

A VANISHING VIRGINIA CONSTITUTION?

*The Honorable Stephen R. McCullough **

I. INTRODUCTION

“The Constitution is the fundamental law of Virginia. It is the charter by which our people have consented to be governed; it sets forth the basic rights and principles sought to be maintained and preserved in a free society”¹

Virginia’s constitution was first established in 1776, when the rift with the mother country thrust upon Virginia colonists the obligation to establish their own government.² A rather modest affair when compared to our modern Virginia Constitution, Virginia’s initial charter of government consisted of two documents: a Declaration of Rights and a constitution proper that set forth the more mechanical aspects of operating a government. Chiefly the handiwork of George Mason, the Declaration of Rights called for, among other protections, the separation of powers, religious liberty, freedom of the press, and protections for persons accused of crimes.³ One writer notes that this “Declaration of Rights is, indeed, a remarkable production. As an intellectual effort, it possesses exalted merit. It is the quintessence of all the great principles and doctrines of freedom which had been wrought out by the

* Judge, Court of Appeals of Virginia. Prior to the author’s appointment to the Court of Appeals of Virginia, he served as State Solicitor General, Office of the Attorney General, Commonwealth of Virginia; J.D., 1997, University of Richmond School of Law; B.A., 1994, University of Virginia.

The views expressed in this article represent strictly the personal views of the author.

1. *Coleman v. Pross*, 219 Va. 143, 152, 246 S.E.2d 613, 618 (1978).
2. In fact, Virginia precipitated the rift with England when the Virginia Convention instructed its delegates in the Continental Congress to seek a declaration of independence. *See* Preamble and Resolution of the Virginia Convention, May 15, 1776, *available at* http://avalon.law.yale.edu/18th_century/const02.asp.
3. The Declaration of Rights was eventually folded into the Virginia Constitution itself in 1870 as article I. A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 35, 45 (1974); *see* VA. CONST. art. 1, §§ 5, 8, 12, 16.

people of England from the earliest times.”⁴ Although the Virginia Constitution has evolved significantly over the more than two centuries that followed, some of the provisions in the current constitution remain unchanged from the quill of George Mason.⁵

In recent decades, however, the most fundamental rights protected for Virginians by the Virginia Constitution have been, for all practical purposes, steadily vanishing. This disappearing act has occurred through a series of decisions issued by Virginia’s own courts. For several decades, Virginia courts repeatedly have held in sweeping fashion that the provisions of the Virginia Constitution are “co-extensive” with those of the United States Constitution. From that point forward, the clauses effectively have been relegated to irrelevance.

This essay endeavors to take a closer look at this trend. Part II offers a brief survey of the court cases holding certain provisions of the Virginia Constitution to be “co-extensive” with clauses of the United States Constitution. Part III analyzes whether this trend is historically justified, as well as its advantages and drawbacks. Finally, Part IV suggests a course correction.

The suggestion of this essay is that, as the fundamental law of Virginia, the Virginia Constitution should retain independent significance. The alternative—sweeping declarations that the various clauses of the Virginia Constitution are co-extensive, followed by irrelevance and obscurity for those clauses—diminishes Virginia’s role as a sovereign and risks giving short shrift to rights that Virginians have enjoyed for over two centuries.

II. THE “CO-EXTENSIVE” JURISPRUDENCE

A large number of the rights protected by the Virginia Constitution have been declared to be co-extensive with a similar provision of the United States Constitution. Nearly all of the protections for criminal defendants found in the Virginia Constitution have been swept into this trend. The Supreme Court of Virginia has held that article I, section 10,⁶ governing searches and sei-

4. HUGH BLAIR GRIGSBY, *THE VIRGINIA CONVENTION OF 1776*, at 163 (1969) (lecture originally delivered on July 3, 1855).

5. Compare VA. CONST. art. 1, with Virginia Declaration of Rights of 1776, available at http://avalon.law.yale.edu/18th_century/virginia.asp.

6. That section reads as follows:

zures, is co-extensive with the Fourth Amendment.⁷ Likewise the double jeopardy provisions of the Virginia Constitution⁸ have been held to be co-extensive with those of the United States Constitution.⁹ The due process prohibition on involuntary statements has been held to be co-extensive with the protections of the Virginia Constitution.¹⁰ A similar fate has met other aspects of the due process clause.¹¹

On the civil side, the free speech protections of article I, section 12 have been declared to be co-extensive with the First Amendment.¹² Most recently, the protections relating to the right to bear arms found in the Virginia Constitution have been declared to be co-extensive with those of the Second Amendment.¹³ Similarly, the prohibition on enacting “special laws,” the Court of Appeals of Virginia has suggested, “add[s] nothing to the minimum rationality test employed by longstanding due process and equal protection doctrines.”¹⁴

Once a provision of the Virginia Constitution has been deemed to be co-extensive with a particular clause of the United States Constitution, Virginia courts cease any separate analysis of the Virginia provision.¹⁵ From that point forward, Virginia appellate

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.

