

# NOT QUITE A STATE OF NATURE: DERIVATIONS OF EARLY VERMONT LAW

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We therefore . . . are at present without law or government, and may be truly said to be in a state of nature; consequently a right remains to the people of said Grants to form a government best suited to secure their property, well being and happiness.<sup>1</sup>

Ira Allen, *Connecticut Courant*,  
March 17, 1777

Vermont created itself out of the wilderness. The first settlers invented a state where none existed before. They reenacted Locke's *Second Essay on Government* (1690), and after declaring themselves free from the constraints of any other sovereign power, they adopted a constitution, and began enacting and enforcing laws of their own, in the midst of a war. Of all the achievements of Vermont from that point on, that act of self-definition essentially distinguishes this place and its history.

The state was not like any seen before. Slavery would not exist here. Voting rights belonged to anyone who would take the oath of allegiance, regardless of the size of his estate. The owner of private property taken for public use would receive equivalent compensation. These were revolutionary ideas, but the most revolutionary was the idea of a separate state.

Not everything was original. Beyond a few basic ideas, Vermont borrowed and adapted laws of other states in its first years. The Vermont Declaration of Independence was inspired by other declarations of independence from all over America, including the one written by Thomas Jefferson. In turn, the American Declaration of Independence owed much of its substance to George Mason's Declaration of Rights of Virginia, which also served as the inspiration for the first chapter of the Pennsylvania Constitution of 1776. The following year, Vermont used the Pennsylvania Constitution as a model for its first constitution. In 1778, at the first session of the legislature, the General Assembly passed an act against treacherous conspiracies, "passed as said act appears in the Connecticut Law Book."<sup>2</sup> That book was used dozens of times over the next year to compile a body of law to govern the new state.

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1. 1 RECORDS OF THE COUNCIL OF SAFETY AND GOVERNOR AND COUNCIL 51 (E.P. Walton ed., 1873) [hereinafter 1 RECORDS OF THE GOVERNOR AND COUNCIL].

2. LAWS OF VERMONT 1777-1780, reprinted in XII STATE PAPERS OF VERMONT 27 (Allen Soule ed., 1964).

What Vermont took from other states, it adapted to its own purposes. The changes helped define what was particular to Vermont. There was simply not enough time to invent a whole legal system. The United States declared its independence in the summer of 1776. Vermont, along with many others, followed suit in January of 1777. Vermont adopted its first constitution in July of 1777, and completed its first code of laws in February of 1779, all in a period of 32 months. Thirty-two months is not long to move from a state of nature to a civil society with a body of established law to support it. During this period, there were distractions. The British invaded Vermont—twice.<sup>3</sup> The fabled thunderstorm which prevented the Windsor Convention from adjourning and gave it time to adopt the constitution, followed the alarm that General Burgoyne's army had reached Lake Champlain.<sup>4</sup> Shortly after the invasion came the battles of Hubbardton, Bennington, and Saratoga. There was a second front. Unlike every other declaration of independence adopted during this time, Vermont's declared independence not only from Great Britain, but also from its neighboring state of New York.<sup>5</sup>

### I. THE NEW YORK PROBLEM

Benning Wentworth, the governor of New Hampshire, began granting charters to the land west of the Connecticut River in 1749.<sup>6</sup> In time, New York also claimed this land, and the dispute was put to the British authorities in July of 1764.<sup>7</sup> The result was an order of King George III giving the Colony of New York exclusive authority to grant charters of land in the New Hampshire Grants.<sup>8</sup> New York Governor Cadwallader Colton persuaded the King to sign the order based on the representation that the inhabitants of the Grants *wanted* to be annexed to his state.<sup>9</sup> Governor Colton is remembered in the Preamble to the Vermont Constitution as having violated the tenth commandment by this act: coveting Vermont land.<sup>10</sup>

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3. Invasions of Vermont from the north by the British came by land and sea in the summer of 1776 and again in 1777. See ZADOCK THOMPSON, II HISTORY OF VERMONT, NATURAL, CIVIL, AND STATISTICAL 38-49 (Chauncey Goodrich ed., 1842).

4. See LAWS OF VERMONT 1777-1780, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 4.

5. See *id.* at 7.

6. See BENJAMIN H. HALL, HISTORY OF EASTERN VERMONT 129 (1858).

7. See *id.* at 130.

8. See *id.*

9. See *id.* at 129.

10. See VT. CONST. of 1777, preamble, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 6. The Preamble spells his name "Colden." *Id.*

Too much blood and ink have been spilled over the legal question of whether New York had a valid claim to the land of the Grants.<sup>11</sup> It is enough to know that the majority of inhabitants of the Grants did not support the claims of New York, largely because New York failed to show them any respect. New York sent an army of 300 men from Albany to Bennington in July 1771 to enforce a charter provision.<sup>12</sup> There were collisions of authority throughout the Grants. As early as 1774, representatives from towns on the western side of the Green Mountains began meeting at regular intervals, organizing, drawing petitions, and trying to decide their next move.<sup>13</sup> They knew they were vulnerable, regarded by the British as hostile and by the United States as a rough and distant cousin. They knew the war would soon come to Vermont. They saw no reason to hope that New York would give up its claims to the Grants.

New York was an engine that never stopped. It controlled the courts in Newfane and Newbury on the east side of the Green Mountains.<sup>14</sup> It refused to accept New Hampshire charters as proof of any legal claim to land in the Grants.<sup>15</sup> It charged high fees for validating land titles.<sup>16</sup> It sent troops to the Grants to eject settlers and attempted to capture its leaders.<sup>17</sup> Then New York began talking about collecting land taxes on Vermont land. In Harlem in 1776, the New York Convention voted, "[t]hat all quit-rents formerly due to the King of Great Britain, are now due and owing to this convention, or such future government as shall be hereafter established in this State."<sup>18</sup> By that act, New York demonstrated its intention to continue its persecution of Vermonters even after independence was declared.

## II. THE VERMONT DECLARATION OF INDEPENDENCE

On May 15, 1776, the Continental Congress passed a resolution, recommending people living "where no government sufficient to the exigencies of their affairs hath been hitherto established, to adopt such government, as shall, in the opinion of the representatives of the people, best

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11. A century after Vermont declared its independence, a war of books and pamphlets ensued over the question of who was right. See Hiland Hall, *Volume First of Collections of Vermont Historical Society: Vindicated from the Attack of the New York Historical Magazine*, in 2 COLLECTIONS OF THE VERMONT HISTORICAL SOCIETY vii (1871); BENJAMIN H. HALL, *supra* note 6, 367-81 (1858).

12. See HILAND HALL, *THE HISTORY OF VERMONT* 124 (1868).

13. See THOMPSON, *supra* note 3, at 26.

14. See *id.* at 28-29.

15. See BENJAMIN H. HALL, *supra* note 6, at 130.

16. See *id.* at 140.

17. See THOMPSON, *supra* note 3, at 21.

18. VT. CONST. of 1777, preamble, *reprinted in XII STATE PAPERS OF VERMONT*, *supra* note 2,

conduce to the happiness and safety of their constituents in particular, and America in general."<sup>19</sup> This triggered a variety of declarations of independence throughout the colonies. Nine colonies and dozens of other political subdivisions declared their independence from British rule before July 4, 1776.<sup>20</sup> Several states' constitutions cited the resolution as their authority for establishing new governments, including Georgia,<sup>21</sup> New Hampshire,<sup>22</sup> New Jersey,<sup>23</sup> and New York.<sup>24</sup> The people of the New Hampshire Grants assumed the invitation extended to their situation as well.

Less than two months later, hope for independence in the Grants expanded upon the adoption of the American Declaration of Independence. John Adams wrote to his wife, Abigail, on July 3: "Yesterday the greatest Question was decided, which ever was debated in America, and a greater perhaps, never was nor will be decided among Men. A Resolution was passed without one dissenting Colony, 'that these united Colonies, are, and of right ought to be free and independent . . .'"<sup>25</sup> On July 4, the convention at Philadelphia approved the Declaration of Independence.

The words of the Declaration of Independence quickly left Philadelphia by newspaper and handbill and traveled throughout the colonies. When the Declaration reached soldiers stationed at Orwell, on Rattlesnake Hill across from Fort Ticonderoga, it was read aloud.<sup>26</sup> The soldiers gave three hurrahs, followed by a thirteen gun salute, and immediately voted to rename the peak Mount Independence.<sup>27</sup> "We hold these truths to be self-evident, that all men are created equal" was heard and repeated in taverns, churches, and homes throughout Vermont.

19. 1 RECORDS OF THE GOVERNOR AND COUNCIL, *supra* note 1, at 40. Vermont historian E. P. Walton called this act the first practical assertion of independence, of which the act of July 4, 1776, was the final declaration. *Id.*

20. See PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 48 (1997) [hereinafter AMERICAN SCRIPTURE]; see THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (Benjamin Perley Poore ed., 2d ed. 1878) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS].

21. See GA. CONST. of 1777, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 378.

22. See N.H. CONST. of 1776, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1279.

23. See N.J. CONST. of 1776, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1311.

24. See N.Y. CONST. of 1777, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1329.

25. Letter from John Adams to Abigail Adams (July 3, 1776), in 2 ADAMS FAMILY CORRESPONDENCE 27-28 (L.H. Butterfield ed., 1963).

26. See THOMPSON, *supra* note 3, at 41.

27. See *id.*

Inspired by the spirit of the times, the settlers called a convention, at Dorset, for late July of 1776, and organized formally.<sup>28</sup> Two delegates from Townshend attended, but otherwise the east side of the state was unengaged.<sup>29</sup> The members resolved to defend the United States against British attack as long as the war lasted.<sup>30</sup> They also made it clear that anyone residing in Vermont who attempted to exercise any New York authority was also their enemy. Without any formal declaration, the people of the New Hampshire Grants were acting on their own, answering to no authority except the Continental Congress, and that by consent.

