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NORTH CAROLINA CONSTITUTIONAL HISTORY

JOHN V. ORTH*

To the intelligent lawyer or layman who cares to know not only what the law is, but the reasons upon which it is founded and the causes which have, either through legislation or judicial decision, contributed to it, there is no more instructive or interesting study than constitutional history.

Hon. Henry Groves Connor
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Eastern District of North Carolina
1909-1924¹

North Carolina's three state constitutions chart the evolution over two centuries of a modern representative democracy. The Independence constitution of 1776, adopted by a Provincial Congress rather than by direct vote of the electorate, organized a republic of free males with full participation reserved for property owners. As settlement on the westward-moving frontier shifted the demographic center of the state, pressure for political reapportionment steadily mounted. Serious civil unrest was avoided only by extensive amendments, ratified at the polls in 1835. While advancing democracy eroded the privileges accorded to wealth, race emerged as a new qualification for voting. With only one further amendment the state's first constitution endured until defeat in the Civil War necessitated a new organic law, adapted to the reality of the end of slavery. Despite continuities, the 1868 constitution marked a greater *caesura* in state constitutional history than even the 1776 constitution. The Republican draftsmen took the opportunity to

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Professor Orth is presently at work on *The North Carolina State Constitution: A Reference Guide*, which will include this Essay on state constitutional history, a section-by-section commentary on the North Carolina Constitution, and a bibliographic essay. Acknowledgment is due to Greenwood Publishing Group, Westport, Connecticut, which will publish the volume as part of its series on state constitutions, for permission to print this Essay. Part of the Essay began as a presentation at Law Alumni Weekend at the University of North Carolina at Chapel Hill on Oct. 20, 1990 and appeared earlier as "*Fundamental Principles*" in *North Carolina Constitutional History*, 69 N.C. L. REV. 1357 (1991).

1. HENRY G. CONNOR & JOSEPH B. CHESHIRE, JR., *THE CONSTITUTION OF THE STATE OF NORTH CAROLINA ANNOTATED*, at xxxviii (1911) [hereinafter *CONSTITUTION ANNOTATED*] (introduction by Connor).

introduce many humanitarian and forward-looking provisions, but the "Carpetbagger" constitution was not finally accepted by indigenous white males until extensive amendments were adopted in 1876. For almost a century, from the end of Reconstruction to 1971, the state's second constitution (as amended) provided the frame of government, although further amendments accumulated in the second third of the twentieth century. To consolidate the gains of the prior hundred years and to introduce a number of much-needed reforms, the state's third constitution was approved by the voters in 1970 and took effect on July 1, 1971. While significant, the break with the past was not dramatic: the changes introduced in 1971 did not compare in magnitude with those in 1868.

I. CONSTITUTION OF 1776

[A]t the time of our separation from Great Britain, we were thrown into a similar situation with a set of people shipwrecked and cast on a marooned island—without laws, without magistrates, without government, or any legal authority— . . . being thus circumstanced, the people of this country, with a general union of sentiment, by their delegates, met in Congress, and formed that system of those fundamental principles comprised in the Constitution, dividing the powers of government into separate and distinct branches, to wit: The legislative, the judicial, and executive, and assigning to each several and distinct powers, and prescribing their several limits and boundaries. . . .

With these observations Judge Samuel Ashe opened the celebrated 1786 case of *Bayard v. Singleton*.² Although the country Ashe had in mind was North Carolina and the Congress was the Fifth Provincial Congress that met at Halifax in November and December 1776, his general description would apply to any of Great Britain's rebellious thirteen colonies. Once independence was declared on July 4, 1776, Americans were like so many Robinson Crusoes, "shipwrecked and cast on a marooned island." Having cut themselves off from the Crown, the historic source of constitutional legitimacy, they were strictly speaking "without laws, without magistrates, without government, or any legal authority." Like the self-reliant pioneers they were, North Carolinians immediately set about the task of rectifying the situation, finding a new source of legal authority in the people themselves. Delegates to the Provincial Congress appointed a committee (including delegate Samuel Ashe) on November 13 to prepare a declaration of rights and a constitu-

2. 1 N.C. (Mart.) 15, 16 (1787).

tion.³ The committee reviewed rather precise instructions from Mecklenburg and Orange counties,⁴ but it profited most from a letter from William Hooper, North Carolina's delegate to the Continental Congress, enclosing copies of recently adopted constitutions from other states.⁵ There were even two pamphlet-sized letters of advice from John Adams, already a renowned authority on constitutionalism.⁶

After barely a month's work, the drafting committee presented proposals to the full Congress which, after making some more or less important changes, speedily approved the final product. The declaration of rights, considered at four sessions, was passed on December 17, 1776,⁷ while the constitution, which was given somewhat more extended consideration—at six sessions—was passed on December 18, 1776.⁸ Although treated separately, the two documents form a single whole, the latter expressly declaring the former “[p]art of the Constitution of this State.”⁹ Like all other contemporary state declarations and constitutions, neither was submitted to the electorate for approval. In part this omission may be explained by the exigencies of the time—a “shipwrecked” people needed speedy rescue—but it also reflected an unfamiliarity with constitution-making: the distinction between ordinary and fundamental law was not yet clearly marked. When the North Carolina provisional government had announced the election for the Fifth Provincial Congress, the resolution informed voters that “it will be the Business of the Delegates then Chosen, not only to make Laws for the good Government of, but also to form a Constitution for this State.”¹⁰

3. 10 THE COLONIAL RECORDS OF NORTH CAROLINA 918 (William L. Saunders ed., Raleigh, Josephus Daniels, Printer to the State, 1890) [hereinafter COLONIAL RECORDS].

4. See *id.* at 870a-870h.

5. Letter from William Hooper to Fifth Provincial Congress (Oct. 26, 1776), in 10 COLONIAL RECORDS, *supra* note 3, at 862-70. For a tabular comparison of the 1776 North Carolina Declaration of Rights with prior declarations of rights from Maryland, Pennsylvania, and Virginia (and with prior British documents), see *infra* app.

6. Letter from John Adams to William Hooper (*ante* Mar. 27, 1776), in 4 PAPERS OF JOHN ADAMS 73-78 (Robert J. Taylor ed., 1979); Letter from John Adams to John Penn (*ante* Mar. 27, 1776), in 4 PAPERS OF JOHN ADAMS, *supra*, at 78-84. These letters formed the basis for Adams's later pamphlet, THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES. IN A LETTER FROM A GENTLEMAN TO HIS FRIEND, reprinted in 4 PAPERS OF JOHN ADAMS, *supra*, at 86-93.

7. 10 COLONIAL RECORDS, *supra* note 3, at 973. The text may be found in 23 THE STATE RECORDS OF NORTH CAROLINA 977 (Walter Clark ed., 1904) [hereinafter STATE RECORDS].

8. 10 COLONIAL RECORDS, *supra* note 3, at 974; 23 STATE RECORDS, *supra* note 7, at 980.

9. N.C. CONST. of 1776, § 44.

10. 10 COLONIAL RECORDS, *supra* note 3, at 696 (misnumbered 996). For a political analysis of this election, see Robert L. Ganyard, *Radicals and Conservatives in Revolutionary*

The declaration of rights and the constitution (narrowly considered) form an effective blend of revolutionary theory and practical politics. The relationship is not that exhibited by the Federal Constitution with its appended Bill of Rights, the latter adding civil rights to a document establishing the basic institutions of government. Instead, North Carolina's declaration of rights, like those of her sister states,¹¹ is logically, as well as chronologically, prior to the constitutional text, a statement of general and abstract principles given particular and concrete realization in the constitution proper. The abstractness of the Declaration has allowed most of it to survive (with modifications and additions) in the state's later constitutions, where it appears in the body of the text as Article I.¹²

The declaration of rights began, appropriately enough, with a categorical assertion of popular sovereignty: "That all political Power is vested in and derived from the People only."¹³ Effective political power, however, was confined by the constitution to certain "Freemen of the Age of twenty-one Years": to vote for members of the senate, one had to possess a freehold of fifty acres;¹⁴ to vote for members of the lower house, the house of commons, one had merely to be a taxpayer.¹⁵ Annual elections ensured accountability. To be eligible for legislative service there were higher property qualifications: membership in the senate was restricted to men with "not less than three hundred Acres of Land in Fee,"¹⁶ while each member of the house of commons had to have "not less than one hundred Acres of Land in Fee, or for the Term of his own Life."¹⁷ The governor had to be a man of still more substantial property, possessed of "a Freehold in Lands and Tenements above the Value of one Thousand Pounds."¹⁸

Similarly the declaration of rights provided for separation of powers: "That the Legislative, Executive and Supreme Judicial Powers of Gov-

North Carolina: A Point at Issue, The October Election, 1776, 24 WM. & MARY Q. 568, 568-71 (1967).

11. For a discussion of the influence of the constitutions of other states on that of North Carolina, see *infra* notes 41-60 and accompanying text.

12. See N.C. CONST. of 1971, art. I, §§ 1-36.

13. N.C. CONST. of 1776, Declaration of Rights, § 1.

14. N.C. CONST. of 1776, § 7.

15. *Id.* § 8.

16. *Id.* § 5.

17. *Id.* § 6.

18. *Id.* § 15. The pound sterling, the British medium of exchange, remained in circulation in North Carolina for many years after the Revolution. From time to time the legislature set an exchange rate for dollars and pounds. See WILLIAM S. POWELL, *NORTH CAROLINA THROUGH FOUR CENTURIES* 178 (1989).

ernment ought to be forever separate and distinct from each other.”¹⁹ In practice, however, it was the bicameral legislature, the general assembly, that was supreme. The general assembly, not the voters, chose the governor²⁰ and members of the council of state,²¹ the state treasurer,²² the state secretary,²³ the attorney general,²⁴ and all the judges,²⁵ as well as the officers of the state militia.²⁶ This contrast of principle and practice did not escape contemporary observers. Reviewing the situation a decade later, on the eve of the adoption of the Federal Constitution, James Madison commented in *The Federalist*:

If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom [separation of powers] has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. . . .

The constitution of North Carolina, which declares “that the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other,” refers, at the same time, to the legislative department, the appointment not only of the executive chief, but all the principal officers within both that and the judiciary department.²⁷

The lesson the Founding Fathers drew was that separation of powers needed to be qualified by checks and balances lest one branch become over-powerful.

Not only was the governor elected by the general assembly but his executive authority was hemmed in on every side. While he could succeed himself, he could not serve more than three years out of six.²⁸ He could fill no executive posts; even the local justices of the peace were named by the general assembly, the governor merely commissioning them.²⁹ He could make no important decision without the advice of the

19. N.C. CONST. of 1776, Declaration of Rights, § 4.

20. N.C. CONST. of 1776, § 15.

21. *Id.* § 16.

22. *Id.* § 22.

23. *Id.* § 24 (three-year term).

24. *Id.* § 13 (good-behavior tenure). The attorney general enjoyed the same tenure as the judges, apparently on the theory that he was an officer of the court.

25. *Id.* (good-behavior tenure).

26. *Id.* § 14.

27. THE FEDERALIST No. 47, at 339, 342 (James Madison) (Benjamin F. Wright ed., 1966) (quoting N.C. CONST. of 1776, Declaration of Rights, § 4).

28. N.C. CONST. of 1776, § 15.

29. *Id.* § 33.

council of state.³⁰ Lacking a veto, he took no formal role in legislation; bills became laws when passed by both houses and signed by the speakers.³¹ Overbearing colonial governors had generated so strong a reaction that the republican office was handicapped for years. To this day North Carolina's governor has no veto.

On the divisive subject of religion, the declaration of rights roundly declared: "That all Men have a natural and unalienable Right to worship Almighty God according to the Dictates of their own Conscience,"³² a principle realized in the body of the constitution by the disestablishment of the Church of England.³³ Nonetheless, clergymen in active service were barred from the legislature and council of state,³⁴ and a religious test for office remained:

That no Person who shall deny the being of God, or the Truth of the Protestant Religion, or the Divine Authority either of the Old or New Testament, or who shall hold Religious Principles incompatible with the Freedom and Safety of the State, shall be capable of holding any Office or Place of Trust or Profit in the Civil Department, within this State.³⁵

Although the section was aimed at (respectively) atheists, Roman Catholics, Jews, and Christian pacifists like Quakers and Moravians, it prompted a later commentator to observe tartly that "it would be difficult to formulate a statute more obscure in its terms or inviting more controversy as to its meaning."³⁶ In fact the constitutional stricture was relaxed in practice. In 1809 Jacob Henry, a Jew elected to the house of commons, was challenged on the basis of his religion. The house, which under the constitution was the judge of its members' qualifications,³⁷ refused to exclude him, apparently on the ground that a seat in the general assembly was not an "Office . . . of Trust or Profit" within the meaning of the constitution,³⁸ an appealing decision that nonetheless puts one in mind of the ingratiating query of the old Tammany Hall politician:

30. *Id.* §§ 18 (calling out the militia), 19 (imposing embargoes), 20 (filling vacancies).

31. *Id.* § 11.

32. *Id.* Declaration of Rights, § 19.

