

## Articles

### Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?

Steven G. Calabresi & Sarah E. Agudo\*

I.	Introduction.....	11
II.	Methodology.....	18
	A. Collecting.....	19
	B. Counting.....	19
	C. Categorizing.....	21
III.	The Data on State Constitutional Rights in 1868.....	22
	A. Rights Bearing on Religion.....	31
	1. <i>Establishment Clause Analogs</i> .....	31
	2. <i>Free Exercise</i> .....	33
	3. <i>Religious Qualifications for Holding Office</i> .....	36
	4. <i>Specific References to God in the Preambles</i> <i>of the 1868 State Constitutions</i> .....	37
	5. <i>Ceremonial Deism</i> .....	38
	6. <i>Blaine Amendments</i> .....	39
	7. <i>Clauses Pertaining to Oaths</i> .....	40
	8. <i>Legislative Duty to Protect Religion</i> .....	40
	9. <i>Witness Qualification on the Basis of Religion</i> .....	40
	B. Rights of Freedom of the Press, of Speech, of Association, and of Political Participation.....	41
	1. <i>Freedom of the Press</i> .....	41
	2. <i>Freedom of Speech</i> .....	42
	3. <i>Assembly and Petition</i> .....	43
	4. <i>Reform Government</i> .....	44
	5. <i>Power over Government Officers</i> .....	45

---

\* Professor Calabresi is the George C. Dix Professor of Constitutional Law at the Northwestern University School of Law. Sarah Agudo is a member of the Northwestern University School of Law class of 2008 and is a candidate for a Master in Public Policy at the Harvard Kennedy School of Government. We are grateful for the helpful comments and suggestions of Guido Calabresi, Andrew Koppelman, Kurt Lash, James Lindgren, and Eugene Volokh.

6.	<i>Libel</i> .....	45
7.	<i>Suffrage</i> .....	46
8.	<i>Free Elections</i> .....	46
9.	<i>One Person, One Vote</i> .....	47
10.	<i>No Right to Secession from the Union</i> .....	47
11.	<i>Arbitrary Power</i> .....	48
12.	<i>Federal Allegiance</i> .....	49
C.	Protection of Gun Rights and Clauses Bearing on the Military .....	49
1.	<i>State Constitutional Rights to Keep and Bear Arms</i> .....	50
2.	<i>The Right Not to Bear Arms</i> .....	54
3.	<i>Clauses Subordinating the Military to the Civil Power</i> .....	55
4.	<i>Clauses Forbidding Standing Armies</i> .....	56
5.	<i>Quartering Soldiers</i> .....	56
D.	Fourth Amendment Rights Against Unreasonable Searches and Seizures .....	57
1.	<i>Search and Seizure</i> .....	57
2.	<i>Warrants and Probable Cause</i> .....	58
E.	Criminal Procedure .....	58
1.	<i>Double Jeopardy</i> .....	59
2.	<i>Habeas Corpus</i> .....	59
3.	<i>Self-incrimination</i> .....	60
4.	<i>Right to Counsel</i> .....	61
5.	<i>Speedy trial</i> .....	62
6.	<i>Public trial</i> .....	62
7.	<i>Confrontation</i> .....	63
8.	<i>Obtain Witnesses</i> .....	63
9.	<i>Informed of Charges</i> .....	64
10.	<i>Other Miscellaneous Criminal Procedure Guarantees</i> .....	64
F.	Due Process .....	65
G.	Criminal and Civil Procedure Rights Borrowed from the Original Constitution .....	68
1.	<i>Ex Post Facto Laws</i> .....	68
2.	<i>Retroactive Civil Laws</i> .....	68
3.	<i>Bills of Attainder</i> .....	69
4.	<i>Corruption of Blood</i> .....	70
5.	<i>Impairment of Contracts</i> .....	70
6.	<i>Treason</i> .....	70
H.	Property Rights .....	71
1.	<i>Takings Clauses</i> .....	72
2.	<i>Monopolies</i> .....	73
3.	<i>Legal Recourse</i> .....	73

4.	<i>Suits Against the State</i> .....	75
5.	<i>Property Escheat</i> .....	75
6.	<i>Married Women</i> .....	75
7.	<i>Property as Supreme Right</i> .....	76
8.	<i>Suicide</i> .....	76
I.	Juries and Grand Juries .....	76
1.	<i>Criminal Jury</i> .....	76
2.	<i>Civil Jury</i> .....	77
3.	<i>Grand Jury</i> .....	78
4.	<i>By Information</i> .....	79
5.	<i>Martial Law</i> .....	80
6.	<i>Trial Within the State</i> .....	80
7.	<i>Impartial Judge</i> .....	80
8.	<i>Jury Determines Law and Fact</i> .....	81
J.	Rights Against Excessive Punishments .....	81
1.	<i>Excessive Bail</i> .....	81
2.	<i>Excessive Fines</i> .....	82
3.	<i>Cruel and Unusual Punishments</i> .....	82
4.	<i>Proportionality</i> .....	83
5.	<i>Prisoners Rights</i> .....	84
6.	<i>Penal Principles</i> .....	85
7.	<i>Sanguinary Laws</i> .....	85
8.	<i>Whipping</i> .....	85
9.	<i>Corporal Punishment</i> .....	86
10.	<i>Imprisonment for Debt</i> .....	86
11.	<i>Witness Detention</i> .....	86
K.	State Constitutional Acknowledgment of the Existence of Unenumerated or Natural Rights .....	87
1.	<i>State Constitutional Law Recognition of Natural and Inalienable Rights</i> .....	88
2.	<i>Fundamental Principles</i> .....	88
3.	<i>Ninth Amendment Analogs</i> .....	89
4.	<i>Tenth Amendment Analogs</i> .....	90
5.	<i>Is the Existence of Unenumerated Natural-Law Rights Itself Deeply Rooted in History and Tradition?</i> .....	91
L.	Right to Travel .....	92
1.	<i>Immigration</i> .....	92
2.	<i>Emigration</i> .....	93
3.	<i>Not Forfeit Residence</i> .....	93
M.	Equality Rights.....	94
1.	<i>Equal Protection of the Laws Clauses</i> .....	94

2.	<i>Privileges and Immunities Clauses</i> .....	96
3.	<i>Feudalism and Allodium</i> .....	97
4.	<i>Nobility</i> .....	98
5.	<i>Prohibit Slavery</i> .....	99
6.	<i>General Laws</i> .....	99
N.	State Constitutional Prohibitions of Certain Named Vices.....	100
1.	<i>Lotteries</i> .....	101
2.	<i>Dueling</i> .....	101
3.	<i>Alcohol</i> .....	102
O.	Government Structure.....	103
1.	<i>Separation of Powers</i> .....	103
2.	<i>Power to Suspend or Dispense With the Laws</i> .....	104
3.	<i>Taxes</i> .....	105
4.	<i>Right of Speech or Debate in the Legislature</i> .....	106
5.	<i>Privilege from Civil Process (for Legislators)</i> .....	106
6.	<i>Privilege from Arrest (for Legislators)</i> .....	106
7.	<i>Inviolable Constitution</i> .....	107
8.	<i>Uniform Government</i> .....	107
P.	Affirmative Rights to a Public-School Education and to Welfare.....	108
1.	<i>Duty to Provide a Public-School Education</i> .....	108
2.	<i>Other Affirmative Rights to Government Aid</i> .....	111
IV.	A Broad Look at Rights.....	113
A.	By Number of States.....	113
B.	By Population.....	114
V.	Discussion.....	114
VI.	Conclusion.....	119

## I. Introduction

Much of the academic writing about constitutional law and theory, both in the originalist and non-originalist camps, presumes that the Constitution protects at least some fundamental rights. Most originalists reject substantive due process and argue alongside Justice Hugo Black and former Judge Robert H. Bork that the only fundamental rights that are protected are the ones enumerated in the Constitution.<sup>1</sup> Other originalists such as Judge Michael McConnell have written that the Privileges or Immunities Clause of the Fourteenth Amendment protects both enumerated and unenumerated rights so long as those rights are deeply rooted in history and tradition.<sup>2</sup> The Supreme Court has shown some sympathy to this latter approach. In *Washington v. Glucksberg*,<sup>3</sup> the Justices declined to recognize a right to assisted suicide because they found such a right was not deeply rooted in our history and tradition.<sup>4</sup> A majority of the Court in *Glucksberg* thus adopted the approach to unenumerated rights advocated by Justice Antonin Scalia<sup>5</sup> in *Michael H. v. Gerald D.* Scalia argued for the protection of only those unenumerated rights that are deeply rooted in American history and tradition when viewed at the most specific level of generality identifiable.<sup>6</sup>

Other Supreme Court Justices have also argued for looking to history and tradition to determine what unenumerated rights, if any, the Fourteenth Amendment might protect. Thus, in *Moore v. City of East Cleveland*,<sup>7</sup> Justice Lewis Powell called for such an inquiry.<sup>8</sup> In *Bowers v. Hardwick*,<sup>9</sup>

---

1. See *Griswold v. Connecticut*, 381 U.S. 479, 509–10 (1965) (Black, J., dissenting) (“I get nowhere in this case by talk about a constitutional ‘right of privacy’ as an emanation from one or more constitutional provisions. . . . I am . . . compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.”); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 118 (1990) (objecting to the “vaporous” nature of substantive due process by arguing that “judge-created phrases specify no particular freedom, but merely assure us, in sonorous phrases, that they, the judges, will know what freedoms are required when the time comes”); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 666–67 (describing the originalist view of substantive due process).

2. See McConnell, *supra* note 1, at 692 (“If there is any textually and historically plausible authorization for the protection of unenumerated rights, it is to be found in [the Privileges or Immunities] Clause . . .”).

3. 521 U.S. 702 (1997).

4. *Id.* at 723.

5. *Id.* at 721 (“[W]e have required in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest.”); see *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (“In an attempt to limit and guide interpretation of the Clause, we have insisted not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.”).

6. *Michael H.*, 491 U.S. at 127 n.6.

7. 431 U.S. 494 (1977).

8. See *id.* at 503 (“Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful ‘respect for the teachings of history [and] solid recognition of

Justice Byron White declined to find a right to engage in sodomy in part because such a right was not deeply rooted in history and tradition.<sup>10</sup> Other Justices have said more vaguely that the only unenumerated rights the Fourteenth Amendment protects are those that are fundamental (Justice Frankfurter<sup>11</sup>) or that are implicit in the concept of ordered liberty (Justice Cardozo<sup>12</sup> and the second Justice Harlan<sup>13</sup>). Presumably any such rights that exist would have a long historical pedigree. It is possible but unlikely that fundamental rights or rights implicit in the concept of ordered liberty would not also be deeply rooted in our history and tradition.

All of this raises the question that we seek to address in this Article: Exactly what fundamental rights did most Americans recognize and enjoy when the Fourteenth Amendment was enacted into law in 1868? If, as Judge McConnell argues, the Privileges or Immunities Clause of that Amendment protects some unenumerated fundamental rights, exactly what such rights did most Americans have in 1868? Put another way, what were the privileges or immunities that most Americans had in 1868? To shed light on this question, we decided to look at state constitutional law. There were thirty-seven states in 1868 when the Fourteenth Amendment was ratified and all of them protected a list of individual rights in their constitutions. What fundamental rights were among those that were protected under state constitutional law in 1868? Did the rights protected include all of the rights in the federal Bill of Rights that were later incorporated to apply against the states? What about the four rights in the Bill of Rights that have not been incorporated? Were those rights protected under state constitutional law in 1868? Did any states in 1868 protect a right to privacy or to bodily autonomy or to freedom in matters of sexuality?

We will not seek to claim here that the question of what unenumerated rights, if any, the Fourteenth Amendment protects can be definitively answered solely by looking at state constitutional law in 1868, but we do think such an inquiry can help shed light on that question. There are clearly a number of fundamental rights, such as the liberty of contract and the rights to own and inherit property, that were protected at common law but for some reason never found their way into state constitutions. So long as those rights were very deeply rooted in our history and tradition, they may be among the rights Justice Bushrod Washington had in mind when he talked about which

---

the basic values that underlie our society.” (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (alteration in original)).

9. 478 U.S. 186 (1986).

10. *Id.* at 192 (“It is obvious to us that [there is no] fundamental right [of] homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots.”), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

11. *Louisiana v. Resweber*, 329 U.S. 459, 469–70 (1947) (Frankfurter, J., concurring).

12. *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937).

13. *Griswold*, 381 U.S. at 500 (Harlan, J., concurring in the judgment); *Poe v. Ullman*, 367 U.S. 497, 549 (1961) (Harlan, J., dissenting).

fundamental privileges or immunities were protected by Article IV, Section Two of the Constitution in his celebrated but vacuous opinion in *Corfield v. Coryell*.<sup>14</sup> (*Corfield* clearly inspired the framers of the Fourteenth Amendment even if the decision seems to offer little guidance to us today.)<sup>15</sup> But all of that is a subject for another day. What we seek to assert here is that if one assumes, as the Court did in *Glucksberg*, that the Fourteenth Amendment protects only those rights that are deeply rooted in history and tradition, then one plausibly good place to look for such rights is in state constitutions in 1868—the year the Fourteenth Amendment was ratified. Such an inquiry could even be said to shed light on the original public meaning of the Privileges or Immunities Clause, which may underpin the modern doctrine of substantive due process.<sup>16</sup>

The Supreme Court in recent years has frequently done nose counts or tallies of state law to determine the evolving meaning of the Eighth Amendment prohibition on cruel and unusual punishment. Recently, in *Roper v. Simmons*,<sup>17</sup> the Court overruled its decision in *Stanford v. Kentucky*<sup>18</sup> and found the death penalty for sixteen- and seventeen-year-olds to be unconstitutional.<sup>19</sup> The Court reached this conclusion in 2005 because thirty states had decided to outlaw the death penalty for juveniles<sup>20</sup> as compared to only twenty-five states that had outlawed that penalty in 1989.<sup>21</sup> The Court also recently did a nose count of states in *Atkins v. Virginia*,<sup>22</sup> where it held that the death penalty for the mentally impaired had become cruel and unusual punishment.<sup>23</sup> By the time of the *Atkins* decision, thirty

---

14. 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230) (describing fundamental rights as those involving “[p]rotection by the government, the enjoyment of life and liberty, . . . the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole”).

15. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 28 (1980) (“[T]he framers of the Fourteenth Amendment adverted repeatedly to an interpretation given its Article IV counterpart by Justice Washington, sitting alone on Circuit, in the 1823 case of *Corfield v. Coryell*.”).

16. See McConnell, *supra* note 1, at 693–96 (exploring the meaning the framers of the Fourteenth Amendment intended for the Privileges or Immunities Clause by examining court doctrine prevailing at the time the Amendment was written).

17. 543 U.S. 551 (2005).

18. 492 U.S. 361 (1989).

19. *Roper*, 543 U.S. at 568 (“A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.”).

20. Twelve states had outlawed the death penalty altogether, and an additional eighteen had maintained it for adults only. *Id.* at 564.

21. See *id.* at 565. *Roper* makes it clear that thirty states had eliminated the juvenile death penalty by 2005, and between 1989 and 2005, five additional states eliminated the juvenile death penalty. *Id.*; see also *Stanford*, 492 U.S. at 370 (finding that, as of 1989, thirteen states prohibited the death penalty entirely and twelve declined to impose it on anyone under eighteen).

22. 536 U.S. 304, 314–15 (2002).

23. *Id.* at 321.

states had abolished the death penalty for the mentally impaired.<sup>24</sup> The decision overruled the Court's 1989 decision in *Penry v. Lynaugh*,<sup>25</sup> where it had upheld the death penalty for the mentally impaired because, at that time, only sixteen states had outlawed that penalty.<sup>26</sup> The Supreme Court has also done nose counts of states in holding the death penalty unconstitutional for rape<sup>27</sup> and for felony murder.<sup>28</sup> Most recently, in 2008, the Court did a nose count of states in *Kennedy v. Louisiana*<sup>29</sup> to support its determination that imposing the death penalty for child rape is unconstitutional.<sup>30</sup>

In each of the above cases, the Court analyzed the case at hand as if the text of the Eighth Amendment—not the Fourteenth—was at issue, even though the cases all arose under the Fourteenth Amendment. Using a nose count of states is more straightforward under the words of the Eighth Amendment because the text of the Cruel and Unusual Punishment Clause arguably calls explicitly for a nose count of states by requiring an inquiry into whether a punishment has become “unusual.” It would be hard to answer that question without doing something like a nose count of state laws unless one wanted to argue that only punishments that were unusual in 1791 are forbidden. The Fourteenth Amendment is not so explicit. Strikingly, neither of the originalist Justices on the Supreme Court has been willing to rely solely on the original meaning of the words *cruel and unusual* in Eighth Amendment cases. They have both followed Chief Justice Warren's plurality opinion in *Trop v. Dulles*<sup>31</sup> when dissenting from recent decisions invalidating death penalty laws not because of the meaning the word “unusual” had in 1791 but because of the meaning that word has in enacted state law today.<sup>32</sup>

Focusing on *current* state constitutional law to determine what rights are deeply rooted in our history and tradition as a matter of substantive due process would obviously be mistaken. That being said, the Court did take account of recent changes in state law when it found a right to engage in sodomy in *Lawrence v. Texas*<sup>33</sup>—a case that Professor Calabresi has criticized as

24. *See supra* note 21.

25. 492 U.S. 302 (1989).

26. *Id.* at 334, 340.

27. *See Coker v. Georgia*, 433 U.S. 584, 595–96 (1977) (finding that Georgia was the only state that permitted the imposition of the death penalty for the rape of an adult woman).

28. *See Enmund v. Florida*, 458 U.S. 782, 792–93 (1982) (reasoning that the fact that “only a small minority of jurisdictions—eight—allow the death penalty to be imposed [for felony murder] . . . weighs on the side of rejecting capital punishment for the crime at issue”).

29. 128 S. Ct. 2641, 2651–52 (2008).

30. *Id.* at 2646.

31. 356 U.S. 86 (1958) (plurality opinion).

32. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 609 (2005) (Scalia, J., dissenting) (stating, along with Justice Thomas, that “words have no meaning if the views of less than 50% of death penalty States can constitute national consensus”).

33. 539 U.S. 558, 569–70 (2003).

having been wrongly decided.<sup>34</sup> But a nose count of what rights were protected under state constitutions in 1868 when the Fourteenth Amendment was adopted would arguably be at least relevant to the historical question of what rights are deeply rooted in our history and tradition. It could be used to shed light on the original public meaning of the Privileges or Immunities Clause. It certainly sheds light on what rights are deeply rooted in history and tradition for substantive-due-process purposes—an inquiry that the Supreme Court’s opinion in *Washington v. Glucksberg* seems to call for. This is important because the Supreme Court cites *Glucksberg* approvingly twice in *Gonzales v. Carhart*,<sup>35</sup> which is its most recent substantive-due-process decision.

We will make no normative claims in this Article about the significance for federal constitutional law today of our tally of state constitutional rights in 1868. Instead, we intend simply to positively describe state constitutional law at that time. Some may argue that the determination of what fundamental rights are protected by the Privileges or Immunities Clause of the Fourteenth Amendment or by substantive due process ought not to be accomplished by examining state constitutional law either in 1868 or today. These critics might say either that it is up to the Justices of the Supreme Court to say what fundamental rights the Fourteenth Amendment protects or, as Bork claims, that the Fourteenth Amendment protects only the rights in the Bill of Rights and nothing more.<sup>36</sup>

Assume for a moment, for the sake of argument, that the Privileges or Immunities Clause of the Fourteenth Amendment protects unenumerated rights that are fundamental, but that those rights can be overcome by a reasonable exercise of the police power, as Justice Washington’s opinion in *Corfield* explicitly says.<sup>37</sup> Would not an examination of state constitutional law in 1868 give you a rough picture of what individual rights people had such that exercise of the police power to overcome them would be unreasonable? We think it would. The *Corfield* opinion clearly implies that there are

---

34. Steven G. Calabresi, *Lawrence, the Fourteenth Amendment, and the Supreme Court’s Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L.J. 1097, 1102 (2004).

35. 550 U.S. 124 (2007).

36. See BORK, *supra* note 1, at 236 (arguing that the only defensible view is that “aside from incorporating the Bill of Rights, the due process clause of the fourteenth amendment was entirely a procedural guarantee and gave the Court no substantive powers”); see also ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 296 (1989). Bronner provides the testimony of Laurence Tribe, who stated that if Bork had been confirmed as the 106th Justice of the Supreme Court, he would have been the

first to read liberty as though it were exhausted by the rights the majority expressly conceded individuals in the Bill of Rights. He would be the first to reject an evolving concept of liberty and to replace it with a fixed set of liberties protected at best from an evolving set of threats.

*Id.*

37. *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3230).

unenumerated individual rights that are deeply rooted in history and tradition and constitutionally protected, but that can be overcome by general laws enacted for the good of the whole people. Transposed to the Fourteenth Amendment, this analysis could be understood to ask the Justices to do what they did in *Lochner v. New York*<sup>38</sup> and separate out reasonable from unreasonable exercises of the police power.<sup>39</sup> What better way to figure out which exercises of the police power the framers of the Fourteenth Amendment would have thought were reasonable or unreasonable at the constitutional level than by looking at state constitutions in 1868? If the Fourteenth Amendment commands that state laws be reasonable as *Lochner* said—and that is a very big if—why not look for the answer to that question in state constitutions in 1868? Surely that is more principled than the alternatives of either deferring to any state law so long as it is barely rational or giving the elite, life-tenured Justices of the Supreme Court the power to create new individual fundamental rights.

But whatever one concludes normatively, it is surely clear that a summary of individual rights under state constitutional law in 1868 is at least interesting as a matter of our constitutional history. That is the premise that underlies our Article, and it is for that reason that we present here a tally of what individual rights were protected—and to what degree—under state constitutions in 1868.

We placed the protected rights in five categories. The first category consists of those individual rights that were recognized by three-quarters or more of the states in 1868. These rights would seem to be especially deeply rooted in history and tradition because three-quarters is the number of states that Article V sets as the threshold consensus necessary for the making of federal constitutional law. The “rule of recognition” under Article V is two-thirds of both houses of Congress and three-quarters of the states.<sup>40</sup> Arguably, rights protected by less than three-quarters of the states in 1868 were not believed to be fundamental and are not deeply rooted in history and tradition. Some, however, will undoubtedly feel that a consensus of three-quarters of the states in 1868 sets the bar way too high, so we also look at four lesser degrees of consensus. Accordingly, we also asked how many individual rights were protected by two-thirds of the states; how many were recognized by a simple majority; how many were recognized by one-quarter or more; and finally, how many rights were recognized by less than one-quarter of the states in 1868. In so doing, we hope to present our data in a

---

38. 198 U.S. 45 (1905).

39. *See id.* at 53–56 (chronicling precedent that defined the reasonable exercise of police power).

40. *See generally* H.L.A. HART, *THE CONCEPT OF LAW* 94–95 (2d ed. 1994) (introducing the concept of a “rule of recognition,” meaning a feature of a given rule that acts as an affirmative indication that the rule is generally supported).

form that will allow others to more readily make whatever normative claims they want to make about the significance of our findings.

In addition to determining what rights were protected by which state constitutions in 1868, we have also asked what percentage of the American people at that time lived in states that protected each specific right. In other words, for example, if right *X* was protected by three-quarters of the states in 1868, we have determined what percentage of Americans living in 1868 lived in the states where right *X* was protected. This number obviously could be higher or lower than 75% of the national population at that time. Article V of the federal Constitution requires a consensus of two-thirds of both houses of Congress in addition to three-quarters of the states to make federal constitutional law. The requirement that two-thirds of the popularly elected House of Representatives concur before federal constitutional law can be made reflects the idea that no new constitutional law ought ever to be fashioned without supermajority support among the population as well as supermajority support among the states. By looking at populations living in states where certain rights are protected, we allow future authors to take account of this concern.

Third, we have looked at three major regions of the United States—the Northeast, the South, and the Midwest–West—to see if certain rights were more widely recognized in one region or another in 1868.<sup>41</sup> Finally, we have grouped state constitutions into constitutions that were older in 1868 (i.e., those that were promulgated before 1855) and those that were more recent (i.e., those that went into effect after 1855). Arguably a right that was only thirteen years old in 1868 might not yet have been viewed as fundamental. Charting the rise and fall of references to rights over time may be relevant to the question of what rights the Supreme Court ought to recognize today. We picked 1855 as the dividing line between old and new state constitutions because half of the thirty-seven state constitutions were ratified before 1855, and half of them were ratified after 1855. This symmetry allowed us to more easily compare trends.

Supreme Court Justices diverge on the question of how to determine what rights are fundamental for substantive-due-process purposes, but the prevalence of rights in state constitutional law over time could, at least in theory, provide a rough benchmark of how deeply rooted a right is. The rights in the federal Constitution closely track those in state constitutions,

---

41. We grouped the Midwestern and Western states together in our analysis because there were only three Western states in 1868: California, Nevada, and Oregon. Our initial calculations for the West, which was analyzed separately from the Midwest, were not terribly probative because of the small sample size. In other words, the fact that there were only three states made it difficult to generalize about “the West” in a meaningful way. Combining the Midwestern and Western states provides the benefit of more valid generalizations about trends in constitutional rights at the cost of potentially losing some interesting information about actual variations between these two regions. Separate data on the West and Midwest were retained by the authors and can be made available upon request.

and many Americans have lived for centuries with these rights and come to regard them as enduring guarantees. There are those who think that the law is what it has been in practice over a long period of time.<sup>42</sup> One may disagree with that Burkean view, but it must surely be the case that a right or practice that was widespread 140 years ago and that remains enshrined in Supreme Court Fourteenth Amendment case law today is an unlikely candidate to be struck down anytime soon. Rights, such as freedom of speech, that were protected by all thirty-seven state constitutions in 1868—and are still protected today—would seem to us to be at least plausible candidates for protection as fundamental rights under the Fourteenth Amendment.

This Article then provides a list of all of the individual rights (and a few of the structural limits on government enacted for the particular benefit of individuals) that were enumerated in the thirty-seven individual state constitutions in place in 1868. In total, an astonishing 102 different rights were guaranteed by the states at that time. Uncovering and categorizing these rights allows a fascinating picture of American liberties to emerge. Both the unanticipated degree of consensus and the telling divergences between states provide fodder for modern debates as to the scope of fundamental constitutional rights. We think this information is potentially useful in understanding substantive due process, in predicting the fate of the few remaining incorporation questions (because incorporation has occurred through substantive due process<sup>43</sup>), in reframing our thinking about clauses assumed to be purely concerned with federalism,<sup>44</sup> or simply in more vividly depicting American citizenship in 1868 and shedding light on American legal history. Our core aim, however, is to provide a descriptive account of what the evidence here shows and not to make any normative claims as to what the evidence implies. That is a question we will leave for another day.

## II. Methodology

Because our historical analysis here depends on the accuracy and thoroughness with which we have compiled our data, it is appropriate to start

---

42. See, e.g., Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 511, 510–11 (1996) (arguing for a mode of jurisprudence of Burkean conventionalism by which judges should interpret text by seeking out “not the original meaning but the conventional meaning—the consensus view about the meaning in the legal community of today”); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356, 355–56 (2006) (noting that some individuals believe that courts should be “closely attentive to entrenched practices” when construing the Constitution).

43. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment rights of free speech and free press). The rights in the Bill of Rights that have not been incorporated include the Second Amendment right to bear arms, the Third Amendment protection against quartering soldiers, the Fifth Amendment right to a grand jury, and the Seventh Amendment right to a jury in civil trials.

44. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 20–22, 32–42, 119–24 (1998) (describing, for example, the rights of speech and press; the protection against state establishment of religion; and the Ninth and Tenth Amendments [the “popular sovereignty” Amendments] as purely or primarily populist, federalist protections).

by providing a detailed account of the method used to generate the results reported below. This method involved three steps: collecting, counting, and categorizing.

### A. *Collection*

The first step was to obtain copies of the thirty-seven state constitutions that were in effect in 1868, the year the Fourteenth Amendment to the United States Constitution was ratified and declared to be part of the Constitution. We chose to look at the state constitutions that were closest in time to 1868 without being later. For example, if a state passed constitutions in 1860 and 1870, we used the 1860 constitution for our analysis even though 1870 was closer in time to 1868. The reason is that we wanted to understand what rights the people of each state were legally entitled to as a matter of positive state law at the time the Fourteenth Amendment was drafted and enacted.<sup>45</sup>

Next we both separately and jointly examined each state constitution closely, and we then coded each right or clause denying a right<sup>46</sup> into a comprehensive database. We recorded the data by state, by the year in which the constitution was adopted, and by the location of the right or denial of a right within the constitution, and we included the entire positive-law constitutional text that recognized the right or denied the right in question. The data were then grouped by individual, state constitutional rights, so that similar rights from the thirty-seven states that were members of the Union in 1868 could be grouped together. The authors then thoroughly reviewed the complete database to ensure its accuracy.<sup>47</sup>

### B. *Counting*

We then counted the number of state constitutions that textually enumerated each individual right or denial of a right. We calculated the number of states, out of thirty-seven, needed to constitute, respectively,

---

45. This sometimes led to the use of constitutions that were ratified much earlier than the others. *See, e.g.*, CONN. CONST. of 1818. Despite potential differences that are a direct function of being ratified in different eras, we felt that it was important not to use constitutions that were not in place in 1868. However, to draw out these potential differences, part of our analysis involved comparing the newer constitutions with the older ones.

46. In addition to individual rights, we also coded clauses that contained relevant structural limitations (e.g., requirements that state governments act only consistently with the separation of powers, and Ninth Amendment analogs) where those structural limitations were most obviously designed to protect individual rights. We also noted the absence of, for example, a right to gamble or to duel, reflected by constitutional clauses that banned lotteries or dueling. Finally, we counted specific constitutional acknowledgments of rights, such as the right to bring a libel suit, that the Supreme Court has found in modern times to be constrained by the First Amendment. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 278–79 (1964). Our coding thus takes account not only of rights recognized under positive state constitutional law in 1868 but also of rights that might have been recognized but were not.

47. *See* Individual Rights Appendix (on file with authors), available at <http://www.utexas.edu/law/journals/tlr/issues/archive>. From the *Texas Law Review* archives home page, click the link for *Volume 87*, then the link for *Issue 1*. From there, click the link for this Article.

three-quarters of the thirty-seven states in the Union in 1868, two-thirds of those states, a majority of those states, one-quarter of those states, and less than one-quarter of those states. We then grouped the rights into each of these five categories. The idea underlying this nose count of states was that the larger the number of states that recognized a right, the more likely it was that the right was considered to be fundamental in 1868 and thus that it is deeply rooted in our history and tradition. Because of the enormous amount of data involved, we looked only at rights textually enumerated in state constitutions and not at state court opinions construing those clauses. That project would be a valuable, if not essential, one to undertake in the future.

We also created other groupings to shed light on the question of what rights were deemed to be fundamental in 1868 such that they might today be considered to be deeply rooted in our history and tradition. Thus, as mentioned above, we calculated what percentage of the total U.S. population at the time lived in states where the particular constitutional guarantee in question was recognized.<sup>48</sup> We also sorted the rights according to geographic region—Northeast, South, and Midwest–West.<sup>49</sup> We wanted to know, for example, whether gun rights were recognized more widely in some geographic regions in 1868 than in others. This might go to the question of whether there was a broad federal consensus recognizing a particular right.

Finally, as mentioned above, we sorted the rights by date of enactment of the relevant state constitution to figure out which state constitutional rights were relatively “new” in 1868 and which were “old.” This allowed us to determine whether each right became more or less pervasive in the years leading up to 1868. It seemed important to us to separate out those state constitutional rights that were relatively new in 1868 from those that dated back to the founding of the republic. Arguably, a constitutional right that three-quarters of the states recognized in 1868 might not have been deemed to be

---

48. This was done by obtaining a population census from 1870 for each state and multiplying the states in which each right was guaranteed by their respective populations. In 1870, there were 38,115,641 people in the United States. The breakdown of population by state was as follows: Alabama, 996,992; Arkansas, 484,471; California, 560,247; Connecticut, 537,454; Delaware, 125,015; Florida, 187,748; Georgia, 1,184,109; Illinois, 2,539,891; Indiana, 1,680,637; Iowa, 1,194,020; Kansas, 364,399; Kentucky, 1,321,011; Louisiana, 726,915; Maine, 626,915; Maryland, 780,894; Massachusetts, 1,457,351; Michigan, 1,184,059; Minnesota, 439,706; Mississippi, 827,922; Missouri, 1,721,295; Nebraska, 122,993; Nevada, 42,491; New Hampshire, 318,300; New Jersey, 906,096; New York, 4,382,759; North Carolina, 1,071,361; Ohio, 2,665,260; Oregon, 90,923; Pennsylvania, 3,521,951; Rhode Island, 217,353; South Carolina, 705,606; Tennessee, 1,258,520; Texas, 818,579; Vermont, 330,551; Virginia, 1,225,163; West Virginia, 442,014; Wisconsin, 1,054,670. Univ. of Va. Library, Historical Census Browser, <http://fisher.lib.virginia.edu/collections/stats/histcensus/php/start.php?year=V1870>.

49. The categorization of states by region is as follows: *Northeast* (ten states, population 12,423,745)—Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont; *Midwest–West* (twelve states, population 11,939,296)—California, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Nebraska, Nevada, Ohio, Oregon, Wisconsin; and *South* (fifteen states, population 13,752,600)—Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Texas, Virginia, West Virginia.

fundamental if the only state constitutions recognizing that right were merely thirteen years old at the time. Alternatively, one could argue that a right that was recognized by a consistently increasing number of states is more deeply rooted than a right that became less pervasive over time.<sup>50</sup>

### C. *Categorizing*

We found a very large number of individual positive-law rights under state constitutional law in 1868. Because we found so many rights that were recognized, we thought it necessary to group the rights into substantive categories for purposes of presenting our results below. We ended up grouping the rights in question into the following sixteen categories: (1) rights involving religion, including establishment-clause and free-exercise-clause rights; (2) rights of political participation, including freedom of the press, freedom of speech, and rights to assemble, associate, and petition; (3) rights involving access to guns or bearing in some way on the military, such as rights conferred by forbidding the quartering of soldiers in private homes or by banning standing armies; (4) individual rights to a particular kind of government structure, such as a guarantee that no official shall exercise at the same time legislative, executive, and judicial powers; (5) rights analogous to those protected by Article I, Section Ten of the federal Constitution, such as rights to be free from ex post facto laws, bills of attainder, or laws impairing the obligation of contracts; (6) rights analogous to those in the federal Fourth Amendment protecting, for example, against unreasonable searches and seizures; (7) rights analogous to the various other criminal-procedure guarantees of the federal Bill of Rights; (8) rights analogous to the federal Eighth Amendment prohibitions on excessive fines, bail, and the imposition of cruel and unusual punishments; (9) rights to jury trials in criminal or civil cases and to grand juries for indictment; (10) clauses protecting rights to private property in any way; (11) rights akin to what we know today as equal protection of the laws; (12) rights to not be deprived of life, liberty, or property without due process of law; (13) rights to travel either into or out of a particular state; (14) rights to an education in a public school or to other forms of positive government assistance or welfare that were implied by the imposition of an obligatory duty on the state to provide the benefit in question; (15) clauses discussing what were regarded in 1868 as prohibitable vices; and finally, and most tellingly, (16) arguable recognitions in positive state constitutional law in 1868 of natural law as a source of rights.

