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IN AID OF PUBLIC EDUCATION: AN ANALYSIS OF THE EDUCATION ARTICLE OF THE VIRGINIA CONSTITUTION OF 1971

*Hullihen W. Moore**

> *Every government degenerates when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories. And to render even them safe their minds must be improved to a certain degree. This indeed is not all that is necessary, though it be essentially necessary. An amendment of our constitution must here come in aid of the public education.*[1]

THOMAS Jefferson recognized the need for promoting adequate public education in Virginia's constitution in the late eighteenth century. Since 1867 education has been a significant part of Virginia's fundamental law, and, as such, the constitutional provisions relating to education have required much time and thought throughout their development. It is the purpose of this article not only to analyze the Education Article of the Virginia Constitution of 1971,[2] but also to ascertain if these provisions provide the needed impetus for quality public education in Virginia.

Any analysis or evaluation of the new Education Article must be based upon an understanding of the function of a state constitution. The Commonwealth, and thus the General Assembly has plenary power and may perform any act not prohibited either by the state or Federal Constitution.[3] Thus, unlike the Federal Constitution which is a grant of power, the Virginia Constitution is merely a restrictive document. Although this restrictiveness is its basic substantive function, the Constitution also states the aspirations of the people of the Commonwealth.

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1 3 WRITINGS OF THOMAS JEFFERSON 254 (P. Ford ed. 1892).

2 Technically the Constitution of 1971 will be the Constitution of 1902, as amended. However, the amendments that will become effective July 1, 1971, are so extensive that as a practical matter it is a new constitution and thus is referred to as the "Constitution of 1971."

3 *See, e.g.*, Development Authority v. Coyner, 207 Va. 351, 355, 150 S.E.2d 87, 90 (1966); Strawberry Hill Land Co. v. Starbuck, 124 Va. 71, 77, 97 S.E. 364, 365 (1918).

THE MANDATE FOR PUBLIC EDUCATION

Sections 1 and 2 of the Education Article form the linchpin of public education in Virginia and continue the constitutional mandate for public education that began in 1869.

Section One of the Revised Education Article

Section 1 contains the basic substantive statement establishing public education in Virginia. It provides as follows:

> The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.

The Predecessors of Section 1

The constitutional convention of 1868-69 provided the first constitutional mandate for public education in the history of the Commonwealth,[4] and it appeared to be a determined fact from the beginning of the convention that the constitution would provide for a mandatory public school system in Virginia.[5] The convention intended that the constitution require the legislature to enact the necessary laws to create a system of public free schools throughout the Commonwealth by 1876.[6] The question of whether or not the legislature could be required by the courts to enact such legislation was never raised because the proper legislation was promptly enacted.[7]

The Constitutional Convention of 1901-02, in adopting section 129, made no substantive change from the Constitution of 1869. Section 129 provided:

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[4] VA. CONST. art. VIII, § 3 (1869), provided as follows:

> The general assembly shall provide by law, at its first session under this constitution, a uniform system of public free schools, and for its gradual, equal, and full introduction into all the counties of the state by the year eighteen hundred and seventy-six, or as much earlier as practicable.

[5] The main reason for this is that such a mandatory education provision had been a plank in the platform of the republican party which had elected a majority of the delegates to the convention. R. MEADE, A HISTORY OF THE CONSTITUTIONAL PROVISIONS FOR EDUCATION IN VIRGINIA 152, 244 (Doctoral dissertation, 1941, University of Virginia D. 407) [hereinafter cited as MEADE].

Another reason for the certainty regarding the mandatory education in Virginia's Constitution was the attitude of the national government towards education immediately after the Civil War. *See generally* MEADE 104-48, 152.

[6] *See* MEADE 210-45.

[7] Va. Acts of Assembly 1870, ch. 259, at 402.

> The General Assembly shall establish and maintain an efficient system of public free schools throughout the State.

The convention of 1901-02, like its predecessor, felt that the section itself would require the Assembly to continue in force the legislation providing for public schools in Virginia.[8]

Following this trend, the judicial interpretations of section 129 prior to 1963 assumed that the section was self-executing—that is, that the courts could require the Assembly to enact the legislation necessary to provide for public education in Virginia.[9] For example, in 1959 in *Harrison v. Day*,[10] the Supreme Court of Appeals held that the acts that cut off all state funds from and closed integrated schools were unconstitutional because they violated section 129.[11] In making this determination, the court noted:

> Section 129 imposes a mandatory duty on the General Assembly to establish and maintain an efficient system of public free schools throughout the State. The language of Section 129 is that it "shall," that is, it *must*, appropriate funds for the latter purpose.[12]

The court further stated that the General Assembly could not define an "efficient system" in such a way as to eliminate certain schools from the system and deprive them of support.[13] It thus applied section 129 only negatively in that it struck down what the Assembly had done rather than require positive action.

In 1963 the Supreme Court of Appeals faced for the first time whether

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8 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION 1051-57 (1901-02) [hereinafter cited as DEBATES OF 1901-02].

9 *See* Board of Supervisors v. Cox, 155 Va. 687, 707, 156 S.E.2d 755, 761 (1931); School Bd. v. Shockley, 160 Va. 405, 412, 168 S.E.2d 419, 422 (1933); County School Bd. v. Board of Supervisors, 169 Va. 213, 215, 193 S.E. 52, 53 (1937); Harrison v. Day, 200 Va. 439, 450, 106 S.E.2d 636, 645 (1959); Kellam v. School Bd., 202 Va. 252, 254, 117 S.E.2d 96, 97 (1960); Griffin v. Board of Supervisors, 203 Va. 321, 323, 124 S.E.2d 227, 229 (1962).

10 200 Va. 439, 106 S.E.2d 636 (1959).

11 *Id.* at 450, 106 S.E.2d at 645.

12 *Id.*

13 *Id.* at 450-51, 106 S.E.2d at 646. The Virginia Supreme Court of Appeals, however, indicated in a subsequent ruling that the *Harrison* decision was not based on section 129. School Bd. v. Griffin, 204 Va. 650, 664, 133 S.E.2d 565, 574 (1963).

or not the "mandatory duty" to establish public schools in Virginia was judicially enforceable, i.e., whether or not section 129 was self-executing. The court in *County School Board v. Griffin*[14] held constitutional the absence of public schools in Prince Edward County where the General Assembly had established a *system* of schools in which the operation of the schools is left to the localities and the receipt of state funds is conditioned on local appropriations. The court was confronted with a situation in which the Assembly had appropriated the State's share of educational expenses for Prince Edward County, but the appropriation was conditioned upon an appropriation by the county. In addition, the court had held numerous times that such county appropriations were completely discretionary on the part of the Board of Supervisors.[15] Following the reasoning of *Harrison,* the court might have declared the condition unconstitutional, thus providing the State's, but not the county's, funds for schools.[16] However, the case involved a more far-reaching issue: Does the Assembly have the duty to appropriate additional funds to make up the county's deficit and operate or maintain the schools?[17]

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[14] 204 Va. 650, 133 S.E.2d 565 (1963).

[15] Griffin v. Board of Supervisors, 203 Va. 321, 124 S.E.2d 277 (1962); Board of Supervisors of Chesterfield County v. County School Bd., 182 Va. 266, 28 S.E.2d 698 (1944); Scott County School Bd. v. Board of Supervisors, 169 Va. 213, 193 S.E. 52 (1937).

[16] In *Harrison v. Day,* 200 Va. 439, 106 S.E.2d 636 (1959), the court declared unconstitutional a condition on the appropriation of funds to localities which cut off those funds if the schools in the particular locality were integrated. The court agreed that the General Assembly had the power to define what an "efficient system" is, but held that the definition could not be tied entirely to integration:

> That section [section 129] requires the State to "*maintain* an efficient system of public free schools *throughout the State.*" (Emphasis added.) That means that the State must support such public free schools in the State as are necessary to an efficient system, including those in which the pupils of both races are compelled to be enrolled and taught together, however unfortunate that situation may be.

Id. at 450, 106 S.E.2d at 646.

The *Harrison* decision struck down a direct racially discriminatory condition based completely on whether the schools of a particular locality were integrated. Carrying this one step further, the court in *Griffin* might have held that a State appropriation conditioned on a local appropriation violated section 129 because it resulted in the breakdown of an efficient system of free public schools throughout the State. However, the *Griffin* court refused to extend the reasoning of *Harrison* and held the conditional appropriation constitutional because the Assembly had the power to define "an efficient system" of public schools in this manner.

[17] There is an important difference in this question and the question whether a particular condition on an appropriation is constitutional. In determining the constitutionality of a particular condition, the court need only strike down a condition

The court held as an independent ground that section 129 was not self-executing, and, therefore, the Assembly could not be forced to make appropriations or enact other legislation.[18] The immediate problem of the *Griffin* case was solved by the holding of the Supreme Court of the United States that the absence of public schools in Prince Edward County, while not violative of the Virginia Constitution, did violate the fourteenth amendment of the United States Constitution.[19] The remedy suggested by the Supreme Court was requiring the locality to appropriate the "necessary funds."[20] This should have been the result in the Virginia Supreme Court of Appeals, there being no prohibition against a state court enforcing federal rights.[21]

While under the foregoing analysis the Virginia court in *Griffin* reached the wrong result, its holding that section 129 was not self-executing was

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which it deems unconstitutional. However, when a court considers the legislature's duty to appropriate funds for the operation of a school system, the only effective remedy upon a finding of such a duty is to order the legislature to appropriate the funds.

[18] County School Bd. v. Griffin, 204 Va. 650, 660, 133 S.E.2d 565, 573 (1963). The court gave two reasons for its holding that the Assembly did not have to make the further appropriations. First, it said that the laws enacted to implement section 129 were within the definition of the "efficient system" mandate of section 129. *Id.* at 667, 133 S.E.2d at 557. However, the court went one step further and declared section 129 not to be self-executing. If the section is not self-executing then it becomes, except for its negative value, only a moral force. *See* note 26 *infra.*

[19] Griffin v. School Bd. of Prince Edward County, 377 U.S. 218 (1964).

[20] *Id.* at 233. This remedy, of course, was contrary to the interpretation given by the Virginia court to VA. CONST. art. IX, § 136 (1902). *See* note 15 *supra.*

[21] In considering the equal protection argument in *Griffin,* the Virginia court held that the state was not required by the fourteenth amendment to operate a system of public free schools. The court cited Judge Haynesworth's opinion in Griffin v. Board of Supervisors, 322 F.2d 322 (4th Cir. 1963), in which he stated that while a state does not have to operate public schools, the schools which it does operate must be made available to all citizens without regard to race.

The determining factor in the *Griffin* decision was that, while the Prince Edward County schools were closed, private schools were being operated with local government funding to the exclusion of Negro students. This fact was pointed out by Justice Black in the majority opinion in Griffin v. School Bd., 377 U.S. 218, 231 (1964):

> . . . [T]he record in the present case could not be clearer that Prince Edward's public schools were closed and private schools operated in their place with state and county assistance, for one reason, and one reason only: to ensure, through measures taken by the county and the State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school.

It was, therefore, obvious to Justice Black, as it should have been to the Virginia Supreme Court of Appeals, that the failure of the locality to appropriate funds for an open public school system violated the fourteenth amendment.

correct[22] and is supported by the leading treatise in the field[23] as well as decisions in other jurisdictions.[24] The principal test for determining

[22] The Supreme Court of Appeals has consistently defined a provision that requires no further legislation to implement and enforce it as being self-executing. Therefore, by definition, a provision that requires the legislature to act cannot be self-executing. This definition was best expressed by the Supreme Court of Appeals in City of Newport News v. Woodward, 104 Va. 58, 61, 51 S.E. 193, 194 (1905):

> It is well recognized in treatises on constitutional limitations and the decided cases that if the nature and extent of the right conferred by a constitutional provision is fixed by the provision itself, so that the same can be determined by the examination and construction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing. The question is one of intention in every case, and if it is apparent that no subsequent legislation is necessary to carry such provision into effect, then such provision is self-executing.

This definition has been used to declare the last paragraph of VA. CONST. art. 1, § 8 (1902), to be self-executing. Dixon v. Commonwealth, 161 Va. 1098, 172 S.E. 277 (1934). Section 58 has also been declared to be self-executing. Virginia Hot Springs Co. v. Lowman, 126 Va. 424, 101 S.E. 326 (1919).

However, in every case where the Virginia Constitution has stated that the legislature shall enact legislation or shall make an appropriation, the Supreme Court of Appeals has held that section not to be self-executing. VA. CONST. art. VIII, § 126 (1902), provides that the General Assembly "shall provide by general laws for the extension and contraction, from time to time, of the corporate limits of cities and towns, and no special act for such purpose shall be valid." This section was held not to be self-executing in that the Assembly could not be required to enact legislation pursuant to that provision. City of Newport News v. Elizabeth City County, 189 Va. 825, 55 S.E.2d 56 (1949). However, this section is self-executing in its negative character. City of Portsmouth v. City of Chesapeake, 205 Va. 259, 136 S.E.2d 817 (1964). In like manner, VA. CONST. art. XI, § 168 (1902), which provides that all property shall be taxed, has been held not to be self-executing. Commonwealth v. Stringfellow, 173 Va. 284, 4 S.E.2d 357 (1939). VA. CONST. art. IV, § 55 (1902), provides that the Virginia Assembly shall reapportion itself. Although the courts have imposed a remedy by requiring congressmen to be elected at large if the reapportionment violates section 55, the Supreme Court of Appeals has held that it cannot compel the legislature to reapportion itself, nor can the court carry out the reapportionment. *See* Wilkins v. Davis, 205 Va. 803, 139 S.E.2d 849 (1965); Brown v. Saunders, 159 Va. 28, 166 S.E. 105 (1932).

The holding of *Harrison* does not speak and could not speak to the question of self-execution involved in the *Griffin* case. Section 129 was, in that case, held to be self-executing in its negative character only. It is almost uniformly held that the negative character of a constitutional provision is self-executing. *See* Robertson v. City of Staunton, 104 Va. 73, 51 S.E. 178 (1905). Consequently, *Harrison* and *Griffin* are not inconsistent in this regard, and, therefore, it is clear that under Virginia law section 129 was not self-executing.

[23] 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS, 165-72 (8th ed. 1927) [hereinafter cited as COOLEY].

[24] *See, e.g.*, State *ex rel.* Firestone Tire & Rubber Co. v. Ritchie, — W.Va. —, 168 S.E.2d 287 (1969); Moffatt v. Traxler, 247 S.C. 298, 147 S.E.2d 255 (1966); Ferrell

whether a constitutional provision is self-executing is whether the right it gives or the duty it imposes may be enforced without the aid of legislation. An important factor in this determination is whether the framers intended that legislation be necessary to carry the provision into effect.[25] Thus, where a mandate is placed on the legislature to enact legislation, as in section 129, the requirement by definition cannot be self-executing and has "only a moral force: the legislature ought to obey it; but the right intended to be given is only assured when the legislation is voluntarily enacted."[26]

The Background and Meaning of Section 1

One of the principal aims of section 1 of the revised Education Article is to negate the decision of the Supreme Court of Appeals in the *Griffin* case.[27] However, unless the Constitution itself establishes a detailed school system, the *Griffin* decision can not be overruled on the issue of self-execution. Section 1, as section 129, is clearly not self-executing.[28] However, this fact is, as a practical matter, academic. The closing of a part of the school system would violate the Federal Constitution,[29] and the closing of the entire school system is politically impossible and even if it were possible,

v. Highway Comm'n, 252 N.C. 830, 115 S.E.2d 34 (1960); Wann v. Reorganized School Dist. No. 6, 293 S.W.2d 408 (Mo. App. 1956).

