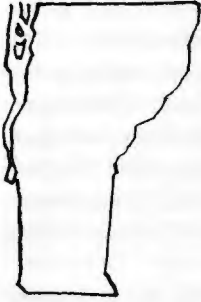


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## A Comparison of the First Constitutions of Vermont and Pennsylvania

By JOHN N. SHAEFFER

THE Windsor convention that wrote the first constitution for Vermont in the Summer of 1777 relied heavily on the Pennsylvania constitution adopted in Philadelphia the previous September. Even the most cursory glance reveals the striking similarity between the two documents, and most accounts have stressed this similarity. But if Vermont's first constitution was essentially a copy of the first Pennsylvania constitution, why did early Vermont attain noteworthy political stability, whereas in Pennsylvania the constitution itself formed the basis of partisan division and served as a focus for contention until it was replaced in 1790?

The contrast between the political histories of the two states in the first years after 1777 could hardly be sharper. In Pennsylvania the public was divided over many issues, including one of the most basic: the very nature of the constitution. Parties were formed on the basis of whether they supported the constitution. The Constitutionists claimed the constitution as a legally adopted experiment in government that should be given a chance to work; the Republicans denounced it as a radical innovation unconscionably instituted. The Constitutionists and Republicans undercut each other on almost every conceivable issue as they alternated in power from 1777 to 1790. Pennsylvania undoubtedly had the least stable political history of any of the new states.<sup>1</sup>

Vermont, by contrast, established one of the most stable, closed regimes in late eighteenth century America. Thomas Chittenden served as governor

1. Robert L. Brunhouse, *The Counter-Revolution in Pennsylvania, 1776-1790* (Harrisburg, 1942) contains the most comprehensive account.

from the beginning until 1789, and again from 1790 to 1797, and incumbents of other offices filled in statewide elections were defeated only a little more often. If the Pennsylvania constitution was a radical innovation that contributed to constant bickering in that state, how could the Vermont constitution have been nearly its exact duplicate and yet set the form for a government re-elected year after year with little visible opposition? Did Vermont take essentially the same document and make it work? Is the consensus in Vermont politics explained by the "homogeneity" of the people, where "party animosities were mild"?<sup>2</sup>

Perhaps the answer does not lie with the supposed differences between Vermonters and Pennsylvanians. It can possibly be explained better by the fact that there were more differences between the two constitutions than historians have generally noted. Historians for over a hundred years have been too dependent on the inaccurate comparison of the two documents made by Daniel Chipman, a member of the 1793 Vermont convention and a brother of Judge Nathaniel Chipman.

In 1849 Daniel Chipman's *A Memoir of Thomas Chittenden, the First Governor of Vermont; With a History of the Constitution during His Administration* held that historians had not noticed that the Vermont constitution was substantially a copy of Pennsylvania's.<sup>3</sup> Chipman then devoted a chapter to reprinting the 1777 Vermont constitution, enclosing in brackets sentences or phrases not found in the 1776 Pennsylvania constitution. He used nine sets of brackets, although two sets embraced more than one section. Chipman bracketed provisions for the prohibition of adult slavery, adequate compensation for private property taken for public use, and the limitation of civil rights to Protestants. He also noted a re-written voters' oath, an expanded legislative procedure that allowed the "perusal" of pending bills by the governor and council, popular control over "internal police," the encouragement of religious worship, a modification to allow the state to regulate fishing, and prohibitions against improper warrants in cases of debts and against transporting a defendant out of the state for trial. Thus from Chipman's analysis it would seem that Vermont's constitution differed from Pennsylvania's only by the addition of these relatively few provisions.

Although Chipman pointed to several of the basic differences, he overlooked many more, and made an error in declaring that the article about internal police was not in the Pennsylvania constitution. Chipman's book provided a valuable constitutional essay, but it was filled with factual er-

2. Allan Nevins, *The American States During and After the Revolution, 1775-1789* (New York, 1924), 674.

3. Daniel Chipman, *Memoir of Thomas Chittenden . . .* (Middlebury, 1849), 28-50.

rors. Besides various additions that Chipman missed, there were many deletions and substitutions.