These groupings are intended to make the information presented below more accessible, and we do not mean to suggest or imply any normative arguments for the underlying importance or meaning of the rights by the categorizations we have used here. We recognize that many of the

---

50. See *Roper v. Simmons*, 543 U.S. 551, 566 (2005) (“It is not so much the number of these States that is significant, but the consistency of the direction of change.” (quoting *Atkins v. Virginia*, 536 U.S. 304, 315 (2002))).

rights we discuss here could easily be argued to fall into several of the categories, or even into new categories, depending on the interests and the understanding of the reader. Here, then, are our findings.

### III. The Data on State Constitutional Rights in 1868

The sixteen different categories in which we found individual, positive-law state constitutional rights appear below. For each right, we discuss: (1) how many states recognized the right; (2) what proportion of the total population lived in states recognizing the right; (3) regional variations in the recognition of the right; and (4) which rights were relatively new in 1868 and which were older and more established. For each right, where possible, we try to provide sample language typically used to describe or declare the right. For each right, there is a corresponding appendix that contains the full text of each constitution's relevant clause granting that right.<sup>51</sup> These are grouped loosely according to the sixteen topics they address.

The following graphs summarize some of our most important or striking findings.

---

51. The full appendix is on file with the authors and with the Texas Law Review. *See supra* note 47.

Figure 1: State Rights with Federal Analogs (by Number of States)

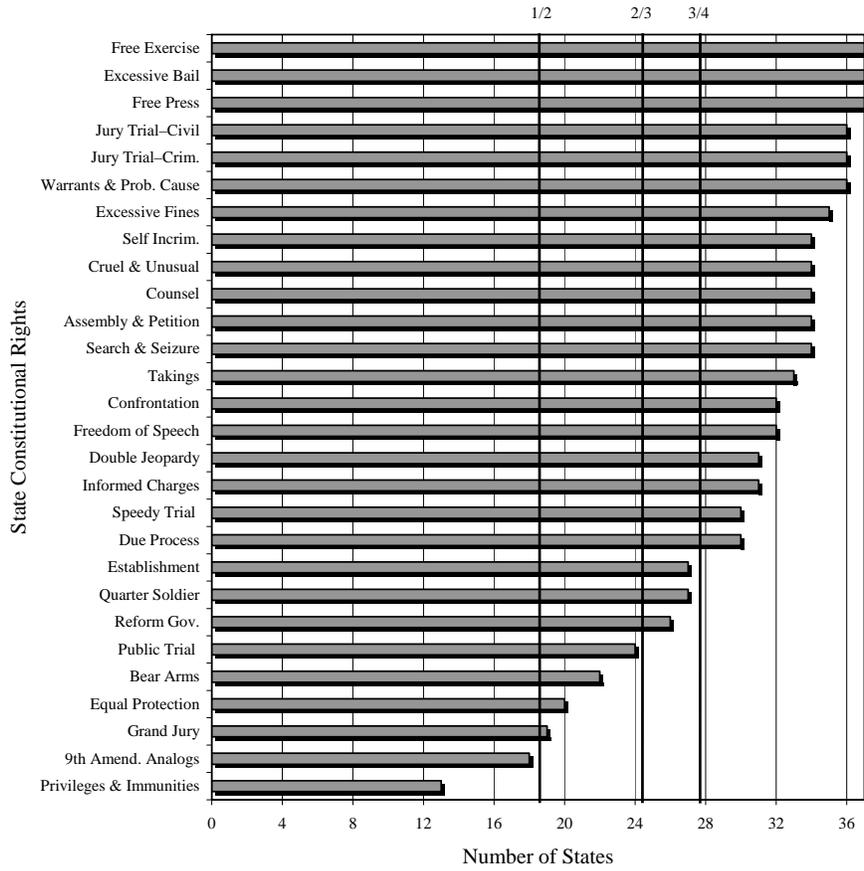


Figure 2: State Rights with Federal Analogs (by Population)

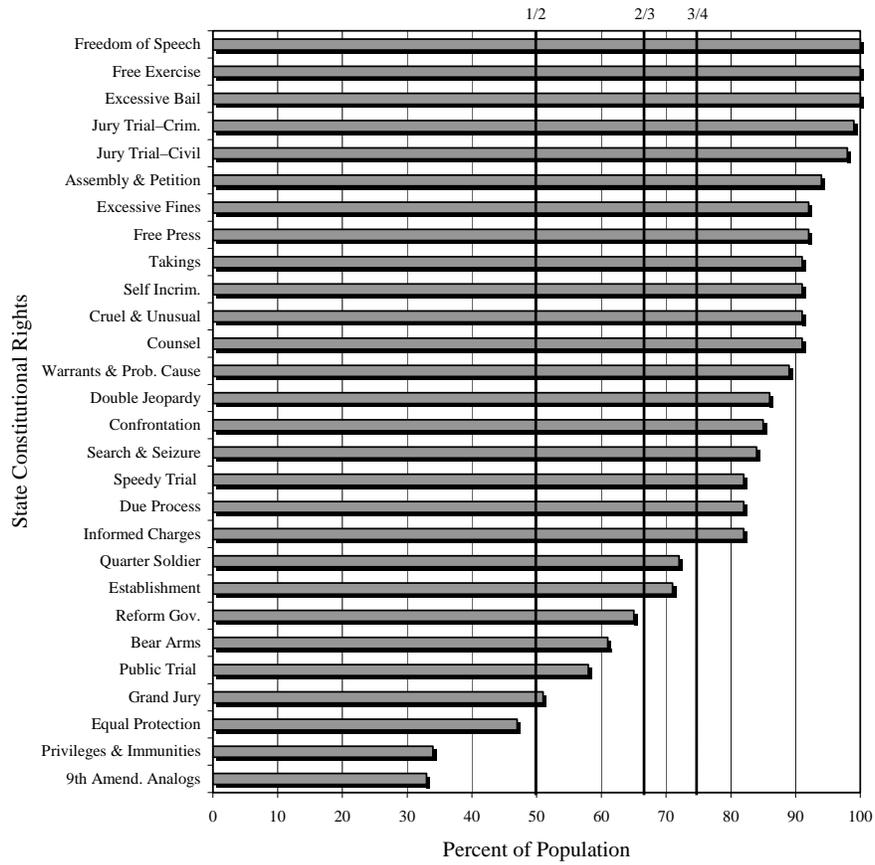


Figure 3: State Rights Without Federal Analogs (by Number of States)

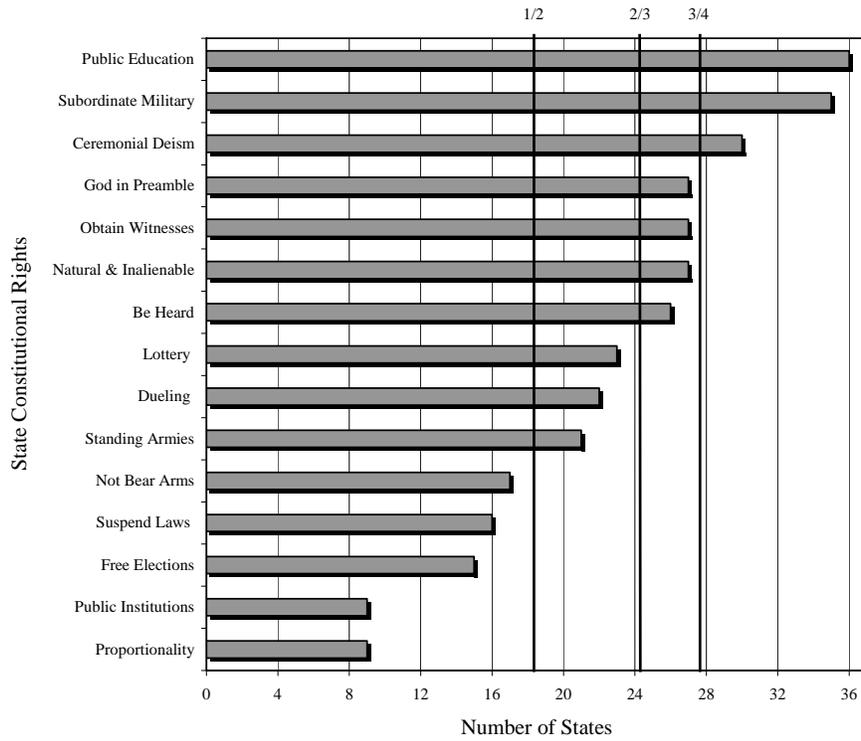


Figure 4: State Rights Without Federal Analogs (by Population)

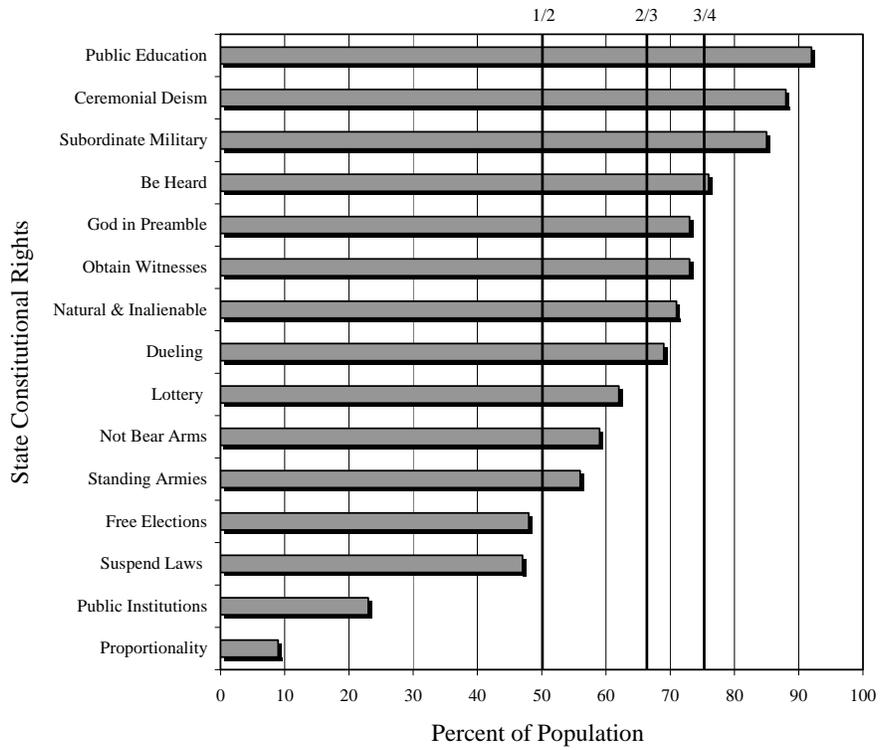


Figure 5: Time Trends of State Rights with Federal Analogs

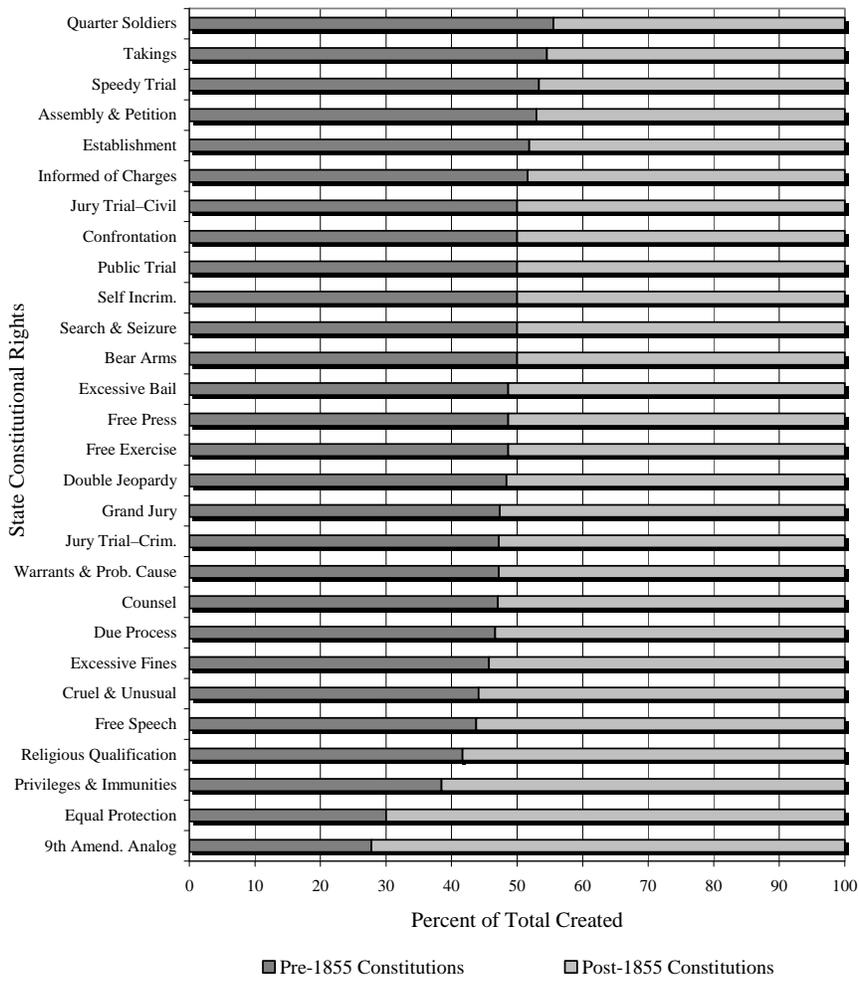


Figure 6: Time Trends of State Rights Without Federal Analogs

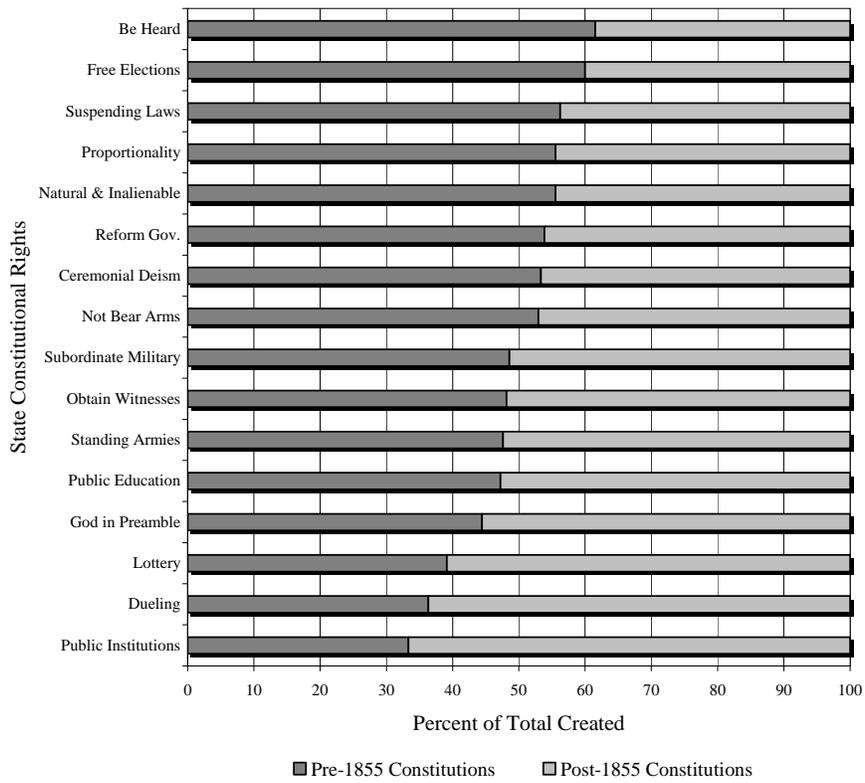


Figure 7: Regional Trends in State Rights with Federal Analogs

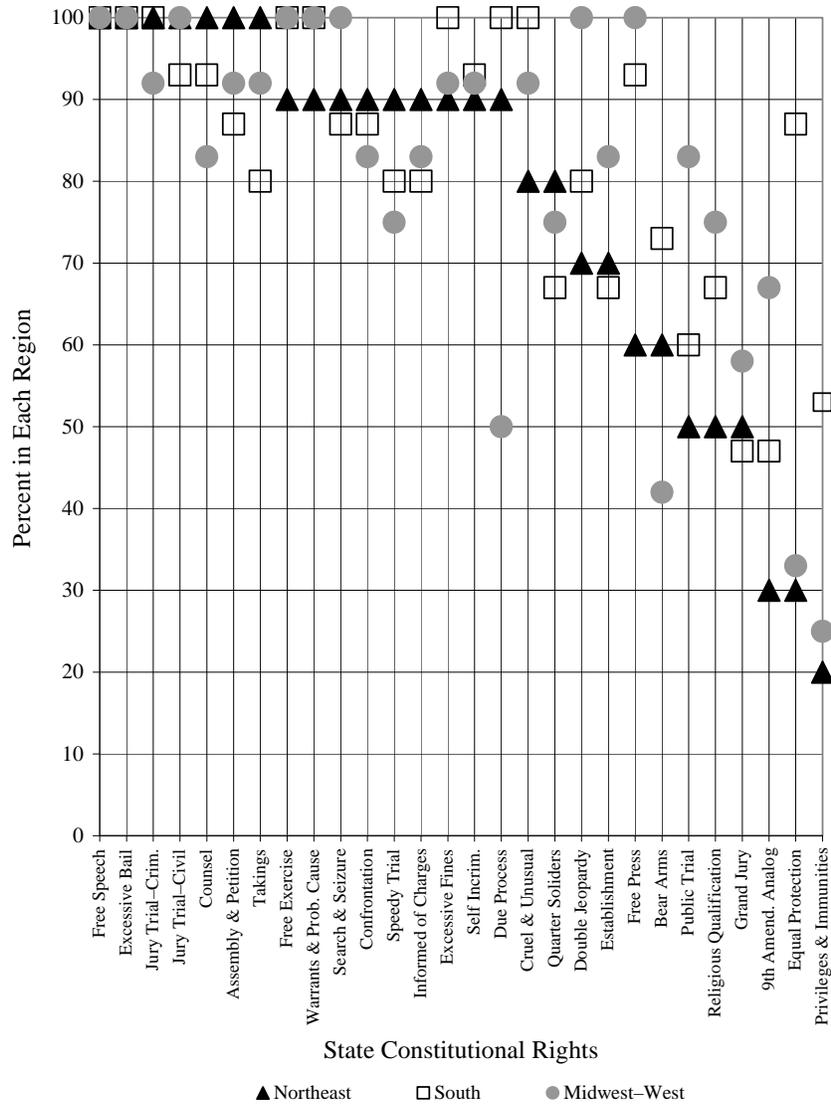
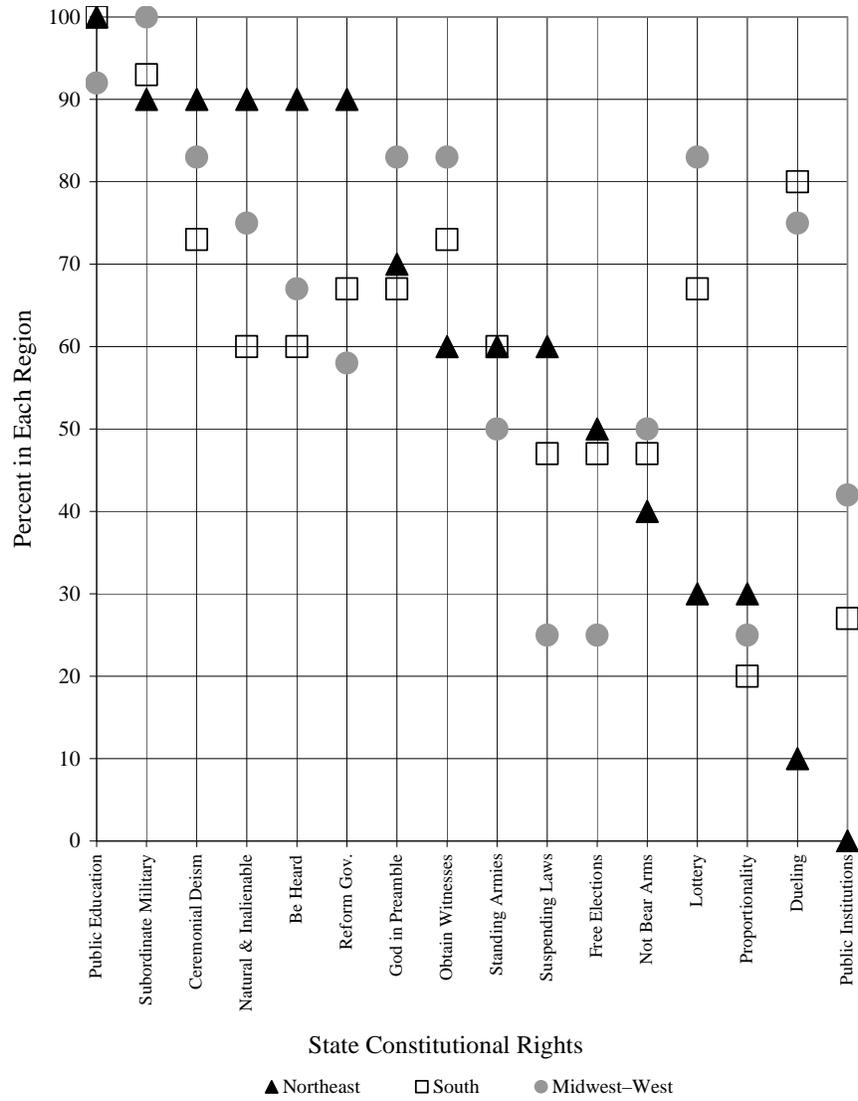


Figure 8: Regional Trends in State Rights Without Federal Analogs



### A. *Rights Bearing on Religion*

The first of our sixteen categories of rights found in the thirty-seven state constitutions in 1868 are rights bearing on the subject of religion. This is appropriate because the religion clauses of the federal First Amendment are the first rights to appear in the federal Bill of Rights.<sup>52</sup> Religious freedom had been a central issue in the English Glorious Revolution of 1688,<sup>53</sup> and it was of central concern to the framers and ratifiers of the federal Bill of Rights as well.<sup>54</sup> It occupied a similarly exalted status in state bills of rights in 1868. The Free Exercise Clause was first applied to the states through its incorporation into the Fourteenth Amendment as a matter of substantive due process in *Cantwell v. Connecticut* in 1940.<sup>55</sup> The Establishment Clause was first incorporated and applied to the states as a matter of substantive due process in *Everson v. Board of Education* in 1947.<sup>56</sup> However, we found that most states already included analogs to both clauses in their state constitutions well before the Supreme Court incorporated them.<sup>57</sup> Such widespread replication of First Amendment rights at the state level in 1868 might suggest that the rights embodied in the First Amendment are fundamental. The question of their scope and meaning, in both state constitutions and our federal Constitution, is still largely up for debate.<sup>58</sup>

1. *Establishment Clause Analogs.*—Twenty-seven states—or two-thirds of the thirty-seven states that formed the United States in 1868—had clauses in their constitutions that, in our view, explicitly prohibited the establishment

---

52. The First Amendment of the Bill of Rights was actually the third of twelve amendments proposed by Congress. See AMAR, *supra* note 44, at 20 (“The First Congress’s first two proposed amendments offer an illuminating perspective on its Third (our First) Amendment.”). The first two were not ratified in 1791 but the last ten were. *Id.* at 8. Those ten amendments then became the Bill of Rights. One of the two unratified amendments was subsequently ratified in 1992 and became the Twenty-Seventh Amendment of the Constitution. *Id.* at 17. It could thus be argued that the Congress that proposed the Bill of Rights did not intend religious rights to come first. Of course, it can be equally well maintained that the ratifiers of the Bill of Rights disagreed, and that they determined that religious rights would come first. In any event, for whatever reason, it is a fact that the Bill of Rights, which Americans have venerated for two centuries, begins with rights bearing on religious freedom.

53. ENCYCLOPEDIA OF RELIGIOUS FREEDOM 115–16 (Catharine Cookson ed., 2003).

54. CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION: A DOCUMENTARY HISTORY 318–19 (John J. Patrick & Gerald P. Long eds., 1999).

55. 310 U.S. 296, 303 (1940).

56. 330 U.S. 1, 15 (1947).

57. For a recent history of Supreme Court case law concerning the religion clauses, see generally Jesse H. Choper, *A Century of Religious Freedom*, 88 CAL. L. REV. 1709 (2000). Choper contends that the federal Judiciary did not hold a substantial role in interpreting the religion clauses until the last hundred years. *Id.*

58. For an excellent overview of the distinct views of the framers regarding the proper relationship between religion and government, see LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 1158–60 (2d ed. 1988). There, Tribe summarizes the “evangelical view,” the “Jeffersonian view,” and the “Madisonian view.” *Id.*

of a state religion. Typical establishment clauses provided, “No subordination nor preference of any one sect or denomination to another shall ever be established by law.”<sup>59</sup> Some clauses were less explicit, prohibiting establishment by preventing the government from forcing citizens to financially support any specific religion.<sup>60</sup>

There was thus a broad consensus in 1868 in favor of nonestablishment in state constitutional law, but the consensus fell one state short of the three-quarters consensus required by Article V of the federal Constitution to make federal constitutional law. It is striking that so many states in 1868 had clauses in their state constitutions prohibiting the establishment of religion and implying that freedom from an establishment was an individual fundamental right and not a collective-federalism state right against the national government. This evidence strongly supports Professor Kurt Lash’s argument that even if the federal Establishment Clause in 1791 was originally meant as a federalism device to protect against established state churches, by 1868 the ratifiers of the Fourteenth Amendment would have thought that freedom from a religious establishment was an individual fundamental right or privilege or immunity.<sup>61</sup> If so, Justice Clarence Thomas’s argument that the Establishment Clause ought never to have been incorporated may turn out to be wrong, because by 1868 most Americans thought of nonestablishment as a matter of individual rights and not federalism.<sup>62</sup> Most Americans in 1868 would have thought that their privileges or immunities included an individual right to be free from a religious establishment.

Looking at the right to be free from a religious establishment in terms of what percentage of the population lived in states that forbade religious establishments, we found that a staggering 71% of the population lived in such states—an overwhelming supermajority. This seems like compelling evidence in support of a Fourteenth Amendment rule of state nonestablishment as a matter of individual right.

---

59. *E.g.*, ME. CONST. of 1819, art. I, § 3.

60. *E.g.*, MICH. CONST. of 1850, art. IV, § 39 (“The legislature shall pass no law to . . . compel any person to attend, erect, or support any place of religious worship, or to pay tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion.”).

61. *See* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1099–1100 (1995) (asserting that if, by 1868, “the words of the Establishment Clause had been reinterpreted to express the principle that no person should be subject to state-imposed religious establishments,” then “it would not have been illogical for the framers of the Fourteenth Amendment to expect its incorporation”).

62. *See* *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring). Justice Thomas wrote that the provision does not on its face limit states with regard to religion. *Id.* Rather, he argued, “The Establishment Clause originally protected States, and by extension their citizens, from the imposition of an established religion by the Federal Government. Whether and how this Clause should constrain state action under the Fourteenth Amendment is a more difficult question.” *Id.* (citation omitted); *see also* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring) (“I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation.”).

There was substantial regional variation in the prevalence of establishment clauses. Establishment of religion was prohibited in 83% of Midwestern–Western state constitutions, in 70% of Northeastern state constitutions, and in 67% of Southern state constitutions. Finally, establishment clauses were found in 78% of the pre-1855 constitutions and 68% of the post-1855 constitutions. This is surprising in light of other evidence that Americans after the Civil War were more religious than they had been in the early years of our constitutional republic.<sup>63</sup> Interestingly, two states in 1868, Massachusetts and New Hampshire, not only permitted the establishment of a religion but explicitly established Christianity<sup>64</sup> and Protestantism,<sup>65</sup> respectively. Connecticut did a little bit of both, in one clause prohibiting establishment by banning compelled support or association with any church,<sup>66</sup> and in another establishing, or at least providing special recognition of, Christianity.<sup>67</sup> Ten states in 1868 thus either did not have establishment clauses or, in two cases, still explicitly established a state religion.

2. *Free Exercise.*—The Free Exercise Clause was first applied to the states through Fourteenth Amendment substantive due process in *Cantwell v. Connecticut* in 1940.<sup>68</sup> However, all thirty-seven state constitutions in 1868 already guaranteed the right to the free exercise of one’s religion, albeit in words that were arguably somewhat more watered-down than the words of the federal Free Exercise Clause. A typical state constitutional free exercise clause read, “That no person shall be deprived of the right to worship God according to the dictates of his own conscience.”<sup>69</sup>

These thirty-seven free-exercise-clause analogs contained extremely interesting variations in their wording that are worth further categorization and analysis. Our federal Constitution guarantees the free “exercise” of religion,<sup>70</sup> but the vast majority of state constitutions in 1868

---

63. See, e.g., ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA, 1776–1990*, at 15–16 (1992) (finding the rate of religious adherence in America to be 17% before the American Revolution and 35% shortly after the Civil War).

64. MASS. CONST. of 1780, pt. 1, art. III (authorizing a form of the establishment of religion, namely the use of government funds to support and maintain public Protestant teachers, but providing that all denominations of Christianity be equal under the law).

65. N.H. CONST. of 1784, pt. I, art. VI (authorizing the use of government funds to support and maintain public Protestant teachers, a form of the establishment of religion).

66. CONN. CONST. of 1818, art. VII, § 1 (“[N]o person shall by law be compelled to join or support, nor be classed with, or associated to, any congregation, church, or religious association . . .”).

67. CONN. CONST. of 1818, art. I, § 4 (“No preference shall be given by law to any Christian sect or mode of worship.”).

68. 310 U.S. 296, 303 (1940).

69. E.g., ALA. CONST. of 1867, art. I, § 4.

70. U.S. CONST. amend. I.

guaranteed seemingly narrower rights to freedom of “worship,”<sup>71</sup> “profession,”<sup>72</sup> “opinion,”<sup>73</sup> and “belief.”<sup>74</sup> Freedom of worship might include the ability of Native Americans to ingest peyote during religious rituals,<sup>75</sup> but it would not necessarily protect Amish parents from having to send their children to school<sup>76</sup> or protect a church from a historic preservation law.<sup>77</sup> Specifically, thirty-five states in 1868—more than a three-quarters, Article V consensus—had freedom-of-*worship* clauses, but only three states had free *exercise* clauses, with one state, Maryland, having both. The differences between these various wordings of religious-rights clauses could have significant ramifications for religious rights. For example, the predominant freedom-of-worship clauses may not protect religiously motivated actions taken outside of religious ceremonies of worship. If so, this finding would suggest that Justice Scalia’s reading of the free exercise right in *Employment*

71. *E.g.*, S.C. CONST. of 1868, art. I, § 9 (“No person shall be deprived of the right to worship God according to the dictates of his own conscience . . .”). Noah Webster’s authoritative 1828 dictionary offers the following definitions that may shed light on the original meaning of the word *worship*. *Worship* is defined as “[t]o perform acts of adoration, [t]o perform religious services.” The example given is from John 4:20: “Our fathers worshipped in this mountain.” NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). The word *worship* derives from the noun *wurrshipe*, which in 1200 meant “condition of being worthy, distinction, honor” with “[t]he meaning of respect or honor shown to a person or thing . . . first recorded in Old English (about 1000) and that of reverence or veneration paid to a being regarded as supernatural or divine in *Cursor Mundi* (before 1325).” THE BARNHART DICTIONARY OF ETYMOLOGY 1245 (Robert K. Barnhart & Sol Steinmetz eds., 1988).

72. *E.g.*, CONN. CONST. of 1818, art. I, § 3 (“The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in this State . . .”).

73. *E.g.*, IND. CONST. of 1851, art. I, § 3 (“No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience.”).

74. *E.g.*, R.I. CONST. of 1842, art. I, § 3 (“[W]e therefore declare that no man shall . . . otherwise suffer on account of his religious belief . . .”). In Webster’s 1828 dictionary, *profession* is defined in the same dictionary as “[o]pen declaration; public avowal or acknowledgment of one’s sentiments or belief; as in professions of friendship or sincerity; a profession of faith or religion.” NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). In turn, Barnhart says that the verb *profess* originally meant to “declare openly, avow, acknowledge. Before 1333 *professen* to take the vows of a religious order . . .” THE BARNHART DICTIONARY OF ETYMOLOGY 844 (Robert K. Barnhart & Sol Steinmetz eds., 1988). The Latin origin of the word is “pro- + *fateri*,” which means “utter, declare, disclose.” *Id.*

75. *See Employment Div. v. Smith*, 494 U.S. 872, 878–89 (1990) (holding that a generally applicable criminal law prohibiting peyote use did not violate free exercise precepts).

76. *See Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (holding that the state’s interest in universal education is subject to a balancing test against parents’ interests, protected by the First Amendment, to control the religious upbringing of their children).

77. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (holding that Section Five of the Fourteenth Amendment does not give Congress the power to alter the meaning of the Free Exercise Clause, and therefore upholding a city ordinance limiting a church’s ability to obtain a building permit).

*Division v. Smith*<sup>78</sup> may be more on the mark than Judge McConnell's reading of that right in McConnell's scholarship.<sup>79</sup>

It is very interesting in light of the Scalia–McConnell debate that five state constitutions in 1868 also specifically prohibited the diminishing or enlarging of individual rights based on a person's religion. These clauses were generally written as follows: “That the civil rights, privileges, or capacities of any citizen shall in no wise be diminished or enlarged on account of his religion.”<sup>80</sup> These clauses could be read to render laws such as the Religious Freedom Restoration Act<sup>81</sup> (RFRA) unconstitutional because such laws enlarge rights and privileges on account of religion. Another interesting finding among the state free exercise clauses is that fifteen states, or 41%, contained explicit public-peace-and-safety exceptions to free exercise rights. A typical such exception stated, “[T]he liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.”<sup>82</sup> This too lends support to Justice Scalia's position in *Smith*.

Many free exercise clauses contained language that to modern ears seems incongruous because it emphasizes the importance of religion over nonreligion; the free exercise of atheism was certainly not contemplated by the majority of these states. Delaware, for instance, protected the free exercise of religion “[a]lthough it is the duty of all men frequently to assemble together for the public worship of the Author of the universe, and piety and morality, on which the prosperity of communities depends, are thereby promoted.”<sup>83</sup> This decision not to protect agnosticism or atheism as a permissible “religious” choice is striking given modern debates about the religion clauses.<sup>84</sup> The point is emphasized by references to God in many of

---

78. 494 U.S. 872 (1990).

79. Compare *id.* at 878 (holding that the First Amendment does not justify violation of a generally applicable law, so long as the prohibition of religious exercise is merely “incidental” rather than the object of the law), with Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 45–47 (2000) (urging an extension of the free exercise doctrine, analogizing to the First Amendment's guarantee of freedom of association).

