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Commentaries on the Constitution of Virginia- By A.E. Dick Howard

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BOOK REVIEW

COMMENTARIES ON THE CONSTITUTION OF VIRGINIA. By A. E. Dick Howard. Charlottesville: University Press of Virginia. 1974. Pp. 1207. 2 Vols. \$25.00.

*Reviewed by William B. Spong, Jr.**

Virginians are aware of the significant contributions made by their forebears to the drafting of the Federal Constitution. They are less mindful of the early history and development of the Virginia constitution. Yet, more than a decade prior to final adoption of our federal charter, a Virginia convention, meeting in Williamsburg in May of 1776, authorized preparation of a Declaration of Rights for Virginia concurrently with enactment of a resolution of independence from Great Britain. This document of self-government, drafted primarily by George Mason and rooted in Magna Carta and the Virginia Charter of 1606, was Virginia's constitution for over fifty years. In 1830, Virginia adopted a new constitution with little substantive change¹ and has enacted five subsequent constitutions, the latest adopted by popular vote in 1970.

A history of the origin and evolution of the Virginia constitutional experience from Jamestown to the present is but part of the basis for A. E. Dick Howard's *Commentaries on the Constitution of Virginia*, a two-volume work written with a style that allays fear of its bulk. Mr. Howard is a law professor and there is a lode in his *Commentaries* for both legal scholar and historian.

The author has not written for Virginia readers only. In his view, the Virginia constitution draws more deeply on the great constitutional and legal themes of this country than any document other than the Federal Constitution. Many of the great minds in the struggle for American independence contributed to the Virginia constitution and its development has been shaped by the nation's growth.²

Few, if any, persons are so well equipped to sustain this view as Professor

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1. This second Virginia constitution was submitted from a convention that listed among its delegates

. . . two former Presidents, James Madison and James Monroe; a future President, John Tyler; the Chief Justice of the United States, John Marshall; the brilliant and eccentric orator John Randolph of Roanoke; seven past, present, or future United States Senators; twenty-six past, present, or future Congressmen; and many other notables. 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 10 (1974) [hereinafter cited as HOWARD].

2. *Id.* at x.

Howard, and his earlier writings³ presage a capacity to succeed in doing so. His experience as Executive Director of the Virginia Commission on Constitutional Revisions qualifies Mr. Howard as a knowledgeable commentator on the Virginia constitution of 1971, the constitutions that preceded it, the forces that compelled change and the identifiable themes from the time of Thomas Jefferson's opposition to the provisions of the first constitution.

Much of the attraction scholars will find for Mr. Howard's *Commentaries* comes from the readability of material that is well presented and assembled. The author is quick to alert lawyers that he has not produced an annotation. The cases cited are leading and illustrative. It is the format of the volumes that should please both lawyers and historians. The author traces the historical development of each article, and his commentary on individual sections typically includes recent legislative history and present meaning as well as historical background and evolution of the section. Where relevant, reference is made to state and federal law, judicial opinions and views of other commentators.⁴

Virginians evidently did not contemplate much change in their early constitutions—they did not provide for it. Amendments, John Randolph told the Convention of 1829-30, catered to those “who love change—who delight in public confusion—who wish to feed the cauldron and make it bubble”⁵ Professor Howard relates that it was not until the constitution of 1870 that provision was made for amendments or for the calling of constitutional conventions. The constitution of 1971 now provides that no change in the constitution can be made unless approved by the people in referendum, quite different from 1902 when the Constitutional Convention proclaimed an entire constitution as law.

Professor Howard is at his best when writing of the Bill of Rights. His exposition of the history of the articles of the Virginia Rights underscores in detail that Mason's efforts in 1776 provided a model for the Federal Constitution and for other states. The commentaries on Article VIII, Education, take us from the rejections of Jefferson's proposals for a system of education to the recent affirmations in the constitution of 1971. Nearly two hundred years after Thomas Jefferson's efforts for the more general diffusion of knowledge, Virginians have adopted the spirit of his writings on that subject as part of their Bill of Rights. There is now imposed upon the state an affirmative duty to assure opportunity for the fullest development

3. A. E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* (1964); A. E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* (1968).

