

Roger Williams University Law Review

Volume 1
Issue 1 Vol. 1: No. 1 (Spring 1996)

Article 3

Spring 1996

Rhode Island's Forgotten Bill of Rights

Kevin D. Leitao

Corporate Counsel, The O'Connor Group

Follow this and additional works at: https://docs.rwu.edu/rwu_LR

Recommended Citation

Leitao, Kevin D. (1996) "Rhode Island's Forgotten Bill of Rights," *Roger Williams University Law Review*.
Vol. 1 : Iss. 1 , Article 3.

Available at: https://docs.rwu.edu/rwu_LR/vol1/iss1/3

This Article is brought to you for free and open access by the School of Law at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized editor of DOCS@RWU. For more information, please contact mwu@rwu.edu.



Content downloaded/printed from

[HeinOnline](#)

Fri Dec 13 12:18:28 2019

Citations:

Bluebook 20th ed.

Kevin D. Leitao, Rhode Island's Forgotten Bill of Rights, 1 Roger Williams U. L. Rev. 31 (1996).

ALWD 6th ed.

Kevin D. Leitao, Rhode Island's Forgotten Bill of Rights, 1 Roger Williams U. L. Rev. 31 (1996).

APA 6th ed.

Leitao, K. D. (1996). Rhode Island's Forgotten Bill of Rights. Roger Williams University Law Review, 1, 31-62.

Chicago 7th ed.

Kevin D. Leitao, "Rhode Island's Forgotten Bill of Rights," Roger Williams University Law Review 1 (1996): 31-62

McGill Guide 9th ed.

Kevin D Leitao, "Rhode Island's Forgotten Bill of Rights" (1996) 1 Roger Williams U L Rev 31.

MLA 8th ed.

Leitao, Kevin D. "Rhode Island's Forgotten Bill of Rights." Roger Williams University Law Review, 1, 1996, p. 31-62. HeinOnline.

OSCOLA 4th ed.

Kevin D Leitao, 'Rhode Island's Forgotten Bill of Rights' (1996) 1 Roger Williams U L Rev 31

Provided by:

Roger Williams University School of Law Library

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

Use QR Code reader to send PDF to your smartphone or tablet device



Rhode Island's Forgotten Bill of Rights

Kevin D. Leitao*

1. INTRODUCTION

State constitutional law is emerging as a powerful basis for the assertion of fundamental liberties. Scholars, judges and advocates are all involved in the current renaissance of state constitutions.¹ Litigants now frequently look to state courts to establish broader civil rights protections under state constitutional law than exist under the federal constitution.² The interpretation of civil

* Corporate Counsel, The O'Connor Group. A.B. 1986 Brown University; M. Phil. 1988 Cambridge University; J.D. 1991 Yale Law School.

1. See generally, Developments in Law, *The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324 (1982) (describing several approaches to state constitutional interpretation of civil rights protections); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977) (recounting the separate historical development and application of state bills of rights); see also, Hans A. Linde, *First Things First: Rediscovering the States' Bills of Right*, 9 U. Balt. L. Rev. 379 (1980) (advocating that state courts first interpret state constitutional protections in deciding cases and examine federal constitution law only if necessary).

2. See, e.g., *State v. Benoit*, 417 A.2d 895 (R.I. 1980) (holding that the Rhode Island Constitution prohibited a warrantless search permissible under the U.S. Constitution); *overruled by State v. Werner*, 615 A.2d 1010 (R.I. 1992) (holding that state protections against search and seizure are identical to those guaranteed by the United States Constitution). In *Benoit*, the Rhode Island Supreme Court rejected a criminal defendant's challenge under the Fourth Amendment of the U.S. Constitution to a warrantless search, citing *Chambers v. Maroney*, 399 U.S. 42 (1970). In interpreting Article I, Section 6 of the Rhode Island Constitution, however, the state supreme court ruled in favor of the defendant's challenge, and based its reasoning on the position adopted by Justice Harlan in his dissent in *Chambers*. *State v. Holliday*, 280 A.2d 333 (R.I. 1971) (holding that Rhode Island's constitutional provision protecting the right to appointed counsel is broader than protection under the United States Constitution); see also *State v. Moretti*, 521 A.2d 1003 (R.I. 1987) and *State v. Medeiros*, 535 A.2d 766 (R.I. 1987) in which the Rhode Island Supreme Court followed its decision in *Moretti*; but see *In re Advisory Opinion (Appointed Counsel)*, 666 A.2d 813 (R.I. 1995) (abrogating *Holliday*, *Mo-*

rights provisions in state constitutions raises the same issues regarding the relevance of history and original intent as are analyzed in the interpretation of the federal constitution.³ Just as James Madison's notes of the Philadelphia Convention and Elliot's Debates have been carefully studied, state constitutional conventions deserve similar scrutiny because they are central to understanding the intent and context of state constitutional development. Indeed, these issues are often more complicated on the state level because many states have had two or more constitutions since the creation of their government.⁴

An examination of Rhode Island's constitutional convention of 1790, held to consider ratification of the U.S. Constitution, reveals more than the original understanding and historical context of the Rhode Island convention's view of the U.S. Constitution. Existing accounts of the 1790 convention reveal that the State of Rhode Island has a forgotten bill of rights enacted by the people in the constitutional convention which ratified the United States Constitution. This Declaration of Rights was the first constitutional document created by the sovereign people of Rhode Island. Once ratified, the Declaration of Rights of the People of Rhode Island fell into virtual total obscurity. There is no record of any enforcement of rights under it. Indeed, extensive research has revealed only three individuals who have referred to the document as a basis for asserting fundamental rights.⁵

retti and *Medeiros* by finding the right to counsel under the Rhode Island Constitution no greater than the protection afforded by the United States Constitution). While Rhode Island appears to have retrenched in reading its constitution more broadly than that of the United States Constitution, the point nonetheless remains that this is an active area of litigation for the assertion of fundamental liberties. See Michael DiBiase, *Reviving Rhode Island State Constitutional Rights: The Need for a New Approach to Constitutional Questions*, 35 R.I.B.J. 5 (1987) (advocating that Rhode Island courts should apply state constitutional provisions first, rather than as a supplement to the application of federal constitutional protections).

3. Hans A. Linde, *E Pluribus - Constitutional Theory and State Courts*, 18 Ga. L. Rev. 165, 183-184 (1984) [hereinafter *E Pluribus*]. Despite the relevance of history to state constitutional interpretation, The Michie Company, publishers of the General Laws of Rhode Island, 1956 Enactment (1978 ed.), does not include historical or reenactment annotations on provisions of the Rhode Island Constitution. Such annotations are provided only for statutory provisions.

4. For example, Rhode Island has had two constitutions since 1776. In contrast, Georgia has had ten constitutions during the same period. *E Pluribus*, *supra* note 2, at 165.

5. First, Seth Luther, a working-class activist in Rhode Island during the 1830's, stated that the system of freehold suffrage was "contrary to the Declaration

A review of the Declaration of Rights of 1790, the convention that ratified it, and later constitutional conventions in Rhode Island suggests that some of the rights declared in this forgotten document may still be enforceable. If so, the people of Rhode Island may be able to assert certain fundamental liberties today based on this obscure proclamation of rights.

This article will argue that this Declaration of Rights was "higher law," that is constitutional law,⁶ because it was proposed

of Independence, the Constitution of the United States, the Bill of Rights of the State of Rhode Island, and the dictates of common sense." Patrick Conley, *Democracy in Decline*, 238 (1977) (quoting Seth Luther: *An Address on the Rights of Free Suffrage*). For a brief narrative on Seth Luther, see Marvin E. Gettleman, *The Dorr Rebellion: A Study in American Radicalism, 1833-1849*, 18-22 (1973). Second, Thomas Wilson Dorr, who led a rebellion against the Charter government in 1842, cited the 1790 Declaration of Rights on several occasions. In the so-called "Nine Lawyers' Opinion" on the "Right of the People to Form a Constitution," Dorr cited the "Declaration of 1790" in support of his argument that the people can choose whatever means they deem most proper to alter or abolish an existing constitution, regardless of the method prescribed for amendment of that Constitution. See *Rhode Island Historical Tracts*, (Sydney S. Rider ed., 1880). The final reference is found in the formidable argument of Benjamin Franklin Hallett before the Supreme Court of the United States in the case of *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). Hallett's argument was published separately as B.F. Hallett, *The Right of the People to Establish Forms of Government*, (1848). In his address, Hallett asked "After this [Declaration of Independence] what were the authentic acts of the people, or the nearest to it, establishing a form of government?" His answer included the following,

It [the Rhode Island Convention of 1790] was the highest to any authentic act of the people which her history exhibits down to 1841; and hence its actions had a higher sanction than that of any Legislative body.

