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## The Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris

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# The Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris†

by Vincent Robert Johnson\*

I. FRAGMENTS OF HISTORY .....	2
II. THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS .....	6
A. <i>Similarity to the American Constitution and Bill of         Rights</i> .....	6
B. <i>American Antecedents and Influences</i> .....	8
III. IMPLEMENTATION OF THE DECLARATION'S GUARANTEES	14
A. <i>Departure From the American Example</i> .....	14
B. <i>Redress in the French Courts</i> .....	17
C. <i>The Reign of Terror and the Revolutionary Tribunal of         Paris</i> .....	19
D. <i>Interference with Judicial Duties and Prosecutorial         Discretion</i> .....	22
E. <i>The Decline of Procedural Protection of the Accused</i> .....	24
F. <i>Freedom of Expression and the Law of Suspects</i> .....	28
IV. CONCLUSION: THE LEGACY OF 1789 .....	30
APPENDIX: THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS, WITH ANNOTATIONS TO THE EARLY AMERICAN STATE CONSTITUTIONS .....	35

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## I. FRAGMENTS OF HISTORY

The political and intellectual relationship of the French and American peoples during the late eighteenth century has been described by one writer as ranking among the "great international flirtations of history."<sup>1</sup> But as much as that is the case,<sup>2</sup> it is also true that like the passions of many an erstwhile beau, America's memory of the affair has faded. If asked about the French Revolution—an event which in its time was of such awesome magnitude as to command not only American attention,<sup>3</sup> but to force much of Europe to choose sides<sup>4</sup>—it is likely that most American lawyers could today recall only a few fragmentary facts.

<sup>1</sup> Bruun, *The Constitutional Cult in the Early Nineteenth Century*, in *THE CONSTITUTION RECONSIDERED* 261 (C. Read ed. 1938).

<sup>2</sup> According to Lord Acton, "Nothing is more certain than that American principles profoundly influenced France and determined the course of the [French] revolution . . ." Ault, *The American Constitution and the Liberal Movement in America, England, and France*, in *THE BACON LECTURES ON THE CONSTITUTION OF THE UNITED STATES* 293 (1939). See generally J. MOORE, *THE ROOTS OF FRENCH REPUBLICANISM* 64–113 (1934) (discussing the influence of American republicanism on French thought).

<sup>3</sup> See L. KAPLAN, *JEFFERSON AND FRANCE: AN ESSAY ON POLITICS AND POLITICAL IDEAS* 40 (1967) ("The Revolution . . . captured the imagination of the American people in 1790 and 1791 as it became identified for them with America's own glorious days of a few years back."), 41 (the principal issue was the "flaming comet of the French Revolution"), 55 (crowds cheered Citizen Genet as he traveled from Charlestown to Philadelphia in 1793, and express[ed] . . . appreciation [for] France's gallant fight for the common cause of liberty); L. GERSHOY, *THE ERA OF THE FRENCH REVOLUTION 1789–1799: TEN YEARS THAT SHOOK THE WORLD* 49 (1957) [hereinafter *TEN YEARS*] ("News of the upheaval in France spread to the outside world, crossing the mountains and the rivers of the European continent, leaping across the Channel, spanning the broad Atlantic"), 54 (in America, there was at first almost universal enthusiasm; "Debates on the issues at home blended with the defense or condemnation of the revolution abroad"); D. MALONE, *JEFFERSON AND THE RIGHTS OF MAN* 404 (1951) (listing prominent American supporters and opponents of the first French Constitution).

<sup>4</sup> France declared war against a number of nations which rose to the defense of the embattled French monarchy. See generally J. BOSHER, *THE FRENCH REVOLUTION* 159–68 (1988) (discussing war with Austria), 183 (discussing war with Great Britain, the Dutch Republic, and Spain); see also *TEN YEARS*, *supra* note 3, at 50 ("from Holland to northern Italy, the news was heatedly received and vigorously discussed"), ("German intellectuals . . . exulted over the first news from Paris"), 51–53 ("Englishmen hailed the destruction of the Bastille," but "Edmund Burke soon sounded the conservative alarm . . . [in his] *Reflections on the Revolution in France*," and later "[p]atriotic mobs attacked the dangerous admirers of the French"); J. BOSHER, *supra* at 183 (execution of the king "stirred up deep hostility abroad"); cf. Berman, *Law and Belief in Three Revolutions*, 18 *VAL. U.L. REV.* 569, 615 (1984) ("there was the constant threat that the royalists would regain power, backed by . . . various foreign powers"). But see *TEN YEARS*, *supra* note 3, at 49 ("backwardness kept the news out of northern, southern, and eastern Europe").

Attorneys might dimly remember, perhaps, that the revolution in France occurred shortly after the one in America;<sup>5</sup> that it was marred by extreme violence;<sup>6</sup> and that despite important French support for the earlier American struggle with Britain,<sup>7</sup> the United States remained largely neutral as French revolutionaries battled the monarchies of Europe at home and abroad.<sup>8</sup> A few might even recall, from the deep recesses of memory, a charter impressively titled *The Declaration of the Rights of Man and of Citizens (Declaration of Rights)*.<sup>9</sup> But only the rare American lawyer would be able to say anything of its content, not to mention its role in galvanizing opinion on both sides of the Atlantic.

This is not surprising. Persons ranging from Justice John Paul Stevens<sup>10</sup> to Professor Ailan Bloom<sup>11</sup> remind us that knowledge

<sup>5</sup> Lord Cornwallis surrendered at Yorktown on October 19, 1781, and the Treaty of Paris between the United States and England was signed on September 3, 1783. R. HOFSTADTER, W. MILLER, AND D. AARON, *THE UNITED STATES: THE HISTORY OF A REPUBLIC* 109 (1957). The French Revolution commenced in mid-1789, with the revolt of Paris. See A. MATHIEZ, *THE FRENCH REVOLUTION* 40 (C. Phillips trans. 1922).

<sup>6</sup> See generally C. MOFFETT, *THE REIGN OF TERROR IN THE FRENCH REVOLUTION* (1962).

<sup>7</sup> See, e.g., R. CLARK, *BENJAMIN FRANKLIN: A BIOGRAPHY* 8 (desperately needed arms), 313 (1983) (reference to "program of aid"); J. MOORE, *supra* note 2, at 70-71 (secret grants of money followed by official recognition of the independence of the United States); C. VAN DOREN, *BENJAMIN FRANKLIN* 593-95 (discussing treaty of alliance and commerce), 578-79 (discussing assistance from Lafayette) (1938).

<sup>8</sup> See generally P. GAXOTTE, *THE FRENCH REVOLUTION* 173-204 (W. Phillips trans. 1932) (discussing war and monarchs); A. MATHIEZ, *supra* note 5, at 133-62, 275-88 (discussing the overthrow of the French monarchy and war with foreign nations); cf. I. KAPLAN, *supra* note 3, at 57.

<sup>9</sup> *DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS*, in T. PAINE, *THE RIGHTS OF MAN* 94-97 (1951) [hereinafter *DECLARATION OF MAN*]. See generally G. JELLINEK, *THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS* (M. Farrand trans. 1979).

<sup>10</sup> Justice Stevens recently suggested that although "law and economics" and "law and literature" are currently fashionable topics in interdisciplinary legal studies, there is a need for greater attention to the relationship between law and history. See Address by Justice J.P. Stevens, Thomas E. Fairchild Inaugural Lecture at the University of Wisconsin (Sept. 9, 1988) (available from the Public Information Office of the Supreme Court of the United States) [hereinafter *Fairchild Lecture*]. In criticizing the incomplete use of history in the majority opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the "nativity scene case," Justice Stevens stated:

A judge's use of history must involve more than a search for isolated items of information. A historical inquiry has both a horizontal and a vertical dimension.

The isolated fact must be studied in its contemporary setting, as well as in relation to what may have preceded or followed. For history, like the law and life itself, involves a process of change, of growth, and of improvement.

Fairchild Lecture, *supra* at 20 (footnote omitted).

<sup>11</sup> A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987). In his recent best seller, Professor Bloom wrote:

of history—our own or that of others—is not an American strength, and the charge distressingly rings true. But even aside from this it is a matter of jurisprudential fact that the legal paths of the two nations have measurably diverged during the intervening two centuries. In the pursuit of social order and justice, the precedent-based American common law tradition has differed in important respects from the codified civil law tradition of France.<sup>12</sup> Like our language, our legal system, since its earliest days, has developed chiefly from the British side of the Channel.<sup>13</sup> This lineage has influenced many aspects of our legal culture, including our perception of which major documents we may legitimately claim as juridical ancestors—or at least acknowledge as respectable relatives. More than a little telling is the fact that while the opinions of the United States Supreme Court frequently venerate the English Magna Carta, the Declaration of Rights has never been cited in the U.S. Reports, not even for comparative purposes.<sup>14</sup>

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[T]he unity, grandeur and attendant folklore of the founding heritage was attacked from so many directions in the last half-century that it gradually disappeared from daily life and textbooks . . . .

. . . . Students now arrive at the university ignorant and cynical about our political heritage, lacking the wherewithal to be either inspired by it or seriously critical of it.

. . . . [N]obody believes that the old books do, or even could, contain the truth.  
*Id.* at 55–58.

<sup>12</sup> See generally M. GLENDON, M. GORDON, AND C. OSARWE, *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS AND CASES ON THE CIVIL LAW, COMMON LAW, AND SOCIALIST LAW TRADITIONS WITH SPECIAL REFERENCE TO FRENCH, WEST GERMAN, ENGLISH, AND SOVIET LAW* 68, 73, 152–54, 589–92, 598–608 (1985) [hereinafter *COMPARATIVE LEGAL TRADITIONS*] (discussing differences in the role of the judiciary, review of legislation for constitutionality, the structure of the legal profession, treatment of precedent, and patterns of legal reasoning).

<sup>13</sup> See L. WRIGHT, *MAGNA CARTA AND THE TRADITION OF LIBERTY* 5 (1976) (a preface by former Chief Justice Burger states, “[t]he Due Process concept embraced in our Constitution traces directly back nearly 600 years to Runnymede.”), 9 (“The colonists looked back to a legacy from Magna Carta as their basic inheritance of freedom and justice . . . . Always there was recourse to the authority of Magna Carta . . . .”).

<sup>14</sup> A search on WESTLAW in September, 1988, revealed that while the United States Supreme Court has never cited the Declaration of Rights of Man, the Magna Carta has grown in popularity. Although the latter was cited only four times between 1790 and 1944, it has been referred to by the Court on forty-three occasions since 1945. Similarly, while the Magna Carta has been cited hundreds of times by state and lower federal courts, the Declaration of Rights has been mentioned on only a handful of occasions.

As part of the celebration of our first 200 years as a nation, the American Revolution Bicentennial Administration published a book commemorating the “Magna Carta and the Tradition of Liberty.” See *supra* note 13.

Recently, Americans have been engaged in an effort to properly commemorate the bicentennial of the U.S. Constitution (1787) and Bill of Rights (1791).<sup>15</sup> If one is serious about that endeavor, it may be profitable to focus on the other bicentennial being celebrated this year in France. The early days of the French and American republics were intertwined, and it would be erroneous to think that the developments which then took place in the two countries can now fully be understood in isolation. The tale of the role of the French courts during the Reign of Terror which occurred shortly after the enactment of the Declaration of Rights holds important lessons for those who are concerned with the implementation of American constitutional provisions declaring basic civil rights.

A fertile topic for scholars,<sup>16</sup> much of the literature on the French Revolution is so entangled with the intricacies of French and Continental politics, or freighted with the baggage of ideological perspective, as to render it all but inaccessible to the interested nonspecialist. The reader, unable to confidently differentiate the Montagnards, the Girondins, the Hebertists, and the *sans-coulottes*, or Danton, Marat, Robespierre, and Brissot,<sup>17</sup> stands

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<sup>15</sup> The Constitutional Convention approved the proposed Constitution on September 17, 1787. Scudiere, "In Order to Form a More Perfect Union": *The United States, 1774-1791*, in *THE CONSTITUTION AND THE STATES: THE ROLE OF THE ORIGINAL THIRTEEN IN THE FRAMING AND ADOPTION OF THE FEDERAL CONSTITUTION*, 13 (P. Conley & J. Kaminski eds. 1988). The first ten amendments were proposed in 1789 and added to the Constitution on December 15, 1791, when the eleventh state, Virginia, ratified the Bill of Rights. *Id.* at 20.

<sup>16</sup> J. BOSHER, *supra* note 4; BRUUN, *supra* note 1; P. GAXOTTE, *supra* note 8; A. MATHIEZ, *supra* note 5; C. MOFFETT, *supra* note 6; and TEN YEARS, *supra* note 3. See generally G. ANDREWS, *THE CONSTITUTION IN THE EARLY FRENCH REVOLUTION* (B. Schmitt ed. 1972); H. BELLOC, *THE FRENCH REVOLUTION* (1911); C. BRINTON, *A DECADE OF REVOLUTION, 1789-1799* (1934); L. GERSHOY, *THE FRENCH REVOLUTION 1789-1799* (1932); C. HAZEN, *THE FRENCH REVOLUTION* (1932) (two volumes); D. JOHNSON, *THE FRENCH REVOLUTION* (1970); A. LOOMIS, *PARIS IN THE TERROR* (1964); R. PALMER, *TWELVE WHO RULED: THE COMMITTEE OF PUBLIC SAFETY DURING THE TERROR* (1941); M. SLAVIN, *THE FRENCH REVOLUTION IN MINIATURE: SECTION DROITS-DE-L'HOMME, 1789-1795* (1984); R. SOBEL, *THE FRENCH REVOLUTION: A CONCISE HISTORY AND INTERPRETATION* (1967); J. BRISSAUD, *History of French Public Law, in THE CONSTITUTION RECONSIDERED* (C. Read ed. 1938); Godfrey, *Revolutionary Justice: A Study of the Organization, Personnel, and Procedure of the Paris Tribunal 1793-95*, in 33 *THE JAMES SPRUNT STUDIES IN HISTORY AND POLITICAL SCIENCE* (A. Newsome, W. Pierson, M. Garrett, F. Green, K. Fraser eds. 1951); see also Ault, *supra* note 2.

Annotated bibliographies of literature on the French Revolution are set forth in J. BOSHER, *supra* note 4, at 292-95; C. MOFFETT, *supra* note 6, at 186-89.

<sup>17</sup> A comprehensive "Who's Who in the French Revolution" is provided in J. BOSHER, *supra* note 4, at xxiii-lxi.

little chance of grasping other than the most obvious aspects of the dramatic legal transformations which took place under the succession of short-lived constitutions adopted by the French.<sup>18</sup> Much of the story of the French court system during the revolutionary era can be found only in fragmentary references scattered throughout diverse sources.

