THE POLITICAL THOUGHT
OF
DANIEL DULANY, the ELDER

by

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This thesis is an examination of the political thought of Daniel Dulany, the Elder (1689-1753), a leading Maryland lawyer and assemblyman of the early 18th century.

Starting with an examination of the structure of Maryland politics up to and including the 1720's, it argues that Dulany, as the leader of the Maryland lower house, used that institution's growing powers to make a vigorous challenge to proprietorial rule between 1722 and 1729; and that this challenge was met by an equally strong one from the lord proprietor. The key issue was the lower house's desire for the extension of the English statutes law. By the late 1720's, this conflict had resulted in an administrative and political stalemate.

The pamphlet that Dulany wrote came out of this context; and this paper argues that it is the best expression of Maryland political thought in the early 18th century. It is also claimed that, because it is one of the earliest surviving southern political writings, it can offer us insight on the nature of ideas available to colonial Americans before the American Revolution.

The key concepts in the pamphlet are then examined in detail. A case is made that Dulany has a strong idea of the rights of the individual subject, and that this is the reason why he desires the English statute law. His position on rights is examined, and an argument is made for the influence of John Locke's idea of natural rights on Dulany. Next the issue of virtue is taken up. Dulany is seen to have a non-civic conception of virtue, one that includes a strong respect for the protection of a private realm. Dulany's views on the public good are also seen to include a respect for the rights of the subject. Finally it is argued that his desire for the protections afforded by English statute law involves a downplaying of the role of the active, publicly concerned citizen in favour of a formal legal setup. Lastly, the various sources used in the pamphlet are examined.

In the conclusion, a demonstration of the ways in which Dulany's concept of rights contributed to his overall political philosophy is offered. Finally, the reading of Dulany's pamphlet offered in this thesis is briefly compared to the reading of early modern political theory presented in modern historiography.
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From my good friend, Steve Jolivette, I received not only the original question that underlies this thesis - what was the nature of colonial political thought? - but also the benefit of many stimulating and engrossing conversations over the last two years on the topics of early American political philosophy specifically, and on ideas in general.

To my mother I owe a special thanks, not only for introducing me to the world of ideas, but also for hours of careful and conscientious word-processing and editing on this thesis, and on the many other papers over the years. Without that help, this thesis would not have been finished, at least not in my lifetime! Finally, a special acknowledgement to my father who first introduced me to the joys of reading and the wonders of history.

To all of the above I can only offer this thesis as thanks.
INTRODUCTION

My interest in 18th-century political thought began as an undergraduate, with a paper that I wrote on Jefferson. Since then, my interest has only grown. When it came time to choose a thesis topic for my master's degree, my curiosity had already been piqued by the lack of any in-depth scholarship on political thought in the American colonies in the fifty years before the Revolution. One came across, from time to time, scattered references to ideas in newspapers, broadsheets, and pamphlets, but little discussion or analysis was forthcoming.

My interest in this period was further fuelled by the massive literature of classical republicanism that has exerted such an influence on recent scholarship concerning the nature of political thought in both early modern Europe, and the new American nation. Briefly, this literature has claimed that at the heart of early modern political thinking lay a revival of the classical ideal of the virtuous, public-spirited citizen, ready and willing to sacrifice all of his private concerns for the public weal. In the words of J. G. A. Pocock, its foremost proponent, "civic humanism or classical republicanism ... revived the ancient assertion that man was by nature a citizen, fulfilling his virtue ... in participation in a self-governing republic".  

Filling in the outlines of Pocock's argument, scholars have argued that this revival of classical concerns was transmitted to the American colonies by the opposition writers of Augustan England, who utilized the classical ideal of the virtuous citizen to combat what they saw as

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the corruption of the court Whigs. This dichotomy of a virtuous country opposition combatting a corrupt court was then used by many historians, most notably Bernard Bailyn, to explain American political life in the 18th century. In this interpretation, the American Revolutionaries become the heirs of Pocock's classical values, striving to protect them from the English King and Parliament. Gordon Wood made the most forceful statement of the impact of these classical ideals on the 18th-century mind. According to Wood: "The sacrifice of individual interests to the greater good of the whole formed the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution".2

The greatest casualty of this classical republican interpretation has been John Locke. From a thinker who was once thought to have defined America as a modern, liberal nation, he has been consigned to an historically insignificant role. In particular his conception of government as limited to the protection of certain inalienable, individual rights, has been eclipsed by the classical republican school which claims that the creation of virtue in the citizenry is the end of government. Although the work of Joyce Appleby and Isaac Kramnick, among others, has challenged this classical republican interpretation, its influence amongst early American historians persists.3

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With my interest in early American political thought fuelled by the classical republican challenge, I resolved to combine it with my curiosity surrounding the nature of colonial political theory. I decided to see if the American colonies before the Revolution were really as devoid of Lockean influences as modern scholars would have us believe. Early in my researches I came across the name of Daniel Dulany, a prominent lawyer and leader of the country opposition in the Maryland lower house in the early 1720's. Further investigation revealed that he had written a pamphlet in Annapolis in 1728, entitled The Rights of the Inhabitants of Maryland to the Benefit of the English Laws. Intrigued, I located the pamphlet and found it to be a learned and well-argued piece of political writing. I also found that the tenor of Dulany's thought confounded much of the received wisdom about the revival of civic humanist ideals and the unimportance of Locke. The results of my discoveries form the core of this thesis.

I have structured the thesis around Dulany's pamphlet. It is the main focus. However, as background and context, I lay out in Chapter I a short history of Maryland government and politics, up to and including the 1720's. The contentious nature of politics in this decade, and the strong battle that ensued over the extension of the English statute law to Maryland are examined. Dulany's pamphlet, which arose out of this conflict, is then offered as the best statement of Maryland political thought in the 1720's. Equally important, I argue that, given the paucity of other contemporary sources, the pamphlet offers modern historians a unique vantage point from which to view the nature of ideas available to colonial Americans. As
such, it constitutes empirical evidence with which to test the validity of the claims made by the classical republican school.

Chapter II, which focuses on the pamphlet, is my attempt to offer such empirical evidence. After a summary of the argument in the pamphlet, I devote the chapter to an analysis of Dulany's key concern: the rights of the freemen of Maryland. I argue that these rights were conceived as essentially barriers or protections around the individual subject. I further argue that the idea of natural rights was a central influence on Dulany's thought. In particular, I claim that he is aware of and employs the political ideas of John Locke. Having examined his view of rights, I turn to his views on virtue, and find that his natural rights' influences contributed to his downplaying of neo-classical conceptions of virtue and the public good. Rather, the idea of protecting rights emerges as one of his main ways of conceiving of the idea of virtuous action. A final section discusses some of the other intellectual influences on Dulany. I note that he is both aware of and uses the arguments of natural law thinkers like Grotius and Pufendorf, as well as those of the English legal scholars, but that his citations from both classical sources and the Walpolean opposition are relatively insignificant.

I conclude with an attempt to synthesize my analysis, looking at how all the parts of his pamphlet cohere around his focus on rights. Again I stress the importance for Dulany of such a Lockean approach to politics. As a final word, I offer some suggestions for modern historiography, based on my findings.
MARYLAND IN THE 1720's
BEGINNINGS

The departure of two sailing ships, the Ark and the Dove, from England on November 22nd, 1633, was the culmination of ten years of effort by George Calvert, Lord Baltimore, a favourite courtier of James I, to gain a colony in the New World. The two ships were bound for "Mariland", the name for Calvert's vast grant of land on the Chesapeake coast, carrying those who were to settle and colonize it. The size of the land grant was staggering: approximately 6,769,290 acres; perhaps even more startling were the powers granted by the King to Calvert. According to Aubrey Land, "the Lord Baltimore was quite literally a monarch in his own New World realm". The vast powers laid out in Maryland's Charter would shape the history of the province for most of the 17th and 18th centuries, inciting a strong provincial response, and a century-long battle between The Lords Baltimore and their "faithfull tenants". In order to understand the subsequent political history of Maryland, one must come to grips with the nature of its founding document.

THE CHARTER

John Murrin has described the Calvert patent for Maryland as a "feudal proprietorship". There had been other 16th and 17th century precedents, but the Calvert grant of 1632 "really

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4 For a full discussion of George Calvert's colonizing efforts, which included an abortive attempt to found a colony in Newfoundland, see Russell R. Menard, Economy and Society in Early Colonial Maryland (New York: Garland Publishing, 1985), 1-30. George Calvert died before the Charter grant had been completed. His son and heir, Cecilius, was named as the grantee. The province was named after Charles I's wife, Henrietta Maria.

defined the type". As a proprietary charter it "marked the fullest alienation of power by the King that the Crown lawyers could devise".\textsuperscript{6} Indeed it was based on a 14th-century grant to the Bishop of Durham; and the powers it gave the Calverts were of a suitably feudal nature.

David Jordan and Lois Carr describe the extent of Calvert’s "extraordinary power" under the Charter: "He owned all the land ... was the sole source of executive and judicial power. He was to establish courts as he saw fit, and all writs were to run in his name ... He could establish an armed force ... and he could exercise martial law in an emergency".\textsuperscript{7} According to Newton Mereness: "The lord proprietor of Maryland was, therefore, made the grantee of the territory with almost unrestricted privileges as to the use he might make of it".\textsuperscript{8}

However, as many scholars have noted, the Charter was not without some countervailing elements; for among the vast feudal powers it conferred, was a grant to the freemen of the province of the right to be called by the lord proprietor for "advice, assent, approbation" concerning "the framing of laws".\textsuperscript{9} Article VIII of the Charter contained a further limit on the proprietor’s palatine powers. It stated that these powers must be:

\begin{quote}
Consonant to reason, and be not repugnant nor contrary, but (so far as may conveniently may be done) agreeable to the laws, statutes, or rights of our Kingdom of England: and so that the same ordinances do not, in any sort,
\end{quote}


\textsuperscript{8} Newton D. Mereness, \textit{Maryland as a Proprietary Province} (New York, 1901; reprinted, 1968), 8.

\textsuperscript{9} "The Charter of Maryland" is reprinted in \textit{Ibid.}, 510.
extend to oblige, bind, charge, or take away the right or interest of any person or persons in member, life, freehold, goods or chattels.\textsuperscript{10}

This dual legacy of the Charter - its grant of both princely powers and the right to representation and security of property - was to play itself out over the course of the 17th and 18th centuries, with both the proprietor and the provincials clashing over their respective rights. According to one recent student of the province: "Representative government in Maryland owes its legitimacy to this clause of the Calvert's charter which made their province the first permanent English colony on the North American continent to provide from its founding for an assembly of resident freemen".\textsuperscript{11}

\section*{17TH-CENTURY STRUGGLES}

The first Assembly in Maryland convened in February 1635, a mere eleven months after the colonists had landed. Almost from the outset, the freemen of the province began to use the Charter's provisions for a representative body to offer "advice, assent and approbation" to the proprietorial deliberations. Lord Baltimore, however, had a slightly different conception of their role. He believed that, as he had "full, free, and absolute power ... to ordain, make and enact laws ... ", the freemen's role was merely to approve or ratify his decisions. As a result, Baltimore, through the Governor, refused to ratify the laws that the freemen had made at the

\textsuperscript{10} Ibid., 512.

\textsuperscript{11} David W. Jordan, \textit{Foundations of Representative Government in Maryland, 1632-1715} (Cambridge: Cambridge University Press, 1987). I. I have drawn heavily on the scholarship of both Jordan and Susan Falb (cited below) for my exposition of 17th-century Maryland politics.
first assembly. He instead transmitted his own set of laws for the assent and approval of a new assembly, called to meet on 25 January 1639.\textsuperscript{12}

The four years that transpired between these two sessions ensured that the proprietor met concerted and organized opposition from the small band of freemen or their delegates.\textsuperscript{13} Immediately upon assembling, they voted two to one against accepting the lord proprietor's laws. What emerged from the resulting impasse was an acknowledgement by Calvert that the assembly of freemen had the right to initiate legislation. According to Susan Falb's study of the early Maryland Assembly, Lord Baltimore's "failure to have his legislation passed verbatim was the first example of prerogative erosion". As Falb notes, even though "the prerogative as presented in the Charter was virtually impregnable", concerted efforts by the freemen of the province could erode proprietorial powers.\textsuperscript{14} More was to follow.

The original assembly had been unicameral. Governor Philip Calvert, the proprietor's brother, sat with the freemen, as did his tiny executive. However in the session of 1650, the delegates succeeded in gaining the division of the assembly into two chambers. With this division, "the

\textsuperscript{12} See Land, Maryland, 34.

\textsuperscript{13} Ibid., 35, for a discussion of the attendance at these early assemblies. According to Land, many freemen sent proxies as "not every male ... could leave livestock and houses untended for six weeks to sit in solemn conclave making laws. Fewer than half the eligible freemen appeared at all, and many of these gave their proxies within a day or so to return home". This widespread use of proxies made the Assembly nominally a representative body.

lower house achieved a veto power over all proposed bills”. Significantly, they also received “the opportunity to develop a more independent political stance”.  

The gradual buildup in the power of the Maryland Assembly, and particularly in its elected lower house, continued through the mid to late 17th century, a time of frequent troubles, both political and economic, for the proprietorial camp. The Maryland Assembly slowly developed a sense of its own privileges with which it tried to counterbalance the proprietorial powers. In its maturation, the assembly attempted “to emulate the House of Commons to a degree probably unmatched anywhere else in the New World”. In the words of David Jordan: “By the 1670’s, the Calverts needed extraordinary patience and clever tactics to achieve their legislative objectives ...”.

There is no doubting that these advances were real. The assembly, drawing on both its Charter powers and the contemporary example of Parliament, had carved out a strong role for itself on the provincial stage; however, there is evidence that by the 1680’s, with a reinvigorated proprietor making full use of his prerogative powers, the assembly was being stymied. Despite a strong anti-proprietorial movement, the 1680’s were "a frustrating time

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15 Jordan, Foundations, 235. Falb, Advice and Assent, 56, notes the dependence on English example and theory in this move to bicameralism. Falb claims that bicameralism allowed the burgesses to make “the lower house the focus of proprietary opposition”, Ibid., 58.

16 See Falb, Ibid., 59-78.


18 Ibid., 235.
for the elected lower house".19 The real day of power for the lower house would have to wait the fall of the proprietorial regime, and its replacement by royal government.

**THE GLORIOUS REVOLUTION**

Despite desperate politicking, the Catholic Lord Baltimore fell victim to the massive changes that swept through the British American colonies in the wake of the Glorious Revolution. Although he did retain full rights to all land revenues, he lost his colony. What ensued was twenty-five years of royal rule. For the lower house, this meant far-reaching changes in both its organization and its powers.

