

COMMENT

COMMONWEALTH AND CONSTITUTION

“The peaceable character of an agricultural people did not incline them to adopt the martial institutions of the Roman or Spartan republics: nor did the extent of their country, or the small number of its inhabitants in proportion to that extent, invite or permit them to embrace those of the Athenian or other populous republics of Greece. An habitual predilection for what has been usually stiled the democratic part of the British constitution, prompted an experiment, to graft a scion from that branch of the government of their parent state, upon a pure republican stock: and to ensure it’s [sic] vigour and success, they carefully lopt off from it every germ of monarchy, and feudal aristocracy.”

— *St. George Tucker*¹

INTRODUCTION

Twelve years after Virginians peaceably instituted their first constitution, they convened for what became an intense debate over the Federal Constitution’s ratification. Reaching temporary compromise, in 1788 the Virginia Convention ratified the Federal Constitution, which took force in 1789.² Despite long deliberations in the Philadelphia Convention and the ratification debates in the several states’ conventions, disagreement and debate continued

1. St. George Tucker, *Of the Constitution of Virginia*, in 1 BLACKSTONE’S COMMENTARIES app. c at 79 (St. George Tucker ed., 2d ed. 1803) (remarking on the Virginia Constitution’s unique design).

2. See J. Gordon Hylton, *Virginia and the Ratification of the Bill of Rights*, 1789–1791, 25 U. RICH. L. REV. 433, 438–39, 441 (1991).

over the Federal Constitution's meaning.³ Nowhere was this disagreement more apparent than in Virginia. Home to the foremost of our Founding Fathers, including the first president and the Father of the Constitution, Virginia nonetheless found herself at odds with the federal government's and federal courts' interpretation. Early controversies arose when Virginia alleged that Congress exceeded its powers by enacting the 1791 Act of Assumption and the Alien and Sedition Acts of 1798. The General Assembly assailed their unconstitutionality.⁴ The federal executive largely ignored Virginia's 1791 protest,⁵ and although they became a political issue,⁶ the Alien and Sedition Acts were enforced by the federal courts—either avoiding arguments that the Acts infringed upon the First Amendment⁷ or finding the Acts constitutionally valid.⁸ Since the Federal Constitution's earliest days, similar constitutional disagreements have arisen between the Commonwealth and the federal government and judiciary.⁹ This disagreement has not been confined to Virginia's political branches; it has also extended to the judiciary, most famously in the Virginia Supreme Court of Appeals' conflict with the Supreme Court of the United States over state sovereignty and appellate jurisdiction in *Martin v. Hunter's Lessee*.¹⁰ In view of this early and continuing disagreement over the Federal Constitution's meaning, it is peculiar that, today, contemporary Virginia courts interpret certain provisions in Virginia's constitution according to the federal courts' interpretation of the Federal Constitution.

3. See *id.* at 433–34.

4. See H.J. Res. of Dec. 21, Va. Gen. Assembly (1798); H.J. Res. of Dec. 16, Va. Gen. Assembly (1790).

5. See CHARLES PINNEGAR, VIRGINIA AND STATE RIGHTS, 1750-1861, at 108–09 (2009).

6. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.1, at 924 (3d ed. 2006).

7. See, e.g., *United States v. Cooper*, 25 F. Cas. 631, 639 (C.C.D. Pa. 1800) (No. 14,865) (Chase, J.); *United States v. Callender*, 25 F. Cas. 239, 242 (C.C.D. Va. 1800) (No. 14,709).

8. See, e.g., *Fries*, 9 F. Cas. 826, 836–40 (C.C.D. Pa. 1799) (No. 5,126) (Iredell, J.) (upholding the Alien and Sedition Acts' validity under Article I and the First Amendment).

9. E.g., VA. CODE ANN. § 38.2-3430.1:1 (Cum. Supp. 2011); S.J. Res. 3, Va. Gen. Assembly (Reg. Sess. 1956); H.J. Res. of Mar. 6, Va. Gen. Assembly (Reg. Sess. 1827); H.J. Res. of Mar. 4, Va. Gen. Assembly (Reg. Sess. 1826); H.J. Res. 2, Va. Gen. Assembly (Reg. Sess. 1821); H.J. Res. of Jan. 22, Va. Gen. Assembly (Reg. Sess. 1811); H.J. Res. of Dec. 21, Va. Gen. Assembly (1798); H.J. Res. of Dec. 16, Va. Gen. Assembly (1790).

10. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), *rev'g* *Hunter v. Martin*, 18 Va. (4 Munf.) 11 (1815); *cf.* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

Virginia's sovereignty itself seems to undermine coextensive interpretation.¹¹ Virginia has greatly influenced our federal government and Federal Bill of Rights; however, her history and law are distinct from those of the several states and, necessarily, the United States. A distinct people settled Virginia, brought with them law and settled traditions, broke from the Crown, and established their own constitution and laws before joining the several states under the Articles of Confederation and, then, the Federal Constitution. Virginians are citizens of these two sovereigns, the Commonwealth and the United States, and each sovereign's constitution sets forth its fundamental law. Yet Virginia courts interpret several provisions of the Virginia Constitution as coextensive with the Federal Constitution. In these instances, the courts do not rely on federal precedent as persuasive authority but as binding precedent for construing protections under the Virginia Constitution.

Coextension's criticism is not new in Virginia,¹² but this comment supplements the prior discussion from a practical approach. It offers new criticisms and provides some concrete analysis that may assist a return to the Virginia Constitution's independent interpretation. In Part I, this comment exposes coextension's tenuous origins. It examines foundational errors in its precedent and questions the curious role coextension has come to serve as an ex-

11. The Hon. Stephen R. McCullough, *A Vanishing Virginia Constitution?*, 46 U. RICH. L. REV. 347, 351–52 (2011).

12. *See id.* 350–54; *see also* *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 588, 281 S.E.2d 915, 922–23 (1981) (quoting VA. COMM'N ON CONST. REV., *THE CONSTITUTION OF VIRGINIA* 86 (1969)) (internal quotation marks omitted) (“That most of the provisions of the Virginia Bill of Rights have their parallel in the Federal Bill of Rights is . . . no good reason not to look first to Virginia’s Constitution for the safeguards of the fundamental rights of Virginians. The Commission believes that the Virginia Bill of Rights should be a living and operating instrument of government and should, by stating the basic safeguards of the people’s liberties, minimize the occasion for Virginians to resort to the Federal Constitution and the federal courts.”) (second alteration in original); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 935–36 (1976); *cf.* *Lee v. Murphy*, 63 Va. (22 Gratt.) 789, 803 (1872) (Bouldin, J., dissenting) (“[T]he question before us is not how a high prerogative is exercised by the King of Great Britain, but to what extent the power has been vested in the Governor of Virginia under her constitution and laws. On that question I am constrained to differ with my brethen. I do not concur in the opinion just expressed, that the pardoning power of the Governor of Virginia is, in general, coextensive with that of the crown of Great Britain.”); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?* 46 WM. & MARY L. REV. 1499, 1501 (2005) (footnote omitted) (“This is a discussion that continues to become more sophisticated, both in the courts and in the academic literature.”). Another author has expressed astonishment that Virginia courts interpret constitutional provisions coextensively. *See* JOHN DINAN, *THE VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE* 44–45 (2006).

ception to established rules of constitutional interpretation in Virginia. Part II discusses the differing rules of constitutional interpretation in Virginia and federal courts as well as the substantive, textual differences between the two constitutions. It further interprets and distinguishes the coextensive provisions' textual meaning and compares the Virginia Constitution's plain textual meaning with the federal courts' construction of similar federal protections. Part III addresses the practical implications for constitutional litigation in Virginia,¹³ examining independent interpretation's potential effects. It addresses the Virginia Constitution's interaction with the Supremacy Clause and federal protections that have been selectively incorporated against the Commonwealth, independent interpretation's present and prospective effects on Virginia litigation, independent interpretation's interaction with the federal courts' comity jurisprudence and jurisdiction to review state courts' decisions, and federalism implications that stem from the application of those doctrines. This comment concludes that coextension's faults warrant its abandonment.

I. COEXTENSION'S FOUNDATIONAL ERRORS

Virginia courts apply coextensive interpretation to constitutional provisions addressing inherent rights; speedy trial; self-incrimination; double jeopardy; searches and seizures; due process; antidiscrimination; speech, press, assembly, and petition; arms and militias; and religious freedom and establishment.¹⁴ Despite coextension's reach, the approach is a recent development in Virginia law. Its origin is tenuous at best.

A. *Virginia's Constitution and Federal Standards*

For much of the Commonwealth's history, her constitution has been paramount in governing Virginia's internal affairs. In June 1776, Virginia instituted the Declaration of Rights and Plan of Government.¹⁵ At that point, Virginia was a free and independent

13. DINAN, *supra* note 12, at 45.

14. *See infra* note 47.

15. THE PROCEEDINGS OF THE CONVENTION OF DELEGATES HELD AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG, IN THE COLONY OF VIRGINIA, ON MONDAY THE 6TH OF MAY, 1776, at 167 (1776) (resolving unanimously in favor of the plan of government on June 29, 1776); *id.* at 100–03 (passing the Declaration of Rights on June 12, 1776); *id.* at 32 (resolv-

state, and her fundamental law—her constitution—was the supreme law of the Commonwealth.¹⁶ When they took force in 1781, the Articles of Confederation imposed few limitations on state action. The states granted Congress only powers involving foreign and interstate affairs.¹⁷ They retained nearly complete autonomy over their internal affairs.¹⁸ The people of the respective states granted a federal government greater power under the Federal Constitution, but even it limited the states in only a few, specified areas.¹⁹ Additionally, the limited body of federal law lessened the occasion for preemption during the Republic's earlier years.²⁰ Virginia enjoyed similar sovereignty under the Confederate Constitution,²¹ but it eroded as restrictive war measures were imposed.²² The most onerous federal standards were imposed under military rule during Reconstruction.²³ When Virginia's respect as a sovereign state was restored, the Reconstruction Amendments imposed greater limitations on Virginians' ability to design their constitution than the Federal Constitution had before secession.²⁴ None-

ing unanimously on May 15, 1776, to instruct their representatives in the Continental Congress to declare the colonies free and independent states). This was Virginia's first written constitution following independence. Before independence, colonial Virginians found support for their individual rights and rights of self-government in their hereditary rights as Englishmen and their founding charters. See A.E. Dick Howard, *The Bridge at Jamestown: The Virginia Charter of 1606 and Constitutionalism in the Modern World*, 42 U. RICH. L. REV. 9, 23, 28 (2007). See generally, Thomas Jefferson, *A Summary View of the Rights of British America* (1774), reprinted in 2 THE WORKS OF THOMAS JEFFERSON 63 (Paul Leicester Ford ed., 1904); RICHARD BLAND, AN INQUIRY INTO THE RIGHTS OF THE BRITISH COLONIES (1766). After Virginia's independence, new Virginia constitutions were effected in 1830, 1851, 1870, 1902, and 1971. A.E. Dick Howard, *Foreword to VA. CONST.*, available at <http://constitution.legis.virginia.gov/Constitution-01-13.pdf>

16. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 222–23 (1796).

17. ARTICLES OF CONFEDERATION of 1781, art. VI, IX.

18. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1446–48 (1987); see Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 285–302 (1997).

19. U.S. CONST. art. I, § 10; THE FEDERALIST NO. 45 (James Madison) (“The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State Governments, are numerous and indefinite.”).

20. *But see* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 253–54 (2000).

21. Compare C.S. CONST. art. I, § 10 (1861), with U.S. CONST. art. I, § 10.

22. See generally David P. Currie, *Through the Looking-Glass: The Confederate Constitution in Congress, 1861-1865*, 90 VA. L. REV. 1257 (2004) (describing the Confederate States' wartime measures and the resulting constitutional crises).

23. 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 14–15 (1974).

24. See U.S. CONST. amend. XIII, XIV, XV. Following the Reconstruction Amendments' passage, several additional federal constitutional limitations were passed. See *id.* amend. XIX, XXIV, XXVI.

theless, the Virginia Constitution's unique primacy over Virginia affairs largely continued.

By the 1960s, however, the Supreme Court of the United States' increased incorporation of federal protections against the states and construal of those provisions to target a greater scope of state action reached its peak.²⁵ The Federal Bill of Rights governed many individual rights that were once vindicated under only state constitutions.²⁶ The federal courts exerted increased control over state action during that period, but they began to step back during the 1970s.²⁷ Today, they similarly accord states dignity and respect as separate sovereigns.²⁸ Virginia courts, however, have continued the federalization of Virginia's constitutional standards through coextensive interpretation, interpreting protections in the Virginia Constitution according only to the federal courts' interpretation of the Federal Constitution.

B. *Coextension's Origin*

Coextension developed recently. For much of the Commonwealth's history, Virginia courts interpreted the Virginia Constitution according to its own meaning. From 1776 to 1985, no Virginia court declared the constitutions to be coextensive. Virginia courts acknowledged some provisions of the Virginia and federal constitutions to be similar, sometimes cited persuasive federal precedent, and not uncommonly found that the two constitutions dictated the same result—but the courts applied the constitutions independently, with each retaining its own meaning.²⁹ In 1985,

25. See *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1328 (1982).

26. *Id.*

27. *Id.* at 1328–29.

28. See, e.g., *Shelby Cnty. v. Holder*, 570 U.S. ___, ___, 133 S. Ct. 2612, 2623 (2013); *Arizona v. Inter Tribal Council of Ariz., Inc.*, ___, U.S. ___, ___, 133 S. Ct. 2247, 2257–60 (2013); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. ___, ___, 132 S. Ct. 2566, 2577–78, 2602–07 (2012) (Roberts, C.J.); *Bond v. United States*, 564 U.S. ___, ___, 131 S. Ct. 2355, 2364–65 (2011); *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203–06 (2009); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J., concurring); *Printz v. United States*, 521 U.S. 898, 918–21 (1997); *United States v. Lopez*, 514 U.S. 549, 557 (1995) (citation omitted); *Arizona v. Evans*, 514 U.S. 1, 8 (1995); *New York v. United States*, 505 U.S. 144, 161–63 (1992).

29. See, e.g., *Working Waterman's Ass'n v. Seafood Harvesters, Inc.*, 227 Va. 101, 109, 314 S.E.2d 159, 163 (1984) (observing only that the federal and Virginia contract clauses are treated similarly); *Archer v. Mayes*, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973) (interpreting Virginia Constitution article I, section 11 independently and stating merely that it is “no broader than” the federal Equal Protection Clause); *York v. City of Danville*,

however, the Supreme Court of Virginia construed the first of ten Virginia constitutional protections to be coextensive with similar federal protections.³⁰ This was only fourteen years after Virginia

207 Va. 665, 671, 152 S.E.2d 259, 264 (1967) (finding a parade ordinance violated the federal and Virginia constitutions under the same analysis but not stating they were coextensive); Zimmerman v. Town of Bedford, 134 Va. 787, 801–02, 115 S.E. 362, 366 (1922) (stating merely that Virginia statutes imposed a “practically identical” requirement as the Fourth Amendment); Flanary v. Commonwealth, 113 Va. 775, 779–80, 75 S.E. 289, 291 (1912) (stating that Virginia’s constitutional right against compelled self-incrimination was “in effect identical” with the Fifth Amendment as construed in *Hale v. Henkel*, 201 U.S. 43 (1906), but not reaching that determination by declaring the protections coextensive); Martin v. Snowden, 59 Va. (18 Gratt.) 100, 109 (1868) (stating, in dicta, that Congress’ and the states’ general powers of direct taxation are “co-extensive and alike unlimited” but not discussing possible limitations imposed by a state constitution). The dissent in *Lee v. Murphy* asserted that the court construed the governor’s pardoning power to be coextensive with that of the King of Great Britain, 63 Va. (22 Gratt.) 789, 803 (1872) (Bouldin, J., dissenting), but the majority actually interpreted the Virginia Constitution’s text with assistance from its common law background. *Id.* at 791–92 (opinion of the court). That is not coextensive interpretation. It is a proper means of constitutional interpretation, based on the Virginia Constitution’s text and history. *Almond v. Day*, 197 Va. 782, 787, 91 S.E.2d 660, 664 (1956).

30. Concededly, it is difficult to determine the first case in which a Virginia court construed a provision in the Commonwealth’s constitution to be coextensive with the Federal Constitution. Virginia courts have not uncommonly and not inappropriately relied on persuasive federal precedent without coextensively construing constitutional protections. *See supra* note 29 and accompanying text. The first case expressly declaring constitutional provisions to be “coextensive” was *Turner v. Commonwealth*, 14 Va. App. 737, 743, 420 S.E.2d 235, 238–39 (1992), and the trend is certainly recent, *see* DINAN, *supra* note 12, at 45, 63, but *Turner* and other recent Virginia cases have cited older precedents for the proposition that Virginia courts coextensively interpret constitutional provisions. *E.g.*, *Bennefield v. Commonwealth*, 21 Va. App. 729, 739–40, 467 S.E.2d 306, 311 (1996) (citing *Walton v. City of Roanoke*, 204 Va. 678, 682, 133 S.E.2d 315, 318 (1963); *Flanary v. Commonwealth*, 113 Va. 775, 779, 75 S.E. 289, 291 (1912)) (other citations omitted); *Turner*, 14 Va. App. at 743, 420 S.E.2d at 239 (citing *Kirby v. Commonwealth*, 209 Va. 806, 808, 167 S.E.2d 411, 412 (1969); *Chevrolet Truck v. Commonwealth*, 208 Va. 506, 508, 158 S.E.2d 755, 757 (1968)). The cases cited, however, held that Virginia statutes imposed the same requirement as a federal constitutional protection, *Kirby*, 209 Va. at 808, 167 S.E.2d at 412; *Chevrolet Truck*, 208 Va. at 508, 158 S.E.2d at 757, or that a Virginia constitutional protection, independently interpreted, required the same result as the Federal Constitution in the case before the court. *Walton*, 204 Va. at 682, 133 S.E.2d at 318. Those approaches were different from coextension, but *Flanary’s* approach was closer. The court stated that the Fifth Amendment “is, in effect, identical with” Virginia Constitution article I, section 8’s self-incrimination provision; however, this was only dictum. *See* 113 Va. at 779, 75 S.E. at 291. Moreover, the court’s reliance on the Fifth Amendment and federal precedent was narrowly limited. The court’s language seemed to suggest that the constitutions’ effects were identical only to the limited extent that it quoted from *Hale v. Henkel*. *See id.* The court further limited its discussion to the constitutional protections’ respective relationships with the respective sovereigns’ immunity statutes. *See id.* at 779–80, 75 S.E. at 291. It did not hold out federal law as imposing the same requirement but merely considered the relationship between the Federal Constitution and federal immunity statute to be persuasive in considering the relationship between the Virginia Constitution and immunity statute. *See id.* The court simply relied on persuasive federal precedent to assist its larger discussion, which rested on Virginia precedents that applied the Virginia Constitution without mentioning federal protections. *Compare id.* at 777–80, 75 S.E.2d at 290–91 (citing *Kendrick v. Commonwealth*, 78 Va. 490 (1884); *Temple v. Commonwealth*, 75

ratified her constitution of 1971, which the commission on constitutional revision reported “should be a living and operating instrument of government and should, by stating the basic safeguards of the people’s liberties, minimize the occasion for Virginians to resort to the Federal Constitution and the federal courts.”³¹

Lowe v. Commonwealth involved a drunk driving conviction and a defense challenging a checkpoint search’s constitutionality.³² The specific issue before the court was the checkpoint’s reasonableness under the Fourth Amendment to the Federal Constitution and article I, section 10 of the Virginia Constitution.³³ Each provision addresses searches and seizures, but article I, section 10 discusses only warrant requirements.³⁴ The Supreme Court of Virginia applied both constitutions under the same Fourth Amendment analysis.³⁵ It cited Professor Howard’s then eleven-year-old *Commentaries on the Virginia Constitution* for the prop-

Va. 892 (1881); *Cullen v. Commonwealth*, 65 Va. (24 Gratt.) 624 (1873)), with *Kendrick*, 78 Va. at 492–93; *Temple*, 75 Va. at 895–96; *Cullen*, 65 Va. (24 Gratt.) at 627. What the court in *Bennefield* considered coextensive interpretation was merely the court’s reliance in *Flanary* on persuasive federal precedent, which only complemented the Virginia precedent applied in the case. Even assuming that the court in *Flanary* might have announced coextensive interpretation, coextension would not accurately describe the analysis the court undertook, and in any event, the court’s comparative statement was merely dictum.