33. *Id.* § 34. On the institution disestablished by this section, see Paul Conkin, *The Church Establishment in North Carolina, 1765-1776*, 32 N.C. HIST. REV. 1, 1-30 (1955).

34. N.C. CONST. of 1776, § 31.

35. *Id.* § 32.

36. CONSTITUTION ANNOTATED, *supra* note 1, at xxvii.

37. N.C. CONST. of 1776, § 10.

38. See Leon Huhner, *Religious Liberty in North Carolina with Special Reference to the Jews*, PUBLICATIONS OF THE AMERICAN JEWISH HISTORICAL SOCIETY No. 16, at 37-71 (1907).

"What's the Constitution between friends?"³⁹ More soul-searching was provoked in 1833 when the general assembly elected the learned but Roman Catholic William Gaston to the state supreme court. Gaston had served previously in the general assembly, apparently profiting from the precedent set by Henry. Two years later, this problem was resolved more straightforwardly by an amendment substituting "Christian" for "Protestant" in the religious test,⁴⁰ a change that did nothing to clarify the position of Jewish officeholders like Jacob Henry.

That the North Carolina drafters in 1776 could have completed their work with such celerity is due to the availability of models from other states, as well as to the arsenal of political arguments accumulated during the frequent quarrels with colonial governors. The revolutionary manifesto with which the declaration of rights began, for instance, "That all political Power is vested in and derived from the People only,"⁴¹ apparently emerged from the deft wielding of an editorial blue pencil on the second section of Virginia's declaration of rights: "That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them."⁴² Similarly, the section on separation of powers is almost identical to that in the Maryland Declaration of Rights,⁴³ while the section on freedom of religion follows almost word-for-word a section of the Pennsylvania Declaration of Rights.⁴⁴

American constitutionalism, as the Revolutionaries themselves loudly protested, was nothing new; rather, it was deeply rooted in English tradition. When North Carolina declared "That excessive Bail should not be required, nor excessive Fines imposed, nor cruel or unusual punishments inflicted,"⁴⁵ it was not merely repeating the antecedent declarations of Virginia⁴⁶ and Maryland.⁴⁷ It was also deliberately echoing the English Bill of Rights of 1689,⁴⁸ a product of the Glorious Revolution that checked Stuart absolutism. In due course, the provision was to make its way into the Federal Bill of Rights as the Eighth Amendment. Some sections were of even older provenance. For example,

39. JOHN BARTLETT, *FAMILIAR QUOTATIONS* 703 (13th ed. 1955) (attributed to Timothy J. Campbell).

40. N.C. CONST. of 1776, amend. of 1835, art. IV, § 2.

41. N.C. CONST. of 1776, Declaration of Rights, § 1.

42. VA. CONST. of 1776, Declaration of Rights, § 2.

43. See MD. CONST. of 1776, Declaration of Rights, § 6.

44. See PA. CONST. of 1776, Declaration of Rights, § 2.

45. N.C. CONST. of 1776, Declaration of Rights, § 10.

46. See VA. CONST. of 1776, Declaration of Rights, § 9.

47. See MD. CONST. of 1776, Declaration of Rights, § 22.

48. 1 W. & M., st. 2, ch. 2, § I, cl. 10 (1689).

North Carolina declared "That no Freeman ought to be taken, imprisoned or disseised of his Freehold, Liberties or Privileges, or outlawed or exiled, or in any Manner destroyed or deprived of his Life, Liberty or Property, but by the Law of the Land,"⁴⁹ a provision traceable, by way of the Maryland Declaration of Rights,⁵⁰ all the way back to Magna Carta in 1215.⁵¹ Although the "law of the land" as a phrase was often supplanted elsewhere by "due process of law," for instance in the Fifth and Fourteenth Amendments to the Federal Constitution, it was—and remains—North Carolina's guarantee of the rule of law.

The nature of the English contribution to American constitutionalism expressly must be recognized. It was a legacy of how power ought to be exercised, not about what ought to be done with it or who ought to have it. How things ought to be done—for example, that neither bail nor fines should be excessive, that punishment should not be cruel or unusual, that life, liberty, and property should be protected by the law of the land—these were the immensely valuable lessons of centuries of struggle over power's inordinate claims. The proper exercise of power earned the government respect and affection; it focused attention on immediate and practical problems and minimized disputes about the process itself. What ought to be done was the concern of day-to-day politics, while who ought to have power was an exceptional question, indeed the ultimate constitutional issue. When in dispute, it could not be answered by ordinary means; if peaceful resolution failed, a revolutionary situation arose. When North Carolinians and other Americans declared the people, as opposed to the Crown, the source of sovereignty, they seized for themselves the highest power in the state, but by solemnly affirming the traditions of English constitutionalism they showed they had learned the lessons about power's proper exercise.

Not every section of the 1776 constitution was concerned with creating the new institutions of government or with setting the ground rules for its operation; some set broad legislative goals, calling for later action by the general assembly. For example, one section modelled on the Pennsylvania Constitution required

That a school or schools shall be established by the legislature for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged

49. N.C. CONST. of 1776, Declaration of Rights, § 12.

50. See MD. CONST. of 1776, Declaration of Rights, § 21.

51. MAGNA CARTA, § 39 (1215).

and promoted in one or more Universities.⁵²

In partial discharge of its duty to provide elementary education the legislature subsequently chartered numerous academies, but their masters looked in vain for state salaries: for years the extent of public support was limited to exemption from taxes and perhaps authority to raise funds by conducting a lottery.⁵³ It was not until 1839, after constitutional revision had unleashed progressive forces in the state, that a recognizable public school law was passed.⁵⁴ Higher education was first addressed during an important legislative session in 1784 when the general assembly considered chartering a university, but it was not until five years later that an actual charter was granted.⁵⁵ Again avoiding an appropriation of public funds, the cost-conscious legislators endowed the new institution with the state's right to escheats,⁵⁶ that is, the property of those who died without an effective will or known heirs, a provision that was to result in an important law suit two decades later.⁵⁷

In 1784 the general assembly redeemed another constitutional promise, one also drawn from the Pennsylvania Constitution: "That the future legislature of this state shall regulate entails in such a manner as to prevent perpetuities."⁵⁸ Entailment provided a means for tying up land in a family, the basis for an hereditary aristocracy. Colonial North Carolina law permitted the practice, actually giving it more leeway than the aristocratic Mother Country then allowed.⁵⁹ The 1784 statute, part of a wide-ranging reform of property law, prevented limitations on the de-

52. N.C. CONST. of 1776, § 41; cf. PA. CONST. of 1776, § 44 (using virtually identical language as North Carolina).

53. POWELL, *supra* note 18, at 216.

54. Act of Jan. 8, 1839, ch. 8, 1838-39 N.C. Pub. Laws 12.

55. Act of 1789, ch. 20, reprinted in 25 STATE RECORDS, *supra* note 7, at 21.

56. Act of 1789, ch. 21, § 2, reprinted in 25 STATE RECORDS, *supra* note 7, at 25; see also Act of 1794, ch. 405, § 1, in 1 LAWS OF NORTH CAROLINA 738 (Henry Potter ed., Raleigh, T. Henderson 1821) [hereinafter POTTER'S REVISAL] (granting all forfeited and confiscated land to UNC trustees for use of the University).

The *State Records* cease reprinting state statutes with the laws of 1790. Thereafter reference is made to Henry Potter's edition of the laws in force from 1715 to 1820, commissioned by the general assembly and known to generations of North Carolina lawyers as *Potter's Revisal*. The chapter numbers in the *State Records* differ from those in *Potter's Revisal* because the former, following modern practice, assigns numbers beginning anew with the first act of each session, while the latter assigns numbers in sequence beginning with the first act of the 1715 session.

57. See *Trustees of the Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58 (1805), discussed *infra* notes 66-67 and accompanying text.

58. N.C. CONST. of 1776, § 43; see PA. CONST. of 1776, ch. 2, § 37 (same); see also N.C. CONST. of 1776, Declaration of Rights, § 23 ("[P]erpetuities . . . ought not to be allowed.").

59. See John V. Orth, *Does the Fee Tail Exist in North Carolina?*, 23 WAKE FOREST L. REV. 767, 778-86 (1988).

scent of land in perpetuity, justifying the change in political terms: "entails of estates tend only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic, and prove in manifold instances the source of great contention and injustice."⁶⁰

The 1776 constitution generated little judicial interpretation. "Prior to 1868," it has been observed, "the Constitution was so simple in its provisions, leaving so much administrative detail to the Legislature, that few questions involving either the validity of acts of the Legislature or of constitutional construction were presented to the courts."⁶¹ A nationwide dearth of constitutional litigation might also be added: the frequent recourse to the courts with constitutional challenges, a characteristic of modern American constitutionalism, did not develop until the second half of the nineteenth century. Nonetheless, one of the most famous constitutional cases in North Carolina history was decided in the eighteenth century. *Bayard v. Singleton*,⁶² the case in which Judge Samuel Ashe likened Americans after the Revolution to a "set of people shipwrecked," involved one of the first recorded challenges in America to the constitutionality of a statute. Despite the guarantee in the declaration of rights of due process of law ("law of the land") and an even more specific guarantee of trial by jury in "all Controversies at Law respecting Property,"⁶³ the general assembly had adopted a statute in 1785 directing that suits brought by claimants of property confiscated during the Revolution should be dismissed upon a showing by defendants that they derived title from the commissioners of forfeited estates.⁶⁴ When forced to choose, the court preferred the constitution over the statute, thereby establishing judicial review in North Carolina more than a decade before *Marbury v. Madison*⁶⁵ established it at the federal level.

In 1805 the lesson was repeated when a legislative attempt to deprive the University of North Carolina of property it had acquired pursuant to its right to escheats was declared unconstitutional. In *Trustees of the University of North Carolina v. Foy*⁶⁶ the state supreme court reasoned that title had vested in the university and that the law of the land protected it from subsequent divestment. The court added that the creation of the university had been directed by the people assembled in con-

60. Act of 1784, ch. 22, § 5, reprinted in 24 STATE RECORDS, *supra* note 7, at 574.

61. CONSTITUTION ANNOTATED, *supra* note 1, at xxxviii.

62. 1 N.C. (Mart.) 5 (1787).

63. N.C. CONST. of 1776, Declaration of Rights, § 14.

64. Act of Dec. 29, 1785, ch. 7, reprinted in 24 STATE RECORDS, *supra* note 7, at 730.

65. 5 U.S. (1 Cranch) 137, 177 (1803).

66. 5 N.C. (1 Mur.) 58 (1805).

stitutional convention and drew the dubious conclusion that the general assembly could not deprive the university of this means of support. Although it acquiesced in the result, the legislature demonstrated its authority by promptly altering the university's charter, making the governor chairman of the board of trustees and empowering the legislature to fill vacancies on the board.⁶⁷ After the Civil War the governance of the university was again to become the subject of dispute, provoking a constitutional amendment in 1873 to restore legislative control.⁶⁸

While the 1776 constitution generally avoided details better left to the legislature, it lapsed into specificity in one important regard: political apportionment. Each county was given one senator,⁶⁹ and two representatives;⁷⁰ in addition, six named towns, the "borough towns" of colonial days⁷¹ (Edenton, New Bern, Wilmington, Salisbury, Hillsborough, and Halifax), were granted a representative apiece.⁷² Fayetteville was added to the list by act of the constitutional convention that met there in 1789. The general assembly had asked the convention to consider, in addition to the momentous question of reversing North Carolina's prior rejection of the Federal Constitution, the propriety of extending representation. The convention voted in favor of joining the Union⁷³ and adopted an ordinance amending the state constitution.⁷⁴ It was apparently thought unnecessary to refer the matter to the voters, the convention (like the Fifth Provincial Congress) having plenary power. The fact that the legislature had not felt competent to act on its own is, however, evidence of the growing recognition of the distinction between fundamental and ordinary law.

67. Act of 1805, ch. 678, in 2 POTTER'S REVISAL, *supra* note 56, at 1041.

68. N.C. CONST. of 1868, amend. 1873, art. IX, § 6; see Act of Feb. 24, 1873, ch. 86, 1872-73 N.C. Pub. Laws 116; Act of Jan. 19, 1872, ch. 53, § 1, 1871-72 N.C. Pub. Laws 81, 85. See also Act of Mar. 3, 1873, ch. 153, 1872-73 N.C. Pub. Laws 249 (submitting proposed constitutional amendments to voters for ratification or rejection).

69. N.C. CONST. of 1776, § 2.

70. *Id.* § 3.

71. See generally Mary P. Smith, *Borough Representation in North Carolina*, 7 N.C. HIST. REV. 177 (1930) (discussing the rise and decline of borough representation).

72. N.C. CONST. of 1776, § 3.

73. 22 STATE RECORDS, *supra* note 7, at 47-49; see LOUISE I. TRENHOLME, *THE RATIFICATION OF THE FEDERAL CONSTITUTION IN NORTH CAROLINA*, 233-49 (1967); Albert R. Newsome, *North Carolina's Ratification of the Federal Constitution*, 17 N.C. HIST. REV. 287, 299-301 (1940). More recent views may be found in JOHN C. CAVANAGH, *DECISION AT FAYETTEVILLE: THE NORTH CAROLINA RATIFICATION CONVENTION AND GENERAL ASSEMBLY OF 1789*, at 23-27 (1989); Walter F. Pratt, Jr., *Law and the Experience of Politics in Late Eighteenth-Century North Carolina: North Carolina Considers the Constitution*, 22 WAKE FOREST L. REV. 577, 577-605 (1987).