This article will consider a number of the legal aspects of the French Revolution especially relevant to the American experience. Among these are the terms of the Declaration of Rights; the American contributions toward its enactment; the failure of the French to enforce the Declaration's guarantees through an independent judiciary; and the abuses of legal procedure and governmental power which occurred during the Reign of Terror.

## II. THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS

### A. *Similarity to the American Constitution and Bill of Rights*

Drafted and enacted in the early days of the French Revolution,<sup>19</sup> within weeks of the fall of the Bastille,<sup>20</sup> the Declaration of Rights is a document which, then and now, most Americans could easily understand and probably embrace. In terms strikingly similar to those found in the U.S. Constitution and its amendments, the Declaration of Rights defines the rights of individuals vis-a-vis the state.<sup>21</sup> Addressing such fundamental concerns as free expression, rights of the accused, due process, and state taking of private property, it delineates for individuals a generous range of personal rights and freedoms.

<sup>18</sup> Ten different constitutions were adopted by the French between 1789 and 1815. Berman, *supra* note 4, at 615; see also J. BRISSAUD, A HISTORY OF FRENCH PUBLIC LAW 545 (1915) [hereinafter FRENCH PUBLIC LAW] (four constitutions between 1791 and 1800).

<sup>19</sup> The enactment of a bill of rights was proposed to the French National Assembly by the Marquis de Lafayette on July 11, 1789. See G. ANDREWS, *supra* note 16, at 13; G. JELLINEK, *supra* note 9, at 14. Following the appointment of a committee to consider various drafts, and discussions in the Assembly, the Declaration of the Rights of Man and of Citizens (Declaration of Rights) was passed on August 26, 1789. See G. ANDREWS, *supra* note 16, 19-20; G. JELLINEK, *supra* note 9, at 1. Interestingly, Boshier notes that, "[i]n the many preliminary drafts and debates this Assembly of 'country attorneys and obscure curates,' as Burke called them, indulged in so much repetition of their own abstractions that they bored each other and began to stay away from the sessions." J. BOSHER, *supra* note 4, at 137. The Declaration of Rights was approved by the King during the month following its passage. *Id.*

<sup>20</sup> The Bastille fell on July 14, 1789. See generally H. BELLOC, *supra* note 16, at 100.

<sup>21</sup> See *infra* notes 22-34 and accompanying text.

The Declaration of Rights provides that subject to responsibility for abuse and disturbance of the public order, "every citizen may speak, write, and publish freely,"<sup>22</sup> and may hold "religious opinions."<sup>23</sup> Persons may not be accused of a crime, arrested, or confined, "except in cases determined by the law, and according to the forms it has prescribed."<sup>24</sup> "Arbitrary" action by state officials is forbidden<sup>25</sup> and detention may not be accomplished by the use of excessive force.<sup>26</sup> A person accused of a crime is "presumed innocent [until] . . . convicted,"<sup>27</sup> and may be punished only to the extent "necessary" to accomplish the objectives of the law,<sup>28</sup> and only pursuant to a law "promulgated before the offense."<sup>29</sup> No person may be "compelled to [do] that which the law does not require."<sup>30</sup> Takings of property by the state are conditioned upon "just indemnity."<sup>31</sup> Taxation without representation is condemned.<sup>32</sup> Equality of persons is recognized by language

<sup>22</sup> DECLARATION OF MAN, *supra* note 9, at art. XI. Compare with U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

<sup>23</sup> DECLARATION OF MAN, *supra* note 9, at art. X. Compare with U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

<sup>24</sup> DECLARATION OF MAN, *supra* note 9, at art. VII. Compare with U.S. CONST. amend. V ("No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor deprived of life, liberty, or property, without due process of law."), amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."). See also U.S. CONST. at art. I, § 9 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

<sup>25</sup> DECLARATION OF MAN *supra* note 9, at art. VII. Due process of law, which proscribes arbitrary treatment, is guaranteed by the fifth and fourteenth amendments to the U.S. Constitution. U.S. CONST. amend. V, XIV.

<sup>26</sup> DECLARATION OF MAN *supra* note 9, at art. IX. Compare with U.S. CONST. amend. VIII ("Excessive bail shall not be required . . .").

<sup>27</sup> DECLARATION OF MAN *supra* note 9, at art. IX. Compare *In re Winship*, 397 U.S. 358, 361-63 (1970) (stating that the due process clause of the U.S. Constitution requires proof beyond a reasonable doubt of criminal charges and that that "standard provides concrete substance for the presumption of innocence"); see also *Coffin v. United States*, 15 S. Ct. 394, 403-05 (1895) (discussing history of presumption of innocence).

<sup>28</sup> DECLARATION OF MAN *supra* note 9, at art. VIII. Compare with U.S. CONST. amend. VIII ("excessive fines [shall not be] imposed, nor cruel and unusual punishments inflicted").

<sup>29</sup> DECLARATION OF MAN *supra* note 9, at art. VIII. Compare with U.S. CONST. art. I, § 9 ("No . . . ex post facto Law shall be passed . . ."), art. I, sec. 10 ("No State shall . . . pass any . . . ex post facto Law . . .").

<sup>30</sup> DECLARATION OF MAN *supra* note 9, at art. V.

<sup>31</sup> DECLARATION OF MAN *supra* note 9, at art. XVII. Compare with U.S. CONST. amend. V ("[P]rivate property [shall not be] taken for public use without just compensation").

<sup>32</sup> DECLARATION OF MAN *supra* note 9, at art. XIV; see also *id.* at art. XIII. Compare with DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776), (condemning the King of Great



providing that “[m]en are born, and always continue, free and equal in respect of their rights,”<sup>33</sup> and that “whether [a law] protects or punishes . . . [all citizens are] equal in its sight.”<sup>34</sup>

### B. *American Antecedents and Influences*

So similar<sup>35</sup> are the guarantees in the Declaration of Rights to those contained in the American Constitution and Bill of Rights, that it would be astonishing if the two were not related. While these documents both draw inspiration from the Enlightenment philosophers,<sup>36</sup> they are in fact more directly linked,<sup>37</sup> though not in the same manner that one might first expect.

The individual rights articulated in the Declaration of Rights were not based on the original text of the U.S. Constitution, for as American states protested during the ratification process, the Constitution initially lacked a bill of rights encompassing such guarantees.<sup>38</sup> The French provisions were also not predicated

Britain “[f]or imposing Taxes on us without our Consent”). As events developed in France, only a select few would prove to be fully entitled to representation. Under the constitution of 1791:

[A] distinction was drawn between “active” and “passive” citizens. All adult males were citizens, but only those who paid in direct taxes the equivalent of three days work, annually, were active citizens with the right of voting. There was an even higher property qualification for those who could sit in the national parliament.

D. JOHNSON, *supra* note 16, at 47.

<sup>33</sup> DECLARATION OF MAN *supra* note 9, at art. I. Compare with DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness . . .”).

<sup>34</sup> DECLARATION OF MAN *supra* note 9, at art. VI. Compare with U.S. CONST. amend XIV (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws . . .”). The federal government is required to provide equal protection by the due process clause of the fifth amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954).

<sup>35</sup> There are, to be sure, important differences between the Declaration of Rights and its American counterparts. For example, the Declaration of Rights did not include rights of petition, assembly, or association. See generally TEN YEARS, *supra* note 3, at 37 (discussing contents of the Declaration of Rights and explaining that by what it omitted, as well as what it underscored, the Declaration of Rights “was most realistically attuned to the historic experiences of living Frenchmen . . . [and] designed for French needs”).

<sup>36</sup> See BERMAN, *supra* note 4, at 616 (French revolution had its origin in the European Enlightenment); see generally F. McDONALD, *NOVUS ORDO SECLORUM* 57–96 (1985) (discussing influence of Locke, Montesquieu, and others on the American founding).

<sup>37</sup> Cf. TEN YEARS, *supra* note 3, at 37 (Declaration of Rights drew “heavily” upon English and American ideas).

<sup>38</sup> See Scudiere, *supra* note 15, at 20 (“Massachusetts, New Hampshire, Virginia, and New York, for example, specifically demanded a bill of rights, and other states ratified the Constitution based on a promise that it would be amended to protect individual liberties.”).

upon any final version of the American Bill of Rights, for those first ten amendments were not ratified until *after* the issuance of the Declaration of Rights.<sup>39</sup>

Rather, the roots of *both* the Declaration of Rights and the American Bill of Rights can be traced to provisions in various American *state* constitutions which had been adopted by the former colonies following America's break with Britain.<sup>40</sup> These state bills of rights influenced the Americans who called for the addition of a bill of rights to the U.S. Constitution in the late 1780s,<sup>41</sup> and they were the subject of considerable discussion in France. As early as 1778, at least seven American state constitutions had been translated into French and distributed in France.<sup>42</sup> Some of these documents—the first written constitutions in the world—reached Paris within weeks of their adoption.<sup>43</sup>

Benjamin Franklin, the American ambassador in Paris from 1776 to 1784, played an important part in the process of promoting the American vision of the proper role of government.<sup>44</sup> Recognized in France as the preeminent American in science, letters, and international prestige,<sup>45</sup> Franklin's views were avidly sought and willingly received by the influential, the ambitious, and, in fact, the merely curious.<sup>46</sup> Taking advantage of his pop-

<sup>39</sup> Whether the Declaration of Rights was inspired by a preliminary copy of the American Bill of Rights circulated prior to its final ratification by the states is unclear. Moore states, "[o]n one of the walls of his Parisian residence, [Lafayette, a leading proponent of the Declaration of Rights] had the American Bill of Rights handsomely framed. Immediately contiguous was a space which he said was to be for the Declaration of Rights." J. MOORE, *supra* note 2, at 91–92. Moore does not indicate that this occurred prior to the adoption of the Declaration of Rights in August 1789.

One source suggests exercise of influence was just the reverse—that the U.S. Bill of Rights was added to the original Constitution "on the inspiration" of the Declaration of Rights. C. FRIEDRICH, *THE IMPACT OF AMERICAN CONSTITUTIONALISM ABROAD* 73 (1967).

<sup>40</sup> See generally Kenyon, *Constitutionalism in Revolutionary America*, in *CONSTITUTIONALISM: NOMOS XX* 90 (J. Pennock & J. Chapman, eds. 1979).

<sup>41</sup> See, e.g., R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776–1791*, 41–47, 126–58 (1955) (discussing the enactment of the state constitutions and subsequent efforts to ratify the federal constitution); Briceland, *Virginia: The Cement of the Union*, in *THE CONSTITUTION AND THE STATES* 222 (P. Conley & J. Kaminski eds. 1988) (five state ratifying conventions which called for a bill of rights shared a common dependence on George Mason's Virginia Declaration of Rights).

<sup>42</sup> A. BLAUSTEIN, *THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 13, 15 (1986).

<sup>43</sup> See A. BLAUSTEIN & J. SIGLER, *CONSTITUTIONS THAT MADE HISTORY* ix (1988).

<sup>44</sup> See J. MOORE, *supra* note 2, at 67.

<sup>45</sup> J. MOORE, *supra* note 2, at 66; see C. VAN DOREN, *supra* note 7, at 527.

<sup>46</sup> "When Jefferson reached Paris he found more respect and veneration attached to the character of Dr. Franklin in France than to that of any other person, foreign or

ularity, Franklin continuously strove to educate the French about contemporary events in America.<sup>47</sup> Soon after Franklin arrived in France, and perhaps as a result of his efforts, extracts of the Declaration of Independence began to circulate throughout Europe.<sup>48</sup> Later, at Franklin's instigation, a complete compilation of American state constitutions was made available.<sup>49</sup> The young Duc de La Rouchfoucauld was persuaded by Franklin to translate the constitutional texts of all thirteen American states.<sup>50</sup> At the urging of the American minister, the French ministry of foreign affairs officially authorized publication of *Constitutions des Triaize Etats de l'Amerique* in 1783,<sup>51</sup> and thereafter circulated the document throughout France.<sup>52</sup> That same year, by order of Congress, Franklin delivered to each ambassador in Paris two copies of the work, while other copies were distributed throughout Europe.<sup>53</sup> Although prerevolutionary France did not lack for political theoreticians, one author has ventured that some Frenchman looked upon the collection of American state constitutions as a basic "grammar for Liberty."<sup>54</sup>

As successor to Franklin, Thomas Jefferson, too, made important contributions to the popularization of American liberal ideals in France.<sup>55</sup> It is particularly difficult, however, to judge the extent of his role, for once the French Revolution turned wantonly bloody, "[h]ighly exaggerated statements about [Jefferson's] per-

native." C. VAN DOREN, *supra* note 7, at 713. *See also id.* at 578 (describing Franklin's overwhelming volume of correspondence and visitors); V. LASKA, *BENJAMIN FRANKLIN: THE DIPLOMAT* 75 (1982) (Franklin was "idolized, lionized, and popularized . . . people paid good money just to be able to see him passing by").

<sup>47</sup> J. MOORE, *supra* note 2, at 68-69.

<sup>48</sup> *See id.* at 67-68.

<sup>49</sup> *Id.* at 75.

<sup>50</sup> *See* C. VAN DOREN, *supra* note 7, at 572, 656; *see also* D. SCHOENBRUN, *TRIUMPH IN PARIS: THE EXPLOITS OF BENJAMIN FRANKLIN* 95-96 (1976).

<sup>51</sup> A. BLAUSTEIN & J. SIGLER, *supra* note 43, at ix.

<sup>52</sup> *See* J. MOORE, *supra* note 2, at 75.

<sup>53</sup> *See* C. VAN DOREN, *supra* note 7, at 656; *see also* V. LASKA, *supra* note 46, at 139 (Franklin "propagated the ideals of his new country . . . by all means, among them the distribution of her states' constitutions.").

<sup>54</sup> C. VAN DOREN, *supra* note 7, at 656.

<sup>55</sup> Authors have differed over whether Jefferson was an uncritical Francophile. Kaplan characterizes Jefferson as "a tolerant and somewhat patronizing teacher of the French, encouraging them in their awkward groping toward democracy but recognizing that their lack of experience with freedom and responsibility would slow their advance." I. KAPLAN, *supra* note 3, at viii.

sonal part in the preliminaries and first stages . . . were made . . . by his political foes"<sup>56</sup>—or so some contend.

Jefferson's objective, over a period of many years, had been to decrease American dependence on Britain through strengthened Franco-American ties.<sup>57</sup> In furtherance of this goal, Jefferson, like Franklin, cultivated numerous important relationships, and carried on voluminous correspondence with reformers not only in France, but in other parts of Europe.<sup>58</sup> An intimate friend of Lafayette and others at the forefront of the early French revolutionary movement,<sup>59</sup> Jefferson came to assume a role of significance. Though his principal biographer has argued that his part was small,<sup>60</sup> others have gone so far as to assert that Jefferson was "perhaps the chief 'advisor' to the intellectuals who were creating the French Revolution."<sup>61</sup> On several occasions, Jefferson opened his home to leaders of disputing factions as a place for reasoned discussion.<sup>62</sup> Acting discreetly because of his diplomatic status,<sup>63</sup> he counseled these men on the principles of de-

<sup>56</sup> D. MALONE, *supra* note 3, at xvi.

