CODE OF VIRGINIA:

WITH THE

DECLARATION OF INDEPENDENCE

AND

CONSTITUTION OF THE UNITED STATE

AND THE

DECLARATION OF RIGHTS

AND

CONSTITUTION OF VIRGINIA.

PUBLISHED PURSUANT TO AN ACT OF THE GENERAL ASSEMBLY OF VIRGIN
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Codification in Virginia

Conway Robinson, John Mercer Patton, and the Politics of Law Reform

During the turbulent years of sectional tension surrounding the Mexican War, Virginians found themselves engaged in an effort to bring their traditional common-law system of jurisprudence into correspondence with their modern social practices. Against the backdrop of prominent national discussions over questions of slavery in the territories, the sale of slaves in the District of Columbia, and southern secession, they embarked on a comprehensive project of legal reform that consequently facilitated the democratic transformation of the commonwealth's juridical and political institutions. This project began with a simple attempt to make courtroom procedures less cumbersome but quickly expanded to include a substantial revision of the civil and criminal codes, as well as the establishment of a special appellate court to relieve notoriously back-logged dockets. Five years of legal reform culminated with the convening of a constitutional convention in October 1850, Virginia's second such assembly in less than two decades. Typically referred to as the Reform Convention, the constitution that resulted from this assembly replaced the archaic political structures of the Revolutionary-era commonwealth with those of a centralized state government specifically designed to administer all aspects of public interest, to arbitrate democratic principles, and to protect slavery. By 1852 the process of democratic reform was complete: Virginia's bar had adopted some modern techniques of procedure, the legislature had enrolled a comprehensive statutory code, and voters had ratified a constitution that implemented white-manhood suffrage and mandated a popular elected judiciary.

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The Reform Convention itself, and the fundamental changes that were made by it in extending suffrage and representation, has often been identified as the seminal moment of democratic development in antebellum Virginia. In contrast, however, the significant episodes of law reform that preceded it have eluded much in the way of scholarly attention. Yet these legal changes demand attention in order to understand the intricate process by which Virginia's ruling class embraced democratic institutions while simultaneously entrenching their commitment to slavery. The codification process—the process of compiling, unifying, and publishing the legislative statutes—was particularly notable in this respect; it raised questions about several core political issues including the expansion of executive power, local taxation policies, the legal status of free blacks, and the nature of an independent judiciary. The legislative debates that emerged as part of the required process to enroll this new code revealed an effort to resolve many of these issues, but one that was often frustrated by the partisan politics of the period. The enrollment debates thus anticipated and even shaped many of the more familiar constitutional debates that took place during the Reform Convention the following year.[1] This essay therefore examines the codification process in Virginia as a means to assess the influence and consequences of law reform on the politics of a slave state.

In February 1846, the Virginia legislature appointed two attorneys, Conway Robinson and John Mercer Patton, to undertake a project to revise the state's thirty-year-old civil code. Within a year, they had taken over a stalled project to reform the criminal code as well. Over the course of the next three years, Robinson and Patton examined every section of the old code and attempted to reconcile each of them with three decades of additional statutes, judicial decisions, and, when applicable, with similar reforms in other common-law jurisdictions. They submitted their recommendations to the legislature in a series of four reports that justified their proposed revisions by providing specific historical descriptions of existing (and often contradictory) statutes and judicial decisions that pertained to each section. These reports also included prefatory statements that summarized their contents,

reported on the status of the project, and raised larger questions about Virginia's laws and legal institutions. By the spring of 1849, Robinson and Patton had completed their assignment and submitted a 900-page draft to the legislature for section-by-section examination and enrollment.

The General Assembly established a special Joint Committee on Revision to expedite the process, but the legislators were unable to attend to the vast project during the regular legislative session. Accordingly, they scheduled a special session to meet during the summer months to complete the task of enrolling the new code. When the special session convened in Richmond in May, fears of a cholera epidemic forced the delegates to remove to Fauquier White Sulphur Springs, just outside Warrenton. There they met throughout the summer, debating and amending the corpus submitted by Robinson and Patton and addressing such diverse legal topics as fiduciaries, corporations, slave-hiring practices, contingent remainders, usury, married women's property rights, and the appointment of flour inspectors. By the end of August, agreement, or perhaps just exhaustion, had been reached, and both the House and the Senate approved the new code, which was to become effective in July 1850.[2]

The impetus for law reform in Virginia was hardly unique to the antebellum decades. Similar projects had been undertaken at least twice during the colonial period, and substantial reforms necessarily followed the American Revolution as well.[3] The antebellum law reform movement shared some common features with previous endeavors; in particular, the obtuse technicality of the traditional common-law forms of action remained an issue and was considered contrary to the democratic spirit of the age. The much-maligned county court system was again exposed to criticism as well. Many perceived their self-nominating procedures and freehold qualifications for office as oligarchic vestiges of a feudal aristocracy. But ample criticisms were now directed at the superior courts as well, reflecting a growing mistrust of an emerging professional class of lawyers and judges who delved into the mysterious arts of legal reasoning. Indeed, circuit judges who pompously rode into a community twice a year and proceeded to dictate the resolution of local affairs often found themselves subject to the ire of disgruntled litigants. Governor William "Extra-Billy" Smith, in his annual address to the legislature, specifically recommended that circuit court judges should be

prohibited from riding the same circuit more than two successive years, because a judge who presided in a county for a long period of time contracted "bitter enmities among the people and the bar of such county." He asserted that, consequently, even the most virtuous judges developed a mistrust of the people that infected the exercise of their office.[4]

Others protested the creeping influence of political party factionalism on the bench. Charges that partisan affiliation often trumped professional qualifications and competence in the judicial appointment process were common. One writer declared it "a grievous thing" that judicial appointments should be made by legislators "as if they were choosing an elector for the office of President of the United States." He chided legislators by remarking that it would serve as "small consolation" to the suitor whose cause was "delayed or erroneously decided" that the judge in the matter concurred with him "on the question [of] who was the most suitable person to be elected president."[5] More substantial complaints concerned the inordinate delays in hearing appeals and the corresponding backlog on the circuit court docket. Reformers decried the fact that it commonly took seven or eight years for a case to be heard once it had been placed on the docket. Conway Robinson, the eventual architect of antebellum reforms, lamented that the foundational principle of Anglo-American law, as articulated in *Magna Carta*, "that justice or right shall not be sold, denied or deferred to any man," could no longer be said to be "fully recognized in Virginia."[6]

Beyond these persistent criticisms of judges and the courts, however, antebellum calls for reform were distinguished by their desire to resolve problems with the substantive elements of the common law itself. These problems were believed to stem from the inadequacy of traditional common law jurisprudence to conform to a changing system of property relations that characterized a modern commercial society. As one contemporary commentator explained, "the system of British law was built upon real property [land]," and modern-day judges frequently found themselves "at a loss for precedents, and even principles" to provide for the adjudicative demands arising from "new elements of national wealth," which characterized an economy dedicated to "accumulations of capital."[7] Many of these new elements appeared in the form of currencies, bonds, and certificates, and belonged to a derivative branch of property law that concerned mercantile

property. Now, however, this historical subset of the common law threatened to become the norm in judicial matters, and the courts were at a loss to deal with the extensive forms of exchange indicative of a market society. Codification represented an effort to respond to these problems. Writing in anticipation of the special legislative session, a Richmond newspaper affirmed this understanding when it confidently reported to its readers that "almost the sole object of this immense Code . . . [was] to provide the means for enforcing contracts between individuals."[8] Accordingly, unlike earlier reforms, the antebellum movement represented Virginia's distinctive experience in modernizing the principles of the common law—a process necessitated by the rampant commercial practices of the age.

Virginia was not alone in this experience. Similar reform projects had occurred recently in Great Britain and throughout most of the common-law diaspora as well.[9] Virginia's antebellum legal reformation was thus part and parcel of a larger, transnational movement to modernize aspects of the English common law, which were perceived as archaic and inefficient in addressing the dynamic commercial and democratic practices of a modern market society. At the most basic level, Virginia's experience was similar to contemporary efforts in these other common-law jurisdictions; the reforms embraced a positivist conception of law that preferred legislative enactments over judge-made determinations, but which was to be adjudicated by a highly professionalized bench and bar. In the details, however, specifically in the manner in which Virginia attempted to reconcile the particular juridical needs of a slaveholding society that found itself immersed in an increasingly commercial culture, Virginia's legal reformation appeared as both distinct and exceptional. Indeed, it signaled the application of a formalist approach in order to ordain slaves as a special form of property that would be sheltered from the vicarious characteristics of market relations. In this respect, Virginia's adoption of contemporary legal doctrines represented a reaction against, and not a promotion of, the economic doctrines of industrial capitalism.[10]

As appointed revisors, Conway Robinson and John Mercer Patton exercised tremendous influence over the course of legal reform in antebellum Virginia. Significantly, neither of these men was born into a family of the slaveholding, planter class, and neither cultivated the rustic, planter-lawyer

image that had characterized lawyers of Virginia's Revolutionary generation. Both men displayed an urban, professional orientation that corresponded with the emergence of a specially educated, professional class of lawyers in the nation at large. Nor were they prone to engage in nostalgic expressions of a lost agrarian age; rather, their writings were filled with the positive visions of modern development and human progress that were characteristic of nineteenth-century middle-class sensibilities. Yet both men adamantly defended slavery as the fundamental basis of Virginia's social order, individual liberty, and republican government. In this sense, both Patton and Robinson represented a new breed of professionally focused lawyers who espoused social progress through legal reform on the basis of their advanced, technical knowledge of the law, while simultaneously advocating the traditional patterns of domestic relations in a slave society as the measure of that progress.[11]

