STATE BILLS OF RIGHTS IN 1787 AND 1791: WHAT INDIVIDUAL RIGHTS ARE REALLY DEEPLY ROOTED IN AMERICAN HISTORY AND TRADITION?

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DRAFT AS OF JANUARY 20, 2012
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I. INTRODUCTION

This Article continues an investigation we began several years ago into the fundamental individual rights held by American citizens at different points in history over the last 225 years. Our initial inquiry, which was published in the Texas Law Review and which was cited in McDonald v. City of Chicago, 561 U.S. 3025 (2010), looked at individual rights found in state constitutions in 1868 – the year when the Fourteenth Amendment to the U.S. Constitution was ratified.¹ That listing of individual rights as of 1868 was informative, we proposed, because we believed it could be used as a proxy for determining what rights might be “deeply rooted in history and tradition.” Both the justices on the U.S. Supreme Court and many scholars have argued that only rights that are “deeply rooted in history and tradition” are protected under the Fourteenth Amendment either by way of the Privileges & Immunities Clause (as we and Justice Thomas believe) or by way of the doctrine of Substantive Due Process (as Chief Justice Roberts and Justices Scalia, Kennedy, and Alito believe). In other words if, as five justices on the Roberts’ Supreme Court have suggested, the Fourteenth Amendment protects only those rights that are “deeply rooted in history and tradition,” then it is helpful to know what individual rights were widely recognized during key constitutional moments such as the Reconstruction moment of 1868.

State constitutional law provides invaluable clues as to what individual rights were in fashion and recognized at particular moments in time. This is the case because state constitutions are today and always have been more easily amendable than the federal Constitution. State constitutional law offers us a snapshot of what rights were widely recognized at any given constitutional moment. Our previous article looked at the constitutional moment of

1868 – the year the Fourteenth Amendment was ratified. This Article offers a prequel to our story by turning the clock back another 71 years to provide a corresponding snapshot of state constitutional rights in 1787 – the year when the federal Constitution was ratified. We also discuss individual rights adopted in state constitutions during the short four-year period between 1787 when the Constitution was proposed and 1791 when the Bill of Rights was ratified. We did this in order to determine whether the ratification of the Bill of Rights spurred the states to adopt similar bills of rights of their own.

Eventually, we will conduct a third investigation to determine what individual rights are protected under state constitutional law today. We hope to publish the completed genealogy in a short book. We think that individual rights that date back to 1787 or 1868 and that remain widely recognized in state constitutional law in 2010 are especially likely to be fundamental rights for the purposes of Supreme Court substantive due process analysis. Rights that lack this historical pedigree, like the right to privacy, are less likely to be considered fundamental under this analysis; the Supreme Court has nonetheless clearly established some of them under differing rationales.

From 1776 to September 17, 1787, when the federal Constitution was proposed for ratification, Americans’ rights were guaranteed exclusively through the original thirteen state constitutions or colonial charters. These constitutions and charters are therefore an important starting point for understanding the origin and evolution of the American idea of individual rights.² Of course, the nature and meaning of the rights listed in state bills of rights in America has changed along with the number and type of rights. For example, some constitutional rights during the Founding era may not have been understood in the same individualistic or libertarian

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² Richard Henry Lee identified five sources or authorities for rights: possession (or ownership), natural law, the British (or English) constitution, colonial charters, and immemorial custom. See THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND 68 (Barry Alan Shain, ed., 2008).
terms in which we understand most constitutional rights today.

The 1780’s and 1790’s were a much less libertarian and more communitarian moment than the constitutional moment of 1868.\(^3\) There were drastically fewer individual state constitutional rights protected in 1787 than were protected in 1868 or than are protected today. In 1868, twenty-eight individual rights were protected by an Article V consensus of three-quarters of the states, whereas from 1787 to 1791 only one right – the right to freedom of religious worship – was protected by three-quarters of the thirteen original states. The contrast in levels of individual rights protection between the 1787 to 1791 constitutional moment and the 1868 constitutional moment could hardly be more stark.

This early dearth of individual rights is especially striking given the loud protests made by the Anti-Federalists over the lack of a Bill of Rights in the proposed federal Constitution of 1787. Why were the Anti-Federalists so upset about the absence of a federal Bill of Rights when they almost all lived in states with bills of rights that by modern standards seem quite skimpy? The answer, of course, is that the Anti-Federalists of the Framing generation were not so much libertarians as they were opponents of national power. The impetus behind the federal Bill of Rights was a desire to limit national power as much as a desire to protect individual rights. The English Bill of Rights had been necessary to limit the power of the King; the federal Bill of Rights must likewise have been thought to be necessary to limit the power of the President and of a distant imperial Congress. In contrast, bills of rights might not have seemed as essential in limiting state governments that were close to home and which presented much lower monitoring and agency costs to a vigilant citizenry.

It must also be noted that some long-existing rights have changed in meaning over the

\(^3\) Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction ( ).
course of American history and it is important to reflect on those subtler changes as well.\textsuperscript{4} For example, the right of self-government may be the signature right of the Founding era, and clauses recognizing that right were thus common in state constitutions in 1787. However, the Founders did not understand the right to “self-government” as a right of personal autonomy, but rather as a communal right to make collective decisions without interference from outside powers like Britain, France, or Spain.\textsuperscript{5} We therefore must remember that words that today sound in individual right to us might have had more communal meanings at the time of the Founding.

Nonetheless, we live in a world where a majority of the Supreme Court has held that substantive due process protects only rights that are “deeply rooted in history and tradition.” It is therefore essential to look at American constitutional history and tradition, and this Article aims to do just that. We count and document here the very first individual rights guaranteed to citizens by the American states from 1787 when the Constitution was proposed to 1791 when the federal Bill of Rights was ratified. The individual rights we identify from the Founding period that were still guaranteed when the Fourteenth Amendment was ratified in 1868 and that continue to be protected today in 2012 are clearly important and, we believe, likely protected by the Fourteenth Amendment. At the very least, we think that a comprehensive cataloguing of all individual rights enjoyed by Americans at the time of the Founding sheds light on our constitutional history.

The late Eighteenth Century was a revolutionary period in America and later in France, and ideas about individual natural rights were growing and changing. The concept of natural rights was born largely from religious origins, but John Locke and later Enlightenment thinkers helped give the idea more concrete content. A starting point for everyone was the English Bill of Rights of 1689, which William and Mary were forced to agree to as a condition to their obtaining

\footnotesize{\textsuperscript{4} See THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND x (Barry Alan Shain, ed., 2008).  
\textsuperscript{5} See THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND 19 (Barry Alan Shain, ed., 2008).}
the English throne. The colonists of Seventeenth Century America had been relatively unacquainted with the practice of defining rights or bills of rights, and, as life was essentially communal at that time, individual rights “could not put down roots.”\(^6\) By the 1730’s, the idea of subjective or “natural” rights began to be heard more and more in public discourse. The Great Awakening and the French and Indian War, ending in 1763, helped to lay a solid foundation on which theories of individual rights could be built out.\(^7\) Most of the natural rights that were talked about in the 1760’s and 1770’s were argued for in direct opposition to British claims of power over the colonies.\(^8\)

These natural rights of Englishmen were identified in the writings of Sir Edward Coke about the primacy of the Ancient English Constitution over the Stuart Kings. Some Americans and Englishmen in the Seventeenth and Eighteenth Centuries even thought these natural English rights dated back to the laws of King Edward the Confessor and had been successfully preserved from the Norman conquerors as a result of King John’s forced acquiescence in the Magna Charta in 1215. This idea of Anglo-Saxon liberties triumphing over the Norman yoke of oppression may be inaccurate, as some have complained, as a matter of the true history of medieval England,\(^9\) but many Americans in the 1760’s and 1770’s believed this and were followers of Sir Edward Coke. They thought that King George III was trying to restore an assertive Stuart-like monarchy by taxing them without representation and depriving them of their right to jury trial just as King Charles I had done in England more than a century before. In fact, King George III did begin his reign determined to enhance the power of the monarchy, and the right to be free of taxation without representation and the right to jury trial were rights that Englishmen enjoyed in England that the King was attempting to subvert in America. Americans in the 1760’s and

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\(^6\) See \textit{The Nature of Rights at the American Founding and Beyond} 42-43 (Barry Alan Shain, ed., 2008).
\(^7\) See \textit{The Nature of Rights at the American Founding and Beyond} 49 (Barry Alan Shain, ed., 2008).
\(^8\) See \textit{The Nature of Rights at the American Founding and Beyond} 69 (Barry Alan Shain, ed., 2008).
1770’s believed they had the ancient rights of Englishmen that had been vindicated in the English Bill of Rights of 1689 and that George III was trying to take away.

Many scholars have commented on the indistinct and incoherent understanding of individual rights in the American colonies in the 1760’s and 1770’s. Gordon Wood has described state constitutional rights in 1776 as a “jarring but exciting combination of ringing declarations of universal principles with a motley collection of common law procedures.”¹⁰ In 1787, James Wilson declared that “there are very few who understand the whole of these rights.”¹¹ Leonard Levy chided the drafters of state constitutions for proceeding “in an incredibly haphazard fashion that verged on ineptitude,’ omitting one fundamental right after another, as though they were ignorant of what rights were or should be.”¹²

These words will ring true throughout the remainder of this Article as each state constitution is dissected and catalogued. Many traditional rights of Englishmen were not protected in the early American state constitutions that were promulgated after the Declaration of Independence was published in 1776. For example, not a single state constitution in 1787 protected criminal defendants against double jeopardy or prohibited religious qualifications for the holding of offices. Compared to the state constitutions in 1868 that we discussed in our Texas Law Review article, the 1787 State constitutions protected many fewer rights in common and many fewer rights over all. In fact, not a single right was guaranteed in all thirteen state constitutions and only one—the right to the free exercise of one’s religion—was guaranteed by three-quarters of the states. In 1868, three rights were guaranteed in all thirty-six state constitutions and twenty-eight rights were guaranteed by three-quarters of the states.¹³

The individual rights protected in state constitutions in the period between 1787 and 1791

¹⁰See The Nature of Rights at the American Founding and Beyond 51 (Barry Alan Shain, ed., 2008).
¹¹See The Nature of Rights at the American Founding and Beyond 51 (Barry Alan Shain, ed., 2008).
¹²See The Nature of Rights at the American Founding and Beyond 52 (Barry Alan Shain, ed., 2008).
are mostly listed in this Article according to their prevalence among the then-existing states. We compiled a tally of each right and determined whether it was guaranteed by all, three-quarters, a simple majority, or a minority of the states in the Founding period. We believe that the rights guaranteed by three-quarters of the states or more would seem to be especially deeply rooted because the “rule of recognition” under Article V sets the threshold for making federal constitutional law at three-quarters of the states and two-thirds of both houses of Congress.

Given the two-thirds requirement in Article V, we have also determined what percentage of the American population in 1787 to 1791 lived in states where a certain right was protected. We thus have tallied not only how many states protect a right but also how many people lived in states where a given right was protected. We think this fuller picture is helpful in understanding the nascent individual rights culture at the Founding, which came to fruition in 1868 with Reconstruction. Some will feel an Article V rule of recognition that requires three-quarters of the states to make national constitutional law sets too high a bar in determining what rights are fundamental. We therefore also report the lesser degrees of consensus in order to allow others to more readily make their own normative claims about the significance of our findings.

