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The Virginia Bill Of Rights

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In the quarter century following the outbreak of the American Revolution no less than eight great pronouncements on human liberty were given to the world: the Virginia Declaration of Rights, the Declaration of Independence, the Massachusetts Bill of Rights, the Virginia Statute for Religious Freedom, the Ordinance of 1787, the French Declaration of the Rights of Man and the Citizen, the Ten Amendments to the Constitution and Jefferson's First Inaugural. All of these save one were American and at least five were Virginian. The Virginia Declaration of Rights came first in point of time and, as George Mason, its author, said, "was closely imitated by the other United States." Let us first examine its origin.

On May 15, 1776, the Virginia Convention in session at the Capitol in Williamsburg resolved unanimously to instruct the Virginia delegates to the Continental Congress "to propose to that respectable body to declare the United Colonies free and independent States." That same day the red cross of St. George came down from the flagstaff atop the Capitol and in its place shortly flew the terrifying emblem of the first Virginia troops—a flag with a coiled rattlesnake and the words: "Liberty or Death." Having thus crossed the Rubicon, the Convention next resolved to appoint a committee "to prepare a Declaration of Rights, and such a plan of Government as will be most likely to maintain peace and order in this Colony, and secure substantial and equal liberty to the people." From these actions of May 15 came directly the Declaration of Independence, the Virginia Bill of Rights and the Virginia Constitution of 1776.

The committee, as originally appointed, consisted of twenty-eight members under the chairmanship of Archibald Cary and including such eminent names as Henry Lee, Patrick Henry, Edmund Randolph,
Richard Bland, and "George Gilmer for Thomas Jefferson, Esquire." Other members were added from time to time including James Madison and George Mason. On May 27 Mr. Cary reported that a Declaration had been prepared "which he read in his place, and afterwards delivered to the Clerk's table, where the same was again read and ordered committed to a Committee of the whole Convention." In the meantime, it was "ordered printed for the persual of the Members." On June 12 the Declaration "having been fairly transcribed was read a third time, and passed, as follows, mem. con.:"

A Declaration of Rights made by [the Representatives of] the good people of Virginia, [assembled in full and free Convention.] (in the exercise of their sovereign powers;) which rights do pertain to them and their posterity, as the basis and foundation of Government.

Sect. 1. That all men are created, born by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Sect. 2. 1868. That this State shall ever remain a member of the United States of America, and the people thereof are part of the American nation, and that all attempts, from whatever source or upon whatever

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3Peter Force, American Archives: A Documentary History of the English Colonies in North America, Fourth Series, VI (Washington, 1846), 1510-1562. The draft of May 27 is printed in the journal of the Convention. An earlier draft in the handwriting of George Mason is in the Virginia State Library and published in Helen Hill, George Mason: Constitutionalist (Cambridge, 1938), 156-158. In the following notes these early drafts are referred to as MMS. Draft and Draft of May 27. In the following text of the Bill of Rights, the original Declaration of June 12, 1776 is printed in lower case type—language later deleted being enclosed in brackets. Amendments adopted since 1776 and still effective are also printed in lower case type enclosed in parentheses, with the date of adoption indicated in the footnotes. Amendments no longer effective and passages of early drafts are in italics. The present reading of the Bill of Rights is, therefore, all of the language not enclosed in brackets or printed in italics. The texts of Virginia Constitutions of 1830, 1851, 1868 are found in: Ben: Perley Poore, The Federal and State Constitutions and Other Organic Laws of the United States, II (Washington, 1878). The text of the Constitution of 1902 is found in the Virginia Code. Changes made in 1928 are in Acts, 252-5.

*The Preamble remained unchanged until 1928.

*The Draft used word "created" and Draft of May 27 used "born."

The words "when they enter into a state of society" are not in either early draft.
pretext, to dissolve said Union or to sever said nation, are unauthorized
and ought to be resisted with the whole power of the State.\textsuperscript{5}

Sect. 3. 1868. That the Constitution of the United States, and the laws
of Congress passed in pursuance thereof, constitute the supreme law
of the land, to which paramount allegiance and obedience are due
from every citizen, anything in the constitution, ordinance, or laws
of any State to the contrary notwithstanding.\textsuperscript{5}

Sect. 2. That all power is by God and nature\textsuperscript{6} vested in, and con-
sequently derived from, the People; that magistrates are their trustees
and servants, and at all times amenable to them.

Sect. 3. That Government is, or ought to be, instituted for the com-
mon benefit, protection, and security of the people, nation, or com-

Sect. 4. That no man, or set of men, are entitled to exclusive or sepa-
rate emoluments or privileges from the community, but in considera-
tion of public services, which, not being descendible, neither ought
the offices of Magistrate, Legislator, or Judge, to be hereditary.