A quarter century later, in 1873, E. P. Walton edited the first volume of the *Records of the Governor and Council*, which gathered many of the documents concerned with the 1777 Vermont constitution.<sup>4</sup> Walton included a list of ten differences between the Vermont and Pennsylvania constitutions. The first nine differences summarized the bracketed phrases in Chipman's reprint. Walton's tenth difference was derived by noting that "Vermont" replaced "Pennsylvania" throughout.<sup>5</sup> It was, in effect, Chipman's list. The editor summarized, without credit, the work of Chipman. And he stated that Vermont made changes only by adding to the Pennsylvania document. It is obvious that Walton borrowed from Chipman, since Chipman's comparison was so fundamentally inaccurate that Walton could not have derived his equally inaccurate list without consulting Chipman.<sup>6</sup> And Walton repeated Chipman's error of claiming the provision concerning internal police as a Vermont addition. Most historians have relied on Walton for their knowledge of the comparison between the two constitutions.<sup>7</sup>

Besides many additions that Chipman, and Walton, missed, there were many deletions and substitutions. In all, Vermont made twenty-seven substantive changes from the Pennsylvania original. Many sections were the same, word for word; both constitutions provided for a single assembly, an executive council, and a supreme court. But the Vermont convention altered the provisions for all three branches, and the changes were more numerous and important than usually recognized. The Vermont constitution contained enough differences to create, in actuality, a different system.

Historians have often considered the Pennsylvania constitution the pre-eminent example of a "radical" constitution, since it incorporated many

4. E[liakim] P. Walton, ed., *Records of . . . the Governor and Council of the State of Vermont . . .* (8 vols., Montpelier, 1873-80), I, 83-103.

5. *Ibid.* 84. Only 14 of the 19 articles of the Declaration of Rights and 16 of the 44 sections of the Frame of Government were taken verbatim from the Pennsylvania document, with seven other sections having only stylistic changes.

6. Walton did, however, cite Chipman's book for tracing Vermont's constitution to William Penn's "Frame of Government" of 1682. *Ibid.* 86.

7. Vermont historians know the Vermont constitution and others know the Pennsylvania constitution, but few made their own comparison. Nevins cites Walton and makes no further comparison. Nevins, *American States*, 675. Chilton Williamson did not rely on Walton, declaring that the Vermont constitution "closely resembled" the Pennsylvania document except for universal manhood suffrage, town representation, and "the addition of ten articles comprising a Declaration of Rights." *Vermont in Quandary, 1763-1825* (Montpelier, 1949), 64-65. This ignores the differences cited by Chipman and Walton (unless the "ten articles" is a mistaken reference to Walton's list of ten), as well as the other differences noted in this article. Of the 19 articles in the Vermont Declaration of Rights, only three and parts of two others were added by the Vermont convention.

innovative features that seemed designed to bring government under more popular control. A unicameral legislature, a multiple executive, the periodic displacement (rotation) of legislators and councillors, a tax-paying instead of property-holding franchise, legislative apportionment by population, and review of the constitution and the constitutionality of legislation by a council of censors were among the distinctive innovations in the Pennsylvania constitution. If Vermont had copied this constitution, with only those changes mentioned by Chipman and Walton, then it too would deserve classification as having adopted a radical constitution.

But the Vermont convention made just enough changes in its final product to make the government, in operation, about as conservative as that in any of the states. The executive branch was noted for conservative stability because of its control by an entrenched oligarchy. In contrast to Pennsylvania, which had no officials elected on a statewide basis, fifteen executive officers were elected directly by the freemen of Vermont — the governor, the lieutenant governor, the treasurer, and the members of the council. The twelve highest in the votes for the council were declared elected, whereas in Pennsylvania two councillors were chosen by each county. Also in contrast with Pennsylvania, there was no prohibition on re-election to any executive office in Vermont, and the incumbents had a distinct advantage in the statewide, popular elections. With no constitutional bar to re-election, the incumbent executive officers and most of the council were returned year after year. Chittenden served as governor for all but one of the first twenty years, and Ira Allen remained treasurer continuously until 1786. Five councillors won seats in all eight elections before the meeting of the first council of censors in 1785; three others were unseated only by death or promotion to higher office. Only twenty men served in the first eight councils. The Vermont constitution thus created a distinctively different executive branch, not at all like the council in Pennsylvania.<sup>8</sup>