25 City of Newport News v. Woodward, 104 Va. 58, 51 S.E. 193 (1905). *See* note 22 *supra*.

26 *See* COOLEY 165. Similarly, the Supreme Court of Nebraska stated in regard to a non self-executing Constitutional provision: "The obligation is an honorary one which the courts are powerless to enforce." State *ex rel.* Walker v. Board of Comm'rs, 141 Neb. 172, 177, 13 N.W.2d 196, 200 (1942).

27 PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION 207 (1969-70) [hereinafter cited as PROCEEDINGS OF THE SENATE]. Also, Delegate Pope, Chairman of the House Committee on Education, made it clear that the provision as recommended by the Committee in the House was, like the Report of the Commission on Constitutional Revision, designed to render impotent the holding in *Griffin*. The debates of the House of Delegates have not been finalized and printed. The references to such debates are from the unofficial transcript and the author's notes. *See also* REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 258-59 (1968) [hereinafter cited as CCR REPORT].

28 *See* notes 22-26 *supra*. This is true even though the intent of the Assembly might have been to overrule *Griffin*. The intent was not to create the school system in the Constitution, but rather create a mandate on the Assembly to create by legislation a school system. The only other alternative would have been to add a sentence similar to that in VA. CONST. art. I, § 8, stating that the section is self-executing. It is difficult to imagine whether or how this would be interpreted and enforced.

29 Griffin v. School Bd. of Prince Edward County, 377 U.S. 218 (1964).

if done to avoid integration, might also violate the Federal Constitution.[30]

The second clause of section 1 of the revised Education Article is new and states that the Assembly "shall seek to ensure that an educational program of high quality is established and continually maintained."[31] This clause is designed solely as language of aspiration.[32] The language as proposed by the Commission on Constitutional Revision (the "Commission") was likewise language of aspiration, but it was more positive. It provided that the General Assembly "shall ensure that an educational program of high quality is established and maintained."[33] Section 2 as proposed by the Commission and the commentary to both sections 1 and 2 made it clear that the standards of "high quality" would be determined by the Board of Education and the General Assembly and not by the courts.[34] However, Governor Godwin, mindful perhaps of recent federal court decisions, objected to the language proposed by the Commission because he felt that such language would invite the courts to define "high quality."[35]

The Commission's proposal was submitted to both the House and Senate Education Committees.[36] In both cases, because of the apprehension created

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30 *See generally* Swann v. Board of Education, 39 U.S.L.W. 4437 (U.S. April 20, 1971).

31 The complete text of all sections of the Education Articles of the Virginia Constitutions of 1902 and 1971 are set forth in the Appendix.

32 PROCEEDINGS OF THE SENATE 209-13. Delegate Pope, Chairman of the House Committee on Education, on March 27, 1969, while giving the report of the Education Committee made this position absolutely clear.

33 CCR REPORT 61. The Commission on Constitutional Revision was created by the General Assembly in 1968 to study the Constitution of Virginia and report its findings and proposed changes to the Governor and General Assembly of Virginia. The Revisions proposed by the Commission are an important part of the development of the Constitution of 1971 because these proposals were introduced as joint resolutions at the 1969 special session, and thus served as the focal point for most of the proposals discussed by the Assembly. PROCEEDINGS OF THE SENATE 3-4.

34 CCR REPORT at 259.

35 In his address to the General Assembly in 1969, Governor Godwin made the following statements:

> The definition of the term "high quality" is so subjective as to invite any citizen who disagreed with the State Board of Education or the General Assembly to bring suit. It poses the gloomy prospect of endless litigation, and very possibly endless expenditure of public funds to fulfill the courts' decrees.
>
> * * *
>
> If the sole responsibility were yours and mine, my reservations would fade away, but your actions here will be the subject of review by courts which have served ample notice that it is possible to stretch drastically the boundaries of judicial restraint and to overturn time honored legal concepts.

VA. SEN. DOC. No. 1 at 7 (Extra Sess. 1969).

36 VA. HOUSE JOURN. 33-35 (Extra Sess. 1969); VA. SEN. JOURN. 23 (Extra Sess. 1969).

by Governor Godwin's address,[37] the Committees reported joint resolutions with the "seek to" added,[38] and amendments to delete the language were defeated by large majorities in both houses.[39] The change has no substantive effect, but tends to lessen the Assembly's commitment to education.

Section 1 differs little, therefore, in substance from section 129 or from similar provisions of other states.[40] However, it does contain the added language of aspiration that appears to be unique to Virginia.

Section Two of the Revised Education Article

Section 2 of the Education Article is more important in practical results than section 1 as it provides for the implementation of the policy of the first section. Section 2 states:

> Standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly.
>
> The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions. Each unit of local government shall provide its portion of such cost by local taxes or from other available funds.

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37 The fear created by Governor Godwin was most evident in the remarks made in the House of Delegates on March 27, 1969, by Delegate Pope, Chairman of the House Committee on Education, and by Delegate Smith. This fear is also evident in the Debates of the Senate. Senator Turk, on the other hand, noted that he was "not worried about any lawsuit that might develop over the words 'high quality.'" PROCEEDINGS OF THE SENATE 209. However, Senator Turk was obviously in a minority as the amendment to delete the words "seek to" was defeated by a vote of 10 to 28. VA. SEN. JOURN. 128 (1969).

38 VA. HOUSE JOURN. 159 (Extra Sess. 1969); VA. SEN. JOURN. 125 (Extra Sess. 1969).

39 The vote in the House was 23 to 70. VA. HOUSE JOURN. 162 (Extra Sess. 1969). The vote in the Senate was 10 to 28. VA. SEN. JOURN. 128 (Extra Sess. 1969).

40 Forty-two states have similar provisions directing the legislature to establish a system of schools. ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. XII, § 1; GA. CONST. art. VIII, § 1, ¶ 1; HAWAII CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. VIII, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, §§ 1, 12; KANS. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. XII, § 1; ME. CONST. art. VIII, § 1; MD. CONST. art. VIII, § 1; MICH. CONST. art. VIII, § 2; MINN. CONST. art. VIII, § 1; MO. CONST. art. IX, § 1a; MONT. CONST. art. XI. § 1; NEB. CONST. art. VII, § 6; NEV. CONST. art. 11, § 2; N.J. CONST. art. IX, § iv, ¶ 1; N. MEX. CONST. art.

The History of Section 2

The important change in this section can be fully appreciated only after analysis of the provisions of the Constitution of 1902 and the proposals of the Commission on Constitutional Revision. The counterpart to section 2 is sections 135 and 136 of the 1902 Constitution.

Under section 135 of the Constitution of 1902, the Assembly was required to "apply" certain amounts to the schools of the Commonwealth. These sums included the interest on the Literary Funds, a designated part of the capitation tax, and an appropriation equal to the total that would be received from an "annual tax on property of not less than one nor more than five mills on the dollar."[41] This provision was not self-executing because it required an appropriation of the legislature.[42] However, the provision was complied with and the amount involved was insignificant when compared to the total school budget.[43]

Section 136 allowed the localities to raise additional funds for education. In addition, section 171 segregated for local taxation only, all real estate and tangible personal property.[44] The Supreme Court of Appeals, in

XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2(1); N.D. CONST. art. VIII, § 147; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1: ORE. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; S.D. CONST. art. VIII, § 1; TEX. CONST. art. VII, § 1; UTAH CONST. art. 10, § 1; WASH. CONST. art. IX, § 2; W. VA. CONST. art. xii, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

Two states provide that the legislature may establish schools. MISS. CONST. art. 8, § 201; VT. CONST. ch. II, § 64.

Four states contain no statement about the establishment of public schools but do contain hortatory statements relating to the value of education. MASS. CONST. Pt. II, ch. V, § II; N.H. CONST. Pt. II, art. 83; R.I. CONST. art. XII, § 1; TENN. CONST. art. XI, § 12.

South Carolina has no mandatory provisions for a school system, although it does have detailed reference to an educational system in its constitution. S.C. CONST. art. XI.

41 VA. CONST. art. IX, § 135 (1902).

42 This provision would not be self-executing because it would require affirmative action by the General Assembly. Similar provisions in other states have been held not to be self-executing. Civil Service Comm'n v. Department of Administration, 324 Mich. 714, 37 N.W.2d 682 (1949); City of Jackson v. Nims, 316 Mich. 694, 26 N.W.2d 569 (1947); State *ex rel.* Walker v. Board of Comm'rs, 141 Neb. 172, 3 N.W.2d 196 (1942). *See also* notes 22-26 *supra.*

43 The total receipts of the localities for educational purposes for the 1969-70 Session were $932,383,173.55 while the constitutional guarantee was only $13,400,000.00. ANNUAL REPORT OF THE VA. SUPERINTENDENT OF PUBLIC INSTRUCTION 202, 214 (1969-70).

44 VA. CONST. art. X, § 171 (1902), provides as follows:

> No state property tax for state purposes shall be levied on real estate or tangible personal property, except the rolling stock of public service corporations. Real estate and tangible personal property, except the rolling stock of public service corporations, are hereby segregated for, and made subject to, local

School Board v. Shockley,[45] held that the General Assembly could not require a locality to impose a property tax for the purpose of building a high school because section 136 made the appropriation of funds of localities for education discretionary with each locality. The court noted in passing that this construction of section 136 was "also in harmony with section 171 of the Constitution."[46] Moreover, it has been held on numerous occasions that the local governing body has the discretion to make appropriations for education and is not required to do so by section 136.[47] Thus the localities could not be legally forced to make appropriations for education were it not for the Federal Constitution.[48] This matter was not made moot by the ruling of the Supreme Court of the United States in *Griffin* because the question is not whether there will be schools, but rather whether the State can require a locality to have certain improved facilities and pay minimum teachers' salaries in an attempt to provide a more uniform and higher quality of education.[49]

The Commission on Constitutional Revision proposed the following language to replace sections 135 and 136:

> taxation, only, and shall be assessed or reassessed for local taxation in such manner and at such times as the General Assembly has heretofore prescribed, or may hereafter prescribe, by general laws.

45 160 Va. 405, 168 S.E. 419 (1933).

46 *Id.* at 414, 168 S.E. at 442.

47 *See, e.g.*, Griffin v. Board of Supervisors, 203 Va. 321, 124 S.E.2d 227 (1962); Board of Supervisors of Chesterfield County v. County School Bd., 182 Va. 266, 28 S.E.2d 698 (1944); Scott County School Bd. v. Board of Supervisors, 169 Va. 213, 193 S.E. 52 (1937).

48 Although the General Assembly could not legally force a locality to appropriate money, sufficient coercion could be applied by the withholding of all other state funds, including sales tax rebates and ABC taxes. This method was the enforcement procedure envisioned by the Commission. CCR REPORT 261.

49 Dr. Woodrow W. Wilkerson, State Superintendent of Public Instruction, pointed out this lack of uniformity and disparity in the quality of education from one locality to another in his presentation before the Code Commission on September 4, 1970:

> Richmond City, Fairfax County, Arlington, et cetera, currently offer a certain program far in excess of some other localities in the State. The State Board stipulates in its accreditation standards that every high school, if the focus is on the high school, shall offer a minimum program in the academic subjects, the fine arts, and the practical arts. That is a minimum for purposes of accreditation. It is not uniform, then, other than being a minimum requirement with respect to accreditation.

REPORT OF THE VIRGINIA CODE COMMISSION ON REVISION OF THE CODE OF VIRGINIA OF 1950, AS AMENDED, TO CONFORM WITH THE CONSTITUTION OF VIRGINIA EFFECTIVE JULY 1, 1971, 227 (1970) [hereinafter cited as CODE COMM'N REPORT].

> The General Assembly shall ensure that funds necessary to establish and maintain an educational program of high quality are provided each school division, and it shall take care that the cost of maintaining such programs is divided equitably between the localities, wherein rests the primary responsibility for the public schools, and the Commonwealth. The standards of quality shall be determined and prescribed from time to time by the State Board of Education, subject to revision only by the General Assembly.[50]

The Commission was careful not to include a provision that would allow the Assembly legally to force a locality to impose taxes or make appropriations. The Commission felt that it would be unnecessary and unwise to sacrifice local independence to ensure local financial support.[51] The Commission surmised that since the major part of the budgets of most localities is for education, such a provision would take the heart out of section 4 of Article X, the counterpart to section 171 of the Constitution of 1902, which segregates all real and tangible personal property for taxation by localities.[52] It thought that the same result would be achieved without so drastic a change.[53] The Commission stated that under its proposal, if a locality refused to appropriate funds sufficient to meet the minimum standards, the Assembly would have to provide the funds until pressure in the form of public opinion and the withholding of all state funds[54] could be brought to bear on the recalcitrant locality.[55] The flaw in the Commission's proposal is that it is dependent on the constitutional mandate that the

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[50] CCR REPORT 61.

[51] *Id.* at 260-61.

[52] *Id.* at 256. The Commission felt that since the state and federal governments had preempted the area of income taxation, and since the state had largely preempted the sales tax area, the only source of revenue left to the locality was the tax on real and personal property. This, combined with the fact that the major portion of the budgets of most localities is devoted to education, made it unwise to allow the Assembly legally to require a locality to appropriate funds. Such a provision would authorize the Assembly to take away the taxing power of the localities and, in effect, eliminate the effectiveness of VA. CONST. art. IX, § 4, by giving localities the sole right to tax real estate in the county, but providing that they must raise a certain amount of money during the year. This procedure, the Commission felt, was only one step removed from the state imposing the tax itself. Indeed, the Commission implied that absent such a specific provision as is found in VA. CONST. art. VIII, § 2, the Assembly would not have the power to require a locality to make appropriations. CCR REPORT 260-61. This position is supported by School Bd. v. Shockley, 160 Va. 405, 168 S.E. 419 (1933).

[53] CCR REPORT 261.

[54] *Id.* at 261.

[55] *Id.* at 260-61.

Assembly supply the deficit of the recalcitrant locality. This requirement, like the mandate in section 1, is not self-executing, and, therefore, a court would not force the Assembly to make an appropriation.[56] Thus the Commission's proposal was little, if any, improvement over sections 135 and 136.

The Drafting of Section 2

The first paragraph of the section was taken with only minor changes from the Commission's proposal.[57] The Commission, perhaps fearful as Governor Godwin was, of court intervention,[58] included the language in its proposal that the standards of quality would not be simply subject to revision by the Assembly, but *only* by the Assembly, to ensure that the courts would not set the standards.[59] The Assembly approved this language.

The General Assembly recognized at once that the answer to the problem of local financial support was not what the Commission proposed,[60] but rather a provision that would require a locality to provide its share once that share has been determined by the Assembly. Both the House and Senate Committees on Education proposed in their reports[61] the language that was finally adopted as the second paragraph of section 2:

> The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions. Each unit of local government shall provide its portion of such cost by local taxes or from other available funds.

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56 *See* notes 22-26, 42 *supra.*

57 CCR REPORT 61.

58 *See* note 35 *supra.*

59 CCR REPORT 260. These standards are intended to be fiscal and operational, such as minimum teachers salaries, course offerings, and pupil teacher ratios. This is evidenced by the second paragraph of section 2 that provides for the apportionment of the costs of a program meeting the standards and the legislation enacted by the Assembly. Va. Acts of Assembly 1971, ch. 162, at —.