May 29, 1790, the Convention ratified the Constitution of the United States, and at the same time adopted and proclaimed a Bill of Rights.

On this platform of right we stand, as the basis of popular government in Rhode Island. The same Bill of Rights, with some modifications, was subsequently enacted by the Legislature and is found in the Digest of Laws of 1798. And a higher power than the Legislature had declared that not one of these rights could be abridged or violated, and that no body of men could deprive or divest their posterity of either of them.

Still the people of Rhode Island were without a written constitution, and so remained for more than half a century after this declaration. Id. at 16-17. The reference in this passage to the Digest of Laws of 1798 is curious. The parts of the Declaration of Rights that were codified in 1798 did not relate to popular sovereignty, which was Hallett's reason for citing the Declaration of Rights.

6. The terms *higher law* and *higher lawmaking* in this article follow Professor Ackerman's theory of a *dualist democracy* whereby the process of lawmaking at the federal level is separated into two separate tracks. *Higher law*, in this view, is fundamental law that is created and approved by the sovereign people. *Normal*

and ratified by a convention of the people.⁷ Under the principles of popular sovereignty articulated during that period by the Rhode Island legislature, the delegates selected for the constitutional convention of 1790 had the power to produce constitutional law. Although this Declaration of Rights was not a complete constitution outlining the structure of government, it was written constitu-

law, in his parlance, corresponds to statutes enacted by legislatures that govern the affairs of the state. In this conceptual scheme, the legislature does not have the authority to alter higher law. In this article, Ackerman's dualist democracy construct is applied to the process of creating higher law and normal law in the State of Rhode Island. See Bruce Ackerman, *We The People* (1991).

Since the 1770s, higher lawmaking at the state level through the United States has generally been through mechanisms such as the people acting in convention or acting by referendum. These mechanisms for creating higher law are normally sponsored or supported by the legislative and executive branches of state government. In addition, the state legislature normally approves the action of the sovereign people *ex poste*.

A considerable literature has developed recently on alternative mechanisms for higher lawmaking at the federal level. For example, Ackerman asserts that alternative mechanisms of higher lawmaking were responsible for the Reconstruction Amendments and the New Deal Court's 'Switch in Time'. *Id.* at 42-43, 58. For an illuminating study of possible alternative mechanisms for adopting higher law, see Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution outside Article V*, 55 U. Chi. L. Rev. 1043 (1988).

7. This conclusion is based on the application of the principles of popular sovereignty to Rhode Island's 1790 constitutional convention. Under principles of popular sovereignty, the people are the source of the government's power and therefore have the right to alter or abolish the government. A common mechanism for the exercise of this right in the American states in the 1770s and 1780s was for representatives chosen by the people to meet in convention for the purpose of drafting and ratifying constitutional law. For a clear statement of the theory and application of popular sovereignty in the United States in the 1770s and 1780s, see 1 R. R. Palmer, *The Age of Democratic Revolution*, 213-35 (1959-64). Palmer wrote,

[t]he constitutional convention in theory embodied the sovereignty of the people. The people chose it for a specific purpose, not to govern, but to set up institutions of government. The convention, acting as the sovereign people, proceeded to draft a constitution and a declaration of rights. Certain natural or inalienable rights of the citizen were thus laid down at the same time as the powers of government. It was the constitution that created the powers of government, defined their scope, gave them legality, and balanced them one against another. The constitution was written and comprised in a single document. The constitution and accompanying declaration, drafted by the convention, must, in the developed theory, be ratified by the people . . .

Id.; see also Gordon Wood, *The Creation of the American Republic* (1969) (providing a detailed study of the development of the theory of popular sovereignty and state constitutional development between 1776 and 1787).

tional law which could only be repealed or revised by a subsequent act of higher lawmaking by the people.

In order to prove the constitutional status of the Declaration of Rights, this article will trace the history of the document from its formation to its ratification. If the Declaration of Rights was valid constitutional law, it is important to explore the extent to which subsequent constitutions adopted by the people of Rhode Island have nullified or revised this document. The article concludes that Rhode Island's subsequent constitutional history has not resulted in the repeal of the Declaration and leads to the conclusion that some sections of the 1790 bill of rights may be enforceable today.

2. RHODE ISLAND HISTORY BEFORE 1790

Before examining the Rhode Island Convention of 1790, it is important to review the constitutional history of Rhode Island prior to its adoption of the U.S. Constitution.

A. *The Charter*

From 1643 to 1842, Rhode Island was governed by two written charters. Rhode Island and Connecticut were the only states not governed by a state constitution by 1789. Indeed, Rhode Island's second charter granted in 1663, survived three periods of widespread higher lawmaking during which new constitutions were adopted in state constitutional conventions across the nation in the early days of the republic.⁸

The charters were not a grant of power to govern originating from the people. Although the people played a role in the design of the charters, the British Sovereign was the source of the charters and granted certain rights to the people of the colony. The first charter, obtained in 1643, was a parliamentary patent.⁹ It provided "full Power and Authority to rule themselves, and such others as shall hereafter inhabit within . . . said tract of land, by such a Form of Civil Government . . . they shall find most suitable

8. These periods were: 1777-1787, 1815-1820, 1830-1840. Connecticut replaced its charter with a state constitution in 1818. See 1 F.N. Thorpe, *Federal and State Constitutions* at 536 (1993).

9. Conley, *supra* note 5 at 17-18. Conley notes that Parliament was the source of the 1643 Charter, because the King, Charles I, had already begun to lose power. Charles I was ultimately executed in 1649 following the English Civil War.

to their Estate and Condition; . . ."¹⁰ Following the restoration of the monarchy in 1660, the 1643 charter was replaced by a royal charter granted by Charles II in 1663. The charters established Rhode Island as a corporate colony. As a corporate colony, the residents of Rhode Island were granted virtual self governance.¹¹

Indeed, the 1663 Charter (Charter) allowed the colonists to establish whatever structure of government was best suited to their needs. These rights of self-governance, however, did not include the right or power to amend the Charter. Rather, the Charter permitted the freemen of Rhode Island to design and revise a form of government as long as such government was in accordance with the Charter. The amendment power rested solely with the British Sovereign, the source of the Charter.

B. *The Revolutionary Era*

Rhode Island's Charter remained in force throughout the colonial period.¹² Violations of several Charter provisions were not infrequent¹³ but the Charter itself was not altered or abandoned.¹⁴ On May 4, 1776, the General Assembly of Rhode Island declared the colony's independence by ending allegiance to the King and establishing government authority in the "Governor and Company of the English Colony of Rhode Island and Providence Plantations."¹⁵ On July 18, 1776, the General Assembly ended its colonial status in a resolution approving the Declaration of Independence of July 4, 1776.¹⁶

10. Thorpe, *supra* note 8 at 3210.

11. Conley, *supra* note 5 at 22-23, especially n.4.

12. *See generally, id.*, for a comprehensive history of the charter governments during the colonial period. Conley's book is the definitive work on Rhode Island constitutional history from 1776 to 1841. It also includes a valuable and very readable history of the charters between 1643 and 1776.

13. Conley cites the exclusion of Catholics from being freemen between 1719-1783, *id.* at 33-35 and the occasional use of primogeniture before 1770, *id.* at 24, n.6 as examples.

14. The possible exception to the continued operation of the Charter involved the consolidation of New England government under the Dominion of New England in the 1680s. Massachusetts lost its corporate charter at that time, but Connecticut and Rhode Island were able to preserve their charters. According to Conley, Rhode Island claimed that it did not surrender its charter when it submitted to the consolidation. *Id.* at 27.

15. 7 Bartlet, Records of the Colony of Rhode Island and Providence Plantations in New England, 522-26 (1968); *see also*

16. *Id.* at 581-82.