74. N.C. CONST. of 1776, amend. of 1789, reprinted in 22 STATE RECORDS, *supra* note 7, at 50-53.

As the demographic balance in the state changed, shifting towards the western frontier, a political imbalance resulted. The smaller eastern counties continued to dominate the general assembly. The recurrent battle of West versus East that raged in many of the seaboard states flared in North Carolina as well. No further piecemeal adjustments were made, and civil disturbance was only narrowly averted by wholesale change in 1835. It is noticeable that North Carolinians chose to resolve their constitutional dispute by amending the existing document rather than by writing a new instrument, the chosen path in many states. Perhaps it testified to the inherent soundness of the first constitution, but it also represented the state's constitutional conservatism, a trait from which the second constitution was eventually to benefit as well.

Since the 1776 constitution made no provision for amendment, the general assembly improvised a process based on that used in 1789. A special election was held to call a constitutional convention that would propose amendments regarding the basis of representation and other specified topics.⁷⁵ All persons qualified to vote for members of the house of commons were eligible to vote on the convention, and delegates were to possess enough property to serve in the house—as well as being of the white race, an ominous indicator of things to come.⁷⁶ As to representation, the convention was to consider restructuring the senate to consist of thirty-four to fifty members chosen by districts based on the amount of taxes paid, and the house to consist of ninety to 120 members (excluding borough members) chosen by districts based on population.⁷⁷ In addition, the convention was to devise a method for further constitutional amendment, should it become necessary.⁷⁸ At its option it could consider, among other things, ending borough representation, disfranchising free blacks, altering the religious test, lengthening legislative terms from one year to two, providing for direct election of the governor, and prescribing the governor's term and eligibility for reelection.⁷⁹ Finally, the convention was forbidden to consider dividing a county between two or more senatorial districts, depriving a county of at least one representative in the house of commons, reducing the property qualification for senatorial voters or for senators, or disfranchising anyone presently qualified to vote—except, of course, for blacks.⁸⁰ The voters approved and delegates

75. Act of Jan. 9, 1835, ch. 2, 1834-35 N.C. Pub. Laws 6; Act of Jan. 6, 1835, ch. 1, 1834-35 N.C. Pub. Laws 3.

76. Act of Jan. 6, 1835, ch. 1, § 7, 1834-35 N.C. Pub. Laws 3, 4.

77. *Id.* § 13, 1834-35 N.C. Pub. Laws at 5.

78. *Id.* § 16, 1834-35 N.C. Pub. Laws at 6.

79. *Id.* § 13, 1834-35 N.C. Pub. Laws at 5-6.

80. *Id.* at 5.

were elected who met in Raleigh from June 4 to July 11, 1835. Whether the limitations on the powers of the convention were valid or not remains unsettled since the delegates chose not to disobey their instructions. They did, however, engage in preliminary debate about whether it was proper for the general assembly to prescribe an oath requiring them to abide by the restrictions.⁸¹ The mere fact that the legislature included the oath suggests doubt concerning its power to control the convention. In the end the majority voted to cut off debate and all delegates took the oath.

The principal amendment they proposed dutifully eliminated the county as the basis of representation. Senators were to be elected by districts based on the amount of taxes paid, although no counties were to be divided,⁸² while representatives in the house of commons were to be elected by districts based on population, each county being guaranteed at least one representative.⁸³ For purposes of apportionment the relevant population would be the so-called "federal population," a concept borrowed from the Federal Constitution; that is, the number determined "by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons."⁸⁴ The obvious effect was to count slaves as three-fifths persons for purposes of representation. The size of the senate was fixed at fifty members, the house at 120, the maximum allowed by the legislation calling the convention—and a size that survived into the second and third constitutions. Borough representation was ended, and legislative terms were lengthened to two years, another change that has endured. Breaking with earlier practice, legislative sessions were made biennial rather than annual.⁸⁵

Exercising their discretionary powers, the delegates proposed to define the electorate on racial lines for the first time since pre-Revolutionary days. Although colonial laws had prohibited blacks from voting,⁸⁶ the 1776 constitution had granted the franchise indiscriminately to all

81. NORTH CAROLINA CONSTITUTIONAL CONVENTION, PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH-CAROLINA, CALLED TO AMEND THE CONSTITUTION OF THE STATE, WHICH ASSEMBLED AT RALEIGH, JUNE 4, 1835 TO WHICH ARE SUBJOINED THE CONVENTION ACT AND THE AMENDMENTS TO THE CONSTITUTION 4-8, 418-24 (Raleigh, J. Gales 1836) [hereinafter PROCEEDINGS AND DEBATES OF THE 1835 CONVENTION].

82. N.C. CONST. of 1776, amend. of 1835, art. I, § 1, cl. 1.

83. *Id.* cl. 2.

84. U.S. CONST. art. I, § 2, cl. 3; *see* N.C. CONST. of 1776, amend. of 1835, art. I, § 1, cl. 2 (using the same language).

85. N.C. CONST. of 1776, amend. of 1835, art. I, § 4, cl. 7.

86. *See, e.g.*, Act of 1715, ch. 10, § 5 (repealed by His Majesty's Order), reprinted in 23 STATE RECORDS, *supra* note 7, at 12-13.

"freemen" who met the property qualification, including free blacks. While it is now impossible to determine whether black voters were admitted to the poll in every North Carolina county, it is certain that they voted in some, and that their numbers in a few places were substantial.⁸⁷ Disfranchisement was extensively discussed in the 1835 Convention and carried by only a small majority: on the key vote delegates were divided sixty-six to sixty-one.⁸⁸ An 1835 amendment excluded all non-whites, substituting a biological for a status qualification: "No free negro, free mulatto, or free person of mixed blood, descended from negro ancestors to the fourth generation inclusive (though one ancestor of each generation may have been a white person) shall vote for members of the Senate or House of Commons."⁸⁹ The effect was that free blacks and other non-whites counted as whole persons for purposes of representation but could not themselves vote.

Property qualifications were to be retained for the senate: to vote, white males still needed a freehold of fifty acres;⁹⁰ to serve, they still needed to possess three hundred acres of land in fee.⁹¹ The new scheme of apportionment represented a compromise between the regions. Basing representation in the senate on taxes and retaining the property qualifications ensured the wealthier East a continued majority in that chamber, while basing representation in the house of commons on population (as qualified by the federal three-fifths rule for counting slaves) meant that the more populous West would gain a majority in the other chamber.⁹²

A second principal amendment broke the general assembly's monopoly on power: the governor was to be elected directly by the voters qualified to vote for representatives in the house of commons.⁹³ His term was to be two years, and he was limited to two terms within six years.⁹⁴ Despite this apparent shift in the balance of power, little changed in reality. As the doughty Nathaniel Macon, Revolutionary War veteran and still a political power in the state in 1835, bluntly put it: "Where the

87. PROCEEDINGS AND DEBATES OF THE 1835 CONVENTION, *supra* note 81, at 65, 70, 80; see JOHN H. FRANKLIN, *THE FREE NEGRO IN NORTH CAROLINA, 1790-1860*, at 105-20 (1943).

88. PROCEEDINGS AND DEBATES OF THE 1835 CONVENTION, *supra* note 81, at 80-81.

89. N.C. CONST. of 1776, amend. of 1835, art. I, § 3, cl. 3.

90. *Id.* cl. 2.

91. *Id.* cl. 1.

92. See Harold J. Counihan, *The North Carolina Constitutional Convention of 1835: A Study in Jacksonian Democracy*, 46 N.C. HIST. REV. 335, 348 (1969).

93. N.C. CONST. of 1776, amend. of 1835, art. II, cl. 1.

94. *Id.* cl. 2. In addition to lengthening the governor's term, the 1835 amendments altered the terms of two other executive officers: the secretary of state's term was reduced from three years to two, *id.* art. I, § 4, cl. 7; the attorney general's tenure was changed from "good behavior" to a four year term. *Id.* art. III, § 4.

Governor has next to nothing to do, it is of little consequence who elects him."⁹⁵ In addition, a procedure was established for future amendments to the constitution. A convention could be called by a two-thirds vote of each house⁹⁶ (no mention was made of submitting the product to the electorate), or a specific amendment could be proposed to the voters by the general assembly if adopted at two successive sessions, with an intervening election, by majorities of three-fifths and two-thirds respectively.⁹⁷ Finally, the religious exclusion was altered from non-Protestants to non-Christians,⁹⁸ a change that would eliminate doubt concerning the Roman Catholic justice of the state supreme court, William Gaston. The proposed amendments were submitted as a single issue to the voters in the fall election, the first time ordinary North Carolinians had been given an opportunity to decide on a constitutional issue, black voters presumably being eligible to vote on their own disfranchisement. Ratifying the compromise worked out by the politicians, the electorate approved the amendments, with an overwhelming majority in favor in the West joined by a small minority in the East.⁹⁹ Following the precedent established by amendments to the Federal Constitution, the state appended the 1835 amendments to the constitution of 1776, rather than incorporating them in the text, the practice with the state's later constitutions.

No other change was made in the constitution for two decades, until political rivalry between the Democratic and Whig parties raised the possibility of eliminating the property qualification in voting for senators.¹⁰⁰ After years of debate the issue was put to the electorate in 1857 and approved.¹⁰¹ The result was perhaps a foregone conclusion since the voters on the amendment were those qualified to vote for representatives in the house of commons; that is, those meeting the minimum tax-paying qualification were invited to permit themselves to vote for representatives in the upper chamber as well. The effect was to double the number of

95. PROCEEDINGS AND DEBATES OF THE 1835 CONVENTION, *supra* note 81, at 335.

96. N.C. CONST. of 1776, amend. of 1835, art. IV, § 1, cl. 1.

97. *Id.* cl. 2.

98. *Id.* § 2.

99. The election returns are reported in PROCEEDINGS AND DEBATES OF THE 1835 CONVENTION, *supra* note 81, at 424, and are analyzed in Counihan, *supra* note 92, at 361.

100. See Thomas E. Jeffrey, "Free Suffrage" Revisited: Party Politics and Constitutional Reform in Antebellum North Carolina, 59 N.C. HIST. REV. 24, 24-25 (1982).

101. N.C. CONST. of 1776, amend. of 1857; see Act of Dec. 11, 1856, ch. 12, 1856-57 N.C. Pub. Laws 12; Act of Feb. 3, 1855, ch. 7, 1854-55 N.C. Pub. Laws 22; see also Act of Jan. 8, 1857, ch. 13, 1856-57 N.C. Pub. Laws 13-16 (submitting constitutional amendment of North Carolina for approval or rejection). Election returns are in A MANUAL OF NORTH CAROLINA, 1913, at 1010-12 (R.D.W. Connor ed. 1913) [hereinafter 1913 MANUAL].

senatorial voters.¹⁰² Now that the electorates of both houses had to meet identical property qualifications it might have been questioned whether the upper house was any longer needed, but the senate continued to be based on districts laid out according to the amount paid in taxes, and senators themselves continued to have to meet a higher property qualification than representatives in the house of commons. When even these distinctions were abolished in 1868, the senate nonetheless survived. Bicameralism, based on colonial and ultimately on English practice, had put down deep roots and maintained itself as an institution.

By 1857 North Carolina had transformed itself into a republic of tax-paying white males twenty-one years of age and older. It is a legitimate subject of inquiry when, and whether, the state would have extended the franchise beyond that group. The experiment with a nonracial republic, one based on free status and at least enough property to pay taxes, had been officially abandoned in 1835. There is no reason to think, given the heightened passions about race and slavery in the period, that North Carolina would soon have reversed itself if left to its own devices. Landless paupers, unable to pay taxes, were equally unlikely to be admitted to the franchise; whatever was happening in other states, North Carolinians still adhered to the conservative political theory that the propertyless were not stakeholders in society and therefore not entitled to a voice in public affairs. Women too seemed permanently excluded from politics. Although a women's movement almost wholly limited to Northern circles had sounded a call for female suffrage in the Seneca Falls Declaration in 1848,¹⁰³ no observer of antebellum North Carolina would have thought votes for women any more realistic a prospect than emancipation of the slaves. Lowering the age of majority from twenty-one to eighteen had not yet been proposed anywhere. The most that such an observer might have forecast would have been a reduction, or perhaps the complete elimination, of the property qualification for (adult white male) officeholders, although as we shall see even this relic still had defenders in influential circles.

In any case, secession and defeat in the Civil War soon set in motion a series of events that would lead in a few short years to the end of slavery and the grant of votes to all males twenty-one or older, of either race and without regard to the payment of taxes. In 1861 the general assembly called a constitutional convention,¹⁰⁴ as authorized under the 1835

102. Jeffrey, *supra* note 100, at 24.

103. See *Declaration of Sentiments and Resolutions*, reprinted in *THE CONCISE HISTORY OF WOMAN SUFFRAGE* 91-98 (MariJo Buhle & Paul Buhle eds., 1978) (retracing the events and results of the 1848 Seneca Falls Convention).