Secondarily, we have also categorized the individual rights we found according to the two major geographic regions in the United States in 1787 to 1791—the Northeast and the South. We wanted to find out if some rights were especially common in the Northeast while others were more common in the South. The results we found showed interesting differences between the regions, with the states in the South generally granting their citizens more constitutional rights than the states in the Northeast. Finally, we counted the number of rights guaranteed in each state in order to paint a complete picture as to which types of rights were guaranteed, how common they were, and where they were most likely to be found.
II. METHODOLOGY

Our historical analysis here depends on the accuracy and thoroughness with which we have compiled our data, so we begin as we did in our Texas Law Review article, by providing our readers with a detailed account of the method used to generate the results reported below. This method involved three steps: collecting, counting, and categorizing.

Collection

The first step was to obtain copies of the thirteen original state constitutions and colonial charters that functioned as constitutions and that were in effect in 1787 when the Constitution was first proposed and the fourteen such documents in effect in 1791 when the federal Bill of Rights was adopted and also when Vermont joined the Union. We chose to look at the state constitutions that were closest in time to 1791 without being later. For example, if a state passed constitutions in 1778 and 1792, we used the 1778 constitution for our analysis even though 1792 was closer in time to 1791. 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 when the Bill of Rights was drafted and enacted.

Next we each separately and jointly looked at each state constitution closely, and we then ourselves coded each right or clause denying a right\(^{14}\) into a comprehensive database. In addition to individual rights, we 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) if those structural limitations were 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

\(^{14}\)
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 were notably absent.

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. We then grouped the data by individual rights, with similar rights grouped together. We then thoroughly reviewed the complete database to ensure its accuracy.\(^{15}\)

**Counting**

Next, we counted the number of state constitutions that textually enumerated each individual right or denial of a right. We determined the number of states, out of thirteen or fourteen, needed to constitute, respectively, three-quarters of the thirteen states in the Union in 1787 or the fourteen states in the Union in 1791. We made the same computations to figure out what rights in both years were recognized by two-thirds of those states, by a majority of those states, by one-quarter of the states, and by less than one-quarter of the states. We have presented the rights in each of these five categories. The idea underlying this tally of states is 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 1787 or 1791 and thus that it is deeply rooted in our history and tradition. Because of the amount of data involved, we looked only at rights textually enumerated in state constitutions and not at state court opinions construing those clauses. Considering such case law would be a valuable, if not essential, project to undertake in the future.

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We also created other groupings to shed light on the question of what rights were fundamental in 1787 or 1791 such that they might today be considered to be deeply rooted in our history and tradition. 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.\(^{16}\) We also sorted the rights according to two geographic regions—the Northeast and the South.\(^{17}\) We wanted to know, for example, whether gun rights were recognized more widely in some geographic regions in 1791 than in others. This might go to the question of whether there was a broad federal consensus recognizing a particular right.

Finally, we sorted the rights by date of enactment of the relevant state constitution to figure out which state constitutional rights were relatively “new” in 1791 and which were “old.” This allowed us to determine whether each right became more or less pervasive in the years leading up to 1791. It seemed important to us to separate out those state constitutional rights that were relatively new in 1791 from those that dated back to the founding of the republic. Arguably, a constitutional right that three-quarters of the states recognized in 1791 might not have been deemed to be 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.\(^{18}\)

**Categorizing**

We grouped the individual rights we were looking for into sixteen categories: (1) rights involving religion, including establishment-clause and free-exercise-clause rights; (2) rights of

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\(^{16}\) This data is from the 1790 census.  
\(^{17}\) The five Southern states were: Georgia, Maryland, North Carolina, South Carolina, and Virginia. The eight Northeastern states were: Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, and Rhode Island.  
\(^{18}\) 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))).
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 10 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 1787 or 1791 as prohibitable vices; and finally, and most tellingly, (16) arguable recognitions in positive state constitutional law in 1787 or 1791 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 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 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.

The Data on State Constitutional Rights in the period from 1787 to 1791

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; and (3) regional variations in the recognition of the right. 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.19 These are grouped loosely according to the sixteen topics they address.

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

19. The full appendix is on file with the authors and with the ___.
### III. DATA

#### A. Summary of Findings

i. Prevalence of Rights

<table>
<thead>
<tr>
<th>Prevalence of Rights by Number of States</th>
<th>All</th>
<th>Minority (4-6)</th>
<th>#</th>
<th>Minority (1-3)</th>
<th>#</th>
<th>None</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td></td>
<td>Fundamental Principles</td>
<td>6</td>
<td>Feudalism</td>
<td>3</td>
<td>9th Amend Analog</td>
</tr>
<tr>
<td>3/4ths</td>
<td>#</td>
<td>Confrontation</td>
<td>6</td>
<td>Not Bear Arms</td>
<td>3</td>
<td>Alcohol</td>
</tr>
<tr>
<td>Free Exercise</td>
<td>11</td>
<td>Free Elections</td>
<td>6</td>
<td>Legal Recourse</td>
<td>3</td>
<td>Appeals</td>
</tr>
<tr>
<td>2/3rds</td>
<td>#</td>
<td>Gov Officers</td>
<td>6</td>
<td>Quarter Soldiers</td>
<td>3</td>
<td>Arbitrary Power</td>
</tr>
<tr>
<td>Jury Trial (Civ)</td>
<td>9</td>
<td>Informed of Charges</td>
<td>6</td>
<td>Speech or Debate</td>
<td>3</td>
<td>Arrest &amp; Detain</td>
</tr>
<tr>
<td>Majority</td>
<td>#</td>
<td>Search &amp; Seizure</td>
<td>6</td>
<td>Proportionality</td>
<td>3</td>
<td>Blaine Clauses</td>
</tr>
<tr>
<td>Due Process</td>
<td>8</td>
<td>Self Incrimination</td>
<td>6</td>
<td>Sanguinary</td>
<td>3</td>
<td>Corporal Punishment</td>
</tr>
<tr>
<td>Free Press</td>
<td>8</td>
<td>Standing Armies</td>
<td>6</td>
<td>Indian Rights</td>
<td>3</td>
<td>Double Jeopardy</td>
</tr>
<tr>
<td>Priv &amp; Immunities</td>
<td>8</td>
<td>Reform Gov</td>
<td>6</td>
<td>Habeas Corpus</td>
<td>3</td>
<td>Dueling</td>
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<tr>
<td>Subordinate Military</td>
<td>7</td>
<td>Natural &amp; Inalienable</td>
<td>6</td>
<td>Imprisoned for Debt</td>
<td>2</td>
<td>Fed Allegiance</td>
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<td>Excessive Fines</td>
<td>7</td>
<td>Excessive Bail</td>
<td>6</td>
<td>Equal Protection</td>
<td>2</td>
<td>Forfeit Residence</td>
</tr>
<tr>
<td>Jury Trial (Crim)</td>
<td>7</td>
<td>Nobility</td>
<td>6</td>
<td>Monopolies</td>
<td>2</td>
<td>General Laws</td>
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<td>Suffrage</td>
<td>7</td>
<td>Separation Powers</td>
<td>6</td>
<td>10th Amend Analog</td>
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<td>Grand Jury</td>
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<tr>
<td>Establishment</td>
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<td>Emigration</td>
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<td>Impair Contracts</td>
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<td>Oaths</td>
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<td>Martial Law</td>
<td>2</td>
<td>Libel</td>
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<td>Ceremonial Deism</td>
<td>5</td>
<td>Suicide</td>
<td>2</td>
<td>Lottery</td>
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<td></td>
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<tr>
<td>Takings</td>
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<td>Uniform Gov</td>
<td>1</td>
<td>Married Women</td>
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<td></td>
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<td>Cruel &amp; Unusual</td>
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<td>Free Speech</td>
<td>1</td>
<td>Penal Principles</td>
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<td>Suspending Laws</td>
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<td>Public Trial</td>
<td>1</td>
<td>Presumed Innocent</td>
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<td></td>
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<td>Warrants &amp; Prob Cause</td>
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<td>By Information</td>
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<td>Prisoner Rights</td>
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<td></td>
</tr>
<tr>
<td>Obtain Witnesses</td>
<td>5</td>
<td>Inviolable Const</td>
<td>1</td>
<td>Protect Religion</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assembly &amp; Petition</td>
<td>5</td>
<td>Prop Supreme</td>
<td>1</td>
<td>Religious Qualification</td>
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<td></td>
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<td>Taxes</td>
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<td>Property Escheat</td>
<td>1</td>
<td>Secession</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ref to God in Preamble</td>
<td>5</td>
<td>Priv from Arrest</td>
<td>1</td>
<td>Suits Against State</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Counsel</td>
<td>5</td>
<td>Treason</td>
<td>1</td>
<td>Take Care</td>
<td></td>
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<td>Trial in State</td>
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<td></td>
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<td>Minority (20-49)</td>
<td>%</td>
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<td>Proportionality</td>
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<td>Warrants &amp; Prob Cause</td>
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<tr>
<td>Obtain Witnesses</td>
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ii. Distribution of Rights Across the States

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<th>State</th>
<th>Date Const</th>
<th># Rights in Constitution</th>
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<tbody>
<tr>
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<td>1784</td>
<td>50</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>1780</td>
<td>49</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>1776</td>
<td>49</td>
</tr>
<tr>
<td>North Carolina</td>
<td>1776</td>
<td>45</td>
</tr>
<tr>
<td>Maryland</td>
<td>1776</td>
<td>44</td>
</tr>
<tr>
<td>Virginia</td>
<td>1776</td>
<td>35</td>
</tr>
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<td>1777</td>
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<tr>
<td>New York</td>
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<td>19</td>
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<tr>
<td>South Carolina</td>
<td>1778</td>
<td>11</td>
</tr>
<tr>
<td>New Jersey</td>
<td>1776</td>
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<tr>
<td>Rhode Island</td>
<td>1663</td>
<td>8</td>
</tr>
<tr>
<td>Delaware</td>
<td>1776</td>
<td>5</td>
</tr>
<tr>
<td>Connecticut</td>
<td>1662</td>
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The number of individual rights enumerated in each state constitution varied remarkably from state to state. New Hampshire’s constitution in 1787 had 50 individual rights, which was more than 10 times the number of rights in Connecticut, the state with the fewest rights. The average number of rights per constitution was 27. Regionally, Southern states had more rights than Northeastern states, with averages of 31 and 24 rights per state, respectively. The number of individual rights enumerated in each constitution was moderately positively correlated with both the year of the constitution and the population on the state in 1787,²⁰ meaning that states with

²⁰ The correlation between the year of the constitution and number of rights was 0.50; the correlation between the state population and number of constitutional rights was 0.51. Note that, because we used census data for our calculations, the population statistics were calculated in 1790 rather than in 1787 and are thus likely to slightly overstate the populations for our purposes.
more people or with more recently ratified constitutions tended to have more rights. The correlation was not remarkably strong though, so that relationship should not be overstated.
ii. Graphs broken down by Federal Analogs/Non-analogs\textsuperscript{21}, by state and by population

\textsuperscript{21} We refer to state constitutional rights that are also protected in our current federal constitution as “federal analogs.” State rights that do not appear in the federal constitution are called “non-analogs.”
B. Comprehensive Overview of State Constitutional Rights in 1787

i. Rights Bearing on Religion

The concept of “natural rights” has religious foundations, and religious freedom had been a central issue in the English Glorious Revolution of 1688.22 Freedom of religious conscience (which the Framers closely associated with a duty of religious devotion) was the first individual right to be widely regarded as inalienable.23 For these reasons, and because the religion clauses of the First Amendment appear first in the federal Bill of Rights, we begin the discussion with state constitutional clauses from 1787 to 1791 bearing on religion.