Two historians of the period have summarized these changes as nothing less than a "revolution in government".20 According to Aubrey Land, these changes, although largely administrative, were very significant. In the words of Land, "the Assembly of 1692 created a permanent committee infrastructure". What this meant was that the elected lower house now had, through its new committees, effective control over its internal affairs, and over a larger portion of those of the province. As Land comments, the lower house "had crossed its Rubicon"; it had become "a miniature Parliament". Significantly it received control over the financial affairs of the province. To quote Land again: "The power of the purse

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19 See R.C. Simmons, *The American Colonies: From Settlement to Independence* (New York: W.W. Norton & Co., 1976), 81-3. According to Simmons the assembly was unable to stop the proprietor from narrowing the franchise and restricting the number of representatives allowed from each county. Baltimore felt that a smaller electorate and legislature was "more amenable to proprietorial influence". Baltimore could get away with such actions because his "powers legally exceeded those the King in relation to Parliament".

eventually became the essential force in self-government, giving the initiative to the elective branch of the legislature”.  

The irony of this development occurring under royal rule was not lost on later commentators. According to one: “Governors appointed by the Crown regarded the introduction of English parliamentary practices as normal and desirable, and ironically these royal placemen aided the advance of representative government”. This assessment held true for most of the twenty five years of royal rule: the Maryland Assembly was treated much like Parliament at a time when Parliament was becoming the central political institution in England. By the time that Maryland was finally returned to the Calverts in 1715, the “central place of the assembly within the governance of the province was safely ensured”. Moreover, “within this now well-developed institution, the assertive lower house with its elected membership had achieved a position as the equal of the appointed upper chamber and as the more legitimate representative of the people's interests”. By 1717 the assembly was the “central institution of provincial government”; it had “assumed most of these fundamental features and powers it was to possess through the years of the American Revolution”. It is against this background of assembly strength that we must judge the tumultuous events of the following decade, a time of intense struggle between proprietor and assembly.

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21 Land, Maryland, 93.


23 Ibid., 233, 237, 7.
THE 1720's: A CONTENTIOUS DECADE

The restoration of the Calverts to their palatinate in 1715 was the first of many factors that came together to create a situation ripe for conflict\(^\text{24}\). For the first five years, there was political calm. Charles Calvert, the new heir, was still a minor; the governor, James Hart, remained from the royal period; he continued to serve in that post under the proprietorship until 1720. In that year Charles Calvert, a distant cousin, became governor. Both his attitude and that of the new heir reflected a desire to return to the kind of prerogative powers exercised by the Calverts of old. It was with this attitude that the proprietary camp entered the 1720's.

To see the potential for conflict we must remember the new position of the assembly in provincial government. According to Land, "there was no complete return to the old days. The Assembly held fast those legislative powers captured during twenty five years of royal administration"\(^\text{25}\). Furthermore, the assembly was not used to facing a concerted veto. During the quarter-century of royal rule the veto had been used sparingly, if at all. Moreover Marylanders were well aware that since the late 17th century, the "Crown veto over acts of Parliament had ceased to be exercised at all". Marylanders, having tasted "the sweets of self-control", now faced a concerted challenge to the gains they had made since 1689, to what

\(^{24}\) Jack P. Greene, quoting Charles Barker, characterizes Maryland politics in the 18th century as "a classic struggle between 'court' and 'country' in which the 'local squirearchy', which dominated 'every phase of the growing life of the province' and expressed itself politically through the elective House of Delegates, was aligned against the absentee proprietor and his representatives who monopolized the seats on the proprietary Council and all major public offices". See his "Changing Interpretations of Early American Politics" in R. A. Billington, ed., The Reinterpretation of Early American History: Essays in Honor of John Edward Pomfret (San Marino: The Huntington Library, 1966), 161.

\(^{25}\) Land, Maryland, 119.
they liked to call "our happy constitution". The new proprietorial governor at first affected a moderate tone, claiming that he had been instructed by Lord Baltimore to act "as a Bountiful Indulgent Father would towards a dutiful Deserving Son"; as well he expressed a desire to bring "our Prerogative" and "your Privileges into Ballance". But in the words of Aubrey Land: "Calvert's administration was to rest on the solid foundation of Baltimore's palatine authority ...". All remained quiet until the election of 1722, which coincided with a precipitous fall in tobacco prices. It was to prove a pivotal election. Unusually for Maryland, the election witnessed a high number of "fresh faces" entering the lower house. These men, members of a new generation of provincial politicians, arrived with a strong mandate from the electors: reverse the trend of plummeting tobacco prices. In a one-crop economy like Maryland's, such an economic situation was calamitous. Falling prices affected not only planters, large and small, but all who made any but the most rudimentary exchanges


27 Archives of Maryland Vol.35, 5. (Baltimore, 1882-); hereafter cited as Archives.

28 Land, The Dulany's, 45. Jack Greene has argued that it is within this context (facing a strong Royal or proprietorial government) that colonial politics can be best understood. As Greene argues: "In the colonies ... the seventeenth-century opposition tradition, with its overriding fear of prerogative power, and its jealous concern with protecting the privileges and authority of the House of Commons, continued to occupy a prominent place in politics at least until the middle of the eighteenth century". See his "Political Mimesis: A Consideration of the Historical and Cultural Roots of Legislative Behavior in the British Colonies in the Eighteenth Century", American Historical Review, LXXV (1969), 343. Maryland in the early 18th century would seem to fit Greene's description well. It does not, however, fit into Bernard Bailyn's general explanation of 18th-century politics and political thought: that it was dominated to the point of obsession with the fear of ministerial corruption. See Bailyn, Origins of American Politics (New York: Vintage Books, 1967). Greene also points out that it was the possession of prerogative powers by the executive that fueled the fear of corruption. See Greene, "Reply", AHR, LXXV (1969), 363.

29 See Land, Maryland, 130, for a discussion of the members of this new generation and their impact on politics in the 1720's.
- for tobacco was not only the main crop, it was also the sole means of exchange. All officers’ fees, including those paid to high proprietorial officials, were set in tobacco. In addition the Anglican clergy, established since 1704, received its salary in tobacco.

The new faces in the lower house who attempted to rectify the economic situation were, therefore, embarking on a course of action fraught with conflict. One new member stood out in particular. Daniel Dulany was a young lawyer from Annapolis, who had come to Maryland twenty years before as an indentured servant and had risen to become a prosperous lawyer on the county court circuit. At the the time of the election, he held the office of Attorney-General of the province. Both he and his new colleague in the Assembly, Thomas Bordley, had long been considered the two best lawyers of their generation in Maryland. The two immediately put their legal knowledge to good use in the Committee of Laws of the lower house, drafting a repealing act to rid the province of a burdensome tobacco regulation. The members of the lower house unanimously adopted their act; however, the upper house,

30 Charles A. Barker, The Background of the Revolution in Maryland (New Haven: Yale University Press, 1940, 71.


32 See Land, The Dulany's, 86-97, for an engrossing account of their legal battle - against each other - in a complicated commercial case, one that ended up being adjudicated in London after several appeals.

33 See Archives, Vol.34, 415. For a contemporary discussion of tobacco regulation, see "A Declaration Concerning the Conduct of the London Merchants", in The Maryland Gazette, LXXIX, March 18, 1729.
sensing the danger that this act might pose to the proprietorial prerogative, as well as to their own fee levels, refused to consent to the act.\textsuperscript{34}

Dulany and Bordley then hatched a scheme that was to spark a decade of conflict, and would reverberate in the proprietorial closet for years.\textsuperscript{35} The result of their handiwork was an innocent-looking resolution, which proposed to insert an additional clause into the current judges’ oath. This clause instructed judges:

\begin{quote}
To Do equall Law and right to all the King's subjects rich and poor and not to delay any person of Common right for the letters of the King, the Lord Proprietary ... or for any other cause. But if any such Letters come to them they shall proceed to do the Law the same Letters Notwithstanding.
\end{quote}

These resolutions went on to claim that:

\begin{quote}
This province hath allwaies hitherto had the Common Law and such General Statues of England as are not restrained by words of Locall Limitation in them ... that therefore whoever shall Advise his Lordship or his Successors to Govern by any other rules ... are evil Counsellors ill wishers to his Lord Proprietary and to Our present happy Constitution and intend thereby to infringe our English Liberties ... .\textsuperscript{36}
\end{quote}

Taken together, these Resolutions of 1722 constituted nothing less than an attempt at "provincial autonomy under lower house domination". The intention was: “to settle in favor of provincials vital constitutional questions that had been in doubt since the Lords Baltimore had retrieved their ancient rights from the Crown”. Most crucially, the intention was to open

\textsuperscript{34} Land, Maryland, 131.

\textsuperscript{35} Ibid., 131.

\textsuperscript{36} The text of these Resolutions can be seen in Archives, Vol.34, 441.
up to provincials “the vast reservoir of English statute law and common law, which the proprietor could not veto as he could ordinary acts of the assembly”. 37

The assembly's claim for the extension of English statutes to Maryland met with a proprietorial rebuff; their radical attempt to carve out a space free from Baltimore’s veto had itself been vetoed. Both sides continued to exchange addresses and messages in the years between 1722 and 1725. Dulany and the Committee of Laws dug deep into the provincial archives to prove that Maryland had had the benefit of English statute law in the past.38 Not surprisingly, the committee found ample evidence that there had been such extension. Equally, the Lord Proprietor and his lawyers unearthed weighty legal precedents, proving the contrary.39 The proprietor offered to enact any of the statutes Marylanders desired but only “De Novo” or individually; he adamantly refused to “Introduce in a Lump ... any of the English statutes”.40 He also took pains to veto any provincial act that introduced the statutes by implication - a tactic Bordley and Dulany had tried. He was particularly insistent on vetoing all of the judges' oaths that Dulany attempted to introduce, based on the Resolutions of 1722,41 as they usually contained a clause instructing the judges to adjudicate cases by reference to the English law. The Lord Proprietor's conviction was that the people of

37 Land, Maryland, 132.

38 See their report in Archives, Vol.34, 661.

39 See the lengthy discussion of the legal aspects of extension in St. George L. Sioussat, The English Statutes in Maryland (Johns Hopkins University Studies, XXI) (Baltimore, 1903), esp., 17-31 and 43-61.

40 Archives, Vol.34, 493.

41 See Dulany's oath bill in Archives, Vol.35, 104.
Maryland would fare better "If the Statutes of England not expressly Located thither are not in Gross force among you". 42 This opinion, delivered to both houses of assembly in the fall session of 1725, was answered by Dulany and Bordley in the same session. Their reply, which has been termed "the battle cry of the country party" 43 by one historian, took up all of the proprietor's legal objections as to extension, countering them with further precedent. Their address concluded with the claim: "that the Crown has no Right to give us other Conditions than in common with our Fellow-Subjects". The Lord Proprietor was further warned to not "treat us so much like men that owe their Lives and Liberties only to your Charter". 44

These exchanges, given in the fall of 1725, were the last for two years, as the Assembly was dissolved and no new elections were called. These crucial years (1722-25) had seen the formation of a formidable country party, able and willing to build on the gains of Royal rule, and to further challenge proprietorial power at its root. In addition, these attacks by the lower house on the proprietorial veto led to other political problems. All attempts at tobacco regulation stalled, as the lord proprietor refused to countenance any act that would reduce the fees - paid in tobacco - that his officers received. The lower house, for their part, claimed that officers' fees were already too high and that the upper house, "Seem to be Assistants to Prerogative and Dependant on it, Rather than a State in which the people place a

42 Ibid., 298.

43 Sioussat, English Statutes in Maryland, 47.

44 Archives, Vol.35, 417.
Confidence". The lower house, as a result, never offered a bill to raise tobacco prices without including a reduction of officers' fees, often on the order of 25 percent. The resultant and inevitable proprietorial vetoes left provincial affairs in a mess. Officers were deprived of any statutory basis for collecting fees; Anglican clergy who depended upon receiving their tithe in tobacco were discontented; and, finally, the continual vetoes by the proprietor of the judges' oath, left the courts of Maryland in a precarious state. As Charles Barker sums up the situation at mid-decade: "With economic distress and political agitation, all things seemed insecure, even the roots and foundations of proprietary government."

Politics remained stalemated for two years (1725-27). In 1727 a new governor arrived, Leonard Benedict Calvert, the proprietor's younger brother. A scholar and student of the antiquarian Thomas Hearne, Leonard Calvert found the wilderness of Maryland a shock. He referred to it as "this unpolished part of the universe" and complained that "our Conversation runs on planting Tobacco and such other improvements of trade, as neither the Muses inspire, nor Classic authors treat of". Unfortunately for provincial relations, his attitude toward the Marylanders did not improve during his governorship. The Lord Proprietor did not help matters much, delivering more crucial vetoes to provincial legislation in 1728 and 1729. Leonard Calvert, aghast at the situation, wrote to his brother that "This Supriority[sic], as I

45 Ibid., 357.
46 Land, Maryland, 141.
47 Barker, Background of the Revolution, 129. Newton Mereness notes that "from the time of the restoration of the proprietary government to the year 1729 inclusive, the lord proprietor vetoed ... at least 15 acts". Maryland as a Proprietary Province, 226.
48 quoted in Land, Maryland, 141.
may term it, of the people over the Government, seems unaturall[sic], and is I am sure repugnant to the very End for which Government was Instituted, viz. An Authoritative Influence for the good order of Society”. As a final comment on the administrative chaos around him, he claimed that “things can never go well in the plantations, whilst the Planters are so generally proud, petulant and Ignorant, and have the common necessary Support of Government so much under their thumb”.49

If things looked bleak from the proprietorial camp, the provincial view was evidently no brighter, for it was in 1728 that Daniel Dulany, despairing of the situation in Maryland, put pen to paper and articulated fully and publicly the provincial position. With Bordley, his colleague of many years, having passed away, Dulany was now the leader of the provincial cause. The pamphlet was to be his final statement on the statutes controversy in Maryland.

Within five years sweeping changes were to come to Maryland. In 1732 Charles, Lord Baltimore, arrived in the province in person, determined to break the legislative and administrative impasse. With the aid of a new and more skilful governor, he was able to exercise the full range of his prerogative power. He simply declared a fee table for proprietorial officers; he passed a modified judges’ oath; and he was responsible for issuing paper currency for the first time in the province’s history. Following his governor's advice,

49 Archives, Vol.25, 605.
he offered places to many of the senior provincial leaders, Dulany among them. Thus ended the turmoil of the 1720's.

