TRACING THE LINEAGE:
TEXTUAL AND CONCEPTUAL SIMILARITIES IN THE REVOLUTIONARY-ERA STATE DECLARATIONS OF RIGHTS OF VIRGINIA, MARYLAND, AND DELAWARE

by

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For Laure, Sam, and Eli.

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The May 27, 1776, draft of the Virginia Declaration of Rights has been called a model for the American Declaration of Independence,[1] the French Declaration of the Rights of Man,[2] and the bills and declarations of rights of many of the American states.[3] This article traces one strand of that influence, the influence of Virginia's May 27, 1776, draft on the declarations of rights adopted by Maryland and Delaware in the fall of 1776.[4] Further, it will examine the relationship between these three documents.[5] Examining these three Revolutionary War-era

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[1] PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 125-28 (1997); JULIAN P. BOYD, THE DECLARATION OF INDEPENDENCE _____ (1943). *But see* EDWARD DUMBAULD, THE DECLARATION OF INDEPENDENCE 21 (1950).

[2] A. E. Dick Howard, *The Values of Federalism*, 1 NEW EUR. L. REV. 143, 143 (1993); A. E. Dick Howard, *How Ideas Travel: The Bill of Rights at Home and Abroad*, 63 N.Y. ST. BAR J. 6, 8 (1991); Albert P. Blaustein, *Our Most Important Export: The Influence of the United States Constitution Abroad*, 3 CONN. J. INT'L LAW 15, 16 (1987); GILBERT CHINARD, LA DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN ET SES ANTÉCÉDENTS AMÉRICAINS (1945); LUCY M. GIDNEY, L'INFLUENCE DES ETATS-UNIS D'AMÉRIQUE SUR BRISSOT, CONCORCET ET MME. ROLAND (1930); Gilbert Chinard, *Notes on the French Translations of the 'Forms of Government or Constitutions of the Several United States' 1778 and 1783*, 88-106 YEARBOOK OF THE AMERICAN PHILOSOPHICAL SOCIETY, 1943; Durand Echeverria, *French Publication of the Declaration of Independence and the American Constitutions, 1776-1783*, 47 PAPERS OF THE BIBLIOGRAPHICAL SOCIETY OF AMERICA 313 (1953).

[3] JOHN SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783 103 (1988) (identifying the Virginia Declaration of Rights as the basis for those adopted in Pennsylvania, Massachusetts, Delaware, Maryland, Vermont, and New Hampshire); G. Alan Tarr, *The Ohio Constitution of 1802: An Introduction*, http://www-camlaw.rutgers.edu/statecon/papers.html (visited April 29, 2001) (identifying the Virginia Declaration of Rights as the basis for the Ohio Declaration of Rights of 1802); R. Carter Pittman, *Book Review of* Sources of Our Liberties, 68 VA. MAG. HIST. & BIOG. 109 (1960); ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 48 (U.N.C. Press, 1951) ("[I]t is hardly remarkable that in the bills of rights adopted in Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts, and New Hampshire, there are provisions that carry either the import or the verbatim language of articles in the Virginia declaration.").

[4] There are other such strands of influence derived from the May 27, 1776, draft of the Virginia Declaration of Rights. One that has been identified and partially explored is the Virginia-Pennsylvania-Kentucky strand. Ken Gormley & Rhonda G. Hartman, *The Kentucky Bill of Rights: A Bicentennial Celebration*, 80 KY. L. J. 1 (1992) (tracing the borrowing of provisions from the Pennsylvania Declaration of Rights of 1790 into the Kentucky Bill of Rights of 1792). Another may prove to be a Virginia—(Maryland or Delaware)—Ohio—Indiana—Oregon strand. *See supra*, note 337.

[5] In so doing, it is my intention to fill a small portion of the research agenda for state constitutional law recommended by Professor Robert F. Williams of Rutgers-Camden Law School. *See* Robert F. Williams, *Foreword: A Research Agenda in State Constitutional Law*, 66 TEMP. L. REV. 1145, 1149 (1993) (identifying

bills of rights together permits some general observations about the interstate borrowing of constitutional provisions, as well as a series of lenses through which to deepen our understanding of many of these provisions.[6]

I. THE EVENTS IN THE STATES: VIRGINIA, MARYLAND, AND DELAWARE

In a resolution drafted on May 10, 1776, and finalized on May 15, 1776, the Second Continental Congress, meeting in Philadelphia, recommended

> to the respective assemblies and conventions of the United Colonies, where no government sufficient to the exigencies of their affairs, have been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their Constituents in particular, and America in general.[7]

This resolution provided the impetus for constitution drafting throughout the mid-Atlantic states and elsewhere.

A. Virginia

Virginia did not even wait for the Continental Congress's invitation. Elections had been held that spring for a state convention, the fifth such "extra-legal" convention that had been called to govern Virginia in the absence of Royal authority.[8] When the convention met in

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"state constitutional history, with a focus on both individual states, as well as comparative regional … treatment" as components of state constitutional research) (footnote omitted). Professor Williams' research agenda specifically suggests an interdisciplinary approach. The merits of this are manifest. In this article, I point out, for the benefit of the legal community, an error that the history community has known, understood, and corrected since the 1930s.

[6] This article does not address interstate borrowing of constitutional, as opposed to bill of rights, provisions. Although copies of various state constitutions circulated throughout the colonies, and were published in the newspapers, there was little interstate borrowing of constitutional provisions. *But see*, *infra* note 23 (regarding Maryland adaptation of New Jersey constitutional property qualification provisions). While bills of rights were thought to contain universal statements about the rights of man, the constitutions were drafted recognizing the unique needs of each state. Existing governmental structures needed to be retained, modified, or specifically discarded. And because those structures were different in each state, so too was the constitutional reaction.

[7] 4 JOURNALS OF CONTINENTAL CONGRESS 342 (Ford ed.) (May 10, 1776). *See also*, 4 JOURNALS OF CONTINENTAL CONGRESS 357-58 (Ford ed.) (May 15, 1776) (adopting a preamble to the resolution). WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 61 (U.N.C. Press, 1980).

[8] JOHN SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783 94 (1988).

Williamsburg on May 6, 1776, delegates were already considering the possibility of independence.[9] In fact, 45 convention delegates who were also members of Virginia's House of Burgesses assembled before the convention to declare the old legislature dead.[10] The convention began its work with more mundane tasks, but on May 15, 1776—the same day that the Continental Congress adopted its resolution—the Virginia convention adopted a resolution calling on Virginia's delegates to the Continental Congress to declare the United Colonies free and independent states.[11] Thomas Nelson, a delegate both to the Continental Congress and to the Virginia Convention, rode off directly to Philadelphia carrying an official copy of the resolution for the Continental Congress.[12] The resolution itself did not declare Virginia's independence, but requested that the Continental Congress do so. Nevertheless, "with its passage Virginia independence became a fact."[13]

The Virginia convention immediately passed a companion resolution creating a committee to prepare a declaration of rights and "such a plan of government as will be most likely to maintain peace and order in this colony, and secure substantial and equal liberty to the

[9] ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 30 (U.N.C. Press, 1951).

[10] JOHN SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783 95 (1988); Thad W. Tate, *The Social Contract in America, 1774-1787, Revolutionary Theory as a Conservative Instrument*, 22 WM. & MARY Q. 3rd 375, 378 (1965).

[11] Apparently, Edmund Pendleton, the convention president, was responsible for the final draft of the resolve, reconciling drafts submitted by Meriwether "Fiddlehead" Smith, Patrick Henry, Thomas Nelson, and Pendleton, himself. JOHN SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783 95-96 (1988) (crediting Henry, Smith, and Pendleton); EMORY EVANS, THOMAS NELSON OF YORKTOWN: REVOLUTIONARY VIRGINIAN 57 (1975) (crediting Nelson, Henry, Smith, and Pendleton); ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 48 (U.N.C. Press, 1951) (crediting Pendleton, Nelson, and Henry).

[12] JOHN SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783 97 (1988); EMORY EVANS, THOMAS NELSON OF YORKTOWN: REVOLUTIONARY VIRGINIAN 58 (1975). Selby points out that Nelson was delayed on his way to Philadelphia, and that the *Pennsylvania Evening Post* printed Virginia's resolution before Nelson arrived.

[13] JOHN SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783 97 (1988).

people."[14] The drafting committee was an unwieldy 27-member committee.[15] Frustrated with the committee's slow pace and "useless" committee members, George Mason wrote out his own draft declaration of rights with the assistance of Thomas Ludwell Lee.[16] Professor Robert Rutland, the editor of Mason's papers, estimates that Mason wrote this draft May 20-24, 1776.[17] The draft contained ten proposals written by Mason and two others in the handwriting of Lee.[18] Mason submitted this draft to the committee, which added eight additional provisions.[19] The committee draft was read aloud to the convention body on May 27, 1776, and immediately ordered printed.[20] It is this draft that was circulated among the American colonies and abroad.[21]

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[14] 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 7, 34 (1971) *citing* 1 PAPERS OF THOMAS JEFFERSON (Boyd ed.) 290-91. Professor Howard explains the relationship between these three events (the call for independence, the call to draft a declaration of rights, and the call to draft a constitution), stating

> in the minds of those who drafted and passed the resolutions, to sever relations with one government implied the necessity to provide for another. Moreover, to create a new government required two acts: provision for the structure and powers of government and a declaration of those rights which should be beyond the reach of government.

1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 34 (1971).

[15] 1 THE PAPERS OF GEORGE MASON, 1725-1792 274 (Rutland ed.). In another account, Professor Rutland appears to contradict himself, calling it a "committee of twenty-eight delegates…. George Mason and James Madison are among four additional members appointed before the week ended." ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 32 (U.N.C. Press, 1951). Yet another tally of the committee membership is given by Professor Hugh Blair Grigsby, who identifies 27 original committee members by name, and reports that 7 more members were added "as they arrived in the city." HUGH BLAIR GRIGSBY, THE VIRGINIA CONVENTION OF 1776, 19 at n.* (1969 reprint).

[16] 1 THE PAPERS OF GEORGE MASON, 1725-1792 274 (Rutland ed.).

[17] 1 THE PAPERS OF GEORGE MASON, 1725-1792 275, 279 (Rutland ed.) (There is a slight discrepancy. On page 275 Professor Rutland says that the original draft was written during the week of May 20-26. On page 279, he refines his estimate, saying that it was most likely written between May 20 and 24).

[18] Professor Rutland is silent as to whether the provisions of the original draft written in Lee's handwriting were his own words or merely Lee's recording Mason's words. 1 THE PAPERS OF GEORGE MASON, 1725-1792 ____ (Rutland ed.).

[19] 1 THE PAPERS OF GEORGE MASON, 1725-1792 275 (Rutland ed.).

[20] 1 THE PAPERS OF GEORGE MASON, 1725-1792 275 (Rutland ed.).

[21] *See infra*, notes 1-3 (and accompanying text). *See also* CLINTON ROSSITER, THE POLITICAL THOUGHT OF THE AMERICAN REVOLUTION 231 (1963), identifying Mason's Virginia Declaration of Rights, and John Adams's Massachusetts Constitution as "among the world's most memorable triumphs in applied political theory." My favorite description is from Professor Grigsby, who compares the Virginia Declaration of Rights favorably to the English Petition of Right, the English Declaration of Rights, and the American Declaration of Independence, and concludes by saying:

Copies of the committee's May 27, 1776, draft of the Virginia Declaration of Rights quickly spread up and down the eastern seaboard. Handwritten copies of the committee draft were mailed north.[22] Copies were published in the *Virginia Gazette* on June 1; the *Pennsylvania Evening Post* on June 6; the *Pennsylvania Ledger* on June 8; the *Pennsylvania Gazette* on June 12; and the *Maryland Gazette* on June 13.[23]

> The Virginia 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 people of England from the earliest times. To have written such a paper required the taste of a scholar, the wisdom of a statesman, and the purity of the patriot. The critical eye can detect in its sixteen sections the history of England in miniature. That it should have been thrown off by [George Mason,] a planter hastily summoned from his plough to fill a vacancy in the public councils; who was not a member of that profession the pursuits of which bring its votaries more directly than any other into contact with the principles of political liberty; and who performed his work so thoroughly that it has neither received nor required any alteration or amendment for more than three-fourths of a century, fills the mind with admiration and grandeur.

HUGH BLAIR GRIGSBY, THE VIRGINIA CONVENTION OF 1776, 163-64 (1969 reprint). *But see*, J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776 178 n.28 (1936) ("Although the Virginia Bill of Rights was little more than a restatement of the great principles of English constitutional liberty as embodied in the Magna Charta, the Petition of Rights, and the Bill of Rights, yet it must be considered a notable victory for true democracy.").

[22] JOHN SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783 102 (1988); 1 THE PAPERS OF GEORGE MASON, 1725-1792 275 (Rutland ed.) (reporting that on or about June 1, 1776 Thomas Ludwell Lee mailed a copy to his brother Richard Henry Lee); ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 44 (U.N.C. Press, 1951) ("the Virginia Declaration of Rights was broadcast throughout the colonies in private letters and public print.").

[23] These publication dates are given in 1 THE PAPERS OF GEORGE MASON, 1725-1792 276 (Rutland ed.) and in R. Carter Pittman, *Jasper Yeates's Notes on the Pennsylvania Ratifying Convention, 1787*, 22 WM. & MARY Q. 3rd 301, 304 n.12 (1965). Many of the reprints erroneously identified the draft as a May 24 draft, rather than May 27. 1 THE PAPERS OF GEORGE MASON, 1725-1792 276 (Rutland ed.).

Other state constitutions were reprinted in the newspapers as well. For example, the New Jersey Constitution of 1776 was published in the *Maryland Gazette* on July 25 and August 1, 1776. Thornton Anderson, *Maryland's Property Qualifications for Office: A Reinterpretation of the Constitutional Convention of 1776*, 73 MD. HIST. MAG. 327 (1978). Professor Anderson determined that New Jersey's Constitution served as a model for Maryland's property qualification provisions. Thornton Anderson, *Maryland's Property Qualifications for Office: A Reinterpretation of the Constitutional Convention of 1776*, 73 MD. HIST. MAG. 327, 329 (1978). Because the New Jersey Constitution did not contain a declaration or bill of rights, and only a few, limited rights provisions at all, it could not have served as a basis for Maryland's declaration of rights. *See* ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 2 (1990); CHARLES R. ERDMAN, JR., THE NEW JERSEY CONSTITUTION OF 1776 46-48 (1929).

The Virginia convention, sitting as a committee of the whole, considered the May 27, 1776, committee draft, made a few corrections and alterations, and, on June 12, 1776 adopted the first American declaration of rights.[24]

B. Maryland

Beginning in 1774, and continuing throughout the revolutionary period, Maryland was governed by convention.[25] The eighth of these conventions authorized the call for elections to a ninth convention for the "express purpose" of drafting a state constitution.[26] The convention assembled in Annapolis on August 14, 1776.[27] On Saturday, August 17, 1776, the convention elected a drafting committee to prepare "a declaration and charter of rights, and a form of

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[24] 1 THE PAPERS OF GEORGE MASON, 1725-1792 275, 287 (Rutland ed.). It is unclear why the May 27 draft was circulated so widely, while the June 12 version adopted by the convention received so little notoriety. As a result of this historical anomaly, however, any changes made between May 27 and June 12 only applied in Virginia, and did not serve to influence the course of events in succeeding constitutional conventions in America and abroad. 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 39 (1971). John Selby notes that only North Carolina seems to have relied on the final (June 12) version, as opposed to the committee draft of May 27. JOHN SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783 103 (1988).

In Rice v. State, Chief Judge Robert C. Murphy of the Court of Appeals of Maryland noted a similarity between the Maryland Declaration of Rights of 1776 and the June 12, 1776, official version of the Virginia Declaration of Rights. Rice v. State, 311 Md. 116, 127 n.8 (1987) ("It is notable that the Maryland Declaration of Rights [of 1776] resembled in many respects the Virginia Declaration of Rights, approved by the Virginia Convention on June 12, 1776."). The Rice case involved an interpretation of the jury unanimity clause of Article 19 of the Maryland Declaration of Rights. The analogous portion of the Virginia Declaration of Rights, Article 8, was unchanged between May 27 and June 12, so Chief Judge Murphy would not have had the opportunity to notice the even greater similarity between the May 27 Virginia draft and the Maryland version.

[25] *See generally*, John Archer Silver, *The Provisional Government of Maryland (1774-1777)*, X JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE (13th Ser., Oct. 1895).

[26] PROCEEDINGS OF THE CONVENTION OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775 & 1776 184-89 (Jonas Green, 1836); http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/index.html (visited April 29, 2001).

[27] THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977) (beginning August 14, 1776); PROCEEDINGS OF THE CONVENTION OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775 & 1776 ____ (Jonas Green, 1836); http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/index.html (visited April 29, 2001).

government for this state."[28] By August 27, 1776, an initial draft of the Declaration of Rights was circulated to the convention body.[29] A draft of the "frame of government" was completed on September 10, 1776.[30] A second draft of the Declaration of Rights was produced on September 17, 1776, which was circulated throughout Maryland for public comment between September 17, 1776, and October 2, 1776.[31] The convention body adopted the Declaration of Rights in final form on November 4, 1776, and the new constitution on November 11, 1776.[32]

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[28] THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977) (August 17, 1776); PROCEEDINGS OF THE CONVENTION OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775 & 1776 222 (Jonas Green, 1836); http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/index.html (visited April 29, 2001). The drafting committee was comprised of Charles Carroll, Barrister; Charles Carroll of Carrollton; Samuel Chase; Robert Goldsborough; William Paca; George Plater; and Matthew Tilghman. Credit for drafting the August 27, 1776 draft has been given alternatively to Charles Carroll, Barrister, *see* ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 51 (U.N.C. Press, 1951) (although pointing out that "[c]onvincing evidence on the point is lacking"); H. H. WALKER LEWIS, THE MARYLAND CONSTITUTION OF 1776____ n.54 (1976) (citing GEORGE A. HANSON, OLD KENT: THE EASTERN SHORE OF MARYLAND 146 (1876) and 2 KATE MASON ROWLAND, THE LIFE OF CHARLES CARROLL OF CARROLLTON, 1737-1832 190 (1908)), and Charles Carroll of Carrollton and Samuel Chase, *see* John C Rainbolt, *A Note on the Maryland Declaration of Rights and Constitution of 1776*, 66 MD. HIST. MAG. 420, 423 n.8 (1971) (*citing* PHILIP A. CROWL, MARYLAND DURING AND AFTER THE REVOLUTION: A POLITICAL AND ECONOMIC STUDY 34-35 (1943)).

[29] THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977) (August 27, 1776); PROCEEDINGS OF THE CONVENTION OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775 & 1776 ____ (Jonas Green, 1836); http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/index.html (visited April 29, 2001). *See generally*, Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637 (1998) (comparing two previous drafts, dated August 27, 1776 and September 17, 1776, with Maryland Declaration of Rights adopted by the convention on November 4, 1776).

[30] THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977) (September 10, 1776); PROCEEDINGS OF THE CONVENTION OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775 & 1776 ____ (Jonas Green, 1836); http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/index.html (visited April 29, 2001).

[31] THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977) (September 17, 1776) (adopting resolutions providing that "the said bill of rights and form of government be immediately printed for the consideration of the people at large, and that twelve copies thereof be sent without delay to each county in this state;" and to adjourn until September 30); PROCEEDINGS OF THE CONVENTION OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775 & 1776 ____ (Jonas Green, 1836) (same); http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/index.html (visited April 29, 2001). The Convention actually resumed on October 2, 1776. *See* THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST

C. Delaware

In Delaware, immediately after independence, Assembly Speaker Caesar Rodney called a special session of the assembly beginning on July 22, 1776.[33] The assembly approved a call for a convention "to ordain and declare the future Form of Government of this State."[34] The convention assembled in New Castle on August 27, 1776.[35] A drafting committee was assigned the task of drafting the Declaration of Rights.[36] The convention approved the proposed

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MARYLAND CONSTITUTION (1977) (October 2, 1776); PROCEEDINGS OF THE CONVENTION OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775 & 1776 ____ (Jonas Green, 1836); http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/index.html (visited April 29, 2001).

The public comment period in Maryland was strongly opposed by the drafting committee and the "Cosmopolitan" voting bloc they led, and supported by the "Localist" faction. Professor David C. Skaggs argues that the Localist faction sought this public comment period both because they saw "the creation of fundamental law … required more than the approval of the assembly to achieve legitimacy superior to that of a legislative statute," David Curtis Skaggs, *Origins of the Maryland Party System: The Constitutional Convention of 1776*, 75 MD. HIST. MAG. 95, 102 (1980), and "as an attack on the committee's draft." David Curtis Skaggs, *Origins of the Maryland Party System: The Constitutional Convention of 1776*, 75 MD. HIST. MAG. 95, 102 (1980).

[32] THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977) (November 4, 1776); (November 11, 1776); PROCEEDINGS OF THE CONVENTION OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775 & 1776 ____, ____ (Jonas Green, 1836); also available on-line at http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/index.html (visited April 29, 2001).

[33] GEORGE HERBERT RYDEN, LETTERS TO AND FROM CAESAR RODNEY, 1756-1784 94-95 (Univ. of Penna., 1933); H. Clay Reed, *The Delaware Constitution of 1776*, DELAWARE NOTES 15 (Sixth Series, 1930).

[34] RICHARD LYNCH MUMFORD, CONSTITUTIONAL DEVELOPMENT IN THE STATE OF DELAWARE, 1776-1897 51 (unpublished Ph.D. dissertation, Univ. of Delaware, 1968).

[35] PROCEEDINGS OF THE CONVENTION OF THE DELAWARE STATE HELD AT NEW-CASTLE ON TUESDAY THE TWENTY-SEVENTH OF AUGUST, 1776 5 (Public Archives Comm. 1927).

[36] PROCEEDINGS OF THE CONVENTION OF THE DELAWARE STATE HELD AT NEW-CASTLE ON TUESDAY THE TWENTY-SEVENTH OF AUGUST, 1776 12 (Public Archives Comm. 1927). The drafting committee consisted of convention president George Read and delegates Richard Bassett, Jacob Moore, Charles Ridgely, John Evans, Alexander Porter, James Sykes, John Jones, James Rench, and William Polk. Delegate Thomas McKean was added to the committee on September 7. PROCEEDINGS OF THE CONVENTION OF THE DELAWARE STATE HELD AT NEW-CASTLE ON TUESDAY THE TWENTY-SEVENTH OF AUGUST, 1776 15 (Public Archives Comm. 1927).

Declaration of Rights on September 11, 1776.[37] A "frame of government" was drafted by September 17, 1776,[38] and adopted three days later, on September 20, 1776.[39]

For convenience, the relevant dates are summarized in the following chart:

Event	Virginia	Maryland	Delaware
Convention called to draft a state constitution	None[40]	June 28	July 27
Conventions assemble	May 6	August 14	August 27
Draft of declaration of rights completed	June 12	August 27	September 11
Draft of "frame of government" completed	June 24[41]	September 10	September 17
Public comment period held	None	September 17 to October 2	None
Adoption and effective date	June 12	November 11	September 20

II. IDENTIFYING THE PROPER SEQUENCE OF EVENTS AND CORRECTING OLD ERRORS

Ascertaining the chronological order in which the state constitutional conventions completed and adopted their respective bills of rights, while informative, cannot answer more important questions about the influence a given bill of rights may have had on subsequent bills. Moreover, where there is a misunderstanding about the chronology of events, it can lead to

[37] PROCEEDINGS OF THE CONVENTION OF THE DELAWARE STATE HELD AT NEW-CASTLE ON TUESDAY THE TWENTY-SEVENTH OF AUGUST, 1776 17-20 (Public Archives Comm. 1927).

[38] PROCEEDINGS OF THE CONVENTION OF THE DELAWARE STATE HELD AT NEW-CASTLE ON TUESDAY THE TWENTY-SEVENTH OF AUGUST, 1776 24 (Public Archives Comm. 1927).

[39] PROCEEDINGS OF THE CONVENTION OF THE DELAWARE STATE HELD AT NEW-CASTLE ON TUESDAY THE TWENTY-SEVENTH OF AUGUST, 1776 26-35 (Public Archives Comm. 1927).

[40] The Virginia convention was not called for the specific purpose of drafting a constitution.

mistaken impressions of who influenced whom, and to what degree. Such, unfortunately, is the case here.

Max Farrand, who would go on to great fame as the editor of the Records of the Federal Constitutional Convention,[42] in 1897 published an article in the *American Historical Review* titled "The Delaware Bill of Rights of 1776."[43] In that article, Professor Farrand attempted to determine which of these revolutionary-era state bills of rights influenced the others. Farrand correctly, if implicitly, understood that Virginia's bill of rights was drafted first, followed by Pennsylvania's. As Professor Farrand noted, "[i]nasmuch as the Pennsylvania bill of rights was completed and adopted on August 16, and was printed in the *Pennsylvania Gazette* of August 21, it must have been in the hands of the members of the Delaware convention when they assembled in Newcastle one week later…"[44]

"The question of priority between Delaware and Maryland is not so easily disposed of," Professor Farrand wrote.[45] Based on the fact that Delaware's Declaration of Rights was approved exactly two months before the approval of Maryland's Declaration of Rights, and because of the obvious similarities between the two documents, Farrand concluded that Delaware's was the model, and that Marylanders copied it: "it is … improbable that Delaware could have profited by Maryland's declaration of rights."[46] Farrand went on to conclude that much of the Delaware draft was borrowed from the Pennsylvania bill of rights.[47]

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[41] HUGH BLAIR GRIGSBY, THE VIRGINIA CONVENTION OF 1776, 19 (1969 reprint).

[42] RECORDS OF THE FEDERAL CONVENTION OF 1787 (Farrand ed.).

[43] Max Farrand, *The Delaware Bill of Rights of 1776*, 3 AM. HIST. R. 641 (1897).

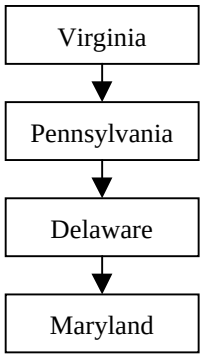
[44] Max Farrand, *The Delaware Bill of Rights of 1776*, 3 AM. HIST. R. 641, 647 (1897).

[45] Max Farrand, *The Delaware Bill of Rights of 1776*, 3 AM. HIST. R. 641, 647 (1897).

[46] Max Farrand, *The Delaware Bill of Rights of 1776*, 3 AM. HIST. R. 641, 648 (1897).

[47] Max Farrand, *The Delaware Bill of Rights of 1776*, 3 AM. HIST. R. 641, 647 n.1 (1897). See also, *supra* n.52.

Thus, Professor Farrand's conclusions can be graphically represented as follows:



The flaw in Professor Farrand's theory is that he had searched for, but failed to locate, the August 27, 1776, draft of the Maryland Declaration of Rights. Without that draft, Farrand could only make an educated guess at the order in which the work was undertaken. As Professor Farrand stated, "[a] copy of the original draft presented by the committee on August 27 would at once settle the whole question…."[48] Now that a copy of this August 27, 1776, draft of the Maryland declaration of rights has been discovered, it commends the opposite conclusion.[49] Unfortunately, however, Professor Farrand's conclusion continues to dominate the legal literature and many have repeated his error.[50]

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[48] Max Farrand, *The Delaware Bill of Rights of 1776*, 3 AM. HIST. R. 641, 648 (1897).

[49] A printed version of the August 27, 1776, draft may be found in Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637 (1998), but not in the electronic versions of that article found on Lexis and Westlaw. A photographic reproduction of the original draft is available on-line at http://www.mdarchives.state.md.us/msa/speccol/2221/04/03/html/0000.html (visited April 29, 2001).