- Establishment Clause Analogs

In 1787, six states, or forty-six percent of the states comprising thirty-six percent of the then total U.S. population, a minority by both counts, prohibited the establishment of a state religion. These states were Delaware, Georgia, North Carolina, New Jersey, New York, and South Carolina. Establishment clauses were most common in the Southern states, at sixty percent, compared to thirty-eight percent of Northeastern states. In population terms, forty-one percent of the Southern population and thirty-two percent of the Northeastern population lived in States with non-establishment guarantees. Some state constitutional clauses used explicit non-establishment language, while others prohibited the state from requiring its citizens to financially support any particular religions. For example, Delaware’s constitution provided that “[t]here

shall be no establishment of any one religious sect in this State in preference to another.”

New Jersey’s constitution provided: “nor shall any person, within this Colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform.”

Although bans on mandatory financial support are generally understood to be non-establishment clauses, South Carolina’s constitution had two clauses that are in some tension with one another—one clause prohibits obligating its citizens to “pay towards the maintenance and support of a religious worship that he does not freely join in, or has not voluntarily engaged to support” while another declares that “[t]he Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State. That all denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges.”

New Hampshire, Maryland, Pennsylvania, and Massachusetts also had clauses that appeared to establish Christianity as the state religion, or at least as the only religion whose followers would receive equal protection by the state.

In 1790, Pennsylvania adopted a new Establishment Clause analog. This clause tracked the state’s 1776 clause fairly closely. However, whereas the 1776 clause had stated that no power should be assumed that would “interfere with, or in any matter control [sic], the right of conscience in the free exercise of religious worship,” the 1790 clause stated “that no preference

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24 DEL. CONST. of 1776, art. 29.
25 N.J. CONST. of 1776, art. 18.
26 S.C. CONST. of 1778, art. 38.
27 S.C. CONST. of 1778, art. 38.
28 See N.H. CONST. of 1784, art. 1, § 6; MD. CONST. of 1776, Dec. of Rights § 33; PA. CONST. of 1776, Dec. of Rights § 2; MASS. CONST. of 1780, pt. 1, art. III.
29 PA. CONST. of 1790, art. IX, § 3.
30 PA. CONST. of 1776, Dec. of Rights, § 2.
shall ever be given, by law, to any religious establishments or modes of worship.”

Vermont, which was admitted to the Union on March 4, 1791, adopted an Establishment Clause analog in its 1786 constitution that was basically identical to Pennsylvania’s 1776 clause, stating that “no man ought, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of his conscience.”

Vermont’s constitution, however, proceeded to place a specific restriction on its Christian population, stating that, “Nevertheless, every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God.”

With the addition of Establishment Clause analogs by both Pennsylvania and Vermont, the number of state constitutions containing such a provision rose from six, in 1787, to eight, in 1791. This meant that the percentage of states recognizing an establishment clause rose from forty-six percent in 1787 to fifty-seven percent in 1791, accounting for thirty-six percent of the population in 1787 and forty-nine percent in 1791. The percentage of Southern states guaranteeing the right remained at sixty percent, but the percentage of Northeastern states guaranteeing the right rose from thirty-eight percent representing thirty-two percent of the Northeastern population in 1787, to fifty-six percent, representing fifty-seven percent of the Northeastern population in 1791.

Free Exercise

The most common individual rights clauses in state constitutions in 1787 were free

31 PA. CONST. of 1790, art IX, § 3.
32 VT. CONST. of 1786, Dec. of Rights, § 3.
33 Id.
34 The six states that had Establishment Clause analogs in 1787 were Delaware, Georgia, North Carolina, New Jersey, New York, and South Carolina.
exercise clause analogs, which guaranteed citizens the right to freedom of religious practice or worship. Eleven states, or eighty-five percent of the total number of states comprising ninety-two percent of the national population at the time, protected freedom of religious worship. Six of those eleven states specified a right to freedom of “worship,” whereas the other five states provided more generally for the free exercise of “religion.” All Southern state constitutions had free exercise clauses compared to only seventy-five percent of Northeastern states. Looking at matters by population, all Southerners and eighty-four percent of Northeasterners lived in states with free exercise of religion rights.

The language of these clauses varied considerably among the state constitutions. For example, Georgia’s Constitution stated that “[a]ll persons whatever shall have the free exercise of their religion; provided it not be repugnant to the peace and safety of the State” while Virginia’s provided that “religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.” To the modern ear, the latter clause seems contradictory—it protects free exercise while at the same time announcing a duty to practice Christian faith. A number of states had similar clauses that seemed to not contemplate or protect atheism, agnosticism, or non-Christian religions.

In 1789, Georgia adopted a free exercise provision that broadened the right of free exercise contained in its 1777 constitution, removing a caveat that stated that free exercise could be precluded if it was “repugnant to the peace and safety of the state.” South Carolina went even

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35 GA. CONST. of 1777, art. 56.
36 See MD. CONST. of 1776, Dec. of Rights § 33; N.H. CONST. of 1784, art. 1, § 5; S.C. CONST. of 1778, art. 38.
37 GA. CONST. of 1789, art. IV, § 5.
further in broadening its protection of free exercise, replacing the clause in its 1778 constitution, which ensured equal religious and civil privileges to “all denominations of Christian Protestants,” with one that guaranteed “[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference.”  

Vermont also provided a seemingly broad right, stating that, “no authority can, or ought to be vested in, or assumed by any power whatsoever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship.”  

However, as was previously mentioned, Vermont ended its clause regarding the establishment and free exercise of religion by stating that all Christians should observe the Sabbath.  

When Vermont became a state in 1791, the number of states with a provision guaranteeing citizens’ the right to free exercise of religion rose from eleven to twelve.  

This raised the percentage of states with free exercise clauses from eighty-five to eighty-six percent. All of the Southern states still recognized a right to free exercise but the percentage of Northeastern states guaranteeing a right to free exercise rose from seventy-five percent in 1787 to seventy-eight percent in 1791, representing eighty-four percent and eighty-five percent of the population, respectively.

**Specific References to God in the Preambles of the 1787 State Constitutions**

A minority of five states, or thirty-eight percent of the states comprising forty percent of the total U.S. population, had references to God in the preambles of their constitutions. These states were Connecticut, Massachusetts, New York, Pennsylvania, and Rhode Island. Interestingly, these references were found exclusively in Northeastern constitutions. They were present in sixty-three percent of Northeastern states in which seventy-nine percent of the Northeastern population lived.  

This reflects the continuing influence of the Puritan settlement of the

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38 S.C. CONST. of 1790, art. VIII, § 1.
39 VT. CONST. of 1786, Dec. of Rights, § 3.
40 Id.
41 The eleven states recognizing a right to free exercise in 1787 were Georgia, Maryland, Massachusetts, North Carolina, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, and Virginia.
New England which was still much more religious in 1787 than were the Episcopalian States of the South. An example of a passing reference to God in a Northeastern constitution appears in Pennsylvania’s constitution which provided:

> Whereas all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it to enjoy their natural rights, and the other blessings which the Author of existence has bestowed upon man...\(^{42}\)

A different example is found in Connecticut’s constitution, which says that “Charles the Second, by the Grace of God, King of England, Scotland, France, and Ireland, Defender of the Faith, &c. To all to whom these Presents shall come, Greeting.”\(^{43}\)

When Vermont adopted its constitution in 1786, it also mentioned God, in a clause clearly couched in the ideas of John Locke and the 1688 Glorious Revolution. The clause reads:

> Whereas all government ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals, who compose it, to enjoy their natural rights, and the other blessings which the Author of Existence has bestowed upon man: and whenever those great ends of government are not obtained, the people have a right, by common consent, to change it, and take such measures as to them may appear necessary to promote their safety and happiness.\(^{44}\)

When Vermont became a state, the number of state constitutions with a specific reference to God in the preamble rose from five to six.\(^{45}\) This increase resulted in forty-three percent of states and 40 percent of the population living in states that had references to God in the preambles of their constitutions in 1791. There still was not any reference to God in the any of the preambles of the Southern constitutions, but the percentage of Northeastern states whose constitutions contained such a clause rose from sixty-three percent to sixty-seven percent, with the corresponding

\(^{42}\) PA. CONST. of 1790, pmbl.
\(^{43}\) CONN. Charter of 1662, pmbl.
\(^{44}\) VT. CONST. of 1786, Preamble.
\(^{45}\) In 1787, the states whose constitutions contained specific references to God in their preambles were Connecticut, Massachusetts, New York, Pennsylvania, and Rhode Island.
percentage of the population living in states with such preambles rising marginally from seventy-nine percent to eighty percent.

Ceremonial Deism

Five states, or thirty-eight percent of the states comprising fifty-nine percent of the national population had constitutions with rhetoric that can be described as exemplifying “ceremonial deism.” These states were: Connecticut, Massachusetts, New York, Pennsylvania, and Virginia. Similar to the constitutions with references to God in the preambles, the language of ceremonial deism was most common in Northeastern state constitutions, specifically in fifty percent of them compared to only one Southern state constitution. Looking at matters by population, seventy-five percent, or three-fourths, of the Northeastern population and forty-two percent of the Southern population lived in states whose constitutions included “ceremonial deistic” language. The Massachusetts constitution in 1787, for example, stated:

We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new constitution of civil government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree upon, ordain, and establish, the following Declaration of Rights, and Frame of Government, as the Constitution of the Commonwealth of Massachusetts.46

Besides containing the clause quoted above in the section on ‘Specific References to God in Preamble,’ the Vermont constitution in 1791 also referred to God as the “great Governor of the universe, who alone knows to what degree of earthly happiness mankind may attain by

46MASS. CONST. of 1780, pmbl.
perfecting the arts of government.” This increased the number of states with constitutions containing “ceremonial deistic” rhetoric from five to six, which in 1791 was forty-three percent of the states at the time and fifty-seven percent of the population. The percentage of Southern state constitutions that contained “ceremonial deistic” rhetoric remained the same: twenty percent of the Southern states (comprising forty-two percent of the Southern population) contained such language in their state constitutions both in 1787 and 1791. The percentage of Northeastern state constitutions containing such language rose from fifty percent of the states and seventy-five percent of the Northeastern population to fifty-six percent of the Northeastern states and seventy-six percent of the Northeastern population in 1791.

Clauses Pertaining to Oaths
Six states, or forty-six percent of the states comprising thirty-five percent of the national population, had clauses pertaining to religious oaths in their state constitutions. These states were: Delaware, Georgia, Maryland, New Hampshire, Pennsylvania, and South Carolina. These clauses were found in sixty percent of the Southern state constitutions and in thirty-eight percent of Northeastern state constitutions. Looking at this by population, thirty-six percent of the Southern population and thirty-four percent of the Northwestern population lived in states with such clauses in their state constitutions. All six of the religious oath clauses in question mention God, most of them requiring a declaration of allegiance or faith. These clauses thus differ from the federal religious oath clause which forbids religious tests for holding office. Five of the six allow affirmation instead of swearing for those whose religion prohibits it. For example, Delaware’s Constitution required that the following oaths (or affirmations) be taken by those holding public office:

47 VT. CONST. of 1786, Preamble.
‘I, A B, will bear true allegiance to the Delaware State, submit to its constitution and laws, and do not act wittingly whereby the freedom thereof may be prejudiced.’ And also make and subscribe the following declaration, to wit: ‘I, A B, do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration.’

In 1790, both Pennsylvania and South Carolina adopted constitutional provisions regarding oaths; neither one of these provisions mentioned God. The clause adopted by Vermont, however, while allowing for affirmation, ultimately required that:

[E]ach member, before he takes his seat, shall make and subscribe the following declaration, viz. You do believe in one God, the Creator and Governor of the Universe, the rewarder of the good, and punisher of the wicked. And you do acknowledge the scriptures of the Old and New Testament to be given by divine inspiration; and own and profess the Protestant religion. And no further or other religious test shall ever hereafter be required of any civil officer or magistrate, in this State.