Turner first used the word “coextensive” to affirmatively describe constitutional provisions, but *Lowe v. Commonwealth* was coextension’s actual origin. The Supreme Court of Virginia quoted the Fourth Amendment and Virginia Constitution article I, section 10 alongside each other, described them as substantially similar, and affirmatively stated that the constitutional provisions would require the same analysis. *Lowe v. Commonwealth*, 230 Va. 346, 348 n.1, 337 S.E.2d 273, 274 n.1 (1985). Although the court stated that the Virginia Constitution and Virginia statutes effected the same rule as the Fourth Amendment, *id.*, the issue before the court was only whether the Virginia and federal constitutions permitted the search. *Id.* at 348, 337 S.E.2d at 274. The appellant argued only from the Virginia and federal constitutions, and the court’s actual analysis did not implicate the statutes’ meaning. *See id.* The strong inference from the court’s wording was that the constitutional provisions would require the same analysis in every case, rendering them coextensive. This approach was different from any the court previously took when interpreting the Virginia Constitution.

31. VA. COMM’N ON CONST. REV., *supra* note 12, at 86 (“That most of the provisions of the Virginia Bill of Rights have their parallel in the Federal Bill of Rights is . . . no good reason not to look first to Virginia’s Constitution for the safeguards of the fundamental rights of Virginians. The Commission believes that the Virginia Bill of Rights should be a living and operating instrument of government and should, by stating the basic safeguards of the people’s liberties, minimize the occasion for Virginians to resort to the Federal Constitution and the federal courts.”), *quoted in* *Richmond Newspapers, Inc. v. Commonwealth*, 222 Va. 574, 588, 281 S.E.2d 915, 922–23 (1981).

32. 230 Va. at 347, 337 S.E.2d at 274.

33. *Id.* at 348, 337 S.E.2d at 274.

34. *Compare* VA. CONST. art. I, § 10, with U.S. CONST. amend. IV.

35. *Lowe*, 230 Va. at 348 & n.1, 337 S.E.2d at 274 & n.1.

osition that Virginia's constitutional and statutory requirements were "substantially the same as those contained in the Fourth Amendment,"³⁶ but the court neither mentioned nor applied those statutes.³⁷ This is troubling in several respects. First, the applicable statutes' text does not plainly impose the same Fourth Amendment requirements, but Virginia courts have construed them to do so.³⁸ The court circularly used these statutes—which are similar to the Fourth Amendment only because the courts have construed them that way—to similarly construe article I, section 10 to be coextensive with the Fourth Amendment. Second, Article I, section 10 includes no reasonableness requirement, and its text did not apply to the facts in *Lowe*. Article I, section 10 only defines requirements for a valid warrant before conducting a search or seizure.³⁹ The court conferred Fourth Amendment meaning to a substantively different constitutional provision.⁴⁰ Third, the court's construal of Professor Howard's work was problematic. Although Professor Howard acknowledged *Zimmerman v. Town of Bedford's* holding that Virginia statutes imposed the same standard as the Fourth Amendment,⁴¹ he understood that the Virginia Constitution requires independent analysis:

Since search and seizure statutes have been in force in Virginia ever since that decision, the [Supreme Court of Virginia] has never had occasion to face directly the question of whether probable cause is implicit in the "evidence" language of section 10 and whether therefore the same probable cause standard would apply even if there were no statutes.⁴²

36. *Id.* at 348 n.1, 337 S.E.2d at 274 n.1 (quoting 1 HOWARD, *supra* note 23, at 182).

37. *Id.* at 348 & n.1, 337 S.E.2d at 274 & n.1.

38. *E.g.*, *Thims v. Commonwealth*, 218 Va. 85, 93, 235 S.E.2d 443, 448 (1977) (interpreting VA. CODE ANN. § 19.2-59 (Repl. Vol. 1975), which, by its plain language, prohibits searches without warrants unless the officer is enforcing, and empowered to enforce, game or marine fisheries laws).

39. *See infra* Part II.B.5.

40. *See infra* Part II.B.5.

41. 1 HOWARD, *supra* note 23, at 179 (quoting *Zimmerman v. Town of Bedford* 134 Va. 787, 802, 115 S.E. 362, 366 (1922)).

42. *Id.* Without explanation or citation, he answered that the Supreme Court of Virginia "[q]uite likely . . . would say that it would." *Id.* The court might say so, but closer inspection demonstrates it would be mistaken. *See infra* Part II.B.5. Professor Howard also considered the question "moot," given the Fourth Amendment's incorporation against the Commonwealth. *Id.* But incorporation alone does not displace the Virginia Constitution. *See infra* Part III.A. That might be so if article I, section 10 imposed a warrant requirement lesser than probable cause. *See Arizona v. Evans*, 514 U.S. 1, 8 (1995). However, article I, section 10's plain text suggests differently. *See infra* Part II.B.5.

The *Lowe* court took a quotation out of context and gave it a different meaning from the author's. The discrepancy is important. The court properly applied the Fourth Amendment analysis, but article I, section 10 did not apply to the underlying facts. The court's construal replaced article I, section 10's intrinsic, textual meaning with the federal courts' interpretation of the Fourth Amendment.⁴³ Subsequent opinions have relied on *Lowe*, reiterating that the protections are coextensive.⁴⁴ None discussed the misquotation, much less the constitutions' different text and meaning.

Coextension's reach has expanded,⁴⁵ leading to the court of appeals' broad declaration: "We have consistently held that the protections afforded under the Virginia Constitution are co-extensive with those in the United States Constitution. Our analysis . . . therefore, proceeds down one, not two, constitutional tracks."⁴⁶ The Supreme Court of Virginia has not made such a broad assertion, but it recently stated that "substantively similar" Virginia and federal constitutional provisions "will be afforded the same meaning."⁴⁷ Each approach is a curious departure from Virginia's well-established rules of constitutional interpretation, but the court of appeals' assertion is particularly troubling. Constitutional interpretation requires examination of the text, contemporary meaning, and historical background⁴⁸—not the federal judiciary's construction of the Federal Constitution. Although some Virginia laws receive and apply foreign standards, they accomplish it by plain, statutory command.⁴⁹ The Virginia Constitution has no receiving clause. Even since coextensive interpretation took root in

43. See *Lowe*, 230 Va. at 349–50, 337 S.E.2d at 275–76.

44. E.g., *Foltz v. Commonwealth*, 58 Va. App. 107, 128 n. 15, 706 S.E.2d 914, 925 n.15 (2011) (citing *Lowe*, 230 Va. at 348, 337 S.E.2d at 274), *aff'd* 284 Va. 467, 732 S.E.2d 4 (2012); *Simmons v. Commonwealth*, 6 Va. App. 445, 451 & n.2, 371 S.E.2d 7, 10 & n.2 (1988) (citing *Lowe*, 230 Va. at 348 n.1, 337 S.E.2d at 274 n.1), *rev'd on other grounds by* 238 Va. 200, 380 S.E.2d 656 (1989).

45. Cf. *infra* note 50.

46. *Roadcap v. Commonwealth*, 50 Va. App. 732, 743–44, 653 S.E.2d 620, 626 (2007) (internal citation and quotation marks omitted).

47. *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 134, 704 S.E.2d 365, 369 (2011).

48. See *infra* Part II.A.1.

49. E.g., VA. CODE ANN. § 1-200 (Repl. Vol. 2011 & Cum. Supp. 2013) ("The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."); W. HAMILTON BRYSON, VIRGINIA CIVIL PROCEDURE § 2.02[1][a], at 2-4 to 2-11 (2005 & Cum. Supp. 2012).

1985, its application has been inconsistent. As they are presently understood, the coextensive provisions are found only in the Virginia Constitution's bill of rights.⁵⁰ Still, a substantial majority of Virginia's bill of rights protections are interpreted independently,⁵¹ including several substantively similar protections.⁵² The re-

50. *E.g.*, *Paris v. Commonwealth*, 35 Va. App. 377, 381, 545 S.E.2d 557, 559 (2001) (interpreting article I, section 1 to be coextensive with federal substantive due process); *Farmer v. Commonwealth*, 12 Va. App. 337, 340, 404 S.E.2d 371, 372 (1999) (interpreting the article I, section 8 right against compelled self-incrimination to be coextensive with the Fifth Amendment right); *Bennefield v. Commonwealth*, 21 Va. App. 729, 739–40, 467 S.E.2d 306, 311 (1996) (interpreting the article I, section 8 right against double jeopardy to be coextensive with the Fifth Amendment right); *Holliday v. Commonwealth*, 3 Va. App. 612, 615–16, 352 S.E.2d 362, 364 (1987) (interpreting the article I, section 8 right to a speedy trial to be coextensive with the Sixth Amendment right); *Simmons v. Commonwealth*, 6 Va. App. 445, 451 & n.2, 371 S.E.2d 7, 10 & n.2 (citing *Lowe v. Commonwealth*, 230 Va. 346, 348 n.1, 337 S.E.2d 273, 274 n.1), *rev'd on other grounds by* 238 Va. 200, 380 S.E.2d 656 (1989) (interpreting article I, section 10 to be coextensive with the Fourth Amendment); *Shivaee v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005) (interpreting the article I, section 11 right to due process to be coextensive with federal procedural due process); *Wilkins v. West*, 264 Va. 447, 466–67, 571 S.E.2d 100, 111 (2002) (interpreting the article I, section 11 protection against discrimination to be coextensive with the Fourteenth Amendment's Equal Protection Clause); *Elliott v. Commonwealth*, 267 Va. 464, 473–74, 593 S.E.2d 263, 269 (2004) (interpreting article I, section 12 to be coextensive with the First Amendment's speech protections); *Digiacinto*, 281 Va. at 133–34, 704 S.E.2d at 368–69 (interpreting article I, section 13 to be coextensive with the Second Amendment); *Va. Coll. Bldg. Auth. v. Lynn*, 260 Va. 608, 626, 538 S.E.2d 682, 691 (2000) (interpreting article I, section 16 to be coextensive with the First Amendment's Establishment Clause).

51. *E.g.*, *R.G. Moore Bldg. Corp. v. Comm. for the Repeal of Ordinance R(C)-88-13*, 239 Va. 484, 489, 391 S.E.2d 587, 589 (1990) (interpreting article I, section 2); *Staples v. Gilmer*, 183 Va. 613, 621, 33 S.E.2d 49, 52 (1945) (interpreting what is now article I, section 3); *Etheridge v. Med. Ctr. Hosps.*, 237 Va. 87, 101, 376 S.E.2d 525, 532 (1989) (interpreting article I, section 4); *Roach v. Commonwealth*, 251 Va. 324, 337–38, 468 S.E.2d 98, 106 (1996) (interpreting article I, section 5), *overruled on other grounds by* *Morrisette v. Warden of the Sussex I State Prison*, 270 Va. 188, 613 S.E.2d 551 (2005); *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 434–35, 657 S.E.2d 71, 79 (2008) (interpreting article I, section 6); *Grier v. Commonwealth*, 35 Va. App. 560, 567–66, 546 S.E.2d 743, 746 (2001) (interpreting article I, section 8's right to demand the cause and nature of accusation); *Cardwell v. Commonwealth*, 248 Va. 501, 508–09, 450 S.E.2d 146, 151 (1994), *cert. denied*, 514 U.S. 1097 (1995) (interpreting article I, section 8's right of an accused to call for evidence in his favor); *Vescuso v. Commonwealth*, 5 Va. App. 59, 64–65, 360 S.E.2d 547, 549 (1987) (interpreting article I, section 8's right to a public trial); *King v. Commonwealth*, 40 Va. App. 364, 373–75, 579 S.E.2d 634, 639–40 (2003) (interpreting article I, section 8's right to a jury trial); *Newberry v. Commonwealth*, 192 Va. 819, 823–26, 66 S.E.2d 841, 843–45 (1951) (interpreting article I, section 8's right to a jury of the defendant's vicinage); *Nobrega v. Commonwealth*, 271 Va. 508, 516, 628 S.E.2d 922, 926 (2006) (interpreting article I, section 8-A); *Jackson v. Commonwealth*, 267 Va. 178, 205–06, 590 S.E.2d 500, 535–36 (2004) (applying article I, section 9's prohibition against cruel and unusual punishment); *Heublein, Inc. v. Dep't of Alcoholic Beverage Control*, 237 Va. 192, 196, 376 S.E.2d 77, 78–79 (1989) (interpreting article I, section 11's contracts clause); *Ottofaro v. City of Hampton*, 265 Va. 26, 31–32, 574 S.E.2d 235, 237–38 (2003) (interpreting article I, section 11's takings clause); *Moore v. Moore*, 61 Va. Cir. 668, 668–69 (2002) (*City of Roanoke*) (interpreting article I, section 11's provisions addressing civil jury trials); *Digiacinto*, 281 Va. at 137–39, 704 S.E.2d at 370–72 (interpreting article I, section 14); *Prashad v. Copeland*,

maining provisions, addressing the government's structure and powers, are also interpreted independently.⁵³ The vast majority of

55 Va. App. 247, 263–64, 685 S.E.2d 199, 207 (2009) (interpreting article I, section 15-A); *see, e.g.*, *Perry v. Commonwealth*, 58 Va. App. 655, 665, 673, 712 S.E.2d 765, 770, 774 (2011) (noting the appellant's Sixth Amendment and article I, section 8 confrontation claims but not declaring them coextensive); *Pilcher v. Commonwealth*, 41 Va. App. 158, 163–64, 583 S.E.2d 70, 72–73 (2003) (applying the Federal Constitution's and article I, section 9's prohibitions against ex post facto laws with assistance from federal precedent but not declaring them coextensive).

52. *E.g.*, *Jackson*, 267 Va. at 205–06, 590 S.E.2d at 535–36; *Ottofaro*, 265 Va. at 31–32, 574 S.E.2d at 237–38; *Heublein*, 237 Va. at 196, 376 S.E.2d at 78–79; *King*, 40 Va. App. at 373–75, 579 S.E.2d at 639–40; *Vescuso*, 5 Va. App. at 64–65, 360 S.E.2d at 549–50; *Covel v. Town of Vienna*, 78 Va. Cir. 190, 199–203 (2009) (Fairfax County), *aff'd*, 280 Va. 151, 694 S.E.2d 609 (2010) (interpreting article IV, section 9's speech and debate clause under Virginia and federal precedent but not declaring the provisions coextensive); *Moore*, 61 Va. Cir. at 668–69; *see, e.g.*, *Perry*, 58 Va. App. at 665, 673, 712 S.E.2d at 770, 774; *Pilcher*, 41 Va. App. at 163–64, 583 S.E.2d at 72–73.

53. *E.g.*, *Sachs v. Horan*, 252 Va. 247, 250, 475 S.E.2d 276, 278 (1996) (interpreting article II, section 1); *Moore v. Pullem*, 150 Va. 174, 193, 142 S.E. 415, 321 (1928) (interpreting what is now amended as article II, section 2); *Fairfax Cnty. Taxpayers Alliance v. Board of Cnty. Supervisors*, 202 Va. 462, 471, 117 S.E.2d 753, 759 (1961) (interpreting what is now amended as article II, section 3); *Pullem*, 150 Va. at 197, 142 S.E. at 422 (interpreting what is now amended as article II, section 4); *Dean v. Paolicelli*, 194 Va. 219, 235–36, 72 S.E.2d 506, 516–17 (1952) (interpreting what is now amended as article II, section 5); *Wilkins*, 264 Va. at 462–63, 571 S.E.2d at 108 (interpreting article II, section 6); *Dovel v. Bertram*, 184 Va. 19, 22, 34 S.E.2d 369, 370–71 (1945) (interpreting what is now article II, section 8); *In re Horan*, 271 Va. 258, 263, 634 S.E.2d 675, 679 (2006) (applying article III, section 1); *Marshall*, 275 Va. at 434, 435, 657 S.E.2d at 79 (interpreting article IV, section 1); *Earley v. Landside*, 257 Va. 365, 371–72, 514 S.E.2d 153, 156 (1999) (interpreting article IV, section 5); *Covel*, 78 Va. Cir. at 199–203 (interpreting article IV, section 9); *Marshall*, 275 Va. at 434 & n.2, 657 S.E.2d at 79 & n.2 (interpreting article IV, section 11); *id.* at 428–31, 694 S.E.2d at 76–77 (interpreting article IV, section 12); *Finn v. Va. Retirement Sys.*, 259 Va. 144, 154, 524 S.E.2d 125, 131 (2000) (applying article IV, section 13); *McConville v. Rhoads*, 67 Va. Cir. 392, 394 (2005) (City of Norfolk) (interpreting article IV, section 14); *Terry v. Mazur*, 234 Va. 442, 456–57, 362 S.E.2d 904, 912 (1987) (interpreting article IV, section 15); *Phan v. Virginia*, 806 F.2d 516, 524 (4th Cir. 1986) (applying article IV, section 16); *Thomson v. Robb*, 229 Va. 233, 242–43, 328 S.E.2d 136, 141–42 (1985) (applying article V, section 2); *Brault v. Holleman*, 217 Va. 441, 445, 230 S.E.2d 238, 241 (1976) (interpreting article V, section 6); *Allen v. Byrd*, 151 Va. 21, 24–25, 144 S.E. 469, 470 (1928) (*per curiam*) (interpreting what is now article V, section 7); *Lewis v. Commonwealth*, 218 Va. 31, 38, 235 S.E.2d 320, 324–25 (1977) (applying article V, section 12); *In re Commonwealth*, 278 Va. 1, 38, 677 S.E.2d 236, 255 (2009) (interpreting article VI, section 1); *Allen*, 151 Va. at 23, 144 S.E. at 469 (interpreting what is now article VI, section 2); *Turner v. Commonwealth*, 221 Va. 513, 519, 273 S.E.2d 36, 40 (1980) (interpreting article VI, section 5); *Kearns v. Hall*, 197 Va. 736, 744, 91 S.E.2d 648, 653–54 (1956) (applying what is now article VI, section 6); *Thompson v. Walker*, 758 F.2d 1004, 1007 n.7 (4th Cir. 1985) (interpreting article VI, section 9); *Judicial Inquiry & Review Comm'n of Va. v. Elliott*, 272 Va. 97, 118, 630 S.E.2d 485, 496 (2006) (applying article VI, section 10); *Infants v. Va. Hous. Dev. Auth.*, 221 Va. 659, 675, 272 S.E.2d 649, 658–59 (1980) (applying article VII, section 1); *Alderson v. Cnty. of Alleghany*, 266 Va. 333, 341–42, 585 S.E.2d 795, 799 (2003) (applying article VII, section 2); *Gray v. Va. Sec'y of Transp.*, 74 Va. Cir. 30, 30 (2007) (City of Richmond) (applying article VII, section 3), *aff'd in part and rev'd in part on other grounds*, 276 Va. 93, 662 S.E.2d 66 (2008); *Walker v. Massie*, 202 Va. 886, 889, 121 S.E.2d 448, 450 (1961) (interpret what is now article VII, section 4); *City Council v. Newsome*, 226 Va. 518, 524, 311 S.E.2d 761, 765 (1984) (applying article VII, section 7);

the Virginia Constitution is interpreted according to its own meaning. Coextension arose as a curious exception to the well-established rules of constitutional interpretation, and the court of appeals' declaration is troubling given coextension's inconsistent and apparently arbitrary application. The approach the Supreme Court of Virginia announced is similarly puzzling for its departure from the well-established rules of constitutional interpretation, and its approach is not applied consistently.