VA. CONST. art. I, § 10.

7. *Lowe v. Commonwealth*, 230 Va. 346, 348 n.1, 337 S.E.2d 273, 274 n.1 (1985); *see also Slayton v. Commonwealth*, 41 Va. App. 101, 109 n.2, 582 S.E.2d 448, 452 n.2 (2003) (warrantless search); *Craddock v. Commonwealth*, 40 Va. App. 539, 552 n.2, 580 S.E.2d 454, 461 n.2 (2003) (strip searches at the jail); *Henry v. Commonwealth*, 32 Va. App. 547, 551, 529 S.E.2d 796, 798 (2000) (validity of a search under a valid search warrant).

8. VA. CONST. art. I, § 8 (No person shall “be put twice in jeopardy for the same offense.”).

9. *Stephens v. Commonwealth*, 263 Va. 58, 62, 557 S.E.2d 227, 229 (2002); *Peterson v. Commonwealth*, 5 Va. App. 389, 394, 363 S.E.2d 440, 443 (1987).

10. *Sabo v. Commonwealth*, 38 Va. App. 63, 77, 561 S.E.2d 761, 768 (2002).

11. *Shivae v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005); *Morrisette v. Commonwealth*, 264 Va. 386, 394, 569 S.E.2d 47, 53 (2002) (pre-indictment delay); *Willis v. Mullett*, 263 Va. 653, 657, 561 S.E.2d 705, 708 (2002).

12. *Elliott v. Commonwealth*, 267 Va. 464, 473–74, 593 S.E.2d 263, 269 (2004); *see also Bennefield v. Commonwealth*, 21 Va. App. 729, 739–40, 467 S.E.2d 306, 311 (1996).

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

14. *Lilly v. Commonwealth*, 50 Va. App. 173, 184, 647 S.E.2d 517, 523 (2007).

15. *See, e.g., Caprino v. Commonwealth*, 53 Va. App. 181, 185 n.1, 670 S.E.2d 36, 38 n.1 (2008).

courts turn to the decisions of the United States Supreme Court and its own decisions interpreting the United States Constitution for resolution of both the Virginia Constitution and the United States Constitution. The net effect of the “co-extensive” trend is to outsource decision-making under the Virginia Constitution to the United States Supreme Court. Clauses of the Virginia Constitution deemed to be co-extensive with a provision of the United States Constitution, effectively have vanished.

III. ANALYSIS OF THE “CO-EXTENSIVE” TREND

Declaring provisions of the Virginia Constitution to be co-extensive with various clauses in the Bill of Rights certainly is not without historical foundation. The Virginia Declaration of Rights and the Bill of Rights share a close kinship. As Judge Widener noted, the importance of the Declaration of Rights “as the source of the federal Bill of Rights may not be overemphasized Every specific guarantee in the Virginia proposal, save one, later found a place in the federal Bill of Rights which was introduced in the first Congress by Madison as proposed by Virginia herself.”¹⁶

One common thread that links the Virginia Constitution and the Declaration of Rights to the Bill of Rights is James Madison. A participant in the Virginia Constitutional Convention of 1776,¹⁷ he was also the principal architect of the Bill of Rights of the United States Constitution.¹⁸

Moreover, the fears and experiences of the colonists that motivated Virginians to enact a Declaration of Rights also prompted calls for a Bill of Rights in the United States Constitution. Indeed, the Declaration of Rights “became the model . . . for the federal Bill of Rights.”¹⁹

One readily apparent benefit of declaring provisions of the Virginia Constitution to be co-extensive is the simplifying effect this

16. *United States v. Payne*, 492 F.2d 449, 459–60 (4th Cir. 1974) (Widener, J., concurring and dissenting).

17. See ROBERT P. SUTTON, *REVOLUTION TO SECESSION: CONSTITUTION MAKING IN THE OLD DOMINION* 21–22 (1989).

18. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 284 (1990) (Brennan, J., dissenting) (“James Madison [is] universally recognized as the primary architect of the Bill of Rights.”).

