

9-1-1975

Book Review: Commentaries on the Constitution of Virginia (1974)

C. Ronald Ellington

University of Georgia School of Law

Repository Citation

C. Ronald Ellington, *Book Review: Commentaries on the Constitution of Virginia (1974)* (1975),
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Commentaries on the Constitution of Virginia. By A. E. Dick Howard,¹ Charlottesville: University Press of Virginia, 1974. 2 Vols. Pp. 1208.

Reviewed by C. Ronald Ellington²

Why, one might naturally wonder, is a book of commentaries on the Constitution of Virginia being reviewed in the pages of the *Georgia Law Review*? *Commentaries* is a massive, comprehensive work growing out of the author's first-hand participation in each stage of the process leading to the successful adoption of the Virginia Constitution of 1971.³ Structured along the same broad topical divisions found in the new Constitution itself, *Commentaries* contains historical background, explanation, and analysis on each article set out in the Constitution, such as the Bill of Rights (Article I), the Legislature (Article IV), the Executive (Article V), the Judiciary (Article VI), Education (Article VIII), and Taxation and Finance (Article X). Certainly, lawyers and researchers of Virginia law will find this work a basic resource tool for understanding the Virginia Constitution, but is it of wider interest?

Even its author cheerfully admits that *Commentaries* is not a work that will rank with those great treatises of Coke, Blackstone, or Storey.⁴ Yet, *Commentaries* is a contemporary manifestation of that honored tradition. Professor Howard, as a wag might put it, has continued a tradition that was dead long before he was born.

Two reasons warrant calling the attention of the general reader to this work. First, as Professor Howard observes:

No document of American constitutionalism, save the Federal Constitution itself, draws so deeply on the great themes of American constitutional and legal development as does the Virginia Constitution. Its origins were contemporaneous with the events leading to independence, some of the greatest minds of the founders' generation made their contribution to it, and its development over the ensuing two centuries has been shaped by the conflicts and movements central to the history of the American nation.⁵

¹ Professor of Law, University of Virginia. B.A., University of Richmond, 1954; LL.B., University of Virginia, 1961; M.A., Oxford University, 1965.

² Associate Professor of Law, University of Georgia. A.B., Emory University, 1963; LL.B., University of Virginia, 1966.

³ Professor Howard was Executive Director of the Virginia Commission on Constitutional Revision in 1968-69, served as counsel to the General Assembly of Virginia at its 1969 special session and 1970 regular session at which the proposed constitution was approved for submission to the people, and directed the referendum campaign which resulted in approval of the new Virginia Constitution by the voters in November 1970.

⁴ A. Howard, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA ix-x (1974) [hereinafter cited as COMMENTARIES].

⁵ *Id.* at x.

Second, ours is a period of renewed interest in state constitutionalism. The New Federalism of the 1970's is evoking new attention and scholarship on the protection of personal liberties and rights secured by state bills of rights.⁶ A number of states are engaged these days in attempted revisions of their basic charters of government.⁷ Thus, the appearance of *Commentaries* stands in the contemporary scene as a tribute of rekindled faith in state innovation and constitutionalism.

One of the attractive features of *Commentaries* is Professor Howard's sense of history and his skill in depicting the original act of constitution-making in Virginia in 1776 as part of the English libertarian heritage and the colonial drive for independence from the British Crown. The Virginia Declaration of Rights of 1776 was the first of the state bills of rights. Its architect, George Mason, drew heavily on Lockean notions of natural rights and social contract. Mason's language, purposefully left unchanged by the 1971 revision, reminds us two hundred years later:

That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.⁸

These words and the political philosophy they embodied were widely disseminated at the time and influenced the drafting of other state constitutions. They were, of course, also relied on by Thomas Jefferson in writing the Declaration of Independence a short while later.

Other instances of the Virginia experience on American constitutional development abound. Perhaps in no area, however, has the significance of early state constitutional development been deemed more authoritative than has the history of the Virginia struggle for religious liberty on the religion clauses of the United States Constitution. The Supreme Court has repeatedly proclaimed that James Madison's famous Memorial and Remonstrance Against Religious Assessments and Jefferson's Bill for Religious Liberty which denounced all public assessments for religious purposes and sought to secure rights of individual conscience are the direct antecedents of the religion clauses of the first amendment and are particularly relevant in determining its meaning.⁹ The influence of the constitu-

⁶ See, e.g., Countryman, *Why A State Bill of Rights?*, 45 WASH. L. REV. 454 (1970); Morris, *New Horizons For A State Bill of Rights*, 45 WASH. L. REV. 474 (1970).