Vermont at the beginning established no property or taxpaying requirement for the right of suffrage, another departure from the Pennsylvania example.<sup>9</sup> Deliberate changes of the convention emphasized that civil rights were guaranteed only to Protestants, and that admission to freemanship could be dependent upon the town's opinion of one's character. Voting was done in town meetings, which determined whether the person was of "a quiet and peaceable behavior," as required by the constitution, and the

8. Compilations derived from Franklin H. Dewart, *et al.*, eds., *State Papers of Vermont* (16 vols., Rutland and elsewhere, 1918-68), especially volume III, Walter H. Crockett, ed., *Journals and Proceedings . . . General Assembly . . .* (hereafter, *State Papers: Journals*, with citation usually by date).

9. Chilton Williamson, *American Suffrage from Property to Democracy, 1760-1860* (Princeton, 1960), 98, explains that discarding the taxpaying requirement might have been a pragmatic rather than an ideological consideration.

state early determined not to interfere with the decisions of the towns about who to admit as freemen. The house represented towns, on the basis of the equality of the towns. Although the convention that wrote the constitution had been weighted roughly in accord with population, and it provided for a legislature in which initially the larger towns would have two representatives, the convention also specified that at the end of seven years all towns would be placed in complete equality "forever thereafter." This contrasted with the Pennsylvanian principle of apportionment by population. Representatives would take the same oaths as in Pennsylvania, with an additional profession of belief in "the protestant religion." Once elected, there were no limits to continued re-election or to holding other offices, as there were in Pennsylvania. In sum, there were important differences in the principles of representation in the two states.<sup>10</sup>

The Vermont convention omitted entirely the principal section of the Pennsylvania constitution dealing with the judiciary. As a result, the Vermont constitution mentioned a supreme court, but said nothing about the election, composition, salary, or tenure of that court. Also omitted was the clause that prohibited members of the supreme court from holding other offices. The power of the legislature to establish other courts was not mentioned, as in the Pennsylvania document, but a new section provided for the popular election of inferior courts of common pleas in the counties, as well as sheriffs, probate judges, and justices of the peace. Unlike Pennsylvania, Vermont did not prohibit the election of legislators to these offices.

On the surface Vermont copied Pennsylvania's unicameral legislature, but one of the important changes, as noted by Chipman, was the rejection of the Pennsylvania procedure for passing public bills. Although all public bills would be printed for public consideration before they could become permanent, as in Pennsylvania, the governor and council would review these bills before they became law, whether permanent or temporary. This section was vaguely written, so that later practices would decide what it meant. With a strong executive this section came to have an interpretation that was entirely favorable to the council. In actuality the governor and council participated in and dominated the legislative process during the first years under the 1777 constitution.<sup>11</sup>

10. *State Papers: Journals*, Mar. 9, Oct. 13, 1780; Sidney G. Morse, "The Representation Issue in Vermont a Century Ago," *Vermont Quarterly*, XXI (1953), 83; and Nathaniel Hendricks, "A New Look at the Ratification of the Vermont Constitution of 1777," *Vermont History*, XXXIV (1966) for the constitutional role of the towns.

11. Dr. Thomas Young advised this change when he commended the Pennsylvania constitution to Vermont. Young to the Inhabitants of Vermont, Apr. 11, 1777 in Walton, *Governor and Council*, I, 395; James B. Wilbur, *Ira Allen, Founder of Vermont* (2 vols., Boston, 1928), I, 96; Daniel B. Carroll, "The Unicameral Legislature of Vermont," *Vermont Historical Society Proceedings*, New Series, III (1932), 12.