19. See SUTTON, *supra* note 17, at 33.

has on courts and litigants. Rather than tracking two separate lines of case law for state and federal constitutional provisions, courts and litigants need only worry about precedent analyzing the relevant provision of the United States Constitution. From a practical perspective, for courts with mounting caseloads, and for beleaguered attorneys who understandably prefer to avoid time-consuming research, this simplicity is not without its virtues. Moreover, case law and academic commentary concerning federal constitutional provisions is abundant and readily available, whereas primary sources for and commentary concerning the Virginia Constitution are relatively scarce. Moreover, the focus of a modern law school education is on the United States Constitution. Many law students' first, and often last, encounter with the Virginia Constitution is a brief overview as part of a bar review course.

Another advantage is that this co-extensive trend reduces the temptation for Virginia courts to deploy constitutional provisions a-historically to enshrine favored policies into law. Other state supreme courts have engendered significant controversy by declaring certain state constitutional provisions to offer broader protections than those of the United States Constitution, often with little or no support from text, history, or precedent.²⁰ Declaring provisions of the Virginia Constitution to be co-extensive with those of the United States Constitution has the advantage of removing this temptation.

There are, however, significant disadvantages to the trend of declaring provisions of the Virginia Constitution to be co-extensive with those of the United States Constitution. First, and most fundamentally, absorbing the provisions of the Virginia Constitution into those of the United States Constitution is inconsistent with our system of dual sovereignty and diminishes Virginia's status as a separate sovereign in our federalist system of government. As Justice Kennedy has noted:

It was the genius of [the Framers'] idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two or-

20. See, e.g., *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) (holding that the constitution of Alaska requires police to electronically record interrogations of suspects that occur in a place of detention).

ders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.²¹

The notion of protecting the sovereignty of Virginia might seem highly abstract or even anachronistic in an age of robust federal power, but that is not so. Concentrated power was one of the principal evils the Framers of the United States Constitution sought to avoid. The horrors of the past century that were inflicted upon the world by totalitarian regimes offer ample evidence of the wisdom of avoiding concentrations of power. As the United States Supreme Court aptly observed, “[s]tate sovereignty is not just an end in itself: ‘[r]ather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’”²² In short, “[f]ederalism secures the freedom of the individual.”²³ If the states gradually but effectively abandon their role as dual sovereigns, the national government becomes the inevitable default option. Preserving the vitality of state constitutions is one small but significant step toward preserving the system of dual sovereignty.

Professor Tribe warned, in a different context, of the danger that resides “in the tyranny of small decisions—in the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell.”²⁴ Although this admonition was directed at the United States Congress, it also holds true for state governments, including state courts. To uphold the vitality of a state constitution is to uphold the vitality of states as integral parts of a framework of government that has served us well for over two centuries.

Moreover, the fact that many of the provisions of the Virginia Constitution and the Bill of Rights share a close historical kinship does not mean that the similar provisions in the two constitutions should reflexively be declared co-extensive. A common origin does not mean a common destination. Decisions from the United States Supreme Court have added a significant gloss to certain constitutional provisions. This jurisprudential overlay will

21. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

22. *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

23. *Bond v. United States*, No. 09-1227, slip op. at 9 (U.S. June 16, 2011).

24. LAURENCE TRIBE & RALPH S. TYLER, JR., *AMERICAN CONSTITUTIONAL LAW* 381 (2d ed. 1988).

not be applicable in all situations to comparable provisions of the Virginia Constitution. There is no historical evidence to suggest, for example, that the Virginia Constitution, in contrast to its federal counterparts, was ever concerned with *Miranda* warnings, or that its free speech protections are designed to protect virtual child pornography.²⁵ Moreover, when the United States Supreme Court overrules or relegates to irrelevance one of its own precedents, it would be odd to conclude that the protections afforded by the Virginia Constitution had simultaneously advanced or receded along with shifting majorities on the United States Supreme Court.

Suppose, for example, that a new United States Supreme Court majority reverses the *District of Columbia v. Heller*²⁶ decision, and concludes that the Second Amendment protects a collective rather than an individual right to bear arms. Would article I, section 12 of the Virginia Constitution, which has been declared to be co-extensive with the Second Amendment, simultaneously recede along with the new holding of the United States Supreme Court? This is by no means a farfetched scenario. The Supreme Court can and does overrule its own precedent, expressly or in practical effect.²⁷ More broadly, throughout its history, the Court has engaged in significant philosophical realignments, moving from natural law to positivism, and transitioning from Lochnerist invalidation of congressional acts to the New Deal accommodation of very broad assertions of federal power. Protections under the Virginia Constitution should not be dependent upon such ideological shifts. That, however, is the inescapable outcome for those clauses of the Virginia Constitution that are tethered to the federal constitution.

