THE HISTORY, DEVELOPMENT, AND INTERPRETATION OF THE MARYLAND DECLARATION OF RIGHTS

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THE HISTORY, DEVELOPMENT, AND INTERPRETATION OF THE MARYLAND DECLARATION OF RIGHTS†

by

Dan Friedman*

"[A]n independent argument under the state clause takes homework—in texts, in history, in alternative approaches to analysis."1

Justice Hans A. Linde,
Oregon Supreme Court

Justice Linde's statement, made at a state constitutional law symposium in Maryland,2 clearly is true. This article and its accompanying chart make the "homework" easier for lawyers developing legal arguments based on the Maryland Declaration of Rights.3

The article first reviews the basic arguments in favor of independent state constitutional jurisprudence. Although familiar to the state constitutional scholar, many practitioners are unaccustomed to invoking the often greater protections afforded by state constitutions than by the federal document. A brief historical sketch of the political and social environs in which the various versions of the Maryland Declaration of Rights were adopted follows. Specific techniques for incorporating the Maryland Declaration of Rights into legal argument also are discussed.

At the heart of this article, in chart form, each provision of every version of the Maryland Declaration of Rights is analyzed. The chart, its accompanying commentary, and bibliography provide the raw material for crafting arguments based on the Maryland Declaration of Rights.

Although the article is, of course, geared toward Maryland lawyers, it is useful to all practitioners to assist them in understanding how to develop "alternative approaches to analysis" to formulate winning arguments under state constitutional law. It also may be helpful as a guide to the type of historical research required in other states.4

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I. THE VALUE OF INDEPENDENT STATE CONSTITUTIONAL ANALYSIS

At least since the publication of Justice Brennan's seminal article in 1977 advocating a return to state constitutions,5 there has been an increased focus on those rights protected by the state constitution.6 One source of this renewed interest can be found in an historical analysis of the political theory underlying our federalist system.

The federalist system was designed as a compromise to balance the perceived need for a strong national government with the political reality of the existing powerful state governments.7 The resulting competitive nature of the federal system has important implications for the protection of the fundamental rights of the people. During the early period of United States history, states, more than the national government, had the capacity to act to curtail citizens' freedoms.8 The national government was constrained to act within the limited powers delegated to it by the United States Constitution.9 Likewise, the United States Constitution was believed to have limited powers over citizens, and the Bill of Rights was believed to constrain only the actions of the federal government, not states.10 State constitutional guarantees of fundamental liberties were, therefore, a citizen's front line of protection.

Later, the balance shifted toward the national government in two parallel ways. First, as a result of the expansion of national authority in the 1930's and 1940's, the national government assumed greater power for direct action on the lives of its citizens.11 Second, many states refused to enforce the basic guarantees of liberty and freedom for their citizens provided in their own constitutions.12 This, in turn, led to intervention by the United States Supreme Court in the form of "incorporating" the guarantees of the United States Bill of Rights against the states.13

Although there is no necessary relationship between selective incorporation and a withering of state constitutional law, citizens, lawyers, and the state courts grew conditioned to view the United States Supreme Court as the guarantor of our most fundamental freedoms.14 Lawyers failed to consult state constitutions and to advance claims based upon them.15

Today, another paradigm shift is underway. In the political arena, there is a distinct trend away from national government as a provider of services, and toward an increased role for the states in the provision of services to citizens.16 Simultaneous with this shift in political models has been a shift in jurisprudential models. As it has retreated from the activism of the Warren Court, the United States Supreme Court, apart from enforcing the minimum constitutional standards, has become more willing to allow states freedom to determine their own policies.17 In some states, the state supreme courts have reacted vigorously and have begun to develop their own independent state constitutional jurisprudences.18 Other states' courts have been more cautious.19

Those states that have begun to develop independent analyses of their own state constitutions have done so in response to two largely incontrovertible theses. First, state constitutions largely predate the Federal Constitu-
tion. The chart will illustrate that the large majority of the rights protected by Maryland's Declaration of Rights date to 1776, thirteen years before the adoption of the first ten amendments to the United States Constitution. Second, the United States Supreme Court's decisions must address the "lowest common denominator" that can be applied to every state, whereas the state supreme courts have the freedom to tailor more narrowly the rules they create to the unique characteristics, history, and traditions of their individual states.

II. THE HISTORY OF THE MARYLAND DECLARATION OF RIGHTS

A history of the Maryland Declaration of Rights encompasses at least five distinct phases: 1) the convention of 1776 and the adoption of the first Maryland Declaration of Rights; 2) the constitutional convention of 1850-1851 and the adoption of the Declaration of Rights of 1851; 3) the constitutional convention of 1864 and the adoption of the Declaration of Rights of 1864; 4) the constitutional convention of 1867 and the adoption of the Declaration of Rights of 1867; and 5) the amendments made to the constitution of 1867. Also of interest is the proposed Constitution of 1967-1968 and the refusal of Maryland voters to adopt that proposal. It is not the purpose of this article to give a complete history of the constitutional conventions from which the various versions of the Maryland Declaration of Rights arose. Instead, I will attempt to provide a reading list for each period so that the practicing lawyer may invoke the milieu from which a provision has developed.

A. The Maryland Declaration of Rights of 1776.

From 1774-1776, as the move to independence fermented in the American colonies, Marylanders governed themselves by a de facto "government by convention." A total of nine conventions were held. The first of these was held June 22-25, 1774 and the last ran from August 14 through November 11, 1776, concluding with the adoption of the first Constitution of the State of Maryland. While the first two conventions addressed policy questions, by the third convention, the delegates began to deal with the daily business of running the colony. The fifth convention adopted an "Association of the Freemen of Maryland" that bound the people of the province into a "loose political organization." That document served as the basis of government until the first state constitution went into effect in 1776.

On June 28, 1776, the eighth convention of Maryland authorized its representatives to the Continental Congress to vote for American independence. The convention also called for elections to a ninth convention to draft a new constitution, to be held beginning August 12, 1776. In planning the Constitutional Convention (which would be the ninth convention), the eighth convention retained the same stringent property requirements for the franchise that had governed previous conventions. This led to significant disruptions during the election. Despite several election defeats, the
“Whiggish” conservatives held a majority of the delegates to the Constitutional Convention. When the Constitutional Convention began, the Whig party quickly seized control. Matthew Tilghman of Talbot County was unanimously elected president of the Convention, a post he held in each of the previous conventions he attended.

When the Constitutional Convention of 1776 concluded its work by adopting a new constitution and declaration of rights on November 11, 1776, it had produced a document that has been called the most conservative of the colonial era constitutions.

A modern lawyer researching a provision of the 1776 Declaration of Rights has a wide range of materials available, but the materials that one desires most do not exist. There are many excellent secondary sources analyzing the revolution. However, no records of the Maryland Constitutional Convention’s deliberative process are known to exist.

B. The Maryland Declaration of Rights of 1851.

Fletcher Green has described the constitutional developments of the “South Atlantic” states of Maryland, Virginia, Georgia, and North and South Carolina, from immediately after the Revolutionary War to the 1850’s, as a time of sectional conflict between “up-country” people and those of the “low country.” In each state that Green studied, the rise in population and power of the western parts of each state came at the expense of the older, rural, and conservative eastern portions of the states.

In Maryland, the legislative branch was elected by county rather than population, creating huge disparities in political power in the General Assembly that favored the Eastern Shore, with its many counties and few residents. Despite previous attempts to redistribute the power, maldistribution continued to lead to agitation for constitutional reform, particularly in the newer, western parts of the state that included Baltimore City.

Advocates for a constitutional convention also cited a need to limit the authority of the General Assembly to appropriate funds and incur debt. The General Assembly had incurred over sixteen million dollars of debt for public works projects primarily in the western portion of the state, leading to increased taxes statewide. The Eastern Shore particularly resented the increased taxes because the proceeds were used to fund public works projects like the Chesapeake & Ohio Canal and the Baltimore & Ohio Railroad that brought products from the West and economic competition to the Eastern Shore.

Reformers also urged two changes in the judicial branch. First, they wanted to do away with the appointed judiciary, which they argued was not sufficiently democratic, and replace it with an elected judiciary. Second, the expense of running the judiciary was thought to be excessive and cost-saving devices were to be considered. When the convention began, Thomas F. Bowie, a convention delegate from Prince George’s County,
stated that judicial reform was the most important issue of the convention, and without it the Eastern Shore and Southern Maryland would never have agreed to a convention.52

Behind each discussion at the 1851 Constitutional Convention lurked the face of slavery, as residents of the Eastern Shore, and their Southern Maryland allies feared that the westerners would abolish slavery given sufficient power in the legislature.53

For the historian, there are far fewer historical and interpretive works explaining the 1851 Constitutional Convention and they are of lesser quality than those about the 1776 Constitutional Convention, but excellent journals of the convention were kept and are available.54

C. The Maryland Declaration of Rights of 1864.

Secession and joining the Confederacy, although threatened, were never realistic possibilities for Maryland. To avoid Washington, D.C. being surrounded by rebel states, the national authorities kept a close watch to ensure Maryland’s loyalty.55 When Marylanders elected Augustus W. Bradford, the Union Party candidate for Governor, on November 6, 1861,56 it signaled that Maryland would remain with the Union.57

The Constitution of Maryland, however, continued to recognize slavery.58 At a minimum, a constitutional amendment was necessary for emancipation,59 but by 1863, many emancipationists felt that a new constitutional convention would be preferable.60 By this time, the Union Party in Maryland had broken into two parties.61 The “Unconditional Union” advocated immediate emancipation of slaves without compensation, a state constitutional convention, and “complete and absolute support of the National administration.”62 The “Conditional Union” proclaimed its loyalty and desire to win the war, but condemned the Lincoln Administration’s aggressive war measures, including the suspension of the writ of habeas corpus.63 The Conditional Union also supported emancipation, but preferred a slower and more deliberate pace.64 It was willing to submit the question of constitutional convention to the voters.65 The Democratic Party was in a weakened state and could only field candidates in the areas of the Eastern Shore and Southern Maryland.66

The 1863 elections67 took place in the long shadow of the National Government. General Robert C. Schenck of the Union Army Corps, headquartered in Baltimore, openly advocated the election of the Unconditional Union ticket.68 Further, to consolidate Union strength and in fear of agitation, Schenck virtually took military control of the supervision of the election.69 Under such conditions, it is not surprising that the Unconditional Union ticket won an overwhelming victory.70 When the new General Assembly session began on January 6, 1864, among the first items was a call for a constitutional convention.71 By January 8, the measure was adopted and a popular election was scheduled for April 6 to determine if the people of Maryland wanted a constitutional convention.72 The convention received strong support73 and was scheduled to begin on April 27, 1864.74
ninety-six delegates elected to the convention: sixty-one Union party members from northern and western counties, Baltimore City, Talbot, Caroline, and Worcester Counties, and thirty-five Democrats exclusively from the Pro-Slavery counties of Kent, Queen Anne’s, Dorchester, Somerset, Anne Arundel, Montgomery, Prince George’s, Charles, Calvert, and St. Mary’s.\(^75\)

As outside forces played a large role in the events leading up to the Convention, they also continued to play a critical role during the Convention. With Lt. General Ulysses Grant’s Union Army besieging Petersburg and Richmond, Confederate General Robert E. Lee ordered General Jubal A. Early to march up the Shenandoah Valley, enter Maryland, and menace Washington, D.C. and Baltimore.\(^76\) Lee hoped that the Union Army would be forced to send troops to defend their capital, thus relieving the pressure on the Confederate capital in Richmond.\(^77\) The main Confederate thrust, although victorious at the battle of Monocacy Junction,\(^78\) was delayed by the battle, thus permitting Union reinforcements to arrive,\(^79\) and eventually requiring their withdrawal.\(^80\) Small detachments of confederate cavalry, made up largely of Maryland natives, fought skirmishes in Cockeysville, Govanstown, and Pikesville.\(^81\) The Constitutional Convention, meeting in Annapolis, recessed for ten days during the height of Early’s raid, but the psychological impact on Convention delegates lasted longer.\(^82\)

The constitution that was produced abolished slavery and sought to ensure continued Unionist control of the Maryland political landscape by disenfranchising southern sympathizers, Copperheads, and Democrats largely through the use of “iron clad” loyalty oaths.\(^83\)

The historical literature exploring the civil war period is too voluminous to catalog. Even those works limited to Maryland’s role in the Civil War are numerous.\(^84\) An excellent source for understanding the 1864 Constitutional Convention are its journals, which are the most extensive for any Maryland Constitutional Convention until 1967.

**D. The Maryland Declaration of Rights of 1867 and Subsequent Amendments.**

The Maryland Constitutional Convention of 1867 is properly described by William Starr Myers as the “self-reconstruction of Maryland.”\(^85\) Democrats, outlawed from voting after the 1864 Convention, made a tremendous political comeback after Governor Thomas Swann declined to enforce the “iron-clad” oaths.\(^86\) The result was a sweep to power by the Democrats.\(^87\) The entire body of the 1867 convention was from the Democratic party as the Union party failed to field a ticket of nominees.\(^88\) Although unable to repeal emancipation, the Democrats did remove what they considered to be the most objectionable provisions of the 1864 Constitution, including the “iron-clad” oaths.\(^89\)

Although the 1867 Declaration of Rights and Constitution are still in force in Maryland, little scholarship has discussed their inception.\(^90\) Convention records were not kept and the only record of the proceedings is a compilation of newspaper accounts.\(^91\)
E. The Proposed Maryland Constitution and Declaration of Rights of 1967-68.

In 1967, Maryland attempted to write a new constitution. It was: [s]upported strongly by all but a handful of convention delegates, it was endorsed by all living governors, the highest judges, the legislative leaders, party luminaries, the captains of industry, the leaders of labor, the mass media of Baltimore and Washington, unlimited numbers of do-gooders, and various itinerant experts from out of state. Opposition came from a rag-tag band of the pitiful elite—courthouse gangs whose jobs had been excised from constitutional status, the know-nothings of the radical right, a few opportunistic politicians, selective puritans who took an instant dislike to a single provision—and a majority of the voters who turned out on May 14 [, 1968].

Despite its defeat at the polls, the proposed Constitution of 1967-68 is an important document. Many of the proposals rejected at the time have been adopted subsequently in a piecemeal fashion. Moreover, the proposals are seen as a high-water mark of good government and it is not infrequent that a proposal will be supported by reference to what would have happened had the 1967-98 Constitution been adopted.

With respect to the 1967-68 Constitutional Convention, there are many excellent resource materials, including convention documents and journals.

III. How To Read the Chart

Each column of the following chart represents the Maryland Declaration of Rights as it existed at a specific time in Maryland history. The left-most column is the Maryland Declaration of Rights as it exists on the publication date of this article. It is the document initially adopted in 1867 with subsequent amendments to date. The second column is the Declaration of Rights as adopted in 1867. The third column is the short-lived 1864 Maryland Declaration of Rights. In column four is the Declaration of Rights adopted in 1851. The fifth column is Maryland’s original Declaration of Rights adopted in 1776. The final two columns are drafts that were circulated during the 1776 Constitutional Convention. While neither of these drafts has (or has had) the force of law, they provide useful legislative history. To the best of my knowledge, never before have these drafts generally been available to the public.

I have retained the integrity of each version so that the reader may read down a column and see the version in the order adopted, as well as read across a row to see the history of a given constitutional provision. As a result there are a few gaps where provisions were moved by a convention to a different order.

In an analysis found in the footnotes to the chart, I have tried to draw upon every possible source to make the chart complete. A major source is the records of the Constitutional Conventions, although these are somewhat
uneven. The annotations also include suggested historical antecedents for the Maryland Declaration of Rights, including the *Magna Carta* and the English Bill of Rights of 1689. These sources are referenced as appropriate.

Other historical antecedents include those constitutions of our sister states adopted prior to the adoption of the first Maryland Declaration of Rights. Although New Hampshire, South Carolina, Virginia, New Jersey, and Pennsylvania all adopted constitutions prior to Maryland, only Virginia and Pennsylvania attempted declarations or bills of rights analogous to Maryland’s. Therefore, the provisions adopted by Virginia and Pennsylvania are the most relevant antecedents to the Maryland Declaration of Rights. The three constitutions provide very similar and, in some cases, identical rights. This is despite the fact that these documents differ greatly in many respects regarding the forms of government established. Maryland’s 1776 Constitution has been described as the most conservative of the state constitutions of this period. Pennsylvania’s 1776 Constitution has been described as “radical,” providing the intellectual counterpoint to the Federal Constitution with its unicameral legislature, lack of an executive branch, and broad-based suffrage.

The similarities in the rights provisions of the Maryland, Virginia, and Pennsylvania Declarations of Rights give rise to two opposing interpretations. First, this would seem to support the claim (made about the Federal Bill of Rights, but equally applicable to those of the states) that those drafting the provisions “did not concern [themselves] primarily with stating, with absolute textual precision, the rights that Americans believed would best protect their liberty.” Under this view, whatever textual differences exist between provisions would be of minor interest because these distinctions would not signify an underlying attempt to give different meaning to a provision. Conversely, the similarities may suggest the universality of agreement that the protection of these rights was important. Even Maryland conservatives and Pennsylvania radicals could agree on the general contours of these rights. A natural corollary of this second view is to give increased importance to the different words used in the various constitutions. Great care would be necessary to ensure that a textual difference indicated an intent to give a different meaning, rather than invoke a preferred manner of expressing a universally understood meaning. I do not attempt to settle this fundamental debate about the nature of text. All relevant provisions of the first Virginia and Pennsylvania constitutions have been included in the chart.

Perhaps a word of caution is warranted. The chart frequently will claim that a provision of the Maryland Declaration of Rights is derived from a right provided by the *Magna Carta*, or is similar to a right afforded by another state’s constitution. This does not necessarily mean that the interpretation must be identical. The American experience and Maryland traditions have improved upon the *Magna Carta*.

Although the chart refers to many of the cases decided by Maryland’s appellate courts that are based on the Maryland Declaration of Rights, the case citations given are not an exhaustive compilation. The reason for this is...
two-fold. First, the Constitutions volume of the Maryland Annotated Code and computer sources do an adequate job of providing a complete list of case citations decided on or referencing the Maryland Declaration of Rights. Second, Maryland's appellate courts traditionally have exhibited a reluctance to give independent content to the provisions of the Declaration of Rights. Instead, the courts have preferred to hold that the provisions of Maryland's fundamental document are "in pari materia" with analogous federal constitutional guarantees. Because these decisions premised on a "lock-step" approach are of limited utility in developing an independent jurisprudence, they generally are omitted. Only those cases that are noteworthy, or those in which the courts escaped the intellectual straight-jacket of this approach, are cited.

IV. How to Create an Argument

For the practitioner, the factual setting obviously drives litigation. If a provision of the Maryland Declaration of Rights might apply colorably to a client's case, turn to the chart, read across the row and see how that article has evolved over the 220 years of Maryland independence. If the Federal Constitution and its amendments do not provide an analogous right, counsel is limited only by the Court of Appeals of Maryland's prior interpretation of the provision. Arguments can be based on the article's text, history, framers' intent, or anything else.

The work is more challenging if the United States Constitution and Bill of Rights provide an analogous right, but the federal court interprets the right to exclude a client's claim or defense. In this situation, counsel must argue to both the state trial and appellate courts that the federal case law interpreting an analogous provision should be discarded and that independent Maryland interpretations of the Maryland provisions should be used. The bases for arguing for independent Maryland interpretations are limitless, but an excellent starting place is a list of factors developed by Justice Handler of the New Jersey Supreme Court in State v. Hunt:

1. **Textual Language Differences**, including both where a right unprotected by the Federal Constitution is protected by the state constitution, and where the language used to describe a right protected by both the federal and state constitution is so significantly different to permit independent evaluation;
2. a **unique Legislative History**;
3. the **existence of state law on the subject prior to the creation or recognition of a constitutional right**;
4. situations where the **different structures** of federal and state governments compel different results;
5. matters of particular **state interest or local concern**;
6. **unique state traditions**; and
7. **public attitudes**.

To Justice Handler's list, I would add virtually anything else, including the persuasiveness of dissenting or subsequently overruled opinions in the United States Supreme Court, persuasive decisions of sister state courts, or
even a state court’s ideological differences with the Supreme Court. Any of these bases provide a solid ground for counsel to argue that the interpretation of an analogous provision of the Federal Constitution should be disregarded in favor of an independent Maryland interpretation. Counsel must then convince the court that an alternative interpretation is superior.

Maryland courts will not be persuaded overnight, but I do not doubt that carefully-made, persuasive arguments will prevail.
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We the People of the State of Maryland, grateful to Almighty God for our civil and religious liberty, and taking into our serious consideration the best means of establishing a good Constitution in this State for the sure foundation and more permanent security thereof, declare:

The parliament of Great Britain, by a declaratory act, having assumed a right to make laws to bind the colonies in all cases whatsoever, and in pursuance of such claim endeavored by force of arms to subjugate the United Colonies to unconditional submission to their will and power, and having at length constrained them to declare themselves into independent states, and to assume new forms of government; WE, therefore, the delegates of Maryland, in free and full Convention assembled, taking into our most serious consideration the best means of establishing a good constitution in this State, for the sure foundation, and more permanent security thereof, declare,
1. That all Government of right originates from the People, is founded in compact only, and instituted solely for the good of the whole; and they have, at all times, the inalienable right to alter, reform or abolish their Form of Government in such manner as they may deem expedient.132,133

2. The Constitution of the United States, and the Laws made, or which shall be made, under the authority of the United States, are, and shall be the Supreme Law of the State; and all Treaties made, or which shall be made, under the authority of the United States, are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding.145,146
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3. The powers not delegated to the United States by the Constitution thereof, nor prohibited by it to the States, are reserved to the States respectively, or to the people thereof. 147
4. That the People of this State have the sole and exclusive right of regulating the internal government and police thereof, as a free, sovereign and independent State. 151, 152

3. That the powers not delegated to the United States by the Constitution thereof, nor prohibited by it to the States, are reserved to the States respectively, or to the People thereof. 148, 149, 150
4. That the People of this State ought to have the sole and exclusive right of regulating the internal government and police thereof. 153, 154

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5. (a) That the Inhabitants of Maryland are entitled to the common Law of England, and the trial by Jury, according to the course of that law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six, and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven, except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State. And the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty, Charles the First, to Cecilius Calvert, Baron of Baltimore, 146, 165.

(b) The parties to any civil proceeding in which the right to a jury trial is preserved are entitled to a trial by jury of at least 6 jurors.

