

Welcome to New Legislators  
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Two hundred and twenty-five years ago people living along the Green Mountains did a remarkable thing: they created a new state based solely on the strength of their collective will. It was a revolution within the Revolution. From the act of self-creation to radical constitutional provisions prohibiting slavery and decoupling suffrage from property qualifications, Vermonters pushed the limits of contemporary belief about the nature of government and liberty. Vermont's creation is a profound milestone in the evolution of American democratic theory. But it is not the story I wish to share today.

That story starts a year later, in March 1778, when the first Vermont legislature convened. It is a story that will soon include you.

Imagine if, come January, the general assembly was in its first, not 225<sup>th</sup>, year. Imagine there were no laws, only broad constitutional mandates and guidelines. Where would you start?

Of course one of the first orders of business was to elect a speaker. Representative Joseph Bowker of Rutland was so elected. Bowker, however, had also been elected to the executive council and so resigned his house seat. Nathan Clark of Bennington was then elected speaker. The 1778 speaker's race went smoothly compared to later contests. In 1853, for example, no one party controlled the house and it took thirty-one ballots to elect a speaker. The coalition that finally elected a speaker immediately fell apart, and the remainder of the session was marred by factional disputes. The public reaction was to create, in 1854, the Vermont Republican Party, which then held the speakership without

interruption until 1975. Though the 1987 house was briefly deadlocked at 75-75, I believe the 2003 session will be the first since 1853 without a house majority.

Returning to 1778, another immediate order of business was to elect the lieutenant governor and state treasurer. Neither of those races provided a majority winner, throwing the election into the joint assembly. Since Vermont had a unicameral legislature, the joint assembly consisted of the house, and the governor and twelve-member executive council, an interesting blurring of executive and legislative authorities. The two plurality winners were elected without controversy. Indeed, no sooner was the deputy governor, as the position was then known, elected, than fifteen additional votes arrived, giving Col. Joseph Marsh the popular majority as well.

In January, you will participate in the 69<sup>th</sup> and 70<sup>th</sup> elections of state officers by joint assembly. It will be the 22<sup>nd</sup> time a governor is so elected; the 26<sup>th</sup> time for lieutenant governor.

The majority requirement is one of the innovations of Vermont's 1777 Constitution. Until 1780 we were the only state to require a majority winner for our top constitutional officers; we were only one of five states, out of fourteen, to popularly elect governors at all. Today I believe we are only one of four states to have some form of majority requirement for governor (Arizona, Georgia, and Mississippi are the other three).

In 18<sup>th</sup> Century America there was great uncertainty about the popular election of executive officers. Should, instead, election be by the legislative body? Should those who did not have a sufficient stake in society, that is some amount of property, be

allowed to vote? Would a wealthy elite unduly influence the votes of the property-less? Or, conversely, would the property-less use their votes to redistribute wealth?

Vermont's founders believed that independence of thought and action—that is, freedom--was based on the broad-based ownership of property. But they also believed that civic virtue did not reside exclusively with the propertied, and that all citizens—that is, male residents 21 or older—had a stake in society. So Vermont adopted universal male suffrage.

They also believed that the best way to determine the will of the voters was through majority requirements. Plurality election would open the door to minority rule. At what point—49%, 40%, 30%--would a plurality winner be able to gain office and implement policies that ran counter to the public will?

By statute, rather than constitutional authority, we applied the majority requirement to the U.S. House, auditor, secretary of state, and the Vermont House. I do not believe it was ever used for U.S. or state senate races. Gradually the statutory majority requirements were dropped; in 1916 for the U.S. House; in 1939 for the Vermont House; and in 1984 for the three other statewide offices.

The 1830 race for Vermont's Fourth Congressional district—and yes, we have had, at times, more than one U.S. Representative—demonstrated the limits of a pure majority requirement. In 1830 it took almost two years and eleven elections to achieve a majority in the Fourth District (and only then because one of the candidates died). After that we began to allow election by plurality if no majority was achieved after a certain number of ballotings (a model eventually applied to the Vermont House as well).

While the rationale for the majority requirement is clear, the reasons for resorting to election by joint assembly are less so. In the absence of documentary evidence, the assumption is that the legislature was the branch closest to the people. There are few guidelines on how the joint assembly should vote. Articles 47 and 9 of the Constitution require joint assembly elections of constitutional officers to be by secret ballot. And the constitutional oath, or affirmation, of office requires legislators to “do equal right and justice to all persons, to the best of your judgment and ability.”