John Mercer Patton was the son of a wealthy Scottish merchant who had immigrated to Virginia in the years before the Revolution. Born in 1797, he came to the bar by an unusual route. He attended Princeton for a year before enrolling in the medical school at the University of Pennsylvania. Upon graduation, he returned home to Fredericksburg, where he elected not to practice medicine but read law instead. In light of his future engagements, Patton's choice of profession can possibly be attributed to the greater potential for political opportunities that a career in the law made possible. But his circle of social relations probably also figured prominently. In 1824, he married Margaret "Peggy" French Williams, the daughter of the well-known state attorney, Isaac Hite Williams. Within six years, Patton had earned a substantial reputation at the Fredericksburg bar himself and, accordingly, was selected to fill the U.S. congressional seat that became vacant when Philip Pendleton Barbour resigned to accept an appointment on the U.S. District Court. The next year, Patton was elected outright to the seat that he continued to hold for four consecutive terms. During his tenure in the House he revealed himself as a staunch Jacksonian Democrat, supporting the president during the bank crisis against the wishes of the Virginia legislature

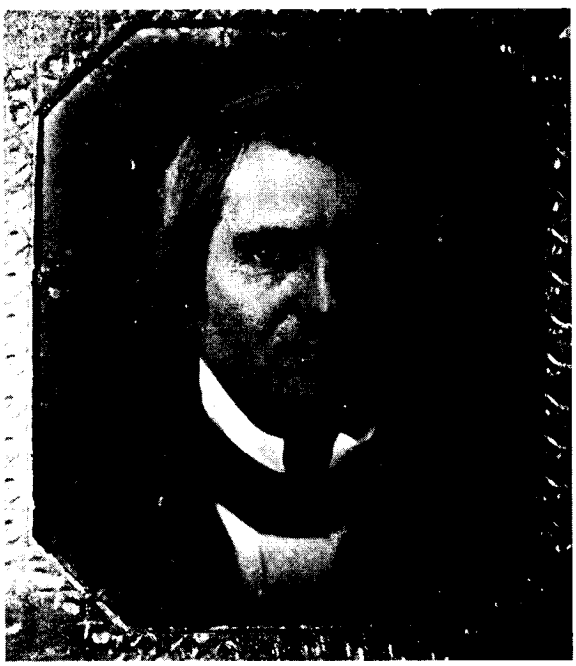
and the governor. He was also an outspoken proponent of the "Gag rule," which prohibited any discussion of slavery on the House floor. He resigned from his congressional seat in 1838 and returned to private practice in Richmond but, very soon thereafter, was recruited by members of both the Whig and Democratic parties to serve on the Executive Council. In 1841, as the senior member of that council, Patton was appointed as acting governor for a few days when Thomas Walker Gilmer resigned from the post. After Patton stepped down from this office, he retired from public service until 1855, when he re-emerged as the Know-Nothing candidate for attorney general. He died in 1858 but was survived by six sons who fought for the Confederacy, one of whom went on to a distinguished legal career as well. Despite his extensive and varied political experiences, however, Patton was best remembered by his contemporaries for his partnership with Robinson in revising the code.[12]

Conway Robinson was born to John and Agnes Conway Moncure Robinson in 1805 and raised in the family home in Richmond. His father served as the clerk of the Henrico circuit court and, at the age of thirteen, the precocious son followed in these footsteps, beginning his legal education as an assistant to Thomas C. Howard, a clerk in Richmond's municipal courts. When the Richmond courts were subdivided in 1824, the nineteen-year-old Robinson trumped his teacher and was assigned as the clerk for the more prominent one. Additionally, he served as the assistant clerk for the General Court. In 1827, when he came of age, Robinson was admitted to the Richmond bar and, the next year, was appointed as the chief clerk for the General Court. In 1831, he resigned his duties as clerk in order to pursue the business of his growing practice and to begin writing legal treatises. Robinson's professional reputation continued to grow as the result of his practice and when he married Mary Susan Selden Leigh, the daughter of Benjamin Watkins Leigh, a prominent Richmond attorney and politician. By decade's end he had been admitted to the bar of the U.S. Supreme Court and had developed friendships with Chief Justice Roger Taney, Joseph Story, and other prominent national jurists. In 1842, Robinson succeeded his father-in-law as the reporter for the Virginia Supreme Court of Appeals and published two volumes of reports during his two-year tenure in that office. Robinson proved a prolific writer of legal treatises and histories. During the

1830s, he published an extensive three-volume work, *Practice in the Courts of Law and Equity in Virginia*, which detailed the legal procedures used in Virginia's courts and established his reputation for his preeminent knowledge of the state's legal history. By the time of his appointment to the code revision, Robinson was recognized as one the most widely read and well-connected members of the Virginia bar.[13]

Robinson and Patton thus brought substantial experience to the codification project, and both were well aware of other contemporary efforts of law reform outside Virginia. Two previous revisions particularly informed how they understood their task: Virginia's *Revised Code of 1819* and the 1836 report of the Massachusetts committee on revision.[14] Virginia's most recent attempt to compile a code provided Robinson and Patton with an example of what not to do. In 1817, the legislature had appointed five legal luminaries to serve as a revision committee: Judges Spencer Roane, John Coalter, William Brockenbrough, and lawyers Robert White and Benjamin Watkins Leigh. These revisors brought lofty ambitions to the project. They had hoped to remove all the contradictions and obsolescence from the text but eventually failed to publish an efficient and comprehensive code. Blame for this failure was placed squarely on the shoulders of the House of Delegates, which proved far less interested in funding the sustained effort necessary to undertake such a substantial project. In the final report, the revisors expressed their regret that they were neither allowed sufficient time nor funding to conduct the extensive examination and revisions they believed were necessary. Instead, they simply assembled the existing statutes into a two-volume collection over Leigh's protests about the inadequacy of the text. These volumes stood as the definitive work on Virginia's statutes for the next thirty years.[15]

Patton and Robinson, in their initial report to the assembly, emphasized the disappointing consequences of the legislature's haphazard commitment to the 1817 revision in order to conceptualize their project as something fundamentally different from previous revisions. They distinguished their own project by explaining that "the principal duty" assigned to the 1817 commission was to reduce the "multiplicity" of laws "into single acts." They themselves, on the other hand, had been charged to "collate and revise all the general statutes" with the expressed purpose "to render the said general

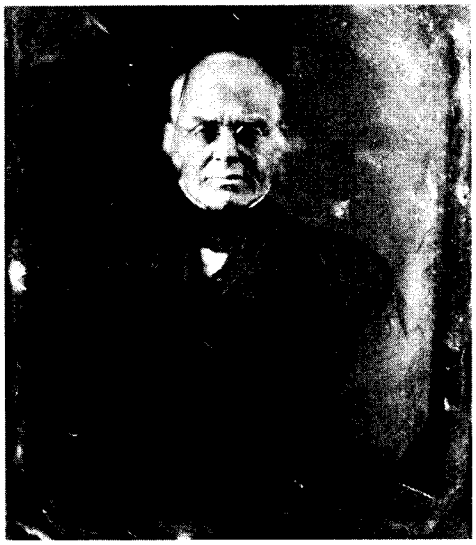


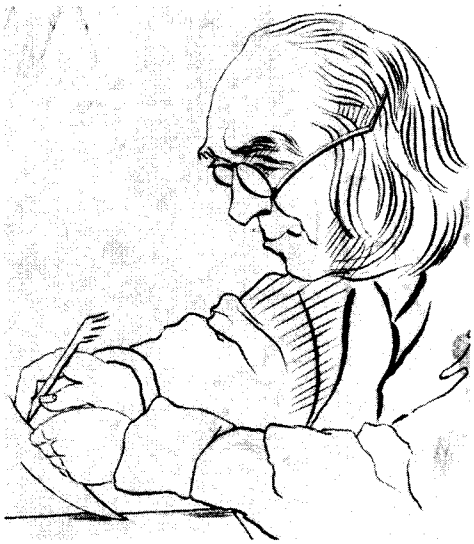
Conway Robinson (1805–1884) was one of the most learned and influential members of the Virginia bar during the nineteenth century as well as an early member of the Virginia Historical Society. He wrote several legal treatises, and in the midst of the code revision, he also published his first work of history, *An Account of Discoveries in the West Until 1519, and of Voyages to and Along the Atlantic Coast of North America from 1520 to 1573*. (*Virginia Historical Society*)

Fredericksburg lawyer John Mercer Patton (1797–1858) served in the U.S. House of Representatives from 1832 to 1838. As the senior member of the Executive Council, he was appointed temporary governor when Thomas Walker Gilmer resigned in 1841. In 1855 he ran for the office of attorney general as a member of the Know-Nothing party. He was also the great-grandfather of Gen. George S. Patton. (*Library of Virginia*)

Benjamin Watkins Leigh (1781–1849), Conway Robinson's father-in-law, was a prominent Richmond attorney and statesman. He is perhaps better known as the author of *A Letter from Appomattox to the People of Virginia*, an influential essay that summarized and redefined the proslavery argument following the 1832 debate in the Virginia legislature. He was also a leading law reformer and the principal compiler of the 1819 *Revised Code of Virginia*. (*Virginia Historical Society*)

A member of the 1817 Committee of Revisors, John Coalter (1769–1838) had been a law student of George Wythe and St. George Tucker at the College of William and Mary before moving west to Staunton in 1789. He practiced law there for more than two decades and was an architect in creating an impressive legal community in the town, which over time included the likes of Briscoe Baldwin, Lucas Thompson, and Chapman Johnson, all of whom exercised significant influences on the antebellum bar. Coalter was appointed to the Virginia Supreme Court in 1811. (*Virginia Historical Society*)





Supreme Court Justice Joseph Story's (1779–1845) plan for law reform in Massachusetts exercised significant influence over Virginia's codification project. An acquaintance of Conway Robinson, Story (above left) presented an alternative plan of codification to that of English social theorist Jeremy Bentham (1748–1832). Writing in opposition to William Blackstone's interpretation of the common law, Bentham (above right) presented his codified system of law as a component of his utilitarian social philosophy. Many of the issues of law reform were also debated in the British Parliament (below) during the reforms of the 1830s. (Above left and below: *Library of Congress*; above right: *Virginia Historical Society*)

statutes most concise, plain and intelligible."[16] Furthermore, they noted that they had been instructed to "suggest such contradictions, omissions or imperfections as they may perceive in the statutes, and the mode in which the same may be reconciled, supplied, or amended."[17] It was a blatant argument for greater authority, and they justified the need for conducting such a substantial revision by explaining that, as things stood, judges and lawyers were required to examine the 1819 code and then the separate acts of thirty subsequent legislative sessions simply to determine which laws were now in force. And they suggested that this particular burden was "only one of many inconveniences" that resulted from the present conditions of the laws. Frequent contradictions between different sections of various acts bred uncertainty, confusion, and litigation. Lastly they noted that another compilation of the statutes passed since the last revision would require a three- or four-volume code and merely encourage further addition to an increasingly voluminous set of laws.[18]