Sect. 5. [That the Legislative and Executive powers of the State should
be separate and distinct from the Judicative] (That the legislative,
executive and judicial \textit{powers} departments of the State should be
separate and distinct)\textsuperscript{8} and that the members [of the two first] \textsuperscript{8} (there-
of)\textsuperscript{8} may be restrained from oppression, by feeling and participating
the burdens of the people, they should, at fixed periods, be reduced to
a private station, and return into that body from which they were
originally taken, and that vacancies be supplied by [frequent, certain,
and]\textsuperscript{9} regular elections,\textsuperscript{10} in which all, or any part of the former mem-

\textsuperscript{5}These two sections were added in 1868 (usually called the Underwood Consti-
tution) and dropped in 1902.

\textsuperscript{6}MMS. Draft.

\textsuperscript{7}This change was made in 1902.

\textsuperscript{8}The present reading was adopted in 1851 except that the word "powers" was
used in place of "departments," adopted in 1902.

\textsuperscript{9}These words were dropped in 1902.

\textsuperscript{10}Both MMS. Draft and Draft of May 27 end here.
bers [to] (shall)\textsuperscript{11} be again eligible, or ineligible, as the law [shall] (may)\textsuperscript{11} direct.

Sect. 6. That (all)\textsuperscript{12} elections [of members to serve as Representatives of the people, in assembly]\textsuperscript{12} ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of (or damaged in)\textsuperscript{13} their property for public uses without their own consent or that of their Representatives [so] (duly)\textsuperscript{13} elected, nor bound by any law to which they have not, in like manner, assented, for the public good.

Sect. 7. That no part of a man's property can be taken from him, or applied to publick uses, without his own consent, or that of his legal

\textsuperscript{11}These changes were made in 1902.
\textsuperscript{12}These changes were made in 1851.
\textsuperscript{13}These changes were made in 1902. The eminent domain power is referred to again and in more detail in Va. Const. of 1902, Section 58. Four types of litigation may arise in this field:

1. The state may appropriate or destroy property pursuant to its police power; Stickley v. Givens, 176 Va. 548, 11 S. E. (2d) 631 (1940); may abate nuisances, Stickley v. Givens, 176 Va. 548, 11 S. E. (2d) 631 (1940); remove obstructions to navigation, Greenleaf Johnson Lumber Co. v. Garrison, 297 U. S. 251, 85 S. Ct. 551 (1915); destroy defective animals, Stickley v. Givens, 176 Va. 548, 11 S. E. (2d) 631 (1940); or other property, the possession of which has been made illegal, such as intoxicating liquor; Mugler v. Kansas, 123 U. S. 623, 8 S. Ct. 273 (1887). In none of these cases need the state make any compensation whatever to the owner, and of course the same is true when the Federal Government, operating within its field, interferes on the same principles with property interests.

2. When property is actually appropriated by the state, we have the exercise of the power of eminent domain. The state's power is unquestioned, the only contention open being that the property is not being taken for public purpose, Miller v. Pulaski, 109 Va. 137, 65 S. E. 880 (1909); or that compensation made is not adequate, Miller v. Pulaski, 114 Va. 85, 75 S. E. 767 (1912).

3. Property, though not taken, may be damaged. Formerly there was no right to compensation in such a case, Fisher v. S. A. L. Ry. Co., 102 Va. 365, 46 S. E. 581 (1904); but under the amended section damages must be paid, Tidewater R. Co. v. Shartzer, 107 Va. 522, 59 S. E. 407 (1907). Davis, Constitutional Provisions Against Damaging Private Property (1902) 8 Va. L. Reg. 525. Formerly close questions arose on the distinction between damaging and taking, but now the distinction is of very much less importance. Compensation must be made in either case.

4. Property may be damaged to an appreciable degree but compensation may be denied because the damage is slight, or because the owner is injured only as the whole body of citizenry is injured. Probably the clearest illustration is an obstruction of a street many block away from the citizen's premises, City of Lynchburg v. Peters, 145 Va. 1, 133 S. E. 674 (1926); City of Lynchburg v. Peters, 156 Va. 40, 157 S. E. 769 (1931); Lambert v. City of Norfolk, 108 Va. 259, 61 S. E. 776 (1908) (claim for compensation because a cemetery has been established on adjoining land).
representatives; nor are the people bound by any laws but such as they have in like manner assented to for their common good.\textsuperscript{14}

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

Sect. 8. That in [all capital or]\textsuperscript{15} criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of twelve men\textsuperscript{16} of his vicinage, without whose unanimous verdict he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

Sect. 9. That laws having retrospect to crimes, and punishing offences committed before the existence of such laws, are generally oppressive, and ought to be avoided.\textsuperscript{17}

Sect. 8. 1894. That in all criminal or capital prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with his accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage without whose unanimous consent he cannot be found guilty; but the General Assembly may, by law, provide for the trial otherwise than by a jury of a man accused of a criminal offense not punishable by death or confinement in the penitentiary; nor can he be compelled to give evidence against himself; that no man may be deprived of his liberty except by the law of the land or the judgment of his peers.\textsuperscript{18}

Sect. 8. 1902. That no man shall be deprived of his life, or liberty, except by the law of the land, or the judgment of his peers; nor shall any man be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offence, but an appeal may be allowed to the commonwealth in all prosecutions for the violation of a law relating to the state revenue.