The second criticism is more practical. Broad declarations of co-extensiveness may, in some instances, deprive Virginians of their rights. Whether a clause of the Virginia Constitution would, in a particular situation, afford broader protection than an equivalent provision in the Bill of Rights is something that is not easily answered in the abstract. The answer would depend on an analysis

25. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 256 (2002) (invalidating a statute that prohibited virtual child pornography on First Amendment overbreadth grounds).

26. 554 U.S. 570 (2008) (5-4 decision).

27. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. ___, 130 S. Ct. 876 (2010). Compare *Gonzales v. Carhart*, 550 U.S. 124 (2007), with *Stenberg v. Carhart*, 530 U.S. 914 (2000) (overruling *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)).

of text, history, and precedent in the context of case-by-case adjudication. To the extent such an analysis leads to the conclusion that the protections afforded by the Virginia Constitution are broader than those offered by the United States Constitution, Virginians should not lose the benefit of those protections.²⁸

This discussion does, however, raise a practical question: is it likely that a careful examination of the scope of a protection afforded by the Virginia Bill of Rights would make any practical difference to litigants? With respect to criminal law, it is unlikely that reversing the trend of declaring state provisions to be co-extensive with provisions of the United States Constitution would have much practical impact. A linchpin of modern criminal litigation is the suppression of evidence remedy that flows from a violation of the United States Constitution.²⁹ The Supreme Court of Virginia has long held that there is no suppression remedy for violations of the Virginia Constitution.³⁰ Therefore, defendants in criminal cases have little incentive to raise search and seizure issues under the Virginia Constitution. With respect to speedy trial, Virginia statutory speedy trial provisions have obviated a need to examine the scope of its constitutional provision.³¹ Other contexts, including double jeopardy and due process protections are unlikely to yield greater rights under the Virginia Constitution than under the current jurisprudence construing the federal Bill of Rights. Therefore, although an analysis of every conceivable scenario is not feasible here, it is unlikely that the Virginia Constitution will provide broader protections to criminal defendants than those afforded by contemporary United States Supreme Court jurisprudence.

In other areas of law, the Virginia Constitution may be of significant utility to litigants. For example, the Virginia Constitu-

28. Of course, in our adversarial system of justice, the burden rests upon the litigants, not the courts, to fashion and support arguments regarding the scope of the Virginia Constitution in a particular set of circumstances. Virginia courts are not required to shoulder the burden of performing such research on their own.

29. See *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (extending the exclusionary rule to the states).

30. *Hall v. Commonwealth*, 138 Va. 727, 732, 121 S.E. 154, 155 (1924). Instead of allowing the guilty to go free through reflexive application of the rule of exclusion, Virginia law calls for the aggrieved party to seek compensation through a civil proceeding. See *Jordan v. Shands*, 255 Va. 492, 497, 500 S.E.2d 215, 218 (1998) (seeking relief for false imprisonment).

31. VA. CODE ANN. § 19.2-243 (Cum. Supp. 2011).

tion specifically recognizes as fundamental a right to acquire and possess property.³² Historically, the protection of property rights lay at the heart of the constitutional design. As one author notes:

To the gentry gathered at Williamsburg [in 1776,] the word *constitution* was one of the “most hallowed terms in their political vocabulary.” A constitution, to these men, had one primary purpose, liberty: to place each person beyond the reach of arbitrary political power. Then, as a secondary consideration, they believed that a fundamental law had to secure a person’s rights in property.³³

With respect to precedent, Virginia courts have long recognized the importance of property rights.³⁴ In contrast, in recent decades, the United States Supreme Court’s decisions have afforded very little protection to property rights. For example, the Court has held that retroactive economic legislation does not necessarily offend due process.³⁵ It is beyond dispute that the Virginia General Assembly possesses broad police power to regulate and restrict the use and disposition of property. Still, property rights constitute one area where text, history, and precedent suggest that the Virginia Constitution, in some situations, would afford greater protections for property rights than would the United States Constitution.

Another example, although not part of the Bill of Rights of the United States Constitution, is the prohibition found in the Virginia Constitution on “special laws.”³⁶ Although the Supreme Court of Virginia has not declared this provision to be co-extensive with modern equal protection or “substantive” due process review, the Court of Appeals of Virginia has stated that the special laws prohibitions “track the minimum rationality requirements employed by longstanding due process and equal protection doctrines.”³⁷

32. VA. CONST. art. I, § 1.

33. SUTTON, *supra* note 17, at 34.

34. Raleigh Court Corp. v. Faucett, 140 Va. 126, 138, 124 S.E. 433, 436 (1924). The doctrine of “vested rights” has played a key role in the protecting property rights of Virginians. See Eaton v. Davis, 176 Va. 330, 337, 342, 10 S.E.2d 893, 896, 898 (1940) (Vested property rights are not subject to retroactive legislative impairment.).