With the adoption of religious oath clauses by both Pennsylvania and South Carolina, and with Vermont’s admission to the union as a state, by 1791, the total number of states with such clauses in their constitutions had risen significantly, from six states to nine. The percentage of state constitutions with clauses pertaining to oaths rose from forty-six percent of the states and thirty-five percent of the national population in 1787 to sixty-four percent of the states and fifty-five percent of the national population in 1791. In 1787, sixty percent of the Southern state constitutions and thirty-six percent of the population had an oath clause; by 1791, that percentage had increased to eighty-percent of the states, a supermajority, and fifty percent of the population.

48 DEL. CONST. of 1776, art. XXII.
49 PA. CONST. of 1790, art. VIII.
50 S.C. CONST. of 1790, art. IV.
51 VT. CONST. of 1786, Ch. 2, § 12.
52 The six states with oaths clauses in 1787 were Delaware, Georgia, Maryland, New Hampshire, Pennsylvania, and South Carolina.
By 1791 the percentage of Northeastern states with clauses pertaining to oaths had risen from thirty-eight percent to fifty-six percent and from thirty-four percent of the population to sixty-percent of the population.

Notable Absences from Rights Bearing on Religion

There were some clauses bearing on religion that were surprisingly not present at the time of the founding. We found no clauses pertaining to witness qualification on the basis of religion; no clauses mandating a legislative duty to protect religion; no bans on religious qualifications for holding office\(^{53}\); and no Blaine Amendment provisions forbidding any taxpayer money from ever going to any institution including a school under sectarian control. The total absence of Blaine Amendment provisions at the Founding is striking because it reemphasizes the extent to which those provisions are likely a product of Nineteenth Century anti-Catholic, anti-immigrant biases.\(^{54}\)

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

1. Freedom of the Press

Nine states, a majority, comprising seventy-six percent of the total U.S. population, a supermajority of all Americans then living, had state constitutional clauses guaranteeing the freedom of the press. These states were Georgia, Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, South Carolina, and Virginia. There were significant regional variations, with free press clauses being found in one hundred percent of the Southern states but in only thirty-eight percent of the Northeastern states. When looked at by population, the

\(^{53}\) In fact, a whopping seven of the thirteen states had explicit religious qualifications for office. New Jersey, Georgia, North Carolina, New Hampshire, and South Carolina all required that office holders be Protestant. Maryland demanded that they be Christian, and Pennsylvania was somewhat more lax, requiring only that office-holders believe in God. Five states (Delaware, Georgia, North Carolina, and South Carolina) prohibited clergymen from holding office.

\(^{54}\) Phillip Hamburger, The Separation of Church and State ( ).
difference was slightly less pronounced, with one hundred percent and fifty-two percent of the
Southern and Northeastern population, respectively, living in States with free press protection.
The freedom of the press clauses we found all contained relatively similar wording. For
example, North Carolina’s constitution read: “That the freedom of the press is one of the great
bulwarks of liberty, and therefore ought never to be restrained.”\textsuperscript{55}

When Vermont adopted its constitution in 1786, it also included a clause guaranteeing
freedom of the press.\textsuperscript{56} Therefore, with Vermont’s admission as a state, the number of states
guaranteeing freedom of the press increased from eight to nine and the percentage of the
population living in such states rose from sixty-two percent to sixty-four percent while, due to
Vermont’s small population, the percentage of the national population with the right remained
the same at seventy-six percent.\textsuperscript{57} All of the Southern states still possessed a guarantee of
freedom of the press, but the percentage of Northeastern states guaranteeing the right increased
from thirty-eight percent of the states and fifty-two percent of the population in 1787 to forty-
four percent of the states and fifty-four percent of the population in 1791.

2. Freedom of Speech

In 1787 when the U.S. Constitution was proposed for ratification only one state,
Pennsylvania, protected the right to freedom of speech in its state constitution. Pennsylvania
represented eight percent of the total number of states and contained twelve percent of the total
national population. This is perhaps a somewhat astonishing fact. We have counted
Pennsylvania as a Northeastern State, and it represented thirteen percent of the Northeastern
states and twenty-four percent of the Northeastern population. This lone free speech clause read:

\textsuperscript{55} N.C. CONST. of 1776, Dec. of Rights § 15.
\textsuperscript{56} VT. CONST. of 1786, Dec. of Rights, § 15.
\textsuperscript{57} The eight states guaranteeing freedom of the press in 1787 were Georgia, Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, South Carolina, and Virginia.
“That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained.”\(^{58}\)

Vermont, which was admitted as the 14th state in 1791, became the second state with a constitutional protection for the freedom of speech. Its free speech clause imported all of the language from Pennsylvania’s free speech clause, but added “[t]hat the people have a right of freedom of speech and of writing and publishing their sentiments, concerning the transactions of government.”\(^{59}\) Vermont’s adoption of the free speech clause and subsequent admission to the union increased the percentage of states guaranteeing a right to free speech from eight percent in 1787 to fourteen percent in 1791, corresponding to twelve percent of the national population in 1787 and fourteen percent of the population in 1791. While Pennsylvania alone accounted for thirteen percent of the Northeastern states and fourteen percent of the Northeastern population, Pennsylvania and Vermont together accounted for twenty-two percent of the Northeastern states and twenty-seven percent of the Northeastern population.

\(3.\) Assembly and Petition

Five states, or thirty-eight percent of the states comprising forty-six percent of the population, had state constitutional rights granting the freedom of assembly and petition. These states were: Maryland, Massachusetts, North Carolina, New Hampshire, and Pennsylvania. There was a roughly even breakdown between regions, with forty percent of the Southern states and thirty-eight percent of the Northeastern states having assembly and petition clauses. Forty-percent of the southern population and fifty-three percent of the Northeastern population lived in states with freedom of assembly and petition clauses. A typical such clause said, “The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good;

\(^{58}\) PA. CONST. of 1776, Dec. of Rights § 12.

\(^{59}\) Id.
give instructions to their representatives, and to request of the legislative body, by the way of
addresses, petitions, or remonstrance, redress of the wrongs done them, and of the grievances
they suffer.”60

Vermont adopted an assembly and petition clause in 1786.61 When it was admitted to the
union in 1791, the number of states with assembly and petition clauses in their constitutions thus
rose from five to six, and the percentage of states with such a provision rose from thirty-eight
percent, corresponding to forty-six percent of the population, to forty-three percent of the states,
corresponding to forty-seven percent of the population.62 While the percentage of Southern
states with an assembly and petition clause remained the same at forty percent, the percentage of
Northeastern states with a provision for assembly and petition rose from thirty-eight percent of
states and fifty-five percent of the Northeastern population to forty-four percent of Northeastern
states and fifty-four percent of the Northeastern population.

4. Reform Government

Clauses giving citizens the right to alter, reform, and abolish their forms of state
government were found in six states, comprising forty-six percent of the states and sixty-five
percent of the total U.S. population in 1787. These states were: Maryland, Massachusetts, New
Hampshire, New York, Pennsylvania, and Virginia. These clauses were present in fifty percent
of Northeastern state constitutions and forty percent of Southern state constitutions, which by
population amounted to seventy percent and fifty-nine percent of the populations in those
regions, respectively. The Reform Government clauses tended to be lengthy and detailed and
some states had multiple clauses reiterating essentially the same right—Pennsylvania, for

60 MASS. CONST. of 1780, pt. 1, art. XIX.
61 VT. CONST. of 1786, Dec. of Rights, § 22.
62 The five states with assembly and petition clauses in 1787 were Maryland, Massachusetts, North Carolina, New Hampshire, and Pennsylvania.
example, had three separate clauses that guaranteed the right to reform government and Massachusetts had two. New Hampshire’s constitution contained a typical clause:

Government being instituted for the common benefit, protection, and security of the whole community, and not for the private interest or emolument of any one man, family or class of men; therefore whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old, or establish a new government. The doctrine of non-resistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.\textsuperscript{63}

North Carolina and Maryland also had clauses with language reminiscent of the other reform government clauses but that were not counted because they were significantly weaker. North Carolina’s said, “That all political power is vested in and derived from the people only”\textsuperscript{64} and Maryland’s said, “That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.”\textsuperscript{65}

The Vermont constitution had two separate provisions guaranteeing the right to reform government.\textsuperscript{66} South Carolina also adopted such a provision in 1790.\textsuperscript{67} Thus, in 1791, the number of states guaranteeing their citizens the right to reform, alter, or abolish the government rose from six to eight.\textsuperscript{68} The percentage of state constitutions guaranteeing the right to reform government rose from forty-six percent of the states and sixty-five percent of the population in 1787 to fifty-seven percent of the states and seventy-two percent of the population in 1791. Fifty percent of the Northeastern states and seventy percent of the Northeastern population recognized the right in 1787; that percentage rose to fifty-five percent of states and seventy-two percent of

\textsuperscript{63} N.H. CONST. of 1784, art. I, § 10.
\textsuperscript{64} N.C. CONST. of 1776, Dec. of Rights § 1.
\textsuperscript{65} MD. CONST. of 1776, Dec. of Rights § 1.
\textsuperscript{66} VT. CONST. of 1786, Preamble, Dec. of Rights, § 7.
\textsuperscript{67} S.C. CONST. of 1790, art. IX, § 1.
\textsuperscript{68} The six states guaranteeing the right to reform government in 1787 were Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, and Virginia.
the Northeastern population in 1791. Forty percent of the Southern states and fifty-nine percent of the Southern population guaranteed the right to reform government in 1787; sixty percent of the Southern states and seventy-three percent of the Southern population guaranteed it in 1791.

5. Power over Government Officers

Six states, or forty-six percent of the states comprising sixty percent of the population, explicitly recognized the power of their citizens as against government officers. These states were: Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, and Virginia. Pennsylvania’s constitution, thus, stated that “those who are employed in the legislative and executive business of the State, may be restrained from oppression, the people have a right, at such periods as they may think proper, to reduce their public officers to a private station, and supply the vacancies by certain and regular elections”\(^{69}\) while Virginia’s Constitution, using slightly different rhetoric, stated 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.”\(^{70}\)

The North Carolina and Maryland Constitutions contain somewhat weaker language to this effect alluding to the power of the people over government officers.\(^{71}\)

Vermont’s constitution contained both a weak\(^{72}\) and a strong\(^{73}\) provision recognizing citizen power over government officers. Therefore, with Vermont’s addition as a state in 1791, the number of states with such a provision increased from six to seven.\(^{74}\) In 1787, the percentage of was forty-six percent of states and sixty-six percent of the population. In 1791, that number rose to fifty percent of the states and remained at sixty-six percent of the population. The

\(^{69}\) PA. CONST. of 1776, Dec. of Rights § 6.

\(^{70}\) VA. CONST. of 1776, Bill of Rights, § 2.

\(^{71}\) See Footnotes 17 & 18 and accompanying text.

\(^{72}\) VT. CONST. of 1786, Dec. of Rights, § 5.

\(^{73}\) VT. CONST. of 1786, Dec. of Rights, § 6.

\(^{74}\) In 1787, the six states with constitutional provisions granting power to the citizens to regulate government officers were Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, and Virginia.
percentage of Southern states recognizing citizen power over government officers remained at sixty percent of states and eighty-two percent of the Southern population, but the percentage of Northeastern states granting such a power rose from thirty-eight percent, (comprising fifty-two percent of the population) in 1787, to forty-four percent of the states (comprising fifty-four percent of the Northeastern population) in 1791.