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(c) That notwithstanding the Common Law of England, nothing in this Constitution prohibits trial by jury of less than 12 jurors in any civil proceeding in which the right to a jury trial is preserved.166.167

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<td>5. The Constitution of the United States, and the laws made in pursuance thereof, being the supreme law of the land, every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and is not bound by any law or ordinance of this State in contravention or subversion thereof.173-174</td>
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<td>6. That all persons invested with the Legislative or Executive powers of Government are the Trustees of the Public, and as such, accountable for their conduct: Wherefore, whenever the ends of Government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the People may, and of right ought, to reform the old, or establish a new government; the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish and destructive of the good and happiness of mankind.</td>
<td>176, 177</td>
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<td>7. That the right in the People to participate in the Legislature is the best security of liberty, and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.</td>
<td>7. That the right in the People to participate in the Legislature is the best security of liberty, and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every white male citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.</td>
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<td>11. That Annapolis be the place of meeting of the Legislature; and the Legislature ought not to be convened or held at any other place but from evident necessity.224,225</td>
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<td>9. 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 public records, and the legislature ought not to be convened or held at any other place but from evident necessity.229,230,231</td>
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<td>12. That for the redress of grievances, and for amending, strengthening and preserving the Laws, the Legislature ought to be frequently convened.232,233</td>
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<td>13. That every man hath a right to petition the Legislature for the redress of grievances in a peaceable and orderly manner.239,240</td>
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<td>15. That the levying of taxes by the poll is grievous and oppressive, and ought to be prohibited; that paupers ought not to be assessed for the support of the government; that the General Assembly shall, by uniform rules, provide for the separate assessment, classification and sub-classification of land, improvements on land and personal property, as it may deem proper; and all taxes thereafter provided to be levied by the State for the support of the government, and by the Counties and by the City of Baltimore for their respective purposes, shall be uniform within each class or sub-class of land, improvements on land and personal property which the respective taxing powers may have directed to be subjected to the tax levy: yet fines, duties or taxes may properly and justly be imposed or laid, with a political view, for the good government and benefit of the community.</td>
<td>15. That the levying of taxes by the poll is grievous and oppressive, and ought to be prohibited; that paupers ought not to be assessed for the support of the government, but every other person in the State ought to contribute his proportion of public taxes for the support of government, according to his actual worth in real or personal property; yet fines, duties or taxes may properly and justly be imposed or laid, with a political view, for the good government and benefit of the community.</td>
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<td>16. That sanguinary Laws ought to be avoided as far as it 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, or at any time, hereafter.</td>
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<td>17. That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no ex post facto Law ought to be made; nor any retrospective oath or restriction be imposed, or required.</td>
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<td>19. That the people of this state ought to have the sole and exclusive right of regulating the internal government and police thereof.</td>
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16. 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 English statutes, as existed at the time of their first emigration, and which by experience have been found applicable to the 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 to 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 Cecilius Calvert baron of Baltimore.301,302,303
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<td>19. That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land.</td>
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<td>20. That the trial of facts, where they arise, is one of the greatest securities of the lives, liberties, and estate of the People.</td>
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<td>21. That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or Charge, in due time (if required) to prepare for his defence, to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.</td>
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<td>22. That no man ought to be compelled to give evidence against himself in a criminal case.341,342,343,344</td>
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<td>20. That no man ought to be compelled to give evidence against himself in a court of common law, or in any other court, but in such cases as have been usually practiced in this State, or may hereafter be directed by the Legislature.349</td>
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<td>20. That no man in the courts of common law ought to be compelled to give evidence against himself.350,351</td>
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23. In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.352,353,354,355

The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law in this State, where the amount in controversy exceeds the sum of five thousand dollars, shall be inviolably preserved.356
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<td>21. That no Freeman ought to be taken, or imprisoned, or dispossessed of his freehold, liberties, or privileges, or outlawed, or exiled, or deprived of his life, liberty, or property, but by the lawful judgment of his peers, or by the Law of the land.367</td>
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<td>(eliminated)371</td>
<td>24. That Slavery shall not be re-established in this State; but having been abolished under the policy and authority of the United States, compensation, in consideration thereof, is due from the United States.372,373,374,375</td>
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Draft #2

21. That no Freeman ought to be taken, or imprisoned, or dispossessed of his freehold, liberties, or privileges, or outlawed, or exiled, or deprived of his life, liberty, or property, but by the lawful judgment of his peers, or by the Law of the land.369

Draft #1

21. That no Freeman ought to be taken, or imprisoned, or dispossessed of his freehold, liberties, or privileges, or outlawed, or exiled, or deprived of his life, liberty, or property, but by the lawful judgment of his peers, or by the Law of the land.370
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<td>31. 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 continuation of their commissions, and reasonable salaries, or fees, allowed to the offices.467</td>
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35. That no person shall hold, at the same time, more than one office of profit, created by the Constitution or laws of this State; nor shall any person in public trust receive any present from any foreign Prince or State, or from the United States, or any of them, without the approbation of this State. The position of Notary Public shall not be considered an office of profit within the meaning of this Article.

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Membership in the militia of this State shall not be considered an office of profit within the meaning of this Article; nor shall any remuneration received as a consequence of membership in a reserve component of the armed forces of the United States or a reserve component of the militia of the United States or of this State be considered a present within the meaning of this Article.
36. That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he 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, nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry, nor shall any person, otherwise competent, be deemed incompetent, as a witness, or juror, on account of his religious belief, provided, he believes in the existence of God, and that under his dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come.

36. That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion or profession, or for his religious practice, unless, under the color of religion, he 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, nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry, nor shall any person, otherwise competent, be deemed incompetent, as a witness, or juror, on account of his religious belief, provided, he believes in the existence of God, and that under his dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor, either in this world or the world to come.

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Nothing shall prohibit or require the making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place.

Section 1876 of the Maryland Declaration of Rights.
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<td>37. That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the legislature prescribe any other oath of office than the oath prescribed by this Constitution.</td>
<td>37. That no religious test ought ever to be required as a qualification for any office of profit or trust, in this State, other than a declaration of belief in the existence of God; nor shall the legislature prescribe any other oath of office than the oath prescribed in this Constitution.</td>
<td>37. That no other test or qualification ought to be required, on admission to any office of trust or profit, than such oath of allegiance and fidelity to this State, and the United States, as may be prescribed by this Constitution, and such oath of office and qualification as may be prescribed by this Constitution, or by the Laws of the State, and a declaration of belief in the Christian religion, or in the existence of God, and in a future state of rewards and punishments.</td>
<td>34. That no other test or qualification ought to be required on admission to any office of trust or profit, than such oath of office as may be prescribed by this Constitution, or by the Laws of the State, and a declaration of a belief in the Christian religion; and if the party shall profess to be a Jew, the declaration shall be of his belief in a future state of rewards and punishments.</td>
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38. That every gift, sale or devise of lands to any minister, public teacher or preacher of the Gospel, as such, or to any religious sect, order or denomination, or to, or for the support, use or benefit of, or in trust for any minister, public teacher or preacher of the Gospel, as such, or any religious sect, order or denomination, and every gift, sale of goods, or chattels, to go in succession, or to take place after the death of the Seller or Donor, to or for such support, use or benefit, and also every devise of goods, or chattels to or for the support, use or benefit of any minister, public teacher or preacher of the Gospel, as such, or any religious sect, order or denomination; and every gift or sale of good or chattels, to go in succession, or to take place after the death of the seller or donor, or for such support, use or benefit, shall be void; except always, any sale, gift, lease or devise of any quantity of land, not exceeding five acres for a church, meeting house, or other house of worship, or parsonage, or for a burying ground, which shall be improved, enjoyed or used only for such purpose; or such sale, gift, lease or devise, shall be void.507

39. That every gift, sale or devise of lands to any minister, public teacher or preacher of the Gospel, as such, or to any religious sect, order or denomination, or to, or for the support, use or benefit of, or in trust for any minister, public teacher or preacher of the Gospel, as such, or any religious sect, order or denomination, and every gift or sale of goods or chattels, to go in succession, or to take place after the death of the seller or donor, or for such support, use or benefit, and also, every devise of goods or chattels, to or for the support, use or benefit of any minister, public teacher or preacher of the Gospel, as such, or any religious sect, order or denomination, shall be void; except always, any sale, gift, lease or devise of any quantity of land and not exceeding five acres for a church, meeting house, or other house of worship, or parsonage, or for a burying ground, which shall be improved, enjoyed or used only for such purpose; or such sale, gift, lease or devise, shall be void.513
35. That no other test or qualification ought to be required, on admission to any office of trust or profit, then such oath of support and fidelity to this State, and such oath of office as shall be directed by this Convention, or the Legislature of this State, and a declaration of a belief in the Christian religion.516

36. 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 all civil cases such persons ought to be permitted to take an affirmation.515

37. That no other oath, affirmation, test or qualification ought to be required on admission to any office of trust or profit, then such oath of support and fidelity to this State, and such oath of office as shall be directed by this Convention or the legislature of this state, and a declaration of a belief in the christian religion.
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<td>36. That the manner of administering an oath to any person, ought to be such as those of the religious persuasion, profession, or denomination, of which such person is one, generally esteem the most effectual confirmation by the attestation of the Divine Being. And that the people called Quakers, those called Dunkers, and those called Menonists, holding it unlawful to take an oath on any occasion, ought to be allowed to make their solemn affirmation in the manner that Quakers have been heretofore allowed to affirm; and to be of the same avail as an oath; in all such cases, as the affirmation of Quakers hath been allowed and accepted within this State, instead of an oath. And further, on such affirmation, warrants to search for stolen goods, or the apprehension or commitment of offenders, ought to be granted, or security for the peace awarded, and Quakers, Dunkers or Menonists ought also, on their solemn affirmation as aforesaid, to be admitted as witnesses, in all criminal cases not capital.</td>
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40. That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.526

41. That monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered.534,535

37. That the city of Annapolis ought to have all its rights, privileges and benefits, agreeable to its Charter and the Acts of Assembly confirming and regulating the same; subject to such alterations as may be made by the Legislature.527,528,529,530,531

38. That the liberty of the press ought to be inviolably preserved.536

39. That monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered.543

40. 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.546

41. 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.546

37. That the city of Annapolis ought to have all its rights, privileges, and benefits, agreeable to its Charter and the acts of Assembly confirming and regulating the same, subject nevertheless to such alteration as may be made by this Convention, or any future Legislature.

38. That the liberty of the press ought to be inviolably preserved.

39. That monopolies are odious, contrary to the spirit of a free government, and the principles of commerce, and ought not to be suffered.

40. 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.
42. That no title of nobility or hereditary honors ought to be granted in this State. 547, 548, 549
43. That the Legislature ought to encourage the diffusion of knowledge and virtue, the extension of a judicious system of general education, the promotion of literature, the arts, sciences, agriculture, commerce and manufactures, and the general amelioration of the condition of the people. 1558, 559
44. That the provisions of the Constitution of the United States, and of this State, apply as well in time of war as in time of peace; and any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good Government, and tends to anarchy and despotism. 566, 567, 568
<table>
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<th>Draft #1</th>
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<th>1851</th>
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<td>41. That the subsisting resolves 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.</td>
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<td>41. That the Legislature shall pass no law providing for an alteration, change or abolishment of this Constitution, except in the manner therein prescribed and directed.575,576</td>
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<td>42. That this declaration of rights, or the form of government, to be established by this Convention, or any part of either of them, ought not to be altered, changed or abolished by the legislature of this State, but in such manner as this Convention shall prescribe and direct.</td>
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<td>44. 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.578</td>
<td>46. Equality of rights under the law shall not be abridged or denied because of sex.579,580,581</td>
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</table>
47. (a) A victim of crime shall be treated by agents of the State with dignity, respect, and sensitivity during all phases of the criminal justice process. (b) In a case originating by indictment or information filed in a circuit court, a victim of crime shall have the right to be informed of the rights established in this Article and, upon request and if practicable, to be notified of, to attend, and to be heard at a criminal justice proceeding, as these rights are implemented and the terms "crime", "criminal justice proceeding", and "victim" are specified by law. (c) Nothing in this Article permits any civil cause of action for monetary damages for violation of any of its provisions or authorizes a victim of crime to take any action to stay a criminal justice proceeding.582,583
This Declaration of Rights was assented to, and passed, in Convention of the Delegates of the freemen of Maryland, begun and held at Annapolis the 14th day of August, A.D. 1776.

By order of the Convention,

MAT. TILGHMAN, President

Printed for the consideration of the members.
Maryland Declaration of Rights

Notes


2 The first annual Judge Irving A. Levine Memorial program was held May 16, 1979, in College Park, Maryland. The topic was "States' Bills of Rights."

3 The scope of this article is limited to a discussion of the Declaration of Rights and not the main body of the Maryland Constitution. There are arguments for and against adopting this limitation. One argument is that the two documents are indivisible, and that only together do they give a complete picture of the intended balance of power between the government and the governed. On the other hand, John R. Hauser suggests that the two documents as an historical matter, were intended to be separate. He argues that "the Declaration of Rights was regarded not as establishing, but only affirming [sic] those traditional rights" that the colonists possessed as English subjects. John Richard Hauser, The Maryland Conventions, 1774-1776: A Study in the Politics of Revolution 88 (1968) (unpublished M.A. thesis, Georgetown University) (on file with the author). By contrast, "[t]he [form of] government, on the other hand, was acknowledged to be revolutionary. Only to this latter document did the Convention apply the term 'consti-
tuting, but only affirming [sic] those traditional rights" that the colonists possessed as English subjects. John Richard

4 Maryland Constitution. There are arguments for and against adopting this limitation. One argument is that the two documents as an inherent right to be a natural first step after dissolution of bond to Great Britain). Without endorsing either of these entirely plausible arguments, I chose to limit this article to an analysis of the Maryland Declaration of Rights due to space and time constraints.

5 The Virginia Bill of Rights, Georgia Bill of Rights, and Florida Declaration of Rights each have been the subject of similar articles. See 1 Howard, supra note 3, at 27-313; Dorothy T. Beasley, The Georgia Bill of Rights: Dead or Alive?, 34 Emory L.J. 341 (1985); Robert N. Katz, The History of the Georgia Bill of Rights, 3 Ga. St. U. L. Rev. 83 (1986-87); Joseph W. Little & Steven E. Lohr, Textual History of the Florida Declaration of Rights, 22 Stetson L. Rev. 549 (1993).

6 See Robert F. Williams, Equality Guarantees in State Constitutional Law, 63 Tex. L. Rev. 1195, 1217 (1985) (stating that equal protection claims brought under state constitutions have been rejected by state courts).

7 See Benton v. Maryland, 395 U.S. 784, 794 (1969) (holding that double jeopardy prohibition of Fifth Amendment applies to states through Fourteenth Amendment); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (holding that Sixth Amendment right to trial by jury applies to states); Washington v. Texas, 388 U.S. 14, 18-19 (1967) (holding that Sixth Amendment right to compulsory process for obtaining witnesses applies to states); Malloy v. Hogan, 378 U.S. 1, 5 (1964) (holding that Fourteenth Amendment secures against states same right to remain silent as Fifth Amendment applies to federal government); Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (holding that Sixth Amendment right to assistance of counsel applies to states); Robinson v. California, 370 U.S. 660, 667 (1962) (holding that state law inflicted cruel and unusual punishment in violation of Fourteenth Amendment); Mapp v. Ohio, 367 U.S. 643, 655-57 (1961) (holding that evidence procured by means of unreasonable search and seizure must be excluded from state criminal trials); Irwin v. Dowd, 366 U.S. 717, 722 (1961) (holding that Fourteenth Amendment entitles accused to impartial jury); In re Oliver, 333 U.S. 257, 273 (1948) (holding that Fourteenth Amendment guarantees public trial); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding that Fourteenth Amendment concept of liberty embraces Free Exercise Clause); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (holding that right to peaceable assembly guaranteed by Due Process Clause of Fourteenth Amendment); Near v. Minnesota, 283 U.S. 697, 707 (1931) (holding that freedom of the press is protected from state invasion by Fourteenth Amendment); Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming that Fourteenth Amendment protects freedom of speech from impairment by states).

17 See, e.g., United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that Federal “Gun-Free School Zones Act” exceeded Congress’s authority under Commerce Clause because it sought to regulate intrastate activity that could have no substantial impact on interstate commerce).

18 See State v. Cadman, 476 A.2d 1148, 1151-52 (Me. 1984) (holding that defendant’s claim that he was denied state and federal right to speedy trial failed under both state and federal constitutional analysis); State v. Ball, 471 A.2d 347, 350 (N.H. 1983) (holding, in part, that when defendant brought claims of unreasonable search and seizure under both state and federal law, court would interpret independently); State v. Hunt, 450 A.2d 952, 957 (N.J. 1982) (holding, in part, that individual’s interest in telephone company’s billing records was entitled under state constitution even though it was not entitled to protection under Federal Constitution); Sterling v. Cupp, 625 P.2d 123, 126 (Or. 1981) (in banc) (holding, in part, that claim based on state constitutional provision guaranteeing rights of prisoners should be addressed prior to federal right to privacy claim).

19 See, e.g., Ronald K. L. Collins, Reliance on State Constitution - The Montana Disaster, 63 TEX. L. REV. 1095, 1115 (1985) (criticizing Montana Supreme Court for limiting Montana’s constitutional protection from self-incrimination to protection afforded by Fifth and Fourteenth Amendments); Lisa D. Munyon, Comment, “It’s A Sorry Frog Who Won’t Holler In His Own Pond.” The Louisiana Supreme Court’s Response to the Challenge of New Federalism, 42 LOY. L. REV. 313, 318 (1996) (discussing Louisiana Supreme Court’s general failure to interpret state constitutional provisions independently from federal standards established by United States Supreme Court).

20 The following states, listed chronologically, adopted their first state constitutions before the Federal Constitution became effective in 1789: Delaware (Del. Const. of 1776, reprinted in 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 199 (William F. Swindler ed., 1973) [hereinafter SOURCES AND DOCUMENTS]; Maryland (Md. Const. of 1776, reprinted in 4 id. at 372 (1975)); New Jersey (N.J. Const. of 1776, reprinted in 6 id. at 449 (1976)); Pennsylvania (Pa. Const. of 1776, reprinted in 8 id. at 277 (1979)); South Carolina (S.C. Const. of 1776, reprinted in 8 id. at 462 (1979)); Virginia (Va. Const. of 1776, reprinted in 10 id. at 51 (1979)); Georgia (Ga. Const. of 1777, reprinted in 2 id. at 443 (1973)); New York (N.Y. Const. of 1777, reprinted in 7 id. at 163 (1979)); Vermont (Vt. Const. of 1777, reprinted in 9 id. at 487 (1979)); Massachusetts (Mass. Const. of 1780, reprinted in 5 id. at 92 (1975)). Even those states whose constitutions post-date the adoption of the United States Constitution may contain provisions which pre-date the analogous federal provision. This is a result of the heavy borrowing that was done in the adoption of later state constitutions. For example, the rights provisions of Oregon’s original 1859 Constitution “adopted Indiana’s copy of Ohio’s version of sources found in Delaware and elsewhere.” Linde, supra note 1, at 381. Justice Linde’s attribution to Delaware as an ultimate source probably is inaccurate as Delaware’s 1776 Declaration of Rights was little more than a copy of Maryland’s Declaration of Rights of the same year. See infra note 99. For a discussion of the borrowing of provisions of state constitutions, see Christian G. Fritz, More than “Shreds and Patches”: California’s First Bill of Rights, 17 HASTINGS CONST. L.Q. 13, 14 (1989) (discussing other 19th century state constitutions and their impact on creation of California’s first bill of rights); Christian G. Fritz, The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth Century West, 25 RUTGERS L.J. 945 (1994) (discussing process of state constitution-making in west and relationship between state constitutions and Federal Constitution).


23 There are a few resources that cut across time periods. Several general Maryland histories exist. By far the best among these is ROBERT J BRUGGER, MARYLAND: A MIDDLE TEMPERAMENT, 1634-1980 (1989). Also available are MARYLAND: A HISTORY, 1632-1974 (Richard Walsh & William Lloyd Fox eds., 1974); 3 J. THOMAS SCHARF, HISTORY OF MARYLAND (1967). The Constitutional Convention Commission, in 1967, wrote a short history of the Maryland Constitution. CONSTITUTIONAL CONVENTION COMMISSION, REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION 25-68 (1967); see also MICHAEL S. MILLER, Tracking the United States and Maryland Constitution in Literature: Then and Now, 20 Mo. Bar J. 5 (1987) (identifying primary and secondary sources that discuss the United States Constitution and the history of the Maryland Constitution); Charles J. Roht, The Conventions of Maryland, 24 JOHN HOPKINS U. ALUMNI MAG. 213 (1936) (discussing the framing of each of Maryland’s four constitutions). There are also works that analyze a particular aspect of the Maryland Constitution across the relevant time periods, although none are directly concerned with the Declaration of Rights. One such work is Charles J. Roht, The Governor of Maryland: A Constitutional Study, 50 JOHN HOPKINS U. STUD. IN HIST. & POL. SCI., NO. 3 (1932) [hereinafter Governor of Maryland], which provides a constitutional study of the development of the governor’s office from the colonial period to the time of publication. Another is CARL N. EVERSTINE, THE GENERAL ASSEMBLY OF MARYLAND: 1634-1776 (1980), which provides a general history of Maryland’s General Assembly, with particular focus placed on matters of legislative philosophy, organization, and procedure.

24 EVERSTINE, supra note 23, at 517. During this period Maryland’s Colonial Governor, Robert Eden, played an inactive role in governmental affairs. Id. at 521.

25 Id. at 522, 559-63.

26 Id. at 522-28.

27 Id. at 531. The Association of Freemen of Maryland provided that political power was vested in the Convention and provided a means for election to the Convention. The executive and some judicial power were given to a 16 member “Council of Safety.” Id. at 531-38. Membership was reduced to seven by the sixth convention. Id. at 541.

28 Id. at 531.

29 Id. at 555, 556, 557. PROCEEDINGS OF THE CONVENTIONS OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS, IN 1774, 1775 & 1776, at 176 (1836) [hereinafter PROCEEDINGS].

30 PROCEEDINGS, supra note 29, at 184-89.

31 Id. at 184-85.


33 Among the election losers were influential conservative leaders from previous conventions, including Thomas Stone (a signer of the Declaration of Independence), Thomas Johnson, Jr. (Maryland’s first governor (1777-1779)),...
MARYLAND DECLARATION OF RIGHTS

William Paca (Governor of Maryland, 1782-1785), Charles Carroll of Carrollton (a signer of the United States Constitution and a United States Senator), Thomas Conte, Robert Tyler, Jonas Beall, Walter Tolley, Jr., and John Moale. It was only through considerable maneuvering that William Paca and Charles Carroll of Carrollton became the representatives from Annapolis, and Thomas Johnson, Jr. was chosen to represent Caroline County, where he owned no property. Id. at 180, 182. Ronald Hoffman, by contrast, says that Johnson did own some minimal property in Caroline County. Ronald Hoffman, A SPIRIT OF DISSENSION: ECONOMICS, POLITICS AND THE REVOLUTION IN MARYLAND 172 (1973).

Skaggs divides the Convention into two factions: a small "democratic" group and a larger "Whigish" or "country" party. Skaggs, supra note 32, at 187. The democratic group was lead by Rezin Hammond. The Whig group was led by Samuel Chase (a signer of the Declaration of Independence), Thomas Johnson, Jr., William Paca, Matthew Tilghman, Charles Carroll of Carrollton, and Charles Carroll, Barrister. Id. at 188.

Id. at 195.

Proceedings, supra note 29, at 209.

Mr. Tilghman, in fact, was President of six conventions. Id. at 1st convention, June 22, 1774; id. at 6 (second convention, Nov. 21, 1774); id. at 11 (fourth convention, Apr. 24, 1775); id. at 19 (fifth convention, July 26, 1775); id. at 39 (sixth convention, Dec. 7, 1775); id. at 165 (eighth convention, June 21, 1776).