That in all criminal prosecutions a man hath a right to demand

\textsuperscript{14}This section was in the Draft of May 27.
\textsuperscript{15}The words “capital or” were dropped in 1902 and the word “all” in 1928.
\textsuperscript{16}This was added in 1851 and dropped in 1868.
\textsuperscript{17}This section was in the Draft of May 27.
\textsuperscript{18}This amendment to the Underwood Constitution was adopted in 1894. Acts (1893-4), 249. By an act approved January 23, 1896, the General Assembly gave the defendant in misdemeanor cases the right to waive jury trial “and submit all matters of law and fact for trial to the court.” Acts (1895-6), 153.
the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; provided, however, that in any criminal case, upon a plea of guilty, tendered in person by the accused, and with the consent of the attorney for the commonwealth, entered of record, the court shall, and in a prosecution for an offence not punishable by death, or confinement in the penitentiary, upon a plea of not guilty, with the consent of the accused, given in person, and of the attorney of the commonwealth, both entered of record, the court, in its discretion, may hear and determine the case, without the intervention of a jury; and that the General Assembly may provide for the trial of offences not punishable by death, or confinement in the penitentiary, by a justice of the peace, without a jury, preserving in all such cases, the right of the accused to an appeal to and trial by jury in the circuit or corporation court; and may also provide for juries consisting of less than twelve, but not less than five, for the trial of offences not punishable by death, or confinement in the penitentiary, and may classify such cases, and prescribe the numbers of jurors for each class.

(Sect. 8. 1928. That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers; nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense.

(Laws may be enacted providing for the trial of offenses not felonious by a justice of the peace or other inferior tribunal without a jury, preserving the right of the accused to an appeal to and a trial by jury in some court of record having original criminal jurisdiction. Laws may also provide for juries consisting of less than twelve, but not less than five, for the trial of offenses not felonious, and may classify such cases, and prescribe the number of jurors for each class.

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9The reading of Section 8, adopted in 1902, to this point shows some deletions, rearrangement and additions compared to the original of 1776. The double jeopardy clause and the addition of "life" to the due process clause are especially significant. The rest of the section, a rather baffling proviso, was added in 1902.
(In criminal cases, the accused may plead guilty; and, if the accused plead not guilty, with his consent and the concurrence of the commonwealth's attorney and of the court entered of record, he may be tried by a smaller number of jurors, or waive a jury. In case of such waiver, or plea of guilty, the court shall try the case.)

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

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

Sect. 11. That (no person shall be deprived of his property without due process of law; and) in controversies respecting property, and in suits between man and man, the ancient trial by Jury of twelve men is preferable to any other, and ought to be held sacred; (but the General Assembly may limit the number of jurors for civil cases in circuit and corporation courts of record to not less than five in cases now cognizable by justices of the peace, or to not less than seven in cases not so cognizable.)

Sect. 12. That freedom of the Press is one of the great bulwarks of lib-

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\item[^{20}] Acts (1928), 253-4.
\item[^{21}] These clauses were in the Draft of May 27. The entire section was absent from MMS. Draft.
\item[^{22}] These words were added in 1851 and dropped in 1868.
\item[^{23}] It is to be noted that the trial by jury which is preserved is that which was practiced in Virginia at the time the Constitution was adopted. W. S. Forbes & Co. v. Southern Cotton Oil Co., 130 Va. 245, 108 S. E. 15 (1921). This decision contains a detailed discussion of the right to trial by jury as guaranteed by Section 11 as amended by the Constitution of 1902. That the Virginia courts have shown no disposition to impose severe limits upon the right to jury trial, see Lambert v. Board of Supervisors, 140 Va. 62, 124 S. E. 254 (1924).
\item[^{24}] This provision for limiting number of jurors in civil cases was adopted in 1902, except that the words "circuit and corporation" were dropped in 1928 and the words "courts of record" substituted.
\end{itemize}
erty, and can never be restrained but by despotic Governments; (and any citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty right."

Sect. 13. That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that Standing Armies, in time of peace, should be avoided as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.

Sect. 14. That the people have a right to uniform Government; and, therefore, that no Government separate from, or independent of the Government of Virginia, ought to be erected or established within the limits thereof.

Sect. 15. That no free Government, or the blessing of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.

Sect. 16. That Religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience; unpunished and unrestrained by the magistrate, unless under color of religion, any

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26The free speech and publication clause was added in 1868, except that the word "freely" was added in 1902 and the word "right" substituted for "liberty." It should be noted, however, that since 1830 the General Assembly has been prohibited by the Constitution from passing any law "abridging the freedom of speech." And the constitutional clause does not add anything about "the abuse of that right."

27This section was not in the MMS. Draft, but was in Draft of May 27.

28See Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20 (1793) in which the fundamental principle was announced by the Virginia court that the Bill of Rights and the Constitution were the supreme law of the land and could not be altered or set aside by the legislature. Section 15 was alluded to as giving clear authority for this conclusion. The decision indicates that the view was adopted from the very beginning of the Commonwealth that the power to determine an act of the legislature void because in conflict with the Constitution is vested in the courts. This doctrine did not arise from a later judicial assumption of power, as is sometimes contended. Even prior to this decision, Chancellor George Wythe had in ringing terms declared the power of the courts to invalidate legislation which exceeded the bounds of the legislature's constitutional authority. Com. v. Caton, 4 Call 5, 8 (Va. 1782) "if the whole legislature, an event to be deprecated, should attempt to overlap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further."
man disturb the peace, happiness or safety of society and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.