80. *E.g.*, KY. CONST. of 1850, art. XIII, § 6.

81. Pub. L. No. 103-141, 107 Stat. 1488, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

82. *E.g.*, N.Y. CONST. of 1846, art. I, § 3.

83. DEL. CONST. of 1831, art. I, § 1.

84. To date, the Supreme Court has avoided formulating a definition of “religion” under the First Amendment. It has, however, been more definitive in cases involving statutory construction. Specifically, the Court has construed the “religious training and belief” requirement for the draft exemption under the Universal Military Training and Selective Service Act to include nontheistic reasons for conscientious objection. See *Welsh v. United States*, 398 U.S. 333, 342–43 (1970) (reasoning that the “religious training and belief” draft exemption is not open to those “whose beliefs are not deeply held” or “whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency”); *United States v. Seeger*, 380 U.S. 163, 184 (1965) (finding that the appropriate inquiry for the requirement is “an objective one,” which asks whether “the claimed belief occup[ies]

the state constitutions as the “author of all good government”<sup>85</sup> or as the “great Legislator of the universe.”<sup>86</sup> These references conflate the existence of ordered liberty with a constitutional acknowledgment of the existence of God, suggesting that the construction of an ordered state requires a constitutional repudiation of atheism. Under such a view, references to “under God” in the Pledge of Allegiance or to “In God We Trust” on our currency would be entirely unproblematic.

3. *Religious Qualifications for Holding Office.*—The original federal Constitution, even before the adoption of the First Amendment, banned religious qualifications for holding federal office.<sup>87</sup> It is thus not surprising that a substantial number of states also banned such qualifications in their constitutions in 1868. In all, twenty-four states—a majority of the thirty-seven—prohibited religious tests as qualifications for holding public office. The clauses in question generally provided, “[N]o religious test shall ever be required as a qualification to any office of public trust under this State.”<sup>88</sup> It is perhaps surprising that more states—two-thirds or three-quarters—did not ban religious qualifications for holding office. Looking at the issue by population, it turns out that 66% of Americans living in 1868—roughly two-thirds—lived in jurisdictions where religious qualifications for holding office were forbidden. This prohibition was found in 75% of Midwestern–Western states, 67% of Southern states, and 50% of Northeastern states. Seventy-four percent of the post-1855 constitutions, compared to 56% of the pre-1855 constitutions, prohibited religious qualifications. This suggests a modest trend toward forbidding religious qualifications for holding office. Interestingly, two states, Pennsylvania and Mississippi, forbade religious qualifications for holding office but allowed the disqualification from office of atheists.<sup>89</sup> One state constitution in 1868, that of New Hampshire, explicitly created a religious (and property) test for qualification for public office.<sup>90</sup> Furthermore, seven of the original state constitutions called for the disqualification of ministers from legislative office—a practice that was declared

---

the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption”).

85. *E.g.*, GA. CONST. of 1868, pmb1.

86. *E.g.*, MASS. CONST. of 1780, pmb1.

87. *See* U.S. CONST. art. VI, cl. 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

88. *E.g.*, ILL. CONST. of 1848, art. XIII, § 4.

89. MISS. CONST. of 1868, art. XII, § 3 (“No person who denies the existence of a Supreme Being shall hold any office in this State.”); *see* PA. CONST. of 1838, art. IX, § 4 (“That no person who acknowledges the being of God and a future state of rewards and punishments, shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth.”).

90. N.H. CONST. of 1784, pt. II (“*Provided nevertheless*, That no person shall be capable of being elected a Senator, who is not of the Protestant Religion, and seized of a freehold estate in his own right of the value of *two hundred pounds*, lying within this State . . . .”)

unconstitutional in *McDaniel v. Paty* in 1978.<sup>91</sup> The federal prohibition of religious tests for office was applied to the states in *Torcaso v. Watkins* in 1961.<sup>92</sup>

4. *Specific References to God in the Preambles of the 1868 State Constitutions.*—There is one striking respect in which many state constitutions in 1868 explicitly differed from the federal Constitution and Bill of Rights on a matter bearing on religion. Fully twenty-seven, or two-thirds, of the 1868 state constitutions contained an explicit reference to God in their preambles. A typical such reference stated, “[W]e, the people of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this constitution.”<sup>93</sup> Some might argue that these references, like other references to God, seem again to legitimize the use of phrases such as “under God” in the Pledge of Allegiance or “In God We Trust” on the currency. They explicitly and textually specify the existence of God in the constitutional text itself. The counterargument might be that we have many more polytheists, atheists, and agnostics today than were present in 1868. As Justice Brennan observed:

[O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.<sup>94</sup>

Obviously, the federal Constitution and Bill of Rights make no reference to God in the text whatsoever.

Looking at this matter by population, it turns out that 73% of the American people in 1868 lived in states that had constitutions that explicitly mentioned God. Sorting these clauses by region, we find that 83% of Midwestern–Western constitutions referred to God, as did 70% of Northeastern state constitutions and 67% of Southern state constitutions. These explicit textual references to God appeared in 67% of the pre-1855 and in 79% of the post-1855 constitutions. This increasing prevalence is surprising given the absolute absence of references to God in our federal Constitution today, but it is consistent with the idea that Americans were actually more religious at the time of the Civil War and the ratification of the

---

91. 435 U.S. 618, 629 (1978).

92. 367 U.S. 488, 495 (1961).

93. *E.g.*, IND. CONST. of 1851, pmb1.

94. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 240 (1963) (Brennan, J., concurring); *see also* *McCreary v. ACLU*, 545 U.S. 844, 884 (2005) (O’Connor, J., concurring) (“[T]he Framers lived at a time when our national religious diversity was neither as robust nor as well recognized as it is now. They may not have foreseen the variety of religions for which this Nation would eventually provide a home.”).

Fourteenth Amendment than they had been during the more deistic period of the founding.<sup>95</sup> This fact is ironic considering the use the Supreme Court has made of the Fourteenth Amendment to stamp out public references to God or religion.

5. *Ceremonial Deism.*—In addition to these references to God in the preambles of state constitutions, thirty state constitutions in 1868, or more than three-fourths of the total, contained references to God that can only be described as a state constitutional “endorsement” of what the U.S. Supreme Court in recent years has sometimes called “ceremonial deism.”<sup>96</sup> Examples of ceremonial deism include the use in constitutional texts of such phrases as “Almighty God,”<sup>97</sup> “Supreme Being, the Great Creator and Preserver of the Universe,”<sup>98</sup> “Author of the universe,”<sup>99</sup> “[A]uthor of all good government,”<sup>100</sup> “Sovereign Ruler of the Universe,”<sup>101</sup> “Divine Being,”<sup>102</sup> “Great Legislator of the Universe,”<sup>103</sup> and “[O]ur Creator.”<sup>104</sup>

95. See *supra* note 63.

96. See *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting). As Justice Brennan explained:

While I remain uncertain about these questions, I would suggest that such practices as the designation of “In God We Trust” as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow’s apt phrase, as a form [of] “ceremonial deism,” protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.

*Id.* (footnote omitted); see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O’Connor, J., concurring). In this case, Justice O’Connor explained how ceremony can strip references to God of their religious significance:

This category of “ceremonial deism” most clearly encompasses such things as the national motto (“In God We Trust”), religious references in traditional patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions (“God save the United States and this honorable Court”). These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all.

*Id.*

97. *E.g.*, S.C. CONST. of 1868, pmb. (“[W]e, the people of the State of South Carolina, in convention assembled, grateful to Almighty God for this opportunity . . .”).

98. *E.g.*, CONN. CONST. of 1818, art. VII, § 1 (“It being the duty of all men to worship the Supreme Being, the great Creator and Preserver of the Universe . . .”).

99. *E.g.*, DEL. CONST. of 1831, art. I, § 1 (“Although it is the duty of all men frequently to assemble together for the public worship of the Author of the universe . . .”).

100. See, *e.g.*, GA. CONST. of 1868, pmb. (“acknowledging and invoking the guidance of Almighty God, the author of all good government”).

101. See, *e.g.*, ME. CONST. of 1819, pmb. (referencing “acknowledging, with grateful hearts, the goodness of the Sovereign Ruler of the Universe”).

102. *E.g.*, MD. CONST. of 1867, Declaration of Rights, art. 39 (referencing “the attestation of the Divine Being”).

103. *E.g.*, MASS. CONST. of 1780, pmb. (referencing “the goodness of the great Legislator of the universe”).

There was thus an Article V, three-quarters-of-the-states consensus in 1868 that ceremonial deism was perfectly consistent with the nonestablishment and free exercise principles. Looking at the matter by population, we found that a whopping 88% of the American people in 1868 lived in states with constitutions that endorsed ceremonial deism. Such references to God appeared in 90% of Northeastern state constitutions, 83% of Midwestern–Western state constitutions, and 73% of Southern state constitutions. Explicit textual references to God were slightly more common in the older constitutions in 1868. Eighty-nine percent of the pre-1855 constitutions had such references as compared with 74% of the post-1855 constitutions.

6. *Blaine Amendments.*—Blaine amendments are provisions that forbid any kind of government financial aid to educational or other government institutions that have any religious affiliation.<sup>105</sup> They are named after former Republican presidential nominee James G. Blaine who originally proposed such an amendment to the federal Constitution.<sup>106</sup> A typical Blaine-amendment clause provided, “[N]o religious or other sect or sects shall ever have any exclusive right to or control of any part of the school funds of this state.”<sup>107</sup> Such provisions would presumably strictly bar government financial aid to parochial schools and might be argued to bar vouchers redeemable at such schools as well. In 1868, when the Fourteenth Amendment was ratified, only eight state constitutions—a relatively small minority—contained Blaine-amendment-like provisions. Looking at the matter by population, we found that only 22% of the American people in 1868 lived in states with this kind of clause in their state constitutions. Looking at the issue regionally, 58% of Midwestern–Western states, 7% of Southern states, and 0% of Northeastern states had such clauses. Blaine-amendment clauses were evenly distributed across older and newer constitutions. Today, many state constitutions have Blaine amendments or provisions, but our research reveals they were not a part of the original public

---

104. *E.g.*, VA. CONST. of 1864, Bill of Rights, art. I (incorporating VA. CONST. of 1776, Declaration of Rights, § 9) (referencing “the duty which we owe to our Creator”).

105. The original Blaine Amendment was proposed in 1875 as an addition to the U.S. Constitution. Blaine Amendment, H.R.J. Res. 1, 44th Cong. (1875), 4 CONG. REC. 205 (introducing the Blaine Amendment). The text of the Amendment read:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

*Id.*

106. The Amendment passed the House, 4 CONG. REC. 5191 (1876) (tallying the House votes), but failed to garner the necessary two-thirds vote in the Senate, *id.* at 5595 (tallying the Senate votes).

107. *E.g.*, OHIO CONST. of 1851, art. VI, § 2.

meaning of the nonestablishment principle in 1868 when the Fourteenth Amendment was ratified.

7. *Clauses Pertaining to Oaths.*—Three states—a very small minority—contained explicit textual clauses mandating that the manner of administering an oath or affirmation to a person ought to be in accordance with his own religious persuasion. Typically, such clauses provided, “The mode of administering an oath or affirmation shall be such as may be most consistent with, and binding upon, the conscience of the person to whom such oath or affirmation may be administered.”<sup>108</sup> These clauses were likely an accommodation for religions—such as the Religious Society of Friends, or Quakers—that prohibited the swearing of oaths by their members. About 7% of the population in 1868 lived in states with such clauses in their bills of rights. These clauses were most common in the Midwest–West, where 17% of the states had them, as compared to 7% in the South and 0% in the Northeast. Oaths clauses were found in 6% of the pre-1855 and in 11% of the post-1855 constitutions.

8. *Legislative Duty to Protect Religion.*—Nebraska, Texas, and Ohio—a small minority of states—had specific clauses in their state constitutions that provided, typically, “[I]t shall be the duty of the legislature to pass such laws as may be necessary to protect every religious denomination in the peaceable enjoyment of their own mode of public worship.”<sup>109</sup> This protection was guaranteed in states where 9% of the population lived in 1868. Two of these states were in the Midwest–West, and one was in the South. Duties to protect religion were found in 6% of the pre-1855 and 11% of the post-1855 constitutions. These clauses are noteworthy because they provide for a positive duty on government to foster religious free exercise, rather than providing only a negative bar on government interferences with religious free exercise. These clauses also protect the freedom of worship, which may involve action, and not simply freedom of conscience or belief. The hard question posed by the Religious Freedom Restoration Act is whether freedom of worship goes beyond freedom to hold religious ceremonies to include, for example, the Amish way of life whereby children are not educated beyond the “Three Rs” (reading, ’riting, and ’rithmetic).

9. *Witness Qualification on the Basis of Religion.*—Three states—a very small minority—had clauses in their state constitutions in 1868 that provided that no person could be rendered incompetent as a witness as a result of his religious beliefs. One such clause stated, for example, “No person shall be rendered incompetent to be a witness on account of his opinions on

---

108. *E.g.*, OR. CONST. of 1857, art. I, § 7.

109. *E.g.*, TEX. CONST. of 1868, art. I, § 4.

matters of religious belief.”<sup>110</sup> This protection was guaranteed to 8% of the population. All three were in the Midwest–West. Eleven percent of the pre-1855 and 5% of the post-1855 constitutions contained these clauses.

*B. Rights of Freedom of the Press, of Speech, of Association, and of Political Participation*

We turn next to the rights of freedom of expression, which appear in the federal First Amendment and which were important protections at the federal level against the suppression of speech and of the press. The need for provisions like these was made evident to Americans by the events that took place in England during that country’s civil war in the late 1600s.<sup>111</sup>

*1. Freedom of the Press.*—All thirty-seven state constitutions in 1868 had clauses that explicitly protected the freedom of the press, rendering its incorporation as a matter of substantive due process in 1931<sup>112</sup> largely redundant except insofar as federal courts might construe such language more liberally than state courts had done. Most of these clauses were worded like the Free Press Clause in our federal First Amendment, stating, for example, “No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever . . . .”<sup>113</sup> Like the First Amendment of the federal Constitution, these clauses were largely structural in that they limited the government with regard to its constituents. Some of the clauses, however, sounded more antimajoritarian than the First Amendment, as they had dropped the structural language for a more individualistic tone. For example, Missouri’s constitution provided, “That the free communication of thoughts and opinions is one of the invaluable rights of man, and that every person may freely speak, write, and print on any subject.”<sup>114</sup> Obviously, since all thirty-seven states in 1868 had such clauses in their state constitutions, 100% of the population in all three regions lived in such states. There was also obviously no difference here between older and more recent state constitutions.

It bears noting that the freedom of the press protected by state constitutional bills of rights in 1868 probably went beyond merely a protection against prior restraints. While in 1791, freedom of the press was arguably nothing more than a protection against prior restraints (as suggested

---

110. MICH. CONST. of 1850, art. VI, § 34.

111. For an in-depth history of the First Amendment, see generally ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (1941).

112. See *Near v. Minnesota*, 283 U.S. 701, 707 (1931) (incorporating the First Amendment’s protection of the press against the states).

113. *E.g.*, OR. CONST. of 1857, art. I, § 8.

114. MO. CONST. of 1865, art. I, § 27.

by the scholarship of Leonard Levy),<sup>115</sup> by 1868 the freedom of the press had come to be understood to forbid laws like the federal Alien and Sedition Acts of 1798<sup>116</sup> and to also forbid actions for seditious libel.<sup>117</sup> Exactly how much broader the original meaning of the fundamental right of freedom of the press was in 1868 than that original meaning was in 1791 is a fascinating topic that unfortunately goes beyond the scope of our Article.<sup>118</sup>

2. *Freedom of Speech.*—Beyond freedom of the press, another core right of expression guaranteed by the federal Constitution’s First Amendment is freedom of speech. The freedom of speech is considered fundamental because it furthers self-governance, aids the discovery of truth, promotes autonomy, and fosters tolerance.<sup>119</sup> It was incorporated against the states as a matter of substantive due process in *Gitlow v. New York* in 1925.<sup>120</sup>

Thus it comes as no surprise that a full thirty-two out of thirty-seven—or more than three-quarters—of the states in 1868 explicitly and textually protected the right to free speech. This is an Article V consensus sufficient for the establishment of federal constitutional law. A typical state constitutional clause protecting freedom of speech in 1868 provided, “No law shall ever be passed to curtail or restrain the liberty of speech or of the press.”<sup>121</sup> Just as a supermajority of states recognized the right to freedom of speech, a huge supermajority of the American people—92% of the population—lived in states where this right was recognized. Looking at the issue regionally, it turns out that 100% of Midwestern–Western states had rights to free speech, whereas only 93% of Southern and 60% of Northeastern states did. Textual protections of the freedom of speech were found in 78% of the pre-1855 constitutions and 95% of the post-1855 constitutions, so the trend in American constitutional law at the state level in 1868 was toward more protection for

---

115. LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 247–48 (1960).

116. An Act for the Punishment of Certain Crimes against the United States (Sedition Act), ch. 74, 1 Stat. 596 (1798) (expired 1801); An Act Respecting Alien Enemies (Alien Enemies Act), ch. 66, 1 Stat. 577 (1798) (current version at 50 U.S.C. §§ 21–24 (2000)); An Act Concerning Aliens (Alien Enemies Act), ch. 58, 1 Stat. 570 (1798) (expired 1800); An Act to Establish an Uniform Rule of Naturalization (Naturalization Act of 1798), ch. 54, 1 Stat. 566 (1798) (repealed 1802).

117. See LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 309–49 (1985) (discussing the emergence of a liberalized view of free press around the turn of the nineteenth century in the context of the scholarly discourse that ultimately culminated in the overruling of such laws as the Alien and Sedition Acts of 1798 and the prohibition of actions for seditious libel).

118. For a discussion of the original significance of the Free Press Clause, see generally David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455 (1983). Anderson interprets the history of the Free Press Clause and reexamines Leonard Levy’s conclusion that, to the framers, freedom of the press meant only freedom from prior restraint. *Id.*

119. For an opinion that generally encompasses these rationales, see *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Justice Brandeis describes the framers’ view of the central importance of freedom of speech in a functioning democracy. *Id.*

120. 268 U.S. 652, 666 (1925).

121. *E.g.*, CONN. CONST. of 1818, art. I, § 6.

freedom of speech. Most free-speech clauses were intertwined with free-press clauses and had the same characteristics, described above. Unlike their modern federal counterpart, however, many of the state constitutions specified that citizens were responsible for the abuse of their right to free speech.<sup>122</sup> Not all press clauses were tethered to speech clauses. Virginia, for instance, provided a strong populist protection that stood alone: “That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.”<sup>123</sup>

3. *Assembly and Petition.*—The third right of political participation guaranteed by the First Amendment to the federal Constitution is the right to assemble peaceably and to petition the government for the redress of grievances.<sup>124</sup> This right also appears to have been a fundamental right under state constitutional law in 1868. A full thirty-four states, or more than three-quarters of the total, protected the right of citizens to peaceably assemble for their common good and to petition the government. Once again, this is an Article V consensus for creating federal constitutional law. A supermajority of the American people—94%—lived in states where these rights were protected in 1868. Protection of these rights was found in 100% of Northeastern states, 92% of Midwestern–Western states, and 87% of Southern states. All of the pre-1855 constitutions included assembly-and-petition clauses, whereas 84% of the post-1855 constitutions had them. The rights to freedom of assembly and petition thus were seen as being implicit in the concept of ordered liberty—along with the rights to freedom of the press and of speech—in 1868.

Typical state constitutional language used to protect these rights read: “The people shall have the right freely to assemble together, to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances.”<sup>125</sup> One state, Delaware, was considerably more cautious about its grant of the right of free assembly. Delaware’s constitution thus provided:

Although disobedience to laws by a part of the people, upon suggestions of impolicy or injustice in them, tends, by immediate effect and the influence of example, not only to endanger the public welfare and safety, but also in governments of a republican form contravenes the social principles of such governments founded on common consent for common good, yet the citizens have a right in an orderly manner to meet together, and to apply to persons intrusted

---

122. *E.g.*, OHIO CONST. of 1851, art. I, § 11 (“Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right . . .”).

123. VA. CONST. of 1864, Bill of Rights, art. I (incorporating VA. CONST. of 1776, Declaration of Rights, § 12).

124. U.S. CONST. amend. I.

125. *E.g.*, CAL. CONST. of 1849, art. I, § 10.

with the powers of government for redress of grievances or other proper purposes, by petition, remonstrance, or address.<sup>126</sup>

The rights of assembly and petition were incorporated against the states through the Fourteenth Amendment in 1937 and 1939, respectively.<sup>127</sup>

4. *Reform Government.*—The state bills of rights, strikingly, go well beyond the First Amendment to the federal Constitution in protecting rights of political participation. A very large number of states—twenty-six, or two-thirds but not three-quarters of the thirty-seven states in the Union in 1868—explicitly gave their citizens the right to alter, reform, or abolish their government as they saw proper. A typical state constitutional clause protecting such a right in 1868 provided, “All power is inherent in the people; all free governments are founded in their authority, and instituted for their benefit; they have, therefore, an unalienable and indefeasible right to institute government, and to alter, reform, or totally change the same, when their safety and happiness require it.”<sup>128</sup> An additional four states contained weak language that may have implied something of the same kind of popular power.<sup>129</sup> Fourteen years ago, Professor Akhil Amar argued in a law review article that the Framers understood that constitutional change or amendment was possible outside the strictures of Article V of the federal Constitution.<sup>130</sup> These clauses arguably suggest that a lot of states, although not an Article V consensus of the states, recognized a fundamental right of the people to alter or abolish their forms of government.

Looking at the issue by population instead of by a nose count or tally of state constitutions, it turns out that strong alter-and-reform-government clauses were present in state constitutions where 65% of the population lived in 1868. Looking at this issue regionally, 90% of people living in Northeastern states had them, 67% of people living in Southern states had them, but only 58% of people living in Midwestern–Western states were so empowered. We do not know why there was such a large regional variation. Clauses recognizing a popular power to alter or abolish forms of government were slightly more common in older state constitutions. We found them in 78% of the pre-1855 and 63% of the post-1855 constitutions.

---

126. DEL. CONST. of 1831, art. I, § 16.

127. *See* *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (incorporating the right of free assembly); *Hague v. CIO*, 307 U.S. 496, 513–16 (1939) (incorporating the right to petition the government).

128. *E.g.*, ME. CONST. of 1819, art. I, § 2.

129. *See, e.g.*, KAN. CONST. of 1859, Bill of Rights, § 2 (“All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit.”).

130. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458 (1994).

5. *Power over Government Officers.*—A very small minority of states—four states to be precise—recognized that their citizens had a fundamental claim of power over their government officers. One such state constitutional clause stated, for example, “That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.”<sup>131</sup> What this meant concretely we do not know. Ten percent of the population in 1868 lived in states with clauses of this type in their state constitutions, and these clauses were found exclusively in the Northeast, where 20% of the states had them, and in the South, where 13% of the states had them. They were equally common in recent and older constitutions. Virginia and Massachusetts each had two clauses allocating such power to citizens.<sup>132</sup> Generally, they permitted the people to regulate government officers and hold the officers accountable to them.<sup>133</sup> Massachusetts stated that these powers are necessary to prevent those vested with authority from becoming oppressors.<sup>134</sup>

6. *Libel.*—Strikingly, notwithstanding the Article V consensus in 1868 supporting a fundamental right to freedom of the press and of speech, a huge number of state constitutions at that time explicitly contemplated libel suits, apparently not thinking that such suits posed any conflict with the fundamental rights protected. This is arguably surprising given the fact that the First Amendment was so popular precisely because it was thought to wipe out some of the English common law bans on libel.<sup>135</sup> Such evidence from state constitutions could call into question the use of the federal First Amendment to limit libel suits at least by states, which are constrained only by the Fourteenth Amendment and not directly by the First. However, most state constitutional clauses did allow for acquittal if the matter charged as libelous was found to be true—a protection that was not present in England.<sup>136</sup>

A full twenty-seven states—or two-thirds but not three-quarters of the total number of states in 1868—had language in their state constitutions that

131. VA. CONST. of 1864, Bill of Rights, art. I (incorporating VA. CONST. of 1776, Declaration of Rights, § 2).

132. MASS. CONST. of 1780, pt. 1, arts. V, VIII; VA. CONST. of 1864, Bill of Rights, art. I (incorporating VA. CONST. of 1776, Declaration of Rights, §§ 2, 5).

133. MASS. CONST. of 1780, pt. 1, art. V; VA. CONST. of 1864, Bill of Rights, art. I (incorporating VA. CONST. of 1776, Declaration of Rights, § 2).

134. See MASS. CONST. of 1780, pt. 1, art. VIII (“In order to prevent those who are vested with authority from becoming oppressors, the people have a right . . . to cause their public officers to return to private life . . .”).

135. See CHAFEE, *supra* note 111, at 21 (arguing that “the First Amendment was . . . intended to wipe out the common law of sedition”).

136. See 14 THOMAS B. HOWELL, *The Trial of John Tutchin, at the Guildhall of London, for a Libel, entitled, ‘The Observer:’ 3 Anne, A.D. 1704, in A COMPLETE COLLECTION OF STATE TRIALS* 1095, 1128 (1816) (defining any publication that reflects poorly on the government as libel).

explicitly contemplated the bringing of at least some libel suits. A typical state constitutional clause in this category read: “In all criminal prosecutions . . . for libel the truth may be given in evidence to the jury, and if it shall appear that the matter charged as libellous is true, but was published from good motives, the party shall be acquitted or exonerated.”<sup>137</sup> Looking at the matter by population, fully 72% of the population in 1868 lived in states that had constitutions that specifically contemplated the bringing of libel suits. Such language was found in 83% of Midwestern–Western state constitutions in 1868, in 73% of Southern state constitutions at that time, and in 60% of Northeastern state constitutions. We do not know what explains these regional variations. Clauses contemplating the availability of libel suits were present in 78% of the pre-1855 and 63% of the post-1855 constitutions. Some states provided that, in all libel suits, the jury was to determine both the law and the facts.<sup>138</sup> Others provided for acquittal should the jury find that the matter charged as libelous was “true, and was published with good motives and for justifiable ends.”<sup>139</sup>

7. *Suffrage*.—The Supreme Court has called the right to vote a “fundamental political right” that is the “preservative of all rights.”<sup>140</sup> It has stated, “The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”<sup>141</sup> It is therefore perhaps surprising that only seven states in 1868—a small minority—protected the right of suffrage in their state constitutions, although arguably the centrality of the right might have caused some constitution makers not to think of mentioning it. A typical state constitutional clause protecting the right to suffrage read: “The privilege of free suffrage shall be supported by laws regulating elections and prohibiting under adequate penalties all undue influence thereon from power, bribery, tumult, or other improper practice.”<sup>142</sup> Twenty-five percent of the population in 1868 lived in states with rights of this kind. Such rights were found in 40% of Southern states and in 10% of Northeastern states but not in any Midwestern–Western state constitutions. Eleven percent of the pre-1855 and 26% of the post-1855 states had suffrage rights of this kind.

8. *Free Elections*.—Sixteen states—a minority that was more than one-quarter but less than one-half of the thirty-seven states in 1868—had clauses

---

137. FLA. CONST. of 1868, art. I, § 10.

138. *See, e.g.*, NEB. CONST. of 1866, art. I, § 3 (“In all criminal prosecutions or indictments for libel the truth may be given in evidence . . . and the jury shall have the right to determine the law and the fact.”).

139. *E.g.*, W. VA. CONST. of 1861, art. II, § 5.

140. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

141. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The Court held that the right to vote is fundamental under the Equal Protection Clause. *Id.* at 556.

142. *E.g.*, LA. CONST. of 1868, tit. VI, art. 103.

in their state constitutions that explicitly provided for the holding of free elections. Ten of the sixteen states provided that the elections be free and equal.<sup>143</sup> Missouri provided that they be free and open,<sup>144</sup> Maryland provided that they be free and frequent,<sup>145</sup> and South Carolina provided that they be free, open, and equal.<sup>146</sup> Forty-eight percent of the American people in 1868—nearly a majority of the population—lived in states with constitutions that protected this right. Free-election guarantees were most common in the Northeast, at 50% of states, followed by 47% in the South, and 25% in the Midwest–West. Fifty percent of the pre-1855 constitutions and 32% of the post-1855 constitutions had free-election clauses.

9. *One Person, One Vote.*—One interesting question of political participation is whether there is a fundamental right to reapportionment of the legislature—a right the Warren Court found in the federal Constitution as the right of “one person, one vote.”<sup>147</sup> Only four state constitutions in 1868—a very small minority—provided explicitly that “[r]epresentation shall be apportioned according to population.”<sup>148</sup> Four percent of the population lived in states where this right was guaranteed. The right was found in 17% of the three Midwestern–Western state constitutions, in 13% of Southern state constitutions, and in none of the Northeastern state constitutions. A right to reapportionment was more common in newer constitutions, as it was included in 6% of the pre-1855 state constitutions and 16% of the post-1855 constitutions. It may be that newer and Midwestern–Western states in the 1860s were coming to realize that the failure to mandate reapportionment was a flaw in the older Northeastern state constitutions.

10. *No Right to Secession from the Union.*—If the people of a state have a fundamental right to alter and abolish their forms of government when they find them to be oppressive, the question will naturally arise whether they also have a fundamental right to secede from the union of the states. This was a

---

143. *E.g.*, DEL. CONST. of 1831, art. I, § 3 (“All elections shall be free and equal.”).

144. MO. CONST. of 1865, art. I, § 14 (stating that “all elections ought to be free and open.”).

145. MD. CONST. of 1867, Declaration of Rights, art. 7 (“That the right of the people to participate in the legislature is the best security of liberty and the foundation of all free government; for this purpose elections ought to be free and frequent . . .”).

146. S.C. CONST. of 1868, art. I, § 31 (“All elections shall be free and open, and every inhabitant of this commonwealth possessing the qualifications provided for in this constitution shall have an equal right to elect officers and be elected to fill public office.”).

147. *See* Reynolds v. Sims, 377 U.S. 533, 560 (1964) (“[O]ne person’s vote must be counted equally with those of all other voters in a State.”); Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (explaining that “[while] it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution’s plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives”); Baker v. Carr, 369 U.S. 186, 208 (1962) (acknowledging “[a] citizen’s right to a vote free of arbitrary impairment by state action”).

148. *E.g.*, NEV. CONST. of 1864, art. I, § 13.

question of great interest in 1868 in the wake of the Civil War. It is thus perhaps not surprising that eleven state constitutions in 1868 make it explicitly clear that whatever fundamental right the people have to alter or abolish their forms of government, that right does *not* include a right to secede. A typical clause of this kind read, “This State shall ever remain a member of the American Union, the people thereof a part of the American nation, and any attempt, from whatever source, or upon whatever pretense, to dissolve said Union, or to sever said nation, shall be resisted with the whole power of the State.”<sup>149</sup> A twelfth state’s constitution, Louisiana’s, contained a weaker declaration of allegiance to the Union.<sup>150</sup> Looking at this question by population, it turns out that 23% of the American people in 1868 lived in states with strong secession prohibitions in their state constitutions. Fully 67%, or two-thirds, of Southern state constitutions contained no-secession clauses, compared with 8% of the constitutions of Midwestern–Western states and none of constitutions of the Northeastern states. Secession was prohibited in only 6% of the pre-1855 constitutions but it was prohibited in 53%—a majority—of the post-1855 constitutions. Obviously, Congress in the 1860s was insisting on antisecession clauses in state constitutions both when admitting new Midwestern–Western states to the Union and when allowing the eleven Confederate states to re-enter the Union in reconstructed form. The antisecession principle thus is an important qualification of the fundamental right of the people to alter or abolish their forms of government, at least as it had come to be understood by 1868.

*11. Arbitrary Power.*—Two states had explicit clauses in their state constitutions in 1868 that protected against exercises of arbitrary government power. Kentucky’s constitution stated, “That absolute, arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority.”<sup>151</sup> Tennessee’s constitution provided, “[G]overnment being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive to the good and happiness of mankind.”<sup>152</sup> The number of people living in these two states constituted 7% of the total U.S. population in 1868. This protection appears only in these two Southern state constitutions, which comprised 13% of all Southern constitutions. Rights of this kind were not present in any post-1855 constitution.

---

149. *E.g.*, FLA. CONST. of 1868, art. I, § 3.

150. *See* LA. CONST. of 1868, tit. 1, art. 2 (“The citizens of this State owe allegiance to the United States; and this allegiance is paramount to that which they owe to the State.”).

151. KY. CONST. of 1850, art. XIII, § 2.

152. TENN. CONST. of 1834, art. I, § 2.

12. *Federal Allegiance*.—Three states—North Carolina, South Carolina, and Missouri—had specific clauses in their state constitutions that declared that every citizen of the state owed paramount allegiance to the United States and to the U.S. Constitution. The three clauses were virtually identical, stating, “Every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and no law or ordinance of this State in contravention or subversion thereof can have any binding force.”<sup>153</sup> The percentage of the American people living in states with such clauses in their constitutions in 1868 was 9% of the total population. Federal allegiance was only demanded of Southerners, and the clause was found in 20% of Southern state constitutions. It was found exclusively in post-1855 constitutions. Again, these clauses, like the antisecession clauses, were obviously part of the price the Reconstruction Congress extracted from the seceded Southern states for letting them back into the Union. North Carolina and South Carolina were part of the Confederacy, and the Missouri legislature passed a secession bill but was kept outside the Confederacy by its pro-Union state government.<sup>154</sup>

### C. *Protection of Gun Rights and Clauses Bearing on the Military*

The Bill of Rights of the federal Constitution protects religious freedom first, freedom of expression second, and gun rights third. This could be argued to reflect the priority the ratifiers and framers attached to each of these sets of rights, although there were two amendments proposed in 1791 ahead of the First that were not ratified at that time.<sup>155</sup> Gun rights are protected by the federal Constitution in the Second Amendment, which was interpreted this year in the Supreme Court’s opinion in *District of Columbia v. Heller*.<sup>156</sup> As the majority and dissenting opinions in *Heller* indicate, there is a famous and longstanding debate over whether the Second Amendment protects an individual’s right to own a gun for his self-defense or whether it

---

153. *E.g.*, S.C. CONST. of 1868, art. I, § 4.

154. *See* CHRISTOPHER PHILLIPS, MISSOURI’S CONFEDERATE: CLAIBORNE FOX JACKSON AND THE CREATION OF SOUTHERN IDENTITY IN THE BORDER WEST 267–69 (2000) (recounting the competing claims for legitimacy between Missouri’s pro-Union government, which occupied the state capitol, and its pro-Confederacy government, which fled the capitol, voted for secession, and was granted admission to the Confederacy).

