

only was such a massive educational campaign probably without precedent in Virginia, a special effort was made throughout the campaign to translate the rather dry abstractions of constitutional revision into issues that touched the lives of individual citizens—education, environmental quality, consumer protection, and taxes. And there is reason to think that the central theme that evolved in the campaign—“Bring government closer to the people”—struck a responsive chord in citizens. In contrast, the Arkansas proponents never successfully translated the dry abstractions dealing with the structure of state and local government into terms the voters could understand. They never made the voters see that the new Constitution would mean something to them personally. Observers have assigned this as a major reason for the defeat in that state.<sup>72</sup>

Not only did the proponents in Virginia mount an effective campaign, but also the opponents of the revision never developed much popular support. In conservative Arkansas, the opposition was successful in confusing the voters with technical and insubstantial criticisms<sup>73</sup> and in convincing them that the increased flexibility of government would lead to increases in taxes.<sup>74</sup> Proponents committed the fatal error of responding defensively to the charges rather than explaining the benefits to be derived from the new document.<sup>75</sup>

Opponents in Virginia tried similar tactics, but they did not succeed. One reason is that the proponents were prepared to meet and rebut opposition attacks. Exposing half-truths requires, of course, an effective way to get the message to the people. In Maryland, the opponents could charge that rights had been eliminated when they had merely been rearranged,<sup>76</sup> or that the new Constitution would cost a lot of money<sup>77</sup> when realistic estimates showed it would cost just a fraction of what they claimed,<sup>78</sup> or that the new Constitution would enfranchise D.C. residents to vote in Maryland elections when an examination of the document would reveal the contrary.<sup>79</sup> They made effective use of such charges because of the inability of the proponents rapidly to respond.<sup>80</sup> In Virginia, by contrast, the proponents met opposition charges with fact sheets and other materials promptly put in the hands of local campaign committees, speakers, editors, and others, to rebut the attacks.

The Maryland opponents were also able to wrap themselves in a cloak of conservatism without fear of contradiction by conservative state leaders, since few Maryland leaders had unquestioned conservative credentials. In Arkansas, the conservative American Independent Party opposed the new document. This not only drained off support from the far right

but also led many moderately conservative Democrats to tone down their support in order to avoid losing votes to ALP candidates.<sup>81</sup> In Virginia, on the other hand, “conservative” opponents of the “socialistic” Constitution were confronted by men like Mills Godwin and James J. Kilpatrick, men with whom conservative voters could readily identify.

Timing has been cited as an important factor in the success or failure of a number of recent revisions. Hostility over student uprisings at the University of Hawaii is thought to be one reason the eighteen-year old vote failed adoption in that state,<sup>82</sup> while the first collection of a newly imposed income tax<sup>83</sup> and riots in Washington and Baltimore following Martin Luther King’s death have been considered important ingredients in the Maryland debacle<sup>84</sup> The proposed Arkansas Constitution faced a particularly fortuitous and lethal circumstance when labor campaigned heavily against repeal of a full-crew law that appeared on the ballot with the new Constitution. Labor voters were likely told to vote “no” on all the propositions of the complex ballot, with the result that not only the full-crew law but also an unopposed, widely supported franchise tax measure was defeated overwhelmingly.<sup>85</sup> By contrast, in Michigan, timing the campaign so that the popular new Governor Romney could rally voters to the new Constitution in the first months of his incumbency was undoubtedly an important factor in the success of the referendum in that state.

The length of time between completion of the document and the vote has sometimes been thought significant. One observer states that the two-month period in Pennsylvania meant that opponents had no time to organize, while the four-month period in Maryland enabled them to mount a more sophisticated effort.<sup>86</sup> Such conclusions ought to be regarded with caution. The opposition in Maryland was never well organized, though their arguments were effective.<sup>87</sup> The lapse of time between drafting a constitution and having the people vote on it can be to the advantage of either proponents or opponents, depending on who makes the best use of the time.

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

The backers of the new Virginia Constitution, however, were successful in enlisting prominent Byrd supporters to endorse it, both on the statewide level (where Byrd's campaign chairman, Mills Godwin, was also honorary chairman of the constitutional referendum campaign), and at the local level (where local constitutional campaign committees often had a Democrat, a Republican, and a Byrd supporter as cochairman). Thus the coincidence of the constitutional referendum with fortuitous external events had little harmful effect in Virginia. The other aspect of timing—the long lapse between legislative approval in the spring of 1970 (a *second* approval, for the legislature had given its first approval in the spring of 1969) and the vote in November—the proponents turned to their advantage by using the summer months to lay a careful groundwork and the weeks after Labor Day to campaign aggressively.