Conversely, the recent report by the Massachusetts committee on revision inspired Robinson and Patton and provided them with a template for constructing an organized code within a common-law jurisdiction. In 1836, Massachusetts formed a special committee to examine the various difficult questions surrounding any codification of the common law and charged them with proposing a plan of reform. This committee, though composed of several prominent Massachusetts jurists, was dominated by Supreme Court Justice Joseph Story. In Massachusetts, as elsewhere, calls for reform abounded, but there remained significant concern over the potentially unsettling aspects of any form of codification, because the idea itself was typically associated with the radical politics of English legal theorist Jeremy Bentham. Bentham had proposed to replace the English common law with a rationally devised, utilitarian-inspired code. Story attempted to belay these concerns and proposed an apparently moderate course in which codification served as a hand-maiden, not an alternative, to the common law. He contended that at the time "the known rules and doctrines of the common law" were scattered among sundry treatises, digests, and reports encompassing several hundred "ponderous volumes," which could be understood by only the most eminent lawyers and judges. This diffusion of essential information fostered uncertainty and caused frequent errors among the many lawyers and

judges who did not have access to adequate law libraries. Story believed that this problem could be rectified rather easily, however, by creating a systematic "code of the common law." Such a code would not presume to address all aspects of the law but would reduce its general principles into a coherent volume, which would be characterized by brevity, clarity, and uniformity. Story's vision of codification focused on the intrinsic instrumental capabilities of knowledgeable, well-written legislation to purge the law of its archaic features, to reconcile any contradictory elements, and to present it in an accessible manner. Indeed, Story believed that his codification system answered the criticism of reformers who called for a more democratic jurisprudence as well. Under his scheme, it would be the democratically elected legislature, not the judiciary, that would "proclaim the common law."[19]

Although the Massachusetts legislature balked at adopting the proposals of its own commission, Robinson and Patton fully embraced Story's concept of codification and used it to guide their revision project. They explained to the Virginia legislature that the revised code was not intended to replace the common law or encompass its entirety but simply to make the common usages more clear, intelligible, and efficient. They noted that New York had provided one example of such a revision during the legal reforms of 1829–30 and that this model had been "in some respects improved upon" by Massachusetts. They also acknowledged the influence of recent reforms in Great Britain, especially the recommendations by the Brougham Commission of Real Property to make land transfers simpler. Virginia's codification plan then appeared as a moderate scheme and rejected more radical proposals that called for replacing the common law with a systematic code. Still, despite their conservative rhetoric, the process of codification signaled a sharp divergence from traditional considerations of the common law as a remedial legal system principally designed to keep the king's peace.[20]

Organizational matters required significant attention in order to achieve the desired standards of clarity and accessibility. Robinson and Patton wanted to consolidate all the laws of the commonwealth into one published volume,

allotting 800 pages for the civil code and an additional 100 pages for the criminal code. Accordingly, they organized the code into four sections. The opening section addressed the essential matters of government and administration; the second treated "the acquisition, enjoyment, and transmission of property," including laws of "domestic relations" and "private rights"; the third section explained judicial procedures; and the final section contained the criminal code. Each chapter began with its own table of contents, which listed the enclosed categories and sub-sections. Robinson and Patton removed superfluous language found in enacting clauses, omitted statements repealing previous acts and unnecessary provisos, and provided one general statement to explain the method of recovering and distributing fines. They believed that anyone who frequently referred to the statutes, especially the magistrates in the county courts, would benefit tremendously from having them "brought into a small compass" and expressed "in concise and plain language." At the outset, they estimated that the entire project would take about three years, and they asked the General Assembly, in the interim, to refrain from passing any new legislation, unless circumstances rendered it imperative.[21]

In addition to issues of procedural and substantive law, Robinson and Patton proposed important institutional reforms in response to the excessive backlog of cases on appeal. These proposals reflected their preference for a small, highly professionalized judiciary. Like others before them, they identified the county courts as an area in need of reform, but they did not concern themselves with traditional criticisms of their oligarchic authority. Instead, they charged that the principal result of the courts' self-appointing mechanism to nominate their own justices was the "multiplication of justices beyond the wants of the county." Too many justices cheapened the office, discouraged learning of the law, and impaired the efficiency of local justice in general. Robinson and Patton recommended that limiting the number of justices from each county and reducing the number required for a quorum would alleviate many of the reasons for appeals and restore the process of local justice.[22]

They targeted the superior courts for reform as well. The Judiciary Act of 1831 had maintained two distinct superior courts: the Supreme Court of Appeals, which served as the final appellate court for civil cases and cases at

equity, and the General Court, which acted as the high court in criminal cases. The Supreme Court of Appeals consisted of five justices appointed exclusively to the position, but the General Court was composed of the judges who were appointed to administer each of the state's twenty-two Circuit Superior Courts. Their primary duties thus entailed riding their circuit and holding courts twice a year in each of the counties within their jurisdiction, but, in late June and December, the five senior judges convened in Richmond as the General Court.[23] Robinson and Patton proposed abolishing the General Court and unifying all final appellate jurisdiction under the Supreme Court of Appeals. They also proposed establishing a temporary special court to alleviate the desperately overcrowded dockets of appeals.[24]

Robinson and Patton also embraced modern notions of procedural reform as a means to expedite litigation as well. These reforms generally sought remedies for the many complex and seemingly antiquated forms of action that rigidly guided common law procedures. Virginia's eminent legal historian, W. Hamilton Bryson, has explained that allowing the practice of motion pleading in order to recover money from contracts substantially expedited the adjudicative process.[25] Robinson and Patton recommended applying this previously restricted practice to the more general circumstances of monetary-based contract recovery in order to alleviate the procedural difficulties that often encumbered those seeking judgment through the traditional system of common-law writs. The reform also removed such recoveries from the purview of a jury and rested determination with a magistrate instead. Other procedural reforms focused on re-defining existing forms of action in order to incorporate sundry traditional writs into one universal form of action. Most notable in this respect was the revision of the action of ejectment. Robinson and Patton recommended following New York's example in "moulding" the existing writ of right into the generally preferred "action of ejectment" in one "simple and comprehensive statute." This new form established a uniform basis to bring cases concerning conflicting land titles to trial as well as allowing for instances of "the recovery and possession" of any rights to real property.[26]

The most significant area of reform, however, was directed toward consolidating the substantive content of the laws respecting property. The revisors devoted much of their attention to reforming Virginia's land laws and

attempted to reconcile them with the prevalent commercial practices by which land was transferred. Specifically, Robinson and Patton sought to resolve the problem that real property (land) was no longer considered a distinct form of property that required a separate category of law, but rather, was now recognized simply as one form of property among many other equivalent forms—especially money and slaves. Accordingly, they focused much of their attention on the laws of conveyances, which regulated transfers and liens upon real estate, in an effort to make titles more secure and transactions more certain. In one example, Robinson and Patton recommended collapsing the traditional distinction between a grant and a livery of seisin in the conveyance of a freehold and incorporating them both under the purview of a written deed of bargain and sale. They also formalized the practice that had arisen of conveying rights through deeds and wills to lands that were not actually possessed but that might be claimed as an abstract future right in the form of a remainder or a reversion.[27]

The most familiar form of a reversion was the concept of dower—the right of a widow to one-third of an estate for life. Dower acted to remedy the doctrine of coverture—the legal fiction that denied married women property rights to the land. For many nineteenth-century Virginians, dower represented the affirmation of contemporary gender roles as well as a legal confirmation of the obligations of paternalism that informed the matrix of all domestic relations, including slavery. Judge John Allen explained that because the widow's right to dower was "frequently the only resource left for her own support and the sustenance of her children" it had "always been much respected as" a most "humane provision of the common law."[28] Legal treatise writers traced the origins of dower to the covenant bond of matrimony and thus intimately connected it to the establishment of the patrilineal household.[29] As was the case with many common law doctrines, Virginia's lawyers considered dower to have once been a plan of original simplicity that had become complicated and confused over time. Some of these complications arose from previous reforms, which had been intended to remedy particular inequities but often had unintended consequences.[30]

By the eighteenth and nineteenth centuries, however, the laws governing dower were further complicated by the increasing amount of wealth generated by forms of property other than land. Dower technically only applied

to real property—land; but increasingly, much of the value of estates derived from rents, perpetuities, appreciation, improvements, and in Virginia, from slaves. Thus within the context of the dynamic commercial relations of the mid-nineteenth century, dower appeared to some as the most visible vestige of an archaic system of property laws that contradicted many of the capitalist dogmas of economic progress. Still, it was also recognized that the complex issues surrounding the place of dower in a modern legal order necessarily challenged the orthodoxy of domestic relations within the patrilineal household. Dower reform accordingly appeared as yet another manifestation of the emergent social crisis that threatened to impose the individualistic relations of the marketplace upon the traditional familial relations of the household. Not surprisingly then, married women's property emerged as a central issue of law reform not only in Virginia but also in most other nineteenth-century common law societies.