155. The first of these unratified structural amendments dealt with representation in the House of Representatives, and it was never ratified. AMAR, *supra* note 44, at 14–15. The second provided that congressional pay increases would not take effect until there had been an intervening congressional election. *Id.* at 18. This amendment was eventually ratified in 1992 as the Twenty-Seventh Amendment. *Id.* at 17. While it is true that the Amendments in the Bill of Rights were listed in an order that would allow them to be interlineated in the original Constitution, it is also true that the first ten Amendments as actually ratified were qualifications of congressional powers under Article I, Section Eight. *See id.* at 36–37 (explaining that the Bill of Rights limited the powers originally conferred to Congress under Article I, Section Eight of the U.S. Constitution). The ordering of these qualifications could therefore be said to be significant.

156. 128 S. Ct. 2783 (2008).

protects a collective right of the people of a state to own rifles so they can serve as members of a well-regulated state militia.<sup>157</sup> The framers of the federal Constitution did arguably favor state militias of armed citizens over standing armies of mercenaries, which might abuse liberty and threaten democratic government.<sup>158</sup> Such mercenaries had historically been quartered in private citizens' homes, which was an abuse of liberty.<sup>159</sup> The Third Amendment to the federal Bill of Rights limits the federal government's power to quarter troops in people's homes.<sup>160</sup> What, then, did state constitutions say in 1868 about whether there was a fundamental right to own guns? Was such a right an individual right in 1868 or was it merely a collective right enjoyed by the state militias? What about standing armies or quartering soldiers in homes? It turns out that all of these topics were addressed by state constitutions in 1868.

1. *State Constitutional Rights to Keep and Bear Arms.*—Twenty-two state constitutions in 1868—a majority but not an Article V, federal-constitutional-law-making consensus—had language that explicitly guaranteed the right of the people to keep and bear arms. As we will explain, there was a lot of variation in the way these clauses were worded, but twelve states—a majority of the state clauses in question—explicitly provided, “[T]he people have a right to bear arms for the defence of themselves and the State.”<sup>161</sup> Thus a majority of the state constitutional clauses protecting gun rights did textually describe the rights in question as being individual rather than merely collective rights. In other states, courts may well have construed Second Amendment analogs as protecting individual rights. But it is quite clear that only twenty-two out of thirty-seven states in 1868 had explicit Second Amendment analogs in their state constitutions. There was thus not an Article V consensus of the states that Second Amendment analogs were per se explicitly fundamental federal constitutional rights, and so there certainly was no such consensus as to an individual's right to own guns for his

---

157. Compare *id.* at 2805–07 (discussing scholarly interpretation of the Second Amendment as protecting an individual's right to bear arms, unconnected with military service), with *id.* at 2839, 2839–41 (Stevens, J., dissenting) (arguing that the scholars the majority cited are mostly “of limited relevance in construing the guarantee of the Second Amendment: Their views are not altogether clear, they tended to collapse the Second Amendment with Article VII of the English Bill of Rights, and they appear to have been unfamiliar with the drafting history of the Second Amendment”).

158. See *id.* at 2846 (Stevens, J., dissenting) (“The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.” (quoting *United States v. Miller*, 307 U.S. 174, 178–79 (1939))).

159. See generally Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL RTS. J. 117, 125 (1993) (reflecting on the undesirable historical practice in the American colonies of quartering British soldiers in private homes from the late seventeenth century until the Revolutionary War).

160. U.S. CONST. amend. III.

161. E.g., VT. CONST. of 1793, ch. I, art. XVI.

own self-defense. As we shall see below, however, the question is complicated significantly by other clauses in state constitutions that were not Second Amendment analogs but that may well have protected gun rights.

Looking at this question by population, however, yields a result more favorable to the claim that there is a fundamental right to own guns. Fully 61% of the population in 1868—a slight supermajority—lived in states with explicit analogs to the Second Amendment in their state constitutions. The explicit right to keep and bear arms was most widely recognized in state constitutions in the South in 1868, where 73% of the states recognized such rights. Protection of gun rights was found in only 60% of Northeastern states, and in only 42% of Midwestern–Western states, even though the threat of Indian raids might have been expected to make protection of gun rights more common in the West. Note that state constitutional protection for gun rights is below 50% of the total population in Midwestern–Western state constitutions. We find this regional data to be intriguing because it suggests that the protection of gun rights was particularly Southern as long ago as 1868. This could arguably be explained by Southern fears of slave revolts and, later on, of freed African-Americans. Alternatively, it could be the result of the Reconstruction Congress insisting on gun rights in Southern state constitutions in order to protect African-Americans. The historical data are fascinating because strong support for gun rights continues to be an important part of Southern culture today even though such support has faded in the Northeast.<sup>162</sup>

Protection in state constitutions for gun rights was equally common in older and newer constitutions. Twelve of the state constitutions in question explicitly stated that gun rights were being protected for the defense of individual citizens themselves in addition to being protected for the defense of the state through membership in the militia.<sup>163</sup> Other constitutions that were less textually explicit may well have been construed to protect individual gun rights. Tennessee’s state constitution tellingly only guaranteed the right to own guns for free white men.<sup>164</sup> Three state constitutions provided for government regulation, and limitation, of the right to bear arms.<sup>165</sup>

---

162. See Andrew J. McClurg, *Child Access Prevention Laws: A Common Sense Approach to Gun Control*, 18 ST. LOUIS U. PUB. L. REV. 47, 76 (1999) (noting the “deep emotions the issue of gun control touches in people, particularly in regions like the South and West, where guns are culturally entrenched”).

163. See, e.g., VT. CONST. of 1793, ch. I, art. XVI (“That the people have a right to bear arms for the defence of themselves and the State . . .”).

164. See TENN. CONST. of 1834, art. I, § 26 (“That the free white men of this State have a right to keep and to bear arms for their common defence.”).

165. See GA. CONST. of 1868, art. I, § 14 (“[T]he general assembly shall have power to prescribe by law the manner in which arms may be borne.”); KY. CONST. of 1850, art. XIII, § 25 (“[T]he general assembly may pass laws to prevent persons from carrying concealed arms.”); OHIO CONST. of 1851, art. IX, § 5 (“The General Assembly shall provide, by law, for the protection and safe-keeping of the public arms.”).

The number of states guaranteeing the right to bear arms may seem surprisingly low given both the prevalence of guns in 1868 and the continued salience of gun-rights debates today. As we just noted above, it is quite possible that the right to bear arms was implicitly embedded in other state constitutional rights in 1868. As we shall see, many state constitutions specifically protected as a matter of state positive law the “natural and inalienable rights” of the people, among which was often the right “to defend” life and liberty and “to protect” property.<sup>166</sup> These rights may very well have encompassed a right to bear arms, although proving that would require further research.<sup>167</sup> In 1868, fourteen states had individual rights to defend life and property, including seven states that did not also have explicit right-to-bear-arms clauses. Thus, counting the right to defend life, liberty, and property increases the number of states (implicitly or explicitly) protecting the right to bear arms from twenty-two to twenty-nine. Under this expanded view, a full 78% of states—a supermajority—guaranteed a right to bear arms. This would be an Article V, three-quarters consensus for some right to defend life, liberty, and property by force of arms.

Today, the question of whether we have a fundamental individual right to keep and bear arms for our own defense and not as part of a state militia is particularly important because the Second Amendment is one of the few parts of the Federal Bill of Rights that has not yet been incorporated to apply against the states by virtue of the Fourteenth Amendment.<sup>168</sup> Now that the Supreme Court has construed the Second Amendment in *Heller* as protecting an individual’s right to keep and bear arms,<sup>169</sup> the question of whether that right ought to be incorporated will become much more important. Our data suggest that explicit Second Amendment analogs were less common in state constitutions in 1868 than were rights to freedom of religion or of expression, but they were recognized by a majority of the thirty-seven states in 1868, and a number of other states may have protected such rights implicitly.<sup>170</sup> What one should do with this information, if anything, is debatable. Furthermore, the Supreme Court has only recently—on a five-to-four vote—settled the debate as to whether the Second Amendment guarantees a collective right to

---

166. *E.g.*, N.J. CONST. of 1844, art. I, § 1 (“All men are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”).

167. For a description of these rights in modern state constitutions, see Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. 400, 401–07 (2007). Here, Volokh lists the “right to defend life” provisions of twenty-one states. *Id.*

168. *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (“[The second] amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States.”); ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW* 466 (2d ed. 2005) (“[T]he Supreme Court has ruled that the Second Amendment ‘right to bear arms’ is not incorporated.”).

169. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2793 (2007).

170. Under the expanded view of gun rights described above, the right to bear arms was recognized by a supermajority of states.

a state militia<sup>171</sup> or an individual right to keep and bear arms to protect and provide for oneself and one's own family.<sup>172</sup> It remains to be seen whether this majority will endure.<sup>173</sup>

An amicus brief submitted to the Supreme Court in the *Heller* case by the City of Chicago argued that an individual right to gun ownership was not fundamental and, therefore, that the Second Amendment should not be incorporated against the states through the Fourteenth Amendment.<sup>174</sup> The brief referred to the Court's four-factor incorporation test outlined in *Duncan v. Louisiana*,<sup>175</sup> which held that a right was more likely to be fundamental if it was protected by the thirteen original state constitutions, in the constitutions of every state entering the Union thereafter, and in modern state constitutions.<sup>176</sup> The City of Chicago's *Heller* brief then proceeded to count the original state constitutions that either explicitly or implicitly declined to provide an individual right to bear arms.<sup>177</sup>

The fact that a nontrivial minority—twelve states—explicitly protected both a collective and an individual right to keep and bear arms in 1868 provides an interesting twist with respect to this issue.<sup>178</sup> The fact that the right was such a distinctively Southern one in 1868 may also bear on whether most

---

171. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1495–1500 (1987) (examining the Constitution's expansion of the federal government's military powers and the framers' view of state militias as a "vital" check on those powers).

172. The first federal circuit court decision to interpret the Second Amendment as containing an individual right to bear arms was *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

173. For an originalist criticism of the *Heller* decision, see Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC, Aug. 27, 2008, at 32; see also J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. (forthcoming 2009).

174. Brief of the City of Chicago and the Board of Education of Chicago as Amici Curiae in Support of Petitioners at 16–17, *Heller*, 128 S. Ct. 2783 (No. 07-290).

175. 391 U.S. 145 (1968). The amicus brief described the test as follows: "The Court applies a four-factor framework to implement its selective-incorporation doctrine, examining (1) the Anglo-American history of the putative right; (2) its recognition in the constitutions of the original States; (3) subsequent popular regard for the right; and (4) the purpose it serves." Brief of the City of Chicago, *supra* note 174, at 16 (citing *Duncan*, 391 U.S. at 151–58).

176. *Duncan*, 391 U.S. at 153–54. The Supreme Court explained:

The constitutions adopted by the original States guaranteed jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases. Even such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court.

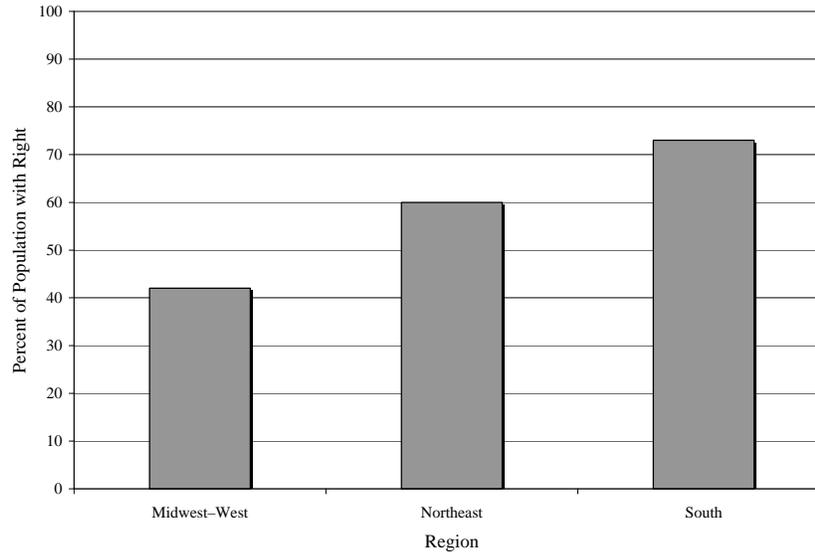
*Id.*

177. Brief of the City of Chicago, *supra* note 174, at 23–27.

178. For additional historical analyses of the meaning of the Second Amendment, see David Yassky, *The Second Amendment: Structure, History and Constitutional Change*, 99 MICH. L. REV. 588, 599–610 (2000) (outlining the debate between the Federalists and Antifederalists over how to allocate the power between a national army and state militias); see also Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 STAN. L. & POL'Y REV. 571, 571–75 (2006) (arguing that much of the gun-rights backlash to gun-control laws dates back to debates that occurred in the Jacksonian era).

Americans recognized it as a fundamental right at that time. The following graph shows regional trends in the right to bear arms.

Figure 9: The Right to Bear Arms by Region



2. *The Right Not to Bear Arms.*—Seventeen states—a minority, although a fairly substantial one—had clauses that expressly prohibited compelling people who are conscientiously (or otherwise) opposed to bearing arms from being compelled to do so or from being drafted into militia duty. Typically, such clauses provided, “[N]o person who conscientiously scruples to bear arms shall be compelled to do so, but may pay an equivalent for personal service.”<sup>179</sup> It is worth noting that we are talking here only about those state constitutions that explicitly recognize conscientious-objector status; other states in 1868 probably understood their freedom-of-worship and freedom-of-conscience clauses to make such an explicit recognition of conscientious-objector status unnecessary. Alternatively, it could be argued that the very fact that seventeen states thought specific language was necessary means that conscientious-objector status was not seen as being encompassed by freedom of conscience, profession, or belief. The federal Constitution makes no direct reference to conscientious objection and, interestingly, the only attempt by the Supreme Court to define the scope of

179. *E.g.*, ALA. CONST. of 1867, art. I, § 29.

“religion” involved statutory construction of the Selective Service Act,<sup>180</sup> which established a religious exemption to the military draft.<sup>181</sup>

An explicit textual right not to bear arms in the military was enjoyed by 59%—a majority—of the population in 1868. Such a right was found in 50% of Midwestern–Western state constitutions, 47% of Southern state constitutions, and 40% of Northeastern state constitutions. Most of the state constitutions in question provided that such exemption from military service required that the person exempted provide financial compensation to the state.<sup>182</sup> A typical clause read: “No person conscientiously opposed to bearing arms shall be compelled to do militia duty; but such person shall pay an equivalent for exemption, the amount to be prescribed by law.”<sup>183</sup>

3. *Clauses Subordinating the Military to the Civil Power.*—It is argued that one of the core purposes of the Second Amendment to the federal Constitution was to protect against a federal standing army, which might extinguish liberty, by constitutionally protecting state militias in which every free adult male is a member and has his own gun.<sup>184</sup> This theme of subordinating the military to the civil power turns out to have been widespread in 1868 when the Fourteenth Amendment was ratified. Fully thirty-five out of thirty-seven states—or an Article V, three-quarters majority—had clauses in their state constitutions mandating that the military be in strict subordination to the civil power. Generally, these state constitutional provisions provided, “[T]he military shall, in all cases and at all times, be in strict subordination to the civil power.”<sup>185</sup> There may or may not have been an explicit Article V, federal-constitutional consensus that individuals had a right to own guns for their self-defense, but there was clearly such a consensus declaring it a fundamental right to live in a society without a standing army and in which the military is subordinate to the civil power. What, if anything, one could do to assert such a right in the modern world is debatable, to say the least.

A huge supermajority of Americans in 1868 lived in states with clauses of this kind in their state constitutions—85% of the population. Such clauses were found in 100% of the constitutions of Midwestern–Western state

---

180. Military Selective Service Act, 50 U.S.C. app. § 456(j) (2000).

181. See *Welsh v. United States*, 398 U.S. 333, 343–44 (1970) (plurality opinion) (concluding that a military draftee’s moral, ethical, or religious beliefs, held with the strength of traditional religious convictions, qualified him for conscientious-objector status); *United States v. Seeger*, 380 U.S. 163, 164–65 (1965) (defining religion broadly to include some nontheistic views).

182. E.g., N.H. CONST. of 1784, pt. I, art. XIII (“No person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an equivalent.”).

183. E.g., IND. CONST. of 1851, art. XII, § 6.

184. E.g., Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 212 (1983).

185. E.g., KY. CONST. of 1850, art. XIII, § 26.

constitutions in 1868, in 93% of Southern state constitutions, and in 90% of Northeastern state constitutions. Protection of this right was equally common both in older and newer constitutions.

4. *Clauses Forbidding Standing Armies.*—A number of state constitutions in 1868 explicitly forbade the existence of standing armies. This is striking given that the United States has had a standing army for a very long time now—and a very large standing army since at least World War II. Twenty-one states in 1868, or a majority but not a two-thirds supermajority, prohibited the maintenance of standing armies in times of peace. Clauses forbidding standing armies were often coupled with clauses subordinating the military to the civil power. Such clauses typically stated, “No standing army shall be kept up without the consent of the legislature.”<sup>186</sup> A solid majority of the American people in 1868—56% of the total population—lived in states that had constitutions that forbade standing armies. The prohibition on standing armies was found in 60% of both Northeastern and Southern state constitutions and in 50% of Midwestern–Western state constitutions. It was equally common in older and newer constitutions. Three of these states provided somewhat weaker limits, providing that standing armies “ought to be avoided.”<sup>187</sup>

5. *Quartering Soldiers.*—Federal gun rights in the Second Amendment are followed by the Third Amendment’s constraints on quartering soldiers in private homes, which is another way of subordinating the military to the civil power. Twenty-seven states—or two-thirds but not an Article V consensus of three-quarters—had provisions in their state constitutions that prohibited the quartering of soldiers in private homes without the consent of the owner in times of peace. These clauses usually provided, “No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war except in the manner to be prescribed by law.”<sup>188</sup> A supermajority of the population in 1868—72% of the American people, but not an Article V, three-quarters supermajority—lived in states with constitutions that prohibited quartering soldiers in private homes. Such prohibitions could be found in 80% of the Northeastern state constitutions, in 75% of the Midwestern–Western state constitutions, and in 67% of the Southern state constitutions in 1868. Clauses forbidding the quartering of soldiers in private homes were somewhat more common in older state constitutions in 1868 than in newer ones, suggesting that this may have been an evil whose time

---

186. *E.g.*, DEL. CONST. of 1831, art. I, § 17.

187. *E.g.*, TENN. CONST. of 1834, art. I, § 24 (“[A]s standing armies in time of peace are dangerous to freedom, they ought to be avoided, as far as the circumstances and safety of the community will admit . . .”).

188. *E.g.*, NEV. CONST. of 1864, art. I, § 12.

was past. Quartering clauses were present in 83% of the pre-1855 but in only 63% of the post-1855 constitutions. Although quartering clauses are seemingly obsolete, the Quartering Act of 1774 was one of the “Intolerable Acts” of the British Parliament<sup>189</sup> and undoubtedly left lingering apprehension of military oppression in nineteenth-century Americans. The Third Amendment’s Quartering Clause has not yet been incorporated against the states through the Fourteenth Amendment.

*D. Fourth Amendment Rights Against Unreasonable Searches and Seizures*

The fourth subject discussed by the federal Bill of Rights—after religion, free expression, and guns and the military—is the protection of an individual from unreasonable searches and seizures. This is a core aspect of the right to privacy and constitutes a fundamental limit on government power. Unsurprisingly, this right turns out to have been very widely recognized in 1868 in state constitutional law.

*1. Search and Seizure.*—Thirty-four states out of thirty-seven in 1868—or a three-fourths majority—gave people the right to be free from unreasonable searches and seizures. This is a federal consensus of the kind sufficient to make federal constitutional law under Article V of the U.S. Constitution. Clauses protecting such rights typically provided, “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches shall not be violated . . . .”<sup>190</sup> This language mimics the federal Fourth Amendment.<sup>191</sup> Looking at matters by population, it turns out that 84% of Americans living in 1868 lived in states with these kinds of protections in their constitutions. Such protections were found in 100% of Midwestern–Western state constitutions, in 87% of Southern state constitutions, and in 90% of Northeastern state constitutions. Ninety-four percent of the pre-1855 and 89% of the post-1855 constitutions prohibited unreasonable searches and seizures. No state constitution, however, provided for a mechanism of enforcement of these rights through, for example, the exclusion of evidence obtained in violation of them. There was thus an Article V consensus in the states in 1868 that freedom from unreasonable searches and seizures was a fundamental right that was implicit in the

---

189. William S. Fields & David T. Hardy, *The Militia and the Constitution: A Legal History*, 136 MIL. L. REV. 1, 25 (1992) (relating that one of the Intolerable Acts was the Quartering Act of 1774, which authorized the quartering of soldiers in private homes of the colonists). The Intolerable Acts, also called the Coercive Acts, were five pieces of legislation passed by the British Parliament in reaction to the Boston Tea Party—the Boston Port Act, the Massachusetts Regulatory Act, the Impartial Administration of Justice Act, the Quartering Act of 1774, and the Quebec Act. ROBERT MIDDLEKAUF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763–1789*, at 230–31 (C. Vann Woodward ed., 1982).

190. *E.g.*, IOWA CONST. of 1857, art. I, § 8.

191. *See* U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

concept of ordered liberty, but there was no apparent consensus that evidence of a crime seized in violation of this right ought to be suppressed in court. Such suppression of evidence is referred to today as the exclusionary rule and was adopted by the Court in *Weeks v. United States* in 1914.<sup>192</sup> The Supreme Court incorporated the Fourth Amendment, including an exclusionary rule, against the states in *Mapp v. Ohio* in 1961.<sup>193</sup>

2. *Warrants and Probable Cause.*—The federal Fourth Amendment also sets rules for the issuance of warrants, a protection that was designed in response to the controversial writs of assistance, which were a significant factor leading up to the American Revolution.<sup>194</sup> Thirty-six states in 1868—or once again an Article V, three-quarters consensus—had provisions in their constitutions requiring all warrants to be supported by oath or affirmation, to describe particularly the person or things to be seized, and to be issued only with probable cause. These clauses were invariably paired with search-and-seizure clauses, as they are in the Fourth Amendment, and they typically stated, “[N]o warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.”<sup>195</sup> Looking at matters by population, a huge supermajority of the American people in 1868 lived in states that recognized this right in their state constitutions—fully 89%. Protection of this right could be found in 100% of the constitutions of Southern and Midwestern–Western states, and in 90% of the constitutions of Northeastern states. The only state constitution without this right was ratified before 1855. The right to a warrant supported by probable cause was slightly weaker in the Vermont constitution at the time, which emphasized that such warrants *ought* not be granted, rather than banning them outright.<sup>196</sup>

### E. *Criminal Procedure*

The fifth major topic addressed by the Bill of Rights to the federal Constitution after religion; freedom of expression; guns and the military; and protection from searches, seizures, and warrants is constitutional criminal procedure. These subjects are addressed in the Fifth and Sixth Amendments, and arguably some related subjects are addressed in Article I, Sections Nine

---

192. 232 U.S. 383, 398 (1914).

193. 367 U.S. 643, 655–59 (1961).

194. For background on writs of assistance, see generally M.H. SMITH, *THE WRITS OF ASSISTANCE CASE* (1978).

195. *E.g.*, IOWA CONST. of 1857, art. I, § 8.

196. VT. CONST. of 1793, ch. I, art. XI (“[W]arrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person[’s] property, not particularly described, are contrary to that right, and ought not to be granted.”).

and Ten of the federal Constitution. We will therefore now look at the criminal-procedure rights protected by state constitutions in 1868.

1. *Double Jeopardy*.—The federal Constitution protects against double jeopardy, but the Supreme Court famously failed to incorporate this right against the states in *Palko v. Connecticut*,<sup>197</sup> where it said such protection was not implicit in the concept of ordered liberty.<sup>198</sup> It turns out, however, that in 1868 fully thirty-one states—or over three-quarters of the total—had clauses in their state constitutions that provided that no person could be put in jeopardy twice for the same offense. Typically these clauses stated, “No person’s life or liberty shall be twice placed in jeopardy for the same offence.”<sup>199</sup> Thus, it would appear, contrary to *Palko*, that there was an Article V consensus for constitutional protection against double jeopardy in 1868 as a right that was implicit in ordered liberty. *Palko* was overruled and the Fourteenth Amendment was held to bar double jeopardy in *Benton v. Maryland*.<sup>200</sup> Looking at matters by population, 86% of the American people in 1868 lived in states where double jeopardy was unconstitutional. All Midwestern–Western state constitutions had clauses banning double jeopardy, compared to 80% of Southern and 70% of Northeastern states. Bans on double jeopardy appeared with the same frequency in state constitutions that were adopted before and after 1855.

2. *Habeas Corpus*.—The federal Constitution provides a criminal-procedure right in Article I, Section Nine that forbids Congress from suspending the writ of habeas corpus, thus prohibiting the detention of individuals without trial, except in cases of invasion or armed rebellion.<sup>201</sup> There was a comparable consensus opposing suspension of the Great Writ in thirty-six states in 1868, making an Article V, three-quarters consensus. In most of the habeas clauses, an exception was granted for cases of rebellion or invasion. Delaware’s constitution, for example, stated, “The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.”<sup>202</sup> Looking at matters by population, 96% of the American people in 1868 lived in states whose constitutions guaranteed the availability of the Great Writ. The only state without a clause guaranteeing the availability of habeas corpus in its

---

197. 302 U.S. 319 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969).

198. *Id.* at 328.

199. *E.g.*, MISS. CONST. of 1868, art. I, § 5.

200. 395 U.S. 784, 793–96 (1969).

201. Note that although Article I, Section Nine ultimately limits Congress’s powers with regard to habeas corpus, its scope and availability is largely determined by statute. *See* 28 U.S.C. §§ 2254–2255 (2000) (providing procedures for writs of habeas corpus for persons in state and federal custody).

202. DEL. CONST. of 1831, art. I, § 13.

constitution was Massachusetts, a Northeastern state, and its constitution in 1868 had been ratified before 1855.

3. *Self-incrimination*.—The Fifth Amendment to the federal Bill of Rights famously guarantees a right in federal trials to be protected from self-incrimination. However, the Supreme Court—over the heated dissent of Justice Hugo Black—declined to incorporate that right in *Adamson v. California*,<sup>203</sup> concluding protection from self-incrimination was not fundamental.<sup>204</sup> The Supreme Court subsequently overruled *Adamson*,<sup>205</sup> and today the Fourteenth Amendment does protect individuals from self-incrimination in state criminal cases. Our historical research suggests that Justice Black was right in *Adamson* and Justice Felix Frankfurter, who wrote the majority, was wrong at least as to whether the right against self-incrimination was historically fundamental. Fully thirty-four of the thirty-seven states in 1868—or an Article V, three-quarters federal consensus—had explicit language in their state constitutions that stated that no criminal defendant could be compelled to be a witness against himself. Typically, state self-incrimination clauses in 1868 provided, “That no man ought to be compelled to give evidence against himself in a criminal case.”<sup>206</sup> Ninety-one percent of the American people living in 1868—a huge supermajority—lived in states that had this right. The right against self-incrimination was recognized by 93% of the Southern state constitutions, by 92% of the Midwestern–Western state constitutions, and by 90% of the Northeastern state constitutions in 1868. Ninety-four percent of the pre-1855 and 89% of the post-1855 constitutions protected against self-incrimination.

This raises an interesting question as to how Justice Frankfurter could have failed to find that freedom from self-incrimination was a fundamental, unenumerated right under the Fourteenth Amendment. The answer may be that Justice Frankfurter, who was born in Vienna, Austria, and who had a life-long fascination with the civil law legal tradition of continental Europe, may have been moved by the fact that France and Germany did not recognize a right against self-incrimination.<sup>207</sup> Accordingly, he might not have recognized such a right. Ironically, if Justice Frankfurter had known as much

---

203. 332 U.S. 46 (1947), *overruled by* *Malloy v. Hogan*, 378 U.S. 1 (1964).

204. *Id.* at 51–53.

205. *See Malloy*, 378 U.S. at 6 (overruling *Adamson*).

206. *E.g.*, MD. CONST. of 1867, Declaration of Rights, art. 22.

207. Kurt Madlener, *The Protection of Human Rights in the Criminal Procedure of the Federal Republic of Germany*, in *HUMAN RIGHTS IN CRIMINAL PROCEDURE* 238, 250 (John A. Andrews ed., 1982) (stating that the right against self-incrimination was first inserted into German law after World War II); Mike Redmayne, *Rethinking the Privilege Against Self-Incrimination*, 27 *O.J.L.S.* 209, 220 (2007) (explaining that although a defendant in France has the privilege against self-incrimination, it is seldom exercised because all defendants are questioned by the court and “[s]ilence is not a realistic option”).

about American history as he knew about comparative law he might have reached a different conclusion in the *Adamson* case.

4. *Right to Counsel.*—Another vitally important criminal-procedure guarantee is the right to counsel. The Supreme Court ruled in 1932 in the infamous *Scottsboro Boys Case, Powell v. Alabama*,<sup>208</sup> that the right to counsel in capital cases was implied in the Bill of Rights as a fundamental freedom.<sup>209</sup> This right was guaranteed in one of two ways in state constitutions: either explicitly, or through the right to be heard by oneself or counsel. As an example of the latter, Illinois guaranteed that “in all criminal prosecutions the accused hath a right to be heard by himself and counsel . . . .”<sup>210</sup> One of the more explicit rights, guaranteed in Georgia, for example, stated, “Every person charged with an offence against the laws shall have the privilege and benefit of counsel . . . .”<sup>211</sup>

Thirty-four states—or a three-quarters majority—guaranteed a right to counsel in one of these two ways. Looking at the matter by population, 91% of Americans—a huge supermajority—lived in states in 1868 that guaranteed a right to counsel in some form. This right was found in 100% of Northeastern state constitutions in 1868, in 93% of Southern state constitutions, and in 83% of Midwestern–Western state constitutions. Recognition of the right to counsel in criminal cases could be found in 89% of the pre-1855 constitutions and in 95% of the post-1855 constitutions.

Twelve states had *explicit* rights to counsel. A typical such clause read: “[T]he accused shall . . . have the assistance of counsel for his defence . . . .”<sup>212</sup> An additional seventeen states had rights to be heard by self *and* counsel, which strongly suggests a right to counsel. Typically, these clauses provided, “[I]n all criminal prosecutions the accused hath a right to be heard by himself and his counsel . . . .”<sup>213</sup> Five additional states had somewhat more ambiguous rights to be heard by self *or* counsel, providing, for example, “[E]very subject shall have a right . . . to be fully heard in his defence by himself, or his counsel at his election.”<sup>214</sup> We read all three types of clauses as providing the right to counsel in criminal prosecutions, but we have described them separately to allow for alternative interpretations. Although, as this evidence shows, many states recognized the right to counsel in their constitutions, it was not until 1963 in *Gideon v.*

---

208. 287 U.S. 45 (1932).

209. *Id.* at 67.

210. ILL. CONST. of 1848, art. XIII, § 9.

211. GA. CONST. of 1868, art. I, § 7.

212. *E.g.*, W. VA. CONST. of 1861, art. II, § 8.

213. *E.g.*, PA. CONST. of 1838, art. IX, § 9.

214. *E.g.*, MASS. CONST. of 1780, pt. 1, art. XII.

*Wainwright*<sup>215</sup> that the Supreme Court affirmed the right for state court defendants to have counsel in felony trials.<sup>216</sup>

5. *Speedy Trial*.—Another criminal-procedure guarantee of the federal Constitution is the right to a speedy trial.<sup>217</sup> Twenty-nine of the thirty-seven states in 1868—or a three-quarters, Article V consensus of the states—guaranteed criminal defendants the right to a speedy trial. Often paired with the right to a public trial, a typical clause guaranteeing a right to a speedy trial stated, “In all criminal prosecutions the accused shall enjoy the right to a speedy and public . . . .”<sup>218</sup> A huge supermajority of Americans in 1868—fully 82%—lived in states where this right was constitutionally protected. A right to a speedy trial was present in 90% of Northeastern state constitutions, 80% of Southern state constitutions, and 75% of Midwestern–Western state constitutions. A constitutional right to a speedy trial was found in 89% of the pre-1855 constitutions and 74% of the post-1855 constitutions. The federal right was incorporated against the states in *Klopfer v. North Carolina* in 1967.<sup>219</sup>

6. *Public Trial*.—Another fundamental criminal-procedure right is the right to a public trial.<sup>220</sup> Twenty-four states out of thirty-seven—or a majority but not an Article V consensus—guaranteed criminal defendants the right to a public trial. Often paired with the right to a speedy trial, a typical clause guaranteeing a right to a public trial stated, “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . . .”<sup>221</sup> By population, a solid majority of Americans in 1868—58%—lived in states that protected this right. Protection of the right to a public trial varied widely by geography. The right could be found in 1868 in 83% of Midwestern–Western state constitutions, in 60% of Southern state constitutions, and in 50% of Northeastern state constitutions. The right to a public trial could be found in 1868 in 67% of the pre-1855 and in 63% of the post-1855 constitutions. The Sixth Amendment right to a public trial was applied to the states through the Fourteenth Amendment in 1948.<sup>222</sup>

---

215. 372 U.S. 335 (1963).

216. *Id.* at 344. As mentioned above, thirty years earlier the infamous *Scottsboro Boys Case* established the right to counsel only in *capital* cases. 287 U.S. 45, 67 (1932).

217. U.S. CONST. amend. VI. *See generally* *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (setting out a four-part balancing test for determining whether a defendant’s speedy-trial right has been violated).

218. *E.g.*, ARK. CONST. of 1868, art. I, § 8.

219. 386 U.S. 213, 223 (1967).

220. U.S. CONST. amend. VI.

221. *E.g.*, ARK. CONST. of 1868, art. I, § 8.

222. *See In re Oliver*, 333 U.S. 257, 273 (1948) (“In view of this nation’s historic distrust of secret proceedings . . . the Fourteenth Amendment’s guarantee that no one shall be deprived of his

7. *Confrontation*.—Yet another criminal-procedure guarantee of the federal Bill of Rights that the Supreme Court, led by Justices Scalia and Thomas, has done a lot to resurrect in recent years<sup>223</sup> is the Confrontation Clause.<sup>224</sup> This Clause guarantees criminal defendants the right to confront the witnesses against them.<sup>225</sup> Thirty-two out of thirty-seven state constitutions in 1868—or an Article V, three-quarters consensus—contained confrontation clauses. Typically, the state constitutional confrontation clauses stated, “In all criminal prosecutions the accused shall have a right to . . . be confronted with the witnesses against him . . . .”<sup>226</sup> A huge supermajority of Americans—85%—lived in states with confrontation clauses in their state constitutions in 1868. Such clauses could be found in 90% of Northeastern state constitutions, in 87% of Southern state constitutions, and in 83% of Midwestern–Western state constitutions. There was not much variation by date, with confrontation clauses being present in 89% of the pre-1855 and 84% of the post-1855 constitutions.