Sect. 16. That religion, or the duty we owe our Creator, and the manner of discharging it, being under the direction of reason and convictions only, not of violence or compulsion, all men are equally entitled to the full and free exercise of it, according to the dictates of conscience; and therefore, that no man or class of men ought on account of religion to be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities unless, under color of religion the preservation of equal liberty and the existence of the State be manifestly endangered.

(Statute for Religious Freedom, 1785.) (Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.)

Sect. 19. 1868. That neither slavery nor involuntary servitude, except as lawful imprisonment may constitute such, shall exist within this State.

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29These words were in both the MMS. Draft and Draft of May 27. Madison was responsible for deleting these words.

It is interesting to note that the Virginia court has expressly held that a person is not incapacitated from being a witness on account of his religious beliefs. Perry v. Com., 44 Va. (3 Grat.) 632 (1846).

30This is Madison's proposed substitute for Mason's section on religious liberty. A comparison of it with the final text as adopted will show that it was adopted only in part. Gaillard Hunt, "James Madison and Religious Liberty," American Historical Association Annual Report, 1901, I, 166-7.

31This is Chapter 6 of the present Code of Virginia. Only the pertinent language of the Statute is given here. Preceding the enacting clause is a long and solemn preamble which states the essence of the Jeffersonian philosophy of free thought, perhaps the most eloquent statement of this truth since Milton and never surpassed in America. The language given above is followed by a solemn declaration "that the rights hereby asserted are of the natural rights of mankind; and that if any act shall be hereafter passed to repeal the present, or narrow its operation, such act will be an infringement of natural right." Strictly speaking, of course, this document is not a part of the Bill of Rights, but its provisions are so strongly pertinent to the subjects of the Bill of Rights that it must be regarded as almost inseparable from the latter.
Sect. 20. 1868. That all citizens of the State are hereby declared to possess equal civil and political rights and public privileges.\(^2\) (Sect. 17) 21. 1868. (That rights enumerated in this Bill of Rights shall not be construed to limit other rights of the people, not therein expressed.)

The declaration of the political rights and privileges of the inhabitants of this State is hereby declared to be a part of the constitution of this Commonwealth, and shall not be violated on any pretence whatever.\(^3\)

The Declaration, thus adopted without a dissenting voice, was principally the work of George Mason. A Virginia planter of Gunston Hall, he has been described as "a gentleman so liberal that he could not swallow the Federal Constitution, yet so aristocratic he regarded Washington as an upstart."\(^4\) Never covetous of public office, deeply read in the classics and political literature of the 17th and 18th centuries, he lacked the magnetism of Jefferson and the fire of Henry. Yet he was one of the greatest of the Virginians of the golden age. As his essentially scholarly mind pondered the problems of his day, he envisioned a Virginia Commonwealth, free, tolerant, somewhat aristocratic. The members of the Committee turned naturally to him—what with Jefferson in Philadelphia writing his own Declaration. And so George Mason wrote it out by candlelight in his room at the Raleigh Tavern.

The manuscript draft of George Mason was clearly the basis of the final text of June 12, 1776. Two new sections were added in Convention. Section 10, relating to searches and seizures, was a fundamental addition. Section 14, relating to the contemporary agitation for the independence of Kentucky, became an anomaly after 1792. An attempt was made to add a section prohibiting ex post facto legislation, but this was stricken out in the final text. Some minor insertions and deletions were made in other sections. The suggestion in Section 1 that man was either born or created with freedom was deleted in favor of the plain assertion that he is endowed with those rights "by nature." In the same section a positive affirmation of the social contract theory of the origin of government was added. In Section 2, a

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\(^2\)Added in 1868 and dropped in 1902.

\(^3\)Added in 1868 as Section 21. The final paragraph was dropped in 1902 and the section changed to number 17.

recognition of the divine origin of popular sovereignty was deleted. Since the official journal of the Convention did not report debates it is not always possible to state the persons or influences behind these changes.

The most important changes in Convention were made in Section 16, relating to religious rights. Madison proposed a far-reaching substitute designed to disestablish the Episcopal Church. He was able to secure the adoption of language which recognized religious liberty in place of mere toleration and deleted a dangerous clause which would have permitted persecution of persons who “under color of religion . . . disturb the peace.” Otherwise, Mason’s original wording stood including a limited recognition of Christian ethics. The adoption of Madison’s substitute would have avoided the long controversy which ended in 1785 with the enactment of Jefferson’s great Statute for Religious Freedom.

As the Declaration emerged from Convention in 1776 we may paraphrase its basic principles as follows: equal freedom of man in a state of nature, origin of government in contract, reservation of certain inalienable rights, popular sovereignty, abolition of special privilege and hereditary office, independence of the judiciary, fixed elections and rotation of office for legislators and executives, elections of legislators free from executive interference, restricted suffrage, no executive suspension of law, right of accused to jury trial and other safeguards, right of convicted to freedom from tyrannical punishment, abolition of general warrants, freedom of press, supremacy of civil over military authority, freedom of religion.