One fascinating aspect of the recent campaign was the degree of comfort, or discomfort, expressed in trusting legislators—you—to use your judgment in deciding the election. Some commentators believed legislators to be trustees; that is, to be entrusted to use their judgment in deciding what was best for all Vermonters. Others felt that legislators should be delegates, strictly adhering to the will of their immediate constituents as expressed by the vote of their district. Other supporters of the delegate model argued the joint assembly should simply ratify the election of those candidates with the most statewide votes. The balance between legislators as trustees or delegates is one of the continuing issues of self-government.

On four occasions the joint assembly picked someone besides the plurality winner in a gubernatorial race. The first was in 1789, the last in 1853. In all four cases the plurality winner was an incumbent governor and the legislatures were divided among multiple factions. The last time a non-plurality winner was elected by joint assembly was in the 1977 lieutenant governor’s race.

That joint assembly vote illustrates the trustee model of representation. Prior to the vote some legislators learned that the plurality winner was to be charged, and

probably convicted, for the misuse of his clients insurance premiums. A handful of legislators—I have heard three--decided, in their judgment, that Vermont would not be well served by having the lieutenant governor under indictment. Their votes gave the election to the candidate who finished second.

That decision did not pass without comment and in 1979 there was an attempt to amend the constitution to allow election by plurality. If no candidate received at least 40% of the vote then a run-off election would be held between the two candidates with the highest vote. Plurality amendments were also offered, and failed, in 1987, 1991 and 1999. More recently supporters of instant run off voting have attempted to modify how a majority could be achieved. Three such bills were introduced in the last biennium.

Okay, I seem to have wandered afield, so let us return to 1778 and the first Vermont legislature. Again, if you were to start a government from scratch, where would you start? The first session of the 1778 legislature lasted two weeks and enacted about twenty laws. I say “about” since the 1778 laws have not survived and may have never been published. What we are left with are just the act titles. From 1778 until 1786, however, all acts were only in effect for one year; if they were not renewed by the incoming legislature, they expired. Since acts with the same or similar titles were enacted in 1779—and the 1779 laws have survived--we have a sense of the language of the 1778 laws.

One of the first general acts passed was “An Act Regulating Attornies and their fees” (March 17, 1778). That act gave the superior courts the authority to qualify and appoint attorneys and, with some exceptions, limited the practice of law to those attorneys so qualified and appointed.

If you are going to start a government, a society, based on law, regulating attorneys is a prudent first step. And so, at the very beginnings of Vermont, government claimed the right to regulate certain professions.

Qualified lawyers were important to economic growth. Arguably the greatest category of laws passed by our early legislatures were intended to enhance Vermont's economic development. Two of my favorite economic development acts from 1778 are the laws regulating brands used to mark livestock and regulating the size of bricks. I assume I am not the only one here who sees the parallels between those acts and your upcoming deliberations on e-government.

How do you prove ownership or authenticity when dealing with non-traditional media? If it is livestock, you set standards for brands. If it is an electronic document, you set standards for digital signatures. In building Vermont's business infrastructure standards are essential, whether you are ordering bricks from a neighboring town or conducting a global transaction via the Internet.

Vermont's early legislatures passed laws regulating the laying out of highways, granting ferry rights, establishing minimum square footage for buildings, or requiring holders of town land grants to cultivate a certain amount of acreage. While the physical infrastructure received great attention, the preservation of legal documents essential to business growth lagged behind. As noted, even the 1778 laws passed to encourage growth were apparently neither published nor preserved. At the municipal level, a lack of accessible and authentic land records clouded title to land and plagued efforts to settle Vermont for years.

We are in a similar period of adjustment right now. Vermont state government currently spends an average of \$50 million a year on information technologies. And yet we have put few resources into managing the records created, stored or transmitted via those technologies. The Archives has, within our limited resources, attempted to create some guidelines for electronic records but we must do so within administrative frameworks that are inadequate for managing even paper records. Just as we lost our first generation of laws, we are now losing our first generation of electronic records.

Well, I seem to have drifted away from 1778 again. Economic development depends on more than laws. The 1778 general assembly passed its economic development package at a time when Vermont was a war zone. With armies marching up and down the Champlain Valley and armed clashes occurring between Vermonters of divided loyalties, economic and population growth remained stagnant. Not until the end of the American Revolution in 1783 and Vermont's acceptance as the 14<sup>th</sup> state in 1791 did we become one of the fastest growing regions in the country.

Vermont's growth was competitive with other regions until around the 1830s. By then it was clear that factors beyond Vermont's borders could control our economy. The opening of western lands undermined the diversity of Vermont's agriculture. Railroad networks largely bypassed the State. Vermont exports became hostage to national tariff policies. Our mountainous terrain and northern climate further restricted our ability to compete for agricultural markets and national transportation links.

