

The Sense of the People

PAPERS FROM A CONFERENCE ON
THE MARYLAND CONSTITUTION

OCTOBER 7, 1989



SALISBURY STATE UNIVERSITY

The Continued Importance of the Maryland Declaration of Rights

William L. Reynolds

Professor of Law, University of Maryland School of Law

The Declaration of Rights has been part of the Constitution of Maryland since our first constitution was adopted in 1778. For the great majority of that period, the majestic provisions found in that document served as the only available protection for citizens of this State against official abuse of power by their government.

The revolution in federal constitutional law over the past three decades has changed that. Today, the provisions of the Bill of Rights of the Constitution of the United States apply to both state and federal governments.¹ The Due Process Clause of the Fourteenth Amendment also has proven to be a fertile source for protecting individual rights, such as the right to privacy, against state interference.² Those federal protections, backed by a full panoply of enforcement agencies³ and federal statutes⁴, are so effective that the need to have and study a state Bill of Rights no longer is obvious. Nevertheless, I propose in this essay to show that our Declaration of Rights retains vitality and should be studied and thought about today for at least three reasons.⁵ It teaches us important lessons about our history; it guarantees rights which may not otherwise be protected; and it may be amended to identify and protect new rights in the future.

The Lessons of History

The Declaration of Rights was adopted in 1776, as our nation was beginning its rebellion against the arbitrariness and despotism of the British government.⁶ Its provisions—the rights it identifies—would be important, even if rendered superfluous by the Federal Constitution, because they remind us of what the Revolutionary generation thought we needed to be protected against. No one who reads that list of rights can avoid thinking about how governmental power can be abused and how those abuses can be prevented.⁷

This notion is captured at the very beginning of the Declaration. Article 1 tells us that “all Government of right originates from the People, is founded in compact only, and instituted solely for the good of the whole . . .” Maryland, it is made clear, is not England where sovereignty was shared with the King. Rather, the People alone are sovereign,

and, as a corollary, they have “the inalienable right” to change their government “as they may deem expedient.” There would be no Divine Right of Kings here.

Article 6 provides another example of the framers’ concern with authority. That Article proclaims that “all persons invested with Legislative or Executive powers of Government are Trustees of the Public” Now, this is not a statement that is enforceable in any practical sense. Yet, it conveys the need to hold accountable those entrusted with power, a need that the colonists found so unsatisfied in British rule. Article 6 also reminds us where enforcement ultimately lies—like sovereignty, it rests with the People:

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

Revolution should be a last resort, we are told, but revolution then becomes a duty for, as Article 6 concludes, “the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish and destructive of the good and happiness of mankind.”

One other example shall have to suffice. Article 8 provides that “the Legislative, Executive and Judicial Powers of Government ought to be forever separate and distinct from each other” That provision, written in 1776 at the start of a civil war, has no counterpart in the Federal Constitution, written a decade later, after the Revolution. Those assembled in Philadelphia in 1787 were keenly aware of, and sympathetic to, the principle of separation of powers, but the doctrine is only implicit in the document they produced. The framers of the Declaration of Rights, with a war still to be fought, felt the need to be more explicit about the dangers of concentrating authority.⁸

The Federal Constitution Does Not Protect Everything

The Declaration of Rights may also protect rights which the Federal Constitution does not. A very recent example is *Choi v. State*.⁹ The Court there was

presented with the question of whether a witness had waived her privilege against compelled self-incrimination, by making an earlier statement to the police. The Court, after discussing the case law under the Fifth Amendment, found that even if the witness had waived her privilege under federal law, "she certainly did not waive her privilege . . . under Art. 22 of the Maryland Declaration of Rights."¹⁰ The privilege, in other words, can be asserted at "any stage of the inquiry."

All too often, unfortunately, counsel (and the courts) ignore state constitutional law in favor of federal laws, even when the state provisions might apply. This is both shortsighted and wrong. It is short-sighted because state law may provide an answer not found under federal law; it is wrong because it ignores a basic judicial responsibility: "(A) state court should always consider its state constitution before the Federal Constitution. It owes its state the respect to consider the state constitutional question even when counsel does not raise it, which is most of the time."¹¹

It is not enough, however, merely to raise a state constitutional question. The *meaning* of the state constitution also must be determined. Instead of a rote recitation, seen all too often in opinions, that the state and federal constitutional provisions are *in pari materia*, the language and history of the state constitutional clauses must be examined to determine whether their meaning does, indeed, differ from that of their federal counterparts.

A glance through the Declaration of Rights reveals a number of fruitful candidates for that analysis. Article 40 states that "the liberty of the press ought to be inviolably preserved, that every citizen in the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege." That language resembles that of the First Amendment, but it certainly does not duplicate it.¹² Are the semantic differences real differences? Only a careful analysis of the history of Article 40 can reveal that. But certainly, unless that analysis is undertaken, one cannot say that Article 40 and the First Amendment should be construed *in pari materia*.¹³

Finally, there are some provisions which might guarantee rights which would come as a surprise to those involved. Article 41, for example, states: "That monopolies are odious, contrary to the spirit of the free government and the principles of commerce, and ought to to be suffered." Although this provision has been little used, it reflects a belief, strongly held at common law, that state-granted monopolies should not exist.¹⁴ Judge Niles wrote in his treatise that if the monopoly the state had granted to the

butchers of New Orleans that was in issue in the famous *Slaughter House Cases*¹⁵ were to be tested under Article 41, the butchers' monopoly would be found unconstitutional under the Declaration.¹⁶ A good attorney should be aware that possibilities like this reside in the glorious provisions of the Declaration of Rights.¹⁷