These principles, of course, were not original with George Mason. They came from diverse sources; firstly, from English political theory of the 17th century, particularly from John Locke. Sections 1-3 state the fundamental propositions of the natural rights school of political philosophy, more eloquently and concisely expressed by Jefferson in the Declaration of Independence. Thomas Hobbes, more concerned with security than with liberty, had conceived of the state of nature as bellum omnium contra omnes, where man, inately anti-social competitive and ruthless, endured a life of “continuall feare . . . solitary, poore, nasty, brutish, short.” From this dread “condition which is called Warre” man was glad to escape into the security of status civilis by a terrible contract: “I Authorize and give up my Right of Governing my selfe to this Man.” So, according to Hobbes, the apologist of Stuart absolutism and Cromwellian dictatorship, originated “that great Le-
viathan," government, a mail-clad figure towering, sword in hand, above the homes of men.35

But the Virginian doctrine come from a more engaging source. It derives from John Locke, the political philosopher of the Glorious Revolution of 1688. Unlike the Hobbesian concept of the state of nature as a condition of war and anarchy with the hand of every man against his brother, Locke pictures it as a "state of peace, goodwill, mutual assistance." In this happy utopia men are in a "state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit . without asking leave or depending on the will of any other man." This natural man is "absolute lord of his own person and possessions equal to the greatest and subject to nobody." Even so there are certain inconveniences and uncertainties and government arises from these rather than from the Hobbesian concept of imperative necessity. And the social contract is the antithesis of the horrible oath of Leviathan. The people simply institute government as an agent for their convenience, delegating to it no more power than is necessary and reserving to themselves the great reservoir of their natural rights. If government invades these or ventures beyond the strict limits of the contract, the people have a weapon—the right of revolution or in the abiding phrase of Locke "an appeal to Heaven." Thus did John Locke defend the right of the English people to attack Leviathan, thrust James, II, out and set William and Mary on the throne.36

The propositions of sections 1-3 have not gone unchallenged in American political philosophy. The Federal Convention of 1787 did not enact the Declaration of Independence. The only place, indeed, where the word "liberty" appears in the original Constitution is in the Preamble. The natural rights philosophy was introduced into American constitutional law through the amendments, particularly the due process clauses of the 5th and 14th amendments. Even in Virginia, the natural rights philosophy was increasingly assailed after the death of Jefferson. Virginia turned more and more to Calhoun as the fountain of political wisdom and the repudiation was proclaimed by Thomas R. Dew in the hallowed precincts of Williamsburg, itself. At the Virginia Convention of 1829-30, Judge Abel P Upshur expressed a growing

conviction that the natural rights theory was an absurdity. As late as 1867, that stout Bourbon, Professor Robert L. Dabney, D.D., pronounced it "a radical and disorganizing scheme of human rights...but Jacobinism in disguise." The primary reason for this transformation of thought in Virginia was the rising abolitionist movement. Another reason was the growing demand to implement the popular sovereignty and majority rule clauses by manhood suffrage.

Now it would be a capital error to suppose that the Virginia Convention of 1776 had any intention of espousing either abolition or modern democracy. Elected on the restrictive franchise of the old laws, it adopted in section 6 the clear declaration that "all men, having sufficient evidence of permanent common interest with, and attachment to the community, have the right of suffrage." Moreover, it adopted a constitution with a highly undemocratic suffrage and put it into effect without a popular referendum. Even Jefferson, originally, seems to have favored some property limitations on the suffrage, for in his draft of a constitution for the Convention he gave the vote to small free-holders and taxpayers.

But the American Revolution was more than a mere political and military event. It was also a profound social revolution and Jefferson's mind was well in advance of the liberal social thought of the period. He soon came to advocate what he called "general suffrage," that is, it seems clear, suffrage for all freemen "who either pay or fight for their country" and considered its adoption as one of the major reforms necessary to democratize Virginia. The movement for freedom of...
franchise gathered momentum in Virginia, as in all America, in the
days of Jacksonian democracy and was heatedly debated at the Con-
vention of 1829-30. The disfranchised freemen of Richmond presented
a petition through John Marshall asking for the right to vote and
citing the Declaration of 1776. "How do the principles thus pro-
claimed," they asked, "accord with the existing regulations of the
suffrage?" The constitution of 1830, while liberalizing the require-
ments, did not grant freedom of franchise. Not until the Convention
of 1850 did King Numbers win over King Property in Virginia. Since
1902, however, the grand debate of American history has been renewed
in Virginia.