60 The General Assembly felt the flaw in the Commission's proposal was that a locality could not be legally forced to make the required appropriations. No mention was made in the debates of either the House or the Senate that the proposed section 2 would not be self-executing. The Commission's proposal was never really discussed as the Committee substitutes in both the House and Senate revised the Commission's proposal to require a locality to make the necessary appropriation.

61 VA. HOUSE JOURN. 160 (Extra Sess. 1969); VA. SEN. JOURN. 125-26 (Extra Sess. 1969); VA. CONST. art. VIII, § 2.

Section 5(b) of the Education Article complements this provision by requiring the Board of Education to report all localities which have not met the prescribed standards.[62]

Although the mandate of the first sentence of the second paragraph of section 2 requiring the Assembly to apportion the cost of education is not self-executing, and, therefore, cannot be enforced,[63] once that mandate has been complied with, the last sentence is self-executing. The language is clear and complete. Once the legislature has established that a given county's share is a sum certain, the judicial determination is simply whether or not that amount has been appropriated. There is even a reporting device so that governmental officers will know which localities have failed to comply. The argument that this might violate section 4 of Article X in that it indirectly taxes the real estate is easily rebutted by the specific provision that the locality "shall provide its portion of such cost by local taxes or from other available funds." [64] The question remains, however, whether legislative action can make a provision self-executing that would not otherwise have been so.[65] If the section is held to be self-executing the appropriate remedy would be to require, by mandamus, the local governing body to appropriate the necessary funds.[66]

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62 *See* Appendix at 313 *infra*. Query whether this provision is self-executing?

63 *See* notes 22-26, 42 *supra*.

64 *See* note 52 *supra*.

65 The question at first glance might appear to put the court in the position of saying that although the Assembly cannot be required to enact legislation, once it goes so far as to establish a school system and apportion the cost, it must finish the task. However, this is not the posture because there would be no action required by the Assembly. Rather the court would ask the question: "Do we have enough facts to say, without question, exactly what must be done?" Without the apportionment by the Assembly, the answer must be no; with such apportionment, it must be yes.

66 Where the provision of the Constitution is self-executing and the statutes provide no remedy, "the common law, which provides a remedy for every wrong, will furnish the appropriate action for the redress of such grievance." Swift & Co. v. City of Newport News, 105 Va. 108, 115, 52 S.E. 821, 824 (1906). *See also* Wann v. Reorganized School Dist. No. 6, 293 S.W.2d 408 (Mo. App. 1956); State *ex rel.* City of St. Louis v. O'Malley, 343 Mo. 658, 122 S.W.2d 940 (1938).

Self-executing constitutional provisions are enforceable by the common law remedy of mandamus. For mandamus to lie, the nature of the duty must be clear and the act required must be ministerial. Griffin v. Board of Supervisors of Prince Edward County, 203 Va. 321, 124 S.E.2d 227 (1962). The court denied the writ in *Griffin* on the ground that the act required of the Board of Supervisors was discretionary rather than ministerial. The court stated:

> Whether mandamus will lie to compel the levy and assessment of taxes depends upon whether the duty with respect to that matter is ministerial or dis-

The General Assembly at its special session in 1971 implemented this last sentence by providing that a writ of mandamus shall be brought by the Attorney General in situations where the locality does not provide its apportioned share.[67] The Assembly may enact such legislation,[68] but this fact does not make or imply that the provision is not self-executing[69] and thus, if repealed, mandamus would lie with the individual citizen.[70]

The legislation providing for mandamus is beneficial because it imposes a duty on the Attorney General to bring the suit and thus gives order to what might otherwise be extensive and duplicative litigation. The provision, however, is not as strong as the recommendation of the Code Commission of Virginia which provided for the mandamus to be heard before the Supreme Court.[71] The Assembly amended the proposal so that the mandamus will be heard by the court of record of the locality involved. This weakens the remedy because the question will be heard in the locality by a judge who might be subject to pressures from the citizenry. It will also make the process more involved as the case will no doubt be appealed to the Supreme Court. Any suit should be a simple determination of whether the locality has appropriated the required funds, and it should be decided initially and as quickly as possible by the highest court of the Commonwealth.

Even with their minor weaknesses, sections 1 and 2 of the Education Article form the framework for great advances in education in Virginia. This framework provides the vehicle whereby the Board of Education and

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> cretionary. If ministerial, the writ will lie; if discretionary, as is the case here, mandamus will not lie.

Id. at 328, 124 S.E.2d 233.

The Court held in *Griffin* that the act was discretionary under VA. CONST. art. IX, § 136 (1902). However, the Court stated that in situations such as that presented in Supervisors of Cumberland County v. Randolph, 89 Va. 614, 16 S.E. 722 (1893), the duty was ministerial and mandamus would lie. In that case the duty was to pay a certain sum on presentation of a coupon of a bond issued by Cumberland County. The amount was perspicuous and the court stated that the duty was "purely ministerial, viz., to levy a tax to pay them . . . ." *Id.* at 622, 16 S.E. at 724. The court also noted that mandamus was the only proper remedy "to enforce the right." *Id.*

The *Randolph* decision would seem to apply to the situation in *Griffin* since the county would have both a statutory and a constitutional duty to pay a sum certain.

67 Va. Acts of Assembly 1971, ch. 160, at —.

68 *See, e.g.*, Roberts v. Spray, 71 Ariz. 60, 223 P.2d 808 (1950); State *ex rel.* Randolph County v. Walden, 357 Mo. 167, 206 S.W.2d 979 (1947).

69 *See, e.g.*, Gherna v. State, 16 Ariz. 344, 146 P. 494 (1915); State *ex rel.* Clarke v. Harris, 74 Ore. 573, 144 P. 109 (1914).

70 *See* note 66 *supra*.

71 CODE COMM'N REPORT 157.

the Assembly can plan for the future on a state-wide basis with certain knowledge that once the cost is apportioned, the locality will provide its share. The framework is there, but the Assembly must use it. At its session in 1972, it must adopt a budget that will lessen the inequities between the localities by improving the schools with an inadequate educational program and requiring more local participation.

Compulsory Education

Compulsory education is provided for in section 3 of the Education Article, which states:

> The General Assembly shall provide for the compulsory elementary and secondary education of every eligible child of appropriate age, such eligibility and age to be determined by law. It shall ensure that textbooks are provided at no cost to each child attending public school whose parent or guardian is financially unable to furnish them.[72]

The Predecessor of Section 3

Section 138 of the 1902 Constitution provided that the General Assembly could "in its discretion, provide for the compulsory education of children of school age." [73] In order to implement this section, a compulsory education law applicable to all localities was enacted and remained in force[74] until

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[72] The free textbook provision of VA. CONST. art. VIII, § 3, is carried forward from Va. Const. art. IX, § 139 (1902).

[73] VA. CONST. art. IX, § 138 (1902).

Section 138, as originally adopted, provided as follows:

> The General Assembly may, in its discretion, provide for the compulsory education of children between the ages of eight and twelve years, except such as are weak in body or mind, or can read and write, or are attending private school, or are excused for cause by the district school trustees.

VA. CONST. art. IX, § 138 (1902). The restrictive provisions of this section prompted an amendment in 1920 in order to give the legislature more latitude in providing for compulsory education. During the 1922 Session, the compulsory education law was amended to apply to persons between the ages of 8 to 14 years, rather than 8 to 12. Va. Acts of Assembly 1922, ch. 381, at 641.

The first reference to compulsory education in Virginia is found in Article VIII, section 4, of the Constitution of 1869:

> The general assembly shall have power, after a full introduction of the public free school system, to make such laws as shall not permit parents and guardians to allow their children to grow up in ignorance and vagrancy.

[74] VA. CODE ANN. §§ 22-251 to -275 (1950) (repealed 1959).

1959.[75] The original statute[76] and its successors which provided that each child had to attend a public or private school or be tutored at home by a person qualified by the State Board of Education,[77] were held constitutional by the Virginia Supreme Court of Appeals.[78] However, in 1959, as a part of massive resistance, the original compulsory education statutes were repealed and replaced.[79] The 1959 law appeared to provide for compulsory education but, in effect, compulsory education became optional to both localities and parents. The statute applied only to localities in which the new section had been adopted by the governing body.[80] Upon adoption of the provision, the school board was directed to

75 The repeal of the compulsory education law was one of the first acts of the extra session of the General Assembly in 1959. Va. Acts of Assembly 1959, ch. 2, at 4.

76 Va. Acts of Assembly 1908, ch. 364, at 640.

77 VA. CODE ANN. § 22-251 (1950) (repealed 1959). The provision allowing for a private tutor qualified by the State Board of Education to serve in lieu of attendance at a public or private school was added in 1928. Va. Acts of Assembly 1928, ch. 471, at 1187, 1214.

78 Rice v. Commonwealth, 188 Va. 224, 49 S.E.2d 342 (1948). The Supreme Court of Appeals held that the first amendment to the United States Constitution was not applicable to compulsory school attendance. This proposition was later overruled, however. *See* McCollum v. Board of Education, 333 U.S. 203 (1948). *See generally* Sherbert v. Verner, 374 U.S. 398 (1963). The court in *Rice* also held that the Virginia constitutional protection of religious freedom "does not provide immunity from compliance with reasonable civil requirements imposed by the State." 188 Va. at 234, 49 S.E.2d at 347. This result is supported by the decisions of other states. *See* People v. Turner, 121 Cal. App. 2d 861, 263 P.2d 685 (Sup. Ct. 1953); Kansas v. Lowry, 191 Kan. 701, 383 P.2d 962 (1963); State *ex rel.* Shoreline School Dist. v. Superior Court, 55 Wash. 2d 177, 346 P.2d 999 (1959). Where there is no provision for qualification of home tutors, it has been held that home instruction can be defined as a "school." *See* Illinois v. Levisen, 404 Ill. 574, 90 N.E.2d 213 (1950).

However, the Supreme Court of Wisconsin has recently held that a compulsory education law as it applies to the Amish is unconstitutional as a violation of the free exercise clause of the First Amendment. State v. Yoder — Wis. 2d —, 182 N.W.2d 539 (1971). The majority and dissenting opinions are excellent discussions of the balancing of the state's versus the individual's interests. *See also* Note, *The Right Not to be Modern Men: The Amish and Compulsory Education*, 53 VA. L. REV. 925 (1967).

The Supreme Court of the United States has held that a state cannot compel public school attendance. The operation of private schools is a property right which is protected by the due process clause of the fourteenth amendment. Pierce v. Society of Sisters, 268 U.S. 510 (1925). The Court intimates that although a state can require and control education, there is one restriction:

> [The] rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.

Id. at 535.

79 VA. CODE ANN. §§ 22-275.1 to -275.25 (1964).

80 VA. CODE ANN. § 22-275.23 (1964) (amended 1968), provided that compulsory

> [e]xcuse from attendance at school any pupil whose parent, guardian or other person having custody of such pupil conscientiously objects to his attendance at such school as is available, when such fact is attested by the sworn statement of such parent, guardian or other person.[81]

In 1968, the General Assembly amended the compulsory education law so that it applied to all localities,[82] but retained the provision excusing children whose parents conscientiously objected to their attendance. The conscientious objection provision differed from the original statute in that it required the school board to excuse from attendance those "whose parents conscientiously object thereto" and thus deleted the sworn statement requirement.[83] Prior to the 1968 amendment, the Attorney General had ruled that once a sworn objection had been submitted to the school board pursuant to the old statute, there could be no prosecution for non-attendance.[84] The 1968 amendment deleted this requirement for a sworn statement.

The Commission on Constitutional Revision proposed an amendment to section 138 *requiring,* rather than permitting, the General Assembly to provide for compulsory education:

> The General Assembly shall provide by law for the compulsory education of every child of appropriate age and of sufficient mental and physical ability.[85]

The Commission thought that the Assembly would thus be required to maintain adequate compulsory education laws.[86] Here, as in section 1, the Commission failed to grasp the concept of self-execution and thus did not realize that the section they proposed, like its predecessor, section 138, had

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attendance laws were to be enforced "in those counties, cities and towns wherein this article is in force." VA. CODE ANN. § 22-275.24 (1964) (repealed 1968), provided that the article would be in force

> when it has been recommended by resolution of the county, city or town school board and duly adopted by the governing body of such county, city or town in the same manner as local ordinances are adopted.

81 VA. CODE ANN. § 22-275.4 (1964) (amended 1968).

82 Va. Acts of Assembly 1968, ch. 178, at 244, 247. VA. CODE ANN. § 22-275.3 (1969).

83 VA. CODE ANN. § 22-275.4 (1969).

84 OPS. ATTY. GEN. 229 (1962-63).

85 CCR REPORT 61.

86 *Id.* at 264.

a moral force only and that the Assembly could not be forced by the courts to enact legislation.[87]

The Drafting of Section 3

The General Assembly, believing that section 3, as proposed, would be self-executing,[88] amended that section even further in an attempt to remove the control of compulsory education from the courts as much as possible:[89]

> The General Assembly shall provide for the compulsory elementary and secondary education of every eligible child of appropriate age, such eligibility and age to be determined by law.[90]

The provision, as finally adopted, serves no useful purpose.[91] Section 3 creates no substantive rights in any authoritative body and its compromising language makes it ineffective even as a moral force.

The Assembly should have either deleted the section entirely or spelled out the compulsory education provision in the Constitution. The latter approach would have been unsatisfactory because provisions relating to

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[87] *See* notes 22-26 *supra*.

[88] Delegate Pope, Chairman of the House Committee on Education, in the report of that Committee to the Assembly on March 27, 1969, said that the Committee was uncertain as to the interpretation of the section proposed by the Commission on Constitutional Revision; but that a Committee amendment would insure that the Assembly, and not the courts, had exclusive authority to define the important terms of section 3.

In like manner, Delegate Mann stated in a debate concerning section 3 on March 27, 1969, that the House Committee on Education had inserted the words "elementary and secondary" to make it abundantly clear that compulsory education did not apply to the kindergarten level or, necessarily, to the community college level. In addition, *see* PROCEEDINGS OF THE SENATE 215-25.

[89] *Id.* Also note that the Senate Committee on Education proposed that the section read "may" rather than "shall." VA. SEN. JOURN. 126 (Extra Sess. 1969). However, an amendment changing the "may" to "shall" was successful by a vote of 23 to 16. *Id.* at 131.

Perhaps some of the debates were aimed at the federal courts. However, the Assembly should have realized that if a federal right were involved the Virginia Constitution could not thwart that right. *See* Griffin v. School Bd., 377 U.S. 218 (1964).

[90] VA. CONST. art. VIII, § 3.

[91] Nine state constitutions deal with the question of compulsory education. Four contain mandatory language that is not self-executing. N.M. CONST. art. XII, § 5; N.C. CONST. art. IX, § 3; OKLA. CONST. art. XIII, § 4; WYO. CONST. art. VII, § 9. Four others contain purely discretionary language. COLO. CONST. art. IX, § 11; DEL. CONST. art. X, § 1; IDAHO CONST. art. IX, § 9; NEV. CONST. art. IX, § 2. Only the Kentucky Constitution, which provides that there can be no compulsory education law, is self-executing. KY. CONST. art. IX, § 5.

compulsory education should be subject to periodic legislative review. Compulsory education is certainly beneficial, but it should be provided for by statute rather than in the Constitution.