POLITICAL PHILOSOPHY IN THE STATUTES CONTROVERSY

Three decades ago Clinton Rossiter characterized political thought in the 18th century in the following terms:

_The pace of public life was slow; indifference rather than eager participation marked the average man’s attitude toward government. Yet there were incidents - the founding of an unorthodox newspaper in Boston, the trial of a popular editor in New York, an attack on an unpopular proprietary government in Pennsylvania, an arbitrary levelling of a land fee in Virginia - that touched off political controversies of an intensely partisan nature. Men of opposing views rushed boldly into the lists, and arguments over specific issues were supported by appeals to general principles._

In this final section I would like to emphasize the importance of this search for general principles. All of the concrete factors that we have examined in 1720's Maryland - the rise of a native elite; the desire for local control free from a strong veto; the economic downturn; the jealous desire to guard assembly privileges - were important factors in shaping the conflicts of the 1720's; but they were not the only factors. There is another context, an intellectual one, that must be accorded a role in any explanation of why colonial Marylanders acted as they did. As Jack Greene, doyen of colonial political historians, has noted: it is "not

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50 See Barker, _Background of the Revolution in Maryland_, 135-8. According to Barker, "when the legislature failed, now in Lord Baltimore's presence, as it had earlier, to enact a satisfactory fee law, he issued the famous fee proclamation of 1733 ... The proclamation fixed officers' fees at rates acceptable to the proprietary element". For a discussion of the motives for Dulany's move to the proprietorial camp, see Land, _The Dulanys_, 125-8. Land notes, "the absence of direct accounts", but emphasizes Dulany's despair over the administrative situation.

universally valid” to think that “ideas are always subordinate to some concrete and tangible factors in politics.” In fact, as Rossiter suggests, these “concrete and tangible factors” may form the immediate context, the spark, for political conflict; but the ideas and values that the participants bring to this context are themselves crucial. There is no automatic or predetermined response to concrete political or economic events. A response will always be dictated in part by one’s intellectual context, by the ideas one has available. As such, the thoughts of men must be accorded a role in explaining their actions and responses to the world around them.

Maryland, with its authoritarian political structure, offers good evidence for this. Susan Falb, in her study of the Maryland Assembly in the 17th century, accords a central role to the ideas that they inherited from 17th-century England in enabling them to challenge a then all-powerful proprietor. According to Falb, Baltimore’s absolutism forced the freemen to use what she calls “ideological persuasions”. Falb concludes that: “Ideas ... played a significant role in the history of Maryland from 1635 to 1689”. Her point is that there was nothing

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53 The recent literature of republican revisionism has been praised for returning to a focus on the importance of ideas in history. But a close reading of the work of many of its leading figures shows them to be caught up in what Daniel Rodgers has called "the structuralist turn in 1970's intellectual history", which involved a switch from a more traditional focus on "ideas" to discussions of "ideology". As Rodgers states: "The need of the moment was for means of investing the ethereal stuff of mind with convincing social power". See Daniel T. Rodger, "Republicanism: The Career of a Concept", Journal of American History, (June 1992), 20-1. However, some have questioned its overall methodology. See also Ralph Lerner, The Thinking Revolutionary: Principles and Practice in the New Republic (Ithaca, 1987), esp., 1-38. Lerner sees the tendency to analyze past thinkers in terms of "paradigms" and "languages" as a new kind of determinism, one that puts "thought in its place".
automatic about the rise of the assembly; there was no inherent impulse toward representative government; rather it took decades of struggle by assemblymen, a struggle fuelled by certain fundamental ideas that they held about representative government.\textsuperscript{54}

In our discussion of the 1720's in Maryland, we have seen examples of fundamental ideas about government in the heated debates between the provincials and the proprietor. The Resolutions of 1722 proclaimed that the judges should “do equal Law and Right to all the King's subjects, Rich and Poor”. They further claimed that this should be done, regardless of any proprietorial instructions to the contrary. They also warned the proprietor not to “infringe” upon their “English liberties” or their “present happy Constitution”. It is with the conviction that a close examination of these ideas is important, both for our understanding of Maryland in the 1720's and for our understanding of the nature of ideas available to colonial Americans in the early 18th century, that this study is undertaken.\textsuperscript{55} In this spirit, let us turn to a close examination of Dulany's pamphlet, as the best expression of Maryland political thought in the 1720's.

\textsuperscript{54} Fulb, \textit{Advise and Ascent}, 2. Fulb documents in detail, the transfer of these ideas, and the awareness in Maryland of the latest English developments, both political and intellectual. She even posits that "Leveller ideas were discussed in the Chesapeake region", \textit{Ibid}, 28.

\textsuperscript{55} For a good discussion of the nature of ideas available in early 18th-century Maryland, see Barker, \textit{Background of the Revolution}, 27-58. Barker claims that Maryland was heavily influenced by Enlightenment ideas. He even argues that the ideas of this "rationalist age", the "interest in the classical and secular, so common everywhere, were not confined to the cultivated gentlemen of Annapolis clubs". As Barker puts it: "many a brief comment in newspaper and in personal correspondence shows that the abrasives of contemporary thought cut wide and deep in Maryland", \textit{Ibid}, 60. See also the various essays by "The Plain Dealer" in \textit{The Maryland Gazette} on English Constitutionalism and on "Philosophical Doubting", February 11, 1729 and December 17, 1728.
II

THE RIGHT OF THE INHABITANTS

OF MARYLAND

TO THE BENEFIT OF THE ENGLISH LAWS
THE HISTORY AND SIGNIFICANCE OF THE PAMPHLET

In the late autumn of 1728, Daniel Dulany took a small manuscript to the office of William Parks, the sole printer in Maryland.\textsuperscript{56} It was his final statement in the nearly decade-long constitutional struggle between the proprietor and the lower house; a struggle in which he, as the principal spokesman for the "country" party had played the leading part. By December it was in print, advertised for sale in Parks' paper, The Maryland Gazette. Unfortunately we know little about its circulation or readership; the sole surviving copy resides in the papers of the Calvert family - apparently unread by anyone in the proprietorial camp.\textsuperscript{57}

Unfortunately this neglect has continued with modern scholars. Apart from the work of those historians who have written on 18th-century Maryland, Dulany's pamphlet has received scant attention. Clinton Rossiter, in his Seedtime of the Republic, praises Dulany, but fails to accord him much space.\textsuperscript{58} Benjamin Wright's book on natural law in early America is the

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\textsuperscript{56} Daniel Dulany, Sr., The Right of the Inhabitants of Maryland to the Benefit of the English Laws (Annapolis, 1728). It has been conveniently reprinted in St. George L. Sioussat, The English Statutes in Maryland (Johns Hopkins University Studies, XXI) (Baltimore, 1903). All further citations from the pamphlet will refer to this reprint. Pagination will be inserted in the body of the text. In addition, all of Dulany's spelling and punctuation have been retained.

\textsuperscript{57} The advertisement appeared in The Maryland Gazette, 17 December 1728. Sioussat claims that this "indicates that it must have had some circulation through the province". The English Statutes in Maryland, 51. He adds that: "only one copy, to the present writer's knowledge, survives ... This one imprint is among the Calvert papers in the possession of the Maryland Historical Society".

only exception. Wright praises the quality of the argument in Dulany's pamphlet, comparing it to the contemporary pamphlet of John Wise, and claiming that "it is a much more developed argument than that of Wise", particularly "for certain of the principles for which the colonists were, after 1760, contending".59

However much the pamphlet was neglected by this older group of scholars, its total absence from recent historical literature is even more of an oversight, given the sweeping re-examination of the nature of early American political thought that has been attempted in the last twenty years. Bernard Bailyn, perhaps the most influential recent writer on colonial politics and political theory, accords Dulany no more than a few sentences, noting that Dulany's work "fused" "Locke, Coke, Pufendorf and Grotius to produce a prototypical American treatise in defense of English liberties".60 Unfortunately this cryptic remark is as extensive a discussion as Dulany has received. Gordon Wood, Bailyn's student, has outdone even Bailyn in this respect. At least Bailyn is aware of the influence of Locke on Dulany; but Wood, who devotes the first chapter of his massive The Creation of the American Republic to a delineation of colonial political theory, fails to mention Dulany's pamphlet at all.61


Given that Dulany's pamphlet is one of the earliest surviving examples of colonial political writing, these omissions are serious indeed;\(^{62}\) for an examination of Dulany's work offers us a rare opportunity to observe the colonial mind at work, to see what ideas were available, and how they were used.\(^{63}\) Given that the currently influential literature of republican revisionism has largely assumed a position on the nature of the ideas available to Colonial Americans, the insight that a close examination of a pamphlet like Dulany's can give us concerning this period should not be ignored.

It is with this object in mind that I will attempt to treat the pamphlet. I will try to break it down, analyze its key premises and arguments, weigh the relative importance of the sources used, and endeavour to come to a conclusion concerning Dulany's overall political philosophy.\(^{64}\) As a result, I hope to provide some insight into the way men in the American colonies conceived of and talked about politics and political philosophy in the generation before the American Revolution.

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\(^{62}\) Simmons, *The American Colonies*, calls it "one of the earliest southern political tracts", 264.

\(^{63}\) For a good discussion of the nature of colonial political theory, see Wright, *American Interpretations of Natural Law*, 36-62. Wright singles out Dulany's pamphlet, as well as that of his near contemporary John Wise, *Vindication of the Government of the New-England Churches* (Boston, 1717), as the two most important for the period 1700-1740. Significantly Wise draws his argument almost exclusively from Pufendorf's *Law of Nature and of Nations*. The influence of Pufendorf and Grotius in colonial America has been large neglected by scholars, especially since the recent focus on classical republicanism.

THE ARGUMENT OF THE PAMPHLET: LAW AND RIGHTS

Dulany's pamphlet is logically structured around the central claim expressed in its title: that the inhabitants of Maryland are entitled to the benefits of English law. Dulany marshals an impressive body of evidence, both legal and historical, to prove this contention. As a precondition to an in-depth analysis of the political philosophy contained in the pamphlet, we shall examine the pamphlet's overall structure, noting all of Dulany's reasoning, and taking a view of the pamphlet as a whole.

Dulany begins by noting that "there has been a pretty warm Contest" concerning the issue of the extension of the English law to Maryland. Dulany stresses the importance of this issue, claiming that "Laws are absolutely necessary, for the good Government and Welfare of Society". Given the importance of law, Dulany claims that it is imperative to inquire "into the Right, which the People of Maryland have, to the Enjoyment of English Liberties; and the Benefit of the English Laws: which I take to be, and hope to prove are, convertible terms". For Dulany this view of the law will continue throughout the pamphlet; his argument will return to it constantly. In Dulany's view the English law, and the rights it enshrines, is the only guarantor of the subject's liberty.

In order to fully understand the rest of the pamphlet, Dulany's normative position on the English law - that it exists to secure rights - must be examined. Dulany, in his characteristically logical fashion, realizes this, and offers the reader a "short Account of the Law itself" before he proceeds to his formal argument concerning the right of
Marylanders to English laws. According to Dulany, "the Law of England consists of the Common and Statute Laws". Dulany carefully defines each type of law. The "Common Law", he holds, "takes in the Law of Nature, the Law of Reason, and the revealed Law of God; which are equally binding, at All times, in All Places, and to All Persons. And such usages, and customs, as have been experimentally found, to suit the Order, and Engagement of Society." (82) According to Dulany, these "Customs" have "by Consent and Long Use ... obtained the Force of Laws". (83) Dulany next defines the "Statute Law", which he claims "consists of such Acts of Parliament, as have been made from Time, to Time, by the whole Legislature". (83) In Dulany's view, the statute law has often included Laws "which, are declaratory or alter the Common Law". (83) As such, many statutes "have restored the People to the Rights, that were theirs, by the Common Law". (83) Dulany claims that this was often necessary because "ill Men had at Times, invaded, and infringed" these common law rights; and thus it became essential to make "New Barriers ... to prevent future Infringements". (83) Dulany is also specific about the type of statute law that he desires for Maryland. As he puts it: "Some Statutes are Introductory of new Laws, which may be divided, into such as are by the words, or subject Matter of them, of general Use and Extent; such as are more confined; and such, as are made for particular Ends, and Purposes". Dulany emphatically states: "I shall have occasion to treat of the first of these, only". (83) That is, as we will see again in the pamphlet, Dulany desires only the general statues - such as Magna Charta - that have been made to secure the subject's rights at the common law.
Thus we can see Dulany's fundamental view of the English law. It is composed of the common law and the statute law, the former being the primary source of the rights of English subjects. In Dulany's words, "The English subject" has "an undoubted Right to his Liberties, Franchises, and Privileges, by the Common Law". The statute law exists primarily to support and preserve these rights at the common law. As Dulany insists repeatedly in the pamphlet, the statute law is a means to preserve common law rights; and the English law as a whole is the best "means" to secure "the Enjoyment of English Liberties". For him they are "convertible Terms".(82) Having examined his understanding of English law, we can now turn to Dulany's overall argument for the right of Marylanders to the protections afforded by English law.

Dulany offers two reasons why the people of Maryland are entitled to the "benefit" of English law:

I As the People are English, or British Subjects, and have always adhered to, and continued in their Allegiance to the Crown.

II As the Rights of English, or British Subjects, are granted unto them, in the Charter of the Province, to the Lord Proprietary.

In his rigorous fashion Dulany takes up each of these contentions in turn.

To prove the first, Dulany claims that "The First Settlers of Maryland, were a Colony of English Subjects, who left their Native Country, with the Assent and Approbation of their Prince". According to Dulany, these settlers went abroad "to enlarge his Empire in a remote Part of the World, destitute of almost all the Necessaries of Life ... "; and they did so "at a great expense; ran all the Hazards, and underwent all the Fatigues incident to so dangerous
and daring an Undertaking”.(85) Furthermore, “Many perished, and those that survived, suffered all the Extremities of Hunger, Cold and Diseases”. Dulany is at pains to stress that “They were not banished from their Native Country, nor did They adjure it”.(85) Dulany writes that in time they became prosperous and aided “their Mother-Country, by greatly increasing its Trade and Wealth”. As such, “they have been as advantageous to England, as any of her Sons, that never went from their own Homes, or underwent any Hardships”. More importantly, “It cannot be pretended, that ever They adhered to the Enemies of their King or Mother-Country; departed from their Allegiance, or swerved from the Duty, of loyal and faithful Subjects”. According to Dulany, “These Truths are too evident, and too well known to be denied ... ”.(85) Thus for Dulany the allegiance of the citizens of Maryland, the great hardships they have endured and the great benefits that they have brought to England, is proof enough that they are still loyal subjects and are therefore entitled to the same laws and liberties as Englishmen at home.

Dulany, with customary thoroughness, further expands upon this point, noting Lord Coke’s claim that “as the Subject oweth to the King, his true and faithful Legiance, and Obedience; so the Sovereign is to govern and protect the Subject”.(86) As Dulany concludes: “It is an established Doctrine, that Allegiance and Protection are reciprocal, and that a Continuance in the one, entitles the Subject to the Benefits of the other”.(86) For Dulany, the protection that the “Subject” receives in return for his allegiance is the protection of the English law.