Elsewhere in the political theory of the 17th century one discovers
other principles of the Virginia Declaration. Sections 4 and 5 state
fundamental propositions of what people of that day meant by "a
republican form of government." It is derived from the republican
writings of the Puritan Revolution, particularly from John Milton and
James Harrington. Indeed, in Harrington's aristocratic Common-
wealth of Oceana (1656) there were free public schools and secret bal-
lots. The principle of free press in section 12 was defended by Mil-
ton's Areopagitica (1644), the most powerful argument against cen-
sorship ever written. It went far beyond Mason's statement to the uni-
versal truth of freedom of thought. The principle of freedom of elec-
tion in section 6 was stated by Locke as the right of representatives to
be "freely chosen and so chosen freely act." This was a much broader
principle than Mason's comprehending also freedom of deliberation.
Even Hobbes went beyond the Virginia Declaration by condemning
ex post facto legislation.

The Virginia Declaration, however, is more than a statement of
generalities drawn from political theory. It contains specific checks on
Leviathan drawn from specific documents of English constitutional

4Proceedings and Debates of the Virginia State Convention of 1829-30 (Rich-
mond, 1830), 25-6.
4Poore, II, 1922. The Constitution of 1850 gave the vote to "Every white male
citizen of the Commonwealth, of the age of twenty-one years, etc." The Constitution
of 1868 gave the vote to "Every male citizen of the United States, twenty-one
years old, etc." Poore, II, 1955. The suffrage requirements of the present Constitution,
adopted in 1902 are found in (Code, 1919, CXXXV).
4G. P. Gooch, English Democratic Ideas in the Seventeenth Century (Cam-
bridge, 1927) 305-307. See also T. Dwight, "Harrington and His Influence upon
American Political Institutions," Political Science Quarterly, II, 1887.
4Milton, Prose Works (Bohn edition) II, 90.
4Locke, 229.
4Hobbes, 153.
history. Sections 8 and 11 state ancient principles of English criminal and civil procedure. The law of the land clause of section 8 is taken directly from Magna Carta.\textsuperscript{47} The whole of section 9 is copied verbatim from the English Bill of Rights. The principles of fixed elections in section 5, of free elections and taxation by consent in section 6, of no executive suspension of law in section 7, and the supremacy of the civil authority in section 13 are all drawn from similar, at times verbatim, passages of the Bill of Rights. The Bill of Rights, indeed, goes further than the Virginia Declaration and grants right of petition and freedom of deliberation in Parliament.\textsuperscript{48} The declaration against general warrants in section 10, states an old principle of English law, vigorously reaffirmed by Camden and Mansfield in 1763 and 1764.\textsuperscript{49} James Otis had given a brilliant argument against general warrants in Boston in 1761 and colonial judges had consistently refused them to royal customs officers on the eve of the Revolution.\textsuperscript{50}

The principle of an independent judiciary in section 5 was drawn from the \textit{Act of Settlement} (1701), which made the commissions of judges "quam diu se bene gesserint." Indeed it went beyond Mason's statement and made "their salaries ascertained and established."\textsuperscript{51} It must be noted, however, that this is no statement of the modern doctrine of separation of powers. Neither the British principle nor Mason's original statement went beyond freeing "the judicative" from executive and legislative pressure. It did not erect any principle of partnership of "the Judicial department" in a tri-partite division of sovereignty. This latter principle reached America through Montesquieu, who in his \textit{Spirit of Laws} (1748) wrote a remarkable misunderstanding of the British constitution.

Important as the Virginia Declaration was, there were many glaring omissions. It carried no principles of free speech, assembly or petition. It did not prohibit \textit{ex post facto} legislation, bills of attainder or impairment of contract. There was no strict definition of treason, no prohibition against suspension of \textit{habeas corpus}, no clear and complete statement of due process, no separation of powers. There was not even a completely adequate statement of an independent judiciary.

\textsuperscript{47}Adams and Stephens, Select Documents of English Constitutional History, (New York, 1908), 47.
\textsuperscript{48}Adams and Stephens, 465.
\textsuperscript{49}Adams and Stephens, 492-3.
\textsuperscript{51}Adams and Stephens, 479.
Under this Declaration a person could be held in slavery and a citizen could be jailed for publicly attacking the institution. The ink was hardly dry before a law was passed providing a fine of 20,000 pounds and five years imprisonment for the simple assertion that Parliament still had power in Virginia. Under section 6 a citizen could be deprived of "the right of suffrage" because he was poor and intelligent. He could be deprived of his property if he were rich and intelligent like Lord Fairfax and the fathers of Thomas Ritchie and Edmund Randolph.

Section 8 established a singularly defective criminal procedure. The accused had no right of public trial, indictment by grand jury, benefit of counsel, privilege to address the jury or immunity from double jeopardy. It may be argued that these defects were cured by the law of the land clause—that this enacted all common law rights and had the force of a due process clause. But it must be noted that the doctrine of due process was not fully developed for over a hundred years. The Virginia Bill did not have an express due process clause for property until 1902. Finally, assuming that the law of the land clause...
enacted common law rights, would it carry any more rights than an Englishman had in 1776? Not until 1836 did an Englishman have full benefit of counsel and not until 1898 could he address the jury. Moreover, the identical language of section 9 had been the law of the land since 1689, yet in 1776 prisoners hung in chains throughout England and the heads of felons were exposed on Temple Bar. As late as 1819 there were 223 capital offenses. The plain fact is that the reform of the criminal code came as a result of the writings of Jeremy Bentham in the 19th century.  