Bray v. Brown, 258 Va. 618, 621, 521 S.E.2d 526, 527–28 (1999) (applying article VII, section 6); Town of Madison, Inc. v. Ford, 255 Va. 429, 432–33, 498 S.E.2d 235, 236 (1998) (interpreting article VII, section 7); Potomac Edison Co. v. Town of Luray, 234 Va. 348, 352–53, 362 S.E.2d 678, 680–81 (1987) (interpreting article VII, section 8); Stendig Dev. Corp. v. City of Danville, 214 Va. 548, 550–51, 202 S.E.2d 871, 873–74 (1974) (per curiam) (interpreting what is now article VII, section 9); Dykes v. N. Va. Transp. Dist. Comm'n, 242 Va. 357, 372–75, 411 S.E.2d 1, 9–10 (1991) (applying article VII, section 10); Cnty. Sch. Bd. v. Griffin, 204 Va. 650, 659, 133 S.E.2d 565, 573–74 (1963) (applying what is now article VIII, section 1); Scott v. Commonwealth, 247 Va. 379, 384–85, 443 S.E.2d 138, 141–42 (1994) (interpreting article VIII, section 1); *id.* (interpreting article VIII, section 2); Sch. Bd. v. Parham, 218 Va. 950, 955, 243 S.E.2d 468, 471 (1978) (applying article VIII, section 5); Bristol Va. Sch. Bd. v. Quarles, 235 Va. 108, 119, 336 S.E.2d 82, 88–89 (1988) (interpreting article VIII, section 7); Va. Pub. Sch. Auth. v. Craigie, 212 Va. 464, 469, 184 S.E.2d 803, 807 (1971) (applying article VIII, section 8); Miller v. Ayres, 214 Va. 171, 179, 198 S.E.2d 634, 630–40 (1973) (applying article VIII, section 10); *id.* at 178, 198 S.E.2d at 639–40 (applying article VIII, section 11); Thomson, 229 Va. at 239, 328 S.E.2d at 139 (interpreting article IX, section 1); Am. Bankers Life Assurance Co. v. Div. of Consumer Counsel, 220 Va. 773, 788, 263 S.E.2d 867, 875 (1980) (interpreting article IX, section 3); Atlas Underwriters, Ltd. v. SCC, 237 Va. 45, 48–49, 375 S.E.2d 733, 735 (1989) (interpreting article IX, section 4); Winchester & W.R.R. v. Commonwealth, 226 Va. 352, 358, 309 S.E.2d 590, 594 (1983) (applying article IX, section 5); French v. Cumberland Bank & Trust Co., 194 Va. 475, 482, 74 S.E.2d 265, 269 (1953) (interpreting what is now article IX, section 6); Potomac Edison Co., 234 Va. at 348, 354, 362 S.E.2d at 681 (applying article IX, section 7); Lee Gardens Arlington Ltd. P'ship v. Arlington Cnty. Bd., 250 Va. 534, 538–539, 463 S.E.2d 646, 648 (1995) (interpreting article X, section 1); Smith v. Board of Supervisors, 234 Va. 250, 257, 361 S.E.2d 351, 355 (1987) (interpreting article X, section 2); McMahon v. City of Virginia Beach, 221 Va. 102, 108, 267 S.E.2d 130, 134 (1980) (applying article X, section 3); Westminster-Canterbury of Hampton Roads, Inc. v. City of Virginia Beach, 238 Va. 493, 501, 385 S.E.2d 561, 565 (1989) (interpreting article X, section 6); Button v. Day, 203 Va. 687, 694, 127 S.E.2d 122, 128 (1962) (interpreting what is now article X, section 7); Fairfax Cnty. Indus. Dev. Auth. v. Coyner, 207 Va. 351, 360, 150 S.E.2d 87, 94–95 (1966) (applying what is now article X, section 8); Miller v. Watts, 215 Va. 836, 840–42, 214 S.E.2d 165, 169 (1975) (interpreting article X, section 9); Almond v. Day, 197 Va. 782, 790–93, 91 S.E.2d 660, 666–68 (1956) (interpreting article X, section 10); Robb v. Shockoe Slip Found., 228 Va. 678, 683, 324 S.E.2d 674, 677 (1985) (interpreting article XI, section 1); *id.* at 682–83, 324 S.E.2d at 677 (interpreting article XI, section 2); Avery v. Beale, 195 Va. 690, 698–99, 80 S.E.2d 584, 590 (1954) (applying what is now article XI, section 3); Orion Sporting Grp., LLC v. Bd. of Supervisors, 68 Va. Cir. 195, 196–99 (2005) (Amherst County) (interpreting article XI, section 4); Coleman v. Pross, 219 Va. 143, 152–54, 246 S.E.2d 613, 619–20 (1978) (interpreting article XII, section 1); Staples, 183 Va. at 621–29, 33 S.E.2d at 51–55 (interpreting what is now article XII, section 2).

C. *Historical Rebuttal*

History has tempted courts to coextensive interpretation,⁵⁴ but the Virginia Declaration of Rights' influence on and similarity to the Federal Bill of Rights has been overstated.⁵⁵ That is especially so for attempts to define the 1776 Declaration of Rights by the 1791 Federal Bill of Rights' text and history.⁵⁶ The Declaration of Rights preceded the Federal Bill of Rights, and there is substantial historical evidence of Virginia's discord with the federal protections when they were proposed.

Virginia's 1788 ratifying convention proposed forty amendments to the Federal Constitution, twenty comprising a Bill of Rights, and twenty imposing structural limitations on the federal government.⁵⁷ This was an Antifederalist demand that Virginia Federalists, led by James Madison, accepted to ensure the Federal Constitution's unconditional ratification in Virginia.⁵⁸ After Madison submitted his proposed amendments—fewer and of less substance than those proposed by the Virginia Convention but more similar than the resulting Federal Bill of Rights⁵⁹—before Congress, the House of Representatives modified them and the Senate weakened them considerably.⁶⁰ Madison himself “objected to the changes” wrought by the Senate.⁶¹ The General Assembly

54. See, e.g., McCullough, *supra* note 11, at 350 (quoting *United States v. Payne*, 492 F.2d 449, 459–60 (4th Cir. 1974) (Widener, J., concurring and dissenting)).

55. See *id.* at 352–53.

56. E.g., *Holliday*, 3 Va. App. at 615–16, 352 S.E.2d at 364.

57. Hylton, *supra* note 2, at 439–40 (citing 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 657–62 (Jonathan Elliot ed., 1886)).

58. *Id.* at 438. Antifederalist leaders including Patrick Henry, George Mason, and William Grayson hoped to avert ratification of the Federal Constitution until it could be amended. *Id.* at 436–37.

59. Among the provisions not found in the final Bill of Rights, Madison proposed a right to a jury of one's vicinage, a double jeopardy protection regardless of whether the penalty was “life or limb,” a clear individual right to keep and bear arms, a clear individual right to speak, write, or publish sentiments, a clarified definition of prohibited establishments, express separation of powers, clarification that the people have an absolute right to reform or change government when it becomes abusive, and foundational language that the Federal Constitution derived its power from the people and existed for the benefit of life, liberty, property, happiness, and safety. Compare 1 ANNALS OF CONG. (1789) 433–36 (Joseph Galas ed., 1834) (statement of Rep. James Madison), with U.S. CONST. amend. I–X, and *infra* notes 68–76 and accompanying text.

60. Hylton, *supra* note 2, at 449 (citing W. HENRY, PATRICK HENRY: LIFE, CORRESPONDENCE, AND SPEECHES 399–401 (1891) (letter from Richard Henry Lee to Patrick Henry (Sept. 14, 1789))).

61. *Id.* at 450.

was dismayed when Congress forwarded the twelve altered amendments for approval in 1789.⁶² The principal drafter of the Virginia Declaration of Rights, George Mason's disappointment significantly undermines the purported close connection with the Federal Bill of Rights. While other Antifederalists were more attentive to the relationship between federal power and states' rights, he "was primarily concerned with the protection of the liberties of individuals."⁶³ The General Assembly's anger eventually subsided for tepid acceptance, but two years passed before it finally approved the Federal Bill of Rights.⁶⁴ It did so with little celebration or fanfare.⁶⁵

Although many Antifederalists' criticisms addressed the relationship between the states and the federal government,⁶⁶ perceived individual rights weaknesses may be understood by comparing the Virginia Convention's proposed amendments with the Virginia Declaration of Rights and, in turn, the ratified Federal Bill of Rights. The state senate's initial rejection of Congress' proposed amendments provides additional support. The Virginia Convention's first seven amendments were substantively similar to the first seven sections of the Virginia Declaration of Rights, and they are not found in the Federal Bill of Rights.⁶⁷ Those provisions announced that men retained inherent and inalienable rights, power is vested in and derived from the people, and government is instituted for the common benefit and should be resisted if it becomes oppressive.⁶⁸ Those omitted provisions announced the government's foundational political philosophy, but there were also differences in concrete, substantive protections. Both Virginia's proposed amendments and Declaration of Rights prohibited "exclusive or seperate [sic] public emoluments or privileges," expressly provided for a separation of powers, set forth

62. *Id.* at 450–51.

63. *Id.* (citations omitted).

64. *See id.* at 456, 460.

65. *See id.* at 460.

66. *See id.* at 450–51.

67. Compare *id.* app. 1 at 467–68, and VA. DECLARATION OF RIGHTS §§ I–VII (1776), with U.S. CONST. amend. I–X.

68. Compare Hylton, *supra* note 2, app. 1 at 467, with VA. DECLARATION OF RIGHTS §§ I–III (1776).

basic suffrage rights, and denied the government power to suspend laws without legislative action.⁶⁹ The Federal Bill of Rights included none of those provisions.

Of the twenty individual rights amendments proposed by the Virginia Convention, only twelve included protections similar to those found in the Federal Bill of Rights.⁷⁰ The Virginia Convention's proposed amendments bore closer resemblance to the Virginia Declaration of Rights. Noticeable differences between the Federal Bill of Rights and Virginia's proposed amendments and Declaration of Rights included Virginia's trial right to a jury of the defendant's vicinage;⁷¹ right against giving self-incriminating "evidence," rather than merely witnessing, against oneself;⁷² express prohibition against general warrants;⁷³ and protection against standing armies and subordination of the military to civil authority.⁷⁴ Voting down the Sixth Amendment, the state senate criticized its failure to clarify that defendants had a right to trial by a jury of their vicinage.⁷⁵ Although they were not in the Virginia Declaration of Rights, the Virginia Convention's proposed amendments also included an express right of "the people" "to keep and bear arms"⁷⁶ as well as a definition of prohibited establishment,⁷⁷ which were both absent from the Federal Bill of Rights. The state senate targeted the First Amendment, voting it down and asserting that its protection against establishment was insufficient and might permit Congress to support certain faiths with tax revenue.⁷⁸ Virginia's proposed amendments included protections that were stronger and better defined than those found in the Federal Bill of Rights. Although the Virginia Declaration of

69. Compare Hylton, *supra* note 2, app. 1 at 467–68 (alteration in original), with VA. DECLARATION OF RIGHTS §§ IV–VII (1776).

70. Compare Hylton, *supra* note 2, app. 1 at 468–69, and VA. DECLARATION OF RIGHTS §§ VIII–XVI (1776), with U.S. CONST. amend. I–VIII.

71. Compare Hylton, *supra* note 2, app. 1 at 468, and VA. DECLARATION OF RIGHTS § VIII (1776), with U.S. CONST. amend. VI.

72. Compare Hylton, *supra* note 2, app. 1 at 468, and VA. DECLARATION OF RIGHTS § VIII (1776), with U.S. CONST. amend. V.

73. Compare Hylton, *supra* note 2, app. 1 at 468–69, and VA. DECLARATION OF RIGHTS § X (1776), with U.S. CONST. amend. IV.

74. Compare Hylton, *supra* note 2, app. 1 at 469, and VA. DECLARATION OF RIGHTS § XIII (1776), with U.S. CONST. amend. II.

75. Hylton, *supra* note 2, at 455.

76. Compare *id.* app. 1 at 469, with U.S. CONST. amend. II, and VA. DECLARATION OF RIGHTS § XIII (1776).

77. Compare Hylton, *supra* note 2, app. 1 at 469, with U.S. CONST. amend. I, and VA. DECLARATION OF RIGHTS § XVI (1776).

78. Hylton, *supra* note 2, at 455.

Rights, in some measure, influenced the Federal Bill of Rights, Virginians considered the Federal Bill of Rights a weakened protection for rights they sought to preserve through their convention's proposed amendments. The relationship between Virginia's Declaration of Rights was closer to the Virginia Convention's proposed amendments, which were not fully realized in the Federal Bill of Rights.

This historical analysis is offered merely to rebut assertions that history justifies coextension. Neither the provisions' legislative histories nor the convention members' viewpoints can dictate the constitution's interpretation; they are irrelevant to that analysis.⁷⁹ The constitution is properly interpreted according to its text and historical and common law background.⁸⁰

D. *Independent Interpretation's Possible Return*

The Supreme Court of Virginia has given slight indication that it might depart from coextensive interpretation. In this year's *Daily Press, Inc. v. Commonwealth* decision, a unanimous court observed that the Virginia and federal speech and press protections were "virtually identical" and cited, with parenthetical quotation, a case stating that the provisions were "co-extensive."⁸¹ But the *Daily Press* court, itself, did not declare them coextensive. Instead, the court offered a qualification: "[F]or purposes of this opinion, we make no distinction between them."⁸² In this case, the qualification meant that analysis under either constitution would reach the same result. This is closer to the Virginia courts' traditional approach, which, in appropriate cases, recognized that the Virginia and federal constitutions independently reached the same result.⁸³ The logical consequence is that a different case may implicate a distinction between the two constitutions and require the court to interpret and apply the Virginia Constitution according to its own, independent meaning. This subtle distinction con-

79. See 4C MICHIE'S JURISPRUDENCE § 18 (Repl. Vol. 2006) [hereinafter MICHIE'S] (citing *Funkhouser v. Spahr*, 102 Va. 306, 312–13, 46 S.E. 378, 380 (1904); *Sherwood v. Atl. & D.R. Co.*, 94 Va. 291, 301–02, 26 S.E. 943, 946 (1897)).

80. See *infra* Part II.A.1.

81. *Daily Press, Inc. v. Commonwealth*, 285 Va. 447, 454 n.7, 739 S.E.2d 636, 640 n.7 (2013) (citing *Black v. Commonwealth*, 262 Va. 764, 785, 553 S.E.2d 738, 750 (2001) (Hassell, C.J., dissenting), *aff'd in part, vacated in part, and remanded*, 538 U.S. 343 (2003)) (internal quotation marks omitted).

82. *Id.*

83. See *supra* note 29 and accompanying text.

veyed a fundamentally different understanding from the court of appeals' broad declaration⁸⁴ and even the Supreme Court of Virginia's narrower endorsement of coextension.⁸⁵ It may foretell a return to the Virginia Constitution's independent interpretation, universally applied.

II. DISTINCT TEXT

Certain provisions in the Virginia and federal constitutions are textually similar but nonetheless distinct. This distinction is important because interpretation begins with the text.⁸⁶ Proper textual interpretation contradicts coextension and further reveals that the Virginia and federal constitutions have different meanings.⁸⁷

A. *Rules of Interpretation*

The Virginia and federal courts' different approaches to constitutional interpretation magnify the differences in the constitutions' text. The federal judiciary's more flexible interpretation results in the periodic emergence of new constitutional doctrines, but Virginia courts' well-established rules ensure the Virginia Constitution's constancy, save for amendment by the people.

84. See *supra* note 46 and accompanying text.

85. See *supra* note 47 and accompanying text.

86. See *Quesinberry v. Hull*, 159 Va. 270, 274–75, 165 S.E. 382, 383 (1932) (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 451, at 436–37 (1833)); ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 53–54, 56, 69, 403–04 (2012); see also Howard, *supra* note 12, at 935–36. Professor Howard lists several guiding “factors” for state judges’ interpretation of state constitutions—the text, the legislative history, the state’s history, and the “subject matter in litigation and the interests affected by the local political process.” *Id.* at 935–37. He denotes no hierarchy, but the text must come first, compare *id.*, with *Quesinberry*, 159 Va. at 274–75, 165 S.E. at 383 (citation omitted), and legislative history has no bearing. 4C MICHIE’S, *supra* note 79, § 18 (citing *Funkhouser v. Spahr*, 102 Va. 306, 312–13, 46 S.E. 378, 380 (1904); *Sherwood v. Atl. & D.R. Co.*, 94 Va. 291, 301–02, 26 S.E. 943, 946 (1897)).

87. This discussion interprets the coextensive provisions’ text, but it does not attempt a full interpretation of each provision’s application in every instance. The courts must apply the Virginia Constitution’s text, with the assistance of history and precedent, to each case’s facts. McCullough, *supra* note 11, at 357.

1. Virginia Rules

Virginia courts have long adhered to traditional rules of constitutional interpretation.⁸⁸ With coextension's exception, they have applied these rules consistently, and time has only enshrined them.⁸⁹ The Virginia courts generally⁹⁰ interpret "every word" of the constitution "in its plain, obvious, common sense,"⁹¹ according to the meaning contemporary to its enactment.⁹² The constitution is "construed as a whole, and every section, phrase and word given effect and harmonized if possible."⁹³ When appropriate, text may be interpreted according to its meaning as a term of art.⁹⁴ Extrinsic evidence may assist its interpretation when the constitution's meaning is ambiguous.⁹⁵ In those instances, courts may resort to "the history of the times and . . . the state of things exist-

88. See, e.g., *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 68 (1793) (Tucker, J.); *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 11–13 (1782) (Wythe, J.).

89. See 17 *MICHIE'S*, *supra* note 79, § 4 (citing *May v. Sherrard*, 115 Va. 617, 625, 79 S.E. 1026, 1028 (1913)) ("The fact that a case is old does not affect its value or authority, and where it appears to have been carefully considered and well supported by authority and is in accord with modern decisions in other states, it should not be regarded as overruled by a subsequent case in conflict therewith which makes no reference to it, and in which the question decided does not appear to have been carefully considered.").

90. Coextensive interpretation is the exception. Its own existence contradicts Virginia's rules of interpretation by applying different rules for different constitutional provisions. See *Dean v. Paolicelli*, 194 Va. 219, 226–27, 72 S.E.2d 506, 510–11 (1952) (citations omitted).

91. *Orion Sporting Grp., LLC v. Board of Supervisors*, 68 Va. Cir. 195, 196 (2005) (Amherst County) (quoting *Farinholt v. Luckhard*, 90 Va. 936, 937, 21 S.E. 817, 817 (1886)) (internal quotation marks omitted); see also *Town of Galax v. Appalachian Elec. Power Co.*, 177 Va. 29, 32, 12 S.E.2d 778, 779 (1941) ("Constitutions were adopted to protect the people against their own rash actions. Their plain mandates should not be disregarded because conditions change, not because new concepts of economic problems may give rise to a desire to overcome the barriers erected. Nor do exigent circumstances justify judicial sophistry as a means to circumvent them. There is an orderly process ordained for the amendment of objectionable provisions.").

92. See *Blake v. Marshall*, 152 Va. 616, 625 148 SE. 789, 791 (1929) ("The contemporaneous construction placed upon constitutional limitations is significant, even though not always decisive."); e.g., *Hart v. Commonwealth*, 131 Va. 726, 741–42, 109 S.E. 582, 586–87 (1921) (citing *Bracey v. Commonwealth*, 119 Va. 867, 871–72, 89 S.E. 144, 145 (1916); *Commonwealth v. Wyatt*, 27 Va. (6 Rand.) 694, 701 (1828); *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 449, 450–51 (1824)).

93. *Dean*, 194 Va. at 226, 72 S.E.2d at 511 (citations omitted); see also *Miller v. Ayres*, 213 Va. 251, 267, 191 S.E.2d 261, 273 (1972), *quoted in* *Phan v. Virginia*, 806 F.2d 516, 521 (4th Cir. 1986).

94. E.g., *Harrison v. Day*, 200 Va. 750, 754–55, 107 S.E.2d 585, 588 (1959); cf. *Carter v. Commonwealth*, 38 Va. App. 116, 125, 562 S.E.2d 331, 335 (2002) (quoting *Stein v. Commonwealth*, 12 Va. App. 65, 69, 402 S.E.2d 238, 241 (1991)).

95. 4C *Michie's*, *supra* note 79, § 18.

ing when the [constitutional provision] was . . . adopted.”⁹⁶ Additionally, courts may rely on constitutional provisions’ common law background to assist their interpretation.⁹⁷

Legislative history and the convention’s views are irrelevant.⁹⁸ These well-established rules respect the people’s convention and amendment powers over the Commonwealth’s fundamental law.⁹⁹

2. Federal Approaches

The federal courts have employed more flexible construction. Traditionally, they adhered to established rules of interpretation.¹⁰⁰ The federal courts have strayed from these rules from time to time. Critics have identified “activism” under living constitutionalism,¹⁰¹ originalism,¹⁰² and other “cosmic” constitutional theo-

96. *Almond v. Day*, 197 Va. 782, 787, 91 S.E.2d 660, 664 (1956) (internal quotation marks and citations omitted). For authorities providing more discussion and evidence of the Virginia Constitution’s historical background, see generally DINAN, *supra* note 11; HOWARD, *supra* note 22, and BLACKSTONE, *supra* note 1. Professor Dinan’s work provides the most recent update, while Professor Howard’s work provides comprehensive background material for Virginia’s 1971 constitution. For provisions original to the 1776 Declaration of Rights and Plan of Government, St. George Tucker’s edition of *Blackstone’s Commentaries* provides helpful historical and common law background.