A survey of the dower reforms to emerge from the revision thus neatly illustrates some of the issues and difficulties encountered in reconciling the existing laws with commercial practices, while still attempting to preserve Virginia's peculiar domestic arrangements. Robinson and Patton opposed simply replacing the common law doctrine of dower with a Married Women's Property statute—as had been the preferred course of reforms in Mississippi and other states.[31] They also rejected most of the tenets of the dower reforms implemented by the British Parliament. The 1833 Dower Act famously followed the proposals of the Real Property Commission and generally limited the definition of dowable lands in order to enhance the transferability of land in Great Britain.[32] Virginia's revisors acknowledged that the British statute had "made very great innovations," but they believed that many of these changes disadvantaged widows and were thus contrary to the desires of "the people of Virginia."[33]

In lieu of embracing statutory change, Robinson and Patton sought to bring consistency to Virginia's existing practices, which had been confused by some contradictory judicial opinions and legal treatises.[34] The principal issues they addressed included: providing an adequate definition for what types of property were subject to dower; determining when bequests acted as a bar to dower rights; deciding how to determine the value of land in adjudicating dower; and specifying by which procedures—law or equity—that

dower should be recovered. As was their modus operandi, Robinson and Patton explained the history of each particular point of dispute, provided a comparative analysis with how other common law jurisdictions approached the problems, weighed the pros and cons of all the arguments, and justified their recommendations to the legislature. In general, their recommendations, which were motivated by an effort to impose procedural standards and regularity on the process, tended to favor the rights of the widow over any adversarial rights of the heirs or creditors.

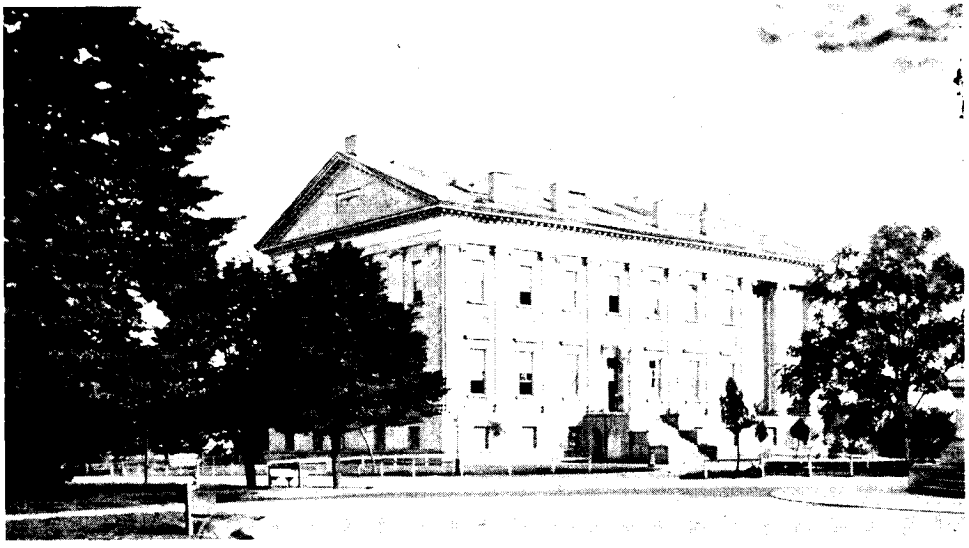
Yet, despite these learned recommendations, the legislators who enrolled the code had their own ideas concerning dower reform. During the first week of July 1849, delegates to the special session authorized the establishment of a thirteen-member committee to "enquire into the expediency of providing more effectually for the protection of the property of married women."[35] The committee appears to have been slightly more sympathetic toward replacing dower with a married women's property statute, although, in the end, they failed to devise a satisfactory one.[36] Such a statute would have allowed married women to own property, both real and personal, separate from their husbands. It was intended simultaneously to protect a wife's separate property from her husband's creditors and to hold her liable for her own debts, irrespective of any claims of dower. Significantly, however, discussions in the committee focused on protecting a widow's personal estate—especially her property in slaves—and did not explicitly address the issues of real property. Charles Faulkner, a member of the committee, presented a report to the House of Delegates that proposed to vest married women with ownership rights to any slaves that they either brought to the marriage or subsequently acquired. Furthermore, Faulkner proposed treating slaves in the same manner as real estate when transferring ownership and suggested that husbands, who henceforth would possess a life interest in any transferred slaves, should be afforded a privy examination—an inquiry conducted to protect married women's dower rights in real estate transactions. It was a radical proposal that turned contemporary gender roles and ideals of mastery on its head. Married women would possess a separate estate in their slaves; and their husbands would have legal protections for their future rights to these slaves. Samuel Price responded to Faulkner's proposal by introducing an amendment to strike out the clause granting husbands a life interest;

he would have preferred for married women to own their slaves exclusively rather than for husbands to participate as a junior partner.[37] In the end, Faulkner's proposal proved too radical, and it was rejected by the legislature in favor of the more procedural-oriented reforms offered by Robinson and Patton.[38]

This legislative effort to use the codification process as an opportunity to construct further protections for property in slaves reveals much about the historical context of the antebellum reforms. It reflected an increasing concern about the potential volatility of private property rights to destabilize the institutional structures of a slave society. The problem arose from the absolute ownership rights of the master over a slave. This absolute dominion had been sanctified during the post-Revolutionary law reforms with the passage of the 1782 Manumission Act, which confirmed absolute property rights of slaveowners by granting them the right to manumit by deed or will without petitioning the legislature. Within the republican political ideals of the period, such absolute ownership rights ensured independence and encouraged civic virtue. But the prevalent commercial attitudes of capitalism subverted this ideal. Self-interest trumped self-government. During the first half of the nineteenth century, as the sectional divide intensified and southerners found it increasingly necessary to defend slavery, Virginians recognized that the same commercial pressures that had undermined the stability of land ownership threatened slave ownership as well. They thus encountered the incongruity of championing the paternalist attributes of the master-slave relationship in opposition to the contract ideology of the wage-labor system, while simultaneously recognizing that the legal foundations of private ownership represented a fundamental source of contractual relations. Reformers sought to resolve this incongruity through the law. The proposal to allow married women to own slaves was thus designed in part to protect both women and slaves from the encroachment of marketplace relations—embodied in the persona of the creditor—and accordingly represented an effort to impose the standards of paternalist stewardship by legislative decree. In that particular instance it proved unsuccessful, but in others areas of codifying the law of slavery, particularly in matters pertaining to slave-hiring and manumission, efforts to restrict the authority of masters and to prescribe a standard of public policy in its place quickly gained ground.[39]

Robinson and Patton's recommendations were grounded in a professional knowledge of the law and guided by a desire for consistency. As such, they were essentially apolitical. The ultimate fate of these recommendations, however, was decided by delegates and senators sitting in the political forum of the General Assembly. Accordingly, a cursory examination of the circumstances of the special session is necessary in order to consider the convergence between law reform and politics—especially the factional politics that characterized the Second Party System—that determined the consequences of codification and informed the subsequent constitutional debates during the Reform Convention. In many respects, the enrollment process of the 1849 Code of Virginia was the first substantial project undertaken by the state legislature under the auspices of the two-party political system, and, by most contemporary accounts, it was a failure. These negative assessments, however, were grounded in a strong nostalgia, expressing an idealistic longing for the consensus model of politics that purportedly informed the republican political thought of the Revolutionary era and thus tacitly recognized the prevalence of the conflict-oriented mode of democratic politics. During the special session, party loyalty trumped the traditional bonds of sectional loyalty between the eastern and western regions of the state, which had characterized previous political debates in Virginia. Partisanship infected the discussions about an array of seemingly non-political topics of law reform. Indeed, at one point, these disputes threatened the entire codification project and brought about an uneasy compromise that generated more questions than answers about the future of the commonwealth's juridical structures.[40]

When the General Assembly convened in December 1848, Robinson and Patton had already submitted two of their reports and were close to completing the third. The legislature accordingly formed a special joint committee to examine the reports in detail and prepare them for enrollment as bills by the full assembly.[41] The twelve-man committee was composed of seven members from the House of Delegates: Richard C. L. Moncure, Robert E. Scott, Burr Harrison, Eustace Conway, Stephen D. Whittle, Francis L. Smith, and Edwin Booth, while the Senate contributed John Thompson, Jr., Vincent Witcher, Thomas Sloan, William Kinney, and

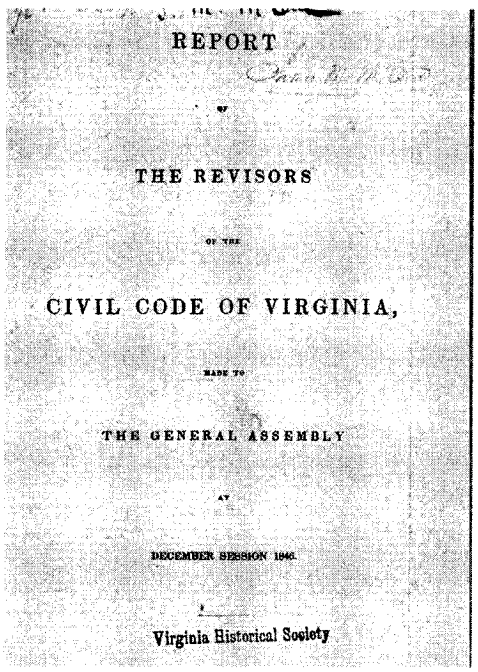


The Virginia legislature reconvened in the State Capitol (above) in May 1849 to enroll the revised code. But fear of a cholera outbreak necessitated that they relocate to Fauquier White Sulphur Springs (below), a popular resort spot during the first half of the nineteenth century that featured two grand hotels, ninety separate cabins, and slave quarters. A grand ballroom in one of the hotels served as the legislative hall during the special session. (Above: *Library of Congress*; below: *Virginia Historical Society*)

Congressman, governor, and Confederate general, William "Extra Billy" Smith (1797–1887) began his career as a Culpeper lawyer but garnered his reputation and his nickname from operating a stage coach line that also carried the mail. He was awarded a contract for the route from Washington, D.C., to Milledgeville, Georgia, and subsequently created several spur lines that demanded extra fee payments from the government. An investigation of the Post Office revealed the practice and earned Smith his nickname. He was a prominent Virginia Democrat who, from 1836 on, held a variety of political offices. He was serving his second term as governor when the Civil War ended. (*Virginia Historical Society*)