Hoffman, supra note 33, at 269.


Secrecy was an important consideration for the delegates to the 1776 Constitutional Convention. For example, the oath of office taken by the Clerk of the Convention, Gabriel Duval (who later served as a Justice of the United States Supreme Court), was to "honest, diligently and faithfully discharge the office of clerk to the convention of Maryland," with a clause forbidding "disclosure or revelation of the secrets thereof." Proceedings, supra note 29, at 209 (emphasis added). As a result of this penchant for secrecy, no records of the debates of the convention were kept. All that remains for the modern historian is the record of the proceedings, recording the questions and the resulting votes. Early drafts circulated among the delegates also provide some insight into the working of the convention. Id.; see also THE DECISIVE BLOW IS STRUCK: A FACSIMILE EDITION OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1776 AND THE FIRST MARYLAND CONSTITUTION (1977) [hereinafter THE DECISIVE BLOW] (beginning August 14, 1776).

Id. at 146-50.

Harry, supra note 33, at 17-18. Rohr discusses this desire to limit the General Assembly's authority to incur debt as part of a general, and necessary, trend away from the dominance of the legislative branch and toward an equal balance of powers. Governor of Maryland, supra note 23, at 71-72.

Harry, supra note 44, at 34-35. Mr. Harry also links these tax protests to objections to Acts of 1844, Chapter 280, the "Stamp Tax." Id. at 22; see also supra note 23, at 121-14 (noting resistance of Marylanders to British Stamp Tax).

Harry, supra note 44, at 18-19.

Id. at 19.

According to contemporary accounts, the expenditures for the judiciary totaled $41,500 in 1840. Id. at 19 n.15. A conflicting report is given in WILLIAM J. EVITTS, A MATTER OF ALLEGIANCES: MARYLAND FROM 1880 TO 1861 (1974), in which Evitts reports that "[i]n 1842 Governor Francis Thomas declared that Maryland's annual $36,000 expenditure was the largest judicial salary bill in all the states. In fact, it was not, but most Marylanders took the governor's estimate as gospel." Id. at 34 n.47.
2 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 460-61 (1851). This is likely an exaggeration: the delegates from the Eastern Shore and Southern Maryland had resisted a constitutional convention for as long as possible in order to try to avoid changes in slavery laws. Harry, supra note 44, at 20-21.

52 Id. at 29-67.

53 A good starting point for researching the 1851 Convention is Harry, supra note 44. Although not specifically about the constitutional convention, several books and articles explain the political climate of the period. The best among these is EVITS, supra note 51. Others include Douglas Bowers, Ideology and Political Parties in Maryland 1851-1856, 64 MO. HIST. MAG. 197 (Fall 1969); Laurence Frederick Schmeckebier, History of the Know-Nothing Party in Maryland, 17 JOHN HOPKINS U. STUD. IN HIST. & POL. SCI., Nos. 4-5 (April-May, 1899). A glimpse of the life of a delegate to the 1851 convention, albeit a relatively unimportant one, is provided in George M. Anderson, A Delegate to the 1850-51 Constitutional Convention: James W. Anderson of Montgomery County, 76 MD. HIST. MAG. 250 (Fall 1981).

54 William Starr Myers, The Maryland Constitution of 1864, 19 JOHN HOPKINS U. STUD. IN HIST. & POL. SCI., Nos. 8-9 at 8 (1901). This election is decried as a “shameless mockery, and its results were but the work of fraud and violence.” 3 SCHARF, supra note 23, at 460. (The home of Governor Bradford, located in Baltimore County on the present-day grounds of the Elkridge Country Club was burned during the Civil War by Confederate soldiers in apparent retribution for the destruction of the Virginia Governor’s mansion.) Myers, supra note 55, at 8-9.

55 MD. CONST. of 1851, art. III, § 43.

56 The Emancipation Proclamation, by its terms, did not affect the slaves of Maryland. The Emancipation Proclamation, 12 Stat. 1268 (1862); see also Lea S. VanderVelde, The Labor Vision of the Thirteenth Amendment, 125 U. PA. L. REV. 437, 441 n.22 (1984) (stating that Emancipation Proclamation had “no effect on the legal status of slaves in . . . Maryland” and other states).

57 There had been several calls for a constitutional convention, notably in 1858 and 1862. See Myers, supra note 55, at 13.

58 See id. at 13 (discussing formation of “Unconditional Union” party).

59 Id. at 15, 32.

60 Id. at 15.

61 See id. (discussing President Lincoln’s aggressive war measures and Unconditional Union’s opposition to them).

62 See id. (discussing convention bill).

63 Id. at 16; see also id. at 24 (discussing overall election results).

64 1863 was not a gubernatorial election year. Candidates for Comptroller of the Treasury headed their parties’ tickets. Id. at 14-15.

65 Id. at 20.

66 See id. at 17-24 (discussing actions taken by General Schenck, including issuance of “General Order No. 53”).

67 Id. at 24.

68 See id. at 30 (discussing opening message delivered to joint meeting of Session of General Assembly).

69 Id. at 30-31.

70 The vote was 31,593 in favor of the convention, with 19,524 opposed to it. Id. at 34.

71 Id. at 35.

72 See id. at 35-39 (discussing delegates in attendance and their respective duties).


74 Id.

75 Id. at 452.

76 Id. at 454.

77 Id. at 461.

78 Myers, supra note 55, at 44-45.

79 Id. at 44-48.

80 The “iron-clad” oaths were authorized by the Maryland Constitution of 1864 in Article I, Sections 4 and 7, and Article III, Section 47. The election judges were required to ask a series of questions designed to eliminate the vote of any Southern sympathizers.

81 Research on the Constitutional Convention of 1864 should begin with Myers, supra note 55. For politics of the period, see JEAN H. BAKER, THE POLITICS OF CONTINUITY: MARYLAND POLITICAL PARTIES FROM 1858 TO 1870 (1973); CHARLES BRANCH CLARK, POLITICS IN MARYLAND DURING THE CIVIL WAR (1952).


83 Governor of Maryland, supra note 23, at 83. Myers, supra note 85, at 76-77.

84 Id. at 113.

85 See supra note 83 for a discussion of the source and nature of these oaths.

86 The only work that I can recommend is Myers, supra note 85.

87 See PHILIP B. PERLMAN, DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION OF 1867 (1923) (noting that sole record of Convention debates consisted of newspaper accounts).


89 Prior to his appointment to the Court of Appeals in Maryland in May of 1968, Judge Marvin Smith served as a delegate to the 1967-68 Constitutional Convention. Judge Smith, more than any other member of the Court, has relied on the work of the Constitutional Convention. In In re Special Investigation No. 244, 459 A.2d 111 (Md. 1983), Judge Smith adopted a rule for the appropriate use of the proposed constitution of 1967-68 as legislative history: “[t]hat proposed Constitution can effectively be used to interpret our present Constitution, that from the Convention of 1867, only in the case of an amendment to the present Constitution adopting some of the language of the proposed Constitu-
tion, as has been done in certain instances." Id. at 1114-15. For other opinions of Judge Smith relying upon the 1967-68 Constitutional Convention, see Maryland Action for Foster Children Inc. v. State, 367 A.2d 491, 507 (Md. 1977) (Smith, J. dissenting) ("The constitutional provisions here under discussion are essentially the same as those proposed by the Constitutional Convention of Maryland in 1968. I find interesting and persuasive the views expressed at the Constitutional Convention on this subject by Delegates Joseph Sherbow and William S. James."). (citations omitted); Kadav v. Board of Supervisors of Elections of Baltimore County, 329 A.2d 702, 711 (Md. 1974) (citing 1967-68 Constitutional Convention records regarding lay judges of Orphan's Court); State Admin. Bd. of Election Laws v. Calver, 327 A.2d 290, 300-04 (Md. 1974) (citing 1967-68 Constitutional Convention proposals as relevant legislative history for provision granting original jurisdiction over redistricting to the Court of Appeals); In re Diener and Broc., 304 A.2d 587, 617-19 (Md. 1973) (Smith, J. dissenting) (concerning judicial removal provisions of 1967-68 Constitution).


93 The drafts are among the only pieces of legislative history available for the 1776 Declaration, as much of the work was done by committee and not recorded.

94 One example is Article 5 of our current Declaration of Rights. In the August 27, 1776, draft, the same guarantees were made by Penrose 16. To maintain the order in both directions, the August 27, 1776, box for the historical antecedent of our Article 5 is blank, but a cross reference sends the reader to the appropriate box for Article 16 of the August 27, 1776, version.

95 It is ironic that those Maryland Constitutional Conventions that were most meticulous about providing an historical record of their debates and proceedings (1967-68 and to a lesser degree, 1864) are those that had the least impact, while the more important conventions (1867 and 1776) kept significantly fewer records and held many of their discussions in private sessions.

96 Professor Howard has described the Virginia Bill of Rights of 1776 as: a restatement of the basic principles of the English liberty documents, such as Magna Carta, the Petition of Right, and the Bill of Rights. To this English heritage were added statements of natural rights philosophy: that power derives from the people, that men have certain inherent rights which they retain in civil society, and that a majority of the people have the right to alter or abolish an existing form of government.

1 HOWARD, supra note 3, at 7. A similar statement could be made about the Maryland Constitution. For reference to origins of Maryland provisions in historic English sources, see chart infra. For specific provisions drawing on a natural rights philosophy, see Tom N. McManus, Natural Law and the Revolutionary State Constitutions, 14 LEGAL STUD. F. 351 (1900).

97 Some commentators have erroneously suggested that the Delaware Declaration of Rights of 1776 predates Maryland's and was a model for the Maryland document. See e.g. Max Farrand, The Delaware Bill of Rights of 1776, THE AMERICAN HISTORICAL REVIEW, VOL. III (1898); Tom W. Bell, The Third Amendment: Forgotten But Not Gone, 2 WM. & MARY BILL OF RTS. J. 127 n.96 (1993). The reverse is true. The Maryland Constitutional Convention assembled in Annapolis on August 14, 1776. The DECISIVE BLOW, supra note 40 (August 14, 1776). On Saturday, August 17, 1776, the convention elected a drafting committee to prepare "a declaration and charter of rights, and a form of government for this state." Id. (August 17, 1776). By August 27, 1776, an initial draft of the Declaration of Rights was circulated to the convention body. Id. (August 27, 1776). A second draft of the Declaration of Rights was produced on September 17, 1776. Id. (September 17, 1776). The convention body adopted the Declaration of Rights in final form along with the new constitution on November 11, 1776. Id. (November 11, 1776).

98 In Delaware, immediately after Independence, Assembly Speaker Caesar Rodney called a special session of the Assembly beginning on July 22, 1776. GEORGE HUBERT RYDEN, LETTERS TO AND FROM CAESAR RODNEY, 1756-1784 94-95 (Univ. of Penn., 1933); H. Clay Reed, The Delaware Constitution of 1776, DELAWARE NOTES 15 (Sixth Series, 1930). The Assembly approved a call for a convention "to ordain and declare the future Form of Government of this State." RICHARD LYNCH MUMFORD, CONSTITUTIONAL DEVELOPMENT IN THE STATE OF DELAWARE, 1776-1897 51 (unpublished Ph.D. dissertation, Univ. of Delaware, 1968). The Convention assembled in New Castle on August 27, 1776. The Convention approved the proposed Declaration of Rights on September 11, 1776.

99 Thus, a careful review of the proceedings of the respective conventions 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 substantially similar to the version ultimately adopted, it is clear that Maryland’s version preceded the Delaware version. H. Clay Reed, The Delaware Constitution of 1776, DELAWARE NOTES 15 (Sixth Series, 1930); Richard Lynch Mumford, Constitutional Development in the State of Delaware, 1776-1897 51 (unpublished Ph.D. dissertation, Univ. of Delaware, 1968); see also Letter from George Read to Caesar Rodney (September 17, 1776) reprinted in GEORGE HUBERT RYDEN, LETTERS TO AND FROM CAESAR RODNEY, 1756-1784 123 (Univ. of Penn., 1933).

100 New Hampshire’s original constitution was adopted January 5, 1776, and contained no rights-type provisions. See N.H. CONST. of 1776, reprinted in Sources and Documents, supra note 20, at 342-43 (1976).

101 South Carolina’s initial constitution, adopted March 26, 1776, contained no declaration or bill of rights. That constitution proved inadequate and was superseded by a new constitution a mere two years later. See S.C. CONST. of 1776, reprinted in 9 id. at 462-67 (1979); id. at 461 ("The South Carolina Constitution of 1776 was a hasty improvisation, and two years later a more systematic scheme of government was substituted.").

102 The Virginia Bill of Rights was adopted June 12, 1776, and its constitution was adopted on June 20, 1776. Va. CONST. of 1776, reprinted in 10 id. at 13-14 (1979). Although the officially adopted version of the Virginia Declaration of Rights is generally accepted that George Mason’s May 27, 1776 draft was more influential nationally and internationally than the official draft. George Mason’s May 27, 1776, draft of the Virginia Declaration of Rights served as a model for the American Declaration of Independence, PAULINE MAIER, AMERICAN
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Linde, of an analogous federal provision.

The first is used primarily when analyzing statutes, but also with regards to the due process and equal protection constitution was the most conservative of the "founding decade").

id.

VA. CONST, OF 10 constitutions including proposed constitutions and drafts), 1776,

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New Jersey's July 2, 1776, Constitution did not contain a separate declaration or bill of rights, but several familiar rights provisions were codified in that document. See ART. XVI (addressing right to counsel and witnesses in criminal trials); ART. XVIII (guaranteeing freedom of religion); ART. XIX (establishing guaranty against the establishment of religion); ART. XXI (stating prohibition against dual office holding); and ART. XXII (providing for retention of English common law). See N.J. CONST. OF 1776, reprinted in 6 SOURCES AND DOCUMENTS, supra note 20, at 449-53 (1976).

The Pennsylvania Convention convened on July 15, 1776, and after a period of public comment, a constitution was adopted September 28, 1776. John N. Schaeffer, Public Consideration of the 1776 Pennsylvania Constitution, 98 PA. MAG. HIST. & BIOG. 415, 417 (1974).

Compare infra chart and accompanying commentary (outlining the legislative history of the various Maryland constitutions including proposed constitutions and drafts), with VA. CONST. OF 1776, reprinted in 10 SOURCES AND DOCUMENTS, supra note 20, at 48-50 (1979) (containing Virginia's Bill of Rights), and PA. CONST. OF 1776, reprinted in 8 id. at 278-79 (1979) (containing Pennsylvania's Declaration of Rights).

See 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, 567 (1989) (stating that Maryland's constitution was the most conservative of the "founding decade").

HOFFMAN, supra note 33, at 269.

Williams, supra note 106, at 547-48, 576-79.


See McNinis, supra note 98, at 368-69.

It is my contention that the Maryland appellate courts use the phrase "in pari materia" in two distinct ways. The first is used primarily when analyzing statutes, but also with regards to the due process and equal protection guarantees implicit within the Declaration of Rights. When speaking of these subjects, the courts give a nuanced meaning to the phrase "in pari materia" meaning that two items arose from the same background and generally have complementary, but not necessarily identical, meanings. See, e.g., Aero Motors, Inc. v. Administrator, Motor Vehicle Adm'n, 337 A.2d 685, 699 (Md. 1975) (holding that although article of Maryland Declaration of Rights concerning due process has "been equated" with D ue Process Clause of Fourteenth Amendment, by judicial construction and application, the two provisions are not synonymous) The second meaning of the phrase "in pari materia" is used when the subject is any other provision of the Declaration of Rights, and particularly those protecting the rights of criminal defendants. In those circumstances the phrase "in pari materia" means that the right protected by the state constitution is identical to the analogous federal provision, and that the Maryland court will defer completely to the United States Supreme Court's interpretation of the provision. See, e.g., State v. Bell, 638 A.2d 107, 109 n.2 (Md. 1994) (interpreting Article 26 of Maryland Declaration of Rights as being identical to Fourth Amendment).

The academic literature of state constitutional law is highly critical of the "lock-step" method of constitutional interpretation, wherein the content of a state provision is shackled to the United States Supreme Court's interpretation of an analogous federal provision. See, e.g., Linde, supra note 1, at 382-83 (arguing that most state courts rely on interpretations of Federal Bill of Rights to determine meaning of state constitutional guarantees); Robert F. Utter, Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases of Civil Rights, 63 TEX. L. REV. 1025, 1047 (1985) (asserting that if states considered constitutional provisions from their own perspective then the federal bench would be deprived of rich and diverse research); Williams, supra note 6, at 397 (stating that state court judicial review of state statutes or executive actions qualitatively different from Supreme Court's judicial review of same action).

I use the word "analogous" intentionally, but somewhat tentatively. I do not want to suggest in any way that the the Federal Fourth Amendment right against unreasonable searches and seizures is identical to the warrant requirement of Article 26 of the Maryland Declaration of Rights. I mean to say only that they are analogous, "similar or comparable in certain respects." WEBSTER'S NEW WORLD DICTIONARY (3d college ed. 1997).

Failure to preserve a state constitutional argument at trial likely will be interpreted as a waiver of that issue in any subsequent appellate proceeding. Mo. R. 9-131.

1450 A.2d 952, 965-69 (N.J. 1982) (Handler, J., concurring). I hasten to note that I do not subscribe to Justice Handler's factor approach, but that I subscribe to the criticism of that approach given in Justice Pashman's concurring opinion in How: "At bottom, Justice Handler's approach effectively entails a presumption against divergent interpretations of the [state] constitution unless special reasons are shown for [a state] to take a path different from that chosen at the federal level." Id. at 960 (Pashman, J., concurring). Nonetheless, Justice Handler's factors provide an excellent starting point for this discussion.

As must be obvious, different judges and different courts each will have different conceptions about what constitutes a significant textual difference. I include within this category decisions of the Supreme Court based on federalism concerns, which obviously are not structurally relevant to the Court of Appeals of Maryland. A clear example of this is San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 58 (1973) (holding education policy to be uniquely state concern); see also Sager, supra note 22, at 975-76 (discussing role of federalism).

For a discussion of how federal state constitutional analysis, see generally Williams, supra note 6 (comparing federal and state judicial review and evaluating states' rejection of Supreme Court reasoning).

This column contains the Declaration of Rights currently in force in Maryland. Md. CONST. decl. of rights. It is the version adopted in 1867 with amendments to date. An overall rewrite of the Declaration of Rights and the Mary-

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land Constitution was undertaken in 1967-68, but failed to be ratified by voters. **Constitutional Revision Study Documents**, supra note 43, at ix. The proposed changes in the Declaration of Rights suggested by the Constitutional Convention of 1967-68 are provided in the notes discussing each provision.

120 The Constitutional Convention of 1867, convened May 8, 1867, and adjourned August 17, 1867. **Constitutional Revision Study Documents**, supra note 43, at 511. The Constitution produced was ratified by the voters on September 18, 1867, and became effective October 5, 1867. Id. The 1867 version has been amended repeatedly. Id. at 883-895.

121 The Constitutional Convention of 1864 commenced April 27, 1864, and adjourned September 6, 1864. Id. at 445. The Constitution became effective November 1, 1864. 3 **Debates of the Constitutional Convention of the State of Maryland 1864** (Richard P. Bayly, 1864). The 1864 Constitution barely was approved and would have been defeated but had votes of Maryland's Union troops in the field not been counted, a novel and perhaps unconstitutional procedure in the days before systematic absentee balloting. **Report of the Constitutional Convention Commission 54-55** (State of Md. 1967). The 1864 Declaration of Rights was not amended before it was superseded by the 1867 version.

122 The Constitutional Convention that produced the 1851 Constitution initially convened on November 4, 1850. **Constitutional Revision Study Documents**, supra note 43, at 413. Thus, some sources refer to the Convention as that of 1850 or 1850-51. The Convention adjourned at one o'clock in the morning of May 14, 1851. 2 **Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution**, supra note 32, at 890. The effective date of this Constitution was July 4, 1851. The Declaration of Rights of 1851 was never amended before it was superseded by the 1864 version.

123 **Constitutional Revision Study Documents**, supra note 43, at 369. The Maryland Constitutional Convention adopted this version on November 4, 1776, and it became effective without popular approval on November 11, 1776. Rainbolt, supra note 39, at 426. The 1776 Declaration of Rights was amended nine times before it was superseded: Acts of 1794, ch. 49 (stating persons being members of religious sects or societies who shall be conscientiously scrupulous of taking an oath and are otherwise qualified and duly appointed or elected may hold any office of Profit or trust to which he may be appointed); Acts of 1797, ch. 118 (allowing members of certain religions, which forbid taking oaths, to make affirmation in the manner that Quakers have been allowed to affirm and shall be admitted as a witness in any Court of Justice); Acts of 1801, ch. 90 (deleting ownership of property as a requirement for right of suffrage); Acts of 1809, ch. 167 (stating it shall not be lawful for the State to tax the people for the support of any religion); Acts of 1817, ch. 61 (allowing persons professing to be of the Christian religion, which forbid taking oaths, to make solemn affirmation in the same manner as Quakers); Acts of 1824, ch. 205 (requiring persons professing to be of the Jewish religion, and appointed to any office, in addition to taking an oath, to make and subscribe a declaration of his belief in a future state of Rewards and Punishments); Acts of 1836, ch. 148 (authorizing creation of additional election district of Washington County, to be composed of parts of third and seventh election districts); and Acts of 1836, ch. 197 (describing general election practices of the General Assembly). **Constitutional Revision Study Documents**, supra note 43, at 390-8.

124 Printed and circulated at the Maryland Constitutional Convention on September 17, 1776. Rainbolt, supra note 39, at 426. The only reference to this draft is a resolution passed by the Convention on September 17, 1776, calling for the printing and distribution of the declaration of rights and form of government. **Proceedings**, supra note 29, at 258. The copy used is from the Historical Society of Pennsylvania. The Court of Appeals of Maryland rarely has consulted these drafts for guidance. But see Rice v. State, 532 A.2d 1357, 1362-63 n.8 (Md. 1987) (discussing drafting of Declaration of Rights to Maryland Constitution in 1776). There was a third draft of the Declaration of Rights, dated October 31, 1776. That draft is reproduced in **The Decisive Blow**, supra note 40 (October 31, 1776). It is not reproduced here, as it is largely identical to the version adopted on November 4, 1776. All differences between the October 31, 1776, and November 4, 1776, documents are noted within the relevant footnotes.

125 A drafting "committee to prepare a declaration and charter of rights, and a form of government, for this state," was elected on August 17, 1776. **The Decisive Blow**, supra note 40 (August 17, 1776). The drafting committee submitted a first draft on August 27, 1776. Id.; Rainbolt, supra note 39, at 426. The only mention is the following sentence from the journal of the convention: "Mr. [George] Plater [of St. Mary's County] brings in and delivers to Mr. President [Delegate Matthew Tilghman of Talbot County] a declaration and charter of rights, which was read, and ordered to be printed for the consideration of the members." **Proceedings**, supra note 29, at 228. The copy used here was obtained from the Historical Society of Pennsylvania.