97. 4C MICHE’S, *supra* note 79, § 14 (citing *Dean*, 194 Va. at 226, 72 S.E.2d at 510–11; *Va. & Sw. Ry. Co. v. Clower’s Admx.*, 102 Va. 867, 872–73, 47 S.E. 1003, 1004 (1904)).

98. *Id.* § 18 (citing *Funkhouser v. Spahr*, 102 Va. 306, 312–13, 46 S.E. 378, 380 (1904); *Sherwood v. Atl. & D.R. Co.*, 94 Va. 291, 301–02, 26 S.E. 943, 946 (1897)).

99. Compare VA. CONST. art. I, § 3, and *id.*, art. XII, §§ 1–2, with *Town of Galax v. Appalachian Elec. Power Co.*, 177 Va. 29, 32, 12 S.E.2d 778, 779 (1941) (“There is an orderly process ordained for the amendment of objectionable provisions.”). See also *Staples v. Gilmer*, 183 Va. 613, 623, 33 S.E.2d 49, 53 (1945) (per curiam) (citing 1 THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 84 (8th ed. 1927)) (“The people have the unlimited power to control and alter their Constitution, subject only to such limitations and restraints as may be imposed by the Constitution of the United States.”); W. Hamilton Bryson, *Judicial Independence in Virginia*, 38 U. RICH. L. REV. 705, 705 (2004) (“The political will of the people of the Commonwealth of Virginia is expressed in the Constitution of Virginia, which created the government of Virginia.”).

100. *E.g.*, *South Carolina v. United States*, 199 U.S. 437, 448 (1905) (“The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now.”); *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 178–80 (1803); THE FEDERALIST NO. 78 (Alexander Hamilton) (“To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . .”).

101. J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY 32 (2012); see also SCALIA & GARNER, *supra* note 86, at 403–04.

102. See WILKINSON, *supra* note 101, at 46. Nothing suggests ulterior motives in Virginia courts’ adherence to well-established rules of interpretation. That approach cannot be considered activist.

ries.¹⁰³ Whatever the label, federal Justices and judges have constructed meaning based on “penumbras,”¹⁰⁴ public policy,¹⁰⁵ undefined theories of justice,¹⁰⁶ foreign law,¹⁰⁷ perceived popular sentiment or evolving standards,¹⁰⁸ debatable historical reading,¹⁰⁹ and so forth to depart from the Federal Constitution’s textual meaning.¹¹⁰ Despite the array of approaches, the federal courts have moved closer to more traditional rules than in the recent past,¹¹¹ and they might approach a uniform application of those rules.¹¹²

103. *See id.* at 70, 103, 116 (discrediting political process theory, pragmatism, and other attempts at cosmic constitutional theory).

104. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

105. *E.g.*, *WILKINSON*, *supra* note 101, at 28–29 (citing *Dandridge v. Williams*, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting); *Lindsey v. Normet*, 405 U.S. 56, 81–82 (Douglas, J., dissenting); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 62–63 (1973) (Brennan, J., dissenting)).

106. *E.g.*, *id.* at 20 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

107. *E.g.*, *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005); *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003). *Contra* Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J. L. & PUB. POL’Y 291, 313 (2005) (“Foreign and international laws, other than treaties ratified by the United States, are not enumerated among the three kinds of law that can be ‘the supreme Law of the Land.’ Therefore, they should not be treated as outcome-determinative in constitutional adjudication.”).

108. *Cf.* *WILKINSON*, *supra* note 101, at 25 (discussing Justice Brennan’s opposition to capital punishment based on “evolving standards of decency,” contradicted by his continued opposition even when evolving standards favored it); *Miller v. Alabama*, 567 U.S. ___, ___, 132 S. Ct. 2455, 2470–75 (2012) (similarly avoiding the question whether objective indicia show a national conscience opposed to the form of punishment when the Court opposed the majority view among jurisdictions). *Contra Miller*, 567 U.S. at ___, 132 S. Ct. at 2487 (Alito, J., dissenting) (“Is it true that our society is inexorably evolving in the direction of greater and greater decency? Who says so, and how did this particular philosophy of history find its way into our fundamental law? And in any event, aren’t elected representatives more likely than unaccountable judges to reflect changing societal standards?”).

109. *Cf.*, *e.g.*, *WILKINSON*, *supra* note 101, at 47–49.

110. Properly, the people retain the power to change the Federal Constitution, whether by convention or amendment. *Compare* U.S. CONST. art. V, *and id.* amend. X, *with* *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 133 (1819).

111. The Hon. D. Arthur Kelsey, *The Resurgent Role of Legal History in Modern U.S. Supreme Court Cases*, 37 VBA NEWS J. 10, 11, 13 (2010); *see* *WILKINSON*, *supra* note 101, at 31 (“It is a stinging indictment of living constitutionalism that the ranks of its disciples on the bench have become so thin. The theory has proven a bit much for even the more liberal members of the present Court.”); *cf.* *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 871 (4th Cir. 2001) (Luttig, J., concurring) (“[T]hat the intellectual scrupulousness of conventional jurisprudence (i.e., the painstaking determination of law from precedent and the meticulous application of that law to the particular facts of the litigation), and the resulting accountability, does serve as a bridle upon the courts is, together with the fact that it demands more of the intellect, precisely why this scrupulousness has been eschewed in many quarters in favor of the intellectually lazier and jurisprudentially misbegotten enterprise of decision by personal policy preference.”).

112. *See* *SCALIA & GARNER*, *supra* note 86, at 413–14; *Kelsey*, *supra* note 111, at 11, 13; *Akhil Reed Amar & Renee B. Lettow, Reply, Self-Incrimination and the Constitution: A Brief Rejoinder to Professor Kamisar*, 93 MICH. L. REV. 1011, 1011 (1995) (“[C]onstitutional law should, ideally, bear some relation to, well, *the Constitution*.”).

These shifting trends render legal interpretation and comparison less predictable and less certain.

B. *Textual Interpretation*

Textual interpretation demonstrates that the Virginia and federal constitutions use different language and carry different meanings. This is coextension's most glaring flaw because legal interpretation begins with the text.¹¹³ The textual meaning does not change, and it is the most consistent and authoritative guide for interpretation. Additionally, the federal courts' construction of the Federal Constitution does change,¹¹⁴ and varying federal construction may yield different interpretation even when the federal and Virginia constitutions are textually indistinct.

1. Inherent Rights

Article I, section 1 of the Virginia Constitution provides

[t]hat all men are 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.¹¹⁵

The Federal Constitution includes no similar text; however, Virginia courts have considered article I, section 10 to be coextensive with federal substantive due process,¹¹⁶ which the Supreme Court

113. The interpretation that follows references general and legal dictionaries, *Almond v. Day*, 197 Va. 419, 425–26, 89 S.E.2d 851, 855–56 (1955); *S. Ry. Co. v. City of Richmond*, 175 Va. 308, 315, 8 S.E.2d 271, 274 (1940) (quoting *Quesinberry v. Hull*, 159 Va. 270, 274, 165 S.E. 382, 383 (1932)); SCALIA & GARNER, *supra* note 86, at 73, and, when appropriate, the common law background to ascertain the provisions' meaning, *Farinholt v. Luckhard*, 90 Va. 936, 938, 21 S.E. 817, 817 (1886) (citations omitted); SCALIA & GARNER, *supra* note 86, at 69, contemporary to the their ratification or enactment, *Blake v. Marshall*, 152 Va. 616, 625, 148 SE. 789, 791 (1929); SCALIA & GARNER, *supra* note 86, at 78–80. The United States Constitution was ratified by sufficient state conventions and took force in 1789, the Bill of Rights in 1791, and the Fourteenth Amendment in 1868. The original Virginia Constitution was instituted by convention in 1776. Although the present Virginia Constitution was ratified in 1971, many of the provisions discussed in this comment were in the original Declaration of Rights. Several alterations have been made over the years, and they will be interpreted according to the year of their inclusion.

114. See McCullough, *supra* note 11, at 353.

115. VA. CONST. art. I, § 1. This provision is original to the 1776 Declaration of Rights. Compare *id.*, with VA. DECLARATION OF RIGHTS § I (1776).

116. *Paris v. Commonwealth*, 35 Va. App. 377, 383, 545 S.E.2d 557, 560 (2001). *But see*

of the United States based on the Due Process Clause's prohibition against deprivation of liberty without due process.¹¹⁷

These meanings do not correspond. The Due Process Clause speaks only to the appropriate process for deprivation of liberty,¹¹⁸ but "substantive due process" protects liberty from state action, no matter how much process is given.¹¹⁹ Without any textual or historical basis, substantive due process is open to considerable judicial construction. Article I, section 1 identifies natural rights that the Virginia people retained under the constitution and which the government may not infringe. Those rights include "enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."¹²⁰ Article I, section 1 employs ambiguous language, amenable to loose and divergent construction by the courts,¹²¹ but its meaning derives from Lockean natural law and social contract principles¹²² and is substantially similar to Blackstone's "absolute rights."¹²³ Blackstone described the three principal absolute rights of Englishmen: "personal security,"¹²⁴ "personal liberty,"¹²⁵ and "property."¹²⁶ Virginia courts applying article I, section 1 should construe it according to its text and background in Lockean theory and the common law understanding of absolute rights.

Article I, section 1 addresses substantive rights rather than procedural protections. No text in the Federal Constitution confers these rights, but even substantive due process' construction provides fundamentally different analyses and outcomes from article I, section 1's text and background.¹²⁷

Gray v. Rhoads, 55 Va. Cir. 362, 368–69 (2001) (City of Charlottesville) (interpreting article I, section 1 independently to find that the provision was not self-executing).

117. CHEMERINSKY, *supra* note 6, § 7.1, at 545–46.

118. See McDonald v. City of Chicago, 561 U.S. ___, ___, 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring in part and concurring in the judgment); United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in the judgment); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 541–42 (1997); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980).

119. See CHEMERINSKY, *supra* note 6, § 7.1, at 546.

120. VA. CONST. art. I, § 1.

121. See 1 HOWARD, *supra* note 23, at 64–69.

122. See *id.* at 58–65.

123. Compare VA. CONST. art. I, § 1, with 2 BLACKSTONE, *supra* note 1, at 123–40.

124. 2 BLACKSTONE, *supra* note 1, at 129–34.

125. *Id.* at 135–38.

126. *Id.* at 138–40.

127. Compare Lawrence v. Texas, 539 U.S. 558, 577–79 (2003), and MacDonald v.

2. Speedy Trial

The Virginia Constitution confers to criminal defendants “the right to a speedy . . . trial.”¹²⁸ This language is original to the 1776 Virginia Declaration of Rights.¹²⁹ The Sixth Amendment similarly provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial.”¹³⁰ Although the text is exactly the same, the implications are similarly uncertain and open to construction. The General Assembly and Congress have enacted statutes to enforce these protections.¹³¹

3. Self-Incrimination

Under article I, section 8 of the Virginia Constitution, no person may “be compelled in any criminal proceeding to give evidence against himself.”¹³² The language “in any criminal proceeding” did not appear in the 1776 Declaration of Rights, but it was added in the 1902 Virginia Constitution.¹³³ Under the Federal Constitution, no person “shall be compelled in any criminal case to be a witness against himself.”¹³⁴ These provisions have two substantive textual differences.

First, article I, section 8 addresses “any criminal proceeding” and the Fifth Amendment, “any criminal case.” In 1902, legal “proceedings” were understood in both a “general” and “narrow[]” sense.¹³⁵ Generally, they were “the form in which actions [we]re to be brought and defended, the manner of intervening in suits, of conducting them, the mode of deciding them, of opposing judgments, and of executing.”¹³⁶ In a narrower sense, they constituted “any act, in the course of an action, done to achieve a given

Moose, 710 F.3d 154, 156, 164–67 (4th Cir. 2013), *with* VA. CONST. art. I, § 1, *and* 5 BLACKSTONE, *supra* note 1, at 215–16. *Compare* Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992), *and* Roe v. Wade, 410 U.S. 113, 167–71 (1973) (Stewart, J., concurring), *with* VA. CONST. art. I, § 1, *and* 2 BLACKSTONE, *supra* note 1, at 129.

128. VA. CONST. art. I, § 8.

129. *Compare id.*, *with* VA. DECLARATION OF RIGHTS § VIII (1776).

130. U.S. CONST. amend. VI.

131. *See, e.g.*, 18 U.S.C. § 3161 (2006 & Supp. V 2012); VA. CODE ANN. § 19.2-243 (Cum. Supp. 2013).

132. VA. CONST. art. I, § 8.

133. *See* SAM N. HURST, AN ANNOTATED CONSTITUTION OF VIRGINIA 5, 7 (1903).

134. U.S. CONST. amend. V.

135. WALTER A. SHUMAKER & GEORGE FOSTER LONGSDORF, THE CYCLOPEDIA OF LAW 729 (1901).

136. *Id.*

end.”¹³⁷ From each definition, it is apparent that “legal proceedings” involved the formal, procedural phases of litigation, from initial filing to final order, or procedural phases of a grand jury hearing or investigation. When the Federal Bill of Rights was drafted and ratified, the ordinary legal meaning of “case” was the mere potential for an action, the “cause of complaint.”¹³⁸ A “case” came into being when the cause of action accrued or, in the criminal context, when the alleged crime occurred. The primary difference between these two texts is that the Virginia right attaches upon formal procedure and the federal right upon the underlying facts. Article I, section 8, by its plain meaning, targets a narrower scope of the criminal process. The Fifth Amendment’s text provides a broader protection. The right attaches before formal proceedings and may, therefore, include investigations and interviews.

Second, article I, section 8 protects a person from “giv[ing] evidence against himself,” and the Fifth Amendment protects a person from “be[ing] a witness against himself.” In 1776, “evidence” included “some proof, by testimony of men on oath, or by writings or records.”¹³⁹ Article I, section 8 is broad enough to encompass physical and demonstrative evidence as well as witness testimony. The Fifth Amendment is narrower. “Witness” denotes “testimony of witnesses,” excluding physical or demonstrative evidence.¹⁴⁰ The Fifth Amendment’s plain text protects persons from testifying against themselves, not from producing documents, records, or other physical or demonstrative proofs. Article I, section 8’s text protects persons from producing those materials.

Although the Supreme Court of Virginia rejected a broader interpretation of “evidence” before the state and federal rights were declared coextensive, that decision rested on the purpose and history of self-incrimination rights¹⁴¹—not textual interpretation.

137. *Id.*

138. See RICHARD BURN, A NEW LAW DICTIONARY 143 (1792) (“[T]he plaintiff’s whole case or cause of complaint is set forth at length in the original writ. . . . [T]he party injured is allowed to bring a special action on his case . . .”).

139. GILES JACOB, A NEW LAW DICTIONARY (9th ed. 1772).

140. See BURN, *supra* note 138, at 320–21 (“[Evidence] containeth also the testimony of witnesses Evidence is of two kinds, written evidence, and the evidence of witnesses.”).

141. *Walton v. City of Roanoke*, 204 Va. 678, 682, 133 S.E.2d 315, 318 (1963) (“The history and purpose of the constitutional privilege against self-incrimination provided by § 8 show that it is to protect an accused against the employment of legal process to extract from his lips an admission of his guilt, and it does not extend beyond testimonial compulsion.”).

Further, the court was incorrect in stating that the right's purpose and history confined "evidence" to testimony. First, the text evinces the provision's purpose,¹⁴² and it plainly prohibits compelled evidence whether it is testimonial, demonstrative, or physical, including written or recorded materials. Second, there is considerable evidence that article I, section 8's history is consistent with its plain, textual meaning. It is consistent with *Entick v. Carrington*,¹⁴³ a "monument of English freedom" with which "every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar."¹⁴⁴ *Entick* addressed several King's messengers searching a person's premises and seizing of his private papers to be used as evidence against him.¹⁴⁵ Presiding over the case, Lord Camden discussed the search and seizure as an invalid execution of a general warrant,¹⁴⁶ but also found that the messengers impermissibly compelled the plaintiff to incriminate himself.¹⁴⁷ The text and history do not support the Supreme Court of Virginia's decision, much less a coextensive interpretation of article I, section 8.

Textually, the Fifth Amendment is broader in its attachment but narrower in the scope of its protection. In a criminal proceeding, investigation, or the underlying events, it protects persons from testifying against themselves. There is textual support for this broad attachment, but modern precedent has found other grounds to support it.¹⁴⁸

Article I, section 8's text is narrower in its attachment but offers broader protections. After a criminal indictment, writ, information, or complaint has been filed or a grand jury hearing or investigation has begun, it protects the person from testifying or

142. *South Hill v. Allen*, 177 Va. 154, 164, 12 S.E.2d 770, 773-74 (1941).

143. (1765) 95 Eng. Rep. 807 (K.B.); 19 How. St. Tri. 1029.

144. *Boyd v. United States* 116 U.S. 616, 626 (1886), *overruled on other grounds as stated in United States v. Doe*, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring). Although the Fifth Amendment's text does not reflect that historical importance, article I, section 8 does, and this history is more appropriate in its context than the Fifth Amendment's.

145. 95 Eng. Rep. at 807-08; 19 How. St. Tri. at 1030.

146. *Id.* at 812, 818; 19 How. St. Tri. at 1030, 1072-73.

147. *Id.* at 818; 19 How. St. Tri. at 1073.

148. *Compare Miranda v. Arizona*, 384 U.S. 436, 457-58, 467 (1966), *with supra* note 138 and accompanying text. *But see Brown v. Mississippi*, 297 U.S. 278, 285 (1936) ("But the question of the right of the State to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter.").

producing any incriminating documents, records, or other physical or demonstrative proofs against himself. It retains the traditional protection for private papers,¹⁴⁹ which neither the Fifth Amendment's text nor recent case law include.¹⁵⁰

4. Double Jeopardy

Article I, section 8 of the Virginia Constitution protects persons from “be[ing] put twice in jeopardy for the same offense.”¹⁵¹ The Federal Constitution provides that no person may “be subject for the same offense to be twice put in jeopardy of life or limb.”¹⁵² The only substantive difference is the Federal Constitution's qualification that jeopardy is “of life or limb.”¹⁵³ The federal prohibition plainly signifies that the right against double jeopardy applies only for crimes punishable by dismemberment or death—where life or limb is in danger. There is, however, evidence that “life or limb” was a legal term of art. Sir Edward Coke used the “nearly identical words ‘life or member’” as a legal term of art for felony offenses.¹⁵⁴ The federal courts have not recognized this qualification since 1873,¹⁵⁵ but proper textual interpretation would import

149. Cf. *Boyd*, 116 U.S. at 625–30; *Entick*, 95 Eng. Rep. at 818; 19 How. St. Tri. at 1073; Robert P. Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 VA. L. REV. 1, 51–52 (1987).

150. U.S. CONST. amend. V; *Doe*, 465 U.S. at 618 (O'Connor, J., concurring).

151. VA. CONST. art. I, § 8. This provision first appeared in the 1902 Virginia Constitution. DINAN, *supra* note 12, at 49.

152. U.S. CONST. amend. V.

153. See HURST, *supra* note 133, at 7 (“[The provision] extends not only to ‘life and limb,’ but to all criminal cases.”). The meaning of “jeopardy” did not change over time. A 1901 legal dictionary defined it as “[p]eril; danger,” SHUMAKER & LONGSDORF, *supra* note 135, at 503, and a general 1785 dictionary as “[h]azard; danger; [p]eril,” 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE m (6th ed. 1785).

154. The Hon. Stephen N. Limbaugh, Jr., *The Case of Ex Parte Lange (or How the Double Jeopardy Clause Lost Its “Life or Limb”)*, 36 AM. CRIM. L. REV. 53, 65–66 (1999).

155. See *id.* at 55 (citing *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 172–73 (1873)). Before *Lange*, the Double Jeopardy Clause's most authoritative and comprehensive interpretation came from Justice Story, sitting on the federal circuit. *Id.* at 70. *United States v. Gilbert* recognized the “life or limb” qualification, but the court relied on the Double Jeopardy Clause's common law background to interpret the qualification as a felony charge rather than jeopardy of “life or limb.” 25 F. Cas. 1287, 1294–95 (C.C.D. Mass. 1834) (No. 15,204). The court chose this interpretation even after recognizing that

[i]f resort should be had to the grammatical structure and meaning of the words, the natural interpretation would certainly seem to be, that no person should be twice put upon trial for any offence, for which he would be liable, upon conviction, to be punished with the loss of life limb; — for jeopardy means hazard, danger, or peril; and when a party is put upon trial for an offence punishable with the loss of life or limb, and he stands for his deliverance upon the verdict of the jury, he is thereby put in jeopardy, hazard, dan-

the distinction.¹⁵⁶ Article I, section 8's text does not include the qualification and plainly prohibits double jeopardy, regardless of the charge or its maximum penalty.

