented and thus dominated by the Tidewater region. A [constitutional convention was finally called in 1829–1830](https://en.wikipedia.org/wiki/Virginia_Constitutional_Convention_of_1829%E2%80%931830)² to fix these two problems. Seventy-eight year old James Madison was invited to attend, as were "giants of the revolution" James Monroe and John Marshall. Madison urged wider suffrage, but his voice was so weak he could hardly be heard. The new constitution expanded suffrage somewhat but retained the property requirement; it left the representation problem unresolved. Note: The 1829 Constitution was the first to be ratified by a popular vote; 1776's had been adopted without putting it to a vote of the citizens.

² https://en.wikipedia.org/wiki/Virginia_Constitutional_Convention_of_1829%E2%80%931830

Another new [Constitution in 1851](#)³ finally eliminated the property requirement for voting, resulting in extending the vote to all white males of a certain age. The 1851 Constitution also established popular election for the Governor, the newly created office of Lieutenant Governor, and all Virginia judges.

After seceding from the union in [April 1861](#)⁴ and ratifying the Constitution of the Confederate States of America in June, Virginia's Confederate government proposed changes to the state constitution, such as changing "United States" to "Confederate States." The citizens rejected them.

During the war, citizens upset at Virginia's secession from the Union formed the "[Restored Government of Virginia](#),"⁵ situated in Fredericksburg, and in 1864 they drafted and "passed" a new state Constitution. Due to doubts over its legality, it is not considered valid and is not listed in Virginia's constitutional history.

After the war, while under military rule, another new constitution was drafted in 1867/68. Opponents called the result the "Underwood Constitution" or the "Negro Constitution", since it gave freed slaves the vote (the Fifteenth Amendment would not be ratified until 1870). The new constitution expanded suffrage to all male citizens over the age of 21, it established a state public school system, and provided for judges to be elected by the General Assembly rather than by popular vote. The Governor was granted full veto power and a constitutional amendment and revision procedure was established.

By the turn of the 20th century, despite the Fourteenth and Fifteenth Amendments to the U.S. Constitution, many Southern states had essentially eliminated their black vote through use of poll tests. Pressure mounted among whites in Virginia to do the same. The [1901 constitutional convention](#)⁶ met in this climate. Delegates focused on how to restrict black voting rights without violating the Fifteenth Amendment or disfranchising poor whites in the process. The convention created the requirement for poll taxes and a literacy test -- an exemption was granted for military veterans (of either Union or Confederate Armies) and their sons.

The prospective voter, before he or she could even register, had to prove "able to read any section of this Constitution submitted to him by the officers of registration and to give a reasonable explanation of the same..." I wonder how many of Virginia voters could do this today? (Note: any persons who had fought a duel or accepted the challenge of a duel were prohibited from voting.) This change effectively disfranchised many black voters, though many illiterate whites were similarly affected. In the years which followed, Virginia's electorate was reduced by half.

Other significant provisions of the 1901 Constitution were the creation of racial segregation in public schools and abolishment of the county court system. Due to concern over African-American opposition, the proposed constitution was not put to a popular vote and the Virginia Supreme Court upheld this action in 1903.

³ <http://vagovernmentmatters.org/primary-sources/519>

⁴ <http://www.janus.umd.edu/Feb2002/Cote/01.html>

⁵ https://en.wikipedia.org/wiki/Restored_Government_of_Virginia

⁶ https://www.encyclopediavirginia.org/Constitutional_Convention_Virginia_1901-1902

In 1926, a commission was appointed to recommend further changes to Virginia's Constitution and the proposed changes were submitted to a vote of the people in 1928. New limits in how the legislature could incur debt for capital improvements and a prohibition on taxing real estate or tangible personal property were approved. The State Treasurer, the Superintendent of Public Instruction and the Commissioner of Agriculture were now to be appointed by the Governor.

A limited Convention was held in 1945 for the sole purpose of ensuring that members of the armed services would not be prevented, by registration and poll-tax requirements, from voting in state elections in 1945.

In response to the Supreme Court's 1954 Brown vs Board of Education decision (which ruled segregated schools unconstitutional), another limited convention was held in 1956 to amend Section 141 and allow for the expenditure of public funds for the education of students at private, non-sectarian schools (i.e. all-white schools). This was part of a [massive resistance](#)⁷ Virginia put up to the Brown decision.