6. Suffrage

Some form of the right to vote was explicitly recognized in seven states, which constitutes a majority at fifty-four percent. Sixty-five percent of all Americans lived in these states at the Founding. These states were: Georgia, Maryland, New Jersey, New York, Pennsylvania, South Carolina, and Virginia. The right was much more prevalent in the South, where a supermajority of the states, eighty percent (comprising seventy-eight percent of the population) had suffrage clauses. Only thirty-eight percent of the Northeastern states (comprising fifty percent of the Northeastern population) had similar clauses in their state constitutions. Overall, the clauses varied significantly, with many states explicitly limiting the right to vote by race, residency, land ownership, or wealth. Georgia’s constitution, for example, stated:

All male white inhabitants, of the age of twenty-one years, and possessed in his own right of ten pounds value, and liable to pay tax in this State, or being of any mechanic trade, and shall have been resident six months in this State, shall have a right to vote at all elections for representatives, or any other officers, herein agreed to be chosen by the people at large.75

New York’s constitution, by contrast, stated:

That every male inhabitant of full age, who shall have personally resided within one of the counties of this State

75 GA. CONST. of 1777, art. IX.
for six months immediately preceding the day of election, shall, at such election, be entitled to vote for representatives of the said county in assembly; if, during the time aforesaid, he shall have been a freeholder, possessing a freehold of the value of twenty pounds, within the said county, or have rented a tenement therein of the yearly value of forty shillings, and been rated and actually paid taxes to this State.76

Between 1787 and 1791, two states, Pennsylvania and South Carolina, adopted revised suffrage provisions. While Pennsylvania’s 1790 provision was substantively the same as the provision it had adopted in 1776,77 South Carolina removed a requirement that a man “acknowledges the being of a God, and believes in a future state of rewards and punishments” in order to vote.78 Vermont adopted a provision regarding suffrage in 1786,79 thus increasing the number of states recognizing some form of the right to vote from seven to eight.80 The percentage of states enjoying such a right rose from fifty-four percent in 1787 to fifty-seven percent in 1791, corresponding to sixty-five percent and sixty-six percent of the population, respectively. While the percentage of Southern states and population enjoying the right remained the same at eighty percent and seventy-eight percent, respectively, the percentage of Northeastern states guaranteeing a right to suffrage rose from thirty-eight percent of states and fifty percent of the population in 1787 to forty-four percent of states and fifty-four percent of the Northeastern population in 1791.

7. Free Elections

Six states, or forty-six percent of the states comprising sixty percent of the population, gave their citizens the right to free elections in their state constitutions. These states were:

76 N.Y. CONST. of 1777, art. VII.
77 PA. CONST. of 1790, art. III, § 1; PA. CONST. of 1776, Plan or Frame of Gov., § 6.
80 The seven states with constitutional suffrage provisions in 1787 were Georgia, Maryland, New Jersey, New York, Pennsylvania, South Carolina, and Virginia.
Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, and Virginia. Like rights to suffrage, free election guarantees were relatively more common in Southern constitutions. Sixty percent of Southern states, comprising eighty-two percent of the Southern population, had free elections clauses. In contrast, only thirty-eight percent of the Northeastern states and fifty-two percent of the Northeastern population had similar clauses. A typical such clause read: “All elections ought to be free, and every inhabitant of the state having the proper qualifications, has equal right to elect, and be elected into office.”\textsuperscript{81}

The Vermont constitution contained two provisions ensuring free elections, one that guaranteed elections that were “free and without corruption”\textsuperscript{82} and the other guaranteeing elections that were “free and voluntary.”\textsuperscript{83} Thus, in 1791, the number of states guaranteeing free elections rose from six to seven. The percentage of states guaranteeing such a right rose from forty-six percent of states and sixty-six percent of the population in 1787 to fifty percent of the states and sixty-seven percent of the population in 1791. This marginally closed the gap between Northeastern and Southern states, with the percentage of Southern states and population guaranteeing the right remaining fixed at sixty percent and eighty-two percent, respectively, and the percentage of Northeastern states and population guaranteeing the right rising from thirty-eight percent and fifty-two percent in 1787 to forty-four percent and fifty-four percent in 1791.

8. No More than One Person, One Vote

Only Georgia had a constitutional clause declaring that “[n]o person shall be entitled to more than one vote, which shall be given in the county where such person resides.”\textsuperscript{84} In 1787, Georgia was home to two percent of the national population and five percent of the Southern

\textsuperscript{81} N.H. CONST. of 1784, art. I, § 11.
\textsuperscript{82} VT. CONST. of 1786, Dec. of Rights, § 9.
\textsuperscript{83} VT. CONST. of 1786, Ch. 2, § 31.
\textsuperscript{84} GA. CONST. of 1777, art. XL.
population. There were no additional “one person, one vote” rights added to state constitutions between 1787 and 1791.

9. Notable Absences from Rights of Freedom of the Press, of Speech, of Association, and of Political Participation

There are several clauses one might have found on these topics that did not turn up in the founding state constitutions. We found no clauses: 1) pledging allegiance to the federal Union; 2) relating to a right of a State to secede; or 3) pertaining to arbitrary exercises of governmental power. We did find one clause pertaining to free expression and libel—in 1790, Pennsylvania’s constitution became the first state constitution to contain a provision regarding libel. The clause read:

That the printing-presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels the jury shall have a right to determine the law and the facts under the direction of the court, as in other cases.\(^5\)

In 1790, Pennsylvania was home to twelve percent of the national population and twenty-four percent of the Northeastern population.

iii. Protection of Gun Rights and Clauses Bearing on the Military\(^6\)

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\(^5\) PA. CONST. of 1790, art. IX, § 7.

\(^6\) There were no “notable absences” from this category.
1. State Constitutional Rights to Keep and Bear Arms

Only four states in 1787—a small minority—had an explicit constitutional clause protecting “the right to keep and bear arms.” These states were Massachusetts, North Carolina, New York, and Pennsylvania. Together they comprised thirty-one percent of the states with forty-three percent of the total population then living in the United States. In the Northeast, thirty-eight percent of the Northeastern states comprising sixty-two percent of the Northeastern population had rights to keep and bear arms whereas in the South only twenty percent of the states comprising twenty-two percent of the Southern population had that right. The language of the clauses protecting the right to keep and bear arms varied considerably, with the Massachusetts’ Constitution simply stating that “[t]he people have a right to keep and to bear arms for the common defence”\(^{87}\) while New York asserted with considerably more prolixity that:

> [W]hereas it is of the utmost importance to the safety of ever State that it should always be in a condition of defence; and it is the duty of every man who enjoys the protection of society to be prepared and willing to defend it; this convention therefore, in the name and by the authority of the good people of this State, doth ordain, determine, and declare that the militia of this State, at all times hereafter, as well in peace as in war, shall be armed and disciplined, and in readiness for service....And that a proper magazine of warlike stores, proportionate to the number of inhabitants, be, forever hereafter, at the expense of this State, and by acts of the legislature, established, maintained, and continued in every county in this State.\(^{88}\)

In addition to those four states, Virginia and Maryland both had clauses that, although not coded as explicit rights to keep and bear arms, should be mentioned because they condoned militias. Virginia’s constitution provided: “That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the

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\(^{87}\) MASS. CONST. of 1780, Pt. 1, art. XVII.
\(^{88}\) N.Y. CONST. of 1777, art. XL.
military should be under strict subordination to, and governed by, the civil power.”VA. CONST. of 1776, Bill of Rights § 13.89 The language of these clauses mimicked the prefatory clause of the Second Amendment to the U.S. Constitution.90

In 1790, Pennsylvania adopted a constitution that divided its 1776 clause guaranteeing the right to bear arms into two separate provisions: the first guaranteeing a right to bear arms as part of a militia,91 the second guaranteeing Pennsylvanians the right to bear arms “in defence of themselves and the State.”92 Vermont adopted a clause that exactly mimicked the clause from Pennsylvania’s 1776 constitution, guaranteeing the right to bear arms as part of a militia and in personal defense in a single provision.93 Therefore, with the addition of Vermont to the Union, the number of states guaranteeing an explicit right to keep and bear arms rose from four to five.94 The percentage of states guaranteeing a right to bear arms rose from thirty-one percent in 1787 to thirty-six percent in 1791. Forty-four percent of the population in 1791 lived in a State with a Constitution that protected the right to keep and bear arms. While the percentage of Southern states guaranteeing the right did not change, remaining fixed at twenty percent of the states and twenty-two percent of the population of the South, the percentage of Northeastern states guaranteeing the right rose from thirty-eight percent of the states and sixty-two percent of the population to forty-four percent of the Northeastern states and sixty-four percent of the Northeastern population.

In the landmark decision McDonald v. Chicago, the Supreme Court considered state constitutional gun rights throughout history in determining that the Second Amendment to the United States constitution is incorporated through the Fourteenth Amendment and applied to the

89 See also MD. CONST. of 1776, Declaration of Rights § 25 (“That a well-regulated militia is the proper and natural defence of a free government.”).
90 U.S. CONST, amend II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).
91 PA. CONST. of 1790, art. VI, § 2.
92 PA. CONST. of 1790, art. IX, § 21.
93 VT. CONST. of 1786, Dec. of Rights, § 8.
94 The four states guaranteeing a right to bear arms in 1787 were Massachusetts, North Carolina, New York, and Pennsylvania.
states. 561 U.S. 3025 (2010). As the Court noted, the understanding that the right to bear arms was fundamental “persisted in the years immediately following the ratification of the Bill of Rights. In Addition to the four States that had adopted Second Amendment analogues before ratification, nine more States adopted state constitutional provisions protecting an individual right to keep and bear arms between 1789 and 1820.” Id. at 3037; see also id. at 3042 (citing our Texas Law Review article on state constitutional rights in 1868 as evidence that “[t]he right to keep and bear arms was also widely protected by state constitutions at the time when the Fourteenth Amendment was ratified”). The Court’s recent approach to Second Amendment jurisprudence confirms the importance of cataloguing state constitutional rights throughout history.

2. The Right Not to Bear Arms

New York, New Hampshire, and Pennsylvania protected their citizens from being compelled to bear arms in defense of the state. These three states together constituted twenty-three percent of the states and comprised twenty-five percent of the national population. Thirty-eight percent of the Northeastern states and fifty percent of the Northeastern population lived in States with a right not to be compelled to bear arms in defense of the state. New Hampshire’s constitution, for example, stated that “[n]o person who is conscientiously scrupulous about the lawfulness of bearing arms, shall be compelled thereto, provided he will pay an equivalent.”95 New York’s provision could be interpreted to only apply to those “being of the people called Quakers.”96

In its 1786 constitution, Vermont adopted a provision protecting the rights of those

94 N.Y. CONST. of 1777, art. XL.
citizens who did not wish to bear arms. Like the other states that guaranteed this right, Vermont provided that no man would be compelled to bear arms, so long as he would pay an amount equivalent to his personal service. When Vermont became a state in 1791, the number of states guaranteeing a right not to bear arms rose from three to four. While in 1787 twenty-three percent of states comprising twenty-five percent of the general population had the right, in 1791 that percentage rose to twenty-nine percent of the states comprising twenty-seven percent of the total U.S. population. Thirty-eight percent of the Northeastern states comprising fifty percent of the Northeastern population had the right in 1787; in 1791, that number rose to forty-four percent of the Northeastern states comprising fifty-two percent of the total Northeastern population.

