

called for, by the common good; that, therefore, the vocabulary of individual rights is not a good vocabulary with which to discuss the problems of politics. Still another issue of critical importance can be put as follows: Who is to *say*, at any given moment and whatever the case may be concerning individual rights, what rights on the part of individuals are to be made legal rights? Is someone going to list them beforehand, and say to the legislature: This is it, boys—or is that precisely what the legislature is there to deliberate and legislate about according to its best lights? Translated into language of the contemporary scene, that becomes the question: Who is to say whom Mrs. Murphy is to admit as roomers in her boarding house, that is, whether everybody has a right to stay at Mrs. Murphy's, whether Mrs. Murphy has a right to exclude from her rooming house people she does not wish to accommodate. Now, down to a very recent moment, as we shall see more fully later, the American answer to that question was quite simply: Not a Supreme Court, not a Chief Executive, not, most particularly, some minority parading placards through the streets, but a representative assembly that We the People elect, and elect precisely to make that kind of decision for us, and in the course of its deliberations, reenactments always of the deliberation there in the saloon of the Mayflower, about the general good.

There are, of course, other possible answers to that question. The vast corpus of literature, for example, which downgrades Congress and the state legislatures is full of other possible answers. But the answer provided for us at a very early stage in the American tradition is that our deliberative assemblies should make such determinations.

## CHAPTER IV

# Rights and the Virginia Declaration

We come, at last, to a moment close to the beginning of the American political tradition as, that is, the official literature understands it. The date is June 12, 1776, only a few weeks before the Declaration of Independence. From the Massachusetts Body of Liberties, that is to say, we take a jump of nearly a century and a half—time enough, in all conscience, for quite a change in people's self-interpretation, unless, of course, it has found itself content, more or less, with the self-interpretation it started out with. *One* thing has changed, certainly, and that is the rhetoric: The document before us, commonly referred to as the Virginia Bill of Rights (technically the Virginia Declaration of Rights),<sup>1</sup> contains a word that we have not run across before in the documents we have been examining, and we are obliged therefore to ask: Does the sudden shift to the vocabulary of "rights" involve a shift, a genuine change, in the self-interpretation of the American political society? Does "rights," as the word is used by the "representatives of the good people of Virginia, assembled in full and free convention," bring us close to the sort of thing the proponents of the Bill of Rights *are said*, thirteen years later, to have in mind? Our first impression is that "yes," a shift has occurred, and there *is*, indeed, something new under the political sun. The rights in question, we are told early in the Virginia Declara-

<sup>1</sup> Poore, II, 1908-909.

tion, are *inherent* rights of all men (this does sound very much like the Declaration of Independence, and the American "tradition" of natural rights as glorified by the official literature). "All men," it says, "have certain *inherent* rights," and those rights because all men are "by nature" (another word we have not been hearing before) "*free and independent*."<sup>2</sup> More still: An *inherent right* turns out to be a right that belongs to each man so much as a matter of course, so much as a part or aspect of his being a man, that he himself cannot, we are told, cannot, upon entering a state of society, renounce it for his posterity (nor, we may infer though the document does not say so, for himself), not even by his own consent, not even by compact.<sup>3</sup> But let us explore these and related matters at some length.

Two things, we may remind ourselves, had happened in the English-speaking world between the Massachusetts Body of Liberties and the Virginia Declaration of Rights that might help account for the shift, if one has occurred, in our self-understanding during this period. First: In 1689 the British Parliament had adopted or, more accurately, forced on their king, a Bill of Rights, which had as its primary purpose the imposition of certain limitations upon the power of the king. Second, and probably more important in light of contemporary intellectual interpretations of our tradition, John Locke had published, hard on the heels of the English Bill of Rights, a book that set forth the idea that man once lived in a state of nature, that is, had once lived without law or government; and that in this state of nature, there had held sway a *law of nature*, the essence of which is that man in the state of

<sup>2</sup> Emphasis added.