[50] *See e.g.*, Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2200 n. 210 (1998); William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 434 n.592 (1997); Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1307-08 n.183 (1995) (citing Max Farrand, *The Delaware Bill of Rights of 1776*, 3 AM. HIST. R. 641 (1897)); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1119-20 (1994) (citing Max Farrand, *The Delaware Bill of Rights of 1776*, 3 AM. HIST. R. 641 (1897)); Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL OF RTS. J. 127 n.96 (1993); Donald S. Lutz, *The State Constitutional Pedigree of the U. S. Bill of Rights*, 22 PUBLIUS 19, 21 (Spring 1992).

Professor William F. Swindler, a compiler of American constitutions, throws up his hands when confronted with the question:

> The constitutional conventions of Delaware, Maryland and Pennsylvania were in session at virtually the same time, and considering the relative proximity of the sites at Annapolis, New

A Revised Chronology

Virginia's declaration of rights was the first drafted, and though many of its provisions were derivative of English law including Magna Carta and the English Bill of Rights, it must be considered the original American bill of rights. The Maryland and Pennsylvania conventions both had access to the May 27 draft of the Virginia Declaration of Rights. Both the Maryland and Pennsylvania conventions made use of the May 27 Virginia draft as a starting point for their own labors. It is unclear now whether the Delaware convention had access to the Virginia draft. In any event, if the Delaware framers had the Virginia draft, they did not use it as a model for their own efforts.

Pennsylvania's constitutional convention drafted next, completing its declaration of rights on July 15. The text of Pennsylvania's declaration shows its reliance on Virginia's May 27 draft. Although the Pennsylvania Declaration of Rights was available to both the Maryland[51] and Delaware constitutional conventions, both states largely ignored the Pennsylvania draft.[52]

> Castle and Philadelphia and the intimacy of personal relationships among delegates from these states to the First or Second Continental Congresses, it is not surprising to find many of the provisions—particularly in the bills of rights—identical in language. *It is difficult to determine which borrowed from which*…

2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 204 (William F. Swindler, ed., 1973) (emphasis added). *But see* Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS L.Q. 199, 208 (2000) (correctly identifying the "unpublished first draft of Maryland's declaration" as a source for Delaware's 1776 declaration of rights).

[51] That the Maryland drafters would ignore Pennsylvania's draft may be consistent with the horror with which the Maryland delegates regarded Pennsylvania's proposed form of government. *See infra*, note 54. For an analysis of the Baltimore readership of Philadelphia newspapers at this period, *see* RONALD HOFFMAN, A SPIRIT OF DISSENSION: ECONOMICS, POLITICS AND REVOLUTION IN MARYLAND 61-65 (1973).

[52] Professor Farrand notes three provisions that bear textual similarities between the Pennsylvania and the Delaware bills of rights (DE #2 and PA #2; DE #4 and PA #3; and DE #10 and PA #8). I concur in these observations. Farrand went further, however, and suggested, without substantiation, that "[n]ot merely the three articles … but also nine others, making practically the whole of the Pennsylvania declaration, are included in substance in Delaware's bill of rights." Max Farrand, *The Delaware Bill of Rights of 1776*, 3 AM. HIST. R. 641, 647 n.1 (1897). Farrand needs this to be true to support his conclusion that the text and ideas contained within the respective bills of rights passed from Virginia to Pennsylvania to Delaware to Maryland. When the fallacy of this hypothesis is exposed, and it is clear that the Delaware drafters had access to both the Maryland and Pennsylvania drafts, it is remarkable how *few* similarities there are between the Pennsylvania and Delaware drafts. While Professor Rutland does not go quite so far, he too notes that the Pennsylvania connection is less than was assumed by Professor

A careful review of the proceedings of the respective conventions, however, reveals that Maryland's first draft declaration of rights was completed on August 27, 1776, the same day that the Delaware Convention convened. Given that Maryland's August 27, 1776, draft was, contrary to Professor Farrand's theory, substantially similar to the version ultimately adopted,[53] it is clear that Maryland's version preceded the Delaware version.

That Maryland's drafting preceded that of Delaware is not enough, by itself, to establish that Maryland was the model for Delaware. Additionally, however, we know that Delaware drafters had access to drafts of the Maryland Declaration of Rights, mailed to them by friends in Annapolis and Philadelphia.[54] A review of the respective texts, conducted below, suggests that Maryland's declaration and that of Delaware are too similar for anyone to conclude that it was mere coincidence.[55] The final evidence is the testimony of George Read, who served both as

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Farrand. ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 53-54 (U.N.C. Press, 1951).

[53] For a comparison of the August 27, September 17, and November 4, 1776, drafts of the Maryland Declaration of Rights, *see* Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 647-76 (1998). *See infra*, note 49.

[54] Dr. Edward Papenfuse has written that the drafts of the Maryland constitution:

> were sent by Samuel Chase to John Dickinson on September 29, 1776, for his comments and criticisms, accompanied by an urgent appeal that Dickinson come in person to Annapolis to advise the Convention on the merits and defects of the drafts. Chase's request was echoed by Thomas Stone, who as a member of Congress was particularly conscious of the radical constitution recently adopted by Pennsylvania. In the hope that Dickinson could help prevent a similar occurrence in Maryland, Stone wrote:
>
> *It is my earnest wish that you should spend a few days at Annapolis while the government of Maryland is under consideration, being satisfied you would render essential most service to that state by the assistance you are able to give in forming a constitution upon permanent first principles & I think it not improbably that a well-formed government in a state so near as Maryland might lend to restore the affairs of this [Pennsylvania] from that anarchy and confusion which must attend any attempt to execute their present no plan of polity.*
>
> All indications are that Dickinson did not come to Annapolis, but he did send Chase his remarks on the draft of the "Bill of Rights and Frame of Government."

THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977) (introduction).

[55] This was Professor Farrand's conclusion as well: "On reading these articles [of the Delaware Declaration of Rights of 1776] one is impressed with their likeness to the corresponding articles of the Pennsylvania and Maryland

presiding officer of the Delaware convention, and as chairman of the committee assigned to draft the declaration of rights. In a letter to Caesar Rodney, the speaker of the Delaware Assembly, and a revolutionary leader who had failed to be elected as a convention delegate, Read wrote:

> I had to give you some satisfactory account of the business we have been more particularly engaged in to wit the Declaration of Rights and the plan of Government—as to the first it has been completed some days past but there is nothing particularly in it—I did not think it an object of much curiosity, it is made out of the Pensilvania [sic] & Maryland Draughts.[56]

Given the combined evidence of the time frame,[57] availability of the Maryland drafts, the textual similarities, and George Read's statement, it is beyond cavil that Maryland's Declaration of Rights not only preceded that of Delaware, but also served as the model for it.[58]

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bills of rights, and the similarity is so striking as to merit a more careful consideration." Max Farrand, *The Delaware Bill of Rights of 1776*, 3 AM. HIST. R. 641, 641 (1897).

[56] Letter from George Read to Caesar Rodney (September 17, 1776), *in* GEORGE HERBERT RYDEN, LETTERS TO AND FROM CAESAR RODNEY, 1756-1784 119 (Univ. of Penna., 1933). Note that President Read did not mention the Virginia "draught."

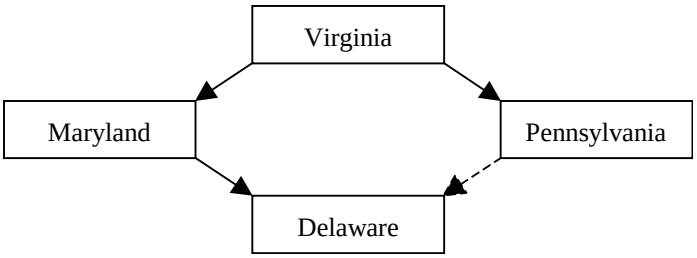
[57] It is, in fact, Delaware's access to Maryland's August 27, 1776 draft that made their remarkably quick drafting possible. Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS L.Q. 199, 208 (2000).

[58] Despite Professor Farrand's mistake, other historians have long known that Maryland's Declaration of Rights and Constitution preceded, and served as a model for Delaware's. *See e.g.*, ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 48 (U.N.C. Press, 1951) ("Some confusion in the chronology of events in both states [Delaware and Maryland] has been cleared away only since the 1930's with the publication of relevant documents. It is now plain that although the Delaware Declaration of Rights reached the general public before the Maryland declaration, both stemmed from the work of the Annapolis convention."); 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 276-79 (N.Y., 1921); H. H. WALKER LEWIS, THE MARYLAND CONSTITUTION OF 1776 45 (1976); Edward Dumbauld, *State Precedents for the Bill of Rights*, 7 J. PUB. LAW 323, 329-31 (1958) (identifying Maryland's 1776 Declaration of Rights as a predecessor to Delaware's 1776 Declaration of Rights); H. Clay Reed, *The Delaware Constitution of 1776*, DELAWARE NOTES 15, 23 n.63 (Sixth Series, 1930) ("Farrand's final conclusions [that Delaware preceded Maryland] must be revised in the light of the additional material now available on the subject. At his time of writing, Farrand could not locate the Maryland first [August 27, 1776] draft, but copies of it may now be seen…"). In 1977, the Maryland State Archives reproduced the existing records of the 1776 Maryland state constitutional convention. THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977). As part of an excellent introduction, Maryland State Archivist Dr. Edward Papenfuse intended to set the record straight. Unfortunately, the printer apparently omitted the relevant section:

> [Delaware's John] Dickinson liked Maryland's draft so well that he presented it to Delaware's Constitutional Convention which adopted portions of it wholesale into their own Declaration of Rights and Constitution before Maryland finished its deliberations, an irony missed by at least one prominent historian.

Compare, http://www.mdarchives.state.md.us/msa/speccol/2221/04/00/html/00000004.html (Dr. Papenfuse's revised version of this introduction, now serving as a description of the Maryland constitutional convention of

Therefore, the proper understanding of the relationships between these four bills of rights may be diagrammed as follows:



The challenge for the modern researcher is to take this information about the direction of the borrowing of bill of rights provisions and "trace the lineage"—determine how language and ideas were shared among the three states. A model for this analysis is provided by the work of Professor Christian Fritz of the New Mexico Law School. Professor Fritz has analyzed the constitutions of the far western states to determine, among other things, the amount and nature of the borrowing of constitutional provisions.[59] His analysis has determined that the framers of these western state constitutions (including those of California, Oregon, and Nevada) borrowed many provisions from their former homes in Ohio, Indiana, New York, and elsewhere. More importantly, Fritz noted that this borrowing was a reflective, self-conscious process intended to perfect the existing forms, not replace them.[60]

1776) (visited April 29, 2001), *with* THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977). Dr. Papenfuse is apparently referring to Max Farrand, but there have been several other prominent historians, lawyers, and judges to make this mistake, *see* infra, note 50. This same essay may also have been published in modified form in *Maryland Humanities* (Winter, 1992). For a printer's error, the public was deprived of a definitive statement. [A TELEPHONE CALL TO DR. PAPENFUSE MAY VERIFY THIS SUPPOSITION].

[59] Christian G. Fritz, *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions*, 26 RUTGERS L. J. 969, 982 (1995); Christian G. Fritz, *More than "Shreds and Patches": California's First Bill of Rights*, 17 HASTINGS CONST. L. Q. 13, ____ (1989) (same).

[60] *See* Christian G. Fritz, *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions*, 26 RUTGERS L. J. 969, 982 (1995) (commenting that delegates to the California state constitutional convention of 1849 "appreciated constitutional choices" and by repeating language of prior constitution were not engaged in the "unthinking perpetuation of past practices"); Christian G. Fritz, *More than "Shreds and Patches": California's First Bill of Rights*, 17 HASTINGS CONST. L. Q. 13, ____ (1989) (same). *See*

Professor Fritz had the advantage, however, of detailed records of convention debates from which to learn the words and infer the thoughts of the delegates. For the Virginia, Maryland, and Delaware conventions of 1776, there was no recorded debate, only the sketchiest recording of the votes cast by the convention delegates. In fact, secrecy was an important consideration for the convention delegates, whose very actions were considered treasonous.[61] The historical record is largely devoid of evidence about the borrowing of provisions. The clues, therefore, must be founded nearly exclusively in the words they wrote.

A tracing of this Virginia—Maryland—Delaware strand of constitution drafting confirms Professor Fritz's view that interstate constitutional borrowing was a thoughtful process, particularly in Maryland, but in Delaware as well. The thoughtful nature of this borrowing may be seen most clearly in those sections where the Maryland and Delaware drafters saw the need for modification—ranging from subtle, minor changes to total rewrites—on the drafts of their predecessors. This careful thought process may also be seen where the Maryland and Delaware drafters added entirely new provisions; reflecting a clear understanding of both what was and what was not included in their predecessor's drafts.

Sometimes the subsequent drafters appear to have preferred a different formulation of the same right. On some occasions a local condition may have lead to a particular emphasis. Most interestingly, sometimes the "mere" placement of a provision indicates subtle, and reflective choices. These placement choices take two forms.

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also Ken Gormley & Rhonda G. Hartman, *The Kentucky Bill of Rights: A Bicentennial Celebration*, 80 KY. L. J. 1 (1992) (tracing the borrowing of provisions from the Pennsylvania Declaration of Rights of 1790 into the Kentucky Bill of Rights of 1792).

[61] The clerk of the Maryland constitutional convention, future United States Supreme Court Justice Gabriel Duvall, was sworn "not to disclose or reveal the secrets" of the convention. THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977) (August 14, 1776); PROCEEDINGS OF THE CONVENTION OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775 & 1776 209 (Jonas Green, 1836); http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/index.html (visited April 29, 2001).

First, on at least two occasions, the Maryland drafters broke into several separate sections what had been a single, complex provision in the May 27, 1776 draft of the Virginia bill of rights. With Virginia's militia provisions, this choice appears to have been stylistic only, with no continuing consequences. With respect to the rights afforded those accused of crimes, the division appears to have been a well-conceived strategy to extend some rights beyond the criminal context and into the civil.

The second type of "placement modification" involves the choices of whether to place a provision within the declaration of rights, or in the body of the constitution. In one notable example, Virginia placed its judicial independence provisions, including appointment and impeachment, in the constitution itself. Maryland then added a universal statement of the importance of an independent judiciary and moved the whole provision into the declaration of rights. Finally, Delaware retained the universal statement in its declaration of rights, but moved the mechanical aspects, including appointment and impeachment, back into the constitution.

The benefits of this exercise are not merely academic. While it is interesting to observe the patterns of interstate borrowing of constitutional provisions, it is only useful if there is some enduring legal significance to those choices.

For Virginia lawyers and judges, it is possible to gain insight into the meaning of Virginia provisions by seeing how contemporaries of the drafters viewed them. If, for example, there was any doubt that §10 of the Virginia Declaration of Rights of May 27, 1776, was directed exclusively to criminal rights, reference to the actions of the Maryland convention would confirm it.

For Maryland lawyers and judges, there are several new insights into the Maryland Declaration of Rights, which may enhance and deepen current understanding. This analysis suggests a broader interpretation of a variety of provisions, including the "open courts"

provision, the "law of the land" provision, and the various jury trial rights provisions, that today remain largely moribund in the Maryland Declaration of Rights.

For Delaware lawyers this article has less to offer.[62] In 1792, Delaware undertook a complete rewrite of its constitution and declaration of rights, generally deleting the provisions discussed herein.[63]

There may also be other applications in other states. Given the interstate borrowing of constitutional provisions, many provisions may be traced to this historical strand. For example, Oregon's "open courts" provision can appropriately be traced back east: Oregon borrowed it from Indiana,[64] which borrowed it from Ohio. The Ohio drafters either borrowed it directly from Maryland, or from Delaware, which had borrowed it from Maryland.[65] And of course, the tracing cannot stop there. These "open courts" provisions reach much farther back and across the Atlantic Ocean, back to King John's *Magna Carta*. In these ways, a careful historical review—a tracing of the lineage—can cast a new light on these old provisions.

III. TRACING THE LINEAGE—TEXTUAL AND CONCEPTUAL SIMILARITIES

The following is a section-by-section analysis of the similarities and differences between the declarations of rights of Virginia, Maryland, and Delaware. The analysis given here is, by necessity, limited. The discussion is limited to the differences and similarities between the three texts to learn what can be learned about the borrowing of provisions. Also included is some

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[62] *But see Johnson v. State*, 711 A.2d 18, 23 (Del. 1998) (analyzing defendant's right to grand jury under Delaware Constitution).

[63] *Compare* DEL. CONST., DECL. OF RTS., AND FUNDAMENTAL RULES (1776) *with* DEL. CONST., PREAMBLE AND ART. I (1792). Copies of each may be found in 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 197-206 (William F. Swindler, ed., 1973). An analysis of the differences between the Delaware Declarations of Rights and Constitutions of 1776 and 1792 may be found in RICHARD LYNCH MUMFORD, CONSTITUTIONAL DEVELOPMENT IN THE STATE OF DELAWARE, 1776-1897 136-39 (unpublished Ph.D. dissertation, Univ. of Delaware, 1968) (on file with the author).

[64] W. C. Palmer, *The Sources of the Oregon Constitution*, 6 OR. L. REV. 200, 201 (19__).

minimal information about the most direct sources of the texts.[66] In each instance the box shows the version of the texts that were available to the delegates to the respective conventions: the May 27, 1776, draft of the Virginia Declaration of Rights;[67] the August 27, 1776, draft of the Maryland Declaration of Rights;[68] and the Delaware Declaration of Rights as presented on September 11, 1776.[69]

In the discussion following the text, I will, when appropriate, express a preference for one form over another. These reflect my judgments about how well the provision succeeds on its own terms. I will express a preference for provisions that capture the essence of the universal rights they seek to protect, but also those that avoid dictating the mechanisms for enforcement of those rights, because the framers clearly thought that such material belonged in the body of the constitution. I also prefer simple and direct language.[70]

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[65] *See supra*, note 336.

[66] A much more detailed account of the Virginia provisions, including subsequent amendment and interpretation is given in A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA (1971) (2 volume treatise). A more limited analysis of the Maryland Declaration of Rights is given in Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637 (1998). Greenwood Press has created a series of Reference Guides to the State Constitutions. *See* http://www.greenwood.com/search/series_search.asp?Listing=List&series_title=Reference**Guides**to**the**State**Constitutions**of**the**United**States (visited February 23, 2002). Volumes on the Virginia, Maryland, and Delaware constitutions are forthcoming. [HOW DO I SUBTLY MENTION THAT I AM WRITING THE MARYLAND VOLUME??]

[67] 1 THE PAPERS OF GEORGE MASON, 1725-1792 ____ (Rutland ed.).

[68] A printed version of the August 27, 1776 draft may be found in Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637 (1998), but not in the electronic versions of that article found on Lexis and Westlaw. A photographic reproduction of the original typeset draft is available on-line at http://www.mdarchives.state.md.us/msa/speccol/2221/04/03/html/0000.html (visited April 29, 2001).

[69] PROCEEDINGS OF THE CONVENTION OF THE DELAWARE STATE HELD AT NEW-CASTLE ON TUESDAY THE TWENTY-SEVENTH OF AUGUST, 1776 17-20 (Public Archives Comm. 1927).

[70] On the other hand, I hope to avoid the unfair modern criticism of exhortatory provisions. Many modern commentators have criticized the exhortatory nature of state constitutions, and suggested that because they are "nonjusticiable" they are irrelevant. I reject this criticism, both because it is ahistorical, and because it is wrong. It is ahistorical, because the framers clearly understood that such provisions were acceptable, and even preferred, in their bills of rights. Modern preferences should not be substituted so lightly. Second, an exhortatory provision in the bill of rights, while nonjusticiable on its own terms, may provide important explanatory content for the mechanical provisions written to uphold the principle. For an example, in reviewing Maryland's constitutional

A. Provisions that are textually identical, or nearly identical, in all three drafts: Virginia, Maryland, and Delaware

There are twelve provisions in the May 27, 1776, draft of the Virginia Declaration of Rights that appear in both the Maryland and Delaware declarations of rights. In a few instances the text is identical in all three versions. More frequently, the same rights are protected or theories espoused in similar, but not identical language. In each instance, the Delaware version reflects changes made in the Maryland declaration, and frequently makes changes on them.

There are also two grammatical observations. The Maryland drafters were overly fond of commas; Delaware removed many of them. And the Delaware drafters loved capital letters.

1. Compact Theory of Government

The Virginia, Maryland, and Delaware drafters each stated their understanding of the compact theory of government in remarkably similar terms, including provisions expressing (1) the compact itself, and the correlative principles (2) that government is instituted for the common benefit, (3) that officials are trustees and servants of the public, and (4) that the people have the right to reform the government. Although the language is similar in all three versions, the Maryland and Delaware drafts are identical but for changes in capitalization. The May 27, 1776, Virginia draft also divided the four concepts between two different provisions than was the case in Maryland and Delaware.

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provisions regarding judicial impeachment, it is beneficial to understand that these provisions were written in an attempt to insure the "independency and uprightness" of judges.

Virginia	"That all power is vested in, and consequently derived from, the people…."[71]
Maryland	"That all Government of right originates from the people, [and] is founded in compact only…."[72]
Delaware	"THAT all Government of rights originates from the People, [and] is founded in Compact only…."[73]

In this clause, expressing the notion of popular sovereignty, it is possible to trace the language and the ideas. The Virginia provision, drafted by George Mason, expresses the concept that all power springs from the sovereign people. The Maryland drafters rewrote the clause, and, if it is not as artful as Virginia's, it more plainly invokes the principle by its use of the word "compact." The Delaware drafters followed Maryland's example closely.

In the Virginia version, this clause is conjoined to the "trustees and servants" concept,[74] while in both the Maryland and Delaware drafts this clause is attached to the "common benefit" clause.[75]

2. Government Instituted for "Common Benefit" or "the Good of the Whole"

Virginia	"That government is, or ought to be, instituted for the common benefit, protection, and security, of the people, nation, or community, of all the various modes and forms of government that is best, which is capable of producing the greatest degree of happiness and safety, and is most effectual secured against the danger of mal-administration…."[76]
Maryland	"That all Government of right … is … instituted solely for the good of the whole."[77]

[71] VA. CONST., Decl. of Rts., art. 2 (May 27, 1776 draft).

[72] MD. CONST., Decl. of Rts., art. 1 (August 27, 1776 draft).

[73] DE. CONST., Decl. of Rts., art. 1 (September 11, 1776 draft).

[74] *See infra*, § 3.

[75] *See infra*, § 2.

[76] VA. CONST., Decl. of Rts., art. 3 (May 27, 1776 draft).

[77] MD. CONST., Decl. of Rts., art. 1 (August 27, 1776 draft).

Delaware	"THAT all Government of rights … is … instituted solely for the Good of the Whole."[78]

Professor A. E. Dick Howard, the preeminent historian of the Virginia Constitution, notes that these "common benefit" provisions predate the development of utilitarianism as an economic theory, but that the ideal of governments established solely for the good of the whole community had been developed by David Hume and Joseph Priestly, both of whom were widely read and admired throughout the American colonies.[79]

The Maryland drafters, while agreeing with the principle that government should be instituted for the common benefit, surely did not care for the language employed by George Mason and incorporated in the May 27 draft of the Virginia Declaration of Rights. The Maryland drafters found a simpler, more direct manner to express the same point, and the Delaware drafters copied Maryland's verbatim.

3. "…trustees and servants…"

Virginia	"…that magistrates are [the people's] trustees and servants, and at all times amenable to them."[80]
Maryland	"That persons entrusted with the legislative and executive powers are the trustees and servants of the public, and as such accountable for their conduct…"[81]
Delaware	"That Persons intrusted[82] with the Legislative and executive Powers are the Trustees and Servants of the Public, and as such accountable for their Conduct…"[83]

[78] DE. CONST., Decl. of Rts., art. 1 (September 11, 1776 draft).

[79] 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 73 n.1-2 (1971) (and accompanying text). A full examination of the republican ideal, that government would be founded for the public good, may be found in GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 53-65 (1993 ed.)

[80] VA. CONST., Decl. of Rts., art. 2 (May 27, 1776 draft).

[81] MD. CONST., Decl. of Rts., art. 2 (August 27, 1776 draft).

[82] The *Oxford English Dictionary* lists "intrust" as a variant form of "entrust," so Delaware's choice of spelling is not necessarily wrong, just unusual to the modern eye.

[83] DE. CONST., Decl. of Rts., art. 5 (September 11, 1776 draft).

While the modern reader is tempted to assume that the word "magistrates," used in the Virginia draft, is limited to judicial officers, Professor Howard suggests that in the 18th Century, the term had a broader meaning that included all public officials.[84] Maryland's substitution of the phrase, "persons entrusted with the legislative and executive powers," thus does not expand, and may even have contracted the scope as compared to the Virginia provision, which, according to Dr. Howard, also includes those exercising the judicial power in addition to the legislative and executive.

Peter C. Hoffer, writing in the *Maryland Historical Magazine*, analyzed the origins of Maryland's version of this "trustees and servants" provision.[85] Mr. Hoffer identifies the phrase's antecedents not in constitutional law, but in the pleadings and forms used in colonial courts of equity. Mr. Hoffer's analysis is interesting and may well be correct. Hoffer errs, however, by making his analysis too personal; he describes Charles Carroll of Carrollton's career as an equity lawyer, and implies that this background led Carroll to draft this provision. The more simple and likely answer is that Carroll borrowed the phrase from George Mason, and the Virginia May 27 draft.[86] Of course, that leaves the question of the source of Mason's language. The answer could be that Mason adapted the equity forms in precisely the manner that Mr. Hoffer suggests.[87]

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[84] 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 69 n.1 (1971).

[85] Peter Charles Hoffer, *"Their Trustees and Servants": Eighteenth-Century Maryland Lawyers and the Constitutional Implications of Equity Precepts*, 82 MD. HIST. MAG. 142 (1987).

[86] Hoffer notes that the same phrase, "trustees and servants" was also used in both the Virginia and Pennsylvania bills of rights of 1776, but treats this as a mere coincidence, and not as the source of the provision.

[87] Mason himself was not a lawyer, but had read law extensively in the home of his uncle, John Mercer. LEE FLEMING REESE, GEORGE MASON'S PART IN FRAMING THE CONSTITUTION OF THE UNITED STATES AND THE BILL OF RIGHTS 7 (rev. ed., 1986).

4. Right to "Reform, Alter, or Abolish" Government

Virginia	"…that whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most conductive to the public Weal."[88]
Maryland	"…whenever the ends of government are perverted, and public liberty manifestly endangered by the legislative singly; or a treacherous combination of both those powers, the people may, and of right ought, to establish a new, or reform the old government: passive obedience is only due to the laws of God, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind."[89]
Delaware	"…whenever the Ends of Government are perverted, and public Liberty manifestly endangered by the Legislative singly; or a treacherous Combination of both [the legislative and the executive] powers, the People may, and of Right ought, to establish a new, or reform the old government."[90]

All three of these Revolutionary-era declarations of rights, specifically recognized the right of the people "to reform, alter, or abolish" the government. Professor Howard notes that the principle that unsatisfactory governments may be changed or replaced follows directly from the compact theory of government—governments formed by consent may also be dissolved by consent.[91]

State constitutional provisions recognizing an inherent natural right of revolution are common. Professor Christian Fritz has noted a trend that emerged in these types of provisions, subsequent to those drafted by Virginia, Maryland, and Delaware.[92] While these three provisions recognized the right to revolution, it was a right only to be exercised in the most dire

[88] VA. CONST., Decl. of Rts., art. 3 (May 27, 1776 draft).

[89] MD. CONST., Decl. of Rts., art. 2 (August 27, 1776 draft).

[90] DE. CONST., Decl. of Rts., art. 5 (September 11, 1776 draft).

[91] 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 73 (1971).