Notwithstanding the review of legislation by the executive council, Vermont also included the Pennsylvania provision for a septennial review by a council of censors. The sections of the two constitutions on the council of censors were almost identical, except for the method of electing the censors. Instead of two members from each county, as in Pennsylvania, Vermont provided for thirteen censors elected on a statewide basis. This circumvented one of the disadvantages that confronted Pennsylvania as new counties were created, but Vermont found that its method also had disadvantages, especially after the organization of political parties enabled the majority party to exclude all critics from the council of censors.<sup>12</sup>

Unfortunately, there are no records to show the method or motive for the changes from the Pennsylvania document. Daniel Chipman believed Governor Chittenden responsible for the requirement that the council review bills before final passage, evidently unaware of Dr. Thomas Young's letter recommending the change. A biographer of Ira Allen claimed that the Vermont document "shows, without question, many evidences of Ira Allen's controlling mind." But the writer presented no evidence to support his claim. It is known, at least, that Allen took the convention's draft to Connecticut to have it printed. Regardless of how it occurred, it is evident that the Vermont constitution was not merely a ratification of the Pennsylvania original.<sup>13</sup>

The written form of the constitution was equalled in importance by the precedents set by the actual operation of the government. The day-to-day procedures of the legislative and executive branches could either implement or ignore the spirit of the constitution, and the procedures established for the consideration of legislative bills, or for making other governmental decisions, could become as important in determining the constitution of the government as the written frame. In Vermont, the inexperienced legislators got off to a slow start in understanding and asserting their prerogatives.

As in Pennsylvania, the constitution allowed the executive to prepare business for each legislative session. Governor Chittenden rarely addressed the house formally, but he usually presented official correspondence and made suggestions for needed legislation. Chittenden's method of dealing with the house was one of subtle persuasion rather than confrontation, and he usually got the legislation he wanted. However, Chittenden had constitutional leverage to go with his tact. The governor and council reviewed

12. Chipman, *Chittenden*, 129; Williamson cites the council of censors as the "one particular" in which the Vermont and New York constitutions were "identical," but the New York council of revision was only vaguely related to the Vermont censors. Williamson, *Quandary*, 64.

13. Chipman, *Chittenden*, 94; Wilbur, *Allen*, 1, 97.

all public bills, and this section soon had an interpretation almost entirely favorable to the council. And the council did not limit its legislative role to the review provision in the constitution.<sup>14</sup>

The first legislature was so devoid of a sense of its prerogatives that it asked the governor and council to draft a bill to supply the treasury, and it let the executive decide when to adjourn and the time and place of the next session. From the beginning the council drafted and sent bills to the house for concurrence, which the house debated and passed. At the end of the first session, the house asked the council to prepare bills for the next session. Not only did the council draft bills, but it participated in the legislative process in the house. Members of the council served on joint committees with house members on many private bills and on a large majority of public bills from 1778 through 1785. Because of the small size of the council, councillors served on more committees than house members. Even the appropriations committee was a joint committee during the first several years. Membership on committees was not limited to members of the house and council; often other officials, including military officers, were used until at least 1791, when three house members refused to serve on a committee with non-members.<sup>15</sup>

In the first legislatures, bills apparently received only one reading before being sent to the council, and in floor debate councillors could and did take part. In fact, in the first years some of the recorded motions were made by persons who did not belong to either the house or the council. It was not until 1785 that the house rules silenced all but members of the house and council; after that time others could speak only with consent of the house.<sup>16</sup>

All really important matters necessitated a meeting of the "grand committee," which was the joint meeting of the entire government of Vermont. The grand committee comprised the house, the council, and the executive officers, presided over by the governor. The chief justice and a majority of the other judges of the highest court were usually present, because until 1786 they were nearly always councillors or assemblymen. The grand committee, however, was only an enlarged joint committee, and its work was subject to ratification by the usual legislative process. Nevertheless, the decisions of the grand committee were consistently enacted until 1786.

The joint participation of the house and council in the entire process of preparing and debating the laws meant that the council disapproved of but

14. Chipman, *Chittenden*, 21, 94-95.

15. *State Papers: Journals*, Mar. 16, 18, 1778, Oct. 17, 1780, Jan. 14, 1791; Walton, *Governor and Council*, II, 6n.