Fifteen states explicitly guaranteed the right to confront witnesses face-to-face. For example, Wisconsin’s constitution provided, “In all criminal prosecutions, the accused shall enjoy the right . . . to meet the witnesses face to face.”<sup>227</sup> This variation of the confrontation clauses is important because Justices Scalia and Thomas have argued that the federal Confrontation Clause requires face-to-face confrontation, although such language is not explicitly used.<sup>228</sup> The federal right was incorporated against the states in *Pointer v. Texas* in 1965.<sup>229</sup>

8. *Obtain Witnesses*.—Another vital criminal-procedure right is the right to have compulsory process for obtaining witnesses in one’s favor. This right is explicitly protected by the Sixth Amendment of the federal Bill of Rights. Unsurprisingly, therefore, a substantial majority of twenty-seven out of thirty-seven states—or over two-thirds—guaranteed criminal defendants the right to have compulsory process for obtaining witnesses in their favor. Such state bill of rights provisions typically provided, “In all criminal

---

liberty without due process of law means at least that an accused cannot be thus sentenced to prison.”).

223. See *Crawford v. Washington*, 541 U.S. 36, 60 (2004) (arguing that the Confrontation Clause has become distorted over time and that the Court’s interpretation should return to its original meaning).

224. U.S. CONST. amend. VI.

225. *Id.*

226. *E.g.*, N.J. CONST. of 1844, art. I, § 8.

227. WIS. CONST. of 1848, art. I, § 7.

228. See, *e.g.*, *Crawford*, 541 U.S. at 59, 50–59 (strengthening Confrontation Clause protection for cases involving testimonial evidence by asserting that the Confrontation Clause applies to both in-court and out-of-court testimony to the extent that “[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine”).

229. 380 U.S. 400, 403 (1965).

prosecutions, the accused shall enjoy the right . . . to have compulsory process to compel the attendance of witnesses in his behalf . . . .”<sup>230</sup> Looking at the prevalence of this right by population, it turns out that 73% of Americans in 1868—almost three-quarters of the total population—lived in states where this right was constitutionally protected. Geographically, the right to obtain witnesses was present in 83% of Midwestern–Western state constitutions in 1868, in 73% of Southern state constitutions, and in 60% of Northeastern constitutions. The right to compel the attendance of witnesses on one’s own behalf was equally present in older and more recent state constitutions.

9. *Informed of Charges.*—The federal Bill of Rights in the Sixth Amendment gives the accused the right to be “informed of the nature and cause of the accusation” against him.<sup>231</sup> Once again, state bills of rights overwhelmingly protected this federal criminal-procedure right in 1868 as well. Thirty-one out of thirty-seven states—or over three-quarters—guaranteed criminal defendants the right to be informed of the charges against them. This is, of course, an Article V consensus of states needed for the making of federal constitutional law. A typical such clause said, “In all criminal prosecutions the accused hath a right to . . . demand the nature and cause of the accusation against him . . . .”<sup>232</sup> Looking at the question by population, 82% of Americans living in 1868 lived in states where this right was protected. Geographically, the right was found in 90% of Northeastern constitutions, 83% of Midwestern–Western constitutions, and in 80% of Southern constitutions. Defendants’ right to be informed of the nature and cause of the accusations against them was present in 89% of the pre-1855 constitutions and in 79% of the post-1855 constitutions. The Sixth Amendment right to be notified of charges was incorporated in 1948 in *In re Oliver*.<sup>233</sup>

10. *Other Miscellaneous Criminal Procedure Guarantees.*—Our study turned up three other miscellaneous criminal-procedure guarantees in a handful of state constitutions that are not present in the federal Bill of Rights. One state, North Carolina, had a clause in its state constitution that provided, “Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the same if unlawful; and such remedy ought not to be denied or delayed.”<sup>234</sup> This could be read to guarantee the availability of collateral review at all times, although it may just guarantee habeas corpus. Three percent of the population lived in North Carolina in 1868, and its constitution was ratified after 1855.

---

230. *E.g.*, WIS. CONST. of 1848, art. I, § 7.

231. U.S. CONST. amend. VI.

232. *E.g.*, PA. CONST. of 1838, art. IX, § 9.

233. 333 U.S. 257, 273 (1948).

234. N.C. CONST. of 1868, art. I, § 18.

Another state, Rhode Island, guaranteed the presumption of innocence in explicit constitutional language. Rhode Island's bill of rights provided, "Every man being presumed innocent until he is pronounced guilty by the law, no act of severity which is not necessary to secure an accused person shall be permitted."<sup>235</sup> Less than 1% of the U.S. population lived in Rhode Island in 1868, and its constitution was ratified before 1855.

Finally, two states protected their citizens from detention or punishment, except in cases clearly warranted by law.<sup>236</sup> These clauses appear to overlap with state due process clauses about which we shall have more to say below. Four percent of the American people lived in states that protected this right in 1868. These states were in the Northeast and the South, one with a constitution before 1855 and one from after 1855.

#### F. Due Process

Perhaps the most consequential clause of the federal Bill of Rights is the provision in the Fifth Amendment that says, "No person shall be . . . deprived of life, liberty, or property without due process of law."<sup>237</sup> This clause was the only provision of the federal Bill of Rights relied on by the U.S. Supreme Court to strike down an act of Congress as unconstitutional prior to the Civil War.<sup>238</sup> In *Dred Scott v. Sandford*,<sup>239</sup> the Court read substantive content into the Fifth Amendment Due Process Clause and concluded that a federal statute that deprived slave owners of their "right" to bring their slaves into federal territories was a deprivation of property "without due process of law."<sup>240</sup> Critics of substantive due process responded that the Due Process Clause was originally meant to protect against only arbitrary and capricious executive deprivations of rights; deprivations pursuant to statute were always okay because the enactment of a statute was all the process that was due.<sup>241</sup> This argument that the Due Process Clause protects only against arbitrary and capricious executive or judicial action and not against arbitrary and capricious statutes is bolstered when one looks at the clause in the Magna Carta from which the federal Due Process Clause derives, the *per legem terrae*

---

235. R.I. CONST. of 1842, art. I, § 14.

236. See ALA. CONST. of 1867, art. I, § 9 ("That no person shall be accused, or arrested, or detained, except in cases ascertained by law, and according to the forms which the same has prescribed . . ."); CONN. CONST. of 1818, art. I, § 10 ("No person shall be arrested, detained, or punished, except in cases clearly warranted by law.").

237. U.S. CONST. amend. V.

238. Akhil Reed Amar, 2000 Daniel J. Meador Lecture: Hugo Black and the Hall of Fame, *in* 53 ALA. L. REV. 1221, 1223 (2002).

239. 60 U.S. (19 How.) 393 (1856).

240. *Id.* at 450–52.

241. Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1531–32 (2008) (explaining that the Due Process Clauses, as interpreted by originalists, are meant only to constrain arbitrary and capricious action by the Executive and are not meant to require that legislation be reasonable in the eyes of the Judiciary).

clause.<sup>242</sup> That provision said that no one could be deprived of their rights “except by the law of the land.”<sup>243</sup> This seemed to be a protection against arbitrary and capricious deprivations by the King’s sheriffs but not a protection against what Parliament might enact “by the law of the land.”<sup>244</sup> As we look at state due process clauses below, consider whether they bolster the procedural- or the substantive-due-process understanding of the Fifth or Fourteenth Amendment federal Due Process Clauses.

Thirty states out of thirty-seven in 1868—or an Article V, three-quarters consensus—had clauses in their state constitutions that explicitly prohibited the deprivation of life, liberty, or property without due process of law or by the law of the land.<sup>245</sup> A typical such due process clause, in the Georgia constitution, provided, “No person shall be deprived of life, liberty, or property, except by due process of law.”<sup>246</sup> Many of the thirty states with due process clauses in their state bills of rights used the old English Magna Carta formulation that deprivations of life, liberty, or property were not allowed except “by the law of the land.”<sup>247</sup> A typical example is the New Hampshire Constitution, which stated, “[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate but by the judgment of his peers or the law of the land.”<sup>248</sup> All in all, eighteen of the thirty states with due process clauses in 1868 used the “by the law of the land” language while fourteen used the words “due process of law.” Two states—Minnesota and New York—had both a clause with “by law of the land” language<sup>249</sup> and a clause with “due process of law” language.<sup>250</sup> This

242. MAGNA CARTA ch. 39.

243. *Id.*

244. *See In re Winship*, 397 U.S. 358, 385 (1970) (Black, J., dissenting) (contending that state legislatures are a manifestation of the constitutional right of self-government, and therefore that the Court should only interfere with this right when laws conflict with the Constitution); *Griswold v. Connecticut*, 381 U.S. 479, 513 (1965) (Black, J., dissenting) (denying that the Court has the power to “measure constitutionality by [its] belief that legislation is arbitrary, capricious or unreasonable”); BORK, *supra* note 1, at 32 (suggesting that due process was thought to be protected by “the law of the land” but, as Justice Black argued in *In re Winship*, was put in question when judges took their interpretive role too far).

245. One exception, Virginia, prohibited deprivation of liberty without due process, but did not mention life or property. VA. CONST. of 1864, Bill of Rights, art. I (incorporating VA. CONST. of 1776, Declaration of Rights, § 8).

246. GA. CONST. of 1868, art. I, § 3.

247. *See Washington v. Glucksberg*, 521 U.S. 702, 757, 756–57 (1997) (Souter, J., concurring) (mentioning that before the ratification of the Fourteenth Amendment, state constitutions commonly contained either due process clauses similar to that found in the Fifth Amendment or language from the Magna Carta that served as a textual antecedent to such due process clauses).

248. N.H. CONST. of 1784, pt. I, art. XV.

249. MINN. CONST. of 1857, art. I, § 2 (“No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers.”); N.Y. CONST. of 1846, art. I, § 1 (“No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.”).

may bolster the notion that the two formulations did have distinct meanings. The fact that so many states in 1868 continued to use the “by the law of the land” language in their state due process clauses suggests there was no Article V, three-quarters-of-the-states consensus that due process clauses had substantive content.

Looking at the issue by population, 82% of Americans in 1868—a huge supermajority—lived in states with either due process or “by the law of the land” guarantees. Thirty-five percent of the total population lived in states with due process clauses and 60%—a large majority—lived in states with “by the law of the land” clauses. The prevalence of due process or “by the law of the land” clauses varied by region. Such clauses were to be found in 100% of Southern state constitutions, 90% of Northeastern constitutions, and only 50% of Midwestern–Western constitutions. The language of due process was used in 47% of Southern constitutions, 20% of Northeastern constitutions, and 58% of Midwestern–Western constitutions. The “by the law of the land” language, in contrast, appeared in 53% of Southern constitutions, 80% of Northeastern constitutions, and 16% of Midwestern–Western constitutions. Seventy-eight percent of the pre-1855 constitutions and 84% of the post-1855 constitutions contained either the due process or the “by the law of the land” formulation. The “by the law of the land” formulation was more common in pre-1855 constitutions while the due process formulation was far more common in the post-1855 constitutions. Specifically, 61% of the “by the law of the land” formulations were found in pre-1855 constitutions whereas 71% of the “due process” formulations were found in post-1855 constitutions. The trend, as the majority in *Roper v. Simmons*<sup>251</sup> might say, was toward preferring the language of due process over the “by the law of the land” formulation.<sup>252</sup> In sum, there was an Article V consensus of three-quarters of the states that procedural due process was a fundamental right in 1868, but there was no such Article V consensus with respect to substantive due process. The right to procedural due process is thus an important criminal and civil right. This may be of help in informing the meaning of the Due Process Clause of the Fourteenth Amendment, which was of course adopted as part of the Amendment in 1868. The question whether this Clause has a substantive component has vexed the Court for the last 140 years.

---

250. MINN. CONST. of 1857, art. I, § 7 (“No person shall be . . . deprived of life, liberty or property without due process of law.”); N.Y. CONST. of 1846, art. I, § 6 (“No person shall . . . be deprived of life, liberty, or property without due process of law . . .”).

251. 543 U.S. 551 (2005).

252. See *id.* at 565–66 (noting the significance of consistency in the direction of change).

*G. Criminal and Civil Procedure Rights Borrowed from the Original Constitution*

We have now looked at the prevalence in state constitutions of the criminal-procedure guarantees that appear in the federal Bill of Rights. This does not end our criminal-procedure inquiry, however, because Article I, Sections Nine and Ten of the federal Constitution also guarantee two such rights. First, Congress and the states are forbidden from passing any ex post facto laws or bills of attainder.<sup>253</sup> In addition, the states, but not Congress, are barred from passing any laws that impair the obligation of contracts.<sup>254</sup> Impairments of contracts could be retroactive civil laws of a certain type. The federal Constitution also contains two other criminal-procedure guarantees. Article III, Section Three forbids federal laws that work corruption of the blood, and it narrows the definition of treason in federal law.<sup>255</sup> To what extent, then, did state bills of rights in 1868 protect any or all of these rights?

1. *Ex Post Facto Laws.*—An ex post facto law is one that criminally punishes an act that was legally permissible when it was done.<sup>256</sup> The Supreme Court initially considered and developed a test for the Ex Post Facto Clause in *Calder v. Bull* in 1798.<sup>257</sup> Unsurprisingly, our nose count revealed that twenty-nine out of thirty-seven states—or over three-quarters—prohibited ex post facto laws. The clauses typically provided, “No *ex post facto* law, nor any law impairing the obligation of contracts, shall ever be made . . . .”<sup>258</sup> Ex post facto clauses were usually coupled with clauses addressing obligations of contracts, corruption of blood, bills of attainder, or a combination of the three. About 73% of the population in 1868—or slightly less than three-fourths—lived in states with bans on ex post facto laws. Ex post facto law clauses were found in 87% of Southern state constitutions, in 83% of Midwestern–Western state constitutions, and in 60% of Northeastern state constitutions. They were present in 72% of the pre-1855 and 84% of the post-1855 state constitutions. These state constitutional clauses were, of course, superfluous because Article I, Section Ten of the federal Constitution already forbade the states from enacting ex post facto laws.<sup>259</sup>

2. *Retroactive Civil Laws.*—Also in *Calder v. Bull*, the U.S. Supreme Court famously ruled that the federal Ex Post Facto Clause applied only to

253. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1.

254. U.S. CONST. art. I, § 10, cl. 1.

255. U.S. CONST. art. III, § 3.

256. BLACK’S LAW DICTIONARY 620 (8th ed. 2004).

257. See 3 U.S. (3 Dall.) 386, 390 (1798) (explaining that only an act of the legislature, rather than that of a private person, can make an act illegal ex post facto).

258. E.g., ILL. CONST. of 1848, art. XIII, § 17.

259. U.S. CONST. art. I, § 10, cl. 1.

retroactive criminal laws and not to retroactive civil laws.<sup>260</sup> Retroactive civil laws thus are not prevented by the Ex Post Facto Clause, although they can be challenged under the Due Process Clause.<sup>261</sup> It is interesting in this respect that only a small minority of four states had clauses in their state constitutions in 1868 that explicitly prohibited retroactive (or retrospective) civil laws. A typical such clause said, “No bill of attainder, *ex post facto* law, retroactive law, or any law impairing the obligation of contracts, shall be made.”<sup>262</sup> Thirteen percent of the population lived in these states, all of which were in the South. The constitutions of these states constituted 6% of the pre-1855 constitutions and 16% of the post-1855 constitutions.<sup>263</sup> All four of the state constitutions here were ratified after *Calder v. Bull* was decided. Justice Clarence Thomas has urged the Court to reconsider *Calder* and extend ex post facto protection to civil laws.<sup>264</sup>

3. *Bills of Attainder*.—Article I, Sections Nine and Ten of the federal Constitution prohibit federal and state governments from adopting bills of attainder, which are laws that direct the punishment of a particular person or group of people.<sup>265</sup> The Supreme Court has stated that “the Bill of Attainder Clause was intended not as a narrow, technical . . . prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function.”<sup>266</sup> Only twenty-two out of thirty-seven states—a simple majority—prohibited bills of attainder in their state bills of rights even though the federal Constitution already forbade the states from enacting them. Of course, many states may have thought such prohibitions unnecessary in light of the federal constitutional proscription of bills of attainder. A typical state constitutional bill-of-attainder clause stated, “No bill of attainder, *ex post facto* law, or law impairing the obligation of a contract shall be passed.”<sup>267</sup> Fifty-three percent of Americans in 1868 lived in states with this right in their state constitution. Protection of the right was fairly evenly distributed across the country, with the prohibition on bills of attainder being found in 67% of Southern state constitutions, 58% of Midwestern–Western state constitutions, and 50% of Northeastern state

---

260. 3 U.S. (3 Dall.) at 390–91.

261. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976) (calling for a rational basis test for the evaluation of retroactive civil laws).

262. E.g., TEX. CONST. of 1868, art. I, § 14.

263. But see *Calder*, 3 U.S. (3 Dall.) at 390 (“[T]he legislatures of several of the states, to wit, Massachusetts, Pennsylvania, Delaware, Maryland, and North and South Carolina, are expressly prohibited, by their state Constitutions, from passing any ex post facto law.”).

264. See *Eastern Enters. v. Apfel*, 524 U.S. 498, 539, 538–39 (1998) (Thomas, J., concurring) (“I would be willing to reconsider *Calder* and its progeny to determine whether a retroactive civil law . . . is . . . unconstitutional under the *Ex Post Facto* Clause.”).

265. BLACK’S LAW DICTIONARY 176 (8th ed. 2004).

266. *United States v. Brown*, 381 U.S. 437, 442 (1965).

267. E.g., W. VA. CONST. of 1861, art. II, § 1.

constitutions. Forty-four percent of the pre-1855 state constitutions and 74% of the post-1855 constitutions forbade bills of attainder.

4. *Corruption of Blood.*—The federal Constitution forbids federal but not state laws that work corruption of the blood.<sup>268</sup> A typical such law would apply criminal penalties or fines against not only those convicted of crimes but also against their descendants.<sup>269</sup> Twenty states out of thirty-seven in 1868—a majority but not an Article V, three-quarters consensus—had provisions in their state bills of rights that prohibited convictions working corruption of blood. A typical such clause provided, “No conviction shall work corruption of blood or forfeiture of estate.”<sup>270</sup> These clauses ban corruption of the blood only from convictions and not because one’s ancestors were, for example, potentially slave owners. Sixty percent of the American people in 1868 lived in states with clauses in their state constitutions that forbade convictions from working corruption of the blood. Such clauses could be found in 67% of Midwestern–Western state constitutions, 60% of Southern state constitutions, and 30% of Northeastern state constitutions. Fifty percent of the pre-1855 and 58% of the post-1855 constitutions prohibited convictions from working corruption of the blood.

5. *Impairment of Contracts.*—The federal Constitution forbids the states from passing laws impairing the obligation of contracts, and twenty-five out of thirty-seven states in 1868—or just over two-thirds—concurred and prohibited laws impairing the obligation of contracts in their state bills of rights. A typical clause of this type provided, “No *ex post facto* law, or law impairing the obligation of contracts, shall be passed.”<sup>271</sup> Sixty-three percent—or just under two-thirds—of the total population in 1868 lived in states with constitutions that forbade laws impairing the obligation of contracts. Contract clauses were present in 83% of Midwestern–Western state constitutions, in 73% of Southern state constitutions, and in 40% of Northeastern state constitutions. Contract clauses could be found in 61% of the pre-1855 and in 74% of the post-1855 constitutions.

6. *Treason.*—The federal Constitution limits the definition of treason in federal cases,<sup>272</sup> and state constitutions in 1868 largely followed suit. Twenty-seven states—or over two-thirds—limited the definition of treason.

---

268. See, e.g., U.S. CONST. art. III, § 3, cl. 2.

269. BLACK’S LAW DICTIONARY 371 (8th ed. 2004).

270. E.g., IND. CONST. of 1851, art. I, § 30.

271. E.g., R.I. CONST. of 1842, art. I, § 12.

272. See U.S. CONST. art. III, § 3, cl. 1 (“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”).

Sixty-two percent—slightly less than two-thirds—of the total population in 1868 lived in states where the definition of treason was limited. The definition of treason was limited in 83% of Midwestern–Western constitutions, in 73% of Southern constitutions, and in 60% of Northeastern state constitutions in 1868. Narrowed definitions of treason were less common in pre-1855 state constitutions, of which only 61% had such clauses, as compared to 84% of the post-1855 state constitutions. These clauses typically established that treason could consist only of levying war against the state, adhering to its enemies, or giving them aid and comfort. For example, Arkansas provided, “Treason against the State shall only consist in levying war against the same, or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.”<sup>273</sup> Like Arkansas, most states provided that no person be convicted of treason unless on the testimony of two witnesses to the same overt act, or confession in open court.<sup>274</sup>

#### H. Property Rights

The federal Bill of Rights starts by protecting religious freedom; it then protects freedom of expression, then guns and the military, then unreasonable searches, and then criminal procedure. The next major topic addressed by the federal Bill of Rights, a topic addressed in the middle of the criminal-procedure sections, is property rights.<sup>275</sup> Specifically, the Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use without just compensation being paid.<sup>276</sup> Many questions have arisen about this language. Are takings for private use ever allowed?<sup>277</sup> Are regulations that impair the value of property also takings, or are only physical invasions takings?<sup>278</sup> How is just compensation to be determined?<sup>279</sup> Ironically, although the Takings Clause appears only in the middle of the Bill of Rights, it was the first Clause to be incorporated into the

---

273. ARK. CONST. of 1868, art. I, § 11.

274. LA. CONST. of 1868, tit. VI, art. 101.

275. For an excellent discussion of property rights in the Constitution, see generally Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981).

276. U.S. CONST. amend. V.

277. See generally *Kelo v. City of New London*, 545 U.S. 469, 472, 489–90 (2005) (holding that a transfer of land from one private owner to another was permissible because expected communal economic growth constituted public use).

278. See generally *Tahoe–Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 306 (2002) (holding that, considering the impact of the regulations and the importance of the public interest involved, temporary regulations pursuant to a valid state objective that impair the value of property do not amount to takings).

279. See generally *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511–12 (1979) (holding that the fair-market value of the property is generally sufficient to compensate the owner and that the need for a relatively objective standard requires that the subjective value of the property to the owner not factor into the amount of compensation).

Fourteenth Amendment as a matter of substantive due process.<sup>280</sup> To what extent then did state constitutions protect private property in 1868 when the Fourteenth Amendment was ratified? Was the early incorporation of the Takings Clause in any way justified?

1. *Takings Clauses.*—Takings clauses place important limits on the government power of eminent domain. Thirty-three states out of thirty-seven in 1868 had takings clauses in their constitutions. This is easily an Article V consensus of the states for the making of federal constitutional law. A typical takings clause in a state constitution at this time provided, “Private property shall not be taken for public uses without just compensation therefor.”<sup>281</sup> Ninety-one percent of the American people in 1868—a huge supermajority—lived in states with takings clauses in their state constitutions. Such clauses could be found in 100% of Northeastern state constitutions, in 92% of Midwestern–Western state constitutions, and in 80% of Southern state constitutions. Takings clauses were notably more common in older state constitutions, and they could be found in 100% of the pre-1855 constitutions and in 79% of the post-1855 constitutions. Alabama and South Carolina’s clauses also specifically prohibited transfers for private use,<sup>282</sup> which is interesting because they would bar *Kelo*-like outcomes.<sup>283</sup> Of course, the other states may just have assumed that it was obvious that takings for private use were forbidden and that there was no need to state it explicitly. Alternatively, one could read something portentous into the failure of these states to ban takings for private use. New Hampshire’s takings clause is slightly different from the others in that it does not require just compensation.<sup>284</sup> One other state constitution, that of Georgia, contains a related clause that provides, “Private ways may be granted upon just compensation being paid by the applicant.”<sup>285</sup>

---

280. See *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897) (holding that a judgment by a state court taking private property for public use without just compensation is a violation of the Due Process Clause of the Fourteenth Amendment); CHEMERINSKY, *supra* note 168, at 458–69 (detailing the cases regarding the incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, and listing *Chicago, Burlington & Quincy* as the first).

281. E.g., ARK. CONST. of 1868, art. I, § 15.

282. ALA. CONST. of 1867, art. I, § 25 (“That private property shall not be taken or applied for public use, unless just compensation be made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner . . . .”); S.C. CONST. of 1868, art. I, § 23 (“Private property shall not be taken or applied for public use, or for the use of corporations, or for private use, without the consent of the owner or a just compensation being made therefor . . . .”).

283. See *supra* note 277.

284. See N.H. CONST. of 1784, pt. I, art. XII (“But no part of a man’s property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.”).

285. GA. CONST. of 1868, art. I, § 20.

2. *Monopolies.*—Another question that arose early in the history of the Fourteenth Amendment was whether the Amendment conferred on individuals a fundamental right to be free of having to compete with monopolies or the right to practice their professions without permission from the state. The U.S. Supreme Court famously addressed these questions in its five-to-four decision in 1873 in *The Slaughterhouse Cases*.<sup>286</sup> A majority of the Court, over some very spirited dissents, found no fundamental right to be free of monopolies or to practice one’s profession without government permission in the Fourteenth Amendment.<sup>287</sup> (In fact, the *Slaughterhouse* majority construed the Fourteenth Amendment in an absurdly narrow way, which has been roundly excoriated by courts and scholars.)<sup>288</sup>

What, then, did state constitutional law say about these types of economic freedoms in 1868? It turns out that only five states out of thirty-seven in 1868—a small minority—banned monopolies for being contrary to the spirit of a free state. Although all worded their state constitutional guarantees slightly differently, they generally declared, “[M]onopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered.”<sup>289</sup> Only 13% of Americans in 1868 lived in states that banned monopolies in their state bills of rights. No Midwestern–Western states banned monopolies, but antimonopoly clauses were found in 27% of Southern and 10% of Northeastern states. They were present in 11% of the pre-1855 constitutions and 16% of the post-1855 constitutions. The *Slaughterhouse* Court was, in our view, profoundly misguided in many respects,<sup>290</sup> but the Court’s conclusion that there was no fundamental, positive-law right to be free of monopolies in 1868 looks to have been a correct statement of the positive law at that time.

3. *Legal Recourse.*—No state in 1868 specifically addressed regulatory takings of property, but state constitutions did overwhelmingly provide a

286. 83 U.S. (16 Wall.) 36 (1873).

287. *See id.* at 81 (doubting “very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of [the Fourteenth Amendment]”).

288. *See* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM 55 (1999) (stating that the *Slaughterhouse* decision is “probably the worst holding, in its effect on human rights, ever uttered by the Supreme Court”); Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 33 (2007) (“From the beginning, *Slaughter-House* was intensely criticized.”). *But see* Meadows v. Odom, 356 F. Supp. 2d 639, 642 (M.D. La. 2005) (“While many legal scholars and lower courts may have criticized portions of the *Slaughter-House* opinion, it is equally clear that the *Slaughter-House* decision has never been overruled, and remains a binding precedent which this Court is bound to follow.”).

289. *E.g.*, MD. CONST. of 1867, Declaration of Rights, art. 41.

290. *See* Calabresi, *supra* note 241, at 1532; Calabresi, *supra* note 34, at 1108 (both asserting that the Privileges or Immunities Clause was “guttled” by *Slaughterhouse*, but explaining that this does not impact the Clause’s meaning for a “good originalist like [him]”).

right of legal recourse for injuries, a right for which the federal Constitution or Bill of Rights provides no analog. Thus, an astonishing twenty-eight out of thirty-seven states in 1868, or an Article V, three-quarters consensus, guaranteed their citizens the right to legal recourse for all injuries done to their land, goods, person, or reputation. This could be argued to support the Supreme Court's holding in 1977 that there exists some kind of a "fundamental constitutional right of access to the courts."<sup>291</sup> However, this right has only been examined at the federal level through narrow holdings involving the right to appeal,<sup>292</sup> challenges to filing fee requirements,<sup>293</sup> and prisoners' access to the Judiciary.<sup>294</sup>

A typical state clause provided, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and justice administered without denial or delay."<sup>295</sup> This fundamental right effectuated the famous dictum in *Marbury v. Madison*<sup>296</sup> where the Court quoted the English law principle that for every right there must be a remedy.<sup>297</sup> This could even be argued to imply the existence of *Bivens*<sup>298</sup>-like causes of action where the legislature has not provided for them.<sup>299</sup>

Seventy-three percent of all Americans in 1868—slightly less than three-fourths—lived in states that had provisions of this sort in their state constitutions. A right to legal recourse could be found in 80% of Northeastern state constitutions, in 75% of Midwestern–Western state constitutions, and in 73% of Southern state constitutions. A right to legal recourse was slightly more common in older constitutions, where it could be found in 83% of those state constitutions ratified before 1855 but in only 68% of those ratified after 1855.

291. *Bounds v. Smith*, 430 U.S. 817, 828 (1977); *see also Windsor v. McVeigh*, 93 U.S. 274, 277, 280 (1876) (describing the right to be heard in court as "founded in the first principles of natural justice").

292. *See, e.g., McKane v. Durston*, 153 U.S. 684, 687–88 (1894) (holding that an appeal to a higher court from a judgment of conviction is not a matter of absolute right, and a state may accord it to the accused upon such terms as it thinks proper).

293. *See, e.g., Gary S. Goodpaster, The Integration of Equal Protection, Due Process Standards, and the Indigent's Right to Free Access to the Courts*, 56 IOWA L. REV. 223, 230–31 (1970) (discussing cases in which petitioners sought to proceed *in forma pauperis* due to filing fee requirements).

294. *See, e.g., Ex parte Hull*, 312 U.S. 546, 551 (1941) (holding that the petitioner failed to adequately show he had been denied procedural due process).

295. *E.g., OHIO CONST.* of 1851, art. I, § 16.

296. 5 U.S. (1 Cranch) 137 (1803).

297. *Id.* at 163.

298. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

299. *See id.* at 389 (holding that a violation of the Fourth Amendment's prohibition on unreasonable searches and seizures "by a federal agent acting under color of his authority . . . gives rise to a cause of action for damages consequent upon his unconstitutional conduct").

4. *Suits Against the State*.—Five states out of thirty-seven in 1868—a small minority—specifically provided in their state constitutions, “Suits may be brought against the State, according to such regulations as shall be made by law.”<sup>300</sup> Thus, thirty-two states—or more than three-quarters of the states—made no provision for such suits. Seventeen percent of all Americans living in 1868 lived in states that had this right. The right could be found in 20% of both Northeastern and Southern state constitutions, but in no Midwestern–Western state constitutions at all. A state constitutional right to sue the state was present in only 17% of the pre-1855 and 11% of the post-1855 constitutions. It would thus seem that there was no widely accepted fundamental right in 1868 to sue the state.

5. *Property Escheat*.—Another small minority of six states out of thirty-seven declared that the people possess the ultimate right to property within the state. A typical clause of this kind provided, “The people of this State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all lands the title to which shall fail, from a defect of heirs, shall revert or escheat to the people.”<sup>301</sup> Twenty-two percent of Americans in 1868 lived in states with provisions like this in their state constitutions. Such provisions could be found in 20% of Southern state constitutions, in 17% of Midwestern–Western state constitutions, and in 10% of Northeastern state constitutions. Property escheat was equally common in more recent and older constitutions.

6. *Married Women*.—Another small minority of five states out of thirty-seven in 1868—less than one-quarter—specifically protected the rights of women to have property separate from their husbands. A typical state constitutional clause protecting the property of married women at this time provided, “The legislature shall provide for the protection of the rights of women in acquiring and possessing property, real, personal, and mixed, separate and apart from the husband; and shall also provide for their equal rights in the possession of their children.”<sup>302</sup> Eight percent of Americans in 1868 lived in states that protected the property rights of married women in this manner. This right could be found in 20% of Southern state constitutions, in 17% of Midwestern–Western constitutions, and in no Northeastern state constitutions. It was found exclusively in constitutions ratified after 1855.

---

300. *E.g.*, DEL. CONST. of 1831, art. I, § 9.

301. *E.g.*, N.Y. CONST. of 1846, art. I, § 11.

302. *E.g.*, KAN. CONST. of 1859, art. XV, § 6.

7. *Property as Supreme Right.*—One state, Kentucky, declared, “The right of property is before and higher than any constitutional sanction . . . .”<sup>303</sup> It subsequently added that the right of an owner of a slave to such slave is the same and as inviolable as other property rights.<sup>304</sup> Three percent of Americans lived in Kentucky, which had a pre-1855 constitution in 1868.

8. *Suicide.*—Six states out of thirty-seven—another small minority—provided that the estates of people who committed suicide would descend or vest as in the case of natural death. A typical such clause provided, “The estates of those who destroy their own lives shall descend or vest as in case of natural death . . . .”<sup>305</sup> Twenty-two percent of Americans in 1868 lived in states with such clauses in their state constitutions. Suicide clauses were found in 30% of Northeastern and 20% of Southern state constitutions in 1868. They were not found in any Midwestern–Western state constitutions. These clauses were more common in older than in newer state constitutions; they could be found in 28% of the pre-1855 constitutions but in only 5% of the post-1855 constitutions.

### I. *Juries and Grand Juries*

The federal Bill of Rights guarantees the right to criminal jury trial in the Sixth Amendment, as does Article III, Section Two of the Constitution. The Seventh Amendment guarantees the right to a civil jury trial in all suits at common law for more than \$20. These provisions are foundational to federal constitutional law, but they are mentioned only after the topics of: religion; expression; guns and the military; searches and warrants; criminal procedure; and property rights. The right to a jury trial in criminal cases was incorporated as a matter of substantive due process in 1968 in *Duncan v. Louisiana*,<sup>306</sup> but the Seventh Amendment right to a civil jury has never been incorporated. The Fifth Amendment of the federal Bill of Rights forbids indictment in ordinary cases except where a grand jury has voted out a true bill. What, then, did state constitutions say in 1868 about whether there was a fundamental right to a criminal jury trial, to a civil jury trial, or to be indicted only with the concurrence of a grand jury?

1. *Criminal Jury.*—Thirty-six states out of thirty-seven in 1868—a clear Article V, three-quarters consensus—explicitly guaranteed the right to jury trials in all criminal prosecutions. A typical state constitutional clause of this type provided, “In all criminal prosecutions the accused shall have a right to

---

303. KY. CONST. of 1850, art. XIII, § 3.

304. *Id.*

305. *E.g.*, DEL. CONST. of 1831, art. I, § 15.

306. 391 U.S. 145, 149–50 (1968).

a speedy and public trial by an impartial jury . . . .”<sup>307</sup> Ninety-nine percent of all Americans in 1868 lived in states that constitutionally guaranteed the right to criminal jury trial. Only one Midwestern–Western state—California—failed to guarantee the right to a criminal jury trial, and its constitution was ratified before 1855. One state of the thirty-six that protected the right to a criminal jury trial—Vermont—also required unanimous consent of the jury for convictions.<sup>308</sup> This might be relevant since modern law has come to allow non-unanimous jury verdicts even though they were not commonplace in 1868.