On January 29, 1971, a juvenile court judge in the City of Richmond declared the compulsory education law unconstitutional as too vague to be enforced.[92] Even though the Assembly was in session when this decision was rendered, no bills were introduced to rectify the situation. It is true, as noted above, that section 3 has only moral force, but it is hoped that its moral force will be sufficient to encourage the Assembly to amend this provision in order to remedy the defect of vagueness.

Board of Education

Section 4 of the Education Article vests the general supervision of the public school system in a Board of Education composed of nine members to be appointed by the Governor subject to confirmation by the General Assembly.[93] The only change brought about by section 4 is an increase in the membership of the Board by two members.[94] The most important constitutional change regarding the Board of Education was brought about

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[92] Judge Kermit Rooke of the Juvenile and Domestic Relations Court of the City of Richmond handed down a three-page opinion in which, although he does not declare the provision unconstitutionally vague, he does state that it is too vague to be enforced. The language referred to by Judge Rooke is found in VA. CODE ANN. § 22-275.4 (Cum. Supp. 1970), which provides that children shall be excused if their parents conscientiously object to their attendance. The statute provides no further guidance. Because Judge Rooke cites no authorities, it is difficult to determine the reason for his decision. However, it is surmised that he relied on the vagueness doctrine as established in a series of United States Supreme Court cases. *See* Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. General Constr. Co., 269 U.S. 385 (1926); United States v. Cohen Grocery Co., 255 U.S. 81 (1921).

The Supreme Court held in United States v. Harris, 347 U.S. 612, 617 (1954), that

> [t]he constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

The Virginia Compulsory Education law clearly falls under such a standard. The law exempts those who conscientiously object to sending their children to school. The fact that the children are not in school indicates that their parents object seriously enough to keep them home. The standard for determining whether these objections are conscientious ones is impossible to ascertain.

[93] The text of VA. CONST. art. VIII, § 4 is set forth in the Appendix at 312 *infra*.

[94] *See* VA. CONST. art. IX, § 130 (1902). The text of the 1902 Constitution is set forth in the Appendix.

by the revision of the constitution in 1928.[95] Prior to 1928 the Board was more politically oriented. It was composed of the Governor, Attorney General, Superintendent of Public Instruction, who was popularly elected, and three other educators from the faculties of the state's universities and educational institutions.[96]

The powers and duties of the Board of Education, set forth in section 5 of the Education Article,[97] differs little in substance from those set out in Section 132 of the 1902 Constitution.[98] Both provide for the division of the Commonwealth into school divisions,[99] the approval of textbooks by the Board,[100] and the certification by the Board of lists of persons for division

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95 Va. Acts of Assembly 1928, ch. 204, at 636, 671.

96 VA. CONST. art. IX, § 130 (1902), provided as follows:

> The general supervision of the school system shall be vested in a State Board of Education, composed of the Governor, Attorney General, Superintendent of Public Instruction, and three experienced educators to be elected quadrennially by the Senate from a list of eligibles consisting of one from each of the faculties, and nominated by the respective boards, visitors or trustees, of the University of Virginia, the Virginia Military Institute, the Virginia Polytechnic Institute, the State Female Normal School at Farmville, the School for the Deaf and Blind, and also of the College of William and Mary, so long as the State continues its annual appropriation to the last named institution.

This provision was significant in that it provided for the first time that the majority of the members of the Board of Education consist of educators. VA. CONST. art. VIII, § 2 (1869), had theretofore provided as follows:

> There shall be a board of education, composed of the governor, superintendent of public instruction, and attorney-general, which shall appoint and have power to remove, for cause, and upon notice to the incumbents, subject to confirmation by the senate, all county superintendents of public free schools. This board shall have, regulated by law, the management and investment of all school funds, and such supervision of schools of higher grades as the law shall provide.

97 The text of VA. CONST. art. VIII, § 5 is set forth in the Appendix at 313 *infra.*

98 The text of VA. CONST. art. IX, § 132 (1902) is set forth in the Appendix at 313 *infra.*

99 *See* notes 127-31 *infra.*

100 VA. CONST. art. VIII, § 5(d). This provision differs from its predecessor provision which was the fourth numbered paragraph of VA. CONST. art. IX, § 132 (1902), which provided that the Board of Education had a mandatory duty to select "textbooks and educational appliances for use in the schools of the state." Section 5(d) is not stated in such mandatory language, but rather provides that the board shall have the authority to approve textbooks and instructional aids. The deletion of the mandatory language of section 132 is a step toward providing the localities with more complete control over the selection of textbooks and instructional aids. VA. CONST. art. VIII, § 6 (1869), provided as follows:

> The Board of Education shall provide for uniformity of textbooks, and the furnishing of school houses with such apparatus and library as may be necessary, under such regulations as may be provided by law.

This provision which required uniformity of textbooks throughout the Commonwealth

superintendents.[101] However, section 5 has two new provisions, one of which provides for a mandatory report to the Governor and General Assembly concerning the needs of education in Virginia and identifying the schools that fail to meet the minimum quality standards of section 2.[102] In addition, the Board is given control over the public school system subject only to review by the General Assembly.[103]

Section 5 of the Education Article is a poor example of constitutional draftsmanship. The Commission on Constitutional Revision noted early in its report:

> A constitution embodies fundamental law. It follows that a constitution is not a code of laws and that unnecessary detail, not touching on fundamental matters, ought to be left to the statute books.[104]

However, both the Commission[105] and the General Assembly violated this

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was softened somewhat by the convention of 1902 which formulated the fourth paragraph of section 132 as follows:

> It shall select textbooks and educational appliances for use in the schools of the State, exercising such discretion as it may see fit in the selection of books suitable for the schools in the cities and counties respectively. . . .

101 VA. CONST. art. VIII, § 5(c). This provision has remained unchanged since the revision of VA. CONST. art. IX, § 132 (1902), in 1928. Prior to that time the Board appointed superintendents subject to Senate confirmation.

102 VA. CONST. art. VIII, § 5(b).

103 VA. CONST. art. VIII, § 5(e). This provision is similar to, but broader than, the third paragraph of VA. CONST. art. IX, § 132 (1902).

104 CCR REPORT 9.

105 The Commission's proposals as to the wording of section 5 of the Education Article are set out in its report at page 62:

> The powers and duties of the State Board of Education shall be as follows:
>
> (a) It shall divide the Commonwealth into school divisions of such geographical area and school-age population as will promote the realization of the prescribed standards of quality, and shall periodically review the adequacy of existing school divisions for this purpose. No county or city shall be divided in the formation of such divisions.
>
> (b) It shall make annual reports to the Governor concerning the condition and needs of public education in the Commonwealth, and shall in such report identify any school divisions which have failed to establish and maintain schools meeting the prescribed standards of quality.
>
> (c) It shall certify to the school board of each division a list of persons having reasonable business and academic qualifications for the office of division superintendent of schools, one of whom shall be selected to fill the post by the division school boards. In the event a division school board fails to select a division superintendent within the time prescribed by law, the State Board of Education shall appoint him.

principle in drafting section 5 of the Education Article. If the Assembly had approved the language of section 5(a) as proposed by the Commission on Constitutional Revision, which gave the Board of Education exclusive authority to divide the Commonwealth into school divisions, it would have had constitutional stature by isolating the division making process from politics.[106] However, as finally drafted, section 5(a) might well have been deleted, the Assembly having plenary power to make provision for school divisions.[107]

Section 5(b), which provides for annual reports to the Governor concerning the needs of public education in the Commonwealth, is helpful but not necessary in implementing section 2 of the Education Article.[108] However, the remaining subdivisions of section 5 are unnecessary as constitutional provisions and, as the Commission on Constitutional Revision suggested, should have been "left to the statute books."[109]

(d) It shall manage and invest the Literary Fund under regulations prescribed by law.

(e) It shall have authority to approve textbooks and instructional aids and materials for use in courses in the public schools of the Commonwealth.

(f) Subject to the ultimate authority of the General Assembly, the Board shall have primary responsibility and authority for effectuating the educational policy set forth in this Article, and, pursuant thereto, it shall have such other powers and duties as may be prescribed by law.

106 *See* notes 122-126 *infra.*

107 Development Authority v. Coyner, 207 Va. 351, 355, 150 S.E.2d 87, 90 (1966); Strawberry Hill Land Co. v. Starbuck, 124 Va. 71, 77, 97 S.E. 364, 365 (1918).

108 *See* notes 62-66 *supra.*

109 Neither the Report of the Commission on Constitutional Revision nor the House and Senate Debates reveal any reason for retaining the unnecessary language of section 5. Senators Turk and Pearson offered an amendment to delete all of section 5 except for a provision that the Board of Education would have such powers and duties as prescribed by the General Assembly. Senator Andrews asked for the rejection of the amendment, asserting that the importance of the subject matter necessitated the inclusion of the specific powers of the Board in the constitution. This argument is somewhat weakened by the fact that section 5 gives the Board no significant power.

Another argument advanced in opposition to the proposed amendment was "that similar powers are stated in the Constitutions of most of the states of the Union." PROCEEDINGS OF THE SENATE 229-30. In fact, most state constitutions which deal with the powers of a Board of Education provide that such powers shall be "as prescribed by law." Such was the proposal of Senators Turk and Pearson. *See* ARIZ. CONST. art. XI, § 3; CAL. CONST. art. IX, § 7; COLO. CONST. art. IX, § 1; LA. CONST. art. XII, § 4; MICH. CONST. art. XI, § 6; MISS. CONST. art. VIII, § 203; MO. CONST. art. IX, § 2(b); NEB. CONST. art. VII, § 15; OHIO CONST. art. VI, § 4; OKLA. CONST. art. XIII, § 5; S.C. CONST. art. XI, § 2; TEX. CONST. art. VIII, § 8; FLA. CONST. art. 9, § 2; HAWAII CONST. art. IX, § 3; GA. CONST. art. VIII, § 2, ¶ 1; N.C. CONST. art. IX, § 5.

CONSOLIDATION OF SCHOOL DIVISIONS

Two sections of the new Education Article affect consolidation of school divisions. Section 5(a) of the Education Article provides as follows:

> Subject to such criteria and conditions as the General Assembly may prescribe, the Board shall divide the Commonwealth into school divisions of such geographical area and school-age population as will promote the realization of the prescribed standards of quality, and shall periodically review the adequacy of existing school divisions for this purpose.

Section 7 provides:

> The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law.

The Predecessors of Sections 5(a) and 7

The predecessors of these sections are sections 132 and 133 of the Constitution of 1902.[110] The latter sections were confusing as to the consolidation of school divisions because they were the result of patchwork changes. Originally, section 132 set out the authority of the Board of Education to draw school division lines:

> It may, in its discretion, divide the State into appropriate school divisions, comprising not less than one county or city each, but no county or city shall be divided in the formation of such divisions.[111]

The debates of 1901-02 make it clear that the determination of the school divisions by the State Board of Education was to be unhampered by the Assembly. Moreover, the division lines could not only be initially drawn but also revised by the Board from time to time.[112]

The general revision of the Constitution in 1928 removed the element of discretion in the drawing of school division lines and directed that the Board "shall" perform this function. The 1928 revisions also amended sec-

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110 The text of Va. Const. (1902), §§ 132 and 133 are set forth in the appendix at 313 *infra*.

111 VA. CONST. art. IX, § 132 (1902).

112 DEBATES OF 1901-02 at 1130.

tion 133,[113] directing that the supervision of the schools in each *county* was to be vested in a school board. In 1949 the second paragraph of section 133 was added, granting to the Assembly the discretionary power to provide for the consolidation of school divisions and school boards.[114]

The result of these amendments was that both the State Board of Education and the General Assembly had the power to consolidate two or more localities into one school division,[115] but only the Assembly had the power to consolidate school boards.

In 1928 the Assembly directed by statute that the State Board of Education "shall" divide the state into school divisions and that the divisions would be made in the "discretion" of the Board.[116] This basic statute which gave the Board power to divide the state into school divisions remained unchanged even after the 1949 amendment.

In 1954 the Assembly established statutory provisions[117] for the consolidation of school boards. These statutes required the consent of the State Board of Education, the local school boards and local governing bodies of all localities affected before any consolidation could be achieved.[118]

To date, the State Board of Education has consolidated eighteen localities into nine school divisions.[119] However, these consolidations are, for the most part, ineffective since the local school boards and governing bodies have refused to permit consolidation of the school boards.[120] Because of section 133, there is only one superintendent for each division; but there are two

113 Va. Acts of Assembly 1928, ch. 46, at 287.

114 Va. Acts of Assembly 1948, ch. 555, at 1330. The change was probably a compromise resulting from the Virginia Education Comission Report of 1944, which proposed that the State Board of Education be authorized to create division school boards which could serve two or more localities. J. BUCK, THE DEVELOPMENT OF PUBLIC SCHOOLS IN VIRGINIA 1607-1952, at 474 (1952).

115 Although VA. CONST. art. IX, §§ 132-33 (1902), appear to have given equal power to both the State Board of Education and the General Assembly, the latter would have had the power of final determination on the question of consolidation since section 133, which gives the Assembly the ultimate power, was enacted subsequent to section 132. If this were not the case, section 133 would be of no effect.

116 Va. Acts of Assembly 1928, ch. 189, at 423.

117 Va. Acts of Assembly 1954, ch. 391, at 484.

118 VA. CODE ANN. § 22-100.2 (1969).

119 The following localities have been consolidated into single school divisions: King & Queen County and King William County; Madison County and Green County; Williamsburg and James City County; Essex County and Middlesex County; Greensville County and Emporia; Halifax County and South Boston; Rappahannock County and Warren County; Roanoke County and Salem; Bedford County and Bedford City.

120 CCR REPORT 266.

school boards, two budgets and two physical plants. Therefore, little, if anything, has been accomplished by the consolidations.[121]

Recognizing this anomalous situation, the Commission proposed two important changes. First, it proposed to delete the provision in section 133 which gave concurrent power to the Assembly to provide for consolidation and which required division lines to be drawn "to promote the realization" of the standards of quality established pursuant to section 2. The Assembly by approving the standards of quality would thus have maintained a degree of control over the Board's exercise of power to consolidate.[122] Second, the Commission proposed to further amend section 133 to provide for only one school board per division, rather than one per county.[123] This would allow realistic fiscal consolidation rather than the mere formal consolidation permissible under sections 132 and 133.[124] The Commission favored retention of the prohibition against dividing a locality in the formation of a school division.[125]

These proposals would have resulted in the Board of Education determining all questions of consolidation. Once that determination was made, only one school board per division would be constitutionally permissible.[126] The strength of the proposal lay in the balance between the power of the Assembly and that of the Board of Education. The decision with regard to consolidation of school divisions is one which ought to be

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121 *Id.*

122 The Commission proposed that section 5(a) of the Education Article read as follows:

> (a) It [the Board of Education] shall divide the Commonwealth in school divisions of such geographical area and school-age population as will promote the realization of the prescribed standards of quality, and shall periodically review the adequacy of existing school divisions for this purpose. No county or city shall be divided in the formation of such divisions.

Id. at 62.

123 CCR REPORT 63. Section 7 was proposed as follows:

> The supervision of schools in each school division shall be vested in a school board, to be composed of trustees selected in the manner, for the term, and to the number provided by law.

124 CCR REPORT 266.

125 The Commission was concerned about the situation where artificial county lines might place the vast portion of a county on one side of a mountain range and a very small part on the other. The school would naturally be built on the side of the mountain with the greatest population and often a school in an adjoining county would be much closer and more convenient to a pupil than the one in his own county. However, the Commission felt that it would not be necessary ever to divide a county so as to place a part of one county in a school division with another county because the few pupils involved could be handled on a transfer basis. CCR REPORT 266.