35. See, e.g., United States v. Carlton, 512 U.S. 26, 32 (1994).

36. VA. CONST. art. IV, § 14.

37. Laurels of Bon Air, L.L.C. v. Med. Facilities of Am. LIV, Ltd., 51 Va. App. 583, 597, 659 S.E.2d 561, 568 (2008). To date, the Supreme Court of Virginia has reviewed challenges under the “special laws” provision separately from assertions that a law violates equal protection or substantive due process. See, e.g., Willis v. Mullett, 263 Va. 653, 659, 551 S.E.2d 705, 709 (2002) (evaluating laws challenged as invalid special laws by examining whether the laws bears “a reasonable and substantial relation to the object

The special laws prohibition, however, should remain distinct from equal protection or substantive due process analysis.

When reviewing challenges under the United States Constitution alleging that a legislative classification violates substantive due process or equal protection, courts employ a highly deferential mode of analysis when the classification does not implicate a suspect class or a fundamental right. With respect to economic legislation, courts are required to imagine any set of circumstances that would justify the classification, regardless of whether the legislature actually relied upon these circumstances.³⁸ Historically, in reviewing special laws challenges, Virginia courts have employed a standard that, while deferential, is not quite so generous as modern equal protection or substantive due process review.³⁹ Given that the prohibition on special laws is designed to restrict certain economic classifications, importing concepts of federal equal protection and substantive due process review into special law review risks robbing that clause of its significance.

Ultimately, broad declarations of co-extensiveness preclude the inquiry into whether, in a specific situation, the protections afforded by the Virginia Constitution are broader than those afforded by the United States Constitution. In recent years, the United States Supreme Court has perceived the wisdom of retreating from broad “facial” challenges that seek to invalidate a law in its entirety.⁴⁰ Instead, the Court now favors “[a]s-applied” challenges as “the basic building blocks of constitutional adjudication.”⁴¹ This trend is consistent with the “longstanding principle of judicial restraint that courts [should] avoid reaching constitutional questions in advance of the necessity of deciding them.”⁴²

sought to be accomplished by the legislation”) (citation omitted); *Jefferson Green Unit Owners Ass’n v. Gwinn*, 262 Va. 449, 459, 561 S.E.2d 339, 344 (2001) (applying the reasonable and substantial relation test).

38. See *Advanced Towing Co. v. Bd. of Supervisors*, 280 Va. 187, 191, 694 S.E.2d 621, 623 (2010).

39. See, e.g., *Riddleberger v. Chesapeake W. Ry.*, 229 Va. 213, 222, 327 S.E.2d 663, 668 (1985) (invalidating as an unconstitutional special law a provision for extinguishing mineral rights in areas west of the Blue Ridge and citing other examples of laws invalidated as impermissible special laws); *Cnty. Bd. of Supervisors v. Am. Trailer Co.*, 193 Va. 72, 77–81, 68 S.E.2d 115, 119–21 (1951) (invalidating as a special law a statute imposing fees on trailers when that statute effectively applied only to Fairfax County).

40. Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1328 (2000).

41. *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (quoting Fallon, *supra* note 40).

42. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988).

Another reason for this shift away from broad constitutional pronouncements is the undesirability for courts “to consider every conceivable situation which might possibly arise in the application of complex” areas.⁴³ These insights concerning the resolution of constitutional boundaries on an incremental case-by-case basis hold true with regard to determining the scope of a provision of the Virginia Constitution relative to its federal counterpart.

As a practical matter, it is not likely that under the modern jurisprudence of the United States Supreme Court the Virginia Constitution will afford, with any degree of frequency, protections that are broader than those of the United States Constitution. Nevertheless, in those instances where it does, Virginians should receive the benefit of their constitutional rights.

IV. A PLEA FOR A COURSE CORRECTION

Some of the most important protections embodied in the Virginia Constitution should not be relegated to irrelevance by sweeping declarations that they are co-extensive with provisions found in the United States Constitution. Instead, a determination of the scope of a provision under the Virginia Constitution should be made on a case-by-case basis, following an examination of text, history, and precedent.

The point of ensuring the continued vitality of the Virginia Constitution is not to advance a “conservative” or a “liberal” political project. Preserving the vitality of the states in our system of government does not advance any particular ideology. State constitutions should retain their vitality not only because they represent the foundational charter of a sovereign component of the Union, but also because the rights protected by the Virginia Constitution represent a valuable inheritance. Ensuring their continued relevance for the centuries to come is a suitable end in itself.

43. *Barrows v. Jackson*, 346 U.S. 249, 256 (1953).