The form of the ballot was unquestionably a factor in the outcome in Virginia. There is general agreement that putting a revised constitution on the ballot as a single question was a central factor in the defeat of the proposed constitution in New York. Anthony Travia, president of the New York convention, insisted that aid to parochial schools be included and that the document be voted on as a single question on the ballot. He argued that the parochial school aid provision alone would capture 40 percent of the vote.<sup>88</sup> So controversial was the aid provision, however, that issue is generally acknowledged to have hurt more than any other.<sup>89</sup> The *New York Times* reflected what proved to be the prevailing view when, before that state's referendum on the revised charter, it carried an editorial entitled, "Take It or Leave It: We Leave It." The editorial explained:<sup>90</sup>

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

In Virginia, by contrast, the General Assembly sought to identify those questions that might be most controversial and to make it possible for the people to vote separately on them. Moreover, separating the questions on the ballot avoided the "take-it-or-leave-it" stigma and thus made

it less likely that the voters would approach the revisions in general in a mood of distrust or apprehension.

Take-it-or-leave-it ballots have met with occasional success, as shown in Michigan, where voters approved a constitution submitted in that form in 1963. But the experience of New York, Maryland, and Rhode Island indicates that many citizens are likely to vote against an entire constitution when they dislike a particular provision rather than vote for it because of the things they like. Not only in Virginia but also in Florida, Hawaii, Pennsylvania, and Connecticut, submission of more than one question led to adoption of most or all of the revisions.<sup>91</sup>

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

### COULD IT BE DONE TODAY?

If the decision were taken to rewrite a state constitution today, how would the situation differ from that confronting Virginia's constitution-makers in 1970? As a specific example, let me consider a hypothetical attempt to rewrite Virginia's constitution today. In many ways, Virginia is not the place it was in 1970. Its population has grown from about 4,650,000 in 1970 to about 7,300,000 in 2002.<sup>92</sup> Republicans, a small minority in the General Assembly in 1970, now control both the houses of the legislature. Northern Virginia, the anchor of the state's Urban Corridor, has exploded in growth, partly because of the advent of the high-tech economy in the 1990s. No longer is it possible to speak of Virginia in the twenty-first century, as V. O. Key did in 1949, as a "political museum piece."<sup>93</sup>

Anyone who might seek to revise Virginia's Constitution today would face a landscape vastly changed from the one, daunting as it was, which

confronted the revisors who carried the day in 1970. What are some of those challenges a generation later? What would constitutional reformers in Virginia's new century be obliged to consider as they set about their task, not only of drafting a constitution, but also of negotiating the shoals of legislative politics and of statewide referendum?

## Partisanship

Party politics in 1970 were very much in flux. The Byrd Machine was breathing its last, the first Republican governor since the nineteenth century was in the statehouse, and U.S. Senator Harry F. Byrd, Jr., was running for reelection as an independent. By and large, during this transitional period, Virginia's politics had a moderate, indeed progressive, mode. A fair degree of consensus was possible in fashioning state policies on education, economic development, fiscal policies, and other essential issues of the day.

A generation later, partisanship is in the air. Consider, for example, the consequences of legislative redistricting. In Virginia, as in most states, the party that holds the majority of seats in the state legislature draws district lines to confer an advantage on that party. Virginia's redistricting in 2002 is a perfect case in point. By adroit districting, the Republican majority created as many "safe" seats as possible. Creating safely Republican districts required, of course, conceding other districts, fewer in number, to the Democrats. The result has been further to polarize politics in legislative elections and thus in the General Assembly itself. In districts where the general election no longer matters, the real contest, if any, is in the primaries. There the issues are likely to be fought out further from the mainstream of two-party politics. In the spring of 2003, several of the most senior and influential Republican legislators found themselves hard pressed by challengers on their party's right wing.<sup>94</sup>

In a state legislature, in which more and more seats are "safe," there tends to be a greater political and ideological gulf between Democratic and Republican members. Such polarization of politics, both in elections and in the legislative process, would surely weigh heavily on those who might contemplate a revision of Virginia's Constitution. The chances of finding common ground, hard enough in enacting legislation, would surely be all the harder in trying to shape the Commonwealth's fundamental law.

## Special Interests and Single-issue Politics

Interest groups are as old as American politics—James Madison warned of the dangers of “faction”<sup>95</sup>—but recent years have seen their influence grow, both in state and national politics. The more complex the legislative process, and the higher the stakes, the more active special interests become. In Virginia, many interest groups are based in the business community (homebuilders, bankers, automobile dealers, etc.), but they include many other groups, such as teachers and public employees.

The adoption of the 1971 Constitution brought annual sessions of the General Assembly. One consequence is that lobbying takes place throughout the year, during legislative sessions and beyond.<sup>96</sup> Legislative staffs have grown, creating more occasions for interest groups to be involved in the making of policy. With more attention paid, more resources deployed, and more money at stake, what might formerly have been legislative detail becomes the deal-breaker of a delicate compromise.<sup>97</sup>

Their adversarial instincts whetted by legislative lobbying, interest groups could become a particular challenge for would-be constitutional revisors. Finding the kind of common ground that successful revision requires would likely be more difficult than in 1970.