Moreover, section 16 was wholly inadequate as a protection for religious rights. True, it represented some advance over the English Toleration Act (1689). It extended freedom of worship to all men, whereas the Act extended it only to Protestants who accepted the Trinity. But the “free exercise of religion” is far short of the modern theory of complete religious equality. Freedom of worship merely legalized dissent. It did not prevent forced contributions to an established church, nor laws imposing civil disabilities on dissenters. Dissenters in England, although “tolerated” were excluded from office, from the universities and from the suffrage. No adequate religious liberty was adopted in England until the 19th century and not completely until after John Stuart Mill’s great essay On Liberty (1859). But the principle has been statute law in Virginia since 1785 and constitutional law since 1830.

It seems clear, therefore, that if the Virginian today had no rights except those declared in the august Declaration of 1776, he would be sadly deficient. Fortunately the rights of Virginians have grown. Let us next examine the amendments to the Virginia Declaration. The Declaration of 1776 remained textually unchanged for seventy-five years. The Convention of 1829-30 resolved that the text “requiring in the opinion of this Convention no amendment, shall be prefixed to this Constitution, and have the same relation thereto as it had to the former Constitution of this Commonwealth.” In the Convention of 1850-1, important changes were made. Section 5 was rephrased to give a more explicit statement of the principle of separation of powers and coordinate judiciary. In section 6, freedom of election was extended

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58 Dicey, 205.
59Poore, 1913.
60In Winchester & S. R. Co. v. Commonwealth, 106 Va. 264, 55 S. E. 692 (1906) the court decided that Section 5 did not prevent the legislature from setting up an administrative agency, the Corporation Commission, and vesting it with legislative, judicial and executive powers. It was said that the constitutional separation of
to "all elections" rather than merely to members of the legislature. In sections 8 and 11 a jury was defined as "of twelve men."61

In the Reconstruction Convention of 1868, extensive changes were made. The rights of free speech and publication, constitutional law since 1830, were added to section 12 and a new section was added stating the important principle of construction which had been adopted for the Federal government in the Ninth Amendment. Other new sections were added stating the principles of perpetuity of the Union, supremacy of the Federal Constitution, abolishing slavery and recognizing the equality of civil rights of all citizens.62 These amendments were, of course, unnecessary in view of the Civil War and resulting amendments to the Federal Constitution. By an amendment in 1894, section 8 was rephrased to permit waiver of jury trial in misdemeanor cases.

The Convention of 1902 promptly struck out the unnecessary sections of 1868 and made other important changes. In section 5, elections were made "regular" in place of "frequent, certain and regular." This change was designed to permit election of judges by the General Assembly on long tenure. Section 6 was amended to prohibit the General Assembly from damaging property without compensation. Sections 8 and 11 were completely overhauled. A property due process clause was added to section 1163 and in criminal trials the accuse was granted immunity against double jeopardy. In both criminal and civil cases, juries could under certain circumstances be less than twelve or dispensed with altogether.

powers provision was intended to recognize "the well-accepted view that the administration of the government would be wholly impracticable if that general maxim were strictly, literally, and unyieldingly applied in every possible situation.

The universal construction of this maxim in practice has been that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, but that either department may exercise the powers of another to a limited extent."

61 Poore, 1920.
62 Poore, 1954.
63 One might at first marvel that in a document devised to preserve human liberty there had been for so many years no reference to due process of law. However, the Virginia Bill of Rights contains many references to procedures which are comprised within that phrase—e.g., Section 8. And in fact, the due process provision of Section 11 has not played and will not play a great part in the protection of personal rights because it parallels the provision of the Fourteenth Amendment to the Federal Constitution. Thus, when a litigant in this state claims that he has been deprived of due process of law, it is customary for him to base his contention on both the Bill of Rights and the Fourteenth Amendment, and the decision usually emphasizes the clause of the Federal Constitution and the United States Supreme Court decisions decided thereunder. See, Reynolds v. Milk Commissioner,
Finally, certain changes in 1928 brought the Bill of Rights to its present reading. An attempt, not entirely successful, was made to restore section 8 to something of the original simplicity and clarity of 1776. The sentence allowing appeals in revenue cases was stricken out and transferred to Article VI, Sec. 88, of the Constitution. The long, baffling proviso relating to waiver of jury trials was rephrased. In Section 11, the provision relating to juries of less than twelve in civil cases was made to apply to all courts of record. Since these amendments were not adopted in convention, the language of the Preamble was made to conform to this fact. Thus was completed, one hundred and fifty-two years of textual evolution of the Virginia Bill of Rights.