This was, in effect, an act of *higher lawmaking by the legislature*. There was no referendum, no convention and no special election by the freemen before this action was undertaken. It was not an act of the people. The General Assembly, on its own authority, altered the source of sovereign power in the Charter. The General Assembly, however, did not alter the substantive provisions of the Charter relating to the structure or operation of the state government.

In September, 1777, the General Assembly created a committee to draft a plan of government, but there is no record of any committee report.¹⁷ The failure of the state to draft a new constitution may be related to the extent of British occupation during the war. One-third of the state, including Newport, was occupied during most of the Revolutionary War.¹⁸ There also may not have been the same urgency to adopt a new form of government in Rhode Island or in Connecticut, the other corporate colony, as there was in other states. Prior to independence, the two corporate colonies had the most autonomous political institutions and political life of the thirteen colonies.¹⁹

The act of higher lawmaking undertaken by the General Assembly in declaring independence and changing the source of authority in the Charter was repeated when it came time to ratify the Articles of Confederation. Here again, the Assembly ratified the Articles without a convention or direct referral to the people.²⁰ The General Assembly acted very quickly in accepting the Articles.²¹ Although the legislators may have discussed the Articles of Confederation in town meetings, historians have not noted any dis-

This Assembly, taking into the most serious consideration, the resolutions of the Most Honorable the Continental Congress of the United States of America, of the 4th instant, declaring the said states free and independent states, do approve the said resolution; and do most solemnly engage, that we will support the said General Congress, with our lives and fortunes . . . Be it enacted by this General Assembly, and by the authority thereof, it is enacted, that for the future, the style and title of this government, in all acts and instruments, whether of a public or private nature, shall be the State of Rhode Island and Providence Plantations; . . .

17. Conley, *supra* note 5, at 67.

18. Irwin Polishook, *Rhode Island and the Union 1774-1795*, 13 (1969).

19. Conley, *supra* note 5 at 24.

20. Richard Morris, *Forging of the Union 316-317* (1987).

21. The state legislature received the Articles of Confederation on December 19, 1777 and ratified them on February 18, 1778. William Staples, *Rhode Island in the Continental Congress 1765-1790*, pp. 133-137 (1971).

cussions at town meetings nor mentioned any instructions given to representatives.

By 1787, the government of Rhode Island had begun to articulate the principle of popular sovereignty as the basis for governmental authority. In a letter to the President of Congress dated September 15, 1787, the Governor of Rhode Island attempted to justify Rhode Island's absence from the Philadelphia Convention by stating that the legislature could not appoint delegates to the late convention because "as that delegation in convention is for the express purpose of altering a constitution . . . the people at large are only capable of appointing the members."²² Several members of the General Assembly from Newport and Providence objected to the letter and its rationale.²³ Putting aside the specific issue of appointing delegates to the Philadelphia Convention, the Governor's letter indicates that popular sovereignty was by then thought to be the basis for the authority of the state government and, accordingly, that altering constitutional law would have to be an act of the people.

The General Assembly also stated that the people are the source of the government's authority in rejecting the Congress' request that the proposed federal constitution be considered by a convention, convened for that purpose, in each state.²⁴ Instead of calling a convention, the General Assembly placed the constitution before the people in a referendum. Rhode Island was the only state which did not honor this request made by the Congress.²⁵

22. Bartlett, *supra* note 15 at 258-59. Rhode Island was the only state not to send any delegates to the Philadelphia Convention. Although this refusal to participate is often used as evidence of the state's rogue character in the 1780s, it is little disputed that the Philadelphia Convention was not legally empowered to propose a new constitution nor was Article VII's ratification provision in accordance with the legal requirements for amending the Articles of Confederation. For different views on the authority of the federal convention, see Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L. J. 1013, 1017 (1984), and Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1047-1049 (1988). The governor's language suggests that dualist democracy principles were in place at that time.

23. Bartlett, *supra* note 15 at 259-60.

24. Congress sent the Constitution to the states in a resolution passed on September 28, 1787. It should also be noted that the Congress' decision to have the new constitution considered by conventions rather than by the state legislatures was at variance with the requirements for amending the Articles of Confederation.

25. The General Assembly's explanation was as follows:

After the Constitution was defeated in the referendum,²⁶ the General Assembly denied eleven motions for a state convention before allowing a convention to take place.²⁷ The General Assembly's decision, on January 17, 1790, to finally permit a convention to be assembled to deliberate on the U.S. constitution was clearly the product of the increasing pressure being applied to Rhode Island by the new government of the United States.²⁸

This legislative body, in General Assembly convened, conceiving themselves representatives of the great body of the people at large, . . . cannot make any innovation in a Constitution which has been agreed upon, and the compact settled between the governors and the governed, without the express consent of the freemen at large, by their own voices individually taken in town meetings assembled.

This explanation was given in an act passed by the General Assembly in February 1788. Bartlett, *supra* note 15 at 271-2.

26. The Constitution was defeated in the March 1788 referendum by a lopsided vote of 2,708 to 237. Bartlett, *supra* note 15 at 275. The incredible margin of defeat was the result of widespread abstentions by those favoring the constitution, in protest against the state legislature's refusal to call a special convention. Conley, *supra* note 5 at 110.

27. According to Conley, historians differ as to the exact number of times the legislature denied motions to call a convention. He cites a list of eleven rejections noted in an unpublished doctoral dissertation by Irwin Polishook, *Rhode Island and the Union, 1774-1790: A Study in State History During the Confederation Era* 280 (1961) (unpublished Ph.D. dissertation, Northwestern University). Conley, *supra* note 5 at 109-110. Other historians, for example Robert Cotner, noted seven such rejections. Robert C. Cotner, *Theodore Foster's Minutes of the Convention* 13 (1929).

28. The U.S. government began operating in early 1789. "On Wednesday the 4th of March, 1789, proceedings commenced under the Constitution; and on the 30th of April, of the same year, George Washington, elected by the unanimous suffrage of the electors, was inaugurated as President of the United States." 1 Elliot's Debates 333 (1866). By January, 1790, Rhode Island was the only state not to ratify the Constitution. North Carolina, the twelfth state to ratify, approved the U.S. Constitution in convention on November 21, 1789. *Id.* During 1789, Congressional legislation was passed that would require Rhode Island to be treated as a foreign nation if the state did not ratify the Constitution in the near future. Conley, *supra* note 5 at 134-138. According to Conley, "The principle proximate cause for Rhode Island ratification was economic coercion exerted upon the state by the new federal government." *Id.* at 134. The impact of Congressional pressure is clearly illustrated by a September, 1789 letter from the General Assembly to the President and Congress of the "eleven United States of America" pleading for Congressional patience with Rhode Island, despite its failure to ratify the Constitution or call a ratifying convention. Bartlett, *supra* note 15 at 356-57.

3. THE FIRST CONVENTION

Pursuant to the resolution passed by the General Assembly on January 17, 1790, town meetings were held to elect delegates to the convention on February 8, 1790.²⁹ During February, delegates received instructions from town meetings regarding whether to ratify the Constitution.³⁰ The Convention convened on March 1, 1790, with approximately forty anti-Federalists out of seventy delegates.³¹

Late in the afternoon on Tuesday, March 2 or early on Wednesday,³² one of the Smithfield delegates, John Sayles,³³ moved for the creation of a committee to frame a bill of rights and amendments to the Constitution. The motion was not passed at that time. Wednesday was spent reviewing the U.S. Constitution, article by article.³⁴ The convention proceeded with its analysis of the Constitution and then considered the twelve amendments proposed by the Congress in March, 1789. Next, the amendments proposed by New York, North Carolina, Massachusetts and Virginia, upon their accessions to the union, were read to the convention. Finally, the convention agreed to appoint a committee to draft a bill of rights and a series of amendments.³⁵

The committee included two delegates from each of the five counties and was comprised primarily of delegates opposed to the Constitution.³⁶ After deliberating from Thursday afternoon to Fri-

29. Bartlett, *supra* note 15 at 373.

30. Two examples of these instructions are reproduced in Staples, *supra* note 21 at 635-37. The Town of Richmond instructed its delegates not to adopt the Constitution at this time, and to explore necessary amendments. In contrast, the Town of Portsmouth instructed its delegates to support ratification, to fight any adjournment past April 1, and to consider possible amendments. *Id.*

31. Cotner, *supra* note 27 at 20.

32. According to Theodore Foster's unofficial minutes of the convention, it was Tuesday afternoon. Cotner, *supra* note 27 at 38. Daniel Updike was the Secretary of the convention. According to his official journal of the convention, it was Wednesday morning. Staples, *supra* note 21 at 643. Updike's journal is reproduced in its entirety in Staples, *supra* note 21.