<sup>57</sup> See L. KAPLAN, *supra* note 3, at 59 (discussing Jefferson's objectives as Secretary of State); see also *id.* at 14 (Jefferson's attachment to France "rested for the most part on the practical advantages which close relations with France had given the United States"), 20 (Jefferson believed that France could replace Britain in the economic life of the United States and protect America from British military designs).

<sup>58</sup> See Ault, *supra* note 2, at 297 (noting "enormous correspondence").

<sup>59</sup> See L. KAPLAN, *supra* note 3, at viii; J. MOORE, *supra* note 2, at 92; see also J. BOSHER, *supra* note 4, at 118; L. KAPLAN, *supra* note 3, at 16; D. MALONE, *supra* note 3, at 216 (discussing ties with Lafayette and other liberal noblemen), 225 (in essence Jefferson spoke through the mouth of Lafayette).

Various authors have noted that "there exists a copy of the French Declaration of the Rights of Man and of Citizens with Jefferson's editorial notes in the margin." See A. BLAUSTEIN, *supra* note 42, at 22; see also D. MALONE, *supra* note 3, at 223 (discussing Jefferson's proposed changes). But it is unclear when the notes were made and to what extent they were conveyed to Lafayette or others.

<sup>60</sup> See D. MALONE, *supra* note 3, at xvi ("In reality his personal part was slight, though the influence of the American example was great . . . . Insofar as he exerted a direct personal influence he did so primarily on Lafayette and a few other kindred spirits.").

<sup>61</sup> A. BLAUSTEIN, *supra* note 42, at 15.

<sup>62</sup> See D. MALONE, *supra* note 3, at 230; see also Ault, *supra* note 2, at 297 ("His house became a resort for French liberals.").

<sup>63</sup> See, e.g., D. MALONE, *supra* note 3, at 216-17 (discussing Jefferson's position in a controversy over the organization of the government and his private advice to Lafayette); L. KAPLAN, *supra* note 3, at 34 ("freely offered" advice to architects of the new government); see also D. MALONE, *supra* note 3, at 224 (Jefferson, as minister to France, distributed copies of a Virginia declaration of rights); but see D. MALONE, *supra* note 3, at 229 (noting that Jefferson declined to meet with the constitution committee on grounds of propriety).

mocracy, and on one occasion went so far as to draft a "Charter of Rights" for Lafayette.<sup>64</sup> It has been said that Jefferson's draft "doubtless[ly]"<sup>65</sup> influenced Lafayette, which is a matter of special note since ultimately it was Lafayette who proposed the enactment of a bill of rights to the French National Assembly in July of 1789.<sup>66</sup> Though the bill which he proposed differed from the one enacted, Lafayette's draft was clearly based on the American Declaration of Independence, which had been written chiefly by Thomas Jefferson.<sup>67</sup>

Jefferson and Franklin were by no means the only Americans who contributed to the promulgation of the Declaration of Rights.<sup>68</sup> Others participated, and the extent of American behind-the-scenes involvement is suggested by one author who recently wrote:

[Lafayette sent a copy of his draft of the Declaration of Rights] to Jefferson in January, 1789, and Jefferson immediately sent a copy on to Madison for comment. Gouverneur Morris, who arrived in Paris on February 3, 1789, as a representative of certain American commercial interests, also studied the draft. He recommended a number of changes . . . Advice from Jefferson, Madison, and Morris was supplemented by Lafayette's conversations on the subject with Hamilton, Franklin, and Thomas Paine. Thus, while the famous French Declaration of the Rights of Man and of the Citizen of August, 1789, was officially the work of Lafayette, Mirabeau, and Jean Joseph Mounier, it also had claim to American parentage.<sup>69</sup>

In his memoirs, Lafayette stated that "his original proposal for a bill of rights . . . was modeled upon the American bills."<sup>70</sup> Although that proposal was not enacted, and many changes occurred during the drafting process, when the final draft of the Declaration of Rights was presented to the National Assembly,

<sup>64</sup> See Ault, *supra* note 2, at 299; see also D. MALONE, *supra* note 3, at 218 n.11.

<sup>65</sup> See Ault, *supra* note 2, at 299; see also D. MALONE, *supra* note 3, at 223 ("Jefferson's influence on the Marquis in this connection was probably greater than appears in any formal record").

<sup>66</sup> See *supra* note 19.

<sup>67</sup> See J. MOORE, *supra* note 2, at 97-98.

<sup>68</sup> See A. BLAUSTEIN, *supra* note 42, at 10.

<sup>69</sup> *Id.* at 16; see also D. MALONE, *supra* note 3, at 223 (discussing Jefferson's correspondence with Madison).

<sup>70</sup> C. FRIEDRICH, *THE IMPACT OF AMERICAN CONSTITUTIONALISM ABROAD* 74 (1967).

the reporter of the committee, the Archbishop of Bordeaux, is said to have "freely and fully acknowledged French indebtedness to America."<sup>71</sup>

As shown by the Appendix, a side-by-side comparison of the French document and provisions contained in antecedent American state constitutions reveals many similarities. Thus, while the first article of the Declaration of Rights begins by stating the premise that "[m]en are born, and always continue, free and equal in respect of their rights,"<sup>72</sup> similar language may be found in at least four early state constitutions.<sup>73</sup> For example, the Massachusetts Constitution of 1780 stated that "[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights."<sup>74</sup> So too, whereas the French document provided that "every citizen may speak, write, and publish freely,"<sup>75</sup> the Pennsylvania Constitution enacted thirteen years earlier had stated in almost identical terms that "people have a right to freedom of speech, and of writing, and publishing their sentiments."<sup>76</sup> Similar parallels may be drawn between language in the Declaration of Rights and the previously enacted American state constitutions dealing with individual rights to liberty and property,<sup>77</sup> accountability of public officers,<sup>78</sup> ex post facto laws,<sup>79</sup> participation in the lawmaking process,<sup>80</sup> taxation,<sup>81</sup> and numerous other subjects as well.<sup>82</sup> While the language used to express these ideas differed to a greater or lesser extent, and while certain provisions in the Declaration of Rights have no apparent American counterparts, the fact that the French authors drew upon the American constitutions must be placed safely beyond doubt.<sup>83</sup>

<sup>71</sup> Ault, *supra* note 2, at 300.

<sup>72</sup> Declaration of Man, *supra* note 9, at art. I.

<sup>73</sup> See *infra* app. note 5.

<sup>74</sup> Mass. Const. art. I (1780).

<sup>75</sup> Declaration of Man, *supra* note 9, at art. XI.

<sup>76</sup> Penn. Const. art. XII (1776).

<sup>77</sup> See *infra* app. note 6 and accompanying text.

<sup>78</sup> See *infra* app. note 24 and accompanying text.

<sup>79</sup> See *infra* app. note 14 and accompanying text.

<sup>80</sup> See *infra* app. note 8 and accompanying text.

<sup>81</sup> See *infra* app. notes 22-23 and accompanying text.

<sup>82</sup> See *infra* app. notes 3-27 and accompanying text.

<sup>83</sup> See G. JELLINEK, *supra* note 9, at 18, 20, 24-42 (comparison of declaration with provisions from various states); see also R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION* appendix (1959) (comparison of French and Virginia declarations); Ault, *supra* note 2, at 299.

### III. IMPLEMENTATION OF THE DECLARATION OF RIGHTS' GUARANTEES

#### A. *Departure from the American Example*

Whereas the American Bill of Rights was not ratified until after the enactment of a constitution, the sequence in France was the reverse. Over the strong objection of some delegates,<sup>84</sup> the National Assembly voted to adopt a declaration of rights prior to resolving questions as to how the government should be restructured.<sup>85</sup>

This decision to give priority to a statement of basic principles is readily understandable. The French delegates intended to work a fundamental change in the relationship between individuals and the state. It was, therefore, logical to first define, so far as possible, the object of their efforts. In substance, this aspect of the French Revolution does not differ significantly from the American experience, for by the time the U.S. Constitution was drafted, the Declaration of Independence, along with various state constitutions and bills of rights, had already articulated the fundamental goals of republican government and the basic rights of individuals.<sup>86</sup> When the American Bill of Rights was finally enacted in 1791, in many respects it echoed that which had come before.<sup>87</sup>

Where the paths of the two countries significantly diverged was in the means chosen to enforce individual rights. The American Constitution, as is well known, created a government of separated

<sup>84</sup> See G. ANDREWS, *supra* note 16, at 19; P. GAXOTTE, *supra* note 8, at 112.

<sup>85</sup> See G. ANDREWS, *supra* note 16, at 19.

<sup>86</sup> See C. FRIEDRICH, *supra* note 70, at 73 ("the men of 1787 deemed it sufficient that these rights were guaranteed in the several state constitutions").

<sup>87</sup> A number of the guarantees of the U.S. Bill of Rights can be traced not only to antecedent state documents but to British precedent. The Petition of Right, passed by Parliament in 1628, prohibited quartering of troops in private homes and detention or imprisonment of persons without cause. G. DAVIES, *THE EARLY STUARTS, 1603-1660* 41 (2d. ed. 1959); see generally F. RELF, *THE PETITION OF RIGHT (1917)* (Ph.D. thesis at U. of Minn.). The Bill of Rights of 1689 guaranteed the right to petition the sovereign, the right to bear arms, the right to trial by jury, the right of free parliamentary debate, and prohibited excessive bail. *Bill of Rights, 1689*, 8 ENGLISH HISTORICAL DOCUMENTS 1660-1714 123-24 (A. Browning ed. 1953).

The American Bill of Rights echoes earlier state codifications in part because they shared at least one common draftsman. James Madison, who played a crucial role in the writing of the U.S. Bill of Rights, had served on the committee which drafted Virginia's Declaration of Rights of 1776. Rumble, *James Madison On the Value of Bills of Rights*, in CONSTITUTIONALISM: NOMOS XX 122, 128 (J. Pennock & J. Chapman eds. 1979).

powers vested in three distinct branches. Although the constitutional text left the question unresolved, it soon became clear, under the leadership of Chief Justice John Marshall, that the final authority to interpret the American Constitution—and thus the obligation to prevent infringement of the rights which it purported to confer—rested in the hands of an independent judiciary.<sup>88</sup> This was the unique American contribution to the theory and practice of government, an idea which did not exist in any other system of government at that time.<sup>89</sup> By and large, the arrangement has proved workable. The federal courts have been reasonably effective in protecting individuals from the shifting winds of majority sentiment.

That France did not settle upon precisely the same scheme in structuring its government is not surprising, for the conditions then prevailing in France greatly differed from those in the United States. The identification of the French judiciary with feudal oppression,<sup>90</sup> the tradition of a French monarchy, the hereditary privileges and power of the nobility and clergy,<sup>91</sup> and the lack of any real history of popular political or economic self-determination,<sup>92</sup> all suggested a different course. Jefferson, though keenly interested in French acceptance of republican

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<sup>88</sup> See G. CASPER, *Constitutionalism*, 22 Occasional Papers from the Law School of the University of Chicago, 15–16 (1987), reprinted from *THE ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 473 (L. Levy ed. 1986) (despite the fact that “Nowhere does the constitutional text grant the power of judicial review of legislation . . . the Supreme Court went ahead [in *Marbury v. Madison*] and in effect appointed itself and the other judges guardians of the Constitution”) (brackets added), see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); see also C. FRIEDRICH, *supra* note 70, at 78–79 (discussing Hamilton’s argument in *The Federalist* that the power of judicial review is implicit).

<sup>89</sup> Address by Chief Justice William H. Rehnquist, Northern Illinois University School of Law, de Kalb, Illinois 2 (Oct. 20, 1988) (copy available from the Public Information Office of the Supreme Court of the United States) [hereinafter Rehnquist address].

<sup>90</sup> See *COMPARATIVE LEGAL TRADITIONS*, *supra* note 12, at 72; see also *FRENCH PUBLIC LAW*, *supra* note 18, at 559 (discussing defects in prerevolution system of justice in France).

<sup>91</sup> The division of the nation into classes and orders was abolished in the early days of the French Revolution. See *FRENCH PUBLIC LAW*, *supra* note 18, at 548.

<sup>92</sup> Cf. C. HAZEN *supra* note 16, at 677 (“The first experiments of the French with parliamentary institutions were discouraging . . . because Frenchmen had had no experience in working with them.”); H. BELLOC, *supra* note 16, at 60 (prior to the revolution the power of the King, at least theoretically, was absolute). Compare with Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 S. CT. REV. 135, 135 (“When the representatives of the several States met to revise the Articles of Confederation in May, 1786, they brought to bear a substantial knowledge of political theory and broad experience in the political process”).



principles,<sup>93</sup> recognized this fact. He did not expect that American institutions could be successfully transplanted into French soil without modification.<sup>94</sup> As a compromise, Jefferson favored the adoption in France of a constitutional monarchy as the form of government then best suited to that country, a political arrangement "modeled after Britain's, but purged of British flaws."<sup>95</sup>

In fact, the French experimented briefly and unsuccessfully with a constitutional monarchy,<sup>96</sup> before testing various republican arrangements with even less success. What is significant is not so much the details of the allocation of power at these various stages, nor even the fact that the drafters of the first French constitution had "hoped to preserve the independence of the legislature and the judiciary by a system of divided powers, legislative, executive, and judicial."<sup>97</sup> Rather, what stands out is the fact that under neither the constitution of 1791 nor its successor, the constitution of 1793, did the French provide an effective means of enforcing the guarantees stated in the Declaration of Rights, to which continued adherence was professed.

As W. Bourke Cockran noted with dismay at the turn of this century with respect to the French Constitution of 1793:

[T]hat remarkable document sought to enforce its provisions by directing the constitution [which incorporated the provisions of the 1789 Declaration of Rights] to be "written upon tablets and placed in the midst of the legislative body and in public places,"[so] that in the language of the Declaration of Rights "the people may always have before its eyes the fundamental pillars of its liberty and strength, and the authorities the standard of their duties, and the legislator the object of his problem." The constitution of 1793 was placed "under

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<sup>93</sup> Cf. D. MALONE, *supra* note 3, at 228 (Jefferson "never ceased rejoicing that 'the appeal to the rights of man, which had been made in the United States was taken up by France, first of the European nations'").

<sup>94</sup> Cf. L. KAPLAN, *supra* note 3, at 35 (aware of "France's political needs, . . . [Jefferson] never confused her revolution with the American Revolution") (brackets added).

<sup>95</sup> *Id.* at 34; D. MALONE, *supra* note 3, at xvii (Jefferson's "hope for France was not that the monarchy would be overthrown all of a sudden, but that it would assume a modified form, and head in the right direction—that is, toward individual freedom and self-government").