2. *Civil Jury.*—Thirty-six states out of thirty-seven in 1868—another clear Article V, three-quarters consensus—guaranteed the right to jury trials in all civil or common law cases. Eighteen of these states explicitly mentioned a right to civil jury trial in all civil or common law trials. Oregon’s constitution, for instance, provided, “In all civil cases the right of trial by jury shall remain inviolate.”<sup>309</sup> The other eighteen states provided more generally for the right by protecting the right of a jury trial in the abstract without specifically singling out civil or criminal jury trials for protection. For example, the Rhode Island constitution provided, “The right of trial by jury shall remain inviolate.”<sup>310</sup> We think these general protections of the right to jury trial, against an English common law backdrop where civil jury trial was available for suits at common law, probably imply that these state constitutions ought to be read as protecting the right to a civil jury trial, although the question is not free from doubt. The lone state that was clearly without a right to civil jury trial in 1868 was the Southern state of Louisiana, and its constitution was ratified after 1855. This is striking because Louisiana is the only state in the Union with a tie to the civil law, rather than the common law, tradition.<sup>311</sup> A key difference between these traditions is that the civil law does not rely on jury trials.<sup>312</sup> Fully 98% of all Americans in 1868 lived in jurisdictions where they had a fundamental state constitutional right to jury trial in all civil or common law cases.

---

307. *E.g.*, N.J. CONST. of 1844, art. I, § 8.

308. VT. CONST. of 1793, ch. I, art. X (“[A] person hath a right to . . . a speedy public trial by an impartial jury of his country; without the unanimous consent of which jury he cannot be found guilty . . .”).

309. OR. CONST. of 1857, art. I, § 18.

310. R.I. CONST. of 1842, art. I, § 15.

311. Christopher Osakwe, *Louisiana Civil Law: The Cinderella of American Law*, 60 TUL. L. REV. 1105, 1105–06 (1986).

312. See Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 461 (1997) (explaining that, after some experimentation with jury trials, most civil law countries have abandoned the practice in favor of “a ‘mixed court’ composed of a panel having both professional and lay judges”).

This is a striking finding that suggests the Supreme Court's failure to incorporate the Seventh Amendment,<sup>313</sup> when it has incorporated almost all of the rest of the Bill of Rights, is quite odd and perhaps mistaken. It might be suggested that this anomaly conforms with a tendency of the Supreme Court to "exile" the Seventh Amendment from traditional constitutional law and "relegat[e] [it] to the largely sub-constitutional inquiry of civil procedure."<sup>314</sup> Admittedly, one could argue that only eighteen states in 1868 explicitly single out civil jury trial as a fundamental right, but we think that would probably misread the state constitutional provisions that protect the right to a jury trial in general. We think those clauses were more likely understood as protecting the right to jury trial in civil as well as in criminal cases. This is confirmed by examination of Noah Webster's authoritative 1828 *American Dictionary of the English Language*—a dictionary that many in 1868 might have consulted. Webster defines petty juries as usually consisting "of twelve men" who "attend courts to try matters of fact in civil causes, and to decide both the law and the fact in criminal prosecutions."<sup>315</sup> The original public meaning of a clause generally protecting the right to a jury trial would thus most likely have been understood in 1868 as applying to civil as well as criminal juries.

3. *Grand Jury*.—The Fifth Amendment in the federal Bill of Rights guarantees that, in nonmilitary cases, "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."<sup>316</sup> The right to a grand jury is thus a fundamental right under federal constitutional law. Nonetheless, it is not one of the rights that the Supreme Court has said is incorporated to apply against the states by the Fourteenth Amendment.<sup>317</sup> What, then, was the status of the right to a grand jury in state constitutional law in 1868?

It turns out that only nineteen states out of thirty-seven in 1868—a bare majority—guaranteed the right to presentment or indictment by a grand jury for felonies (or capital and other infamous crimes). A typical clause protecting this right provided:

---

313. See *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974) (stating that, by 1974, the Court had "not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment"). To date, the Supreme Court has not decided a case holding otherwise.

314. Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 408 (1995) ("[W]hen the Supreme Court is asked to enforce the jury trial right, it often seems to abandon any grounding in governing principles of American constitutional and political theory.").

315. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

316. U.S. CONST. amend. V.

317. *Hurtado v. California*, 110 U.S. 516, 538 (1884).

No person shall be held to answer a criminal offence unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases of petit larceny, assault, assault and battery, affray, vagrancy and such other minor cases as the general assembly shall make cognizable by justices of the peace; or arising in the Army and Navy of the United States, or in the militia when in actual service in time of war or public danger . . . .<sup>318</sup>

Thus, there was no Article V consensus of three-quarters of the states, nor was there a two-thirds majority of the states protecting the right to a grand jury. This could be argued to weigh in favor of the non-incorporation of the grand jury requirement.

Looking at the issue by population, it turns out that 51% of Americans in 1868—again a bare majority—lived in states that guaranteed the right to a grand jury indictment. Geographically, the right to a grand jury was found in 58% of the Midwestern–Western state constitutions in 1868, in 50% of Northeastern state constitutions, and in 47% of Southern state constitutions. It was present in 50% of the pre-1855 constitutions and 53% of the post-1855 constitutions. One additional state, North Carolina, stated that prosecutions must be by indictment, presentment, or impeachment but did not mention grand juries by name.<sup>319</sup> In addition, one state’s constitution—Indiana’s—explicitly denied that there was a right to a grand jury in its state.<sup>320</sup>

4. *By Information.*—A small minority of seven states out of thirty-seven in 1868 protected criminal defendants from being prosecuted by information (except in military or militia cases). This prohibits the initiation of criminal prosecutions based solely on information—be it from the King, a government, or a private citizen—for fear that such prosecutions could be politically or maliciously motivated.<sup>321</sup> The alternative to prosecution by information is prosecution upon indictment by a grand jury. A typical clause of this kind provided, “No person shall for any indictable offence be proceeded against criminally by information, except in cases arising in the land and naval forces, or in the militia when in actual service in time of war or public danger . . . .”<sup>322</sup> Twenty-six percent of Americans lived in states where this protection was a part of state bill-of-rights constitutional law. Such a right was found in 33% of Southern state constitutions in 1868 and in 20% of Northeastern state constitutions at that time. No Midwestern–Western state had such a right. Twenty-two percent of the pre-1855 and 16%

---

318. *E.g.*, ARK. CONST. of 1868, art. I, § 9.

319. N.C. CONST. of 1868, art. I, § 12.

320. IND. CONST. of 1851, art. VII, § 17 (“The general assembly may modify or abolish the grand-jury system.”).

321. *See* Wayne L. Morse, *A Survey of the Grand Jury System*, 10 OR. L. REV. 101, 119–20 (1931) (describing the historical abuse of prosecutions by information).

322. *E.g.*, DEL. CONST. of 1831, art. I, § 8.

of the post-1855 constitutions recognized this right. In contrast, two state constitutions—those of Texas and of Louisiana—explicitly *permitted* prosecution by information.<sup>323</sup>

5. *Martial Law*.—Nine states—a fairly large minority—protected their civilians from being subjected to martial law in times of peace. A typical clause in this category provided, “[N]o person except regular soldiers and marines, and mariners in the service of this State, or militia, when in actual service, ought, in any case, to be subject to or punishable by martial law.”<sup>324</sup> Seventeen percent of Americans lived in states with clauses of this kind. Such clauses could be found in 50% of Northeastern state constitutions, in 20% of Southern constitutions, and in only 8% of Midwestern–Western state constitutions. This right was protected in 39% of the pre-1855 constitutions but in only 11% of the post-1855 constitutions. One of the states whose constitution protected this right, Rhode Island, provided a significantly weaker protection than the others.<sup>325</sup>

6. *Trial Within the State*.—The Sixth Amendment to the federal Bill of Rights guarantees a right to a criminal jury trial “by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .”<sup>326</sup> Eight states out of thirty-seven in 1868 to some degree echoed this requirement of federal law by guaranteeing the right to a trial within the state (or county) for criminal prosecutions. A typical clause of this kind stated, “[N]o person shall be liable to be transported out of this State for any offence committed within the same.”<sup>327</sup> Twenty-one percent of Americans living in 1868 lived in states with such clauses in their state constitutions. These clauses were found in 50% of Northeastern state constitutions and in 25% of Midwestern–Western state constitutions, but not in any Southern state constitutions in 1868. This right was protected in 39% of the pre-1855 state constitutions but in only 5% of the post-1855 state constitutions.

7. *Impartial Judge*.—Two states—a tiny minority—explicitly guaranteed all citizens the right to be tried by impartial judges. Of course, such a right could be argued to be inherent in the due process clauses that

---

323. See LA. CONST. of 1868, tit. I, art. 6 (“Prosecutions shall be by indictment or information.”); TEX. CONST. of 1868, art. I, § 8 (“And no person shall be holden to answer for any criminal charge but on indictment or information, except in cases arising in the land or naval forces, or offences against the laws regulating the militia.”).

324. E.g., MD. CONST. of 1867, Declaration of Rights, art. 32.

325. See R.I. CONST. of 1842, art. I, § 18 (“And the law martial shall be used and exercised in such cases only as occasion shall necessarily require.”).

326. U.S. CONST. amend. VI.

327. E.g., ILL. CONST. of 1848, art. XIII, § 18.

most states already had. The Massachusetts constitution, for example, provided for an impartial judge by saying, “It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit.”<sup>328</sup> Five percent of Americans lived in the two states that had such clauses. Both of these states were in the Northeast and both had constitutions ratified before 1855.

8. *Jury Determines Law and Fact.*—Three states—another small minority—had clauses in their constitutions in 1868 that explicitly provided, “In all criminal cases whatever the jury shall have the right to determine the law and the facts.”<sup>329</sup> This could materially aid in facilitating jury nullification. Seven percent of the total population lived in these three states, and this right was found in 17% of Midwestern–Western state constitutions, in 7% of Southern state constitutions, and in no Northeastern state constitutions. One clause was in a pre-1855 constitution; the other two were in post-1855 constitutions.

#### *J. Rights Against Excessive Punishments*

Following the protection of the right to a civil jury trial in the Seventh Amendment, the Eighth Amendment turns to the subject of protecting against excessive punishments. In particular, it forbids excessive bail, excessive fines, and cruel and unusual punishments. One ambiguity of the Cruel and Unusual Punishment Clause is whether it forbids *all* disproportionate punishments or only a certain set of punishments that were thought to be cruel and unusual 200 years ago, like drawing and quartering. Debate has also focused on the question of whether the Cruel and Unusual Punishment Clause forbids practices that would be condemned, as *Trop v. Dulles* says, under the “evolving standards of decency that mark the progress of a maturing society.”<sup>330</sup> Unsurprisingly, state constitutions did forbid at least some excessive punishments in 1868.

1. *Excessive Bail.*—All thirty-seven state constitutions in 1868—every last one—provided that excessive bail shall not be required in criminal cases. Protection against excessive bail was almost always paired with state constitutional bans on excessive fines and on cruel and unusual punishments. A typical clause tracked the language of the federal Eighth Amendment, stating, “Excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted.”<sup>331</sup> Obviously, all Americans in all three regions of the country lived under state

---

328. MASS. CONST. of 1780, pt. 1, art. XXIX.

329. *E.g.*, IND. CONST. of 1851, art. I, § 19.

330. 356 U.S. 86, 101 (1958).

331. *E.g.*, IOWA CONST. of 1857, art. I, § 17.

constitutions with this rule, and the rule was found in all pre- and post-1855 state constitutions. There can be no question that there was a fundamental right under state constitutional law to be protected from excessive bail in 1868. It can be argued that the Supreme Court signaled its willingness to incorporate this right against the states through the Fourteenth Amendment in 1971,<sup>332</sup> although it has not technically done so thus far. This finding may have implications for the constitutionality of preventive detention in some circumstances.

2. *Excessive Fines.*—Thirty-five states, or an Article V, three-quarters consensus in 1868, provided explicitly in their state constitutions that excessive fines not be imposed upon criminal defendants. A typical clause banning excessive fines stated, “Excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted.”<sup>333</sup> Ninety-two percent of Americans in 1868—a huge supermajority—lived in states with constitutions that banned excessive fines. A ban on excessive fines was found in 100% of the Southern state constitutions, in 92% of the Midwestern–Western state constitutions, and in 90% of the Northeastern state constitutions. Eighty-nine percent of the pre-1855 constitutions and 100% of the post-1855 constitutions banned excessive fines.

3. *Cruel and Unusual Punishments.*—The ban on cruel and unusual punishments dates back to the English Bill of Rights of 1689,<sup>334</sup> the language of which was exactly replicated in the Eighth Amendment of our federal Bill of Rights.<sup>335</sup> Despite the ban’s longstanding history, modern debates rage as to the types of punishments that should be considered cruel and unusual.<sup>336</sup> The use of capital punishment is often the focus of these debates, as evidenced by the Supreme Court’s recent seminal decision holding that a

---

332. See *Schilb v. Kuebel*, 404 U.S. 357, 366 (1971) (stating, in dicta, that “the Eighth Amendment’s proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment”).

333. E.g., IOWA CONST. of 1857, art. I, § 17.

334. An Act Declaring the Rights and Liberties of the Subject, and Setting the Succession of the Crown (Bill of Rights), 1689, 1 W & M, c. 2 (Eng.) (“excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted”).

335. See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

336. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 281 (1972) (Brennan, J., concurring) (offering four principles that could potentially determine whether a particular punishment is cruel or unusual, including whether or not the particular punishment is degrading to human dignity, whether the punishment is “inflicted in a wholly arbitrary fashion,” whether the punishment is “clearly and totally rejected throughout society,” and whether or not the punishment is “patently unnecessary”); see also *Gregg v. Georgia*, 428 U.S. 153, 169–73 (1976) (briefly detailing the history of the prohibition of cruel and unusual punishment and the evolution of that debate in American jurisprudence).

commonly used type of lethal injection did not violate the Eighth Amendment because it did not create a substantial risk of wanton and unnecessary infliction of pain, torture, or lingering death.<sup>337</sup>

Thirty-four states—or an Article V, three-quarters consensus—in 1868 had clauses in their state constitutions that banned cruel and unusual punishments. Although there was some variation in language, as discussed below, a typical such clause read, “That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>338</sup> Ninety-one percent of all Americans in 1868—again a huge supermajority—lived in states with bans on cruel and unusual punishments. Such a ban was found in 100% of Southern state constitutions, in 92% of Midwestern–Western state constitutions, and in 80% of Northeastern state constitutions. Eighty-three percent of the pre-1855 state constitutions had bans on cruel and unusual punishments while 100% of the post-1855 state constitutions had such bans. Seventeen of the thirty-four states with such bans banned cruel *and* unusual punishments, tracking the language of the Eighth Amendment.<sup>339</sup> Fourteen of those thirty-four states went even further than the federal Eighth Amendment and banned cruel *or* unusual punishments.<sup>340</sup> Four states banned only cruel punishments with no reference to unusual punishments.<sup>341</sup> The Eighth Amendment protection against cruel and unusual punishment was incorporated as a matter of substantive due process in *Robinson v. California* in 1962.<sup>342</sup>

4. *Proportionality*.—Only nine states out of thirty-seven in 1868—a minority of slightly less than one-quarter of the states then in the Union—explicitly required in their state constitutions that all penalties and punishments be proportioned to the offense. This is striking because the U.S. Supreme Court has found a proportionality principle in the Fourteenth Amendment since its decision in *Weems v. United States* in 1910.<sup>343</sup> A typical proportionality clause in 1868 provided, “[A]ll punishments ought to be proportioned to the offence.”<sup>344</sup> Only 21% of Americans in 1868—a

337. *Baze v. Rees*, 128 S. Ct. 1520, 1534–36 (2008).

338. *E.g.*, MO. CONST. of 1865, art. I, § 21.

339. VA. CONST. of 1864, Bill of Rights, art. I (incorporating VA. CONST. of 1776, Declaration of Rights, § 9) (“That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

340. *E.g.*, TEX. CONST. of 1868, art. I, § 11 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishment inflicted.”).

341. *E.g.*, R.I. CONST. of 1842, art. I, § 8 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted; and all punishments ought to be proportioned to the offence.”).

342. 370 U.S. 660, 667–68 (1962) (invalidating a California statute that criminalized drug addiction on grounds that it inflicted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments).

343. 217 U.S. 349 (1910).

344. *E.g.*, R.I. CONST. of 1842, art. I, § 8.

minority of about one-fifth of the total population—lived in states with proportionality requirements. Such requirements were fairly evenly dispersed across the country, with 30% of Northeastern states, 25% of Midwestern–Western states, and 20% of Southern states including them in their constitutions. Proportionality requirements were found in 28% of the pre-1855 constitutions and 21% of the post-1855 constitutions. Again, these explicit proportionality requirements are interesting to us today because they are relevant to the debate about whether or not cruel-and-unusual-punishment clauses implicitly require proportionality of punishment. In *Weems*, a federal Eighth Amendment case, and later in *Solem v. Helm*,<sup>345</sup> a state Fourteenth Amendment case, the Supreme Court held that they do.<sup>346</sup> However, significant disagreement still exists within the Court.<sup>347</sup> The existence of only nine explicit proportionality clauses in state constitutions in 1868 may be relevant to the modern debate. Of course, it is always possible that some states lacked proportionality clauses because citizens thought their states’ ban on cruel and unusual punishment already banned disproportionate punishment or that such a ban was an inalienable natural right that, as we shall see below, some state constitutions explicitly and textually protected.

5. *Prisoners Rights*.—Five states in 1868—a small minority—had clauses with explicit prisoners-rights protections in their state constitutions. Whether this meant prisoners rights were or were not protected by bans on cruel and unusual punishment in 1868 is a question beyond the scope of this Article. Although there was variation in their wording, a typical prisoners-rights clause in 1868 provided, “That no person arrested or confined in jail shall be treated with unnecessary rigor.”<sup>348</sup> Eleven percent of Americans in 1868 lived in states with constitutions that protected prisoners rights in this fashion. Prisoners rights were protected by 17% of Midwestern–Western state constitutions, in 13% of Southern state constitutions, and in 10% of Northeastern state constitutions. Seventeen percent of the pre-1855 constitutions and 11% of the post-1855 constitutions had protections of this kind for prisoners rights.

---

345. 463 U.S. 277 (1983).

346. See *Weems*, 217 U.S. at 367 (“[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.”); *Solem*, 463 U.S. at 296–303 (holding that life imprisonment without the possibility of parole for a pattern of seven nonviolent felonies violated the Eighth Amendment).

347. Compare *Rummel v. Estelle*, 445 U.S. 263, 274 (1980) (holding that prescribing criminal punishment is a legislative prerogative), with *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (holding that a sentence of twenty-five-years-to-life was not “grossly disproportionate” to the crime of felony grand theft under California’s three-strikes statute), and *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (reiterating the “gross disproportionality principle,” and holding that two consecutive terms of twenty-five-years-to-life imprisonment were not grossly disproportionate to the crime of felony theft under the same California statute).

348. E.g., TENN. CONST. of 1834, art. I, § 13.

6. *Penal Principles*.—Four states in 1868—a minority—established various penal principles of some kind. The Indiana and Oregon constitutions provided that their penal codes would “be founded on the principles of reformation, and not of vindictive justice.”<sup>349</sup> A third state—North Carolina—provided in its constitution, “The objects of the punishments being not only to satisfy justice, but also to reform the offender, and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the general assembly shall so enact.”<sup>350</sup> In contrast, the fourth state—Vermont—called for continued visible punishments of incarceration of long duration in order to deter the commission of crimes and to make sanguinary laws less necessary.<sup>351</sup> Eight percent of Americans in 1868 lived in states that based their penal codes on principles of reformation. Such principles were declared constitutional in 17% of Midwestern–Western state constitutions, in 13% of Southern state constitutions, and in 10% of Northeastern state constitutions. Such clauses were equally common in older and more recent constitutions.

7. *Sanguinary Laws*.—Three states in 1868—a minority—prohibited sanguinary laws. A typical clause provided, “[A] multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind.”<sup>352</sup> These three states—Maine, New Hampshire, and Maryland—contained 3% of the American population. These states are in addition to the three that had reformatory penal principles. Two were in the Northeast and one was in the South. Two had constitutions ratified before 1855, and one had a constitution ratified after 1855. One of these state constitutional provisions—that of Maryland—was somewhat weaker than the others in that it provided only that sanguinary laws *ought* to be avoided.<sup>353</sup>

8. *Whipping*.—One state—Georgia—explicitly prohibited whipping as a punishment for crime in its state constitution in 1868.<sup>354</sup> Three percent of the total population lived in Georgia at the time. Its constitution was ratified after 1855. Whether whipping would have been viewed as cruel and unusual

---

349. IND. CONST. of 1851, art. I, § 18; OR. CONST. of 1857, art. I, § 15.

350. N.C. CONST. of 1868, art. XI, § 2.

351. See VT. CONST. of 1793, ch. II, § 37 (“To deter more effectually from the commission of crimes, by continued visible punishments of long duration, and to make sanguinary laws less necessary, means ought to be provided for punishing by hard labor . . . and all persons, at proper times ought to be permitted to see them at their labor.”).

352. E.g., N.H. CONST. of 1784, pt. I, art. XVIII.

353. MD. CONST. of 1867, Declaration of Rights, art. 16 (“That sanguinary laws ought to be avoided as far as it is consistent with the safety of the State . . .”).

354. GA. CONST. of 1868, art. I, § 22 (“Whipping, as a punishment for crime, is prohibited.”).

punishment in 1868 in the three-quarters majority of states that outlawed such punishment is a question beyond the scope of this Article.

9. *Corporal Punishment.*—Three additional states in 1868—a minority—prohibited subjecting citizens to corporal punishment under some circumstances. These states contained 7% of the population. One state—Maine—was in the Northeast, and two states—Tennessee and South Carolina—were in the South. Two of the constitutions were pre-1855, and one was post-1855. South Carolina provided an outright ban,<sup>355</sup> while Maine and Tennessee banned subjecting citizens to corporal punishment under military law.<sup>356</sup> Again, the question whether corporal punishment would have been viewed as cruel and unusual in 1868 in the various states is a question beyond the scope of this Article.

10. *Imprisonment for Debt.*—Twenty-eight states out of thirty-seven in 1868, or an Article V, three-quarters majority, prohibited imprisonment for debt. Alabama, for example, provided simply, “[N]o person shall be imprisoned for debt.”<sup>357</sup> Some states made an explicit exception to the prohibition in cases of fraud.<sup>358</sup> Seventy-four percent of the total population in 1868—or slightly less than three-fourths of all Americans—lived in states with constitutions that explicitly prohibited imprisonment for debt. The protection was the least common in the Northeast; 100% of Midwestern–Western, 80% of Southern, but only 40% of Northeastern state constitutions prohibited imprisonment for debt. The presence of a specific ban on imprisonment for debt could be argued to imply that there was no proportionality principle in state cruel-and-unusual-punishment clauses in 1868, or it could be argued to suggest a consensus against one of many forms of punishment that was disproportionate.

11. *Witness Detention.*—Seven states in 1868—again a minority—prohibited the unreasonable detention of witnesses in criminal cases. A typical such clause stated, “Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishment be inflicted, *nor*

---

355. S.C. CONST. of 1868, art. I, § 16 (“All persons shall, before conviction, beailable by sufficient sureties, except for capital offences, when the proof is evident or the presumption great; and excessive bail shall not in any case be required, nor corporal punishment inflicted.”).

356. ME. CONST. of 1819, art. I, § 14 (“No person shall be subject to corporal punishment under military law, except such as are employed in the army or navy, or in the militia when in actual service, in time of war or public danger.”); TENN. CONST. of 1834, art. I, § 25 (“That no citizen of this State, except such as are employed in the Army of the United States, or militia in actual service, shall be subjected to corporeal punishment under the martial law.”).

357. ALA. CONST. of 1867, art. I, § 22.

358. *E.g.*, S.C. CONST. of 1868, art. I, § 20 (“No person shall be imprisoned for debt, except in cases of fraud . . .”).

*shall witnesses be unreasonably detained.*”<sup>359</sup> Twenty percent of Americans lived in states in 1868 with constitutional protections of this kind. Such protections were found in 25% of Midwestern–Western state constitutions in 1868, in 20% of Southern state constitutions, and in 10% of Northeastern state constitutions. Witness detention was prohibited in 17% of the pre-1855 constitutions and in 21% of the post-1855 constitutions.

*K. State Constitutional Acknowledgment of the Existence of Unenumerated or Natural Rights*

The Ninth Amendment, in the federal Bill of Rights, explicitly says, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>360</sup> Some have argued that the Ninth Amendment secures natural-law unenumerated rights from congressional intrusion,<sup>361</sup> while others have argued that the provision was put in simply to avoid arguments that the federal Bill of Rights preempted the protection of other rights such as those in state bills of rights.<sup>362</sup> Everyone agrees that the Ninth Amendment is not incorporated by the Fourteenth Amendment to apply against the states, but some believe that the Fourteenth Amendment is itself a font of judicially enforceable unenumerated natural-law rights,<sup>363</sup> while others argue that it is not.<sup>364</sup> This raises rather insistently the question of whether state bills of rights in 1868 had what Professor John Yoo has called “baby Ninth Amendments.”<sup>365</sup> It turns out many of them did. The following graph shows the number of unenumerated rights guarantees in older and newer constitutions and exposes a dramatic increase in the prevalence of such rights over time.

359. *E.g.*, N.Y. CONST. of 1846, art. I, § 5 (emphasis added).

360. U.S. CONST. amend. IX.

361. *See, e.g.*, DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* 197 (2007) (asserting that the Ninth Amendment was established to preserve federal unenumerated rights).

362. *See* Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEXAS L. REV. 597, 600–01 (2005) (arguing that despite its reference to “retained rights,” the primary intent of the Ninth Amendment was to protect the states from overly broad interpretations of federal power). For a modern commentary about Ninth Amendment protection of fundamental rights, see generally FARBER, *supra* note 361.

363. *See* FARBER, *supra* note 361, at 69 (arguing that the drafters of the Fourteenth Amendment used vague language because they wanted it to protect “fundamental rights,” and quoting John Hart Ely’s interpretation of the Privileges or Immunities Clause as “‘a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives direction for finding’”).

364. *See* Lash, *supra* note 362, at 601, 651–53 (describing how courts from Reconstruction to the New Deal applied the Madison rule of Ninth Amendment construction to prohibit the use of the Fourteenth Amendment as a tool for the enumeration of any rights that deny or disparage the retained rights of the people).

365. *See* John Choo Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 968–69 (1993) (observing that state constitutions, in the late eighteenth and early nineteenth centuries, contained Ninth Amendment analogs).

1. *State Constitutional Law Recognition of Natural and Inalienable Rights.*—Twenty-seven out of thirty-seven state constitutions in 1868—or two-thirds of the states but not an Article V consensus—declared as a matter of positive state constitutional law the existence of natural, inalienable, inviolable, or inherent rights. A typical such state constitutional provision read, “All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property: and pursuing and obtaining safety and happiness.”<sup>366</sup> Seventy-one percent of all Americans in 1868 lived in states whose positive state constitutional law acknowledged the existence of these kinds of natural, inalienable, inviolable, or inherent individual rights, which, as we have seen, could well have included gun rights. Clauses acknowledging the existence of these rights were most popular in the Northeast, where 90% of state constitutions had them. This was followed by 75% in the Midwest–West and 60% in the South. Mention of natural and inalienable rights was more common in older constitutions than in newer ones. Such references were found in 83% of the pre-1855 constitutions but in 63% of the post-1855 constitutions. One state—Kentucky—stated that the right to own slaves was a property right and therefore also was inviolable.<sup>367</sup> It is not clear from reading the text of these state constitutional bill-of-rights provisions whether they were meant to be judicially enforceable or not, and if they were to be so enforced, how the unenumerated rights in question would be identified.

These references to unenumerated rights, and particularly to natural and inalienable rights, deserve special mention because their presence in state constitutions in 1868 could be read to indicate a belief that certain rights—including, perhaps, the right to defend life, liberty, and property—exist in and of themselves as preexisting entitlements. In other words, it suggests that our constitutions and bills of rights do not *create* rights but simply *declare* or *recognize* their existence. Although modern-day positivists may be tempted to dismiss this view as antiquated, it is arguably in some respects echoed in present-day substantive-due-process decisions. Our nation is founded on the belief that natural and inalienable rights exist, but we do not yet know for certain, or have consensus about, what they all are, nor is there any indication in the state constitutions from 1868 that such rights are judicially discoverable or enforceable. Certainly the right to defend life, liberty, and property is different from what the modern Supreme Court has protected under the rubric of a right to privacy.

2. *Fundamental Principles.*—Seven states out of thirty-seven in 1868—a minority—vaguely mentioned the existence of “fundamental principles”

---

366. *E.g.*, CAL. CONST. of 1849, art. I, § 1.

367. KY. CONST. of 1850, art. XIII, § 3.

and emphasized the importance of a frequent recurrence to them in order to preserve the blessings of liberty. A typical such clause provided, “The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles.”<sup>368</sup> These clauses seem to us to be somewhat analogous to the state constitutional clauses just discussed that acknowledge the existence of natural and inalienable rights. These clauses did not, however, explicitly recognize man’s inherent freedom in the state of nature. And, again, there is no reason to think these clauses were judicially enforceable. Twenty percent of the American people in 1868 lived in states with these clauses in their state constitutions. Such clauses were most common in the Midwest–West, where 25% of the states had them, followed by 20% in the Northeast, and 13% in the South. Fundamental-principles clauses were slightly more common in older constitutions; they were found in 22% of the pre-1855 constitutions and in 16% of the post-1855 constitutions. Some states announced a legal right of the people to demand constant regard of these principles from their public officers.<sup>369</sup> None of these grandiose and enigmatic clauses described the fundamental principles they referred to with any specificity.

3. *Ninth Amendment Analogs.*—Eighteen out of thirty-seven state constitutions in 1868—slightly fewer than one-half—contained clauses analogous to the Ninth Amendment of the federal Constitution. These baby Ninth Amendments declared that the enumeration of rights in *state* constitutions should not be construed to impair or deny other rights retained by the people.<sup>370</sup> Thirty-three percent of Americans lived in states with Ninth Amendment analogs. The prevalence of baby Ninth Amendments varied greatly by region—they were found in 67% of Midwestern–Western states, 20% of Northeastern state constitutions, and 13% of Southern state constitutions. Ninth Amendment analogs were also more common in recent constitutions, as they were present in 28% of the pre-1855 and 68% of the post-1855 constitutions.

All eighteen Ninth Amendment analogs are virtually identical to each other and to the Ninth Amendment of the federal Constitution, stating, “The enumeration of the foregoing rights shall not be construed to impair or deny others retained by the people.”<sup>371</sup> Once again, scholars and judges disagree

---

368. *E.g.*, WIS. CONST. of 1848, art. I, § 22.

369. *E.g.*, MASS. CONST. of 1780, pt. 1, art. XVIII (“[T]he fundamental principles of the constitution . . . are absolutely necessary to preserve the advantages of liberty, and to maintain a free government. The people . . . have a right to require of their lawgivers and magistrates an exact and constant observance of them . . .”).

370. *See, e.g.*, ME. CONST. of 1819, art. I, § 24 (“The enumeration of certain rights shall not impair nor deny others retained by the people.”).

371. *E.g.*, R.I. CONST. of 1842, art. I, § 23.

as to whether the principal thrust of the federal Ninth Amendment is as an anti-preemption federalism provision or as a protection for unenumerated, natural-law individual rights.<sup>372</sup> As Professor Akhil Amar has argued, these baby Ninth Amendments present in state constitutions in 1868 at the time of the ratification of the Fourteenth Amendment may intimate a transformation of the Ninth Amendment from a federalism clause in 1791 to more of “a free-floating affirmation of unenumerated rights” in 1868.<sup>373</sup> However, this theory of transformation presumes that the states with baby Ninth Amendments did not adopt baby Tenth Amendments as well, and that there were no federalism provisions in state constitutions in 1868. As we shall see, three states *did* adopt Tenth Amendment analogs, and that may muddy the significance of the existence of baby Ninth Amendments.

4. *Tenth Amendment Analogs.*—Three states in 1868—a tiny minority—contained clauses in their state constitutions analogous to the Tenth Amendment of the federal Constitution. These clauses specifically reiterated that the powers neither delegated to the United States nor prohibited to the States by the federal Constitution are reserved to the States respectively or to the people themselves.<sup>374</sup> Seven percent of the American people in 1868 lived in states with Tenth Amendment analogs in their state constitutions. The three states with such analogs constituted 20% of the Northeastern states and 7% of the Southern states. There were no Tenth Amendment analogs in Midwestern–Western constitutions. Tenth Amendment analogs appeared in 11% of the pre-1855 constitutions compared with 5% of the post-1855 constitutions. The adoption of Tenth Amendment analogs in state constitutions is perhaps somewhat surprising because they purport to limit federal power as a matter of state positive law. They are probably best understood as declaring the relationship between the states and the federal government just as the baby Ninth Amendments may have declared the existence of individual rights.

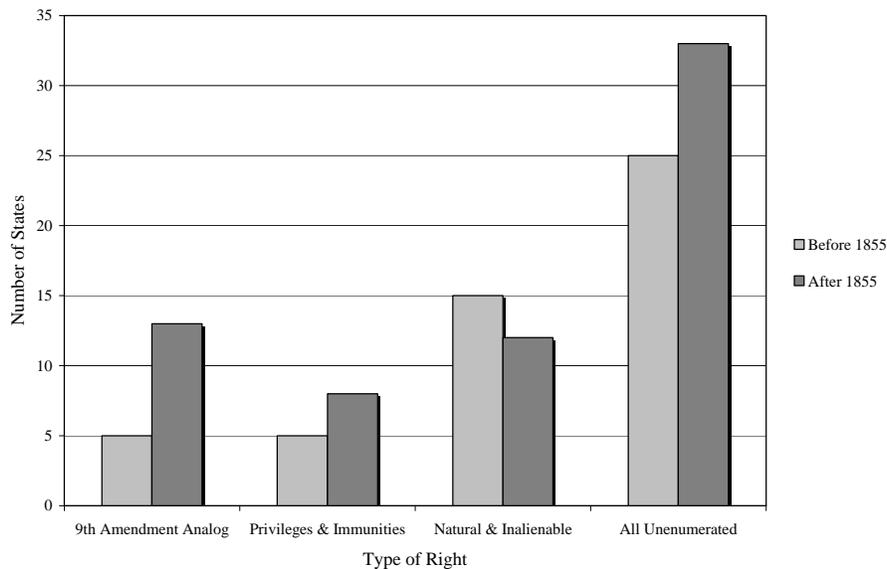
---

372. See, e.g., Lash, *supra* note 362, at 715 (chronicling the various interpretations of the Ninth Amendment by the Supreme Court).

373. AMAR, *supra* note 44, at 280.

374. E.g., MD. CONST. of 1867, Declaration of Rights, art. 3 (“The powers not delegated to the United States by the Constitution thereof, nor prohibited by it to the States, are reserved to the States respectively, or to the people thereof.”).