126 *See* proposal 7 as set forth in CCR REPORT 63.

made by experts without local political pressure. At the same time, the political body, the General Assembly, should have some control. However, such control could have been maintained through the Assembly's ability to define the standards of quality established in the Commission's proposal.

The Drafting of Section 5(a)

The Commission's proposed section 7 providing for one board per division rather than per locality was approved by the General Assembly. However, the Commission's proposed section 5(a) was amended by the House Committee on Education to provide that the General Assembly may prescribe the criteria for the consolidation of school divisions. The Committee also deleted the prohibition against splitting a locality in the formation of school divisions and left section 7 unchanged.[127] The Committee explained that the provision for legislative prescription of such criteria was added to insure that the Assembly retained some control over the consolidation. The Committee further stated that such criteria might include a prohibition against dividing a locality and possibly the requirement of a referendum before consolidation.[128] Because of this explanation, no amendment was added to require such a referendum.

The Senate Committee on Education proposed the same amendments as the House for basically the same reasons.[129] However, an amendment to section 5(a) requiring a referendum before consolidation was adopted on the floor.[130] This amendment was finally rejected after adoption of the provision allowing the General Assembly to establish the "criteria" and "conditions" thereby insuring that a referendum could be required.[131]

Section 5(a) as adopted is an improvement over sections 132 and 133 of the 1902 Constitution only because it eliminates confusion. The new provision gives the Assembly virtually complete control over consolidation and could easily have been deleted.[132]

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127 VA. HOUSE JOURN. 160-61 (Extra Sess. 1969).

128 On March 27, 1969, Delegate Pope, while giving the report of the Committee on Education, stated that the prohibition against dividing localities had been deleted because the term "criteria" had been added to section 5(a). Later that same day Delegate Smith, who was chairman of the sub-committee responsible for section 5(a), conversed with Delegate Carneal and stated specifically that the term "criteria" was designed to include the requirement of a referendum if the General Assembly so provided.

129 VA. SEN. JOURN. 126 (1969).

130 *Id.* at 132. *See also* PROCEEDINGS OF THE SENATE 228-35.

131 *See* PROCEEDINGS OF THE SENATE 521-22.

132 Virginia is one of only seven states which provide in their constitution for con-

The General Assembly at its 1971 session avoided implementing the "criteria and conditions" provision, preferring to create a commission to study the question and propose the criteria and conditions to the 1972 legislature for statutory enactment.[133] The Code Commission proposed realistic conditions and criteria which would have allowed the Board of Education to make meaningful consolidations.[134] The House Committee on Education, however, rejected the Commission's Report on this section and attempted to draw certain school division lines itself and thereby prohibit the State Board from drawing any others. The Attorney General ruled that such action was an unconstitutional attempt by the legislature to divest the Board of Education of its power to draw school division lines.[135] While the General Assembly may establish criteria and conditions pursuant to which the Board is required to act, it may not divest the Board of a power which only the Board is authorized to exercise.[136]

In response to the Attorney General's opinion, the Assembly achieved the same result by imposing stringent conditions upon consolidations by the Board, including that no school division shall be composed of more than one locality.[137] It is hoped that the Assembly in 1972 will establish realistic criteria which will enable the Board of Education to make the necessary consolidations.

SUPERINTENDENT OF PUBLIC INSTRUCTION

Section 6 of the Education Article continues the position of Superintendent of Public Instruction. The office is to be filled by appointment of the Governor for a term coincident with that of the Governor. It further provides that the duties of the Superintendent of Public Instruction shall be as provided by law and that the Assembly may alter the method of selecting the Superintendent as well as his term.[138] Section 6 is identical in sub-

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solidation of localities into school districts. Florida, Georgia and Utah provide for local autonomy in the area of consolidation. *See* FLA. CONST. art. IX, § 4; GA. CONST. art. VIII, § V, ¶ 1; UTAH CONST. art. X, § 5. Three states provide for consolidation by the legislature. *See* CAL. CONST. art. VII, § 14; MD. CONST. art. VIII, § 150; W. VA. CONST. art. XII, § 4.

133 Va. Acts of Assembly 1971, ch. 225, at —.

134 CODE COMM'N REPORT 158-59.

135 OPS. ATTY. GEN. — (Feb. 3, 1971).

136 *Id.*

137 Va. Acts of Assembly 1971, ch. 225, at —. *See* amendments to VA. CODE ANN. § 22-30 and § 22-43 contained in the Act which apply to the continuation of special town school districts.

138 The text of Va. Const. art. VIII, § 6, is set forth in the Appendix at 314 *infra*.

stance to its predecessor, section 131.[139] The important change in this section, as in section 4, occurred during the general revision of the Constitution in 1928.[140] Prior to that date, the Superintendent of Public Instruction, whose duties were prescribed by the State Board of Education, was elected by the people and served as an ex-officio president of the Board.[141] In 1928 he and the entire State Board of Education were made gubernatorial appointees. Also, his duties were prescribed by the Assembly rather than by the Board.

It was proposed to both the Commission on Constitutional Revision[142] and the General Assembly[143] that this section be amended to provide that the Board of Education appoint the Superintendent of Public Instruction to serve as its executive officer, but neither body approved the change.[144] Such a change would have three major advantages. First, it would eliminate possible loss of effectiveness in the event of disagreement between the Board and the Superintendent; second, it would give the Board, which is charged with the duty of effectuating the educational policy of the Commonwealth, more complete control over that policy and its implementation; finally, it would remove the Superintendent further from political pressures. The Commission on Constitutional Revision proposed no change because the Assembly had the power to make the change under section 131. However, the Commission did note the advantages of such a change.[145]

Section 6 merely establishes the position of Superintendent of Public Instruction. The selection, term and duties are left to the General Assembly. The office could be made meaningless by the Assembly and thus, in effect, eliminated. Since this was the case, there was no reason for retaining the section. It had a substantive purpose in the Constitution when the Superintendent was elected by the people and served on the State Board of Education, but when that was altered in 1928, the effectiveness of the

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139 The text of Va. Const. (1902), art. IX, § 131, is set forth in the Appendix at 314 *infra*.

140 Va. Acts of Assembly 1928, ch. 205, at 700.

141 VA. CONST. §§ 130, 131 (1902) (Pollard's Code 1904, at ccxliii-ccxliv). The Constitution of 1869 provided that the Superintendent of Public Instruction would be elected by the General Assembly and also serve on the Board of Education. VA. CONST. art. VIII, § 1 (1869).

142 The proposal that the Superintendent of Public Instruction be appointed by the Board of Education was suggested by both the Virginia Education Association and the Virginia Congress of Parents and Teachers. CCR REPORT 494, 516.

143 VA. HOUSE JOURN. 164-65 (Extra Sess. 1969).

144 *Id.* at 165; CCR REPORT 267.

145 CCR REPORT 267.

section was destroyed. The only conceivable reason for retaining the section after the 1928 revision would be to give constitutional stature to the office.[146]

In lieu of deleting the section, or at least the provisions relating to the manner of selecting the Superintendent, the Assembly should have provided that the Board of Education select the Superintendent. Although the Commission on Constitutional Revision emphasized the advantages of such a change, the Assembly failed to adopt this amendment, noting only that such change could deprive the Governor of his appointive power[147] and that the change should be made by statute.[148]

THE LITERARY FUND

Section 8 of the Education Article provides for the continuation of the Literary Fund provision of section 134 of the Constitution of 1902.[149]

146 Such a section might well read as follows:

> There shall be a Superintendent of Public Instruction who shall be an experienced educator and whose selection, term and duties shall be as prescribed by law.

147 *See* Debates of the House of Delegates (March 27, 1969). This point was made primarily by Delegates Mason and Slaughter who noted in addition that since the Governor is able to appoint all other department heads, the Department of Education should not be excluded. It was pointed out by Mrs. Galland that Virginia was one of only four states that provided for the Superintendent of Public Instruction to be appointed by the Governor.

There are 31 states that provide for the appointment of the Superintendent of Public Instruction or a similar office. ALA. CODE tit. 52, § 102 (1958); ALASKA STAT. tit. 14, § 14.07.100 (1962); ARIZ. CONST. art. XI, § 3; ARK. STAT. ANN. § 80-118 (1947); COLO. CONST. art. IX, § 1; CONN. STAT. ANN. tit. 10, § 10-1 (1958); DEL. CODE ANN. tit. 14, § 107 (1953); HAWAII CONST. art. IX, § 3; IOWA CONST. art. IX, § 6; KAN. CONST. art. VI, § 4; ME. REV. STAT. ANN. tit. 20, § 101 (1964); MD. CODE ANN. tit. 77, § 23 (1969); MASS. ANN. LAWS ch. 15, § 1F (1966); MICH. CONST. art. VIII, § 3; MINN. STAT. ANN. § 121.08 (1969); MO. CONST. art. IX, § 2(b); NEB. CONST. art. VII, § 16; NEV. CONST. art. XI, § 1; N.J. STAT. ANN. § 18A:7-1 (1964); N.M. CONST. art. XII, § 6; N.Y. EDUC. LAW § 2204 (1970); N.C. GEN. STAT. § 115-55 (1966); OHIO CONST. art. VI, § 4; OKLA. STAT. ANN. tit. 70, § 4-6 (1966); PA. CONST. art. IV, § 8; R.I. GEN. LAWS § 16-2-9 (1956); TENN. CODE ANN. § 49-103 (1966); UTAH CONST. art. X, § 8; VT. STAT. ANN. ch. 7, § 301 (1959); WASH. REV. CODE ANN. § 28A.58.137 (1970); W. VA. CONST. art. XII, § 2.

There are 18 states that provide for the election of the Superintendent of Public Instruction or a similar office: CAL. CONST. art. IX, § 2; FLA. CONST. art. IX, § 5 and art. XII, § 2; GA. CONST. § 2-6701; IDAHO CONST. art. IV, § 2; ILL. STAT. ANN. ch. 122, § 2-1 (1962); IND. CONST. art. VIII, § 8; KY. CONST. § 91; LA. CONST. art. XII, § 5; MISS. CONST. § 202; MONT. CONST. art. XVI, § 5; N.H. REV. STAT. ANN. § 197:12 (1964); N.D. CONST. art. VIII, § 150; ORE. CONST. art. VIII, § 1; S.C. CONST. art. XI, § 1; S.D. CONST. art. IX, § 4; TEX. STAT. ANN. ch. 10, art. 2655 (1965); WIS. CONST. art. X, § 1; WYO. CONST. art. IV, § 11.

148 Debates of the House of Delegates (March 27, 1969) (remarks of Delegate Dudley of Lynchburg).

149 VA. CONST. art. VIII, § 8, and VA. CONST. art. IX, § 134 (1902), are both set forth in the Appendix at 315 *infra*.

Development of the Literary Fund

The Literary Fund, established in 1810,[150] was one of the first concrete steps toward public education in Virginia. In its early years it was an ineffective instrument to encourage a statewide system of education in the Commonwealth.[151] In 1869 the Fund gained constitutional stature with control of the Fund being shifted from the Board of the Literary Fund to the State Board of Education.[152] No substantive changes were made in the section in 1902,[153] but section 135 was added providing that the interest from the Fund was to be applied to the schools of the Commonwealth.[154] From its inception until 1906, the Literary Fund was invested with only the interest used for education; the principal was never touched. In 1906 the Assembly authorized local school boards to borrow money from the Literary Fund for school construction.[155] With this act, the Literary Fund took on the broader character which it has today.

Although the constitutional revisions of 1928 did not change section 134,

150 Va. Acts of Assembly 1810, ch. XIV, at 15.

151 The Fund began with little or no funds, and therefore, was inconsequential for the first few years. The Second Annual Report of the Literary Fund reported assets of only $21,705.40. W. MADDOX, THE FREE SCHOOL IDEA IN VIRGINIA BEFORE THE CIVIL WAR 50 (1918) [hereinafter cited as MADDOX].

In 1816 the Federal Government repaid a loan made by Virginia during the War of 1812 and the Fund was increased by $1,210,550. J. BUCK, THE DEVELOPMENT OF PUBLIC SCHOOLS IN VIRGINIA, 1607-1952 at 29 (1952) [hereinafter cited as BUCK]. This early Fund was administered by a board consisting of the Governor, Lieutenant Governor, Attorney General, Treasurer and President of the Court of Appeals and was to be used to provide education for the poor under indefinite mandates established by the Assembly of 1811. Va. Acts of Assembly 1811, ch. VIII, at 8; MADDOX 51-52. In 1818, the Fund was used as it was again in 1829 to encourage localities to establish a system of free public schools by paying a part of the cost of the system. Va. Acts of Assembly 1818, ch. XI, at 11; Va. Acts of Assembly 1829, ch. 14, at 13. The fact that both acts failed to accomplish their objectives is evidenced by the fact that by 1846 only six counties and towns out of a possible one hundred and ten developed district school systems. BUCK 40.

For discussions of the Literary Fund and its impact on education in Virginia prior to the Civil War, *see* MADDOX 42-104; BUCK 25-64.

152 VA. CONST. art. VIII, § 7 (1869), provided as follows:

> The General Assembly shall set apart as a permanent and a perpetual literary fund, the present literary funds of the State, the proceeds of all public lands donated by Congress for public school purposes, of all escheated property, of all waste and unappropriated lands, of all property accruing to the state by forfeitures, and all fines collected for offenses committed against the state, and such other sums as the General Assembly may appropriate.

153 VA. CONST. art. IX, § 134 (1902).

154 VA. CONST. art. IX, § 135 (1902).

155 Va. Acts of Assembly 1906, ch. 252, at 446.

these revisions did include the addition of section 115a which affected the borrowing power of counties. Section 115a provided that no debt could be contacted on behalf of any county or any county school board without a vote of the people.[156] Less than two years later the Supreme Court of Appeals held in *Board of Supervisors v. Cox*,[157] that loans made by the Literary Fund were not within the prohibition of section 115a and thus were permissible without a vote of the people.[158]

In 1944 section 134 was amended to provide that any amount in excess of ten million dollars could be transferred from the Fund for other school purposes, including the Teacher's Retirement Fund.[159] Even though this amendment was designed primarily to bolster the Teacher's Retirement Fund, it became more useful later.

In 1947, the General Assembly, seeking to extend the *Cox* case, provided for the Virginia Supplemental Retirement System to purchase the bonds of the various localities which were held by the Literary Fund.[160] The Literary Fund could then lend the money thus acquired from the Retirement System to other localities, thereby permitting an increased flow of funds to the

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156 VA. CONST. art. VII, § 115a (1902), as amended in 1928, provided as follows:

> No debt shall be contracted by any county, or by or on behalf of any school board of any county, or by or on behalf of any school district in any county, except in pursuance of authority conferred by the general assembly by general law; and the general assembly shall not authorize any county, or any district of any county, or any school board of any county, or any school district in any county, to contract any debt except to meet casual deficits in the revenue, a debt created in anticipation of the collection of the revenue of the said county, board or district for the then current year, or to redeem a previous liability, unless in the general law authorizing the same provision be made for the submission to the qualified voters of the proper county or district, for approval or rejection, by a majority vote of the qualified voters voting in an election, on the question of contracting such debt; and such approval shall be a prerequisite to contracting such debt. No script, certificate or other evidence of county or district indebtedness shall be issued except for such debts as are expressly authorized in this Constitution or by the laws made in pursuance thereof.