<sup>3</sup> The text reads as follows: "That 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."

nature is born with a right, his *by* nature, to self-preservation; that man had emerged from the state of nature and entered into society by virtue of a freely negotiated compact, by which, so to speak, he trades off his natural right to self-preservation (making sure, of course, that he gets a good deal) in return for the privilege of living under government that is *limited* in the sense that there are certain things which he (man) specifies beforehand, that it is not empowered to do. Those things which government should not do yield up his *rights*, which are precisely rights he holds *against* government, that government must not violate.

Now, according to our official literature, America had, in the course of the eighteenth century, come under the influence of Locke—as we see at once, so exponents of the official literature would tell us, from the Virginians' use of the term "by nature," of the term "inherent rights," of the term "enter into a state of society," and of the term "compact." We concede at once this much: *If* the Americans did indeed become Lockean in the course of the decades preceding 1776, then there did indeed occur a shift in self-understanding, *not* a mere shift in rhetoric. We concede at once, too, that we cannot prove that the Virginians to whom we are now listening had not fallen under Locke's spell—which is, let us emphasize, a potent spell, capable of producing strange behavior on a scale that would put to shame the spell of a mere Svengali. While we cannot prove that the Virginians were not Lockean, we *can* say, and say with profound conviction, that the charge cannot be proved out of the document before us. The term "compact," as we know, entered the vocabulary of American politics more than half a century before Locke even published his wonderful working book; "rights," as used by the Virginians, may well refer only to the kind of thing the folk of Massachusetts had in mind when they spoke of their "liberties"; the reference to "entering into a state of society" turns out, *not* to be a refer-

ence, not necessarily anyhow, to men's emerging from a state of nature into society. The document speaks, rather, of entering into a state of society, not into *the* state of society, which could just as easily mean moving, as the Virginians were in the act of doing, from an old state of society into a new one. As for the reference to "nature," Locke was in fact a Johnnie-come-very-lately in the history of Western man's speculation about law that is *natural* to man, about man's duties and rights under natural law: Western man, that is, had long been familiar with the idea—it is as old as Augustine—that there are limits to the kind of submission a man can rightly offer up to any earthly government. If we pursue the document a little further, we see that the rights the Virginians proceed to name are old friends of ours, well known and articulated before Locke ever wrote. The rights named by the Virginians under "namely" are precisely "the enjoyment of life, and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety," which is recognizably a rewrite of the passage we have already examined briefly in a document that preceded Locke by several decades. Moreover, it is a passage that says nothing that would not have been acceptable to Locke's great teacher Hooker, who certainly was not a Lockean, or to Hooker's great teacher St. Thomas Aquinas. Finally, and a very crucial point, the Virginia Declaration makes a further statement about the "inherent rights" that, for reasons we will readily understand, we hear of far less often in the official literature than the supposedly Lockean statements we have already noticed. The rights, the Declaration begins by saying, are rights that pertain not to all men, not to individuals, but to the "good people of Virginia," and pertain to them precisely as "the basis and foundation of government." But at this point we must again pause, this time to answer a very sensible objection that will have occurred to the reader: What is the difference between rights that pertain to "the

people" and rights that pertain to "all men [as individuals]"? This is not only a sensible objection, but it brings us to the very heart of the matter before us.

Let us be very clear about the logic of the objection, which is based to a large extent on the logic of those brought up on the official literature. The people, it says, is made up of *individuals* and *individuals* are what count. To speak the truth of the matter, indeed, there is no such thing as the people, unless you mean by it a collection of individuals. In other words, "the people" is an abstraction, which possesses only a constructive reality; to speak therefore of the "rights of the people," the rights of all men, and the rights of individuals, is simply to say the same thing in three different ways. *How*, then, the objection concludes, can you suggest that there could be a right of the people that is not a right of the individuals who make up the people, and thus of each and every individual?