126 The 1967-68 Constitutional Convention proposed replacing the preamble and the first four Articles with a new preamble:

We the people of the State of Maryland, grateful to Almighty God for our civil and religious freedom, recognizing that all political power originates in the people and that all government is instituted to secure their right to life, liberty, and the pursuit of happiness, and acknowledging our duty and responsibility to posterity, do establish and ordain this Constitution.

**Constitutional Convention Commission, Constitutional Convention of Maryland 1967-1968: Comparison of Present Constitution and Constitution Proposed by Convention**, supra note 111 (1967). Every state constitution currently in force, except those of Vermont and West Virginia, begins with a preamble. All of these precedents, with the exceptions of New Hampshire, Oregon and Tennessee, begin with a religious invocation similar to "grateful to Almighty God" in the Maryland preamble.

129 The change from "Delegates" in 1776 to "People" in the 1851 version came as a result of an amendment offered by Delegate Alexander Randall of Anne Arundel County. Harry, supra note 44, at 53. This followed a long debate over the relationship between the counties and the state. Id. The debates of the 1851 Constitutional Convention reveal a debate about who were the parties in the compact of government. Id. at 51. The Convention clearly deter-
mined that it was the people and not the counties who created the state government. \textit{Id.} at 53; see also 1 \textsc{Debates of the Constitutional Convention of the State of Maryland, supra} note 52, at 235-39, 437-41. The phrase "we, the people" also clearly invokes the preamble to the United States Constitution.

U.S. \textsc{Const. preamble}.

Judge William Carr has noted that the preamble to the Maryland Declaration of Rights places the blame for the American Revolution on the English Parliament, in contrast to the United States Declaration of Independence, which places the onus squarely on King George III. The Honorable William O. Carr, Circuit Court for Hartford County, Maryland, Address to the Judicial Institute of Maryland (April 18, 1996). Judge Carr did not draw a conclusion based on this distinction. It is tempting to attribute this difference to Maryland's conservatism during this period and unwillingness to break from the monarchy. Contrary evidence, however, suggests that the difference was not particularly meaningful. On July 6, 1776, unaware that the Continental Congress had passed a Declaration of Independence two days previously, the Maryland Convention issued its own Declaration of Independence. \textsc{Proceedings, supra note} 29, at 201. That document claimed that "the king of Great Britain has violated his compact with this people, and that they owe no allegiance to him . . .." \textit{Id.} at 202. It is unclear, therefore, how much weight should be ascribed to the decision made by the drafters of this preamble to blame the English Parliament as opposed to the king. An interesting analysis of the issue of upon whom the revolutionary generation placed the blame for the Revolution—King or Parliament—is contained in \textsc{Garry Wills, Inventing America: Jefferson’s Declaration of Independe

The deletion of this provision apparently was accomplished by the Committee on the Declaration of Rights. \textsc{Perlm. supra note} 91, at 61. When that Committee made its initial report, the Article was not among them. \textit{Id.} at 76-84.

This Article was not included in the report of the Committee on the Declaration of Rights but offered from the floor and adopted without debate. 2 \textsc{Debates of the Constitutional Convention of the State of Maryland, supra note} 121, at 749. J. Thomas Scharf refers to this Article as an "acknowledgment from the Declaration of Independence with an attempted improvement." 3 \textsc{Scharf, supra note} 25, at 582. Myers calls it "merely a broad statement of the principle involved in the article abolishing slavery." \textsc{Myers, supra note} 55, at 62. The fact that it was added as a new Article 1, after debate on all other Articles, makes the numbering used by the delegates in their debate of all other provisions off by one.

The 1967-68 Constitutional Convention proposed replacing the preamble and the first four Articles with a new preamble. See \textsc{supra note} 126 for the exact wording of the proposed preamble. The proposed constitution was rejected by the voters.

Although the Court of Appeals of Maryland rarely has referenced this provision in its decisions, the West Virginia Supreme Court has been active in its interpretation of a similar provision in the West Virginia Constitution. See \textsc{United Mine Workers of America v. Parsons, 305 S.E.2d 343, 350 (W. Va. 1983) (recognizing Article III as alternative source of equal protection)}; \textsc{Pushinsky v. West Virginia Bd. Of Law Examiners, 266 S.E.2d 444, 449 (W. Va. 1980) (finding freedom of political speech and association protected under Article III of West Virginia Constitution)}; \textsc{Cowman v. County Comm’n of Logan County, 240 S.E.2d 675, 681 n.6 (W. Va. 1977) (supporting inherent political rights of the people articulated in Article III of West Virginia Constitution)}; \textsc{Mapel v. John, 42 W. Va. 30, 36-37 (1896) (justifying state’s use of police power through Article III of West Virginia Constitution)}; \textsc{Phillip B. Scott, The "Right of Revolution: The Development of the People’s Right to Reform Government, 90 W. Va. L. Rev. 283, 293 (1987) (discussing and evaluating courts’ application of Article III of West Virginia Constitution in light of historical meaning of article). The West Virginia provision provides: Government is instituted for the common benefit, protection and security of the people, nation or community. Of all its various forms that is the best, which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of maladministration; and when any government shall be found inadequate or contrary to these purposes, a majority of the community has an indubitable, inalienable, and indefeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal. \textsc{W. Va. Const. art. III, § 3.}"

The Convention of 1867 considered amending this provision with the following: All just powers of government are derived from the people, and all persons invested with the executive or legislative powers of government are trustees of the public, and as such are accountable for their conduct; wherefore, whenever the ends of government are perverted and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to, reform the old or establish a new government; that the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind. \textsc{Perlm., supra note} 91, at 96. The amendment eventually was rejected. \textit{Id.}

Professor Alfred Niles in 1915 wrote the pre-eminent text on the Maryland Constitution. \textsc{Alfred S. Niles, Maryland Constitutional Law (1915).} Professor Niles divided the provisions of the Maryland Declaration of Rights into four categories: Class A ("declarations of abstract principles whose sole practical effect is to declare from what standpoint the law shall be considered and in what spirit interpreted"); Class B ("exact duplications of provisions found in the Federal Constitution"); Class C ("limitations on the power of the State similar to those limitations prescribed in the United States Constitution for the Federal Government"); and Class D ("concrete rules peculiar to Maryland, which have substantially equal force and equal practical value with any other part of the Maryland Constitution"). \textit{Id.} at 12-14. Although I disagree with the underlying premises, and the categories that result, this chart would be incomplete without Professor Niles’s classifications. He placed Article 1 in Class A (abstract principles). \textit{Id.} at 15.

A proposal was made to delete this Article and replace it with the text discussed \textsc{supra note} 134. \textsc{Perlm. supra note} 91, at 96-97. It also was proposed to limit the right of altering, reforming or abolishing the government to legal, rather than revolutionary means. \textit{Id.} at 98-99. This too was defeated. \textit{Id.}

The 1864 Convention deleted the "mode prescribed" language as the constitutional convention had not been called in accordance with the rules contained in the prior constitution. \textsc{Myers, supra note} 55, at 62-63.

The \textsc{Committee proposed the deletion of the phrase "according to the mode prescribed in this Constitution." \textsc{Debates of the Constitutional Convention of the State of Maryland, supra note} 121, at 133. A footnote
amendment sought to re-introduce the phrase, but was rejected after much debate about the inherent rights of the people to organize their government. *Id.* at 134-46, 149-60.

139 Article 59 of the 1776 Constitution required stringent preconditions to constitutional amendment. *Id.* at 55, note 65. These preconditions were not met in the call for the 1851 Constitutional Convention. *Id.* This clause was added to "indicate the revolutionary character of the convention." Harry, *supra* note 44, at 55.

140 The debate surrounding the adoption of this provision was among the most sophisticated debates of this convention. The draft proposed by the Bill of Rights Committee proposed to replicate the 1776 provision. *1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION,* supra note 52, at 140. Delegate Benjamin C. Prestman of Baltimore City offered the following language as an amendment: "And they have at all times the inalienable right to alter, reform or abolish their form of government in such manner as they may think expedient." *Id.* at 143. Some feared that this statement of general principle would be interpreted to permit majorities to replace the constitution at will to the detriment of minorities. *Id.* at 143-86. Delegates from the counties particularly feared that Baltimore City would soon constitute a majority of the state's residents and, depending on the outcome of debate regarding the elective franchise, Baltimore City might contain a majority of the state's voters. *Id.* at 143-86. To allay these fears about Baltimore City's potential despotism, Delegate (and Circuit Court Judge) Ezekiel F. Chambers of Kent County proposed the additional requirement that constitutional change was to be accomplished by the "mode prescribed." *Id.* at 157. The entire provision was adopted as amended. *Id.* at 186.

141 This expression of the compact theory of government is more explicit than the equivalent language contained in the Virginia Bill of Rights of 1776. See *PA. CONST.* of 1776, decl. of rights, art. I (declaring "[t]hat all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety"); *VA. CONST.* of 1776, bill of rights, § 1 (stating that all men are equal, free, and independent by nature, "and have certain inherent rights, of which, when they enter into a state of society, which, cannot, by any contract, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety"). Delaware, writing immediately after Maryland, copied Maryland's Article I word for word. *DEL. CONST.* of 1776, § 1. See *supra* note 99.

142 The 1967-68 Constitutional Convention proposed replacing the Preamble and the first four Articles with a new preamble. *See supra* note 126 for the exact wording of the proposed preamble. The proposed constitution was rejected by the voters.

143 Many state constitutions provide a similar recognition of the supremacy of the United States Constitution. Maryland's is most similar to those of Georgia and West Virginia. *GA. CONST.* art. XII, § 1, 1; *W. VA. CONST.* art. I, § 1. Other state constitutions merely provide that the United States Constitution is the "supreme law of the land." *ARIZ. CONST.* art. II, § 3; *CAL. CONST.* art. I, § 3; *IDAHO CONST.* art. I, § 3; *N.M. CONST.* art. II, § 1; *N.D. CONST.* art. I, § 3; *S.D. CONST.* art. VI, § 26; *UTAH CONST.* art. I, § 3; *WASH. CONST.* art. I, § 2; *W. VA. CONST.* art. I, § 1.

144 This Article was derived from Article 5 in the 1864 Constitution. The language requiring "paramount allegiance" to the federal government was removed.

145 Professor Niles placed this Article in Class B (exact duplications). *NILES,* supra note 135, at 16. See *supra* note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

146 There was floor opposition to the adoption of this Article, based on its declaration of national supremacy, origins in the 1864 Constitution, and its inappropriateness in a declaration of rights. Alternatives were proposed, but this proposal was adopted. *PERLMAN,* supra note 91, at 99-101, 104-07, 381-82 (1923).

147 The 1967-68 Constitutional Convention proposed replacing the Preamble and the first four Articles with a new preamble. *See supra* note 126 for the exact wording of the proposed preamble. The proposed constitution was rejected by the voters.

148 This provision is a verbatim copy of the Tenth Amendment to the United States Constitution, except the word "thereof" is twice added.

149 Professor Niles placed this Article in Class B (exact duplications). *NILES,* supra note 135, at 16. See *supra* note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

150 An amendment adding a reservation to the state of all rights not granted to the federal government was defeated. *PERLMAN,* supra note 91, at 107-98.

151 The 1967-68 Constitutional Convention proposed replacing the Preamble and the first four Articles with a new preamble. *See supra* note 126 for the exact wording of the proposed preamble. The proposed constitution was rejected by the voters.

152 Similar reservations of the right to self-governance are found in several other state constitutions. *GA. CONST.* art. I, § II, 1; *MO. CONST.* art. II, § 3; *N.C. CONST.* art. I, § 3; *VT. CONST.* ch. I, art. 5; *W. VA. CONST.* art. I, § 2; *see also MAss. CONST.* pt. I, art. 4; *N.H. CONST.* pt. I, art. 7; *N.M. CONST.* art. II, § 3.

153 Professor Niles placed this Article in Class A (abstract principles). *NILES,* supra note 135, at 16.

154 The 1867 Convention adopted two floor amendments to this Article. The first amendment deleted the words "ought to." The second amendment added the phrase, "as a free, sovereign and independent State." That language was taken directly from the Massachusetts Constitution. *PERLMAN,* supra note 91, at 119-20. The Massachusetts provision states that [t]he people of this commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction and right, which is not, or may not hereafter be, by them [expressly] delegated to the United States of America in Congress assembled.

155 Mass. Const. pt. I, art. IV.

156 A proposal was made to amend this Article by adding a new clause: "[p]rovided, however, that in times of civil war the internal government and police of this State shall be exclusively regulated by military commanders and Provost Marshals appointed by the President of the United States, and such as a state of society the United States may deem right and proper." *1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND,* supra note 121, at 165. The amendment was rejected unanimously; even its author, Delegate George Peter of Montgomery County, voted against it. *Id.*
The committee draft proposed the capitalization of the word "State." 165 Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution, supra note 52, at 141. This provision was re-adopted without debate on the convention floor. Id. at 186.

This provision had been Article 2 in the August 27, 1776 draft. 166 Compare this provision with Pennsylvania Declaration of Rights (1776), Article III: "[t]hat the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same." Pa. Const. of 1776, decl. of rights, art. III, reprinted in 8 Sources and Documents, supra note 20, at 278 (1979).

The delegates to the 1776 Maryland Constitutional Convention were particularly adamant about state prerogatives, only allowing Maryland's delegates to the Continental Congress to vote for independence, "[p]rovided the sole and exclusive right of regulating the internal government and police of this colony be reserved to the people thereof." 167 The right of the State Convention, as opposed to the Continental Congress, to govern Maryland, also came to the forefront when the Congress requested that the colonies establish a "fully effective government." Id. The Convention responded, "the sole and exclusive right of regulating the internal government and police of this colony be preserved to the people thereof." 168 Id. at 62.

A similar provision was included in the Articles of Confederation of 1777: "Each State retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." Articles of Confederation, art. II.

The right to a jury trial may be waived in accordance with Md. Const. art. IV, pt. I, § 8(a).

See also Md. Const. art. 23 (stating right to trial by jury exists for all cases in which amount in controversy exceeds $500). Both of these provisions guarantee the right to trial by jury.

Article 5 of the Maryland Declaration of Rights and the Seventh Amendment to the United States Constitution both represent attempts to constitutionalize the rights to jury trials that existed at the respective dates of drafting, without being forced to enumerate specifically those situations to which the right attaches. See Charles W. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 639 (1973) (finding that due to simplistic nature of Seventh Amendment, it has been difficult to discern true intent of the framers). Article 5, by its text, freezes the jury trial right as it existed in English law on July 4, 1776. See Md. Const. art. 5 (declaring that "the inhabitants of Maryland are entitled to the Common law of England, and the trial by jury"). The United States Supreme Court's interpretation of the Seventh Amendment consistently has been that the decision on whether the jury right attaches is governed by English courts in 1791, the date of the amendment's adoption. See Wolfram, supra, at 640 (stating that "if a jury would have been impaneled in this kind of case in 1791 English practice, then generally a jury required by the seventh amendment"). It appears that in both the federal and Maryland constitutions, the respective drafters' decision to tie the interpretation to a date, rather than to specify those situations in which the jury right attaches, is a matter of convenience because then, as now, it is difficult to distinguish those cases in which a jury trial is necessary from those in which a jury is unnecessary. For a critique of the United States Supreme Court's jurisprudence in this regard, see Martin H. Redish & Daniel J. LaFave, Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory, 4 Wm. & Mary Bill Rts. J. 407 (1995). The framers of the United States Constitution, working four years prior to the drafting of the Bill of Rights, also struggled with the difficulty of distinguishing equity and other non-jury cases from cases requiring a jury. See James Madison, Debates in the Federal Convention, in 2 Debates of the Federal Convention of 1787, at 585, 587-88 (M. Farrand ed., 1911) (noting that "[i]t is not possible to discriminate equity cases from those in which juries are proper"). The difficulty in finding an appropriate distinction was one of the reasons a jury trial right eventually was omitted from the Federal Constitution. See id.


The scope of that property granted by the royal charter is defined in sections III and IV of the Charter. See Charter of Maryland granted by King Charles I to Caecilius Calvert, Baron of Baltimore (June 20, 1632) (giving Maryland to Baron of Baltimore); see also Kerelman v. Board of Pub. Works of Md., 276 A.2d 56, 61 (Md. 1971) (stating that "the inhabitants of Maryland became entitled to all property derived from and under the Charter"); Board of Pub. Works of Md. v. Larmar Corp., 277 A.2d 427, 432 (Md. 1971) (quoting Kerelman). The original charter was written in Latin, but English translations are reprinted in Maryland Manual 1979-1980, at 785-86 (Edward C. Papenfuse et al. eds., 1979) and 4 Sources and Documents, supra note 20, at 358 (1975).

See 1992 Md. Laws 203, 204 (permitting six member juries in civil matters).

The 1967-68 Constitutional Convention proposed replacing Article 5 with two new sections, Section 1.03 and Section 1.02. See Comparison of Full Draft and Constitution Proposed by Convention, supra note 52, at 123 (stating text of articles). Section 1.13 would have provided that: [e]very person shall have the right of trial by jury of all issues of fact in civil proceedings at law in the courts of this State where the amount or value in controversy exceeds the minimum that the General Assembly may prescribe by law. The jury shall consist of twelve, except that the General Assembly may provide by law for a jury of not less than six nor more than twelve in the District Court. A unanimous decision of the jury shall be required to constitute its verdict.

Id. at 222. Section 10.02 would have provided that: [a]ll legislation, including local legislation, and all other law, including common law, in force on June 30, 1968, in force on the date the Constitution comes into effect and shall continue in force until it expires by its own terms or is lawfully changed. A law in effect on June 30, 1968, shall not be deemed in conflict with this Constitution solely because it was enacted pursuant to authority granted by a provision of the Constitution of 1867 as amended. All existing wills, actions, suits, proceedings, civil or criminal liabilities, prosecutions, judgments,
sentences, orders, decrees, appeals, causes of action, contracts, claims, demands, property titles, and rights shall continue unaffected except as modified by law or in accordance with the provisions of this Constitution.

_168_ Professor Niles placed this Article in Class D (concrete, peculiar rules). See _NILES_, _supra_ note 135, at 16-18 (finding that Article 5 belongs to class of concrete rules peculiar to Maryland). See _supra_ note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

_169_ There was no recorded debate prior to re-adoption of this Article. See _PERLMAN_, _supra_ note 91, at 120.

_170_ Floor amendments seeking to protect slave owners' property rights in their slaves were rejected on the floor of the convention. See _1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra_ note 121, at 168.

_171_ This provision was adopted without floor debate upon the recommendation of the Bill of Rights Committee. See _1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra_ note 52, at 186.

_172_ This provision is a slight update from Article 16 in the August 27, 1776, draft.

_173_ J. Thomas Scharf states, "[w]hat idea it was intended to convey by the prepositional phrase 'paramount allegiance,' it were as idle now, as it would have been dangerous then, to inquire." _SCHARF_, _supra_ note 23, at 582. Myers concludes that this provision:

contained . . . the dangerous principle of absolutely denying any original or inherent rights on the part of the State of Maryland, which would enable it to make the least opposition to any acts the National Government might see fit to commit. While the tendency of the present day is to cede more and more authority to the National Administration [a tendency that has not alleviated since Mr. Myers wrote in 1901], yet there is certainly no disposition to take away all inherent power from the states as such, or vest in the Federal Government all authority not absolutely guaranteed to the state by the United States Constitution. This last is clearly the result to which the article tended.

Myers, _supra_ note 55, at 59-60. The Constitution of North Carolina retains a statement that citizens "paramount allegiance" is to the United States Constitution. _N.C. CONST_, _art. 1_, § 5. This provision was moved with amendments to Article 2 in the 1867 Constitution. See _MD. CONST_, _art. 2_.

_174_ This Article was the subject of more debate than any other single topic at the Convention of 1864. It was proposed initially by the Committee on the Declaration of Rights. See _1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra_ note 121, at 79 (quoting text of Article 4). A minority of the Committee opposed its adoption and filed a minority report. See _id_. at 81-82 (stating minority position). The debate consisted of long speeches including citation to the great common law lawyers of England, original American Federalist sources, and the constitutions of other states. _Id_. at 272-92, 303-21, 325-56, 400-36, 441-68, 469-71, 477-503, 504-35 (discussing debate on Article 4). The reference to Article 4 rather than 5 is caused by the addition of the new Article 1. See _supra_ note 131 for a discussion of the new Article 1.

_175_ This provision would not have been continued had the 1967-68 Constitution been adopted. See _COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra_ note 126, at 2 (showing no provision equivalent to Article 6 in constitution proposed in 1967-68). The proposed constitution was rejected by voters. See _id_. at xi.

_176_ Professor Niles placed this Article in Class A. See _NILES_, _supra_ note 135, at 18 (finding that Article 6 belongs to a class of abstract principles). See _supra_ note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

_177_ There was no recorded debate prior to re-adoption of this Article. See _PERLMAN_, _supra_ note 91, at 120. The changes in punctuation were the work of the Committee. See _id_. at 77.

_178_ A floor amendment to delete the final sentence, so important in 1776, see _infra_ note 181, thought to be a non sequitur in 1864, was defeated nonetheless. See _1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra_ note 121, at 167 (showing that amendment deleting final sentence was defeated).

_179_ This provision was re-adopted without recorded debate. See _1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra_ note 52, at 186.

_180_ Judge William Carr has pointed out that the drafters of this article were sophisticated lawyers and, hence, we may assume that the use of the word "trustee" was made deliberately. The preference of the trustee relationship over other legal relationships (i.e. master/servant or principal/agent) indicates certain notions about that relationship. Deletion in this second draft of the description of the relationship as a master/servant relationship is further evidence of the intentionality involved in the analogy to the trust relationship. While a trustee is accountable to the trust, it is clear that a trustee also has a broad range of authority over action in pursuit of the trust's goals. This analogy provides us with a glimpse of the framers' vision of representative democracy. The Honorable William O. Carr, Circuit Court for Hartford County, Maryland, Address to the Judicial Institute of Maryland (April 18, 1996). See _generally_ Peter Charles Hoffer, _Their Trustees and Servants_: Eighteenth-Century Maryland Lawyers and the Constitutional Implications of Equity Precepts, 82 MD. HIST. MAG. 142, 142-53 (1987) (proposing strict accountability of trust relationship as basic feature of republicanism).

_181_ This phrase rejected the Tory doctrine of non-resistance. See _HAUER_, _supra_ note 3, at 114. The Tories, English loyalists, argued that legitimate governments "receive their power from God, and to oppose the government was a form of sacrilege." _Id_. at 21-22. Moreover, many [Tories] admitted that [the English] Parliament was performing an illegal act in its attempt to tax the colonists without their consent, yet 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. _Id_. at 21-22. The state constitutions of both Tennessee and New Hampshire contain similar repudiations of this Tory philosophy. _N.H. CONST_, pt. I, art. 10 (repudiating non-resistance); _TENN. CONST_. art. I, § 2 (same).

_182_ Compare this provision with _PA. CONST_. of 1776, decl. of rights, art. IV, reprinted in _8 SOURCES AND DOCUMENTS, supra_ note 20, at 278 (1979) ("That all power being originally inherent in, and consequently derived from, the people, the power of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them."). And _VA. CONST_. of 1776, bill of rights, § 2, reprinted in _10 id_., at 49 (1979) ("That all
power is vested in, and consequentially derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.