Va. Acts of Assembly 1928, ch. 204, at 664-65.

The Constitution of 1902 as initially adopted provided that a city or town could contract debts without a vote of the people up to 18% of the assessed valuation of the real estate within their bounds. Va. Const. art. VIII, § 127 (1902). There was no such limitation placed on counties until 1928. Thus, after 1928 a city or town could issue bonds without a vote of the people, but the counties could not.

157 155 Va. 687, 156 S.E. 755 (1931).

158 *Id.* at 700, 156 S.E. at 759.

159 Va. Acts of Assembly 1944, ch. 408, at 798-99.

160 Va. Acts of Assembly 1946, ch. 309, at 522; Va. Acts of Assembly 1947, ch. 27, at 68.

counties without a vote of the people. The Supreme Court of Appeals, however, in *Almond v. Gilmer*[161] held the system unconstitutional. The court, strictly applying *Cox,* stated that the Retirement System funds could not take on the character of the Literary Fund exemption from section 115a by merely flowing through the Fund, nor could the Literary Fund interest be paid to the Retirement System.

> [W]e are constrained to conclude that when the actual literary fund has been exhausted by loans or use of such funds, it may not then be employed as a conduit or outlet, a mere banking house or brokerage institution, through which funds of the retirement system may be passed as if they were literary funds to the county school boards and the prohibition of sec. 115–a so circumvented and avoided.[162]

This case was expressly overruled by a constitutional amendment to section 115a in 1958 providing that counties could borrow directly from the Virginia Supplemental Retirement System or its successor without a vote of the people.[163] This gave the counties an added source from which to borrow money without a vote,[164] but it did not affect the ruling in *Almond* that the Literary Fund could not borrow money.

The Virginia Public School Authority

Since the Literary Fund could only lend its money one time, it could not, therefore, be used as a brokerage house by which interest rates for a number of localities could be lowered. To achieve lower interest rates for a number of localities, a separate governmental authority had to be created and funded by the Literary Fund. In 1962 the Virginia Public School Authority (the "Authority")[165] was created. The Act creating the Authority

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161 188 Va. 1, 49 S.E.2d 431 (1948).

162 *Id.* at 17, 49 S.E.2d at 440. The court continued as follows:

> Nor can the reserve of the retirement system be loaned through and as literary funds to county school boards, and the interest required by sec. 135 to be paid into the literary fund when its principal is invested, diverted and paid to a fund distinctly different in object and purpose.

163 Va. Acts of Assembly 1958, ch. 643, at 1087. The same amendment was approved by the Assembly in 1952 and in 1954, but was rejected by the voters. Va. Acts of Assembly 1954, ch. 711, at 1054.

164 In fact a large amount of the borrowing by the counties in Virginia is done from the Literary Fund or the Virginia Supplemental Retirement System. *See* tables in CCR REPORT 250.

165 Va. Acts of Assembly 1962, ch. 194, at 287. The Act was upheld on all pertinent points by the Supreme Court of Appeals. Button v. Day, 203 Va. 687, 127 S.E.2d 122 (1962).

provided that the principal in the Literary Fund in excess of ten million dollars be transferred twice each year to the Authority.[166] The original transfer amounted to $51,025,704.[167]

Additional fundings have been accomplished by transferring to the Authority the notes of the various localities which were previously held by the Literary Fund.[168] With the aid of such funds, the Authority has been able to issue bonds of its own, pledging the income from the bonds it purchases with the proceeds of the bonds and the income from the notes received from the Literary Fund.[169] Since both the notes received from the Literary Fund and the bonds purchased by the Authority have the full faith and credit of the various localities pledged behind them, a favorable interest rate is easily obtained. This favorable interest rate can then be passed on to a locality which could not otherwise have obtained such a rate.[170]

Since its creation in 1962, the Authority has issued only $35,000,000 in bonds, even though on June 30, 1970, the Authority held over eighty-one million dollars in notes transferred to it by the Literary Fund. Of the $35,000,000 in proceeds, only $27,500,000 has been used to purchase school bonds. Moreover, the school bonds so purchased have aided only three localities: the County of Fairfax and the cities of Chesapeake and Virginia Beach.[171] Thus, to date, the Virginia Public School Authority has either not achieved its purpose or there is little or no demand for the funds. Although the recent extraordinary increase in interest rates has certainly affected municipal borrowing,[172] this situation existed prior to the increase.

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166 VA. CODE ANN. § 22-29.15 (1969).

167 REPORT OF THE TREASURER OF VIRGINIA FOR THE FISCAL YEAR ENDED JUNE 30, 1970, at 8 [hereinafter cited as TREASURER'S REPORT].

168 Although these transfers generally consist of notes, the statute does not so require. VA. CODE ANN. § 22-29.15 (1969). For example, in the fiscal year 1969-70, notes valued at $10,210,990 and $211.76 in cash were transferred to the Authority. ANNUAL REPORT OF THE VA. SUPERINTENDENT OF PUBLIC INSTRUCTION 203 (1969-70).

169 VA. CODE ANN. § 22-29.8 (1969). This procedure has been implemented in the bond resolutions adopted by the Authority. Virginia Public School Authority Bond Resolution 11 (May 21, 1963).

170 Indeed, the Act requires that the Chairman of the Board of Supervisors certify that, based on current data, the purchase of the county's bonds "will result in a lower financing cost to the borrower than the sale of such local school bonds in the open market . . . ." VA. CODE ANN. § 22-29.6 (1969).

171 TREASURER'S REPORT 8, 44-45.

172 In addition to the effect of the high interest rates themselves, many localities were legally unable to issue bonds that had already been approved by the voters. After the previous ceiling on the interest rate of 6% was removed in 1970, the Supreme Court

The primary reason for the apparent lack of success of the Authority is that any loan obtained from the Authority must be approved by the voters of the borrowing county. Between June 30, 1969, and June 30, 1970, thirty-two counties borrowed a total of $16.6 million from the Literary Fund.[173] During this same period, the Authority made no loans to counties.[174] The Virginia Supplemental Retirement System also purchased a number of school bonds from counties even though such a sale by the counties is often at a higher rate than would be available from the Authority.[175] The major reason for this disparity is that loans from neither the Literary Fund nor the Retirement System have to be approved by the voters, while loans from the Authority do. Thus, many localities have effectively avoided the voter approval requirement of section 115a at the expense of a higher interest rate.[176]

The Revision of The Literary Fund

The revisions of the Literary Fund provision in section 8 of the Education Article were intended to facilitate school financing by means of the Literary Fund and the Authority. The amendments are threefold. First, the Literary Fund itself can now borrow money. This, combined with the revision of section 115a of the Constitution of 1902 (now section 10 of Article VII) make it explicit that loans from the Literary Fund and other designated agencies such as the Public School Authority do not have to be approved by the voters.[177] These revisions, taken together, overrule all aspects of *Almond v. Gilmer*. The Literary Fund now can not only issue bonds to localities without a vote, but can also serve as a banking institution similar to the Authority.

of Appeals held that bonds approved by the voters before 1970 could not be sold at interest rates above 6% without again being submitted to the people. Miller v. Ayres, 211 Va. 69, 175 S.E.2d 253 (1970). This decision affected some $124,025,000 in school bonds, although there was no indication these bonds would have been sold to the Authority. *See* Brief for Petitioner, at Appendix A, Miller v. Ayres, 211 Va. 69, 175 S.E.2d 253 (1970).

173 TREASURER'S REPORT 18-19.

174 *Id.* at 44-45.

175 CCR REPORT 243.

176 *Id.*

177 VA. CONST. art. VII, § 10(b), provides, with regard to county debt, that the following bonds do not have to be approved by the voters:

> [B]onds issued, with the consent of the school board and the governing body of the county, by or on behalf of a county or district thereof for capital projects for school purposes and sold to the Literary Fund, the Virginia Supplemental Retirement System, or other state agency prescribed by law. . . .

The second major change in the section is the increase in the amount that must be kept in the Fund from ten to eighty million dollars. Finally, the new section states that the principal of the Literary Fund shall include all assets of the Fund held by other authorities but repayable to the Literary Fund. Thus, the bonds transferred to the Authority[178] are considered assets of the Fund. This negates in large part the increase in the amount that must be kept in the Fund.

The principal advantage of the new section is that, coupled with section 10 of Article VII,[179] it will enable a county to float its school bonds without a vote,[180] and also obtain a lower interest rate using the approach employed by the Authority.[181] The lower interest rate, the lack of the voting requirement, and the new pressure for better facilities that will hopefully be placed on the localities by the Assembly under section 2 should sharply increase the demand for these funds.

Section 8 as drafted gives the Assembly two alternatives: First, it could transfer all bonds held by the Literary Fund to the Authority and let the Authority be the vehicle that serves the localities; or second, it might phase out the Authority and let the Fund provide this service. Although either approach would provide the same result, it would be best for the Literary Fund to serve as the funding vehicle. Even under section 8, the Literary Fund would have to make the first loan and then transfer the bonds of the locality to the Authority. Thus, there would be a duplication of effort in purchasing the local school bonds if the Authority were chosen as the vehicle. Second, and more importantly, the Authority is a separate

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This also means that with proper Assembly action, the Virginia Public School Authority can purchase local school bonds without a vote.

178 VA. CODE ANN. § 22-29.10 (1969), provides that payments on loans transferred to the Authority are to be paid to the Authority and that once each year these repayments are to be transferred to the Literary Fund.

179 VA. CONST. art. VII, § 10, is the successor to VA. CONST. art. XII, § 115a (1902).

180 The ability to issue school bonds without a vote is an advantage in that it allows the local governing body to make long-range, concrete plans for a stable building program which will not be interrupted by the failure of a particular bond issue to be approved by the people.

181 An added advantage to VA. CONST. art. VIII, § 8, is that the entire amount of the Literary Fund will be available for use in the revolving fund approach. Prior to the adoption of this section, when the revolving fund was used by the Virginia Public School Authority, only those funds in excess of $10,000,000 could be transferred to the Authority. Now, however, since all funds can be transferred to the Authority and since the Fund itself can borrow money, all of the funds within the Literary Fund will be available to be used in the same manner as those of the Authority had been previously used.

body, independent of the Board of Education.[182] The Board of Education is charged with the responsibility for the public schools of the Commonwealth and specifically with supervision of the Literary Fund.[183] The allocation of control of these funds is a part of this overall responsibility and should play an important part in the central planning of the Board. A total abdication of this authority would completely avoid an important segment of its responsibility. The Authority was created to circumvent a decision of the Supreme Court of Appeals and the Constitution has now remedied the situation, so the Authority should be phased out.

TUITION GRANTS

Section 10 of the Education Article is identical to its predecessor, section 141 of the Constitution of 1902. It provides as follows:

> No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; second, that the General Assembly may appropriate funds to an agency, or to a school or institution of learning owned or controlled by an agency, created and established by two or more States under a joint agreement to which this State is a party for the purpose of providing educational facilities for the citizens of the several States joining in such agreement; third, that counties, cities, towns and districts may make appropriations to nonsectarian schools of manual, industrial or technical training and also to any school or institution of learning owned or exclusively controlled by such county, city, town or school district.

This section limits the authority of the Assembly to appropriate public funds to educational institutions which are not exclusively controlled by the Commonwealth or one of its political subdivisions. This ban was absolute

182 VA. CODE ANN. § 22-29.4 (1969).

183 VA. CONST. art. VIII, §§ 4, 5, 8.

prior to 1956;[184] however, as a part of massive resistance, the section was relaxed in 1956 to allow tuition grants to private non-sectarian schools.[185] This revision enabled both the state and the locality to make such grants—the state portions being $125 for each elementary pupil and $150 for each high school pupil.[186] The localities were allowed to grant an additional $100 per pupil per year.[187] The cost for this tuition grant program during the fiscal year 1959-60 for both state and local aid was over $1,000,000. This figure rose to a high of $3,000,000 in the 1963-64 fiscal year.[188]

The Supreme Court of the United States held in 1964 that the tuition grant program could not be used to avoid integration by closing the public schools and funnelling these funds to private segregated schools.[189] In the late sixties the tuition grant provision of the southern states came under even harsher attack. While the Commission on Constitutional Revision was deliberating, the United States Supreme Court upheld a special three judge court's decision declaring Louisiana's tuition grant provision unconstitutional.[190] This decision rang a death knell for Virginia's tuition grant program.

The Commission then had four choices. First, it could delete section 141 thereby allowing the legislature to determine whether there could be aid to private schools, and, if so, whether this aid could extend to sectarian schools. A second approach would be to amend section 141 so that it banned, as it did prior to 1956, all aid to private schools, whether sectarian or not. Third, the section could have been amended to specifically allow aid to sectarian as well as non-sectarian schools. The final alternative was to leave section 141 unchanged. Since the Commission did not want to involve a religious issue in the revision of the constitution it rejected the alternative of permitting aid to sectarian schools.[191] The Commission, still

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184 VA. CONST. art. IX, § 141 (1902); VA. CODE ANN., Vol. 9, at 509 (1950).

185 The amendment was made by a convention which convened pursuant to Va. Acts of Assembly 1956, ch. 1.

186 VA. CODE ANN. § 22-115.30 (1969).

187 VA. CODE ANN. § 22-115.32 (1969).

188 THOMAS JEFFERSON CENTER FOR STUDIES IN POLITICAL ECONOMY REPORT ON THE VIRGINIA PLAN FOR UNIVERSAL EDUCATION 9 (1965).

189 Griffin v. School Bd. of Prince Edward County, 377 U.S. 218 (1964).

190 Poindexter v. Louisiana Financial Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968).

191 The Commission was fearful that such action could become the central issue in a ratification campaign and thus cause the defeat of the entire constitution. CCR REPORT 272.

hopeful that some vestige of the tuition grant program might survive,[192] proposed only a renumbering of section 141.[193]

However, soon after the Assembly met to revise the Constitution, a special three judge court declared section 141 and the entire tuition grant program unconstitutional.[194] Even though the court's order declared the entire act unconstitutional, the opinion stated that grants to aid handicapped children would not be prohibited. The Assembly proposed two amendments to section 141.[195] First, the grants would be limited to

> education or training of emotionally disturbed, mentally retarded, and mentally or physically handicapped Virginia students, and such other handicapped Virginia students as may be prescribed by law. . . .[196]

Second, the reference to "non-sectarian" would be deleted. The advocates of this second change argued that if the aid was going to be limited to handicapped children only, there would be no significant violation of the separation of church and state.[197]

The proposal was adopted by the special session in 1969, but, like all of the proposed revisions, it had to be approved by two sessions of the legislature.[198] Because of the church and state issue, the proposal was de-

192 Even though Poindexter v. Louisiana Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968), should have been sufficient for the Commission to realize the end was not far off, the Commission clung to the test of constitutionality as set out by the court in Griffin v. Board of Education, 239 F. Supp. 560 (E.D. Va. 1965), in which the court held that the tuition grant program was not unconstitutional unless "the preponderant financial support" for a racially segregated school came from the tuition grants. The *Griffin* decision is in sharp contrast to the decision of the lower court in *Poindexter* which found that the natural effect of the tuition grant law was to preserve segregation. The court in *Poindexter* noted that "[t]he United States Constitution does not permit the State to perform acts indirectly through private persons which it is forbidden to do directly." 275 F. Supp. at 835.