[92] Professor Fritz presents an alternate account of the history of this period. Christian G. Fritz, *Alternative Visions of American Constitutionalism; Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 338-39 (1997).

of circumstances, for example as the Maryland draft provided, "whenever the ends of government are perverted, and public liberty manifestly endangered. …"[93] Over time, Fritz notes, the right to revolution was replaced by a right of constitutional revision, but it was a right "that did not require a pre-condition of near revolutionary crisis."[94] Fritz attributes this change to broadening notions of popular sovereignty, which required constitutions to be more responsive and adaptable to public needs.

The Maryland provision alone added a second clause repudiating the doctrine of non-resistance.[95] According to English loyalists ("Tories") legitimate governments "receive their power from God, and to oppose the government was [not only treason, but] a form of sacrilege."[96] Thus, although many of these loyalists

> admitted that [the English] Parliament was performing an illegal act in its attempt to tax the colonists without their consent, … they insisted that the only path open to the colonists was to petition Parliament to change its mind. These Tories considered it immoral to use an economic boycott to force British compliance and unthinkable to use military force in defense of their rights.[97]

The Maryland founders specifically and permanently rejected this Tory doctrine of non-resistance, reinforcing the right to "reform, alter, or abolish" the government. The Delaware drafters specifically chose to omit this clause.

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[93] MD. CONST., Decl. of Rts., art. 2 (August 27, 1776 draft).

[94] Christian G. Fritz, *Alternative Visions of American Constitutionalism; Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 338-39 (1997).

[95] JOHN RICHARD HAEUSER, THE MARYLAND CONVENTIONS, 1774-1776: A STUDY IN THE POLITICS OF REVOLUTION 114 (1968) (unpublished M. A. thesis, Georgetown University) (on file with the author).

[96] JOHN RICHARD HAEUSER, THE MARYLAND CONVENTIONS, 1774-1776: A STUDY IN THE POLITICS OF REVOLUTION 21-22 (1968) (unpublished M. A. thesis, Georgetown University) (on file with the author).

[97] JOHN RICHARD HAEUSER, THE MARYLAND CONVENTIONS, 1774-1776: A STUDY IN THE POLITICS OF REVOLUTION 21-22 (1968) (unpublished M. A. thesis, Georgetown University) (on file with the author). For an explanation of the right and process of petitioning, *see* Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153 (1998).

5. "Free and Frequent" Elections

Virginia	"That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage."[98]
	"… and that the members of the [legislature and the executive] may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections."[99]
Maryland	"That the right in the people to participate in the legislature is the foundation of liberty, and of all free government; for this purpose, elections ought to be free, and frequent, made *viva voce*, without treating or bribery, and every man having sufficient evidence of a permanent common interest with, and attachment to the community, ought to have the right of suffrage."[100]
Delaware	"That the Right in the People to participate in the Legislature, is the Foundation of Liberty, and of all free Government, and for this End all Elections ought to be free and frequent, and every Freeman, having sufficient Evidence of a permanent common Interest with, and Attachment to the Community, hath a Right of Suffrage."[101]

The English Bill of Rights of 1689 complained that King James II had interfered with parliamentary elections, and upon their coronation, William and Mary agreed, "elections of members of parliament ought to be free."[102] The Virginia drafters[103] adapted the language of the English Bill of Rights by removing the reference to "parliament" with the wordier phrase "members to serve as representatives of the people, in assembly." This change also allowed the Virginia drafters to repeat, once again, the concept of popular sovereignty. The Virginia drafters

[98] VA. CONST., Decl. of Rts., art. 6 (May 27, 1776 draft).

[99] VA. CONST., Decl. of Rts., art. 5 (May 27, 1776 draft).

[100] MD. CONST., Decl. of Rts., art. 3 (August 27, 1776 draft).

[101] DE. CONST., Decl. of Rts., art. 6 (September 11, 1776 draft).

[102] 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 86 (1971) (citing 1 W. & M., sess. 2, ch. 2 (1689)); MICHAEL EVANS & R. IAN JACK, EDS., SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL LAW 353 (1984).

[103] Although this provision was added during the committee's deliberations, Professor Rutland states that this provision "bears G[eorge] M[ason]'s stylistic imprint and expresses a fundamental part of his political philosophy." 1 THE PAPERS OF GEORGE MASON, 1725-1792 285 (Rutland ed.).

then added the second clause, which ties the franchise to an "interest with, and attachment to the community."[104] The Virginia Declaration of Rights also included a second article that also required "frequent … elections," article 5. Article 5, however, is more in the nature of a provision requiring a "rotation in office" and is discussed more fully in connection with provisions of that sort.[105]

The Maryland article continued Maryland's tradition of voting *viva voce*, orally, before the election judges. This method of voting, as opposed to by secret ballot, reinforced and "strengthened the role of the aristocratic planters, merchants and lawyers who dominated political affairs by enabling them to discover [and thus control] how their subordinates voted."[106] The Delaware drafters generally copied the Maryland provision, but with three exceptions. Delaware substituted the phrase "and for this End" instead of the Maryland phrase, "for this purpose;" Delaware deleted the *viva voce* voting provision and the "treating and bribery" that went with it; and Delaware capitalized every proper noun. Of these, only the changes in voting procedure appear to have been meaningful.

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[104] In the final version of the Virginia Declaration of Rights adopted by the convention, Article 6 was combined with Article 7 to create a new article that required frequent elections to a legislature empowered to tax and having the power of eminent domain. 1 THE PAPERS OF GEORGE MASON, 1725-1792 288, 290 (Rutland ed.).

[105] *See infra*, notes 292-298.

[106] Edward A. Tomlinson, *The Establishment of State Government in Maryland: The Constitution of 1776*, 9 MD. BAR J. 4, 9 (1976). The demand for the continuation of *viva voce* voting came not only from the wealthy conservatives who made up the Maryland convention, but also from the radical leaders of the freemen of Anne Arundel County. *See Maryland Gazette* (August 22, 1776) *reprinted in* DAVID CURTIS SKAGGS, ROOTS OF MARYLAND DEMOCRACY: 1753-1776 227 (1973).

6. Prohibiting the "Suspending of Laws"

Virginia	"That all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."[107]
Maryland	"That no power of suspending laws, or the execution of laws, unless by the legislature, ought to be exercised or allowed."[108]
Delaware	"That no Power of suspending Laws, or the Execution of Laws, ought to be exercised, unless by the Legislature."[109]

The Virginia provision was not part of George Mason's original draft, but was added in committee, either by Mason himself, or by another committee member. Professor Rutland takes a decidedly neutral tone in stating "G[eorge] M[ason] later (1778) claimed authorship of Article Eight."[110] The concept and language of the provision is clearly derived from the English Bill of Rights (1689), which provided "[t]hat the pretended power of suspending of laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal."[111]

The Virginia drafters, as a rule, never referred to the legislature, by that name, but as the "representative of the people." The Maryland drafters simplified the provision by the use of the word "legislature." The Delaware drafters further improved the provision by placing the directive before the exception.

[107] VA. CONST., Decl. of Rts., art. 8 (May 27, 1776 draft).

[108] MD. CONST., Decl. of Rts., art. 5 (August 27, 1776 draft).

[109] DE. CONST., Decl. of Rts., art. 7 (September 11, 1776 draft).

[110] 1 THE PAPERS OF GEORGE MASON, 1725-1792 285 (Rutland ed.).

[111] ENGLISH BILL OF RIGHTS (1689), *reprinted in* 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 133 (William F. Swindler ed., 1982). I am not sure if the phrasing is correct—another copy of the English Bill of Rights quotes this provision as "[t]hat the pretended power of suspending of laws or the execution of laws by regal authority without consent of parliament is illegal." MICHAEL EVANS & R. IAN JACK, EDS., SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL LAW 353 (1984).

7. Prohibiting "Retrospective Laws"

Virginia	"That laws having retrospect to crimes, and punishing offences, committed before the existence of such laws, are generally oppressive, and ought to be avoided."[112]
Maryland	"That retrospective laws, punishing acts committed before the existence of such laws, and by them only declared to be criminal, are oppressive, unjust, and incompatible with liberty; therefore, no *ex post facto* law ought to be made."[113]
Delaware	"THAT retrospective Laws, punishing Offences committed before the Existence of such Laws, are oppressive and unjust, and ought not to be made."[114]

Professor Rutland hypothesizes that Article 9 of the Virginia draft "may have been a committee suggestion shaped in words by G[eorge] M[ason] and [Thomas Ludwell] Lee."[115] The entire article, however, was deleted from the final version of the Virginia Declaration of Rights, apparently at the urging of Patrick Henry.[116] The Maryland constitutional convention's committee added the now familiar Latin phrase "*ex post facto*." Bernard Schwartz suggests that this is the first American constitutional use of the phrase.[117]

There is a theory that urges a broader application of state constitutional provisions prohibiting retrospective (or *ex post facto*) laws than the interpretation given to the two

[112] VA. CONST., Decl. of Rts., art. 9 (May 27, 1776 draft).

[113] MD. CONST., Decl. of Rts., art. 13 (August 27, 1776 draft).

[114] DE. CONST., Decl. of Rts., art. 11 (September 11, 1776 draft).

[115] 1 THE PAPERS OF GEORGE MASON, 1725-1792 285 (Rutland ed.).

[116] 1 THE PAPERS OF GEORGE MASON, 1725-1792 290 (Rutland ed.) (citing Edmund Randolph, *Essay on the Revolutionary History of Virginia*, 44 VA. MAG. OF HIST. & BIOGRAPHY 43 (1936)).

[117] BERNARD SCHWARTZ, 1 BILL OF RIGHTS: A DOCUMENTARY HISTORY 279 (1971). *See also* Joyce A. McCrary Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedom*, 36 HOW. L. REV. 43, 52 (1993) (stating that Maryland's was the first American protection against *ex post facto* laws). Mason and Thomas Ludwell Lee had apparently considered, and then rejected, using the phrase "ex post facto" in the Virginia Declaration of Rights. Mason and Lee wrote that their formulation of the provision "is thought to state with more precision the doctrine respecting ex post facto laws & to signify to posterity that it is considered not so much as a law of right, as the great law of necessity, which by the well known maxim is—allowed to supersede all human institutions." 1 THE PAPERS OF GEORGE MASON, 1725-1792 278 (Rutland ed.). Interestingly, Professor Rutland reports that this portion of the draft is in Lee's handwriting, not Mason's. Id. at 279.

prohibitions against such laws found in the federal constitution.[118] Although there is some suggestion that the broader application could be based on textual differences between some state provisions and the federal counterparts,[119] the main thrust is that the United States Supreme Court's *ex post facto* jurisprudence is unnecessarily limited to the criminal context because of an erroneous interpretation of the clauses[120] given by United States Supreme Court Justice Samuel Chase in *Calder v. Bull*.[121] If Justice Chase erred in thinking that the federal *ex post facto* clauses were limited to a criminal context, he might have been confusing the federal clauses with the one he helped write while a member of drafting committee of the Maryland Constitutional Convention of 1776.[122] The text of the Maryland provision, like the Virginia provision before it and the Delaware provision after it, is clearly directed exclusively to criminal laws.

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[118] Neil Coleman McCabe & Cynthia Ann Bell, *Ex Post Facto Provisions in State Constitutions*, 4 EMERGING ISSUES ST. CONST. L. 133 (1991); Marshall J. Tinkle, *Forward into the Past: State Constitutions and Retroactive Laws*, 65 TEMP. L. REV. 1253 (1992).

[119] Neil Coleman McCabe & Cynthia Ann Bell, *Ex Post Facto Provisions in State Constitutions*, 4 EMERGING ISSUES ST. CONST. L. 133, 136-43 (1991).

[120] U.S. CONST., Art. I, §§ 9, 10.

[121] 3 U.S. (3 Dall.) 386 (1798). The conclusion that Justice Chase erroneously narrowed interpretation of the federal ex post facto clauses to the criminal context is first found in Justice William Johnson's opinions in Ogden v. Saunders, 12 Wheat (U.S.) 213, 286 (1827) and Satterlee v. Matthewson, 2 Pet. (U.S.) 380, 416 and Appendix I (1829). The academic literature supports Justice Johnson's conclusions. *See* Oliver P. Field, *Ex Post Facto in the Constitution*, ____ MICH. L. REV. 315 (19____); William Winslow Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539 (1947); William Winslow Crosskey, *The Ex-Post-Facto and the Contracts Clauses in the Federal Constitution: A Note on the Editorial Ingenuity of James Madison*, 35 U. CHI. L. REV. 248 (1968).

[122] Justice William Johnson, in his appendix to Satterlee v. Matthewson, 2 Pet. (U.S.) 380 (1829), noted that Maryland's was the first state constitution to restrict the application of ex post facto prohibitions to the criminal context only, and that Justice Samuel Chase, by virtue of his participation in the Maryland Constitutional Convention, "stands as the authority for the restricted use." Satterlee, at 686.

8. Rights of Criminally Accused[123]

Virginia	"That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers or witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers."[124]

[123] The following is, by necessity, a limited listing of source materials describing the history and origin of the rights protecting persons accused of crimes. **Cause and Nature of Accusation**: *United States v. Cruikshank*, 92 U.S. 542 (1876); 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 98-101 (1971). **Confrontation**: Roger W. Kirst, *The Procedural Dimension of Confrontation Doctrine*, 66 NEB. L. REV. 485 (1987); Frank T. Read, *The New Confrontation-Hearsay Dilemma*, 45 S. CAL. L. REV. 1 (1972); Daniel Shaviro, *The Supreme Court's Bifurcated Interpretation of the Confrontation Clause*, 17 HASTINGS CONST. L.Q. 383 (1990); Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381 (1959); Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557 (1992); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L. J. 77 (1995); 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 101-04 (1971). **Right to Counsel**: WILLIAM MERRITT BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955); William M. Beaney, *The Right to Counsel: Past, Present, and Future*, 49 VA. L. REV. 1150 (1963). **Calling for Favorable Evidence**: 2 Wigmore, EVIDENCE, § 557; 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 104-06 (1971). **Speedy Trial**: A. E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 487 (U. Va. Press 1968); Note, *The Right to A Speedy Criminal Trial*, 57 COLUM. L. REV. 846 (1957); Note, *Dismissal of Indictment as a Remedy for Denial of the Right to Speedy Trial*, 64 YALE L. J. 1208 (1955); Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587 (1965); Note, *The Right to a Speedy Trial*, 20 STAN. L. REV. 476 (1968); 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 106-11 (1971). **Public Trial**: Charles W. Quick, *A Public Criminal Trial*, 60 DICK. L. REV. 21 (1955); Max Radin, *The Right to a Public Trial*, 6 TEMP. L. Q. 381 (1932); 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 111-13 (1971). **Trial by Jury**: *Duncan v. Louisiana*, 391 U.S. 145, 151 n.15 (1968) (and sources cited therein); Lewis F. Powell, Jr., *Jury Trial of Crimes*, 23 WASH. & LEE L. REV. 1 (1966); 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 113-20 (1971). **Vicinage**: Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 57 U. PA. L. REV. 197 (1909); William Wirt Blume, *The Place of Trial of Criminal Cases*, 43 MICH. L. REV. 59 (1944); A. E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 387 (U. Va. Press 1968); 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 118-19 (1971). **Self-Incrimination**: LEONARD LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1121 (1994); John H. Langbein, *Essay: The Historical Origins of the Privilege Against Self Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994); R. H. Helmholz, *Origin of the Privilege Against Self-Incrimination: The Role of the European Ius Commune*, 65 N.Y.U. L. REV. 962 (1990); John A. Kemp, *Background of the Fifth Amendment in English Law: A Study of Its Historical Implications*, 1 WM. & MARY L. REV. 247 (1958); R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935); 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 129-35 (1971).

[124] VA. CONST., Decl. of Rts., art. 10 (May 27, 1776 draft).

Maryland	**"**That in all capital or criminal prosecutions, every man hath a right to be informed of the accusation against him, to be allowed counsel, to be confronted with the accusers, or witnesses, to examine evidence on oath in his favour, and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty."[125]
	"That no man in the courts of common law ought to be compelled to give evidence against himself."[126]
	"That the trial of facts where they arise is one of the greatest securities of the lives, liberties, and estate of the people."[127]
	"That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or, in any manner destroyed, or deprived of his life, liberty, or property, but by the lawful judgment of his peers, or by the law of the land."[128]
Delaware	"THAT in all Prosecutions for criminal Offences, every Man hath a Right to be informed of the Accusation against him, to be allowed Counsel, to be confronted with the Accusers or Witnesses, to examine Evidence on Oath in his Favour, and to a speedy Trial by an impartial Jury, without whose unanimous Consent he ought not to be found Guilty."[129]
	"THAT no Man in the Courts of common Law ought to be compelled to give Evidence against himself."[130]
	"THAT the Trial by Jury of Facts, where they arise is one of the greatest Securities of the Lives, Liberties, and Estate of the People."[131]

Article 10 of the Virginia Declaration of Rights provided the first American catalog of rights for those accused of crimes. The list includes many that modern Americans take for granted, but omits familiar protections like the right against double jeopardy.

[125] MD. CONST., Decl. of Rts., art. 19 (August 27, 1776 draft).

[126] MD. CONST., Decl. of Rts., art. 20 (August 27, 1776 draft).

[127] MD. CONST., Decl. of Rts., art. 18 (August 27, 1776 draft).

[128] MD. CONST., Decl. of Rts., art. 21 (August 27, 1776 draft). This provision is similar in origin, and frequently confused with MD. CONST., Decl. of Rts., art. 17 (August 27, 1776 draft). That provision is discussed *infra* at notes 325-340.

[129] DE. CONST., Decl. of Rts., art. 14 (September 11, 1776 draft).

[130] DE. CONST., Decl. of Rts., art. 15 (September 11, 1776 draft).

[131] DE. CONST., Decl. of Rts., art. 13 (September 11, 1776 draft).

Professor Eben Moglen stresses that these constitutional provisions "were primarily devices to protect existing constitutional arrangements as Americans saw them, rather than a program of law reform."[132] Together, these rights—to "indictment, venue, representation, confrontation, and general verdict"—were part of a cluster of rights, which Professor Moglen calls the "trial-rights cluster."[133] Thus, "Mason's language encapsulated the constitutional history to the trial-rights cluster, from Magna [Carta] to the Treason Act of 1696."[134] Moglen even dismisses the significance of differences between written formulations of this trial-rights cluster, for example, the provision for counsel in the Pennsylvania, Maryland and Delaware declarations of rights, not found in Virginia's. As he says, "…Pennsylvanians did not think they had one more right than Virginians—both groups thought they enjoyed all the rights of Englishmen and no more."[135]

Professor Moglen's hypothesis, that the rights of the criminally accused listed in the Virginia Bill of Rights was intended to reproduce existing criminal rights, not create new rights, is supported at least tangentially by the fact that the Maryland and Delaware framers adopted so

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[132] Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1121 (1994).

[133] Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1121 (1994).

[134] Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1113 (1994).

[135] Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1119 (1994).

much of Virginia's draft.[136] Yet the Maryland and Delaware drafters did make several significant changes.[137]

Historian Leonard Levy has criticized the Virginia draft for the redundancy of the opening clause, " … in all capital or criminal prosecutions…."[138] Although the Maryland drafters retained this repetitive language, the Delaware drafters corrected this drafting error, making it clear that these rights attach "in all Prosecutions for criminal Offences." The Delaware drafters may have relied on the Pennsylvania model for this change, which similarly provided that "[i]n all prosecutions of criminal offences…"[139]

The first right of the criminally accused, as George Mason wrote it, was the "right to demand the cause and nature of his accusation." Leonard Levy criticizes this formulation as an "inadequate statement," in that it only permitted the accused to demand the charges; it does not provide the positive right to know the charges.[140] The Maryland drafters remedied that fault by changing the right to a positive "right to be informed of the accusation against him …"

The Virginia draft did not include a right to representation by counsel for the criminally accused, but the Maryland draft added that right, and Delaware followed suit. The Pennsylvania

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[136] Professor Howard notes that the omissions in the Virginia formulation include the "… rights to the writ of habeas corpus, counsel, and grand jury proceedings, as well as the freedom from double jeopardy, attainders, and ex post facto laws …" 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 95 (1971). The Maryland drafters rectified some, but not all of these omissions, leaving unmentioned the right to the writ of habeas corpus, and to grand jury proceedings, and freedom from double jeopardy.

[137] There are four rights that remained unchanged from the May 27 Virginia draft through both Maryland's August 27 draft and Delaware's September 11 draft, and that are not discussed herein: the right to confrontation of accusers and witnesses; the right to a speedy trial; the right to an impartial jury; and the requirement of a unanimous jury verdict to convict. For historical information on these rights, *see infra*, note 123.

[138] LEONARD LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 406-07 (1968) (calling attention to the "superfluousness" of the words, "capital or" in the Virginia draft). *See also*, Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, ___ n.334 (1998) (indicating that "[t]here is no historical record to explain why 'capital' crimes would have been treated differently.").

[139] PA CONST., Decl. of Rts., Art. 9 (1776).

[140] LEONARD LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 408 (1968).

bill of rights also included a right to counsel, but it was phrased differently than the Maryland and Delaware drafts, and probably was not a model for them.[141]

The right "to call for evidence in his favour" in the Virginia draft was changed to a right "to examine evidence on oath in his favour" in the Maryland and Delaware versions.[142] The inclusion of the right to call witnesses under oath in the Maryland and Delaware drafts did not expand the right as it existed, but clarified an existing right. At early common law, defendants had been prevented from calling witnesses. Later, they were permitted to call witnesses, but the witnesses were not sworn. Finally, by the end of the 17th Century, defendants were permitted to call witnesses to testify under oath. In England, that right was eventually protected by statute.[143] Professor Howard also points out that the use of the word "evidence" in these provisions, as compared to the word "witness" in the federal constitution,[144] suggests that the state provisions provide a broader right.[145]

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[141] PA CONST., Decl. of Rts., Art. 9 (1776) ("In all prosecutions of criminal offences, a man hath a right to be heard by himself and his council…"). The spelling used in the Pennsylvania draft "council" is erroneous, and should be spelled "counsel." The Maryland drafters started with the correct spelling, "counsel," but changed to the erroneous spelling for the final, November 4, 1776 version only. Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 696 n.332 (1998). The next Maryland constitutional convention changed the spelling back to the proper "counsel." Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 696 n.332 (1998). The Delaware drafters, whether relying on the Maryland version, or by virtue of their own good spelling, used the proper spelling.

[142] Apparently, Leonard Levy is critical of Mason for failing to include a provision guaranteeing compulsory process for criminal defendants. LEONARD LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 408 (1968) ("Compulsory process should have been guaranteed."). I do not understand Levy's criticism, as I believe compulsory process to be included within this clause.

[143] 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 104 n.50-52 (1971) (*citing* 2 Wigmore, EVIDENCE, § 575)

[144] U. S. CONST., Amend. VI ("In all criminal prosecutions the accused shall enjoy the right … to have compulsory process for obtaining witnesses in his favor …").

[145] 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 106 (1971).

Expanding Rights Beyond the Criminal Context

Article 10 of the May 27, 1776, draft of the Virginia Declaration of Rights is, by its terms, limited to the criminal context.[146] The rights guaranteed in that article are not available in a civil trial. To avoid this limitation, the Maryland drafters carefully split out from the Maryland criminal rights article, article 19, all portions that they wished to be maintained in both the criminal *and* civil contexts.[147]

The provision preserving the right against self-incrimination was made into a stand-alone provision in the Maryland draft of August 27, 1776.[148] Delaware followed suit.[149]

Maryland also split out and made substantial changes in that portion of the Virginia article preserving the right of the criminally accused to be tried by a jury "of his vicinage."[150]

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[146] Leonard Levy saves his harshest criticism of Mason's work for the clause on self-incrimination. LEONARD LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 406-07 (1968). Levy criticizes Mason's draft for narrowing the then-existing right against self-incrimination, and for failing to "extend the right against self-incrimination to witnesses, as well as parties, in civil as well as criminal cases." LEONARD LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 407, 409-10 (1968).

[147] I also suspect that article 16 of the August 27, 1776, draft of the Maryland declaration of rights was modified for the same purpose. Because the guarantee of trial by jury would otherwise have been provided only in the criminal context, an extra clause was added into article 16 preserving the right to trial by jury: "[t]hat the inhabitants of Maryland are entitled to the common law of England, and to the trial by Jury…" MD. CONST., Decl. of Rts., art. 16 (August 27, 1776 draft). There is no indication in article 16 that the right is intended for the civil context, but any other interpretation would render it redundant to the jury trial right found in MD. CONST., Decl. of Rts., art. 19 (August 27, 1776 draft). Of course, the subsequent addition of Art. 23 to the Maryland Declaration of Rights makes the redundancy problem unavoidable. The history of the creation of Art. 23 is traced in Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 697 n.356 (1998).

[148] MD. CONST., Decl. of Rts., art. 20 (August 27, 1776 draft). Thus, at least in Maryland, the defect Leonard Levy found in limiting the right against self-incrimination to the criminal context, was rectified. *See infra*, note 146. Interestingly, the Maryland constitutional convention of 1864 amended the provision to limit it to the criminal context. Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 659 (1998).

Subsequent drafts of this provision weakened the right against self-incrimination, first by permitting self-incrimination "in such cases as have usually been practiced in this state," then by permitting the General Assembly to further erode the right legislatively. See Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 659 (1998); R. Carter Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 787-88 (1935).

[149] DE. CONST., Decl. of Rts., art. 15 (September 11, 1776 draft).

[150] VA. CONST., Decl. of Rts., art. 10 (May 27, 1776 draft).

Vicinage, at common law, referred "not [to] the place of trial, but the place from which the jury must be summoned."[151] The Maryland drafters separated their provision from the criminal rights context, suggesting that the provision could apply to both criminal and civil proceedings. The Maryland drafters also transformed the provision from one guaranteeing "vicinage," *i.e.*, a local jury, to one protecting "venue," *i.e.*, a local trial. The Maryland change from vicinage to venue reflected modern theory at that time. The right to a jury from the vicinage was declining in importance as a consequence of the rise of impartial juries relying on evidence rather than personal knowledge.[152] Simultaneously, the right of venue—"trial of facts where they arise"—was of increasing importance. England had passed numerous statutes requiring that persons accused of various crimes committed in the American colonies would be tried in England.[153] The colonists complained that such laws violated their historical constitutional venue rights.[154] In this context, it appears likely that the Maryland provision was intended to prevent criminal defendants from being transported for trial in a distant land, but was not intended to limit the General Assembly's power to determine venue for civil and criminal matters within the state.[155] Delaware copied Maryland's provision verbatim.

Finally, the Virginia drafters included a clause providing that "that no man be deprived of his liberty except by the law of the land, or the judgment of his peers." This language is derived from Chapter 39 of the English Magna Carta. As Professor A. E. Dick Howard, an expert on both the Magna Carta and the Virginia Constitution describes it:

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[151] William Wirt Blume, *The Place of Trial of Criminal Causes*, 43 MICH. L. REV. 59, 60 (1944).

[152] William Wirt Blume, *The Place of Trial of Criminal Causes*, 43 MICH. L. REV. 59, 60-62 (1944).

[153] William Wirt Blume, *The Place of Trial of Criminal Causes*, 43 MICH. L. REV. 59, 63-66 (1944).

[154] William Wirt Blume, *The Place of Trial of Criminal Causes*, 43 MICH. L. REV. 59, 63-66 (1944).

[155] Stewart v. State, 21 Md. App. 346, 319 A.2d 621 (1974); Chadderton v. State, 54 Md. App. 86, 456 A.2d 1313 (1983).

> The phrase ["law of the land"], held by Coke to be synonymous with "due process of law," is the essential assurance that the law is above rulers and ruled alike, that power, wherever vested, can have no capricious exercise, and that those minimal safeguards which are expected from a system founded on justice will be furnished.[156]

The Virginia provision, however, provides a more limited right than provided by chapter 39 of the Magna Carta.[157] It is more limited first, because it is limited to the criminal context only, and second, because only liberty interests are protected.