3. Clauses Subordinating the Military to the Civil Power

Clauses subordinating the military to the civil power were some of the most prevalent clauses in state constitutions in 1787. We found them in seven states, or fifty-four percent of the state constitutions comprising seventy-three percent of the total national population—a huge supermajority. These states were: Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, South Carolina, and Virginia. The subordination of the military to the civil power was especially popular in the South, where it was mandated in eighty percent of the states (four in total) which together comprised ninety-five percent of the Southern population—clear supermajorities. In contrast, the subordination of the military to the civil power was only constitutionalized in thirty-eight percent of the Northeastern states comprising fifty-two percent of the Northeastern population. Massachusetts expounded on the reasoning behind the right, stating in its constitution that:

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97 VT. CONST. of 1786, Dec. of Rights, § 10.
98 The three states protecting a right not to bear arms in 1787 were New York, New Hampshire, and Pennsylvania.
The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.\textsuperscript{99}

Vermont adopted a clause subordinating the military to the civil power\textsuperscript{100} that was identical to the corresponding provision in Pennsylvania’s 1776 constitution.\textsuperscript{101} Thus, in 1791, the number of state constitutions containing such a provision rose from seven to eight.\textsuperscript{102} In 1787, fifty-four percent of the states comprising seventy-three percent of the national population had such a right, but in 1791 the percentage of state constitutions with subordinate military clauses rose to fifty-seven percent of the states comprising seventy-four percent of the population. While the percentage of Southern constitutions containing a clause subordinating the military to the civil power remained the same at eighty percent of the states comprising ninety-five percent of the Southern population, the percentage of Northeastern state constitutions recognizing the right rose from thirty-eight percent of states to forty-four percent, and from comprising fifty-two percent of the Northeastern population to comprising fifty-four percent.

4. Clauses Forbidding Standing Armies

Six states, or forty-six percent of the state constitutions in this period comprising sixty-six percent of the total U.S. population, had constitutional clauses forbidding standing armies in times of peace. These states were: Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, and Virginia. Like the subordinate military clauses these clauses barring standing

\textsuperscript{99} MASS. CONST. of 1780, Pt. 1, art. XVII.
\textsuperscript{100} VT. CONST. of 1786, Dec. of Rights, § 8.
\textsuperscript{101} PA. CONST. of 1776, Dec. of Rights, § 13.
\textsuperscript{102} In 1787, the seven states with constitutional clauses subordinating the military to the civil power were Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, South Carolina, and Virginia.
armies were more common in the South, where sixty percent of the states comprising eighty-two percent of the southern population had this protection. In the Northeast, only thirty-eight percent of the states comprising fifty-two percent of the population had standing army prohibitions. Maryland, for example, had the following constitutional clause: "That standing armies are dangerous to liberty, and ought not to be raised or kept up, without consent of the Legislature." 103

In 1790, Pennsylvania redrafted the clause in its constitution forbidding standing armies, adding a caveat, like that in Massachusetts’ constitution, that a standing army could be kept up in peacetime with the consent of the legislature. 104 Vermont added a provision forbidding standing armies in 1786, 105 causing the number of states forbidding standing armies to rise from six to seven, and, consequently, for the percentage of states providing such protection to rise from forty-six percent to fifty percent. 106 The population then living in states with such clauses in their constitutions rose marginally: from sixty-six percent in 1787 to sixty-seven percent in 1791. And, while sixty percent of the Southern states and eighty-two percent of the Southern population continued to be governed by constitutions with clauses forbidding standing armies, the number of Northeastern states recognizing the protection rose from thirty-eight percent of the states comprising fifty-two percent of the population in 1787 to forty-four percent of the states comprising fifty-four percent of the population in 1791.

5. Quartering Soldiers

Only three states—New Hampshire, Maryland, and Massachusetts—had precursors in

103 MD. CONST. of 1776, Declaration of Rights § 26.
104 PA. CONST. of 1790, art. IX, § 22.
106 In 1787, the six states with constitutional clauses forbidding standing armies were Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, and Virginia.
their State constitutions to the Third Amendment to the U.S. Constitution. These states comprised twenty-three percent of the states and twenty-three percent of the total U.S. population. The clauses all had very similar wordings, an example of which was: "That no soldier ought to be quartered in any house, in time of peace, without the consent of the owner; and in time of war, in such manner only, as the Legislature shall direct." Pennsylvania added a provision regarding the quartering of soldiers in 1790, leading the number of states protecting their citizens from the peacetime quartering of soldiers in their homes to increase from three to four, and from comprising twenty-three percent of the population to comprising thirty-four percent in 1791.

iv. Fourth Amendment Rights Against Unreasonable Searches and Seizures

1. Search and Seizure

Six states, forty-six percent of the total number of states comprising sixty-six percent of the population, had constitutional protections against unreasonable searches and seizures in their state constitutions in 1787 and also required that searches be made with a warrant and for probable cause. These states were: Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, and Virginia. Search and seizure protections were more prevalent in the South, where sixty percent of the states comprising eighty-two of the population had search and seizure clauses, compared to thirty-eight percent comprising fifty-two percent respectively in the Northeast. Virginia’s constitution, for example, stated:

That general warrants, whereby an officer or messenger

107 See U.S. CONST Amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”)
108 MD. CONST. of 1776, Declaration of Rights § 28.
109 PA. CONST. of 1790, art. IX, § 23.
110 In 1787, the three states with constitutional provisions regarding the quartering of soldiers in civilians’ homes were New Hampshire, Maryland, and Massachusetts. E
111 There were no “notable absences” from this category.
may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.\textsuperscript{112}

Vermont’s constitution also contained a provision ensuring its citizens against unreasonable searches and seizures.\textsuperscript{113} Therefore, in 1791, the number of states offering such protection rose from six to seven.\textsuperscript{114} The percentage of states protecting their citizens from unreasonable searches and seizures rose from forty-six percent of the total number of states comprising sixty-six percent of the population, in 1787, to fifty percent of the total number of states comprising sixty-seven percent of the population, in 1791. And, while the same percentage of Southern states recognized the protection, in the Northeast the percentage of states offering the protection rose from thirty-eight percent in 1787 to forty-four percent in 1791, and from comprising fifty-two percent of the Northeastern population to comprising fifty-four percent of the population.

v. Criminal Procedure

1. Habeas Corpus

Only three states—Georgia, North Carolina, and New Hampshire—protected the right to petition for \textit{habeas corpus} in their state constitutions. These states made up forty percent of the South and thirteen percent of the Northeast. This is an astonishingly low number for such a venerable right, and it suggests how limited the bill of rights culture really was in the U.S. in 1787. Looking at matters by population, twenty-seven percent of Southerners and eight percent

\textsuperscript{112} VA. CONST. of 1776, Bill of Rights § 10.
\textsuperscript{113} VT. CONST. of 1786, Dec. of Rights, § 12.
\textsuperscript{114} In 1787, the six states with constitutional provisions ensuring citizens against unreasonable searches and seizures were Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, and Virginia.
of Northeasterners lived in states that had habeas corpus protection. New Hampshire and Georgia mentioned the right to habeas corpus explicitly by name, for example New Hampshire’s constitution read: “The privilege and benefit of the habeas corpus, shall be enjoyed in this state, in the most free, easy, cheap, expeditious, and ample manner, and shall not be suspended by the legislature, except upon the most urgent and pressing occasions, and for a time not exceeding three months.”

North Carolina used weaker language, saying: “That every freeman, restrained of his liberty, is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same, if unlawful; and that such remedy ought not to be denied or delayed.”

In 1790, Pennsylvania adopted a provision that protected habeas corpus rights, referring to the right by name. Therefore, in 1791, the number of states recognizing habeas rights rose from three to four. Twenty-nine percent of the states comprising twenty-eight percent of the population now recognized such rights, as compared to twenty-three percent comprising seventeen percent in 1787. The percentage of Southern states with the right did not change, remaining at forty percent of the states comprising twenty-seven percent of the population in 1791. However, two Northeastern states comprising thirty-percent of the Northeastern population now had the right, compared to only one of the Northeastern states comprising eight percent of the Northeastern population in 1787.

2. Self-incrimination

The right to a privilege against self-incrimination was guaranteed in six states, or forty-six percent of the total number of states comprising sixty-six percent of the total population.

115 GA. CONST. of 1784, Pt. 2 Oaths and Subscriptions.
117 PA. CONST. of 1790, art. IX, § 14.
118 The three states protecting habeas corpus rights in 1787 were Georgia, North Carolina, and New Hampshire.
These states were: Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, and Virginia. This right was more widely recognized in the South, where sixty percent of the states (a majority) comprising a full eighty-two percent of the population (a large super-majority) had rights protecting them from self-incrimination. In contrast, only thirty-eight percent of the Northeastern states comprising fifty-two percent of the Northeastern population had the same rights. The phrasing of the rights was similar in all of the six state constitutions. As an example, North Carolina’s constitution read: “That, in all criminal prosecutions, [no] man ... shall ... be compelled to give evidence against himself.”

In 1786, Vermont adopted a provision guaranteeing a right against self-incrimination, leading the number of states recognizing such a right to rise from six to seven. The percentage of states recognizing the right thus rose from forty-six percent in 1787 to fifty percent in 1791, comprising sixty-seven percent of the population in 1791. The percentage of Southern states with a clause pertaining to self-incrimination remained fixed, while in the Northeast the percentage rose from thirty-eight percent of states comprising fifty-two percent of the population in 1787 to forty-four percent of states comprising fifty-four percent of the Northeastern population, in 1791.

3. **Right to Counsel**

Five states, or thirty-eight percent of the total number of states in 1787, guaranteed the right to counsel for criminal defendants. They were: Maryland, Massachusetts, New Hampshire, New Jersey, and Pennsylvania. Forty percent of the total U.S. population lived in those states.

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119 N.C. CONST. of 1776, Declaration of Rights § 7.
120 VT. CONST. of 1786, Dec. of Rights, § 11.
121 The six states guaranteeing a right against self-incrimination in 1787 were Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, and Virginia.
The right to counsel was one of the very few rights that was more common in the Northeast than in the South. It was found in fifty percent of the Northeastern states and in only twenty percent of the Southern state constitutions. By population, the right to counsel was guaranteed to eighteen percent of all Southerners and to sixty-two percent of all Northeasterners. There was some minor variation in the wording of the clauses: two states, New Jersey and Maryland, had the most explicit rights to counsel. For example, Maryland’s constitution stated: “That, in all criminal prosecutions, every man hath a right...to be allowed counsel.” New Hampshire and Pennsylvania, in comparison, gave defendants the right to “be heard” by himself and counsel and Massachusetts gave “every subject...a right to...be fully heard in his defence by himself, or his counsel, at his election.”

In 1791, Vermont enacted a right to counsel clause similar to that of New Hampshire’s and Pennsylvania’s, which allowed a defendant “to be heard by himself and his counsel.” This raised the number of states guaranteeing the right to counsel from five to six. Consequently, the percentage of states guaranteeing the right rose from thirty-eight percent of the states comprising forty percent of the population in 1787 to forty-three percent of the states comprising forty-one percent of the population in 1791. This marginally widened the gap between possession of the right in the Southern and Northeastern states.

4. Speedy trial

The right to a speedy trial was constitutionally guaranteed by four states, or thirty-one percent. Fifty-two percent of the total population of the United States lived in those states in

122 MD. CONST. of 1776, Declaration of Rights § 19.
124 MASS. CONST. of 1780, Pt. 1, art. XVII.
125 Pennsylvania added a second clause guaranteeing counsel in its 1790 constitution. PA. CONST. of 1790, Art. 9 § 9
126 VT. CONST. of 1786, Dec. of Rights, § 11.
127 In 1787, the five states guaranteeing a right to counsel were Maryland, Massachusetts, New Hampshire, New Jersey, and Pennsylvania.
1787. These states were: Maryland, Massachusetts, Pennsylvania, and Virginia. The right to a speedy trial was found in forty percent of the Southern states comprising fifty-nine percent of the Southern population, and in twenty-five percent of the Northeastern states comprising forty-four percent of the Northeastern population. Virginia’s constitution stated, for example: “That in all capital or criminal prosecutions man hath a right to...a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty.”