Robert Eden Scott (1808–1862) was a prominent Whig politician from Warrenton. He served as member of the House of Delegates from 1839 to 1842 and then again from 1845 to 1852. He was elected as a delegate to the Reform Convention as well as to Virginia's Secession Convention. Scott was killed in Fauquier County by Union deserters in 1862. His son, Robert Taylor Scott, followed him into a legal career and served as Virginia's Attorney General from 1889 to 1897. (*Virginia Historical Society*)

Questions of slavery and economic development occupied center stage in crafting the 1849 Code. The slave auction (above) vividly represented the encroachment of commercial practices on what was characterized as a traditional social relationship. The proliferation of mills in Virginia (below), as elsewhere, often stood as the clearest example of industrial progress. Neither Robinson nor Patton considered slavery incompatible with economic development, and they spent substantial efforts to create a legal system that reconciled slavery with the habits of a modern commercial society. Tragically, they succeeded. (Above: *Virginia Historical Society*; below: *Library of Congress*)


REPORT

OF

THE REVISORS

OF THE

CIVIL CODE OF VIRGINIA,

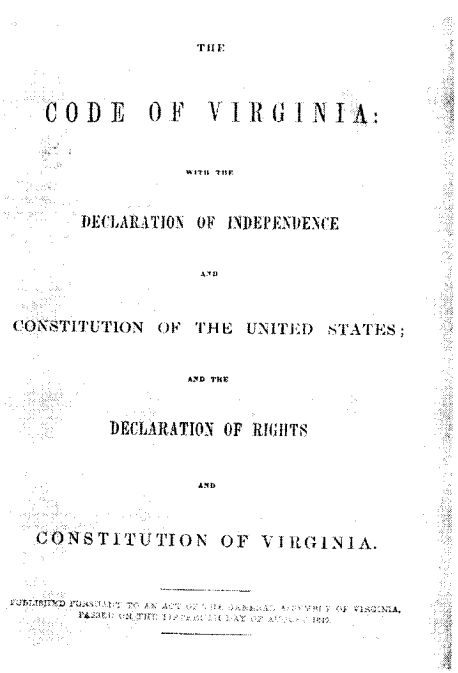
MADE TO

THE GENERAL ASSEMBLY

AT

DECEMBER SESSION 1846.

Robinson and Patton detailed their recommendations for legal reform to the legislature in a series of four reports. The *Reports of the Revisors* were published in part because they explained many of the motivations and reasons for the proposed changes. As such, they provide an extensive account of Virginia's legal history during the first half of the nineteenth century and illustrate the challenges of applying the common law in a modern slave society. (*Virginia Historical Society*)


THE

CODE OF VIRGINIA:

WITH THE

DECLARATION OF INDEPENDENCE

AND

CONSTITUTION OF THE UNITED STATES;

AND THE

DECLARATION OF RIGHTS

AND

CONSTITUTION OF VIRGINIA.

The *Code of Virginia* became the law of the commonwealth on 1 July 1850. In its final form, it was 898 pages long (including prefatory material and an index) and stands as a testament to the successful efforts of Robinson and Patton to compile and organize Virginia's laws in a comprehensive and accessible manner. In making the law accessible, however, they made it easier to change capriciously. Having been amended or altered by several hundred new laws, a new edition to the code was needed just ten years later. The new edition was compiled by George Munford and required 1022 pages to address the changes. (*Virginia Historical Society*)

William M. Ambler.[42] Given the long history of sectional divisiveness in state politics, the composition of the committee was remarkable for its near absence of western Virginians (and for the lack of any discussion about this omission). Only two senators—Sloan and Witcher—represented constituencies from the western regions of the state. A greater balance seems to have been achieved between Whig and Democrat members. Owing to the demands of the session, and perhaps because the state legislature spent a month of its time debating the Wilmot Proviso and slavery in the District of Columbia, the committee had accomplished little by the time of the March recess. With the august task of enrolling a 900-page code still before them, the delegates decided to reconvene at the end of May for a special session devoted solely to the task. During the recess, the Joint Committee members met in conference with the revisors to review any points of ambiguity and discuss any proposed amendments.[43]

When the delegates reconvened at the end of May, some of them quickly found it necessary to call for an adjournment because of the threat of a cholera outbreak in Richmond. Not everyone was convinced of the threat however. Some delegates believed that it was being exaggerated in order to remove discussions of the code out of the public spotlight in Richmond. The ensuing pitched discussion over where to reconvene the session lends some credence to this view. Consequently, the special session spent much of its first days debating alternate locations for the assembly as well as listening to testimony from a parade of doctors who offered varying assessments of whether cholera was actually present in the city. After a couple of days, anxiety and apprehension—or perhaps just the muggy summer air of Richmond—prevailed, and the delegates voted to adjourn and to reconvene the following week at Fauquier White Sulphur Springs. Throughout the remainder of the summer, they gathered there on a daily basis to discuss, amend, approve, or reject the proposed revisions. Many of the revisions concerned technical points of law that were enrolled with little discussion, particularly when the intent was to conform the laws to existing practices. Such was the case with most of the land law reforms. Certain aspects of the code had implicit political ends, however, and generated contentious debates. Most notably, debates erupted over the issues of the governor's power to pardon slaves, the taxation authority of the county courts, and the

process of appointing inspectors. Indeed, the inspector controversy threatened to derail the entire project and consequently provides an example of the intrusion of politics onto the codification process and reveals some of the unintended consequences of the revision project itself.

Inspectors and inspection laws had been around for a long time in Virginia, but it was not until they came under the scrutiny of revision that they became charged with conflict over issues of local governance and patronage power. Not surprisingly, Virginia's initial inspection laws concerned tobacco. First enacted by the colonial assembly in 1630, the original law addressed the problem of poorly cured tobacco that was to be exported to foreign markets. Planters who were charged with growing poor quality tobacco had their crop destroyed, and they were prohibited from planting again until their disability had been removed by the General Assembly. Subsequent laws established tobacco warehouses as points of inspections, specified their locations, proscribed the manner of appointment and duties of inspectors, and facilitated the development of the warehouse-sale system in conjunction with these procedures.[44] As Virginia's economy diversified during the eighteenth century, inspection laws proliferated, and, by the time of the American Revolution, inspections were required for such commodities as flour, corn meal, bread, salt, fish, pork, beef, tar, pitch, turpentine, lumber, lime, hemp, and lard. Each of these inspections required inspectors, and the methods of appointing individuals to this office varied widely.[45]

Robinson and Patton sought to consolidate these sundry laws and standardize the array of existing practices that had developed at different times to meet various needs. In the case of tobacco inspectors, those county and corporation courts with a tobacco warehouse in their jurisdiction were charged with nominating four men every August or September to serve as inspectors. From the list of four, the governor would appoint a first and second inspector who served for a term of one year.[46] County courts appointed all inspectors for flour, meal, and bread without confirmation from the governor, although he was entitled to make the appointment if the court failed to do so. On the other hand, lumber inspectors were appointed exclusively by the governor, while laws pertaining to inspectors of salt, fish, beef, and pork were tasked only to the courts and made no provision for the executive. Robinson and Patton explained that they hoped "to remedy the incon-

gruities and defects" of the existing inspection laws "by making a uniform rule" and "put all inspectors on the same footing."[47] That said, perhaps because of the disproportionate volume of laws dealing with tobacco inspection, they recommended retaining the traditional two-step process of nominating and appointing tobacco inspectors but insisted upon a single process for appointing all other inspectors, including lumber. Their revised laws stipulated that all other commodity inspectors should be appointed annually by the county courts during the September or October term. They also believed that the courts should be given the authority to remove these appointees in cases of negligence or misconduct.[48]

When discussion of these revised inspection laws initially arose in the House of Delegates in late June 1849, the topic of appointment authority did not arise. Instead, debate was confined to the question of whether inspections were even desirable any longer. Salt inspections attracted the particular attention of some delegates from the Kanawha Valley, who advocated the abolition of the process altogether, believing that market mechanisms provided sufficient incentive for manufacturers to police themselves. Charles Faulkner disagreed; he explained that the inspection laws were not designed as a mere "sanitary regulation" but were intended to ensure a good reputation for "the products of our State in foreign countries."[49] Because inspections served the interest of all Virginians, he insisted that they should not be delegated to the unsupervised performance of self-interested parties. Faulkner's argument carried the day, and the House initially approved Robinson and Patton's recommendations without amendment.

The question of appointment power, however, garnered considerable attention in the Senate. In late July, the overwhelmingly Democratic-controlled Senate amended the revisors' report and placed the appointment power of flour and commodity inspectors exclusively in the hands of the governor. This amendment generated very little discussion at the time, but a contentious debate broke out on 3 August when the Senate was forced to revisit the section because it now conflicted with the House version. George Deneale, a Democratic senator representing the Valley counties of Rockingham and Pendleton, took the lead and proposed that the Senate should insist upon its amendment. Francis Rives, a Democrat from Petersburg, and Vincent Witcher, a leading Whig from Pittsylvania, balked

at Deneale's uncompromising stance and pointed out that the House had already given way on almost every other point. They thought it magnanimous, and in the best interest of completing the revision, if the Senate yielded on this particular issue of little note. Deneale proved recalcitrant, however, and argued that such a change was needed because the county courts had become corrupted by the undue influence of merchants.[50]

Francis Rives responded by noting that the county courts had exercised this appointment power for at least a century with no apparent problems. He argued for the advantages of local authority and believed that the courts were in a better position to assess "the qualities and fitness" of a particular man than "a distant Governor." But most importantly, he noted that the change "would make these offices political offices" subject to the patronage of the governor. Politics would be introduced into an area it had not formerly intruded, and the Democrat Rives exclaimed that "he had not come here for the purpose of making a *party Code*."[51] Witcher and other Whigs gladly affirmed Rives's views and repeatedly lamented the attempt to make these positions into political offices.

Two votes were called on the amendment, both ending in a 14–14 tie that prevented the amendment from passing. But late in the afternoon, John S. Carlisle, a Democrat from the northwestern district surrounding Grafton, changed his mind in favor of the amendment. He explained that he originally thought the issue inconsequential, but now he wanted to rebut the charges of making "this matter into a party question." He argued that because the governor was the one representative who served the entire population of the state, all of whom benefited from the process of inspections, he should possess the power of appointment.[52] A third vote thus sustained the amendment giving the governor the power of appointment, and the Senate sent it back to the House for approval.