The Maryland drafters, as they did with the self-incrimination clause and the vicinage clause, removed the right to "the law of the land"[158] from the criminal article, and thus made it applicable in both criminal and civil contexts.[159] They also broadened the right, from only protecting liberty interests as it did in the Virginia draft, to protecting interests in life, liberty, and property:

> That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or, in any manner destroyed, or deprived of his life, liberty, or property, but by the lawful judgment of his peers, or by the law of the land.[160]

The drafting of Article 21 of the August 27, 1776, draft of the Maryland Declaration of Rights was a remarkable endeavor. The Maryland drafters apparently (1) recognized that the

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[156] 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 120-21 (1971) (internal citations omitted).

[157] "No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers, or by the law of the land." WILLIAM S. MCKECHNIE, MAGNA CARTA, A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375 (2d ed. 1914).

[158] The phrase "law of the land" also appeared in Article 17 of the Maryland Declaration of Rights (1776). That provision is discussed *infra* at notes 325-336. The relationship between the two provisions is specifically discussed, *infra* at note 329.

[159] My theory, that Article 21 of the Maryland Declaration of Rights (1776), is an edited and expanded version of the final clause of Article 10 of the May 27, 1776, draft of the Virginia declaration of rights, can only be substantiated by the evidence that I have brought to bear: that the Maryland drafters apparently removed several clauses from Article 10 to make them applicable in the civil as well as the criminal context, and by the numbering sequence in the Maryland draft. The Virginia provision (Art. 10) was broken into four Maryland provisions that are found *in sequence* in the Maryland draft: venue at Art. 18, rights of the accused at Art. 19, right against self-incrimination at Art. 20, and this "law of the land" provision at Art. 21.

[160] MD. CONST., Decl. of Rts., art. 21 (August 27, 1776 draft).

final clause of Virginia's Article 10 was derived from Magna Carta; (2) recognized that the final clause of Article 10 was too limited for Maryland's needs in that it protected only liberty rights and only in the criminal context; (3) found the text of Article 39 of the Magna Carta; (4) "reinstated" the traditional Magna Carta language, edited to ensure that the protections were extended to interests in life, liberty, and property.[161] It is noteworthy that the Delaware drafters did not follow Maryland's lead with this provision, perhaps determining that an "open courts" provision was sufficient to protect "due process" rights.[162]

9. Prohibiting "Excessive Bail" and "Cruel" and/or "Unusual Punishment"

Virginia	"That excessive bail ought not to be required, nor excessive fines impossed, nor cruel and unusual punishments inflicted."[163]
Maryland	"That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."[164]
Delaware	"THAT excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel or unusual Punishment inflicted."[165]

[161] This can most easily be demonstrated by comparing Chapter 39 of the Magna Carta (1215) with Article 21 of the Maryland draft. I have adopted the legislative convention of striking out and underlining textual changes:

> That [n]o freeman ~~shall~~ ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled or in any ~~way~~ manner destroyed, ~~nor will we go upon him nor send upon him~~, or deprived of his life, liberty or property ~~except~~ but by the lawful judgment of his peers, or by the law of the land.

It is particularly noteworthy that the Maryland framers, looking at the mandatory term "shall" in the Magna Carta, deleted that word in favor of the exhortatory phrase "ought to." The decision to do so may have represented a stylistic choice to make this provision match the use of the phrase "ought to" in other articles. It might also have been a preference for an exhortatory provision, as opposed to our modern preference for justiciable language. Many accounts have criticized early state constitutions for employing the exhortatory "ought" rather than the mandatory "shall." *See* LEONARD LEVY, EMERGENCE OF FREE PRESS 184 (1985) (calling use of "ought" in early state constitutions "flabby" and "namby-pamby"); J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776 203-04 (1936); BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 90-91 (1977). *But see* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 77-79 and n.71 (1998) (and source therein); Jeremy Elkins, *Declarations of Rights*, 3 U. CHI. L. SCH. ROUNDTABLE 243, 307-08 (1996).

[162] *See* DE. CONST., Decl. of Rts., art. 12 (September 11, 1776 draft); *infra*, notes 319-32.

[163] VA. CONST., Decl. of Rts., art. 11 (May 27, 1776 draft).

[164] MD. CONST., Decl. of Rts., art. 22 (August 27, 1776 draft).

The Virginia provision is a verbatim copy of the English Bill of Rights (1689), which provided that "excessive bail ought not to be required, nor excessive fines imposed nor cruel and unusual punishments inflicted."[166] The Maryland drafters explicitly rejected the phrase "cruel *and* unusual" in favor of the broader construction "cruel *or* unusual."[167] Delaware followed Maryland's example.[168]

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[165] DE. CONST., Decl. of Rts., art. 16 (September 11, 1776 draft).

[166] ENGLISH BILL OF RIGHTS (1689), *reprinted in* 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 133 (William F. Swindler ed., 1982); MICHAEL EVANS & R. IAN JACK, EDS., SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL LAW 354 (1984).

[167] In discussing the difference between "cruel *and* unusual" and "cruel *or* unusual," the Supreme Court of Michigan stated:

> [I]t seems self-evident that any adjectival phrase in the form "A *or* B" necessarily encompasses a broader sweep than a phrase in the form "A *and* B." The set of punishments which are *either* "cruel" *or* "unusual" would seem necessarily broader than the set of punishments which are *both* "cruel" *and* "unusual."

People v. Bullock, 485 N.W.2d 866, 872 n.11 (Mich. 1992) (emphasis in original) (holding that sentence of life imprisonment without parole for possession of cocaine was unconstitutional as a cruel *or* unusual punishment.). For additional cases discussing the legal consequences of the differences between these two phrases, *see* Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 699-700 n.382 (1998).

[168] Because the text of this article is so clearly grounded in the English Bill of Rights, I reject Professor Rutland's analysis of this provision:

> Article Eleven [of the Virginia Declaration of Rights] stressed the growing American resentment against a medieval heritage of ear-slitting, stake-burning, branding, and other capital punishments repulsive to a society that increasingly sought proof of man's virtues instead of his wickedness. A committee addition, this article may have been given its persuasive brevity by G[eorge] M[ason].

1 THE PAPERS OF GEORGE MASON, 1725-1792 285-86 (Rutland ed.). In contrast, I agree with Professor Rutland's final comment, that "this is the only article in the Revolutionary declarations of rights which was accepted almost verbatim for the federal Bill of Rights in 1789-1791." 1 THE PAPERS OF GEORGE MASON, 1725-1792 286 (Rutland ed.).

10. Prohibiting General Warrants

Virginia	"That warrants unsupported by evidence, whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are grievous and oppressive, and ought not to be granted."[169]
Maryland	"That all warrants, without oath, to search suspected places, or to seize any person, or his property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend all persons suspected, without naming or describing the place, or any person in special, are illegal, and ought not to be granted."[170]
Delaware	"THAT all Warrants without Oath to search suspected Places, or to seize any Person or his Property, are grievous and oppressive; and all general Warrants to search suspected Places, or to apprehend all Persons suspected, without naming or describing the Place or any Person in special, are illegal and ought not to be granted."[171]

Although Mason admitted that he was the author of this provision, he "rejected an association" with the article stating that the rights protected by it were "not of a fundamental nature."[172] Maryland's draft, while clearly modeled on Virginia's, goes further and, for the first time, declares general warrants to be illegal, rather than merely "grievous and oppressive".[173]

Interestingly, Pennsylvania had adopted a provision that can be considered a prototype for the Fourth Amendment to the United States Constitution, in that it prohibited both general warrants *and* unreasonable searches and seizures.[174] The Maryland drafters, although they had access to this Pennsylvania provision, preferred to use Virginia's provision as their model. It is, therefore, at least ironic that the Court of Appeals of Maryland has chosen to engraft fourth

[169] VA. CONST., Decl. of Rts., art. 12 (May 27, 1776 draft).

[170] MD. CONST., Decl. of Rts., art. 23 (August 27, 1776 draft).

[171] DE. CONST., Decl. of Rts., art. 17 (September 11, 1776 draft).

[172] 1 THE PAPERS OF GEORGE MASON, 1725-1792 286 (Rutland ed.).

[173] William Cuddihy, *From General to Specific Warrants: The Origins of the Fourth Amendment in* THE BILL OF RIGHTS: A LIVELY HERITAGE 85, 91-93 (Jon Kukla ed. 1987).

[174] William Cuddihy, *From General to Specific Warrants: The Origins of the Fourth Amendment in* THE BILL OF RIGHTS: A LIVELY HERITAGE 85, 91-93 (Jon Kukla ed. 1987); PA. CONST., Decl. of Rts., Art. X (1776) *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 279 (William F. Swindler, ed., 1979).

amendment search and seizure jurisprudence onto Maryland's warrants provision.[175] It is my view that in an appeal alleging an "unreasonable search and seizure," a Maryland appellate court must evaluate the claim solely on federal constitutional grounds, because there are no state constitutional grounds for doing so.

11. Preserving "Freedom of the Press"

Virginia	"That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotick governments."[176]
Maryland	"That the liberty of the press ought to be inviolably preserved."[177]
Delaware	"THAT the Liberty of the Press ought to be inviolably preserved."[178]

This most famous provision of the Virginia Declaration of Rights was not necessarily even drafted by Mason himself. Professor Rutland has stated unequivocally that this provision appears in the initial draft in Thomas Ludwell Lee's handwriting, not George Mason's, although it is not clear if Lee was writing his own words or merely recording those of Colonel Mason.[179]

The description of the freedom of the press as a "bulwark of liberty" apparently originates with *Cato's Letters*, a series of essays by two English pamphleteers, widely reprinted

[175] For a partial listing of cases in which the appellate courts of Maryland have analyzed this warrants provision as creating a prohibition on unreasonable searches and seizures, see Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 699 n.393 (1998).

[176] VA. CONST., Decl. of Rts., art. 14 (May 27, 1776 draft).

[177] MD. CONST., Decl. of Rts., art. 39 (August 27, 1776 draft).

[178] DE. CONST., Decl. of Rts., art. 23 (September 11, 1776 draft).

[179] 1 THE PAPERS OF GEORGE MASON, 1725-1792 279 (Rutland ed.). George Mason never served in the military, but was awarded the honorary title of Colonel for his service on the Virginia Council of Safety. LEE FLEMING REESE, GEORGE MASON'S PART IN FRAMING THE CONSTITUTION OF THE UNITED STATES AND THE BILL OF RIGHTS ____ (rev. ed., 1986). It was, however, a title that Mason seemed to enjoy, and that his contemporaries used frequently. For example, in a letter to Thomas Jefferson written on May 24, 1776, Edmund Pendleton wrote that "Colo. Mason seems to have the Ascendancy in the great work" of drafting the Virginia constitution." 1 THE PAPERS OF GEORGE MASON, 1725-1792 274 (Rutland ed.).

and quoted in the American colonies.[180] *Cato's Letter* No. 15 states that "Freedom of Speech is the great Bulwark of Liberty; they prosper and die together." In 1768, the Massachusetts General Assembly refused to prosecute the publisher of the *Boston Gazette* for an attack on the governor, and responded with Cato's words: "The Liberty of the Press is a great Bulwark of the Liberty of the People: It is, therefore, the incumbent Duty of those who are constituted the Guardians of the People's Rights to defend and maintain it."[181]

After Mason and Lee used it in the Virginia Declaration of Rights, the phrase "bulwark of liberty" was trotted out one more time, this time by James Madison, in his draft proposal that became the First Amendment to the United States Constitution. Madison's proposal provided that, "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty shall be inviolable."[182] Professor Bogen describes the phrase—"one of the great bulwarks of liberty"—as "stick[ing] out like a sore thumb" and "add[ing] nothing to the operative force of the sentence."[183] Bogen describes the phrase as "[l]ike a fossil preserved in amber," providing "an important clue in reconstructing the past," and thus tracing the First Amendment back to its roots in the Virginia Declaration of Rights.[184]

Maryland, followed by Delaware, preferred a more direct (and perhaps more enforceable) version of the right of freedom of the press, apparently unrelated to Virginia's. This comports

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[180] *See* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 445-46 (1983) (citing 1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 100 (1755)). *See also* David A. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. REV. 455, 491-92 n.214-20 (1983) (and accompanying text).

[181] David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 446 (1983) (*quoting* LEONARD LEVY, LEGACY OF SUPPRESSION 67-69 (1960)).

[182] 1 ANNALS OF CONG. 434 (J. Gales ed. 1789) (*quoted in* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 445 (1983)).

[183] David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 445 (1983).

[184] David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 445 (1983).

with David Anderson's analysis, which identifies four models of early press clauses—(1) the Virginia model, which was copied by North Carolina; (2) the Maryland model, which served as the basis for the Delaware, Georgia, and South Carolina provisions; (3) the Massachusetts model, which was adopted by New Hampshire; and (4) the Pennsylvania model, the only one to incorporate a free speech right.[185]

[185] David A. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. REV. 455, 464-65 n.53-66 (1983) (and accompanying text).

12. Governing the Militia

Virginia	"That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power."[186]
Maryland	"That a well regulated Militia is the proper, natural and safe defence of a free Government."[187]
	"That standing armies are dangerous to liberty, and ought not to be raised, or kept up without consent of the legislature."[188]
	"That in all cases and at all times the military ought to be under strict subordination to, and controul of the civil power."[189]
	"That no person except soldiers, mariners or marines in the service of this state, ought in any case to be subject to, or punishable by martial law."[190]
Delaware	"THAT a well regulated Militia is the proper, natural and safe Defence of a free Government."[191]
	"THAT standing Armies are dangerous to Liberty, and ought not to be raised or kept up without Consent of the Legislature."[192]
	"THAT in all Cases and at all Times the Military ought to be under strict Subordination to and governed by the Civil Power."[193]

Although the authorship of this article cannot be definitively determined, Professor Rutland notes that the wording of article 15 of the Virginia Declaration of Rights is

[186] VA. CONST., Decl. of Rts., art. 15 (May 27, 1776 draft).

[187] MD. CONST., Decl. of Rts., art. 25 (August 27, 1776 draft).

[188] MD. CONST., Decl. of Rts., art. 26 (August 27, 1776 draft).

[189] MD. CONST., Decl. of Rts., art. 27 (August 27, 1776 draft).

[190] MD. CONST., Decl. of Rts., art. 29 (August 27, 1776 draft).

[191] DE. CONST., Decl. of Rts., art. 18 (September 11, 1776 draft).

[192] DE. CONST., Decl. of Rts., art. 19 (September 11, 1776 draft).

[193] DE. CONST., Decl. of Rts., art. 20 (September 11, 1776 draft).

"characteristically G[eorge] M[ason]'s."[194] If so, Mason borrowed from the English Bill of Rights, which contained a similar provision "[t]hat the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law…"[195] Professor Howard eloquently assures us that Virginia's provision (and, by implication, the nearly identical provisions in the 1776 declarations of rights of Maryland and Delaware) is intended to protect the rights of citizens to form militias, and did not include any individual right of gun ownership:

> [These provisions have their] roots in the prerevolutionary experience and speaks to the rights of the citizenry as a whole to prevent the seizure of militia arms as the British were attempting to do on the day they marched for Lexington. The section[s] also ensure the right of all citizens to fight in the defense of their nation and to live free from the fear of an alien soldiery commanded by men who are not responsible to law and the political process. Such guarantees are therefore intertwined with the survival of representative government and personal freedoms.[196]

Thus, it is plain that the text of the militia provisions of the Virginia, Maryland, and Delaware declarations of rights of 1776 do not include an individual right of firearm ownership.[197]

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[194] 1 THE PAPERS OF GEORGE MASON, 1725-1792 286 (Rutland ed.) (referring to George Mason, "Plan for Embodying the People" (Feb. 6, 1775), *reprinted in* 1 THE PAPERS OF GEORGE MASON, 1725-1792 215 (Rutland ed.)).

[195] MICHAEL EVANS & R. IAN JACK, EDS., SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL LAW 354 (1984); 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS ____ (William F. Swindler, ed., 1973). A further clause of the English Bill of Rights guaranteed, "That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law." The meaning of this clause, and whether it secured an individual right to own firearms, is subject to debate, *see* 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 268 n.13 (1971) (and sources cited therein). That this clause was not repeated in the bills of rights of Virginia, Maryland, and Delaware should be beyond cavil.

[196] 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 277 (1971).

It should be noted that both Virginia and Delaware have both subsequently amended their constitutions to add what was not there before—a right of individual gun ownership. VA. CONST., Decl. of Rts., Art. 13 (as amended, 1970); DE. CONST., Decl. of Rts., Art. I, § 20 (as amended, 1987). Maryland's Declaration of Rights has not been amended and continues as drafted, without an individual right of gun ownership. *See* 79 OP. ATT'Y GEN. 69 (February 25, 1994).

[197] There are those who would quarrel with my analysis. Advocates of the unrestricted availability of handguns have asserted that the Virginia militia provision, Article 15 of the May 27, 1776 draft, was intended to provide a right to individual gun ownership. Stephen P. Halbrook, *Rationing Firearm Purchases and the Right to Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States*, 96 W. VA. L. REV. 1, 13 (1993); Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights:* Pennsylvania, *North Carolina,*

The Maryland draft broke the Virginia draft down into its three constituent parts,[198] a decision that the Delaware drafters copied.[199] The sequence of the provisions is interesting. After the three militia provisions, Maryland included its prohibition against the quartering of soldiers,[200] followed by Article 29, regarding martial law.[201] Although the text of the martial law article is unique among the three constitutions ("That no person except soldiers, mariners or marines in the service of this state, ought in any case to be subject to, or punishable by martial

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Vermont, and Massachusetts, 10 VT. L. REV. 255, 270, 316-17 (1985); and Thomas M. Moncure, Jr., *Who is the Militia – The Virginia Ratification Convention and the Right to Bear Arms*, 19 LINCOLN L. REV. 1, 21 (1990). These authors support this claim by reference to a proposal by Thomas Jefferson (who, although a convention delegate, was not present at the convention) to include a provision in the Virginia constitution that "no freeman shall ever be debarred the use of arms." Stephen P. Halbrook, *Rationing Firearm Purchases and the Right to Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States*, 96 W. VA. L. REV. 1, ____ (1993). Of course, a rejected proposal, authored by a man who was not at the convention should have little interpretive value. Halbrook and Moncure also claim that the description of the militia contained in the Virginia provision, "composed of the body of the people, trained to arms" supports an individual right of gun ownership. Stephen P. Halbrook, *Rationing Firearm Purchases and the Right to Keep Arms: Reflections on the Bills of Rights of Virginia, West Virginia, and the United States*, 96 W. VA. L. REV. 1, ____ (1993). I think that this is a strained reading of the phrase. Rather, the intent of the phrase seems more likely to be addressed to a communal right of self-defense. Finally, Halbrook suggests that the description of the militia "expressed in other words" Jefferson's proposal, that "no freeman shall ever be debarred the use of arms," and that each supports an individual right of firearm ownership. It is far more likely, and a more reasonable historical interpretation, that Jefferson's proposal was considered (if it was considered at all) as too broad, and that the convention delegates intentionally choose to limit their provision to the militia and a communal right to defense.

[198] *See* 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 266 (1971) (Virginia's article 13 contains "three separate ideas that were thought essential to the continuance of representative institutions").

[199] Although the language of the Maryland provisions is clearly derived from the Virginia draft, it is interesting to note that the "militia resolves" of the "freemen of Anne Arundel county" contain similar statements. *Maryland Gazette* (June 27, 1776) *reprinted in* DAVID CURTIS SKAGGS, ROOTS OF MARYLAND DEMOCRACY: 1753-1776 225 (1973) ("15. That no standing armies be kept up only [except?] in time of war. 16. That a well regulated militia be established in this province as being the best security for the preservation of the lives, liberties and properties of the people.").

[200] MD. CONST., Decl. of Rts., art. 28 (August 27, 1776 draft). For a discussion of this provision, *see infra*, notes ____-____

[201] For a discussion of the placement of these Maryland articles, and the ramifications of that placement both for the Maryland articles and the interpretation of the second and third amendments to the United States Constitution, *see* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 59-63 (1998). *See also*, *supra* notes ___-____.

law"[202]), it clearly arises from similar impulses—to maintain democratic control over the operation of the armed forces.[203]

B. Provisions that are not textually similar, but that contain similar ideas in all three drafts: Virginia, Maryland, and Delaware

There are three provisions in each of the three constitutions that are conceptually linked, but share few of the same words. I have omitted the chart comparing the language of these provisions in this section because little is gained by showing these provisions next to each other. Instead, I will trace the evolution of each provision. Full text of each provision is, however, always provided, either in text or note.

1. Religious Toleration and Freedom: Free Exercise and Disestablishment

George Mason's original draft,[204] and the slightly modified May 27 committee draft,[205] would have provided "the fullest toleration" of religious dissenters.[206] Neither draft proposed

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[202] MD. CONST., Decl. of Rts., art. 29 (August 27, 1776 draft).

[203] While this Maryland provision is unique among these three states, *but see* Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 702 n.437 (1998) (noting similar provisions in other state constitutions), and has never been construed by the Maryland courts, I note that the question of to whom *federal* martial law applies, and when, remain subjects of some controversy. *See e.g.*, Note, *Court-Martial Jurisdiction Over Civilian Crimes of Soldiers*, 83 HARV. L. REV. 212 (1969). *See also*, Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957) (opining that constitutional guarantees in the bill of rights were intended to apply to members of the armed forces); Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958); and Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266 (1958) (opining that constitutional guarantees in the bill of rights were not intended to apply to members of the armed forces). [I WOULD APPRECIATE IF SOMEONE COULD UPDATE THIS RESEARCH, AND CONFIRM THAT THESE REMAIN OPEN QUESTIONS. THANKS—DF].

[204] 1 THE PAPERS OF GEORGE MASON, 1725-1792 278 (Rutland ed.).

[205] 1 THE PAPERS OF GEORGE MASON, 1725-1792 284 (Rutland ed.).

[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, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless, under colour of religion, any man disturb the peace, the happiness, or safety of society. And that it is the mutual duty of all to practice Christian forbearance, love, and charity, towards each other." VA. CONST., Decl. of Rts., art. 18 (May 27, 1776 draft).

nor implied the disestablishment of the state-sponsored Anglican Church and suggested only that the majority would "tolerate" other religious practices, not that dissenters enjoyed an inherent right to religious freedom.[207] That was the status of the drafts on May 27, when they were carried on to Philadelphia, Annapolis, New Castle, and beyond. Fortunately, neither the Virginia convention, nor those meeting in Pennsylvania, Maryland, or Delaware adopted that version. In each of these state's bills of rights, the concept contained in Mason's draft was expanded and broader religious freedoms adopted.

In Virginia, James Madison[208] drafted an amendment that transformed religious tolerance into a natural right to the "full and free exercise" of religion.[209] Madison's amendment also would have explicitly disestablished the Anglican Church, but that portion was deleted, leaving the question of disestablishment unresolved.[210] According to one historian, "Madison's proposal [establishing religious freedom as a natural right] constituted one of the most creative contributions of the American Revolution, a major innovation in Western political thought."[211] Yet, despite the just acclaim for this provision, it must be remembered that Madison's

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[207] JOHN SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783 108-09 (1988).

[208] Apparently, young Madison arranged for his amendment to be proposed to the convention by the more experienced Patrick Henry. 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 290 (1971). Later, Henry was erroneously credited with authoring the amendment, which ironically, it turned out that he did not fully support. JOHN SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783 109-10 (1988).

[209] JOHN SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783 109 (1988); 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 290 (1971); JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 13 (1990). *See also* Everson v. Board of Education, 330 U.S. 1, 34 (1947) (Rutledge, J. dissenting).

[210] JOHN SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783 109 (1988); 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 290-91 (1971). The question of the establishment of the Anglican Church in Virginia remained unresolved until 1784. That year, Virginia Governor Patrick Henry supported an assessment bill for the support of religious teachers. In response, James Madison wrote his famous "Memorial and Remonstrance against Religious Assessments." 8 THE PAPERS OF JAMES MADISON 295 (19___). *See also*, Everson v. Board of Education, 330 U.S. 1, 11-13 (1947). The assessments bill was tabled and ultimately replaced by Thomas Jefferson's Bill for Religious Liberty that denounced all religious assessments. In 1969, portions of Jefferson's Bill for Religious Liberty were added to article 16 of the Virginia Declaration of Rights, confirming the prohibition against establishment. 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 291-92 (1971).

amendment was made *after* the May 27 draft. Thus, it is unlikely that the delegates to the Pennsylvania, Maryland, and Delaware conventions ever saw Madison's changes. In fact, it was apparently "almost impossible" to obtain a copy of the official, June 12 version in America for the next forty years.[212] While Madison's amendment was an innovative concept, it was not influential in the drafting of revolutionary-era bills and declarations of rights.[213]

Fortunately, however, the idea of religious freedom as a natural right of man did not disappear with the official version of the Virginia Declaration of Rights. In Pennsylvania, the colonial Charter of Privileges (1701) had contained a strong religious freedom provision that provided both for the free exercise of religion, and prohibited the establishment of an official religion:

> That no Person or Persons, inhabiting in this Province or Territories, who shall confess and acknowledge One almighty God, the Creator, Upholder and Ruler of the World; and profess him or themselves obliged to live quietly under the Civil Government, shall be in any Case molested or prejudiced, in his or their Person or Estate, because of his or their conscientious Persuasion or Practice, nor be compelled to frequent or maintain any religious Worship, Place or Ministry, contrary to his or their Mind, or to do or super any other Act or Thing, contrary to their religious Persuasion.[214]

The Pennsylvania constitutional convention of 1776 repeated the same concepts of free exercise and anti-establishment in similar language:

> That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend religious worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any

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[211] JOHN SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783 109 (1988).

[212] JOHN SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783 103 (1988).

[213] While the influence of Madison's religious freedom amendment cannot be found in these subsequent state bills of rights, it is, of course, found in Madison's later work, the federal bill of rights, including the First Amendment to the United States Constitution—"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" U. S. CONST., amend. I.

[214] William Penn's "Charter of Privileges Granted by William Penn, Esquire to the Inhabitants of Pennsylvania and Territories" (October 28, 1701), reproduced at http://www.yale.edu/lawweb/avalon/states/pa07.htm (visited April 29, 2001).

> man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiment or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise or religious worship.[215]

Maryland, founded by the Catholic George Calvert and envisioned as a safe haven for Catholics, was home to the first expansive protection of the free exercise of religion.[216] When the Maryland framers drafted the constitution, they set out to protect religious expression and end the state-sponsorship of the Anglican Church.[217] It can be assumed that Charles Carroll of Carrollton, a Catholic and member of the drafting committee, was active in support of these aims.[218] The August 27, 1776, draft contained two provisions: Article 34, providing for the free exercise of religion,[219] and Article 35, ending the establishment of the Anglican Church.[220]

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[215] PA. CONST., Decl. of Rts., art. II (1776). For further information on the provisions of the Pennsylvania Declaration of Rights and Constitution of 1776 pertaining to religion, *see* William Bentley Ball, *The Religion Clauses of the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 709, 710-16 (1994).

[216] The Maryland Act of Toleration, Acts of 1649, ch. ___, confirmed by the Lord Proprietor (Aug. 26, 1650). *Reprinted in* 4 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 368-71 (William F. Swindler, ed., 1975); 1 ARCHIVES OF MARYLAND 244-247 (1883); http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000001/html/am1--244.html (visited April 29, 2001). *But see*, Carl N. Everstine, *Maryland's Toleration Act: An Appraisal*, 79 MD. HIST. MAG. 99, 102-05 (1984) (describing various historians' appraisals of the limitations and weaknesses of the Act of Toleration).