Vermont’s constitution contained a provision guaranteeing a right to a speedy trial, which, in 1791, raised the number of states guaranteeing the right from four to five. The percentage of states guaranteeing a right to a speedy trial rose from thirty-one percent in 1787 to thirty-six percent in 1791. This corresponded to an increase in the percentage of the national population possessing the right to a speedy trial from fifty-two percent in 1787 to fifty-three percent in 1791. The percentage of Northeastern states with the right rose from twenty-five percent of the states and forty-four percent of the Northeastern population in 1787 to thirty-three percent of Northeastern states and forty-seven percent of the Northeastern population in 1791.

5. Public trial

Only Pennsylvania, a Northeastern state in which twelve percent of the national population and twenty-four percent of the Northeastern population resided in 1787, had a constitutional right to a public trial. Its state constitution read: "That in all prosecutions for criminal offences, a man hath a right to...a speedy public trial."

In 1786, Vermont became the second state, after Pennsylvania, to adopt a provision that
guaranteed the right to a public trial.\textsuperscript{132} Thus, in 1791, fourteen percent of the states comprising fourteen percent of the national population guaranteed the right to a public trial, whereas in 1787, the right had belonged to only eight percent of the states and twelve percent of the population. Twenty-two percent of the Northeastern states and twenty-seven percent of the Northeastern population were now guaranteed the right; in 1787, these numbers had been twelve percent of the Northeastern states and twenty-four percent of the Northeastern population.

6. Confrontation

In 1787, criminal defendants had a right to confront witnesses against them in six states, or forty-six percent of the states comprising sixty-six percent of the population. These states were: Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, and Virginia. Confrontation clauses were more common in the South, where sixty percent of the states comprising eighty-two percent of the total Southern population had constitutional confrontation rights. In the Northeast, thirty-eight percent of the states comprising fifty-two percent of the total Northeastern population had the same rights. Maryland, for example, gave every criminal defendant a right “to be confronted with the witnesses against him.” Massachusetts and New Hampshire varied slightly from the others in that they gave the defendant the right to meet his accusations “face-to-face.”\textsuperscript{133}

In 1790, Pennsylvania revised the wording of its confrontation clause, echoing the clauses of Massachusetts and New Hampshire in guaranteeing that the accused could meet his witnesses “face to face.”\textsuperscript{134} Vermont adopted a provision stating that a man had a right “to be

\textsuperscript{132} VT. CONST. of 1786, Dec. of Rights, § 11.
\textsuperscript{133} MASS. CONST. of 1780, Pt. 1, art. XII; N.H. CONST. of 1784, Pt. 1, art. XII.
\textsuperscript{134} PA. CONST. of 1790, art. IX, § 9.
confronted with the witnesses.” With the addition of Vermont as the fourteenth state, the number of states guaranteeing a defendant’s right to confront the witnesses against him rose from six to seven. In 1787, forty-six percent of the states comprising sixty-six percent of the population recognized the right; in 1791, these percentages rose to fifty percent of the states comprising sixty-seven percent of the population. The percentage of the states (60%) and population (82%) possessing the right in the South went unchanged, but the percentage of Northeastern states and population with the right rose from thirty-eight percent and fifty-two percent, respectively, to forty-four percent and fifty-four percent.

7. **Obtain Witnesses**

Five states, or thirty-eight percent of the total number of states in 1787, had constitutional rights to obtain witnesses in criminal trials. Fifty percent of the total U.S. population lived in these states, which were: Maryland, New Hampshire, New Jersey, Pennsylvania, and Virginia. The right to obtain witnesses was fairly evenly spread across regions, with forty percent of the Southern states and thirty-eight percent of the Northeastern states, or fifty-nine percent and forty-one percent of the respective populations, having rights to obtain witnesses. Maryland and New Jersey specifically mentioned witnesses, for example Maryland’s constitution stated: “That, in all criminal prosecutions, every man hath a right...to have process for his witnesses; to examine the witnesses, for and against him, on oath.” The remaining states, New Hampshire, Pennsylvania, and Virginia, gave defendants the right to produce all “evidence” or “proofs,” which presumably would include witness testimony. For example, Pennsylvania’s constitution

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135 VT. CONST. of 1786, Dec. of Rights, § 11.
136 The six states guaranteeing a defendant’s right to confrontation in 1787 were Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, and Virginia.
137 MD. CONST. of 1776, Declaration of Rights § 19.
read: "That in all prosecutions for criminal offences, a man hath a right...to call for evidence in his favour."

In 1790, Pennsylvania adopted a new clause regarding a defendant’s right to obtain witnesses. This clause read, “That in all criminal prosecutions the accused hath a right...to have compulsory process for obtaining witnesses in his favor.” Vermont, however, adopted a provision that echoed Pennsylvania’s 1776 clause, stating that a defendant had a right “to call for evidence in his favour [sic].” When Vermont became a state in 1791, the number of states guaranteeing a defendant’s right to obtain witnesses in criminal trials rose from five to six. The percentage of states guaranteeing the right rose from thirty-eight percent of states comprising fifty percent of the population in 1787, to forty-three percent of the states comprising fifty-one percent of the population in 1791. Forty-four percent of the Northeastern states and population now guaranteed the right, compared to thirty-eight percent and forty-one percent in 1787. The percentage of Southern states with the right remained the same at forty percent of the states and fifty-nine percent of the Southern population.

8. **Informed of Charges**

Six states, or forty-six percent of the states comprising sixty-six percent of the population in 1787, gave criminal defendants the right to be informed of charges against them. These states were: Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, and Virginia. The right was more prevalent in the South, where sixty percent of the states comprising eighty-two percent of the population had rights to be informed of charges against them. In the

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138 PA. CONST. 1776, Declaration of Rights § 9.
139 PA. CONST. of 1790, art. IX, § 9.
140 VT. CONST. of 1786, Dec. of Rights, § 11.
141 In 1787, the five states guaranteeing a defendant’s right to obtain witnesses were Maryland, New Hampshire, New Jersey, Pennsylvania, and Virginia.
Northeast, thirty-eight percent of the states comprising fifty-two percent of the population had the same right. A typical right stated: “That, in all criminal prosecutions, every man has a right to be informed of the accusation against him.”\footnote{N.C. CONST. of 1776, Declaration of Rights § 7.}

In 1786, Vermont adopted a clause requiring that a criminal defendant be informed of the charges against him,\footnote{VT. CONST. of 1786, Dec. of Rights, § 11.} which, with Vermont’s admission as a state in 1791, led the number of states recognizing the right to increase from six to seven.\footnote{In 1787, the six states that had constitutional provisions requiring that a criminal defendant be informed of the charges against him were Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, and Virginia.} Where forty-six percent of the states comprising sixty-six percent of the population had recognized the right in 1787, those numbers grew to fifty percent comprising sixty-seven percent of the population in 1791. The percentage of Southern states with a provision requiring that a criminal defendant be informed of charges against him remained the same at sixty percent of the states comprising eighty-two percent of the population. But in the Northeast, the percentages increased from thirty-eight percent of the states comprising fifty-two of the population in 1787, to forty-four percent of the states comprising fifty-four percent of the population in 1791.

9. Notable Absences from Criminal Procedure Rights

In 1787, not a single state constitution protected accused persons against double jeopardy or guaranteed them a right of appeal or guaranteed a presumption of innocence. These are all striking omissions.

In 1790, Pennsylvania became the first state to recognize a defendant’s right to be protected against double jeopardy, with a provision reading, “No person shall, for the same
offence, be twice put in jeopardy of life or limb.”¹⁴⁵ In 1791, Pennsylvania represented seven percent of the states and twelve percent of the population. It comprised eleven percent of the Northeastern states and twenty-two percent of the Northeastern population.

vi. Due Process

Due process clauses were found in eight of the state constitutions comprising sixty-two percent of the total number of states in the U.S. in 1787 when the Constitution was first proposed. These states were: Maryland, Massachusetts, North Carolina, New Hampshire, New York, Pennsylvania, South Carolina, and Virginia. However, these clauses all allowed for deprivations of life, liberty, or property “by the law of the land” rather than “with due process of law.” This older formulation dates back to Magna Charta in 1215 and was the traditional English formulation of the Due Process principle. Eighty-three percent of the total U.S. population in 1787 lived in states whose constitutions had due process clauses phrased in this way. Therefore, almost an Article V three quarters consensus of the thirteen states (and a huge supermajority of the total population) had the protection of a state constitutional due process guarantee. Due process rights were thus among the most widely protected individual rights at that time in state constitutional law. As with most constitutional clauses protecting individual rights in 1787, the state constitutional clauses protecting due process rights were found more often in the South, where eighty percent of the states comprising a full ninety-five percent of the population had this protection. In the Northeast, in contrast, fifty percent of the states comprising seventy percent of the population had due process guarantees. South Carolina, for example, had the following due process clause in its constitution: “That no freeman of this State be taken or imprisoned, or

¹⁴⁵ PA. CONST. of 1790, art. IX, § 10.
disseized of his freehold, liberties, or privileges, or outlawed, exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land.\textsuperscript{146} Again, all eight of the states with due process guarantees had the same “but by the judgment of his peers or by the law of the land” phrasing. This appears to emphasize the belief at the Founding in procedural but not substantive due process.

Vermont adopted a due process guarantee in 1786 that employed phrasing similar to that used in the eight other constitutional guarantees of due process in force at that time, stating, “That in all prosecutions for criminal offences, a man [cannot]... be justly deprived of his liberty, except by the laws of the land, or the judgment of his peers.”\textsuperscript{147} Therefore, in 1791, the number of states guaranteeing a right to due process rose from eight to nine; the percentage of states guaranteeing the right rose from sixty-two percent to sixty-four percent; and the corresponding affected populations did not change more than a percentage point, remaining fixed at eighty-three percent.\textsuperscript{148} This marginally increased the percentage of Northeastern states guaranteeing the right from fifty percent, comprising seventy percent of the Northeastern population, in 1787, to fifty-five percent, comprising seventy-two percent of the Northeastern population, in 1791. The percentage of Southern states with the right remained the same at eighty percent of the states comprising ninety-five percent of the population.

\textit{vii. Criminal and Civil Procedure Rights Later Enumerated in the Original Constitution}

1. \textit{Ex Post Facto Laws}

Four states, or thirty-one percent, had clauses forbidding the enactment of ex post facto laws in their state constitutions in 1787 when the Constitution was first proposed. These states

\textsuperscript{146} S.C. Const. of 1778, art. 41.
\textsuperscript{147} VT. Const. of 1786, Dec. of Rights, § 11.
\textsuperscript{148} The eight states guaranteeing a right to due process in 1787 were Maryland, Massachusetts, North Carolina, New Hampshire, New York, Pennsylvania, South Carolina, and Virginia.
were: Maryland, Massachusetts, North Carolina, and New Hampshire. Thirty-four percent of the total U.S. population lived in these states. Clauses forbidding Ex Post Facto Laws applied to forty percent of the Southern states, and forty percent of all Southerners lived in these states. In contrast, twenty-five percent of the Northeastern states had state constitutional clauses forbidding the enactment of ex post facto laws. Twenty-eight percent of all Northeasterners lived in these states. Maryland’s constitution, for example, stated: “That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no ex post facto law ought to be made.”

Both Pennsylvania and South Carolina adopted clauses forbidding the enactment of ex post facto laws in 1790. Therefore, despite the fact that Vermont’s constitution did not include such a provision, between 1787 and 1791, the number of states forbidding ex post facto laws rose from four to six, and the percentage of states with such a provision rose from thirty-one percent to forty three per cent. While only thirty-four percent of the population was protected from ex post facto laws in 1787, this number had increased over the majority mark, to fifty-one percent, in 1791. In the South, the percentage of states and population with such a provision rose from forty percent in 1787 to sixty percent and fifty-four percent, respectively, in 1791. In the Northeast, the percentage of states with such a provision rose from twenty-five percent, or twenty-eight percent of the population, in 1787, to thirty-three percent of states and fifty-nine percent of the population in 1791.