104. Act of May 1, 1861, ch. 9, 1860-61 N.C. Pub. Laws (1st Extra Sess.) 100.

amendments. Delegates to this convention, unlike those twenty-six years earlier, were not limited in any way in the matters they could consider. Drawing their power directly from the people, they regarded themselves as superior to the general assembly, which continued in session, even defying an order by the latter to disband.¹⁰⁵ In addition to seceding from the Union and ratifying the Constitution of the Confederate States of America, the convention—like that at Fayetteville in 1789—also amended the state constitution.¹⁰⁶ (Under the provision adopted in 1835 there was no requirement that it submit amendments to the voters.) Most of the 1861-62 amendments concerned adjustments required by secession and the ensuing war, but a few involved other changes. Of greatest significance, perhaps, was an amendment providing for a tax on land and slaves based on their assessed value (*ad valorem*);¹⁰⁷ previously they had been taxed at a flat rate. Long desired by western North Carolinians, this change had been blocked during more settled times by eastern interests.¹⁰⁸ By another amendment the convention altered the religious test for office, deleting the words requiring belief in the “truth of the Christian religion” and amending the biblical test to exclude only those who denied “the divine authority of both the Old and New Testaments,”¹⁰⁹ thereby formally admitting Jews.

After the Confederacy’s defeat in the Civil War, the provisional governor, William W. Holden, who had been appointed by the president of the United States,¹¹⁰ called a convention that ratified two ordinances, one nullifying secession, the other abolishing slavery.¹¹¹ The same convention later proposed a new organic law, largely a restatement of the 1776 constitution and its 1835 amendments. Although black men were to be enfranchised, political apportionment in the general assembly was to be based on the number of whites,¹¹² defined (in keeping with the 1835

105. POWELL, *supra* note 18, at 348.

106. See ORDINANCES AND RESOLUTIONS PASSED BY THE STATE CONVENTION OF NORTH CAROLINA AT ITS SEVERAL SESSIONS IN 1861-62, at 174-75 (Raleigh, John W. Syme, Printer to the Convention, 1862) [hereinafter 1861-82 ORDINANCES AND RESOLUTIONS].

107. Ord. VI, *reprinted in* 1861-62 ORDINANCES AND RESOLUTIONS, *supra* note 106, at 32-33.

108. POWELL, *supra* note 18, at 252, 339.

109. Ord. IX, *reprinted in* 1861-62 ORDINANCES AND RESOLUTIONS, *supra* note 106, at 56.

110. Proclamation of President Andrew Johnson, May 29, 1865, *reprinted in* 6 MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 312 (James D. Richardson ed., Washington, D.C., Gov’t Prtg. Off. 1897).

111. CONSTITUTION OF NORTH-CAROLINA, WITH AMENDMENTS, AND ORDINANCES AND RESOLUTIONS PASSED BY THE CONVENTION, SESSION, 1865, at 39-40 (Raleigh 1865) (pagination begins anew with each document).

112. See ORDINANCES AND RESOLUTIONS PASSED BY THE NORTH CAROLINA STATE

amendment) as those having "less than one-sixteenth of Negro blood"¹¹³—the purpose apparently being to reduce the representation of the eastern counties, where the black population was largely concentrated, even below that accorded by the three-fifths rule. Property qualifications for office-holding were to be retained.¹¹⁴ The outcome of the Civil War, however, had raised expectations far too high to be satisfied with a barely modified version of the antebellum regime, and the proposed constitution of 1866 was rejected at the polls.¹¹⁵

II. CONSTITUTION OF 1868

In 1868, perhaps even more than in 1776, North Carolinians were "a set of people shipwrecked." As in the struggle for independence from Great Britain, so in the Civil War, the state severed itself from a source of constitutional legitimacy. But this time the center did manage, however bloodily, to hold. While not quite bereft, strictly speaking, of laws, magistrates, or government, the legal authority after the war was that of the victorious army. Just as defeat in the earlier revolutionary struggle would have led to the displacement of an important segment of the colonial elite and a significant diminution of local control, so actual surrender in 1865 caused an upheaval in political leadership and a dramatic shift of power toward the federal government. The North Carolina constitutional convention of 1868 was called on the initiative of the Federal Congress,¹¹⁶ then in the hands of the Radical Republicans, although it was approved in a state election.¹¹⁷ Reconstruction legislation required the selection of delegates by the state's male citizens, black as well as white, except those disfranchised for rebellion or felony, despite the fact that the 1776 constitution (as amended), which restricted voting to white taxpayers, was still legally in force. Federal legislation stipulated further that the resulting state constitution must extend suffrage on the same basis.

CONVENTION, SECOND SESSION, 1866, at 7 (Raleigh 1866) (art. II, § 3 of proposed constitution not ratified).

113. See *id.* at 17 (proposed art. V, § 10).

114. *Id.* at 8 (proposed art. II, § 7; senators shall possess "not less than three hundred acres of land in fee; or a freehold of not less value than one thousand dollars"); *id.* (proposed § 8; representatives in house of commons shall possess "a freehold of one hundred acres of land, or the value of three hundred dollars"); *id.* at 11 (proposed art. III, § 2; governor shall possess "a freehold in lands and tenements of the value of two thousand dollars").

115. Election returns are in 1913 MANUAL, *supra* note 101, at 1016-18.

116. Act of Mar. 11, 1868, ch. 25, 15 Stat. 41; Act of July 19, 1867, ch. 30, 15 Stat. 14; Act of Mar. 23, 1867, ch. 6, 15 Stat. 2; Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

117. Election returns are in JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH-CAROLINA, AT ITS SESSION 1868, at 114-18 (Raleigh, J.W. Holden, Convention Printer, 1868) [hereinafter JOURNAL OF THE 1868 CONSTITUTIONAL CONVENTION]. The text of the 1868 constitution is printed in *id.* at 3-39.

Of the 120 delegates that assembled in Raleigh in January 1868, fifteen were black, while eighteen were carpetbaggers.¹¹⁸ One of the most influential among the latter was a twenty-nine-year-old native of Ohio, Albion W. Tourg  e, a lawyer and Union army veteran who had moved to Greensboro in 1865 and established a newspaper; he left his mark on many parts of the convention's work, including local government, social services, and law reform. The constitution the convention delegates drafted was approved at a special election in April 1868.¹¹⁹

The new constitution, North Carolina's second, marked a sharp break with what had gone before, a break as sharp, if not more so, than that marked by the Independence constitution itself. Just as the 1776 constitution had carried over the best elements of the past, so the Reconstruction constitution continued some aspects of its predecessor—the declaration of rights largely reappeared as Article I—but changes were more numerous than continuities. For one thing, the new constitution was much more detailed than the old. While the 1776 organic law had been comprised of a declaration of rights of twenty-five sections and a constitutional text of forty-six sections, the 1868 constitution was divided into fourteen articles (of which the first was the declaration of rights), 197 sections in all. The old constitution could be printed in eight pages; the new covered twenty-three.¹²⁰

Of the changes introduced in 1868, a few related directly to the outcome of the Civil War. A preamble was added piously thanking Almighty God "for the preservation of the American Union,"¹²¹ a piety that must have been wormwood to many Confederate veterans. A new section was prefixed to the declaration of rights, drawn from the American Declaration of Independence, declaring it to be "self-evident that all men are created equal."¹²² At the decree of Congress, secession was rejected,¹²³ allegiance to the Federal Constitution proclaimed,¹²⁴ and the Confederate war debt repudiated.¹²⁵ Slavery was "forever prohibited."¹²⁶ Otherwise, ancient rights were restated and perhaps refined. For the first time, the "privilege of the writ of habeas corpus" was ex-

118. POWELL, *supra* note 18, at 392.

119. Election returns are in 1913 MANUAL, *supra* note 101, at 1016-18.

120. See 5 THE FEDERAL AND STATE CONSTITUTIONS 2787-94 (Francis N. Thorpe ed., 1909) (reprinting 1776 constitution), 2800-22 (reprinting 1868 constitution).

121. N.C. CONST. of 1868, pmbl.

122. *Id.* art. I, § 1.

123. *Id.* § 4.

124. *Id.* § 5.

125. *Id.* § 6.

126. *Id.* § 33.

pressly guaranteed;¹²⁷ the men of 1776 may have thought the precaution unnecessary in light of the state's reception of basic English statutes, including the Habeas Corpus Act.¹²⁸ Only one new principle was formulated: "As political rights and privileges are not dependent upon or modified by property, therefore no property qualifications ought to affect the right to vote or hold office."¹²⁹ Implementing this principle, later articles changed the plan of representation in the senate from one based on taxes paid into the state treasury, as provided in 1835, to one based on population.¹³⁰ The 1835 apportionment plan was retained for the lower house, renamed in conformity with American usage the house of representatives, although, of course, the "federal population" plan of counting slaves as three-fifths persons for purposes of representation was deleted.¹³¹

Elective offices were multiplied. While North Carolina voters since 1835 had chosen representatives and governors (and senators, if they met the property qualification in effect until 1857), the new constitution provided for the direct election of all significant executive officers: governor, secretary of state, auditor, treasurer, superintendent of public works, superintendent of public instruction, and attorney general.¹³² The office of lieutenant governor (also elective) was created, replacing the former speaker of the senate as presiding officer of that chamber¹³³ and further complicating the principle of separation of powers. Legislative terms remained two years, as set in 1835, although annual legislative sessions were required, while executive officers enjoyed four-year terms. The procedure for impeachment was spelled out¹³⁴—just in time for the trial of Governor William W. Holden, the first American governor to be removed from office.¹³⁵ The supreme court was enlarged from three members as provided by statute in 1818¹³⁶ to five members,¹³⁷ and all judges

127. *Id.* § 21.

128. 31 Car. 2, ch. 2 (1679); see *Report of the Commissioners Appointed by an Act of the Legislature of 1817, To Revise the Laws of North-Carolina*, in 1 POTTER'S REVISAL, *supra* note 56, at v-vi.

129. N.C. CONST. of 1868, art. I, § 22.

130. *Id.* art. II, § 5.

131. *Id.* § 7.

132. *Id.* art. III, § 1.

133. *Id.* art. II, § 21; *id.* art. III, § 11.

134. *Id.* art. IV, §§ 5-6.

135. POWELL, *supra* note 18, at 400. See TRIAL OF WILLIAM W. HOLDEN, GOVERNOR OF NORTH CAROLINA, BEFORE THE SENATE OF NORTH CAROLINA, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS (Raleigh, "Sentinel" Ptg. Off. 1871).

136. Acts of 1818, ch. 962-63, in 2 POTTER'S REVISAL, *supra* note 56, at 1433.

137. N.C. CONST. of 1868, art. IV, § 8.

were to be elected for eight-year terms.¹³⁸ Local government was to be based on the township,¹³⁹ a new unit copied from the Ohio Constitution,¹⁴⁰ and its officers, a clerk and two justices of the peace, were to be elected biennially.¹⁴¹

As decreed by Congress, universal manhood suffrage was provided,¹⁴² although in practice it would be some years before all ex-Confederates could vote. With the elimination of property qualifications and the end of slavery—all persons now were legally free—no foundation remained for a republic based on status and wealth such as that created in 1776. A republic erected on race and property was also, for the time being, excluded; a Reconstruction convention dominated by Union loyalists, carpetbaggers, and blacks could hardly be expected to do otherwise. Despite the stirrings of a national women's movement, no serious consideration was given to ending the sexual qualification. A mention of votes for women (and for those under the age of twenty-one) came in the minority report of the committee on suffrage, protesting the end of the racial qualification:

We do not regard the right to vote as natural or inherent, but conventional merely—to be regulated in such way as will best promote the welfare of the whole community. Upon this principle, women and minors have been excluded. Is there any reason why the negro should be advanced to a higher position?¹⁴³

In fact, there was to be considerable backsliding on the principle of universal manhood suffrage, at least insofar as black men were concerned, before further extensions of the franchise were considered, and in the cases of race, sex, and age, national developments would be required before North Carolina would enlarge the basis of representation.

State government was new-modeled, catching up and leaping ahead at the same time. The judicial system was overhauled, and the ancient distinction between actions at law and suits in equity was abolished.¹⁴⁴ A commission of three (including Albion W. Tourgée) was appointed by the convention to prepare enlightened codes of civil and criminal proce-

138. *Id.* § 26. For an edited transcript of the debates concerning judicial selection at the 1868 convention, see John V. Orth, *Tuesday, February 11, 1868: The Day North Carolina Chose Direct Election of Judges*, 70 N.C. L. REV. 1825 (1992).

139. N.C. CONST. of 1868, art. VII, §§ 3-4.

140. OHIO CONST. of 1851, art. X.

141. N.C. CONST. of 1868, art. VII, § 5.

142. *Id.* art. VI, § 1.