For historical antecedents of the concept that sovereignty resides in the people, see I Howard, supra note 3, at 69-71.

1971 Md. Laws 357 (deleting "white male" from Article 7 of Maryland Declaration of Rights of Maryland Constitution). This amendment was ratified November 7, 1972.

The 1967-68 proposal would have replaced this Article with Section 2.01: Every citizen of the United States who has attained the age of nineteen years, and who has been a resident of this State for six months and of the county in which he offers to vote for three months next preceding an election, shall be eligible to vote, and if registered shall be qualified to vote in that county in national, state, and county elections. If any county is divided into different electoral districts or into portions of different electoral districts for the election of any national, state, or county officer, then, to vote for such an officer, a person shall have been a resident of the electoral district for three months next preceding the election. Removal from one electoral district to another electoral district in this State shall not deprive a person of his qualification to vote in the electoral district from which he has removed until three months after his removal.

Comparison of Present Constitution and Constitution Proposed by Convention, supra note 126, at 2. The proposed constitution was rejected by voters. Wheeler & Kinsey, supra note 92.

See Michael Carlton Tolley, State Constitutionalism in Maryland 38-45 (1992) (discussing provisions and voting rights). Tolley discusses this provision's relation to several substantive articles of the Maryland Constitution, as well as the effect the judiciary has had upon the principles of elective franchise. Id.

The Maryland Reform Convention Committee recommended the two major revisions in this Article from the 1776 version: "free white male citizen" in place of "man" and the removal of the property requirement. 1 Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution, supra note 52, at 141. The deletion of the property requirement was a "housekeeping" amendment as the property requirement for suffrage has been removed in 1802. Acts of 1801, ch. 90, ratified 1802. An amendment on the floor sought to reinstate the "common interest" requirement, but that was defeated. 1 Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution, supra note 52, at 186-87.

In 1846, Maryland voters had approved a change from annual to biennial legislative sessions. Hart, supra note 44, at 29. One commentator has argued that the change was anti-reform in that aside from reducing the cost of government, it "removed the agitation for a constitutional convention." Id. When, at the 1851 Constitutional Convention, the reform delegates suggested a return to annual sessions, they buttressed their arguments by reference to this provision. See, e.g., 1 Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution, supra note 52, at 252, 261. The anti-reform delegates objected to the return to annual sessions and ridiculed the reform delegates for ignoring the voice of the people as expressed in the 1846 amendment creating biennial sessions. Id. at 253-59, 262-66.

Compare this provision with Va. Const. bill of rights, § 6 (1776), which provides:

"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 common permanent interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assembled, for the public good.

Id. Also compare with Pennsylvania's Declaration of Rights (1776): "[t]hat all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or be elected into office." Pa. Const. of 1776, decl. of rights, art. VII.

The proposed 1967-68 Constitution did not contain an explicit separation of powers provision relying, as does the United States Constitution, on the structure of the government to create the inference of separation. See Comparison of Present Constitution and Constitution Proposed by Convention, supra note 126, at 2-3. The proposed constitution was rejected by voters.

See Tolley, supra note 186, at 131-49 (discussing separation of powers doctrine under Maryland Constitution).

The Constitution of Maryland is structured in accord with the principle of a separation of powers: Article II governs the executive branch. Article III, the legislature, and Article IV controls the judiciary. The requirement for the presentation of legislation to the governor for approval is justified by a separation of powers theory: "To guard against hasty or partial legislation and encroachments of the legislative department upon the co-ordinate executive and judicial departments, every bill which shall have passed the house of delegates and the senate shall, before it becomes a law, be presented to the governor of the state..." Mo. Const. art. II, § 177.

It is more common for state constitutions specifically to require a separation of powers than to follow the model of the United States Government and create the separation by necessary implication of the structure. Specific state articulations of the separation of powers can be found in more than half of the states' constitutions. See Ala. Const. art. III, §§ 1-2; Ariz. Const. art. III; Ark. Const. art. IV, §§ 1-2; Cal. Const. art. III; Colo. Const. art. III; Conn. Const. art. II; Fla. Const. art. II; Ga. Const. art. I, § 1, para. 23; Idaho Const. art. II, § 1; Ill. Const. art. III; Ind. Const. art. III, § 1; Iowa Const. art. III; Ky. Const. §§ 27, 28; La. Const. art. II, §§ 1, 2; Me. Const. art. III, §§ 1-2; Mass. Const. decl. of rights, § 30; Mich. Const. art. IV, §§ 1-2; Minn. Const. art. III, § 1; Miss. Const. art. I, §§ 1-2; Mo. Const. art. III; Mont. Const. art. IV, §§ 1-2; Nev. Const. art. III; N.H. Const. art. I, § 37; N.J. Const. art. III; N.M. Const. art. III, § 1; N.C. Const. art. I, § 8; Okla. Const. art. IV; Or. Const. art. III; R.I. Const. art. III; S.C. Const. art. I, § 14; S.D. Const. art. II; Tenn. Const. art. II, §§ 1-2; Tex. Const. art. II; Utah Const. art. I, § 1; Wash. Const. art. I, § 1; Wyo. Const. art. I.

Professor Niles placed this Article in Class C (analogous limitations). Niles, supra note 135, at 19-22. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

There was no recorded debate prior to the re-adoption of this Article. Perlman, supra note 91, at 120.

This provision was re-adopted without recorded debate. 1 Debates of the Constitutional Convention of the State of Maryland, supra note 121, at 167.

The second clause, "...and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other..." was added by an amendment on the floor of the convention and adopted with only cursory explanation. 1 Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution, supra note 52, at 187.

Governor Thomas Hicks (1858-62), resenting an entreaty by several state senators to call a special session of the general Assembly to contemplate secession, cited this provision as support for his position that the senators had no right to interfere with his executive duty to convene the legislature. George L. Radcliffe, "George Thomas H. Hicks of Maryland and the Civil War" in Johns Hopkins U. Stud., Series XIX, Nos. 11-12, at 533-34 (Nov.-Dec., 1901).

A substitute Article was proposed on the convention floor on October 31, 1776: "That the legislative, executive and judicial powers of government, or any two of them, ought not to be vested in the same man or body of men." This proposal was defeated. Proceedings, supra note 29, at 302; see also Tolley, supra note 40 (October 31, 1776).

This provision was adopted by a simple vote, 30 to 29. See Tolley, supra note 186 at 132.

Compare this provision with Va. Const. bill of rights, § 5 (1776), which provides: 'That the legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections, in which all, or any part of the former members, to be again eligible, or ineligible, as the laws shall direct."

Id. There is no similar provision in the United States Constitution. The framers of the United States Constitution, in fact, realized that the system of "checks and balances" expressly violated the traditional notion of the separation of powers. See also Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 441-43 (1977) (rejecting argument that separate federal branches were to operate absolutely independently in Nixon tapes case).

Historian George L. Radcliffe places the provision in the "committee of the whole" (1776), for the concept of separation of powers based on Montesque's incorrect understanding of the English system. Greiben, supra note 39, at 81.

This provision was proposed to be deleted in the 1967-68 Constitutional revision. Comparison of Present Constitution and Constitution Proposed by Convention, supra note 126, at 3. The proposed constitution was rejected by voters.


Professor Niles placed this Article in Class A (abstract principles). Niles, supra note 135, at 22. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

There was no recorded debate prior to re-adoption of this Article. Perlman, supra note 91, at 120.

This provision was re-adopted without recorded debate. 1 Debates of the Constitutional Convention of the State of Maryland, supra note 121, at 167.

This provision was re-adopted without recorded debate. Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution, supra note 135, at 187.

The English Bill of Rights (1689) offered a similar protection: "[t]hat the pretended power of suspending of laws, or the execution of laws, by legal authority, without consent of parliament is illegal; That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal." English Bill of Rights (1689), reprinted in 1 Sources and Documents, supra note 20, at 133 (1982).

The Virginia Bill of Rights (1776) provided a similar protection: "Sec. 7. That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised." Va. Const. of 1776, art. I, § 7.

The 1967-68 Constitutional Convention proposed combining the concepts of Articles 10, 13, and 40 into two new provisions, sections 1.01 and 3.14. Section 1.01 would have provided that: 'The people shall have the right peaceably to assemble and to petition the government for a redress of grievances. Freedom of the press and freedom of speech shall not be abridged, each person remaining responsible for abuse of those rights.' Section 3.14 would have provided immunity for legislators: "Words used by a member of the General Assembly in any of its proceedings, including the proceedings of any committees and sub-committees, shall be absolutely privileged, and a member shall not be liable therefor in any civil action or criminal prosecution." Comparison of Present Constitution and Constitution Proposed by Convention, supra note 126, at 3. The proposed constitution was rejected by voters.

See also Md. Const. art. III, § 18 (stating that "[n]o Senator or Delegate shall be liable in any civil action or criminal prosecution, whatever, for words spoken in debate").

Although the language employed by this article is unique, most other states also provide a freedom of speech for legislators. There is no Maryland case on point; however, the Maryland provision appears more limited than provisions of other states which declare that, "for any speech or debate in either House, [legislators] shall not be questioned in any other place." Tenn. Const. art. II, § 13 (emphasis added). For similar provisions, see Alaska Const. art. II, Const. art. IV, pt. II, § 7; Ga. Const. art. III, § 8; Md. Const. art. IV, pt. III, § 8; Mass. Const. decl. of rights, § 21; Neb. Const. art. III, § 26; N.H. Const. art. I, § 14; Wash. Const. art. II, § 17; Wis. Const. art. IV, § 16. For examples of the broader protections, see Ala. Const. art. IV, § 56; Ark. Const. art. V, § 15; Colo. Const. art. V, § 16; Conn. Const. art. III, § 13; Del. Const. art. II, § 13;
Legislators: "Words used by a member of the General Assembly in any of its proceedings, including the proceedings of the State of Maryland," supra note 121, at 167.

In 1817, the Constitutional Convention proposed by the Maryland Reform Convention to revise the State Constitution, supra note 52, at 187. The proposed constitution was rejected by voters.

The English Bill of Rights (1689) offered a similar protection: "[t]hat the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament." See English Bill of Rights (1689), reprinted in 1 SOURCES AND DOCUMENTS, supra note 20, at 133 (1982). No other 1776-era constitution provided this protection for legislators.

Had the 1967-68 Constitutional Convention proposals been adopted, this article would have been replaced by Section 3:20: "[t]he capital of the State and the meeting place of the General Assembly shall be at Annapolis." COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 141. The proposed constitution was rejected by voters.

This provision is supported by three provisions in the Constitution. Md. Const. art. II, § 21 (requiring Governor to reside at seat of government); Md. Const. art. III, § 25 (identifying Annapolis as seat of legislature); Md. Const. art. IV, § 14 (requiring Court of Appeals to hold sessions in Annapolis).

Professor Niles placed this Article in Class D (concrete, peculiar rules). NILES, supra note 135, at 23. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.


The proposal did not recommend carrying this provision forward. Section 3:15 of the proposed constitution did provide for annual ninety-day assembly sessions. COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 146. The proposed constitution was rejected by voters.

The proposal was re-adopted without recorded debate. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 167.

The only instance in which the Maryland General Assembly met in a place other than Annapolis was in 1861. Governor Thomas Hicks, fearful that secessionist leanings within the General Assembly would exacerbate the southern sympathizers in and around Annapolis, moved the session to Frederick, a Union stronghold. Radcliffe, supra note 202, at 572-73.

A 1786 proposal to move the capital westward was defeated in the General Assembly. See generally GREEN, supra note 39, at 165 (identifying the failed effort as part of overall attempt at westward shift of power). In 1817, another proposal would have made Baltimore the capital. Fletcher Green identifies these attempts with those in other states to move state capitals westward, part of an overall westward shift of power.

The change from the 1776 version was proposed by the Bill of Rights Committee. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 187. The proposal was accepted without recorded debate by the convention. Id.

The proposal did not recommend carrying this provision forward. Section 3:15 of the proposed constitution did provide for annual ninety-day assembly sessions. COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 146. The proposed constitution was rejected by voters.

The proposal was re-adopted without recorded debate. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 167.

This proposal was re-adopted without recorded debate. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 187.

The English Bill of Rights (1689) offered a similar protection: "that for redress of all grievances, and for the amendment, strengthening and preserving of the laws, parliaments ought to be held frequently." English Bill of Rights (1689), reprinted in 1 SOURCES AND DOCUMENTS, supra note 20, at 133 (1982).

The Maryland Court of Appeals has interpreted this provision merely to permit direct redress to the legislative branch for "wrongs previously committed," but not before a law is passed. Richards Furniture v. Board of County Comm'rs, 196 A.2d 621, 626-27 (Md. 1964).

The 1967-68 Constitutional Convention proposed combining the concepts of Articles 10, 13, and 40, into two new sections. 1:01 and 3:14. Section 1:01 would have provided: "The people shall have the right peaceably to assemble and to petition for a redress of grievances. Freedom of the press and freedom of speech shall not be abridged; each person remaining responsible for abuse of those rights." COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 3. Section 3:14 would have provided for immunity of legislators: "Words used by a member of the General Assembly in any of its proceedings, including the proceedings of
any committees and sub-committees, shall be absolutely privileged, and a member shall not be liable therefor in any civil action or criminal prosecution." Id. at 145-46. The proposed constitution was rejected by voters.

241 Professor Niles placed this Article in Class C (analogous limitations). NILES, supra note 135, at 23. See supra note 135 for a discussion of Professor Niles’ division of the provisions of the Maryland Declaration of Rights into four categories. See infra notes 545 and 553 accompanying Articles 39 and 40 of the 1776 Declaration of Rights (characterizing articles as examples of “whiggish, republican ideology of equality”).

242 There was no recorded debate prior to the re-adoption of this Article. PERLMAN, supra note 91, at 120.

243 This provision was re-adopted without recorded debate. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 167.

244 Pennsylvania’s Declaration of Rights (1776) also provided for a right to redress, but the scope of Pennsylvania’s provision was broader in that it also encompassed a right to assemble: “XVI. That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance.” PA. CONST. decl. of rights, art. XVI (1776).

245 The proposed 1967-68 Constitution replaced this provision with Section 6:01: “Taxes shall be imposed only for public purposes and only by the elected representatives of the people exercising legislative powers.” COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 194. The proposed constitution was rejected by voters.

246 See MD. CONST. art. III, § 51 (granting taxing authority to General Assembly).

247 That several other state constitutions contain similar, though not identical, provisions preventing “taxation without representation,” should be no surprise given that this was a rallying point for the American Revolution. See infra notes 455 and 553 accompanying Articles 39 and 40 of the 1776 Declaration of Rights (characterizing articles as examples of “whiggish, republican ideology of equality”).

248 This provision was re-adopted without recorded debate. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 167.

249 It has been suggested that this Article was a reaction to the Proprietary fee controversy in Maryland rather than a more general colonial complaint against Parliamentary taxation. LEWIS, supra note 39, at 46. For a general discussion of the fee controversy, see HOFFMAN, supra note 33, at 92-125.

250 There was no recorded debate prior to the re-adoption of this Article. PERLMAN, supra note 91, at 120.

251 This provision was re-adopted without recorded debate. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 167.

252 This provision was re-adopted without recorded debate. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 187.

253 It has been suggested that this Article was a reaction to the Proprietary fee controversy in Maryland rather than a more general colonial complaint against Parliamentary taxation. LEWIS, supra note 39, at 46. For a general discussion of the fee controversy, see HOFFMAN, supra note 33, at 92-125.

254 It is suggested that this right has origins in both the Magna Carta and the English Bill of Rights (1689). A. E. Dick Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America (UVA Press 1986). The English Bill of Rights provides “[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.” English Bill of Rights (1689), reprinted in 1 SOURCES AND DOCUMENTS, supra note 20, at 133 (1982). Howard also suggests that this is derived from the Magna Carta, ch. 12, which provides:

No scutage [money payment in lieu of a knight’s services] or aid [a grant by the tenant to the lord in times of distress] shall be imposed in our kingdom except by the common council of our kingdom, except for the ransom of our body, for the making of our oldest son a knight, and for marrying our oldest daughter, and for these purposes it shall be only a reasonable aid; in the same way it shall be done concerning the aids of the city of London.

Magna Carta ch. 12. H. H. Walker Lewis also suggests that the Bill of Rights promulgated by the Stamp Act Congress as an antecedent of this Article. Article III of that document provided: “That it is inseparably essential to the Freedom of a Person, and the undefiled right of every Englishman, that no taxes be imposed on them, but by their own Consent, given personally, or by their Representatives.” H. H. Walker Lewis, The Tax Articles of the Maryland Declaration of Rights, 13 MD. L. REV. 83, 84 (1953) (stating Article III of Bill of Rights adopted by Stamp Act Congress of 1765 “was the forerunner of Article 14 of the Maryland Declaration of Rights”).

255 Only the state constitutions of Maryland, Oregon, and Ohio prohibit poll taxes. See MD. CONST. decl. of rights, art. IX, § a (prohibiting tax polls); OHIO CONST. art. XII, § 1 (same); OR. CONST. art. IX, § 1a (same).

256 The uniformity clause of this article has been amended twice since 1867. Lewis, supra note 254, at 95. In 1915 the requirement that property taxes be apportioned according to actual worth was deleted and replaced by a system of classifications. 1914 Md. Laws 633. For a discussion of the history of these changes and their effect on the tax system, see Lewis, supra note 254, at 96-103. The historical roots of the 1915 amendments are inestricably linked to an experiment with a “single tax system” in Hyattsville, Maryland, and the legal challenge to that experiment. See Philip L. Merkel, Tax Reform—“With a Political View:” The Hyattsville Single Tax Experiment in the Maryland Courts, 79 Md. Hist. Mag. 145, 146 (1984); see also Wells v. Commissioners of Hyattsville, 77 Md. 125, 138-43 (1893) (holding act void because of limited exemption of personal property from assessment and taxation is unconstitutional). Subsequently, this clause was amended. 1960 Md. Laws 185. This final change permitted the classification and sub-classification of land. Id. Essentially, taxes no longer must be uniform as to people, but must be uniform in their application to similarly situated land and property. See id.

257 The proposed 1967-68 Constitution replaced this provision with three new sections: 6:03, 6:04 and 6:05. COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 194-96. Section 6:03 would have provided: “[a] assessments with respect to any tax shall be made pursuant to uniform rules and pursuant to classifications of property, taxpayers, and events prescribed by law, which classes shall include agricultural property as defined by the General Assembly by law.” Id. at 195. Section 6:04 would have provided: “[t]he State shall prescribe and administer uniform rules and methods for determining property tax assessments. State funds distributed to units of local government on the basis of assessments of property shall be determined by assessments equalized among those units, as prescribed by the General Assembly by law.” Id. Section 6:05 would have provided that...
“[c]omplaints with respect to any tax imposed by the State shall be made pursuant to uniform rules within classes of property, taxpayers, or events.” Id. at 196. The proposed constitution was defeated by the voters. Id. at xi.

229 See MD. CONST. art. III, § 51 (granting taxing authority).

230 Professor Niles placed this Article in Class D (concrete, peculiar rules). NILES, supra note 135, at 24-36. He described the provision as “perhaps the most important in the whole Declaration of Rights.” Id. at 24. See supra note 135 for a discussion of Professor Niles’ division of the provisions of the Maryland Declaration of Rights into four categories.

231 Although there was much debate about removing the prohibition against poll taxes, no changes were made. PERLMAN, supra note 91, at 120-33.

232 The change from “abolished” to “prohibited” was made in response to the objection of Delegate Henry Stockbridge of Baltimore City, who said, “[w]e cannot abolish a thing that does not exist.” 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 168.

233 By 1864, the concept of a “poll tax” as a general per capita tax had disappeared, and delegates discussed the “poll tax” as “a capital tax levied upon the voters at the polls.” Lewis, supra note 254, at 92 (quoting Delegate Frederick Schley of Frederick County in 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 168).

234 This Article was disparaged roundly, called self-contradictory, and became the subject of numerous vitiating amendments, yet emerged exactly as it had been in the Declaration of Rights of 1851. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 167-80, 185-202, 214-23.

235 The Bill of Rights Committee proposed deleting the initial clause banning the poll tax in order to give the General Assembly the freedom to institute such a tax to fund education. 2 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 32, at 187. The ban on poll taxes was quickly reinstated on the floor of the Convention. Id.

236 The two amendments to this provision were to add the phrase “or person holding property therein,” and to delete the final phrase “within this State” from the clause. Both amendments originated in the Bill of Rights committee. The debate over these amendments reflect considerable confusion about the situs of intangible property. Lewis, supra note 254, at 95; see also 2 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 32, at 226-35 (showing confusion about intangible property during debate).

237 H. H. Walker Lewis suggests that use of the word “assessed” indicates that this was limited to property taxes. Lewis, supra note 254, at 93.

238 There was a proposal on the convention floor on October 31, 1776, to delete the final provision of this Article, beginning with “yet fines” to the end of this Article, but it was easily defeated. PROCEEDINGS, supra note 29, at 202; see also THE DECEIVE BLOW, supra note 40 (October 31, 1776).

239 H. H. Walker Lewis contends that the purpose of this phrase was expressly to permit taxation other than property taxes. Lewis, supra note 39, at 47.

240 H. H. Walker Lewis attributes this concept to Adam Smith. Smith’s first maxim regarding taxation provides: “1. The subjects of every State ought to contribute towards the support of the government, as nearly as possible, in proportion to the revenue which they respectively enjoy under the protection of the state.” Lewis, supra note 254, at 94.

241 Contrary to modern understanding, at the time of the revolution, a “poll tax” was any per capita tax. Id. at 90. Lewis states that pre-revolutionary poll taxes were used to support the unpopular and corrupt Church of England, thus leading to the obvious antipathy for such taxes. Id. at 90-91; see also Lewis, supra note 39, at 46.

242 Lewis refers to this August 27, 1776, version, which includes the phrase “pauper estates not exceeding thirty pounds currency,” as a “more understandable and generous term” than the bare word “pauper” in the version adopted. Id. at 47.

243 The 1967-68 Constitution Convention Commission found unequivocally that, “[i]n modern usage, a ‘sanguinary law’ is one providing for capital punishment.” REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION TO HIS EXCELLENCY, SPIRO T. AGNEW, GOVERNOR OF MARYLAND, supra note 126, at 111.

244 “Sabbatical laws” also are prohibited by the Maine Constitution and are limited by the Constitution of New Hampshire. ME. CONST. art. 1, § 9 (“Sabbatical laws shall not be passed; all penalties and punishments shall be proportioned to the offense . . .”). N.H. CONST. pt. 1, art. 18 (“All penalties ought to be proportioned to the nature of the offense . . . Where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses . . . . The true design of all punishments being to reform, not to exterminate mankind.”).

245 The proposed 1967-68 Constitution would have replaced Articles 16, 25, and 27 with a single provision, proposed Section 1.11: “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Conviction of crime shall not work corruption of blood or forfeiture of estate.” COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 129, at 4. Although proposed, a prohibition against capital punishment was not adopted by the constitutional convention of 1967-68. WHEELER & KINSEY, supra note 92, at 130. The proposed constitution was rejected by voters.