At the January session in Westminster, the convention began with a report from Ebenezer Hoisington, providing an early form of polling, that "more than three-fourths of the people in Cumberland and Gloucester counties, that have acted, are for a new state; the rest we view as neutrals."<sup>31</sup> The convention then named a committee "to prepare a draft of a declaration for a new and separate state."<sup>32</sup> On January 17, 1777, the Vermont Declaration of Independence, consisting of two parts, a preamble and a declaration, was adopted.<sup>33</sup> Ira Allen helped write it, according to his invoice for payment of expenses.<sup>34</sup>

The preamble begins by describing two rights: first, "that whenever protection is withheld, no allegiance is due, or can of right be demanded," and second, "that whenever the lives and properties of a part of a community have been manifestly aimed at by either the legislative or executive authority of such community, necessity requires a separation."<sup>35</sup> The first right establishes Vermont's independence from Great Britain. The second is concerned with New York. Vermont argued its separation was a "necessity" because of the way it was treated by New York governors and judicial officials.<sup>36</sup>

The preamble then recites the May 15 resolution of congress inviting the adoption of governments in places where there were none "sufficient to the

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28. See The Public Papers of Governor Thomas Chittenden, reprinted in XVII STATE PAPERS OF VERMONT 5 (John A. Williams ed., 1969).

29. See *id.* at 6-7.

30. The resolution committed the delegates and their towns to "voluntarily and Solemnly Engage under all the ties held sacred amongst Mankind at the Risque of our Lives and fortunes to Defend, by arms, the United American States against the Hostile attempts of the British Fleets and Armies, until the present unhappy Controversy between the two Countries shall be settled." *Id.* at 15.

31. *Id.* at 34.

32. *Id.*

33. See *id.* at 33-35.

34. See THOMPSON, *supra* note 3, at 107. Allen's entry for 1777, dated January 17, requests payment of four pounds, ten shillings for "9 days, part at Westminster, in assisting to write a declaration, and other pieces for the Hartford papers." *Id.*

35. I RECORDS OF THE GOVERNOR AND COUNCIL, *supra* note 1, at 40.

36. See *id.* at 41.

exigencies of [the inhabitants'] affairs."<sup>37</sup> Reflecting on the conduct of New York and the "equitableness" of the congressional resolution, the convention then adopted the declaration:

This Convention, whose members are duly chosen by the free voice of their constituents in the several towns, on the New-Hampshire Grants, in public meeting assembled, in our names, and in behalf of our constituents, do hereby proclaim and publicly declare that the district of territory comprehending and usually known by the name and description of the New Hampshire Grants, of right ought to be, and is hereby declared forever hereafter to be considered as a separate, free and independent jurisdiction or state; by the name, and forever hereafter to be called, known and distinguished by the name of NEW CONNECTICUT; and that the inhabitants that at present are, or that hereafter may become resident, either by procreation or emigration, within said territory, shall be entitled to the same privileges, immunities and enfranchisements as are allowed; and on such condition, and in the same manner, as the present inhabitants in future shall or may enjoy; which are, and forever shall be considered, to be such privileges and immunities to the free citizens and denizens as are, or, at any time hereafter, may be allowed to any such inhabitants of any of the free and independent states of America; And that such privileges and immunities shall be regulated in a bill of rights, and by a form of government, to be established at the next adjourned session of this convention.<sup>38</sup>

The few surviving records do not indicate debate or discussion on the question of independence, but the final vote was described as "N.C.D.," meaning by unanimous vote.<sup>39</sup> Finally, Vermont was independent. Twenty-two delegates from nineteen towns had voted.<sup>40</sup>

Before adjourning, the convention made sure its work became known to the world. The delegates named a committee to ensure the declaration was published in the *Connecticut Courant*, in Hartford, and sent to the Continental Congress with a proper petition.<sup>41</sup> It appointed another committee to rally

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37. *Id.* at 40.

38. The Public Papers of Governor Thomas Chittenden, reprinted in XVII STATE PAPERS OF VERMONT, *supra* note 28, at 36.

39. *See id.* *Nemine contra dissente* translates to mean with no one contradicting or dissenting.

40. *See* I RECORDS OF THE GOVERNOR AND COUNCIL, *supra* note 1, at 38-39.

41. *See id.* at 37.

support for the state by traveling to the various towns to invite those as yet uninvolved to send delegates to future sessions of the convention.<sup>42</sup>

When the March 17, 1777 edition of the *Hartford Courant* was issued, it did not contain the preamble adopted by the Westminster Convention or the declaration in the form approved by the convention. The words that appeared in the newspaper purported to be the work of the convention, but its language was the expression of the committee. A new introduction appeared instead, beginning with a statement that the declaration of independence of the United Colonies on July 4, 1776 dissolved the jurisdictional claims of New York over the New Hampshire Grants.<sup>43</sup> The committee concluded that the Grants were then in a state of nature and as such "a right remains to the people of said Grants to form a government best suited to secure their property, well being and happiness."<sup>44</sup> Then a shortened version of the Vermont Declaration of Independence appeared.<sup>45</sup> The piece is printed over the name "Ira Allen, Clerk."<sup>46</sup> Allen knew his Locke.<sup>47</sup>

The convention met in June at Windsor.<sup>48</sup> There were two items to discuss. First, it appeared that the name "New Connecticut" was not available. A tract of land on the Susquehanna River, later known as the Western Reserve, was already named New Connecticut.<sup>49</sup> "Vermont" was chosen instead. The convention was also unhappy with the March publication because "[b]y mere accident, or through mistake," it failed to include a list of grievances against New York along with the Declaration.<sup>50</sup>

The revised Vermont Declaration came out in the June 30 edition of the *Courant*. It listed all the grievances Vermonters had against New York in detail, including the land speculation, the attempt to collect taxes, and the

42. See *id.* at 37.

43. See *id.*

44. *Id.*

45. See *id.*

46. *Id.* at 50-51.

47. See Ira Allen, Some Miscellaneous Remarks, in I ETHAN AND IRA ALLEN, COLLECTED WORKS 120 (Kevin Graffagnino ed., 1992).

48. See I RECORDS OF THE GOVERNOR AND COUNCIL, *supra* note 1, at 51 n.2.

49. See THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 257. The Western Reserve was a parcel of land as wide as Connecticut, running westerly as far as there was land. The land was claimed by Connecticut in 1777, as a result of a grant from Charles II in 1662, which conveyed to the colony of Connecticut "all of the territory of the present state and all of the lands west of it, to the extent and breadth, from sea to sea." HARRIET TAYLOR UPTON, HISTORY OF THE WESTERN RESERVE (1902) (visited Nov. 9, 1998) <<http://www.rootsweb.com/~ohlake/western/csw.html>>. In time, this area was partitioned and sold. Today the land covers eleven counties and parts of two others in northern Ohio, including Cleveland, Akron, Youngstown, and Sandusky to the west, as well as parts of New York and Pennsylvania. See *id.*

50. I RECORDS OF THE GOVERNOR AND COUNCIL, *supra* note 1, at 46-47.

branding of Vermont's leaders as outlaws.<sup>51</sup> It ended with a "sincere wish that in the future a lasting peace may continue between the state of New York and this, with the other United States of America."<sup>52</sup>

A complete Vermont Declaration of Independence includes the resolutions and preambles of the January Westminster Convention and the June Windsor Convention. Between the two, independence was justified by the delegates on a host of legal and historical grounds. New York had no authority in the first place; it violated the King's orders; whatever authority it had under the crown was dissolved by the American Declaration of Independence; and most importantly, New York had never respected the Vermonters.<sup>53</sup> This was New York's mistake. It cared more for the money to be gained from selling charters than for the welfare of those who had settled the Grants. Its self-interest clouded its vision of a united New York bounded on the east by the Connecticut River.

The Declaration was Vermont's first formal act of self-government. It defined Vermont in the eyes of the world, taking a name for itself and showing everyone, including the officials of New York and the Continental Congress, that the settlers of the Grants intended to remain in control of the land. It validated years of struggle by settlers fighting for a secure land title and peace in their communities. However, peace did not come with independence. There was a war on, and while New York did not again take arms against Vermont, it continued to press its claims to the land until the late 1780s.<sup>54</sup> The Vermont Declaration of Independence was then forgotten, its business completed once the declaration was published. The next step was a constitution. The list of grievances from the declaration, however, lived on with minor changes as the Preamble of the Vermont Constitution, which was adopted at the next convention in July at Windsor.<sup>55</sup>

### III. THE VERMONT CONSTITUTION

The suggestion that Vermont use the Pennsylvania Constitution of 1776 as a model for its own came from Thomas Young.<sup>56</sup> Thomas Young's contributions to Vermont came through his friendship with Ethan Allen. They knew each other in Salisbury, Connecticut, in the early 1760s, where Young

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51. See The Public Papers of Governor Thomas Chittenden, *reprinted in XVII STATE PAPERS OF VERMONT*, *supra* note 28, at 48-49.

52. *Id.* at 50.

53. See *id.* at 48-50.

54. See THOMPSON, *supra* note 3, at 82-83.

55. The Vermont Declaration of Independence is discussed by historians, but as a legal document, it has never been published with the various compilations of Vermont laws.

56. See I RECORDS OF THE GOVERNOR AND COUNCIL, *supra* note 1, at 395.

persuaded his friend that there was more money to be earned in land speculation than in farming.<sup>57</sup> Young was also one of the first to show Ethan the opportunities of investing in the New Hampshire Grants.<sup>58</sup> In April of 1777, Young, at the time a Philadelphia physician (and former Boston Son of Liberty), wrote a letter to the inhabitants of Vermont that first recommended using the 1776 Pennsylvania Constitution as a model.<sup>59</sup> Young's letter was printed in a handbill and distributed throughout Vermont.<sup>60</sup>

Young spoke as an insider. He wrote:

I have taken the minds of several leading Members in the Honorable Continental Congress and assure you that you have nothing to do but send attested copies of the Recommendation to take up government to every township in your district, and invite all your freeholders and inhabitants to meet in their respective townships and choose members for a General Convention, to meet at an early day, to choose Delegates for the General Congress, a Committee of Safety, and to form a Constitution for your State.<sup>61</sup>

Then Vermont's delegates would be admitted into Congress, he promised.<sup>62</sup>

Young sent along a copy of the Pennsylvania Constitution to use as a model, which, "with a very little alteration, will, in my opinion, come as near perfection as any thing yet concerted by mankind."<sup>63</sup>

#### *A. Sources for the Pennsylvania Constitution of 1776*

The Pennsylvania Constitution of 1776 was the product of many hands. Benjamin Franklin chaired the convention that adopted it.<sup>64</sup> The mechanics of organizing a government came in part from William Penn's Frame of Government.<sup>65</sup> The Virginia Declaration of Rights of 1776, drafted by George Mason, served as the basis for the statement of first principles that

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57. *See id.*

58. *See id.*; see also PAULINE MAIER, *THE OLD REVOLUTIONARIES: POLITICAL LIVES IN THE AGE OF SAMUEL ADAMS* 101-38 (1980).