<sup>96</sup> The first constitution, enacted in 1791, provided for a weak, legally restricted monarch, while the Legislative Assembly was to enjoy extensive powers. See P. GAXOTTE, *supra* note 8, at 173-74; I. GERSHOY, *supra* note 16, at 28; see also A. BLAUSTEIN & J. SIGLER, *supra* note 43, at 81-83.

<sup>97</sup> J. BOSHER, *supra* note 4, at 136.

the guarantee of all the virtues," and the Declaration of Rights concluded by solemnly enacting that ". . . When government violates the rights of the people, insurrection of the people and of every single part of it is the most sacred of its rights and the highest of its duties."

The framers of that constitution made a fatal mistake. They assumed that the mere declaration of certain privileges as the rights of citizens would actually secure those rights for each individual citizen. In practical operation, however, it was soon found that the sacred right of insurrection was too unwieldy a weapon to be wielded by a single arm. "All the virtues" proved to be indifferent guardians for a constitution assailed by all the passions. A mob thirsting for the blood of a victim did not pause to read the measure of his rights on tablets, however legibly inscribed or conspicuously posted. The legislator, menaced by an infuriated populace, did not hesitate to seek his own security in the sacrifice of the lives of thousands without regard to "the object of his problem."<sup>98</sup>

### B. *Redress in the French Courts*

To be sure, even during the French Revolution there were courts to which one could resort for legal redress. Indeed, the first constitution, enacted in 1791, effected a number of desirable judicial reforms.<sup>99</sup> It substituted a unified court system in place of numerous existing tribunals (ecclesiastical, seignioral, administrative, and exceptional), abolishing their overlapping jurisdictions and their accompanying special privileges.<sup>100</sup> In addition, other reforms made access to the courts free for all citizens, and the judicial process was stabilized and simplified.<sup>101</sup>

Consistent with the republican ideals of the revolution, however, the constitution of 1791 also provided that judges were to

<sup>98</sup> Address of W. Bourke Cockran, in J. DILLON, 1 JOHN MARSHALL: LIFE, CHARACTER AND JUDICIAL SERVICES 407-08 (1903).

<sup>99</sup> See L. GERSHOY, *supra* note 16, at 28 (referring to "felicitous" reforms). Among the constructive changes affecting the administration of justice were the creation of a supreme court, the Court of Review, which tended to ensure uniform interpretation of the laws, and the endorsement of a new principle requiring courts to give reasons for their decisions. See J. BRISSAUD, *supra* note 16, at 560-61.

<sup>100</sup> See J. BRISSAUD, *supra* note 16, at 559-61; L. GERSHOY, *supra* note 16, at 28; see also C. BRINTON, *supra* note 16, at 275. The idea of a single, graduated system of tribunals serving all alike was based on the principle of the sovereignty of the people. See A. MATHIEZ, *supra* note 5, at 90.

<sup>101</sup> See L. GERSHOY, *supra* note 16, at 29.

be elected, and thereby held accountable to the people.<sup>102</sup> This departure<sup>103</sup> from prior French practice, which lasted until about 1800,<sup>104</sup> arguably had important implications for efforts to realize the rights enshrined in the Declaration of Rights. As one writer has stated, by "making the judges elective, the Revolution abolished the principle of irremovability of the magistracy, that is to say, the independence of judges."<sup>105</sup> According to this view, judges who attempted to protect individual rights by rendering unpopular decisions were vehemently rebuked by the electorate.<sup>106</sup> The effect, it is said, was to silence those jurists who might otherwise have championed cases where civil rights clashed with the prevailing majoritarian will.

There is likely some validity to this appraisal, for the American experience with state judiciaries reveals that some elected judges will decide cases not with a view to the merits, but with an eye to the next election.<sup>107</sup> It is a different matter to say, however, that the prospect of being voted out of office was so potent during the French Revolution as to account for the near total collapse of the judiciary as a check on governmental abuse.<sup>108</sup> The past two centuries in the United States have shown that even during times of civil unrest or war the norm for elected judges has been faithful adherence to the laws. Despite certain unfortunate exceptions,<sup>109</sup> faithlessness to guaranteed rights has never been the rule. Indeed, our history is replete with stories of heroic judges who have championed civil rights, regardless of the currents of public opinion.<sup>110</sup> Thus, even when allowance is made for the

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<sup>102</sup> See J. BRISSAUD, *supra* note 16, at 561-62; FRENCH PUBLIC LAW, *supra* note 18, at 547; L. GERSHOY, *supra* note 16, at 29.

<sup>103</sup> See J. BRISSAUD, *supra* note 16, at 561 ("election of the judges was one of the most radical innovations of the Constituent Assembly").

<sup>104</sup> See *id.* at 562 (rule of irremovability reestablished).

<sup>105</sup> *Id.*

<sup>106</sup> When the judges "tried to apply the laws impartially, they were attacked with the greatest violence by the electors." *Id.*

<sup>107</sup> Cf. Grodin, *Judicial Elections: The California Experience*, 70 JUDICATURE 365, 368 (1987) (discussing judicial election campaign contributions by attorneys); see generally Wold and Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348 (1987).

<sup>108</sup> See *infra* note 111 and accompanying text.

<sup>109</sup> See *infra* note 224 and accompanying text.

<sup>110</sup> See, e.g., T. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* 144-52 (1981) (discussing Judge James Horton of Alabama and the second capital rape prosecution of Haywood Patterson in 1933).

extraordinary pressures that surely were faced by French judges sitting amidst a revolution, it seems likely that if only loss of office was at stake, many judges would have chosen to stand for faithful adherence to the principles of the Declaration of Rights.

To fully explain the fact that during the French Revolution the excessive use of violence by the state and others was largely "unchecked by normal judicial procedures,"<sup>111</sup> one must look beyond the innovation of judicial election. When one does, four features emerge as significant: first, the handling of "political cases" was specialized so as to deprive the ordinary courts of jurisdiction;<sup>112</sup> second, the legislature commonly interfered with the trying of such suits;<sup>113</sup> third, procedures operating in favor of the accused were increasingly restricted statutorily or otherwise;<sup>114</sup> and fourth, judges who failed to submit to the legislative will faced not merely loss of position but, in the absence of immunity for their official acts, the prospect of prosecution for disloyalty, and consequently capital punishment.<sup>115</sup>

### C. *The Reign of Terror and the Revolutionary Tribunal of Paris*

Beginning in 1793,<sup>116</sup> the French government commenced a systematic "Reign of Terror" (Terror) for the alleged purpose of purging society of those corrupt and wicked influences which purportedly constituted an obstacle to true constitutional government.<sup>117</sup> Pursuant to this plan, the constitution of June 24, 1793,

<sup>111</sup> C. BRINTON, *supra* note 16, at 160.

<sup>112</sup> See *infra* notes 116–40 and accompanying text.

<sup>113</sup> See *infra* notes 141–58 and accompanying text.

<sup>114</sup> See *infra* notes 159–91 and accompanying text.

<sup>115</sup> See *infra* notes 192–208 and accompanying text.

<sup>116</sup> Although it is generally agreed that the Reign of Terror (Terror) ended with the death of Robespierre on July 27, 1794, scholars disagree as to when the Terror began. All define it differently. See, e.g., J. BOSHER, *supra* note 4, at 178 (Terror began Friday, August 10, 1792); C. HAZEN, *supra* note 16, at 674–75 (implicitly suggesting that the Terror began on October 10, 1793, when the constitution of June 24, 1793 was set aside); C. MOFFETT, *supra* note 6, at 179 (Terror began in 1789). The consensus appears to be that it covered at least part of 1793 and the first seven months of 1794.

<sup>117</sup> C. HAZEN, *supra* note 16, at 674. Scholars differ as to the goals which animated the architects of the Terror. A few have ventured that the Terror was an economic measure, a means of killing thousands of people and seizing their property in order to address the severe and continuing national financial crisis. See J. BOSHER, *supra* note 4, at 194; P. GAXOTTE, *supra* note 8, at 306; A. MATHIEZ, *supra* note 5, at 395. But the larger number of writers have depicted the Terror as an ideological act of purification deemed prerequisite to true constitutional government. See, e.g., C. BRINTON, *supra* note 16, at 158–63.

was suspended within months of its adoption for the duration of the war.<sup>118</sup> In its stead was substituted "a sort of codification, with innovations and amendments, of a large number of earlier decrees establishing various organs and methods" of government.<sup>119</sup> Based on a rejection of the principle of separation of powers,<sup>120</sup> the procedures installed by this decree, which became known as the "Constitution of the Terror,"<sup>121</sup> were intended to "check unrest at home in the face of national danger,"<sup>122</sup> and to preserve the liberties of 1789 by "provisionally" destroying them.<sup>123</sup>

Consisting both of instigated popular violence and brutal use of governmental force, the hallmark of the Terror was death, whether inflicted suddenly or with a slight delay to conform with "legal" procedures.<sup>124</sup> Those who opposed the state were increasingly subject to arrest,<sup>125</sup> and "suspects," who were arrested on the flimsiest of reasons, filled the prisons.<sup>126</sup> "Streetlamp lynchings and destruction of property . . . were . . . daily occurrences," which accompanied "a nightmarish series of house-to-house visits by roving search parties, armed with batches of freshly printed warrants."<sup>127</sup> Procedural limitations did not prevent such warrants from being enforced.<sup>128</sup>

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<sup>118</sup> See C. HAZEN, *supra* note 16, at 675 (the Convention suspended the constitution on October 10, 1793).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 674.

<sup>121</sup> L. GERSHOY, *supra* note 16, at 61.

<sup>122</sup> Ault, *supra* note 2, at 304. See also C. HAZEN, *supra* note 16, at 674 (adopted to deal with "state of distress").

<sup>123</sup> C. HAZEN, *supra* note 16, at 674-75.

<sup>124</sup> See J. BOSHER, *supra* note 4, at 178 (discussing popular violence); TEN YEARS, *supra* note 3, at 49 (at ad hoc trials in September 1792, 1200 prisoners were sentenced to death in four days); C. MOFFETT, *supra* note 6, at 48-50 (discussing janitor-judge sentencing person after person to death for 36 continuous hours at pseudo-hearings during civil riots amidst a cheering crowd).

<sup>125</sup> Because those loyal to the Crown became traitors when the monarchy fell, political arrests occurred daily. See C. BRINTON, *supra* note 16, at 88; see also J. BOSHER, *supra* note 4, at 180.

<sup>126</sup> C. MOFFETT, *supra* note 6, at 42. See also C. HAZEN, *supra* note 16, at 700.

<sup>127</sup> C. MOFFETT, *supra* note 6, at 8; see also TEN YEARS, *supra* note 3, at ——— (discussing house-to-house searches for "suspects"). "[P]olitical moderates who did not hide were often . . . murdered along with the rest, their bodies plundered, stripped, mutilated, and the heads hacked off and paraded on pikes." J. BOSHER, *supra* note 4, at 178.

<sup>128</sup> See C. BRINTON, *supra* note 16, at 122; C. HAZEN, *supra* note 16, at 688 (The local committees that were charged with issuing writs against "suspected" persons "often abused their powers and imprisoned many entirely innocent persons.").

Once confined, prisoners were often beaten,<sup>129</sup> starved,<sup>130</sup> raped,<sup>131</sup> or executed without trial.<sup>132</sup> Those who survived these abuses, and who did not commit suicide in despair,<sup>133</sup> stood little chance of an impartial hearing or fair treatment. Political cases,<sup>134</sup> the suits most likely to involve claims of fundamental right, were removed from the ordinary courts and channelled into a special system of "revolutionary justice." Headed by the Revolutionary Tribunal of Paris,<sup>135</sup> this system included local and military tribunals which adopted similar methods.<sup>136</sup> The function of revolutionary justice, in stark but accurate terms, was not to provide equal treatment, nor to fairly enforce the rule of law, but to

<sup>129</sup> Beatings were administered by guards or by vigilantes who gained entry to the prisons. See A. MATHIEZ, *supra* note 5, at 353; J. BOSHER, *supra* note 4, at 179 (discussing massacre of more than 1000 prisoners at seven prisons including fourteen prisoners in full view of several hundred persons); C. MOFFETT, *supra* note 6, at 46 (suspects were permitted to fall victim to mobs en route to prison), 49, 116. Frequently, "invaders formed themselves into an impromptu court . . . One by one prisoners were brought from their cells before this tribunal, sitting in an inner court or hall, summarily charged and tried, and if found guilty, pushed into the street or outer court, where they were killed by a small group of chosen murderers." C. BRINTON, *supra* note 16, at 89; see also C. MOFFETT, *supra* note 6, at 47-48. In numerous cases, severed body parts were impaled on spikes and displayed about the city. See C. MOFFETT, *supra* note 6, at 53.

<sup>130</sup> See *id.* at 110.

<sup>131</sup> See *id.* at 54.

<sup>132</sup> See A. MATHIEZ, *supra* note 5, at 402; C. MOFFETT, *supra* note 6, at 45 (discussing resolution providing that all priests and suspect persons held in certain facilities would be put to death), 108-18 (mass drownings unaccompanied by trials); see also H. BELLOC, *supra* note 16, at 90 (discussing massacre of prisoners by organized band of assassins).

<sup>133</sup> See J. BOSHER, *supra* note 4, at 195; see also C. HAZEN, *supra* note 16, at 706 (Condorcet, one of the fathers of the constitution of 1793, "committed suicide or perhaps . . . died of hunger").

<sup>134</sup> The legislation of March 10 and 11, 1793, establishing the Revolutionary Tribunal, provided:

An extraordinary criminal tribunal shall be established at Paris which shall have cognizance of all counter-revolutionary activities, of all attacks against the liberty, the equality, the unity, the indivisibility of the Republic, the internal and external security of the state, and of all plots tending to reestablish the monarchy or to establish any other authority inimical to the liberty, equality or sovereignty of the people, regardless of whether the culprits should be employees of the government, military personnel, or plain citizens.

Godfrey, *supra* note 16, at 7.

<sup>135</sup> Theoretically, the Paris Tribunal was intended to "replace the supreme tribunal of the people's vengeance" by expediting the trial of suspects and securing convictions by "all possible means." J. BOSHER, *supra* note 4, at 193 (quoting Georges-Jacques Danton and Robert Lindet, respectively).

<sup>136</sup> See TEN YEARS, *supra* note 3, at 63 (petty revolutionary courts were more or less independent from the Paris Tribunal); see also R. PALMER, *supra* note 16, at 155, 169 (discussing tribunals in Lyons), 185, 189 (in Alsace), 219-20 (in Brittany).

enable the government to remain in power<sup>137</sup> by efficiently and expeditiously<sup>138</sup> eliminating its enemies<sup>139</sup> or filling them with terror.<sup>140</sup> Thus, political defendants, those most in need of invoking the guarantees of the Declaration of Rights, were deprived of any real opportunity to be judged according to those principles by being routed to tribunals expressly dedicated to contrary objectives.