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65 Dulany is quoting from Book IV of Coke's Reports.
And, as he points out, "This Subjection, and this Protection, are not bounded by any Space, less extensive than the British Dominions". (87)

With characteristic rigor, Dulany adduces more evidence for his contention that Marylanders are entitled to the King's protection. Dulany pens a lengthy passage discussing "the Case of St. Paul", who claimed "The Benefit of the Roman law", despite being born "in Judea". Summoning historical precedent, Dulany claims that "There was no Dispute of his Right, because he was born in a remote Province of the Empire; There was no Pretence, that the Laws which were securitative of the Roman's Rights, were confined within narrower limits than those of the Roman Dominions". (87) Having set up the obvious parallel, Dulany writes that "the Province of Maryland, is as much a Part of the British Dominions, as Tarsus the City, or Cilicia the Country, of St. Paul's Birth, was Part of the Roman Empire. Consequently, a Man, born in Maryland, hath as Good a Right, to demand the Benefit of the Laws of his Mother Country, as the Apostle had, to demand the Privileges of a Roman". (87)

With the example of St. Paul, Dulany draws this part of his argument to a close. His position thus far is clear: since Marylanders have been loyal and faithful subjects, they are entitled to the equal protection of the law. He concludes with a two-fold claim. First he asks rhetorically: "Can any thing be more evident than that All the Subjects, of the same Prince, living within his Dominions, adhering to their Allegiance, and in a word, behaving themselves as dutiful and legal Subjects ... should also be entitled to the same Rights, and Liberties, with the rest of the subjects of the same Prince ...." (88) Dulany goes on to ask: "Or can anything
be more clear, than that Subjects, having an equal Right to Privileges, must also have an equal Right to the Laws, made to create or preserve such Privileges. And without which, they cannot be preserved".(88) This is the essence of Dulany's argument: Marylanders have the same rights as British subjects and, as a result, must also have equal title to "the Laws ... without which they cannot be preserved".(88)

Dulany next turns to the contention "of some Men, who have advanced, that the People of Maryland, have a Right to English Liberties, but not to English laws".(89) Dulany challenges this claim, stating in colourful fashion that "such Notions are the Effect of Ignorance ... And (as I hope to prove) are big with Absurdity".(89) Dulany once again brings out his central theme of the connection between the English law and English rights. As he expresses it: "All the Rights, and Liberties, which the British Subject, so justly, values Himself upon; are secured to Him, by the British Laws. And when, ... those Rights and Liberties are invaded, recourse must be had to the Law for Reparation".(89) To reinforce the connection, Dulany musters his legal erudition and points out that "Right and Remedy are inseparable". Quoting "as great a Judge as ever sate in Westminster Hall"66, Dulany claims that "Want of Right, and Want of Remedy, are Termini convertibles".(89) Appealing "to every Man's Reason" Dulany says that "it is well known, that in all civil Governments, the only certain and just Remedy, is the Benefit of the Law".(89) He concludes darkly that "some who advance the foregoing Notions are aware" of this reasoning, but they keep their knowledge "carefully concealed, from those, that they would impose their destructive Doctrines upon".(89)

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66 Dulany's citation is to "Holt and F. Salkeld's, Rep.415, Vol.1".
Dulany now deals with another criticism, one advanced by those who "are so good natured, as to allow the People of Maryland, the benefit of the Common Law; but contend stiffly, that they have no Right to any of the Statues". (89) Dulany again makes short work of such critics, claiming "that we derive our Right to British Liberties ... as we are British subjects: That as such, we have a Right to all the Laws, whether Statute or Common, which secure to the Subject, the Right of a Subject". (89) Dulany claims that the benefit of the statute laws is "inseparably incident" to the subject's common law rights. He worries that if the Marylanders give up "any Part of that Right, without our consent ... We may by the same Reason, and Authority, be deprived of some other Part; and this will naturally render the whole, uncertain; and our Lives, Liberties, and Properties, Precarious". (90)

The strength with which Dulany holds to the necessity of the statute law is evidenced by the lengths he goes to stress the inseparable connection between the common law and the statute law. To further illustrate this point, Dulany launches into a lengthy historical disquisition on the fate of English liberties without such statutory protection. For, as he words it, "all the Rights, which the English Subject was entitled to, by the Common Law, were at Times, invaded by Men of Power and Authority ... And that very Law, which was calculated, and instituted for the Defence, and Safeguard, of Property; perverted to the Destruction of Property". (90) In such cases even the virtue of the men of England was unable to secure their rights against such "Iniquity". As Dulany makes clear, there was a need for "some further Provision by positive Laws; such as our Statutes". (91) Only this would "oblige Men to comply with, what the Love of Justice would not, but the Fear of Punishment, might
induce them to comply with, and to punish the Disobedient, and Refractory”.(91) For Dulany, such general statues as Magna Charta and the Petition of Right have served this purpose; they have safeguarded and shielded the subject from such aggression, securing him in his common law rights. As further evidence, Dulany discusses the iniquities of the Star Chamber at length, claiming that it was only ended by “Parliamentary Declaration”.(92) Dulany showers an equal amount of attention on “the Habeas Corpus Act”, the preamble to which “shews what shifts, and Evasions, were used, to elude the Force of the Laws that were instituted, to secure the Subject’s Liberty”.(93) As he concludes, “the British Subjects esteem the several statutes, that have been made to confirm their Common Law Rights” and they “would be alarmed” if “any Attempt should be made, to abrogate those great Defences and Bulwarks of the People’s Liberty”.(95) For Dulany, the lesson to be drawn from English history was the absolute necessity of the statues for the preservation of the people’s “Liberties”.

Having exhaustively proved the right of the people of Maryland to both the statute and common law, Dulany next turns to address those who claim that the English Statues do not extend to Maryland, because of “several Book cases; wherein the Judges have resolved, that the English Laws did not extend; ‘til it was expressly enacted that they should. And that the English Acquisitions in France, were never governed but by their own Laws: From whence, the Necessity of enacting the English Statues, in Maryland, before it’s [sic] Inhabitants can have the Benefit of them, is often inferred”.(95) Dulany had faced this technical objection from the proprietorial lawyers many times before in the heated debates of the 1720’s, and he
makes short work of it here. Differentiating Maryland from both Ireland and France, Dulany claims "that those Countries, were inhabited, by civilized, sociable People, conversant with Arts, Learning and commerce"; as a result they "had Laws, suited, and adapted to the order, and Engagements of Society; by which, themselves, and others ... might be peaceably, and happily governed". (95) But, as Dulany is eager to point out, there is no such parallel to Maryland, for "before it was settled by the English" it was "as to Law, and government in the same Condition, with an uninhabited Wilderness". Citing legal opinion, Dulany notes that "in Case of an uninhabited Country, newly found out, by the English Subjects; All Laws in Force in England, are in Force there". (95)

Now that he has dealt with this technical issue, as well as with a similar legal precedent concerning the non-extension of the statutes to the Isle of Man, Dulany pens an interesting passage wherein, citing Grotius at length, as well as numerous classical sources, he attempts to show the benefits that accrued historically to rulers of empires who treated their subjects well. Dulany discusses a wide range of cases, citing Seneca, Tacitus, Caesar, Polybius amongst others. Dulany concludes that "it appears plainly in History, that some of the wisest, as well as most successful Nations in the World have been very careful to avoid ... an irreconcilable Hatred between the Victors and the Vanquished". As Dulany states, with the plight of Maryland clearly in mind, "there is neither Policy, nor Humanity, in making People desperate". (96)
Dulany now turns to his second claim: that the Charter of Maryland explicitly grants its inhabitants English rights. As he words it, "suppose even this, to be the Case, that the English, by being brave and successful, had forfeited their Native Rights" they would still have the right to the benefit of English Laws, for "the Charter of Maryland, does not only contain a Grant of the Country, with several Prerogatives to the Lord Proprietary: But also contains a Grant, to the People, of all the Rights, Privileges, Immunities, Liberties and Franchises, of English subjects". (98) Thus, Dulany concludes, even if the technical issues of extension are against him, he has the unanswerable argument of the actual legal grant in the Charter. After quoting at length the relevant passage, Dulany comments that "It would be difficult to invent stronger, or more comprehensive Terms than these, whereby All the Liberties, Franchises, and Privileges, of English Subjects, are granted to the People of Maryland". (99) Dulany cannot resist adding that "This Charter, which I have seen in the Old Books ... has been confirmed, by Act of Parliament". (99) Dulany proceeds to reiterate his earlier claim that if "by these words of the Charter, the Liberties, Franchises, and Privileges of an English Subject, are granted fully, and amply, to the People of Maryland; the Benefit of the Laws, securitative of those Liberties, etc., as inseparably incident to the Liberties themselves, are also granted by Implication". (99-100) Dulany again resorts to legal doctrine to defend this idea of an implicit grant, claiming that there are "established and uncontroverted maxims that when the Law gives a Thing, it gives Remedy to come at it ... when the Law gives a Thing, All Things necessary for obtaining it, are included". (100)
Finally bringing the many strands of his argument together, Dulany informs the reader that he hopes "the Passage out of the Charter, the Authorities produced, and the Nature of the Thing are sufficient to convince every unprejudiced Person, that if the first settlers of Maryland, had really lost their Native laws, and Rights, ... they, by this Charter, are put into the same state, and condition, that their Fellow Subjects residing in England are in, as to their Rights and Liberties". (100) As Dulany hastens to add, this must include "the Statute as well as the Common Law", the two together being "the only sure Defence and Bulwark of the subject's Life, Liberty, and Property". (100)

Having concluded our lengthy treatment of Dulany's formal argument, it is important to note that there are several points in the pamphlet where an argument from natural law and natural rights appears; in addition, the pamphlet concludes with a complete break from Dulany's legal argument. In its stead, he advances a bold claim for the benefit of English law and rights, from "a State of Nature and Equality". These arguments and their implications for his political thought will be examined in detail in the following sections.

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One further point needs to be made about the structure of the pamphlet. Although it is a learned and well-argued piece of political writing, it was not written as a systematic treatise. There are no sections where Dulany defines and delineates his position on rights or virtue or the public good. His positions on these things must be extracted from around his formal
argument. However, this is not to say that the pamphlet eschews theory and that nothing of substance can be gained from it. As we have seen, Dulany takes a strong normative position on the English law: it exists to protect the rights and liberties of Marylanders. It is to an examination of his view of the nature and origin of these rights that we now turn.

DULANY ON RIGHTS

The idea of rights is the key one in Dulany's pamphlet; it is his main focus, his central concern. As we have seen, his desire for rights is the reason that he wants the "benefit" of English law. This desire is the motive force behind the pamphlet. As such, it is necessary for us to inquire closely into what Dulany means by rights, to look at how he holds the concept.

According to Dulany, his concern in the pamphlet is the "sure Defence of the Subject's Life, Liberty and Property". (100) Indeed these three rights - to Life, Liberty and Property - are claimed by Dulany several times in the pamphlet. He states that "Every Subject has a Right to the Enjoyment of his Liberty and Property" (86); he worries that without the protection of English law, the "Lives, Liberties and Properties" of Marylanders will be rendered "Precarious" (90); and he is certain that the English statutes were made "to confirm, and establish the Subject's Right, in his Liberty and Property." (92) In order to fully explore Dulany's view of rights, we must examine in concrete terms what Dulany means by the subject being secure in his life, liberty and property.
Primarily, for Dulany, to have these rights means to be secure from arbitrary rule, from "invasions" by "Men of Power and Authority". Throughout the pamphlet he evinces a strong concern for the protection of the individual subject from such assaults. He worries that Marylanders "are to be governed by the Discretion (as some People softly term the Caprice and Arbitrary Pleasure) of any Set of Men". He praises the English law for having "paved out a certain, determinable Path, for every Subject, suffering violence and Oppression ...". In his examination of English history, Dulany cites with evident praise the legal protections that the subject has been granted from the arbitrary acts of Kings and tyrants.

Quoting Henry Care's *English Liberties*, Dulany notes the numerous transgressions of the Star Chamber against "the antient rights" of the subject. These transgressions included allowing "the Great officers of the Crown, and other Great men to punish, where no Law did warrant, and to make Decrees for Things, having no such Authority; and to inflict heavier Punishment than by any Law was warranted". Dulany, still quoting Care, goes on to note that the Star Chamber "assumed to itself, a Power to intermeddle in civil Causes and Matters only of private Interest, between Party and Party, and had adventured to determine of the Estates and Liberties of the Subject, contrary to the Laws of the Land and the Rights and Priviledges of the Subject". This constituted "an intolerable Burthen to the Subject"; it was "the Means to introduce an arbitrary Power and Government".

Dulany sees the antidote to such attacks on the "Rights and Priviledges of the subject" in the limits that Englishmen had historically placed on their rulers. According to Dulany, these
limits included "the antient and indubitable Right of every Freeman, that he hath full and absolute Property, in his Goods and Estate".\textsuperscript{67}(84) For Dulany such rights constituted "New Barriers" against "ill Men" in Authority; these rights were designed "to prevent future Infringements" (83) and to create a "bulwark" around the individual subject.

Dulany's view of rights is brought out with particular clarity by his judicious citations from Coke's \textit{First Institutes}. According to Dulany, "the great oracle of the law, the Lord Coke, saith of the Common Law, that it "is the best and most Common Birth-right, that the Subject hath, for the Safeguard and Defence, not only of his Goods, Lands, and Revenues; but of his wife, and Children, his Body, Fame, and Life, also".(83) A further passage taken from Coke, indicates Dulany's view on the importance of rights and freedoms in combating arbitrary authority. The passage that Dulany supplies is as follows: "Tis by virtue of This Law, that a British Subject, may with Courage, and Freedom, tell the most daring and powerful Oppressor, that He must not injure him, with Impunity. This Law uprightly and honestly applied, and administered, will secure Men from all Degrees of Oppression, Violence, and Injustice; it tells the Magistrate what he has to do, and leaves him little Room, to gratify his own Passion, and Resentment, at the Expense of his Fellow-Subject".\textsuperscript{68}(84)

\textsuperscript{67} Dulany is quoting from Rushworth's \textit{Historical Collections}. His citation is to "Rush I.B. 513".

\textsuperscript{68} Dulany cites from the first part of \textit{Institutes}: "I.Inst.142".
Rights, then, for Dulany, are essentially "negative"; they pertain to the individual subject, creating a space around him, securing him from the coercion of others, and protecting him in his person and property. He holds to this view of rights throughout the pamphlet, paying scant attention to any other conception of freedom or rights; specifically he fails to entertain any notion of freedom as the ability to participate in the polity. His main concern is with the limits on political authority dictated by the need of the individual subject to be secure in his life, liberty and property.

Unfortunately for the student of early American political theory, Dulany has little to say about the precise relationship between his three main rights - life, liberty and property. His concern to protect the individual subject is clearly basic to his whole approach to politics, but he singularly fails to expand on any other implications of these basic rights. While he is adamant that the individual subject must be secure in his person and property, he gives little or no guidance concerning what the individual subject is entitled to do with the private realm that rights grant him.