5. Searches and Seizures

Article I, section 10, of the Virginia Constitution and the Fourth Amendment to the United States Constitution address searches and seizures. Article I, section 10 states,

That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.¹⁵⁷

Since its inclusion in the 1776 Declaration of Rights, it has not been changed.¹⁵⁸ The Federal Constitution announces,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁵⁹

The most apparent difference is article I, section 10's omission of security rights against unreasonable searches and seizures. It mentions only the requirements for a valid warrant to search or seize. Article I, section 10 includes no "right" to security in "persons, houses, papers, and effects" or against "unreasonable searches and seizures." The Fourth Amendment does. Also, article I, section 10 flatly prohibits "general warrants." The Fourth Amendment might impliedly do so by announcing warrant requirements, but the protection is not as strong as article I, section 10's prohibition.

Further inspection reveals substantive differences in the warrant requirements. Article I, section 10 requires "evidence of a fact committed" for a warrant to search a suspected place. For seizures of a person, it requires an identified and named person,

ger or peril of his life or limb.

Id. at 1294.

156. *See Gilbert*, 25 F. Cas. at 1294.

157. VA. CONST. art. I, § 10.

158. 1 HOWARD, *supra* note 23, at 175.

159. U.S. CONST. amend. IV.

particular description of his offense, and evidentiary support that he committed an offense. The Fourth Amendment's text differs. For a valid warrant, it requires only "probable cause, supported by oath or affirmation" and a particular description of the "place to be searched" or "the persons or things to be seized." Article I, section 10 does not require particular description of places to be searched, but like the Fourth Amendment, it requires identification of an actual person. The Fourth Amendment's warrant requirement of "oath or affirmation" of probable cause is similar to the article I, section 10 requirement that evidence of the "offense" or "act committed" support the warrant; when the Declaration of Rights was enacted, "evidence" included "testimony of men on oath," and a sworn or affirmed statement will suffice.¹⁶⁰ A significant difference arises over the offense's required description. The Fourth Amendment only requires probable cause supported by oath or affirmation, and it does not mention the offense's description. In contrast, article I, section 10 requires the offense's particular description, defined as "[s]ingle, individual, relating to distinct persons or things; attentive to minute circumstances."¹⁶¹ It requires particular description of the offense instead of mere probable cause.

Probable cause is rather amorphous¹⁶² in contrast to a "particularly described" offense. The Supreme Court of the United States has stated that probable cause "is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances."¹⁶³ Under article I, section 10, a warrant to seize a person requires particular description of his offense; the description must be "[s]ingle, individual, relating to distinct persons or things; attentive to minute circumstances."¹⁶⁴ According to article I, section 10's text, a Virginia officer must bring more substantial evidence to obtain a warrant to seize a person than must a federal officer.

160. JACOB, *supra* note 139.

161. 2 JOHN ASH, NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1775).

162. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). The federal courts formerly followed a more concrete standard, *see Camara v. Mun. Ct. of San Francisco*, 387 U.S. 523, 534–35 (1967), but its textual and historical bases were questionable.

163. *Pringle*, 540 U.S. at 371. *Compare Texas v. Brown*, 460 U.S. 730, 742 (1983) ("[Probable cause] does not demand any showing that such a belief be correct or more likely true than false."), *with* 2 JOHNSON, *supra* note 153 (defining "probable" as "[l]ikely; having more evidence than the contrary").

164. 2 ASH, *supra* note 161.

6. Due Process

Virginia courts interpret Virginia and federal constitutional guarantees of procedural due process to be coextensive.¹⁶⁵ The Virginia Constitution provides for due process of law in two sections. Article I, section 11 reads, “That no person shall be deprived of his life, liberty, or property without due process of law.”¹⁶⁶ Article I, section 11’s due process clause first appeared in the 1902 constitution but only applied to deprivation of property.¹⁶⁷ The 1971 constitution added “life” and “liberty.”¹⁶⁸ The Fifth and Fourteenth Amendments are similar to article I, section 11. The Fifth Amendment prohibits “depriv[ation] of life, liberty, or property, without due process of law,” and the Fourteenth similarly limits the states.¹⁶⁹ The Fifth and Fourteenth Amendments’ Due Process Clauses are textually identical to article I, section 11. They each require due process of law for any government deprivation of life, liberty, or property. Under article I, section 15, “rights cannot be enjoyed save in a society where law is respected and due process is observed.”¹⁷⁰ The language was added in 1971 and has no counterpart in the Federal Constitution.¹⁷¹ It appears within a larger provision that sets forth the basic political philosophy of the Virginia Constitution and Virginians’ rights.¹⁷² It is a reminder of the importance of due process.¹⁷³ Textually, these provisions’ meanings are indistinct. Construction may, however, distinguish federal procedural due process.

165. *Shivae v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005) (citations omitted).

166. VA. CONST. art. I, § 11.

167. HURST, *supra* note 133, at 12. Interestingly, Hurst defined due process as “requir[ing] that a person shall have reasonable notice, and a reasonable opportunity to be heard before an impartial tribunal, before any binding decree can be made affecting his rights to liberty or property.” *Id.* at 12. This is a narrower interpretation than federal courts have given federal procedural due process. Compare *id.* at 12, with CHEMERINSKY, *supra* note 6, § 7.4.1–.3, at 579–604.

168. DINAN, *supra* note 12, at 55.

169. U.S. CONST. amend. V; see U.S. CONST. amend. XIV.

170. VA. CONST. art. I, § 15.

171. 1 HOWARD, *supra* note 23, at 284.

172. See *id.* at 190, 284–85.

173. See *id.* at 190 (quoting VA. COMM’N ON CONST. REV., *supra* note 12, at 96).

7. Antidiscrimination

The Virginia Constitution's article I, section 11 antidiscrimination provision ensures "that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination."¹⁷⁴ It is much more specific than the Federal Constitution's Equal Protection Clause, which prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws."¹⁷⁵

Comparison requires analysis of the protected classifications and the protection envisioned. Article I, section 11 announces specific classifications, protecting persons from "discrimination upon the basis of religious conviction, race, color, sex, or national origin."¹⁷⁶ The Equal Protection Clause's text provides no classifications, stating only that states may not deny "any person within [their jurisdiction] equal protection of the laws."¹⁷⁷ The Clause's text leaves uncertain what classifications are protected, and history is the best guide for its interpretation.

The Fourteenth Amendment was enacted specifically to combat the "Black Codes" that arose following the abolition of slavery.¹⁷⁸ This background suggests equal protection on the basis of race and possibly national origin,¹⁷⁹ but neither the Equal Protection Clause's text nor history suggest protections for classifications based on religion or gender. According to their text and history, article I, section 11 reaches more broadly than the Equal Protection Clause, but federal courts have construed the Clause to protect against discrimination on the basis of sex,¹⁸⁰ religion,¹⁸¹ and

174. VA. CONST. art. I, § 11. It first appeared in the 1971 constitution. DINAN, *supra* note 12, at 58.

175. U.S. CONST. amend. XIV.

176. VA. CONST. art. I, § 11.

177. U.S. CONST. amend. XIV (emphasis added).

178. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 957–58, 993 (1995); see also *Strauder v. West Virginia*, 100 U.S. 303, 306–07 (1879) (describing the reasons for adopting the Fourteenth Amendment); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 784–88 (1985).

179. See *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).

180. *Reed v. Reed*, 404 U.S. 71, 76–77 (1971).

181. See *Olsen v. Comm'r of Internal Revenue*, 709 F.2d 278, 283 (4th Cir. 1983) (citing *Gillette v. United States*, 401 U.S. 437, 452 (1971)).

classifications.¹⁸² So construed, it is the Equal Protection Clause that reaches more broadly.

The protection envisioned is even less certain and, therefore, less comparable. Article I, section 11's protection against discrimination, "[a]n act based on prejudice," suggests a prejudicial intent standard.¹⁸³ It might accord to the "equal protection of the laws," but "equal protection" remains ambiguous. There is, however, historical evidence that the Equal Protection Clause guarded against more than prejudicial intent. The test may have been whether enforceable civil rights extended to all persons, regardless of race.¹⁸⁴ Under this interpretation, "equal protection" is broader than article I, section 11's prohibition against "discrimination." Nonetheless, the Equal Protection Clause's ambiguity and history make interpretation difficult,¹⁸⁵ and the Supreme Court of the United States follows a prejudicial intent standard¹⁸⁶ that is not unreasonable.

According to their text and history, article I, section 11's protected classifications are broader than the Equal Protection Clause's, but historical support suggests "equal protection" might be broader than antidiscrimination. In this sense, article I, section 11 attaches more broadly but targets less state action than the Equal Protection Clause. Of course, debate over the Fourteenth Amendment's history and basic meaning continues,¹⁸⁷ and the Equal Protection Clause's construction beyond its textual and historical basis is slightly broader than article I, section 11's plain meaning.

182. See CHEMERINSKY, *supra* note 6, §§ 9.5–9.6, at 766–82 (discussing protections based on alienage and birth out of wedlock); see also *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012) (extending heightened scrutiny based on homosexuality), *aff'd on other grounds by* ___ U.S. ___, 133 S. Ct. 2675 (2013) (failing to articulate specifically whether the law was invalid on equal protection (under either heightened or rational basis scrutiny), substantive due process, or federalism grounds).

183. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 376 (1st ed. 1969).

184. McConnell, *supra* note 178, at 993.

185. See *id.* at 951 (quoting Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 252 (1991)).

186. *Vieth v. Jubelirer*, 541 U.S. 267, 333 (2004) (Stevens, J., dissenting) (citing *Washington v. Davis*, 426 U.S. 229 (1976)).

187. See generally, e.g., Akhil Reed Amar, *The Lawfulness of Section 5—and Thus of Section 5*, 126 HARV. L. REV. F. 109 (2013), available at www.harvardlawreview.org/issues/126/February13/forum_989.php; McConnell, *supra* note 178.

8. Speech, Press, Assembly and Petition

Article I, section 12 of the Virginia Constitution and the First Amendment to the United States Constitution address freedoms of speech, press, peaceable assembly, and petition. Article I, section 12 provides,

That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.¹⁸⁸

The First Amendment states, “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹⁸⁹ They target different legislatures, but article I, section 12’s final clause is almost identical to the First Amendment. The substantive differences arise from the complementary language found in the Virginia Constitution. Article I, section 12 warns that only “despotic governments” restrain “the freedoms of speech and of the press” and adds that “any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right.” Each is noteworthy, given their omission in the First Amendment.

Significantly, the First Amendment’s text limits its application only to Congress.¹⁹⁰ Article I, section 12 does not encounter this problem. First, whatever branch impedes “the freedoms of speech and of the press” is “despotic.” Second, the First Amendment’s text merely limits congressional action, but article I, section 12 goes further in defining an individual right and its scope. Citizens

188. VA. CONST. art. I, § 12. In the 1776 Declaration of Rights, this provision stated only “[t]hat the freedom of the press is one of the greatest bulwarks of liberty, and can never be restrained but by despotick governments.” VA. DECLARATION OF RIGHTS § XII (1776). In 1830, it was amended to include speech and to prohibit the General Assembly from abridging either freedom. 1 HOWARD, *supra* note 23, at 252. The 1870 constitution added “that every man could ‘freely speak, write, and publish his sentiments, being always responsible for the abuse of that right.’” *Id.* (quoting VA. CONST. of 1870, art. I, § 12). Finally in 1971, the present constitution adopted the language regarding the rights of assembly and petition. *Id.* at 253.

189. U.S. CONST. amend. I.

190. *Cf.* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1252–56 (2010).

may speak, write, or publish their thoughts or opinions on any subject, but they are nonetheless answerable for abusing that right.¹⁹¹ This provides textual basis for an individual right, protected from any government interference. The text also supports exceptions from protected freedom of speech and press. Among these exceptions is obscenity. Although obscenity is not protected “speech” under the First Amendment, the Supreme Court of the United States has narrowed obscenity’s definition and indirectly protected it against overbroad government regulation.¹⁹² Under article I, section 12, however, abuses of speech such as obscenity, are specifically excluded from protection.¹⁹³

Article I, section 12’s textual meaning provides broader and better defined speech and press rights. The scope of those rights is defined; they may not be abused. In contrast, the First Amendment’s plain text limits only Congress and does not address abusive speech or press. The First Amendment’s construction, however, has provided substantively similar rights as article I, section 12. The federal courts have applied the First Amendment to all branches of government,¹⁹⁴ and they have excluded certain forms of expression from protected speech and press.¹⁹⁵ The principal difference between article I, section 12’s plain, textual meaning and federal construction of the First Amendment appears to be the First Amendment’s overbreadth doctrine, which article I, section 12’s text forecloses.

9. Arms and Militias

Arms and militias are addressed in article I, section 13 of the Virginia Constitution and the Second Amendment to the United States Constitution. Article I, section 13 provides

191. “[A]ny citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right.” VA. CONST. art. I, § 12. “Sentiment” stood for “[t]hought; notion; opinion.” JOSEPH E. WORCESTER, JOHNSON’S AND WALKER’S ENGLISH DICTIONARIES, COMBINED 823 (1828). “Responsible” was defined as “[a]nswerable; accountable.” *Id.* at 778. To “abuse” meant “[t]o make ill use of.” *Id.* at 59.

192. See CHEMERINSKY, *supra* note 6, § 11.3.4.2, at 1017, 1020–22; see also, e.g., McCullough, *supra* note 11, at 353.

193. See McCullough, *supra* note 11, at 353.

194. *N.Y. Times Co. v. United States*, 403 U.S. 713, 718 (1971) (Black, J., concurring).

195. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769–84 (2004) (discussing First Amendment’s coverage and boundaries). The federal courts recognized a limited scope early in the Republic’s history. See *United States v. Cooper*, 25 F. Cas. 631, 639 (C.C.D. Pa. 1800) (No. 14,865) (Chase, J.); *Fries*, 9 F. Cas. (3 Dall. 515) 826, 839–40 (C.C.D. Pa. 1799) (No. 5,126) (Iredell, J.).

[t]hat a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; 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.¹⁹⁶

The 1776 Declaration of Rights did not include “the right . . . to keep and bear arms;” it was added in the 1971 Virginia Constitution.¹⁹⁷ The Second Amendment states, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”¹⁹⁸ Article I, section 13 provides more substance and elaboration on rights regarding arms, militias, and standing armies.

The Second Amendment does not discuss the dangers of standing armies or the need for civil authority over the military. The Declaration of Rights plainly included them.¹⁹⁹ Owing to its 1971 update, article I, section 13 also clarifies a right that is open to construction in the Second Amendment. The Second Amendment’s text is ambiguous whether the right “to keep and bear arms” is qualified by service in the militia or is a consequence of a free state’s need for a “well regulated Militia.”²⁰⁰ History may similarly lead to different conclusions.²⁰¹ Article I, section 8 does not have this problem. It links the free state’s safe defense by a trained militia to the people’s right to keep and bear arms, free from infringement. The word “therefore” makes this right an independent and necessary consequence of the free state’s need for a safe defense. It provides an individual right. Article I, section 13’s individual right to keep and bear arms is plainer than the federal right, which required extrinsic historical analysis to announce it.²⁰² The substantive differences are article I, section 13’s better defined individual right to keep and bear arms, protection

196. VA. CONST. art. I, § 13.

197. DINAN, *supra* note 12, at 64.

198. U.S. CONST. amend. II.

199. See VA. DECLARATION OF RIGHTS § XIII (1776).

200. Compare *District of Columbia v. Heller*, 554 U.S. 570, 576–600 (2008), *with id.* at 640–62 (Stevens, J., dissenting).

201. WILKINSON, *supra* note 101, at 58.

202. See *Heller*, 554 U.S. at 598 (“We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above.”). The Virginia Constitution’s plain text is sufficient to reach the same conclusion.

against standing armies, and the military's subordination to civil authority.

The federal courts' Second Amendment interpretation follows a textual analysis assisted by historical reference.²⁰³ Considering the relatively short history of Second Amendment precedent as well as the present push for innovative limitations on the right to keep and bear arms, the Second Amendment's further explication awaits future cases and controversies. It remains to be seen whether the Second Amendment's explication accords to article I, section 13's plain, textual meaning. At present, those rights to keep and bear arms are similar, but article I, section 13 is substantively broader in prohibiting standing armies during peacetime and subordinating the military to civil authority.

10. Religious Freedom and Establishment

Several provisions of the Virginia and federal constitutions discuss religion.²⁰⁴ Of those, the Virginia courts have interpreted article I, section 16 as parallel and coextensive with the First Amendment's protection of religious freedom and prohibition against religious establishment.²⁰⁵ Article I, section 16's first sentence is original to the 1776 Declaration of Rights:²⁰⁶

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 exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.²⁰⁷

The remaining two sentences were added in the 1830 constitution and "draw heavily" from the 1786 Virginia Statute for Religious Freedom:²⁰⁸

203. *See id.*; *see also* United States v. Carpio-Leon, 701 F.3d 974, 978–82 (4th Cir. 2012); United States v. Weaver, 2012 U.S. Dist. LEXIS 29613, at *10–14 (S.D. W. Va. Mar. 7, 2012) (citing United States v. Masciandaro, 638 F.3d 458, 467–68 (4th Cir. 2010)).

204. U.S. CONST. art. VI; *id.* amend. I; VA. CONST. art. I, §§ 11, 16; *id.* art. IV, § 16; *id.* art. X, § 6. Article I, section 11's antidiscrimination provision is discussed *supra* Part II.B.7.

205. *See* Va. Coll. Bldg. Auth. v. Lynn, 260 Va. 608, 626–27, 528 S.E.2d 682, 691 (2000); Denny v. Prince, 68 Va. Cir. 339, 344 (2005) (City of Portsmouth); *see also* Demmon v. Loudoun Cnty. Pub. Schs., 279 F. Supp. 2d 689, 693 (E.D. Va. 2003).

206. DINAN, *supra* note 12, at 67.

207. VA. CONST. art. I, § 16.

208. DINAN, *supra* note 12, at 67.

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 nowise 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, or the people of any district within this Commonwealth, 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,²⁰⁹ and to make for his support such private contract as he shall please.

In contrast to article I, section 16's detail, the First Amendment merely states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."²¹⁰

The differences are similar to those found in the speech and press clauses. First, the First Amendment's text applies only to Congress. Article I, section 16 limits the General Assembly from specific legislative acts, but it includes additional protections targeting all government branches. The first two sentences and the second sentence's final clause are written in the passive voice. They address individual rights the government may not infringe upon, and they limit all branches. The First Amendment's text targets only congressional action.

Second, article I, section 16's protections are specified, but the First Amendment's ambiguity leaves it open to construction. Article I, section 16's elaboration comes from the two sentences added in 1830. The first prohibits compelled attendance and worship as well as persecution for religious opinions or beliefs. It also protects civil freedom to profess and maintain opinions on religion. The second prohibits the General Assembly from requiring religious tests, privileging any religious organization, or levying taxes to benefit religious organizations; it also provides that persons are free to choose and support their faith. This is considerably more specific than the First Amendment's prohibition against laws "respecting an establishment of religion" or "prohibiting the

209. VA. CONST. art. I, § 16; *see also* VA. CODE ANN. § 57-1 (Repl. Vol. 2012) (reciting the January 16, 1786 Virginia Statute for Religious Freedom).

210. U.S. CONST. amend. I.

free exercise [of religion].” “Establishment” most closely signified a “[s]ettled regulation; form; model of a government or family” as in, “[e]stablishment by which all men should be contained in duty.”²¹¹ Without elaboration, containing persons in religious duty remains abstract and amenable to construction that might expand or contract religious protections. Understood as a term of art, however, “establishment” “buttress[ed]” the Free Exercise Clause and required congressional neutrality toward different faiths, one consequence being the prohibition of a national church.²¹² The term of art is helpful in interpreting the Establishment Clause, but the First Amendment remains narrower and less defined in its textual application. Article I, section 16’s text protects specific rights against legislative and other governmental actions.