143. JOURNAL OF THE 1868 CONSTITUTIONAL CONVENTION, *supra* note 117, at 236.

144. N.C. CONST. of 1868, art. IV, § 1.

ture for consideration at the next session of the general assembly;¹⁴⁵ the commissioners were also to work on a comprehensive code of substantive law.¹⁴⁶ Capital punishment was restricted by the constitution to four crimes only: murder, arson, burglary, and rape—Tourgée would have limited it to murder alone¹⁴⁷—and the object of punishment was proclaimed to include “reform of the offender” as well as satisfaction of justice.¹⁴⁸ Dueling, part of the antebellum elite’s atavistic code of honor, now would disqualify a person from holding public office.¹⁴⁹ The religious test for officeholding was shrunken to its first clause only, excluding those “who shall deny the being of Almighty God”;¹⁵⁰ even this would have gone but for the belief that “no oath would bind a man who denied the existence of a higher power.”¹⁵¹

The new constitution detailed the system of taxation,¹⁵² reaffirming the Secession Convention’s mandate for ad valorem rates, and for the first time imposed limitations on state borrowing,¹⁵³ as well as explicitly guaranteeing repayment of the state debt¹⁵⁴ (except, of course, for the Confederate war debt). Counties were required to provide public schools at least four months a year,¹⁵⁵ and the state was required to care for deaf-mutes, the blind, and the insane.¹⁵⁶ Married women secured control over their own property,¹⁵⁷ a right the common law had denied them. Laborers’ and mechanics’ liens were secured.¹⁵⁸ In contradiction to advances elsewhere, however, the cumbersome amendment procedure devised in 1835 was simply carried over: a convention could be called by a two-thirds vote of each house, or a specific amendment could be proposed by the general assembly if adopted by two successive sessions, with an intervening election, by majorities of three-fifths and two-thirds

145. *Id.* § 2; Ord. of Mar. 13, 1868, ch. 41, in JOURNAL OF THE 1868 CONSTITUTIONAL CONVENTION, *supra* note 117, at 79.

146. N.C. CONST. of 1868, art. IV, § 3.

147. OTTO H. OLSEN, CARPETBAGGER’S CRUSADE: THE LIFE OF ALBION WINEGAR TOURGÉE 101-02 (1965).

148. N.C. CONST. of 1868, art. XI, § 2.

149. *Id.* art. XIV, § 2.

150. *Id.* art. VI, § 5.

151. *Proceedings and Debates of the 1868 Constitutional Convention*, reported in NORTH CAROLINA STANDARD, Feb. 26, 1868.

152. N.C. CONST. of 1868, art. V, §§ 1 & 3.

153. *Id.* §§ 4-5.

154. *Id.* art. I, § 6; *id.* art. V, § 4.

155. *Id.* art. IX, § 2.

156. *Id.* art. XI, § 10.

157. *Id.* art. X, § 6.

158. *Id.* art. XIV, § 4.

respectively.¹⁵⁹

Ratification of the 1868 constitution and of the Fourteenth Amendment to the Federal Constitution earned North Carolina readmission to representation in Congress and the end of Reconstruction.¹⁶⁰ When pre-war political forces reemerged in 1870 in the form of the Conservative Party and won control of the general assembly, they immediately proposed a convention to replace the hated carpetbagger constitution.¹⁶¹ Although not required to submit the issue to the voters, they did so—and suffered an embarrassing defeat.¹⁶² The assemblymen were then forced to resort to the process for individual amendments. In 1873 eight amendments were submitted to the voters¹⁶³ and approved by wide margins.¹⁶⁴ Despite the preceding political furor, some of the changes were relatively minor, such as eliminating the state census¹⁶⁵ and amending the dual officeholding provision.¹⁶⁶ Retrenching the commitments of 1868, other amendments abolished the office of superintendent of public works¹⁶⁷ and terminated the code commission,¹⁶⁸ leaving unfulfilled the promise of an up-to-date law code for the state. In addition the amendments restored some familiar arrangements obliterated in 1868: biennial legislative sessions,¹⁶⁹ authorized in 1835, and legislative control over the University of North Carolina,¹⁷⁰ secured by statute in the wake of the

159. *Id.* art. XIII.

160. Act of June 25, 1868, ch. 70, 15 Stat. 73.

161. Act of April 3, 1870, ch. 211, 1870-71 N.C. Pub. Laws 326; Act of Feb. 8, 1870, ch. 63, 1870-71 N.C. Pub. Laws 119.

162. For election totals, see John L. Sanders, *A Brief History of the Constitutions of North Carolina, in NORTH CAROLINA GOVERNMENT, 1585-1979: A NARRATIVE AND STATISTICAL HISTORY* 797 (John L. Cheney, Jr. ed., 1981).

163. N.C. CONST. of 1868, amend. of 1873; see Act of Feb. 24, 1873, ch. 88, 1872-73 N.C. Pub. Laws 118 (proposing amendment VIII); Act of Feb. 24, 1873, ch. 87, 1872-73 N.C. Pub. Laws 117 (proposing amendment VII); Act of Feb. 24, 1873, ch. 86, 1872-73 N.C. Pub. Laws 116 (proposing amendment VI); Act of Feb. 24, 1873, ch. 85, 1872-73 N.C. Pub. Laws 115 (proposing amendment V); Act of Feb. 24, 1873, ch. 84, 1872-73 N.C. Pub. Laws 114 (proposing amendment IV); Act of Feb. 24, 1873, ch. 83, 1872-73 N.C. Pub. Laws 113 (proposing amendment III); Act of Feb. 24, 1873, ch. 82, 1872-73 N.C. Pub. Laws 112 (proposing amendment II); Act of Feb. 24, 1873, ch. 81, 1872-73 N.C. Pub. Laws 111 (proposing amendment I); Act of Jan. 19, 1872, ch. 53, 1871-72 N.C. Pub. Laws 81; see also Act of Mar. 3, 1873, ch. 153, 1872-73 N.C. Pub. Laws 249 (submitting proposed amendments to the people of North Carolina for vote for or against ratification).

164. For election totals, see JOHN L. SANDERS & JOHN F. LOMAX, JR., *AMENDMENTS TO THE CONSTITUTION OF NORTH CAROLINA, 1776-1989*, at 2 (1990).

165. N.C. CONST. of 1868, amend. I 1873.

166. *Id.* amend. VIII.

167. *Id.* amend. IV.

168. *Id.* amend. VII.

169. *Id.* amend. II.

170. *Id.* amend. VI.

state supreme court decision in *Trustees of the University of North Carolina v. Foy*.¹⁷¹ Finally, the general assembly gained enhanced authority to exempt personal property from taxation,¹⁷² and the prohibition against repudiation of the state debt was repealed.¹⁷³ Indeed, Henry Groves Connor, prominent politician and jurist of the next generation, remembered the 1873 amendments as primarily economic, dealing "chiefly with the question of taxation which, by reason of the immense debt which had been created by the Convention and the Legislature (1868-9), [sic] would without such amendments have been a grievous burden to the people."¹⁷⁴

In 1875 the general assembly called a constitutional convention,¹⁷⁵ this time not risking defeat by submitting the question to the voters. The convention, the last in the state's history, was supposedly limited by legislation in the topics it could consider, being forbidden, for example, to alter the section providing for ad valorem taxation. As in 1835, an oath was required to secure compliance with the terms, and, again as in 1835, after a protest¹⁷⁶ the oath was finally taken, so the question of the validity of such limitations remains unanswered. The strength of the state Republican Party was still such that it elected as many delegates as the Conservatives (shortly to be renamed Democrats), leaving the casting votes to a few independents.¹⁷⁷ The convention proposed and the voters in 1876 ratified a set of thirty amendments affecting no less than thirty-six sections of the 1868 constitution.¹⁷⁸ Given the sheer number of changes and perhaps as well the desire on the part of the elite to signal the end of Reconstruction, the practice arose of referring to the amended 1868 constitution as the "Constitution of 1876,"¹⁷⁹ but in legal circles it was always recognized that the amendments did not result, juridically speaking, in an altogether new instrument. The terminology does reflect, however, the new practice of incorporating amendments into the text of

171. 5 N.C. (1 Mur.) 58 (1805). For a discussion of *Foy*, see *supra* notes 66-67 and accompanying text.

172. N.C. CONST. of 1868, amend. III of 1873.

173. *Id.* amend. V.

174. CONSTITUTION ANNOTATED, *supra* note 1, at xxxvi.

175. Act of Mar. 19, 1875, ch. 222, 1874-75 N.C. Pub. Laws 303-05.

176. See JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA, HELD IN 1875, at 3-4 (Raleigh, J. Turner, State Printer, 1875) [hereinafter JOURNAL OF THE 1875 CONVENTION].

177. POWELL, *supra* note 18, at 404.

178. See JOURNAL OF THE 1875 CONVENTION, *supra* note 176, at 5-27. For voting totals, see Sanders, *supra* note 162, at 798.

179. See, e.g., 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 120, at 2822-43 ("Constitution of North Carolina—1876"); 7 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 443-48 (William F. Swindler ed., 1978) ("Constitution of 1876").

the constitution, rather than merely appending them, as had earlier been done. The effect has been to make the constitution appear to be a sort of super-statute, alterable only by extraordinary means, rather than a repository of fundamental principles and an outline of institutional structures. The excessive detail of some provisions, such as the minimum length of the public school term, has contributed to the impression.

The principal aim of the 1876 amendments was to restore to the general assembly more of the power it had lost. The new elective offices in 1868 had lessened legislative control over the executive and judicial branches. Although direct election of judges was retained, the amendments reduced the number of supreme court justices from five to three¹⁸⁰ and restored to the legislature the power to create new courts and to determine the jurisdiction of all lower courts.¹⁸¹ In addition, the general assembly regained its former power over local government. By simple legislative enactment it could resume the power to appoint township and county officers.¹⁸² The purpose of this amendment, as was well understood, was to block control of local government in the eastern counties by blacks who were in the majority there.¹⁸³ William S. Powell, North Carolina historian, has tartly observed: "‘Home rule’ was restored, Democrats said. Nevertheless, under acts of the 1877 general assembly, elected county government was abolished and local power was concentrated in appointed officials."¹⁸⁴

The unsettled conditions in the aftermath of the Civil War and Reconstruction appeared in amendments to Article I, the declaration of rights, denouncing "secret political societies" and the practice of carrying concealed weapons.¹⁸⁵ The enlightened article on penal institutions was hopelessly compromised by an amendment authorizing "convict labor on public works, or highways, or other labor for public benefit,"¹⁸⁶ that is, the notorious "chain gangs" that became a sinister feature of the Southern landscape. Still worse, the same amendment authorized "farming out," the system by which convicts were rented out for industrial as well as agricultural labor, a practice referred to years later in *Gone With the Wind* by Margaret Mitchell: after the Civil War Scarlett O'Hara ea-

180. N.C. CONST. of 1868, amend. XII of 1875.

181. *Id.* amends. XI & XVII.

182. *Id.* amend. XXV.

183. See CONSTITUTION ANNOTATED, *supra* note 1, at xxxvii.

184. POWELL, *supra* note 18, at 406 (referring to Act of Feb. 27, 1877, ch. 141, 1876-77 N.C. Pub. Laws 226-27, providing for election of county commissioners by county justices of the peace, who were appointed by the general assembly).

185. N.C. CONST. of 1868, amends. I-II of 1875.

186. *Id.* amend. XXVIII.

gerly hired convicts for work in her saw mill because she could get them, as she said, "for next to nothing and feed them dirt cheap."¹⁸⁷ Race had been an explicit part of North Carolina's constitution from 1835 to 1868. After a brief eclipse it reappeared in 1876 in two amendments, the first providing for racially segregated schooling¹⁸⁸ ("separate but equal"), the second banning interracial marriages.¹⁸⁹

In other amendments the process of constitutional change was simplified, perhaps in response to the Conservatives' unhappy experience with the old system. In place of the cumbersome machinery of 1835, carried over in 1868, an amendment provided that the general assembly by a three-fifths vote of each house could submit an amendment to the voters at the next election.¹⁹⁰ This became the preferred means of constitutional change for the next century and was eventually used for the adoption of the constitution of 1971. Another amendment fixed in the constitution for the first time the rate of legislative compensation: four dollars a day for a sixty-day session (thereafter without pay).¹⁹¹ Over the years voters faced frequent proposals to authorize increases, and amendments were approved in 1927,¹⁹² 1949,¹⁹³ and 1955.¹⁹⁴ Only in 1967 were the members of the general assembly once again given authority to set their own compensation,¹⁹⁵ a sensible provision carried over into the constitution of 1971.¹⁹⁶

The amendments of 1876 brought a certain quietude to North Caro-

187. MARGARET MITCHELL, *GONE WITH THE WIND* 741 (Macmillan 1936); see generally EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE NINETEENTH CENTURY AMERICAN SOUTH* 185-222 (1984).

188. N.C. CONST. of 1868, amend. XXVI of 1875; see Frenise A. Logan, *Legal Status of Public School Education for Negroes in North Carolina, 1877-1894*, 32 N.C. HIST. REV. 346, 346-57 (1955).

189. N.C. CONST. of 1868, amend. XXX of 1875.

190. *Id.* amend. XXIX.

191. *Id.* amend. VIII.