#### D. *Interference with Judicial Duties and Prosecutorial Discretion*

From its inception,<sup>141</sup> the Revolutionary Tribunal (Tribunal) was a minion of the National Convention (Convention), the chief legislative body following the enactment of the constitution of 1793. Created by the Convention, the Tribunal consisted of judges and jurors elected by the Convention, who often served very short terms.<sup>142</sup> Some of the judges lacked legal credentials and others had limited judicial experience.<sup>143</sup> However, these matters were deemed unimportant, for the chief requirement for the positions was ideological loyalty. When the work of the judges and jurors displeased the Convention, they were promptly removed from office, and more suitable replacements were named.<sup>144</sup>

A public prosecutor, also chosen by the Convention, was empowered to initiate cases.<sup>145</sup> However, the Convention frequently intervened in prosecutorial affairs. First, through its Committee of General Security, the Convention commonly ordered the release of prisoners prior to trial, both before and after the holding

<sup>137</sup> See J. BOSHER, *supra* note 4, at 181.

<sup>138</sup> "The essential feature of this Revolutionary Government was rapidity of action." C. HAZEN, *supra* note 16, at 690.

<sup>139</sup> See Godfrey, *supra* note 16, at 4; see also TEN YEARS, *supra* note 3, at 64 (the Terror was an instrument designed to strike down real and presumed counter-revolutionaries); C. HAZEN, *supra* note 16, at 693.

<sup>140</sup> See C. HAZEN, *supra* note 16, at 682.

<sup>141</sup> The Tribunal was created in March, 1793, and abolished at the end of May, 1795. See Godfrey, *supra* note 16, at 4, 116.

<sup>142</sup> See *id.* at 8, 16; see also A. MATHIEZ, *supra* note 5, at 395 (initially temporary judges were appointed in a rush to commence operations).

<sup>143</sup> See Godfrey, *supra* note 16, at 27.

<sup>144</sup> See *id.* at 4, 44; cf. FRENCH PUBLIC LAW, *supra* note 18, at 561-62 (stating, without reference to the Revolutionary Tribunal, that under the constitution of 1793, "[T]he Convention annulled the judgments of the elected magistrates, tried cases itself, dismissed the judges, and elected new ones.").

<sup>145</sup> See J. BOSHER, *supra* note 4, at 194.

of preliminary examinations.<sup>146</sup> Second, this same committee often furnished the Tribunal with evidence concerning not the circumstances of the crime, but the undesirable position which the suspect occupied in his community.<sup>147</sup> Third, the Convention reserved to itself, and frequently exercised, the considerable prerogative of determining whether its members, and whether executive ministers or army generals, would be tried before the Tribunal.<sup>148</sup> Fourth, pursuant to lists prepared nightly by its Committee of General Security, the Convention forwarded to the prosecutor numerous other, non-elite suits for appropriate legal action.<sup>149</sup> Fifth, during certain celebrated political trials, the Committee directed that prisoners who "resisted or insulted" the system of justice should be silenced.<sup>150</sup> Finally, during the latter stages of the Tribunal's history, committees of the Convention injected themselves into the determination of whether a person against whom no legally justified charges existed would be released from government custody.<sup>151</sup>

These various actions frustrated any possibility that a tradition of independent professional judgment might be developed by the public prosecutor. All of the cases forwarded by the Convention arrived before the Tribunal clearly marked with the stigma of guilt, the verdict in such proceedings being a foregone conclusion.<sup>152</sup> In other suits, the evidence furnished or opinion ex-

<sup>146</sup> See Godfrey, *supra* note 16, at 117–18.

<sup>147</sup> See *id.* at 123.

<sup>148</sup> See C. HAZEN, *supra* note 16, at 676 (discussing Convention's decision to have Marat arrested and similar "proscriptions" that followed); J. BOSHER, *supra* note 4, at 194.

<sup>149</sup> See C. HAZEN, *supra* note 16, at 681 (the Convention's "Committee of General Security . . . selected the prisoners who were to be sent before the Revolutionary Tribunal . . . . Night after night it ground away at the preparation of the fatal lists"); Godfrey, *supra* note 16, at 13, 15, 54–56. While the instances of direct or indirect involvement by the Convention were numerous, in many cases it had nothing to do with the trial of the accused. *Id.* at 58.

<sup>150</sup> R. PALMER, *supra* note 16, at 300.

<sup>151</sup> See Godfrey, *supra* note 16, at 132, 148.

<sup>152</sup> See *id.* at 57.

[C]harges levied by the Convention—and this was especially true of the charges against its members—were of such an authority that in the subsequent trials the Convention, in a very real sense, may be said to have participated in the finding of the verdict and the pronouncement of the judgment.

*Id.* at 57. See also *id.* at 58 (documents forwarded by a committee of the Convention strengthened the presumption of guilt); cf. H. BELLOC, *supra* note 16, at 105 (Of the 2000 or more of those executed at the direction of the Revolutionary Tribunal, "the large majority were those whom the [Convention's] Committee of Public Safety judged to be obstacles to their military policy.").



pressed by the Convention ensured that the suspect would be cast in a light favorable to the radical objectives of revolutionary justice.<sup>153</sup>

As a result, there was little separation of legislative, executive, and judicial powers.<sup>154</sup> The prosecutor acted on the order of the Convention's committees, and the judges "fell into step" with him.<sup>155</sup> Describing the functioning of the Tribunal, one writer recently stated:

Late in the evening, after the day's work, [the prosecutor] used to visit the [Convention's] committees to discuss cases with them and receive his orders. The jurymen . . . did nothing to distinguish guilt from innocence, and could not have done so even if they had wished to. Charges were hopelessly vague, and the tribunal had neither the time nor the inclination to seek the truth in particular cases . . . . At least two [of the twelve] jurors passed the time sketching the prisoners, and others made ribald jokes about them and their almost certain death.<sup>156</sup>

For those found guilty by the Revolutionary Tribunal, death by guillotine was the likely and final sentence.<sup>157</sup> From a judgment of the Tribunal, there was no appeal of findings as to law or fact.<sup>158</sup>

#### E. *The Decline of Procedural Protection of the Accused*

Although it has been said that during the Terror "to be accused generally meant to be found guilty,"<sup>159</sup> this is an overstatement, for at least during its early days a significant number of cases before the Revolutionary Tribunal resulted either in acquittal or in dismissal of charges for lack of evidence.<sup>160</sup> Some of these

<sup>153</sup> Cf. Godfrey, *supra* note 16, at 124.

<sup>154</sup> See *id.* at 64 (accord).

<sup>155</sup> J. BOSHER, *supra* note 4, at 194; see also Godfrey, *supra* note 16, at 60, 66 (the Convention's important committee on Public Safety and the Tribunal frequently "went hand in hand"), 131 (noting pressure on Tribunal from dominant committees in government).

<sup>156</sup> J. BOSHER, *supra* note 4, at 194.

<sup>157</sup> Deportation and imprisonment were levied as sanctions in a small number of cases. See Godfrey, *supra* note 16, at 108 n.20.

<sup>158</sup> See A. MATHIEZ, *supra* note 5, at 395.

<sup>159</sup> R. SOBEL, *supra* note 16, at 110.

<sup>160</sup> One writer summarizes the work of the Paris Tribunal as follows: "5283 persons appeared before the Revolutionary Tribunal; of these 1273 were acquitted and 973 dismissed for lack of evidence while 2747 were sentenced to death, 32 deported, 44 sentenced to prison, 163 detained, and 51 referred to another tribunal." Godfrey, *supra*

failures to convict may be accounted for by the fact that during its first stages, the Tribunal functioned much as a typical criminal court,<sup>161</sup> acting in a “reasonably fair” manner,<sup>162</sup> willing to afford the accused important procedural protections. Preliminary hearings were held;<sup>163</sup> formal charges were prepared carefully;<sup>164</sup> the accused was entitled to representation by counsel<sup>165</sup> and to summon and present witnesses;<sup>166</sup> cross-examination was permitted;<sup>167</sup> and, at least occasionally, extensive testimony was heard.<sup>168</sup> During this period, the Tribunal was distinguished not by the special quality of its procedures, but by the fact that under revolutionary law the penalties imposed were of a final nature, usually condemning the accused to death.<sup>169</sup>

As the political pace of the Terror accelerated to a frenzy,<sup>170</sup> the Tribunal was increased in size and empowered to sit in sec-

note 16, at 108 n.20. The example of the Paris Tribunal was readily followed by other courts which had adopted the methods of revolutionary justice. In the provinces, so-called judicial proceedings accounted for 16,000 to 18,000 deaths. C. HAZEN, *supra* note 16, at 707.

<sup>161</sup> See C. BRINTON, *supra* note 16, at 126; *cf.* Godfrey, *supra* note 16, at 10 (“There was little in the institutional form of the Tribunal that could have excited alarm”).

<sup>162</sup> C. HAZEN, *supra* note 16, at 684.

<sup>163</sup> See Godfrey, *supra* note 16, at 117–18 (discussing procedures).

<sup>164</sup> See *id.* at 119, 126.

<sup>165</sup> See *id.* at 119, 125 (“The voice of the defense, while not a loud one, was not stifled during the first year of the Tribunal’s operations”).

<sup>166</sup> See C. HAZEN, *supra* note 16, at 684; Godfrey, *supra* note 16, at 124.

<sup>167</sup> See C. BRINTON, *supra* note 16, at 126; C. HAZEN, *supra* note 16, at 684.

<sup>168</sup> See Godfrey, *supra* note 16, at 121–22 (discussing case in which 140 witnesses appeared against the defendants and 100 appeared for them); *cf. id.* at 121 (“At times the Tribunal—in view of its function as an instrument of revolutionary justice—went beyond what might have been expected in the search for evidence.”), 129 (“During the first year . . . the Tribunal was rather patient with the oral testimony . . .”).

<sup>169</sup> See *id.* at 127.

<sup>170</sup> The increasingly hurried pace of the Tribunal is suggested by the fact that while it sentenced only 70 persons to death during its first six months, more than 500 were guillotined by the end of its first year, and nearly 2700 died before the Terror ended less than seventeen months after the Tribunal was created. See J. BOSHER, *supra* note 4, at 194; Godfrey, *supra* note 16, at 131 (50 percent of the Tribunal’s death sentences were handed down during the two months preceding the death of Robespierre). The Tribunal, of course, was only the apex of the revolutionary justice zигurat which, as a whole, sentenced about 15,000 or 16,000 to death after mock trials. See J. BOSHER, *supra* note 4, at 192.

The pressure for ever-faster purging of unpatriotic persons from the body politic extended to the execution process. When even the swift guillotine was perceived as being too slow, alternative methods were adopted. On one occasion, sixty young men were arrayed in a line and then fired upon by canons. This procedure was abandoned, however, when it was learned that the technique left most of the victims horribly mutilated but alive. See C. HAZEN, *supra* note 16, at 711 (soldiers were required to kill the survivors “by

tions.<sup>171</sup> Procedural safeguards for the accused were sacrificed to the goals of quantity and speed as the public prosecutor, judges, and jurors grew both more aware of the social mission of revolution<sup>172</sup> and more willing to allow the Tribunal to be "employed by politicians to rid themselves of personal enemies."<sup>173</sup> "[P]olitical murder for political ends" became a chief goal of revolutionary justice.<sup>174</sup> To that extent, the excesses of the Tribunal were the result of the abandonment by the Convention and its committees of considered principles in favor of a political agenda.

Preliminary hearings were eliminated,<sup>175</sup> and at times as many as fifty wholly unrelated defendants were "amalgamated" into "batches" for purposes of trial.<sup>176</sup> The role of defense counsel, always unattractive because of the political complexion of the Tribunal,<sup>177</sup> was at first rendered perfunctory,<sup>178</sup> then terminated entirely, as the profession of barrister was abolished in favor of a system which allowed anyone to act as counselor before the court.<sup>179</sup> The theory behind this change may have been that "the virtue of the jurors in the formal trial . . . [would adequately substitute for representation by defense counsel because] the honesty and patriotism of the jurors would prevent the successful prosecution of any true patriot."<sup>180</sup> More likely, as one writer concluded, the effect of these changes was that "[d]efendants were exploited by unscrupulous individuals who played upon their fears."<sup>181</sup>

Special legislation was enacted by the Convention whenever the procession of judicial business was perceived as too slow to satisfy

slashing them to death with their swords"); C. MOFFETT, *supra* note 6, at 138; A. MATHIEZ, *supra* note 5, at 401.

<sup>171</sup> See C. HAZEN, *supra* note 16, at 683.

<sup>172</sup> See *id.* at 684. C. BRINTON, *supra* note 16, at 126; Cf. Godfrey, *supra* note 16, at 119 (noting that increasing rapidity prevented careful consideration of all available evidence), 135 (increasing tendency to use Tribunal "as an instrument of class war").

<sup>173</sup> See C. HAZEN, *supra* note 16, at 683.

<sup>174</sup> *Id.* at 699.

<sup>175</sup> See Godfrey, *supra* note 16, at 132.

<sup>176</sup> See P. GAXOTTE, *supra* note 8, at 312; Godfrey, *supra* note 16, at 131, 133-34; A. MATHIEZ, *supra* note 5, at 499; see also C. HAZEN, *supra* note 16, at 704 (describing trial *en bloc*).

<sup>177</sup> See J. BOSHER, *supra* note 4, at 194.

<sup>178</sup> See Godfrey, *supra* note 16, at 130.

<sup>179</sup> See J. BOSHER, *supra* note 4, at 194.

<sup>180</sup> Godfrey, *supra* note 16, at 132.

<sup>181</sup> J. BOSHER, *supra* note 4, at 194.

political needs.<sup>182</sup> One law permitted jurors to end a trial whenever they had heard enough to make up their minds, so long as three days had passed.<sup>183</sup> Regardless of the stage of the proceedings, the judge would be silenced, the attorneys discharged, and the proceedings terminated by a sudden and irreversible verdict.<sup>184</sup> Because even three days per trial can be a slow pace during a revolution, however, other legislation made the hearing of witnesses unnecessary when “documentary or intellectual (*morales*) proofs of guilt existed independently of testimonial evidence.”<sup>185</sup> This might not have caused a noticeable deterioration in the quality of the justice dispensed by the Tribunal, for documentary evidence was often comprehensive.<sup>186</sup> But with the increased number of persons appearing before the Tribunal, less time was available to study the assembled evidence.<sup>187</sup>

Another law allowed defendants to be found guilty of obstructing justice when statements they made in their own behalf were deemed to give rise to unnecessary delay.<sup>188</sup> In practice, this rule was often applied so as to strictly limit a defendant’s presentation of a defense. When large groups of suspects were tried *en bloc*, the president of the Tribunal, despite prosecutorial intercessions, often would not allow a defendant to speak beyond answering to his name.<sup>189</sup> Trials were reduced to little more than the physical presence of the accused in the courtroom.<sup>190</sup>

In the end, according to the late professor Charles Hazen of Columbia University, the Revolutionary Tribunal:

[S]tood as a sign and symbol of arbitrary and remorseless tyranny, more odious and hateful because of the hypocrisy of its pretense to be dispensing only justice. It earned so black a reputation by the iniquities it committed that it took its

<sup>182</sup> See generally Godfrey, *supra* note 16, at 21, 128.