193 CCR REPORT 63.

194 Griffin v. Board of Education, 296 F. Supp. 1178 (E.D. Va. 1969). This case involved the same panel in the same action on a motion for further relief prompted by the United States Supreme Courts' change announced in Poindexter v. Louisiana Assistance Comm'n, 389 U.S. 571 (1968), as in Griffin v. Board of Education, 239 F.2d 560 (E.D. Va. 1965). The *Griffin* court in 1969, however, rejected the res judicata argument of the State Board stating that the litigation had "extensive implications of public import [and would not be] allowed to stultify reassessment of the prior decision." Griffin v. Board of Education 296 F.2d 1178, 1182 (E.D. Va. 1969).

195 Va. Acts of Assembly 1969, ch. 29, at 93.

196 *Id.*

197 PROCEEDINGS OF THE SENATE 249-51.

198 VA. CONST. art. XV, § 196 (1902).

feated at the 1970 regular session. In fact, the proposed section was not even reported out of either the Education Committee of the Senate or the House.[199] Therefore, section 141 of the 1902 Constitution has remained unchanged.

The question now arises as to the viability of section 10. In view of the federal courts' trend to look not at the legislation or grants themselves but at their effect, a tuition grant program in Virginia making funds available to students attending racially imbalanced or segregated schools would still be held unconstitutional.[200] Therefore, there is little chance for a meaningful tuition grant program in the near future. However, this situation may be beneficial to the Commonwealth, since section 10 will permit Virginia to concentrate upon improving public education while allowing aid to handicapped children at the same time. At this time the Commonwealth cannot afford the luxury of financing a dual school system.

HIGHER EDUCATION

There are three sections of the revised Constitution which affect higher education in Virginia. Section 9 of the Education Article and section 9(c) of the Taxation and Finance Article deal with public institutions of higher education, while section 11 of the former article concerns aid to private institutions of higher learning.

Public Higher Education

Section 9 of the Education Article provides for the establishment and government of the state colleges and universities:

> The General Assembly may provide for the establishment, maintenance, and operation of any educational institutions which are desirable for the intellectual, cultural, and occupational development of the people of this Commonwealth. The governance of such institutions, and the status and powers of their boards of visitors or other governing bodies, shall be as provided by law.

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199 PROCEEDINGS OF THE SENATE 606.

200 *See* Poindexter v. Louisiana Financial Assistance Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 571 (1968); King, *Rebuilding the "Fallen House" — State Tuition Grants for Elementary and Secondary Education*, 84 HARV. L. REV. 1057, 1080-81 (1971).

This section, which replaces sections 137 and 142 of the Constitution of 1902,[201] serves no other purpose than to give constitutional stature to state colleges and universities and their governing bodies.[202] Moreover, section 9 is unnecessary and should have been deleted as the Senate of Virginia proposed in 1969.[203]

Section 9(c) of the Taxation and Finance Article[204] allows the full

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201 The text of VA. CONST. art. IX, §§ 137 and 142, are set out in the Appendix *infra*.

202 The Commission on Constitutional Revision proposed the following for section 9:

> The General Assembly may provide for the establishment, maintenance, and operation of any educational institutions which are desirable for the intellectual, cultural and occupational development of the people of this Commonwealth. Members of the boards of visitors, trustees, or governing bodies of such institutions shall be appointed as provided by law.

CCR REPORT 63.

In its commentary on section 9, the Commission said that the governing bodies of state institutions "should be protected from ultimate subjugation to a single central agency regulating all public higher education in Virginia . . . ." *Id.* at 269. The Commission noted further that the section did not guarantee such protection but merely gave the boards of visitors constitutional stature. The section was changed to make it absolutely clear that the Assembly has full control over the state colleges and universities. See the remarks made by Delegate Pope on March 28, 1969, when this section was debated.

203 VA. SEN. JOURN. 140 (1969).

204 VA. CONST. art. X, § 9(c) provides as follows:

> (c) Debt for certain revenue producing capital projects.
>
> The General Assembly may authorize the creation of debt secured by a pledge of net revenues derived from rates, fees, or other charges and the full faith and credit of the Commonwealth, and such debt shall not be included in determining the limitation on general obligation debt for capital projects as permitted elsewhere in this Article, provided that
>
> (1) the creation of such debt is authorized by the affirmative vote of two-thirds of the members elected to each house of the General Assembly; and
>
> (2) such debt is created for specific revenue producing capital projects (including the enlargement or improvement thereof), which shall be distinctly specified in the law authorizing the same, of institutions and agencies administered solely by the executive department of the Commonwealth or of institutions of higher learning of the Commonwealth.
>
> Before any such debt shall be authorized by the General Assembly, and again before it shall be incurred, the Governor shall certify in writing, filed with the Auditor of Public Accounts, his opinion, based upon responsible engineering and economic estimates, that the anticipated net revenues to be pledged to the payment of principal of and interest on such debt will be sufficient to meet such payments as the same become due and to provide such reserves as the law authorizing such debt may require, and that the projects otherwise comply with the requirements of this subsection, which certifications shall be conclusive.
>
> No debt shall be incurred under this subsection if the amount thereof when added to the aggregate amount of all outstanding debt authorized by this subsection and the amount of all outstanding debt incurred to redeem a previous

faith and credit of the Commonwealth to be placed behind certain revenue producing projects in Virginia, and is aimed primarily at the construction of dormitories, dining facilities and other revenue producing projects at state colleges and universities.[205] This does not authorize new borrowing on behalf of these institutions, but rather provides a less expensive method of borrowing.

Prior to the adoption of section 9(c) the General Assembly, by virtue of its plenary power, issued bonds to build revenue producing facilities on state campuses. The amount of the bonds was not included in the state's debt limit and did not have to be approved by the voters because, technically, the bonds were backed only by the revenues derived from the particular project and not the full faith and credit of the Commonwealth.[206] If these projects failed to provide the necessary revenues to pay the interest and principal on the bonds, the Assembly was under no legal obligation to make the deficit payments. On June 30, 1970, there were over $70 million of these bonds outstanding.[207] The interest rates on these bonds are higher because they are not backed by the full faith and credit of the Commonwealth.[208] As a practical matter, however, the state is supporting these bonds[209] since it is inconceivable that the legislature would allow the bonds

debt obligation by virtue of the provisions of this Article authorizing the contracting of debts to redeem a previous debt obligation of the Commonwealth, less any amounts set aside in sinking funds for the payment of such debt, shall exceed an amount equal to 1.15 times the average annual tax revenues of the Commonwealth derived from taxes on income and retail sales, as certified by the Auditor of Public Accounts, for the three fiscal years immediately preceding the incurring of such debt.

This subsection shall not be construed to pledge the full faith and credit of the Commonwealth to the payment of any obligation of the Commonwealth, or any institution, agency, or authority thereof, or to any refinancing or reissuance of such obligation which was incurred prior to the effective date of this subsection.

205 PROCEEDINGS OF THE SENATE 190, 192; CCR REPORT 294.

206 Under the Constitution of 1902, bonds only become general obligations of the Commonwealth when approved by the voters thereof. VA. CONST. art. XI, § 184-a (1902). This basic proviso has been retained as VA. CONST. art. X, § 9(b).

207 TREASURER'S REPORT 36-41.

208 The rates on revenue bonds issued in 1968 for institutions of higher learning ranged from 4.5% to 6%, whereas a year later the rates on general obligation bonds of the Commonwealth ranged from 4.5% to 5% even though there was a sharp increase in interest rates. TREASURER'S REPORT 30-31, 36-37. Estimates for the difference between the rates range from one-half of one per centum to one per centum. CCR REPORT 318.

209 The General Assembly frequently supports these projects financially even though it is not required to do so. This fact is dramatically demonstrated in the Peninsula Ports Authority where the Authority agreed contractually to urgently request the

for the construction of a state facility, such as a dormitory, to ebb into default.

Section 9(c) allows Virginia to take advantage of the lower interest rates available on full faith and credit bonds. This provision allows the Assembly, without approval of the voters,[210] to obtain lower rates by pledging the full faith and credit of the Commonwealth behind the bonds for certain revenue producing projects. The procedure for this is complex and replete with safeguards which more than compensate for the lack of popular approval of the indebtedness. Under the Constitution of 1902, only a simple majority vote of the General Assembly was required for the issuance of bonds.[211] However, section 9(c) sets out three steps which must be followed before such bonds may be issued. First, the Governor, using engineering and economic estimates, must certify that the project will pay for itself without the aid of state funds. Second, the Assembly must approve the issuance of the bonds by a two-thirds majority of the members elected to each house.[212] Finally, just prior to the issuance of the bonds, the Governor must again certify that the project will pay for itself. This prevents the issuance of the bonds after the financial situation has changed due to rising interest rates and construction costs subsequent to the Assembly's approval.

In addition, there are two other important safeguards. First, the bonds can only be used to back the projects of institutions of higher learning and those of agencies and institutions administered solely by the state executive department. This restriction eliminates projects of the independent state authorities[213] and ensures that, except in the case of educational institutional

Assembly to appropriate 50% of the annual amortization of the bonds. Button v. Day, 205 Va. 629, 139 S.E.2d 91 (1964). Subsequently, the Assembly appropriated the funds. Va. Acts of Assembly 1964, ch. 658, Item 190, at 1026.

210 General obligation bonds for non-revenue producing projects must still be approved by the voters. VA. CONST. art. X, § 9(b). However, this section permits more indebtedness than its predecessor. *Compare* VA. CONST. art. X, § 9(b) *with* VA. CONST. art. XI, § 184a (1902). This change will also benefit public education as the proceeds of this borrowing power can be applied in part to the community college program and other similar projects. A majority of the proceeds of the general obligation bonds issued in 1968 were applied to the community college program. TREASURER'S REPORT 30-31.

211 There was no provision in the Constitution of 1902 for issuing bonds that did not have the full faith and credit of the Commonwealth pledged behind them. Therefore, a simple majority was sufficient.

212 It should be noted that the requirement is two-thirds of those *elected*, not two-thirds of those *present*. Thus, regardless of the number present, 67 members of the House of Delegates and 27 Senators must approve the proposal.

213 PROCEEDINGS OF THE SENATE, 192-98.

bonds, the Governor and the Assembly will have control over the project. This might have the effect of limiting the use of these bonds to educational institutions. The second safeguard is found in the overall debt limitation of section 9(c). The total debt authorized by the Assembly pursuant to this section cannot exceed an amount equal to 115 per cent of the average income of the Commonwealth from taxes on income and retail sales for the last three fiscal years. Based on current figures, this limit is $117,000,000,[214] but it will naturally increase as the tax revenues of the Commonwealth increase.

Under the revised Constitution, bonds for revenue producing projects at state institutions of higher learning can thus be issued in two ways. First, the plenary power of the Assembly can be used to issue bonds as has been done in the past. However, these bonds will not technically be obligations of the Commonwealth and, therefore, will have a higher interest rate. The second method could be an issuance pursuant to section 9(c) of the Taxation and Finance Article. Bonds issued in this manner, which must meet a number of qualifications, will technically become debts of the Commonwealth, but the interest rate will be lower. The flexibility thus gained in financing these projects should save the Commonwealth millions of dollars in interest.[215]

Private Higher Education

Section 11 of the Education Article aids private institutions of higher learning in several ways. It states as follows:

> The General Assembly may provide for loans to students attending nonprofit institutions of higher education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education. The General Assembly may also provide for a state agency or authority to assist in borrowing money for construction of educational facilities at such institutions, provided that the Commonwealth shall not be liable for any debt created by such borrowing.

This section expressly provides that the Assembly may authorize loans of state funds to students attending any private institution of higher learning in Virginia other than those whose primary purpose is religious training

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214 *See* A. HOWARD, SUMMARY OF THE PROPOSED CONSTITUTIONAL AMENDMENTS 12 (1970).

215 CCR REPORT 318.

or theological education. Thus, a student attending a church affiliated school can obtain a loan of state funds. Without this section, the provisions of section 10 which prohibit aid to private church affiliated colleges and universities might make the appropriations for such loans unconstitutional.[216] Section 11 allows loans[217] to aid students attending church affiliated schools. The limitation on the loans, preventing their use by students attending seminaries and other theological institutions, is designed to differentiate aid to education from aid for religious training, thereby avoiding problems of establishment of religion.

This section, combined with section 10, strikes an even balance between public and private education. In the realm of elementary and secondary education, the emphasis should be primarily on public education. Therefore, the use of public funds to aid private schools is restricted to "nonsectarian" schools. However, at the college level, where the State depends much more heavily on the private institutions to educate Virginia's youth, section 11 permits state loans to a student attending a private church affiliated school.

The second advantage provided by section 11 is state aid to private colleges for financing construction projects. It permits the Assembly to establish a state agency or authority to assist the private institutions in borrowing money for construction. If the Assembly establishes such an authority, it would be a political subdivision of the Commonwealth and thus able to issue bonds with interest thereon tax exempt.[218] The Authority thus created will be nothing more than a conduit which would allow private institutions to obtain lower interest rates due to the tax exemption. This saving has been available to other businesses for years under industrial authorities,[219] and it could easily have been applied to education. The typical

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216 *See* Almond v. Day, 197 Va. 419, 89 S.E.2d 851 (1955).

217 These will be considered loans, but, as in the case of loans to state colleges, the students would be allowed to repay them by teaching in the public schools of Virginia for a certain number of years. CCR REPORT 273.

These loans will, of course, aid the colleges by decreasing the drain of scholarship and loan funds.

218 INT. REV. CODE of 1954, § 103(a)(1).

219 *See* Development Authority v. Coyner, 207 Va. 351, 150 S.E.2d 87 (1966) (upholding Va. Acts of Assembly 1964, ch. 643, at 975); Chesapeake Development Authority v. Suthers, 208 Va. 51, 155 S.E.2d 326 (1967) (upholding Va. Acts of Assembly 1966, ch. 651, at 998).

In 1968 the Internal Revenue Code of 1954 was amended to virtually eliminate the tax to private business by severely restricting this tax exemption. INT. REV. CODE OF 1954, § 103(c).

industrial authority borrows money to build a plant or facility by pledging as collateral the rental income which it will receive upon leasing the premises to private industry. Even though this same approach could have been used to build college facilities, section 11 makes the process even easier. Because there is no fear of violating section 10 of Article X,[220] the authority can operate in a manner similar to the Virginia Public School Authority and thereby be a clearing house for these bonds. Such procedure would transform the bonds into tax exempt securities for which the interest rate would be substantially lower. Such legislation is now possible and the Assembly should establish an agency or authority as soon as possible.

CONCLUSION

When compared with the theorist's view of a model constitution, the revision of the Education Article was a failure. These theorists advocate either no mention of education at all or a single section dealing with health, education and welfare.[221] By these standards Virginia's Education Article is little more than a compilation of unnecessary grants of power, non self-executing mandates and details that belong in the Code rather than the Constitution. Such a view is easily taken by the theorist, but as has been recently noted

> this aim overshoots the mark, and that in state constitution-making we must be content with something less than the Platonic ideal; we must

220 VA. CONST. art. X, § 10, provides as follows:

> Section 10. Lending of credit, stock subscriptions, and works of internal improvement.
>
> Neither the credit of the Commonwealth nor of any county, city, town, or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation; nor shall the Commonwealth or any such unit of government subscribe to or become interested in the stock or obligations of any company, association, or corporation for the purpose of aiding in the construction or maintenance of its work; nor shall the Commonwealth become a party to or become interested in any work of internal improvement, except public roads and public parks, or engage in carrying on any such work; nor shall the Commonwealth assume any indebtedness of any county, city, town, or regional government, nor lend its credit to the same. This section shall not be construed to prohibit the General Assembly from establishing an authority with power to insure and guarantee loans to finance industrial development and industrial expansion and from making appropriations to such authority.