Federal construction has broadened the First Amendment’s application to all branches of government.²¹³ It has also resulted in an expanded Establishment Clause that narrows the Free Exercise Clause. The courts now construe the First Amendment to prohibit private religious expression through sectarian prayer that might convey government endorsement in public forums including public school football games,²¹⁴ public school graduation ceremonies,²¹⁵ and legislative proceedings.²¹⁶ Religious establishment no longer means binding all persons in religious duty or showing preferential treatment; it extends to government allowance of private persons’ religious expression that might subtly convey an endorsement of those expressed sentiments.²¹⁷ Under the First Amendment’s textual interpretation, this must constitute protected free exercise of religion—not establishment.

Construction is not the only culprit; the First Amendment’s limited textual elaboration renders it more amenable to construc-

211. 1 JOHNSON, *supra* note 153, at dccxviii.

212. Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL OF RTS. J. 73, 138 (2005).

213. See, e.g., Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (discussing the Free Exercise Clause’s application to the executive), *superseded by statute on other grounds as stated in* Cutter v. Wilkinson, 544 U.S. 709 (2005).

214. E.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

215. E.g., Lee v. Weisman, 505 U.S. 577 (1992).

216. E.g., Galloway v. Town of Greece, 681 F.3d 20, 33–34 (2d Cir. 2012), *cert. granted* ___ U.S. ___, ___ S. Ct. ___ (May 20, 2013); Joyner v. Forsyth, 653 F.3d 341 (4th Cir. 2011), *cert. denied* ___ U.S. ___, 132 S. Ct. 1097 (2012). See generally Robert Luther, “Disparate Impact” and the Establishment Clause, 10 GEO. J.L. & PUB. POL’Y 529 (2012).

217. E.g., Santa Fe Indep. Sch. Dist., 530 U.S. at 308.

tion—especially when compared with article I, section 16. Article I, section 16 is much less amenable to this construction. It permits persons to invoke religious language or prayer in the public sphere: “[A]ll men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities.”²¹⁸ Article I, section 16 itself refers to “our Creator” and our mutual duties of “Christian forbearance, love, and charity.”²¹⁹ Article I, section 16 provides stronger free exercise guarantees than the First Amendment’s federal construction, but they may not be effected because they are superseded as prohibited establishment under federal precedent.²²⁰

Article I, section 16 plainly defines what government acts are prohibited, and it even prohibits government acts in excess of the First Amendment’s prohibition against “establishment” in its plain, textual sense or as a term of art. Article I, section 16 clarifies Virginians’ rights in a way that the First Amendment’s text does not, in a way that flatly contradicts the trend in federal construction of using the Establishment Clause to narrow free exercise.

C. *Different Meanings*

The coextensive provisions’ textual examination alone reveals that the Virginia and federal constitutions provide substantively different protections. Provisions addressing inherent rights, self-incrimination, double jeopardy, warrant requirements for seizure of a person, and protections against standing armies are plainly distinct.²²¹ Additional Virginia provisions describe protections more specifically than the Federal Constitution, and they are less amenable to construction than the federal provisions. Those protections include antidiscrimination, speech and press, arms and militias, and religious freedom and establishment.²²² Provisions addressing speedy trial and due process have textually indistinct meanings.²²³

218. VA. CONST. art. I, § 16.

219. *Id.*

220. *See infra* Part III.A.

221. *See supra* Part II.B.

222. *See supra* Part II.B.

223. *See supra* Part II.B.

Given that the federal courts do not apply uniform rules of interpretation, the textual meaning will not always govern analysis of the Federal Constitution. In some instances, flexible methods might construe the Federal Constitution's textually distinct protections similarly to plain, textual interpretation of the Virginia Constitution; however, that does not warrant coextensive interpretation. The Virginia and federal courts' differing approaches to interpretation may similarly give different meanings to textually indistinct provisions. Flexible construction can deviate from the plain, textual meaning, and it is unreliable for permanence or consistency. Wavering patterns of federal interpretation should not control the Virginia Constitution's meaning, which is more specific and better defines the contours of Virginians' most fundamental protections.²²⁴ Present federal construction differs from the Virginia Constitution's textual meaning of inherent rights,²²⁵ rights against self-incrimination,²²⁶ warrant requirements for seizure of a person,²²⁷ and religious freedom and establishment.²²⁸ Present federal construction provides lesser self-incrimination, warrant, and free exercise protections than the Virginia Constitution's plain text.²²⁹ At different times, however, federal construction has provided weaker federal protection than the present Virginia Constitution's plain text would provide. This is so for double jeopardy,²³⁰ antidiscrimination,²³¹ speech and press,²³² and arms and militias.²³³ In the double jeopardy and antidiscrimination contexts, federal precedents that are no longer in force have greater

224. See McCullough, *supra* note 11, at 353.

225. See *supra* notes 115–27 and accompanying text.

226. Compare *supra* Part II.B.3, with *United States v. Doe*, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring), and *Fisher v. United States*, 425 U.S. 391, 400–01 (1976).

227. Compare *supra* Part II.B.5, with *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

228. Compare *supra* Part II.B.10, with *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) and *Lee v. Weisman*, 505 U.S. 577, 599 (1992), *Galloway v. Town of Greece*, 681 F.3d 20, 33–34 (2d Cir. 2012), *cert. granted* ___ U.S. ___, ___ S. Ct. ___ (May 20, 2013), and *Joyner v. Forsyth*, 653 F.3d 341, 355 (4th Cir. 2011).

229. See *supra* Parts II.B.3, .5, .10.

230. Compare *supra* Part II.B.4, with *United States v. Gilbert*, 25 F. Cas. 1287, 1294–95 (C.C.D. Mass. 1834) (No. 15,204) (Story, J.).

231. Compare *supra* Part II.B.7, with *Goesaert v. Cleary*, 335 U.S. 464, 465–67 (1948).

232. Compare *supra* Part II.B.8, with *United States v. Cooper*, 25 F. Cas. 631, 639 (C.C.D. Pa. 1800) (No. 14,865) (Chase, J.), and *Fries*, 9 F. Cas. (3 Dall. 515) 826, 839–40 (C.C.D. Pa. 1799) (No. 5,126).

233. Compare *supra* Part II.B.9, with *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (quoting *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971)), *overruled as stated* in *United States v. Chapman*, 2010 U.S. Dist. LEXIS 58680 (S.D. Va. July 14, 2010).

textual and historical basis than present construction. If the federal courts returned to these double jeopardy and antidiscrimination precedents, coextension would require substantial under enforcement of those state constitutional rights. Interpreted according to its text and history, however, the Virginia Constitution would vindicate those rights in the absence of federal protection.

Coextensive interpretation is not justified. Virginia courts cannot heed established rules of interpretation, according each word significance and consistency, if they do not examine the Virginia Constitution's actual text. Abstractly, coextension strains or narrows the text with meaning it cannot support. Concretely, it erodes substantial limitations that the Virginia Constitution imposes on the government. The detriment is to the constitution's integrity and Virginians' rights—individual rights and rights of self-government. Virginia courts should interpret these protections as they interpret other provisions in the Virginia Constitution, according to their textual meaning with assistance from historical and common law background if necessary.

III. PRACTICAL IMPLICATIONS

Interpretation has significant practical implications. Practitioners and judges must navigate various state and federal rules and doctrines when they interpret the Virginia Constitution, coextensively or independently. Initially, it is important to discuss how the state and federal constitutions interact under the Supremacy Clause and in view of selective incorporation. Second, this part examines how the Virginia Constitution's independent interpretation would presently affect Virginians' claims and defenses. Third, it discusses coextension's implications for the federal courts' comity toward state tribunals and jurisdiction to review state decisions. Finally, it explores the normative implications of these federal concerns, which figure into stare decisis analysis.

A. *Supremacy and Incorporation*

State courts have “primitive” jurisdiction: their existence precedes the federal courts, and they have jurisdiction over both

state and federal claims.²³⁴ Both state and federal substantive law may apply, and parties will regularly litigate federal claims alongside state claims without fearing the state claims' preemption.²³⁵ The pleadings will ultimately determine the specific legal issues before the court,²³⁶ and state courts may entertain multiple state and federal claims in a single case. There may be a similar result in federal courts when state claims satisfy diversity, supplemental, or "hybrid law" federal question jurisdiction.²³⁷

The Virginia Constitution applies to only the Commonwealth's government and officers.²³⁸ It does not and cannot reach federal officers exercising their official, federal duties.²³⁹ The Federal Constitution also targets state action, both in specific provisions²⁴⁰ and through selective incorporation. Selective incorporation has increased the overlap of state and federal constitutional law. The doctrine applies most²⁴¹ provisions of the Federal Bill of Rights against the states under the Fourteenth Amendment's prohibition against states' deprivation of liberty without due process of law.²⁴² To the extent a state constitutional right is not preempted

234. THE FEDERALIST NO. 82 (Alexander Hamilton) ("I hold that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth."); see also U.S. CONST. art. VI; Haywood v. Drown, 556 U.S. 729, 734–35 (2009); Testa v. Katt, 330 U.S. 386, 394 (1947); The Moses Taylor, 71 U.S. (4 Wall.) 411, 421–22 (1866).

235. Nelson, *supra* note 20, at 231 ("[I]f state and federal law can stand together, the Supremacy Clause does not require courts to ignore state law. Courts remain free to apply state law *except* to the extent that doing so would keep them from obeying the Supremacy Clause's direction to follow all valid rules of federal law.")

236. See BRYSON, *supra* note 49, § 6.02[4][a], at 6-19.

237. See 28 U.S.C. §§ 1332, 1367 (2006). For an extensive discussion of federal hybrid law jurisdiction, see generally John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. CIN. L. REV. 145 (2006).

238. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) ("The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.")

239. *Johnson v. Maryland*, 254 U.S. 51, 55–56 (1920); *Ohio v. Thomas*, 173 U.S. 276, 283 (1899); *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 270 (4th Cir. 2011) (citing *Mayo v. United States*, 319 U.S. 441, 445 (1943); *Johnson*, 254 U.S. at 55–56).

240. U.S. CONST. art. I, § 10; *id.* amend. XIII, XIV, XV, XIX, XXIV, XXVI.

241. JEROD H. ISRAEL, YALE KAMISAR & WAYNE R. LAFAVE, *CRIMINAL PROCEDURE AND THE CONSTITUTION* 28 n.13 (2012 ed., 2012); see also *Manns v. Commonwealth*, 213 Va. 322, 323–24, 191 S.E.2d 810, 811–12 (1972).

242. If the Fourteenth Amendment's Privileges or Immunities Clause ever replaces the Due Process Clause as incorporation's source, it would not likely affect the present discus-

or unconstitutional under the Federal Constitution,²⁴³ both constitutions will apply. In those cases, parties may raise claims and defenses under both the state and federal constitutions.²⁴⁴ Each constitution retains its own meaning, but the party's rights against the state will be protected to their full extent. In contexts where federal and state provisions both apply, the federal provision serves as the floor of the party's rights, and the greater protection, federal or state, will control the full extent of the party's rights.²⁴⁵ Accordingly, when non-coextensive state and federal constitutions address a similar protection against state action, the non-coextensive state provision may confer rights exceeding, but not lessening, those conferred by the Federal Constitution.²⁴⁶ In practice, parties' state constitutional rights become complementary. When state constitutional rights are coextensive, however, they are meaningless. They only mimic the federal protections.

B. *Claims and Defenses*

Coextension's abandonment most readily realizes additional protections in the contexts of self-incrimination rights and warrant requirements for seizure of a person.²⁴⁷ The Virginia Constitution protects them more robustly than the Federal Constitution, and Virginians may rely on them if the Virginia courts interpret the Virginia Constitution independently. Free exercise protections are also broader under the Virginia Constitution, but federal Establishment Clause precedent will prevent those state rights from being realized.²⁴⁸

Aside from implications for Virginia courts' interpretation of Virginia statutes in accordance with the Virginia Constitution,²⁴⁹

sion. See *McDonald v. City of Chicago*, 561 U.S. ___, ___ & n.20, 130 S. Ct. 3020, 3084 & n.20 (2010) (Thomas, J., concurring in part and concurring in the judgment).

243. *E.g.*, *Falwell v. Miller*, 203 F. Supp. 2d 624, 632–33 (W.D. Va. 2002).

244. *E.g.*, *Boyd v. Bulala*, 877 F.2d 1191, 1195–97 (4th Cir. 1989) (applying, under separate analyses, Virginia Constitution article I, section 11, article III, section 1, and article IV, section 14 and the Federal Constitution's Seventh Amendment, Fourteenth Amendment, and underlying separation of powers principles).

245. See, e.g., 1 HOWARD, *supra* note 23, at 203.

246. See *Arizona v. Evans*, 514 U.S. 1, 8 (1995) (“Under [*Michigan v. Long*], state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.”).

247. *Contra McCullough*, *supra* note 11, at 354–57.

248. See *supra* footnotes 238–45 and accompanying text.

249. 4C MICHIE'S, *supra* note 79, § 16.

independent interpretation has significant, present implications for Virginians' rights before the grand jury, rights in a criminal trial, and available state tort remedies, as well as state and local officers' federal qualified immunity. Other Virginia constitutional rights may similarly be enforced in excess of the Federal Constitution's protections depending on trends in federal construction.

1. Independent Interpretation's Present Potential Effects

a. Self-Incrimination

Textually, the Virginia Constitution offers stronger protections against self-incrimination. The Federal Constitution protects persons "only against" self-incrimination by their own "compelled testimonial communications."²⁵⁰ Although the Virginia right attaches only to persons in criminal proceedings, rather than cases, it guards more broadly against means of compelled self-incrimination. It protects against compelled self-incrimination by giving evidence.²⁵¹ That may include testimonial, physical, and demonstrative evidence, and article I, section 8 retains the traditional private papers protection that the federal courts have abandoned.²⁵² The Fifth Amendment, selectively incorporated by the Fourteenth Amendment, is the floor of Virginians' self-incrimination protections against state action. Article I, section 8 may protect rights in excess.

i. Subpoenas Duces Tecum and Grand Juries

Virginia special or multi-jurisdictional grand juries may issue subpoenas duces tecum.²⁵³ Virginia courts govern the subpoena power's interaction with self-incrimination rights under Fifth Amendment analysis, which no longer includes a private papers

250. *Doe v. United States*, 487 U.S. 201, 207 (1988) (internal quotation marks omitted) (quoting *Fisher v. United States*, 425 U.S. 391, 409 (1976)).

251. *See supra* Part II.B.3.

252. That protection was once acknowledged by the federal courts but not based precisely on the Federal Constitution's text. *See Boyd v. United States*, 116 U.S. 616, 625–30 (1886), *overruled as stated in* *United States v. Doe*, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring); *In re Grand Jury Matter (Brown)*, 768 F.2d 525, 526 (3d Cir. 1985); *United States v. Haimowitz*, 706 F.2d 1549, 1557 (11th Cir. 1983).

253. VA. CODE ANN. § 19.2-208 (Repl. Vol. 2008 & Cum Supp. 2012); *id.* § 19.2-215.5 (Repl. Vol. 2008).

protection.²⁵⁴ Application of article I, section 8's plain text, however, would provide grand jury witnesses a right to resist producing self-incriminating "evidence."²⁵⁵ Under this independent interpretation, Virginia courts would recognize grounds for a witness to successfully move to quash subpoenas for testimonial, physical, or demonstrative evidence that may incriminate him.²⁵⁶ Rights before a special or multi-jurisdictional grand jury, however, would not change. Virginia Code section 19.2-208 requires a special grand jury witness be instructed that he need not testify or produce evidence "tend[ing] to incriminate him."²⁵⁷ If the court compels him, and he validly invokes his right, the compelled testimony or evidence may not be used against him in a criminal proceeding, unless it is a prosecution for perjury.²⁵⁸ In practice, this Code section includes the same protection provided by article I, section 8's textual prohibition against self-incrimination. This statutory protection is substantively the same as the one provided for witnesses before multi-jurisdictional grand juries.²⁵⁹

If article I, section 8 is given its plain meaning, to the extent that any regular grand jury compels a person's self-incrimination by evidence, he may similarly resist that compelled self-incrimination whether by testimony, documents, or other forms of evidence. Relative to the Federal Constitution, proper interpretation of article I, section 8 rights against self-incrimination—as well as statutory rights before a special or multi-jurisdictional grand jury—are broader.²⁶⁰

254. See *Moyer v. Commonwealth*, 33 Va. App. 8, 20–21, 531 S.E.2d 580, 586 (2000); see also *In re Bryant*, 27 Va. Cir. 414, 415–16 (1992) (City of Richmond). *In re Bryant* held that the Fifth Amendment protected witnesses against producing self-incriminating documents, 27 Va. Cir. at 416 (citing *Rees v. Commonwealth*, 203 Va. 850, 866–67, 127 S.E.2d 406, 417–18 (1962), cert. denied, 372 U.S. 964 (1963), but *Moyer* has since acknowledged that the United States Supreme Court abandoned *Boyd's* Fourth and Fifth Amendment private papers protection. 33 Va. App. at 15–16, 531 S.E.2d at 583–84.

255. See VA. CONST. art. I, § 8.

256. See *supra* Part II.B.3.

257. VA. CODE ANN. § 19.2-208 (Repl. Vol. 2008 & Cum. Supp. 2013).

258. *Id.*

259. Compare *id.*, with VA. CODE ANN. §§ 19.2-215.7(B), (C) (Repl. Vol. 2008).

260. Compare VA. CONST. art. I, section 8, and VA. CODE ANN. § 19.2-208 (Repl. Vol. 2008 & Cum. Supp. 2013), and VA. CODE ANN. §§ 19.2-215.7(B), (C) (Repl. Vol. 2008), with JOHN L. COSTELLO, VIRGINIA CRIMINAL LAW AND PROCEDURE § 43.5 (4th ed. 2008 & Cum. Supp. 2012).

ii. Exclusion

Independent interpretation would also allow a criminal defendant to refuse, or move to suppress, self-incriminating evidence. Article I, section 8's text itself appears to provide this outcome,²⁶¹ and in a concurring opinion, a court of appeals judge found it to be self-executing when interpreted independently.²⁶² Even if Virginia courts found that article I, section 8 was not self-executing, according to its independent interpretation, a person would be able to seek the exclusion of self-incriminating evidence under Virginia Code section 19.2-60. This provision requires seized property's return and its suppression from evidence when the Commonwealth has obtained it by "unlawful search or seizure."²⁶³ It applies to an "unlawful search or seizure,"²⁶⁴ but the private papers doctrine has an acknowledged relationship with both self-incrimination and search and seizure protections,²⁶⁵ and—in any event—Virginia courts have held that any constitutional violation may justify section 19.2-60 suppression.²⁶⁶

iii. Virginia Torts, Immunity, and Privilege

Virginia has no cause of action against officers or agencies that have tortiously violated her constitution,²⁶⁷ but victims of unconstitutional self-incrimination may sue the offending officer in a common law tort action. Tort actions against the clerk, judge, Commonwealth's Attorney, or grand jury would be unavailing because each is entitled absolute immunity for official acts.²⁶⁸ With

261. See VA. CONST. art. I, § 8.

262. *Taylor v. Commonwealth*, 26 Va. App. 485, 502, 495 S.E.2d 522, 531 (1998) (Benton, J., concurring).

263. VA. CODE ANN. § 19.2-60 (Repl. Vol. 2008 & Cum. Supp. 2013).

264. *Id.*

265. See *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.) 812; 19 How. St. Tri. 1029, 1038–39, 1072–73.

266. *Troncoso v. Commonwealth*, 12 Va. App. 942, 945, 407 S.E.2d 349, 350 (1991) (“[S]uppression is properly denied absent a showing that the evidence was seized pursuant to a constitutional violation or pursuant to the violation of a statute which expressly provides suppression as a remedy for its breach.”).

267. See DOUG RENDLEMAN, ENFORCEMENT OF JUDGMENTS AND LIENS IN VIRGINIA § 2.2(b) n.65.1 (2d ed. 2012) (citing 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 7 (4th ed. Cum. Supp. 2012); Sharon N. Humble, Annotation, *Implied Cause of Action for Damages for Violations of Provisions of State Constitutions*, 75 A.L.R. 5th 619 (2000 & Supp. 2005)).