Consequently a majority of Vermont towns reached population levels in 1830 they would not exceed until the 1960s. Declining population levels meant shrinking tax

bases, including the statewide property taxes that were a major source of government revenue. As our tax base weakened, public services became more expensive.

In numerous categories Vermont began to fall behind the other states. By the mid-19<sup>th</sup> Century 40% of those born in Vermont were living outside the State. While Vermonters took pride in the number of their sons and daughters who rose to prominence elsewhere, they became increasingly concerned that so many of their children had to leave in order to succeed. In 1931 the Vermont Commission on Country Life wondered what “Vermont would have been like if all this [youthful] energy and intelligence had been kept at home.” In response to their own question they articulated the first great state development plan of the 20<sup>th</sup> Century. They hoped implementing their plan would make Vermont so “attractive that the children shall not be lured away as the fathers were, but turn with eager eyes and hands to the realm around their doors. We mean to knit and lace the state together with the best roadways in the world—roads that feel like velvet, and stand like adamant, and stretch away like a satin ribbon in the shade and sun. And over these shall come seekers of health and beauty, drinking in from many landscapes the enchanted draught that leaves the gazer restless and unsatisfied until he can return. And so we mean to guard with jealous care the nobility and freshness of our scenery. Here is the wealth that can never be exhausted but by our own stupidity.”

They don't make reports like they used. Of course what the Commission was proposing was the commitment of Vermont to tourism. Actually their plan linked tourism to eugenics and the sterilization of undesirable Vermonters, but that is a story for another day.



Actually there are hundreds of stories I would love to share that must await another day. I would have loved to talk about how those first legislators funded state government and how, by 1779, the first environmental laws appeared. Or how the early legislators prohibited gambling, while allowing, by special act, for lotteries to build roads, bridges and breweries. We eventually banned all gambling, except bingo, until the 1959 law on pari-mutual betting and the 1977 state lottery law. I would have loved to talk about how early laws encouraging economic growth through regulation (remember the early standards for branding and bricks) led inexorably to the exercise of government's police powers and the right to restrict certain business activities. Or to have discussed how town land grant charters foreshadowed our first zoning laws in 1931 and our current dialogues over land use planning. I would have loved to discuss how the 1778 general assembly adjourned to watch Vermont's first public hanging and how the debate over capital punishment evolved over the centuries. And I would have loved to talk about the 1779 general assembly's vote to make the Constitution part of state law, and how we have always tried to distinguish between the fundamental principles of the Constitution and the narrower concerns of statutory laws. That too will be an issue before you in the coming biennium.

What I hope I have suggested is that you are soon to become part of a wonderful process that began 225 years ago. I would argue that there is nothing you will consider in the next two years that was not debated, in one form or other, by your predecessors. It is not that we are incapable of resolving issues; rather there are continuing issues that each generation must address within its own social expectations and fiscal realities.

The Archives, which is charged with preserving government records of continuing value, can be a resource for your deliberations on these continuing issues. We can provide evidence of past actions, and context for current dialogues. We have begun to make some of that contextual information available to you via the Web. If you go to the Secretary of State's home page and click on Archives you will find everything from copies of our three state constitutions to continuing issues such as election by joint assembly, the use of the veto, or the evolution of judicial review. We are currently working on a history of proposals of amendment to the Vermont Constitution.

I used the 1778 legislature to suggest how our current dialogues have antecedents—and thus context—dating back centuries. Let me end by illustrating the same point by drawing from a more recent session. In 1982 the general assembly passed Joint Resolution 87 celebrating the "undaunted resistance of the Afghan freedom fighters against the Soviet occupational forces" as "an inspiration to the free world." Noting that "the people of Afghanistan observe March 21 as the start of each new year and as a symbol of the nation's birth," the General Assembly declared March 21<sup>st</sup> Afghanistan Day in Vermont. It called upon Vermonters to "observe this occasion in symbolic recognition of unity and support for oppressed people throughout the world, and, in particular, the courageous freedom fighters of Afghanistan."<sup>i</sup>

And so Vermont celebrated Afghanistan Day, and the war continued. The Soviets withdrew toward collapse, regimes toppled, warlords fought, and we moved on. Afghanistan's undaunted freedom fighters, indeed, Afghanistan itself, were forgotten. But we were not forgotten, and history is rarely left behind.

Thank you and good luck.

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<sup>i</sup> Acts and Resolves of the 1982 General Assembly of the State of Vermont, page 739.