The power of special interests is reinforced by the phenomenon of single-issue politics. Some voters and interest groups judge a candidate for office solely by the position he or she takes on the single issue about which that voter or group cares above all others. This phenomenon can be found on both the left and right wings of American politics. It can be those opposed to abortion or those defending a woman’s right to choose; it can be those who want gun control or those who invoke the Second Amendment. Candidates know how difficult it is to persuade a single-interest voter to look past the one issue to the larger scene. Similarly, it is easy to imagine the drafting and referendum process in which a proposed constitution would, in the minds of some voters, be judged solely by whether it embraces their favored position. Single-interest groups would make every effort to have the draft constitution incorporate their views and, if it did not, then oppose it in referendum.

## Money

No one would embark on a campaign to adopt a revised Constitution without thinking about money—lots of it. It was 1973 when a candidate for Governor of Virginia, Mills Godwin, first spent more than \$1,000,000.<sup>98</sup> In

1981, the two parties spent between them \$5.2 million in the governor's race. Twenty years later, in 2001, the two parties spent \$31.4 million.<sup>99</sup> In June 2003, Governor Mark Warner, at a dinner in Northern Virginia, raised \$1 million for his political action committee, setting a record for a single event hosted by a Virginia governor.<sup>100</sup>

Spending on legislative races has similarly soared. Senator John H. Chichester spent \$33,000 for his first race for the state Senate in 1977; in 2003, he was projecting to spend \$235,000.<sup>101</sup> A member of the House of Delegates from Albemarle County, Rob Bell, facing no opponent in the forthcoming November 2003 general election, had raised \$111,161 by June and had major fund-raising events ahead of him.<sup>102</sup>

Much of the money flowing into American politics comes from political action committees (PACs). In Virginia, PACs are becoming increasingly important. Boutique PACs have come into being, their purpose being to help lawmakers of a particular political or ideological bent.<sup>103</sup> Former House of Delegates Speaker Vance Wilkins, Jr., helped foster the idea of leadership PACs; his Dominion Leadership Fund disbursed over \$687,000 and helped the Republicans gain control of the General Assembly in 1999.<sup>104</sup>

The rise of PACs has undercut the role of the political parties as common ground for politicians. A lobbyist for the Virginia Automobile Dealers Association said that the politics of money had changed so much in his sixteen years of lobbying that he was foregoing contributions to the state parties and instead targeting donations.<sup>105</sup>

Constitutional reformers of the new century would need to ponder the lessons gleaned from spending on constitutional initiatives in other states. In California in one year (1998), \$256 million was spent by groups on ballot question campaigns.<sup>106</sup> It is difficult to document the claim that the side that spends the most money necessarily prevails; passion and effort, including grassroots campaigning, count for something. But there are several studies showing that, in initiative campaigns involving high levels of spending (over \$250,000 for each side), the side spending the most money is virtually guaranteed to succeed if that side *opposes* the initiative.<sup>107</sup> Such studies would be sobering to those considering a try at rewriting Virginia's Constitution.

## Virginia's 2002 Sales Tax Referendum

In November 2002, citizens in Northern Virginia and in Hampton Roads were asked to vote on whether the sales tax in those regions should be

increased by one-half and 1 percent, respectively. The revenues were to be used for transportation improvements. Governor Mark Warner, a Democrat, led the campaign, enlisting substantial bipartisan support, including Senator John Warner and Congressman Tom Davis.<sup>108</sup> Prominent members of the business community supported the tax, as did many major newspapers. A well-organized and -financed campaign spent \$4 million in support of the referendum.<sup>109</sup>

An odd alliance opposed the tax proposal—environmentalists, who feared development and urban sprawl, and antitax conservatives. Altogether these groups spent less than \$200,000.<sup>110</sup> But what they lacked in money, they made up for in an aggressive grassroots campaign depending on e-mail networks and energized volunteers. When the results were in, the proposals were defeated.<sup>111</sup>

How to explain the result? Environmentalism and antitax sentiment played an obvious role. But more appears to have been involved, namely a distrust of the politicians who supported the tax. A poll conducted shortly before the referendum reported that fully two-thirds of voters believed that the proponents would break their promise to use the tax proceeds solely for transportation.<sup>112</sup> Many voters, seeing developers among the biggest contributors to the campaign, decided that the tax would be little more than a subsidy for those developers. One commentator saw the vote as bespeaking a distrust of government itself:<sup>113</sup>

There was no unifying message in the voters' discontent with business as usual. Except for this: there was an underlying frustration with elected leaders from top to bottom—an impatience, if you will, at representative governments that don't work smart anymore, especially on land development, taxes, commuting, and other big issues of the day.