[217] Carl N. Everstine, *Maryland's Toleration Act: An Appraisal*, 79 MD. HIST. MAG. 99, ____ (1984). *See also* Kenneth Lasson, *Free Exercise in the Free State: Maryland's Role in the Development of First Amendment Jurisprudence*, 18 U. BALT. L. REV. 81 (1988); Kenneth Lasson, *Free Exercise in the Free State: Maryland's Role in Religious Liberty and the First Amendment*, 31 J. CH. & STATE 419 (198__).

[218] Carl N. Everstine, *Maryland's Toleration Act: An Appraisal*, 79 MD. HIST. MAG. 99, 112 (1984).

[219] "That the rights of conscience are sacred, and all persons professing the Christian religion ought for ever to enjoy equal rights and privileges in this state." MD. CONST., Decl. of Rts., art. 34 (August 27, 1776 draft).

[220] "That no person ought to be by any law molested in his person or estate for his religious persuasion, profession, or practice, nor compelled to frequent or maintain any religious worship, place of worship, or ministry, provided that such of the present clergy of the church of England, who have remained in their parishes, and performed their duty, and shall continue to do so, be entitled to receive during their lives the provision and support established by an act of assembly passed at a session of assembly, begun and held at the city of Annapolis the 16th of November, 1773, entitled, 'An act for the support of the clergy of the church of England in this province,' subject nevertheless to such rules and regulations as shall be hereafter made by the legislature." MD. CONST., Decl. of Rts., art. 35 (August 27, 1776 draft).

Interestingly, Article 35 proposed a "grandfather clause" that would have permitted existing Anglican ministers to continue to be supported by state taxes throughout their lives.

By the September 17, 1776, draft of the Maryland Declaration of Rights, the two provisions from the prior draft had been combined into a single article declaring both the right to the free exercise of religion (at least for persons "professing the christian religion") and the end to the formal establishment of the Anglican church.[221] Additionally, a new article, limiting gifts to the church, was added.[222]

In Delaware, the drafters took one religious freedom provision from Pennsylvania, one from Maryland, and created one of their own. Delaware's article 2 is a shortened version of Pennsylvania's article 2.[223] The Delaware drafters' only change to the Pennsylvania version (except for capitalization and punctuation) was to delete the Pennsylvania prohibition on religious discrimination.[224]

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[221] For the text of Article 33 of the September 17, 1776 draft of the Maryland Declaration of Rights, *see* Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 666-67 (1998).

[222] For the text of Article 34 of the September 17, 1776 draft of the Maryland Declaration of Rights, limiting gifts and bequests to the Church, *see* Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 669 (1998).

[223] "THAT all Men have a natural and unalienable Right to worship Almighty God according to the Dictates of their own Consciences and Understandings; and that no Man ought or of Right can be compelled to attend religious Worship or maintain any Ministry contrary to or against his own free will and Consent, and that no Authority can or ought to be vested in, or assumed by any Power whatever that shall in any Case interfere with, or in any Manner controul the Right or Conscience in the free Exercise or Religious Worship." DE. CONST., Decl. of Rts., art. 2 (September 11, 1776 draft).

To demonstrate the difference, I have marked the Pennsylvania version with the Delaware edits:

> That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend religious worship, or maintain any ministry, contrary to, or against, his own free will and consent: ~~Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiment or peculiar mode of religious worship:~~ And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise or religious worship.

[224] *See infra*, note 223.

The Delaware drafters were obviously not comfortable with so broad a statement against religious discrimination as was found in Pennsylvania's draft, and mimicked the Maryland provision in Delaware's article 3, which prohibits the religious prosecution of Christians.[225] Delaware also added one additional concept to article 3, the final clause: "unless, under Colour of Religion, any Man disturb the Peace, the Happiness or Safety of Society." Interestingly, this language mirrors language in the May 27, 1776, draft of the Virginia Declaration of Rights, with only the characteristic changes in capitalization and punctuation. This is the only place where I can find any Virginia language in the Delaware declaration without it having also been repeated in either the Maryland or Pennsylvania drafts.[226]

The Delaware drafters also placed a firm anti-establishment provision in the body of their constitution: "There shall be no establishment of any one religious sect in this State in preference to another…"[227]

Additionally, in their respective constitutions, Maryland and Delaware each provided a prohibition on ministers serving in the legislature—a rudimentary barrier between church and state.[228]

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[225] "THAT all Persons professing the Christian Religion ought forever to enjoy equal Rights and Privileges in this State, unless, under Colour of Religion, any Man disturb the Peace, the Happiness or Safety of Society." DE. CONST., Decl. of Rts., art. 3 (September 11, 1776 draft).

[226] Maryland's August 27 draft contained no such limitation. Subsequently, the Maryland convention amended the provision to add a similar, although not quite so broad limitation. The language, added "unless under colour of religion any man shall disturb the good order, peace, or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil or religious rights…" MD. CONST., Decl. of Rts., Art. 33 (1776). *Reprinted* in Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 664, 666 (1998). For an analysis of these provisions, placing a "limit on the liberty," *see* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1461-62 (1990). Professor McConnell notes that the Delaware provision is the only state provision that is as broad as Mason's draft. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1463 (1990).

[227] DE. CONST. (1776), Art. 29 *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 203-04 (William F. Swindler, ed., 1973).

[228] MD. CONST., art. 37 (1776) ("No … minister or preacher of the gospel, or any denomination … shall have a seat in the [G]eneral [A]ssembly or the [C]ouncil of this [S]tate."). Carl Everstine has suggested that this provision

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Debate over the meaning and proper interpretation of the Religion Clause of the First Amendment to the U.S. Constitution has frequently relied, with limited success, on the history of the clause.[229] Justice Rutledge, in his important dissent to *Everson v. Board of Education*,[230] identified James Madison's central role in modifying the "free exercise" in the Virginia Declaration of Rights,[231] Madison's critical role in drafting the First Amendment,[232] and identified both acts with a strict separationist philosophy.[233] Chief Justice William Rehnquist has read the historical record differently, and found nonpreferentialism to be the animating philosophy behind the Religion Clause.[234] In so doing, Rehnquist denies that Madison's philosophy in drafting the Virginia "free exercise" provision influenced Madison's views in

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served as "insurance" of the disestablishment of the Church of England. Carl N. Everstine, *Maryland's Toleration Act: An Appraisal*, 79 MD. HIST. MAG. 99, 113 (1984). The successor of this provision, MD. CONST., Art. III, § 11, was held unconstitutional in Kirkley v. State, 381 F. Supp. 327 (D. Md. 1974) and deleted from the constitution by Acts of 1978, ch. 681.

Delaware's constitution of 1776 also contained a prohibition against ministers serving in the legislature. DE. CONST., Art. 29 (1776) ("… no clergyman or preacher of the gospel, of any denomination, shall be capable of holding any civil office in this State, or of being a member of either of the branches of the legislature, while they continue in the exercise of the pastoral function").

While it is clear that the Maryland declaration of rights was available to the Delaware drafters, the evidence is less clear with respect to the availability of the Maryland Form of Government. Given the relatively short, one week time frame between the completion of the draft constitution and its printing on September 10, and the publication of a Delaware draft on September 17, and given the distinct dissimilarities between the documents, it is unlikely that the Delaware provision is a descendant of the Maryland provision, but, instead, a similar manifestation of a similar impulse.

[229] David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94 (2002).

[230] 330 U.S. 1, 28 (1947) (Rutledge, J. dissenting). David Reiss has identified the Rutledge dissent in *Everson* as altering Religion Clause discourse. David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94, 125 (2002).

[231] 330 U.S. at 38-39.

[232] 330 U.S. at 39.

[233] 330 U.S. at 63.

[234] Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J. dissenting).

introducing to Congress the language that eventually became the Religion Clause.[235] Rehnquist particularly complains about the central role assigned to the Virginia experience in developing Religion Clause jurisprudence, blasting the Court's opinion in *Abington School District v. Schempp*[236] for stating "'the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States.' On the basis of what evidence we have, this statement is demonstrably incorrect as a matter of history."[237] In a recent article, David Reiss argues that Rehnquist does not adequately support this conclusion.[238]

The history of the development of the state constitutions described here (Pennsylvania, Maryland, and Delaware), serve to reinforce the centrality of the Virginia experience in the development of the federal Religion clause, because each developed independently of the Virginia tradition. Thus, neither Maryland's continued establishment of the Anglican church,[239] nor the explicit nonpreferential text of Article 35 of Maryland's September 17, 1776 draft declaration of rights,[240] can provide support that the federal provision should be interpreted

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[235] 472 U.S. at 98-99.

[236] 374 U.S. 203 (1963).

[237] Jaffree, 472 U.S. at 99 (Rehnquist, J. dissenting) (quoting Schempp, 374 U.S. at 214 (internal citation omitted)).

[238] David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 MD. L. REV. 94, 135 (2002).

[239] 472 U.S. at 99 n.4.

[240] "… nor ought any person to be compelled to frequent or maintain, or contribute, unless on contract, to maintain any particular place of worship, or any particular ministry; yet the legislature may in their discretion lay a general and equal tax for the support of the christian religion, leaving to each individual the power of appointing the money collected from him, to the support of any particular place of worship or ministry, or for the poor of his own denomination, or the poor in general of any particular county…" MD. CONST., Decl. of Rts., Art. 33 (September 17, 1776 draft). For the complete text of Article 33 of the September 17, 1776 draft of the Maryland Declaration of Rights, *see* Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 666-67 (1998).

according to the nonpreferentialist theory espoused by Chief Justice Rehnquist.[241] Similarly, the separationist language of the Pennsylvania and Delaware provisions provide limited support for the

2. Prohibitions against Plural Office Holding

The traditional understanding of state constitutional prohibitions against plural office holding is that these provisions were intended to reinforce the separation of powers.[242] A more recent analysis suggests that while the Virginia provision was based on the separation of powers, it was unique in this regard.[243] Prohibitions on plural office holding in other early state constitutions, including those of Maryland and Delaware, according to the authors, "were conceived first and foremost as anti-corruption measures."[244]

The Virginia text supports this interpretation, stating, "The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time…"[245] Virginia included its prohibitions against plural office holding exclusively within the constitution itself, not as part of the declaration of rights.[246]

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[241] Chief Justice Rehnquist's citation to Maryland's continued establishment of the Anglican religion into the early nineteenth century, Wallace v. Jaffree, 472 U.S. 38, 99 n.4 (1985) (Rehnquist, J. dissenting), therefore, cannot support his contention that this supports a national

[242] *See e.g.* FLETCHER M. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES 1776-1860: A STUDY IN THE EVOLUTION OF DEMOCRACY 81-82 (1930).

[243] Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel*, 79 CORNELL L. REV. 1045, 1060-61 (1994).

[244] Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel*, 79 CORNELL L. REV. 1045, 1060 (1994).

[245] VA. CONST. (unnumbered provision) (June 12, 1776) *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 52 (William F. Swindler, ed., 1979).

[246] "The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the

In Maryland, prohibitions against plural office holding were scattered repeatedly throughout both the declaration of rights, which had two such provisions,[247] and the constitution, which contained *eight*.[248] None of these provisions intimates an underlying separation of powers agenda, but would be appropriate to prevent the sort of plural office holding abuses of colonial administration.[249]

The Delaware drafters adopted multiple prohibitions against plural office holding, but did not include them in the bill of rights, preferring to leave them within the constitution itself.[250]

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same time; except that the Justices of the County Courts shall be eligible to either House of Assembly." VA. CONST. (unnumbered provision) (June 12, 1776) *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 52 (William F. Swindler, ed., 1979). "These officers [Judges of the Supreme Court of Appeals, and the General Court, Judges in Chancery, Judges in Admiralty, Secretary, and the Attorney-General] shall have fixed and adequate salaries, and, together with all others, holding lucrative offices, and all ministers of the gospel of every denomination, be incapable of being elected members of either House of Assembly or the Privy Council." VA. CONST. (unnumbered provision) (June 12, 1776) *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 54-55 (William F. Swindler, ed., 1979).

[247] MD. CONST., Decl. of Rts., art. 32 (August 27, 1776 draft) ("That no person holding a place of profit, or receiving any part of the profits thereof, or concerned in army, navy, or government contracts, or employed in the executive department of civil government, or in the regular land service, or marine, of this, or the United States, or a minor, or an alien, ought to have a seat in the legislature or privy council of this state."); MD. CONST., Decl. of Rts., art. 33 (August 27, 1776 draft) ("That no person ought to hold at the same time more than one office of profit, nor any person in public trust to receive any gratuity, present, or emolument, from any foreign prince, or state, or from the United States, or any of them."). The Maryland drafters apparently reconsidered, and determined that two separate bill of rights prohibitions against dual office holding were redundant. By the September 17, 1776 draft, Article 32 had been deleted. Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 664, 703 n.468 (1998).

[248] MD. CONST., Art. 7 (1776) (declaring vacant office of a delegate if that delegate is elected governor); MD. CONST., Art. 19 (1776) (declaring vacant office of a senator if that senator is elected governor); MD. CONST., Art. 27 (1776) (language is unclear, but appears to prohibit plural office holding by members of the United States Congress representing Maryland); MD. CONST., Art. 37 (1776) (prohibiting plural office holding by delegates, senators, members of the council, governor); MD. CONST., Art. 38 (1776) (requiring oath against plural office holding or receipt of profits of multiple offices); MD. CONST., Art. 39 (1776) (establishing a penalty for plural office holding); MD. CONST., Art. 44 (1776) (permitting plural office holding by justices of the peace); MD. CONST., Art. 45 (1776) (prohibiting "field officer[s] of the militia" from serving as senator, delegate or member of counsel).

[249] Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel*, 79 CORNELL L. REV. 1045, ____ (1994).

[250] DE. CONST., Art. 8 (1776) ("… a member of the legislative counsel or of the house of assembly being chosen of the privy council, and accepting thereof, shall thereby lose his seat.") *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 201 (William F. Swindler, ed., 1973); DE. CONST., Art. 12 (1776) ("… during the time the justices of the … supreme court and courts of common pleas remain in office, they shall hold none other except in the militia.") *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 201 (William F. Swindler, ed., 1973); DE. CONST., Art. 18 (1776) ("The justices of the supreme court and courts of common pleas, the members of the privy council, the secretary, the trustees of the loan office,

3. The "Independency and Uprightness" of Judges

Although English judges initially served at the pleasure of the monarch, after the Glorious Revolution of 1688 judges were appointed to serve "during good behaviour."[251] Parliament codified this as a requirement for English judges by the Act of Settlement of 1701.[252] The king refused, however, to extend life tenure "during good behaviour" to colonial judges.[253] This was a major American grievance, as is evidenced by Jefferson's including it within the Declaration of Independence.[254]

Immediately upon independence, the former colonists sought to rectify that problem.[255] The Virginia Constitution of 1776 provided that all judicial officers served during their good behavior,[256] and provided the mechanism for impeachment if their behavior was not good.[257]

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and clerks of the court of common pleas, during their continuance in office, and all persons concerned in any army or navy contracts, shall be ineligible to either house of assembly; and any member of either house accepting of any other of the offices hereinbefore mentioned (excepting the office of a justice of the peace) shall have his seat thereby vacated, and a new election shall be ordered.") *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 202 (William F. Swindler, ed., 1973).

[251] 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 195 (7th ed. 1956); BERNARD SCHWARTZ, THE ROOTS OF FREEDOM: A CONSTITUTIONAL HISTORY OF ENGLAND 199 (1967).

[252] Act of Settlement, 12 & 13 Will. 3, ch. 2, § 3 (1701) (Judge's Commissions [shall] be made Quamdiu se bene gesserint [during good behavior], and their Salaries ascertained and established; but upon Address of both Houses of Parliament it may be lawful to remove them.").

[253] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 160 (1969).

[254] The Declaration of Independence, paras. 10 & 11 (1776). For other evidence that the colonists considered the King's refusal to permit life terms for colonial judges, *see* PAMPHLETS OF THE AMERICAN REVOLUTION 249-51 (Bernard Bailyn ed., 1965).

[255] The ideological and practical needs for this change are clear. The 1776-era state constitutions, frequently referred to as the "first wave" of state constitutions, are marked by legislative supremacy and by strict limitations on the executive branch. *See e.g.*, Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, ____ (1989). Judicial tenure during good behavior removed the judiciary from the influence of the executive branch, enforcing this legislative supremacy and simultaneously supporting the separation of powers.

[256] "The two Houses of Assembly shall, by joint ballot, appoint Judges of the Supreme Court of Appeals, and the General Court, Judges in Chancery, Judges in Admiralty, Secretary, and the Attorney-General, to be commissioned by the Governor, and continue in office *during good behaviour*." VA. CONST. (unnumbered provision) (June 12, 1776) (emphasis added) *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 54 (William F. Swindler, ed., 1979).

The Maryland drafters agreed with the concept, but went further and, for the first time, enshrined the concept of judicial independence in their bill of rights.[258] At least by the understanding of the time, this indicated an implicit recognition that the right was regarded as a universal right of man. The Maryland founders proclaimed, "That the independency and uprightness of judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people…."[259] Inexplicably, however, the Maryland drafters also included the mechanics of maintaining judicial independence and integrity in the bill of rights, thus cluttering up the provision.[260]

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[257] VA. CONST. (unnumbered provisions) (June 12, 1776) *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 55 (William F. Swindler, ed., 1979). Professor Howard explains the Virginia impeachment provisions:

> The first Constitution authorized impeachment of the Governor, when out of office, and others offending against the State, through maladministration, corruption, or other, so as to endanger the safety of the State. Impeachment was by the House of Delegates and was to be prosecuted by the Attorney General, or others appointed by the House, in the General Court. Judges of the General Court could themselves be impeached by the House and, in such case, were to be prosecuted before the Court of Appeals. Persons found guilty could be punished by being barred from public office, by being removed from office pro tempore, or by being subjected to such punishments as provided by law.

1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 553-54 (1971).

[258] Joyce A. McCrary Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedom*, 36 HOW. L. REV. 43, 52 (1993) (identifying Maryland's provision as the first American judicial independence provision).

[259] MD. CONST., Decl. of Rts., art. 30 (August 27, 1776 draft).

[260] The full provision provided: "That the independency and uprightness of judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people; therefore, the chancellor and all judges and justices ought to hold commissions during good behaviour; removable only for misbehaviour on conviction in a court of law, on conviction by impeachment, or by a vote of the legislature." MD. CONST., Decl. of Rts., art. 30 (August 27, 1776 draft). *See also* MD. CONST., Art. 40 (1776) (stating that all judges hold their office "during good behaviour"). H. H. WALKER LEWIS, THE MARYLAND CONSTITUTION OF 1776 ____ n.64 (1976).

The subsequent history of this provision is interesting. The August 27, 1776, draft of the Maryland Declaration of Rights provided alternate means for the impeachment of judges—"on conviction in a court of law, on conviction by impeachment, or by a vote of the legislature." MD. CONST., Decl. of Rts., art. 30 (August 27, 1776 draft) [I DON'T KNOW WHAT "ON CONVICTION BY IMPEACHMENT" MEANS IN THIS PHRASE]. Apparently, the drafting committee had second thoughts about giving unlimited impeachment powers to the legislature, or the committee unexpectedly felt they could get the votes to limit legislative removal of judges, and, on November 1, William Paca, offered, and the Convention adopted, two amendments limiting the legislature's removal powers. The first amendment provided that judges "*shall* be removed for misbehavior on conviction in a court of law, and *may* be removed by the governor upon the address of the general assembly" (emphasis added). THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977) (November 1, 1776); PROCEEDINGS OF THE CONVENTION

Delaware, with a copy of the Maryland draft in hand, made a sensible change. The opening clause of the Maryland provision, which states the fundamental premise of judicial independence, was copied verbatim into the Delaware Declaration of Rights.[261] The mechanics for accomplishing that judicial independence, however, were appropriately moved into the Delaware Constitution itself.[262]

C. Provisions that are textually identical, or nearly identical, between Virginia and Maryland, but not Delaware

1. Prohibiting Hereditary Titles

Virginia	"That no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of publick services; which, not being descendible, or hereditary, the idea of a man born a magistrate, a legislator, or a judge, is unnatural and absurd."[263]
Maryland	"That no title of nobility ought to be granted in this state."[264]

OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775 & 1776 ____ (Jonas Green, 1836); http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/index.html (visited April 29, 2001). The second amendment required a two-thirds vote by each house to impeach a judge. THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977) (November 1, 1776); PROCEEDINGS OF THE CONVENTION OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775 & 1776 ____ (Jonas Green, 1836); http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/index.html (visited April 29, 2001). *See* H. H. WALKER LEWIS, THE MARYLAND CONSTITUTION OF 1776 ____ (1976).

[261] "THAT the Independency and Uprightness of Judges are essential to the impartial Administration of Justice, and a great Security to the Rights and Liberties of the People." DE. CONST., Decl. of Rts., art. 22 (September 11, 1776 draft).

[262] DE. CONST., Art. 12 (1776) ("…three justices of the supreme court for the state, … a judge of admiralty, and also four justices of the courts of common pleas and orphans' courts for each county, … who shall continue in office during good behavior") *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 201 (William F. Swindler, ed., 1973). DE. CONST., Art. 23 (1776) (""… all officers shall be removed on conviction of misbehavior at common law, or on impeachment, or upon the address of the general assembly.") *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 202-03 (William F. Swindler, ed., 1973). Delaware also changed the spelling of "behaviour" to the more American "behavior." Maryland did not modernize the spelling until 1864. *See* Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 663 (1998).

[263] VA. CONST., Decl. of Rts., art. 4 (May 27, 1776 draft).

[264] MD. CONST., Decl. of Rts., art. 42 (August 27, 1776 draft).

Virginia's provision prohibits the inheritance of offices, reflecting the republican notion that political and public office should be earned by merit, not by the accident of birth.[265] The Maryland provision, as drafted, is both broader and, perhaps, narrower than Virginia's. The Maryland article prohibits any titles of nobility whatsoever, but does not address office holding at all. Theoretically then, the Maryland provision may permit hereditary office holding so long as there is no title of nobility associated with the holding of the office. Happily, these are just esoteric musings, and no court has been asked to draw the distinctions made here.

Professor Rutland emphasizes the connection between Virginia's provision, prohibiting hereditary offices, with Mason's "guiding political principle" of frequent elections based on natural merit.[266] By the final June 12 draft, Mason's phrase "the idea of a man born a magistrate, a legislator, or a judge, is unnatural and absurd," was deleted in favor of a simple prohibition on hereditary positions.[267]

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[265] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 70-75 (1993 ed.).

[266] 1 THE PAPERS OF GEORGE MASON, 1725-1792 280 (Rutland ed.) (*citing* George Mason, "Remarks on Annual Elections" (date), *reprinted in* 1 THE PAPERS OF GEORGE MASON, 1725-1792 ____ (Rutland ed.)).

[267] "That no man, or set of men, are entitled to exclusive or separate emoluments and privileges from the community, but in consideration of publick services; which, not being descendible, neither ought the offices of Magistrate, Legislator, or Judge, to be hereditary." 1 THE PAPERS OF GEORGE MASON, 1725-1792 287 (Rutland ed.).

2. Separation of Powers

Virginia	"That the legislative and executive powers of the state should be separate and distinct from the judicative; and that the members of the two first may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections."[268]
	"The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time; except that the Justices of the County Courts shall be eligible to either House of Assembly."[269]
Maryland	"That the legislative, judicial, and executive powers of government ought to be for ever separate, distinct from, and independent of each other."[270]

Historians generally credit Montesquieu for developing and promoting the concept of the separation of powers.[271] Ironically, however, Montesquieu's celebration of the separation of powers was based on his misunderstanding of the English system, thinking its constituent parts to be more separate from each other than they were.[272] Thus the American founders, by emulating what had never existed, enshrined in their bills of rights a stronger separation of powers than in the English system.

The Virginia Declaration of Rights provision, by its terms, emphasizes the need for an independent judiciary, and only concerns itself with separating the judiciary from the other branches. Professor Howard notes that this too is derived from Montesquieu, who wrote, "there is no liberty at all if the power of judging is not separated from the legislative and executive

[268] VA. CONST., Decl. of Rts., art. 5 (May 27, 1776 draft).

[269] VA. CONST. (unnumbered provision) (June 12, 1776) *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 52 (William F. Swindler, ed., 1979).

[270] MD. CONST., Decl. of Rts., art. 4 (August 27, 1776 draft).

[271] BARON DE MONTESQUIEU, SPIRIT OF THE LAWS (1748).

[272] *See, e.g.*, FLETCHER M. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES 1776-1860: A STUDY IN THE EVOLUTION OF DEMOCRACY ____ (1930).

powers."[273] Howard also urges us not to make too much of the particular attention to the judiciary in the Virginia bill of rights provision, by pointing out that George Mason also drafted the tripartite separation of powers provision (quoted in the second box above), which was placed in the constitution itself.[274]

Maryland's concise phraseology may originate in the "militia resolves" of the "freemen of Anne Arundel County." These militia resolves, published in the *Maryland Gazette* on June 27, 1776, proposed a form of government that included the following statement regarding the separation of powers:

> It is essential to liberty, that the legislative, judicial, and executive powers of government be separate from each other; for where they are united in the same person, or number of persons, there would be wanting that mutual check which is the proper security against their making of arbitrary laws, and a wanton exercise of power in the execution of them.[275]

It is interesting to note that the Maryland drafting committee was dissatisfied with its own August 27 draft of the separation of powers provision. On October 31, 1776, Samuel Chase, a member of the drafting committee, proposed a substitute provision to the convention body, "That the legislative, executive, and judicial powers of government, or any two of them, ought not to be vested in the same man or group of men." All five members of the drafting committee who cast votes supported the amendment, but it was defeated.[276] H. H. Walker Lewis speculates as to reasons for the members of the drafting committee to have changed their minds, but each of these seems implausible.[277] The Chase amendment would have changed this

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[273] 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 82 n.3 (1971).

[274] 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 83 (1971).

[275] *Maryland Gazette* (June 27, 1776) *reprinted in* DAVID CURTIS SKAGGS, ROOTS OF MARYLAND DEMOCRACY: 1753-1776 223-24 (1973).

[276] H. H. WALKER LEWIS, THE MARYLAND CONSTITUTION OF 1776 ____ (1976).

[277] H. H. WALKER LEWIS, THE MARYLAND CONSTITUTION OF 1776 ____ (1976).

provision from a "separation of powers" provision to a "plural office holding" prohibition, redundant to Articles 32 and 33, discussed below. This redundancy may have caused the defeat of the Chase amendment.

Delaware choose not to follow Virginia's lead or Maryland's concise restatement. Instead, Delaware relied, as does the federal constitution, on the separation of powers implied by dividing government into three coordinate branches: legislative, executive, and judicial. Delaware buttressed this implied separation of powers with prohibitions against simultaneously holding offices in different branches.[278]

3. No Taxation (or Legislation) Without Representation

Virginia	"That no part of a man's property can be taken from him, or applied to publick uses, without his own consent, or that of his legal representatives; nor are the people bound by any laws but such as they have, in like manner, assented to, for their common good."[279]
Maryland	"That no aid, charge, tax, burthen, fee, or fees, ought to be set or levied on any pretense whatever, without the consent of the legislature."[280]

No battle cry of the American Revolution was sounded louder or more repeatedly than the slogan, "no taxation without representation."[281] It is no surprise that both Virginia and Maryland included this concept in their 1776 bills of rights; it is more surprising that Delaware omitted such a provision. The Maryland and Virginia provisions are not textually similar,

[278] DE. CONST., Art. 8, 18 (1776). *See generally*, In re Request of Governor for Advisory Opinion, 722 A.2d 307 (De. Supr. 1998).

[279] VA. CONST., Decl. of Rts., art. 7 (May 27, 1776 draft).

[280] MD. CONST., Decl. of Rts., art. 10 (August 27, 1776 draft).