59. *See* Dr. Thomas Young to the Inhabitants of Vermont, *reprinted in* 1 RECORDS OF THE GOVERNOR AND COUNCIL, *supra* note 1, at 395.

60. *See id.* at 394.

61. *Id.*

62. *See id.*

63. *Id.*

64. *See id.* at 83.

65. *See id.* at 86.

formed Chapter I of the Pennsylvania Constitution, and was incorporated into the Vermont Constitution.

Penn's Frame of Government established a colonial government in Pennsylvania that lasted from 1682 until 1776 when the constitution was established.<sup>66</sup> Penn enjoyed the right to his land from a charter granted to him by Charles II, and Penn issued the Frame of Government as a conveyance of his authority to the freemen of the province. The Frame established a general assembly of 200 members and a provincial council of seventy members.<sup>67</sup> Members of the council were to be elected by the freemen from among those "of most note for their wisdom, virtue and ability."<sup>68</sup> It required a two-thirds quorum, and gave the governor a "treble voice" in legislation.<sup>69</sup> It required bills to be printed at least thirty days before being passed into law.<sup>70</sup> It instructed the governor and provincial council to "take care that laws be duly and diligently executed."<sup>71</sup> It provided for impeachment of state officers and prohibited the assembly from altering, changing, or diminishing the charter without the consent of the governor, his heirs or assigns, and six parts of seven of the said freemen in provincial council and general assembly.<sup>72</sup> All of these provisions were reflected to some degree in the 1776 Pennsylvania Constitution and, via that document, in the Vermont Constitution of 1777.

The Pennsylvania Convention did not invent the opening words of the Pennsylvania Constitution either. They originated from the draft Virginia Declaration of Rights, written by George Mason.<sup>73</sup> The Virginia Declaration of Rights was published in the *Pennsylvania Gazette* in June of 1776.<sup>74</sup> The Pennsylvania Constitution was finally enacted on September 28, and revealed the contributions of George Mason to the constitutions of Pennsylvania and subsequently Vermont. Mason's statement of rights began:

That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter a state of society, they cannot, by any compact, deprive or divest their posterity;

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66. *See id.*

67. *See id.* at 59.

68. *Id.* at 55. Section VII of the 1777 Vermont Constitution said the members of the house should be "persons most noted for wisdom and virtue." VT. CONST. of 1777, ch. II, § 7, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 12. These words Vermont took directly from Section 7 of the 1776 Pennsylvania Constitution. *See* PA. CONST. of 1776, § 7.

69. *See* DANIELCHIPMAN, A MEMOIR OF THOMAS CHITTENDEN, THE FIRST GOVERNOR OF VERMONT 60 (1849).

70. *See id.* at 57.

71. *Id.*

72. *See id.* at 64.

73. *See* AMERICAN SCRIPTURE, *supra* note 20, at 165-66.

74. *See id.* at 126.

namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.<sup>75</sup>

Thomas Jefferson used Mason's language in writing the second paragraph of the Declaration of Independence, "that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness."<sup>76</sup> Pennsylvania started with Mason's draft, and rewrote it to read: "That all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."<sup>77</sup> Article I of the Vermont Constitution uses the same words for its first sentence.<sup>78</sup>

The second paragraph of Mason's Declaration explains "[t]hat all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them."<sup>79</sup> Article IV of the Pennsylvania Constitution and Article V of the Vermont Constitution change this by adding one word to read that all power is "inherent in, and consequently derived from the people," and substitutes "all officers of government, whether legislative or executive," for "magistrates."<sup>80</sup>

There is a common benefits clause in the Pennsylvania Constitution which is very close in language to Article VI of the 1777 Vermont Constitution. There are also direct antecedents for what would become Vermont's Articles III (right to worship), IX (proportional contribution), X (rights to criminal process), XII (civil warrant or attachment), XIII (right to trial), XIV (freedom of press), XV (militia), and XVI (fundamental principles) as well as Sections VIII (regular elections) and XXVI (excessive bail) in both the Pennsylvania and Vermont constitutions.<sup>81</sup> Mason's Declaration includes

75. VIRGINIA BILL OF RIGHTS OF 1776, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1908.

76. AMERICAN SCRIPTURE, *supra* note 20, at 133-34, 236.

77. PA. CONST. of 1776, *preamble*, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1540.

78. *See* VT. CONST. of 1777, ch. I, art. I, *reprinted in* XII STATE PAPERS OF VERMONT, *supra* note 2, at 8.

79. VIRGINIA BILL OF RIGHTS OF 1776, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1908.

80. VT. CONST. of 1777, ch. I, art. V, *reprinted in* XII STATE PAPERS OF VERMONT, *supra* note 2, at 9; PA. CONST. of 1776, art. IV.

81. *See* PA. CONST. of 1776, art. II, VI, VIII, IX, X, XI, XII, XIII, XIV; § 29, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1541-42, 1546; VT. CONST. of 1777, ch. I, art. III,

a separation of powers clause and a prohibition against suspending laws that were not adopted as part of the Vermont Constitution of 1777, but were later adopted in the Vermont Constitution of 1786.<sup>82</sup>

These ideas were not new to George Mason. They echo throughout the centuries, from the Magna Carta to the Mayflower Compact to the revolutionary era, in various forms. George Mason's formulation of the principles of democracy, however, represent the flowering of the search for freedom and a limited government of written laws and constitutions in the new world.

### B. The Preamble

The Preamble to the Vermont Constitution begins and ends with two paragraphs taken from the Pennsylvania Constitution of 1776.<sup>83</sup> The middle part consists of fourteen paragraphs describing the reasons Vermont and New York were at odds.<sup>84</sup> Ira Allen and Thomas Chittenden drafted the Preamble together in the late fall of 1777, in Williamstown, Massachusetts, months after the body of the Vermont Constitution was adopted by the Windsor Convention.<sup>85</sup> The words were not new to Vermonters, however, as twelve of

XV, XVI; ch. II, §§ 8, 26, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 8-11, 13, 17.

82. See VT. CONST. of 1786, ch. II, § 6, reprinted in XIV STATE PAPERS OF VERMONT 127, 129 (John A. Williams ed., 1965).

83. See PA. CONST. of 1776, preamble, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1540-41; VT. CONST. of 1777, preamble, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 5-6, 8.

84. Two paragraphs from the list of complaints originally printed in the June *Connecticut Courant* were not included in the Preamble:

They have endeavored and many times threatened to excite the king's troops to destroy us. . . . In truth, they, the late government of New York, have spared neither costs or pains, nor been wanting in using every artful insinuation in their power, (however unwarrantable by the laws of God or man,) to defraud those inhabitants out of the whole of their landed property; and nothing but consciences void of offence towards God and man, to whose impartial judgment we appeal, could have induced those inhabitants to have run the risk, and to have undergone the hardships and fatigues they have borne, for the salvation of their lives, liberties and properties.

The Public Papers of Governor Thomas Chittenden, reprinted in XVII STATE PAPERS OF VERMONT, *supra* note 28, at 48, 49.

85. There is a story repeated in Connecticut that the draft of the original constitution of Vermont was penned in Lakeville. See 1 HISTORICAL COLLECTIONS RELATING TO THE TOWN OF SALISBURY 138-39 (The Salisbury Assoc., Inc. 1913). Lakeville is the town of Salisbury, in Connecticut's northwest corner, and it does have a strong Vermont connection. Thomas Chittenden, Ethan Allen and his brothers, Nathaniel Chipman and his brothers all moved to Vermont from Lakeville, and it was to Lakeville that Ethan and Ira returned frequently during these years. In November of 1777, Ira Allen entered a note in his account book: "To 15 days going from Salisbury to Williamstown and there with President Chittenden writing the Preamble to the Constitution, &c. from there to Bennington to confer with the Council respecting s'd Preamble—assisting to complete compiling from manuscript, the Constitution of the state, £7 100 Expense

the paragraphs appeared first as the list of grievances compiled for the Windsor Convention in June for publication in the *Connecticut Courant*.<sup>86</sup> They represented the best argument of the Vermonters against continued claims by New York, and they had been used and redrafted in numerous pamphlets and petitions from as early as January of 1775.<sup>87</sup>

The Preamble recites the principal charges against New York, from its judicial interference with New Hampshire land grants to physical assaults on settlers.<sup>88</sup> It is a political history from the Vermont perspective. Like all tracts, it tends to hyperbolize. One of the few changes made to the list of complaints from June was designed to show that New York could not govern Vermont because it was so remote. "[T]he local situation of this State, from New-York, at the extreme part, is upwards of four hundred and fifty miles from the seat of that government."<sup>89</sup> By today's official Vermont highway map, Albany is thirty-six miles from Bennington and 259 miles from Canaan, Vermont, the most "extreme part" of the state.<sup>90</sup>

The Preamble is evocative of the list of grievances that appears in the American Declaration of Independence.<sup>91</sup> Listing grievances was a feature of many early state constitutions, well before July 4, 1776.<sup>92</sup> The difference here

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money 3 2 8." THOMPSON, *supra* note 3, at 107 n.\*.

This shows that the Preamble was written not in Salisbury but in Williamstown, Massachusetts. Where is not important, but the notation explains who wrote the Preamble and when it was done. The delay in completing the Preamble was one reason the elections originally scheduled for January of 1778 were rescheduled to March. See Ira Allen, *Some Miscellaneous Remarks*, in III ETHAN AND IRA ALLEN, COLLECTED WORKS 58 (Kevin Graffagnino ed., 1992).

86. See The Public Papers of Governor Thomas Chittenden, reprinted in XVII STATE PAPERS OF VERMONT, *supra* note 28, at 46-49; VT. CONST. of 1777, preamble, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 5-7.

87. See II RECORDS OF THE GOVERNOR AND COUNCIL OF THE STATE OF VERMONT, 489-97 (E.P. Walton ed., 1874). This is the first document labeled a "constitution" of Vermont by Ira Allen, although its formal title is "Covenant, Compact, and Resolutions." E. P. Walton believed it was written by Ethan Allen. The document is distinctive in reciting the complaints of Vermont against New York from the perspective of "His Majesty's Loyal Subjects" in the Grants. See *id.*

88. See VT. CONST. of 1777, preamble, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 6-8.

89. *Id.* at 7.

90. See OFFICIAL VERMONT STATE HIGHWAY MAP (1997). The Preamble also charges New York with sending "savages on our frontiers, to distress us" and sending foreign troops, "emigrants from Scotland," to "drive us out of possession." VT. CONST. of 1777, preamble, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 7. The precise historical basis for these charges is unclear. The incidents they describe are not part of the traditional histories of the relations of New York and Vermont.