246 Professor Niles placed this Article in Class C (analogous limitations). NILES, supra note 135, at 36-37. See supra note 135 for a discussion of Professor Niles’ division of the provisions of the Maryland Declaration of Rights into four categories.

247 There was no recorded debate prior to re-adoption of this Article. PERLMAN, supra note 91, at 141.

248 The Committee proposed the change from “so” to “as.” 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 80. There is no explanation given for the change.

249 Delegate Henry Stockbridge of Baltimore City, on the floor of the 1864 Convention argued that this article, and the article now known as Article 25, 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) 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 courts in imposing punishments. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 224-26.

250 This provision was re-adoption without recorded debate. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 32, at 190.
categories.

laws. It must be presumed that any subsequent state constitutional conven-
art. I, § 22; N.C. OR. CONST, art. I, § 18; WASH. CONST, art. I, § 9; VA. CONST, art. I, § 18; W.VA. CONST, art. I, § 16; NEB. CONST, art. I, § 16; NEV. CONST, art. I, § 15; N.H. CONST, art. II, § 26; N.M. CONST, art. II, § 20; N.C. CONST, art. I, § 1; OH. CONST, art. II, § 28; OR. CONST, art. I, § 18; PA. CONST, art. I, § 17; R.I. CONST, art. I, § 12; S.C. CONST, art. I, § 4; S.D. CONST, art. VI, § 12; TENN. CONST, art. I, § 20; TEX. CONST, art. I, § 18; UTAH CONST, art. III, § 4; WASH. CONST, art. I, § 23; W. VA. CONST, art. III, § 4; WIS. CONST, art. I, § 12; WYO. CONST, art. I, § 35. Since 1789, Article I, Section 10 of the United States Constitution has prohibited states from passing ex post facto laws. It must be presumed that any subsequent state constitutional conventions adopting or readopting such provisions were aware of the federal guarantee. That those states chose to adopt or readopt such a provision in testament both to the fundamental nature of the right and the fear that the federal government would fail to fully enforce Article I, Section 10 to the fullest extent.

This provision, regarding retrospective oaths, was added as a response to the "iron-clad" oaths of the 1864 Constitution. Those oaths were considered retrospective because they had the effect of disenfranchising Democrats for activities, which at the time undertaken, were legal. The Convention delegates, all members of the Democratic party, understood the purpose of this amendment and adopted it without recorded debate. PERLMAN, supra note 91, at 141.

Professor Niles placed this Article in Class B (exact duplications). NILES, supra note 135, at 37-39. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

This provision was re-adopted without recorded debate. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 226.

The printed debates of the convention spell "ex post facto" as three words, italicized, 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 190, but the resultant document used this spelling. There was a suggestion on the floor to remove the Latin phrase, but it was decided that "the expression 'ex post facto,' was so well understood by the profession, and by all law-givers . . . [that] it would be inequitable to change it." Id. at 190.

H. H. Walker Lewis cites Bernard Schwartz as saying that this is the first constitutional use of the term "ex post facto laws." LEWIS, supra note 39, at 45 (citing Bernard Schwartz, 1 BILL OF RIGHTS: A DOCUMENTARY HISTORY 279 (1971)).

The proposed 1967-68 Constitution would have combined Articles 17 and 18 into one single protection, Section 1.15: "[n]o bill of attainder, or ex post facto law, or law impairing the obligation of contracts shall be enacted." COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 4-5. The proposed constitution was rejected by voters.

Although Article I, Section 10 of the United States Constitution prohibits states from passing bills of attainder, nearly every state constitution contains a similar prohibition. See, e.g., ALA. CONST, art. I, § 19 ("No person shall be attainted of treason by the legislature; and no conviction shall work corruption of blood or forfeiture of estate."); ALASKA CONST, art. I, § 15 ("No bill of attainder or ex post facto law shall be passed."); ARIZ. CONST, art. II, § 25 ("No bill of attainder . . . [or] ex-post-facto law . . . shall ever be enacted."); Ark. CONST, art. II, § 17 ("No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed; and no conviction shall work corruption of blood and forfeiture of estate.").

Professor Niles placed this Article in Class B (exact duplications). NILES, supra note 135, at 39. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

There was no recorded debate prior to re-adoption of this Article. PERLMAN, supra note 91, at 141.

The Committee report had this word as "attain" rather than "attain," but presumably this was a typographical error, not an attempt to change this provision. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 90.

This provision was re-adopted without recorded debate. Id.

This provision was re-adopted without recorded debate. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 190.

H. H. Walker Lewis cites Bernard Schwartz as saying that this is the most significant innovation of the Maryland Declaration of Rights. LEWIS, supra note 39, at 45 (citing Bernard Schwartz, 1 BILL OF RIGHTS: A DOCUMENTARY HISTORY 279 (1971)).

A bill of attainder includes a "legislative act which inflicts punishment without a judicial trial." Cummings v. Missouri, 177 U.S. 277, 287 (1900). The defect of a bill of attainder is that it serves to do a thing without the procedural and evidentiary safeguards that attend a judicial trial. In this respect, the constitutional prohibition against bills of attainder promotes the separation of powers. See United States v. Brown, 381 U.S. 437 (1965) (empha-
sizing that Bill of Attainder clause was included in Federal Constitution to prevent legislature from exercising judicial function."

208 It appears that this "unusual pains and penalties" clause was deleted from this provision and grafted onto Article 14, in the September 17, 1776, draft. See supra note 280.

209 This article was moved to become Article 2 in the September 17, 1776 draft.

210 The delegates to the Maryland Constitutional Convention were adamant particularly about state prerogatives, only allowing Maryland's delegates to the Continental Congress to vote for independence. "[p]rovided the sole and exclusive right of regulating the internal government and police of this colony be reserved to the people thereof." See supra note 159.

211 This article was moved to become Article 3 in the September 17, 1776, draft.

212 The colonial charter of Maryland granted to Maryland's settlers the full rights of Englishmen including the right to common law. CHARTER OF MARYLAND art. X (1634). This article states: "We will also, and of our more abundant Grace, for Us, our Heirs and Successors, do firmly charge, constitute, ordain, and command, that the said Province be of our Allegiance; and that all and singular the Subjects and Liege-Men of Us, our Heirs and Successors, transplanted, or hereafter to be transplanted into the Province aforesaid, and the Children of them, and of others their Descendants, whether already born there, or hereafter to be born, be and shall be Natives and Liege-Men of Us, our Heirs and Successors, of our Kingdom of England and Ireland and in all Things shall be held, treated, reputed, and esteemed as the faithful Liege-Men of Us, and our Heirs and Successors, born within our Kingdom of England; also Lands, Tenements, Revenues, Services, and other Hereditaments whatsoever, within our Kingdom of England, and other our Dominions, to inherit, or otherwise purchase, receive, take, have, hold, buy, and possess, and the same to use and enjoy, and the same to give, sell, alien and bequeath; and likewise all Privileges, Franchises and Liberties of this our Kingdom of England, freely, quietly, and peaceably to have and possess, and the same may use and enjoy in the same manner as our Liege-Men born, or to be born within our said Kingdom of England, without impediment, Molestation, Vexation, Impeachment, or Grievance of Us, or any of our Heirs or Successors; any Statute, Act, Ordinance, or Provision to the contrary thereof, notwithstanding."

213 Analytically, this Article contains two rights: the right to the common law and the right to trial by jury. Both the Virginia Bill of Rights (1776) and the Pennsylvania Declaration of Rights (1776) ensured trial by jury. See PA. CONST. of 1776, art. XI ("That in controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred."); VA. CONST. of 1776, bill of rights, § 11 ("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."). The New Jersey Constitution of 1776, a precursor to the Maryland Constitution, also preserved the right to the common law. HOWARD, supra note 254, at 242. Professor Howard suggests that the choice to place this protection in the Declaration of Rights section of the Maryland Constitution is meaningful. Id. at 243.

214 Articles 19 and 23 of the Maryland Declaration of Rights of 1867 were slated to be replaced by Section 1.03 of the proposed 1967-68 Constitution. COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 120-21 ("No person shall be deprived of life, liberty, or property without due process of law, nor be denied the equal protection of the laws, nor be subject to discrimination by the State because of race, color, religion, or national origin."). The proposed constitution was rejected by voters.

215 Professor Howard attributes the origin of this right to chapter 40 of the Magna Carta. See HOWARD, supra note 3, app. at 483-87.

216 Cf. U.S. CONST. amend. XIV. § 1.

217 Professor Niles placed this Article in Class B (exact duplications). NILES, supra note 135, at 39-40. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

218 There was no recorded debate prior to re-adoption of this Article. PERLMAN, supra note 91, at 141.

219 A floor amendment to return this phrase to "every free man" was defeated. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 228. The purpose of the proposal was argued only on the premise that the previous language was from the Magna Carta. Id. at 226-28 (indicating that the Magna Carta contained the phrase because there were men who were not free when document was written).

220 The change to "any" from "every" was proposed by the committee. Id. at 80.

221 This provision was re-adopted by the convention without recorded debate. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 130.

222 Professor Howard attributes the origin of this right to chapter 39 of the Magna Carta. See HOWARD, supra note 254, at 388 ("No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land."). Professor Howard also attributes the origin of this right to chapter 40 of the Magna Carta. See id. ("To no one will We deny, or delay right or justice.").

223 Professor Niles placed this Article in classes A (absent principles) and C (analogous limitations). NILES, supra note 135, at 40-41. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

Professor Randolph N. Jonakait presents an alternative historical account of the Federal Confrontation Clause. His theory is that the Sixth Amendment generally, and the Confrontation Clause specifically, are the culmination of a developing American constitutionalism, which began in state law and state constitutions, aimed at reducing the power and privilege of the government and its prosecutors. Randolph N. Jonakait, The Origins of the Confrontation Clause: An Alternative History, 27 Rutgers L.J. 77 (1995). In this way, it might be argued that Article 21 serves a similar function of checking prosecutorial power.

Section 1.06 would have required grand jury indictment: "[n]o person shall be held to answer for a felony unless on indictment of a grand jury, except in cases arising in the militia while in actual service." Id. at 123. The proposed constitution was rejected by voters.

Two other sections, 1.06 and 1.10, would have created rights not explicitly included (although included by judicial interpretation). Section 1.06 would have required grand jury indictment: "[n]o person shall be held to answer for a felony unless on indictment of a grand jury, except in cases arising in the militia while in actual service." Id. at 123. The proposed constitution was rejected by voters. See Tolley, supra note 186, at 186-99 (discussing under Maryland Constitution trial by jury rights).

The state constitutions of nearly every state protect these rights, although the jury unanimity requirement has been reduced in many states. See, e.g., La. Const. art 1, § 17 (requiring capital cases to be tried before twelve jurors, all of whom must agree; cases calling for confinement at hard labor to be tried before twelve jurors, ten of whom must agree; cases calling for confinement, with or without hard labor, for six months, to be tried before six jurors, five of whom must agree); Ok. Const. art 1, § 11 (amended 1991) (allowing accused to waive trial by jury in non-casual cases). The United States Supreme Court has ruled that non-unanimous state jury verdicts do not offend the federal constitution. See, e.g., Johnson v. Louisiana, 406 U.S. 356 (1972) (holding Louisiana provision for less-than-unanimous verdicts in other than capital or five member jury cases does not violate equal protection); Apodaca v. Oregon, 406 U.S. 404 (1972) (holding Sixth Amendment guarantee of trial by jury applicable to state via Fourteenth Amendment does not require unanimous verdicts).

Professor Niles placed this Article in Class C (analogous limitations). Niles, supra note 135, at 41-45. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

There was no recorded debate prior to re-adoption of this Article. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.
Several other amendments to this Article were proposed on the floor, but all ultimately were rejected: allowing the accused the right to make a closing address, Id. at 191; granting the State peremptory challenges, Id.; designating the jury as trier of law and fact, Id. at 193 (this proposal subsequently has been adopted and is now codified at Article 23); and permitting the right to jury instructions by the court, Id.

Several other amendments to this Article were proposed on the floor, but all ultimately were rejected: allowing the accused the right to make a closing address, Id. at 191; granting the State peremptory challenges, Id.; designating the jury as trier of law and fact, Id. at 193 (this proposal subsequently has been adopted and is now codified at Article 23); and permitting the right to jury instructions by the court, Id.

32. Changed from "counsel" to "counsel" for the final 1776 version only. Delaware's 1776 Constitution, Article 14, adopted within days of the Maryland provision, see supra note 99, and in many regards similar to that provision, uses the spelling "counsel." Del. Const. decl. of rights, art. 14 (1776).

33. A proposal to add "or affirmation" after the word "oath" was offered, October 31, 1776, on the convention floor, but was defeated. Proceedings, supra note 29; see also The decisive blow, supra note 40 (October 31, 1776).

34. There is no record to explain why "capital" crimes would have been treated differently.

35. For a history of the right of a defendant to be informed of the charges, see United States v. Cruikshank, 92 U.S. 542 (1876), which states that the accused has a constitutional right to know of accusations and charges in order to defend himself. Id. at 557-59.

36. Professor A. E. Dick Howard cites the Bible (Acts 25:16) and an English statute of 1552, 5 & 6 Edw. 6, c. 11, § 12 (1552), as the sources of the right of confrontation. 1 Howard, supra note 3, at 101 (noting two thousand year old Bible precedent of Roman accused facing accuser and 1552 English Statute requiring accuser to confront accused).

37. Professor A. E. Dick Howard traces the speedy trial right to the Magna Carta, ch. 40, because "justice delayed" violates "speedy trial" rights. Howard, supra note 254, at 487; see also 1 Howard, supra note 3, at 106-07 (citing chapter 40 of the Magna Carta).

38. Chief Judge Robert C. Murphy of the Court of Appeals of Maryland, discussing the unanimity requirement of this Article, points out that in the original draft "the word proceeding 'consent' has been marked out and the word 'unanimous' written above it. This may indicate some discussion concerning unanimity; or it may indicate only a misspelling or other error." Rice v. State, 532 A.2d 1357, 1362-63 n.8 (Md. 1987).

39. Compare this provision with Va. Const. bill of rights, § 8 (1776), which states: 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 and witnesses, to call for evidence in his favor, and a speedy public trial, by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be unjustly deprived of his liberty except by the laws of the land or the judgment of his peers.

40. Id. Also compare this provision with Pa. Const. decl. of rights, § 9 (1776), which states: In all prosecutions of criminal offences, a man hath a right to be heard by himself and his council, to demand the cause and nature of his accusations, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial, by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be unjustly deprived of his liberty except by the laws of the land, or the judgment of his peers.

41. Id. All three 1776-era provisions are more specific in their protections than the 5th Amendment to the United States Constitution.

42. It is noteworthy that the Maryland criminal rights provision omits a prohibition against double jeopardy, as did Virginia's Declaration of Rights of 1776. Professor Howard states that there is no obvious explanation for the omission from Virginia's Constitution, "unless it is precisely that the universal acceptance of the concept at the time caused it to be overlooked." 1 Howard, supra note 3, at 156

43. The proposed 1967-68 Constitution would have made stylistic changes in this Article: "[N]o person shall be compelled in any criminal case to be a witness against himself." Comparison of present Constitution and constitution proposed by convention, supra note 126, at 5. The proposed constitution was rejected by voters.

44. See Tolley, supra note 186, at 94-97 (discussing right against self-incrimination in Maryland Constitution).

45. Other states provide similar protections against compelled self-incrimination. See, e.g., Ala. Const. art. I, § 7 ("That in all criminal prosecutions the accused . . shall not be compelled to give evidence against himself."); Alaska Const. art. I, § 9 ("No person shall be compelled in any criminal proceeding to be a witness against himself."); Ariz. Const. art. II, § 19 ("[N]o person shall be prosecuted or subject to any penalty or forfeiture for or on account of, any transaction of any kind whatever, or thing concerning which he may be required to give evidence."); Ark. Const. art. II, § 8 ("[N]or shall any person be compelled, in any criminal case to be a witness against himself."); Cal. Const. art. I, § 15 ("Persons may not be compelled . . . in a criminal cause to be a witness against themselves."); Colo. Const. art. II, § 18 ("No person shall be compelled to testify against himself in a criminal case."); Conn. Const. art. I, § 8 ("No person shall be compelled to give evidence against himself."); Ga. Const. art. I, § 1, para. XVI ("No person shall be compelled to give testimony tending in any manner to be self-incriminating."); Ill. Const. art. I, § 10 ("No person shall be compelled in a criminal case to give evidence against himself."); Kan. Const. bill of rights, § 10 ("No person shall be a witness against himself."); La. Const. of 1974, art. I, § 16 ("No person shall be compelled to give evidence against himself."); Mass. Const. pt. I, art. XII ("[N]o subject shall be . . compelled to accuse, or furnish evidence against himself."); Neb. Const. art. I, § 12 ("No person shall be compelled, in any criminal case, to give evidence against himself."); N.H. Const. pt. I, art. XV ("No subject shall . . be compelled to accuse or furnish evidence against himself."); N.C. Const. art. I, § 23 ("In all criminal prosecutions, every person charged with crime has the right . . . not to be compelled to give self-incriminating evidence."); Okla. Const. art. II, § 21 ("[N]o person shall be compelled to give evidence which will tend to incriminate him."); R.I. Const. art. I, § 13 ("No person in a court of common law shall be compelled to give self-incriminating evidence."); U.S. Const. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself.").

46. See U.S. Const. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself.").

47. Professor Niles placed this Article in Class C (analogous limitations). Niles, supra note 135, at 45-46. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

48. There was no recorded debate prior to re-adoption of this Article. Perlman, supra note 91, at 141.
350 The 1776 constitutions of Virginia and Pennsylvania protected a right against self-incrimination, but in each of those provisions the right was combined with other criminal rights. See supra note 339. Maryland’s independent self-incrimination provision may have permitted the interpretation that this right was not limited to criminal cases but also was available in the civil context. Of course, the 1864 and subsequent constitutions have precluded this interpretation.

351 For a discussion of the historical development of the right against self-incrimination, see Leonard W. Levy, Origins of the Fifth Amendment 266-313 (1968).

352 This provision originally was enacted as Article X (Miscellaneous), Section 5 of the Maryland Constitution of 1851, which provided, “[t]he trial of all criminal cases shall be by jury.” Md. Const. of 1851, art. X, § 3. This was regarded as a check against the arbitrary power of judges. See Brooks v. State, 472 A.2d 981, 983 (Md. 1984) (discussing evolution of Maryland constitutional provision guaranteeing right to jury trial). The identical provision became Article XII (Schedule), Section 4 in the 1864 Constitution, and Article XV (Miscellaneous) in the 1867 Constitution. The provision, and its results, particularly in removing limiting issues available on appellate review, were criticized heavily. See Wylly v. Warden, 372 F.2d 742, 745-46 (4th Cir. 1967) (listing critics of the rule, but upholding its constitutionality).

353 The Court of Appeals of Maryland has interpreted Article 23 as making the trial judge’s instructions on the law binding upon the jury. See Montgomery v. State, 437 A.2d 654, 657 (Md. 1981) (discussing circumstances when instructions are binding or non-binding). There is, however, a single, small, and rapidly diminishing exception to this rule, applicable when there are legitimate conflicting interpretations of the substantive law of the criminal offense charged. In such circumstances, the trial judge’s instructions are advisory only. See Stevenson v. State, 423 A.2d 558, 565 (Md. 1980) (stating that judge’s comments respecting substantive “law of the crime” and “legal effect of the evidence” are advisory only, but instructions on all other law are binding); Barnhard v. State, 587 A.2d 561, 567-68 (Md. Ct. Spec. App. 1991) (reaffirming that court’s instructions on law are binding absent dispute on “law of the crime”); White v. State, 502 A.2d 1084, 1093 (Md. Ct. Spec. App. 1986) (finding judge’s instructions advisory where dispute exists over proper interpretation of criminal law); Alnutt v. State, 478 A.2d 321, 325 (Md. Ct. Spec. App. 1984) (holding judge’s instructions on law binding unless rare instance of dispute over “law of the crime” exists).

354 The Indiana Constitution provides that juries are “to determine the law and the facts.” Ind. Const. art. I, § 19. The Oregon Constitution and the former Louisiana Constitution provide that juries are to determine both law and fact, but under the direction of the court as to the law. La. Const. of 1921, art. XIX, § 9 (“The jury in all criminal cases shall be the judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge.”); On. Const. art. I, § 16 (“In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases.”).

355 See also Md. Const. art. 5. Both this Article and Article 5 guarantee the right to trial by jury. The Court of Appeals of Maryland appears to have adopted the view that the jury trial right herein preserved are those rights that existed in 1776. See Houston v. Lloyd’s Consumer Acceptance Corp., 215 A.2d 192, 198 (Md. 1965) (citing with approval Judge Pearce’s opinion in Knee v. Baltimore City Pacc. Co., 40 A. 890 (Md. 1898), stating that right to trial by jury was right as it existed when Constitution of Maryland first was adopted). See also approving Judge Pearce’s opinion at 198. The proposed constitution was rejected by voters.

358 The judges of the proposed 1967-68 Constitution would have deleted this provision, considering its function absorbed under sections 1.03, 1.07 and 1.13. Comparison of Present Constitution and Constitution Proposed by Convention, supra note 126, at 5. The proposed constitution was rejected by voters.

359 The drafters of the proposed 1967-68 Constitution would have deleted this provision, considering its function absorbed under sections 1.03, 1.07 and 1.13. Comparison of Present Constitution and Constitution Proposed by Convention, supra note 126, at 5. The proposed constitution was rejected by voters.

360 Id. Articles 19 and 24 of the 1867 Constitution were slated to be replaced by Section 1.03 of the proposed 1967-68 Constitution, which states, “[n]o person shall be deprived of life, liberty, or property without due process of law, nor be denied the equal protection of the laws, nor be subject to discrimination by the State because of race, color, religion, or national origin.” Id. The proposed constitution was rejected by voters.

361 This provision has long been held to contain a guarantee of the equal protection of the laws. See Tolley, supra note 186, at 71-77 (discussing equality guarantee in Maryland Constitution).

362 Compare this provision with U.S. Const. amend. XIV, § 1.

363 See Niles, supra note 135, at 46-48. Professor Niles placed this Article in Class B (exact duplications of United States Constitution provisions); although he acknowledged that from independence until passage of the Fourteenth Amendment in 1868 it belonged in Class C (analogous limitations of state and federal power). Id. This is a major problem with Niles’ analysis, because the difference between Class B and Class C is the Supreme Court’s determina-
tion of the incorporation of a federal right against the states. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

364 An amendment to add the phrase "on no pretext whatever" was defeated without recorded debate. Perl-
man, supra note 91, at 141.

365 A proposal to reinsert "free," ostensibly to restore the language of the Magna Carta was defeated. 1 Debates of the CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 236-39.

366 Scharff indicates that the final clause was deleted from Article 23 to conform with Article 24, a new article abolishing slavery. 3 Scharff, supra note 23, at 583. The deletion of the material regarding the "free colored population" was recommended by the Committee. 1 Debates of the CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 124, at 80. A floor amendment would have reinserted this denial of due process to free African-Americans, but was defeated. Id. at 236-39.