33. According to Cotner, Sayles "voted against the Constitution every time he had an opportunity." Cotner, *supra* note 27 at 34.

34. Article I, Section 8, was the most widely debated because of the issue of slavery. Cotner, *supra* note 27 at 47-54.

35. Cotner, *supra* note 27 at 58-60.

36. George Champlin, a Federalist delegate from Newport, proposed that the Committee consist of anti-Federalists. Cotner speculated that Champlin, "Realizing that the Federalists were outnumbered . . . probably hoped that by getting all

day afternoon, the drafting committee reported a bill of rights and series of additional amendments to be proposed to the U.S. Congress. There is apparently no record of the committee's deliberations. While the provisions of the Committee's draft Declaration of Rights were taken almost verbatim from the resolutions passed by the Virginia convention when that state ratified the U.S. Constitution,³⁷ a careful comparison of the two texts reveals some interesting differences.³⁸ The Virginia resolutions read as follows:

That there be a declaration or bill of rights asserting, and securing from encroachment, the essential and unalienable rights of the people, in some such manner as the following:

1st. That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.

2d. That all power is naturally invested in, and consequently derived from the people; that magistrates therefore are their *trustees* and agents, at all times amenable to them.

3d. That government ought to be instituted for the common benefit, protection, and security of the people; and that the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive to the good and happiness of mankind.

4th. That no man or set of men are entitled to separate or exclusive public emoluments or privileges from the community, but in consideration of public services, which not being descendible, neither ought the offices of magistrate, legislator, or judge, or any other public office, to be hereditary.

5th. That legislative, executive, and judicial powers of government should be separate and distinct; and, that the

the objections in writing, the Federalists could force a vote to adopt the Constitution with the suggested amendments." *Id.* at 60.

37. See 3 Elliot's Debates at 657-59 (1878); see also 5 The Founders' Constitution, 15-17 (1987).

38. The most interesting difference was the addition of Section III, especially its reference to popular sovereignty. There were also partial differences in wordings in Sections XI, XII, XIV, XV and XVII. For example, in Sections XIV and XV, the Rhode Island convention substituted "person" for "freeman." The order of the sections is also different. For example, the religion clause was sixteenth in the Virginia Convention, but fourth in the Rhode Island Declaration.

members of the two first may be restrained from oppression by feeling and participating the public burdens, they should, at fixed periods, be reduced to a private station, return into the mass of the people, and the vacancies be supplied by certain and regular elections, in which all or any part of the former members to be eligible or ineligible, as the rules of the Constitution of government, and the laws, shall direct.

6th. That the elections of representatives in the legislature ought to be free and frequent, and all men having sufficient evidence of permanent common interest with, and attachment to, the community, ought to have the right of suffrage; and no aid, charge, tax, or fee, can be set, rated, or levied, upon the people without their own consent, or that of their representatives, so elected; nor can they be bound by any law to which they have not, in like manner, assented, for the public good.

7th. That all power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people in the legislature, is injurious to their rights, and ought not to be exercised.

8th. That, in all criminal and capital prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in his favor, and to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, (except in the government of the land and naval forces;) nor can he be compelled to give evidence against himself.

9th. That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, privileges, or franchises, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land.

10th. That every freeman restrained of his liberty is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same, if unlawful, and that such remedy ought not to be denied nor delayed.

11th. That, in controversies respecting property, and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and to remain sacred and inviolable.

12th. That every freeman ought to find a certain remedy, by recourse to the laws, for all injuries and wrongs he may receive in his person, property, or character. He ought to

obtain right and justice freely, without sale, completely and without denial, promptly and without delay; and that all establishments or regulations contravening these rights are oppressive and unjust.

13th. That excessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

14th. That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, and property; all warrants, therefore, to search suspected places, or seize any freeman, his papers, or property, without information on oath (or affirmation of a person religiously scrupulous of taking an oath) of legal and sufficient cause, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend any suspected person, without specially naming or describing the place or person, are dangerous, and ought not to be granted.

15th. That the people have a right peaceably to assemble together to consult for the common good, or to instruct their representatives; and that every freeman has a right to petition or apply to the legislature for redress of grievances.

16th. That the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.

17th. That the people have a right to keep and bear arms; that a well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, are dangerous to liberty, and therefore ought to be avoided, as far as the circumstances and protection of the community will admit; and that, in all cases, the military should be under strict subordination to, and governed by the civil power.

18th. That no soldier in time of peace ought to be quartered in any house without the consent of the owner, and in time of war in such manner only as the law directs.

19th. That any person religiously scrupulous of bearing arms ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.

20th. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and alienable right

to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others.

Virginia's declaration of rights was clearly intended to be suggestions for civil rights-type amendments to the U.S. Constitution.³⁹ At the time of Virginia's ratification, the Congress had not yet approved the twelve amendments sent to the states for ratification in March, 1789. Moreover, Virginia already had a Declaration of Rights accompanying its state constitution.⁴⁰

The Preamble to the Rhode Island drafting committee's report evidenced a significantly different purpose:

We, the subscribers, being the committee appointed to report amendments necessary to the proposed Constitution of the United States of America, do report: That, previous to the adoption of the Federal Constitution, there be a Declaration, or Bill of Rights, asserting and securing from encroachments the essential and inalienable rights *of the people of this state*. [emphasis added]

The Committee reported the following Declaration of Rights:

1. That there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity, - among which are the enjoyment of life and liberty, with the means of acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.

2. That all power is naturally vested in and consequently derived from the people: That magistrates, therefore, are their trustees and agents, and at all times amenable to them.

3. That the powers of government may be reassumed by the people, whensoever it shall become necessary to their happiness: —That the rights of the States respectively to nominate and appoint all State officers, and every other

39. The Virginia convention also proposed a separate list of amendments to the structure of government proposed in Articles I-III of the U.S. Constitution.

40. Virginia had adopted a Declaration of Rights on June 12, 1776. Soon after, the state adopted a constitution providing for the structures of state government. The 1776 Constitution did not include another statement of rights. The June declaration was higher law that was somehow incorporated into the state constitution. For a copy of the Declaration of June 12, 1776, see 5 *The Founders' Constitution*, 3-4 (1987).

power, jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or to the departments of government thereof, remain to the people of the several States, or their respective State governments, to whom they may have granted the same; —and that those clauses in the said Constitution which declare that Congress shall not have or exercise certain powers, do not imply, that Congress is entitled to any powers not given by the said Constitution; — but such clauses are to be construed, as exceptions to certain specified powers, or as inserted merely for greater caution.

4. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence—and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience; —and that no particular religious sect, or society, ought to be favoured or established by law, in preference to others.

5. That the legislative, executive and judiciary powers of government, should be separate and distinct; —and that the members of the two first may be restrained from oppression, by feeling and participating the public burdens, they should at fixed periods be reduced to a private station, return into the mass of the people, and the vacancies be supplied by certain and regular elections—in which all or any part of the vacancies be supplied by certain and regular elections, in which all or any part of the former members to be eligible or ineligible, as the rules of the Constitution of government and the laws shall direct.

6. That elections of Representatives in Legislature ought to be free and frequent—and all men, having sufficient evidence of permanent common interest with and attachment to the community, ought to have the right of suffrage: And no aid, charge, tax or fee, can be set, rated or levied upon the people, without their own consent, or that of their Representatives, so elected; —nor can they be bound by any law, to which they have not, in like manner, assented for the public good.

7. That all power of suspending laws, or the execution of laws, by any authority, without the consent of the Representatives of the people in the Legislature, is injurious to their rights, and ought not be exercised.

8. That in all capital and criminal prosecutions, a man hath a right to demand the cause and nature of his accusation—to be confronted with the accusers and witnesses—to call for evidence, and be allowed counsel in his favour—and to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty (except in the government of the land and naval forces) nor can he be compelled to give evidence against himself.