192. *Id.* amend. II of 1927 (members \$600; presiding officers \$700); see Act of Mar. 9, 1927, ch. 203, 1927 N.C. Pub. Laws 549. This amendment was ratified by the narrowest of margins: 147,946 votes for; 147,734 votes against. Election returns are in NORTH CAROLINA MANUAL, 1929, at 413-14 (A.R. Newsome ed., 1929).

193. N.C. CONST. of 1868, amend. V of 1949 (members \$15 a day; presiding officers \$20 a day—both up to 90 days); see Act of Apr. 23, 1949, ch. 1267, 1949 N.C. Sess. Laws 1661. Election returns are in NORTH CAROLINA MANUAL, 1951, at 244-47 (Thad Eure ed., 1951).

194. N.C. CONST. of 1868, amend. I of 1955 (compensated sessions extended to 120 days); see Act of May 20, 1955, ch. 1169, 1955 N.C. Sess. Laws 1163. Election returns are in NORTH CAROLINA MANUAL, 1957, at 255-58 (Thad Eure ed., 1957).

195. N.C. CONST. of 1868, amend. I of 1967; see Act of May 10, 1967, ch. 391, 1967 N.C. Sess. Laws 406. Election returns are in NORTH CAROLINA MANUAL, 1969, at 336-37 (Thad Eure ed., 1969).

196. N.C. CONST. of 1971, art. II, § 16.

lina constitutional history. As constitutional scholar John L. Sanders has observed: "With the passage of time and amendments, the attitude towards the Constitution of 1868 had changed from resentment to a reverence so great that until the second third of the twentieth century, amendments were very difficult to obtain."¹⁹⁷ In the last quarter of the nineteenth century only four amendments were submitted to the voters, and one of these failed to be ratified.¹⁹⁸ Retreating still further from Tourg  e's humanitarian program, voters in 1880 amended the constitutional command that the general assembly "shall provide" for the care of deaf-mutes, the blind, and the insane¹⁹⁹ to read that the general assembly *may* so provide.²⁰⁰ As part of the state's ongoing struggle with its creditors, the constitution was also amended in 1880 to prohibit payment of the debt contracted by the Reconstruction regime and to reduce payments on the balance of the state debt.²⁰¹ By this amendment state bonds with a face value of more than twelve million dollars and accrued interest of seven million dollars were repudiated.²⁰² In 1888 the overworked state supreme court was again enlarged to five members.²⁰³

During the first third of the twentieth century North Carolinians became even more reluctant to tamper with the state's basic law, ratifying only fifteen of thirty-five proposed amendments.²⁰⁴ Undoubtedly, the most important to succeed in those years was the first: the suffrage amendment of 1900, which added a literacy test and a poll tax requirement for voting.²⁰⁵ The poll tax requirement was subsequently abolished

197. Sanders, *supra* note 162, at 798.

198. *Id.*

199. N.C. CONST. of 1868, art. XI, § 10.

200. *Id.* amend. I of 1879; see Act of Mar. 14, 1879, ch. 314, 1879 N.C. Pub. Laws 489; see also Act of Mar. 14, 1879, ch. 254, 1879 N.C. Pub. Laws 421 (authorizing submission of constitutional amendment to state vote). For voting totals, see SANDERS & LOMAX, *supra* note 164, at 2.

201. N.C. CONST. of 1868, amend. II of 1879; see Act of Mar. 14, 1879, ch. 268, 1879 N.C. Pub. Laws 436. For voting totals, see SANDERS & LOMAX, *supra* note 164, at 2.

202. B.U. Ratchford, *The Adjustment of the North Carolina Public Debt, 1879-1883*, 10 N.C. HIST. REV. 157, 166 (1933); see John V. Orth, *The Eleventh Amendment and the North Carolina State Debt*, 59 N.C. L. REV. 747, 747-66 (1981) (discussing the influence of economic and political conditions on Eleventh Amendment jurisprudence).

203. N.C. CONST. of 1868, amend. of 1887; see Act of Mar. 7, 1887, ch. 212, 1887 N.C. Pub. Laws 449. For voting totals, see SANDERS & LOMAX, *supra* note 164, at 2.

204. Sanders, *supra* note 162, at 798. For a study of 10 proposed amendments that were rejected by the voters in 1914, see Joseph F. Steelman, *Origins of the Campaign for Constitutional Reform in North Carolina, 1912-1913*, 56 N.C. HIST. REV. 396, 396-418 (1979).

205. N.C. CONST. of 1868, amends. of 1899-1900; see Act of June 13, 1900, ch. 2, 1900 N.C. Pub. Laws 54, Act of Feb. 21, 1899, ch. 218, 1899 N.C. Pub. Laws 341. Election returns are in 1913 MANUAL, *supra* note 101, at 1016-18.

in 1919,²⁰⁶ something not required by the Federal Constitution until the ratification of the Twenty-Fourth Amendment in 1964; the literacy test remains in the constitution to this day,²⁰⁷ although of no practical effect because of federal civil rights legislation.²⁰⁸ Copied from an earlier scheme developed in Louisiana, the literacy test included a "grandfather clause" to protect illiterate white male voters: whether one was literate or not, he was entitled to vote if he or a lineal ancestor—the amendment did not actually specify a "grandfather"—had been qualified to vote on January 1, 1867, a date artfully chosen. As we have seen, an 1835 amendment still in effect on that date had provided that "No free Negro, free mulatto, or free person of mixed blood, descended from Negro ancestors to the fourth generation inclusive (though one ancestor of each generation may have been a white person) shall vote for members of the Senate or House of Commons."²⁰⁹

To take advantage of the grandfather clause, illiterate white men had to register by December 1, 1908; white males coming of age thereafter would have to pass the literacy test to qualify to vote. It has often been observed that state politicians' enthusiasm for "universal education" (sometimes explicitly qualified by the oxymoron "of the white children") dates to this era.²¹⁰ Although in 1915 the United States Supreme Court ruled grandfather clauses unconstitutional,²¹¹ North Carolina's had by then safely accomplished its mission. As later described by Henry Groves Connor, one of the architects of the suffrage amendment:²¹² "With the qualification imposed by this amendment the political power of the State practically passed to the white voters—certainly for the present generation."²¹³ The racial republic expressly avowed in 1835 was thus recreated by other means. Ironically, at the very moment of this retreat from democratic principles, the state Democratic Party began to select nominees for United States Senator by primary election,

206. N.C. CONST. of 1868, amend. of 1919; see Act of Aug. 26, 1920, ch. 93, 1920 Pub. Laws 119; Act of Mar. 5, 1919, ch. 129, 1919 N.C. Pub. Laws 305. Election returns are in NORTH CAROLINA MANUAL, 1921, at 327-28 (R.D.W. Connor ed., 1921) [hereinafter 1921 MANUAL].

207. N.C. CONST. of 1971, art. VI, § 4.

208. See *Gaston County v. United States*, 395 U.S. 285, 297 (1969) (upholding application of Federal Voting Rights Act of 1965).

209. N.C. CONST. of 1776, amend. of 1835, art. I, § 3, cl. 3.

210. POWELL, *supra* note 18, at 443.

211. *Guinn v. United States*, 238 U.S. 347, 364-65 (1915) (construing Oklahoma Constitution).

212. See William A. Mabry, "White Supremacy" and the North Carolina Suffrage Amendment, 13 N.C. HIST. REV. 2, 2-4 (1936).

213. CONSTITUTION ANNOTATED, *supra* note 1, at xxxvii.

the winners being then formally chosen by the general assembly.²¹⁴ When the Seventeenth Amendment to the United States Constitution provided for the direct election of Senators in 1913, the process was made official. Just as in 1835, white males gained political power as black males were shut out.

Votes for women came with the ratification of the Nineteenth Amendment to the Federal Constitution in 1920, with no thanks to the North Carolina General Assembly. In the 1868 convention, as we have seen, it was taken for granted that women and those under age could not vote, and the minority had argued from this premise against votes for black men. In 1897 a women's suffrage bill was introduced in the general assembly but was derisively referred to the committee on insane asylums.²¹⁵ The legislature even refused the opportunity provided by a special session in 1920 to add the last necessary vote in favor of the Nineteenth Amendment. Instead assemblymen joined in a cowardly "round robin" petition—signed in a circle so that no one would know whose name was put down first—urging the Tennessee General Assembly, also considering the amendment, not to ratify it.²¹⁶ Without its membership in the Union, North Carolina would apparently have long delayed advancing beyond universal (white) manhood suffrage. In 1946 the state constitution belatedly registered the new reality when an amendment deleted the superseded sexual qualification for voting, part of a thoroughgoing editorial revision replacing masculine with neuter nouns, designed in general to make the constitution "equally applicable to men and women" and in particular to admit women to jury service.²¹⁷ In 1971, long after the triumph of the democratic principle, the general assembly added its token support to the Nineteenth Amendment.²¹⁸

As the large issues of constitutionalism shifted to the national level, North Carolina constitutional development became increasingly preoccupied with details. In 1916 the general assembly was prohibited from granting special charters to private corporations,²¹⁹ and its power to levy

214. POWELL, *supra* note 18, at 439 n.1.

215. 1877 N.C. SENATE JOURNAL 295.

216. See A. Elizabeth Taylor, *The Woman Suffrage Movement in North Carolina*, 38 N.C. HIST. REV. 186, 186-89 (1961).

217. N.C. CONST. of 1868, amend. I of 1945; see Act of Mar. 15, 1945, ch. 634, 1945 N.C. Sess. Laws 875. Election returns are in NORTH CAROLINA MANUAL, 1947, at 231-32 (Thad Eure ed., 1947).

218. Act of May 6, 1971, ch. 327, 1971 N.C. Sess. Laws 258.

219. N.C. CONST. of 1868, amend. III of 1915; see Act of Mar. 9, 1915, ch. 99, 1915 N.C. Pub. Laws 148. Election returns are in NORTH CAROLINA MANUAL, 1917, at 294 (R.D.W. Connor ed., 1917).

taxes and borrow money was further curtailed in 1920.²²⁰ The mandatory minimum school term was lengthened from four to six months in 1918,²²¹ a change that had been rejected only four years earlier.²²² In the second third of the twentieth century North Carolinians displayed a far greater willingness to accept constitutional change. Between 1933 and 1968 only seven of forty-nine proposed amendments were rejected by the voters.²²³ Again the changes were matters of detail rather than of broad constitutional principle: authorizing the classification of property for taxation²²⁴ and strengthening limitations on the state debt;²²⁵ authorizing the general assembly to enlarge the supreme court from five to seven justices,²²⁶ and to create a department of justice;²²⁷ enlarging the council of state to include the commissioners of agriculture, labor, and insurance;²²⁸ creating an appointive state board of education;²²⁹ transferring the governor's power to assign judges to the chief

220. N.C. CONST. of 1868, amend. I of 1919; *see* Act of Aug. 26, 1920, ch. 93, 1920 N.C. Pub. Laws (Extra Sess.) 119; Act of Mar. 5, 1919, ch. 129, 1919 N.C. Pub. Laws 305. Election returns are in 1921 MANUAL, *supra* note 206, at 327-28.

221. N.C. CONST. of 1868, amend. II of 1917; *see* Act of Mar. 6, 1917, ch. 192, 1917 N.C. Pub. Laws 343. Election returns are in NORTH CAROLINA MANUAL, 1919, at 300-01 (R.D.W. Connor ed., 1919).

222. *See* Act of Oct. 13, 1913, ch. 81, 1913 N.C. Pub. Laws (Extra Sess.) 95 (proposed amendment X, not ratified). Election returns are in NORTH CAROLINA MANUAL, 1915, at 222-23 (R.D.W. Connor ed., 1915).

223. Sanders, *supra* note 162, at 801.

224. N.C. CONST. of 1868, amend. of 1935, art. I, § 1; *see* Act of Apr. 29, 1935, ch. 248, 1935 N.C. Pub. Laws 270. Election returns are in NORTH CAROLINA MANUAL, 1937, at 152-53 (H.M. London ed., 1937) [hereinafter 1937 MANUAL].

225. N.C. CONST. of 1868, amend. of 1935, art. 1, § 3. Election returns are in 1937 MANUAL, *supra* note 224, at 152-53.

226. N.C. CONST. of 1868, amend. of 1935, art. II, § 1; *see* Act of May 11, 1935, ch. 444, 1935 N.C. Pub. Laws 745. Election returns are in 1937 MANUAL, *supra* note 224, at 154-55. The general assembly promptly exercised its newfound power. Act of Feb. 3, 1937, ch. 16, 1937 N.C. Pub. Laws 47. The increased size was incorporated in the 1971 constitution. N.C. CONST. of 1971, art. IV, § 6(1).

In 1930, the voters had refused to ratify a proposed amendment that would have made the change directly. *See* Act of Mar. 13, 1929, ch. 142, 1929 N.C. Pub. Laws 166 (proposed amendment III, not ratified). Election returns are in NORTH CAROLINA MANUAL, 1931, at 116-17 (H.M. London ed., 1931).

227. N.C. CONST. of 1868, amend. II of 1937; *see* Act of Mar. 23, 1937, ch. 447, 1937 N.C. Pub. Laws 908. Election returns are in NORTH CAROLINA MANUAL, 1939, at 131-32 (H.M. London ed., 1939).