A New Meaning

The importance of the Declaration of Rights, however, does not rest solely with what it has meant, or even with what it means today. Its importance also inheres in what it can *become*. If the people of Maryland wish it, the Declaration of Rights can be amended to guarantee their protection from intrusion by the State.¹⁸ A decade and a half ago, for example, the Declaration of Rights was amended by the adoption of the Equal Rights Amendment.¹⁹

Of course, an amendment could be controversial. Consider *Roe v. Wade*²⁰, which held that women have a right to abort a fetus within the first two trimesters of pregnancy. If the Supreme Court were to hold, as seems plausible at this writing,²¹ that a state may protect the fetus (but is not required to) by forbidding an abortion, the Maryland Declaration of Rights could be amended—if the electorate deems it wise—to provide an express identification and guarantee of the right to have an abortion.²² Conversely, the electorate—if it deemed it wise—could amend the Declaration to forbid abortions.²³

Abortion, of course, is a controversial example. Less controversial opportunities for additions to the Declaration of Rights can be found easily. Environmental protection leaps readily to mind. The immense and fragile resource that is the Chesapeake Bay certainly could be placed under a special category of constitutional protection, perhaps one similar to the "forever Wild" provision of the New York Constitution which protects the Adirondack Park.²⁴

Conclusion

The Declaration of Rights of Maryland teaches us about the past; it helps protect us in the present; and it may extend more protection in the future. Two centuries ago, our ancestors realized the need to protect the individual from the power of the State. May we never forget that need.

The Continued Importance of the Maryland Declaration of Rights

Notes

¹ There are some minor exceptions to this statement (e.g., the Seventh Amendment's guarantee of jury trials in cases involving \$20 or more has not been held applicable to the states).

² E.g., *Griswold v. Connecticut*, 381 U.S. 479 (1964).

³ E.g., the Department of Justice and the Equal Employment Opportunity Commission.

⁴ E.g., 42 U.S.C. Section 1983.

⁵ There has been a renaissance of interest in State constitutions in recent years. See, e.g., Brennan, "State Constitutions and the Protection of Individual Rights", 90 *Harvard Law Review*, 489 (1977); "Developments in the Law—The Interpretation of State Constitutional Rights, 95 *Harvard Law Review* 1324 (1982).

⁶ The Constitutional Convention met in the late Summer of 1776.

⁷ See generally A. Niles, *Maryland Constitutional Law* 12-14 (1915). Judge Niles' book divides the Declaration of Rights into four classes: A) "Declarations of abstract principles"; B) "Exact duplications of provisions found in the Federal Constitution"; "Limitations on the power of the State similar to those prescribed in the (Federal) Constitution."; and D) "Concrete rules peculiar to Maryland." Article 6 is an example of a "Class A" provision. *Id.* at 18. See also Rees, "State Constitutional Law for Maryland Lawyers: Individual Civil Rights", 7 *University of Baltimore Law Review*, 299 (1978)

⁸ See M. Vile, *Constitutionalism and the Separation of Powers* 131-34 (1967).

⁹ 316 Md. 529 (1989).

¹⁰ *Id.* at 545. The Court relied on *Chesapeake Club v. State*, 63 Md. 446 (1885), a case decided long before the Fifth Amendment was applied to the states.

¹¹ Linde, "First Things First: Rediscovering the States' Bills of Rights", 9 *University of Baltimore Law Review* 379, 383 (1980). The author, a Justice of the Oregon Supreme Court, gives a number of examples where wise counsel sought relief based on the state rather than federal constitution.

¹² The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

¹³ *Hearst Corp. v. Hughes*, 297 Md. 112, 466 A.2d 486 (1983) provides an example.

¹⁴ The common law believed in this strongly. See, e.g., *Case of Monopolies*, 77 Eng. Rep. 1260 (K.B. 1602).

¹⁵ 83 U.S. (16 Wall.) 36 (1873).

¹⁶ A. Niles, *supra* note 8, at 63. Judge Niles added that "there can be no doubt" of that result.

¹⁷ This can also work in reverse; a provision of the Declaration might no longer satisfy the Federal Constitution. Thus, the statement in Article 36 that "it is the duty of every man to worship God in such manner as he thinks most acceptable to Him . . .," surely offends the Establishment Clause of the First Amendment. See Rees, *supra* note 8, at 304-05.

¹⁸ Sturm, "The Development of American State Constitution," 12 *Publius* 57 (1982), for a discussion of recent trends in state constitutional lawmaking.

¹⁹ Maryland Declaration of Rights, Article 46.

²⁰ 410 U.S. 113 (1973).

²¹ See *Webster v. Reproductive Health Services*, 106 L.Ed.2d 410 (1989).

²² This formulation finesses the question of whether that right can be found under existing provisions of our State Constitution, such as the Equal Rights Amendment.

²³ Obviously, any state amendment would have to conform with the holdings in the Supreme Court. Also obviously, an amendment could take a position between the polar extremes.

²⁴ N.Y. Const. Art. 14, Section 1.