Figure 10: Time Trends in Unenumerated Rights



5. *Is the Existence of Unenumerated Natural-Law Rights Itself Deeply Rooted in History and Tradition?*—We have reported here how many of the thirty-seven state constitutions in 1868 either protected natural and inalienable rights, protected fundamental principles, or had Ninth Amendment analogs. It turns out that in 1868 twenty-nine state constitutions—78%, greater than an Article V consensus—protected unenumerated rights in one of these three guises as a matter of positive state constitutional law. If one excludes states whose constitutions protect fundamental principles (a vaguer term) and looks only at state constitutions recognizing either natural and inalienable rights or having Ninth Amendment analogs, the number of states with such protections remains at twenty-nine—an astounding Article V federal-constitutional consensus. This is a very high percentage of the total number of states in 1868 and therefore suggests that, with regard to questions about what rights are so deeply rooted as to be fundamental, the concept of natural, inalienable, and unenumerated rights may itself be deeply rooted in history and tradition. This is an ironic outcome. If the whole point of looking at what rights are deeply rooted in history and tradition is to give content to the unenumerated rights protected by the Fourteenth Amendment, then the conclusion of an exhaustive study of history and tradition such as this one suggests that the framers of the Fourteenth Amendment may have believed in natural law could be said to call positive-law historical inquiries like our own into question. Nonetheless, it bears repeating that there is no indication in the baby Ninth Amendments or other similar provisions we found that they were meant to authorize judges to invent new rights and apply them in

judicial review against legislatures. In fact, to the contrary, the Fourteenth Amendment was written to overturn the judicially invented right to bring slaves into federal territories.<sup>375</sup> It seems doubtful the framers of that Amendment would have meant for it to become a font of new, additional, judicially invented unenumerated rights. But then again, maybe they just goofed when they drafted it, and we, fellow citizens, are stuck with or blessed with that result, depending on one's point of view.

\*\*\*

We have now come to the end of the rights secured by the federal Bill of Rights or by Article I, Sections Nine or Ten of the original constitution. There are, however, a number of additional rights we found in state constitutions in 1868 that are of great interest to federal constitutional case law. We will proceed to discuss those additional rights in no particular order below.

#### *L. Right to Travel*

The U.S. Supreme Court has protected a right to travel in *Shapiro v. Thompson*<sup>376</sup> and arguably to some degree in *Saenz v. Roe*.<sup>377</sup> It is argued that a right to travel is implicit in the structure of the federal Constitution.<sup>378</sup> Even *The Slaughterhouse Cases*, while gutting the Fourteenth Amendment, recognized that there must be an implicit individual right of citizens to travel to Washington, the seat of government.<sup>379</sup> Interestingly, a number of state constitutions recognize a right to immigrate into a state or to emigrate from it, which means they to some degree acknowledge the existence of a right to travel.

*1. Immigration.*—Eleven states in 1868—a minority—specifically protected the right to immigrate into their state as a matter of positive constitutional law by guaranteeing out-of-staters who came to reside in their state enjoyment of rights equal to those of native-born citizens. A typical such clause provided, “Foreigners who are or may hereafter become *bona-*

375. See Michael W. McConnell, Remarks at the Panel on Originalism and Unenumerated Constitutional Rights, in ORIGINALISM: A QUARTER CENTURY OF DEBATE 113, 148 (Steven G. Calabresi ed., 2007) (theorizing that the Fourteenth Amendment envisioned Congress and not the federal courts as its enforcement agent because “[w]hen the framers of the Fourteenth Amendment thought of judges, they were thinking of Roger B. Taney and *Dred Scott v. Sanford*”).

376. See 394 U.S. 618, 629 (1969) (holding one-year residency requirements for state aid to be unconstitutional restrictions on travel).

377. See 526 U.S. 489, 503 (1999) (affirming a preliminary injunction against a California statute providing different levels of aid to state citizens who had not lived in California for one year).

378. *Id.* at 498 (“The word ‘travel’ is not found in the text of the Constitution. Yet the ‘constitutional right to travel from one State to another’ is firmly embedded in our jurisprudence.” (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966))); *Shapiro*, 394 U.S. at 629 (“[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel . . .”).

379. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

*fide* residents of this State shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens.”<sup>380</sup> Fifteen percent of Americans in 1868 lived in states that protected the rights of out-of-staters in this way. These clauses were most popular in the Midwest–West, where they were found in 67% of state constitutions. Such constitutional clauses were present in 13% of Southern state constitutions and 10% of Northeastern state constitutions. Immigration protections were found in 22% of the pre-1855 constitutions and 37% of the post-1855 constitutions. These clauses are technically superfluous because the Privileges and Immunities Clause of Article IV of the federal Constitution already guaranteed these rights to out-of-staters in a state as a matter of federal constitutional law.<sup>381</sup>

2. *Emigration*.—Six states out of thirty-seven in 1868—a minority—explicitly protected the right of their citizens to emigrate. A typical clause provided, “[E]migration from the State shall not be prohibited.”<sup>382</sup> This type of clause is more striking than the immigration clauses. It clearly acknowledges and gives life to an important fundamental liberty—the liberty to flee a jurisdiction that is becoming tyrannical. Twenty-one percent of Americans in 1868 lived in states whose constitutions guaranteed the right to emigrate. This right was slightly more evenly distributed than the right to immigrate. We found it in 20% of Northeastern, 17% of Midwestern–Western, and 13% of Southern state constitutions in 1868. It was twice as common before 1855 than after 1855.

3. *Not Forfeit Residence*.—Three states in 1868—a small minority—protected the property of citizens who temporarily left the state. A typical such clause provided, “Temporary absence from the State shall not forfeit a residence once obtained.”<sup>383</sup> Nine percent of Americans had this protection as a matter of state constitutional law in 1868. The protection was found only in 13% of Southern and in 8% of Midwestern–Western state constitutions. It was twice as common after 1855 than before 1855.

In sum, there are some hints at protection of a right to travel in positive state constitutional law in 1868, which is interesting to the extent that the federal Constitution can be argued to imply such a right.

---

380. *E.g.*, NEV. CONST. of 1864, art. I, § 16.

381. U.S. CONST. art. IV, § 2, cl. 1 (“The citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States.”).

382. *E.g.*, PA. CONST. of 1838, art. IX, § 25.

383. *E.g.*, S.C. CONST. of 1868, art. I, § 35.

### M. Equality Rights

The federal Constitution guarantees equality rights most famously in Section One of the Fourteenth Amendment, which forbids the making of discriminatory laws and the unequal application of neutral laws on state statute books.<sup>384</sup> This equality guarantee of the Fourteenth Amendment was reverse-incorporated into the Fifth Amendment's Due Process Clause in *Bolling v. Sharpe*.<sup>385</sup> In *Frontiero v. Richardson*,<sup>386</sup> the federal guarantee of equality rights against the national government was expanded to apply to women as well as racial and ethnic minorities.<sup>387</sup> It may have been expanded in *Romer v. Evans*<sup>388</sup> to apply to gays and lesbians as well.<sup>389</sup> Finally, the original federal Constitution guaranteed a form of equality by forbidding titles of nobility and therefore by forbidding feudalism.<sup>390</sup> Feudalism, like a system of racial-caste apartheid, violates the notion that all citizens are born equal and must always have equal civil and political rights. What did state constitutional law have to say about this in 1868—a mere three years after the conclusion of the Civil War?

1. *Equal Protection of the Laws Clauses*.—Although use of the Equal Protection Clause got off to a slow start,<sup>391</sup> the Court at least since *Brown v. Board of Education*<sup>392</sup> has used it as a primary tool for protecting fundamental rights.<sup>393</sup> The basic inquiry in equal-protection cases is whether the government's classifications or restrictions are justified by a sufficient

384. U.S. CONST. amend. XIV, § 1.

385. 347 U.S. 497, 499 (1954).

386. 411 U.S. 677 (1973).

387. *Id.* at 682.

388. 517 U.S. 620 (1996).

389. *Id.* at 635; *see also* Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring) (acknowledging that while the Texas law banning homosexual sodomy was unconstitutional under the Equal Protection Clause, other statutes distinguishing between homosexuals and heterosexuals could pass rational basis review).

390. U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States . . .").

391. Until the mid-1950s, the Supreme Court rarely struck down laws under the Equal Protection Clause, leading Justice Holmes to refer to it as "the usual last resort of constitutional arguments." *Buck v. Bell*, 274 U.S. 200, 208 (1927); *see also* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 341–42 (1949) (discussing the Equal Protection Clause and its growing importance following its initial failure to attain the scope that its framers intended).

392. 347 U.S. 483 (1954).

393. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding a Colorado amendment that repealed various city ordinances prohibiting discrimination on the basis of sexual orientation to be "a classification of [homosexual] persons undertaken for its own sake, something the Equal Protection Clause does not permit"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations."); *Gray v. Sanders*, 372 U.S. 368, 379 (1963) ("[A]ll who participate in the election are to have an equal vote . . . . This is required by the Equal Protection Clause of the Fourteenth Amendment.").

purpose, and differing levels of scrutiny are applied depending on the type of discrimination involved.<sup>394</sup> Of particular interest here is the way in which courts use equal-protection clauses to protect fundamental rights (as opposed to discrimination based on specific characteristics).<sup>395</sup>

Nineteen states out of thirty-seven in 1868—a bare majority—specifically guaranteed “equality” of some kind or equal protection of the laws in their state constitutions. The nineteen clauses we found protecting equal protection varied considerably in their wording. For example, the Connecticut constitution provided simply, “[A]ll men, when they form a social compact, are equal in rights; and that no man, or set of men, are entitled to exclusive public emoluments or privileges from the community.”<sup>396</sup> South Carolina’s constitution contained slightly different language: “No title of nobility or hereditary emolument shall ever be granted in this State. Distinction, on account of race or color, in any case whatever, shall be prohibited, and all classes of citizens shall enjoy, equally, all common, public, legal, and political privileges.”<sup>397</sup> This clause is also a privileges-or-immunities clause, but we count it here because it uses the word “equally.”

Forty-seven percent of Americans in 1868 lived in states that constitutionally guaranteed equality of some kind, or equal protection. Equal-protection clauses were by far most common in the South, where 87% of states had them. In contrast, they were found in 33% of Midwestern–Western state constitutions and 30% of Northeastern state constitutions. Equal-protection clauses were also a relatively more modern right in 1868; they could be found in only 33% of the pre-1855 constitutions but in 74% of the post-1855 constitutions. The reason for the greater prevalence of equal-protection clauses in Southern state constitutions and in the more recent state constitutions in 1868 is that the Southern states were forced to adopt such provisions in their state constitutions as a condition of their being readmitted to the Union.<sup>398</sup> It is ironic therefore to find the former slave states at the vanguard of protecting equality rights in 1868.

In addition to the nineteen states with explicit equal-protection clauses, the Mississippi state constitution in 1868 contained three partial equal-protection clauses. These clauses provided for equality in state funding of charitable and public institutions;<sup>399</sup> in the possession, enjoyment, or descent

---

394. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4, 153–54 (1938).

395. One of the first cases to use the Equal Protection Clause in this way was *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (striking down an Oklahoma sterilization law under strict scrutiny because it implicated the “fundamental” right to procreate, and unjustifiably discriminated between people who “committed intrinsically the same quality of offense”).

396. CONN. CONST. of 1818, art. I, § 1.

397. S.C. CONST. of 1868, art. I, § 39.

398. *See* Reconstruction Act, § 5, 14 Stat. 428, 429 (1867) (requiring both that Southern states ratify the Fourteenth Amendment and that they form a constitution of government “in conformity with the Constitution of the United States in all respects”).

399. MISS. CONST. of 1868, art. I, § 21.

of property;<sup>400</sup> and in the right to travel upon public conveyances.<sup>401</sup> This latter provision is striking in light of the Supreme Court's upholding of segregation in *Plessy v. Ferguson*<sup>402</sup> with respect to the public conveyance of railroad cars.<sup>403</sup> The Rhode Island state constitution in 1868 contained a somewhat weaker equal-protection clause that called for the "burdens of the state . . . to be fairly distributed among its citizens."<sup>404</sup>

2. *Privileges and Immunities Clauses.*—To some, the Bill of Rights seems the most obvious enumeration of the privileges and immunities of citizenship in the United States.<sup>405</sup> Of course, this argument was famously foreclosed in *The Slaughterhouse Cases*<sup>406</sup> and has not since been revisited by the Supreme Court.<sup>407</sup> In a seminal law review article in 1992, Professor John Harrison, building on the arguments of Professor David Currie, showed how the Privileges or Immunities Clause of the Fourteenth Amendment could have originally been meant to be the main equality guarantee of that Amendment.<sup>408</sup> Professor Harrison noted that the Privileges or Immunities Clause said no state could "make" a law that "abridged" the rights of its citizens by discriminating against them.<sup>409</sup> The Black Codes were unconstitutional because they gave an abridged or lesser set of rights to freed African-Americans than were given to white Americans.<sup>410</sup> In Harrison's view, the Privileges or Immunities Clause dealt with equality in the making of laws

400. *Id.* § 22.

401. *Id.* § 24.

402. 163 U.S. 537 (1896).

403. *Id.* at 548.

404. R.I. CONST. of 1842, art. I, § 2.

405. See *Duncan v. Louisiana*, 391 U.S. 145, 166 (1968) (Black, J., concurring) ("What more precious 'privilege' of American citizenship could there be than that privilege to claim the protection of our great Bill of Rights?"); see also ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 473–74 (2d ed. 2002) ("[A] strong argument can be made that the privileges or immunities clause should be interpreted as applying the Bill of Rights to the states. The claim would be that the provisions of the Bill of Rights are the basic 'privileges' and 'immunities' possessed by all citizens.")

406. See 83 U.S. (16 Wall.) 36, 78–79 (1873) (declaring that the Court was excused from enumerating the privileges and immunities protected by the Fourteenth Amendment).

407. *The Slaughterhouse Cases* narrowly interpreted the Fourteenth Amendment in its entirety, but the Privileges or Immunities Clause is the only restrictive interpretation that has not been subsequently overruled. CHERMERINSKY, *supra* note 405, at 474.

408. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385, 1451–54 (1992) (arguing that an equality-based reading of the Privileges or Immunities Clause and a more limited view of the Equal Protection Clause would ensure equal rights effectively and as the Fourteenth Amendment originally intended); see also DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 344–51 (1985) (questioning Justice Miller's construction of the Privileges or Immunities Clause in *The Slaughterhouse Cases*, which severely constricted the Privileges or Immunities Clause, and suggesting that a construction mandating that nonwhites be provided with the same rights as whites more closely aligns with the drafters' intent).

409. Harrison, *supra* note 408, at 1422.

410. *Id.*

while the Equal Protection Clause guaranteed equal enforcement (or protection) of those laws already on the books.<sup>411</sup> If Harrison is right, we should expect to see some equality-protecting privileges-or-immunities clauses in state constitutions in 1868.

It turns out that thirteen states out of thirty-seven in 1868—a minority—explicitly prohibited either the deprivation or the unequal provision of privileges and immunities. Although the wording differed somewhat by state, a typical such clause provided, “No law shall be passed granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens.”<sup>412</sup> Thirty-four percent of all Americans in 1868 lived in states with such equal-protection provisions. These clauses could be found in 53% of Southern state constitutions in 1868, in 25% of Midwestern–Western state constitutions, and in 20% of Northeastern state constitutions. This right was somewhat less common in pre-1855 constitutions, where it appeared 28% of the time, while it appeared in 42% of the post-1855 constitutions. The significance of these thirteen state constitutional clauses using privileges-or-immunities language as equal-protection language is that it may provide some support to Harrison’s argument that the federal Fourteenth Amendment Privileges or Immunities Clause is only an antidiscrimination clause and not a font of unenumerated individual rights, whether deeply rooted in history and tradition or not. Professor Calabresi has previously disagreed with Harrison, arguing that the Clause is both an antidiscrimination clause and a protection for individual rights, and he stands by that view.<sup>413</sup>

3. *Feudalism and Allodium.*—We saw that the original federal Constitution protected equality rights by outlawing feudalism and titles of nobility. This theme was very evident in state constitutional law in 1868 as well, even though feudalism was by then ancient history. Twenty-eight out of thirty-seven states—or an Article V, three-quarters consensus—had clauses in their state constitutions that explicitly prohibited feudalism. A typical such clause provided:

[N]o title of nobility, or hereditary distinction, privilege, honor, or emolument, shall ever be granted or conferred in this State; that no property qualification shall be necessary to the election to, or holding of any office in this State, and that no office shall be created, the

---

411. *Id.* at 1448–50.

412. *E.g.*, OR. CONST. of 1857, art. I, § 21.

413. Calabresi, *supra* note 241, at 1535 (rejecting Harrison’s conclusion that the Privileges or Immunities Clause is a ban on discrimination, but not a protection of individual rights); Calabresi, *supra* note 34, at 1109–10 (supporting the position that the Privileges or Immunities Clause protects fundamental rights from abridgement).

appointment to which shall be for a longer time than during good behavior.<sup>414</sup>

Note the ban on *any* hereditary distinctions. Does this forbid a hereditary right of the descendants of slaves to privileged treatment to atone for the sin committed against their ancestors? Eighty-seven percent of Americans in 1868—a huge supermajority—lived in states that banned feudalism in this way. Feudalism clauses were found in 87% of Southern state constitutions, in 75% of Midwestern–Western state constitutions, and in 70% of Northeastern state constitutions. Such clauses were found in 72% of the pre-1855 constitutions and in 84% of the post-1855 constitutions. Some states banned feudalism by also declaring all lands to be allodial,<sup>415</sup> while others banned it as well, as we shall see below, by prohibiting titles of nobility.<sup>416</sup>

The Article V, three-quarters consensus of the states in 1868 that feudalism was an unconstitutional caste system or class-based system of laws is arguably of interest with regard to modern equal protection law. We have always known that the framers of the Fourteenth Amendment viewed the Black Codes as paradigmatic systems of class-based law that they wished to render unconstitutional.<sup>417</sup> It looks as if feudalism was pretty much viewed the same way in 1868. There is no direct evidence on this next point, but it seems highly likely that if one had asked the framers of the Fourteenth Amendment if the Hindu caste system—with its divisions of the population into Brahmins and untouchables—was unconstitutional, they would almost certainly have said yes. The Hindu caste system, like feudalism, and like the Black Codes, was an effort to create a class-based social system. These observations are arguably of relevance to modern debates about whether laws that distinguish on the basis of sex create a class-based social system as well, even if the framers of the Fourteenth Amendment did not appreciate that fact.

4. *Nobility*.—As part of the prohibition on feudalism, twenty states out of thirty-seven in 1868—a majority—specifically prohibited titles of nobility or hereditary emoluments, privileges, and honors. This category is a subset of feudalism. A typical clause provided, “No title of nobility or hereditary emolument shall ever be granted in this State.”<sup>418</sup> Fifty-nine percent of the population in 1868 lived in states that forbade titles of nobility. Such clauses were most common in the Northeast and the South, and were found in 60% and 67% of the state constitutions in those regions, respectively. They were

414. *E.g.*, ALA. CONST. of 1867, art. I, § 32.

415. *E.g.*, N.Y. CONST. of 1846, art. I, § 13 (“All lands within this State are declared to be allodial, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates.”).

416. *See infra* section III(M)(4).

417. *See, e.g.*, CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 401–02 (1997) (explaining that the Fourteenth Amendment was calculated to abolish state legislation that was hostile to particular groups of people, primarily African-Americans).

418. *E.g.*, S.C. CONST. of 1868, art. I, § 39.

found in 33% of Midwestern–Western state constitutions in 1868. Titles-of-nobility clauses were fairly evenly distributed between older and more recent constitutions.

5. *Prohibit Slavery.*—The Thirteenth Amendment to the federal Constitution, adopted in 1865—three years before the adoption of the Fourteenth Amendment—specifically protected equality by banning slavery. It is therefore not surprising that twenty-eight out of thirty-seven states in 1868—or an Article V consensus—banned slavery. Sixty-five percent of Americans in 1868 lived in states that banned slavery in their state constitutions. A typical clause provided, “Neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State.”<sup>419</sup> Slavery bans varied widely by region and were found in 100% of Midwestern–Western state constitutions, in 93% of Southern state constitutions, but in only 20% of Northeastern state constitutions. Bans on slavery were new in 1868. We found them in only 50% of the pre-1855 constitutions but in 100% of the post-1855 constitutions. West Virginia, included in the post-1855 count, had a somewhat weaker ban than the other states because it provided a grace period for keeping slaves.<sup>420</sup> By contrast, Kentucky’s constitution contained three separate clauses *protecting* slavery.<sup>421</sup>

6. *General Laws.*—Seven states—a minority—contained some language in their state constitutions mandating generality in the laws, uniformity in the operation of the law, or prohibition of laws of a private, special, or local character. These provisions could be read to ban special-interest legislation. Although there was some variation, a typical such clause provided, “All laws of a general nature shall have a uniform operation.”<sup>422</sup> This wording, of course, applies only to the operation and not to the making of the laws. Sixteen percent of Americans lived in states with such clauses in their constitutions in 1868. Such clauses were found in 33% of Midwestern–

---

419. *E.g.*, CAL. CONST. of 1849, art. I, § 18.

420. W. VA. CONST. of 1861, art. XI, § 7. West Virginia’s constitution provided significant detail on how long the grace period would last for slaves of varying ages:

The children of slaves born within the limits of this State after the fourth day of July, eighteen hundred and sixty-three, shall be free; and all slaves within the said State who shall, at the time aforesaid, be under the age of ten years shall be free when they arrive at the age of twenty-one years; and all slaves over ten and under twenty-one years shall be free when they arrive at the age of twenty-five years; and no slave shall be permitted to come into the State for permanent residence therein.

*Id.*

421. *See* KY. CONST. of 1850, art. X, §§ 1–3 (restricting the legislature’s ability to emancipate slaves without compensating owners; criminalizing immigration to and residence within the state by free blacks; and removing the requirement for a grand jury in felony prosecutions of slaves).

422. *E.g.*, FLA. CONST. of 1868, art. I, § 12.

Western state constitutions, 13% of Southern state constitutions, and 10% of Northeastern state constitutions. They were present in 17% of the pre-1855 and 21% of the post-1855 constitutions.

*N. State Constitutional Prohibitions of Certain Named Vices*

A constant theme in the modern U.S. Supreme Court's substantive-due-process case law from *Griswold v. Connecticut*,<sup>423</sup> to *Roe v. Wade*,<sup>424</sup> to the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>425</sup> to *Lawrence v. Texas* is that the unenumerated rights protected by the Fourteenth Amendment include, at a minimum, a right of sexual autonomy or bodily integrity<sup>426</sup> and, at a maximum, what Justice Harry Blackmun in his dissent in *Bowers v. Hardwick* called "the right to be let alone."<sup>427</sup> Stated most broadly, this right could constitutionalize John Stuart Mill's harm principle—a principle that states that the government ought only to legislate to protect individuals from directly, physically harming one another without consent.<sup>428</sup> Laws to protect individuals from harming themselves are, under this view, none of the government's business.<sup>429</sup> Some have read Justice Kennedy's opinion in *Lawrence v. Texas* as constitutionalizing this view,<sup>430</sup> although Professor Calabresi has published an article reading that

423. 381 U.S. 479 (1965).

424. 410 U.S. 113 (1973).

425. 505 U.S. 833 (1992).

426. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."); *Casey*, 505 U.S. at 851. The *Casey* Court wrote:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

*Id.*

427. 478 U.S. 186, 199 (Blackmun, J., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). The phrase "the right to be let alone" was coined by Justice Brandeis and Samuel Warren in their seminal article, *The Right to Privacy*. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

428. *See* JOHN STUART MILL, ON LIBERTY 68 (Gertrude Himmelfarb ed., Penguin Books 1984) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.").

429. *Id.* at 68–69 ("The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute.").

430. *See, e.g.,* Keith Burgess-Jackson, *Our Millian Constitution: The Supreme Court's Repudiation of Immorality as a Ground of Criminal Punishment*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 407, 414 (2004) (comparing Justice Kennedy's "general rule" that a state should not attempt to define the meaning of a relationship or set its boundaries absent injury to a person or abuse of a legally protected institution with Mill's harm principle).

opinion more narrowly.<sup>431</sup> It is possible that all *Lawrence* creates is a limited realm of adult consensual sexual freedom where money has not been exchanged.<sup>432</sup> What did state constitutions in 1868 say about the protection of a right to engage in conduct beyond the sexual realm that violates Mill's harm principle—so-called victimless crimes? There is nothing one way or the other about sexual matters, but there are a few state constitutional provisions that explicitly contemplate a state role in banning at least some nonsexual victimless crimes.

1. *Lotteries*.—Twenty-three states out of thirty-seven in 1868—a majority—specifically prohibited the authorization or sale of lottery tickets in their state constitutions. A typical such clause provided, “The legislature shall never authorize any lottery, or the sale of lottery tickets.”<sup>433</sup> Since gambling is not an activity where one individual directly harms another without the other's consent, this recognition of the power of the states to regulate gambling is a recognition of the power to prevent people from engaging in conduct that is harmful to themselves. These state constitutional clauses might sound to modern ears as if they only forbade state-run lotteries. If so, “private” gambling might be permissible. The clauses are potentially susceptible, however, to a broader reading that forbids legalization of the sale of any lottery tickets. Sixty-two percent of Americans in 1868—a solid majority—lived in states that banned legalization of the sale of lottery tickets in their state constitutions. Thus, it is highly likely that whatever rights the Fourteenth Amendment creates, those rights do not include a federal constitutional right to gamble. State constitutional bans on lotteries were found in 83% of Midwestern–Western state constitutions, 67% of Southern state constitutions, and 30% of Northeastern state constitutions. Lottery bans were found in 50% of the pre-1855 but in 74% of the post-1855 constitutions. The trend in 1868, then, was toward *more* morals legislation, not less.

2. *Dueling*.—One traditional activity between two mutually consenting adults with a rich historical pedigree is dueling. Duels to the death were famously fought in old England and in colonial America; even Alexander Hamilton, one of the brightest and most illustrious of the framers of our Constitution, was willing to engage in a duel that resulted in his death.<sup>434</sup> Thus, surely if the framers of the Fourteenth Amendment had meant to constitutionalize a principle of leaving people alone or of anti-paternalism they

---

431. See Calabresi, *supra* note 241, at 1525–26 (arguing that *Lawrence* was a symbolic opinion and an affirmation of the status quo rather than an example of the Supreme Court enacting radical social change).

432. *Id.* at 1518.

433. *E.g.*, MINN. CONST. of 1857, art. IV, § 31.

434. 26 THE PAPERS OF ALEXANDER HAMILTON: MAY 1802–JULY 1804, at 235–37 (Harold C. Syrett ed., 1979).

ought to have left in place the ancient right to duel—a right that could even have been said to have been deeply rooted in history and tradition.

The evidence, however, from the thirty-seven state constitutions in effect in 1868 says otherwise. Twenty-two states at that time—a majority—had specific clauses in their constitutions that penalized or discouraged dueling. Far from recognizing a right of mutually consenting adults to fight to the death the way professional boxers or football players sometimes do even today, the generation that ratified the Fourteenth Amendment was paternalistic when it came to dueling. Typical of the twenty-two state constitutional clauses penalizing dueling is the following language from the Wisconsin state constitution:

Any inhabitant of this State who may hereafter be engaged, either directly or indirectly in a duel, either as principal or accessory, shall forever be disqualified as an elector, and from holding any office under the Constitution and laws of this State, and may be punished in such manner as shall be prescribed by law.<sup>435</sup>

Not only was there not a fundamental right to duel, there was a fundamental police power of state government to outlaw, regulate, and discourage dueling. What conclusions, if any, to draw from this is obviously a matter for debate.

Looking at bans on dueling by population, it turns out that 69%—or just over a two-thirds supermajority—of all Americans in 1868 lived in states with paternalistic anti-dueling language in their state constitutions. Such anti-dueling clauses were found in 80% of Southern, 75% of Midwestern–Western, and 10% of Northeastern state constitutions in 1868. They were relatively recently added clauses, found in 44% of the pre-1855 constitutions but in a whopping 74% of the post-1855 constitutions. This is consistent with the idea that America between 1855 and 1868 was a society on a series of important moral crusades: a crusade against slavery and for equal civil rights, a crusade against dueling, a crusade for women’s rights, a crusade against lotteries, and a crusade against alcohol that culminated many decades later in Prohibition.<sup>436</sup> As we have just seen, most state constitutions at this time discouraged dueling by preventing anyone who engaged in or assisted a duel from holding any public office.<sup>437</sup> Others provided for additional punishments as could be prescribed by law.<sup>438</sup>

3. *Alcohol*.—Speaking of lotteries and dueling, we are naturally led to the subject of alcohol for the reasons just mentioned. Did the ratifiers of the

435. WIS. CONST. of 1848, art. XIII, § 2.

436. See JAMES A. MORONE, *HELLFIRE NATION* 213 (2003) (“In an era rich with moral crusades and millennial dreams, the Civil War itself became the long-awaited American apocalypse.”).

437. *E.g.*, WIS. CONST. of 1848, art. XIII, § 2.

438. *E.g.*, *id.*

Fourteenth Amendment in 1868 understand it to protect a fundamental right to ingest alcohol, or, by analogy, drugs or other substances that might help one better “define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”?<sup>439</sup> Only three state constitutions in 1868—a small minority of the thirty-seven—prohibited or severely limited the sale and use of alcohol within the state. A typical state constitutional clause in this genre provided, “No license to traffic in intoxicating liquors shall hereafter be granted in this State; but the general assembly may, by law, provide against evils resulting therefrom . . . .”<sup>440</sup> Only 12% of Americans in 1868 lived in these three somewhat dry states. Limits on alcohol could be found in 13% of Southern, 10% of Northeastern, and 8% of Midwestern–Western states. None of these states were in the far West, where Westerners must still at that time have liked their saloons. Limits on alcohol were equally common in 1868 in older and in more recent constitutions. In addition, West Virginia had a weaker clause permitting the legislature to pass laws regulating or prohibiting liquor sales.<sup>441</sup> What conclusions, if any, to draw from this very limited historical data is a matter for fair debate.

#### *O. Government Structure*

A number of state constitutions protected individuals or officeholders with rights of government structure in situations where the absence of those rights would heavily burden individual rights. A comprehensive survey of the common government structures in state constitutions in 1868 is well beyond the scope of this article, but we will now briefly address just a few rights of government structure that served to protect the individual rights of citizens or officeholders and that were arguably deeply rooted in history and tradition in 1868.

*1. Separation of Powers.*—Several state bills of rights specifically protected individuals from being subjected to the authority of a government official simultaneously exercising a combination of legislative, executive, and judicial power. More commonly, the state constitutions in 1868 had a separate freestanding article protecting the separation of powers for the benefit of their individual citizens.<sup>442</sup> All in all, twenty-nine out of thirty-seven states in 1868—or an Article V, three-quarters consensus of the states—specifically provided for the division of their state governments into three separate and co-equal departments: the executive, the judicial, and the

---

439. See generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

440. E.g., OHIO CONST. of 1851, sched., § 18.

441. W. VA. CONST. of 1861, art. XI, § 4 (“Laws may be passed regulating or prohibiting the sale of intoxicating liquor within the limits of this State.”).

442. E.g., VA. CONST. of 1864, art. II (“The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others . . .”).

legislative. A typical separation-of-powers clause provided, “The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit: those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.”<sup>443</sup> Sixty-six percent of the total U.S. population in 1868—roughly two-thirds—lived in states that constitutionally guaranteed the separation of powers. Such guarantees could be found in 93% of Southern, 70% of Northeastern, and 67% of Midwestern–Western states. Seventy-two percent of the pre-1855 and 84% of the post-1855 constitutions had separation-of-powers provisions.

This fact is striking because Professor Bruce Ackerman has observed that James Madison proposed adding a separation-of-powers clause to the federal Constitution but the framers declined to do so.<sup>444</sup> Ackerman reads a lot into their failure to adopt this specific clause.<sup>445</sup> Others have suggested the separation of powers is less strictly followed at the state than at the federal level.<sup>446</sup> Our data here suggest, however, that in 1868 when the Fourteenth Amendment was ratified, an Article V, three-quarters consensus of the states supported the idea that Americans had a fundamental right to a government of separated powers. What, if anything, a court ought to do with this data is a subject for another day.

2. *Power to Suspend or Dispense With the Laws.*—A big issue in the English Revolution of 1688 was whether the King had the power to suspend or dispense with Acts of Parliament, or whether only Parliament could suspend its own laws.<sup>447</sup> In response to this concern, the framers of the federal Constitution specifically imposed a duty on the President that he take care that the laws be faithfully executed.<sup>448</sup> The framers put the Take Care Clause in our Constitution to make it clear that the President did not have a dispensing power.<sup>449</sup>

---

443. *E.g.*, CONN. CONST. of 1818, art. II.

444. Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 318 n.4 (1992) (citing BERNARD SCHWARZ, 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1028 (1971)). The proposed separation-of-powers clause died in the Senate. SCHWARZ, *supra*, at 1146.

445. Ackerman, *supra* note 444, at 318 n.4 (asserting that the omission of the clause was “by no means unintentional”).

446. *See, e.g.*, Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1189 (1999) (arguing that enforcement of separation-of-powers clauses “by state courts is weaker than at the federal level”).

447. Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 871–72 (1994) (documenting King James’s abuse of the royal-prerogative dispensing power, which eventually led to his abdication in the Glorious Revolution of 1688).

448. U.S. CONST. art. II, § 2.

449. May, *supra* note 447, at 873 (“[T]he requirement that the President ‘take Care that the Laws be faithfully executed’ is a succinct and all-inclusive command through which the Framers

It is striking in this respect that sixteen states—a minority, although a very sizeable one—had language in their state constitutions that explicitly granted the power to suspend laws exclusively to the *legislature*. A typical such clause provided, “[N]o power of suspending laws shall be exercised, unless by the legislature or its authority.”<sup>450</sup> By population, this limit applied to 47% of Americans. It was found in 60% of Northeastern, 47% of Southern, and 25% of Midwestern–Western state constitutions. Fifty percent of the pre-1855 and 37% of the post-1855 state constitutions limited the suspension of laws.

Even more dramatically, fully thirty-two states out of thirty-seven in 1868—or an Article V constitutional consensus—provided specifically in their state constitutions that the governor “shall take care that the laws be faithfully executed.”<sup>451</sup> Eighty-nine percent of the population—a huge supermajority—lived in these thirty-two states. Take-care clauses could be found in 92% of Midwestern–Western state constitutions, 87% of the Southern state constitutions, and 80% of Northeastern state constitutions. Take-care clauses could be found in 89% of the pre-1855 and in 84% of the post-1855 constitutions. Americans may thus have a fundamental right not to have the executive suspend the laws that apply to them, a right that is deeply rooted in history and tradition. Admittedly, state take-care clauses only explicitly set limits on governors’ powers by imposing on them a duty, but they also may provide individuals with a legal right.