[281] A measure of the ubiquity of this phrase is its prevalence in the modern understanding of the causes of the American Revolution:

> He taxed their property, he didn't give them any choice,
> And back in England, he didn't give them any voice,
> That's called "Taxation without Representation", and it's not fair,
> But when the colonists complained, the King said, "I don't care."

sharing only the operative word "consent." Professor Howard traces the antecedents of the Virginia provision from John Locke's Second Treatise and through George Mason's own Fairfax County Resolves.[282] H. H. Walker Lewis, the chronicler of the Maryland Constitution of 1776, traces the origins of Maryland's provision from the English Bill of Rights, the American Stamp Act Congress of 1765, and Maryland's own Proprietary fee controversy.[283] In truth, it was these sources and a hundred more.

Although there is no textual evidence that the Maryland provision is patterned on Virginia's, they clearly arose in response to the same concerns. The subsequent history of the Virginia provision seems to confirm this. The Virginia Convention added a specific reference that made it clear that "taxation" without representation was specifically among the evils to be avoided. Moreover, to make sure no future reader missed the point, the article was conjoined to what had been article 6 in the May 27 draft requiring free elections.[284]

"No More Kings," AMERICA ROCKS.

[282] 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 87-88 (1971). Locke wrote that the great and *chief end* … of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property*." 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT, § 124. In the Fairfax County Resolves, Mason wrote "that the most important and valuable Part of the British Constitution, upon which it's very Existence depends, is the fundamental Principle of the People's being governed by no Laws, to which they have not given their Consent, by Representative freely chosen by themselves…." 1 THE PAPERS OF GEORGE MASON, 1725-1792 201-02 (Rutland ed.).

[283] H. H. WALKER LEWIS, THE MARYLAND CONSTITUTION OF 1776 ____ (1976); H. H. Walker Lewis, *The Tax Articles of the Maryland Declaration of Rights*, 13 MD. L. REV. 83, 84 (1953). The English Bill of Rights provided "[t]hat levying money for or to the use of the Crown by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal." MICHAEL EVANS & R. IAN JACK, EDS., SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL LAW 354 (1984). Similarly, the Stamp Act Congress (1765), in its declaration of rights stated: "[t]hat it is inseparably essential to the Freedom of a People, and the undoubted right of Englishmen, that no taxes be imposed on them, but with their own Consent, given personally, or by their Representatives." (CITE). For the History of the Proprietary fee controversy, *see* DAVID CURTIS SKAGGS, ROOTS OF MARYLAND DEMOCRACY: 1753-1777 ____ (Greenwood Press, 1973); H. H. WALKER LEWIS, THE MARYLAND CONSTITUTION OF 1776 ____ (1976).

[284] 1 THE PAPERS OF GEORGE MASON, 1725-1792 290 (Rutland ed.).

4. Right to "Trial By Jury"

Virginia	"That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other, and ought to be held sacred."[285]
Maryland	"That the inhabitants of Maryland are entitled to the common law of England, and to the trial by Jury, according to the course of that law, and to the benefit of such of the English statutes, as at the time of their first emigration, and which by experience have been found applicable to their local, and other circumstances, and of such others as have been since introduced, used, and practiced by the courts of law, or equity; and also of all acts of assembly in force prior to the first of June, seventeen hundred and seventy-four; except such as have been, or may be altered by acts of Convention, or this charter of rights; and to all property derived from, or under the charter granted by his majesty Charles the first to Cæcilius Calvert, baron of Baltimore."[286]

The Virginia jury trial right is, by its terms, limited to civil cases—"controversies respecting property and … suits between man and man."[287] This limitation is sensible because the right to trial by jury in a criminal context was already preserved in a previous article.[288]

Although it is not clearly stated, and although courts have occasionally misinterpreted it,[289] the Maryland provision ought to be interpreted similarly to Virginia's as providing a right to a jury trial in the civil context only. A broader interpretation would cause this provision to be redundant to the previously discussed right to a jury trial in criminal cases.[290] The rest of the Maryland provision, preserving the right to common law, is discussed below.[291]

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[285] VA. CONST., Decl. of Rts., art. 13 (May 27, 1776 draft).

[286] MD. CONST., Decl. of Rts., art. 16 (August 27, 1776 draft).

[287] VA. CONST., Decl. of Rts., art. 13 (May 27, 1776 draft).

[288] VA. CONST., Decl. of Rts., art. 10 (May 27, 1776 draft). *See infra*, notes ____.

[289] CITE?

[290] MD. CONST., Decl. of Rts., art. 19 (August 27, 1776 draft). *See infra*, notes ____. Of course, the subsequent addition to the Maryland Declaration of Rights of the current Article 23 (regarding civil jury trials) makes the redundancy problem unavoidable. The history of the creation of Art. 23 is traced in Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 697 n.356 (1998).

[291] *See infra*, note ____.

5. "Rotation … in Office"

Virginia	"… and that the members of the [legislature and the executive] may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections."[292]
Maryland	"That a long continuance in offices of trust or profit is dangerous to liberty a rotation therefore in office is one of the best securities of permanent freedom; that salaries liberal, but not profuse, ought to be secured to the chancellor and the judges, during the continuance of their commissions, and reasonable salaries or fees, allowed to the officers."[293]

Joyce McCreary Pearson has inaccurately described Maryland's provision as the first state constitutional provision requiring a rotation in offices.[294] Virginia and Pennsylvania each had such provisions prior to Maryland's.[295]

The Pennsylvania provision is similar to that of Virginia, and each contains that odd phrasing, "may be restrained from oppression." The phrase was written by George Mason,[296] and must be read that in order to prevent officials from becoming oppressors, they must know that they will soon be returned to private life. Professor Rutland cites *Cato's Letters* as a precursor, "I can see no Means in human Policy to preserve the publick Liberty … but by the

[292] VA. CONST., Decl. of Rts., art. 5 (May 27, 1776 draft).

[293] MD. CONST., Decl. of Rts., art. 31 (August 27, 1776 draft).

[294] Joyce A. McCrary Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedom*, 36 HOW. L. REV. 43, 52 (1993) (stating that Maryland's was the first American constitutional requirement of rotation of offices).

[295] The Pennsylvania provision provided "[t]hat those who are employed in the legislative and executive business of the State, may be restrained from oppression, the people have a right, at such periods they may think proper, to reduce their public officers to a private station, and supply the vacancies by certain and regular elections." PA. CONST., Decl. of Rts., art. VI (1776) *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 278 (William F. Swindler, ed., 1979)

[296] 1 THE PAPERS OF GEORGE MASON, 1725-1792 277 (Rutland ed.).

frequent fresh Elections of the People's Deputies…. [T]he only Way to put them in mind of their former Condition … is often to reduce them to it."[297]

The Maryland provision is poorly drafted in that it contains two entirely separate and distinct concepts, and it does it in such a way as to confuse the reader. The first sentence of the provision ("That a long continuance in offices of trust or profit is dangerous to liberty a rotation therefore in office is one of the best securities of permanent freedom") and its final clause ("… reasonable salaries or fees, allowed to the officers") are directed to the executive and legislative branches only, because elsewhere the Maryland framers stated that judicial office should be held "during good behaviour," and therefore, not subject to this "rotation of offices." By similar deductive logic, the final clause is directed to "officers" who are not "the chancellor and the judges," ergo, legislative and executive officers. Caught in the middle between these two provisions governing the executive and legislative branches, is the clause about the payment of judicial officers: "that salaries liberal, but not profuse, ought to be secured to the chancellor and the judges, during the continuance of their commissions…" It would have been more appropriate to place it in the provision regarding the Independency and Uprightness of Judges.[298]

D. Provisions that are textually identical, or nearly identical, between Virginia and Delaware, but not Maryland

There are no bill of rights provisions that are common to the Delaware and Virginia bills of rights that are not also part of the Maryland Declaration. Although this fact is certainly not dispositive, it tends to reinforce the understanding that the drafters of the Delaware bill of rights were not relying on the May 27, 1776 draft of the Virginia Declaration of Rights. Had the

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[297] 1 THE PAPERS OF GEORGE MASON, 1725-1792 277 (Rutland ed.) (*citing* 2 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 239-40 (1755)).

[298] MD. CONST., Decl. of Rts., art. 30 (August 27, 1776 draft).

Delaware drafters been relying on that Virginia draft, they could have, but did not, include any of the unique Virginia provisions listed in section E, below.[299]

E. Provisions that are textually identical, or nearly identical, between Maryland and Delaware, but not Virginia

The May 27, 1776 draft of the Virginia Declaration of Rights is the only likely direct source for those provisions that are common to all three bills of rights, and also for those that Virginia and Maryland, or Virginia and Delaware, have in common. For those provisions that cannot be traced directly back to the Virginia draft, including those that Maryland and Delaware have in common, and those that are unique to either state, alternative sources must be found.[300]

1. "Legislature ought to be Frequently Convened"

Maryland	"That for redress of all grievances, and for the amending, strengthening and preserving of the laws, the legislature ought to be frequently convened."[301]
Delaware	"That for Redress of Grievances, and for amending and strengthening of the laws, the Legislature ought to be frequently convened."[302]

[299] *But see infra*, note 226 (and accompanying text).

[300] One alternative source of provisions may be found in the work of the "Freemen of Anne Arundel County," led by convention delegate Rezin Hammond, and his brother Matthias. By a series of machinations that are more fully described in H. H. WALKER LEWIS, THE MARYLAND CONSTITUTION OF 1776 ____ (1976), the "Freemen" met, adopted, and caused to be published a set of militia resolves, published July 18, and, on August 22, a series of instructions to the Anne Arundel County representatives to the Ninth Convention—Charles Carroll, Barrister, Samuel Chase, Brice T. B. Worthington, and Rezin Hammond, himself. The "militia resolves" of July 18, and the "instructions" of August 22 are reprinted in DAVID CURTIS SKAGGS, ROOTS OF MARYLAND DEMOCRACY: 1753-1776 220-29 (1973). On receiving these instructions, Carroll, Chase, and Worthington resigned, because they could neither flout the wishes of their constituents, nor follow instructions that they considered "incompatible with good government and the public peace and happiness." *Maryland Gazette* (August 22, 1776) *reprinted in* H. H. WALKER LEWIS, THE MARYLAND CONSTITUTION OF 1776 ____ (1976); DAVID CURTIS SKAGGS, ROOTS OF MARYLAND DEMOCRACY: 1753-1776 228-29 (1973). Nonetheless, according to State Historian Dr. Edward Papenfuse, "the convention that summer adopted the majority of their proposals and much of their language into a Declaration of Rights and Form of Government…." Edward C. Papenfuse, *An Afterward: With What Dose of Liberty? Maryland's Role in the Movement for a Bill of Rights*, 83 MD. HIST. MAG. 58, 59 (1988). That the convention should adopt the concepts and language promoted by the "freemen" and opposed by Carroll and Chase, is all the more remarkable given that these men were members of the drafting committee, and responsible for drafting the declaration of rights.

[301] MD. CONST., Decl. of Rts., art. 8 (August 27, 1776 draft).

[302] DE. CONST., Decl. of Rts., art. 8 (September 11, 1776 draft).

The English Bill of Rights of 1689 provided "[t]hat for redress of all grievances, and for the amending, strengthening and preserving of the laws, parliaments ought to be held frequently."[303] Thus, Maryland's provision reflects only minor changes from the English Bill of Rights to reflect the singular nature of the Maryland General Assembly as the only legislature in the State of Maryland. The Delaware drafters adopted Maryland's change, but also improved on it, deleting the notion that the legislature convenes to "preserve" the laws.

Professor Gregory Marks, who has written extensively on the historical significance of the right to petition, argues that the construction of these provisions suggest that receiving petitions "for redress of all grievances" was the state legislature's primary responsibility, while the modern legislative function, "the amending, strengthening and preserving of the laws," was considered secondary.[304]

2. "Right to Petition the Legislature"

Maryland	"That every man hath a right to petition the legislature for the redress of grievances, in a peaceable and orderly manner."[305]
Delaware	"THAT every Man hath a Right to petition the Legislature for the Redress of Grievances in a peaceable and orderly manner."[306]

Professor Gregory Mark has written an historical review of the right to petition, tracing its origins from pre-Magna Carta England, transport to North America, and the demise of the

[303] MICHAEL EVANS & R. IAN JACK, EDS., SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL LAW 354 (1984).

[304] Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2200-01 (1998). For a discussion of the right of petitioning the government, *see infra* notes 305-313.

[305] MD. CONST., Decl. of Rts., art. 9 (August 27, 1776 draft).

[306] DE. CONST., Decl. of Rts., art. 9 (September 11, 1776 draft).

right, both in England and the United States.[307] Professor Mark concludes that petitioning was "originally a central feature of the relationship between the governed and the government…,"[308] and was available even to the disenfranchised.[309] To emphasize the point, Professor Mark points out that the American Declaration of Independence was in its form a petition, and that the ultimate grievance listed in it was the King's failure to heed American petitions.[310] Professor Mark then traces the right to petition through the earliest state constitutions,[311] the First Amendment,[312] and then to its ultimate demise as a meaningful right both in the United States and in England.[313]

In the federal Bill of Rights,[314] and in many state constitutional bills and declarations of rights, the right to petition is closely tied to the right of assembly, both by proximity, and ideologically. Six revolutionary-era state constitutions affirmed the right to assemble, and in

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[307] Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153 (1998). Professor Mark highlights the right to petition found in the Delaware Declaration of Rights of 1776, and relegates the Maryland provision to a footnote.

[308] Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2155 (1998).

[309] Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2187-91 (1998).

[310] Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2191-93 (1998). Similarly, the Virginia Constitution of 1776, begins with a list of colonial grievances, concluding with the following passage, "By answering our repeated petitions for redress with a repetition of injuries: And finally, by abandoning the helm of government and declaring us out of his allegiance and protection." VA. CONST., unnumbered preamble (1776), *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 52 (William F. Swindler, ed., 1979).

[311] Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2199-2203 (1998).

[312] Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2203-12 (1998).

[313] Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 FORDHAM L. REV. 2153, 2212-2229 (1998). *See also* Stephen A. Higginson, *Note, A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L. J. 142 (1986).

[314] U.S. CONST., Amend. I.

each of those, the right was "explicitly yoked" to the right to petition.[315] The converse was not true as Maryland and Delaware protected petitioning without mentioning assembly.[316]

3. Right to "Internal Government and Police"

Maryland	"That the people of this state have the sole and exclusive right of regulating the internal government and police thereof."[317]
Delaware	"That the People of this State have the sole exclusive and inherent Right of governing and regulating the internal Police of the same."[318]

The 1776 bills of rights of Pennsylvania, Maryland, and Delaware each contain a provision reserving to the people of the respective states the right to internal government and the police power. Although all three of these provisions are similar, the Pennsylvania and Delaware provisions are identical in wording, and vary only in matters of capitalization and punctuation.[319] The Maryland version is different. It seems clear that the Pennsylvania draft was the model for the Delaware draft, and that the Delaware drafters preferred the Pennsylvania construction to that of Maryland, although the differences are merely stylistic.

This analysis leaves unanswered the question of the original source of this concept as material for a bill of rights. It could be that it originated with the Pennsylvania drafters and was borrowed by the Maryland drafters. Alternatively, Maryland and Pennsylvania may have drawn from another, as yet undiscovered source.

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[315] AKHIL REED AMAR, THE BILL OF RIGHTS 30 (1998).

[316] AKHIL REED AMAR, THE BILL OF RIGHTS 30, n.53 (1998). *See also* Eric Schnapper, *"Libelous" Petitions for Redress of Grievances—Bad Historiography Makes Worse Laws*, 74 IOWA L. REV. 303, 347 n.249 (1989) (erroneously stating that all revolutionary-era state constitutional provisions guaranteeing the right to petition also included the right to assembly).

[317] MD. CONST., Decl. of Rts., art. 15 (August 27, 1776 draft).

[318] DE. CONST., Decl. of Rts., art. 4 (September 11, 1776 draft).

[319] *Compare* PA. CONST., Decl. of Rts., art. 3 (1776) ("That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same.").

The delegates to Maryland's conventions were particularly adamant about retaining state prerogatives, and presumably frightened of the possibility of a national, as opposed to federal, government. On at least three separate occasions in the spring of 1776, the conventions of Maryland asserted that the people of Maryland were to retain the "sole and exclusive" right of internal government. The first came after an embarrassing scene with Sir Robert Eden, Maryland's last royal governor. Eden was found to have violated a pledge given to the colonists by sending secret letters to the English ministry. The Continental Congress, meeting in Philadelphia, was outraged and ordered that Eden be arrested. The Maryland Convention bristled at the Continental Congress's interference in Maryland's internal affairs, and responded that Congress had no authority over the internal government of Maryland.[320]

The second occasion came in response to the Continental Congress's May 15, 1776 directive that the colonies should "adopt such government as shall…best conduce to the happiness and safety of their Constituents…"[321] The Maryland convention responded that "the sole and exclusive right of regulating the internal government and police of this colony be preserved to the people thereof."[322]

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[320] This story is related in JOHN RICHARD HAEUSER, THE MARYLAND CONVENTIONS, 1774-1776: A STUDY IN THE POLITICS OF REVOLUTION 39-47 (1968) (unpublished M. A. thesis, Georgetown University) (on file with the author); Herbert E. Klingelhofer, *The Cautious Revolution: Maryland and the Movement Toward Independence: 1774-1776*, 60 MD. HIST. MAG. 261, 274-82 (1965); John Archer Silver, *The Provisional Government of Maryland (1774-1777)*, X JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE (13th Ser., Oct. 1895). The specific response from the Maryland Council of Safety to the Maryland deputies in Congress is found at 11 ARCHIVES OF MARYLAND 354, 355 (April 19, 1776) ("We consider the Congress as having the supreme Authority over the Continent and look up to them with Reverence and Esteem, but that they cannot interfere with uncontroulable Power in the internal Polity of this or any other Province"). This letter may also be viewed at http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000011/html/am11--354.html (visited April 29, 2001). The view of this affair from Virginia was considerably different, *see* JOHN SELBY, THE REVOLUTION IN VIRGINIA, 1775-1783 ____ (1988).

[321] 4 JOURNALS OF CONTINENTAL CONGRESS 342 (Ford ed.) (May 10, 1776).

[322] Herbert E. Klingelhofer, *The Cautious Revolution: Maryland and the Movement Toward Independence: 1774-1776*, 60 MD. HIST. MAG. 261, 287 (1965) citing PROCEEDINGS OF THE CONVENTION OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775 & 1776 141 (Jonas Green, 1836).

Finally, on June 28, 1776, when the Maryland convention instructed its delegation to the Continental Congress to vote for independence, it did so only so long as Maryland would retain its independence on internal matters; "provided, the sole and exclusive right of regulating the internal government and police of this colony be reserved to the people thereof."[323]

Given this history, it can come as little surprise that the Maryland convention sought to add this provision into the Maryland Declaration of Rights.[324] It is interesting that the second draft of the Maryland Declaration of Rights—printed on September 17, 1776—moved this article from number 15 to number 2. While there is no record to explain the reason for the change, it can be inferred that the convention wished to increase the prominence of the provision.

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[323] "*Resolved unanimously*, That the instructions given by the convention of December last (and renewed by the convention in May) to the deputies of this colony in congress, be recalled, and the restrictions therein contained removed; that the deputies of this colony attending in congress, or a majority of them, or any three or more of them, be authorized and empowered to concur with the other united colonies, or a majority of them in declaring the united colonies free and independent states, in forming such further compact and confederation between them, in making foreign alliances, and in adopting such other measures as shall be adjudged necessary for securing the liberties of America, and this colony will hold itstelf [sic] bound by the resolutions of a majority of the united colonies in the premises: provided, the sole and exclusive right of regulating the internal government and police of this colony be reserved to the people thereof." PROCEEDINGS OF THE CONVENTION OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775 & 1776 176 (Jonas Green, 1836); http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/index.html (visited April 29, 2001). *See also*, John Archer Silver, *The Provisional Government of Maryland (1774-1777)*, X JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 45 (13th Ser., Oct. 1895).

The same language also appeared in an unofficial context. The "freemen of Anne Arundel County" published an open letter to the Anne Arundel County delegation to the eighth convention of Maryland meeting in Annapolis. That open letter, published in the *Maryland Gazette* on July 18, 1776, called for their representatives to pass a resolution calling for independence, and establishing the colonies as free and independent states, "provided the sole and exclusive right of regulating the internal Government and police of this Province be reserved to the people thereof." DAVID CURTIS SKAGGS, ROOTS OF MARYLAND DEMOCRACY: 1753-1776 221 (1973). The similar language could not have been coincidental.

[324] *See* Herbert E. Klingelhofer, *The Cautious Revolution: Maryland and the Movement Toward Independence: 1774-1776*, 60 MD. HIST. MAG. 261, 291-92 (1965) ("The Convention's extraordinary touchiness about outside interference was due not only to the resolutions of Congress, though it served as an outlet, being but the last step in a series of what they considered provocations and offenses. The cup was overflowing, and the Convention bristled with righteous indignation.").

4. Open Courts/Right to a Remedy

Maryland	"That every freeman for any injury done to him in his goods, lands, or person, by any other person, ought to have remedy by the course of the law of the land, and ought to have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay, according to the law of the land."[325]
Delaware	"THAT every Freeman for every Injury done him in his Goods, Lands, or Person, by any other Person, ought to have Remedy by the Course of the Law of the Land, and ought to have Justice and Right for the Injury done to him freely without Sale, fully without any Denial, and speedily without Delay, according to the Law of the Land."[326]

More than any other type provision in any state constitution, provisions guaranteeing open courts and the right to a remedy like these, have spawned an entirely independent state constitutional jurisprudence.[327] All are apparently descended from Chapter 29 of the Magna Carta of 1225.[328] Interestingly, the August 27, 1776 draft of the Maryland declaration of rights contained two provisions that are both clearly descended from this chapter of the Magna Carta—Articles 17 and 21—and both remain in the Maryland declaration of rights today.[329]

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[325] MD. CONST., Decl. of Rts., art. 17 (August 27, 1776 draft). This provision is similar in origin, and frequently confused with MD. CONST., Decl. of Rts., art. 21 (August 27, 1776 draft). That provision is discussed *infra* at n.156-160.

[326] DE. CONST., Decl. of Rts., art. 12 (September 11, 1776 draft).

[327] For a directory of state constitutional law cases predicated on these provisions, *see* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 346-406 (2d ed., 1996 and 1998 Supp.). Similar issues are treated in shorter form in William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 434 n.592 (1997); Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1307-08 (1995). For a critique of those attorneys and courts that confuse open courts/right to remedy-type provisions with due process of law provisions like the federal 14th amendment, *see* Hans A. Linde, *Without "Due Process,"* 49 OR. L. REV. 125, 136-38 (1970).

[328] JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 348 (2d ed., 1996 and 1998 Supp.).

[329] There is no convincing explanation for why both provisions were included. Many commentators seem to have missed that there are two. See e.g. JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES ____ (2d ed., 1996 and 1998 Supp.). The historical record suggests a redundancy. Article 17 of the August 27, 1776 draft of the Maryland Declaration of Rights is clearly derived from Chapter 39 of the Magna Carta of 1215, and Chapter 29 of the Magna Carta of 1225. Article 21 of the August 27, 1776 draft of the Maryland Declaration of Rights is clearly derived from Coke's commentary on Chapter 29 of the Magna Carta of 1225. If Coke's explanation was accurate then, there should be no difference between the two provisions in the Maryland Declaration of Rights. Maryland lawyers and judges have generally agreed, treating

The original Magna Carta, agreed to by King John at Runnymede in 1215, contained two relevant sections, subsequently numbered chapters 39 and 40. Chapter 39 provided, "[n]o freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers, or by the law of the land."[330] Chapter 40 provided, "To no one will we sell, to no one will we refuse or delay, right or justice."[331] The Magna Carta was reaffirmed on February 11, 1225, during the reign of King Henry III. In this version, chapters 39 and 40 were combined to create a new chapter 29:

> No freeman shall be taken or imprisoned, or disseised of any freehold, or liberties, or free customs, or outlawed or banished, or in any other way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny, or delay right or justice.[332]

Sir Edward Coke, in his Second Institute, expounded on the Magna Carta in language that has been characterized as "more enthusiastic than accurate":[333]

> Every Subject of this Realm, for injury done to him in bonis, terries, vel persona [goods, lands, or person], by any other Subject, be he Ecclesiastical, or Temporal, Free, or Bond, Man, or Woman, Old or Young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the

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the two provisions as identical to each other, and identical to guarantees of "due process of law" found in the 14th Amendment to the United States Constitution, and elsewhere. Attorney General v. Johnson, 282 Md. 274, 385 A.2d 57 (1978); Sanner v. Trustees of Sheppard & Enoch Pratt Hosp., 278 F. Supp. 138 (D. Md.), *aff'd*, 398 F.2d 226 (4th Cir.), cert. denied, 393 U.S. 982, 89 S. Ct. 453, 21 L. Ed. 2d 443 (1968), rehearing denied, 393 U.S. 1112, 89 S. Ct. 853, 21 L. Ed. 2d 813 (1969) (and cases cited therein); 63 Op. Att'y Gen. 246 (1978). But see Maryland Aggregates v. State, 337 Md. 658, 682 n. 15 (1995). Reading the two provisions as redundant, however, violates the canon of constitutional interpretation that requires that each word of a constitution be given meaning. [CITE TO A MARYLAND CASE.] The declarations of rights of both Massachusetts and New Hampshire also contain both types of provisions. MASS. DECL. OF RTS., Art. XI, XII; NEW. HAMP. CONST., Art. I, §§ 14, 15.

[330] WILLIAM S. MCKECHNIE, MAGNA CARTA, A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375 (2d ed. 1914).

[331] WILLIAM S. MCKECHNIE, MAGNA CARTA, A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 395 (2d ed. 1914).

[332] WILLIAM F. SWINDLER, MAGNA CARTA: LEGEND AND LEGACY 316-17 (1965).

[333] David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 39 and n.30 (1986).

> course of the Law, and have justice, and right for the injury done him, freely without sale, fully without denial, and speedily without delay.[334]

Thus, we can see that the Maryland drafting committee, in drafting Article 17 of the August 27, 1776 draft of the Maryland Declaration of Rights was paraphrasing Lord Coke's restatement of Chapter 29 of the Magna Carta of 1225, which itself was a combination of chapters 39 and 40 of the Magna Carta of 1215.[335] Delaware's equivalent article, Article 12 of the Delaware Declaration of Rights (1776), but for minor changes (changing the fifth word from "any" to "every," capitalization, and comma placement), is identical to Maryland's. Variations on these same themes appear in 37 of the 50 state constitutions.[336]

In a recent article analyzing state constitutional "open courts" and "right to a remedy" provisions, Jonathan M. Hoffman traces these provisions from their historical roots in England, through the revolutionary period in the original thirteen colonies, and as they are currently understood in Oregon.[337] In the course of his historical analysis, Mr. Hoffman repeats the

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[334] SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 55-56 (photo. reprint 1979) (1642), *quoted in* Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1294 n.96 (1995)

[335] This can most easily be demonstrated by comparing Lord Coke's statement with the Maryland draft. I have adopted the legislative convention of striking out and underlining textual changes:

> That every freeman ~~Every Subject of this Realm,~~ for any injury done to him in ~~bonis, terries, vel persona [~~ his goods, lands, or person~~]~~, by any other person, ~~Subject, be he Ecclesiastical, or Temporal, Free, or Bond, Man, or Woman, Old or Young, or be he outlawed, excommunicated, or any other without exception, may take his~~ ought to have a remedy by the course of the Law of the land, and ought to have justice, and right for the injury done him, freely without sale, fully without any denial, and speedily without delay according to the law of the land.

[336] JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 347-48 n.11-12, 403 (2d ed., 1996 and 1998 Supp.).

[337] Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279 (1995).