221 *See* Graves, *State Constitutional Law: A Twenty-five Year Summary*, 8 WM. & MARY L. REV. 1, 34 (1966).

> aim rather for a constitutional document that is designed to enable the state to carry on its work of government today and in the foreseeable future. . . .[222]

Because the Education Article is interrelated with the other parts of the Constitution, a model Education Article could not have been drafted without making the entire Constitution a model constitution. If the Assembly had made such a proposal the entire effort might well have failed as it did in Maryland.[223] Whatever might have been the shortcomings of the General Assembly, it did design a revised Constitution acceptable to the people.[224]

Even though a model Education Article would not have been approved in the Commonwealth, the question is still raised as to whether the revision goes far enough to improve public education in Virginia. There is no doubt that definite achievements were made. Section 2 is the greatest stride forward because it gives the Assembly the power for the first time in recent history to require localities to both establish adequate school systems and then to appropriate the necessary funds to support them. The new Constitution also provides much needed financial assistance to Virginia's state and private colleges. Although these achievements are few in number they represent virtually all that substantively could have been done in the Constitution in aid of public education. The remaining provisions simply make more perceptible several ambiguous provisions of the Constitution of 1902, but, with the exception of the consolidation provision, they are not substantively detrimental to public education. However, these non self-executing and superfluous provisions are important because they reflect well the attitude of the Assembly toward public education.

This attitude is important because these advances in the Constitution are only instruments which must be utilized by the Assembly to improve public education in Virginia. Unfortunately, this attitude is typified by the

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222 Grad, *The State Constitution: Its Function and Form For Our Time*, 54 VA. L. REV. 928, 928-29 (1968).

223 Wheeler, *Constitutional Reform Fails in The Free State: The Maryland Constitutional Convention of 1967-68*, 26 WASH. & LEE L. REV. 218, 232, 247-49 (1969).

Philip Barbour, President of the 1829-30 Virginia Constitutional Convention, said:

> If I am right, we must discard mere theory, adopt nothing on the ground of mere speculation, but proceed to men and things as they are. In the language of Solon, we must establish not the best possible, but the best practicable Government.

PROCEEDINGS AND DEBATES OF THE VIRGINIA CONSTITUTIONAL CONVENTION OF 1829-30 at 94 (1830).

224 The proposals were adopted by a vote of more than two to one. Proclamation of the Governor, November 25, 1970, PROCEEDINGS OF THE SENATE 817.

Assembly's treatment of section 15 of the Declaration of Rights. The Commission on Constitutional Revision thought public education was so fundamental in Virginia that it deserved a statement of aspiration in the Declaration of Rights. Thus, the Commission proposed the adoption of the following language of Thomas Jefferson as the goal of public education in Virginia:

> That free government rests, as does all progress, upon the broadest possible diffusion of knowledge, and that the Commonwealth should avail itself of those talents which nature has sown so liberally among its people by assuring the opportunity for their fullest development through an effective system of public education.[225]

The General Assembly made only one revision of that paragraph: it deleted the word "public."[226]

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225 CCR REPORT 99.

226 VA. HOUSE JOURN. 215 (Extra Sess. 1969); VA. SEN. JOURN. 307 (Extra Sess. 1969).

APPENDIX

This Appendix is a comparison in parallel tables of the Education Article of the Constitution of Virginia of 1971* and the Constitution of Virginia of 1902**.

VIRGINIA CONSTITUTION OF 1971	VIRGINIA CONSTITUTION OF 1902
ARTICLE VIII. EDUCATION	ARTICLE IX. Education and Public Instruction.
Sec. 1. Public schools of high quality to be maintained. The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.	Sec. 129. Free schools to be maintained. The General Assembly shall establish and maintain an efficient system of public free schools throughout the State.
Sec. 2. Standards of quality; state and local support of public schools. Standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly. The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions. Each unit of local government shall provide its portion of such cost by local taxes or from other available funds.	Sec. 135. Appropriations for school purposes, school age. The General Assembly shall apply the annual interest on the literary fund; that portion of the capitation tax provided for in the Constitution to be paid into the State treasury, and not returnable to the counties and cities; and an amount equal to the total that would be received from an annual tax on property of not less than one nor more than five mills on the dollar to the schools of the primary and grammar grades, for the equal benefit of all the people of the State, to be apportioned on a basis of school population; the number of children between the ages of seven and twenty years in each school district to be the basis of such apportionment. And the General Assembly shall make such other appropriations for school purposes as it may deem best, to be apportioned on a basis to be provided by law.

(*) Technically the Constitution of 1971 will be the Constitution of 1902, as amended. However, the amendments that will become effective July 1, 1971, are so extensive that as a practical matter it is a new Constitution and thus is referred to as "the Constitution of 1971."

(**) As amended through 1970, this Constitution does not include the amendments that will become effective July 1, 1971.

VIRGINIA CONSTITUTION OF 1971	VIRGINIA CONSTITUTION OF 1902
	Sec. 136. Local school taxes. Each county, city or town, if the same be a separate school district, and school district is authorized to raise additional sums by a tax on property, subject to local taxation, not to exceed in the aggregate in any one year a rate of levy to be fixed by law, to be apportioned and expended by the local school authorities of said counties, cities, towns and districts in establishing and maintaining such schools as in their judgment the public welfare may require; provided that such primary schools as may be established in any school year shall be maintained at least four months of that school year, before any part of the fund assessed and collected may be devoted to the establishment of schools of higher grade. The boards of supervisors of the several counties, and the councils of the several cities and towns, if the same be separate school districts, shall provide for the levy and collection of such local school taxes.
Sec. 3. Compulsory education; free textbooks. The General Assembly shall provide for the compulsory elementary and secondary education of every eligible child of appropriate age, such eligibility and age to be determined by law. It shall ensure that textbooks are provided at no cost to each child attending public school whose parent or guardian is financially unable to furnish them.	Sec. 138. Compulsory education. The General Assembly may, in its discretion, provide for the compulsory education of children of school age. Sec. 139. Free textbooks. Provision shall be made to supply children attending the public schools with necessary textbooks in cases where the parent or guardian is unable, by reason of poverty, to furnish them.
Sec. 4. Board of Education. The general supervision of the public school system shall be vested in a Board of Education of nine members, to be appointed by the Governor, subject to confirmation by the General Assembly. Each appointment shall be for four years, except that those to fill vacancies shall be for the	Sec. 130. State Board of Education; composition; vacancies, how filled. The general supervision of the school system shall be vested in a State Board of Education, to be appointed by the Governor, subject to confirmation by the General Assembly, and to consist of seven members. The first appointment under

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unexpired terms. Terms shall be staggered, so that no more than three regular appointments shall be made in the same year.	this section shall be one member for one year, two members for two years, two members for three years, and two members for four years, and thereafter all appointments shall be made for a term of four years, except appointments to fill vacancies, which shall be for the unexpired terms.
Sec. 5. Powers and duties of the Board of Education.	Sec. 132. Powers and duties of State Board of Education.
The powers and duties of the Board of Education shall be as follows:	The duties and powers of the State Board of Education shall be as follows:
(a) Subject to such criteria and conditions as the General Assembly may prescribe, the Board shall divide the Commonwealth into school divisions of such geographical area and school-age population as will promote the realization of the prescribed standards of quality, and shall periodically review the adequacy of existing school divisions for this purpose.	First. It shall divide the State into appropriate school divisions, comprising not less than one county or city each, but no county or city shall be divided in the formation of such divisions. It shall certify to the local school board or boards of each division in the State a list of persons having reasonable academic and business qualifications for division superintendent of schools, one of whom shall be selected as the superintendent of schools for such division by the said school board or boards, as provided by section one hundred and thirty-three of this Constitution.
(b) It shall make annual reports to the Governor and the General Assembly concerning the condition and needs of public education in the Commonwealth, and shall in such report identify any school divisions which have failed to establish and maintain schools meeting the prescribed standards of quality.	Second. It shall have the management and investment of the school fund under regulations prescribed by law.
(c) It shall certify to the school board of each division a list of qualified persons for the office of division superintendent of schools, one of whom shall be selected to fill the post by the division school board. In the event a division school board fails to select a division superintendent within the time prescribed by law, the Board of Education shall appoint him.	Third. It shall have such authority to make rules and regulations for the management and conduct of the schools as the General Assembly may prescribe; but until otherwise provided by law, the State Board of Education may continue existing rules and regulations in force and amend or change the same.
(d) It shall have authority to approve textbooks and instructional aids and materials for use in courses in the public schools of the Commonwealth.	Fourth. It shall select textbooks and educational appliances for use in the schools of the State, exercising such discretion as it may see fit in the selection of books suitable for the schools in the cities and counties, respectively; provided, however, the General Assembly may prescribe the time in which the State Board of Education may change the textbooks.
(c) Subject to the ultimate authority of the General Assembly the Board shall have primary responsibility and authority for effectuating the educational policy set	

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forth in this Article, and it shall have such other powers and duties as may be prescribed by law.	
Sec. 6. Superintendent of Public Instruction. A Superintendent of Public Instruction, who shall be an experienced educator, shall be appointed by the Governor, subject to confirmation by the General Assembly, for a term coincident with that of the Governor making the appointment, but the General Assembly may alter by statute this method of selection and term of office. The powers and duties of the Superintendent shall be prescribed by law.	Sec. 131. Superintendent of Public Instruction. A Superintendent of Public Instruction, who shall be an experienced educator, shall be appointed by the Governor, subject to confirmation by the General Assembly, for a term coincident with that of each Governor making the appointment; provided, however, that the first appointment under this section, as hereby amended, shall not be made until the expiration of the term of office of the Superintendent of Public Instruction, which began February first, nineteen hundred and twenty-six; and provided, further, that the General Assembly shall have power, by statute enacted after January first, nineteen hundred and thirty-two, to provide for the election or appointment of a Superintendent of Public Instruction in such manner and for such term as may be prescribed by statute. No Superintendent of Public Instruction shall be elected at the general election to be held on the Tuesday succeeding the first Monday in November, nineteen hundred and twenty-nine. The powers and duties of the Superintendent of Public Instruction shall be prescribed by law.
Sec. 7. School boards. The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law. [*See also* §§ 5(a), 5(c)]	Sec. 133. School districts; school trustees. The supervision of schools in each county and city shall be vested in a school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law. Each magisterial district shall constitute a separate school district, unless otherwise provided by law, and the magisterial district shall be the basis of representation on the school board of such county or city, unless some other basis is provided by the

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	General Assembly; provided, however, that in cities of one hundred and fifty thousand or over, the school boards of respective cities shall have power, subject to the approval of the local legislative bodies of said cities, to prescribe the number and boundaries of the school districts. The General Assembly may provide for the consolidation, into one school division, of one or more counties or cities with one or more counties or cities. The supervision of schools in any such school division may be vested in a single school board, to be composed of trustees to be selected in the manner, for the term and to the number provided by law. Upon the formation of any such school board for any such school division, the school boards of the counties, or cities in the school division shall cease to exist. There shall be appointed by the school board or boards of each school division, one division superintendent of schools, who shall be selected from a list of eligibles certified by the State Board of Education and shall hold office for four years. In the event that the local board or boards fail to elect a division superintendent within the time prescribed by law, the State Board of Education shall appoint such division superintendent.
Sec. 8. The Literary Fund. The General Assembly shall set apart as a permanent and perpetual school fund the present Literary Fund; the proceeds of all public lands donated by Congress for free public school purposes, of all escheated property, of all waste and unappropriated lands, of all property accruing to the Commonwealth by forfeiture, of all fines collected for offenses committed against the Commonwealth, and of the annual interest on the Literary Fund; and such other sums as the General Assembly may appropriate. But so long as the principal of the Fund totals as much as eighty	Sec. 134. Literary fund. The General Assembly shall set apart as a permanent and perpetual literary fund, the present literary fund of the State; the proceeds of all public lands donated by Congress for public free school purposes; of all escheated property; of all waste and unappropriated lands; of all property accruing to the State by forfeiture, and all fines collected for offenses committed against the State, and such other sums as the General Assembly may appropriate; provided that when and so long as the principal of the literary fund amounts to as much as ten million dollars,

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million dollars, the General Assembly may set aside all or any part of additional moneys received into its principal for public purposes, including the teachers retirement fund. The Literary Fund shall be held and administered by the Board of Education in such manner as may be provided by law. The General Assembly may authorize the Board to borrow other funds against assets of the Literary Fund as collateral, such borrowing not to involve the full faith and credit of the Commonwealth. The principal of the Fund shall include assets of the Fund in other funds or authorities which are repayable to the Fund.	the General Assembly may set aside all or any part of moneys thereafter received into the principal of said fund for public school purposes including teachers retirement fund to be held and administered in such manner as may be provided by general law.
Sec. 9. Other educational institutions. The General Assembly may provide for the establishment, maintenance and operation of any educational institutions which are desirable for the intellectual, cultural, and occupational development of the people of this Commonwealth. The governance of such institutions, and the status and powers of their boards of visitors or other governing bodies, shall be as provided by law.	Sec. 137. Agricultural, normal, manual training and technical schools. The General Assembly may establish agricultural, normal, manual training and technical schools, and such grades of schools as shall be for the public good. Sec. 142. Boards of visitors and trustees of educational institutions, how appointed, and term of office. Members of the boards of visitors or trustees of educational institutions shall be appointed as may be provided by law, and shall hold for the term of four years; provided, that at the first appointment, if the board be of an even number, one-half of them, or, if an odd number, the least majority of them, shall be appointed for two years.
Sec. 10. State appropriations prohibited to schools or institutions of learning not owned or exclusively controlled by the State or some subdivision thereof; exceptions to rule. No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the	Sec. 141. State appropriations prohibited to schools or institutions of learning not owned or exclusively controlled by the State or some subdivision thereof; exceptions to rule. No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof; provided, first, that the

Virginia Constitution of 1971	Virginia Constitution of 1902
General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in futherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; second, that the General Assembly may appropriate funds to an agency, or to a school or institution of learning owned or controlled by an agency, created and established by two or more States under a joint agreement to which this State is a party for the purpose of providing educational facilities for the citizens of the several States joining in such agreement; third, that counties, cities, towns, and districts may make appropriations to nonsectarian schools of manual, industrial, or technical training, and also to any school or institution of learning owned or exclusively controlled by such county, city, town, or school district.	General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town; second, that the General Assembly may appropriate funds to an agency, or to a school or institution of learning owned or controlled by an agency, created and established by two or more States under a joint agreement to which this State is a party for the purpose of providing educational facilities for the citizens of the several States joining in such agreement; third, that counties, cities, towns, and districts may make appropriations to nonsectarian schools of manual, industrial, or technical training, and also to any school or institution of learning owned or exclusively controlled by such county, city, town, or school district.
Sec. 11. Aid to nonpublic higher education. The General Assembly may provide for loans to students attending nonprofit institutions of higher education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious or theological education. The General Assembly may also provide for a state agency or authority to assist in borrowing money for construction of educational facilities at such institutions, provided that the Commonwealth shall not be liable for any debt created by such borrowing.	[New]
[Deleted]	Sec. 140. Mixed schools prohibited. White and colored children shall not be taught in the same school.