268. 2 CHARLES E. FRIEND & KENT SINCLAIR, FRIEND'S VIRGINIA PLEADING AND PRACTICE, §§ 35.02[2][e][v], [vi], at 35-52 to 35-53 (2d ed. 2006).

the exception of the clerk's liability for his deputies' torts, respondeat superior is generally inapplicable for public officers' or employees' torts.²⁶⁹ Actions are proper, however, against officers who improperly seize a person's personal property to compel self-incriminating evidence against him. For example, *Entick v. Carrington*, "one of the landmarks of English liberty" in the self-incrimination context,²⁷⁰ involved a trespass suit against several of the King's messengers who improperly searched the plaintiff's premises and took away his private papers to be used as evidence against him.²⁷¹ Lord Camden considered this search and seizure a "means of compelling self-accusation."²⁷²

The specific causes of action will vary on the facts, but trespass to land,²⁷³ trespass to chattels,²⁷⁴ trover and conversion,²⁷⁵ and detinue²⁷⁶ are the most appropriate in this context.²⁷⁷ Different factual circumstances might limit available causes of action, but plaintiffs must also consider the potential remedies. Trespass to land may return nominal damages for the trespass in addition to any actual damage to the property, consequential damages, emotional distress, and punitive damages.²⁷⁸ A successful trespass to chattels action will return damages for the personal property's "loss and use" but not the property itself.²⁷⁹ Trover and conversion will similarly return damages but not the personal property.²⁸⁰ Final-

269. See *id.*, § 35.02[2][e][ix], at 35-55 & n.236 (Cum. Supp. 2012).

270. *Boyd v. United States* 116 U.S. 616, 626 (1886), *overruled on other grounds as stated in* *United States v. Doe*, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring).

271. *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.) 807-08; 19 How. St. Tri. 1029, 1030.

272. *Id.* at 818; 19 How. St. Tri. at 1073 ("Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. . . . In the criminal law such a proceeding was never heard of. . . . But our law has provided no paper search in these cases to help forward the convictions. . . . It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.")

273. See generally 2 FRIEND & SINCLAIR, *supra* note 268, § 27.14[1], at 27-59 to 27-63.

274. See generally *id.* § 27.14[2], at 27-63 to 27-64.

275. See generally *id.* § 27.13, at 27-51 to 27-58.

276. See generally *id.* § 27.12, at 27-45 to 27-51.

277. See *id.* § 27.14[2], at 27-63 to 27-64.

278. See *id.* § 27.14[1][e], at 27-60 to 27-61.

279. *Id.* § 27.14[2], at 27-64 (citing *Vines v. Branch*, 244 Va. 185, 418 S.E.2d 890 (1992)).

280. *Id.* § 27.13[4], at 27-56.

ly, detainee may return the personal property, if it is available, or else return “its value at the time of the verdict.”²⁸¹

Defendant officers may rely on whatever immunity their agency is entitled.²⁸² The protection is available for their discretionary acts but not ministerial acts.²⁸³ If the officer is acting in his discretion, however, he is not “immunized from suit,” but the standard for liability becomes gross negligence instead of simple negligence.²⁸⁴ It does not shield officers from liability for intentional torts.²⁸⁵ Defending against intentional tort actions, officers will more frequently rely on a privilege defense.

The plaintiff must show each element of the tort has been satisfied, and one of the most important elements in any intentional tort is that the act was “unprivileged.”²⁸⁶ Although other privileges may be available depending on the underlying facts, the defendant officer will most likely defend himself with the privilege of legal authority.²⁸⁷ Acts taken under legal authority are privileged.²⁸⁸ But for the legal authority privilege, most law enforcement conduct would be actionable.²⁸⁹ Law enforcement officials regularly detain or apprehend persons or enter upon persons’ land, but they are protected because they act within their legal authority—usually under a valid warrant or other circumstances justifying the conduct.²⁹⁰ When they do so, tort actions against them will fail.²⁹¹ Official actions lacking valid legal authority, however, are not privileged, and state or local officers’ federal or state constitutional violations will remove the privilege.²⁹²

281. *Id.* § 27.12[2], at 27-46 (citing MARTIN P. BURKS & T. MUNFORD BOYD, COMMON LAW AND STATUTORY PLEADING AND PRACTICE § 154 (4th ed. 1952)). The property may be recovered before trial. *Id.*; see VA. CODE ANN. § 8.01-114 (Repl. Vol. 2007 & Cum. Supp. Codification 2013).

282. CHARLES E. FRIEND, PERSONAL INJURY LAW IN VIRGINIA, § 11.3, at 264 (3d ed. 2003 & Cum. Supp. 2012).

283. *Id.* § 11.3, at 265.

284. *Id.* § 11.3, at 55, 57 (Cum. Supp. 2012).

285. See 2 FRIEND & SINCLAIR, *supra* note 268, § 35.02[2][e][ii], [iii], [iv], at 35-51 to 35-52.

286. *Id.* § 25.03[8], at 25-59.

287. *E.g.*, FRIEND, *supra* note 282, § 7.3, at 190-91.

288. 1 FRIEND & SINCLAIR, *supra* note 268, § 25.03[8][c], at 25-61.

289. *Cf. id.* § 25.03[8][c], at 25-61 to 25-62 (explaining how legal authority keeps a police officer’s actions from being tortious).

290. *E.g.*, FRIEND, *supra* note 282, § 7.3, at 191.

291. *E.g.*, *id.* § 7.3, at 191 (citing *Parker v. McCoy*, 212 Va. 808, 188 S.E.2d 222 (1972)).

292. *E.g.*, *id.* § 7.3, at 191 (citing *Broadus v. Standard Drug Co.*, 211 Va. 645, 179 S.E.2d 497 (1971); *Banks v. Bradley*, 192 Va. 598, 66 S.E.2d 526 (1951)).

Officers' article I, section 8 self-incrimination violations, as independently interpreted, allow the intentional tort action to proceed for compelled self-incrimination by testimonial, physical, or demonstrative evidence. Compelled self-incrimination by physical or demonstrative evidence would be privileged under the Fifth Amendment or a coextensive article I, section 8, both of which only protect a person's testimonial evidence from compelled self-incrimination.²⁹³ Interpreting article I, section 8 independently and according to its plain, textual meaning, however, plaintiffs have viable intentional tort actions when officers compel their self-incrimination by any form of evidence.

iv. Federal Qualified Immunity

A state or local officer's article I, section 8 violation may have 42 U.S.C. section 1983 consequences. Section 1983 does not target their state law violations,²⁹⁴ but the Fourth Circuit has held that acts clearly beyond an officer's scope of authority, as informed by state law, will not permit the officer to raise a federal qualified immunity defense.²⁹⁵ The court applies this test as a precondition to the two-part qualified immunity analysis.²⁹⁶ The precondition is a minority rule among the federal circuits. Only the Fourth, Ninth, and Eleventh Circuits adhere to it.²⁹⁷

293. Compare *supra* Part II.B.3, and 1 FRIEND & SINCLAIR, *supra* note 268, § 25.03[8][c], at 25-61 to 25-62.

294. *Eldridge v. Bouchard*, 645 F. Supp. 749, 757 (W.D. Va. 1986), *aff'd*, 823 F.2d 546 (4th Cir. 1987); see also 42 U.S.C. § 1983 (2006); *Davis v. Scherer*, 468 U.S. 183, 194 n.12 (1984); *Maine v. Thiboutot*, 448 U.S. 1, 4, 6, 9-11 (1980).

295. *Better Gov't Bureau v. McGraw (In re Allen)*, 106 F.3d 582, 593-94 (4th Cir. 1997), *reh'g en banc denied* 119 F.3d 1129, *cert. denied* 522 U.S. 1047 (1998).

296. *Id.*; see also *In re Allen*, 119 F.3d at 1133. For a recent reiteration of the two-part qualified immunity test, see *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

297. Compare *In re Allen*, 106 F.3d at 593-94, *Rich v. Dollar*, 841 F.2d 1558, 1564 (11th Cir. 1988), and *Merritt v. Mackey*, 827 F.2d 1368, 1373 (9th Cir. 1987), with *Eddy v. V.I. Water & Power Auth.*, 256 F.3d 204, 210-11 (3d Cir. 2001), and *Varrone v. Bilotti*, 123 F.3d 75, 82 (2d Cir. 1997), and *Sellers ex rel. Sellers v. Baer*, 28 F.3d 895, 902 (8th Cir. 1994), and *Goyco de Maldonado v. Rivera*, 849 F.2d 683, 687-88 (1st Cir. 1988), and *Gagne v. City of Galveston*, 805 F.2d 558, 559-60 (5th Cir. 1986), and *Coleman v. Frantz*, 754 F.2d 719, 727 (7th Cir. 1985), *abrogated in part on other grounds by Benson v. Allphin*, 786 F.2d 268 (7th Cir. 1986), and *T.S. v. Gabbard*, No. 10-217-KSF, 2012 U.S. Dist. LEXIS 82548, at 5-16 (E.D. Ky. June 14, 2012). The minority rule seems at odds with the United States Supreme Court's precedent, *Elder v. Holloway*, 510 U.S. 510, 515 (1994) (ci-

If a state or local officer violated the plaintiff's federal constitutional or statutory rights, accruing the plaintiff's Section 1983 cause of action, and the defendant officer acted clearly beyond his scope of authority under the Virginia Constitution, a court in the Fourth, Ninth, or Eleventh Circuits will find that the defendant may not even raise the qualified immunity defense. The court will not conduct the two-part qualified immunity analysis. Without the qualified immunity shield, the litigation will proceed to trial to determine whether the defendant officer violated the plaintiff's federal statutory or constitutional rights and what damages the plaintiff may be entitled.

In this context, if an officer violates a person's federal rights while clearly violating article I, section 11's prohibition against compelling a person's self-incrimination by evidence, then he forfeits his qualified immunity defense in any resulting section 1983 action. Article I, section 11's independent interpretation would bar the officer's qualified immunity defense beyond the Fifth Amendment ground of compelled self-incrimination by testimonial evidence; compelled self-incrimination by physical and demonstrative evidence would also prevent the officer from raising the defense.

b. Warrant Requirements for Seizure of a Person

Virginia imposes a more onerous standard for valid warrants to seize a person. It requires the offense's particular—"single, individual, relating to distinct persons or things" and "attentive to minute circumstances"²⁹⁸—description and evidentiary support for a warrant to seize a person.²⁹⁹ For a valid warrant to either search or seize, the Federal Constitution requires probable cause, based on a "totality of circumstances," supported by an oath or affirmation.³⁰⁰ The article I, section 10 requirement exceeds the floor set by the Fourth Amendment, as selectively incorporated by the

tation omitted) ("*Davis*, in short, concerned not the authorities a court may consider in determining qualified immunity, but this entirely discrete question: Is qualified immunity defeated where a defendant violates *any* clearly established duty, including one under state law, or must the clearly established right be the federal right on which the claim for relief is based? The Court held the latter.") *Davis v. Scherer*, 468 U.S. 183, 194 & n.12 (1984), but an evenly divided Fourth Circuit denied *In re Allen's* rehearing en banc. 119 F.3d 1129, 1129 (4th Cir. 1997).

298. 2 ASH, *supra* note 161.

299. See *supra* Part II.B.5.

300. U.S. CONST. amend. IV; *Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

Fourteenth Amendment. Article I, section 10's independent interpretation, according to its plain, textual meaning, will allow persons to rely on this greater right.

i. Exclusion

A warrant for a person's seizure will produce the person, and it may also produce evidence that the police seize from the person incident to his seizure or arrest. Virginia Code section 19.2-60 allows an aggrieved person to move a Virginia trial court to suppress and return property obtained by an "unlawful search or seizure."³⁰¹ Interpreting article I, section 10's requirements to seize a person independently, and beyond the Fourth Amendment requirement,³⁰² section 19.2-60 may suppress evidence seized pursuant to warrants to seize a person that fail to particularly describe the person's offense. Article I, section 10's independent interpretation would allow for more instances of suppression than its coextensive interpretation.

ii. Virginia Torts, Immunity, and Privilege

Traditionally, persons remedied officers' unconstitutional searches and seizures in common law tort actions.³⁰³ Depending on the specific facts, a state or local officer's violation of article I, section 10's requirement for seizure warrants may be liable for personal injury.³⁰⁴ Unlawful searches and seizures are not property injuries,³⁰⁵ but they may attend the unlawful search or seizure, and the plaintiff may, then, have additional, independent causes of action for those property torts.³⁰⁶

Available personal injury torts may include battery,³⁰⁷ assault,³⁰⁸ false imprisonment,³⁰⁹ and malicious prosecution.³¹⁰ A

301. VA. CODE ANN. § 19.2-60 (Repl. Vol. 2008 & Cum. Supp. 2013).

302. See *supra* Part II.B.5.

303. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 774, 777, 786 (1994); see also McCullough, *supra* note 11, at 354 n.30 (citing Jordan v. Shands, 255 Va. 492, 497, 500 S.E.2d 215, 218 (1998)); e.g., Entick v. Carrington, (1765) 95 Eng. Rep. 807 (K.B.); 19 How. St. Tri. 1029; Wilkes v. Wood, (1763) 98 Eng. Rep. 489 (K.B.); 19 How. St. Tri. 10.

304. See FRIEND, *supra* note 282, § 6.4.C, at 186.

305. See *id.*

306. See *supra* notes 273–81 and accompanying text.

307. See generally FRIEND, *supra* note 282, § 6.2, at 173–80.

308. See generally *id.* § 6.3, at 180–85 (3d ed. 2003 & Cum. Supp. 2012).

successful battery action may yield damages for the injury itself, pain, related expenses, lost income, shame, and punitive damages.³¹¹ The same damages are available for a successful assault action.³¹² For false imprisonment torts, successful plaintiffs may receive compensatory damages for “mental pain and suffering, indignity, and humiliation” as well as possible punitive damages.³¹³ Finally, a plaintiff may be awarded damages for reputational harm, disgrace, or distress and possible punitive damages for a successful malicious prosecution action.³¹⁴

If the officer’s employer agency is entitled immunity, he may rely on that immunity if his actions were discretionary and not ministerial.³¹⁵ Whether the seizures constitute discretionary or ministerial acts, the officer’s immunity only raises the standard for liability from simple to gross negligence.³¹⁶ The officer is not immunized from suit, and actions for intentional tort may proceed.³¹⁷ The lawful authority privilege will likely come into issue. If Virginia courts independently interpret the warrant requirements for seizure of a person, the lawful authority privilege will not defeat the plaintiff’s tort action when the officer has seized the person under authority of a warrant failing the article I, section 10 requirements that the offense be particularly described and supported by evidence. Officers must then rely on some other defense or else the plaintiff will prevail.

iii. Federal Qualified Immunity

Article I, section 10’s independent interpretation has similar implications for federal Section 1983 qualified immunity in the Fourth, Ninth, or Eleventh Circuits. If a state or local officer violates a person’s federal statutory or constitutional rights while clearly violating article I, section 10’s warrant requirement for

309. See generally 1 FRIEND & SINCLAIR, *supra* note 268, § 25.03[4], at 25-42 to 25-48.

310. See generally *id.* § 25.03[5], at 25-48 to 25-55.

311. FRIEND, *supra* note 282, § 6.2.8, at 180.

312. See *id.* § 6.3.1(5) at 184 (“There is virtually no case law in Virginia distinguishing between the tort of assault and the tort of battery.”).

313. 1 FRIEND & SINCLAIR, *supra* note 268, § 25.03[4][d], at 25-45.

314. *Id.* § 25.03[5][g], at 25-54 to 25-55.

315. See *supra* notes 282-85 and accompanying text.

316. See *supra* note 284 and accompanying text.

317. See *supra* note 285 and accompanying text.

seizure of a person, he forfeits his qualified immunity defense in a section 1983 action.³¹⁸

2. Independent Interpretation's Prospective Effects

Independent interpretation's effect on litigants' rights under the Virginia Constitution will depend largely on trends in federal construction. The federal courts' narrowing of federal constitutional rights would allow the state constitutions greater force, but the federal courts' expansion of federal constitutional rights would renew the former trend of targeting and directing a greater scope of state action.³¹⁹ The constitutions' interaction will depend largely on the respective courts' interpretation, but some possible outcomes are apparent. Several special concerns warrant additional discussion.

Whenever Virginia constitutional rights impose greater protections than similar federal constitutional rights, independent interpretation's effects will be similar to those for self-incrimination and warrants for seizure of a person. Persons whose Virginia constitutional rights have been infringed may have available causes of action in tort for damages against state or local officers.³²⁰ In Section 1983 litigation in the Fourth, Ninth, or Eleventh Circuits, clear state constitution violations may defeat state or local officers' ability to even raise a qualified immunity defense.³²¹ Finally, if a criminal charge or conviction is invalid under the Virginia Constitution, the defendant or prisoner is entitled acquittal or release, and his conviction will not be valid. If Virginia courts give independent force to the Virginia Constitution when its protections are stronger than the federal courts' construction of similar federal provisions, Virginia litigants may realize substantive effects.

Special concerns may arise where the Federal Constitution protects competing rights. Interacting with the incorporated federal provisions, Virginia constitutional rights may be enforced more vigilantly than federal constitutional rights as long as they do not undermine federal rights.³²² It will be rarer that the Federal Con-

318. *See supra* Part III.B.1.a.iii.

319. *Cf. supra* note 25–26 and accompanying text.

320. *See supra* Parts III.B.1.a.ii, b.i.

321. *See supra* notes 294–97 and accompanying text.

322. *See supra* Part III.A.

stitution prevents broader Virginia rights' enforcement, but those difficulties may arise when constitutional provisions protect competing interests. Those may include religious freedom and establishment³²³ and antidiscrimination.³²⁴ If Virginia courts find article I, section 16 protects private persons' prayers or invocations in public forums such as legislative proceedings and public schools' athletic events and graduation ceremonies, they may not enforce those broader state free exercise rights because the incorporated Establishment Clause protections do not allow it.³²⁵ Antidiscrimination may raise similar issues in the affirmative action context. Affirmative action's interaction with the Fourteenth Amendment's Equal Protection Clause remains to be clarified,³²⁶ but it may be significant for state protections' independent interpretation. The United States Supreme Court has limited permissible affirmative action,³²⁷ but the Sixth Circuit recently held that states may not use constitutional referenda to bar universities from considering race in admissions decisions.³²⁸ Depending on coming federal decisions, competing constitutional interests of limiting affirmative action and preserving it could weaken independent interpretation's potential effects in this context. Virginia litigators and courts must remain aware of competing constitutional interests that may preempt broader state protections.

323. CHEMERINSKY, *supra* note 6, § 12.1, at 1183 & n.9 (“[T]here is also often a tension between the establishment and free exercise clauses. Government actions to facilitate free exercise might be challenged as impermissible establishments, and government efforts to refrain from establishing religion might be objected to as denying the free exercise of religion.”).

324. See Stephen Wermiel, *SCOTUS for Law Students (Sponsored by Bloomberg Law): Affirmative Action in Texas and Michigan*, SCOTUSBLOG (May. 1, 2013, 12:54 PM), <http://www.scotusblog.com/2013/05/scotus-for-law-students-sponsored-by-bloomberg-law-affirmative-action-in-texas-and-michigan/>.

325. Compare *supra* Part II.B.10, with *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301, 307–13 (2000), and *Lee v. Weisman*, 505 U.S. 577, 589, 591–94, 599 (1992), *Galloway v. Town of Greece*, 681 F.3d 20, 33–34 (2d Cir. 2012), *cert. granted* ___ U.S. ___, ___ S. Ct. ___ (May 20, 2013), and *Joyner v. Forsyth*, 653 F.3d 341 (4th Cir. 2011).

326. See Wermiel, *supra* note 324.

327. *Coalition to Defend Affirmative Action v. Regents of Univ. of Mich.*, 701 F.3d 466, 471 (6th Cir. 2012) (en banc) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003)) (“[U]niversities cannot establish quotas for members of certain racial groups” or treat their applications uniquely. But the Court allowed universities to continue “consider[ing] race or ethnicity more flexibly as a plus factor in the context of individualized consideration . . .” along with other relevant factors.” (second alteration in original) (internal quotation marks and citations omitted)), *cert. granted, sub nom. Schuette v. Coalition to Defend Affirmative Action*, ___ U.S. ___, 133 S. Ct. 1633 (2013).

328. *Id.* at 485.

Realization of these prospective effects depends greatly on the cases appearing before state and federal courts as well as future trends in state and federal courts' constitutional interpretation. These issues may be important if federal precedent requires different outcomes from the Virginia Constitution's text, especially if federal protections are weaker than those provided in the Virginia Constitution.

C. Federal Comity and Jurisdiction

In cases involving the Virginia Constitution, practitioners and courts must consider the federal courts' hesitancy to interpret state law and their limited jurisdiction to review state decisions. The Virginia Constitution's independent or coextensive interpretation implicates these doctrines.