The defeat of the sales tax proposal, despite ample funding for the campaign and the support of much of the state's political and business establishment, is an obvious note of caution to anyone who might wish to undertake constitutional revision in Virginia. One such defeat, however, should not be taken as making victory impossible under any and all circumstances. On the same day that the sales tax proposal died, Virginia voters readily approved over \$1 billion in bonds for college construction and parks.<sup>114</sup> The voters also approved a state constitutional amendment



involving the use of DNA evidence in criminal appeals.<sup>115</sup> Indeed, amendments to the Constitution of Virginia are routinely approved, partly because they usually are uncontroversial.<sup>116</sup>

## Leadership

Ultimately, no factor is more critical to the success of a constitutional revision effort than leadership. Americans often realize how fortunate we are to have been blessed with the inspired and dedicated leaders who met at Philadelphia in 1787 to draft the nation's Constitution and who then led the successful campaign for its ratification by the states.

In the years since the founding, Virginia seems often to have been fighting a rearguard action—in the era of Reconstruction, for example, or more recently, in crafting “massive resistance” against school desegregation. However, Virginia in the 1960s and 1970s saw a genuinely remarkable cluster of leaders at its helm. These same leaders, seasoned in government, business, law, and the academy, played key roles in inspiring the idea of a new Virginia Constitution, in giving it content, and in carrying it to the people.

Governor Miles E. Godwin, Jr., called for the creation in 1968 of the Commission on Constitutional Revision. Of Godwin, it has been said, “Few political leaders have equaled Mills Godwin in comprehending the anatomy of Virginia politics or in translating into reality the aspirations of their constituents.”<sup>117</sup> The only man twice elected by Virginia's voters to be their governor, he achieved a doubling of funding for public education, laid the basis for a statewide system of community colleges, and vastly expanded state support for higher education. His skill in leading the campaign for a major bond issue for higher education and mental health in 1968 anticipated the success, two years later, of the referendum on the new Constitution. As a biographer has concluded, “In many respects Godwin's first administration provided a textbook example of the art of leadership.”<sup>118</sup>

When the Commission on Constitutional Revision assembled, around the table sat members who brought to their work a wealth of experience and insight. Colgate W. Darden, Jr., had been a farmer, a businessman, a lawyer, a state legislator, a member of Congress, Virginia's Governor, the President of the University of Virginia, and a delegate to the United Nations. Fond of quoting Thomas Jefferson, Darden, like Jefferson, believed in the link

between education and self-government by a free people. An outspoken opponent of “massive resistance,” Darden called education the “engine of civilization.”<sup>119</sup> As President of the University of Virginia, he began the transformation of that venerable institution from a rather exclusive preserve of privilege to the dynamic capstone of education conceived by its founder, Jefferson. Within the 1968 commission, he led the way to establishing education as being among the Commonwealth’s fundamental rights.<sup>120</sup>

Lewis F. Powell, Jr., also a member of the Commission on Constitutional Revision, was a nationally respected Richmond lawyer who had served as President of the American Bar Association. Soon after the adoption of the Virginia Constitution, Powell was appointed to the United States Supreme Court. Fellow justices have paid glowing tribute to the qualities of mind and character he brought to that tribunal’s deliberations.<sup>121</sup> So central did Powell become to the work of the Court during his tenure that a civil liberties leader called him “the most powerful man in America.”<sup>122</sup> Ever careful to listen to all perspectives, Powell was especially influential when the Court struggled with the “hard legal issues that lie at the center of moral and political debate.”<sup>123</sup> In Powell, legal acumen and personal qualities came together in a way that made him such a respected jurist—and so important to the work of Virginia’s commission.<sup>124</sup>

Another memorable figure who served on the Commission on Constitutional Revision was Hardy Cross Dillard. His life embraced more than one career. Steeped in the tradition of the humanities, Dillard was professor, then Dean, at the University of Virginia’s Law School.<sup>125</sup> A West Point graduate, he directed the training of military government officers during World War II and later served as legal adviser to the High Commissioner of Germany. In 1970 he became a judge of the International Court of Justice at the Hague. Yale law professor Myres McDougal spoke for many when, of Dillard, he said, “He was teacher to all of us.”<sup>126</sup>

Virginia’s leading civil rights lawyer, Oliver W. Hill, served on the revision commission. In 1948, Hill was the first African American elected to Richmond’s City Council. Active in the NAACP’s long campaign against school segregation, Hill became the lead attorney in the Prince Edward County case, one of the five cases combined by the United States Supreme Court as *Brown v. Board of Education* in 1954. In 1999 President Clinton presented Hill, then ninety-two, with the nation’s highest civilian honor, the Presidential Medal of Freedom.<sup>127</sup> Hill’s presence on the constitutional revision commission symbolized the prospect that, in

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."<sup>128</sup> 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.