367 There was a proposal to change the words "freeman" to "citizen" to exclude "free Negroes" from this right. It ultimately was determined that by adding a final clause to the article, it could be ensured that no due process rights would attach to the deprivation of the property of "free Negroes" if the legislature chose to withhold such rights. 1 Debates and PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 194-98, 259-60. This amended Article was adopted. Id. at 199.

368 The rights of "free Negroes" apparently had been an important issue for the convention delegates. The Con-
vention of 1850 had appointed a committee to investigate "some prospective plan, looking to the riddance of this State, of the free negro, and mulatto population thereof, and their colonization in Africa." Harry, supra note 44, at 60. The colonization in Africa of free African Americans had been state policy since 1831, when the state legislature incorporated the Maryland State Colonization Society. Id.

369 The United States Supreme Court interpreted this provision in Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235 (1819):

As to the words from Magna Carta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. Id. at 244. Justice Johnson's opinion in Okely is remarkable, not only because of the Supreme Court's attempt to analyze a provision of a state constitution, but also because of its application of the Seventh Amendment of the United States Constitution against the states. See Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193, 1203 (1992) (discussing early view of Bill of Rights as imposing restrictions on state power).

370 This right was derived from the Magna Carta, ch. 39: "No free man shall be taken, imprisoned, dispossessed, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." Howard, supra note 254, at 388; see also id. at 211-12 (documenting incorporation of Magna Carta into constitutional thought).

371 This provision was deleted by Act of Nov. 7, 1978, ch. 681, 1977 Md. Laws 2743, 2748.

372 Professor Niles appears to have erroneously used the word "thereof" rather than "therefore." Niles, supra note 135, at 48.

373 The compensation for slave "property" taken was an important and emotional issue at the constitutional con-
vention of both 1864 and 1867. While in both instances it was decided that the state government would not compensate for the losses of the slave owners, the 1867 Convention inserted a provision enabling the legislature to promulgate measures so it could demand compensation from the national government. See Myers, supra note 85, at 122.

374 Professor Niles placed this provision in Class B (exact duplications). Niles, supra note 135, at 48-49. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

375 The drafting committee proposed changing this provision to read, "[i]slavery shall not be permitted in this State." Perl-
man, supra note 91, at 79. A minority of the Committee objected both to the substance of the provision and that it was passed without a vote. Id. at 89-90. After much debate, however, this substitute was adopted. See id. at 141-44, 148-50, 382.

376 Slavery was permitted under the 1851 Constitution of Maryland, which provided, "[t]he Legislature shall not pass any law abolishing the relation of master or slave, as it now exists in this state." Myers, supra note 55, at 12 (quoting Md. Const. of 1851, art. III, § 43).

377 At the conclusion of the Civil War, slave owners struggled to find methods to retain slave labor. One such effort, creating "apprenticeships" for young African Americans was held not to violate this provision in Brown v. State, 23 Md. 503 (1865). This result is criticized by Professor Niles. Niles, supra note 135, at 49 (arguing that apprenticeship laws would now be violative of Thirteenth Amendment of United States Constitution).

378 This Article was proposed by the Committee. 1 Debates of the CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 80. A minority report opposed its adoption. Id. at 81-82. This provision required substantial debate. Id. at 538-60, 653-618, 620-64, 665-712, 713-42.

379 Having first determined that the Eighth Amendment's excessive fines clause had never been "officially" incor-
porated to the states, the Court of Appeals of Maryland recently adopted a new test for the excessive fines clause of Article 25. See Aravanis v. Somerset County, 664 A.2d 888, 898 (Md. 1995) (holding constitutional prohibition against excessive fines requires consideration of whether forfeited item was an instrumentality of crime as well as factors comparing gravity of offense with extent of owner's loss experienced by forfeiture); see also Note, On Constitutional Limitations of Civil In Rem Forfeiture and the Double Jeopardy Dilemma: Civil In Rem Forfeiture Constitutes Punish-
ment and Subject to Excessive Fines Analysis, 26 U. Balt. L. Rev. 155 (1996).

380 The proposed 1967-68 Constitution would have replaced Articles 16, 25 and 27 with a single provision, pro-
posed Section 1.11: "[x]cessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual pun-
ishments inflicted. Conviction of crime shall not work corruption of blood or forfeiture of estate." COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 123. The proposed con-
stitution was rejected by voters.

381 See tolley, supra note 186, at 199-207 (discussing constitutionality of death penalty under Article 25).

382 Although most state constitutions include some limitation on acceptable punishments, the formulation of those limitations varies. The most common is the prohibition against "cruel and unusual" punishments. See, e.g., U.S.
First, Article 26 does not, on its face, require warrants at all; rather, it mandates that any warrants that are used are reasonable, see, e.g., Coolidge v. New Hampshire, 403 U.S. 443, 444 (1971) (holding that under undue restraint, "[e]xcessive bail ought not to be required, nor excessive fines imposed nor cruel or unusual punishments inflicted." English Bill of Rights (1689), reprinted in 1 SOURCES AND DOCUMENTS, supra note 20, at 133 (1982). The Virginia Bill of Rights (1776) provided a verbatim copy of the English Bill of Rights (1689) by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized); COLO. CONST, art. II, § 20 (same); VA. CONST. art. I, § 9 (same). Several, like Maryland, prohibit "cruel or unusual" punishments. See, e.g., CAL. CONST. art. I, § 17 (stating that "[e]xcessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishment be inflicted"); MICH. CONST. art. II, § 15 (same); WYO. CONST. art. I, § 14 (same). Still others prohibit only "excessive" punishment. See, e.g., DEL. CONST. art. I, § 11 (stating that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor punishments inflicted"); PA. CONST. art. I, § 13 (same). The distinctions potentially are significant. See People v. Bullock, 485 N.W.2d 866, 872 n.11 (Mich. 1992) (["It 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.'"]) see also Harmelin v. Michigan, 501 U.S. 966-67 (1991) (finding Eighth Amendment choice of "and" rather than "or" significant).

Professor Niles placed this provision in Class C (analogous limitations). Niles, supra note 135, at 49. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

There was no recorded debate prior to re-adoption of this Article. PERLMAN, supra note 91, at 150.

Although the relationship between this Article and Article 14 (1851) (the modern Article 16) was subject to debate, see supra note 278, it was re-adopted without recorded debate here, 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 239.

It is unclear what was intended by the change from singular to plural.

This provision was re-adopted without recorded debate. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 199.

The English Bill of Rights (1689) provided that "excessive bail ought not to be required, nor excessive fines imposed nor cruel or unusual punishments inflicted." English Bill of Rights (1689), reprinted in 1 SOURCES AND DOCUMENTS, supra note 20, at 133 (1982). The Virginia Bill of Rights (1776) provided a verbatim copy of the English provision. VA. CONST. of 1776, bill of rights, § 9.

The phrase "by the court of law" did not exist in the original August 27, 1776, committee draft. From this information, I theorize that this final phrase was intentionally added and, therefore, disagree with the Court of Appeals determination in Bartholomew v. State, that the phrase was "superfluous." Bartholomew v. State, 273 A.2d 164, 170 (Md. 1971). I argue that Article 25 is directed to the judiciary's sentencing determinations, while Article 16 is directed to the legislative branch in its lawmaking capacity. See supra note 278. Language in the Massachusetts and New Hampshire constitutions is similar and supports this construction. See MASS. CONST. pt. 1, art. 26 (stating that "[n]o magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments"); N.H. CONST. art. I, § 33 (same).

The proposed 1967-68 Constitution would have replaced this provision with Section 1.05, designed to improve upon the Fourth Amendment to the United States Constitution:

[the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches, seizures, interceptions of their communications, or other invasions of their privacy, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized, or the communications sought to be intercepted.]

COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 121. The proposed constitution was rejected by voters.

See Tolley, supra note 186, at 90-94 (discussing Maryland Court of Appeals' refusal to adopt federal "good faith exception" to exclusionary rule).


The Court of Appeals of Maryland has made abundantly clear that it regards this Article as providing an identical protection to that afforded by the Fourth Amendment to the United States Constitution. See Givner v. State, 124 A.2d 764, 771 (Md. 1956) (finding that United States Supreme Court decisions regarding unlawful searches and seizures entitled to great respect when deciding state court cases involving searches and seizures). The Givner court's conclusion is not supported by the text of the Article. The Fourth Amendment provides:

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

U.S. CONST. amend. IV. Under traditional Fourth Amendment jurisprudence, it may be said that searches and seizures may be made in either of two ways: with a valid warrant, or under certain limited circumstances where it would be unreasonable to require a warrant. See Coolidge v. New Hampshire, 403 U.S. 443, 444 (1971) (holding that under certain circumstances the police may seize evidence absent a warrant). Such a dichotomy cannot be found in Article 26. First, Article 26 does not, on its face, require warrants at all; rather, it mandates that any warrants that are used must be reasonable, see the Court of Appeals of Maryland long ago read the equivalent of a warrants requirement into Article 26, stating: "If a general search warrant is condemned, how much more obnoxious must be an authorization to conduct a general and indiscriminate search of persons and property without any warrant." Miller v. State, 198 A. 710, 716 (Md. 1938). Second, if this provision is interpreted to always require a warrant for the conduct of a search or seizure, it lacks a "reasonableness" test that is the hallmark of the United States Supreme Court's interpretation of the Fourth Amendment. Using the reasonableness requirement, the Supreme Court has found numerous exceptions to the warrant requirement. See, e.g., Schneckloth v. Bustamonte, 442 U.S. 218, 248-49 (1973) (permitting warrantless searches when consent is given); Coolidge v. New Hampshire, 403 U.S.

394 Professor Niles placed this provision in Class C (analogous limitations). NILES, supra note 135, at 49. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

395 There was no recorded debate prior to re-adoption of this Article. PERLMAN, supra note 91, at 150.

396 This provision was re-adopted without recorded debate. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 239.

397 This provision was re-adopted without recorded debate. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 199.

398 The first state constitutions dealt with the problem of general warrants in three ways. The Virginia Constitution simply denounced general warrants. Maryland and others declared general warrants to be illegal. Pennsylvania and Massachusetts "foreshadowed" the Fourth Amendment to the United States Constitution by declaring a general right against unreasonable searches and seizures. 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).

399 Compare this provision with Va. CONST. of 1776, bill of rights, § 10, which provides:

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

 id. Also compare this provision with Pa. CONST. of 1776, decl. of rights, art. 1, § 10:

That the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure, and therefore warrants without oaths or affirmation first made, affording a sufficient foundation for them, and 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 contrary to that right, and ought not to be granted.

Id. 400 The proposed 1667-68 Constitution would have replaced Articles 16, 25, and 27 with a single provision, proposed Section 1:11: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Conviction of crime shall not work corruption of blood or forfeiture of estate." COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 123. The proposed constitution was rejected by voters.


402 Professor Niles placed this provision in Class D (concrete, peculiar rules) although he acknowledged that it was unlikely to be imposed. NILES, supra note 135, at 50. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

403 The return to the 1851 language was suggested by the Committee and adopted without recorded debate. PERLMAN, supra note 91, at 150.

404 The 1864 Convention was held during the Civil War. The punishments of corruption of blood and forfeiture of estate were authorized for the crime of treason—joining or supporting the Confederacy. Shelby Foote, the pre-eminent popular historian of the Civil War, described the situation in the North in 1862 with regards to treason in this way:

"Treason was a much-used word these days. . . . The syllables had a sound that caught men's ears, overtones of enormity that went beyond such scarecrow words as rape or arson or incest. Observing this, the radicals had made it their watchword, their cry in the night, expanding its definition in the process."

405 The changes were not proposed by the Declaration of Rights Committee, but by floor amendment. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 239-47, 249-71.
The Bill of Rights Committee recommended re-adopting the language of the 1776 Constitution, but even though the convention body felt that forfeiture of estate was too harsh a penalty for murder, it was not too harsh for treason. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 199-200 (striking forfeiture of estate from realm of possible punishments for murder).

In the proposed 1967-68 Constitution, Articles 28-32 would have been combined into a single Section 9.05 regarding the militia:

"[t]he General Assembly may provide by law for a militia. The governor shall be its commander in chief and shall appoint its officers. The governor may order the militia into active service to repel invasions, to suppress insurrections, to enforce the execution of the laws, and to provide assistance when great destruction of life or property may be threatened or may have occurred. The military authority of the State shall be and remain subject to civil control in the person of the governor at all times. Only a member of the militia may be subject to a military trial and then only for offenses committed while in actual service."

COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 6. The proposed constitution was rejected by voters.

See Mo. Const. art. II, § 8 ("The governor shall be the commander-in-chief of the land and naval forces of the State; and may call out the Militia to repel invasions, suppress insurrections, and enforce the execution of the Laws, but shall not take the command in person, without the consent of the Legislature."); Mo. Const. art. IX (providing for organization of militia).


Professor Niles placed this provision in Class C (analogous limitations). NILES, supra note 135, at 50-51. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

A floor amendment would have added: "and every citizen has the right to bear arms in defense of himself and the State." It was rejected. PERLMAN, supra note 91, at 150-51. The Attorney General of the State of Maryland has opined that the text of the article as currently written does not include a right to bear arms. 79 Op. Mo. Atty Gen. 69 (February 25, 1994).

This provision was re-adopted without recorded debate. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 356.

This provision was re-adopted without recorded debate. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 201.

The phrase "and safe" appeared in the August 27, 1776, draft, as it does in the Virginia Bill of Rights. Va. Const. of 1776, bill of rights, § 13. That language was dropped for the September 17, 1776, draft.

The rights contained in Articles 25, 26, and 27 of the 1776 Maryland Declaration of Rights (Articles 28, 29, and 30 today) are similar to the rights provided in a single Article in 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.

VA. CONST. art. I, § 13. Similarly, the Pennsylvania Constitution provides:

That the people have a right to bear arms for the defence of themselves and the state: and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.

PA. CONST. art. I, § 21. Many historians agree that the Second Amendment is intended to ensure the existence of a state militia, as opposed to a standing national army, in defense of the country. The amendment probably was not intended to assure private citizens of a right to carry weapons. Lawrence Delbert Cress, A Well-Regulated Militia: The Origins and Meaning of the Second Amendment, in THE BILL OF RIGHTS: A LIVELY HERITAGE (Jon Kukla ed., 1987); but see Robert E. Shalhope, The Ideological Origins of the Second Amendment, 69 J. AM. HIST. 691 (1986) (arguing that right to bear arms and right to form militia are distinct rights and Framers intended individuals to have a right to bear arms for personal defense and defense of the state).

See supra note 407 for the text of the 1967-68 proposal to combine Articles 28-32 of the Maryland Constitution into a single section, 9.05.


Professor Niles placed this provision in Class A (abstract principles). NILES, supra note 135, at 51. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

There was no recorded debate prior to re-adoption of this Article. PERLMAN, supra note 91, at 151.

This provision was re-adopted without recorded debate. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 356.

The English Bill of Rights provided, "[t]hat the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of parliament [sic], is against law." English Bill of Rights (1689), reprinted in 1 SOURCES AND DOCUMENTS, supra note 23, at 133.

See supra note 407 and accompanying text for the language of proposed Section 9.05 regarding the militia.

Forty-nine of fifty states have similar provisions in their constitutions. INDEX DIGEST OF STATE CONSTITUTIONS (Richard A. Edwards ed., 2d ed. 1959).

Professor Niles placed this provision in Class A (abstract principles). NILES, supra note 135, at 51. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.
There was no recorded debate prior to re-adoption of this Article. \textsc{Perlman, supra\ note 91, at 152.}

This provision was re-adopted without recorded debate. \textsc{1 Debates of the Constitutional Convention of the State of Maryland, supra note 121, at 356.}

This provision was re-adopted without recorded debate. \textsc{1 Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution, supra note 52, at 201.}

The debate on this Article centered on a proposed grammatical correction. \textsc{1 Debates of the Constitutional Convention of the State of Maryland, supra note 121, at 301-62 (inserting "to" after "case" so as to read, "ought in any case to be subject"). An amendment to Article 19 would have added a provision about courts manner prescribed by law." \textsc{Supra note 91, at 152.}

This provision was re-adopted without debate. \textsc{1 Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution, supra note 52, at 201.}

This phrase was changed to make its provisions consistent with the removal provisions found in Article IV of the Constitution. \textsc{Perlman, supra note 91, at 382.}

The Attorney General has opined that this comma, between "political trust" and "or employment," was added erroneously by a "scrivener/editor" and was not approved by the convention. As a result, the Attorney General has arrived at the conclusion that the word "political" was intended—and, therefore, should be read by us—to modify both "trust" and "employment." Consequently, in our opinion, only "political . . . employment . . . under the . . . Laws of this State" is prohibited by this portion of Article 33. Bell, \textit{The Third Amendment: Forgotten But Not Gone}, 2 WM. & MARY BILL OF RTS. J. 117 (1993). It should be noted that Bell has stated erroneously that Delaware's 1776 Constitution predates Maryland's. \textsc{Id. at 127 n.96. For the correct time sequence, see supra note 99.}

Professor Niles placed this provision in Class C (analogous limitations). \textsc{Niles, supra note 135, at 51. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.}

A small amendment was proposed, but rejected. \textsc{Perlman, supra note 91, at 151-52.}

This Article was changed in 1864 to "correspond[ ] literally with the third amendment to the Constitution of the United States." \textsc{Myers, supra note 55, at 64. This makes Article 31 the only Article of the Maryland Declaration of Rights for whose meaning the United States Constitution is a direct source. Edward Dumbauld, \textit{State Precedents for the Bill of Rights}, 7 J. PUB. LAW 323, 330 (1958).}

The Committee proposed the change in the final sentence from "as the Legislature shall direct" to "in the manner prescribed by law." \textsc{1 Debates of the Constitutional Convention of the State of Maryland, supra note 121, at 80. I suspect that this was a response to fears arising from the "rebel" assembly of 1861. A proposal to restore the old language was defeated. \textsc{Id. at 356-60.}

The Committee report proposed omitting the word "only." \textsc{1 Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution, supra note 52, at 142. The word was reinserted by floor amendment. \textsc{Id. at 201.}

This right clearly is descended from the English Petition of Right, 3 Car. I, c. 1 (1627). Petition of Right (1627), reprinted in 10 Halsbury's Statutes of England and Wales 26 (Andrew Davies et al. eds., 4th ed. 1995) [hereinafter Halsbury's Statutes]; see also 1 Howard, supra note 3, at 29; Howard, supra note 254, at 211 (indicating Petition of Right of 1627 to be ban on quartering troops by populace during peacetime). An excellent history of the problem of "billeting" troops is provided by B. Carmon Hardy, \textit{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).


Professor Niles placed this provision in Class C (analogous limitations). \textsc{Niles, supra note 135, at 51-52. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.}

There was no recorded debate prior to re-adoption of this Article. \textsc{Perlman, supra note 91, at 152.}

The Committee proposed the change in the final sentence from "as the Legislature shall direct" to "in the manner prescribed by law." \textsc{1 Debates of the Constitutional Convention of the State of Maryland, supra note 121, at 301-62 (inserting "to" after "case" so as to read, "ought in any case to be subject"). An amendment to Article 19 would have added a provision about courts martial. It should be consulted in conjunction with this Article. \textsc{Id. at 228-35.}

This provision was re-adopted without debate. \textsc{1 Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution, supra note 52, at 201.}

See \textsc{Md. Const. art. IV, §§ 4, 4A, 4B concerning removal of judges.}

See \textsc{Md. Const. art. IV, § 6 (prohibiting fees in addition to salary).}

The proposed 1867-68 Constitution would have replaced this provision with Section 5.25, [n]o judge shall practice law, or seek public elective office other than the judicial office he then holds, or contribute to or hold office in a political party or political organization, or participate in a partisan political campaign, or serve as officer, director, or employee of any business formed with the intention of making a profit. No retired judge while practicing law or holding any public office of profit shall be paid any pension for his judicial service.

\textsc{Comparisons of Present Constitution and Constitution Proposed by Convention, supra note 126, at 185. The proposed constitution was rejected by voters.}

\textsc{Act of Nov. 6, 1990, ch. 61, 1990 Md. Laws 405 (extending exception to members of executive and legislative branches).}

This phrase was changed to make its provisions consistent with the removal provisions found in Article IV of the Constitution. \textsc{Perlman, supra note 91, at 382.}

The Attorney General has opined that this comma, between "political trust" and "or employment," was added erroneously by a "scrivener/editor" and was not approved by the convention. As a result, the Attorney General has arrived at the conclusion that the word "political" was intended—and, therefore, should be read by us—to modify both "trust" and "employment." Consequently, in our opinion, only "political . . . employment . . . under the . . . Laws of this State" is prohibited by this portion of Article 33.\textsc{65 Op. Md. ATT'Y GEN. 285, 288-90 (May 8, 1980).}

Professor Niles placed this provision in Class D (concrete, peculiar rules). \textsc{Niles, supra note 135, at 52-53. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.}

There was some discussion of the form that an impeachment proceeding should take in the General Assembly, and an amendment proposed to clarify the procedure, but it was defeated. \textsc{1 Debates of the Constitutional Convention of the State of Maryland, supra note 121, at 362-64, 367-68.}

The committee report used "ought to" here, as did the 1776 provision. A floor amendment changed it to "shall" to make it "expressly prohibitory." \textsc{1 Debates and Proceedings of the Maryland Reform Convention...
TO REVISE THE STATE CONSTITUTION, supra note 52, at 201. It leaves one to wonder why a similar change was not made throughout the entire Declaration of Rights.

Delegate James L. Ridgeley of Baltimore County proposed the amendment to add the phrase "or political trust or employment of any kind whatever." Id. at 201. It was amended again, id., and then the debates show that it was defeated. Id. at 204. An erratum, id. at 260, makes it clear that the language was adopted.

A provision to prohibit judges from sitting in constitutional conventions required much debate, but was defeated. Id. 1 suspect that this was a lightly veiled attack on Delegate (and Circuit Court Judge) Ezekiel F. Chambers of Kent County, the leader of the anti-reformers in the convention.

Fletcher Green equates this provision with Maryland's separation of powers. GREEN, supra note 39, at 82. These amendments ("and the said chancellor and judges shall be removed for misbehaviour, on conviction in a court of law, and may be removed by the governor upon address of the general assembly" and "provided that two-thirds of all the members of each house concur in such address") were added on November 1, 1776. PROCEEDINGS, supra note 29, at 304-05; see also THE DECISIVE BLOW, supra note 40 (November 1, 1776).

A proposal to replace this clause with "that a liberal salary ought to be secured to the chancellor during his continuance in office, and that the judges be paid per diem for their services during their term of sitting" was rejected on November 1, 1776. Id.

One possible source for this provision is the English Act of Settlement, 12 & 13 Will. 3 c.1 (1700). Act of Settlement (1700), reprinted in 10 HALSBURY'S STATUTES, supra note 436, at 40; see also HOWARD, supra note 254, at 210 (noting value of independent judiciary as recognized by English Act of Settlement).


The proposed 1967-68 Constitution would have deleted this principle and replaced it with Section 4.02, a provision that merely limited terms: "... [i]no person elected governor for two full consecutive terms shall be eligible to hold that office again until one full term has intervened." COMPARISON OF PRESENT CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 7. The proposed constitution was rejected by voters.