4. 1 HOWARD xi.

5. 2 *Id.* at 1167.

of its people by an effective system of education throughout the Commonwealth.

Professor Howard reminds us that the first provisions in Virginia for a mandatory system of free public schools were enacted by the Underwood Convention of 1867-68, a creature of Reconstruction. Case citations and legislative history portray effectively the battleground over school integration that Virginia became during its troubled period of massive resistance. Those not familiar with recent Virginia history may have difficulty comprehending the diverse postures reflected during a decade when the Commonwealth moved from state sanctioned school closings to constitutional requirements for a mandatory system of public education that seek to ensure, establish and maintain an education program of high quality, and direct each locality to provide its share of financial support for such programs.⁶ The constitutional duty imposed upon localities in the 1971 constitution has not been court tested or interpreted. Judicial review in Virginia would prove interesting in the wake of recent decisions⁷ and of the increasing difficulty localities are experiencing in financing public education.

Students of contemporary Virginia problems will be interested in Mr. Howard's treatment of Article IX, Corporations. This confirms, as might be suspected, that railroad regulation was the reason for creation of the State Corporation Commission by the Constitutional Convention of 1901-02.⁸ We are reminded that Virginia's State Corporation Commission is unique among states and that the 1971 constitution leaves it so. Possessed of both legislative and judicial powers, the Commission today has rate-making functions for all utilities and is at the vortex of consumer activity. Though the General Assembly placed language in the new constitution requiring consumer representation in Commission proceedings, the author finds its effect, "a bit obscure."⁹

While Professor Howard's fine work might be regarded as a legal history, it is—as all constitutional histories should be—a political history as well. Underlying the faithful reporting of constitutional conventions and cases is a commentary on the political forces that have shaped or prevented constitutional change in Virginia over two centuries—periods when Vir-

6. See VA. CONST. art. VIII, §§ 1, 2.

7. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 47 (1971).

8. This effort, some years behind regulatory measures enacted in many states, was supported at the convention with the question: "I ask you if there has been a judge elected in this State, if there has been a legislature elected and in session, if there has been a campaign fought out, in which you do not see the hand of the railroad." 2 HOWARD 969.

9. *Id.* at 986.

ginia set the standards for a nation and others when adjustments to exterior, economic and social forces came slowly, and sometimes painfully. The strength of the *Commentaries* is the author's ability to identify significant themes, frame them in historical context, buttress them with legislative history and case law and apprise the reader of pertinent developments in national government and other states.

Beginning with the constitutional enactments of 1776 it is possible to sense from the *Commentaries* the continuing struggle in Virginia for an enlarged franchise and an equitably apportioned legislature. These struggles have their genesis in Jefferson's criticisms of the first constitution but are much with us today. For many years they were manifested in confrontations between east and west, the Tidewater planter against mountain and valley people. As Virginia became more industrialized and less agrarian, the struggle became one between rural and urban. Equally arresting are the movements toward an independent judiciary and a strong executive. Neither were features of the 1776 constitution despite its proclamation of the separation of powers.

The benefits of the Howard *Commentaries* are many. We are reminded of the enormous influence of the first Virginia constitutional efforts upon the nation. We are provided with an excellent history of constitutional development in Virginia over two centuries, told in terms of political and legal decisions that show Virginia through a somewhat different looking glass. Moreover, we are provided a legislative history of the Virginia constitution of 1971 and made aware of the incisive surgery performed to eliminate surplus matters better addressed by statute, as well as a contemporary view of the constitutional aspects of local government, taxation and finance. For some readers, Professor Howard's crowning achievement may be that the thousands of words, hundreds of notes and dozens of constitutional sections are so interrelated and well presented that one is able to recognize in a recitation of constitutional history the constancy of values so characteristically Virginian—love of individual liberty, respect for the rule of law and reluctance to change.