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69 See Isaiah Berlin, "Two Concepts of Liberty" in his Four Essays on Liberty (London: Oxford University Press, 1969), 118. Berlin famously defines freedom as "the area within which a man can act unobstructed by others". For a dissenting view, one that challenges both the philosophical coherence of this conception of liberty, as well as its historical importance, see Quentin Skinner, "The Idea of Negative Liberty: Philosophical and Historical Perspectives", in Rorty, Schneewind and Skinner, eds., Philosophy in History: Essays on the Historiography of Philosophy (Cambridge: Cambridge University Press, 1984), 193-221.

70 Lance Banning has recently claimed that "American Revolutionaries ... attempted to combine (and probably confused) concepts of liberty deriving from a classical tradition - freedom to - with more modern liberal concepts that associated liberty more exclusively with the private, pre-governmental realm - freedom from". See his "Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic", William and Mary Quarterly, (1986) 43. Regardless of the veracity of Banning's claim, Dulany shows little trace of such a "confusion". As well, a recent study of the political thought of Algernon Sidney concludes that, for Sidney, "the liberty of the ancients - the right to participate in political decision making - was a chimera and could not be used to undermine authority of modern sovereigns". See Alan Houston, Algernon Sidney and the Republican Heritage in England and America (Princeton: Princeton University Press, 1991), 118.
There are, however, some tantalizing hints in the pamphlet. Returning to the lengthy passage devoted to Coke's *First Institutes*, we can see Dulany again quoting Coke with evident approval. According to Coke, the rights enshrined in the English law "effectually secure every Honest Man, who has the Benefit of it, in his Life, the Enjoyment of his Liberty, and the Fruits of his Industry". Here Dulany is not just using Coke to support the idea of rights as a barrier to men of authority, he is also using him to put forth the notion, albeit in a brief and undeveloped way, that part of what rights secured was the right to take private actions and to profit thereby - to enjoy the "Fruits" of one's "Industry".71

This passage is interesting for it shows Dulany's respect for a private realm, and his sanctioning of private actions taken within it. Unlike within the civic humanist tradition, property for him is not a precondition for the public role of the landed, independent citizen; it is rather something that is a security for the subject in his private concerns. Nevertheless, it would be a mistake to assume that Dulany is attempting to justify the pursuit of profit via private economic activity,72 as he has nothing of substance to say concerning the propriety of commercial activity. Given the paucity of discussion in the pamphlet, all that can be said is that Dulany has an idea of the link between the right to own property and the ability to act free from the control of others. Significantly, he speaks of the law being "perverted to the

71 For a discussion of this issue that concentrates on American political theory later in the 18th-century, see the various essays in Ellen Frankel Paul and Howard Dickman, eds., *Liberty, Property and the Foundations of the American Constitution* (New York, 1989).

72 Dulany's extensive economic activities have been ably documented in Land, *The Dulany of Maryland* (Baltimore: The Johns Hopkins Press, 1958), 98-117. Dulany played a particularly important, and visionary, role in the settling of the Maryland backcountry; as well he was an investor in an early iron manufacturing company.
Destruction of Property", and he worries that this "would leave Us in a poor condition, with regard to our Liberties".\textsuperscript{73}(90)

The fact that Dulany does not fully work out all the implications of his view of rights should not detract from the fact that he does have a strong view of individual rights, and that this is historically important for our understanding of colonial political theory.\textsuperscript{74} What becomes clear from a close reading of the pamphlet is his overall position on rights. For him rights pertain to the individual subject and their value lays in the protections they afford him in his person and property, protections which are necessary to secure him in both his private actions and from the designs of "wicked Men in Power".(94)

**ENGLISH RIGHTS AND NATURAL RIGHTS**

The question of what, for Dulany, is the source of the rights of Marylanders is our next topic.

At first glance, this may seem to be clearly stated in the pamphlet. Dulany claims openly

\textsuperscript{73} Robert Webking suggests an outline of the Americans' view of property, and its role in preserving life and liberty: "When the fruits of a person's labor are at the complete disposition of another, then that person does not work for himself but works, indeed as a slave, for another ... without some assurance of material sufficiency, a human being cannot plan for the future and decide how he wishes to live his life. He has no freedom or self-determination". See The American Revolution and the Politics of Liberty (Louisiana State University Press, 1988), 113. Clinton Rossiter notes that "there was surprisingly little discussion of property in colonial political theory". Seedtime of the Republic, fn. 132, 493.

\textsuperscript{74} Scholars of colonial political theory need a better understanding of the Enlightenment's view of rights, particularly such key concepts as "self-preservation" and the "right to life" which appear so frequently in 18th-century writings. For an outline of such an argument, see Garrett Ward Sheldon, The Political Philosophy of Thomas Jefferson (The Johns Hopkins University Press, 1991), 9. According to Sheldon: "Modern, liberal political philosophy conceives of man as naturally individual and independent ... this free and separate condition derives from liberalism's conception of man as essentially a material being ... motivated primarily by a desire for continued life, or "self-preservation". And such material existence gives the natural right to those things ("life, liberty, and property") which insure that continued existence. The power of reason is employed by man to best secure those individual rights and that self-preservation".
"that we derive our Right to British Liberties, and Privileges, as we are British Subjects". (90)

Indeed the contention that the people of Maryland have British rights because they are British subjects is a central theme of the pamphlet. Dulany refers again and again to "English Liberties" (89) and the "antient rights of the subject" (99, 92, 94); rights derived from a "common Birth-Right" and from a long historical struggle. Trevor Colbourn discusses Dulany solely in these terms, claiming that he "reasoned from a firm legal and historical base". Colbourn claims that Dulany and the other colonial southern gentry grounded their political philosophy on "a knowledge of the law" and "a familiarity with the history of the rights they sought to maintain".75

While this approach to rights can be accurately attributed to Dulany, it is not the whole story. A close reading of the pamphlet reveals Dulany also employing a different approach to grounding rights, one based not on English citizenship nor historical title but on the European natural law tradition, and particularly on John Locke's idea of natural rights.76

Throughout the pamphlet, there are references to the "Rights of Mankind". At the start of the pamphlet, Dulany puts his case in the following terms: "the People of Maryland are Freemen and will certainly continue to be such as long as they enjoy the Benefit of Laws


76 Both Benjamin Wright and Charles Barker have noted this duality in the pamphlet. Barker claims that Dulany argues from "philosophical as well as from legal grounds". Barker, Background of the Revolution in Maryland, 165. Wright concurs, claiming that "the pamphlet consists of a remarkably learned legal argument for the benefit of English statutes. However, in a number of places the theory of original, natural rights appears". Wright, American Interpretations of Natural Law, 60.
calculated for the security of Liberty and Property, and the Rights of Mankind”. Later, Dulany speaks of ill men who are “Violators of Laws and the Rights of Mankind”. The pamphlet also contains several references to the idea of “consent” as a precondition for the acceptance of any set of laws. Overall the pamphlet evinces a strong undercurrent of natural law and natural rights. To see this more fully, we will look at Dulany’s argument in detail, observing where and how he employs these ideas.

Dulany uses natural law ideas at four key points in the pamphlet. The first comes at the outset of the pamphlet when Dulany defines the common law in terms of natural law. According to him: “the Common Law, takes in The Law of Nature, the Law of Reason, and the revealed Law of God; which are equally binding at All Times, in All Places, and to All Persons”. (82) The crucial significance of this formulation of the common law is that, for Dulany, the common law is the main source of rights. As we have seen, he speaks of the statutes which “restored the People to the Rights that were theirs by the Common Law”. (83) For Dulany “it is evident that the English Subject had very ample Rights and Privileges, by the Common Law”. (93) Given that the structure of his argument is that the English subject has rights by virtue of the common law, his inclusion of the “Law of Nature” at the core of his definition of the common law strongly suggests a naturalistic grounding for rights.

(77) I shall use these two terms interchangeably. However, the reader should be aware that there is considerable scholarly dispute over their exact meaning. Dulany, however, sees no distinction between the two. He seems to follow Locke in the idea that it is the law of nature that gives rise to natural rights. See Locke: “The State of Nature has a law of nature to govern it, which obliges everyone. And reason, which is that law, teaches all mankind who will but consult it that, being all equal and independent, no one ought to harm another in his life, health, liberty or possessions”. David Wootton, ed. The Political Writings of John Locke (New York: Mentor Books, 1993), 263-4. Locke adds that “the law of nature ... which willeth the peace and preservation of all mankind” includes “that all men may be restrained from invading others' rights ... ”. Ibid., 264.
This linking of the common law with natural law can be seen again in the pamphlet when Dulany discusses historical instances of the violation of rights. For Dulany, "all The Rights which the English Subject was entitled to by the Common Law, were at Times, invaded by Men of Power and Authority". This, of course, is the reason that Dulany wants the statute laws: to make such invasions illegal. Yet mere illegality is not Dulany's main complaint against such "Men of Power". Reciting the history of such rights violations, he claims that it became absolutely necessary to make some further provision by "positive laws" (i.e., the statutes), because some men failed to comply voluntarily with "the Love of Justice". The naturalism behind this statement is made clear by Dulany. To violate justice is to violate natural equality, that is to deal with other men by force and to thereby act immorally. As Dulany puts it: "By the Law of Nature, All Men were equal; and by that law, the Law of Reason, and the Revealed Law of God, Men are enjoyned to treat One Another, with Humanity, Justice and Integrity". Clearly Dulany is making a strong connection between invasions of the subject's rights at law - the destruction of their lives and property - and violations of natural law. From the very structure of the way he argues, it is evident that Dulany has a normative position, grounded in the law of nature, which tells us how we should treat other people; and it is on this naturalistic base that he makes his call for "some further Provision by positive laws" to reinforce these pre-existing rights.

So far the "Law of Nature", although used by Dulany at key points in his argument for rights, has gone unattributed. The first indication of its source comes when Dulany, in attempting to prove that the Marylanders have the same rights at law as do subjects in England, has
recourse to "what the Learned Mr. Locke says of natural Equality". (87) Dulany proceeds to quote from "that great Man", citing at length a key passage from Locke's Second Treatise, wherein Locke claims that all men, being equal, have an equal right to be free from the domination of others. The passage from Locke that Dulany cites is as follows: "A State of Equality, wherein all Power and jurisdiction, is reciprocal, no one having more than another; There being nothing more evident than that Creatures of the same species, and Rank, promiscuously born, to all the same Advantages of Nature and the use of the same Faculties, should also be Equal, One, amongst another, without subordination, or Subjection". (88)

Dulany here uses Locke to claim that Marylanders have the same rights as British subjects because they share the same essential nature as men. In making this case Dulany has stepped entirely outside his historical and legal case for rights and has gone to a natural-law grounding for his position, showing himself to be fully aware of and conversant with Lockean theory.

Dulany's substantial use of natural law ideas continues throughout the pamphlet. Indeed the radicalism that his leads him into is most noticeable near the end of the pamphlet. Having concluded the proof for his second contention that Marylanders are entitled to English laws because they were granted them in the province's founding charter, Dulany turns away sharply from this legal argument, warning his readers that he has not given up "the first Right I mentioned" (that the Marylanders have British rights by being British subjects) by laying

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78 Dulany's citation reads "Locke of Civil Government, Chap. 2, Sec. 4".
so great a stress on that which is derived from the Charter". Dulany protests that he intends no such thing - indeed "far from it, for I should think the Right good, had the Charter never been made; as were the Rights of English Men, to all the Liberties, confirmed by Magna Charta and other subsequent Statues, before they were Made". (101) Dulany adds that "as the Confirmation of the subject's antient or Common-Law Rights, by several Acts of Parliament, is very beneficial to the subject; so the Grant, or Confirmation of the same Liberties by the King to the People of Maryland is also very advantageous". Looked at closely, this passage is very revealing of Dulany's deepest premises, for in it he claims that English subjects have "antient or common-law Rights" before Parliament or any other body - even the King - made the "Grant or Confirmation". For Dulany, these rights existed before the political authority was instituted and the political authority merely provides "Confirmation" of the rights, an action that is "advantageous" to the subject's liberty but not constitutive of it. In short, neither Kings nor Lord Proprietors create rights. Dulany goes on to make this idea of a grant clear. As he notes, "It is no new thing, even in particular cases, to have a Grant from the King to a private Person, of a Thing in which he really had a right and the King had none". (101) Although notions of natural law are not explicitly used by Dulany in this passage, his idea of rights being based on a "higher law", a law which even Kings must obey, shines through.79 As a result, Dulany holds that the "antient or common law rights" can supersede

79 For a full discussion of the American use of the idea of a "higher law" in both their political and constitutional theory, see Edward S. Corwin, "The 'Higher Law' Background of American Constitutional Law", Harvard Law Review, 149 (1928), 159-185. According to Corwin, "The influence of higher law doctrine associated with the names of Coke and Locke was at its height when the American colonies were being settled", Ibid., 394. Also see Clinton Rossiter's comments about colonial political theory: "The ancient doctrine of natural law and its latter-day corollary of natural rights were staples of political theory", Seedtime of the Republic, 142.
and even override the claims of both Kings and Parliamentary Acts.

The final stage in Dulany's transcendence of an historical or legal case for rights comes on the pamphlet's final page. Having ended his rigorous and exhaustive argument for English rights, Dulany pens a final passage that is worth quoting at length, for it captures the essence of the naturalism in the pamphlet. It begins almost as an aside, with Dulany writing:

*And I beg leave to add, that Men, from a state of Nature and Equality, formed themselves into Society, for mutual Defence, and Preservation, and agreed to submit to Laws that should be the rule of their Conduct, under certain Regulations. Let us suppose the first Settlers of Maryland, to be a Society of People, united and combined together, for mutual Defence and Preservation; and sensible, not only of the use, but also of the Necessity of Laws, and conscious of their own Incapacity, to make such as might suit their Occasions, and procure their Welfare and Safety: I say, suppose them under these circumstances, without any Regard to their Rights as English or British Subjects, or by Charter: And that they actually agreed to make the Laws of their Mother-Country, (of which it is to be presumed, they had a general, or at least some Notion,) to be the Rule of their conduct ... And that upon long Tryal, and Experience, of those Laws; they became convinced, of the Equality, and Justice of them, and consequently fond of them: Will any one say, that they are obliged to change those Laws? Or, to have them upon other Terms, than they have always had them, without their own Consent. (103)*

In this final passage, we can see clearly both Dulany's view of what rights consist of, as well as his deepest reason for why Marylanders are entitled to those rights.

Dulany's negative view of rights emerges clearly from this passage. As he puts it "Men, from a state of Nature and Equality, formed themselves into Society for mutual Defence and Preservation". Here we see the concern for the subject's rights, for his "Defence and Preservation", and we see it posited as the reason why men enter into civil society, why they have "agreed to submit to Laws, that should be the Rule of their Conduct ..." (103). Here
Dulany's negative view of individual rights is both the content of the law and, implicitly, the end of civil society. Society is entered into for certain ends - the protection of the subject's rights - and these ends serve as the standard by which to judge any polity.