⁷ See A. Stwin, *THIRTY YEARS OF STATE CONSTITUTION-MAKING: 1938-1968* (1970); HOWARD, *Constitution Revision: Virginia and the Nation*, 9 UNIV. OF RICH. L. REV. 1 (1974).

⁸ VA. CONST. art. I, § 1. See COMMENTARIES at 58-69.

⁹ See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947) (Black, J.); *id.* at 33 (Rutledge, J., dissenting); *McGowan v. Maryland*, 366 U.S. 420, 437-43 (1961) (Warren, J.); *Engel v.*

tional development in Virginia on the United States Constitution has been considerable, and *Commentaries* tells in readable, if not original, scholarship the story of this exciting seedtime of the American republic.

Moreover, Professor Howard has been careful to demonstrate that the close connection between Virginia constitutional development and the federal constitution has worked both ways. Federal law, especially Supreme Court decisions, have decidedly impinged on state law. *Commentaries* thus appropriately contains a concise, informative treatment of leading federal constitutional decisions that touch on topics covered by the articles of the Virginia Constitution. Thus, for example, Professor Howard traces the leading cases decided under the Federal Constitution in the field of criminal procedure in connection with his discussion of criminal prosecutions in Article I, section 8, of the Virginia Bill of Rights.¹⁰ Other sections survey federal constitutional development in areas that run the gamut from the time-honored cases on impairment of contracts¹¹ to the more recent litigation concerning sex discrimination.¹² While the discussion of federal constitutional law is at times greatly oversimplified, Professor Howard is an experienced constitutional law scholar,¹³ and his generalizations are nevertheless helpful in painting a broad overview of federal constitutional doctrine. It is Professor Howard's rare ability to tie historically the Virginia Constitution into our national heritage and to keep in clear focus the contemporary federal and state cases surrounding its provisions that gives *Commentaries* its certain richness.

One other feature involving the intersection of federal and state law contained in *Commentaries* deserves special mention. This is the parallelism, as opposed to the conflict, that sometimes emerges from federal and state court decisions construing similar concepts found in each constitution. For example, every student of the United States Supreme Court is aware of the rise and decline of the doctrine of substantive due process,

Vitale, 370 U.S. 421, 428 (1962) (Black, J.); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 770 n.28 (1973) (Powell, J.).

Although the opinions of Justices Black and Rutledge in *Everson* are commonly cited as the beginning of the Court's reliance on Virginia history in interpreting the religion clauses, this historical approach in fact originated much earlier with the opinion of Chief Justice Waite for the Court in *Reynolds v. United States*, 98 U.S. 145, 162-63 (1878).

¹⁰ COMMENTARIES at 94-149.

¹¹ COMMENTARIES at 202-10.

¹² COMMENTARIES at 237-42. VA. CONST. art. I, § 11, the Virginia provision banning governmental discrimination on the basis of sex, probably goes beyond the current federal judicial doctrine grounded in the equal protection clause of the fourteenth amendment and corresponds more nearly with the aim of the proposed Equal Rights Amendment to the Federal Constitution. It should be noted that section 11 of the Virginia Bill of Rights recognizes that some *distinctions* based on sex are desirable and explicitly provides that "the mere separation of the sexes shall not be considered discrimination." See COMMENTARIES at 241.

¹³ Professor Howard is also the author of *The Road From Runnymede* (1968) which traces the impact of Magna Carta on constitutional development in America.

from the judicial philosophy expressed in *Allgeyer v. Louisiana*¹⁴ and *Lochner v. New York*¹⁵ to that announced in *West Coast Hotel Co. v. Parrish*¹⁶ and *Day-Brite Lighting, Inc. v. Missouri*.¹⁷ However, in his discussion of substantive due process, Professor Howard shows that the rise and fall of substantive due process in Virginia has closely paralleled the corresponding development of the prevailing judicial attitude toward economic regulation in the federal courts. Thus, we learn that in *Young's Case*,¹⁸ decided by the Virginia Supreme Court of Appeals six years after *Allgeyer* and two years before *Lochner*, the state court invalidated the conviction of a merchant who had given trading stamps to a purchaser of goods in violation of state law. In holding the state law to be an invalid exercise of the state's police powers to protect public health, safety or morals, the Virginia court observed in language reminiscent of *Allgeyer* and *Lochner* that the "liberty" guaranteed in the Virginia Bill of Rights

is deemed to embrace the right of the citizen . . . to live and work where he will; to earn his livelihood by any lawful calling, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out . . . the purpose above mentioned.¹⁹