1. Interpretation of State Laws

Out of respect for state tribunals³²⁹ and their expertise in state law,³³⁰ federal courts generally avoid interpreting state laws. This concern manifests itself in certified questions,³³¹ United States Supreme Court appellate jurisdiction,³³² habeas jurisdiction,³³³

329. See ARTHUR D. HELLMAN, LAUREN K. ROBEL & DAVID R. STRAS, FEDERAL COURTS: CASES AND MATERIALS ON JUDICIAL FEDERALISM AND THE LAWYERING PROCESS 252 (2d ed. 2009).

330. See, e.g., *Nicholson v. Scopetta*, 344 F.3d 154, 168 (2d Cir. 2003).

331. See *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (footnote omitted) ("It does, of course, in the long run save time, energy, and resources and helps build a *cooperative judicial federalism*." (emphasis added)); e.g., *Travco Ins. Co. v. Ward*, 468 F. App'x 195, 201 (4th Cir. 2012) ("[B]ecause no controlling Virginia appellate decision, constitutional provision, or statute appears to address the precise question presented in this case, and the answer to the certified question is potentially determinative of this appeal, the question is properly subject to review by the Supreme Court of Virginia on certification."); *Boyd v. Bulala*, 877 F.2d 1191, 1199 (4th Cir. 1989) (relying on the Supreme Court of Virginia's answer to a certified question to resolve application of the Virginia Constitution). Federal courts of appeals are within their discretion to certify questions of state law to a state supreme court when the state permits jurisdiction to answer. *Lehman Bros.*, 416 U.S. at 389–91; e.g., VA. SUP. CT. R. 5:40 (Repl. Vol. 2013).

332. E.g., *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). For further discussion, see *infra* Part III.C.2.

333. *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)). Congress has also acted to protect the finality of state court habeas decisions. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 104, 110 Stat. 1214, 1218–19 (codified as amended at 28 U.S.C. § 2254 (2006)); see also *id.* sec. 101, 106, at 1217, 1220–21 (codified as amended at 28 U.S.C. § 2244 (2006)).

well-pleaded complaints,³³⁴ preemption,³³⁵ qualified immunity,³³⁶ *res judicata*,³³⁷ and abstention of federal jurisdiction.³³⁸

Two practical considerations further inform this concern.³³⁹ First, the federal courts concede that state judges are “often far more expert . . . at understanding the implications of each decision in [their] practiced field.”³⁴⁰ State judges are generally more familiar with the state’s constitution and laws. For example, a recent Fourth Circuit opinion misconstrued a Virginia statute’s enactment date when the court failed to observe Virginia’s constitutional procedures for legislative enactment.³⁴¹ Apprehension over similar results may justify certified questions or abstention of ju-

334. See generally *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156 (1997); *Merrill Dow Pharms. Inc. v. Thompson*, 478 U.S. 804 (1986); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908).

335. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); *City of Falls Church v. Fairfax Cnty. Water Auth.*, 272 F. App’x 252, 256–57 (4th Cir. 2008).

336. *Davis v. Scherer*, 468 U.S. 183, 195 (1984).

337. See, e.g., *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). See generally *Effect of State Law on Federal Res Judicata Rules*, 18B FED. PRAC. & PROC. § 4472 (Charles Alan Wright & Arthur R. Miller eds., 2d ed. 2002 & Supp. 2012).

338. E.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996); *Colo. River Water Conserv. Dist. v. United States*, 424 U.S. 800 (1976); *Younger v. Harris*, 401 U.S. 37 (1971); *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593, 593–95 (1968) (per curiam); *Buford v. Sun Oil Co.*, 319 U.S. 315, 317–18 (1943); *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496, 500–01 (1941) (“Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, whether the policy relates to the enforcement of the criminal law, or the administration of a specialized scheme for liquidating embarrassed business enterprises, or the final authority of a state court to interpret doubtful regulatory laws of the state.”) (internal citations omitted); *Front Royal & Warren Cnty. Indus. Park Corp. v. Town of Front Royal*, 945 F.2d 760, 764–65 (4th Cir. 1991) (abstaining jurisdiction because the case centered on Virginia’s annexation courts and because plaintiffs had available Virginia constitutional and statutory remedies); *AFA Distributing Co. v. Pearl Brewing Co.*, 470 F.2d 1210, 1214 (4th Cir. 1973) (“Peripheral and episodic federal court interpretations of state statutory schemes of control are not desirable and could be harmful.”). Comity concerns have similarly compelled Congress to limit federal jurisdiction. E.g., Act of June 25, 1948, ch. 646, 62 Stat. 968 (codified at 28 U.S.C. § 2283 (2006)); Tax Injunction Act, ch. 646, 62 Stat. 932 (1948) (codified at 28 U.S.C. § 1341 (2006)); Johnson Act, ch. 646, 62 Stat. 932 (1948) (codified at 28 U.S.C. § 1342 (2006)); Anti-Injunction Act, ch. 646, 62 Stat. 932 (1948) (codified at 28 U.S.C. §§ 1341, 2283 (2006)); see also *Norris-Laguardia Act*, ch. 90, § 4, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 104 (2006)).

339. See *Nicholson v. Scopetta*, 344 F.3d 154, 168 (2d Cir. 2003).

340. *Id.*; see also *Davis*, 468 U.S. at 195 (fretting that under appellee’s argument “qualified immunity then might depend upon the meaning or purpose of a state administrative regulation, questions that federal judges often may be unable to resolve on summary judgment”).

341. Compare Petition for Writ of Certiorari at 19 n.5, *Virginia ex rel. Cuccinelli v. Sebelius*, No. 11-420 (Sept. 30, 2011) (citing VA. CONST. art. V, § 6(b)(iii)), with *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 270–71 (4th Cir. 2011).

risdiction.³⁴² The federal courts are more comfortable applying state law when the state supreme court has provided precedent to guide their analysis,³⁴³ but they are still wary. They exhibit the strong “caution appropriate to a federal court called upon to interpret a state constitution.”³⁴⁴ Second, judicial selection suggests compelling sovereign interests. The president nominates potential federal Justices and judges, and the Senate may confirm them.³⁴⁵ Bar admission and state residency are not constitutionally required. Federal judges’ principle charge is to interpret and apply the Constitution and laws of the United States in cases and controversies before them.³⁴⁶ In contrast, a state’s judges are of the state’s particular choosing and specialty. In Virginia, the General Assembly selects the Commonwealth’s justices and judges by majority vote.³⁴⁷ They must be Virginia residents, and they must have been admitted to the Virginia bar at least five years before their appointment.³⁴⁸ They take an oath to support the Constitution and laws of the United States in addition to the Virginia Constitution.³⁴⁹ Federal judges have no charge or oath to uphold the Virginia Constitution; they serve a different sovereign. Those most familiar with state practice—state judges, who have been members of the state bar and have been chosen by the sovereign state they serve—are better entrusted to interpret their state laws and constitution.

Coextension tends to lessen the federal courts’ comity concerns, and it may lessen their occasion to certify questions to the Supreme Court of Virginia or cautiously heed Virginia precedents. Discussing an answer to a certified question, the Fourth Circuit observed that the Supreme Court of Virginia’s interpretation of the Virginia Constitution was “absolutely binding.”³⁵⁰ For similar

342. Compare *Lehman Bros. v. Schein*, 416 U.S. 386, 390 (1974), with *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496, 500–01 (1941).

343. *E.g.*, *Phan v. Virginia*, 806 F.2d 516, 521–25 (4th Cir. 1986).

344. *Id.* at 524.

345. U.S. CONST. art. II, § 2.

346. U.S. CONST. art. III, § 2.

347. VA. CONST. art. VI, § 7; BRYSON, *supra* note 49, § 2.01, at 2-2 to 2-3. During recess, the governor may fill a vacancy by appointing a justice “to serve until thirty days after the commencement of the next session of the General Assembly.” VA. CONST. art. VI, § 7.

348. VA. CONST. art. VI, § 7. The same holds true for “all judges of other courts of record” in Virginia. *Id.*

349. *Id.* (requiring Virginia’s constitutional officers take an oath to support the federal and Virginia constitutions); see also U.S. CONST. art. VI (binding state judges to uphold the Constitution and laws of the United States).

350. *Boyd v. Bulala*, 877 F.2d 1191, 1195 (4th Cir. 1989).

reasons, the Fourth Circuit has observed that federal courts must exercise particular “caution” when interpreting a state’s constitution.³⁵¹ But the federal courts will equally respect Virginia courts’ interpretation of the Virginia Constitution as coextensive; they will interpret it according to federal precedent.³⁵² In the latter case, although they interpret the Virginia Constitution in fact, they apply the Federal Constitution. Federal precedents control its meaning and undermine the federal courts’ comity concerns that may otherwise justify cautious adherence to Virginia precedent when interpreting the Virginia Constitution or certifying a question to the Supreme Court of Virginia when there is no controlling precedent.

2. Federal Review of State Decisions

The United States Supreme Court may review state courts’ decisions only when they involve federal law.³⁵³ State sovereignty compels this narrowed appellate jurisdiction.³⁵⁴ Accordingly, the United States Supreme Court has appellate jurisdiction over state cases when the state court’s judgment does not rest on adequate and independent state grounds.³⁵⁵ This rule similarly applies for federal district courts’ habeas corpus jurisdiction over state prisoners’ claims,³⁵⁶ although the justification is slightly different.³⁵⁷

351. *Phan v. Virginia*, 806 F.2d 516, 524 (4th Cir. 1986).

352. *E.g.*, *Glassman v. Arlington Cnty.*, 628 F.3d 140, 149–50 (4th Cir. 2010).

353. *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945).

354. *Balt. & Ohio R.R. Co v. Baugh*, 149 U.S. 368, 401 (1893) (“Any interference with either, except as [constitutionally] permitted, is an invasion of the authority of the State, and, to that extent, a denial of its independence.”) (Field, J., dissenting). Justice Harlan considered the principle—“in a different but closely related context”—vital to the adequate and independent state grounds doctrine, suggesting “complementary” rationales for Article III jurisdiction and our federalism. HELLMAN, ROBEL & R. STRAS, *supra* note 329, at 252 (quoting *Fay v. Noia*, 372 U.S. 391, 466 (1963)) (internal quotation marks omitted).

355. *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

356. *Lee*, 534 U.S. at 375 (internal quotation marks omitted) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729); *e.g.*, *O’Dell v. Netherland*, 95 F.3d 1214, 1243–44 (4th Cir. 1996) (en banc).

357. Concerns of comity and federalism inform the adequate and independent state grounds analysis, *Coleman v. Thompson*, 501 U.S. 722, 730–31, but jurisdiction is predicated on determining “whether the petitioner ‘is in custody in violation of the Constitution or laws or treaties of the United States,’” *id.* at 730 (quoting 28 U.S.C. § 2254 (1988)), and the petitioner must exhaust avenues of state review. *Id.* at 731.

State grounds are adequate when they serve as the decision's "fair or substantial basis."³⁵⁸ They are inadequate when state law does not dispose of the entire case.³⁵⁹ State grounds are independent when the decision clearly rests on state law.³⁶⁰ Relevant to this discussion, state grounds are not independent when they "depend[] upon the state court's view of the reach of the [Federal Constitution]."³⁶¹ The United States Supreme Court instructed in *Michigan v. Long*,

[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.³⁶²

The United States Supreme Court recognizes that state courts are the appropriate interpreters of state constitutions: "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."³⁶³ Nonetheless, the Court must review state courts when their decisions implicate the Federal Constitution's meaning and precedent.³⁶⁴ A state court may

358. *Broad River Power Co. v. South Carolina ex rel. Daniel*, 281 U.S. 537, 540–41 (1930) ("[I]f there is no evasion of the constitutional issue, and the nonfederal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court.") (internal citations omitted).

359. *E.g.*, *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98–99, 109 (1938) (finding the state statutory grounds inadequate to dispose of the case, given the remaining federal issue whether the state statute's repeal was valid under the Federal Constitution's Contracts Clause).

360. *See Wise v. Williams*, 982 F.2d 142, 144 (4th Cir. 1992) (quoting *Coleman*, 501 U.S. at 740).

361. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)

362. 463 U.S. 1032, 1040–41 (1983).

363. *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940), *quoted in* *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 78 (2000).

364. *See Arizona v. Evans*, 514 U.S. 1, 8–9 (1995) ("[W]e [have] recognized that our authority as final arbiter of the United States Constitution could be eroded by a lack of clarity in state-court decisions."); *see also Phan v. Virginia*, 806 F.2d 516, 524 (4th Cir. 1986).

readily avoid this outcome by following *Michigan v. Long's* instructions.

Federal review of state decisions implicates coextension. A state decision grounded on a coextensive provision in a state constitution—however adequate it may be—is not independent, and the United States Supreme Court's appellate jurisdiction or a district court's habeas jurisdiction may attach.³⁶⁵ Conversely, a state decision clearly grounded on the state constitution alone is independent, and the state supreme court retains the final authority to interpret and apply the state constitution.³⁶⁶

The best way to avert federal review of state constitutional decisions is for Virginia courts to ground their analysis independently—on the Virginia Constitution's text and historical and common law background. Many cases may involve distinct issues of federal and Virginia law, and the issues involving the Virginia Constitution may not be adequate to avert federal review. In those cases, the federal courts may review the federal law issues, but the state law issues go no further. They are preserved according to the Supreme Court of Virginia's interpretation.

D. *Federalism Implications*

The Federal Constitution enshrines our federalism, and it is one of the constitutional convention's most important and lasting judgments. Federal doctrines—including selective incorporation, comity, and jurisdiction over state decisions—are significant for both state and federal practice, and coextension's interaction with them demonstrates the extent of its faults.

First, coextension—alongside selective incorporation—limits state constitutional provisions to mere redundancies. The result is the state provisions' essential repeal. However, independently, those state protections might vindicate or defend individual rights. As much as it sought to increase federal power, the Recon-

365. *Michigan v. Long*, 463 U.S. 1032, 1043 (1983) (finding jurisdiction satisfied in a state supreme court decision invoking both the federal and state constitutions because "[t]he references to the State Constitution in no way indicate[d] that the decision below rested on grounds in any way *independent* from the state court's interpretation of federal law.").

366. See *Evans*, 514 U.S. at 8; Frederic S. Le Clercq, *The Process of Selecting Constitutional Standards: Some Incongruities of Tennessee Practice*, 61 TENN. L. REV. 573, 578 (1994).

struction Congress intended incorporation to supplement—not limit—rights against state action.³⁶⁷ Further, it is difficult to imagine the same Virginians who feared the prospect of “uniform national standard[s] . . . imposed on the states”³⁶⁸ convening in 1776 to establish courts that would redundantly impose then-unforeseen federal standards under the name, but to the exclusion, of their Declaration of Rights.

Second, the federal courts show state courts great comity. State courts should be grateful for the gesture, but they undermine it when they declare their state constitutions coextensive with the Federal Constitution. Federal judges are experts in the Federal Constitution and laws, but their general uneasiness interpreting state law dissuades their binding interpretation of the Virginia Constitution.³⁶⁹ Even though they apply federal precedent, they interpret coextensive state constitutions as state constitutions in fact, and the federal courts are in an uncomfortable position as the final interpreters of a sovereign state’s fundamental law.³⁷⁰ Coextensive interpretation upsets the federal courts’ comity toward state tribunals and confuses the proper spheres of sovereignty.

Finally, interpreting a state constitution coextensively, the state supreme court allows some of its authority to fall to the United States Supreme Court. This is more than outsourcing the state constitution’s interpretation and meaning.³⁷¹ It is also the state supreme court’s effective resignation of its own final authority to interpret its state constitution, allowing that duty to fall to a different sovereign’s supreme court. In this regard, it effectively becomes a court of intermediary authority. This is a peculiar outcome for a federal system. The federal judiciary should have no interest in how state courts interpret their states’ constitutions, and it generally does not.³⁷² The United States Supreme Court becomes the final interpreter of state constitutional provisions when they are deemed coextensive. It is a position appropriate for the

367. See *McDonald v. City of Chicago*, 561 U.S. ___, ___, 130 S. Ct. 3020, 3060–61 (2010) (Thomas, J., concurring in part and concurring in the judgment).

368. *Hylton*, *supra* note 2, at 465–66.

369. See *supra* Part III.C.1.

370. *E.g.*, *Minnesota v. Nat’l Tea Co.*, 309 U.S. 551, 557 (1940), *quoted in* *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 78 (2000).

371. *Cf.* *McCullough*, *supra* note 11, at 350.

372. Compare *Nat’l Tea Co.*, 309 U.S. at 557, with *Phan v. Virginia*, 806 F.2d 516, 524 (4th Cir. 1986).

Supreme Court of Virginia and one the United States Supreme Court does not desire. It befits a sovereign Commonwealth to have her own judiciary, selected from her own citizenry and bar, bear that duty.

E. *Stare Decisis*

Virginia courts have recognized ten constitutional protections to be coextensive with the Federal Constitution. Those cases stand as precedent. When appropriate cases appear before the Supreme Court of Virginia, however, stare decisis principles will warrant coextension's abandonment.

Virginia courts honor precedent under stare decisis, but they will discontinue it when they discover that it is based on "flagrant error or mistake."³⁷³ The Supreme Court of Virginia does not blindly repeat past errors, but it acknowledges that critical reexamination of its precedent "will enhance confidence in the judiciary and strengthen the importance of stare decisis in [its] jurisprudence."³⁷⁴ Stare decisis will not save precedent that is foundationally mistaken, underappreciates the legislative power, and produces confusion.³⁷⁵ Constitutional provisions' coextensive interpretation suffers from all three defects.

First, coextensive interpretation's original invocation misconstrued Professor Howard's observations and conferred Fourth Amendment meaning on article I, section 10 when its text plainly did not apply. Its extension to other constitutional provisions has similarly ignored substantive textual differences between the federal and Virginia constitutions as well as Virginia's well-established rules of constitutional interpretation. Second, the approach weakens Virginians' power to design their constitution by convention or amendment. Only the Virginia people may alter the Virginia Constitution,³⁷⁶ and coextensive interpretation imports text and meaning chosen by different conventions of different peoples. Third, coextension's practical implications upset the fed-

373. *Nelson v. Warden of the Keen Mt. Corr. Ctr.*, 262 Va. 276, 280, 552 S.E.2d 73, 75 (2001) (quoting *Selected Risks Ins. Co. v. Dean*, 233 Va. 260, 265, 355 S.E.2d 579, 581 (1987)) (internal quotation marks omitted).

374. *Nunnally v. Artis*, 254 Va. 247, 253, 492 S.E.2d 126, 129 (1997).

375. *Nelson*, 262 Va. at 284, 522 S.E.2d at 77.

376. Compare VA. CONST. art. I, § 3, and *id.*, art. XII, §§ 1–2, with *Town of Galax v. Appalachian Elec. Power Co.*, 177 Va. 29, 32, 12 S.E.2d 778, 779 (1941).

eral judiciary's efforts to respect state sovereignty; these implications question the Virginia Constitution's force and allow the United States Supreme Court to serve the Supreme Court of Virginia's proper role as the final judicial authority on the Virginia Constitution's interpretation.

CONCLUSION

Virginia judges are experts in the Commonwealth's constitution and laws, and they may readily interpret them according to their text and history. When parties raise claims or defenses under the Virginia and federal constitutions or under only the Virginia Constitution, Virginia courts should apply the Virginia Constitution independently. They should rely on *Michigan v. Long's* specific prescriptions to ensure that Virginia law decisions are independently grounded. Interpreting the Virginia Constitution, they should accord each provision its plain, textual meaning, and they may rely on historical and common law background when additional guidance is necessary. When similar state and federal claims and defenses are litigated alongside each other, state rights may vindicate or defend litigants beyond the federal standard. Although Virginia law issues will not always be adequate to avert federal review, their meaning remains significant for Virginia precedent and should be grounded independently. Preserving the Virginia Constitution's independent meaning ensures constancy, and may vindicate Virginia rights when federal rights are not as robust, whether those federal rights are plainly narrower or constructed to be so.

*Robert S. Claiborne, Jr. **

* I am greatly indebted to the Hon. Stephen R. McCullough of the Court of Appeals of Virginia, whose piece, *A Vanishing Virginia Constitution?*, inspired my interest in this topic. I owe additional thanks to the *Annual Survey* Editor, Chris Bascom, as well as Professors W. Hamilton Bryson, John F. Preis, John Paul Jones, and John G. Douglass for their critical review and advice, which greatly improved this piece from its earlier drafts. Finally, I owe special thanks to Glenice Coombs, the editors, and the staff of the *University of Richmond Law Review*; this piece would not be possible without their hard work and dedication.