3. *Taxes*.—Seven states in 1868—a small minority—prohibited taxation of any form without the consent of the people or their legislative representatives. This right echoed the famous cry of the people of Massachusetts in the 1770s that they were the victims of an unconstitutional taxation by Parliament without representation in it.<sup>452</sup> A typical clause forbidding taxation without popular consent stated, “No tax or duty shall be imposed without the consent of the people or their representatives in the legislative assembly, and all taxation shall be equal and uniform.”<sup>453</sup> Sixteen percent of the American people in 1868 lived in states with these clauses in their state constitutions. Such clauses could be found in 30% of Northeastern, 20% of Southern, and only 8% of Midwestern–Western state constitutions. Tax clauses were found in 17% of the pre-1855 constitutions and in 21% of the post-1855 constitutions.

---

sought to prevent the Executive from resorting to the panoply of devices employed by English kings to evade the will of Parliament.”).

450. *E.g.*, PA. CONST. of 1838, art. IX, § 12.

451. *E.g.*, LA. CONST. of 1868, tit. III, art. 65.

452. *See* CONCISE DICTIONARY OF AMERICAN HISTORY 927–28 (Wayne Andrews ed., 1962) (discussing the history of the famous phrase “Taxation without Representation is Tyranny!”).

453. *E.g.*, OR. CONST. of 1857, art. I, § 33.

4. *Right of Speech or Debate in the Legislature.*—Twenty-six states out of thirty-seven in 1868—or two-thirds but not three-quarters of the total—specifically protected the freedom of speech, deliberation, and debate in the legislature by prohibiting its use as a foundation for prosecution or civil action in any court. The state constitutions typically provided, “For any speech or debate in either house of the Legislature, the members shall not be questioned in any other place.”<sup>454</sup> Eighty percent of all Americans in 1868 lived in states with speech-or-debate clauses in their constitutions. There was significant geographical variance in the presence of speech-or-debate clauses—100% of Northeastern, 67% of Midwestern–Western, and 53% of Southern states protected legislative speech or debate. There was also significant difference by date—94% of the pre-1855 and 47% of the post-1855 constitutions had speech-or-debate clauses.

5. *Privilege from Civil Process (for Legislators).*—A right related to protection for speech or debate is privilege from civil process during a legislative session. Readers here will remember former President Bill Clinton’s claim for a presidential privilege from civil process in the Paula Jones sexual harassment lawsuit during the time he held office as President.<sup>455</sup> Seven states in 1868—a minority—gave members of their legislatures privilege from civil process during a legislative session (and for a designated time period surrounding that session). Usually coupled with a privilege from arrest, these clauses stated,

Members of the legislature shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest, and they shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session.<sup>456</sup>

Twelve percent of the population in 1868 lived in states with these clauses in their constitutions. Such clauses were found in 33% of Midwestern–Western state constitutions, 13% of Southern state constitutions, and 10% of Northeastern state constitutions. Seventeen percent of the pre-1855 and 21% of the post-1855 constitutions granted this privilege.

6. *Privilege from Arrest (for Legislators).*—Privileges from criminal process or arrest were unsurprisingly far more common in state constitutions in 1868. Twenty-nine out of thirty-seven states—or a three-quarters Article V consensus of the states—granted members of their legislatures privilege

454. *E.g.*, N.Y. CONST. of 1846, art. III, § 12.

455. *See* Clinton v. Jones, 520 U.S. 681, 686 (1997) (“In response to the complaint, [President Clinton] promptly advised the District Court that he intended to file a motion to dismiss on grounds of Presidential immunity . . .”).

456. *E.g.*, CAL. CONST. of 1849, art. IV, § 12.

from arrest during a legislative session (and for a designated time period surrounding that session). These clauses typically provided:

The members of the general assembly shall, in all cases except treason, felony, breach or surety of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.<sup>457</sup>

Seventy-eight percent of Americans lived in these states. The privilege was found in 92% of Midwestern–Western, 73% of Southern, and 70% of Northeastern state constitutions. Eighty-three percent of the pre-1855, compared to 74% of the post-1855, constitutions protected legislators in this manner.

7. *Inviolable Constitution.*—In an effort to guard against transgressions of the state government, four states—a minority—declared that everything in the state constitution shall remain inviolate and that all laws contrary to it shall be void. A typical such clause stated, “To guard against transgressions of the high powers herein delegated, we declare that everything in this bill of rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or the following provisions, shall be void.”<sup>458</sup> Eighteen percent of the population in 1868 lived in states with such provisions in their constitutions. Such provisions could be found in 20% of Southern and 10% of Northeastern state constitutions and not in any Midwestern–Western state constitutions. Seventeen percent of the pre-1855 and 5% of the post-1855 constitutions protected this right.

8. *Uniform Government.*—One state, Virginia, provided that the people have a right to uniform government, and that no separate government within the limits of the state ought be erected or established. The clause read as follows: “That the people have a right to uniform government; and, therefore, that no government separate from, or independent of the government of Virginia, ought to be erected or established within the limits thereof.”<sup>459</sup> Three percent of the population lived in Virginia in 1868. Virginia’s constitution was ratified after 1855. It is, to say the least, ironic that it was Virginia that had this clause in its state constitution, since the state of West Virginia was in fact carved out of it, by perfectly constitutional means, during the Civil War.<sup>460</sup>

---

457. *E.g.*, KY. CONST. of 1850, art. II, § 25.

458. *E.g.*, TEX. CONST. of 1868, art. I, § 23.

459. VA. CONST. of 1864, Bill of Rights, art. I (incorporating VA. CONST. of 1776, Declaration of Rights, § 14).

460. Vasani Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 293, 297–98 (2002).

*P. Affirmative Rights to a Public-School Education and to Welfare*

The final set of rights that we found in state constitutions in 1868 is in many ways the most important, and perhaps the most surprising. We found that an Article V, three-quarters consensus of the thirty-seven states in 1868 recognized a fundamental state constitutional duty to provide a public-school education as a matter of their formal, positive state constitutional law. The existence of such a duty on government could be said to create a right on the part of individuals. In *Prigg v. Pennsylvania*,<sup>461</sup> the Supreme Court held that the individual constitutional right of slave owners to recover fugitive slaves implied that the federal government had the power to pass a federal fugitive-slave law—a power not expressly spelled out in Article I, Section 8.<sup>462</sup> Thus, Justice Story's opinion stood for the proposition that an individual right can give rise to government power, which is far more tenuous than our claim that a government duty to educate implies an individual right to be educated at public expense.

A right to a public-school education is thus arguably deeply rooted in American history and tradition and is implicit in the concept of ordered liberty. This is an extraordinary finding because of its implications for *Brown v. Board of Education*, and because it is usually argued that a distinctive feature of American constitutionalism is that it guarantees negative liberties against government but not positive claims for entitlements from government.<sup>463</sup> That point is generally true, but our data on fundamental state constitutional rights in 1868 suggest that there may be at least one very fundamental positive-law entitlement that all Americans have long possessed. In addition to finding an Article V consensus that Americans had a right in 1868 to a public-school education, we found that a few state constitutions imposed on their state governments an obligation to run certain other charitable public institutions. There was not, however, a widespread public consensus on that matter in 1868 the way there was a widespread public consensus on the states' duty to provide a public-school education.

*1. Duty to Provide a Public-School Education.*—An astonishing thirty-six out of thirty-seven states in 1868—an Article V, three-quarters consensus—imposed a duty in their constitutions on state government to provide a public-school education. We think it is fair to construe these clauses as in effect guaranteeing individuals a right to some kind of government provision of a public-school education. The Supreme Court has thus

---

461. 41 U.S. (16 Pet.) 539 (1842).

462. *Id.* at 615 (reasoning that because the individual right of slave owners to recover fugitive slaves was enumerated in Article IV, Section Two of the Constitution, “the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it”).

463. *See Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (“[T]he Constitution is a charter of negative rather than positive liberties.”).

far rejected the notion of a right to public education. In *San Antonio Independent School District v. Rodriguez*,<sup>464</sup> the Court expressly said that public education is not a fundamental right.<sup>465</sup> It held:

Education, of course, is not among the rights afforded explicit protection under our federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.<sup>466</sup>

However, the Court has also recognized the importance of education without deeming it a fundamental right, saying instead that it “has a pivotal role in maintaining the fabric of our society”<sup>467</sup> and is “the most important function of state and local governments.”<sup>468</sup>

Ninety-two percent of all Americans in 1868 lived in states whose constitutions imposed this duty on state government. Every state except Illinois, which had a pre-1855 constitution, had a clause imposing a duty on the state government to offer at least some kind of a public-school education. A typical clause of this kind provided, in the words of the Mississippi Constitution:

As the stability of a republican form of government depends mainly upon the intelligence and virtue of the people, it shall be the duty of the legislature to encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement, by establishing a uniform system of free public schools, by taxation or otherwise, for all children between the ages of five and twenty-one years, and shall, as soon as practicable, establish schools of higher grade.<sup>469</sup>

These clauses then guaranteed as a matter of formal positive law that individuals essentially had a fundamental right to obtain a public-school education if they wanted one. The clauses in question, however, did not make school attendance compulsory for the young, so parents could still choose to homeschool their children, or possibly, like the Amish, to not educate them beyond a certain minimal level. Notably, South Carolina required not only the provision of public schools but also compulsory attendance.<sup>470</sup> This was an exception. The issue of compulsory school attendance was one

---

464. 411 U.S. 1 (1973).

465. *Id.* at 35.

466. *Id.*

467. *Plyler v. Doe*, 457 U.S. 202, 203 (1982).

468. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

469. MISS. CONST. of 1868, art. VIII, § 1.

470. See S.C. CONST. of 1868, art. X, §§ 3, 4 (“It shall be the duty of the general assembly to provide for the compulsory attendance, at either public or private schools, of all children between the ages of six and sixteen years . . .”).

that was generally not addressed or resolved in 1868, despite the provisions for public education.

This finding is striking because it could be argued to imply that a right to a public-school education in 1868 was a privilege or immunity for Fourteenth Amendment purposes as to which the states were not allowed to discriminate on the basis of race. The framers and ratifiers of the Fourteenth Amendment may well not have understood that the Amendment outlawed segregation in education, but arguably that is precisely what it did. Obviously, it is the formal text of the Fourteenth Amendment that governs, and not the uncodified and erroneous ideas of the ratifiers of that text as to what it might mean.

Judge Michael McConnell, in his originalist defense of *Brown v. Board of Education*, found that the Congress that passed the Civil Rights Act of 1875 came close to passing federal legislation outlawing segregation in state public schools on Fourteenth Amendment grounds.<sup>471</sup> One question raised by McConnell's brilliantly defended thesis is how the Congress in 1875 could have thought that federal legislation prohibiting school segregation was appropriate to "enforce" the rights guaranteed by Section One of the Fourteenth Amendment. One explanation that our Article supports is that public-school education was conceived as a privilege or immunity as to which class-based legislation was forbidden.

As it happens, three states specifically discussed segregation in education in their state constitutions—Missouri permitted it,<sup>472</sup> and South Carolina and Louisiana prohibited it.<sup>473</sup> Vermont's state constitutional clause requiring the state to offer a public-school education was slightly weaker than the others. It stated only that "a competent number of schools *ought* to be maintained in each town."<sup>474</sup> North Carolina's state constitutional clause on public-school education was particularly strong, calling the right to

---

471. See Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL'Y 457, 463 (1995) (indicating that the Civil Rights Act of 1875 was almost passed with a provision prohibiting segregation in public schools, though that provision was ultimately stricken); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1060–79 (1995) (detailing several failed attempts by Congress to pass the Civil Rights Act of 1875 with a provision requiring desegregation of public schools); Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937, 1947 (1995) ("[A] substantial majority of the Congress . . . took the position that public school segregation violates the Fourteenth Amendment.").

472. MO. CONST. of 1865, art. IX, § 2 ("Separate schools may be established for children of African descent.").

473. See LA. CONST. of 1868, tit. VII, art. 135 ("All children of this state between the years of six and twenty-one shall be admitted to the public schools or other institutions of learning sustained or established by the state in common, without distinction of race, color, or previous condition."); S.C. CONST. of 1868, art. X, § 10 ("All the public schools, colleges and universities of this state, supported in whole or in part by the public funds, shall be free and open to all the children and youths of the State, without regard to race or color.").

474. VT. CONST. of 1793, ch. II, § 41 (emphasis added).

education a *privilege* and placing the clause within the Bill of Rights.<sup>475</sup> This is consistent with the idea argued for above that this right was a privilege or immunity as to which the Fourteenth Amendment forbade the making of racial classifications. The pervasiveness in state constitutional law in 1868 of a right to a public-school education, or a duty of the state to provide a free education to all its citizens, is striking because we have no such right, at least explicitly, in our federal Constitution. This reflects partly the fact that most of our Constitution was drafted in the eighteenth century and partly the fact that education was originally seen as being a matter for the states and not for the federal government. Some scholars have argued that a right to public education is inherent in other rights, for instance, in the right to substantive due process.<sup>476</sup> These findings may support such claims, although they do not necessarily lead to the conclusion that public school funding must be equal. If the Supreme Court were to revisit *Rodriguez*, it is possible that the overwhelming presence of the right to education in state constitutions in 1868 would qualify as at least a partial “basis for saying it is implicitly so protected.”<sup>477</sup>

2. *Other Affirmative Rights to Government Aid.*—Nine states out of thirty-seven in 1868—a minority—provided in their state constitutions for the existence of public institutions, provided for and supported by the state, to aid some of those in need. A typical clause provided, “Institutions for the benefit of the insane, blind, and deaf and dumb shall always be fostered and supported by the State, and be subject to such regulations as may be prescribed by the general assembly.”<sup>478</sup> Note that this clause imposes a duty on the states in question and creates an affirmative right to government aid on the part of the insane, blind, deaf, and dumb. Twenty-three percent of Americans living in 1868—just shy of one-quarter of the population—lived in states with clauses of this type in their state constitutions. Such clauses were found in 42% of Midwestern–Western, 27% of Southern, and 0% of Northeastern state constitutions. They were present in 17% of the pre-1855 constitutions and in 32% of the post-1855 constitutions, so the trend toward government provision of positive aid was already noticeable when the Fourteenth Amendment was ratified in 1868. In addition, Michigan and Wisconsin (the former also included a clause on public institutions generally) required that the legislature provide for the establishment of free public

---

475. N.C. CONST. of 1868, art. I, § 27 (“The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.”).

476. See, e.g., Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 612 (1992) (arguing that the Fourteenth Amendment is cast in terms of equal access to state-created rights).

477. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

478. E.g., OHIO CONST. of 1851, art. VII, § 1.

libraries.<sup>479</sup> Louisiana went further, making it the duty of the general assembly to oblige parishes to support all paupers residing within their limits.<sup>480</sup> This is the only state constitution we found in 1868 that could be argued to create a right to welfare. It is interesting, but not surprising, that such a right would have existed in the only civil law state in the country. The civil law, with its ties to the Catholic Church, is generally less libertarian and more paternalistic than the common law.<sup>481</sup> The subject of whether the federal Constitution created a right to welfare was a major topic of discussion in the 1960s and 1970s.<sup>482</sup>

---

479. MICH. CONST. of 1850, art. XIII, § 12 (“The legislature shall also provide for the establishment of at least one librarian in each township . . .”); WISC. CONST. of 1848, art. X, § 2 (“The residue [of funds] shall be appropriated to the support and maintenance of Academies and Normal Schools, and suitable libraries and apparatus therefor.”).

480. LA. CONST. of 1868, tit. VI, art. 126 (“It shall be the duty of the general assembly to make it obligatory upon each parish to support all paupers residing within its limits.”).

481. See John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 49 (2001) (contrasting the common law, under which individuals were to fend for themselves, with the civil law, “which was inherently and pervasively paternalistic”).

482. See, e.g., Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 3 WASH. U. L.Q. 659, 663 (1979) (explaining that the right to welfare is “but a thinly fictionalized report of various decisions handed down by the United States Supreme Court over the six-year period from 1969 to 1974”).

## IV. A Broad Look at Rights

A. *By Number of States*

Table 1: Prevalence of Rights by Number of States

All (37)	2/3rds (25-27)	Minority (6-18)	Minority (1-5)
Free Press	Quarter Soldiers (27)	9th Amendment Analog (18)	Penal Principles (4)
Free Exercise	Obtain Witnesses (27)	Not Bear Arms (17)	Retroactive Laws (4)
Excessive Bail	Natural & Inalienable (27)	Suspending Laws (16)	Government Officers (4)
	Treason (27)	Free Elections (15)	One Person, One Vote (4)
<b>3/4ths (28-36)</b>	Establishment (27)	Privileges & Immunities (13)	Alcohol (4)
Warrants & PC (36)	Libel (27)	Secession (11)	Inviolable Constitution (4)
Jury Trial-Crim. (36)	God in Preamble (27)	Immigration (11)	Protect Religion (3)
Habeas Corpus (36)	Be Heard (26)	Proportionality (9)	Sanguinary (3)
Jury Trial-Civil (36)	Speech or Debate (26)	Public Institutions (9)	10th Amendment Analog (3)
Public Education (36)	Reform Government (26)	Martial Law (9)	Oaths (3)
Subordinate Military (35)	Impair Contracts (25)	Trial in State (8)	Jury Determines Law & Fact (3)
Excessive Fines (35)		Blaine Amendment (8)	Corporal Punishment (3)
Search & Seizure (34)	<b>Majority (19-24)</b>	By Information (7)	Forfeit Residence (3)
Assembly & Petition (34)	Religious Qualifications (24)	Witness Detention (7)	Federal Allegiance (3)
Counsel (34)	Public Trial (24)	Suffrage (7)	Witness Qualifications (3)
Cruel & Unusual (34)	Lottery (23)	General Laws (7)	Impartial Judge (2)
Self Incrimination (34)	Duelling (22)	Taxes (7)	Arbitrary Power (2)
Takings (33)	Bills of Attainder (22)	Civil Process (7)	Arrest & Detain (2)
Free Speech (32)	Bear Arms (22)	Fundamental Principles (7)	Appeals (1)
Confrontation (32)	Standing Armies (21)	Suicide (6)	Uniform Government (1)
Take Care (32)	Corruption of Blood (20)	Emigration (6)	Whipping (1)
Informed of Charges (31)	Nobility (20)	Property Escheat (6)	Presume Innocent (1)
Double Jeopardy (31)	Equal Protection (20)	Suits Against State (5)	Property is Supreme (1)
Ceremonial Deism (30)	Grand Jury (19)	Prisoner Rights (5)	
Due Process (30)		Married Women (5)	
Speedy Trial (30)		Monopolies (5)	
Privilege from Arrest (29)			
Ex Post Facto (29)			
Separation of Powers (29)			
Feudalism (29)			
Legal Recourse (28)			
Imprisonment for Debt (28)			
Slavery (28)			

B. *By Population*

Table 2: Prevalence of Rights by Population

All	2/3rds	Minority (10–50%)	Minority (0–9%)
Free Press	Imprisonment for Debt (.74)	Free Elections (.48)	Protect Religion (.09)
Free Exercise	Legal Recourse (.73)	Equal Protection (.47)	Federal Allegiance (.09)
Excessive Bail	Obtain Witnesses (.73)	Suspending Laws (.47)	Forfeit Residence (.09)
	Ex Post Facto (.73)	Privileges & Immunities (.34)	Penal Principles (.08)
<b>3/4ths</b>	God in Preamble (.73)	9th Amendment Analog (.33)	Witness Qualifications (.08)
Jury Trial–Crim. (.99)	Quarter Soldiers (.72)	By Information (.26)	Married Women (.08)
Jury Trial–Civil (.98)	Label (.72)	Suffrage (.25)	Corporal Punishment (.07)
Habeas Corpus (.96)	Establishment (.71)	Secession (.23)	Arbitrary Power (.07)
Assembly & Petition (.94)	Natural & Inalienable (.71)	Public Institutions (.23)	10th Amendment Analog (.07)
Excessive Fines (.92)	Dueling (.69)	Property Escheat (.22)	Oaths (.07)
Public Education (.92)	Separation of Powers (.66)	Blaine Amendment (.22)	Jury Determines Law & Fact (.07)
Self Incrimination (.91)	Religious Qualifications (.66)	Suicide (.22)	Impartial Judge (.05)
Takings (.91)		Trial in State (.21)	Sanguinary (.05)
Cruel & Unusual (.91)	<b>Majority</b>	Emigration (.21)	Arrest & Detain (.04)
Counsel (.91)	Slavery (.65)	Proportionality (.21)	One Person, One Vote (.04)
Take Care (.89)	Reform Government (.65)	Fundamental Principles (.20)	Property is Supreme (.03)
Warrants & PC (.89)	Impair Contracts (.63)	Witness Detention (.20)	Uniform Government (.03)
Ceremonial Deism (.88)	Treason (.62)	Inviolable Constitution (.18)	Whipping (.03)
Feudalism (.87)	Lottery (.62)	Martial Law (.17)	Appeals (.03)
Free Speech (.86)	Bear Arms (.61)	Suits Against State (.17)	Presume Innocent (.01)
Double Jeopardy (.86)	Corruption of Blood (.60)	General Laws (.16)	
Subordinate Military (.85)	Not Bear Arms (.59)	Taxes (.16)	
Confrontation (.85)	Nobility (.59)	Immigration (.15)	
Search & Seizure (.84)	Public Trial (.58)	Retroactive Laws (.13)	
Informed of Charges (.82)	Standing Armies (.56)	Monopolies (.13)	
Speedy Trial (.82)	Bills of Attainder (.53)	Alcohol (.12)	
Due Process (.82)	Grand Jury (.51)	Civil Process (.12)	
Speech or Debate (.80)		Prisoner Rights (.11)	
Privilege from Arrest (.78)		Government Officers (.10)	
Be Heard (.76)			

## V. Discussion

We have now completed our long and winding tour of the individual rights protected as a matter of state constitutional law in 1868. We have seen that almost all of the provisions of the federal Bill of Rights, and other analogs to it in other parts of the federal Constitution, were protected by state constitutions in 1868. In addition, state constitutions explicitly protect some important rights, such as the right to a public-school education, that were not protected in 1868 by the federal Constitution. One purpose of our nose count or tally of states, as we said in the Introduction, was to help determine how fundamental, or deeply rooted, or implicit in the concept of ordered liberty a right really is as revealed by state constitutional law in 1868. This arguably is relevant to debates about the original meaning of the Fourteenth Amendment or the contours of modern substantive due process. The charts above reveal that thirty-one rights-related provisions that we separately identified were recognized by an Article V consensus of three-quarters of the states in 1868 when the Fourteenth Amendment Privileges or Immunities

Clause was ratified. Another eleven individual-rights-related provisions were recognized by a supermajority of two-thirds of the states in their 1868 positive-law state constitutions, which gives those rights a claim to the status of being fundamental rights as well. An additional eleven rights-related provisions were recognized and protected by a majority of state constitutions in 1868. Three-quarters of all Americans living in 1868 lived in states that recognized twenty-eight of the rights-related provisions we discussed, and two-thirds of Americans lived in states that recognized another ten of the rights-related provisions. Substantial supermajorities of Americans thus lived in states in 1868 that recognized an astonishing thirty-eight individual rights-related provisions in their positive state constitutional law. American culture in 1868 was thickly populated by the protection of individual fundamental rights. An additional fifteen rights-related provisions beyond these thirty-eight were enshrined by constitutions governing a majority of Americans living in 1868.

Many of the most common state constitutional rights, for example, the right of free speech and the right to petition for habeas corpus, are also protected by the federal Constitution. However, some interesting discrepancies emerged as well. For instance, only a majority and not a supermajority of the states (and of the total population) had, in effect, a right to bear arms or to be free from the imposition of religious qualifications for office. This number arguably changes if one counts clauses allowing people abstractly a right to defend their liberty and property. Conversely, an Article V, three-quarters consensus of the states (and population) had a right to a public-school education—a right that is not explicitly found anywhere in the federal Constitution. This right is an implication of the duty state constitutions imposed on their legislatures to provide all children a free public-school education. Patterns and divergences like these were abundant. Specific findings and implications are discussed above for each of the individual rights and limitations. This Part will provide a broader, though inevitably noncomprehensive, discussion of the most striking results.

Professor Akhil Reed Amar's exceptional and well-received book, *The Bill of Rights: Creation and Reconstruction*, offers an excellent medium through which to showcase the significance of our findings. In his book, Amar first gives a thorough narrative of the history and meaning of each Amendment in our Bill of Rights.<sup>483</sup> He next argues that, as an original matter in 1791, the rights protected by the Bill of Rights had a far more collective meaning than the libertarian, individualistic meaning they acquired in 1868 when the Fourteenth Amendment was ratified.<sup>484</sup> We think Amar is exactly right that for those wondering about incorporation or judicial

---

483. See generally AMAR, *supra* note 44 (establishing the relevant political and legal context in which each Amendment was drafted to elucidate its meaning).

484. See *id.* at 125–27 (highlighting the original populist character of the Antifederalist demands for a bill of rights in contrast to the current emphasis on individual rights).

protection against the states of unenumerated rights in federal constitutional law, the question is controlled not by the original meaning of the first ten Amendments in 1791 but instead by the meaning those texts and the Fourteenth Amendment had in 1868.<sup>485</sup> Our Article here builds on this critical theme of Amar's by offering a descriptive account of what individual rights were thought to be truly fundamental in 1868 as a matter of positive state constitutional law. We express no opinion here on Amar's claim that the Fourteenth Amendment literally incorporates the federal Bill of Rights so that it applies against the states.<sup>486</sup> Amar makes a powerful case, but that is a subject for another time. We do claim that something very much like the selective incorporation of the Bill of Rights that has actually occurred as a matter of Fourteenth Amendment substantive due process can be explained and justified by asking what rights were fundamental and deeply rooted in history and tradition as a matter of state constitutional law in 1868. On this question, we reach largely the same results as Amar, although for different reasons.

Amar argues that there are roughly two types of rights: those that address agency and populism problems (henceforth referred to as "collective rights") and those that are antimajoritarian and individualistic (henceforth referred to as "individualistic rights").<sup>487</sup> He proposes that some of the clauses of the federal Bill of Rights, such as the Establishment Clause, were originally meant to protect a collective right.<sup>488</sup> Amar argues, correctly in our view, that the Establishment Clause was meant to *permit* states to establish religions and that it only protected the state-established churches from a federally established church.<sup>489</sup> Amar thus concludes that it would make no more sense to incorporate a states-rights clause like the federal Establishment Clause against the states than it would make sense to so incorporate the federal Tenth Amendment.<sup>490</sup> This point obviously has important implications for the theory of incorporation, and indeed it leads Amar to propose his own theory of "refined incorporation."<sup>491</sup> Essentially, Amar's theory of refined

---

485. See *id.* at 234–35 (recounting the broad conception of freedom of speech popularized in the decades leading up to the adoption of the Fourteenth Amendment as a determinant of what rights are protected by the Amendment against states' intrusion). Kurt Lash rightly refers to this transformation as the "second adoption." See Lash, *supra* note 61, at 1109 ("This Article explores the proposition that the Free Exercise Clause was adopted a second time through its incorporation into the Privileges or Immunities Clause of the Fourteenth Amendment and that the scope of the new Free Exercise Clause was intended to include protections unanticipated at the Founding.").

486. See AMAR, *supra* note 44, at 174 (asserting the correctness of Hugo Black's contention that the text of the Fourteenth Amendment applies the Bill of Rights to the states).

487. See *id.* at xiv–xv (postulating a basic distinction in the Bill of Rights between majoritarian and populist "republican political 'right[s] of the people,'" and libertarian provisions conferring "liberal civil rights—'privileges and immunities' of individuals").

488. *Id.* at xiv.

489. *Id.* at 41.

490. *Id.* at 41–42.

491. *Id.* at xiii–xiv.

incorporation calls on the Supreme Court to code every sentence or clause of the original federal Constitution of 1787 and its twenty-seven Amendments to determine whether the sentence or clause in question protects a collective or an individual right.<sup>492</sup> If the right protected by the clause in question is collective, and concerns the self-governance of states, Amar argues it ought not to be incorporated by the Fourteenth Amendment against the states.<sup>493</sup> If the right in question, however, is an individualistic right, then Amar argues it can and should be incorporated against the states.<sup>494</sup> Amar's refined theory of incorporation thus allows for acknowledgement that some rights in the federal Constitution and Bill of Rights are states' rights and some are individuals' rights.<sup>495</sup> Only the latter, and not the former, can be repacked as being among the "privileges and immunities" of American citizens that are protected by the Fourteenth Amendment.<sup>496</sup> Amar's theory is attractively crisp, and it explains and legitimizes the Supreme Court's messy substantive-due-process incorporation case law.

The contribution our historical study could be argued to make to this constitutional debate is as follows: Many of the rights that Amar identifies as collective—such as the rights protected by the federal Establishment Clause, the Tenth Amendment, and the Second Amendment right to keep and bear arms—were also found in many, and in some cases in most, of the thirty-seven state constitutions that were in effect in 1868. In those state constitutions, the rights to be free of an established church or to own guns were clearly individual rights of citizens according to state constitutional law in 1868 and not merely collective rights. In fact, Amar has already acknowledged the existence of some of these state analogs and, as a result, softened his position.<sup>497</sup> He has conceded, for example, that the presence of establishment clauses in state constitutions may make nonestablishment a "soft substantive rule" (although not a full privilege or immunity).<sup>498</sup> Our comprehensive chronicle of rights exposes other instances of states turning federal constitutional collective rights of states into individual rights against the government instead. This could be argued to shed light on the original meaning of the Fourteenth Amendment.

---

492. *See id.* at xiv ("[A]ll of the privileges and immunities of citizens recognized in the Bill of Rights became 'incorporated' against states by dint of the Fourteenth Amendment. But not all of the provisions of the original Bill of Rights were indeed rights of citizens. Some instead were at least in part rights of states . . .").

493. *See id.* at 222 (proposing that, in considering whether a clause should be incorporated, "the right question is not whether a clause is fundamental but whether it is truly a private right of the citizen rather than a right of the states or the public generally").

494. *Id.*

495. *Id.*

496. *Id.* at xiv–xv.

497. *Id.* at 251–55.

498. *Id.* at 251.

In addition to collective rights of states and rights of individual citizens, our amended Constitution protects another type of rights: structural rights, such as the right not to have a federal statute suspended or dispensed with by the President acting alone. Amar does not consider structural constitutional rights of this kind to be individual freedoms to be incorporated by the Fourteenth Amendment.<sup>499</sup> He believes that “[t]he right question is not whether a clause is fundamental but whether it is truly a private right of the citizen rather than a right of the states or the public generally.”<sup>500</sup> But our findings could most definitely be used to challenge Amar’s narrow definition of individualistic rights. We found that many states mimicked some of the most important of the structural guarantees of the federal Constitution; such guarantees could, in specific cases or controversies, provide a cause of action to an individual litigant. For example, an Article V consensus of three-quarters of the states provided for the division of government into three separate departments—the executive, the judicial, and the legislative. This would confer on individuals a right not to be proceeded against by a government official who was simultaneously both prosecutor and judge. That occurrence would be a forbidden intermixture of the executive and judicial powers. An Article V consensus of three-quarters of the states in 1868 recognized a right not to have a statute one is relying upon suspended or dispensed with by the executive in cases where the individual is being proceeded against by the executive in violation of statutory law.<sup>501</sup> Thus, over three-quarters of the 1868 state constitutions contained take-care clauses requiring that the governor take care that the laws be faithfully executed. A convincing claim could be made that the “right” to have a governor who cannot suspend or dispense with the law is not meaningfully different from the “right” to due process before a court before being deprived of life, liberty, or property. Both take-care-clause rights and due-process-clause rights are deeply rooted in our history and tradition—a point Amar may have overlooked.

One of our intriguing findings is arguably quite central to Amar’s work: evidence that state positive constitutional law in 1868 openly contemplated the existence of at least some unenumerated fundamental, natural, and inalienable rights beyond all the many positive-law rights catalogued in this Article. A right to privacy in sexual matters of the kind found by the Supreme Court in *Griswold v. Connecticut*<sup>502</sup> or *Lawrence v. Texas*<sup>503</sup> could

---

499. *See id.* at 225 (stressing the need to “sort out which aspects of the pre-1866 Constitution were indeed privileges of individuals (for example, habeas) and which were instead structural provisions unique to the federal government and inappropriate for imposition on the states (for example, capitation and bicameralism)”).

500. *Id.* at 222.

501. Note that there is no individual right to force the executive to execute the law by prosecuting someone else, a situation that should be clearly distinguished from the one governed by the take-care clauses.

502. 381 U.S. 479, 485–86 (1965).

arguably be such a right. Clearly, not even a single state in 1868 protected a right to privacy in its state constitution. But if those constitutions protected natural-law rights, and if the right to privacy is a natural-law right, then maybe constitutional recognition of natural-law rights is itself deeply rooted in our history and tradition. This conclusion suggests that the Supreme Court's attempts in *Washington v. Glucksberg* and *Michael H. v. Gerald D.* to cabin the right to privacy by limiting it to only those unenumerated rights that are deeply rooted in American history and tradition may be doomed to fail. If recognition of natural-law unenumerated rights is itself deeply rooted in American history and tradition, then following *Glucksberg* simply leads one back to the question of what is a natural and inalienable right. Of course, Justice Scalia or Judge Bork might legitimately respond that just because a lot of states in 1868 recognized the existence of natural-law rights does not mean that they thought *courts* ought to recognize or enforce those rights against state legislatures. They might also well dispute the claim that state constitutional baby Ninth Amendments were understood in 1868 as endorsing the existence of natural law.

One other point on which we and Amar agree is that we have found that positive state constitutional laws in 1868 were not so much efforts to create and legislate the existence of individual fundamental rights as they were efforts to declare and memorialize in writing what some of those rights might be.<sup>504</sup> On this view, fundamental individual rights are preexisting entitlements, and are simply “declared” or “acknowledged” or “recognized” by our constitutions, bills of rights, and laws. Whether and to what degree those rights or other unmentioned rights “like” them were meant to be judicially enforceable or discoverable is a question that goes well beyond the scope of this Article. We do think, however, that we have helped nail down more clearly which rights are and which rights are not deeply rooted in our history and tradition.

## VI. Conclusion

Our goal here has been to stay as far away from normative claims as we can manage and to simply positively describe the protections afforded to individuals by positive state constitutional law in 1868. There is a huge amount of normative writing and theorizing about the Fourteenth Amendment and precious little scholarship that provides a descriptive account of some of the rights that normative scholars have said the Amendment might protect. Normative scholarship in this area is both

---

503. 539 U.S. 558, 578 (2003).

504. AMAR, *supra* note 44, at 147–56 (describing the natural-rights-grounded declaratory theory, which viewed the federal Bill of Rights as “not simply an enactment of We the People as the Sovereign Legislature bringing new legal rights into existence, but rather a declaratory judgment by We the People as the Sovereign High Court that certain natural or fundamental rights already existed”).

essential and fraught with risks. We think it helpful to stand back, hold our breath, and simply collect, group, and count the positive state constitutional rights that were in place in 1868. That is why we chose here to collect all the individual rights that were recognized in state constitutional law in 1868, when the Fourteenth Amendment was ratified, and group them together to display the story of rights protection they tell. Remarkably strong and consistent patterns emerge, creating what we hope will prove to be a rich and valuable data set in the ongoing judicial discovery and subsequent protection of our fundamental individual rights.