By the 1920's, however, the Virginia court had begun carving out exceptions to the broad doctrine of substantive due process and, after the New Deal Supreme Court's retreat and disavowal of its role as a "superlegislature" in weighing the wisdom of economic regulation in the 1930's, the Virginia court similarly sanctioned a broad reading of the police power in the area of economic regulation.²⁰ *Commentaries* thus underscores the multifaceted relationship that exists between state and federal law.

The second reason *Commentaries* should be of interest to those outside Virginia is the current emphasis manifested nationally in state constitutionalism. For many years judicial and scholarly attention was focused on the much publicized debate over the "incorporation" of the federal Bill of Rights into section one of the fourteenth amendment and its concomitant application to the states. Many critics both on and off the Court decried the resulting federalization of criminal procedure. However, with the apparent easing by the Burger Court of further expansion of the rights of the criminally accused, scholars have now begun to look more and more to state constitutional guarantees to secure broader claims for individual

¹⁴ 165 U.S. 578 (1897).

¹⁵ 198 U.S. 45 (1905).

¹⁶ 300 U.S. 379 (1937).

¹⁷ 342 U.S. 421 (1952). See generally McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

¹⁸ *Young v. Commonwealth*, 101 Va. 853, 45 S.E. 327 (1903).

¹⁹ *Id.* at 863, 45 S.E. at 328.

²⁰ COMMENTARIES at 198-99.

rights, and some state courts looking to their basic laws have responded by extending such protections beyond the scope given the corresponding provision in the federal constitution.²¹ Thus, the federal constitution may come more and more to represent only a minimum threshold rather than a ceiling on protected rights with the states left free to develop higher standards for the liberties of their citizens. The broadest protection of civil rights in the future could quite conceivably lie with the people of the states themselves as evidenced by their fundamental law.

Similarly, the states are free to create new fundamental rights. The United States Supreme Court ruled in *San Antonio Independent School District v. Rodriguez*²² that education was not a fundamental right in rejecting a challenge under the equal protection clause to a state system of school financing that relied heavily on property taxes and resulted in great disparities in the amount expended on education between wealthy and poor school districts. Nevertheless, the new Virginia Constitution enumerates education as an affirmative right guaranteed in the state Bill of Rights,²³ thereby imposing a duty on the state to insure that the legislatively prescribed standard of quality education will be provided even in schools in localities lacking sufficient resources to do the job themselves.

In other areas also the 1971 Virginia Constitution stands as a model of state responsiveness to current problems. Governmental discrimination on the basis of race, color, national origin, sex, or political conviction is banned in the Virginia Bill of Rights.²⁴ Another article on conservation proclaims that it shall be the policy of the Commonwealth to conserve and develop its natural resources to insure that the people shall have clean air, pure water, and opportunities for recreation.²⁵

If the New Federalism of the 1970's ultimately succeeds in returning some significant measure of responsibility to the states to protect the basic liberties of their citizens and to insure them a chance for a decent life, it will occur because the American states have fundamental laws that are recognized as responding to the felt needs of society. *Commentaries* is an affirmation of the vitality of the states in the federal system. One can hardly conceive of a more meaningful or fitting way for Georgia to celebrate the Bicentennial of the American Revolution than by following suit with its own much needed constitutional revision.

²¹ See, e.g., Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1975); Falk, *Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Project Report, *Toward An Activist Role for State Bills of Rights*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 271 (1973).

²² 411 U.S. 1 (1973).

²³ VA. CONST. art. I, § 15. See COMMENTARIES at 285-87, 886-907.

²⁴ VA. CONST. art. I, § 11. See COMMENTARIES at 229-43.

²⁵ VA. CONST. art. XI, §§ 1-2. See COMMENTARIES at 1139-57.