This provision is effectuated by the provision of the constitution limiting the consecutive terms of office for the governor. See Md. Const. art. II, § 1 (prohibiting governor who has served two consecutive terms from succeeding himself or herself again after second term).

The wording of this provision is unique among state constitutions, but the concept is not. Many state constitutions limit the number of times a person is eligible for the office of governor. See Ala. Const. art. V, § 116; Alaska Const. art. III, § 5; Del. Const. art. III, § 5; Fla. Const. art. IV, § 5, cl. 6; Ga. Const. art. V, § 1, para. 1; Ind. Const. art. V, § 1; Ky. Const., § 71; La. Const. art. IV, § 5, cl. 8; Me. Const. art. I, § 2; Miss. Const. art. V, § 116; Mo. Const. art. IV, § 17; N.J. Const. art. V, § 1, § 5; N.M. Const. art. V, § 1; N.C. Const. art. III, § 2; Ohio Const. art. III, § 2, art. XVIII, § 2; Okla. Const. art. VI, § 4; Or. Const. art. V, § 1; Pa. Const. art. IV, § 3; S.C. Const. art. IV, § 2; Tenn. Const. art. III, § 4; Va. Const. art. V, § 69; Va. Va. Const. art. VII, § 4.

Professor Niles placed this provision in Class A (abstract principles). NILES, supra note 133, at 53. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

There was no recorded debate prior to re-adoption of this Article. PERLMAN, supra note 91, at 152.

There was no recorded debate about the re-adoption of this provision. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 368.

This provision was re-adopted without recorded debate. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 206.

This provision is part of Maryland's conception of the separation of powers. GREEN, supra note 39, at 82. See supra note 196 for a discussion of separation of powers in Maryland.

Professor Howard suggests that the historical antecedents of the concept of rotation in offices of trust dates to ancient Athens and Rome. HOWARD, supra note 3, at 82-83.

The Pennsylvania Constitution of 1776 provided:

VI. That 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 as they may think proper, to reduce their public officers to a private station, and supply the vacancies by election of such persons as shall be regularly chosen by the people.

PA. Const. of 1776, decl. of rights, art. VI (repealed 1790).

See infra Article 33 of the August 27, 1776, draft. This provision probably was considered redundant and therefore deleted for the September 11, 1776, draft.


Act of Nov. 6, 1990, ch. 61, 1990 Md. Laws 405 (declaring reserves and militia service are not offices of profit).

The proposed 1967-68 Constitution would have replaced this Article with Section 9.03: "[n]o person shall hold at the same time more than one office of profit created by this Constitution or the laws of this State, except as may be prescribed by law. COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 7. The proposed constitution was rejected by voters.

The prohibition on dual office holding also is found in the Maryland Constitution. Md. Const. art. III, §§ 10, 11 (prohibiting holding dual office).


Professor Niles placed this provision in Class D (concrete, peculiar rules). NILES, supra note 135, at 53. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

A floor amendment changed both incidences of "ought" to "shall." PERLMAN, supra note 91, at 152.

The amendment considered and rejected an exception for justices of the peace. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 368-69.

The Committee had proposed changing this to "presents," but the convention returned it to the original "present." Id. at 81, 368.
This provision was re-applied without recorded debate. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 206.

This was originally a separation of powers provision. See GREEN, supra note 39, at 81-82. Today, this likely would be regarded more as a "good government" provision.

This provision is discussed in Horace Mann League v. Board of Public Works, 220 A.2d 51, 60 (Md. 1966).

I theorize that this provision is in fundamental conflict with the decisions of the United States Supreme Court governing death penalty juror qualification. See, e.g., Wainwright v. Witt, 466 U.S. 412 (1986); Witherspoon v. Illinois, 391 U.S. 510 (1968). Put simply, Witherspoon and Wainwright require the dismissal of jurors who are philosophically and steadfastly opposed to the death penalty. Article 36 prohibits dismissing jurors who are "otherwise competent" because of their religious beliefs. Given that the phrase "otherwise competent" was added only so as to permit the General Assembly to prohibit African Americans from serving as jurors, see infra notes 486, 488, it is possible that the rights of a potential juror are infringed if the juror is denied the right to serve on a death penalty jury due to an opposition to the death penalty based on a religious belief or doctrine.

This provision was held to violate the First Amendment to the United States Constitution. Schowgurow v. State, 213 A.2d 475, 480 (Md. 1965).

The proposed 1967-68 Constitution would have replaced Articles 36, 37, and 39 with sections 1.02 and 9.01. COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 230. Article 38 would have been deleted altogether. Id. Section 1.02 would have provided that "[n]o law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof." Id. at 7. Section 9.01 would have provided a single oath for all offices:

[person]person elected or appointed to any office of profit or trust under the Constitution of laws of this State, before he enters upon the duties of such office, shall take and subscribe to the following oath or affirmation, that such office being optional: "(In the presence of Almighty God [name here], do you do solemnly swear that you will support the Constitution of the United States; that you will be faithful and bear true allegiance to the State of Maryland and support the Constitution and laws thereof; and that you, to the best of my skill and judgment, diligently and faithfully, without partiality or prejudice execute the office of [office name here], according to the Constitution and laws of this State."

No other oath or affirmation shall be required. Should any person elected or appointed to an office of profit or trust refuse or neglect to take the oath or affirmation, then such office shall be vacant, and shall be filled as prescribed by this Constitution or by law.

Id. at 8-9. The proposed constitution was rejected by voters.


This was included as a compromise, to allow the legislature to determine the competence of African Americans. See Md. Const. art. III, § 53 (subsequently repealed by Act of Nov. 7, 1978, ch. 681, 1977 Md. Laws 2750).

Professor Niles placed this provision in Class C (analogous limitations). NILES, supra note 135, at 54-55. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

This provision spawned the most discussion of any of the provisions of the Declaration of Rights in 1867. At issue was permitting African Americans the right to testify as witnesses in trials. The Committee on the Declaration of Rights proposed that the last phrase should read "nor shall any person be deemed incompetent as a witness on account of race or color." PERLMAN, supra note 91, at 90. A minority of the Committee objected. Id. at 89-90, 92-93. Eventually a compromise was adopted. Id. at 154-64, 171-72. There was also a side debate about the meaning of the rest of the provision, which one delegate described as "only toleration, not religious liberty." Id. at 153. Concern was expressed to ensure that the legislature maintained the right to pass laws of morality. Id.

The convention body considered and ultimately rejected a proposal to remove from the legislature the right to deem witnesses incompetent based on a lack of religious belief. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 509-71.

The last phrase was not included in the committee draft, but added by floor amendment. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 208-216.

See also Md. CONST. of 1776, art. 37 ("No . . . minister or preacher of the gospel, of any denomination . . . shall have a seat in the [General] Assembly or the [Council of this] State.").


The following passage was added as a result of an amendment offered to Article 34 on November 2, 1776: 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 payment over of the money collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general in any particular county.

PROCEEDINGS, supra note 29, at 307; see also THE DECISIVE BLOW, supra note 40, (November 2, 1776).

Compare this provision with Va. CONST. bill of rights, § 16, which provides:

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.

Id. Also compare this provision with P.S. CONST. decl. of rights, art. II, which provides:

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their consciences and understanding: And that no man ought or of right can be compelled to attend any religious
Maryland's history of broad religious toleration may be traced to George Calvert, the first Lord Baltimore, a convert to Catholicism, whose son Cecil Calvert received the land grant which became Maryland from the Anglican King of England, Charles. BRUGGER, supra note 23, at 3-7. An indirect result was Maryland's Toleration Act (1649), frequently regarded as the first expression of religious toleration in the new world. The Toleration Act, Act of April 25, 1649; for a critical, but realistic review of the Toleration Act, as well as a substantial reprint of the Act itself, see Everstine, supra note 491, at 99-115.

This provision was found to violate the First Amendment to the United States Constitution in TORCASO v. WATKINS, 367 U.S. 488 (1961).
See supra note 483 for sections of the proposed 1967-68 Constitution which would have replaced Articles 36, 37, and 39. The proposed constitution was rejected by voters.


520 Professor Niles placed this provision in Class A (abstract principles). NILES, supra note 125, at 60-61. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

521 This provision was re-adopted without any recorded floor debate. PERLMAN, supra note 91, at 174.

522 An amendment to make the oath more personal was rejected: "That the manner of administering an oath or affirmation to any person, ought to be such as is most in accordance with and most binding upon the conscience of the person to whom such oath or affirmation may be administered." 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 386.

523 See 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 218 (presenting debate after dropping last part of amendment).

524 This language permitted Quakers to testify in criminal cases, other than those for which the death penalty was sought. This was apparently traditional law in England. See 1 HOWARD, supra note 3, at 105 (explaining that the Quakers adopted only some of the English Common Law rules).

525 This Article, as written, originally was proposed from the Convention floor on November 3, 1776, although the concept is carried forward from that embodied in Article 26 of August 27, 1776, draft.

526 This Article was re-adopted without recorded debate. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 218.

527 The text of this Article does not seem to require state action in preventing the speech, a requirement of the Federal Constitution's First Amendment. See G. Alan Tarr, Understanding State Constitutions, 65 Temp. L. Rev. 1169, 1172-73 n.28 (1992) (explaining that forty-four state constitutions provide affirmative right to free speech, rather than merely restraint on state action).

528 This provision was held to be in pari materia with the First Amendment to the United States Constitution. See Sigma Delta Chi v. Speaker, Md. House of Delegates, 310 A.2d 156, 158 (Md. 1973) (citing cases supporting proposition).

529 The 1967-68 Constitutional Convention proposed combining the concepts of Articles 10, 13, and 40, into two new sections, 1.01 and 3.14. COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVEN-


531 Professor Niles placed this provision in Class C (analogous limitations). NILES, supra note 135, at 60-61. See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

532 This provision was re-adopted without any recorded floor debate. PERLMAN, supra note 91, at 174. I have been unable to find any information regarding the change of the final word from "liberty" to "privilege."

533 Scharf describes this change thus, "Article 40 was a blow at the dreaded liberty of the press; to the affirmation of which was added the clause that those using it were "responsible for the abuse of that liberty."" 3 SCHARF, supra note 23, at 584.

534 The Committee would have continued the 1851 Article without amendment. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 386. An amendment to add a free speech right to the first clause was rejected. Id. at 386-87. Later, a new Article was proposed, but eventually that proposed article was engraved onto this provision as the second clause. Id. at 393-400.

535 This Article was re-adopted without recorded debate. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 218.

536 Compare this provision with the Virginia Bill of Rights (1776): "[t]hat the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments." Va. Const. of 1776, bill of rights, § 12, reprinted in 10 SOURCES AND DOCUMENTS, supra note 20, at 50 (1979). Also compare this provision with the Pennsylvania Declaration of Rights (1776): "[t]hat the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." Pa. Const. of 1776, decl. of rights, § 12, reprinted in 8 id. at 279 (1979).

537 The proposed Constitution of 1967-68 would have deleted this provision. COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 9. The proposed constitution was rejected by voters.

538 In Grempel v. Multiple Listing Bureau, the Court of Appeals of Maryland gave a limited interpretation to this provision. Grempel v. Multiple Listing Bureau, 266 A.2d 1, 4 (Md. 1970). This interpretation is far narrower than previous, more expansive interpretations given this provision. See Raney v. County Comm'rs, 183 A. 548, 554 (Md. 1936) (holding statute unconstitutional because it tended to create monopoly prohibited by Article 41).

The proposed Constitution of 1967-68 would have deleted this provision. **Comparison of Present Constitution and Constitution Proposed by Convention, supra note 126, at 9.** The proposed constitution was rejected by voters.


547 This provision was defeated in the committee as a whole, but H. H. Walker Lewis finds it to be a very liberal proposal, particularly because the committee members responsible for drafting the provision were slave owners. Lewis, **supra note 39,** at 46. Lewis’s admiration for this provision probably is misplaced. A prohibition on the importation of slaves creates a scarcity that accrues to the economic advantage of slave owners. See **John R. Alden, A History of the American Revolution 367 (1969).**

548 The proposed Constitution of 1967-68 would have deleted this provision. **Comparison of Present Constitution and Constitution Proposed by Convention, supra note 126, at 9.** The proposed constitution was rejected by voters.

549 Professor Niles placed this provision in Class B (exact duplications). **Niles, supra note 135,** at 63. See supra note 135 for a discussion of Professor Niles’ division of the provisions of the Maryland Declaration of Rights into four categories.

550 This provision was re-adopted without any recorded floor debate. **Perlman, supra note 91,** at 174.

551 There was no recorded debate about the re-adoption of this provision. **1 Debates of the Constitutional Convention of the State of Maryland, supra note 121,** at 387.

552 This Article was re-adopted without recorded debate. **1 Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution, supra note 52,** at 218.

553 Historian Gordon Wood suggests that Articles 39 (prohibiting monopolies) and 40 (prohibiting titles of nobility) of the Maryland Declaration of Rights, 1776, are examples of a whiggish, republican ideology of equality, whereby the colonial aristocracy would be replaced by a system in which people would be distinguished only by individual merit. **Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 72 & n.57 (1993).** Wood identifies legislation prohibiting entail, primogeniture, and monopolies, as well as laws establishing public education as examples of this ideology. **Id.** When examined in light of such ideology, the consecutive placement of these two provisions seems less arbitrary although the placement of Article 41 (the August 27, 1776, draft) is unexplained.

554 This provision was re-adopted without any recorded floor debate. **Perlman, supra note 91,** at 174.

555 Professor Niles placed this provision in Class C (concrete, general, fundamental rules). **Niles, supra note 135,** at 63. See supra note 135 for a discussion of Professor Niles’ division of the provisions of the Maryland Declaration of Rights into four categories.

556 This provision was defeated in the committee as a whole, but H. H. Walker Lewis finds it to be a very liberal proposal, particularly because the committee members responsible for drafting the provision were slave owners. Lewis, **supra note 39,** at 46. Lewis’s admiration for this provision probably is misplaced. A prohibition on the importation of slaves creates a scarcity that accrues to the economic advantage of slave owners. See **John R. Alden, A History of the American Revolution 367 (1969).**

557 Professor Niles placed this provision in Class D (concrete, peculiar rules). **Niles, supra note 135,** at 62-63. See supra note 135 for a discussion of Professor Niles’ division of the provisions of the Maryland Declaration of Rights into four categories.


559 This provision was re-adopted without recorded debate. **1 Debates of the Constitutional Convention of the State of Maryland, supra note 121,** at 387.

560 This Article was re-adopted without recorded debate. **1 Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution, supra note 52,** at 218.

561 See supra note 545 for a discussion of Historian Gordon Wood's suggestions regarding Articles 39 and 40 and each article's relation to whiggish ideology of equality.

562 See supra note 135 for a discussion of Professor Niles' division of the provisions of the Maryland Declaration of Rights into four categories.

563 Professor Niles placed this provision in Class D (concrete, peculiar rules). **Niles, supra note 135,** at 63. See supra note 135 for a discussion of Professor Niles’ division of the provisions of the Maryland Declaration of Rights into four categories.

564 The addition of this clause was proposed by the Committee. **1 Debates of the Constitutional Convention of the State of Maryland, supra note 121,** at 81.

565 There was no recorded debate about the re-adoption of this provision. **Id.** at 387.

566 There was no recorded debate about the re-adoption of this provision. **Id.** at 387.

567 This provision was not proposed by the Committee but by a floor amendment. **1 Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution, supra note 52,** at 222-25.

568 The General Assembly is prohibited by the state constitution from suspending the writ of habeas corpus. **Md. Const. art. III, § 55.**

569 The West Virginia Constitution provides a similar protection. **W.Va. Const. art. I, § 3.**

570 The proposed Constitution of 1967-68 would have replaced this provision with Section 1.17:

[4] The General Assembly by law shall provide for a statewide system of free public schools. The system shall be headed by a governing board whose members shall be appointed by the governor. The General Assembly by law shall provide also for such other public educational institutions and services as may be necessary or desirable for the intellectual, cultural, and occupational development of the people of this State.

571 This provision was re-adopted without any recorded floor debate. **Perlman, supra note 91,** at 174.

572 The addition of this clause was proposed by the Committee. **1 Debates of the Constitutional Convention of the State of Maryland, supra note 121,** at 81.

573 There was no recorded debate about the re-adoption of this provision. **Id.** at 387.

574 This provision was not proposed by the Committee but by a floor amendment. **1 Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution, supra note 52,** at 222-25.

575 The General Assembly is prohibited by the state constitution from suspending the writ of habeas corpus. **Md. Const. art. III, § 55.**

576 The West Virginia Constitution provides a similar protection. **W.Va. Const. art. I, § 3.**

577 The proposed Constitution of 1967-68 would have replaced this provision with Section 1.17: The provisions of this Constitution shall not be suspended, except that the General Assembly by law shall provide for the temporary suspension of specific provisions during an emergency caused by disaster or enemy attack. Any suspension shall be for the period of the emergency only, and only provisions of this Constitution concerning state and local public offices and government operations may be suspended.

**Comparison of Present Constitution and Constitution Proposed by Convention, supra note 126, at 9.** The proposed constitution was rejected by voters.
566 Myers states unequivocally that “[i]t was a direct condemnation of the war policy of President Lincoln.” Myers, supra note 85, at 120. See PERLMAN, supra note 91, at 61, for a nearly identical draft of this Article. There were no further discussions of the provision recorded. Id. at 174.

567 Professor Niles placed this provision in Class A (abstract principles). NILES, supra note 135, at 64. See supra note 135 for a discussion of Professor Niles’ division of the provisions of the Maryland Declaration of Rights into four categories.

568 Judge W. Mitchell Digges of the Court of Appeals of Maryland took an expansive view of the application of this provision. In Kent v. Huntingdon Building Ass’n, 170 A. 526 (Md. 1934), a party argued that the onset of the economic depression of 1929 made enforcement of a pre-existing contract inequitable. Id. Judge Digges concurred in the decision to hold the parties bound to their contractual obligation. He wrote separately, in part to base his opinion on Article 44 of the Declaration of Rights, stating, “it is our duty to protect and enforce every clearly defined legal right, and this without regard to the presence of real or fancied emergencies.” Id. at 529 (Digges, J., concurring). In this manner, Judge Digges suggested that this provision was not limited to issues of war and peace, but also to other crises.

569 The proposed 1967-68 Constitution, Section 1.18, would have substituted a slightly different construction of this right: “The enumeration of rights in this Constitution shall not be construed to impair, disapper, or deny others retained by the people.” COMPARISON OF PRESENT CONSTITUTION AND CONSTITUTION PROPOSED BY CONVENTION, supra note 126, at 9. The proposed constitution was rejected by voters.

570 Professor Niles placed this provision in Class C (analogous limitations). See NILES, supra note 135, at 64-65. See supra note 135 for a discussion of Professor Niles’ division of the provisions of the Maryland Declaration of Rights into four categories.

571 This provision was re-adopted without any recorded floor debate. PERLMAN, supra note 91, at 174.

572 There was no recorded debate at the re-adoption of this provision. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 387.

573 It is unclear what construction should be given to this provision. Maryland courts have never construed the provision. It is similar, but not identical linguistically, to the Ninth Amendment to the United States Constitution. The Ninth Amendment, however, serves to remind that the federal government is limited to those powers granted to it by the United States Constitution. By contrast, the Maryland Constitution is a document containing power that is otherwise plenary. It is therefore unclear what the function of this provision is in the Maryland Declaration of Rights. See generally Note, Unenumerated Rights Clauses in State Constitutions, 63 Ten. L. Rev. 1321 (1985).

574 Brought by floor amendment and adopted by the convention. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 725-26.

575 The Committee on the Declaration of Rights proposed continuing the language from the 1851 Constitution. 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND, supra note 121, at 81. Delegates believed that the provisions of Articles 1 and 44 of the 1851 Constitution were contradictory in that Article 1 declared the right of the people to change their government at will, while this Article limited the right. Id. at 143-46. In the end the question of the right of the people to amend or replace the constitution was deleted from this provision, leaving that question to Article 2. This Article then was modified to become a check on the power of the legislature. Id. at 387-91.

576 The provisions governing amendments to the Maryland Constitution now are contained at Md. Const. art. XIV.

577 Adopted as Article 41. This Article was re-adopted without debate. 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION, supra note 52, at 219.

578 This provision explicitly made the constitution supreme to legislative law. Although this concept is apparent today, it was an issue of disagreement in the colonial period. GREEN, supra note 39, at 51-52. Thomas Jefferson’s critique of the Virginia Constitution of 1776 specifically criticizes that document because it was subject to amendment by the legislature. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 121-25 (William Peden ed., 1955).


580 States have adopted various standards for the review of classifications under their respective “little ERAs.” Utah, Virginia, and Louisiana have adopted the least restrictive rational basis test. The Maryland Equal Rights Amendment: Eight Years of Application, 9 U. Balt. L. Rev. 342, 349 (1980). That interpretation leaves less protection under a state “little ERA” than exists under the Equal Protection Clause of the Federal Constitution. U.S. Const. amend. XIV; Craig v. Boren, 429 U.S. 190 (1976) (adopting intermediate scrutiny for gender discrimination, thus rendering state constitutional provision nugatory). A majority of states has adopted “strict judicial scrutiny” as the standard of review. The Maryland Equal Rights Amendment: Eight Years of Application, supra, at 350. This test is the same as that applied by the federal courts in cases of racial discrimination. Finally, the courts of Pennsylvania and Washington have adopted a third standard, the absolute standard. This standard is “based on a perception that even [the strict scrutiny] standard permits too much discretion and might allow some classifications to survive.” Note, Burning Tree Club, Inc. v. Bainum—State Action, Strict Scrutiny, and the “New Judicial Federalism,” 47 Md. L. Rev. 1219, 1231 (1988).

581 Prior to its first ERA case, the Court of Appeals suggested in Maryland State Board of Barber Examiners v. Kahn, 312 A.2d 216, 222 (Md. 1973), that the strict scrutiny standard would be applied. When the first case arrived, however, the Court of Appeals adopted an absolute standard. Rand v. Rand, 374 A.2d 900, 905 (Md. 1977). That standard was short-lived. Burning Tree v. Bainum, 501 A.2d 817, 822 (Md. 1985) (“Burning Tree I”) (plurality decision) (indicating that strict scrutiny should be applied); see also Note, Burning Tree Club, Inc. v. Bainum, State Action, Strict Scrutiny, and the “New Judicial Federalism”, supra, at 1221. The strict scrutiny standard then was adopted, if obliquely, by the Court of Appeals. State v. Burning Tree, 554 A.2d 366 (1989) (“Burning Tree II”). The adoption of this standard was clarified in subsequent cases. See Tyler v. State, 623 A.2d 648, 651 (Md. 1993) (holding that under Article 46, sex, like race, is suspect classification subject to strict scrutiny analysis); Murphy v. Edmonds, 601 A.2d 102, 109 n.7 (Md. 1992) (applying strict scrutiny analysis); Briscoe v. Prince George’s County Health Dept’, 593 A.2d 1135, 1137 (Md. 1991) (holding gender based classifications subject to strict scrutiny).

582 Act of Nov. 8, 1994, 1994 Md. Laws 1195-96 (proposing addition of victim's rights article to Declaration of Rights).

583 The first judicial interpretation of this provision came in Cianos v. State, 659 A. 2d 291 (Md. 1995).