91. See AMERICAN SCRIPTURES, *supra* note 20, at 237-39.

92. See, e.g., GA CONST. OF 1777, MD. CONST. OF 1776, N.H. CONST. OF 1776, N.J. CONST. OF 1776, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 377-78, 817, 1279, 1310-11, 1328-32. New York's 1777 Constitution listed its own grievances and then repeated the entire American Declaration of Independence as well. N.Y. CONST. OF 1777, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1328.

is that Vermont spent little time listing problems with Britain and directed most of its charges against New York. It is clear from the grievances that the principal audience, aside from the people of the Grants, was the Continental Congress, which at this time was still undecided on what to do with the Vermont dissidents.

The Preamble was included in the 1777 and 1786 Vermont Constitutions, but was formally deleted from the Vermont Constitution by the Constitutional Convention of 1793.<sup>93</sup> By that time there was peace with New York. Questions of jurisdiction were over, money had been promised for reparations, Vermont was a member of the United States, and there was no longer a need for the Declaration.

### C. What Vermont Deleted from the Pennsylvania Constitution

Most of the Vermont Constitution is Pennsylvanian in origin, but there are intriguing deletions. The obvious changes include replacing "commonwealth of Pennsylvania" with "state of Vermont," "president" with "governor," and "elector" with "freeman," wherever these words appear in the draft.<sup>94</sup> The City of Philadelphia gets special treatment in the Pennsylvania Constitution which uses "city" to describe municipalities.<sup>95</sup> The Vermont Constitution treats all towns generally alike.<sup>96</sup>

There are also subtle changes that demonstrate Vermont's status as an outsider among the United States. In its Preamble, the Pennsylvania Constitution justified independence by listing acts of tyranny "whereby all allegiance and fealty to the said king and his successors, are dissolved and at an end, and all power and fealty derived from him ceased in these colonies."<sup>97</sup> Pennsylvania could use the words "these colonies" because it was one of the

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93. See RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT 711 (Paul Gillies & D. Gregory Sanford eds. 1991) [hereinafter RECORDS OF THE COUNCIL OF CENSORS]; see also I RECORDS OF THE GOVERNOR AND COUNCIL, *supra* note 1, at 85-86.

94. The term "freeman" was commonly used in seventeenth century charters and conventions. See CHARTER OF THE COLONY OF CONNECTICUT (The Case, Lockwood & Brainard Co. 1900) (1662); THE FUNDAMENTAL ORDERS OF CONNECTICUT (1638-1639), *reprinted in* I OLD SOUTH LEAFLETS (Directors of the Old South Works eds., 1896); WILLIAM PENN, THE FRAME OF GOVERNMENT OF THE PROVINCE OF PENNSYLVANIA § XVI (1682).

95. See PA. CONST. of 1776, §§ 4, 12, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1542, 1543.

96. See, e.g., VT. CONST. of 1777, ch. II, § 31, *reprinted in* XII STATE PAPERS OF VERMONT, *supra* note 2, at 18; see also CHIPMAN, *supra* note 65, at 33-50. Care must be taken in relying too much on Chipman and Walton for the fine details of the comparison, as there are errors. See VT. CONST. of 1777, *reprinted in* XII STATE PAPERS OF VERMONT, *supra* note 2, at 5-21; see also John N. Shaeffer, *A Comparison of the First Constitutions of Vermont and Pennsylvania*, 43 VT. HIST. 33, 34-35 (1975).

97. PA. CONST. of 1776, preamble, *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1540-41.

thirteen. The Vermont Constitution replaced "these" with "the American" colonies.<sup>98</sup> Where Pennsylvania says that "whereas it is absolutely necessary for the welfare and safety of the inhabitants of said colonies" that they be free and independent, Vermont's Preamble speaks only of Vermont, replacing "said colonies" with "this state" and calling itself a "free and independent state."<sup>99</sup> Vermont was still an outsider, and would remain one until its admission as a state in 1791.

Vermont was brand new. There was no need for Vermont to use words like "heretofore" which were in the Pennsylvania draft in a phrase such as "[t]rials shall be by jury *as heretofore*"; there was no "heretofore" in the eyes of the drafters.<sup>100</sup> Where Pennsylvania had to change the system of collecting fees, license money, fines, and forfeitures from payment to the governor or his deputies to the public treasury, Vermont merely directed that they be paid according to the "direction hereafter to be made by the General Assembly."<sup>101</sup> Where Pennsylvania sought to ensure that all religious societies continued to be "encouraged and protected in the enjoyment of the privileges, immunities and estates which they were accustomed to enjoy, or could of right have enjoyed, under the laws and former constitution of this state,"<sup>102</sup> Vermont looked forward. It had no custom and no former constitution, so it described the privileges, immunities and estates "which they, in justice, ought to enjoy, under such regulations, as the General Assembly of this State shall direct."<sup>103</sup> Clearly the Vermonters did not feel the need to throw off the mantle of law placed on them by New York when it exercised jurisdiction in the Grants. They never acknowledged it and if there were any lingering questions, the Vermont Declaration of Independence took care of them.

The most important deletion is found in Section 6, where Vermont eliminated the property qualification for voters (freemen). Pennsylvania's

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98. See, e.g., VT. CONST. of 1777, preamble, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 6.

99. PA. CONST. of 1776, preamble, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1540-41; VT. CONST. of 1777, preamble, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 6.

100. PA. CONST. of 1776, § 25, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1546; VT. CONST. of 1777, ch. II, § 22, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 17.

101. PA. CONST. of 1776, § 33, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1547; VT. CONST. of 1777, ch. II, § 30, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 18.

102. PA. CONST. of 1776, § 45, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1547-48.

103. VT. CONST. of 1777, ch. II, § 41, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 20.

electors needed to be twenty-one years of age, to be residents for one year, and to have "paid public taxes during that time."<sup>104</sup> Vermont kept the first two requirements, but dropped the qualification that a voter had to be a taxpayer. The Vermont draft also deleted the words, "[p]rovided always that sons of freeholders of the age of twenty-one years shall be entitled to vote although they have not paid taxes," which appeared at the end of Section 6 in the Pennsylvania Constitution.<sup>105</sup> Paying taxes would never be a prerequisite for voting status at state and legislative elections, although voting status at town meeting could be lost for failing to pay a local tax in later years.<sup>106</sup>

Pennsylvania's Constitution was hard on its officials. There were prohibitions against dual office holding and term limits, few of which Vermont adopted. Vermont changed Pennsylvania's requirement that a member of the house of representatives live in the town he would represent for two years immediately preceding the election.<sup>107</sup> Vermont required only one year's residency.<sup>108</sup> Vermont also deleted the prohibition that no member of the house may, "while he continues such, hold any other office, except in the militia."<sup>109</sup> In the Pennsylvania Constitution, "[n]o person shall be capable of being elected a member to serve in the house of representatives . . . for more than four years in seven."<sup>110</sup> Vermont did not include this provision on term limits. Vermont rejected most of Pennsylvania's limits on service, which were designed to keep the three branches of government separate and distinct.<sup>111</sup> Pennsylvania prohibited various members of the executive branch

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104. PA. CONST. of 1776, § 6, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1542.

105. Compare PA. CONST. of 1776, § 6, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1542, with VT. CONST. of 1777, ch. II, §§ 6, 7, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 12.

106. Compare *Slayton v. Town of Randolph*, 108 Vt. 288, 187 A. 383 (1936) (permissible to remove a voter from the checklist for failing to pay local tax when the article to be voted is purely local), with *Martin v. Fullam*, 90 Vt. 163, 97 A. 442 (1916) (improper for town to remove voter from the checklist for failing to pay local taxes when a statewide public question is involved).

107. See PA. CONST. of 1776, § 7, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1542-43.

108. See VT. CONST. of 1777, ch. II, § 6, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 12.

109. Compare VT. CONST. of 1777, ch. II, § 6, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 12-13, with PA. CONST. of 1776, § 7, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1542-43.

110. PA. CONST. of 1776, § 7, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1542-43.

111. The constitutional requirement that the "legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the others," was added to the Vermont Constitution in 1786. At the same time, prohibitions against holding dual offices were also added. VT. CONST. of 1786, ch. II, §§ 5, 23, 27, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1870, 1872, 1873.

from serving in the general assembly, on the council, or in the Continental Congress.<sup>112</sup> Vermont omitted these sections as well.<sup>113</sup>

Lacking contemporary accounts of the Windsor Convention of July 1777, no one will know precisely *why* certain choices were made. Why did Vermont change the date of the annual election of state officers from the second Tuesday in October to the first Tuesday in September, for instance?<sup>114</sup> Why did Pennsylvania's general assembly elect the commonwealth's treasurer, while the Vermont Constitution provided for the statewide election of a treasurer?<sup>115</sup>

Pennsylvania's general assembly was apportioned according to the number of taxable inhabitants, and provided for reapportionment every seven years.<sup>116</sup> Vermont replaced this with a plan that allowed all towns with at least eighty inhabitants to have two representatives (and all others one representative) for the first seven years, after which a one-town, one-vote principle would apply.<sup>117</sup> Vermont also deleted the sentence which stated, "wages of the representatives in general assembly, and all other state charges shall be paid out of the state treasury."<sup>118</sup>

The supreme executive council of Pennsylvania was made up of representatives from the various counties and the City of Philadelphia. Vermont elected its councilors at-large statewide. Pennsylvania included term limits of two or three years "and no longer" for its council;<sup>119</sup> Vermont set no limits on the number of terms one might serve.<sup>120</sup> Both Pennsylvania and Vermont Constitutions elected twelve members of the council, but a quorum in Vermont was seven, compared to Pennsylvania's five.<sup>121</sup>

112. See PA. CONST. of 1776, § 23, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1545-46.

113. See VT. CONST. of 1777, ch. II, § 8, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 12; PA. CONST. of 1776, § 17, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1544.

114. See VT. CONST. of 1777, ch. II, § 8, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 12; PA. CONST. of 1776, § 17, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1544.

115. The secretary of state remained appointed by the general assembly until the constitutional amendments of 1883. See RECORDS OF THE COUNCIL OF CENSORS, *supra* note 93, at 746.