16. *State Papers: Journals*, pt. II, 126, Feb. 12, 1779, June 8, 1785.



few bills. The house in the first years showed a notable lack of jealousy in preserving its right to enact laws. At the end of the February 1779 session, after approval of a series of laws to serve as a law code, which the council had taken from the 1769 Connecticut law code and submitted to the house, the house gave authority to the governor and council to "revise, prepare and make any necessary alterations in the several laws and acts passed in the General Assembly and have the same printed as soon as may be."<sup>17</sup>

During the first two years, the council used its right to review public bills infrequently, probably because the vast majority of all public bills had originated in the council. In the first session only one bill was returned by the council with "exceptions," and the house decided to reject the entire bill. Going beyond the constitution, in 1779 the house provided that all resolutions be sent to the council, and two days later the council returned an unanimous dissent to a house resolution for a township land grant. A house member then entered his dissent from the house vote, but apparently the grant was not revoked. In March 1780 the house approved a council amendment for the first time, "after long debate" and a roll-call vote. The early assemblies seemed conscious of their own inexperience and eager to accept the leadership of the executive branch.<sup>18</sup>

The constitution mentioned a supreme court and county courts, but the section of the Pennsylvania constitution that dealt with the creation of these courts had been omitted, and the clause empowering the legislature to create additional courts was also omitted. Nevertheless, the first legislature created special courts in each "shire," and later decided that these were not the regular county courts. In October 1778 the house, at that time expanded by the representatives from sixteen western New Hampshire towns, created a "Superior Court" and appointed five judges by a resolution of the house.<sup>19</sup>

At the next session, the first union with the New Hampshire towns was dissolved. The council sent a superior court bill for approval, which authorized a five-man court and allowed any councillor to sit on the court in the absence of a quorum. The house passed the bill without changes on February 13, 1779, despite a major defect of not specifying how the judges would be appointed. Later in the year, another act provided for the election of superior court judges annually by joint ballot of the governor, council, and house. Still another act constituted the superior court as a court of

17. *Ibid.*, Feb. 25, 1779.

18. *Ibid.* Mar. 18, 1778, Oct. 25, 27, 1779, Mar. 16, 1780 and *passim*; Walton, *Governor and Council*, II, 14.

19. There is no indication in either house or council journals whether the governor and council considered this resolution. *State Papers: Journals*, Mar. 24, June 5, Oct. 23, 1778.

equity, with right of appeal to the joint meeting of the governor, council, and house. All equity causes of less than £4000 then before the legislature were referred to the superior court. Thus the constitutional provision for a "supreme" court was ignored, while a "superior" court was brought into being by the joint ballot of the executive and legislative branches, which would also review the equity decisions of that court.<sup>20</sup>

Although the effort to move equity cases to the judiciary was well intentioned, the house in practice never ceased providing relief to those who felt aggrieved by court decisions. There were few such petitions to the legislature during the war years, because the courts were forbidden by law to hear land title cases, but after the war appeals to the legislature were frequent.

In contrast, the house gave jurisdiction to the courts in one area that other legislatures usually considered an exclusive legislative concern. This involved house attendance. Despite a constitutional requirement for a two-thirds quorum, most Vermont legislatures organized within two days of the time appointed. But after having difficulty in obtaining a quorum for the February 1782 session, the house passed an act to compel attendance by directing the secretary to sue absent members in court for £1/10 for each day the member missed, unless excused by the house. If the secretary failed to bring suit, he would be sued by treasurer for £50 for each dereliction. The secretary did his duty. He prosecuted nine members, who then petitioned the house and obtained a remission of their fines, minus court costs. The legislature, at the next session, repealed the entire law.<sup>21</sup>

During the second, short-lived union with the western New Hampshire towns in 1781-82, the house began to assert itself in relations with the council. Immediately after the admission of these towns, a joint committee on necessary business was appointed to arrange the agenda for the session. Two of the five appointed by the house came from New Hampshire, including Elisha Payne. This committee listed only three of the most obvious items for consideration and it was not important in itself, but it provided a start for the house to control its agenda. The council had formerly arranged the business for a session, and even though the new arrangements committee was always a joint committee, it provided a means for the shifting of some power from the council to the house. The arrangements committee made a list of the principal items of public business and these items were then referred to committees, with the most important referred immediately to the grand committee. There had been few worries about these procedural matters before, but by 1781 some members of the house began to show

20. *Ibid.* Feb. 16, 18, Oct. 20, 22, 1779; Frank L. Fish, "The Vermont Bench and Bar," in Walter H. Crockett, *Vermont, the Green Mountain State* (5 vols., New York, 1921-23), V, 14-15.