Apparently, many of Oregon's declaration of rights provisions were derived from the Indiana provisions, which were in turn, borrowed from Ohio provisions. *See* Hans A. Linde, *Without "Due Process,"* 49 OR. L. REV. 125, 137 (1970); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 381 (1980) (stating that Oregon's original 1859 Constitution "adopted Indiana's copy of Ohio's version of [other] sources…."). *See also* Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279 (1995); W. C. Palmer, *The Sources of the Oregon Constitution*, 6 OR. L. REV. 200, 201 (19__). *But see*, David A. Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the*

mistake that "Article XII of the Delaware Declaration appears to be the first open courts clause in any state constitution."[338] Mr. Hoffman proceeds from this assumption and speculates about the personalities and relationships among Delaware and Pennsylvania constitutional drafters to explain the inclusion of this provision in Delaware's bill of rights (and exclusion from Pennsylvania's).[339] The discussion, while interesting, is less important if the Delaware drafters copied a draft received from the Maryland convention. As it turns out, Mr. Hoffman may have been better off scrutinizing the biographies of the Maryland drafters: Charles Carroll, Barrister; Charles Carroll of Carrollton; Samuel Chase; Robert Goldsborough; William Paca; George Plater; and Matthew Tilghman.[340]

Oregon Constitution, 65 OR. L. REV. 35 (1986) (finding evidence that Oregon's constitution was derived from Indiana's to be inconclusive). Ohio had borrowed many of its provisions from Virginia's bill of rights. G. Alan Tarr, *The Ohio Constitution of 1802: An Introduction*, http://www-camlaw.rutgers.edu/statecon/papers.html (visited April 29, 2001) (identifying the Virginia Declaration of Rights as the basis for the Ohio Declaration of Rights of 1802). Of course, this could not have been true of Ohio's "access-to-justice" guarantee (art. 7), because Virginia had no such provision. Ohio could have borrowed the provision from Delaware as Linde reports, or taken it directly from Maryland. Either way, the ultimate American parent of this provision is the Maryland August 27, 1776 draft. *But see* Suzanne L. Abram, *Note, Problems of Contemporaneous Construction is State Constitutional Interpretation*, 38 BRANDEIS L.J. 613, 621 (2000) (incorrectly identifying Massachusetts's 1780 constitution as the first American constitution to contain an "open courts" provision).

[338] Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1308 (1995).

[339] Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1303 (1995) (speculating that Thomas McKean's role during the Stamp Act crisis was formative of his "open courts" philosophy); Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1308-11 (1995) (discussing relationship between John Dickinson and Thomas McKean).

[340] By coincidence, Charles Carroll, Barrister, and Samuel Chase resigned from the Convention on August 27, 1776, the same day that the first draft of the Declaration of Rights was printed. *See infra*, note 300. Their replacements on the drafting committee, Robert T. Hooe and Thomas Johnson, while perhaps important in the formulation of the subsequent redrafts (and of the Form of Government), cannot have been drafters of the August 27 draft.

5. Prohibition against the Quartering of Soldiers

Maryland	"That no soldier ought to be quartered in any house in time of peace, without the consent of the owner; and in time of war in such manner only as the legislature shall direct."[341]
Delaware	"THAT no Soldier ought to be quartered in any House in Time of Peace, without the Consent of the Owner; and in Time of War in such Manner only as the Legislature shall direct."[342]

In Europe, the practice of billeting—the quartering of soldiers in civilian homes—had long been a source of consternation.[343] The English Petition of Right (1628), Declaration of Rights (1689), and Mutiny Act (1689) each featured prohibitions on quartering.[344] In America, the problems associated with the quartering of troops became an issue during the Seven Years War, but came to a boil after the passage of the Quartering Act in 1765.[345] This Act, and its annual reissues, purported to require the American colonists not only to billet British soldiers, but also to provision them at colonial expense, at least in part through the hated Stamp Act.[346]

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[341] MD. CONST., Decl. of Rts., art. 28 (August 27, 1776 draft).

[342] DE. CONST., Decl. of Rts., art. 21 (September 11, 1776 draft).

[343] *See* B. Carmon Hardy, *A Free People's Intolerable Grievance: The Quartering of Troops and the Third Amendment in* THE BILL OF RIGHTS: A LIVELY HERITAGE 68-69 (Jon Kukla ed., 1987) (tracing practice of quartering of soldiers from the Middle Ages); Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL OF RTS J. 117, 118-24 (1993) (same).

[344] PETITION OF RIGHT (1628), Sec. VI. ("And whereas of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourn against the laws and customs of this realm, and to the great grievance and vexation of the people."). MUTINY ACT (1689), 1 W & M Sess. 2, cap. 4. ENGLISH BILL OF RIGHTS (1689), *reprinted in* 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS ____ (William F. Swindler ed., 1982); MICHAEL EVANS & R. IAN JACK, EDS., SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL LAW ____ (1984) (listing as grievances the "keeping [of] a standing army within this kingdom in time of peace without consent of parliament and quartering soldiers contrary to law"). Interestingly, although the quartering of soldiers was listed as one of the grievances against James II, there was no corresponding right asserted in the Declaration of Rights. B. Carmon Hardy, *A Free People's Intolerable Grievance: The Quartering of Troops and the Third Amendment in* THE BILL OF RIGHTS: A LIVELY HERITAGE 72 n.9 (Jon Kukla ed., 1987).

[345] *See* B. Carmon Hardy, *A Free People's Intolerable Grievance: The Quartering of Troops and the Third Amendment in* THE BILL OF RIGHTS: A LIVELY HERITAGE 74-76 (Jon Kukla ed., 1987); Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL OF RTS J. 117, 125-27 (1993).

[346] Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL OF RTS J. 117, 126-27 (1993)

The quartering of British troops in Boston lead, directly or indirectly to the Boston Massacre, and the Boston Tea Party, leading events on the road to revolution.[347] Jefferson included the British practice of quartering among the colonial grievances in the Declaration of Independence.[348]

The Virginia Declaration of Rights of 1776 did not include a prohibition on the quartering of troops, but the preamble to the Virginia Constitution listed the "quartering of large bodies of armed troops among us," as one of the grievances leading to the necessity of independence.[349] Thus, Maryland's is the first American constitutional limitation on the quartering of troops.[350] Delaware's version is remarkably similar, differing only in Delaware's characteristic capitalization of each noun. Both are similar to the Third Amendment to the United States Constitution, which provides that "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."[351]

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[347] B. Carmon Hardy, *A Free People's Intolerable Grievance: The Quartering of Troops and the Third Amendment in* THE BILL OF RIGHTS: A LIVELY HERITAGE 78-79 (Jon Kukla ed., 1987); Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL OF RTS J. 117, 126-27 (1993).

[348] THE DECLARATION OF INDEPENDENCE, para. 16 (1776) ("For quartering large bodies of armed troops among us").

[349] VA. CONST. (unnumbered provision) (June 12, 1776) *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 52 (William F. Swindler, ed., 1979).

[350] Joyce A. McCrary Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedom*, 36 HOW. L. REV. 43, 52 (1993) (stating that Maryland's was the first American protection against quartering). This is a limited claim. Both Hardy and Bell recognize the New York Assembly's 1683 "Charter of Libertyes and Priviledges" as the first American anti-quartering law. B. Carmon Hardy, *A Free People's Intolerable Grievance: The Quartering of Troops and the Third Amendment in* THE BILL OF RIGHTS: A LIVELY HERITAGE ____ (Jon Kukla ed., 1987); Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL OF RTS J. 117, 125 (1993).

[351] U.S. CONST., Amend. III. In analyzing the third amendment, Akhil Amar has noted that each of the Revolutionary-era prohibitions on quartering strictly distinguished between peace, when no quartering was permitted, and war, when quartering would be permitted only by legislative act. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 61 (1998).

All three provisions, Maryland's, Delaware's, and the Third Amendment contain a "dual standard": no quartering during peacetime, and limited quartering during war, subject to legislative control.[352] During the War of Independence, when faced with the need to quarter continental troops, the state legislatures of both Maryland and Delaware complied with their respective state constitutional mandates, passing acts permitting, but regulating the quartering.[353]

Akhil Amar, in analyzing the relationship between the second and third amendments to the federal constitution, has suggested that they are "siblings," and both were originally intended to serve as "military amendments."[354] Professor Amar relies both on the fact that the federal amendments stand "back-to-back" in the Bill of Rights, and that these anti-quartering provisions in the Delaware and Maryland declarations of rights form "an integrated package" with the militia provisions of those documents.[355] From these relationships and his understanding of the history of the anti-quartering provisions, Professor Amar concludes that "the deep spirit of the Third Amendment cautions skepticism about unilateral executive assertions of military necessity…"[356] The same can also be said of the anti-quartering provisions of the Maryland and Delaware declarations of rights of 1776.

The proceeding sections discussed provisions located within Maryland's declaration of rights and discussed them in terms of analogous provisions in the Delaware Declaration of

[352] Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL OF RTS J. 117, 125 (1993) (describing dual standard for quartering).

[353] Tom W. Bell, *The Third Amendment: Forgotten But Not Gone*, 2 WM. & MARY BILL OF RTS J. 117, 137 n.160-61 (1993) (**Delaware**: Acts of 1779, ch. ___; **Maryland**: Acts of 1777, ch. 14, §II, I).

[354] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 59-63 (1998).

[355] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 60 (1998).

[356] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 62 (1998).

Rights. The following pairs are different in that while the Maryland drafters choose to locate these provisions within the Declaration of Rights, Delaware placed the analogous provision in its "form of government." The choice is significant, as the two documents served very different functions: the declaration of rights to reaffirm man's inherent rights beyond which government could not trespass, and a constitution to define and describe that government.

6. Right to the "Common Law of England"

Maryland	"That the inhabitants of Maryland are entitled to the common law of England … according to the course of that law, and to the benefit of such of the English statutes, as at the time of their first emigration, and which by experience have been found applicable to their local, and other circumstances, and of such others as have been since introduced, used, and practiced by the courts of law, or equity; and also of all acts of assembly in force prior to the first of June, seventeen hundred and seventy-four; except such as have been, or may be altered by acts of Convention, or this charter of rights; and to all property derived from, or under the charter granted by his majesty Charles the first to Cæcilius Calvert, baron of Baltimore."[357]
Delaware	"The common law of England, as well as so much of the statute law as has been heretofore adopted in practice in this State, shall remain in force, unless they shall be altered by a future law of the legislature; such parts only excepted as are repugnant to the rights and privileges contained in this constitution, and the declaration of rights, &c., agreed to by this convention."[358]

The inclusion of these provisions preserving the common law should come as no surprise, given that a fundamental claim of the revolution was to the rights and privileges of Englishmen. Foremost among these rights was the right to the great traditions of English common law. The text of the Delaware provision is remarkably similar to, and likely derived

[357] MD. CONST., Decl. of Rts., art. 16 (August 27, 1776 draft). The portion of this provision replaced by the ellipsis contains a right to trial by jury. That portion of the article is discussed *infra* at notes 285-291.

[358] DE. CONST. (1776), Art. 25 *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 203 (William F. Swindler, ed., 1973).

from, a provision of the New Jersey Constitution of 1776, which had been adopted on July 2, 1776.[359]

7. Prohibiting Importation of Slaves

Maryland	"That no person hereafter imported into this state from Africa, or any part of the British dominions, ought to be held in slavery under any pretence whatever, and that no negro or mulatto slave ought to be brought into this state for sale from any part of the world."[360]
Delaware	"That no person hereafter imported into this State from Africa ought to be held in slavery under any pretence whatever; and that no negro, Indian, or mulatto slave ought to be brought into this State, for sale, from any part of the world."[361]

Maryland legal historian H. H. Walker Lewis has suggested that this was a liberal provision by Maryland's drafting committee, made up mainly of slaveholders.[362] Similarly, Maryland State historian, Dr. Edward Papenfuse hales this draft as "Maryland's first attempt at abolishing slavery and condemning the slave trade."[363] But others suggest that limiting the availability of this human commodity made those slaves already held more valuable.[364]

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[359] The New Jersey article provided "The common law of England, as well as so much of the statute law, as has been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this Charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever." N. J. CONST., Art. XXII (1776) *reprinted in* ____ SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS ____ (William F. Swindler, ed., 19__); CHARLES R. ERDMAN, JR., THE NEW JERSEY CONSTITUTION OF 1776 150 (1929). Interestingly, Erdman argues that the New Jersey framers intended to subsume within this provision a variety of basic rights including the rights to life, liberty, and property, and to the "law of the land." CHARLES R. ERDMAN, JR., THE NEW JERSEY CONSTITUTION OF 1776 47 (1929).

[360] MD. CONST., Decl. of Rts., art. 41 (August 27, 1776 draft).

[361] DE. CONST. (1776), Art. 26 *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 203 (William F. Swindler, ed., 1973).

[362] H. H. WALKER LEWIS, THE MARYLAND CONSTITUTION OF 1776 46 (1976).

[363] Edward C. Papenfuse, "*Writing it all down: The effort to make government work*," BALT. SUN (December 14, 1991) at 9A, *available* at 1991 WL 5922724.

[364] *See, e.g.* JOHN R. ALDEN, A HISTORY OF THE AMERICAN REVOLUTION 367 (1989).

This provision illustrates how Professor Farrand was hampered by not having access to Maryland's August 27, 1776 draft of its declaration of rights.[365] If Farrand had noted the provision at all—which is not a given considering that he was studying only the declarations of rights—he would have assumed that this was an idea originated in Delaware but rejected by the Maryland framers because it did not appear in any draft Farrand inspected. Only if the August 27, 1776 Maryland draft is read, does the flow of idea become clear. Maryland wrote the provision for the August 27, 1776, draft and it was copied by Delaware. By September 17, 1776, Maryland had deleted its provision.[366] The Delaware drafters either did not know or did not care that Maryland deleted the provision, and incorporated it verbatim into the body of the Delaware constitution.

8. Reaffirming Prior Statutes

Maryland	"That the resolves and proceedings of this and the several Conventions held for this colony ought to continue and be in force as laws, unless altered by this Convention, or the legislature of this state."[367]
Delaware	"All acts of assembly in force in this State on the 15th day of May last (and not hereby altered, or contrary to the resolutions of Congress or of the late house of assembly of this State) shall so continue, until altered or repealed by a future law of the legislature of this State, unless they are temporary, in which case they shall expire at the times respectively limited for their duration."[368]

These provisions reveal the tenuous legal position of the state conventions that met between the end of colonial rule and before the drafting of the constitutions. These provisions

[365] *See supra*, notes ____.

[366] Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 672 (1998)

[367] MD. CONST., Decl. of Rts., Art. 43 (August 27, 1776 draft).

[368] DE. CONST. (1776), Art. 26 *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 203 (William F. Swindler, ed., 1973).

also presage the constitutional transitional provisions that are needed to continue and maintain government during the changeover period between constitutions.[369]

9. Constitutional Amendment and Revision

Maryland	"That the form of government to be established by this Convention ought not to be altered, changed or abolished, but in such manner as this convention shall prescribe and direct."[370]
	"That this form of government, and the declaration of rights, and no part thereof, shall be altered, changed, or abolished, unless a bill to alter, change or abolish the same, shall pass the general assembly, and be published at least three months before a new election, and shall be confirmed by the general assembly after an election of new delegates, in the first session after such new election…"[371]
Delaware	"No article of the declaration of rights and fundamental rules of this State, agreed to by this convention, nor the first, second, fifth, (except that part thereof that relates to the right of suffrage,) twenty-sixth, and twenty-ninth articles of this constitution, ought ever to be violated on any pretence whatever. No other part of this constitution shall be altered, changed, or diminished without the consent of five parts in seven of the assembly, and seven members of the legislative council."[372]

There is a tension between a constitution's role as fundamental (and thus superior) law, and the need for a constitution to be responsive and mutable to the will of the people who create it. This tension is played out in provisions like these that discuss the method of constitutional amendment and, in more modern constitutions, by provisions that govern the calling of constitutional conventions. The 1776 Virginia Constitution permitted constitutional amendment

[369] For a modern discussion of the difficulties of drafting appropriate transition provisions, *see* JOHN P. WHEELER, JR. & MELISSA KINSEY, MAGNIFICENT FAILURE: THE MARYLAND CONSTITUTIONAL CONVENTION OF 1967-1968 60-62 (1970) .

[370] MD. CONST., Decl. of Rts., Art. 44 (August 27, 1776 draft). *See also*, MD. CONST., Art. 59 (1776).

[371] MD. CONST., Art. 59 (1776).

[372] DE. CONST. (1776), Art. 30 *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 204 (William F. Swindler, ed., 1973).

by mere legislative enactment.[373] While such an arrangement would create a flexible constitution, the resultant constitution would not have the characteristics of fundamental law.

The Maryland drafters of 1776 display ambivalence about the question. Article 4 of the August 27, 1776, draft explicitly recognizes the untrammeled right of the citizens of Maryland to reform their government, presumably by means including constitutional amendment. Article 44 of the August 27, 1776, draft declaration of rights, and Article 59 of the 1776 Maryland Constitution, severely curtail the exercise of the right to amend the constitution. This dichotomy, which remains a part of the Maryland declaration of rights today, has caused considerable controversy. In fact, every constitutional convention held in the state of Maryland (1776, 1851, 1864, 1867, and 1967) was plagued by assertions that it was called in contravention to the existing constitutional provisions.[374]

The Maryland provision[375] attempts to create a compromise. Although constitutional amendment could be undertaken by the legislature, any amendment would have to be approved by two consecutive sessions of the legislature, with an election intervening. Presumably, a legislature that approved an unpopular constitutional amendment during the first term would be voted out of office, and not be available to vote in the second session.

The Delaware approach was different. The Delaware convention "permanently" enshrined their declaration of rights and certain parts of their constitution as inviolate, and made

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[373] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 121-25 (William Peden ed., 1955).

[374] 50 OP. ATT'Y GEN. 48, 50 (February 9, 1967) *reprinted in* CONSTITUTIONAL CONVENTION COMMISSION OF MARYLAND, REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION 443, 444 (1968) ("None of the four Maryland Constitutional Conventions would appear to have been called in accordance with existing legal requirements."). That opinion of the Attorney General was issued in an effort to allay criticisms that the impending fifth Maryland constitutional convention, that of 1967, although not called in the proper year, was a valid convention. The Court of Appeals of Maryland eventually resolved the issue in favor of holding a convention. *Board of Supervisors of Elections for Anne Arundel Cty. v. Attorney General*, 246 Md. 417, 229 A.2d 388 (1967) *reprinted in* CONSTITUTIONAL CONVENTION COMMISSION OF MARYLAND, REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION 531 (1968).

[375] MD. CONST., Art. 59 (1776).

other portions subject to amendment only by a legislative supermajority (5/7 of the legislature), and executive branch agreement. Of course a mere sixteen years later, in 1792, Delaware rewrote its entire declaration of rights and constitution including the portions held inviolate under the 1776 constitution.[376]

F. Provisions that are unique to Virginia

1. "All Men Are Born Equally Free…"

Here is George Mason's famous paraphrase of John Locke, declaring the natural rights of man. Here is the rhetoric that inspired Thomas Jefferson's Declaration of Independence[377] and the French Declaration of the Rights of Man:[378]

Virginia	"THAT all men are born equally free and independent, and have certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity; among which are, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[379]

R. Carter Pittman has tracked this same language, or variations upon it, through the numerous state constitutions where it may be found.[380] But remarkably, neither the language of this provision, nor the natural rights philosophy that it espouses, are repeated in the Maryland and Delaware declarations of rights, which, in other respects, tracked the Virginia draft so closely.[381]

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[376] DEL. CONST. (1792) *reprinted in* 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 197-206 (William F. Swindler, ed., 1973).

[377] *See supra*, note 1.

[378] *See supra*, note 2.

[379] VA. CONST., Decl. of Rts., art. 1 (May 27, 1776 draft).

[380] R. Carter Pittman, *Book Review of* Sources of Our Liberties, 68 VA. MAG. HIST. & BIOG. 109, 111 (1960).

[381] *See* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEXAS L. REV. 1195, 12000 (1985) (noting that among early state constitutions, only Pennsylvania and Massachusetts included such a broad equality provisions as that in Article 1 of the May 27, 1776 draft).

This may reflect the conservative nature of the Maryland convention. During the debate on the Virginia Declaration of Rights the initial phrase of the first article—"THAT all men are born equally free"—caused significant controversy, as a faction argued that this language would lead to a slave revolt.[382] This fear—of admitting the natural equality of all men—would have been obvious to the Maryland delegates, many of whose livelihood depended on slavery, based as it was on the inequality of men. It is no surprise, therefore, that Maryland's drafting committee decided against copying this provision.

Delaware's omission of a statement of the equality of man may be attributable either to the absence of a model in the Maryland document from which the Delaware drafters were copying, or from the same conservative and self-protective impulses that appear to have motivated the Maryland drafters.[383]

2. "Right to Uniform Government"

Virginia	"That the people have a right to uniform government; and therefore, that no government separate from, or independent of, the government of Virginia, ought, of right, to be erected or established within the limits thereof."[384]

George Mason disavowed this article in the Virginia constitution, stating that the right to a uniform government was not a fundamental right.[385] Rutland states that this article was a

[382] 1 THE PAPERS OF GEORGE MASON, 1725-1792 289 (Rutland ed.).

[383] ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 55 (U.N.C. Press, 1951) (linking the absence of a "prefatory statement of the equality of man" in the Delaware declaration to the fact that Delaware was a slave state).

[384] VA. CONST., Decl. of Rts., art. 16 (May 27, 1776 draft).

[385] 1 THE PAPERS OF GEORGE MASON, 1725-1792 286 (Rutland ed.).

"device to keep western counties within Virginia's jurisdiction."[386] Obviously, this was not a concern for Maryland and Delaware, two states that made no claims of western land holdings.

The language of Virginia's Article 16 does, however, bear a passing resemblance to Article 15 of Maryland's August 27, 1776 draft declaration of rights, which provided "[t]hat the people of this state have the sole and exclusive right of regulating the internal government and police thereof." Given the independent history of Maryland's provision,[387] however, I conclude that Virginia's Article 16 and Maryland's Article 15 are unrelated.[388] In fact, Professor Howard seems to agree, pointing out that this provision has no analogue in any other state bill of rights.[389]

3. "Frequent Recurrence to Fundamental Principles"

Virginia	"That no free government, or the blessing of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles."[390]

This provision "represents George Mason's 'return to a lifelong personal commitment to moderation and frugality as well as a conviction that a contrary course evidenced "strong symptoms of decay.'"[391] Mason had used similar language two years earlier in the Fairfax

[386] 1 THE PAPERS OF GEORGE MASON, 1725-1792 286 (Rutland ed.).

[387] Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 686 n.159 (1998).

[388] Professor A. E. Dick Howard, recognizes the "tempt[ation] to read into this provision notions of the indivisibility of the sovereign and the supremacy of government within its own sphere…," but rejects those in favor of the description here, as a device for maintaining control over the western portions of the Virginia territory. 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 278-79 (1971).

[389] 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 278 (1971).

[390] VA. CONST., Decl. of Rts., art. 17 (May 27, 1776 draft).

[391] 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 282 (1971); 1 THE PAPERS OF GEORGE MASON, 1725-1792 281 (Rutland ed.).

County Resolves, which proclaimed "that it is the indispensable Duty of all Gentlemen to set Examples of Temperance, Fortitude, Frugality and Industry."[392]

Professor Christian Fritz explains that pre-Revolutionary political thinkers had argued "all human Constitutions are subject to Corruption and must perish, unless they are timely renewed by reducing them to their first Principles."[393] To these philosophers however, "the best a 'frequent recurrence' to first principles might do was stave off the inevitable" natural decline.[394] Fritz describes how this notion was transformed during the revolutionary period by a linkage with concepts of popular sovereignty. According to Fritz, "frequent recurrence" to fundamental principles became a "serious reminder of the importance of timely reforms of the constitutional system."[395] Only in this way could the new republics be maintained.

Fritz also describes an alternative, more passive vision of popular sovereignty that resisted the claimed need and right of continuous revision.[396] The decision by the Maryland framers to omit a "frequent recurrence" provision may indicate their position in this debate. Because it is unclear if the Delaware drafters had a copy of the May 27, 1776 draft of the Virginia Declaration of Rights, it is unclear whether Delaware's omission of a "frequent recurrence" provision was intentional or merely unknowing.

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[392] 1 THE PAPERS OF GEORGE MASON, 1725-1792 229 (Rutland ed.). *See also* 1 A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 283 (1971).

[393] Christian G. Fritz, *Alternative Visions of American Constitutionalism; Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 342 (1997).

[394] Christian G. Fritz, *Alternative Visions of American Constitutionalism; Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 343 (1997).

[395] Christian G. Fritz, *Alternative Visions of American Constitutionalism; Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 343 (1997).

[396] Christian G. Fritz, *Alternative Visions of American Constitutionalism; Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 343 (1997).

G. Provisions that are unique to Maryland

There are twelve provisions that are unique to the August 27, 1776 draft of the Maryland Declaration of Rights. Professor Farrand noted this excess and used it as support for his theory that Delaware preceded Maryland: "That Maryland's declaration included all of the rights proclaimed by Delaware, while Delaware's declaration did not include all of those proclaimed by Maryland, certainly argues in favor of a later date for the Maryland instrument."[397] Having refuted the Farrand hypothesis, another explanation must be made to explain the Maryland excess. The alternative, however, is also unsatisfying—that the Delaware drafters reviewed these Maryland provisions and determined that they were non-fundamental.

1. "Freedom of Speech … in the Legislature"

Maryland	"That freedom of speech, and debates, or proceedings, in the legislature, ought not to be impeached or questioned in any other place."[398]

Professor David S. Bogen, of the University of Maryland School of Law, has traced the development of this "parliamentary privilege" in England.[399] While Parliament was originally very deferential to the King in its debate,[400] over time parliament claimed a parliamentary privilege, and the sole right to punish its own members.[401] After the Glorious Revolution, this right of free speech in Parliament was codified in the English Bill of Rights (1689).[402]

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[397] Max Farrand, *The Delaware Bill of Rights of 1776*, 3 AM. HIST. R. 641, 649 (1897).

[398] MD. CONST., Decl. of Rts., art. 6 (August 27, 1776 draft).

[399] David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 431-35 (1983).

[400] David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 432 (1983).

[401] David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 432-33 (1983).

[402] ENGLISH BILL OF RIGHTS (1689), *reprinted in* 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 133 (William F. Swindler ed., 1982); MICHAEL EVANS & R. IAN JACK, EDS., SOURCES OF ENGLISH LEGAL AND CONSTITUTIONAL LAW 354 (1984). *See also* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 433 (1983).

Maryland was the first American State to codify this parliamentary privilege in its declaration of rights.[403] The same privilege was incorporated in the Articles of Confederation,[404] the Massachusetts Declaration of Rights,[405] and finally, the United States Constitution.[406]

It is Professor Bogen's hypothesis that the right of parliamentary privilege is one of several "threads" that come together to form the "constitutional tapestry" of the freedom of speech. Parliamentary privilege is predicated on an implicit recognition that free discussion and debate are necessary for self-government.[407] When the parliamentary privilege is combined with other existing freedoms and developing theories, together they gave rise to the First Amendment protections of free speech and press.[408] If we are to credit Professor Bogen's theory, the constitutionalization of the parliamentary privilege was a critical step on the way to the First Amendment, a step that Maryland made first.[409]

The positioning of this provision in the declaration of rights, as opposed to within the "Form of Government," would seem to support Professor Bogen's interpretation—that freedom of speech in the legislature was viewed as an inherent right, whose function was to preserve self-

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[403] Montgomery County v. Schooley, 627 A.2d 69, 73 n.2 (1993) (Wilner, J.) (describing Maryland's provision as the first American constitutional provision guaranteeing the parliamentary privilege); Joyce A. McCrary Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedom*, 36 HOW. L. REV. 43, 52 (1993) (stating that Maryland's was the first American protection for legislative debate); Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 690 n.223 (1998).