The House debated the amendment the following day. James H. Ferguson, delegate from Logan and Boone counties, moved that the House should recede from its position and embrace the Senate plan. The debate followed the same general lines of argument that had been advanced in the Senate the day before. Most delegates, both Whig and Democrat, openly lamented the intrusion of party politics into the enrollment process, and both blamed the other for the intrusion. A key moment occurred however

when Robert E. Scott, a Whig delegate from Fauquier County, spoke out against the Senate plan by embracing the partisan aspects of the debate. Scott suggested that the issue had laid bare the designs of those in power and rather drastically proposed that all men were necessarily "regulated in their course" of policy by either republican or monarchical political principles. He proclaimed that the "true Republican principle was that of not conferring more power on the executive than was absolutely necessary" and praised the "beautiful feature" in the commonwealth's constitution and laws in traditionally limiting the power of the governor. He provocatively asserted that the moment one abandoned this principle was the moment one took a "stand on the monarchical platform." But he did not stop there. He also contended that this tendency toward monarchy was inherent in the Democratic Party platform. And he noted that during the special session consistent attempts had been made to increase "central power, patronage, and influence" by trying to expand the governor's pardoning power, by extending his control over state banks and internal improvement companies, and now, by attempting to make the inspectors political appointees. He concluded by affirming that he stood against this "one-man power" and proposed that those gentlemen who called themselves Democrats, and who supported this amendment, were in truth acting upon the principle of Louis Napoleon of France, whom Scott quoted as saying "that Democracy was the Government of the people, in the hands of one man."[53]

The Richmond newspapers picked up the debate at this point, and for the remainder of the month, the dialogue continued in the public square with both the *Richmond Whig* and its Democratic rival the *Richmond Enquirer* trying to rally the party faithful. The *Enquirer* chastised any Democrats who, like Francis Rives, had abandoned the recognized interests of the people and had advocated compromise with the Whigs. Its editors also noted an incongruity in Whig ideology between patronage at the state and federal level, citing recent political appointments to substantial federal offices made by President Zachary Taylor.[54] The *Richmond Whig*, on the other hand, praised Scott's speech for its defiance of the new political principles of "Red Republicanism."[55] By the end of the month, however, a resolution of sorts had been achieved. The Democratic-controlled Senate, threatening to adjourn without completing the enrollment of the code, pre-

vailed. In the end, the General Assembly approved Robinson and Patton's recommendations as they pertained to the appointment of tobacco inspectors, but the legislature gave the power to appoint all other inspectors to the governor.[56] This resolution proved even more advantageous for the governor because he had the power not only to appoint the flour and commodity inspectors but also to approve the appointment of the inspectors' deputies as well.[57] The governor was also given the authority to remove any inspector or deputy inspector, at any time, "for neglect of duty, incapacity, or misconduct."[58] With the inspector crisis resolved, the code was adopted and subject to go into effect the following July.

Attitudes toward the new code, as revealed through the newspapers, were predictable. The *Enquirer* lauded the project, while the *Whig* expressed reservations—complaining that the House of Delegates had been "yoked to a Senate" that had demonstrated the most severe "mockery of Free Government that was ever presented in this Commonwealth." The Senate, the editors believed, had ridden heavy handed over the true representatives of the people and had taken the opportunities afforded them in revising the code to impose their own ideological designs. Given these circumstances, the *Whig* editors noted, the people of Virginia should be thankful that the new code was "not worse than it really is."[59]

Legal professionals shared in this ambivalence but were initially more tentative in their assessment of the new code. Because of the comprehensive nature of the revision, they acknowledged that many of the changes remained cloaked in ambiguity and could only be assessed over time. They readily praised Robinson and Patton and concluded that, taken as a whole, the work would "fulfill the just expectations" of the bench and bar. But they lamented the aggressiveness with which legislators were willing to make imprudent changes to the recommendations of the revisors. A contributor to the *Southern Literary Messenger* warned that in instances where the legislature "decided adversely to the changes proposed by the revisors," those decisions were not "always determined for the better," and he cautioned that such democratic participation seemingly undermined the consistency of the code.

He could have commented on the fate of the inspection laws as testimony but instead offered as an example an inconsistency in the laws of marriage, which forbade a man from marrying his brother's wife but not his wife's sister. The revisors had suggested that there was no sound reason to maintain this distinction—neither broached consanguinity—but the legislature had decided to retain it. In matters left to the wisdom of the revisors, however, the commentator heaped praise. He specifically applauded the reforms to the law pertaining to the conveyance of real estate, which he argued would "obviate doubts . . . remedy inconveniences" and "remove much of the insecurity" associated with the frequent examination of land titles. In his final assessment, he believed that most of the reforms had been prudently considered and would prove "advantageous in practice," particularly because many of them had already been "tested by the experience of Great Britain" as well as in other states.[60]

A mere six years later, however, the attitudes of Virginia's jurists and lawyers had soured significantly. The inaugural issue of the *Quarterly Law Journal*, the state's first legal journal, examined the phenomenon of "legislative tinkering" that had arisen as a direct consequence of the reform movement. The contributor explained that the same process of legislative tinkering that had corrupted the codification project had continued unabated for the past five years, with the legislature making an additional "four or five hundred alterations" to the code since it had been enrolled and published. Indeed, one of the stated purposes of the journal was to examine "a chapter or more" of the code and the reports of the revisors, along with any subsequent statutory amendments, in each issue in order to shed "light upon the provisions of the code and [demonstrate] the *intention* of the Legislature in the various general acts passed." The commentator chastened intervening legislators who, despite being "men of intelligence and ability," had lacked the "corrected and extended knowledge" of the law necessary for "the promulgation of a new system of jurisprudence." He questioned their very motivations, making a sharp distinction between practicing lawyers and those who were "mostly politicians, men who combined the profession of the law with an attachment to political life and an ambition of political distinction." In contrast, he applauded Robinson and Patton for their professionalism and called for the adoption of the English practice of establishing a permanent

committee of revisors to review the content and language of legislative statutes and to alter them to conform to the uniformity of the code.[61]

This contemporary commentary reveals a developing tension between the professional bar and the legislature that had emerged during the codification process. Certainly other elements of the reform contributed to this tension as well, most notably the short-lived experiment of an elected judiciary that was borne from the democratic zeal of the Reform Convention and lasted until Reconstruction. At the most basic level, this struggle reflected the negotiation of power relations incumbent in the process of democratization over the question of who possessed authority over the law. But it also manifested the changing conceptualization of the law itself. The *Quarterly Law Review*'s characterization of the code as a new system of jurisprudence revealed the profession's awareness that a substantial re-conceptualization had occurred. Despite the conservative intentions of Robinson and Patton, codification in Virginia, as elsewhere, came to represent a shift away from the traditional remedial conception of law toward a more rule-based understanding of law as a positive statement of authority. This new conceptualization required consistent standards of law and justice and thus necessarily favored legislative pronouncement over independent judicial adjudication. Within the climate of democratic fervor of the mid-nineteenth century, these standards could only be legitimated by an appeal to the popular will and their subsequent expression through statutes enacted by elected representatives. Such a positive characterization of statutory law represented a sharp break with the common-law orthodoxy that considered statutes essentially inadequate to provide for the requisite specificity of personal justice.

This conceptual transformation of the law served as a necessary precondition for the implementation of other democratic institutions, most notably, a bureaucratic state government. In this respect, the process of codification contributed to antebellum Virginia's political transformation as well. The code was intended to assist local magistrates in determining the law, but the uniformity and consistency established by it also imposed limitations on their judicial discretion and minimized allowances for the customary variances of a particular locality or region. The published standard of uniform laws thus subverted some of the traditional authority and

functions of the county courts and facilitated the consolidation of constitutional powers within the legislative, executive, and judicial apparatus of the state government. Subsequent amendments continued this trend toward centralization. The Reform Constitution abolished the taxation power of the county courts, replaced the freehold qualification for jurors and grand jurors with a legislatively administered system based on voter registration, enhanced the power of the governor, abolished the General Court, and removed life-tenure for judges by making all judicial offices subject to popular election. It also recognized slavery as a special public interest that the state government was charged with protecting, particularly through taxation policies.

In the wake of these reforms, the 1849 Code of Virginia quickly came to be considered not only an expression but also the foundation of the commonwealth's law. Although Robinson and Patton had eschewed any radical schemes of codification, the comprehensiveness of their project and, ironically, their success in accomplishing it, had the unintended consequence of transforming Virginia's inherited common law into the handmaiden of its published code. In this manner, the code replaced the principles of the English common law as the normative source of jurisprudence and set the stage for the development of what Howard Schweber has described as a unique "system of American common law" grounded in "the principles of tort, contract, and property liability."[62] This reconfigured system of jurisprudence promulgated a certain and consistent standard of law in order to facilitate the arbitration of conflicting claims to individual rights, which proved the defining characteristic of modern democratic societies. Yet in Virginia, unlike in the northern states, where this reconfiguration was also taking place, any question of property rights could not be divorced from the issue of slavery. Accordingly, the law reforms incumbent in the codification process not only provided the necessary juridical foundations for the democratic reforms enacted in the Reform Convention but also facilitated the legal construction of a modern slave society. And the 1849 Code thus stands as a prominent example of Virginia's tragic effort to reconcile slavery with modern democracy.