Now this is compelling logic for persons who have fallen under the spell of Locke, which for most purposes is the same thing as the spell of the official literature—compelling, if for no other reason, because it presupposes or reflects a metaphysics and epistemology of which, you may be sure, we shall not soon hear the last. In light of our purpose, which is an understanding of the American political tradition, we must content ourselves by answering as follows: All that may be right as rain; it may be true that rights inhere only in individuals. But our ancestors, even as late as the Virginia Declaration, did not so understand it. Their logic runs rather as follows: There are indeed rights of individuals (life, liberty, property, happiness, safety); those rights ought to be protected, and a good government will, within the limits of the possible, protect them, but that raises the questions: What *is* good government? What is the basis and foundation of such a government? These questions were very much on the minds of the Virginians as we can clearly see by glancing again at the passage in which they

define the very task at hand. Their immediate concern is with the rights that pertain to the *good people of Virginia*. And we do not overburden the language of the document by noting that it so much as tells us that the rights of all individuals will be safest if *first* the rights of the people are assured, and above all the right or rights of the people to govern themselves, that is, the very right that we have watched emerging in America from the Mayflower Compact through the Body of Liberties. There are, in other words, rights of the people that are *not* mere shorthand expressions for the rights of individuals; and we understand more clearly than ever before why we have not been encountering, in our canvass of the tradition, claims to rights on the part of individuals that prove to be claims to rights *against* the legislature. Most important of all, we see, that the Virginia Declaration, far from being anything particularly novel, falls right within the traditional symbolization as we have come to know and understand it.

It does, indeed, specify rights that are rights of individuals (although, curiously, it also tends to avoid the word "rights"). But—and this much we would expect from our previous inquiries—these turn out to be rights "against" the courts of law and the executive, that is, the so-called "common law rights": The right of an accused man to know what he is accused of, to be confronted with his accusers, to call favorable witnesses, to enjoy speedy trial by an impartial jury, to refuse to testify against himself. On the negative side, it guarantees against excessive bail, excessive fines, cruel and unusual punishment, unreasonable searches and seizures, and standing armies. Then, finally, on the positive side, a further list of rights: to trial by jury in civil suits, and—so it appears at first glance—to freedom of the press (a matter that we will come back to shortly).

Yet, for all of this, the main business of the Declaration, as its inherent logic indicates, is the further differentiation of a

symbol we already had in hand before our arrival in Virginia, "better ordering" understood as a matter of self-government by the people. Government, it says, is instituted for the "common benefit, protection, and security, of the people," and for "producing the greatest happiness and safety." This, of course, is our old Mayflower friend, the "general Good," now differentiated into almost the form in which it turns up in the Preamble of the Constitution. All power is vested in, and so derived from, the *people*, so that officials are the people's trustees and responsible to them—as we have seen them to be, by implication, in Massachusetts. This very idea will in due course become a basic, though tacit, principle of the Constitution. When, the document continues, a government "shall be found"—our old Mayflower friend "thought to be"—"inadequate or contrary" to the purposes named, "a majority of the community hath an indubitable, inalienable, and indefeasible right [one of the few cases in which the word "right" is used, but, clearly, a right of the people, now concerned as acting by majority vote, another of our old friends] to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal" (which again is one of our old friends "thought to be meet and convenient for the general Good," though now highly differentiated). These provisions of the Virginia Declaration are clearly the core of Article V of our Constitution which gives the majority of the American people the right in question.

No public office, we are told, should be "hereditary"—a new specification, but clearly a differentiation out of the electoral arrangements we encountered a century earlier; and, as we know, all offices in the 1789 Constitution are either elective or appointive. Legislative, executive, and judicial powers, the document continues, should be in separate and distinct hands which, again, is a specification already present, potentially, in the Body of Liberties. Executive and legislative offices should

be rotated, vacancies being supplied by "frequent, certain, and regular elections"—again a further differentiation of the Massachusetts differentiation of the Mayflower "better ordering," and one that will turn up in due course in the Philadelphia Constitution. The power of suspending laws, or their execution, shall be exercised only by consent of the representatives of the people, because such power exercised without that consent is injurious to the "rights" of "the people." This is a new specification, but clearly a differentiation out of the Mayflower claim to a capacity, on the part of the signers, to "enact laws, etc." But once again, though a new specification, this too will be incorporated into the Constitution.