21. *State Papers: Journals*, Mar. 15, 1780, Feb. 25, 1782.

increasing distrust of at least some of those in the executive branch and began doubting whether they were being fairly informed about the state business in such matters as negotiations with the British, relations with New York, New Hampshire, and Congress, the accounts of Treasurer Ira Allen, and the recurring problems involving land grants.<sup>22</sup>

From March 1778 until June 1781, the house concurred with every recommendation of the council, but the expanded assembly of 1781 refused a council request to delay passage of a bill to prevent the diverting of streams. In October 1781 a committee chaired by Elisha Payne recommended that the treasurer be required to render an annual accounting to the legislature. This was the first move by the house to try to call an executive officer to account. This action led to a long battle between the house and Treasurer Ira Allen. The house established a fact-finding committee to make certain inquiries of the treasurer, the board of war, and other officials, and resolved that the governor and council furnish the house at the opening of the next session with "exact copies of all their proceedings respecting the fees, limitations and restriction they have put on the several grants of land. . . ." Again, the initiative for these moves seems to have come from the New Hampshire members, and this was more initiative than the Vermont house had previously shown. The house and council in joint balloting elected Payne to be both deputy governor and chief judge of the superior court, and at the next session included him among Vermont's potential delegates to Congress.<sup>23</sup>

At the October 1781 session, the house passed a tax bill without council concurrence, after rejecting a council-proposed substitute. However, on "motion" of Ira Allen, the house reconsidered the next day and sent the bill back to committee. Allen was treasurer, surveyor general, and a councillor, but not a member of the house; he probably made his motion in this case in his role as holder of the finance portfolio.<sup>24</sup>

The house passed two private bills over council objections during the February 1782 session. Then the union with the New Hampshire towns dissolved. But the house did not entirely lose its new-found sense of independence. In October two public bills passed after the rejection of council amendments. This marked only the second and third times that the council had been unable to secure its amendments to public bills. However, some of the earlier lack of concern for due form returned when, rather than pass an amendment to an act of the previous session, the house merely directed

22. *Ibid.* Apr. 6, 1781.

23. *Ibid.* Oct. 18, 22, 1781.

24. *Ibid.* Oct. 24, 25, 1781.

the secretary to erase certain words and insert new provisions in the four-month-old law.<sup>25</sup>

The fact that a law could be amended merely by erasing words in the manuscript points to a constant difficulty the state had in distributing its laws. No newspaper was printed in the state before 1780, and none regularly published until 1783. The legislature tried various means to have the sheriffs distribute the laws to the town meetings, but the repeated efforts to improve and enforce this method testifies to its ineffectiveness. One law, though, the government purposely kept secret after passing it. The law authorized a special superior court in Windham County, recently torn by riots. This was followed by a resolution that no member would divulge the existence of the law "on penalty of Incurring the Censure of this House." Equally as questionable were various maneuvers in making land grants, particularly the sudden and unannounced opening and closing of the times for reception of land grant petitions, which favored those present at the session over the interests of the general public.<sup>26</sup>

Leadership developed only slowly in the house after the war, and it was many years before the legislature attained in reality the status of a co-equal branch. Vermont established a government dominated by a strong executive, a tendency permitted by the changes made by the Windsor convention. The Vermont executive, exploiting its limited legislative power, and not subject to rotation out of office, provided most of the governmental leadership through the war years, in contrast to the divided and comparatively ineffective executive council in Pennsylvania. The unicameral Vermont legislature, representing the towns of the state, was no match for the council, elected statewide. This led to the naive dependence of the inexperienced Vermont legislators, in contrast to the adept maneuvering of experienced assemblymen in Pennsylvania.

Possibly the homogeneity of the Vermonters does explain the comparative lack of contention in Vermont's early politics; the first challenges to the council's control came from east of the Connecticut River. But once the issues, particularly those involving land sales, had been brought into the open, Vermonters proved they could be as contentious as any. The institutional structure created by the constitution, however, served to delay the emergence of a faction to rival the entrenched oligarchy.

Someone deserves more credit for originality in devising Vermont's government than historians have customarily been willing to concede.

25. *Ibid.* Oct. 23, 1781; John A. Williams, ed., *Laws of Vermont in State Papers*, XIII, p. 103.

26. *State Papers: Journals*, Oct. 21, 1779, Mar. 11, 1780, June 21, 1782.