228. N.C. CONST. of 1868, amend. I of 1943; *see* Act of Feb. 10, 1943, ch. 57, 1943 N.C. Sess. Laws 50. Election returns are in NORTH CAROLINA MANUAL, 1945, at 234-36 (Thad Eure ed., 1945).

229. N.C. CONST. of 1868, amend. I of 1941; *see* Act of Mar. 14, 1941, ch. 151, 1941 N.C. Pub. Laws 240. Election returns are in NORTH CAROLINA MANUAL, 1943, at 241-42 (Thad Eure ed., 1943). Further amendments were subsequently proposed in 1943. N.C. CONST. of 1868, amend. III of 1943; *see* Act of Mar. 5, 1943, ch. 468, 1943 N.C. Sess. Laws 527. Election

justice²³⁰ and his parole power to a Board of Paroles.²³¹ In 1962 an amendment completely rewrote Article IV on the judiciary,²³² an early installment of thoroughgoing constitutional revision.

Two amendments were adopted in this period in response to United States Supreme Court decisions, further indications of the reactive mode that characterized the state's relationship with the federal government. Responding to the 1954 ruling in *Brown v. Board of Education*,²³³ which required the desegregation of public schools, the voters authorized the closing of schools on a local option basis and payment of educational expense grants,²³⁴ an option in fact never exercised²³⁵ and one that was later, in a further Supreme Court decision concerning a similar law in another state, declared unconstitutional.²³⁶ In the next decade, in response to the Court's 1962 decision in *Baker v. Carr*,²³⁷ requiring one-person-one-vote, representation in the legislature was made dependent solely on population,²³⁸ a change that particularly affected apportionment of the state senate.

Merely as a matter of housekeeping, redrawing the state constitution in order to consolidate the changes and eliminate anachronisms became politically attractive. As early as 1933 a new constitution had been drafted,²³⁹ although it never reached the voters because of a technical-

returns for this 1943 amendment are in NORTH CAROLINA MANUAL, 1945, at 234-36 (Thad Eure ed., 1945).

230. N.C. CONST. of 1868, amend. III of 1949; see Act of Apr. 23, 1949, ch. 1194, 1949 N.C. Sess. Laws 1523; Act of Apr. 4, 1949, ch. 775, 1949 N.C. Sess. Laws 882. Election returns are in NORTH CAROLINA MANUAL, 1951, at 245-47 (Thad Eure ed., 1951).

231. N.C. CONST. of 1868, amend. II of 1953; see Act of Apr. 2, 1953, ch. 621, 1953 N.C. Sess. Laws 465. Election returns are in NORTH CAROLINA MANUAL, 1955, at 255-58 (Thad Eure ed., 1955).

232. N.C. CONST. of 1868, amend. I of 1961; see Act of May 2, 1961, ch. 313, 1961 N.C. Sess. Laws 436. Election returns are in NORTH CAROLINA MANUAL, 1963, at 305-08 (Thad Eure ed., 1963).

233. 347 U.S. 483, 495 (1954).

234. N.C. CONST. of 1868, amend. of 1956; see Act of July 27, 1956, ch. 1, 1956 N.C. Sess. Laws (Extra Sess.) 1. Election returns are in NORTH CAROLINA MANUAL, 1957, at 255-56 (Thad Eure ed., 1957).

235. POWELL, *supra* note 18, at 524.

236. *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 225 (1964) (invalidating Virginia law).

237. 369 U.S. 186, 237 (1962); see also *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (invalidating Alabama voting apportionment plan).

238. N.C. CONST. of 1868, amend. II of 1967; see Act of May 31, 1967, ch. 640, 1967 N.C. Sess. Laws 704. Election returns are in NORTH CAROLINA MANUAL, 1969, at 336-37 (Thad Eure ed., 1969).

239. REPORT OF THE NORTH CAROLINA CONSTITUTIONAL COMMISSION TO THE GOVERNOR AND GENERAL ASSEMBLY, 1932; see Dillard S. Gardner, *The Proposed Constitution for North Carolina: A Comparative Study*, POPULAR GOV'T, June 1934, at 1.

ity;²⁴⁰ a comprehensive effort at reform in 1959 came to grief in the general assembly.²⁴¹ By the late 1960s the time seemed ripe for another try, and the North Carolina state bar, acting on the suggestion of the governor, formed a commission to draft a new constitution.

III. CONSTITUTION OF 1971

Some of the changes are substantive, but none is calculated to impair any present right of the individual citizen or to bring about any fundamental change in the power of state and local government or the distribution of that power.²⁴²

In 1971 North Carolina was not a "shipwrecked" society, either from Revolution or Civil War; quite the opposite, the state was experiencing an era of prosperity. Many of its social problems, even the grievous one of race, looked more likely to be resolved than ever before. The 1971 constitution, the state's third, was not therefore a product of haste and social turmoil. It was instead a good-government measure, long-matured and carefully crafted by the state's leading lawyers and politicians, designed to consolidate and conserve the best features of the past, not to break with it. The State Constitution Study Commission, a sentence from whose report is quoted above, clearly avowed its non-revolutionary character.²⁴³ Unlike its two predecessors, the latest constitution was not drafted by elected representatives; prepared by experts, it was referred to the general assembly which then presented it without change to the vot-

240. Opinions of the Justices in the Matter of Whether the Election Held on Tuesday After the First Monday in November, 1933, Was the Next General Election Following the Adjournment of the 1933 Session of the General Assembly, 207 N.C. 879, 880, 181 S.E. 557, 557 (1934) (answering in the affirmative and thereby indicating that the proposed constitution of 1933 could not be submitted to the voters at the 1934 election).

The judges of only a small minority of American states give advisory opinions such as the one cited. Of those that do, most are acting pursuant to authorization in the state constitution or a state statute. Perhaps alone, the justices of the North Carolina Supreme Court have rendered advisory opinions without either. See Preston W. Edsall, *The Advisory Opinion in North Carolina*, 27 N.C. L. REV. 297, 297-99 (1949).

There has recently been an indication that the North Carolina justices will no longer issue advisory opinions. See *State ex rel. Martin v. Preston*, 325 N.C. 438, 454, 385 S.E.2d 473, 481 (1989) (referring to "advisory opinions formerly issued on occasion by this Court" (emphasis added)).

241. See JOHN L. SANDERS, CONSTITUTIONAL REVISION AND COURT REFORM: A LEGISLATIVE HISTORY, 1959, at 3-7 (1959).

242. REPORT OF THE NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION TO THE NORTH CAROLINA STATE BAR AND THE NORTH CAROLINA BAR ASSOCIATION 4 (1968) [hereinafter 1968 NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION REPORT].

243. 1968 NORTH CAROLINA CONSTITUTION STUDY COMMISSION REPORT, *supra* note 236, at 4.

ers.²⁴⁴ Although an entirely new instrument, it was routed through the process normally used for piecemeal change.

The text of the new frame of government was that of the 1868 constitution as amended, subjected to rigorous editorial revision. A number of noncontroversial changes were introduced; the minimum school term, for example, was lengthened from six months (set in 1918) to nine months,²⁴⁵ where it had in fact been fixed by statute for years. The section on amendment by constitutional convention was clarified by authorizing the general assembly to propose limitations on the convention which, if adopted by the voters, would be binding;²⁴⁶ no longer would the legislature have to rely on the oaths of the delegates not to exceed their authority as in 1835 and 1875. Fundamental reforms were left to the ordinary amendment process; indeed, five amendments were approved by the voters at the same election that ratified the new constitution.²⁴⁷ Of these, the most important was an amendment concerning state finance, of particular significance for local government.²⁴⁸ A further amendment assigned the income from escheats to a special fund providing scholarships for state university students.²⁴⁹ For two centuries, ever since a 1794 statute accompanying the charter of the University of North Carolina, escheats had provided a source of revenue for the university; now that the university received regular appropriations from the state, the income from escheats was less needed, and of course, giving the money to needy students was, so to speak, "keeping it in the family."

Since 1971, amendments have continued to accumulate. During the period 1972-1990, twenty-eight amendments have been proposed to the voters, of which twenty-two have been adopted²⁵⁰—a sign that the state's constitutional conservatism, from which the first two constitutions benefitted, is wearing thin. On the very day the new constitution became

244. Act of July 2, 1969, ch. 1258, 1969 N.C. Sess. Laws 1461. Election returns are in NORTH CAROLINA MANUAL, 1971, at 359-67 (Thad Eure ed., 1971) [hereinafter 1971 MANUAL].

245. N.C. CONST. of 1971, art. IX, § 2(1).

246. *Id.* art. XIII, § 1.

247. N.C. CONST. of 1971, amend. of 1969; see Act of July 2, 1969, ch. 1270, 1969 N.C. Sess. Laws 1492 (proposing amendment VI); Act of July 2, 1969, ch. 1200, 1969 N.C. Sess. Laws 1385 (proposing amendment V); Act of June 23, 1969, ch. 1004, 1969 N.C. Sess. Laws 1149 (proposing amendment IV); Act of June 20, 1969, ch. 932, 1969 N.C. Sess. Laws 1074 (proposing amendment III); Act of June 16, 1969, ch. 872, 1969 N.C. Sess. Laws 976 (proposing amendment II); Act of June 13, 1969, ch. 827, 1969 N.C. Sess. Laws 920 (proposing amendment I). Election returns are in 1971 MANUAL, *supra* note 244, at 359-67. Amendment IV, which would have eliminated the literacy test for voting, was defeated. *Id.*

248. N.C. CONST. of 1971, amend. V of 1969.

249. *Id.* amend. I.

250. See SANDERS & LOMAX, *supra* note 164, at 23.

effective, its provision limiting the franchise to persons twenty-one years of age or older²⁵¹ was rendered obsolete by the ratification of the Twenty-Sixth Amendment to the Federal Constitution, enfranchising those eighteen and over. In short order the state constitution caught up with the Twenty-Sixth Amendment,²⁵² as it had earlier, albeit more slowly, caught up with the Nineteenth. In 1977 a popular governor secured an amendment permitting the governor to serve two consecutive terms²⁵³—a privilege of which he promptly took advantage. The ultimate prize, the gubernatorial veto, continued, however, to elude the state's chief executive. In 1977, too, the legislature's power of the purse was curtailed: the state's longstanding commitment to a balanced budget was reinforced by a constitutional amendment empowering the governor to "effect the necessary economies" in order to prevent expenditures exceeding revenues.²⁵⁴

Like its two predecessors, the constitution of 1971 includes the bold declaration that "[a]ll political power is vested in and derived from the people,"²⁵⁵ yet we have seen the changing realities of popular sovereignty over two centuries: from taxpaying freemen (1776), to white male taxpayers (1835), to all males twenty-one and older (1868), to males who could pass the literacy test or who could take advantage of the grandfather clause (1900), to voters of both sexes (1920), and finally to all persons eighteen and over (1971). The fundamental principle remains the same, but its application has changed dramatically over time. It is now hard to imagine any retreat from universal suffrage; the racial disfranchisements of 1835 and 1900 would doubtless today fall foul of the Federal Constitution. Yet it is equally difficult to foresee further advances of the democratic principle.

From 1776 until the present, North Carolina constitutions also have unequivocally declared the principle of separation of powers: "The legislative, executive, and supreme judicial powers shall be forever separate

251. N.C. CONST. of 1971, art. VI, § 1.

252. *Id.* amend. I of 1971; see Act of Apr. 16, 1971, ch. 201, 1971 N.C. Sess. Laws 150. Election returns are in NORTH CAROLINA MANUAL, 1973, at 434-37 (John L. Cheney, Jr. ed., 1973). This change had first been called for in North Carolina by Governor W. Kerr Scott (1949-53). See POWELL, *supra* note 18, at 514.

253. N.C. CONST. of 1971, amend. III of 1977; see Act of May 11, 1977, ch. 363, 1977 N.C. Sess. Laws 369. Election totals are in SANDERS & LOMAX, *supra* note 164, at 17-18.

254. N.C. CONST. of 1971, amend. V of 1977; see Act of June 23, 1977, ch. 690, 1977 N.C. Sess. Laws 837. Election totals are in SANDERS & LOMAX, *supra* note 164, at 18.