NOTES

1. Charles Henry Ambler, *Sectionalism in Virginia from 1776 to 1861* (Chicago, 1910); John Dinan, *The Virginia State Constitution: A Reference Guide* (Westport, Conn., 2006); William W. Freehling, *Road to Disunion, Vol. 1, Secessionists at Bay, 1776–1854* (New York, 1990); A. E. Dick Howard, "'For the Common Benefit': Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker," *Virginia Law Review* 54 (1968); Francis Pendleton Gaines, Jr., "The Virginia Constitutional Convention of 1850–51: A Study in Sectionalism" (Ph.D. diss., University of Virginia, 1950); Fletcher M. Green, *Constitutional Development in the South Atlantic States, 1776–1860: A Study in the Evolution of Democracy* (Chapel Hill, 1930); Robert P. Sutton, *Revolution to Secession: Constitution Making in the Old Dominion* (Charlottesville, 1989); contrast with William G. Shade, *Democratizing the Old Dominion: Virginia and the Second Party System, 1824–1861* (Charlottesville, 1996). As is the case with this essay, Shade examines the process by which democracy developed (particularly the development of two-party politics), instead of focusing on the traditional signifiers of suffrage and representation. He thus portrays the convention as a consequence of an ongoing democratic process and not necessarily as a catalyst of it.

2. *The Code of Virginia . . .* (Richmond, 1849), pp. vii–ix. Hereafter the Code of Virginia will be cited as *Code of Virginia* followed by (date) and pages referenced. The reports submitted to the legislature were individually published as the *Report of the Revisors* and will be hereafter cited as *Report of the Revisors* followed by (month and date) and pages referenced. The events of the special session at Warrenton Springs were well covered in Virginia's major newspapers of the time.

3. A. G. Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia Legal Culture, 1680–1810* (Chapel Hill, 1981); Charles T. Cullen, "Completing the Revisal of the Laws in Post-Revolutionary Virginia," *Virginia Magazine of History and Biography* (hereafter cited as *VMHB*) 82 (1974): 84–99; Kathryn Preyer, "Crime, the Criminal Law and Reform in Post-Revolutionary Virginia, *Law and History Review* 1 (1983): 53–85; and David Thomas Konig, "Legal Fictions and the Rule(s) of Law: The Jeffersonian Critique of Common-Law Adjudication," in *The Many Legalities of Early America*, ed. Christopher L. Tomlins and Bruce H. Mann (Chapel Hill, 2001), pp. 97–117.

4. Speech of Governor Smith, 6 Dec. 1847, *Journal of the House of Delegates of Virginia* (Richmond, 1848), pp. 24–26 (quotation on p. 24).

5. 41 Va. (2 Rob.) vi (1844).

6. Ibid., pp. iii–iv. Similar expressions can be found in [Robert Ruffin Collier], *Some Observations on the Law-Affairs of Virginia . . .* (Petersburg, 1846), pp. 13–14.

7. "The Code of Virginia," *Southern Literary Messenger* 16 (1850): 322. This particular passage addressed the process of law reform in England but did so in order to contextualize codification in Virginia.

8. *Richmond Whig and Public Advertiser*, 28 May 1849.

9. Michael Lobban, *The Common Law and English Jurisprudence, 1760–1850* (New York, 1991); Philip Girard, "Land Law, Liberalism, and the Agrarian Ideal: British North America, 1750–1920," in *Despotic Dominion: Property Rights in British Settler Societies*, ed. by John McLaren, A. R. Buck, and Nancy E. Wright (Vancouver, 2005), pp. 120–43; Charles M. Cook, *The American*

Codification Movement: A Study of Antebellum Legal Reform (Westport, Conn., 1981); Perry Miller, *The Life of the Mind in America, from the Revolution to the Civil War* (New York, 1965), pp. 239–65; and Gregory S. Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776–1970* (Chicago, 1997).

10. The influence of capitalist economic doctrines on the development of American law has dominated the historiography of nineteenth-century legal history. Although substantial interpretative disagreements between participants persist, a consensus exists that economic development represented a driving force of legal change that owes much to the lasting influence of J. Willard Hurst. See Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison, Wis., 1956); Peter Karsten, *Heart Versus Head: Judge-Made Law in Nineteenth-Century America* (Chapel Hill, 1997); William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill, 1996); Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass., 1977); Tony Allen Freyer, *Producers Versus Capitalists: Constitutional Conflict in Antebellum America* (Charlottesville, 1994); and, most recently, Howard H. Schweber, *The Creation of American Common Law, 1850–1880: Technology, Politics, and the Construction of Citizenship* (New York, 2004).

11. For a similar treatment of the symbiotic relationship between bourgeois professionals and the planter class in the Old South, see E. Brooks Holifield, *The Gentlemen Theologians: American Theology in Southern Culture, 1795–1860* (Durham, N.C., 1978). Similarly, the relationship between southern intellectuals and the planter class is treated in Drew Gilpin Faust, *A Sacred Circle: The Dilemma of the Intellectual in the Old South, 1840–1860* (Baltimore, 1977). On the rise of legal professionalism in general, see Maxwell H. Bloomfield, *American Lawyers in a Changing Society, 1776–1876* (Cambridge, Mass., 1976).

12. *Dictionary of American Biography*, "John Mercer Patton"; *Daily Richmond Enquirer*, 1 Nov. 1858; *Daily National Intelligencer*, 3 Nov. 1858; and Martin Blumenson, ed., *The Patton Papers, 1885–1940* (Boston, 1972), pp. 22–23. John Mercer Patton is perhaps better known to history as the great-grandfather of George S. Patton, the famous general of World War II. For a similar example of a contemporary who also abandoned medicine for the law, see Michael A. Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era* (Baton Rouge, 2003). Ross suggests that Miller's motivations were political, and that might reasonably be the case for Patton as well.

13. Richard A. Claybrook, Jr., "Conway Robinson," in *Virginia Law Reporters Before 1880*, ed. by W. Hamilton Bryson (Charlottesville, 1977), pp. 57–64. In addition to his two volumes of the *Virginia Reports* (1843, 1844), Robinson's principal works include: *The Practice in the Courts of Law and Equity in Virginia*, 3 vols. (Richmond, 1832–39); *Forms Adapted to the Practice in Virginia* (Richmond, 1841); *An Essay upon the Constitutional Rights as to Slave Property* (Richmond, 1840); *An Account of Discoveries in the West until 1519, and of Voyages to and Along the Atlantic Coast of North America from 1520 to 1573* (Richmond, 1848); *Views of the Constitution of Virginia . . .* (Richmond, 1850); *The Practice in the Courts of Justice in England and the United States* (7 vols.; Richmond, 1854–74); and *History of the High Court of Chancery and Other Institutions of England . . .* (Richmond, 1882). In addition to the duties of his profession, Robinson involved himself in a host of civic activities as well. He served as the president of the Richmond, Fredericksburg, and Potomac Railroad Company for two years in the 1830s and remained the company's legal advisor thereafter. He also served as a member of the Richmond City Council and was instrumental in

championing civic improvement projects in public education, road construction, gas lighting, city parks and cultural centers, and perhaps most significantly, he was one of the original founders of the Virginia Historical Society. During the 1850s, Robinson moved to Washington, D.C., to conduct research at the Library of Congress in support of his increasingly ambitious writings and to continue his practice before the Federal Supreme Court. He remained in the District throughout the war but was unable to appear before the Court after he refused to take the "test-oath" professing loyalty to the United States. Indeed, three of his sons fought for the Confederacy, and two of them, as well as his brother-in-law, were killed in its service. Robinson's attachment to Virginia and the Confederacy proved troublesome after Lincoln's assassination when he and his wife were arrested and jailed for a brief period, but by 1866, Robinson was again practicing before the Supreme Court as well as the Virginia Supreme Court of Appeals. He maintained this high level of activity, both professionally and with his historical writing, until his death from pneumonia in 1884. Robinson's wartime situation was made known to me through a generous conversation with Lee Shepard, senior archivist at the Virginia Historical Society, who is writing an eagerly awaited biography of Robinson.

14. *Code of Virginia* (1849), pp. iii–iv, vi.

15. *The Revised Code of the Laws of Virginia* . . . (2 vols.; Richmond, 1819); *Code of Virginia* (1849), pp. vi–vii. In 1833, Samuel Shepherd published a supplemental volume containing only the legislative acts "of a public and permanent nature," which had been passed since the publication of the 1819 code. An effort to reform the state's criminal laws, undertaken by Staunton attorney Chapman Johnson, also occurred during the 1830s but never was completed because of his ill health. It was the remnants of Johnson's project that Robinson and Patton picked up when they assumed the criminal code revisions.

16. *Code of Virginia* (1849), pp. vi–vii.

17. *Journal of the House*, 1845–46, bill 142.

18. *Code of Virginia* (1849), p. vii.

19. Joseph Story, "Codification of the Common Law," in *The Miscellaneous Writings of Joseph Story*, ed. by William W. Story (Boston, 1852), pp. 722–25 and R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill, 1985), pp. 271–81.

20. *Report of the Revisors* (Dec. 1846), p. vi. New York law reforms are discussed in Cook, *Codification Movement*; Alexander, *Commodity and Propriety*; Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics, 1839–1865* (Chapel Hill, 2001); and Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca, N.Y., 1982). See Lobban, *Common Law*, as well as Cook for discussions of the negotiations between the Benthamite ideal and practical reform in other contemporary contexts.

21. *Report of the Revisors* (Feb. 1847), pp. iv–v, vii, ix–xii. Enacting clauses typically began all bills and read: "Be it enacted by the general assembly." Robinson and Patton submitted their first report to the legislature on 6 February 1847 and followed with subsequent reports on 22 March 1848, 8 January 1849, and 31 May 1849.

22. The section read as follows: "Hereafter no justices shall be recommended or appointed in any county which may be entitled to choose three delegates to the general assembly, when there are forty acting justices in such county; nor in any county entitled to choose two delegates, when there

are thirty acting justices therein; nor in any county entitled to choose one delegate, when there are twenty acting justices therein; nor in any other county, when they are fifteen acting justices in the said county" (*Report of the Revisors* [Mar. 1848], pp. 265–66).

23. The law allowed for disability and replacement, and this exemption was exercised frequently. Indeed, these General Court sessions were more often than not treated as an inconvenience, especially by the longest-serving members of the bench and those who lived some distance from the capital. On the difficulties of attending the General Court and for insight into Virginia's legal culture in general, see James Allen to John James Allen, 7 Sept. 1829, John James Allen Papers, 1820–51, Virginia Historical Society, Richmond.