9. That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, privileges or franchises, our outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the trial by jury, or by the law of the land.

10. That every freeman restrained of his liberty is entitled to a remedy, to enquire into the lawfulness thereof, and to remove the same, if unlawful; —and that such remedy ought not to be denied or delayed.

11. That in controversies respecting property, and in suits between man and man, the ancient trial by jury, as hath been exercised by us and our ancestors, from the time whereof the memory of man is not to the contrary, is one of the greatest securities to the rights of the people, and ought to remain sacred and inviolate.

12. That every freeman ought to obtain right and justice freely, and without sale—completely, and without denial,—promptly, and without delay—and that all establishments or regulations, contravening these rights, are oppressive and unjust.

13. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

14. That every person has a right to be secure from all unreasonable searches and seizures of his person, his papers, or his property; —and therefore that all warrants to search suspected places, or seize any person, his papers, or his property, without information upon oath, or affirmation of sufficient cause, are grievous and oppressive; —and that all general warrants (or such in which the place or person suspected are not particularly designated) are dangerous, and ought not to be granted.

15. That the people have a right peaceably to assemble together, to consult for their common good, or to instruct their

Representatives; —and that every person has a right to petition, or apply to the Legislature, for redress of grievances.

16. That the people have a right to freedom of speech, and of writing and publishing their sentiments: —That freedom of the press is one of the greatest bulwarks of liberty, and ought not be violated.

17. That the people have a right to keep and bear arms: —That a well-regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defence of a free State: —that the militia shall not be subject to martial law, except in time of war, rebellion, or insurrection: —That standing armies in time of peace are dangerous to liberty, and ought not to be kept up, except in cases of necessity; —and that at all times the military should be under strict subordination to the civil power: —That in time of peace no soldier ought to be quartered in any house without the consent of the owner—and in time of war, only by the civil magistrate, in such manner as the law directs.

18. That any person religiously scrupulous of bearing arms, ought to be exempted, upon payment of an equivalent to employ another to bear arms in his stead.⁴¹

From the language of the Preamble it is clear the proposed bill of rights was meant to assert and secure the rights of Rhode Islanders. It was not intended to be a series of amendments to the United States Constitution, but rather to be a Rhode Island Bill of Rights. Indeed, there was no need for the convention to propose a declaration of rights for the U.S. Constitution because the Rhode Island convention already had the first twelve amendments proposed by Congress before it for deliberation. Furthermore, the Declaration of Rights included provisions that were parallel to most of the rights enumerated in the proposed amendments that constitute the U.S. Bill of Rights.

Charged with reviewing and voting on the U.S. Constitution, the convention had to confront the most fundamental issue of political life in their day—the power of the people in relation to their government. Because the protection of the fundamental rights of the people in a federal system of government requires that the limits on the authority of the state government as well as the limits on

41. Patrick Conley, *First in War Last in Peace, Rhode Island and the Constitution, 1786-1790* 26 (1987). Staples, *supra* note 21 at 650-53; 1 Elliot's Debates 334-335 (1878).

the authority of the national government be established, the convention delegates considered not only the powers to be granted by the people to the national government, but also the powers of granted to the state government. In Rhode Island, however, unlike Virginia and most of the other states, there had never been a state constitutional convention that had created a state bill of rights delineating the limits on state government power.⁴² Because it was essential for the delegates to articulate the rights of the people in relation to the state, the convention delegates drafted a Declaration of Rights that focused on the limits of the power of the state government.⁴³ Having drafted this statement of the rights of the people of the state, the convention delegates submitted it to the people of Rhode Island for their approval and later linked their ratification of the federal constitution to its adherence to the principles in the Declaration of Rights. Indeed, the Bill of Ratification later adopted by the convention indicates that the ratification of the U.S. Constitution may have been a conditional ratification, i.e., that the people of Rhode Island only approved the U.S. Constitution to the extent that it was "consistent" with the Declaration of Rights.⁴⁴

On Saturday, March 6, 1790, the convention voted to refer the amendments and the Declaration of Rights to "the freemen of the several towns."⁴⁵ The convention then agreed to adjourn until late May, well beyond the threatened deadlines for Congressional action to exclude Rhode Island from the union. The decision to ad-

42. This convention was the first convention of the people of the State of Rhode Island. See *infra*, note 60.

43. Because this state bill of rights was drafted during the constitutional convention held to consider the federal constitution, it does contain one section (section 3) that makes explicit references to the federal government and the U.S. Constitution.

44. See *infra*, n.54.

45. Staples, *supra* note 21 at 656. The resolution read in part, "VOTED, That 'the Bill of Rights' and 'Amendments' proposed to the Federal Constitution, be referred to the freemen of the several towns, at their town meetings . . . for their consideration . . ." The report in the *Providence Gazette* of March 13, included the following statement:

Gov. Bradford then proposed that the adjournment should be to the last Monday in March. In favor of this motion, it was observed, that the adjournment proposed would afford sufficient time to lay the Bill of Rights and the amendments before the people for their consideration, and that this had been the ostensible object of the gentlemen who had voted for an adjournment. . . .

journal, however, was better than defeat for supporters of the Constitution. Indeed, they had entered the convention with a ten vote deficit. The anti-Federalists probably voted to adjourn because they feared that the Constitution might be ratified with the proposed amendments and the Declaration of Rights.⁴⁶ The ten vote gap apparently had receded during the deliberations.

4. THE SECOND CONVENTION

During late May 1790, the delegates assembled again, this time in Newport. Between the first and second session of the convention, the people of the towns had met to discuss the Constitution, the Declaration of Rights and the proposed amendments. Many of the towns provided instructions for their delegates. Four of the six written instructions known to exist specifically mention the Bill of Rights.⁴⁷ Only one of the four instructions, that of Mid-

46. Cotner, *supra* note 27 at 21.

47. The six written instructions are reproduced in Staples, *supra* note 21 at 663-66. The instructions from the town of Richmond, state in part,

In Town meeting, 15th April, A.D. 1790. Upon the Bill of Rights and amendments, proposed by the Convention of the State of Rhode Island, & c., to the Constitution of the United States:

IT IS VOTED AND RESOLVED, That the same, hereby, are approved by this meeting, and that the delegates appointed by this town be, and they hereby are, instructed to use their influence, in said Convention, at their adjournment, that the following amendments be added to said amendments: . . .

In Middletown, the instructions included the following,

VOTED, That this meeting do approve of the Bill of Rights and amendments, submitted by the late Convention; and that the delegates of this town are hereby instructed to use their votes and influence for adopting the Constitution of the United States, if the said Bill of Rights and the said amendments first become a part of said Constitution, together with the following additional amendment, . . .

In Charlestown, the instructions included the following,

At a town meeting held in Charlestown, in Washington County, on the 21st day of April, 1790:

VOTED, That the Bill of Rights, framed by the State Convention, be approved by this town meeting.

VOTED, That this town meeting do approve of the amendments made by this State Convention, to the new Constitution.

VOTED, That the delegates from this town, do not adopt the Constitution of the United States, until the amendments proposed by our State Convention, shall become a part of said Constitution.

In North Kingstown, the instructions included the following,

Instructions for the delegates of the town of North Kingstown, when in convention assembled, on the 24th day of May, A.D. 1790, respecting

dletown, refers to the Bill of Rights as becoming part of the Federal Constitution.⁴⁸

The second session of the Convention assembled on Tuesday, May 25, 1790. The following day, the drafting committee was requested to propose further amendments to the Constitution "as they shall think expedient, agreeably to the instructions from the several towns, and that they report."⁴⁹ On Thursday morning, the committee reported its findings and then proceeded to consider a variety of amendments. On Friday afternoon, a motion of adjournment until Saturday at 3:00 p.m. was passed, to allow certain delegates to receive instructions from their towns before voting on ratification.⁵⁰

On Saturday, May 29, at 5:20 p.m., the bill of ratification was accepted by the convention by a vote of thirty-four delegates to thirty-two delegates.⁵¹ The Ratification began as follows:

the Bill of Rights and amendments, recommended to the consideration of the freemen of this town:

VOTED, That the amendments proposed . . . are conceived, by the freemen of this town, inadequate to real and substantial amendments . . . and that they do not adopt the Constitution, until their proceedings be again laid before and conceded to by the freemen of this State, and the amendments made by said Convention be agree to by the Congress of the United States. . . .