What does all this add up to? At least this much: This listing of *rights of the people* that comes to us with the Virginia Declaration shows that the American people have arrived, already, in 1776, at the conception of *democratic government*, that is embodied in the greatest of the post-1776 symbols, namely, the Constitution. We at least began to understand why the Framers of the Constitution opposed the incorporation in it of a bill of rights, and did so on the grounds that it was already a bill of rights. The Constitution incorporated, lock, stock, and barrel, the Declaration's list of "rights of the people," although it omits, as if by conscious intention, the *individual* rights of the Virginia Declaration. As we shall see, the Framers stick to the primary meaning of "rights" in the Virginia Declaration, which has to do with individual rights only at second remove, and even then not as rights "against" the legislature—rights, that is, that the legislature is forbidden to infringe or violate. They stick, and let us emphasize this, to a conception of "rights" that has evolved precisely out of the Mayflower symbols to the extent that they are American symbols, not English symbols. They stick, in short, to a conception of rights that we now see to be the rights of Americans, not Englishmen—unless someone wants to argue that the rights

of the Englishmen in 1776 included the right to self-government of the kind that is embodied in the Virginia Declaration. This, we take it, nobody is about to do.

What about freedom of the press which we mentioned in passing? Is it not an individual right and even one that restricts the power of the legislature? If we look only to the text of the Virginia Declaration, we see at once (surprising as it may seem to many) there is no foundation for any such claim. "Freedom of the press," it says, "is one of the great bulwarks of liberty, and can never be restrained but by despotic governments."<sup>4</sup> At most the statement simply affirms a principle or maxim of good government; one that would have to be drastically altered or re-written to confer a legal right to individual citizens. Indeed, if we look a second time at the document, we find that it does not use the word "right" except when it is speaking of a right of the people. What is more, we find that when we come to the matter of "excessive bail," another of the so-called rights, the very same language is used. What the document tells us is that "excessive bail" *ought* not to be required. The same terminology is used with respect to unreasonable searches and seizures (or, as the Declaration puts it, searches and seizures by "general warrant") which, again, *ought* not to be permitted. One might say that the authors of the Declaration seem to be very cautious when they approach the area of what we, today, call individual rights. They only specify the "purest" and most procedural of the common law rights which, in effect, come down to being rights against the courts and administration. For instance, "a man,"

<sup>4</sup> Let us note first the "positioning" of this "right." It is to be found in section 12 of the 16 sections which compose the Virginia Bill of Rights. Also, pay close attention to the language of this injunction, if we may call it that. What is more important, we do not find such language, equivocal in nature, used with respect to the injunctions of the first eleven sections of the Virginia Bill of Rights. We will say more about this in Chap. 7 which is on the national Bill of Rights.

that is, each individual, "hath a right" to know what he is accused of, to confront hostile witnesses, to summon friendly witnesses, to be tried speedily by jury, to refuse to testify against himself. But, in this very sentence, covering matters which *we* now regard as personal or individual liberties or rights, the authors of the Declaration do not use the word "right" in the same manner as we do today. What we find in this connection is "no man [can] be deprived of his liberty, except by the *law of the land* or the judgement of his peers"—which, as we should expect from the tradition as we now know it, puts the matter of "liberty" right up to the legislature, and so becomes an affirmation of legislative supremacy. Moreover, to come back to freedom of the press, we know from the first chapter of this book that freedom of the press had, in those days, a meaning that made of it also an affirmation of legislative supremacy: Freedom of the press was freedom to publish within the limits set by the law of seditious libel, which again puts the matter up to the legislature. We are still far from the idea of legally enforceable individual rights that must be respected by the representative assembly. We will have occasion to say more, much more, about legislative supremacy in our chapter on the Bill of Rights.