<sup>183</sup> See Godfrey, *supra* note 16, at 128; A. MATHIEZ, *supra* note 5, at 399; see also C. MOFFETT, *supra* note 6, at 134–35 (no room was left for “quibbling” or “hair-splitting”).

<sup>184</sup> See C. HAZEN, *supra* note 16, at 684 (“Often, after some brief semblance of investigation, the judges would ask the jury if it was convinced, an affirmative answer would be given, and a verdict of guilt immediately rendered. The judges would then pronounce the sentence of death, often taking occasion by the way to abuse and insult the unhappy victim in coarse and brutal fashion. Execution would follow immediately . . .”).

<sup>185</sup> See Godfrey, *supra* note 16, at 128 (parenthesis in original), 132.

<sup>186</sup> See *id.* at 132, 134–35.

<sup>187</sup> See *id.* at 133 (point stated), 134.

<sup>188</sup> See C. MOFFETT, *supra* note 6, at 106, 164.

<sup>189</sup> See Godfrey, *supra* note 16, at 134.

<sup>190</sup> See R. PALMER, *supra* note 16, at 365–66.

place in the minds and memories of men alongside the Inquisition as the embodiment of the most malignant passions known to the human race.<sup>191</sup>

#### F. *Freedom of Expression and the Law of Suspects*

The grand pronouncements of the Declaration of Rights concerning free expression were subordinated during the Terror to the perceived needs of the revolution.<sup>192</sup> In the name of ideological conformity, books and pamphlets were censored;<sup>193</sup> theaters were expected to produce appropriately stirring patriotic fare;<sup>194</sup> royalist newspapers were closed and their confiscated presses redistributed to left-wing journalists.<sup>195</sup>

Consistent with the "terrorizing" objectives of these restrictions, the Convention, on September 17, 1793, enacted the broad-ranging<sup>196</sup> Law of Suspects.<sup>197</sup> A "draconian"<sup>198</sup> piece of legislation, this law institutionalized and greatly expanded the hitherto intermittent and random<sup>199</sup> arresting of persons whose acts or beliefs were perceived as inimical to the interests of the nation. Small groups of men in every town and hamlet were given tyrannical powers of oppression over those they opposed, with few procedures for reviewing whether they acted for patriotic or ignoble reasons.<sup>200</sup>

The Law of Suspects defined several classes of persons subject to immediate arrest and imprisonment, including but not limited

<sup>191</sup> C. HAZEN, *supra* note 16, at 684.

<sup>192</sup> These moves formed merely one piece of a larger fabric. As Professor Hazen has stated:

The authors of the Declaration of the Rights of Man of the Constitution of 1791 had been determined to protect the individual and had been willing to weaken the state to that end. Now, in 1793, the state had become everything, the individual nothing, save as he served the state.

*Id.* at 690.

<sup>193</sup> See C. BRINTON, *supra* note 16, at 148; C. MOFFETT, *supra* note 6, at 122.

<sup>194</sup> C. MOFFETT, *supra* note 6, at 43; see also C. BRINTON, *supra* note 16, at 147.

<sup>195</sup> See J. BOSHER, *supra* note 4, at 180-81.

<sup>196</sup> See C. HAZEN, *supra* note 16, at 694 ("comprehensive and elastic"); R. PALMER, *supra* note 16, at 67 (the law defined suspects so "vaguely" that "almost anyone might find himself compromised").

<sup>197</sup> See generally A. MATHIEZ, *supra* note 5, at 370-71.

<sup>198</sup> See TEN YEARS, *supra* note 3, at 61.

<sup>199</sup> See A. MATHIEZ, *supra* note 5, at 370-71.

<sup>200</sup> See C. HAZEN, *supra* note 16, at 695; R. PALMER, *supra* note 16, at 146 (committees had such discretion that they could denounce as suspects even those to whom the law did not apply).

to those persons who by "their remarks or their writings show[ed] themselves [to be] the partisans of tyranny or federalism and the enemies of liberty"<sup>201</sup> and "public functionaries suspended or removed from their functions by the National Convention or its commissioners and not reinstated."<sup>202</sup> As described by a leading writer:

These provisions, elastic as they were, suspended a terrible threat over the heads not only of real suspects, but of all those capable of giving trouble to the Government, and, what was more, of the indifferent and timid, since it included even those citizens whose only fault was that they had failed to fulfill their duties as electors.<sup>203</sup>

Under the Law of Suspects, the discharge of a disloyal official was promptly followed by imprisonment.<sup>204</sup>

The extent to which the passage of the Law of Suspects affected the performance of the judges and jurors of the Revolutionary Tribunal is a matter of speculation. Such risks undoubtedly discouraged some persons from accepting such positions,<sup>205</sup> and it seems likely that those who did accept would have been greatly influenced in the exercise of their official discretion.<sup>206</sup> Participating day after day in pseudo-legal proceedings which more often than not culminated in a capital sentence,<sup>207</sup> these men must have poignantly appreciated the cost of less than zealous devotion to the objectives of the Terror. What *is* certain is that stripped of any semblance of immunity for their official actions, the judges and jurors of the Revolutionary Tribunal played no significant role in curbing the government's use of institutionalized violence.<sup>208</sup>

<sup>201</sup> TEN YEARS, *supra* note 3, at 157.

<sup>202</sup> *Id.*

<sup>203</sup> A. MATHIEZ, *supra* note 5, at 371; *see also* P. GAXOTTE, *supra* note 8, at 306.

<sup>204</sup> A. MATHIEZ, *supra* note 5, at 371.

<sup>205</sup> *See* Godfrey, *supra* note 16, at 12 (suggesting that fear of reprisal and "the necessity of voting publicly in cases involving powerful conspirators" accounted for some refusals to serve).

<sup>206</sup> *Cf.* R. PALMER, *supra* note 16, at 300 (suggesting that during the trial of Danton, the judge and prosecutor were "terrified themselves at the thought that their own heads depended on getting a conviction").

<sup>207</sup> *See supra* note 160.

<sup>208</sup> The lack of legislative immunity also adversely affected the official conduct of the members of the National Convention. *See* C. HAZEN, *supra* note 16, at 676-77.

## IV. CONCLUSION: THE LEGACY OF 1789

The Reign of Terror ended in July, 1794, with the death of its leader, Maximilien Robespierre.<sup>209</sup> Although the Revolution continued for several more years,<sup>210</sup> that event marked the turning point in the history of the Tribunal. Sickened by the killing and emotionally exhausted, the French nation, so long rapt in an atmosphere of violence and fear,<sup>211</sup> retreated from the *idée fixe* of the Terror, and began to dismantle its machinery.<sup>212</sup> Weakened at first, the Revolutionary Tribunal of Paris was abolished on May 31, 1795, shortly after Fouquier-Tinville, its public prosecutor and accomplice in so many deaths, was placed on trial, convicted, and beheaded like countless others.<sup>213</sup> Soon thereafter, a new constitution—France's third—was adopted; it would last about five years.<sup>214</sup>

By the end, the dictatorship which was known as the Reign of Terror had exacted a horrendous toll. Though the figures seem high, according to various estimates, approximately 300,000 persons had been imprisoned,<sup>215</sup> 100,000 massacred,<sup>216</sup> 20,000 executed without trial or allowed to die in confinement,<sup>217</sup> and another 20,000 or more guillotined as enemies of the state.<sup>218</sup>

<sup>209</sup> See *supra* note 116. But see H. BELLOC, *supra* note 16, at 57–58 (rejecting the view that Robespierre was the “master” of the Terror).

<sup>210</sup> Some scholars date the French Revolution as having ended in 1799, as is reflected by the titles of the works by Gershoy and Brinton, cited *supra* in note 16. But see Berman, *supra* note 4, at 616 (suggesting preferable dates are 1789 to 1830). Cf. A. LOOMIS, *supra* note 16, at 12 (“Anarchy . . . preceded the institution of the Revolutionary Tribunal; dictatorship followed it”).

<sup>211</sup> The “essence” of the Revolutionary government “was the fear men have of death.” C. HAZEN, *supra* note 16, at 688.

For an interesting discussion of the role fear played in keeping members of the National Convention from attending its sessions or voting on controversial issues, see *id.* at 676–77.

<sup>212</sup> See D. JOHNSON, *supra* note 16, at 100.

<sup>213</sup> See L. GERSHOY, *supra* note 16, at 72; Godfrey, *supra* note 16, at 23, 53.

<sup>214</sup> See A. BLAUSTEIN, *supra* note 42, at 33 n.20; see also *supra* note 18.

<sup>215</sup> See R. SOBEL, *supra* note 16, at 110.

<sup>216</sup> See J. BOSHER, *supra* note 4, at 192.

<sup>217</sup> See C. MOFFETT, *supra* note 6, at 179; see also C. HAZEN, *supra* note 16, at 708 (discussing mass shooting of prisoners without trial), 709 (discussing mass drownings of prisoners on boats in the Loire River, accounting for 2,800 to 4,200 deaths).

<sup>218</sup> See C. HAZEN, *supra* note 16, at 707 (the Paris Tribunal and similar provincial courts accounted for 20,000 deaths); C. MOFFETT, *supra* note 6, at 179; but see J. BOSHER, *supra* note 4, at 192 (15,000 or 16,000 people were executed “after the mock trials of revolutionary tribunals”); TEN YEARS, *supra* note 3, at 64 (in 1793–94, “with some semblance of a formal trial the Terror took the toll of 40,000 men and women”); Berman, *supra* note 4, at 615 (“in all, there were over 14,000 victims of the Terror and civil war”).

The complicity of the Revolutionary Tribunal of Paris and other courts in the abuses of the Reign of Terror ranks as one of the most ignominious episodes in the history of legal institutions. Their story is a catalogue of the risks of judicial infidelity to fundamental rights, legislative interference with the adjudicatory process, diminished procedural protection of the accused, and the absence of judicial immunity. It is a tale which is depressing and sobering, and it underscores the fact that judicial independence and tenure, fair procedures, and immunity from suit for official actions *are* important components of a just court system. Nevertheless, it would be unfair to judge the reformers whose efforts gave rise to the French Revolution by the failures of the Tribunal or the excesses of the Terror.

There is, first of all, a serious question as to whether any nascent government, through any written constitution, could have enforced the terms of the Declaration of Rights under the conditions then extant in France. Less than five years into its constitutional history at the time of the Reign of Terror, the French nation was torn not only by a severe economic crisis,<sup>219</sup> but by the civil clash of competing revolutionary and counter-revolutionary forces,<sup>220</sup> and by the onerous burdens of a war simultaneously waged with foreign nations.<sup>221</sup> Some have suggested that an independent judiciary, similar to that in the United States, could have stayed the carnage of the Terror.<sup>222</sup> But when one recalls the impotence of Chief Justice Roger Taney to enforce the habeas corpus provisions of the U.S. Constitution over Pres-

<sup>219</sup> See J. BOSHER, *supra* note 4, at 3 (noting overcrowding, scarcity of food, and economic inflexibility), 179 (riots were triggered by concern over subsistence); TEN YEARS, *supra* note 3, at 63 (bread was rationed); cf. C. HAZEN, *supra* note 16, at 696, 714–52; C. VAN DOREN, *supra* note 7, at 657.

<sup>220</sup> See, e.g., A. MATHIEZ, *supra* note 5, at 334, 344, 386.

<sup>221</sup> See *supra* note 4. Cf. J. BOSHER, *supra* note 4, at 283–84 (French armies conquered and plundered all of continental Europe between 1793 and 1814).

<sup>222</sup> For example, Chief Justice William Rehnquist, discussing the abuses to which the Tribunal was a party, recently stated:

It seems rather obvious to me that the reason it happened was that during the Reign of Terror there was no separation of powers in the French government at all . . . [T]here was no organ of government in France at the time which would stand up and enforce them on behalf of the individual.

Rehnquist Address, *supra* note 89, at 11–12; see also C. FRIEDRICH, *supra* note 70, at 78 (while the United States has always “been insistent that a declaration of human rights is not worth the paper it is written on unless . . . accompanied by suitable provisions for their enforcement . . . , the grandiloquent declarations of the French revolutionaries went by the board precisely because they were just declarations.”). See generally Fratcher, *The Independence of the Judiciary Under the Constitution of 1787*, 53 Mo. L. REV. 1 (1988).



ident Lincoln's objection during the Civil War,<sup>223</sup> and the Supreme Court's truckling to military hysteria on the Japanese-American internment question during another war less than a half century ago,<sup>224</sup> it is considerably uncertain whether any judiciary, fully independent or not, could have saved France from near anarchy. It is, after all, the executive branch which must execute the judgments of the judiciary.

Moreover, the French people were then engaged in an Olympian struggle of "overwhelming suddenness"<sup>225</sup> to break chains of political repression which had been forged over the course of a thousand-year monarchy. Protection of civil rights is an act of governmental maturity and willingness to embrace the ideal of the rule of law, as is well evident to anyone who looks around the world today. It may be too harsh a judgment to now fault the revolutionary leaders of two centuries ago for failing to exhibit the maturity which many long established nations presently appear to lack.

To focus on the Terror to the neglect of the Declaration of Rights itself would also be to obscure the importance of publicly articulating basic civil rights. The Declaration of Rights had dared to proclaim in ringing terms what few documents had ever before stated. In so doing, the Declaration of Rights bore witness to what much of the world now recognizes as self-evident, inalienable, basic civil rights. The Declaration of Rights raised the sights of countless thousands, in France and elsewhere, toward the prospect of a better, more decent way of life. While it may be true that today "bills of rights are a dime a dozen,"<sup>226</sup> that was not true in 1789. As the French revolutionaries well recognized, any sincere effort to protect civil rights must begin with their articu-

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<sup>223</sup> See generally W. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 147-49 (1987) (discussing *Ex Parte Merryman*, 17 Fed. Cas. 144, (C.C.D. Md. 1861) (No. 9487); Spector, *Lincoln and Taney: A Study in Constitutional Polarization*, 15 AM. J. LEGAL HIST. 199, 204-05 (1971); see also J. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 118-39 (1926) (discussing power to suspend habeas corpus).

<sup>224</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944), discussed in J. JOSEPH, *BLACK MONDAYS: WORST DECISIONS OF THE SUPREME COURT* 163-82 (1987).