48. It is impossible to determine whether the people of Middletown viewed the convention's draft Bill of Rights as intended to be a series of amendments to the Constitution, or whether their instructions reflected a desire for approval of a Bill of Rights together with the Constitution. The latter seems more plausible since there were twelve amendments before the states for ratification at that time, ten of which became the federal "Bill of Rights." It should also be noted that Middletown was the only one of the four towns that mentioned the Bill of Rights whose delegates voted for ratification. See Staples, *supra* note 21 at 672-73, for the final vote of the convention, ratifying the Constitution.

49. *Id.* at 668.

50. *Id.* at 668-69.

51. It should be noted that the U.S. Constitution was ratified in Rhode Island by delegates representing a minority of the voters. Indeed, the delegates voting for ratification represented only 44.1% of the population, while those voting against represented 51.4%. Roll, Jr., Charles W., *We, Some of the People: Apportionment in the Thirteen State Conventions Ratifying the Constitution*, *The Journal of American History*, 26 Vol. LV1, (June, 1969). It is likely, however, that many of those who voted against ratification were happier with the new state bill of rights than with the U.S. Constitution because the drafting committee had been comprised mainly of opponents to the Constitution. Furthermore, many delegates in Rhode Island and other states had refused to affirm the Constitution largely because there was no bill of rights contained in it. Opposition to the Rhode Island Bill of

BY THE CONVENTION OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.

We, the delegates of the people of the State of Rhode Island and Providence Plantations, duly elected and met in Convention, having maturely considered the Constitution of the United States of America, . . . and having also seriously and deliberately considered the present situation of this State, do declare and make known: . . .⁵²

The Declaration of Rights, composed of eighteen articles, immediately followed the preface. After the Declaration of Rights, the Bill of Ratification stated, in part,

Under these impressions and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the *amendments hereinafter mentioned* will receive an early and mature consideration. . . we, the said delegates. . . do, by these presents, assent to and ratify the said Constitution. . .⁵³

The preface to the Declaration of Rights, the Declaration of Rights and the above paragraph, constituted the Bill of Ratification. The bill itself was followed by a second statement, consisting of the twenty-one proposed amendments to the U.S. Constitution. Before adjourning *sine die*, the convention also recommended that the legislature adopt eleven of the twelve amendments proposed by the Congress.⁵⁴

A Preliminary Conclusion

This account of the ratifying convention establishes that the Declaration of Rights and the proposed amendments to the U.S. Constitution were contained in separate documents addressing different concerns. The paragraph following the Declaration of Rights clearly indicates that the Declaration was not intended to merely be a proposal for additional amendments to the Federal

Rights, then, was probably rather limited. Indeed, I have found no secondary references to substantial debate about its provisions.

52. Staples, *supra* note 21 at 674. The text of the Bill of Ratification, including the Declaration of Rights and the proposed amendments can also be found in 1 Elliot's Debates, 334-37 (1878).

53. Staples, *supra* note 21 at 677 (emphasis added).

54. *Id.* at 674. On June 7, 1790, the General Assembly of the State of Rhode Island ratified eleven of the twelve amendments that had been proposed by the U.S. Congress in March, 1789. Bartlett, *supra* note 15 at 381-82.

Constitution. Rather, *the paragraph shows that the Declaration of Rights as enacted by the people in convention was to take effect regardless of whether any other amendments were subsequently adopted.* Further, the Bill of Ratification explicitly stated that the ratification of the U.S. Constitution was subject to the inviolability of the rights in the Declaration. The language of the bill suggests that these principles were not viewed as amendments, but rather as limitations on the grant of sovereignty to the federal government and by implication to the assembly itself.⁵⁵

By 1790, the governor and general assembly of Rhode Island had repeatedly asserted to the U.S. Congress that their power was derived from the people. The Declaration of Rights was proposed by a convention of the people that had been initially convened with the consent of the legislature, and then was submitted directly to the people for consideration in town meetings. On May 29, 1790, the Declaration of Rights was approved by the representatives of the people in the second convention. Because it was proposed by a convention of the people, submitted to the people, and then ratified by that convention, it became higher law (i.e., constitutional law) in the State of Rhode Island under the principles of popular sovereignty operating in the state at that time.⁵⁶

55. Whether the State of Rhode Island could have later withdrawn its grant of sovereignty to the U.S. government based on a breach of its conditional grant of sovereignty was indirectly resolved by the U.S. government's victory in the War between the States in 1865.

56. It could be argued that the bill of rights was not valid because the convention was not authorized by the legislature to write a state "constitutional" document and because it was never valorized as higher law by the state government. This argument raises the major conceptual issue regarding popular sovereignty faced by the Supreme Court in *Luther v. Borden* 48 U.S. (7 How.) 1 (1894).

If the legislature neither authorized nor valorized the Declaration of Rights, it may be viewed as of doubtful validity as higher law. If higher lawmaking requires the consent or approval of the existing government, the Bill of Rights may not be a constitutional document *yet* (the legislature or Supreme Court of Rhode Island could still valorize it). However, by accepting the Bill of Ratification from the convention, the General Assembly may have valorized the Declaration of Rights. If higher lawmaking only requires the approval of the people, the Bill of Rights is valid because voted on by the people in town meetings before its ratification. The fate of this document, then, may rest on the same rocky ground as the "People's Constitution" of 1842, except that the Bill of Rights could now be recognized.

The recent ratification of the 27th Amendment to the U.S. Constitution is a powerful precedent for certification of a constitutional law provision after a very lengthy period of gestation. The 27th Amendment, which states that no Congressional pay raise may take effect until after an intervening election, was originally proposed by Congress in 1789. Pursuant to Article V of the U.S. Constitution, it

The Declaration of Rights was not intended as a series of constitutional amendments to the U.S. Constitution, but rather as an exposition of the fundamental "constitutional" rights of the people of Rhode Island. The Declaration of Rights was distinct from the proposed amendments. The fact that the Congressional amendments which became known as the U.S. "Bill of Rights" were also considered separately by the convention lends further support to this idea. The Declaration of Rights, therefore, should be viewed as written higher law, aimed at preserving the fundamental rights of Rhode Islanders. Indeed, the passage of such a Declaration of Rights as Rhode Island law was also very significant for the people

was sent to the states for approval together with eleven other amendments, ten of which were approved in 1792 (and are commonly known as the U.S. Bill of Rights). On May 7, 1992, Michigan became the thirty-eighth state to ratify the Congressional pay amendment, satisfying the requirement in Article V that an amendment proposed by the Congress be approved by legislatures of three-quarters of the states. Michael Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 Yale L.J. 677, 678 (1993).

Because the period between proposal and ratification was 202 years, it was uncertain whether Michigan's ratification would result in the actual amendment of the Constitution. Soon after Michigan's action, the National Archivist, an executive branch official, certified the amendment as valid. Both houses of the U.S. Congress then voted to endorse the amendment's certification as part of the U.S. Constitution. *Id.* at 678-682.

The Declaration of Rights presents a different factual question because it is the certification, *if necessary*, that has been delayed for 206 years, not the ratification itself. The facts also differ because Article V provides written rules of recognition, whereas the Rhode Island Charter had no provision for amendment. Furthermore, the principles governing ratification of amendments proposed by a convention may differ from those governing amendments proposed by an ordinary legislature.

The status of the 27th Amendment, however, was not clear despite the presence of written rules of recognition. Indeed, Paulsen asserts that existing interpretations of Article V's procedures by the courts and constitutional scholars are all "flawed as a matter of textual interpretation, descriptive accuracy, or constitutional logic." *Id.* at 682. As an alternative, Paulsen proposes a formalist "concurrent legislation" model, pursuant to which an "amendment results whenever there concurrently exists a valid, unrepealed enactment of Congress proposing an amendment and the valid, unrepealed enactments of thirty-eight state legislatures ratifying that proposal." *Id.* at 722. For a different view, see, Stewart Dalzell and Eric Beste, *Is the Twenty-Seventh Amendment 220 Years Too Late?* 62 Geo. Wash. L. Rev. 501 (1994), who argue that Article V requires contemporaneous approval from Congress and the state legislatures.