Two provisions of the Virginia Declaration of Rights warrant our attention in this context. First, the apparent—but as we shall see merely apparent—affirmation of a right of all men, that is, an individual right, to the suffrage. Here, too, we find ourselves in a different world of discourse from that of the individual rights as the official literature usually explains them. If we look hard enough we see that it is not all men who have a right to the suffrage, but merely such men as have given "sufficient evidence of permanent common interest with, and attachment to, the community"—clearly an invitation to the legislature to decide, with an eye to the general good, who may vote and who may not, a power that, under the Constitution,

American legislatures continue to exercise, on condition that they can convince the courts that they are not acting arbitrarily. Perhaps it is not too much to say that the authors of the Virginia Declaration, once they move away from the area of procedural rules in courts of law, assume that an individual has rights only on pain of having performed certain *duties*, certain obligations, which—let us say it again—it is the business of the legislature to define. The Declaration puts us right back with the Connecticut and Massachusetts solution: A man's legal rights are, in general, the rights vouchsafed to him by the representative assembly—which, like the Lord of the Scriptures, giveth and taketh away.

We must, therefore, ask ourselves once again, Are we to understand that the legislature is being invited to do what it pleases, to improvise its own standards, to, in effect, set itself up as God? Here the Virginia Declaration gives us two answers which tell us "No." The legislature is expected—may, counted upon—to subordinate itself to considerations of humanity, civility, and Christianity. The very words of the document tell us that "no free government, or the blessings of liberty, can be preserved by any people but"—and let us attend carefully to the words employed—"by firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." This is a reiterated appeal to the deepest level of symbolization, the Massachusetts appeal to the political and moral philosophy of the Great Tradition of the West. We see once again our old friend, the symbol of a virtuous people. Clearly the legislature is *not* to set itself up as God. Precisely the function of the Declaration, at its most solemn moment, is to establish the standards which tell us (a) the representative assembly is supreme—a proposition which we might expect from our tradition—in the sense that no other *political* authority can challenge or gainsay it; but (b) its supremacy, its right or power, is simultaneous with

is obligation to subordinate itself to standards *not* of its own making—standards embodying, in Voegelin's phrase, the truth of the soul and of society as that truth has been made known to us by the great philosophers from whom, at this juncture, the Virginia Declaration draws its vocabulary.

Second, we confront another example of what Voegelin means by differentiation of symbols in the course of experience. We notice that something has happened between Massachusetts and Virginia to the symbol of "Christianity," whose continuity through the pre-1789 documents we have noted. "Government" is not mentioned in the paragraph that the Declaration devotes to this topic. More: The paragraph devoted to Christianity stands in juxtaposition with—indeed, follows hard upon—a paragraph in which the authors had every opportunity to mention Christianity in connection with government and, so it seems at least, deliberately passed up the opportunity. One might say that the Virginia Declaration drives a *wedge* between philosophy, which is the symbol to which it appeals when it speaks of justice, moderation, etc., and religion; and, with recognizably symbolic intent, drains the latter, religion, off for separate treatment. We should attend carefully to the language used, at least in order to decide whether we are to mark this as a new turn of the road in our tradition.

The authors of the Declaration do not, we perceive at once, understand or interpret themselves as less Christian, less committed to the truth of the soul and of society as that truth comes to us through Revelation, than, say, the signers of the Mayflower Compact. The Christian religion, they affirm, is the duty which "we," that is, all men, all individuals, owe "to our Creator." "We"—that is, all men, all individuals—have a "mortal duty," they affirm further, "to practice Christian forbearance, love, and charity, towards each other." This we recognize at once as a statement on the level of private, not public ethics,

if for no other reason than the matter of governmental or public ethics was amply dealt with in the preceding paragraph. What is affirmed, one might say, is the duty of all Virginians to obey the Ten Commandments plus, over and above the Ten, the Eleventh Commandment, the commandment to love one another. But there is no suggestion that, as in Massachusetts, it is the business of government to enforce the mutual duty in question, or even—to recur to the Mayflower Compact—to glorify God and advance the faith. In other words, the confusion that we noticed back in Massachusetts has been dispelled, and we are on the threshold of the idea, which in due course will become explicit in *The Federalist*, of a Christian society with a secular, that is precisely *not* religious, form of government.