24. *Report of the Revisors* (Dec. 1847), p. iv; ibid. (Jan. 1849), pp. iv–xii; *Code of Virginia* (1849), pp. 617–20. The creation of a Special Court of Appeals was a controversial proposal, which they tied to redrawing the circuits. For elaboration and analysis of Robinson and Patton's recommendation to the legislature, see Erwin C. Surrency, "An Unusual Judicial Proposal: A Proposed Reduction in the Number of Judges—The Report of the Virginia Revisors on the Circuit Superior Courts—1848," *American Journal of Legal History* 13 (1969): 145–64. Robinson had made a similar proposal in his preface to the 1844 *Virginia Reports* as a means to raise judicial salaries. The Special Court was established in 1847 and continued to operate through 1856. See John M. Patton, Jr., and Roscoe B. Heath, *Reports of the Cases Decided in the Special Court of Appeals of Virginia* . . . (2 vols.; Richmond, 1856–57). The proposal to abolish the General Court was initially rejected but then became part of the judicial restructuring in the Reform Constitution.

25. W. Hamilton Bryson, "The Abolition of the Forms of Action in Virginia," *University of Richmond Law Review* 17 (1983): 273–84.

26. *Report of the Revisors* (Jan. 1849), pp. 691–92.

27. Ibid., pp. 602–3. In so doing, they followed the latest English statute (J. Stuart Anderson, *Lawyers and the Making of English Land Law, 1832–1940* [New York, 1992]).

28. *Wilson* v. *Davisson*, 41 Va. (Rob.) 398 (1844). That Allen wrote these comments as part of his dissenting opinion suggests the extent to which the custom was being threatened.

29. John Tayloe Lomax, *Digest of the Laws Respecting Real Property* . . . (3 vols.; Philadelphia, 1839), 1:74.

30. Jointure stands as one of the best examples in this regard. Jointure allowed for the creation of a joint estate between husband and wife under the principles of equity. Once jointure was established, upon the death of the husband, the widow would simply maintain the estate for life. It initially reflected an effort to make married women's property less of an anomaly at law and was authorized by the Statute of Uses during the reign of Henry VIII. But the statute did not specifically abolish dower; and, accordingly, in instances where jointure did not apply, or where it was disadvantageous to the widow, the right of dower continued to function. From that point forward, both practices developed together in both the courts of law and equity, making the jurisprudence of widow's property rights even more complex.

31. In 1839, Mississippi became the first state to adopt a statute allowing for the existence of a separate estate. During the subsequent decade, this practice appeared in various forms in Maine, Michigan, Massachusetts, Texas, California, and New York (Basch, *In the Eyes of the Law*, pp. 27–28, 136–61).

32. Susan Staves, *Married Women's Separate Property in England, 1660–1833* (Cambridge, Mass., 1990) and Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (Toronto, 1983).

33. *Report of the Revisors* (Jan. 1849), pp. 564–65.

34. See especially, *Wiseley* v. *Findlay and Others*, 24 Va. (3 Rand.) 361 (1825) and the subsequent exchange between Lomax, *Digest of the Laws*, 1:119 and Henry St. George Tucker, *Commentaries on the Laws of Virginia* . . . (2 vols.; Winchester, Va., 1836–37), 2:72.

35. *Journal of the House of Delegates, 1848–49*, p. 557. James M. Laidley, representing Kanawha and Putnam counties, made the original motion to have the committee on the revision investigate such measures on 3 July. His motion was amended by James H. Ferguson (Logan and Boone counties) who proposed creating the select committee. Benjamin Hiner (Pendleton and Highland counties) moved to postpone the consideration of the resolution, but this motion was narrowly defeated. The delegates then approved Laidley's resolution with Ferguson's amendment.

36. The select committee consisted of Ferguson, Charles J. Faulkner (Berkeley County), Hugh Sheffey (Augusta County), Joseph Harvey (Westmoreland County), Richmond Lacy (Charles City and New Kent counties), William M. Burwell (Bedford County), James R. Strother (Rappahannock County), William C. Worthington (Jefferson County), John R. Kilby (Nansemond County), Egbert Watson (Albemarle County), Henry Irving (Cumberland County), James Irvine (Campbell County), and Algernon Wood (Frederick County) (ibid., p. 559). Harvey and Strother were early advocates for a married women's property act, and Ferguson, Burwell, Worthington, and Kilby voted to defeat the Hiner motion to quash the committee (as did Speaker Hopkins, who appointed the committee). Faulkner, Irvine, Irving, Wood, Lacy, and Watson voted in favor of the Hiner motion, but Faulkner became the spokesmen for the committee's recommendation. Sheffey did not vote on the Hiner motion, and I cannot discern his initial attitude toward a statute.

37. A similar proposal was offered in the Senate as well (see *Journal of the Senate of Virginia, 1848–1849*, pp. 319–20). On the resolution, compare the 1849 code with *Report of the Revisors*; the special session was not the first time that the creation of a married women's property statute had been suggested in Virginia. In years previous, two motions had been raised in the House of Delegates to instruct the judiciary committee "to enquire into the expediency" of protecting the property of married women by statute (*Journal of the House, 1847–1848*, pp. 211–12 and *Journal of the House, 1848–1849*, p. 50).

38. Some significant changes were subsequently made in the language of the code that extended a widow's ability to choose between law and equity jurisdictions for her recovery, which subverted the procedural integrity sought after by Robinson and Patton. Contrast the section on dower in the *Code of Virginia* (1849), pp. 474–76 with the *Report of the Revisors* (Jan. 1849), pp. 564–67, esp. sections 3 and 4.

39. This important aspect of the revision is developed elsewhere, but for some examples, see *Richmond Whig and Public Advertiser*, 10 July 1849; *Code of Virginia* (1849), pp. 456–60; and *Report of the Revisors* (Jan. 1849) pp. 542–43. The important questions of manumission authority arising from the case of *Maria and Others* v. *Surbaugh* (1824) 2 Randolph 228 is adeptly discussed in Thomas D. Morris, *Southern Slavery and the Law, 1619–1860* (Chapel Hill, 1996), pp. 404–12.

40. Shade, *Democratizing the Old Dominion* and Ronald P. Formisano, *The Transformation of*

Political Culture: Massachusetts Parties, 1790s–1840s (New York, 1983).

41. *Journal of the Senate*, 8 Dec. 1848, p. 31. Robinson and Patton submitted their third report in January 1849 and their fourth in May 1849.

42. *Code of Virginia* (1849), p. viii. The delegates represented the following counties, all of which are east of the Blue Ridge: Moncure (Stafford), Scott (Fauquier), Harrison (Loudoun), Conway (Spotsylvania), Whittle (Mecklenberg), Smith (Alexandria), and Booth (Nottoway). A liberal reading might consider William Kenney, representing the senatorial district of Augusta and Rockbridge counties in the Shenandoah Valley, a western delegate as well. Although this region historically was considered part of the "western" interest, by 1849 it had more in common with the eastern Piedmont districts.

43. Ibid., p. ix; Shade, *Democratizing the Old Dominion*, pp. 255–56.

44. William W. Hening, comp., *The Statutes at Large, being a Collection of All the Laws of Virginia . . .* (13 vols.; Richmond and Philadelphia, 1809–23), 1:152 and Joseph Clarke Robert, *The Tobacco Kingdom: Plantation, Market, and Factory in Virginia and North Carolina, 1800–1860* (Durham, N.C., 1938), pp. 76–93.

45. *Report of the Revisors* (Dec. 1847), p. 476; Philip Alexander Bruce, *Economic History of Virginia in the Seventeenth Century* (2 vols.; New York, 1896), 1: 302–8; Arthur G. Peterson, "Flour and Grist Milling in Virginia: A Brief History," *VMHB* 43 (1935): 97–108; and Thomas S. Berry, "The Rise of Flour Milling in Richmond," *VMHB* 78 (1970): 387–408.

46. *Report of the Revisors* (Dec. 1847), p. 459. Tobacco inspectors could not own any tobacco warehouses, hold any other state or local office, or be an ordinary keeper "at or near the warehouse where he is inspector." Local variations on the process developed especially in cases distinguishing between publicly owned and private warehouses.

47. Ibid., pp. 476. Robinson and Patton also explained that although the previous Code of 1819 and subsequent acts had specifically identified "the different places of inspection," as was the case with tobacco inspection points, they had decided to omit such a lengthy listing in the new code. In the case of tobacco, which commanded an entire chapter, they decided to refer to it exclusively as a crop because it had ceased possessing transferable value as a medium of exchange. The extended footnote on page 455 documenting the numerous pre-existing exceptions to the established norms clearly demonstrates that the motives surrounding Robinson and Patton's recommendations concerning appointment were purely organizational and designed to promote efficiency, familiarity, and uniformity in the manner of appointing inspectors.

48. Ibid., pp. 458–59, 476–77.

49. *Richmond Whig*, 29 June 1849. Delegate James M. Laidley, representative from Kanawha County, opposed the section prohibiting inspectors from being paid in salt, which persisted as a medium of exchange in his region.

50. *Richmond Enquirer*, 10 Aug. 1849.

51. Ibid.

52. Ibid.

53. *Richmond Whig*, 10 Aug. 1849.

54. *Richmond Enquirer,* 10, 14, and 24 Aug. 1849.

55. *Richmond Whig,* 10 and 28 Aug. 1849.

56. *Code of Virginia* (1849), pp. 402–3, 414.

57. Ibid., p. 414.

58. Ibid (quotation). Two years later, in May 1852, the legislature revisited the inspection laws and amended them so that tobacco inspectors were to be appointed exclusively by the governor as well (George W. Munford, ed., *The Code of Virginia, Second Edition . . .* [Richmond, 1860], p. 451).

59. *Richmond Whig,* 28 Aug. 1849; see also the editorial from the *Fredericksburg News* reprinted in the *Whig* on 31 Aug. 1849.

60. "The Code of Virginia," pp. 325–26.

61. *Quarterly Law Journal* 1 (1856): 7–14.

62. Schweber, *Creation of American Common Law,* pp. 1–12.