Although there are differences between the ratification process of the Declaration of Rights and that of the 27th Amendment, the 27th Amendment's certification by the executive and legislative branches supports the thesis that one or more branches of the government of Rhode Island could now certify the Declaration of Rights of 1790 after more than two hundred years since its ratification.

of Rhode Island because, even if ratified, the federal Bill of Rights would only protect the people of Rhode Island from encroachment of their rights by the federal government.

5. THE STATUTORY BILL OF RIGHTS OF 1798

The Rhode Island General Assembly enacted legislation to create a Digest of Laws in 1798.⁵⁷ The act which authorized the codification also provided that the Charter of 1663, the Declaration of Independence, the Articles of Confederation, the Constitution of the United States and President Washington's Farewell Address would be published with the new Digest of Laws. It is significant, however, that the Rhode Island Bill of Rights was not printed with the new digest.

The codification of law included a new statutory bill of rights, titled, "An Act declaratory of certain Rights of the People of this State." This Bill of Rights was a pale shadow of the rights contained in the Declaration of Rights of 1790. A comparison of the two documents reveals that they share little in substance or language. Indeed, the 1798 statute focused exclusively on matters of criminal and civil procedure.⁵⁸ This statutory bill of rights was followed in the Digest by an important act on religious freedom, reflecting Rhode Island's history of religious toleration.

At the present time, there is no explanation as to why the Rhode Island Declaration of Rights was not included in the Digest, although its absence signifies a glaring deficiency in the written protection of individual rights under Rhode Island law at that time. Either these rights were viewed merely as rights limiting federal power or the Rhode Island General Assembly deliberately overlooked the statement of the people in convention. The legislature's record of opposing constitutional change, up to and including

57. A copy of this legislative enactment can be found in the Rhode Island Digest of Laws of 1798. The Digest was originally printed as *The Public Laws of the State of Rhode Island and Providence Plantations*, Providence, (1798). The Digest was recently reprinted as *The First Laws of the State of Rhode Island*, (1983).

58. The statutory bill of rights corresponds only to Sections 8-10 and 12-14 of the Rhode Island Bill of Rights. In addition, it adds sections on grand jury indictments and double jeopardy (Section 3) bail and habeas corpus (Section 5), nonimprisonment for debtors (Section 7) and ex post facto laws (Section 8). The statutory bill of rights ignores the other provisions of the Bill of Rights, most notably: popular sovereignty, separation of powers, freedom of the press, freedom of assembly, the right to bear arms, civil jury trial.

the Dorr Rebellion, suggests that the legislature may have intentionally marginalized the Declaration of Rights, given its radical proposals.

Members of the General Assembly may have been opposed to one or more substantive provisions of the Declaration of Rights. It is perhaps more than a coincidence that the statutory bill of rights failed to guarantee the right to jury trial "in controversies respecting property, and in suits between man and man" (Section 11, Rhode Island Declaration of Rights of 1790). The right to a jury trial had been the subject of litigation in Rhode Island during the 1780s. The famous precedent for judicial review, *Trevett v. Weeden*, addressed the Rhode Island's legislature's refusal to provide for jury trial for violations of its paper money legislation.⁵⁹ In general, the narrow scope of the statutory bill of rights suggests that the legislature was unwilling to codify broad civil rights.

In addition, the General Assembly would have been forced to call a constitutional convention to replace the Charter government's legislative supremacy had they recognized the validity of the Rhode Island Declaration of Rights, because Section 5 of the Declaration of Rights required "That the legislature, executive, and judiciary powers of government should be separate and distinct" There was no such separation of powers under the Charter; rather, the legislature was clearly in control of the other branches.⁶⁰

From the 1780s until the 1840s, Rhode Island government was dominated by supporters of the Charter. Because a majority of the Rhode Island General Assembly supported the Charter, they had good reason to ignore the constitutional status of the 1790 Declaration of Rights. Indeed, the legislature consistently rejected efforts to draft a written constitution from the 1770s until the 1840s, at which time they reluctantly acquiesced to demands for reform when faced with popular revolt.⁶¹

59. For a clear account of the *Trevett* case, see Polishook, *supra* note 18 at 134-142.

60. See *id.* at 24-27, for a discussion of legislative omnipotence under the Charter; see also, Conley, *supra* note 5 at 36-46.

61. Between 1777 and 1824, all efforts to hold a convention to draft a state constitution were rebuffed by the state legislature. See Conley, *supra* note 5 at 66-68, 162-167, 171, 177; Polishook, *supra* note 18 at 44-45. There were "unsuccessful" conventions held in 1824 and 1834.

The Rhode Island Declaration of Rights also articulated a view of popular sovereignty that might have been opposed by a majority of the state legislature. Section 3 of the Bill of Rights⁶² established a very broad right to alter and abolish the existing government. It states, "That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness. . . ." Although it may be impossible to know the sentiments of the legislature regarding popular sovereignty in 1798, during the 1830s and 1840s Charter supporters rejected this broad definition of the power to alter and abolish. Indeed, the Constitution of 1842, drafted by Charter supporters, expressed a more narrow view of popular sovereignty,

In the words of the Father of his Country, we declare that the basis of our political systems is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.⁶³

This provision was intended to limit constitutional change to higher lawmaking authorized and certified by the existing government. There was no such limitation on the right of popular sovereignty in the Rhode Island Declaration of Rights of 1790.

Supporters of the Charter also frequently argued that it was impossible to amend the Charter because there was no provision for amendment. The doctrine that the Charter was not amendable provides the clearest, and most plausible, justification for ignoring the constitutional status of the Rhode Island Bill of Rights. In practice, however, even a weak version of popular sovereignty undercuts any argument that the Charter cannot be amended. Indeed, the General Assembly had amended the Charter on behalf of the people in 1776 when, without any consultation with the people whatsoever, they removed the king as the sovereign power in the Rhode Island Charter. Ratification of the Articles of Confederation and of the U.S. Constitution also effected *pro tanto* an amendment of the state's Charter.⁶⁴ It is difficult to see how these legislative

62. It is worthy of note again that this was the only section of the Declaration of Rights not based on a similar provision from the Virginia ratifying convention.

63. R.I. Const., art. I, § 1. This passage by George Washington was from his Farewell Address, which was included in the 1798 Digest of Laws by order of the state legislature.

64. Amar, *supra* note 6 at 1049.

acts of higher lawmaking should be any more legitimate than a similar act of higher lawmaking undertaken by the people in convention.

6. THE CURRENT CONSTITUTIONAL STATUS OF THE DECLARATION OF RIGHTS: IS IT STILL VALID?

The Rhode Island Declaration of Rights of 1790 may have been repealed or revised by subsequent higher lawmaking. Since the convention of 1790, there have been two constitutions validly enacted in Rhode Island.⁶⁵ The present status of the 1790 bill of rights requires an examination of the 1842 Constitution and the 1986 Constitution.

A. The 1842 Constitution

In order to determine whether the 1842 Constitution repealed the Declaration of Rights, it is necessary to examine the enactment provisions of the 1842 Constitution and the proceedings of that convention. Neither source provides an explicit reference to the Rhode Island Declaration of Rights, which is not surprising since it was not recognized as higher law by the Charter government.⁶⁶

Article XIV of the 1842 Constitution, titled "Of the Adoption of this Constitution," made no explicit reference to the Charter or preexisting rights. Its references to prior laws and rights were limited to the following sentences,

All statutes, public and private, not repugnant to this constitution, shall continue in force until they expire by their own limitation, or are repealed by the general assembly. All char-

65. For the purposes of this article, the People's Constitution of 1842 was not higher law because, regardless of the historical merits of the arguments, the issue was *legally resolved*. Rhode Island courts concluded that the People's Constitution, which was drafted in a convention and approved in a referendum without governmental sponsorship or support, was never valid.

66. It is not surprising that the supporters of the Charter, who wrote the 1842 Constitution, did not refer to the 1790 Bill of Rights. It is surprising, however, that Thomas Wilson Dorr, who led the unsuccessful rebellion against the Charter government, did not assert that the Declaration of Rights was *higher* law. Dorr's failure to invoke the Declaration is troubling, but not fatal, to my view of the Declaration of Rights because Dorr, himself, believed in an extreme version of popular sovereignty. Dorr may not have argued this position for strategic reasons. Indeed, Dorr was unlikely to convince a legislature that agreed to hold the convention that drafted the 1842 Constitution only under duress, that the Declaration of Rights of 1790 was higher law.

ters, contracts, judgments, actions and rights of action shall be as valid as if this constitution had not been made.