255. N.C. CONST. of 1971, art. I, § 2; cf. N.C. CONST. of 1868, art. I, § 2 ("That all political power is vested in and derived from the people."); N.C. CONST. of 1776, Declaration of Rights, § 1 ("That all political Power is vested in and derived from the People only.").

and distinct from each other.”²⁵⁶ As with popular sovereignty, this principle too has had its changing applications. If the legislative branch was separate from the other two branches in the first constitution, it was only in the Orwellian sense of being “more separate” than the others. As we have seen, the general assembly elected all executive and judicial officers; the first, and for a long time the only, exception came in 1835 when the governor became popularly elected. In 1868 appeared the long ballot and clouds of elective officials, executive, judicial, and local. The governor gained in constitutional power and benefitted politically from a lengthened term. In the years following Reconstruction, the general assembly regained the initiative and recovered parts of its lost power. Recently, however, the growth of legislative power has been checked. In 1982, relying on the separation of powers clause, the state supreme court declared unconstitutional statutes providing for the appointment of legislators to bodies in the executive branch.²⁵⁷

What the effects of the long ballot have been and whether it actually increased popular sovereignty and strengthened separation of powers, are difficult questions. One effect, at least, was soon apparent. Speaking in 1889 on the history of the state supreme court, Kemp P. Battle, president of the University of North Carolina, observed: “All the judges as a rule belong to the same political party, whereas the old Court had generally representatives of the two leading parties.”²⁵⁸ The same could be said of the other newly elected officers; as could Battle’s candid recognition that the effect had been to transfer the choice from the general assembly to the party nominating conventions. What was still new when Battle spoke became settled practice in later years: the suffrage amendment in 1900 clinched one-party rule in the state for most of the twentieth century.²⁵⁹ Although the short ballot has been commended by experts for reasons of efficiency and accountability,²⁶⁰ it is the recent prospect of partisan judicial elections that has prompted calls for a return to the

256. N.C. CONST. of 1971, art. I, § 6; cf. N.C. CONST. of 1868, art. I, § 8 (“That the Legislative, Executive, and Supreme judicial powers of the government ought to be forever separate and distinct from each other.”); N.C. CONST. of 1776, Declaration of Rights, § 4 (“That the Legislative, Executive and Supreme Judicial Powers of Government ought to be forever separate and distinct from each other.”).

257. *State ex rel. Wallace v. Bone*, 304 N.C. 591, 601-09, 286 S.E.2d 79, 84-89 (1982); see John V. Orth, “Forever Separate and Distinct”: *Separation of Powers in North Carolina*, 62 N.C. L. REV. 1, 1-28 (1984).

258. Kemp P. Battle, *An Address on the History of the Supreme Court* (Feb. 4, 1889), in 103 N.C. 363 (1889).

259. See POWELL, *supra* note 18, at 443.

260. See BROOKINGS INSTITUTION, REPORT ON A SURVEY OF THE ORGANIZATION AND ADMINISTRATION OF THE STATE GOVERNMENT OF NORTH CAROLINA SUBMITTED TO GOVERNOR O. MAX GARDNER 3-4, 50, 162-63 (1930).

practice of having judges chosen by another branch—this time, significantly, by the governor with the “advice and consent” of the general assembly.²⁶¹ Such a change, if made, would raise in most minds no serious questions of constitutional conflict with the fundamental principles of popular sovereignty and separation of powers, just as the gubernatorial veto, if conceded, would doubtless be immune from challenge on that score. The reality is that these fundamental principles are general guidelines only and not detailed blueprints.

Just as North Carolina lost power to the federal government as a result of defeat in the Civil War and the ratification of the Reconstruction Amendments, so the general assembly lost power, not just to the other branches of state government but also to the people. In his 1889 address Battle observed from close range the sea change that had occurred in 1868. The state’s first constitution, he said, had been founded on the assumption that the general assembly could be entrusted with powers “almost unlimited.”²⁶² Antebellum legislators “could tax any subject to any amount, and exempt any subject from any tax at all. They had boundless right to pledge the State credit.”²⁶³ They had, in addition, “vast powers in the control of the other departments of government”²⁶⁴ and “full discretion as to nearly all subjects of legislation.”²⁶⁵ By contrast, the constitution of 1868 was founded on the assumption that “the representatives may be untrustworthy.”²⁶⁶ This explains, Battle pointed out, “the limitations on the taxing power, and on the power of pledging the State credit,”²⁶⁷ as well as the many provisions declaring “what the General Assembly must do, what it may do, and what it may or may not do,”²⁶⁸ provisions that “seem properly to belong to the statute books, to be modified or amended whenever the interests of the people require.”²⁶⁹ Other states than North Carolina had lost their Revolutionary confidence in the legislature by the mid-nineteenth century, but in Southern states like North Carolina the displacement of the elite was more dramatic.

Patterns established more than a century ago continue to be discernible in the constitution of 1971. Although the legislators have regained

261. See John J. Karzan, Comment, *Changing North Carolina's Method of Judicial Selection*, 25 WAKE FOREST L. REV. 253, 264-68 (1990).

262. Battle, *supra* note 258, in 103 N.C. at 366.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 366-67.

268. *Id.* at 367.

269. *Id.*

some of their discretion—they recovered, as we have seen,²⁷⁰ the power to set their own wages in 1968—they remain far from the “almost unlimited” powers of their predecessors under the state’s first constitution. The taste for repeated constitutional amendment acquired during the middle of the twentieth century shows little sign of change: the 1776 constitution was amended only three times in eighty-five years; its modern successor has more than once equaled or excelled that in a single year, although admittedly not all the amendments together have rivaled the extensive changes adopted in 1835. Government has certainly become far more complex than it was in the eighteenth century and the pace of change has greatly quickened, but that alone does not explain the modern fondness for constitutional amendment. In fact, the process has become a complicated version of the initiative or referendum, a means by which democracy occasionally becomes direct rather than representative—the people legislating for themselves rather than through delegates.

Over the centuries, by far the most stable provisions of North Carolina’s organic law have been those safeguards of due process expressed in the declaration of rights, now Article I. Gleaned from English tradition, they have (among other things) prohibited excessive bail or fines and cruel or unusual punishment; they have specifically guaranteed trial by jury and have generally proclaimed the rule of law (“law of the land”). Unlike the sweeping fundamental principles of popular sovereignty and separation of powers, these provisions have over the years been given specific content by the courts; indeed, they empower the state courts to provide protections going even beyond those secured by the Federal Constitution.²⁷¹ Other than the necessary provisions establishing the institutions of government, such clauses have become the hallmark of American constitutionalism. Perhaps they suggested the idea of giving other policy statements constitutional status, such as the sections in the 1776 constitution calling for public schools and the regulation of entails, or the section in the 1868 constitution calling for the codification of state law. Of course, the nearer such sections came to outright legislation, the more frequent became the need for amendments, as political and social realities changed. The minimum public school term, as we have seen, set at four months in the 1868 constitution, was lengthened to six months by amendment in 1918 and finally reached nine months in the 1971 constitution. Provisions such as this one are undoubtedly benign; others, such as the constitutional determination of legislative compensation from 1876

270. See *supra* notes 195-96 and accompanying text.

271. See, e.g., *State v. Carter*, 322 N.C. 709, 724, 370 S.E.2d 553, 562 (1988) (finding no good faith exception to the exclusionary rule under the North Carolina Constitution, in contrast to the Federal Constitution).

to 1968, are merely nuisances. There is reason for concern, however, if too frequent amendments so habituate voters to constitutional change that they someday, in the grip of temporary passion or fear, tamper with the fundamental guarantees of due process. Of course, the Federal Constitution, far more immune to change, would continue to provide protection, but only to the extent recognized by the justices of the United States Supreme Court. The best guarantee of North Carolinians' basic rights must ever be what it has always been: not only a balanced institutional arrangement of government subject to wise restraints enforced when necessary by fearless judges, but also, above all, a thoughtful and informed citizenry, conscious of its constitutional history and zealous to preserve the best for posterity.

APPENDIX

SOURCES OF NORTH CAROLINA
DECLARATION OF RIGHTS

The column on the left reprints the North Carolina Declaration of Rights adopted on December 17, 1776. (The numbers in brackets refer to the comparable sections of Article I of the North Carolina Constitution of 1971.) The center column reprints analogous sections from the previously adopted declarations of rights of Virginia (June 12, 1776), Maryland (August 14, 1776), and Pennsylvania (September 28, 1776). The column on the right reprints analogous sections from British documents: the 1689 Bill of Rights (BOR), and the 1225 version of Magna Carta (MC).

NORTH CAROLINA DECLARATION OF RIGHTS	VIRGINIA, MARYLAND, PENNSYLVANIA DECLARATIONS OF RIGHTS	BRITISH DOCUMENTS
<hr/>		
A Declaration of Rights made by the Representatives of the Freemen of the State of North Carolina.		
1.[2.] That all political Power is vested in and derived from the People only.	VA 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.	
2.[3.] That the people of this State ought to have the sole and exclusive Right of regulating the internal Government and Police thereof.	MD 2. That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof.	
3.[32.] That no Man or set Men are entitled to exclusive or separate Emoluments or Privileges from the Community, but in Consideration of Public Services.	VA 4. That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge to be hereditary.	
4.[6.] That the Legislative, Executive and Supreme Judicial Powers of	MD 6. That the legislative, executive and judicial powers of	

Government ought to be forever separate and distinct from each other.

5.[7.] That all Powers of Suspending Laws, or the Execution of Laws, by any Authority, without Consent of the Representatives of the People, is injurious to their rights and ought not to be exercised.

6.[10.] That Elections of Members to serve as Representatives in General Assembly, ought to be free.

7.[23] That in all criminal Prosecutions every man has a Right to be informed of the Accusation against him, and to confront the Accusers and Witnesses with other Testimony, and shall not be compelled to give Evidence against himself.

8.[22.] That no Freeman shall be put to answer any criminal Charge, but by Indictment, Presentment, [or] Impeachment.

9.[24.] That no Freeman shall be convicted of any Crime, but by the unanimous verdict of a Jury of good and lawful Men, in open Court as heretofore used.

government, ought to be forever separate and distinct from each other.

VA 7. That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.

VA 6. That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assembled [sic], for the public good.

BOR 1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

BOR 8. That election of members of parliament ought to be free.

10.[27.] That excessive Bail should not be required, nor excessive Fines imposed, nor cruel nor unusual punishments inflicted.

VA 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

BOR 10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

MD 22. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted, by the courts of law.

11.[20.] That General Warrants whereby any Officer or Messenger may be commanded to search suspected Places, without Evidence of the Fact committed, or to seize any Person or Persons not named, whose offence is not particularly described, and supported by Evidence, are dangerous to Liberty, and ought not to be granted.

VA 10. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

12.[19.] That no Freeman ought to be taken, imprisoned or disseised of his Freehold, Liberties or Privileges, or outlawed or exiled, or in any Manner destroyed or deprived of his Life, Liberty or Property, but by the Law of the Land.

MD 21. That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land.

MC 29. No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor we will not pass upon him nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

13.[21.] That every Freeman restrained of his Liberty is entitled to a Remedy to enquire into the Lawfulness thereof, and to remove the same if unlawful, and that such Remedy ought not to be denied or delayed.

14.[25.] That in all Controversies at Law

VA 11. That in controversies respecting

respecting Property, the ancient Mode of Trial by Jury is one of the best Securities of the Rights of the People, and ought to remain sacred and inviolable.

15.[14.] That the Freedom of the Press is one of the great Bulwarks of Liberty, and therefore ought never to be restrained.

16.[8.] That the People of this State ought not to be taxed or made subject to the Payment of any Impost or Duty, without the Consent of themselves, or their Representatives in the General Assembly freely given.

17.[30.] That the People have a right to bear Arms for the Defence of the State; and as standing Armies in Time of Peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil Power.

18.[12.] That the People have a right to Assemble together to consult for their common good, to instruct their Representatives, and to apply to the Legislature for Redress of Grievances.

19.[13.] That all Men have a natural and unalienable Right to worship Almighty God according to the Dictates of their own Conscience.

property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred.

VA 12. That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.

PA 13. That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

PA 16. That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance.

PA 2. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought[,] or of right

can, be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.

20.[9.] That for redress of Grievances and for amending and strengthening the Laws, Elections ought to be often held.

21.[35.] That a frequent Recurrence to fundamental Principles is absolutely necessary to preserve the Blessings of Liberty.

MD 10. That, for redress of grievances, and for amending, strengthening and preserving the laws, the Legislature ought to be frequently convened.

PA 14. That a frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty, and keep a government free: The people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to exact a due and constant regard to them, from their legislators and magistrates, in the making and executing such laws as are necessary for the good government of the state.

BOR 13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently.

22.[33.] That no
Hereditary Emoluments,
Privileges, or Honours
ought to be granted or
conferred in this State.

23.[34.] That Perpetuities
and Monopolies are
contrary to the Genius of a
free State, and ought not
to be allowed.

24.[16.] That retrospective
Laws, punishing Facts
committed before the
Existence of such Laws,
and by them only declared
criminal, are oppressive,
unjust, and incompatible
with Liberty, wherefore,
no Ex post Facto Law
ought to be made.

MD 15. That retrospective
laws, punishing facts
committed before the
existence of such laws, and
by them only declared
criminal, are oppressive,
unjust, and incompatible
with liberty; wherefore no
ex post facto law ought to
be made.

25.[Art. XIV, § 2]
(concerning state
boundaries).

SOURCES: North Carolina Declaration of Rights of 1776, in 23 *The State Records of North Carolina* 977 (Walter Clark ed., 1904). The Virginia, Maryland, and Pennsylvania declarations of rights may be found in 10, 4, & 8 *Sources and Documents of United States Constitutions* (William F. Swindler ed., 1973). The British Bill of Rights may be found in 9 Statutes at Large from the Magna Carta to the Eleventh Parliament of Great Britain 68-69; the Magna Carta (1225) in 1 *id.* at 10-11.