116. See PA. CONST. of 1776, § 17, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1544.

117. See VT. CONST. of 1777, ch. II, § 16, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 14-15.

118. VT. CONST. of 1777 ch. II, § 17, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 15.

119. See PA. CONST. of 1776, § 19, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1544-45.

120. See VT. CONST. of 1777, ch. II, § 17, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 15.

121. Compare PA. CONST. of 1776, §§ 19, 20, reprinted in THE FEDERAL AND STATE

Vermont's Governor was elected by the freemen at the annual election.<sup>122</sup> Pennsylvania's president was chosen by the joint ballot of the assembly and the council.<sup>123</sup> Pennsylvania's supreme court had seven year terms.<sup>124</sup> Vermont's supreme court was elected by the joint assembly and governor and council for one year terms.<sup>125</sup> Vermont also removed the mandate that courts of sessions, common pleas, and orphans courts be held quarterly in each city and county.<sup>126</sup> The legislature made that decision in coming years.

Vermont adopted the Connecticut system of recording deeds town by town, rather than Pennsylvania's county system of recording.<sup>127</sup> Vermont required a school in each town paid for by each town.<sup>128</sup> Pennsylvania required schools in each county to be supported by the public.<sup>129</sup> Vermont's Constitution also included the duty to establish a university, where Pennsylvania's was silent.<sup>130</sup> There were other changes, best explained by what Vermont added to, rather than deleted from, the Pennsylvania model.

#### *D. What Vermont Added to the Pennsylvania Constitution*

Vermont is justly celebrated for abolishing slavery before any other government in America. This action is found in the second sentence of Article I of the 1777 Constitution.<sup>131</sup> Following the threshold recognition that

CONSTITUTIONS, *supra* note 20, at 1544-45, with Vt. Const. of 1777, ch. II, § 18, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 15.

122. See VT. CONST. of 1777, ch. II, § 17, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 15.

123. See PA. CONST. of 1776, § 19, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1544-45.

124. See *id.* § 23.

125. See VT. CONST. of 1777, ch. II, § 21, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 16-17.

126. Compare PA. CONST. of 1776, § 26, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1546, with VT. CONST. of 1777, ch. II, § 21, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 16-17.

127. Compare VT. CONST. of 1777, ch.2, § 31, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 18, with PA. CONST. of 1776, § 34, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1547, and ACTS AND LAWS OF HIS MAJESTY'S COLONY OF CONNECTICUT IN NEW ENGLAND IN AMERICA 242-43 (1769) ("An Act concerning Town Clerks Office, and Duty.") [hereinafter ACTS AND LAWS OF CONNECTICUT].

128. See VT. CONST. of 1777, ch. II, § 40, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 20.

129. See PA. CONST. of 1776, § 44, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1547.

130. Compare VT. CONST. of 1777, ch. II, § 40, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 20, with PA. CONST. of 1776, § 44, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1547.

131. See VT. CONST. of 1777, ch. I, art. I, reprinted in XII STATE PAPERS OF VERMONT, *supra* note

"all men are born equally free and independent, and have certain natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety,"<sup>132</sup> which is the first section of the Pennsylvania Constitution,<sup>133</sup> Vermont added these words:

Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave or apprentice, after he arrives to the age of twenty-one years, nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent, after they arrive at such age, or bound by law, for the payment of debts, damages, fines, costs, or the like.<sup>134</sup>

The promise of liberty contained in this article was unprecedented at the time it was written. There were, of course, other charters and constitutions that gave similar rights to freeborn citizens. The Connecticut Colonial Charter of 1682, for instance, provides:

That all and every the Subjects of us, our heires or Successors which shall goes to Inhabite within the said Colony, and every of their Children which shall happen to bee borne there or on the Sea in going thither or returneing from thence, shall have and enjoy all liberties and Immunities of free and naturall Subjects within any the Dominions of us, our heires or Successors, to all intents, Construccons, and purpose whatsoever, as if they and every of them were borne within the Realme of England.<sup>135</sup>

But Connecticut sanctioned slavery, treating "indians" and slaves differently from the white population.<sup>136</sup> Vermont later became an engine of anti-slavery sentiment, beginning in 1786 with an act to prevent the sale and transportation of slaves out of Vermont.<sup>137</sup>

2, at 8.

132. VT. CONST. of 1777, ch. I, art. I, *reprinted in XII STATE PAPERS OF VERMONT*, *supra* note 2, at 8.

133. See PA. CONST. of 1776 art. I, *reprinted in THE FEDERAL AND STATE CONSTITUTIONS*, *supra* note 20, at 1541.

134. VT. CONST. of 1777, ch. I, art. I, *reprinted in XII STATE PAPERS OF VERMONT*, *supra* note 2, at 8.

135. CHARTER OF THE COLONY OF CONNECTICUT (1662), *reprinted in CHARTER OF THE COLONY OF CONNECTICUT* (1900).

136. See ACTS AND LAWS OF CONNECTICUT, *supra* note 127, at 229-31 ("An Act concerning Indian, Molatto, and Negro Servants, and Slaves.").

137. See LAWS OF VERMONT 1785-1791, *reprinted in XIV STATE PAPERS OF VERMONT*, *supra* note

Vermont's next contribution to constitutional history is no less extraordinary. Article II guarantees, "[t]hat private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."<sup>138</sup> These words were not included in the Pennsylvania Constitution. Pennsylvania included in its Article XIII,<sup>139</sup> and Vermont adopted in its Article IX<sup>140</sup> a provision that "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," but this was a guarantee without a promise of just compensation.<sup>141</sup> Just compensation was assumed in other jurisdictions and was recognized as a principle by colonial governments, but Vermont's expression of this as a right of private property was the first constitutional articulation of the principle in America.<sup>142</sup>

The constitution also addressed protestant religion. Inserted in Article III was a provision limiting a freeman's guarantee of protection against being "[un]justly deprived or abridged of any civil right as a citizen, on account of his religious sentiment, or peculiar mode of religious worship," to those who "profess[ ] the protestant religion."<sup>143</sup> Pennsylvania was more liberal, giving "any man who acknowledges the being of a God" the same protection.<sup>144</sup> The same qualification is added in Section 9 of the Vermont Constitution to the religious declaration required of each member of the assembly.<sup>145</sup>

81, at 100 ("Whereas by the Constitution of this State all the subjects of this Commonwealth of whatever colour are equally entitled to the inestimable blessings of Freedom unless they have forfeited the same by the commission of some crime, and the Idea of Slavery is expressly and totally exploded from our free Government."). The legislature sets a hundred pound fine on those who would attempt to transport slaves out of Vermont. *See id.*

138. VT. CONST. of 1777, ch. I, art. II, *reprinted in XII STATE PAPERS OF VERMONT*, *supra* note 2, at 8.

139. *See* PA. CONST. of 1776 art. XIII, *reprinted in THE FEDERAL AND STATE CONSTITUTIONS*, *supra* note 20, at 1542.

140. *See* VT. CONST. of 1777, ch. I, art. IX, *reprinted in XII STATE PAPERS OF VERMONT*, *supra* note 2, at 9.

141. VT. CONST. of 1777, ch. I, art. IX, *reprinted in XII STATE PAPERS OF VERMONT*, *supra* note 2, at 9.

142. Each of the colonies except Rhode Island and Massachusetts adopted constitutions before Vermont, but none contain the guarantee of compensation for the taking of private property for public uses. *See THE FEDERAL AND STATE CONSTITUTIONS*, *supra* note 20, *passim*.

143. VT. CONST. of 1777, ch. I, art. III, *reprinted in XII STATE PAPERS OF VERMONT*, *supra* note 2, at 9.

144. PA. CONST. of 1776 art. III, *reprinted in THE FEDERAL AND STATE CONSTITUTIONS*, *supra* note 20, at 1541.

145. *See* VT. CONST. of 1777, ch. II, § 9, *reprinted in XII STATE PAPERS OF VERMONT*, *supra* note 2, at 13. South Carolina's first constitution establishes the "Christian Protestant religion" as the established religion of that state. *See THE FEDERAL AND STATE CONSTITUTIONS*, *supra* note 20, at 1626.

Vermont also altered Article III to add that "every sect or denomination of people ought to observe the Sabbath, or the Lord's day, and keep up, and support, some sort of religious worship, which to them shall seem most agreeable to the revealed will of God."<sup>146</sup> Connecticut took the laws respecting the Sabbath seriously, and Vermont may have included this regulation in its constitution from that source. Legislation modeled on Connecticut law implementing this restriction was adopted by the General Assembly in 1779.<sup>147</sup>

Vermont added Article XII:

That no warrant or writ to attach the person or estate of any freeholder within this state, shall be issued in civil action, without the person or persons who may request such warrant or attachment first make oath, or affirm before the authority who may be requested to issue the same, that he or they are in danger of losing his, her, or their debt.<sup>148</sup>

This article was continued in the Constitution of 1786, but deleted in 1793.<sup>149</sup>

Article XIX of the 1777 Vermont Constitution was also new: "That no person shall be liable to be transported out of this State, for trial, for any offence committed within this State."<sup>150</sup> This was likely inspired by actions of New York in the years leading up to Vermont independence.

Vermont changed the qualifications of a freeman ("elector" in Pennsylvania's language) by requiring not only that a freeman be twenty-one and have resided in Vermont for one whole year before the election, but also be "of a quiet and peaceable behaviour and will take the following oath (or affirmation)."<sup>151</sup> Vermont also added the freeman's oath.<sup>152</sup> In addition, Vermont added good moral character as a qualification for holding civil office.<sup>153</sup>

146. VT. CONST. of 1777, ch. I, art. III, *reprinted in XII STATE PAPERS OF VERMONT*, *supra* note 2, at 9.

147. *Compare* LAWS OF VERMONT 1777-1780, *supra* note 2, at 67-70 ("An Act for the due observation and keeping the first day of the week as Sabbath, or Lord's Day; and for punishing Disorders and Profaneness on the same."), *with* ACTS AND LAWS OF CONNECTICUT, *supra* note 127, at 139-42 ("An Act for the due observation and keeping the Sabbath or Lord's-Day; and for preventing and punishing Disorders, and Prophaneness on the same.").

148. RECORDS OF THE COUNCIL OF CENSORS, *supra* note 93, at 139.

149. *See id.* at 87, 139.