The 1842 Constitution, then, did not explicitly repeal earlier higher lawmaking by the people. As a result, the Rhode Island Declaration of Rights may not have been repealed by the 1842 Constitution.

In order to determine whether the Rhode Island Bill of Rights was revised or superseded, in whole or in part, by the 1842 Constitution, it is necessary to compare the substantive provisions of the two documents. Article I of the 1842 Constitution was titled, "Declaration of Certain Constitutional Rights and Principles." The twenty-three sections of Article I overlapped substantively with the declaration ratified in 1790.

Sections 5 through 14 of Article I of the 1842 Constitution incorporated, with almost no changes, the language and meaning of the ten sections of the statutory declaration of rights of 1798. As discussed above, several of those sections granted similar rights to those provided in the 1790 Declaration of Rights. Section 3, which provided for religious freedom, was also based on a statute in the 1798 Digest of Laws.⁶⁷ Nowhere in Article I, however, did the 1842 convention use the language of the 1790 document.

Three sections of Article I of the 1842 Constitution declared rights that were not mentioned in the 1790 declaration.⁶⁸ Several sections corresponded to rights enumerated in the 1790 document, but absent from the statutory Bill of Rights of 1798.⁶⁹ In many of these similar sections, however, the rights were substantively quite different. There was a direct conflict in only one section, that

67. See Digest of Laws of 1798, at 84. It should be also noted that the Declaration of Rights of 1790 contained a section on religious liberty.

68. Section 4 prohibited slavery. Section 16 added a takings clause. Section 17 discussed fishing and shore rights.

69. Section 16 (1842), guaranteeing the right to jury trial, corresponded to Section 11 (1790). It should be noted again that this right was not made explicit in the 1798 statute. Section 18, on military subordination to the civilian, corresponded to Section 17, although the provision dealing with martial law was different presumably because of the use of martial law during the Dorr Rebellion. Section 19, on quartering troops, also corresponded to Section 17. Section 20, on freedom of the press, was similar to section XVI, although it added a libel provision. Section 21, on assembly and redress of grievances, was similar to Section 15, although it did not mention the right to instruct representatives. Section 22, on bearing arms, corresponded to Section 17. In none of these sections, however, did the 1842 Constitution use the language of the 1790 Bill of Rights.

governing popular sovereignty.⁷⁰ In general, Article 1 of the 1842 Constitution apparently repealed Section 3 (in part) and superseded Sections 4, and 7-17, of the 1790 Bill of Rights.⁷¹

According to this analysis, Sections 1, 2, 3 (in part), 5-7, and 18 of the Rhode Island Bill of Rights may have remained in force after the passage of the 1842 Constitution, unless contradicted by other articles of that Constitution. The "surviving" provisions of the 1790 Declaration of Rights, however, may also have been repealed or superseded by some of the more than forty amendments which were adopted between 1842 and 1986.

70. Popular sovereignty was central to the major constitutional crisis, the Dorr Rebellion, which led to the sponsorship of a constitutional convention by the legislature in 1842 and the subsequent enactment of the 1842 Constitution. It is not surprising, therefore, that the 1842 Constitution included a much narrower statement of the right to alter and abolish. Section 1 (1842) states,

in the words of the Father of this Country, we declare: "That the basis of our political systems is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.

This provision essentially declared that the right to alter and abolish was contingent upon authentication by the existing government. In contrast, Section 3 (1790) had provided in part, "That the powers of government may be reassumed by the people whensoever it shall become necessary to their happiness." There seems to be a direct conflict between the two provisions such that the first portion of Section 3 should be considered repealed by Article I, Section 1 of the Rhode Island Constitution of 1842. There is, however, a possible middle ground suggested by Professor Akhil Amar. "Although effective implementation of the right of the People to alter or abolish their government requires assistance from the ordinary organs of government . . . the right does not and should not depend on the will of ordinary government." Amar, *supra* note 7 at 1065, n. 81.

The 1842 Constitution was later construed by the Rhode Island Supreme Court as prohibiting a constitutional convention in an 1883 advisory opinion. In re the Constitutional Convention, 14 R.I. 649 (1883). This opinion was reversed in an advisory opinion handed down by the state supreme court on April 1, 1935. In re the Constitutional Convention, 55 R.I. 56 (1935). Hubbard, *The Issue of Constitutional Conventions in Rhode Island*, 30 Am. Poli. Sci. Rev. 537 (1936). On the Dorr Rebellion, see Conley, *supra* note 5 and William Wiecek, *The Guarantee Clause of the U.S. Constitution* (1972).

71. This is a preliminary conclusion. Close analysis of particular provisions such as the right to instruct representatives and the warning against standing armies in Sections 15 and 17 (1790), respectively, may reveal that they have not been superseded. The goal in examining these two documents in this article is primarily to illustrate the analysis which must be undertaken in order to determine the status of the rights declared in the Bill of Rights, rather than present a definitive answer regarding each provision.

B. The 1986 Constitution

The 1986 Constitution of Rhode Island did not effect a general repeal of the 1790 Declaration of Rights. In Article XV, titled "General Transition," Section 1 states "the rights and duties of all public bodies shall remain as if this Constitution had not been adopted with the exception of such changes as are contained in this Constitution."⁷² Under this provision, the 1790 Declaration of Rights survives the new constitution except for provisions contrary to the new document.

In order to determine which, if any provisions of the Declaration of Rights of 1790 could be enforced today, it would be necessary to examine each provision that "survived" the ratification of the 1842 Constitution, as amended, and the case law interpreting it. If those provisions are not contrary to the Constitution of 1986, they may be enforceable as constitutional rights in the State of Rhode Island today.

7. CONCLUSION

The Declaration of Rights passed by the convention in Rhode Island that ratified the U.S. Constitution may, in small part, still be enforceable. Although this article has raised more questions than it has resolved, the following facts seem to be clear:

- 1.) The Declaration of Rights of 1790 was drafted by the first session of the ratifying convention, submitted to the people and ratified by second session of the ratifying convention;
- 2.) The Declaration of Rights as drafted was intended to apply to the "people of the state;" and
- 3.) Applying the principles of popular sovereignty, the Declaration of Rights could have been enforced as constitutional law in Rhode Island.

This article presents no definitive reasons why the document was not enforced. The history of Rhode Island from the 1780's to the 1840's suggests many possible motives for the General Assembly to ignore its declarations, especially the provisions regarding popular sovereignty and suffrage. It is also noteworthy that Seth

72. Article XV, Section 1, continues as follows: "All laws, ordinances, regulations and rules of court not contrary to, or inconsistent with, the provisions of this Constitution shall remain in force, until they shall expire by their own limitation or shall be altered or repealed pursuant to this Constitution."

Luther, Thomas Wilson Dorr and Benjamin F. Hallett cited the document.

Because the document has been virtually ignored since its ratification, the discussion of its status after ratification and after 1842 is largely a thought experiment. If it is possible for higher lawmaking to occur without *ex post* valorization by the existing government, then it is possible that some provisions of the Bill of Rights of 1790 may be enforceable today. Even if *ex post* authentication was a requirement for higher lawmaking in Rhode Island in 1790, the General Assembly's acceptance of the bill of ratification may have been sufficient. As a practical matter, however, the Declaration of Rights would require certification by at least one branch of state government in order to enter into force today. In order to accept the Declaration of Rights, the government would have to embrace the very strong belief in popular sovereignty and the higher lawmaking powers of conventions which underlies the analysis in this article. These notions of popular sovereignty are similar to the ideas of Thomas Wilson Dorr and others who were defeated in the Dorr Rebellion.⁷³

Authentication by the government is particularly important in Rhode Island because the people and government of Rhode Island resolved the authentication issue in the Dorr Rebellion of 1842. It would be necessary for the present government, or at least one branch of it, to declare that the Bill of Rights of 1790 was an authentic act of the people. As a result, the Supreme Court of Rhode Island or the General Assembly could now valorize this two hundred year-old statement that was ratified by the people in convention.

73. See *supra* note 5.