[404] ARTICLES OF CONFEDERATION, art. 5, cl. 5.

[405] MASS. CONST., DECL OF RTS., para. XXI (1780). For a compilation of other state constitutional provisions protecting the parliamentary privilege, *see* Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 689 n.217 (1998).

[406] U.S. CONST. Art I, § 6. *See* Tenny v. Brandhove, 341 U.S. 367, 373 (1951).

[407] David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 435 (1983).

[408] David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 459 (1983).

[409] David Anderson presents a contrary vision of parliamentary privilege. According to Anderson, parliamentary privilege was used more frequently as a sword than as a shield, to punish those who would speak against the legislature. Only when popular opposition forced legislatures to curtail this practice did free speech develop. David A. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. REV. 455, 511-12 (1983).

government. When the broader right to freedom of speech for all citizens (not just legislators) emerged, beginning in the Pennsylvania Bill of Rights, and eventually in the First Amendment, the fundamental nature of the debate clause simultaneously fades, and it was logical for the framers of the federal constitution to place the equivalent provision within the constitution itself.[410]

2. "Place for the Meeting of the Legislature"

Maryland	"That a place for the meeting of the legislature ought to be fixed, the most convenient to the members thereof, and to the depository of the public records, and the legislature ought not to be convened and held at any other place but from evident necessity."[411]

Apparently, the Maryland Constitutional Convention was unable or unwilling to designate Annapolis as the permanent state capital, and although the new government was commanded to begin its operations in Annapolis, it was not necessary that the capital would remain there.[412]

3. Prohibition against "Levying of Taxes by the Poll"

Maryland	"That every person in the state ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal estate; that the levying of taxes by the poll is grievous and oppressive, and ought to be abolished; that pauper estates not exceeding thirty pounds currency ought not to be assessed for the support of the government."[413]

[410] U.S. CONST., Art. I, § 6.

[411] MD. CONST., Decl. of Rts., art. 7 (August 27, 1776 draft).

[412] *See* MD. CONST., Art. 15 (1776) (requiring senatorial electors to meet in the "city of Annapolis, or such other place as shall be appointed for convening the legislature…"); MD. CONST., Art. 61 (1776) (requiring the first general assembly to meet in Annapolis on February 10, 1777).

[413] MD. CONST., Decl. of Rts., art. 11 (August 27, 1776 draft).

This appears to be a Maryland innovation,[414] which may have originated in the militia resolves of the freemen of Anne Arundel County, whose suggestions for a form of government included a prohibition on poll taxes.[415] H. H. Walker Lewis, in his history of the Maryland Constitution of 1776, explains that the poll tax was collected for the maintenance of the Church of England, and colonial opposition to the poll tax came as a result of the excesses of ministers of that Church.[416]

4. Prohibition against "Sanguinary Laws"

Maryland	"That sanguinary laws ought to be avoided as far as is consistent with the safety of the state."[417]

By the September 17, 1776 draft, this provision was changed to a form that is virtually identical to today's version: "That sanguinary laws ought to be avoided, as far as is consistent with the safety of the State; and no law to inflict cruel and unusual pains and penalties ought to be made in any case at any time hereafter." This involved grafting the second clause from what had been Article 14 onto this provision.[418] The changes are substantial. As a result the reach of the prohibition against "unusual pains and penalties" is simultaneously reduced and increased. To merit prohibition, punishments must be simultaneously "cruel" and "unusual," where under the previous draft they had merely to be "unusual." Removing the phrase "unknown to the

[414] Joyce A. McCrary Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedom*, 36 HOW. L. REV. 43, 52 (1993) (stating that Maryland's was the first American prohibition against poll taxes).

[415] *Maryland Gazette* (June 27, 1776) *reprinted in* DAVID CURTIS SKAGGS, ROOTS OF MARYLAND DEMOCRACY: 1753-1776 226 (1973) ("22. That all monies to be raised on the people be by a fair and equal assessment, in proportion to every person's estate— and that the unjust mode of taxation by the poll, heretofore used, be abolished…"). *See also Maryland Gazette* (August 22, 1776) *reprinted in* DAVID CURTIS SKAGGS, ROOTS OF MARYLAND DEMOCRACY: 1753-1776 227-28 (1973).

[416] H. H. WALKER LEWIS, THE MARYLAND CONSTITUTION OF 1776____ (1976).

[417] MD. CONST., Decl. of Rts., art. 12 (August 27, 1776 draft).

common law," however, also broadened the scope. Thus, a punishment permitted by the common law, but cruel and unusual was, and is, unconstitutional.

The Maryland appellate courts have repeatedly denigrated this provision, treating this provision as if it is redundant to Maryland's cruel or unusual punishments provision.[419] For example in Delnegro v. State, the Court of Appeals stated, "The Maryland Declaration of Rights contains two prohibitions against cruel and unusual punishment"—thus getting them both wrong.[420] This provision is unique to Maryland, and was an innovation of the 1776 constitutional convention.

The independent content of this provision was suggested at the 1864 Maryland constitutional convention. Delegate Henry Stockbridge, Sr., of Baltimore City argued that this article, and the "cruel or unusual punishments" article, embraced the same topic and ought to be combined. Delegate Oliver Miller of Anne Arundel County (later a Judge of the Court of Appeals of Maryland (1867-1892)) persuaded the convention that the provisions were different in that this article is directed to the legislature in adopting penalties, while the other is directed exclusively to the judiciary in imposing sentences.[421] This view is reinforced by the fact that between the August 27, 1776 draft and the September 17, 1776 draft, Article 22 was changed to emphasize the fact that that article was directed specifically to the judiciary.[422]

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[418] *See supra*, note 426.

[419] MD. CONST., Decl. of Rts., art 22 (August 27, 1776 draft), *see infra* note ____. *See also* MD. CONST., Decl. of Rts., art. 25 (1999 edition).

[420] Delnegro v. State, 198 Md. 80, 88 (1950).

[421] 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND 224-26 (Richard P. Bayly, 1864).

[422] *Compare* MD. CONST., Decl. of Rts., Art. 22 (August 27, 1776 draft), *with* MD. CONST., Decl. of Rts., Art. 22 (September 17, 1776 draft). Both are reprinted in Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 660 (1998). The difference between the two drafts is the addition of the final five words, "by the courts of law." This argument is also made in Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 699 n. 389 (1998). In Bartholomey v. State, 273 A.2d 164, 170 (Md. 1971) the Court of Appeals rejected this argument,

Independent content may also be given to this provision by reference to the Pennsylvania constitution of 1776, drafted days prior in Philadelphia. The Pennsylvania constitution used the word "sanguinary" twice. In both instances, the Pennsylvania framers used the word to describe punishments that were *unnecessary* or *disproportionate* to the offenses committed.[423]

Professor A. E. Dick Howard has traced this provision, and those like it in other state constitutions, to Chapter 20 of the *Magna Carta*, which requires punishments to be proportionate to the crimes.[424] If true, the origins of this provision are distinct from the origins of provisions prohibiting "cruel" and/or "unusual punishments."[425]

5. Prohibition against Bills of Attainder

Maryland	"That no law to attaint particular persons of treason or felony, no law to inflict unusual pains and penalties, unknown to the common law, ought to be made in any case, or at any time hereafter."[426]

stating that final phrase, "by the courts of law" is "superfluous" to the meaning of Article 25. The Court of Appeals recently seems to have changed its collective mind on the issue. In Aravanis v. Somerset County, the county argued that the General Assembly, in adopting a civil forfeiture statute, had already made a proportionality review pursuant to Article 25, thus obviating the need for the court to do so. Aravanis v. Somerset County, 339 Md. 644, 665 n.17, 664 A.2d 888, 898 n.17 (1995). The court rejected that argument, holding that the final clause of Article 25 is clearly directed at the courts, not the legislature. Id.

[423] PENN. CONST., Art. 38 (1776) ("The penal laws as heretofore used shall be reformed by the legislature of this state, as soon as may be, and punishments made in some cases less *sanguinary*, and in general more proportionate to the crimes") *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 277 (William F. Swindler, ed., 1979) (emphasis added); PENN. CONST., Art. 39 (1776) ("To deter more effectually from the commission of crimes, by continued visible punishments of long duration, and to make *sanguinary* punishments less necessary; houses ought to be provided for punishing by hard labor, those who shall be convicted of crimes not capital; wherein the criminals shall be employed for the benefit of the public, or for reparation of injuries done to private persons: And all persons at proper times shall be admitted to see the prisoners at their labor") *reprinted in* 8 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 277 (William F. Swindler, ed., 1979) (emphasis added).

[424] A. E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 213, and App. A at 387 (U. Va. Press 1968).

[425] *See supra*, note ___.

[426] MD. CONST., Decl. of Rts., art. 14 (August 27, 1776 draft).

A "bill of attainder" is defined as a "legislative act which inflicts punishment without a judicial trial."[427] The defect of a bill of attainder is that it serves to determine guilt without the procedural and evidentiary safeguards that attend a judicial trial, and instead subjects the accused to the whim of the popularly elected legislature. Moreover, by removing the legislative branch from the realm of dispensing punishment in individual cases, prohibitions against bills of attainder serve to promote the separation of powers.[428]

Bernard Schwartz has determined that the prohibition against bills of attainder is a Maryland innovation.[429] The federal constitution contains two prohibitions on bills of attainder, the first prohibits the United States Congress from passing bills of attainder,[430] and the second prohibits the various state legislatures from doing so.[431] Despite the federal constitution's assurance that the states are prohibited from passing bills of attainder, most state constitutions, including those adopted after the federal constitution, continue to prohibit bills of attainder.[432]

The text of this provision changed substantially between August 27 and September 17, 1776. The phrase "no law to inflict unusual pains and penalties, unknown to the common law," which was a part of the August 27, 1776 draft of this article, was moved to, and engrafted onto

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[427] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 287 (1866).

[428] *See generally* United States v. Brown, 381 U.S. 437 (1965) (emphasizing that Bill of Attainder clauses were included in federal constitution to prevent Congress and state legislatures from exercising judicial function).

[429] Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 693 n.296 (1998) (PREFER TO CITE TO SCHWARTZ); Joyce A. McCrary Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedom*, 36 HOW. L. REV. 43, 52 (1993) (stating that Maryland's was the first American prohibition against bills of attainder).

[430] U.S. CONST., Art. I, § 9.

[431] U.S. CONST., Art. I, § 10.

[432] Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 693 n.290 (1998).

Article 12, regarding "sanguinary laws".[433] As a result, by September 17, 1776, this provision read as it does today: "That no Law to attaint particular persons of treason or felony ought to be made in any case, or at any time, hereafter."[434]

6. Prohibition against Forfeiture of Estate

Maryland	"That there ought not to be a forfeiture of any part of the estate of convicted and attained persons except for murder or high treason against the state."[435]

With the current popularity of civil forfeiture as a weapon in the "war on drugs," many courts and commentators have looked to the history of forfeiture law prior to and during the American Revolution in both England and this country as a basis for determining the constitutionality of these statutes. The literature is uniform in describing English forfeiture law as evolving in three traditions: (1) deodand; (2) "attainder forfeiture" or "forfeiture of estate"; and (3) statutory or admiralty forfeiture.[436] The deodand evolved out of ecclesiastical law and required the forfeiture to the crown of the instrument causing a person's death.[437] The second class of forfeitures—"attainder forfeiture" or "forfeiture of estate"—was the largest class of

[433] Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 694 n.298 (1998).

[434] MD. CONST., Decl. of Rts., art. 18 (1867, with amendments to 2000). The only differences between the September 17, 1776 version and that of today are the capitalization of the third word, "Laws," and the addition of the final comma, before the word "hereafter." *See* Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 656 (1998).

[435] MD. CONST., Decl. of Rts., art. 24 (August 27, 1776 draft).

[436] *See e.g.* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-83 (1974); Donald J. Boudreaux & A. C. Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*, 61 MO. L. REV. 593, 600-08 (1996); Alan Nicgorski, *Comment: The Continuing Saga of Civil Forfeiture, the 'War on Drugs,' and the Constitution: Determining the Constitutional Excessiveness of Civil Forfeitures*, 91 NW. U. L. REV. 374, 378-81 (1996). These citations are but a few in a vast sea; every law review in the country seems to have published a note or comment on civil forfeiture law, and most include at least a reference to this aspect of the history of forfeiture law.

[437] Donald J. Boudreaux & A. C. Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*, 61 MO. L. REV. 593, 600-01 (1996).

forfeitures at English law.[438] Under this theory, all personal property of a person convicted of a felony was forfeited to the crown and all real property to the felon's feudal lord.[439] Under the related concept of "corruption of blood," the children of the convicted felon could not inherit from these forfeited properties. Underlying this system of forfeiture of estate was the English understanding of the nature of property. As explained by William Blackstone:

> [t]he true reason and only substantial ground of any forfeiture for crimes consists in this; that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities.[440]

English theory, then, "presume[d] that property is merely a social construct, and that society—which confers property rights—can revoke those rights for transgressions against society."[441] In America, a different understanding of property rights developed, one that "regarded property as both a natural right and the cornerstone of individual liberty."[442] State constitutions, beginning with Maryland's,[443] served to limit attainder forfeiture, and were later

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[438] Donald J. Boudreaux & A. C. Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*, 61 MO. L. REV. 593, 602 (1996) (*citing* Stuart David Kaplan, *Note: The Forfeiture of Profits Under the Racketeer Influenced and Corrupt Organizations Act: Enabling Courts to Realize RICO's Potential*, 33 AM. U. L. REV. 747, 751 (1984)).

[439] Donald J. Boudreaux & A. C. Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*, 61 MO. L. REV. 593, 602 (1996). In the case of treason, all property, real and personal, was forfeited to the crown.

[440] Donald J. Boudreaux & A. C. Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*, 61 MO. L. REV. 593, 603 (1996) (*quoting* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWES OF ENGLAND, c. 8, 289 (1765)).

[441] Donald J. Boudreaux & A. C. Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*, 61 MO. L. REV. 593, 604 (1996).

[442] Donald J. Boudreaux & A. C. Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*, 61 MO. L. REV. 593, 604 (1996).

[443] The authors erroneously transpose the relationship between the state and federal governments, arguing that "[t]he state governments followed the federal government's lead in curtailing the use of forfeiture," when, in fact, it was the other way around. Donald J. Boudreaux & A. C. Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*, 61 MO. L. REV. 593, 604 (1996).

incorporated into the federal constitution[444] and the first laws of the United States.[445] Thus, United States Supreme Court Justice William Brennan could properly say that neither deodands, nor forfeiture of estates became "part of the common-law tradition of this country."[446]

The third class of English forfeiture laws—statutory or admiralty forfeiture—was incorporated into the American tradition and is generally thought to be the forerunners of modern forfeiture provisions.[447]

It may be concluded that the Maryland framers were concerned to prevent "forfeiture of estate"-type forfeitures, but intended to permit, and continue to permit, statutory forfeitures. Merely intoning the history, and suggesting that modern forfeiture laws are descendants of statutory, and not attainder forfeiture laws, is not a sufficient protection against the abuses the framers sought to avoid—the punishment of innocents, including the children of the felon. To satisfy this provision, a court must be assured that the effect of a given forfeiture is not to deprive a felon's children of their rights.[448]

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[444] U.S. CONST., Art. III, § 3 ("[n]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.").

[445] Act of April 30, 1790, 1 Stat. 117, c. 9, § 24.

[446] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 682-83 (1974).

[447] *But see* Donald J. Boudreaux & A. C. Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*, 61 MO. L. REV. 593, 601 n.54-55 (1996) (and sources therein) (identifying deodand as the forerunner of modern in rem forfeiture).

[448] Inadvertently, the Court of Appeals of Maryland seems to have developed a formula that will protect the concerns of the drafters of the Maryland provision. In Aravanis v. Somerset County, the Court of Appeals, relying exclusively on the excessive fines clause of article 25 of the Maryland Declaration of Rights, adopted a standard for constitutional review of *in rem* forfeitures. Aravanis v. Somerset County, 339 Md. 644, 665 n.17, 664 A.2d 888, 665 (1995). That review includes protections against the forfeiture of property owned by innocents, including, at least implicitly, the children of the felon. Id. Thus, the Court's analysis under the excessive fines provision dovetails with the framers' concerns as demonstrated by the prohibition on forfeiture of estate.

7. Limiting Test Oaths

Maryland	"That no person conscientiously scrupulous of taking an oath ought to be obliged by any law to take an oath in order to be admitted into office, and in civil cases such persons ought to be permitted to take an affirmation."[449]
	"That no other oath, affirmation, test or qualification ought to be required on admission to any office of trust or profit, than such oath or affirmation of support and fidelity to this state as shall be proscribed by this Convention, and such oath of office as shall be directed by law, and a declaration of belief in the Christian religion."[450]

The August 27, 1776 draft of the Maryland declaration of rights contained two separate provisions intended to limit test oaths. H. H. Walker Lewis speculates that the drafting committee could not come to a consensus about the two oath provisions "and thought it best to propose both versions and let the Convention take its pick."[451] By the September 17, 1776 draft of the Maryland Declaration of Rights, aspects of both had been combined into a single provision regarding test oaths.[452]

The second oath provision, requiring officeholders to take only an oath of support and fidelity to the state, echoes a similar sentiment suggested in the militia resolves of the freemen of Anne Arundel County, and those resolves may have provided the impetus for this proposal.[453]

8. Preserving Annapolis's Rights

[449] MD. CONST., Decl. of Rts., art. 36 (August 27, 1776 draft).

[450] MD. CONST., Decl. of Rts., art. 37 (August 27, 1776 draft).

[451] H. H. WALKER LEWIS, THE MARYLAND CONSTITUTION OF 1776 ____ (1976).

[452] H. H. WALKER LEWIS, THE MARYLAND CONSTITUTION OF 1776 ____ (1976).

[453] *Maryland Gazette* (June 27, 1776) *reprinted in* DAVID CURTIS SKAGGS, ROOTS OF MARYLAND DEMOCRACY: 1753-1776 226 (1973) ("21. That an oath be taken by every person who shall hold an office of profit or trust, to stand true, be faithful, maintain and support the constitution, and to the utmost of his power promote the interest of the people."). *See also Maryland Gazette* (August 22, 1776) *reprinted in* DAVID CURTIS SKAGGS, ROOTS OF MARYLAND DEMOCRACY: 1753-1776 227-28 (1973).

Maryland	"That the city of Annapolis ought to have all its rights, privileges, and benefits, agreeable to its charter and the acts of assembly."[454]

When the Eighth Convention of Maryland authorized the election of delegates to the Maryland Constitutional Convention, they were very specific in detailing the apportionment of delegates, and the basis of that apportionment:

> RESOLVED, That there be four representatives chosen for each of the [three] districts of Frederick county, … two representatives for the City of Annapolis, and two representatives from the town of Baltimore in Baltimore county, and four representatives for each county in this province, except Frederick county aforesaid; but that the inhabitants of Annapolis and Baltimore-town be not allowed to vote for representatives for their respective counties, nor shall the resolution be understood to engage or secure such representation to Annapolis or Baltimore-town, but temporarily, the same being, in the opinion of this convention, properly to be modified, or taken away, on a material alteration of the circumstances of those places, from either a depopulation or a considerable decrease in the population thereof.[455]

The voters of Annapolis selected well, electing Charles Carroll of Carrollton and William Paca. Both Carroll of Carrollton and Paca were subsequently elected to the drafting committee, and must have inserted this provision in direct response to the resolution of the eighth convention.

As the drafting committee searched for a means of protecting Annapolis's rights to elect its own representatives, Carroll of Carrollton and Paca may have pointed to a precedent in Magna Carta, "[a]nd the city of London shall have all it ancient liberties and free customs, as

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[454] MD. CONST., Decl. of Rts., art. 38 (August 27, 1776 draft).

[455] THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977) (July 3, 1776); PROCEEDINGS OF THE CONVENTION OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775 & 1776 184 (Jonas Green, 1836); http://www.mdarchives.state.md.us/megafile/msa/speccol/sc2900/sc2908/000001/000078/html/index.html (visited April 29, 2001). The freemen of Anne Arundel County, in instructing their delegates also demanded "that Annapolis be represented, but that the inhabitants thereof be not allowed to vote for the representatives for this county." *Maryland Gazette* (August 22, 1776) *reprinted in* DAVID CURTIS SKAGGS, ROOTS OF MARYLAND DEMOCRACY: 1753-1776 226 (1973).

well by land as by water…,"[456] and urged the drafting committee and the Convention to protect their capital as the Magna Carta protected London.[457]

9. Prohibition against Monopolies

Maryland	"That monopolies in trade are odious, contrary to the spirit of a free government, and the principles of commerce, and ought not to be suffered."[458]

According to historian Gordon Wood, a central tenet of revolutionary-era republicanism was the doctrine of equality.[459] As understood by the colonists, this doctrine of equality opposed all distinctions between persons, except for those based on "differences of capacity, disposition, and virtue."[460] Wood points to a variety of constitutional and statutory provisions which "would prevent the perpetuation of privilege and the consequent stifling of talent," including prohibitions against entail, primogeniture, and monopolies.[461] Maryland was the first state to incorporate the prohibition against monopolies into its constitution.[462]

[456] Magna Carta (1215), Ch. 13. WILLIAM S. MCKECHNIE, MAGNA CARTA, A COMMENTARY ON THE GREAT CHARTER OF KING JOHN ____ (2d ed. 1914).

[457] This is conjecture, based on the scant historical record available. By contrast to Annapolis, the "rights, privileges, and benefits" of Baltimore-town, were not protected by the constitution, perhaps because Baltimore-town had no delegates on the drafting committee to protect its interests.

[458] MD. CONST., Decl. of Rts., art. 40 (August 27, 1776 draft).

[459] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 70 (1993 ed.).

[460] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 71 (1993 ed.).

[461] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 72 (1993 ed.).

[462] Joyce A. McCrary Pearson, *The Federal and State Bills of Rights: A Historical Look at the Relationship Between America's Documents of Individual Freedom*, 36 HOW. L. REV. 43, 52 (1993) (stating that Maryland's was the first American prohibition against monopolies).

Professor Rutland suggests an alternate version of the history of this provision, that it may have been added as "a reaction to recent commercial experience under the English Navigation Acts."[463]

H. Provisions that are unique to Delaware

As discussed above, George Read, the president of the Delaware constitutional convention of 1776, and the chairman of its drafting committee, wrote Caesar Rodney that the Delaware declaration of rights was not "an object of much curiosity, it is made out of the Pensilvania [sic] & Maryland Draughts."[464] Thus it is no surprise that there were no truly unique provisions in the Delaware declaration of rights of 1776.

1. Right to be Protected; Just Compensation; Conscientious Objection

Delaware	"THAT every Member of Society hath a Right to be protected in the Enjoyment of Life, Liberty and Property, and therefore is bound to contribute his Proportion towards the Expence of that Protection, and yield his personal Service when necessary, or an Equivalent thereto; but no Part of a Man's Property can be justly taken from him or applied to public Uses without his own Consent or that of his legal Representatives: Nor can any Man that is conscientiously scrupulous of bearing Arms in any Case be justly compelled thereto if he will pay such equivalent."[465]

[463] ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 52 (U.N.C. Press, 1951). I ADMIT THAT I DON'T KNOW WHAT RUTLAND IS TALKING ABOUT. THIS SHOULD BE EXPANDED OR OMITTED.

[464] Letter from George Read to Caesar Rodney (September 17, 1776), *in* GEORGE HERBERT RYDEN, LETTERS TO AND FROM CAESAR RODNEY, 1756-1784 119 (Univ. of Penna., 1933).

[465] DE. CONST., Decl. of Rts., art. 10 (September 11, 1776 draft).

Delaware's article 10 is unique (as defined by this article) in that it does not appear in either the Virginia or Maryland declaration of rights.[466] It is, however, directly descended from a provision in the Pennsylvania declaration of rights of 1776.

IV. CONCLUSION

Professor Christian G. Fritz has observed that a standard criticism of nineteenth-century state constitutions is that they "generally lacked creativity and were largely the result of expedient borrowing and imitation."[467] The same criticisms have been leveled at state constitutions from other eras. Professor Fritz concludes that this assessment—that state constitution making has not been innovative—is "partly correct."[468] It certainly is not true for the Virginia Declaration of Rights, the drafting of which must be considered a largely original enterprise. It is, however, true that every subsequent state constitution has been influenced by its predecessors, and that there are substantial textual and conceptual similarities between these subsequent state constitutions. Fritz concludes, however, that

> [m]erely noting the fact that state constitutions contain similar provisions does not reveal how or why particular language was incorporated. Whether such borrowing was unthinking and lacked creativity can only be determined by examining the constitutional convention debates. In fact, the borrowing process in nineteenth-century constitution making occurred within a broad national awareness of constitutional models and structures.[469]

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[466] Although this provision is drafted in language that is dissimilar from Article 1 of the Virginia Declaration of Rights of 1776, there are certainly similarities in the natural rights theory espoused. *See infra*, notes ____-____ (and accompanying text).

[467] Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth Century West*, 25 RUTGERS L.J. 945, 960 (1994).

[468] Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth Century West*, 25 RUTGERS L.J. 945, 975 (1994).

[469] Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth Century West*, 25 RUTGERS L.J. 945, 977 (1994) (footnote omitted).

The same point must be made about the drafting of bills of rights during the fall of 1776 in Maryland and Delaware. The fact that there are numerous textual and conceptual similarities between these bills of rights and that of Virginia does not reveal how or why the language was selected. Unlike in the western states studied by Professor Fritz, the constitutional conventions described here did not maintain systematic records of their debates. Only by the careful review of the similarities in text and placement can we arrive at the same conclusion Professor Fritz did, that while not wholly original, the drafting of state bills of rights has been a careful and thoughtful process. This realization should have powerful implications for those charged with interpreting these provisions and those provisions that are descended from them.

Appendix A: Table of Comparable Maryland Provisions[470]

Maryland's Declaration of Rights has remained relatively intact over the course of its two hundred and twenty-four year history. So much so that most of the provisions discussed in this article are still part of the Maryland Declaration of Rights. The numbering of the articles, however, has changed substantially as is reflected below:

Subject	Position in the August 27, 1776 draft	Current Position
Social compact	1	1
Right to change government	2	6
Free and frequent elections	3	7
Separation of powers	4	8
Suspending laws	5	9
Freedom of speech in the legislature	6	10
Meeting place of legislature	7	11
Frequent convening of legislature	8	12
Right of petition	9	13
No tax without consent of legislature	10	14
Poll taxes prohibited	11	15
Sanguinary laws prohibited	12	16
Ex post facto laws prohibited	13	17
Bills of attainder prohibited	14	18
Internal government	15	4
Common law preserved	16	5
Open courts; Right to remedy	17	19
Right to venue	18	20
Rights of accused	19	21
Right against self incrimination	20	22
Due process	21	24
Cruel or unusual punishments	22	25
Warrants	23	26
Forfeiture of estate	24	27
Militia	25	28
Standing armies	26	29
Military subordinate to civilian	27	30
Prohibiting Quartering	28	31
Martial law	29	32
Independency of judges	30	33
Rotation in offices	31	34
Prohibiting plural office holding	32	35
Prohibiting plural office holding	33	35
Free exercise	34	---
Anti-establishment	35	36
Oaths	36	39
Oaths	37	39
Annapolis	38	---
Liberty of the press	39	40
Prohibiting monopolies	40	41
Non-importation of slaves	41	---
Prohibiting titles of nobility	42	42
Retaining existing laws	43	---
Constitutional amendment	44	---

[470] An equivalent table is not necessary for Virginia, which has carefully retained George Mason's numbering system, or for Delaware, which, by 1792 had totally revised its bill of rights, rendering the numbering irrelevant.