150. VT. CONST. of 1777, ch. I, art. XIX, *reprinted in XII STATE PAPERS OF VERMONT*, *supra* note 2, at 11.

151. VT. CONST. of 1777, ch. II, § 6, *reprinted in XII STATE PAPERS OF VERMONT*, *supra* note 2, at 12.

152. *See id.*

153. *See* VT. CONST. of 1777, ch. II, § 28, *reprinted in XII STATE PAPERS OF VERMONT*, *supra* note

Thomas Young's April, 1777 letter to the inhabitants of Vermont had urged an alteration to the Pennsylvania Constitution, promoting the idea that

all the Bills intended to be passed into Laws should be laid before the Executive Board for their perusal and proposals of amendment. All the difference then between such a Constitution and those of Connecticut and Rhode-Island, in the grand outlines is, that in one case the Executive power can advise and in the other compel. For my own part, I esteem the people at large the true proprietors of governmental power.<sup>154</sup>

Young was talking about the role of the council in legislation. In the 1776 Pennsylvania Constitution, before any bills could become a law, they had to be printed for the consideration of the people.<sup>155</sup> There was no express role for Pennsylvania's supreme executive council in legislation until it was enacted.<sup>156</sup> Vermont changed the Pennsylvania model by adding that bills also first be "laid before the Governor and Council, for their perusal and proposals of amendment," as well as printed.<sup>157</sup> The assembly would decide a bill had merit and pass it, then refer it to the governor and council (and supposedly print it), and the following year the council was to return and it would be read for the last time and enacted into law.<sup>158</sup> The governor and council had the power to delay, but not to veto legislation.<sup>159</sup>

The governor of Vermont was, from the beginning, to be elected into office directly by the freemen.<sup>160</sup> In the Pennsylvania model, the governor was

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2, at 18.

154. Dr. Thomas Young to the Inhabitants of Vermont, *reprinted in I RECORDS OF THE GOVERNOR AND COUNCIL*, *supra* note 1, at 395.

155. See PA. CONST. of 1776, § 15, *reprinted in THE FEDERAL AND STATE CONSTITUTIONS*, *supra* note 20, at 1544. Printing bills before they became law did not happen in Vermont, in spite of the constitutional direction. Until the Constitution was amended in 1786, all laws were regarded as temporary. Section XIV provided an exception to the mandate to print all bills for the case of "temporary acts, which, after being laid before the Governor and Council, may (in cases of sudden necessity) be passed into laws." VT. CONST. of 1777, ch. II, § 14, *reprinted in XII STATE PAPERS OF VERMONT*, *supra* note 2, at 14.

156. See PA. CONST. of 1776, § 20, *reprinted in THE FEDERAL AND STATE CONSTITUTIONS*, *supra* note 20, at 1545.

157. VT. CONST. of 1777, ch. II, § 14, *reprinted in XII STATE PAPERS OF VERMONT*, *supra* note 2, at 14.

158. See RECORDS OF THE COUNCIL OF CENSORS, *supra* note 93, at 376-77.

159. The constitutional authority of the governor and council became the subject of a legislative crisis in 1826, when the council refused to return a bill to the assembly. The assembly, believing it had the power to act whether the paperwork returned or not, went ahead and passed the bill into law. This collision of branches led directly to the establishment of the Vermont Senate in 1836. See *id.*

160. See VT. CONST. of 1777, ch. II, § 17, *reprinted in XII STATE PAPERS OF VERMONT*, *supra* note 2, at 15.

elected from among the council.<sup>161</sup> In Vermont's Constitution, election required a candidate to have "the major part of the votes," and allowed that if no choice was made "then the Council and the General Assembly, by their joint ballot, shall make choice of a Governor."<sup>162</sup> Connecticut provided the precedent for this, not Pennsylvania. From the beginning, Connecticut had required candidates for governor to have "the greatest nu[m]ber" of votes.<sup>163</sup> Representatives to the Connecticut Assembly were required to obtain "the major [part]" of the votes of the freemen of their respective districts by the Colonial Charter of 1662.<sup>164</sup>

Thomas Chittenden, who was President of the Constitutional Convention at Windsor in July of 1777, had served in the Connecticut assembly for seven annual terms between 1764 and 1772, and would have been familiar with the charter's requirements for his election.<sup>165</sup>

Vermont's Constitution included some temporary provisions for the election of the first legislature. The July 7, 1777 version explained that the election would occur in December with the assembly first meeting in January.<sup>166</sup> However, due to a delay in printing, the convention was reconvened in December and the provision was changed to provide for a general election on the first Tuesday of March and commencement of the first legislative session on the second Thursday of March.<sup>167</sup> It was at this convention that the Preamble was finalized and adopted.<sup>168</sup>

Vermont added language to the section on hunting and fishing in seasonable times, including the words, "under proper regulations, to be hereafter made and provided by the General Assembly."<sup>169</sup> Vermont also added Section XLII, which states that, "[a]ll field and staff officers, and commissioned officers of the army, and all general officers of the militia, shall

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161. See PA. CONST. of 1776, § 19, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1544-45.

162. VT. CONST. of 1777, ch. II, § 17, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 15.

163. THE FUNDAMENTAL ORDERS OF CONNECTICUT (1638-1639), reprinted in 1 OLD SOUTH LEAFLETS 2 (Directors of the Old South Work eds., 1896).

164. *Id.*

165. See FRANK SMALLWOOD, THOMAS CHITTENDEN: VERMONT'S FIRST STATESMAN 31 (1997).

166. See HILAND HALL, *supra* note 12, at 268.

167. *See id.*

168. *See id.* at 268-70.

169. Compare VT. CONST. of 1777, ch. II, § 39, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 20, with PA. CONST. of 1776, § 43, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1547.

be chosen by the General Assembly"<sup>170</sup>—where Pennsylvania's constitution was silent on the subject.<sup>171</sup>

These are the major changes. There are countless smaller details, but the rest of the Vermont Constitution is straight from the Pennsylvania Constitution.

### *E. Afterthought on the Vermont Constitution*

It is so easy to forget what we owe to others. All that wonderful language from the Vermont Constitution that Vermonters celebrate as so perfectly Vermont in character has been known to be Pennsylvanian in character from as early as the spring of 1777. Yet, it is still the Vermont Constitution, whatever its origins. The parts Vermont added and subtracted from the Pennsylvania Constitution are what makes Vermont unique among governments throughout history. Nevertheless, the majority of the provisions of the Vermont Constitution that daily guide the courts in determining the rights of Vermonters were not written by representatives of this state. Curiously, the Pennsylvania Constitution of 1776 was radically amended and replaced with a new constitution for that state in 1790.<sup>172</sup> The Council was abolished, a Senate created as a co-ordinate branch of the legislature, and the Council of Censors abolished. Many of the most inspiring ideas still in use in Vermont today were discarded, making the Vermont Constitution more special than promised in 1777. The Vermont cases that have followed provisions in the first constitution rarely rely on Pennsylvania precedent because there is little there to find. Once the words became Vermont's, we seldom looked back, because this was our constitution.<sup>173</sup>

## IV. THE CONNECTICUT LAW BOOK

Vermonters had declared their independence and adopted a constitution. The next challenge was enacting laws to govern the new state. A "state of nature," as envisioned by John Locke, did not come with a set of operating instructions, but Vermont had one. It was a book of Connecticut

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170. VT. CONST. of 1777, ch. II, § 42, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 20.

171. See generally PA. CONST. of 1776 reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1540-48.

172. See generally PA. CONST. of 1790, reprinted in THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20, at 1548-57.

173. See WILLIAM C. HILL, THE VERMONT STATE CONSTITUTION: A REFERENCE GUIDE *passim* (1992). This book is an essential tool in understanding how the Vermont Constitution works in practice and how the Vermont judiciary has understood the language of its articles and section.

laws which the first legislatures used as a form book for most of the laws adopted in the early years.<sup>174</sup>

This book was a compilation of Connecticut statutes likely owned by Thomas Chittenden from his days as a Connecticut legislator and justice of the peace. Calf-bound, it was about eight inches by eleven inches and contained 350 pages in large lettering.<sup>175</sup> The book was published in New London by Thomas and Samuel Green in 1769 and contained a variety of different sources.<sup>176</sup> The main body of the work was a reprint of the 1750 edition of Connecticut laws, representing the work of nearly a century of colonial lawmaking. Next came the acts and resolves of the intervening years, up to and including 1769, published and paginated serially with the body of law from the 1750 edition. At the beginning of the book was the 1662 Connecticut charter, followed by a good table of contents, organized alphabetically.<sup>177</sup>

A copy of the book used by the first legislature has not survived. The book was not among Thomas Chittenden's estate when he died in 1789.<sup>178</sup> It was not among the books in the State Library at the time the first catalog was made and published in 1850.<sup>179</sup> Little is known of its ownership or destiny, but its service to early Vermont is obvious in the first laws.

It is clear that the book was used by the Council of Safety to prepare for the convening of the first legislature.<sup>180</sup> The first legislature was supposed to convene in January of 1778, following an election the previous month, but war and the difficulty of having the first constitution printed delayed the plan.<sup>181</sup> The Council of Safety, having authority to act in lieu of a legislature between the adoption of the constitution and the convening of the first General Assembly, called the Convention back in session in Windsor in December of 1777.<sup>182</sup> The delegates unanimously agreed to delay the first election until March of the following year.<sup>183</sup> The Council's letter to the inhabitants of Vermont, signed by Thomas Chittenden, explained that only the lack of a firm

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174. See generally *ACTS AND LAWS OF CONNECTICUT*, *supra* note 127.

175. One copy is at the Starr Library at Dartmouth, another in State Archives at the Connecticut State Library in Hartford. A microform copy is available through the Charles Evans Imprint collection at Middlebury College.

176. See generally *ACTS AND LAWS OF CONNECTICUT*, *supra* note 127.

177. See *id.* at 1-10.

178. See *SMALLWOOD*, *supra* note 165, at 237.

179. See *CATALOGUE OF THE VERMONT STATE LIBRARY 1850* (State Librarian ed., 1850).

180. See *I RECORDS OF THE GOVERNOR AND COUNCIL*, *supra* note 1, at 98 n.1.

181. See *id.* at 98.

182. See *The Public Papers of Governor Thomas Chittenden*, *supra* note 28, at 221.

183. See *id.*

attachment and joint connection of the inhabitants "can frustrate or prevent their being what they so Reasonably wish to be."<sup>184</sup>

The first statewide elections were held on the first Tuesday of March, and representatives to the General Assembly met a week later at Windsor on March 12.<sup>185</sup> Sixty-six men from fifty towns assembled at the meeting house on the opening day to declare Thomas Chittenden the governor and begin the process of enacting laws for the new republic.<sup>186</sup>

During that two-week session, the General Assembly enacted twenty new laws. No copy of the first year's session laws has survived, but the journal gives titles for what was enacted and describes them briefly.<sup>187</sup> Clearly the Connecticut law book was present, as three of the new laws refer directly to it. The acts describing the crimes and penalties for treacherous conspiracies and treason, and the act setting the fees for the Secretary of State, each refer to the book.<sup>188</sup> The fees were to be three times what was specified in the Connecticut law book, except for memorials or petitions to the General Assembly.<sup>189</sup>

The Assembly Journal does not contain the text of the Connecticut laws on treason and conspiracy, but the old Connecticut law book covers conspiracy in *An Act for the Punishment of divers Capital, and other Felonies*, where death is the penalty

if any Person shall Conspire, or Attempt any Invasion, Insurrection, or public Rebellion against this Colony; or shall Treacherously, and Perfidiously Attempt the Alteration and Subversion of our Frame of Government, Fundamentally Established by His late Majesty's gracious *Charter*, granted to this Colony, by endeavouring the Betraying of the same into the Hands of any foreign Power.<sup>190</sup>

The following year, during the February session of 1779, the Vermont General Assembly enacted a law with the same name that used essentially the same

184. *Id.* at 222.