The wedge we have been talking about turns out to be a wedge not so much between philosophy and religion (though to some degree it is that), but a wedge between the sphere of government and the sphere of society. The Christian religion is to govern the relations between Virginians out in society, but is, *as* religion, given no special status in the area of law and coercion. Indeed, the Declaration goes on to say, as on that showing we should expect it to, that the duty we owe to our Creator, and the manner of discharging it, "can be directed only by reason and conviction, *not by force or violence*"<sup>5</sup>—that is, as we understand it, not by government. In the sphere of government, in short, religion is to be given the status it enjoys in the Constitution, which is to say *no* status at all. And it does not seem that we go too far when we say, doubling back to our question as to where the American tradition begins: The Mayflower symbols, in this area at least, have arrived—even before the Declaration of Independence—at their definitive American differentiation, and done so in the course of an evolution that we can study only on *this* side of the Atlantic.

<sup>5</sup> Emphasis added.

But having said this, let us repeat that the authors of the Virginia Declaration did *not* understand themselves as less Christian than the authors of the Body of Liberties. It is *not* that the authors of the Virginia Declaration, seemingly taking issue with the authors of the Body of Liberties, understand the commonwealth to be other than a Christian commonwealth. But they do understand a Christian commonwealth to be a different sort of thing from what it was in Massachusetts; in the very act of symbolically disestablishing the Christian religion, by separating it from American government, they establish it as the religion, the public truth, of American society; a status which (we believe) it continues to enjoy. We must not, then, suppose ourselves to be entering the intellectual and spiritual world of some of our Supreme Court justices, the more so as we find the Declaration going on to say: "All men are equally entitled to the free exercise of religion, according to the dictates of conscience." Only by wrenching these words out of context could we get out of them a "right" claimed by atheists and agnostics—a "right," that is, to the free exercise of irreligion. The very words we have quoted above follow the declaration that religion is a duty that every man owes to his Creator and, to boot, they are preceded by the word "therefore." The "right" to free exercise of religion emerges, in short, as a correlative of the duty to worship God. In the context of the Virginia Declaration, it can have no other meaning. Nor do we think—and this will seem heretical to some—that the framers of our First Amendment entertained a different view.

## CHAPTER V

# The Declaration of Independence: A Derailment?

We now take up the most difficult and undoubtedly the most controversial of our tasks: the symbolism and so the meaning of the Declaration of Independence in the context of the American tradition.<sup>1</sup> Before we discuss its place in the tradition, a few preliminary comments are in order. One obvious matter—so obvious, in fact, it hardly seems to merit our attention or emphasis—is that the Declaration of Independence should be read for what it purports to be. We begin at this point because the official literature tends to overlook the obvious: The document's primary purpose is to announce publicly the severing of those "bands" that had, until July 4, 1776, tied us morally and legally to Great Britain. *That* is the purpose of the document and *that*, we submit, should be foremost in the minds of those who read and interpret it.

The Declaration begins with these words: "*The unanimous Declaration of the thirteen united States of America.*" The words are in themselves important because we see at once that, contrary to what we may have been taught in our institutions of higher learning, there is no pretense as of this moment that we are, legally speaking or otherwise, one people or nation. Why, indeed, would this phraseology be used if the participants felt the colonies should be regarded as one? The thirteen

<sup>1</sup> We use as our text the Declaration as reproduced in Poore, I, 1-6.