That the source of these rights is naturalistic is also clear from this final passage. Dulany explicitly starts with individual men in "a State of Nature and Equality"; he never mentions Englishmen or Marylanders. Indeed, the whole point of the passage is that Marylanders would be entitled to these rights, regardless of any formal claim to them. As he puts it: "suppose them under these circumstances, without any Regard to their Rights, as English, or British subjects, or by Charter". Indeed, he says, what if they "actually agreed, to make the Laws of their Mother-Country ... to be the rule of their Conduct", having become convinced "of the Equality and Justice of them".(103) Dulany is claiming here that men can "consent" to certain laws based upon those laws' "Equality and Justice", irrespective of whether or not they have a legal or historical title to them.

This final passage contains further proof that Dulany's fundamental premises are those of natural law. It has abundant evidence that his political reasoning is based on a notion of the pre social individual, free and equal by nature, who consents to a society that protects his rights and "procures" his "Welfare and Safety"(103). This passage also provides strong evidence of the influence of Locke's Second Treatise on Dulany. Locke is directly cited once, and strongly echoed in this lengthy final passage. That Dulany would end the pamphlet
in this fashion is an eloquent indication of both the availability of natural law ideas to him, and his willingness to use them as a basis for the rights of Marylanders.

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There is one final issue that needs to be dealt with before we leave this discussion of what Dulany considers the source of rights to be: namely, what is the exact relationship between his two methods - English rights and natural rights - of arguing for the "benefit" of English laws. In particular we must ask which, for him, was the most fundamental reason for rights?80

Several points are worthy of comment here. The first is that Dulany mixes the two arguments and seems to see no incompatibility between them. This mixture occurs throughout the pamphlet. Several examples will suffice. In the definition of the common law discussed above, Dulany first defines it in natural law terms, but then goes on to add that the common law also includes "such Usages, and Customs, as have been experimentally found, to suit the Order and Engagements of Society ... and which by consent, and long use, have obtained the Force of Laws" (82). Dulany evinces a similar concern for long usage as the basis of rights in the Lockean section at the end of the pamphlet. Again it comes right after an argument for rights based, as we have seen, on the law of nature. According to Dulany,

if Marylanders were men in a state of nature, they would choose to make "The Laws of The
Mother Country ... to be the rule of their Conduct"; and they would only do so if "upon long
Tryal, and Experience, of those Laws; they became convinced, of the Equality, and Justice
of them, and consequently, fond of them".(103) As we have seen, Dulany also cites many
passages in which he claims Marylanders have "a Right to English Liberties"(89); he speaks
of "the Rights" Marylanders "were born to in Common, with their Fellow Subjects".(102)
At the start of the pamphlet he describes the English law as something the "Mother Country
has experimentally found, to be beneficial to Society, and adapted to the Genius, and
Constitution of their Ancestors".(81) Yet, at the same time, he is equally capable of
criticizing arbitrary rule as inimical to the "Rights of Mankind". Finally he states that his
whole argument in the pamphlet "for the Preservation, and Security of the Subject's Liberty",
has been argued "from Reason and Authority"(103); that is, from the law of nature and from
an historical precedent or title - the long tenure to such rights held by British subjects.
Throughout, the pamphlet is characterized by a mixing of these two arguments for rights, one
following the other, with no explicit indication on Dulany's part of any order or priority.

Perhaps the most important thing to state is that Dulany clearly sees no conflict between the
respective claims of English rights and natural rights. Both, for him, have the same essential
content: the preservation of the subject's life, liberty and property. He makes no systematic
statement to this effect, but the structure of the pamphlet, his continual juxtapositioning of
the two approaches, leaves one in no doubt that he regards them as compatible. Each, for
Dulany, protects the subject in his person and property. Moreover both the rights of
Englishmen and the rights of mankind have been violated by tyrants in the past, and each, therefore, need the benefit of English laws. It appears that Dulany is not alone in this approach to the issue. Several historians have noted the tendency of 18th-century Americans to conflate the claims of the "Ancient Constitution" and English law with those of the natural rights tradition. According to Clinton Rossiter, although "sound Whig doctrine" dictated that "the antiquity of the English Constitution and liberties was their chief claim to devotion [as] colonists became increasingly conscious of natural law and rights, they began to set conformity to nature alongside antiquity as an explanation of the peculiar excellence of the English scheme". Rossiter cites the Connecticut Gazette of April 10, 1756, which declares that "It is the glory of the British Government that these natural Rights of Mankind, are secured by the Laws of the Land". While the issue of the relationship between these two approaches to rights, their relative influence on and importance for the colonial and revolutionary mind, is too large an issue to delve into here, an examination of how Dulany weighs their relative importance should provide some further insights into his deepest premises.

Despite the mixture that we have observed in Dulany's pamphlet, there is strong evidence that, for Dulany, the idea of natural rights, was the deepest premise in his political philosophy. The most important indication that this was the case is his continual use of natural law theory at key points in his argument. As we have seen, he defines the common

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law in terms of natural law, "a law which is equally binding, at All Times, in All Places, and to All Persons" (82); he makes his case for the equality of rights between Englishmen and Marylanders on the basis of a key passage from Locke's Second Treatise; and he railed against those who would violate "all the Rights, which the English subject was entitled to, by the Common Law ... (90), branding such men as violators of "The Law of Nature", a law which states that "All Men were equal" and are therefore "enjoyed, to treat one Another, with Humanity, Justice and Integrity". (90)

Perhaps the most compelling evidence in the pamphlet regarding the importance of a natural law or natural rights approach on Dulany, is the final passage, quoted at length above, where he claims that Marylanders could contract into a society to protect their rights, regardless of whether or not they were English subjects. Again, he explicitly states that this could be done "without any Regard to their Rights, as English or British subjects, or by Charter". (91) In fact his priority clearly is on a set of pre-existing rights that Marylanders would choose to have enshrined "by the Laws of their Mother-Country". (103) Here Dulany is claiming that English laws would be chosen by such a people, because they respect rights; and he is also making an unmistakable claim that these rights are based on a freely entered-into compact. On the evidence of this passage, Dulany clearly believes that the laws of England are what men in a state of nature would consent to. That he would place such a strong statement of natural law concepts - consent and rights - as the final statement of a pamphlet arguing for the "benefit" of English laws, is good evidence of their importance for Dulany. The fact that he is aware of Locke this early and that he goes to him for fundamental theory is also
significant for our understanding of the pre-Revolutionary acceptance of Locke. That Dulany, as early as the 1720's, sees no problem with using a natural law approach to rights in an important public pamphlet is good evidence of both the availability and importance of such ideas in colonial America.

**DULANY ON VIRTUE**

The idea of republican or civic virtue has become perhaps the key concept in recent scholarship on 18th-century American political theory. The central thesis of this scholarship is that 18th-century thinkers held, at the core of their political thought, the ideal of the virtuous citizen, sacrificing all his private concerns to the public good. Significantly, along with this development in the scholarly literature has gone a downplaying of the role of John Locke and the historical importance of his theory of individual, natural rights. Alan Houston summarizes the essentials of this trend, claiming that most modern historians assume the existence of "a classical theory of virtue" and take it to be "distinct from and in tension with the liberal logic of rights and interests". Given Dulany's strong concern for rights, it

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82 According to Barker, in Dulany's pamphlet, "the idea of natural law was invoked hardly less boldly than it was to be during the revolutionary period itself". *The Background to the Revolution in Maryland*, 163. For evidence concerning the influence of Locke on the early 18th-century New England clergy, see Alice M. Baldwin, *The New England Clergy and the American Revolution* (New York, 1928).


84 Houston, *Algernon Sydney and the Republican Heritage*, 3.
will be interesting and informative to enquire into his view of what virtue is, and how it relates to his overall political philosophy.

Several points merit attention in this respect. The first is the marked lack of concern for civic virtue in the pamphlet. As we have seen, Dulany's main focus is on the political question of the proper limits to governmental action, on what rulers may or may not do. The amount of space devoted to discussing the moral character of the citizenry pales in comparison. Modern historiography notwithstanding, Dulany treats issues of civic virtue and the sacrifice of individual interests to the greater good as secondary.

The second point to be made is that when Dulany does discuss the issue of virtue, his concern is not wholly with civic virtue. As Jack Greene has noted in an essay critical of the historical importance of classical or civic virtue, the colonial Americans were a society whose "conceptions of virtue were primarily personal and non-civic". Dulany provides evidence to support this contention: his view of virtue is a mixed one, incorporating a concern for both private and public morality. A close look at some key passages from the pamphlet will allow us to explore these issues in greater depth.

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85 Jack P. Greene, "The Concept of Virtue in Late Colonial British America", in his Imperatives, Behaviors, Identities: Essays in Early American Cultural History (Charlottesville: University Press of Virginia, 1992), 232. According to Greene: "notwithstanding the recent emphasis given it by the Anglo-American historical community, the significance of the concept of civic virtue may have been considerably inflated". Ibid., 234. Joyce Appleby, one of the most trenchant critics of the classical republican tradition, describes this shift away from public virtues: "Virtue had lost its public character and attached itself instead to the private rectitude essential to a system of individual bargains. The instrumental attitude toward government implicit in Locke's Second Treatise was made explicit ... that the security of life, liberty, and property was the only reason for entering civil society and hence the punishment of offenses against violators the major task of government". Capitalism and a New Social Order: The Republican Vision of the 1790's (New York: New York University Press, 1984), 96.
Again, one of the most important places to look at is Dulany's discussion of the common law as an expression of the law of nature. Having made this crucial connection, Dulany goes on to add that this formulation contains "Nothing inconsistent with Honesty, Decency, and Good Manners". What can be made of this contention? The first point is that his discussion of these virtues is a secondary matter, it comes almost as an aside, a qualification. His main concern in this section is "to treat of these several Rights ..." and their base in the common law and the law of nature. It is not that he is indifferent to the issue of virtue, merely that his main concern is political. The second point is that the virtues he lists are not primarily public; they refer not to one's capacity to sacrifice but rather to a man's moral character, to his "Honesty, Decency and Good Manners", virtues that could as easily apply to the private realm as to the public. Indeed Dulany's prime concern is with the former realm. This becomes evident when he discusses the kind of men that the English law is to protect. According to him, its purpose is to "restrain those that are unruly amongst us, and to secure and protect those that are peaceable, and innocent ... ". Although Dulany doesn't elaborate, it is clear from this passage that he believes in the existence of virtues in the citizenry, and that these virtues are mainly private ones: he is arguing for "peaceable and innocent" citizens to be secure in their common law rights, rights which contain "Nothing inconsistent with Honesty, Decency and Good Manners".

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86 See Greene, *Ibid.*, 234. Rossiter has an excellent catalogue of the range of virtues discussed in colonial newspapers and pamphlets. According to Rossiter, "the virtues themselves ... were an ill-assorted mishmash of Greek, Roman, Christian, and latter-day English qualities ... " He cites a huge list, including: "wisdom, justice, temperance ... honesty, fortitude, love, benevolence ... ". *Seedtime of the Republic*, 138.
Indeed Dulany has little to say on the issue of the virtuous citizen. He does not anguish over his existence, nor fear for his corruption. Dulany takes it for granted that there are both good men and bad men, but has little to say on the subject. He does refer to the "Depravity of Human Nature" and laments how "little the Love of Equity, and Justice" has "prevailed among Men". Yet he is also certain that virtue does exist, claiming that England is "A Nation, that has abounded, with Men of great Abilities, great Interest, and opulent Fortunes; that were Patrons of Liberty, Lovers of Justice". In fact it is when describing the clash between these two types of men that Dulany's view of what it is to act virtuously comes out with particular clarity.

As we have seen, good men for Dulany are honest and decent, peaceable and innocent. More importantly, the evil men, the "Men of Power", are those who use force to violate the rights of their fellow subjects. As Dulany puts it, "all the Rights, which the English Subject was entitled to by the Common Law, were at Times, invaded by Men of Power and Authority". Here Dulany's normative position can be seen. According to him, these evil men are unvirtuous because they violate rights and thus the law of nature; they fail to treat their fellow subjects "with Humanity, Justice and Integrity". Indeed when Dulany does bemoan the "Depravity of Human Nature", he offers as an example of this depravity men who treat "One Another, with the greatest Cruelties imaginable" and thus discard "the Love of Equity and Justice". So, for Dulany, the issue of virtuous action is inextricably bound up with respecting the rights of one's fellow subjects. For him, to violate rights is the paradigmatic example of immoral or unvirtuous conduct. Rights are thus one way that he
holds the ideas of justice and virtue. Indeed this connection between rights and virtue is one that has been ignored by much of the recent scholarship on the political thought of the 18th century; yet it is a theme that runs through Dulany's pamphlet. Indeed the whole idea of natural law and natural rights, an idea that has such a strong hold on Dulany's thought, contains strong normative claims concerning how men should act toward one another. It is, in fact, a form of moral universalism and contains a conception of virtuous action within it, one that according to Dulany's strong statement at the outset of the pamphlet is "equally binding, at All Times, in All Places, and to All Persons". On the evidence of the pamphlet, Dulany's primary moral concern is with this law of nature and the equality of rights that it grants to all men. As a consequence, Dulany holds no simple notion of classical virtue, but rather includes the idea of respecting rights within his general notion of moral conduct. For him, unlike for modern scholars, rights and virtues are compatible, and the rights which all men have are clearly intended to preserve a large private realm wherein "every subject has a Right to the Enjoyment of his Liberty and Property". Furthermore, the virtues that these rights protect are not wholly civic; indeed, it is clearly a moral priority for Dulany "to secure Good Men from Violence and Oppression". And, as we have seen, these "Good Men" are praised by Dulany for being "peaceable and innocent", as well as honest and decent - virtues that emphasize the subject's private character and conduct, not his capacity to act in the public realm. To explore the issue of virtue more fully, we shall next turn to Dulany's views on the issue of the public good.
DULANY ON THE PUBLIC GOOD

Although we have attempted to diminish the importance for Dulany of a civic or public idea of virtue, there clearly are hints in the pamphlet of the classical idea of virtuous sacrifice to the public good. One passage in particular stands out, yet when it is looked at in the context of the overall concerns of the pamphlet, it offers further proof for the contention that Dulany's idea of virtue is a mixture of classical and modern notions, and that again the idea of natural rights is a central one. The passage occurs as part of Dulany's discussion of historical instances of rights-violations. He notes that England has had many virtuous men in the past, "Men of great abilities, great Interest, and Opulent Fortunes"; and "Men", Dulany stresses "that were Patrons of Liberty, Lovers of Justice and such as preferred the Good of their Country to All their own particular Concerns". However, taken in context, this passage reveals the complexity of the issue, because Dulany goes on to claim that these men, acting in this way, "were therefore, Checks to Oppressors, and Violators of Laws, and the Rights of Mankind".