We have next to notice how the Bill of Rights has been supplemented by provisions of the Virginia Constitution. Since 1830, the Virginia State Constitution has carried a section on civil liberty. The present reading, which, with two exceptions, is substantially the same as the original reading of 1830, is as follows:

"Sec. 58. The privileges of the writ of habeas corpus shall not be suspended unless when, in cases of invasion or rebellion, the public safety may require. The general assembly shall not pass any bill of attainder, or any ex-post facto law, or any law impairing the obligation of contracts, or any law abrogating the freedom of speech or of the press. It shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the general assembly. No man shall be compelled to frequent or support any religious worship, place, or ministry, whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in no wise diminish, enlarge, or affect, their civil capacities. And the general assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society,

163 Va. 957, 179 S. E. 507 (1935); Stickley v. Givens, 176 Va. 548, 11 S. E. (2d) 631 (1940); Assaid v. City of Roanoke, 179 Va. 47, 18 S. E. (2d) 287 (1942). The last case cited is a very interesting decision in which the court declared: "While the Virginia Bill of Rights does not in explicit language guard the preservation of a citizen's character, it does say that all men have an inherent right to 'the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.' [Section 1] What will it profit a man if he acquires and possesses property untold, if by the arbitrary act of an administrative officer, his character may be destroyed and he may thus be robbed of the enjoyment of life and the pursuit of happiness?"
or the people of any district within this State, to levy on themselves, or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please.”

Actually, these provisions add very few rights. The statement regarding religious rights was essentially, in part verbatim, from Jefferson’s Statute of 1785. The prohibitions against *ex post facto* laws, bills of attainder and impairment of contract had been rights since 1788, by virtue of the Constitution of the United States. The prohibition against suspension of the writ of *habeas corpus* and the specific grant of freedom of speech, not added to the Bill of Rights until 1868, were important. And, of course, it was just as well to make the religious rights constitutional law rather than mere statute law, although since 1868 these would be protected by the due process clauses of State and Federal constitutions.

The rights of Virginians are also supplemented by provisions of the Constitution of the United States. These are in a category of supreme rights placed beyond any power in the state to alter. By the original Constitution, ratified by Virginia in 1788, the state is prohibited from issuing legal tender, impairing the obligation of contracts, granting titles of nobility, or enacting bills of attainder or *ex post facto* laws. Moreover, for whatever it meant, the state is guaranteed ‘a republican form of government.” Neither the strict definition of treason in Article III, the prohibition of tests oaths in Article VI, nor the liberties set forth in the first ten amendments of 1791 added anything to the rights of Virginians as against their own state. The 13th, 14th, 15th and 19th amendments, however, made far-reaching additions. The 18th made a conspicuous subtraction, subsequently restored by the 21st. Not the least important of the rights provided by the Federal Constitution is the due process clause of the 14th amendment. This places in the hands of the Supreme Court a potent instrument with which to enforce “liberty” within the state, whenever the court is of a mood to clothe that word with its historic meaning in the natural rights philosophy. Even if “the people” become Leviathan, the court can strike down invasion of natural rights by “a majority of the community” itself.

“Acts, 1928, 265. The original Section of 1830 (Poore, 1916) stated that “the writ of habeas corpus shall not in any case be suspended.” The present reading was adopted in 1868. The principle that private property could not be “damaged” was
In recent years Virginia has been quick to reject any additions to the liberty of her citizens by national action. The 13th, 14th and 15th Amendments were accepted with marked reluctance. Virginia did not ratify the 16th and 17th Amendments providing for income taxes and direct election of Senators. Pressing Mississippi close for first place, Virginia hastened to ratify the 18th Amendment and did not consent to its repeal in the 21st. The oldest democratic body in the New World, as the General Assembly likes to call itself, rejected the woman suffrage amendment, the lame duck amendment and the pending child labor amendment. Indeed, it is amazing to observe that the Convention of 1902 deleted from the official text of the Virginia Bill of Rights a section abolishing slavery. This is not as startling as might at first appear, however, for by deleting Section 19 of the Virginia Bill of Rights, the Convention of 1902 did not repeal the 13th Amendment of the United States Constitution.

Like all bills of rights, the Virginia Bill fails adequately to state duties: the duty of man to man and to the community, the duty of the community to itself and to the individual. In the main, the declarations, like the Commandments, are negative, stating the case of Man v. Leviathan. Alone of all the great declarations on human liberty of the period, however, the Virginia Bill comes nearer to hinting at the modern concept of positive liberty stated long ago in the Beatitudes. At any rate, it goes beyond 18th century laissez-faire. In section 16 the very positive concept of “mutual duty” is introduced, and in section 3 is a solemn recognition of the idea of government for the commonweal. Significantly enough, this is followed by the doctrine of inalienable right “to reform, alter or abolish.”

To declare rights, however, and inscribe them on parchment, is not enough. Nor is it yet enough to search out the sources of the ideas in history and trace subsequent amendments. More important than all this is the eternal vigilance with which a free people must guard their liberties. In the words of a well-known Virginia columnist:

“Human freedom is not a thing which is preserved by charters, or bills of rights, or constitutions, or by any words written on parchment or paper or printed in law books. It didn't come that way. It isn't kept that way. It is born of that love of liberty which burns in the breasts of some of the tribes of man. This kindled it and this alone keeps it alight.”

added in 1902. The first sentence relating to religious rights is taken verbatim from the Statute of 1785. The amendments of 1928 left Section 58 unchanged.

65Thomas Lomax Hunter, Esq., in the Richmond Times-Dispatch, November 13, 1940.