<sup>225</sup> A. MATHIEZ, *supra* note 5, at 3. See also A. LOOMIS, *supra* note 16, at 12 ("Paris was a 'storm-tossed sea . . . .' One after another, various men or parties emerged to seize power. One after another, they were swept away by forces stronger than themselves."); Kirkwood, *Consolidation of Power and the Napoleonic Codes*, 18 VAL. U.L. REV. 665, 669 (1984) ("The Revolution . . . took France, and ultimately the Continent and the world, by storm. It swept with an unexpected fury.")

<sup>226</sup> Rehnquist Address, *supra* note 89, at 7 (attributing view to Justice Antonin Scalia).

lation—that quintessentially human act of daring to say that they exist and are important.

Although at times the promises of the Declaration of Rights have proved hollow in France, the liberal doctrines and guiding principles of the French Revolution have generally prevailed in that country over the past 200 years.<sup>227</sup> Concern for the rights of the individual has been embraced regularly by the French courts, as some have argued was evidenced at the turn of this century in the celebrated case of Captain Alfred Dreyfus.<sup>228</sup> After being court-martialled and imprisoned for betrayal of military secrets, Dreyfus was retried, pardoned, reinstated, and decorated with honors.<sup>229</sup> “In the political struggle over Dreyfus, a majority of the French public eventually responded to appeals for truth, liberty, and justice,”<sup>230</sup> and as Professor J.F. Boshier of York University concludes, the outcome in that case vindicated the principles of the Declaration of the Rights of Man.<sup>231</sup>

In the end, the French Revolution, ranging from the zenith of the Declaration of Rights to the nadir of the Terror, remains difficult to judge. What is clear, however, is that the Declaration of Rights remains “[o]ne of the classic statements of liberal thinking,”<sup>232</sup> one of the great human rights charters in Western history.<sup>233</sup> The concerns it addresses are timeless, and the spirit of its provisions is as commanding today as when they were first set down on paper. The Declaration of Rights has served as a model

<sup>227</sup> As Professor J.F. Boshier recently wrote on the eve of the French Bicentennial:

[The] guarantees for the citizen have been substantial, in spite of the miscarriages of justice that might be found in the history of the last two centuries. Public guarantees have not protected every citizen against private vengeance, mob violence, police brutality, political spite, or terrorism, but they have maintained a good measure of safety for the individual in normal times. French streets in the nineteenth and twentieth centuries have been decidedly freer from robbers, footpads, and murderous gangs than have American streets.

J. BOSHER, *supra* note 4, at 272.

[T]he National Constituent Assembly of 1789 established principles and a tradition, even though its own constitution was short lived. Upon that heritage the nation may not maintain a regime for long, but it will “reconstitute” itself (*se constituer*) by due process now two centuries old. The liberal doctrines of the Revolution have been preserved and implemented in this way.

*Id.* See also W. ANDREWS, *CONSTITUTIONS AND CONSTITUTIONALISM* 67 (3d ed. 1968).

<sup>228</sup> J. BOSHER, *supra* note 4, at 272–73. See generally Katz, *The Trials of Captain Alfred Dreyfus*, 51 CAL. ST. B.J. 12 (1976).

<sup>229</sup> See J. BOSHER, *supra* note 4, at 272.

<sup>230</sup> *Id.* at 272–73.

<sup>231</sup> *Id.* at 273.

<sup>232</sup> *Id.* at 137.

<sup>233</sup> See BLAUSTEIN & SIGLER, *supra* note 43, at 81.

for similar bills of rights contained in constitutions of other countries throughout Europe and around the world.<sup>234</sup> Indeed, several nations, including France and former French dependencies,<sup>235</sup> continue to expressly affirm their support of its ideals. In reflecting on the Declaration of Rights' origin and content on the occasion of the French bicentennial, we pay tribute to the struggles of the great nation and, as Franklin and Jefferson might remind us, we also honor a small part of our own history as well.

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<sup>234</sup> See G. JELLINEK, *supra* note 9, at 4.

<sup>235</sup> See Spitzer, *France*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, (A. Blaustein & G. Flanz eds. 1988) (French Constitution of 1958); A. BLAUSTEIN, *supra* note 42, at 10 (Senegal Constitution of 1963, Mali Constitution of 1974, and Central African Republic Constitution of 1981).

**APPENDIX**  
**The French Declaration of 1789 with Annotations to the Early  
American State Constitutions<sup>1</sup>**

The Declaration of the Rights of Man and of Citizens<sup>2</sup>

The representatives of the people of France, formed into a National Assembly, considering that ignorance, neglect, or contempt of human rights, are the sole causes of public misfortunes and corruptions of Government, have resolved to set forth in a solemn declaration, these natural, imprescriptible, and inalienable rights; that this declaration being constantly present to the minds of the members body social, they may be ever kept attentive to their rights and their duties;<sup>3</sup> that the acts of the legislative and executive powers of Government, being capable of being every moment compared with the end of political institutions, may be more respected; and also, that the future claims of the citizens, being directed by simple and incontestable principles, may always tend to the maintenance of the Constitution, and the general happiness.<sup>4</sup>

For these reasons the National Assembly doth recognise [sic] and declare, in the presence of the Supreme Being, and with a hope of his blessing and favour, the following *sacred* rights of men and of citizens:

I. Men are born, and always continue, free and equal in respect of their rights.<sup>5</sup> Civil distinctions, therefore, can only be founded on public utility.

II. The end of all political associations is the preservation of the natural and imprescriptible rights of man; and these rights are Liberty, Property, Security, and Resistance of Oppression.<sup>6</sup>

III. The Nation is essentially the source of all sovereignty;<sup>7</sup> nor can any individual or any body of men, be entitled to any authority which is not expressly derived from it.

IV. Political Liberty consists in the power of doing whatever does not injure another. The exercise of the natural rights of every man, has no other limits than those which are necessary to secure to every *other* man the free exercise of the same rights; and these limits are determinable only by the law.

V. The law ought to prohibit only actions hurtful to society. What is not prohibited by the law, should not be hindered; nor should anyone be compelled to that which the law does not require.

VI. The law is an expression of the will of the community. All citizens have a right to concur, either personally or by their representatives, in its formation.<sup>8</sup> It should be the same to all, whether it protects or

punishes;<sup>9</sup> and all being equal in its sight, are equally eligible to all honors, places, and employments, according to their different abilities, without any other distinction than that created by their virtues and talents.<sup>10</sup>

VII. No man should be accused, arrested, or held in confinement, except in cases determined by the law, and according to the forms which it has prescribed.<sup>11</sup> All who promote, solicit, execute, or cause to be executed, arbitrary orders, ought to be punished,<sup>12</sup> and every citizen called upon, or apprehended by virtue of the law, ought immediately to obey, and renders himself culpable by resistance.

VIII. The law ought to impose no other penalties but such as are absolutely and evidently necessary;<sup>13</sup> and no one ought to be punished, but in virtue of a law promulgated before the offense, and legally applied.<sup>14</sup>

IX. Every man being presumed innocent till he has been convicted, whenever his detention becomes indispensable, all rigor to him, more than is necessary to secure his person, ought to be provided against by the law.<sup>15</sup>

X. No man ought to be molested on account of his opinions, not even on account of his religious opinions,<sup>16</sup> provided his avowal of them does not disturb the public order established by law.<sup>17</sup>

XI. The unrestrained communication of thoughts and opinions being one of the most precious Rights of Man, every citizen may speak,<sup>18</sup> write,<sup>19</sup> and publish<sup>20</sup> freely, provided he is responsible for the abuse of this liberty, in cases determined by the law.

XII. A public force being necessary to give security to the Rights of Men and of citizens, that force is instituted for the benefit of the community and not for the particular benefit of the persons with whom it is entrusted.<sup>21</sup>

XIII. A common contribution being necessary for the support of the public force, and for defraying the other expenses of Government, it ought to be divided equally among the members of the community, according to their abilities.<sup>22</sup>

XIV. Every citizen has a right, either by himself or his representative, to a free voice in determining the necessity of public contributions, the appropriation of them, and their amount, mode of assessment, and duration.<sup>23</sup>

XV. Every community has a right to demand of all its agents, an account of their conduct.<sup>24</sup>

XVI. Every community in which a separation of powers and a security of rights is not provided for, wants a Constitution.<sup>25</sup>

XVII. The rights to property being inviolable and sacred, no one ought to be deprived of it, except in cases of evident public necessity, legally ascertained,<sup>26</sup> and on condition of a previous just indemnity.<sup>27</sup>

## ANNOTATIONS

1. For citations suggesting parallels between the French Declaration of the Rights of Man and of Citizens (Declaration of Rights) and the American Constitution and Bill of Rights, *see supra* notes 22–34.

2. This translation is taken from T. PAINE, *THE RIGHTS OF MAN* 94–97 (1951) (reprint). The state constitutions cited *infra* in notes 3–27 may be found in *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES* (P. Poore, ed., 2d ed. 1878).

3. For language similarly suggesting the importance of continued public attention to declared rights and duties, *see* N.C. CONST. art. XXI (1776) (“a frequent recurrence to fundamental principles is absolutely necessary, to preserve the blessings of liberty”); VA. BILL OF RIGHTS § 15 (1776) (“no free government, or the blessings of liberty, can be preserved to any people, but by . . . frequent recurrence to fundamental principles”).

4. The stated goal of maintaining the “general happiness” parallels American references to advancing the “general” or “common” good. *See* MASS. CONST. part I, art. VII (1780) (“Government is instituted for the common good”); N.H. CONST. art. I (1784) (“all government . . . is . . . instituted for the general good”); PA. CONST. art. V (1776) (“government is, or ought to be, instituted for the common benefit, protection and security of the people”).

5. Strongly similar language may be found in: N.H. CONST. art. I (1784) (“All men are born equally free and independent”); MASS. CONST. part I, art. I (1780) (“All men are born free and equal, and have certain natural, essential, and unalienable rights”); PA. CONST. art. I (1776) (“all men are born equally free and independent”); VT. CONST. ch. I, art. I (1777) (“all men are born equally free and independent”); VA. BILL OF RIGHTS § 1 (1776) (“all men are by their nature equally free and independent”).

6. Very similar language may be found in: MASS. CONST., preamble (1780) (“The end of the institution, maintenance, and administration of government is to . . . furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights and the blessings of life”), part I, art. I (“All men . . . have . . . the right of enjoying and defending their lives and liberties; . . . of acquiring, possessing, and protecting property; . . . of seeking and obtaining their safety and happiness”); N.H. CONST. art. II (1784) (“All men have certain natural, essential, and inherent rights; among which are—the enjoying and defending life and liberty—acquiring, possessing and protecting property—and in a word, of seeking and obtaining happiness”); PA. CONST. preamble (1776) (“all government ought to . . . enable the individuals who compose it to enjoy their natural rights”), art. I (“all men . . . 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"); VT. CONST. ch. I, art. I (1777) ("all men . . . 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. BILL OF RIGHTS § 1 (1776) ("all men . . . have certain inherent rights, . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing happiness and safety").

7. The same idea is conveyed by language contained in American constitutions stating that all power is vested, or resides, in the people; that all government originates from the people; or that the people have the sole right of governing themselves. *See* CONN. CONST. preamble (1776) ("The People of this State . . . have the sole and exclusive Right of governing themselves"); MD. CONST. § I (1776) ("all government of right originates from the people"); MASS. CONST. part 1, art. V (1780) ("All power [resides] originally in the people"); N.H. CONST. art. I (1784) ("all government of right originates from the people"); N.C. CONST. art. 1 (1776) ("all political power is vested in and derived from the people only"); PA. CONST. preamble (1776) ("government . . . [properly is] derived from and founded on the authority of the people only"), art. IV ("all power . . . [is] originally inherent in, and consequently derived from, the people"); VT. CONST. ch. I, art. V (1777) ("all power . . . [is] originally inherent in, and consequently, derived from, the people"); VA. BILL OF RIGHTS § 2 (1776) ("all power is vested in, and consequently derived from, the people").

8. Substantially similar language may be found in MASS. CONST. part 1, art. X (1780) ("the people . . . are not controllable by any other laws than those to which their constitutional representative body have given their consent"). *See also* N.H. CONST. art. XII (1784) ("the inhabitants of this state [are not] controllable by any other laws than those to which they or their representative body have given their consent"); VT. CONST. ch. I, art. 1860 (1777) ("the people [are not] bound by any law, but such as they have, in like manner, assented to, for their common good"); N.Y. CONST. art. I (1777) ("no authority shall . . . be exercised over the people . . . but such as shall be derived from and granted by them").

The same idea—that persons have the right to participate in the formation of laws—is conveyed by provisions in American state constitutions providing for the popular election of representatives empowered to make laws. *See* GA. CONST. art. I, §§ 2, 6, 16, art. IV, §§ 1–2 (1789) (decreeing popular election of the state senate and house of representatives and conferring on those bodies the "power to make all laws and ordinances"); VA. BILL OF RIGHTS § 5 (1776) (legislative and executive vacancies should be filled "by frequent, certain, and regular elections"), § 6 ("all men . . . have the right of suffrage, and cannot . . . , without their own consent, or that of their representatives . . . , [be] . . . bound by any law to which they have not . . . assented"); *see also* MD. CONST. Declaration of Rights § V (1776) ("the right in the people to participate in the

Legislature, is the best security of liberty . . . ; for this purpose, elections ought to be free and frequent, and every man, having property in, a common interest with, and an attachment to the community, ought to have a right of suffrage”).

9. For expressions likewise embodying the concept of equal protection of the laws, *see* MASS. CONST. preamble (1780) (endorsing “impartial interpretation” of the laws); N.H. CONST. art. XXXV (1784) (“there [must] be an impartial interpretation of the laws, and administration of justice”); N.J. CONST. art. XVI (1776) (“all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to”); PA. CONST. § 26 (1776) (“justice shall be impartially administered”).

10. The cited phrase in the Declaration of Rights refers to the revolutionary goal of ending special privileges for the clergy and nobility, who prior to the revolution enjoyed preferential treatment in France. The same idea—that talent, ability, and application, rather than matters unrelated thereto, should determine one’s place in society—is found in various provisions in American state constitutions, including those which abolish or place special burdens on titles of nobility, prohibit public offices from being hereditary, or state that one’s privileges are determined solely by one’s public service. *See* GA. CONST. art. XI (1777) (no “person who holds any title of nobility [shall] be entitled to a vote, or be capable of serving as a representative”); MD. CONST. Declaration of Rights § XI. (1776) (“no title of nobility, or hereditary honours, ought to be granted in this State”); MASS. CONST. part 1, art. VI (1780) (“No . . . men have any other title to obtain advantages, or particular and exclusive privileges distinct from those of the community, than what rises from the consideration of services rendered to the public, and this title being neither hereditary nor transmissible”); N.H. CONST. art. IX (1784) (“No office or place whatsoever in government, shall be hereditary—the abilities and integrity requisite in all, not being transmissible to posterity or relations.”); N.C. CONST. art. III (1776) (“no man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services”), art. XXII (“no hereditary emoluments, privileges or honors ought to be granted or conferred in this State”); VT. CONST. ch. I, art. VI (1777) (“government is . . . instituted for the common benefit, protection, and security of the people . . . ; not for the particular emolument or advantage of any single man, family or set of men”); VA. BILL OF RIGHTS § 4 (1776) (“no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services”).