The combination of concerns in this passage should indicate to us something about Dulany's premises: namely that he believes in both the existence of virtuous men and a public good above their own "particular Concerns" to which they should aspire; but that this public good and this virtue exist in part to secure the "Rights of Mankind". Here Dulany is exhorting "the Men of great Abilities" to combat those "Men of Power and Authority" who would violate rights. Clearly Dulany includes in this seemingly classical definition of the public good,
a strong element of concern for rights; and it is toward this latter goal that the "Virtue, Resolution and Endeavours of These Worthies" (91) was to be directed. Here civic virtue becomes a means to secure rights, and the protection of these rights comprise, at least in part, Dulany's notion of the public good.

Something like this thesis has been glimpsed by modern scholars, as a way of reconciling the competing 18th-century notions - liberal or republican, classical or modern - with which modern historiography is wrestling. As Gordon Wood has noted, "public or political liberty ... meant participation in government. And this political liberty provided the means by which the personal liberty and private rights of the individual ... were protected". Lance Banning offers a similar characterization of the role of the virtuous citizen in 18th-century political thought. Referring to the Jeffersonian Republicans, he claims that they "inherited a way of thinking that accustomed men to move immediately from the concepts of a contractual origin of government and inherent individual rights, to the assertion that a balanced form of

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67 Algernon Sidney, allegedly an early modern proponent of a purely classical view of the public good, has this to say: "If the publick safety be provided, liberty and propriety secured, justice administered, virtue encouraged, vice suppressed ... the ends of government are accomplished". Although Sidney includes the encouragement of virtue amongst the ends of government, he also believes that these ends also include "the defence of every private man's life, liberty, lands and goods". As such he exemplifies the mixture of concerns - both private and public - that 17th and 18th-century political theory identified by the idea of the public good. See Discourses Concerning Government (London, 1698) III, 21. Reprinted by Liberty Press, 1990, ed. by Thomas G. West.

68 See the excellent discussion of the "evolution" of virtue in the 18th century in Richard Vetterli and Gary Bryner, In Search of the Republic: Public Virtue and the Roots of American Government (Totowa: Rowan & Littlefield, 1987), 3. According to these authors, for the "modern" conception of virtue, the task was no longer "the organized development of civic virtue in the citizenry"; rather it became the "means to assure individual liberty and self-government".

government and sufficient virtue to preserve that form are necessary guarantees of liberty". As we have seen, Dulany provides support for this thesis: he clearly has a strong notion of individual rights, and includes this as part of his conception of the public good. In addition, he speaks repeatedly of the virtuous men of England, those "brave, honest Patriots" who strove mightily in the public realm to defend rights. However, there is a sense in which Dulany transcends even this idea of classical virtue as a means to liberty. To see this more fully, we will now turn to his discussion of the law and its relation to virtue.

**LAW AND VIRTUE**

Although Dulany clearly has an idea of classical or civic virtue as a means to secure the public good and the individual rights which comprise it, there are other aspects of Dulany's thought, which confound a simple conception of civic virtue. This can be seen if we examine his views on the relative importance of civic virtue and English law as a means of securing rights. Here Dulany comes the closest to transcending the venerable ideal of the participatory citizen. Instead he employs the idea of law as the best means to protect the rights of the citizens.

This can be seen in his treatment of the efficacy of the English patriots in defending their rights and those of their fellow citizens. As we have seen, Dulany describes these English men of virtue as preferring "the Good of their country to All their own particular Concerns". And, as such, he believes that they "were therefore, Checks to Oppressors,

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and Violators of Laws, and the Rights of Mankind". Here we can see Dulany's belief both in the existence of the disinterested citizen, and in that citizen's role in the preservation of rights. However, the passage that follows should give us pause for thought, for in it Dulany offers a different approach to the issue of securing the public good, one that clearly downplays the role of men of virtue. It is worth quoting at length, for having proclaimed these "Men of great Abilities" to be protectors of the "Rights of Mankind", Dulany adds that:

Yet the Virtue, Resolution and Endeavours of these Worthies, were not sufficient, to secure themselves, or their Fellow Subjects, in the Enjoyment of their Rights and Liberties; or the Law, from being polluted by All Men, in Authority; or turn'd to the Destruction of the Best, for opposing the Ruin of their Country. That this, hath often been the Case in England, everybody knows, who is at all acquainted with its History; and I believe it has been so, in all other Nations. Such calamitous Circumstances, were not to be born by a Free-People, who were possessed of the Means, to provide for their own Safety.

In this passage Dulany is claiming that the "Virtue, Resolution and Endeavours of these Worthies" was not enough "to secure themselves, or their Fellow Subjects, in the Enjoyment of their Rights and Liberties". What is required, he claims, is the force of the laws, specifically the statutory laws like Magna Charta, which he so strongly desires for Maryland. Only these, he holds, can fully protect the subject's rights. Alone, the endeavours of the virtuous citizen can only lead "to the Destruction of the Best, for opposing the ruin of their Country". Only by "further Provision by positive laws; such as our Statutes" can Men be stopped "from treating one Another, with the greatest Cruelties imaginable". For Dulany, then, only "the Fear of Punishment", and not civic virtue, is able to deter the "Disobedient and Refractory", and thereby "secure Good Men, from Violence and
Oppression”. In the final analysis this is why “a Free People” need legal protection as “the Means, to provide for their own Safety”.(91)

This theme of the importance of the law and the unimportance of civic virtue is sustained throughout the pamphlet. In emphasizing the need for the statute law in Maryland, Dulany again refers to English history, claiming “that there were great Numbers of brave, honest Patriots, who understood the Laws of their country, perfectly well, and who never fail’d to use their utmost efforts, in Opposition to every Violation of that Law; that notwithstanding all they could do, themselves, and others, were insecure in their Lives, Liberties and Properties”.(94) Dulany is at pains to point out that this happened despite the large number of patriots “that England has been blest with, in all Ages”.(95) Thus “it became necessary, to confirm and strengthen, the antient rights by the Legislative Authority”.(94) As if to reinforce this point, Dulany asks rhetorically if Marylanders “have less Occasion for Laws, to restrain those that are unruly amongst us, and to secure and protect those that are peaceable and innocent” than Englishmen do, given that it is doubtful that in Maryland “the Number, Ability, Interest, or Fortune, of our Patriots bear any Proportion, to those that England has been blest with, in all Ages”.(95) Given that the answer is clearly ‘no’, and that if England’s virtuous patriots were ineffectual, Maryland’s will be even more so, Dulany claims that this is why Marylanders need “the Statutes to declare the subject’s Right at the Common Law; and to establish, strengthen, and confirm that Right”.(95) The danger is that without such law, the subject “must not only submit to past Injuries, if done by a Person superior to him in
Power; but be exposed to future Insults, whenever Power, and Inclination, concur to oppress Him". (86-7)

The hold that this idea of a fundamental law had on Dulany can be further illustrated. At one point he declares: "that the greatest Advantage, which the Subject can possibly derive, from the Royal Protection, is the Benefit of the Laws; that so long as the Subject hath that, he is secure of every Thing which belongs to Him; that when He loses It, he loses every Thing; or at best hath but a very uncertain and precarious Tenure, in any Thing". (87) Dulany accords the same role to Parliamentary Declarations; for him, their prime function has always been to secure and protect the subject's common law liberties from violation. In his historical treatment, Dulany accords pride of place to such key Parliamentary Declarations as Magna Charta and the Petition of Right. According to him these statutes gave evidence of "ample, and large Declarations in Parliament, of the Subject's Rights; loud Complaints of the violation of those Rights; The Rights, themselves, confirmed; and the knavish chicanes and crafty Inventions, that were introduced to deprive the Subject of his Rights, are abolished". (93) Here, Dulany makes it clear that it was the role of fundamental statute law, not civic virtue, to protect rights, to abolish the acts of "Knavish Chicanes" and their "crafty Inventions". For Dulany such acts of Parliament were necessary "to heal the Breaches that had been made in the laws; and to establish and confirm the antient Rights of the Subject". (99) Furthermore such Acts "have always been deemed as essential a Part of the Security of the Subject to his Rights and Privileges as the Common law itself". (99) To emphasize the point, Dulany claims
that so important are these statues that their "Abrogation ... would in Effect, be an Abolition of the Liberties themselves". (99)

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The substitution of civic virtue and public spirit by Dulany, for the protection of fixed laws, and his clear downplaying of the role of the patriot, leads to our last topic, what may be termed his nascent constitutionalism. For in a tentative way, his call for the protection of the English statutes is really a call for a fixed and written body of laws to secure the citizens of Maryland in their rights, to free them once and for all from the proprietorial veto. He does not want to have to rely on Maryland having men of sufficient virtue and integrity to defend liberty - he clearly believes that this had proved ineffectual in the case of England - but wants the protections afforded by the great body of English statute law instead. Admittedly the pamphlet does not contain any call for a fixed constitution, but such a claim is consistent with his overall position; which is that Marylanders' rights, "Rights they were born to in Common with the Fellow Subjects", are in a precarious position if only held at the common law or defended solely by men of virtue. He is certainly aware of English constitutionalism, and praises the early English experiments with written constitutions, noting that in 1688 "a Parliamentary Declaration of the Rights, and Liberties of the Subject, was thought necessary; not because the Subject had forfeited his rights, and Liberties; or demanded new: But because

99 Hannah Arendt, the great 20th-century proponent of a classical approach to political life, captures the essence of this approach, labelling it "fundamentally anti-political", a desire to "be rid of all public cares and duties; to establish a mechanism of government administration through which men could control their rulers ... ". On Revolution (New York, 1963), 133.
those that antiently belonged to him had been invaded, and violated". (93) Dulany is even adamant that Marylanders should get the English statues "in a lump" and not be obliged to enact them "De Novo", as the Lord Proprietor had offered. Clearly Dulany fears the proprietorial veto; but he also believes that if Marylanders have the right to English liberties, then they should automatically get "the benefit" of the fixed body of statute law that guards them so well. As he puts it: "Should We attempt to enact such of the English Statues as may be supposed to suit the condition of the Country, upon a Supposition, that We have no Right to them, without so doing; and that We should miscarry in that Attempt, which is not impossible, it would be such an argument against the Right we contend for, as we could not easily get over". (105) Clearly, Dulany feels that the best protection for the "Right we contend for" is in the wholesale transfer of the statute law to Maryland. In Dulany's claim we can see the beginnings of a modern approach to constitutionalism. Viewed in this way, his desire for the statutes constitutes further evidence of both his concern for the subject's rights and legal protection, as well as his relative lack of concern for a classical, participatory approach to politics. 92

92 Dulany here presages the American concern for constitutionalism, which reached its apogee in the late 18th century, at both the state and federal level. This American interest in fundamental law was part of the Enlightenment's "science of politics"; the project whereby the Americans "not only embraced the body of Enlightenment principles, but wrote them into law, crystallized them into institutions, and put them to work". Henry Steele Commager, The Empire of Reason: How Europe Imagined and America Realized the Enlightenment (New York: Anchor Press, 1977), xi. See also Douglass Adair, "That Politics May be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist", in H. Trevor Colbourn, ed., Fame and the Founding Fathers: Essays by Douglass Adair (New York: W. W. Norton & Co., 1974), 93-106.
SOURCES

Much of the current debates surrounding 18th-century political thought concern the issue of which intellectual traditions were available, to whom, and when. We have already examined the influence of John Locke on Dulany. To conclude our analysis of the pamphlet we will discuss some of the other sources employed by Dulany in the pamphlet. This will allow us to round out our analysis of Dulany's fundamental premises by an examination of the full-range of the intellectual influences on the pamphlet, seeing what each contributes to its argument.

Fortunately for the historian, Dulany is, unlike many 18th-century authors, concise and clear in his citations; he always supplies the reader with full references and notes, and always indicates these with clear quotation marks. As a result it is easy to identify his sources. By far the most frequently cited body of thought in the pamphlet is that of the English legal scholars and historians. The pamphlet abounds with quotations from Lord Coke's Institutes and his Reports; from Rushworth's Historical Collections; and from Henry Care's English Liberties. As we have seen, Dulany also exhibits an intimate knowledge with the history of fundamental statute law, especially the Magna Charta and the Petition of Right. He is also familiar with those statutes which resulted from the Glorious Revolution, giving us an

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94 For a listing of the contents of Dulany's library, see Joseph T. Wheeler, "Reading and Other Recreations of Marylanders, 1700-1776", *Maryland Historical Magazine*, (38) 1943, 52-3.
example of "the first Act for settling the Succession of the Crown", which included "a Parliamentary Declaration, of the Rights, and Liberties of the Subject".(93)

The link between Dulany's legal and historical erudition and his political philosophy is made clear repeatedly in the pamphlet. The history of English law consisted of attempts to limit the power of "the Great officers of the Crown, and other Great Men" from violating the Subject's common law rights.(92) According to Dulany these legal steps were taken "not because the Subject had forfeited his Rights, and Liberties; or demanded new; but because those that antiently belonged to him, had been invaded and violated".(93) The lesson Dulany learned from this is clear: the subject's "antient rights" were invaded by arbitrary authority and thus the law of England was necessary to shore up these breaches of the subject's rights.

Dulany's citations from English legal scholars also help us get a fuller picture of what he meant by the subject being secure in his rights. One aspect of Dulany's thought that comes across strongly from his reading of the history of English law is his concern for due process. Dulany cites the 29th chapter of the Magna Charta which declares that no subject shall be subject to exile or imprisonment or have his property seized. According to Dulany: "The 29th chapter is not long, and ought to be read by every Body, and (in my humble Opinion,) taught to children, with their first Rudiments".(91) Dulany continues with this theme, claiming that "By another statute, subsequent to Magna Charta, it is provided "That no Man, of what Estate, or Condition that he be, shall be put out of Land, or Tenement; nor taken, nor
imprisoned, nor disinherited, nor put to death, without being brought in to answer, by due Process of Law".(91)

For Dulany the lessons to be drawn from his study of the law and its history was the necessity for the subject to be dealt with by fixed and settled law; a law that protected him by due process from arbitrary attacks. Only thus could the "Lands, Tenements, Hereditaments, Goods, or Chattels, of any of the Subjects of this Kingdom" be secured.(93) As Dulany concludes: "Great officers transgressing this Law, are liable to severe Penalties".(93)

What is interesting about Dulany's use of these legal history sources is the complete absence of any references to the venerable Saxon constitution which exercised such a great influence on many colonial Americans.95 The closest he gets to such an appeal is his repeated insistence on the importance of the subject's "antient rights". But even his linking of rights to the common law does not include a claim that the common law dates from Saxon times; rather, as we have discussed, he describes the common law in terms of natural law. He claims that the Magna Charta "appears to be, A Declaration of the Common Law", noting that this is something to which "all eminent Lawyers agree".(91) But, for the most part, he resolutely avoids a discussion of the historical roots of the subject's rights. He seems to be content with just proclaiming their antiquity. By contrast he lavishes a great deal of attention

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95 For extended discussions of the importance of the Saxon idea in Colonial America, see H. Trevor Colbourn, The Lamp of Experience, 21-39; and David N. Mayer, The Constitutional Thought of Thomas Jefferson, 11-18,
on the history of modern statute law and the great advances that it has brought about in the protection of individual rights. Indeed this shift of attention puts him at odds with the way some scholars have portrayed the Americans’ use of the history of English law. For Dulany has no trace of sentimentality or longing for a mythical past of Saxon purity and virtue. In his brisk and matter-of-fact way he seems to be content with the ability of modern law to secure the subject in his person and property.