In 1968, the Virginia General Assembly established a commission to revise the constitution once again. The Commission on Constitutional Revision presented its recommendations to the Governor and the General Assembly the following year. The proposed Constitution was overwhelmingly approved by the voters and took effect on July 1, 1971. [This remains Virginia's Constitution today](#).⁸ As I've noted, several changes were made to the Declaration of Rights. Since then, the constitution has been amended at least twelve times.

- An amendment in 1972 reduced the voting age to eighteen (the 26th Amendment, lowering the voting age to eighteen in national elections, had been ratified the previous year).
- In 1976, an amendment modified the state's residency requirements. 1980 and 1994 amendments set procedures for reconvening the General Assembly.
- A 1994 amendment brought the constitution in compliance with the new national Motor Voter Act.
- A 1996 amendment established rights for victims of crime.
- A 2000 amendment established that all the state's residents had a right to hunt, fish and harvest game.
- In 2002, amendments were approved which concerned claims of actual innocence presented by convicted felons and allowed local governing bodies to grant tax exemptions for property used for charitable and certain other purposes.

7

http://www2.vcdh.virginia.edu/xslt/servlet/XSLTServlet?xml=/xml_docs/solguide/Essays/essay13a.xml&xsl=/xml_docs/solguide/sol_new.xsl§ion=essay

⁸ <http://hodcap.state.va.us/publications/Constitution-01-13.pdf>

- A 2004 amendment established decennial redistricting and added a list of persons who may serve as Acting Governor.
- In 2006, an amendment was approved by 60% of the voters prohibiting same-sex marriage (ostensibly nullified by Obergefell v Hodges).
- A 2010 amendment provided property tax relief for certain persons with income and/or financial worth limitations and certain veterans. This almost certainly violated the earlier constitutional provision that “That no individual or group is entitled to exclusive or separate benefits or privileges from the community.” Another amendment set a maximum amount for the Revenue Stabilization Fund.
- Reacting to the Supreme Court’s Kelo v City of New London decision, a 2012 amendment prohibited the taking or damaging of private property for public purposes.
- In 2014, the people approved an amendment to exempt surviving spouses of soldiers killed in action from paying property tax.
- Finally, in 2016, a similar property tax exemption for spouses of certain emergency services providers was approved.

We can see from Virginia’s constitutional history that a constitution can at times be used as a weapon. Democrats controlled the Virginia legislature from at least the mid-1800s until 2000,⁹ an amazing 150-year stretch (except for a short period of military rule during re-construction). During the Jim Crow era, they used the state constitution to, first, suppress the black vote, and then to extend de-facto segregation by facilitating segregated schools.

In their 1981 book “The Constitutional Convention as an Amending Device,” editors Kermit Hall, Harold Hyman and Leon Sigal identify a great disparity in American constitutionalism, namely, Americans show great interest in “tweaking” their state constitutions, sometimes by amendment, sometimes by complete replacement. Conversely, they seem to reluctant to replace or even amend the U.S. Constitution. “Between 1776 and 1976 some 226 state constitutional conventions were convened, 136 constitutions ratified, and more than 5,000 amendments adopted.”¹⁰ Virginia itself has had five Constitutions since 1776. Yet the U.S. Constitution, never replaced, has been amended only 27 times since its ratification in 1788 (18 times if you count the first ten amendments as a block) and the last amendment was 25 years ago. Why the disparity?

Perhaps we revere our national constitution too much (or our state constitutions too little). Given that the U.S. Constitution is today a shell of its former self in terms of limiting the national government, creating a government that today “can do most anything in this country,” perhaps it is time we reassess our reluctance to consider long overdue amendments that will help put the national government “back

⁹ https://en.wikipedia.org/wiki/Virginia_House_of_Delegates

¹⁰ The Constitutional Convention as an Amending Device, Kermit Hall, Harold Hyman & Leon Sigal, ed., American Historical Association, 1981, p.69.

in its box.” Perhaps we should take a lesson from our state experiences and once again make the U.S. Constitution serve the people who provide its political power. Just saying.

“Constitutional Corner” is a project of the Constitution Leadership Initiative, Inc. To unsubscribe from future mailings by Constitution Leadership Initiative, [click here](#)