185. See *Journals and Proceedings of the General Assembly 1778-1780*, reprinted in III STATE PAPERS OF VERMONT 4 (Walter H. Crockett ed., 1924).

186. See *id.*; see also E. P. Walton, *The First Legislature of Vermont*, in VERMONT HISTORICAL SOCIETY PROCEEDINGS (1878).

187. See *Journals and Proceedings of the General Assembly 1778-1780*, *supra* note 185, at 3-48; *Laws of Vermont 1777-1780*, *supra* note 2, 25-31.

188. The Assembly Journal for March 26, 1778, for instance, explains, "[p]assed an act for the punishing high treason and other atrocious crimes, as said Act stands in the Connecticut law Book." *Journals and Proceedings of the General Assembly 1778-1780*, *supra* note 185, at 17.

189. See *id.* at 16.

190. ACTS AND LAWS OF CONNECTICUT, *supra* note 127, at 68.

language, substituting "state" for "colony" and "constitution" for the charter reference.<sup>191</sup>

Other laws adopted that month used the Connecticut law book as their inspiration or source. The laws regulating attorneys, county elections, highways, listers' duties, the militia, and town meetings were all reenacted in 1779, and reflect the same devotion to Connecticut law as the statute on conspiracy. It is a fair assumption that the text of the laws of 1778 and 1779 on the same subjects contained the same provisions.

These and other laws of 1778 were reenacted in 1779 because of a belief among early lawmakers that laws were temporary and would not last more than a year unless the General Assembly specifically re-adopted them. Everything about Vermont was temporary in those early years. War was raging in and to the west of Vermont. There was no certainty that Vermont itself would survive the threat of invasion from the north by the British, from the west by New York, or, within a few years, even from the south, by the United States when relations heated up.

The laws of 1778 were thought to last only one year. The February 1779 session of the General Assembly, meeting in Windsor, started over again as if there were no continuing law but the Constitution.<sup>192</sup> In October of that year, the legislature's last act was to declare that the laws passed in February would "remain in full force and virtue until the rising of the assembly in March next."<sup>193</sup> This practice continued until 1786.<sup>194</sup>

During that February 1779 session of eleven legislative days, the General Assembly enacted over 100 new laws.<sup>195</sup> Thirty-nine of these were passed on February 15 alone, making it the single most productive day in

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191. "That if any person shall conspire, or attempt any invasion, insurrection, or public rebellion against this state; or shall treacherously, and perfidiously attempt the alteration and subversion of our frame of government, fundamentally established by the constitution of this state, by endeavoring the betraying of the same in the hands of any foreign power, he shall be put to death." LAWS OF VERMONT 1777-1780, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 128.

192. *See id.* at 185.

193. *Id.* at 221.

194. *See id.* at 185 ("An Act to Revive the Laws Passed by the Legislature of this State," October 27, 1779). Similar laws were passed for each of the following six years. *See id.* at 221; LAWS OF VERMONT 1781-1784, reprinted in XIII STATE PAPERS OF VERMONT 70, 167, 225, 291-92 (John A. Williams ed., 1965) (years of 1781, 1782, 1783, 1784 respectively); LAWS OF VERMONT 1785-1791, reprinted in XIV STATE PAPERS OF VERMONT, *supra* note 82, at 69 (1785). Curiously, there is no reviving act in 1786, but in October 1787 the General Assembly, having enacted a new compilation of laws the previous February, suspended the operation of the new laws until December 1, when the printer could distribute the new compilation to the towns and state officials. *See* LAWS OF VERMONT 1785-1791, reprinted in XIV STATE PAPERS OF VERMONT, *supra* note 82, at 374 ("An Act Suspending the Operation of the Revised Laws Passed the Last Session of the Legislature Until the First Day of December Next.").

195. *See* LAWS OF VERMONT 1777-1780, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 36-175.

Vermont legislative history. A look at the assembly journal for that day shows what happened. Legislators simply took the Connecticut law book of 1750 act by act and made it Vermont law. The changes it made to the text were minor in most cases. What was left out is even more telling about the early Vermont legislature and how it defined itself.

The 1750 compilation of Connecticut laws was organized alphabetically. The 1779 General Assembly adopted its laws in the same way, going through the book from front to back taking what it liked and making it Vermont Law. On February 15, for instance, the journal reports that the legislature enacted laws on barratry, bastardy, town brands (for horses), burglary, and so on, in that order.<sup>196</sup> On other days, acts were taken out of alphabetical order, perhaps because they required more study or a little more effort at revision. Yet the exercise of adopting the law of Connecticut almost wholesale continued through that extraordinary week and a half, and when the assembly was done, it had a code of law on which to build a state.<sup>197</sup>

The acts defined crimes, established legal forms, told how elections would be run and taxes collected, explained the duties of state and local offices, and how government should run in the new state. The assembly made regular changes to the fees and penalties, usually doubling or tripling the Connecticut standard, as it had done in 1778 with the secretary of state's fees. Connecticut, for instance, provided a fine of forty shillings for a person who put his fence within the highway right-of-way; Vermont made the penalty four pounds.<sup>198</sup> The simple explanation is inflation. What was a fit fine for 1750 could not have had the same bite in 1779.<sup>199</sup>

Inflation does not explain the Vermonters' interest in increasing the number of stripes an offender would suffer when convicted of a crime. Imprisonment was not the favored punishment for crime in those years. A letter signifying the crime—"C" for counterfeiting, "M" for manslaughter, "I"

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196. See Journals and Proceedings of the General Assembly 1778-1781, *supra* note 185, at 54-55.

197. Benjamin Hall mistakenly saw the hand of New York statute in the laws relating to the laying out and maintaining of highways. See BENJAMIN H. HALL, *supra* note 6, at 139. In fact, the Connecticut statute on highways is nearly identical to the 1779 law on the subject. Compare LAWS OF VERMONT 1777-1780, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 86-87, with ACTS AND LAWS OF CONNECTICUT, *supra* note 126, at 85-90.

198. Compare ACTS AND LAWS OF CONNECTICUT, *supra* note 127, at 47 ("An Act to Prevent Encroachments on High-ways, and on Common and Undivided Lands"), with LAWS OF VERMONT 1777-1780, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 142-44 ("An Act to Prevent Encroachments on High-ways, and on Common and Undivided Lands," passed February 15, 1779).

199. See LAWS OF VERMONT 1777-1780, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 202 ("An Act Directing what Money and Bills of Credit Shall be Legal Currency in this State," November 1, 1780); LAWS OF VERMONT 1781-1784, reprinted in XIII STATE PAPERS OF VERMONT, *supra* note 194, at 30 ("An Act Ascertaining the Current Value Continental Bills of Credit in Spanish Milled Dollars, in this State; and of Contracts Made for Payment thereof, in the Several Periods of its Depreciation.").

for incest—was sewn on clothes or branded on the body, along with whipping and a fine.<sup>200</sup> As a punishment for adultery, Connecticut provided whipping, to an unspecified number of stripes and stigmatizing the letter “A” with a hot iron on the forehead, among other penalties.<sup>201</sup> Vermont continued all of it, but set the number of stripes at thirty-nine.<sup>202</sup> Thirty-nine stripes caught someone’s eye, and the number is frequently repeated in the laws of February 1779, for conviction of various other crimes, where Connecticut required fewer or was unspecified.<sup>203</sup>

The differences between Connecticut law and Vermont law are telling. When Vermont adopted its first law governing legal procedure, it copied Connecticut’s prohibition against delay or loss of a case purely on technical grounds, but added a requirement that all pleadings “shall be in the english tongue, and no other.”<sup>204</sup>

Connecticut law allowed attorney’s fees and costs to the winner of a law suit.<sup>205</sup> Vermont went along with this idea, but excepted trials before Justices of the Peace from the rule.<sup>206</sup> Vermont also eliminated the Connecticut statute that allowed a party to have two attorneys in actions where title to land was involved, while in all other cases a party was limited to one attorney.<sup>207</sup>

Why the Vermont General Assembly created a superior court, rather than a supreme court as the Vermont Constitution directed, has always been unclear.<sup>208</sup> One reason may be that Connecticut’s law constituting and

200. See GEORGE VAN SANTVOORD, SKETCHES OF THE LIVES AND JUDICIAL SERVICES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 222-23 (1854). Van Santvoord explains the strictness of Connecticut’s laws on capital offenses is “founded on the strict precepts of Levitical law.” *Id.* at 223 n. \*. The punishments were more humane in Connecticut than in the Old Testament: “And the man that committeth adultery with another man’s wife, even he that committeth adultery with his neighbor’s wife, the adulterer and the aduress shall surely be put to death.” *Leviticus* 20:10.

201. See ACTS AND LAWS OF CONNECTICUT, *supra* note 127, at 7 (“An Act Against, and for the Punishment of Adultery.”).

202. The Vermont statute with the same name was enacted February 18, 1779. See LAWS OF VERMONT 1777-1780, *reprinted in* XII STATE PAPERS OF VERMONT, *supra* note 2, at 38.

203. Compare ACTS AND LAWS OF CONNECTICUT, *supra* note 127, at 143,145,146, 237 (lying, incest, and theft respectively), with LAWS OF VERMONT 1777-1780, *reprinted in* XII STATE PAPERS OF VERMONT, *supra* note 2, at 147, 40, and 80 (lying, incest, and theft respectively).