11. *Compare* CONN. CONST. para. 2 (1776) (“No Man’s Person shall be arrested . . . unless clearly warranted by the Laws of this State”), para. 4 (“no Man’s Person shall be restrained, or imprisoned, by any authority whatsoever, before the Law hath sentenced him thereunto, . . . unless . . . some express Law doth allow”); MD. CONST. Declaration of Rights § XXI (1776) (“no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled . . . but by the judgment of his peers, or by the law of the land”); MASS. CONST. part 1, art. XII (1780) (“no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities or privileges,



. . . but by the judgment of his peers, or the law of the land"); N.H. CONST. art. XV (1784) ("no subject shall be arrested, imprisoned, despoiled or deprived of his property . . . , but by the judgment of his peers or the law of the land"), art. XIX ("no warrant ought to be issued but in case, and with the formalities prescribed by the laws"); N.Y. CONST. art. XIII (1777) ("no member of this State shall be disenfranchised, or deprived of any . . . rights and privileges . . . , unless by the law of the land, or the judgment of his peers"); N.C. CONST. art. XII (1776) ("no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled . . . but by the law of the land"); PA. CONST. art. IX (1776) ("nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers"); VT. CONST. ch. I, art. X (1777) (no man may "be justly deprived of his liberty, except by the laws of the land or the judgment of his peers"); VA. BILL OF RIGHTS § 8 (1776) ("no man [may] be deprived of his liberty, except by the law of the land").

Unlike the Declaration of Rights, many of the American state constitutions specifically endorsed the right to trial by jury and extensively detailed the rights of the accused. *See, e.g.*, VT. CONST. ch. I, art. X (1777) (discussing rights of accused and trial by jury). The American charters also tended to include extensive discussions of search warrants, which are not mentioned in the French document. *See, e.g.*, N.C. CONST. art. XI (1776) ("general warrants . . . ought not to be granted"); PA. CONST. art. X (1776) ("warrants without oaths or affirmations first made, affording a sufficient foundation for them . . . ought not to be granted"); VA. BILL OF RIGHTS § 10 (1776) (condemning search warrants lacking specificity).

12. Perhaps the closest parallel to this provision in the Declaration of Rights calling for the punishment of those who engage in arbitrary action is language in the Pennsylvania constitution indicating that public officers may be "reduced" to a "private station" to curb oppressive practices. *See* PA. CONST. art. VI (1776) ("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 certain and regular elections").

13. The French prohibition of unnecessary penalties echoes American state constitutional provisions condemning excessive fines or bail or cruel and unusual punishment, or directing that a penal sanction should be proportionate to the offense. *See* GA. CONST. art. LIX (1777) ("Excessive fines shall not be levied, nor excessive bail demanded"); MD. CONST. Declaration of Rights § XIV (1776) ("sanguinary laws ought to be avoided . . . and no law, to inflict cruel and unusual pains and penalties, ought to be made"), § XXII ("excessive bail ought not to be required, nor excessive fines imposed"); MA. CONST. part 1, art. XXVI (1780) ("No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments"); N.H. CONST. art. XVIII (1784) ("All penalties ought to be proportioned to the nature of the offense"), art. XXXIII ("No magistrate or court of law shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments");

N.C. CONST. art. X (1776) ("excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"); PA. CONST. § 38 (1776) ("punishments [should be] made . . . proportionate to the crimes") (brackets added); S.C. CONST. § XL (1778) (providing that "the penal laws . . . shall be . . . in general proportionate to the offense"); VA. BILL OF RIGHTS § 9 (1776) ("excessive bail ought not to be required, nor excessive fines imposed"; "cruel and unusual punishments [ought not to be] inflicted") (brackets added).

14. Corresponding *ex post facto* law prohibitions are found in: MD. CONST. Declaration of Rights § XV (1776) ("no *ex post facto* law ought to be made") (italics in original); MASS. CONST. part 1, art. XXIV (1780) ("Laws made to punish for actions done before the existence of such laws . . . are unjust"); N.H. CONST. art. XXIII (1784) ("Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offences"); N.C. CONST. art. XXIV (1776) ("no *ex post facto* law ought to be made") (italics in original).

15. See *supra* note 13 (noting state constitutions prohibiting cruel and unusual punishment).

16. Topics relating to religion were extensively treated in the early American state constitutions, and the treatment often differed substantially from state to state. Language paralleling the French guarantee of a right to hold religious opinions may be found in: GA. CONST. art. IV, § 5 (1789) ("All persons shall have the free exercise of religion"); N.J. CONST. art. XVIII (1776) ("no person shall ever . . . be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience"); N.Y. CONST. art. XXXVIII (1777) ("the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed"); N.C. CONST. art. XIX (1776) ("all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences"); PA. CONST. art. II (1776) ("all men have a natural right to worship Almighty God according to the dictates of their own consciences and understanding . . . And . . . no authority can or ought to . . . interfere with . . . the free exercise of religious worship"); VA. BILL OF RIGHTS § 16 (1776) ("all men are equally entitled to the free exercise of religion . . . , and it is the mutual duty of all to practise Christian forbearance . . . towards each other"). See also DEL. CONST. art. 29 (1776) ("There shall be no establishment of any one religious sect . . . in preference to another").

However, not all states were equally tolerant of all religions. Thus, South Carolina's constitution provided that only those "persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated." S.C. CONST. § XXXVIII (1778). The same document further designated the "Christian Protestant religion" as the "established religion" of the state, and defined conditions for the formation of churches, the hiring of ministers, and the conduct of religious assemblies. *Id.* See also N.H. CONST. part II (1784) (providing that senators, representatives, and state presidents had to be of the

Protestant religion); PA. CONST. § 10 (1776) (providing that members of the state house of representatives had to take an oath which stated in part: "I do acknowledge the Scriptures of the Old Testament and New Testament to be given by Divine inspiration."); VT. CONST. ch. II, § IX (1777) (similar language).

North Carolina was evidently ambivalent on the issue of religious freedom. While providing in its "Form of Government" that "all persons shall be at liberty to exercise their own mode of worship," it burdened that liberty by providing that "no person, who shall deny the . . . truth of the Protestant religion . . . shall be capable of holding any office or place of trust or profit in the civil department [of the] State." N.C. CONST. Form of Government arts. XXXII and XXXIV (1776).

Similarly, while Vermont's constitution provided that "no authority can . . . interfere with, or in any manner controul [sic], the rights of conscience, in the free exercise of religious worship," it expressed a preference for one sect, stating that "any man who professes the protestant religion, [cannot] be justly deprived or abridged of any civil right . . . on account of his religious sentiment," and further opined that "every sect or denomination ought to observe the Sabbath." VT. CONST. ch. I, art. III (1777).

17. The proviso in the Declaration of Rights conditioning the right to religious opinion on nondisturbance of the public order finds parallels in several American state constitutions. *See* GA. CONST. art. LVI (1777) ("All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State . . ."); MASS. CONST. part I, art. II (1780) ("no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in the religious worship"); N.H. CONST. art. V (1784) ("no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience . . . provided he doth not disturb the public peace, or disturb others, in their religious worship") (caps in original).

Maryland's constitution of 1776 protected the religious liberty only of those persons "professing the Christian religion," and even those persons were enjoined from "disturb[ing] the good order, peace or safety of the State, or . . . [infringing] the laws of morality, or [injuring] others." MD. CONST. Declaration of Rights § XXXIII (1776).

18. *Compare* PA. CONST. art. XII (1776) ("the people have a right to freedom of speech"); VT. CONST. ch. I, art. XIV (1777).

19. *Compare* PA. CONST. art. XII (1776) ("the people have a right to freedom . . . of writing"); VT. CONST. ch. I, art. XIV (1777).

20. Equivalent language is found in many of the American constitutions. *See* GA. CONST. art. LXI (1777) ("Freedom of the press and trial by jury [are] to remain inviolate forever."); GA. CONST. art. IV, § 3 (1789) ("Freedom of the press and trial by jury shall remain inviolate."); MD. CONST. Declaration of

Rights § XXXVIII (1776) ("the liberty of the press ought to be inviolably preserved"); MASS. CONST. part 1, art. XVI (1780) ("liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained"); N.H. CONST. art. XXII (1784) ("The Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved."); N.C. CONST. art. XV (1776) ("freedom of the press . . . ought never to be restrained"); PA. CONST. art. XII (1776) ("the people have a right to freedom of . . . publishing their sentiments; therefore the freedom of the press ought not to be restrained"); S.C. CONST. § XLIII (1778) ("the liberty of the press [shall] be inviolably preserved"); VT. CONST. ch. I, art. XIV (1777) (freedom to publish); VA. BILL OF RIGHTS § 12 (1776) ("freedom of the press . . . can never be restrained").

21. The Declaration of Rights' recognition of the importance of police or military forces and of the fact that they do not exist for their own benefit is echoed in VA. BILL OF RIGHTS § 13 (1776) ("a well-regulated militia . . . is the proper, natural, and safe defence of a free State; . . . and . . . in all cases the military should be under strict subordination to, and governed by, the civil power"). *See also* MD. CONST. Declaration of Rights § II (1776) (the "State ought to have the sole and exclusive right of regulating the internal government and police thereof"), § XXV ("a well-regulated militia is the proper and natural defence of a free government"), § XXVII ("the military ought to be under strict subordination to and control of the civil power"); N.H. CONST. art. XXVI (1784) ("the military ought to be under strict subordination to, and governed by the civil power"); N.C. CONST. Declaration of Rights art. XVII (1776) ("the military should be kept under strict subordination to, and governed by the civil power"); PA. CONST. art. XIII (1776) ("the military should be kept under strict subordination to, and governed by, the civil power"); S.C. CONST. § XLII (1778) (providing that "the military [shall] be subordinate to the civil power of the State"); VT. CONST. ch. I, art. IV ("the people . . . have the sole . . . right of governing and regulating the internal police" of the state), art. XV (1777) ("the military should be kept under strict subordination to, and governed by, the civil power").

22. *See* N.H. CONST. part I, art. XII (1784) ("Every member of the community has a right to be protected by it in the enjoyment of his life, liberty and property; he is therefore bound to contribute his share in the expense of such protection . . ."); PA. CONST. art. VIII (1776) ("every member of society hath a right to be protected . . . and therefore is bound to contribute his proportion towards the expense of that protection"); VT. CONST. ch. I, art. IX (1777) ("every member of society hath a right to be protected . . . and therefore, is bound to contribute his proportion towards the expense of that protection").

Other state constitutions, through provisions not directly dealing with the subsidization of public protection, embraced the idea that there is a civic obligation to pay taxes and that a tax burden imposed on an individual should be proportional to his ability to pay. *See* MD. CONST. Declaration of Rights § XIII (1776) (except paupers, "every . . . person in the State ought to contribute his proportion of public taxes, for the support of government, according to his

actual worth"); MASS. CONST. part 1, art. X (1780) ("Each individual . . . is obliged . . . to contribute his share to the expense of . . . protection").

23. This article—providing in effect that there should be no taxation without representation—has counterparts in a number of state constitutions. *See* MD. CONST. Declaration of Rights § XII (1776) ("no . . . tax . . . ought to be . . . levied . . . without the consent of the Legislature"); MASS. CONST. part 1, art. XXIII (1780) ("No subsidy, charge, tax, impost, or duties, ought to be established, fixed, laid, or levied . . . without the consent of the people, or their representatives"), art. X ("no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people"); N.H. CONST. art. XXVIII (1784) ("No subsidy, charge, tax, impost or duty shall be established . . . without the consent of the people or their representatives"); N.C. CONST. Declaration of Rights art. XVI (1776) ("the people of this State ought not to be taxed, or made subject to any . . . impost or duty, without the consent of themselves, or their Representatives in General Assembly, freely given"); VT. CONST. ch. II, § XXXVII (1777) ("No public tax . . . shall be imposed upon . . . the people of this State, except by a law for that purpose" passed by the legislature); VA. BILL OF RIGHTS § 6 (1776) ("all men . . . 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").

24. The theme that public agents should be accountable was sounded in many of the American state constitutions. *See* GA. CONST. art. XLIX (1777) ("Every officer of the State shall be liable to be called to account by the house of assembly"); MD. CONST. Declaration of Rights § IV (1776) ("all persons invested with the legislative or executive powers of government are the trustees of the public, and, as such, accountable for their conduct"); MASS. CONST. part 1, art. V (1780) ("magistrates and officers of government . . . are at all times accountable" to the people), art. XVIII (the people "have a right to require of their lawgivers and magistrates an exact and constant observance" of the fundamental principles of the constitution); N.H. CONST. art. VIII (1784) ("all power residing originally in, and being derived from the people, all the magistrates and officers of government, are their substitutes and agents, and at all times accountable to them"); PA. CONST. art. IV (1776) ("all officers of government, whether legislative or executive, are . . . accountable to" the people); VT. CONST. ch. I, art. V (1777) ("all officers of government . . . [are] accountable to" the people); VA. BILL OF RIGHTS § 2 (1776) ("magistrates are [the people's] trustees and servants, and at all times amenable to them").

25. The concept of separation of powers was also basic in the early American state constitutions. *See* GA. CONST. art. I (1777) ("The legislative, executive, and judiciary departments shall be separate and distinct"); MD. CONST. Declaration of Rights § VI (1776) ("the legislative, executive and judicial powers of government, ought to be forever separate and distinct"); MASS. CONST. part 1, art. XXX (1780) (providing for separation of powers); N.H. CONST. art. XXXVII (1784) ("the three essential powers . . . , the legislative, executive and judicial,

ought to be kept as separate from and independent of each other, as the nature of a free government will admit"); N.C. CONST. art. IV (1776) ("the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other"); VA. BILL OF RIGHTS § 5 (1776) ("the legislative and executive powers of the State should be separate and distinct from the judiciary").

26. Provisions barring unlawful takings of private property may be found in: N.H. CONST. art. XII (1784) ("no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people"); PA. CONST. art. VIII (1776) ("no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives"); VT. CONST. ch. I, art. IX (1777) ("no part of a man's property can be justly taken from him, and applied to public uses, without his own consent, or that of his legal representatives").

27. A few of the early state constitutions recognized the right to compensation for property taken by the state, but, unlike the Declaration of Rights, they did not require that the compensation be paid prior to the taking. *See* MASS. CONST. part I, art. X (1780) ("whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefore"); VT. CONST. ch. I, art. II (1777) ("whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money").