Dulany also confounds modern scholarship in his lack of any real concern for the classics. As we have observed, he uses the example of St. Paul as historical evidence for the way the Roman Empire granted equal protection of the laws to all its subjects. He also cites many classical authorities, from Tacitus and Seneca, to Caesar’s Commentaries, for historical evidence of the benefits that accrue to the rulers of an empire if they treat their subjects well. However, these two passages exhaust Dulany’s use of classical sources. More importantly, they contribute nothing fundamental to his argument, which is predicated on the Marylanders possessing rights and laws, either by virtue of being British subjects or by their nature as men. Dulany’s classical references do not speak to how one grounds a claim to rights, nor to the issue of why the people of Maryland are entitled to them. They are offered as extra proof, as an example of how well some empires in the past have dealt with their subjects; but Dulany never claims that Marylanders have rights because of any classical precedent. Moreover, a close inspection of the passage which contains the bulk of Dulany’s classical citations, indicates an even weaker acquaintance with the classics on Dulany’s part; for most of the examples he cites, such as Tacitus’ account of Cerealis addressing the Gauls, or
Polybius' admiration of Antigonus' moderate attitude toward the Spartans, are taken verbatim from Grotius' *Rights of Peace and War*.96(97)

In fact, Dulany's awareness of both Grotius and Pufendorf is made clear in the pamphlet. Much in the manner that he uses Locke, he employs both Grotius and Pufendorf to establish the equality of rights between Colony and Mother Country. Dulany claims that:

*It will not be amiss, to observe the Opinions of the two great Civilians, and Politicians, Pufendorf, and Grotius, in Relation to Colonies: The first, says, "That Colonies may be, and often are, settled in different Methods; For, either the Colony continues a Part of the Common-wealth It was sent from; or else is only to pay dutiful Respect to the Mother-Common-wealth, and to be in Readiness to defend and vindicate its Honour"*(86) ... And Grotius saith: "that such, enjoy the same Rights of Liberty with the Mother City". And again, in another Place, "For they are not sent out to be Slaves, but to enjoy equal priviledges, and Freedom".(86)

Dulany's use of "these great Men" supplies further evidence for the claim that natural law and natural rights were key components of his thinking. As recent scholarship has suggested, both men were key figures in the early modern revival of the idea of natural law.97 Dulany's employment of them as sources for his claim of equal rights for Marylanders should give modern scholars food for thought. Unfortunately, the recent downplaying of the role of John Locke has meant that there has been very little scholarly investigation into the influence of other natural law thinkers on colonial thought. Perhaps the evidence presented in Dulany's

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96 The citation reads "Grotius of the Rights of Peace and War, B.3, Chap.15".

97 See Richard Tuck, "The 'Modern' Theory of Natural Law" in Anthony Pagden, ed., *The Languages of Political Theory in Early Modern Europe* (Cambridge: Cambridge University Press, 1987), 119. Tuck claims that: "the moral theories of the late 17th and 18th century natural lawyers constituted in many ways the most important language of politics and ethics in Europe, influential over a huge area and in a wide variety of disciplines".
pamphlet, and in that of his near contemporary John Wise, will be a catalyst for further work on the transmission of natural law ideas to the American colonies.

Given the tenor of the current scholarly debate, a discussion of some of the sources that Dulany fails to employ will be entertained here. We have seen the marked lack of any use of the classics by Dulany; what is more intriguing is his failure, with a single exception, to cite any of the members of the “Real Whigs” or “Commonwealth Men”, figures supposedly exercising a determinative influence on pre-Revolutionary political theory, with their revival of classical ideals and concerns. 98 The sole exception to this is Dulany’s brief use of Cato’s Letters. He employs them as support for the important role of the statutes in providing at least some check on “wicked Men in Power”. Referring to Cato as “an ingenious Author”, Dulany cites the following passage: “If Men will be great Knaves, in spight of Opposition; how much greater would they be, if there were none”.(95) Although this passage indicates Dulany’s awareness of Cato, its importance in the overall scheme of the pamphlet is diminutive. Dulany does not employ Cato to provide new ideas, or fundamental theory, as he does with Locke; he merely adduces him in support of a point already well established. On the evidence of this pamphlet, Dulany would seem to defy the generalizations proffered by Bailyn and others, that the literature of the Walpolean opposition was a formative one is the shaping of colonial political theory.99

98 Although not employed in the pamphlet, Dulany’s library included the following radical Whig writers: Gordon’s Tacitus; Molesworth’s Account of Denmark; as well as “Locke’s Works”; “Grotius”; “Polibius History”; and “Pufendorf’s Law of Nature”. See Wheeler, “Reading and Other Recreations”, 53.

One final component of Dulany's thought is revealed in the pamphlet: his knowledge of the legal history of Maryland. We know from the scholarship of Aubrey Land that Dulany was not only the prime spokesman for the Maryland Country party in the 1720's, he was also their most knowledgeable member concerning issues surrounding the legal history of the province. Dulany sat on the powerful Committee of Laws of the lower house of assembly, and as such spent many hours searching through the provincial archives, gathering knowledge for his speeches and addresses in the lower house. This knowledge is put to good use in the pamphlet, as he skilfully incorporates the grant of "the Rights of English, or British Subjects" in the Maryland charter into his broader argument. Here Dulany gives evidence of the self-confident colonial, able to blend European influences and local knowledge, to articulate a powerful and well-reasoned case against proprietorial power. Having examined the full range of sources that Dulany employs in the pamphlet, we will now conclude with a consideration of the work as a whole.

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100 See Land, *The Dulanys of Maryland*, 62-75.

101 For a glimpse of the richness of intellectual life in the colonial south, see Richard Beale Davis, "The Intellectual Golden Age in the Colonial Chesapeake Bay Country", *The Virginia Magazine of History and Biography*, 78 (1970), 131-143.
III

CONCLUSION
DULANY'S POLITICAL THOUGHT: A FINAL WORD

In conclusion I would like to bring the various strands of my analysis together, and take a view of Dulany's political philosophy as a whole. We have already dwelt at length on the importance he places on the idea of the rights of the individual subject. What I propose to do in this conclusion is to look at the way that this central idea structures the rest of his concerns.

We have seen this happen in our examination of his views on virtue. The strong emphasis that he places on securing the subject from invasions of his rights, necessarily involves him in a downplaying of the civic or public dimensions of virtue. His focus is shifted from the public realm to the private; he desires to preserve Marylanders from political power, not to involve them in its exercise. As well, his views on rights assume the propriety of the citizen acting in this private realm; his desire is to secure the individual subject from aggression, a security that allows the "peaceable and innocent" to pursue their private concerns.

The strong emphasis that Dulany places on natural law also contributes to this overall re-orientation. As we have seen, claims of natural law function for Dulany as a guide or norm to how individuals should act towards one another. As he expresses it: "By the Law of Nature, All Men were equal; and by that Law ... Men are enjoyned to treat One Another, with Humanity, Justice and Integrity". (90) Thus Dulany is saying that to act virtuously, to treat others with "Humanity, Justice and Integrity", is dictated by the "Law of Nature"; a law that
declares that all men are "equal" and thus deserve to be accorded a degree of autonomy. We know from the rest of the pamphlet that such treatment is inseparably connected to protecting "the Security of Liberty, and Property, and the Rights of Mankind". Thus Dulany's focus on natural rights gives him a new conception of virtue: treat others as equals, respecting their rights. Here Dulany combines rights and virtue in a way that confounds current historiography. He is not, however, jettisoning any concern for virtuous action. Far from it. Rather his emphasis on natural rights, while shifting his view away from civic virtue, leads him to emphasize private virtues. As we have seen, rights exist to protect "Good Men" from "Violence and Oppression"; they are indispensable to secure the "peaceable and innocent". As Dulany remarks, the law of nature that undergirds common law rights, contains "Nothing inconsistent with Honesty, Decency and Good Manners". This linking of the natural law tradition to virtue is something that has been noticeably absent from recent historical debate.

The way that he grounds rights is also important for an understanding of his thought. I have made a strong argument that Dulany bases his claim for rights on natural equality, i.e., on the law of nature. Rights for Dulany are thus inviolable; they rest on nature, not precedent or authority. This has been discussed at length in the pamphlet. What is of interest here is the boldness of his use of this Lockean theory. He uses a Lockean view of government to claim that Marylanders would consent to English laws, if those laws protected their natural rights and "procured their Welfare and Safety". Although Dulany did not advocate dissolving
the bonds of civil society, his claim that rights can predate the political authority is a strong precursor of later American theory.

This naturalistic approach to the issue of rights also shapes Dulany's view of the law. If we all have rights by nature, then the sole purpose of the civil authority is to create a legal structure to protect them. Such a legal structure is then bound by the ends for which it was entered into. If those ends - the protection of our natural right to life and liberty - are violated, then the civil authority can be dissolved. Dulany does not go this far, but his reasoning is clearly congenial to such an approach. Once again this involves a radical shift away from a classical approach to politics.

Thus Dulany's focus on rights leads him to begin to re-draw the boundaries between the public and private. As a result, his conception of virtue encompasses a respect for rights. Concomitantly, his naturalistic grounding for these rights leads him to advance the Lockean idea that the civil authority is to be held accountable to a standard - the protection of life, liberty, and property - derived from man's nature. Having seen strong evidence that Dulany is aware of and uses such a political theory early in the 18th century, we will now turn to a discussion of our findings in relation to modern historiography.

DULANY AND MODERN HISTORIOGRAPHY

What can be concluded about the nature of early American political thought from a study of Dulany's pamphlet? The first point is that, contemporary historiography notwithstanding,
Locke was clearly a central, and not merely a peripheral, figure. If Dulany is not unique in his influences, and there is no reason to think that he is, then his pamphlet constitutes further evidence that Locke does not deserve his recent marginalization. In fact, the most striking thing about the pamphlet in this context is how early Locke’s influence appears. Even historians who argue for a Lockean influence later in the 18th century, are usually willing to concede that he was a marginal figure earlier in the century. However, the pamphlet shows Dulany employing him confidently as early as the 1720’s, more than a generation before the Revolution.

Further evidence of the importance of Locke has been offered recently by modern scholars. The late Herbert Storing, in his seminal collection of Anti-Federalist writings, said that he expected to find the Anti-Federalists employing classical ideas in their criticism of the Federalists. However, upon closer inspection, he found that “the Anti-Federalists are liberals ... in the decisive sense that they see the end of government as the security of individual liberty, not the promotion of virtue or the fostering of some organic common good".102 Ronald Hamowy has undertaken a similar reappraisal of Cato’s Letters. He concludes that "it would be very hard to read the Letters and not be struck by how similar Cato’s analysis of the origin and functions of government is to that which appeared in the Two Treatises".103 Robert Webking, in analyzing the political thought of late the 18th century, notes the

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predominance of a Lockean approach to politics upon members of the Revolutionary generation. According to Webking: "The American Revolution was not undertaken with the goal of creating virtue in the citizens of the community. It was undertaken to secure the liberty of human beings to act as they might choose".104 Alan Houston, in a major reassessment of the political thought of Algernon Sidney, argues that "virtually all of the 'republican' principles drawn from Sidney's writings - from the rule of law to the right of revolution - were perfectly compatible with Lockean liberalism".105 Finally, Garrett Sheldon, in a reassessment of the political thought of Thomas Jefferson, makes a strong critique of the classical republican thesis. Noting the strong influence of Locke on Jefferson, Sheldon accuses the proponents of the "classical republican paradigm" of a "lack of theoretical clarity". Most notably, he draws historians' attention to the necessity of maintaining a distinction between classical and modern political thought: one being concerned with the structuring of a political regime to achieve the good life; the other focussing on the protection of rights.106

This issue of the importance of rights in early modern political thought is a crucial one. As Paul Rahe reminds us, the ancients had no equivalent conception.107 We have seen in Dulany


105 Houston, The Republican Heritage, 8.

106 Sheldon, The Political Philosophy of Thomas Jefferson, 159.

107 See Rahe's massive Republics Ancient and Modern (Chapel Hill, 1992), for a rumination on the differences separating ancient and modern political thought. See also his "The Primacy of Politics in Classical Greece", The American Historical Review, 89 (1984), 265-293. Rahe quotes Thomas Pownall, royal governor of Massachusetts Bay, who criticized Greek polities. According to Pownall: "They destroyed or perverted all
a small example of the influence of the idea of individual natural rights in the 18th century; but more work needs to be done on the philosophical origins of this idea in Europe,\textsuperscript{108} as well as the manner and timing of its transfer to the American colonies.\textsuperscript{109} The recent interest in the early modern revival of classical ideas has forestalled such inquiry. However, the recent flowering of scholarship on Locke and on other early modern natural law thinkers should prove beneficial.\textsuperscript{110} For, if we have a better understanding of the language of natural rights and its early modern origins, we may finally have a proper context for understanding the nature of the ideas on politics and political theory bequeathed to colonial Americans in the generations before the American Revolution.

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\textsuperscript{108} See Richard Tuck, \textit{Natural Rights Theories: Their Origin and Development} (Cambridge, 1979). As well, see James Tully "After the Macpherson Thesis", in his \textit{An Approach to Political Philosophy: Locke in Contexts} (Cambridge, 1993), 71-95, esp. 82-84, where he discusses the distinctive context within which 17th-century political theory developed: namely the debates over the origin of political power.

\textsuperscript{109} See Alan Tully, \textit{In Search of Early American Politics: Particularism, Tradition and Innovation in the Articulation of British-American Political Culture, 1664-1770} (unpublished manuscript, in the author's possession), for a discussion of the importance of the idea of rights to colonial Americans. According to Tully: "One of the most important characteristics of public life in New York and Pennsylvania was the extensive rights-consciousness of the provincial citizenry", \textit{Ibid}, 188.

\textsuperscript{110} For a summary of the new Locke scholarship, see David Wootton's "Introduction" to \textit{The Political Writings of John Locke} (Mentor, 1993), 7-130. See also the various essays in Pagden, ed, \textit{The Languages of Political Theory in Early-Modern Europe} (Cambridge, 1987).
SELECTED BIBLIOGRAPHY

I
PRIMARY SOURCES

1) Archives of Maryland. (1883 - ), Volumes, XXV, XXXIV - XXXVI.


II
SECONDARY SOURCES:
MARYLAND IN THE 17TH AND 18TH CENTURY

1) Barker, Charles A. The Background of the Revolution in Maryland. New Haven: Yale University Press, 1940.


II

SECONDARY SOURCES:

POLITICS AND POLITICAL PHILOSOPHY

IN THE 17TH AND 18TH CENTURIES