204. Compare LAWS OF VERMONT 1777-1780, *reprinted in* XII STATE PAPERS OF VERMONT, *supra* note 2, at 38 (“An Act Concerning Abatement and Amendment of Writs, Judgments, etc.” February 23, 1779), with ACTS AND LAWS OF CONNECTICUT, *supra* note 127, at 2 (“An Act Relating to the abatement and amendment of Writs, Reversal of Judgments, &c.”).

205. See ACTS AND LAWS OF CONNECTICUT, *supra* note 127, at 9-10 (“An Act for the appointment and regulating Attorneys.”).

206. See LAWS OF VERMONT 1777-1780, *reprinted in* XII STATE PAPERS OF VERMONT, *supra* note 2, at 89-90.

207. See *id.* (“An Act for the appointment and regulating Attornies.”).

208. See *id.* at 16-17. “The supreme court, and the several courts of common please of this State shall, besides the powers usually exercised by such courts, have the power of a court of chancery . . . and

regulating the courts created a "Superior Court of Judicature" rather than a supreme court, and when Vermont enacted the Connecticut statute, it made no changes other than the state name.<sup>209</sup> The first Vermont Supreme Court, so-named, was not elected until 1781.<sup>210</sup>

Not all early Vermont laws were derived from Connecticut. The most important differences include Vermont's decision to adopt the common law by statute, and making the Vermont Constitution a part of the laws of Vermont.<sup>211</sup> The February 1779 session of the legislature also enacted a law authorizing Quakers to affirm in lieu of swearing, in the freeman's oath, an act to prevent certain named individuals who had left Vermont to return, and an act assigning all trials to the superior court since no county courts had yet been established in the state.<sup>212</sup> Otherwise, every new law enacted in 1778 and 1779 had a Connecticut antecedent.

There were Connecticut laws Vermont did not borrow. Connecticut's laws covered subjects foreign to Vermont, such as seaports, commerce on the sea, and ocean fishing rules.<sup>213</sup> Connecticut condoned slavery in 1769, and slave owners enjoyed the benefits of a law that would restrict the free movement of "negroes, mulattoes, indians, and spanish [servants]."<sup>214</sup> Vermont's version of Connecticut's law on taverns and inns did not include a provision providing a fine for allowing apprentices, servants or negroes (or "Men's sons under age") to drink there.<sup>215</sup> There was no need for a law requiring selectmen in Vermont to convene annual meetings of "indian" residents in their towns to review the laws punishing "[i]mmoralities as they may be guilty of," prohibiting the sale of alcohol to them, and directing all teachers to teach "indian" children to read English and convert them to the

such other powers as may be found necessary by future General Assemblies, not inconsistent with this constitution." *Id.*

209. Compare ACTS AND LAWS OF CONNECTICUT, *supra* note 127, at 30 ("An Act for Constituting, and Regulating Courts; and Appointing the Times, and Places for Holding the same."), with LAWS OF VERMONT 1777-1780, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 49-50 ("An Act Constituting and Establishing One Superior Court in the State of Vermont," February 13, 1779).

210. In October of 1781, the legislature elected five members of the supreme court. In October of 1782, it returned to the practice of electing members of the superior court, as it had since 1779, but the following year abandoned the superior court as the name for the high court for good.

211. See LAWS OF VERMONT 1777-1780, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 36-37.

212. See *id.* at 74, 125-27 and 175.

213. See ACTS AND LAWS OF CONNECTICUT, *supra* note 127, at 12 ("An Act concerning Ballast").

214. *Id.* at 229-31 ("An Act concerning Indian, Molatto, and Negro Servants, and Slaves.").

215. Compare LAWS OF VERMONT 1777-1780, reprinted in XII STATE PAPERS OF VERMONT, *supra* note 2, at 147-49 ("An Act for Licensing and Regulating Houses of public Entertainment, or Taverns; and for suppressing unlicensed Houses."), with ACTS AND LAWS OF CONNECTICUT, *supra* note 127, at 129-35 ("An Act for Licensing and Regulating Houses of public Entertainment, or Taverns; and for suppressing unlicensed Houses.").

Christian religion.<sup>216</sup> Vermont did not adopt the Connecticut law requiring a Bible in every household.<sup>217</sup> That law also held selectmen responsible for enforcement by regular investigation of all houses within their towns, fining those without the book.<sup>218</sup>

Vermont did not enact the Connecticut law for punishing and preventing oppression by tradesmen and laborers who charged excessive wages for work or unreasonable prices for work, which Connecticut found a mischievous evil "to which Men are prone in their trade."<sup>219</sup>

Connecticut had a strong education law that made towns responsible for their schools. For each of the listed towns, the colony paid forty shillings for every 1,000 pounds for the purpose of education and required schools to be open eleven months of the year.<sup>220</sup> Vermont did not mandate schools by statute until 1782, and then was neither ready to fund the schools with state revenues nor specific about how long the terms of schools should be.<sup>221</sup>

It is curious to think that the laws of a loyal colony of Great Britain should serve so well as the foundation for Vermont law, but as many Vermonters were recent Connecticut residents it is no surprise that they would find comfort in recreating a New Connecticut among the Green Mountains.<sup>222</sup> This dedication was made obvious several years later when Vermont officials began negotiating with British authorities for a truce and possible establishment of Vermont as a district of Canada. In the midst of the negotiations with General Haldimand, in 1781, Ira Allen wrote the general to say, "[a] very considerable part of the citizens of this state are emigrants from Connecticut, and would choose charter privileges similar to that government, and would expect to remain a reasonable time in a state of neutrality."<sup>223</sup>

At the official opening on April 26, 1913, of the Tercentenary of Connecticut, Governor Wilbur L. Cross stated that the people of Vermont had

216. ACTS AND LAWS OF CONNECTICUT, *supra* note 127, at 95-99 ("An Act for well Ordering and Governing the *Indians* in this Colony; and securing their Interests and Lands therein.").

217. *See id.* at 196-97 ("An Act for the more Effectual putting in Execution the Laws against Prophaneness, and Immorality; and for promoting Christian Knowledge.").

218. *See id.*

219. *Id.* at 184 ("An Act for Punishing, and Preventing of Oppression.").

220. *See id.* at 212-15 ("An Act for Appointing, Encouraging, and Supporting Schools.").

221. *See* LAWS OF VERMONT 1777-1780, *reprinted in* XII STATE PAPERS OF VERMONT, *supra* note 2, at 137 ("An Act for Appointing and Supporting Schools.").

222. The list of leading Vermonters of this era who were born in Connecticut includes Thomas Chittenden (born in Guilford, Connecticut, more recently of Salisbury), Paul Brigham (Coventry), Joseph Marsh (Lebanon), Ethan Allen (Litchfield), Ira Allen (Cornwall), Stephen Row Bradley (Wallingford), Jonas Galusha (Norwich), Israel and Noah Smith (Suffield), Seth Warner (Roxbury), Thomas Chandler (Woodstock), Samuel Crafts (Woodstock), William Palmer (Hebron), and Nathaniel, Lemuel, and Daniel Chipman (Salisbury). *See generally* JACOB G. ULLERY, MEN OF VERMONT: AN ILLUSTRATED BIOGRAPHICAL HISTORY OF VERMONTERS AND SONS OF VERMONT (1894).

223. HILAND HALL, *supra* note 12, at 143.

declared that "they would adopt the laws of Connecticut and of God until they could find something better."<sup>224</sup> As with the constitution, once Vermont had embraced the laws of Connecticut in 1778 and 1779, their origin was quickly forgotten and the Vermont legislature began to enact and amend laws suitable for itself, without the need for a model. Major revisions of the laws were made in 1782, 1787, and 1797, which amended many of the laws enacted during the first two years of the legislature by giving them a more local flavor.<sup>225</sup> The severity of the punishments in the first criminal laws eased, and the outlines of the formal colonial laws grew more indistinct, as Vermont finally took the time to deliberate on laws appropriate to its needs.

## V. A STATE OF NATURE

A "state of nature," as John Locke used the term, is "a state of perfect freedom to order their actions, and dispose of their personal possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending on the will of any other man."<sup>226</sup>

Ira Allen used the phrase in his March 17, 1777 argument accompanying the publication of the Vermont Declaration of Independence.<sup>227</sup> The words appeared again in a postscript to Thomas Young's April 11, 1777 letter to the inhabitants of Vermont. Young wrote, "[y]our committee have obtained for you a copy of the Recommendation of Congress to all such bodies of men as looked upon themselves returned to a state of nature, to adopt such government as should in the opinion of the Representatives of the people best conduce to the happiness and safety of their constituents in particular and America in general."<sup>228</sup>

As used by these men, a "state of nature" was more a place to start from than an actual condition. Vermonters went from denying New York authority to independence and their own government of laws in a very short period. The outlaw of 1775 became the patriot of 1777. The period of a Vermont "state of nature" can be calculated as beginning on the date of the

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224. FLORENCE S. MARCY CROFUT, *GUIDE TO THE HISTORY AND THE HISTORIC SITES OF CONNECTICUT* 429 (1937).

225. See *LAWS OF VERMONT 1798*, reprinted in *XVI STATE PAPERS OF VERMONT* (John A. Williams ed., 1968). This was a third compilation and the first comprehensive rewrite of Vermont's laws since the adoption of the first code in February of 1779. The General Assembly provided for the publication of all current laws in 1782 and 1787. See *VT. STAT. ANN.*, Introduction.

226. JOHN LOCKE, *THE SECOND TREATISE ON GOVERNMENT* II.4 (Bobbs-Merrill Company, Inc. 1952) (1690).

227. See *I RECORDS OF THE GOVERNOR AND COUNCIL*, *supra* note 1, at 51.

228. *Dr. Thomas Young to the Inhabitants of Vermont*, reprinted in *I RECORDS OF THE GOVERNOR AND COUNCIL*, *supra* note 1, at 395-96.

Vermont Declaration of Independence (January 17, 1777) and ending on the rising of the first legislature (March 12, 1778).<sup>229</sup>

The course of leaving a "state of nature" for early Vermont took three stages: independence, a constitution, and a set of laws. None of these were original, carved out of the wilderness the way the first farms and town centers were. For each stage, Vermont used models from other states to show it the way. These models served the state well, and still form the basis of Vermont law.

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229. This depends on how you regard the period between the adoption of the Vermont Constitution in July of 1777 and the first legislative session, during which Vermont was run by its Council of Safety. See *The Public Papers of Governor Thomas Chittenden*, reprinted in *XVII STATE PAPERS OF VERMONT*, *supra* note 28, at 57-253. Assuming that a "state of nature" only ends when there are laws as well as recognized authorities to enforce them, March 12, 1778 seems the more appropriate date to end it.