2. Retroactive Civil Laws

149 MD. CONST. of 1776, Declaration of Rights § 15.
150 PA. CONST. of 1790, art. IX, § 17.
151 S.C. CONST. of 1790, art. IX, § 2.
152 In 1787, the four states with constitutional provisions forbidding ex post facto laws were Maryland, Massachusetts, North Carolina, and New Hampshire.
Only New Hampshire had a constitutional clause prohibiting retroactive civil laws. Today, the terms “retroactive laws” or “retrospective laws” are understood to be the civil counterparts of ex post facto laws. Thus, although many of the ex post facto laws in 1787 used the term “retrospective,” only New Hampshire explicitly used that term to prevent the retroactive application of civil laws. The New Hampshire clause read: “Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offences.”

Vermont did not adopt a provision regarding retroactive civil laws. Therefore, in 1791, New Hampshire remained the only state to have such a provision. The sheer addition of Vermont as a state led the percentage of states with such a provision to decline marginally, from eight percent in 1787 to seven percent in 1791. The percentage of the population protected from such laws remained the same at four percent.

3. Bills of Attainder

Four states, or thirty-one percent of the total number of states comprising thirty percent of the population in 1787 prohibited bills of attainder in their constitutions. These states were: Maryland, Massachusetts, New Hampshire, and New York. This protection was more common in the Northeast, where thirty-eight percent of the states comprising forty-seven percent of the population had bill of attainder clauses. In the South, twenty percent of the states comprising eighteen percent of the population had similar clauses. The four state clauses used varied phrasing. For example Maryland’s stated that “no law, to attaint particular persons of treason or

153 N.H. CONST. of 1784, art. XXIII.
felony, ought to be made in any case, or at any time hereafter” and New York’s read: “And that no acts of attainder shall be passed by the legislature of this State for crimes, other than those committed before the termination of the present war; and that such acts shall not work a corruption of blood.”

In 1790, both Pennsylvania and South Carolina adopted clauses forbidding bills of attainder. While Vermont did not adopt such a provision, the number of state constitutions containing such a provision rose from four to six between 1787 and 1791, and the corresponding percentage of the number of states with such a provision rose from thirty-one percent to forty-three percent. In 1787, thirty percent of the national population was protected from bills of attainder; by 1791, that percentage had grown to fifty percent. In the Northeast, the percentage of states and population with the protection rose from thirty-eight percent and forty-seven percent, respectively, in 1787, to forty-four percent and sixty-seven percent in 1791. In the South, the percentages increased from twenty percent of the states comprising eighteen percent of the population recognizing the provision in 1787, to forty percent of the states comprising thirty-two percent of the population recognizing it in 1791.

4. Corruption of Blood

New York was the only state with an explicit constitutional prohibition against laws permitting corruption of blood. Nine percent of the total U.S. population and eighteen percent of the Northeastern population lived in New York. New York’s state constitution provided: “And that no acts of attainder shall be passed by the legislature of this State for crimes, other than

154 MD. CONST. of 1776, Declaration of Rights § 16.
155 MASS. CONST. of 1780, Pt. 1, art. XXV.
156 PA. CONST. of 1790, art. IX, § 18.
157 S.C. CONST. of 1790, art. IX, § 2.
158 In 1787, the four states with constitutional provisions forbidding bills of attainder were Maryland, Massachusetts, New Hampshire, and New York.
those committed before the termination of the present war; and that such acts shall not work a corruption of blood.”\textsuperscript{159}

In 1790, Pennsylvania became the second state, after New York, to adopt a constitutional prohibition against laws permitting corruption of blood.\textsuperscript{160} Therefore, between 1787 and 1791, the percentage of states with clauses regarding corruption of blood rose from eight percent, or nine percent of the national population, to fourteen percent, or twenty-one percent of the national population. Both of the states with provisions pertaining to corruption of blood were in the Northeast, leading the percentage of states in that region with such provisions to increase from thirteen percent of the states and eighteen percent of the population to twenty-two percent of the states and forty percent of the population.

5. Treason

Massachusetts had a unique constitutional provision in 1787 which read: "No subject ought, in any case, or in any time, to be declared guilty of treason or felony by the legislature."\textsuperscript{161} Massachusetts made up thirteen percent of the Northeastern states and twenty-one percent of the Northeastern population. It contained ten percent of the national population. This state constitutional ban on treason prosecutions undoubtedly reflects the many unjust treason prosecutions that were commonplace in Tudor and Stuart England.

When Vermont’s admission to the Union, it became the second state, after Massachusetts, to have a constitutional ban on legislative acts penalizing treason.\textsuperscript{162} Whereas eight percent of the states with ten percent of the total national population had such clauses, in 1787, fourteen

\textsuperscript{159} N.Y. CONST. of 1777, art. XLI.
\textsuperscript{160} PA. CONST. of 1790, art. IX, § 19.
\textsuperscript{161} MASS. CONST. of 1780, Pt. 1, art. XXV.
\textsuperscript{162} VT. CONST. of 1786, Ch. II, § 17.
percent of the states with twelve percent of the total population had such bans in 1791. Both Massachusetts and Vermont are in the Northeast, which increased the percentage of states in that region with clauses banning treason from thirteen percent in 1787 to twenty-two percent in 1791, and raised the percentage of the Northeastern population recognizing the ban from twenty-one percent to twenty-four percent.

6. Notable Absences from Criminal and Civil Procedure Rights Later Enumerated in the Original Constitution

a. Impairment of Contracts

There were no state constitutional clauses prohibiting the impairment of contracts in 1787. However, in 1790, both Pennsylvania\(^{163}\) and South Carolina\(^{164}\) adopted constitutional clauses that forbade the passage of any law that would impair contracts. Thus, in 1791, fourteen percent of the states had such a provision, securing the right for eighteen percent of the population. Pennsylvania’s population comprised twenty-two percent of the Northeast’s population at that time; South Carolina’s population was fourteen percent of the South’s.

viii. Property Rights

1. Takings Clauses

Five states total comprising thirty-eight percent of the number of states in the Union had takings clauses in their state constitutions in 1787 protecting private property rights from being taken by the government without just compensation. Fifty-eight percent of the total U.S. population lived in states that had takings clauses in their state constitutions in 1787. These

\(^{163}\) PA. CONST. of 1790, art. IX, § 17.

\(^{164}\) S.C. CONST. of 1790, art. IX, § 2.
states were: Massachusetts, North Carolina, New Hampshire, Pennsylvania, and Virginia. In the South, forty percent of the states had such clauses in their constitutions, while sixty-four percent of the population lived in states that had such clauses in their constitutions. In contrast, in the Northeast takings clauses were found in thirty-eight percent of the states where fifty-two percent of all Northerners lived. Virginia’s takings clause was typical. It provided “that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected.”\footnote{VA. CONST. of 1776, Bill of Rights § 6.} Massachusetts’s clause was the only one to mention reasonable compensation.\footnote{“But not part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people . . . and whenever the public exigencies require that the property of an individual should be appropriated to public use, he shall receive a reasonable compensation therefor.” MA. CONST. of 1780, Part 1, Art. 10.}

Vermont adopted two clauses requiring that all takings be compensated and authorized by citizens’ representatives.\footnote{VT. CONST. of 1786, Dec. of Rights, § 2, §11.} Therefore, in 1791, the number of states with takings clauses rose from five to six, and the percentage of states with such provisions rose from thirty-eight percent, comprising fifty-eight percent of the national population, to forty-three percent of states, comprising fifty-nine percent of the population. While the percentage of Southern states (40%) and population (64%) with the protection remained the same, the percentage of Northeastern states with the right increased from thirty-eight percent, comprising fifty-two percent of the Northeastern population, in 1787, to forty-four percent of states, comprising fifty-four percent of the population, in 1791.

2. \textbf{Monopolies}

Two Southern states—Maryland and North Carolina—prohibited the granting of
monopolies in their state constitutions. These two states made up forty percent of both the Southern states and the Southern state population, and twenty percent of the national population. Maryland’s constitution stated: "That monopolies are odious, contrary to the spirit of a free government, and the principles of commerce; and ought not to be suffered"\textsuperscript{168} and North Carolina’s read: “That perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.”\textsuperscript{169}

Vermont did not adopt a provision prohibiting monopolies, which means that, between 1787 and 1791, the number of states with such a provision remained fixed at two.\textsuperscript{170} This resulted in a marginal drop in the percentage of states and populations whose constitutions prohibited monopolies, from fifteen percent of the states and twenty percent of the national population in 1787 to fourteen percent of the states and nineteen percent of the national population in 1791.

3. **Legal Recourse**

Three states, or twenty-three percent, had clauses in their state constitutions providing a right to legal recourse. Twenty three percent of Americans lived in those states, which were: Maryland, Massachusetts, and New Hampshire. Twenty percent of Southern states with eighteen percent of the Southern population had such a right. A right to legal recourse existed in twenty-five percent of the Northeastern states wherein twenty-eight percent of the Northeastern population resided. A typical clause, found in the New Hampshire constitution, read:

> Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property or

\textsuperscript{168} MD. CONST. of 1776, Declaration of Rights § 39.
\textsuperscript{169} N.C. CONST. of 1776, Declaration of Rights § 23.
\textsuperscript{170} The two states with constitutional provisions prohibiting monopolies were Maryland and North Carolina.
character, to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws.\textsuperscript{171}

In 1790, Pennsylvania adopted a clause which, while not using the term “legal recourse,” guaranteed much the same thing. Pennsylvania’s clause said: “That all courts shall be open, and every man, for an injury done him in his lands, goods, person, or reputation, shall have remedy by the due course of law, and right and justice administered without sale, denial, or delay.”\textsuperscript{172} Vermont adopted a clause similar to that of New Hampshire,\textsuperscript{173} resulting, in 1791, in five of the state constitutions containing such a provision, where only three constitutions had protected a right to legal recourse in 1787.\textsuperscript{174} By 1791, the percentage of states recognizing such a right had risen from twenty-three percent of the states comprising twenty-three percent of the population to thirty-six percent of the states comprising thirty-seven percent of the population. This widened the gap between Northeastern and Southern states recognizing the right, with the percentage of Southern states and population guaranteeing a right to legal recourse remaining at twenty percent comprising eighteen percent of the population, respectively, but with the percentage of Northeastern states guaranteeing the right increasing from twenty-five percent comprising twenty-eight percent of the population in 1787 to forty-four percent comprising fifty-four percent of the population in 1791.

4. Property Escheat

North Carolina was the only state to prohibit property escheat. The state contained

\footnotesize{\textsuperscript{171} N.H. CONST. of 1784, art. I, § 14. \\
\textsuperscript{172} PA. CONST. of 1790, art. IX, § 11. \\
\textsuperscript{173} VT. CONST. of 1786, Dec. of Rights, § 4. \\
\textsuperscript{174} The three states protecting a right to legal recourse in 1787 were Maryland, Massachusetts, and New Hampshire.}
eleven percent of the national population and twenty-two percent of the Southern population, and comprised twenty percent of Southern states. The relevant clause stated: “That the future Legislature of this State shall regulate entails, in such a manner as to prevent perpetuities.”

In 1790, Georgia became the second state, after North Carolina, to adopt a clause prohibiting property escheat, stating:

> Estates shall not be entailed; and when a person dies intestate, leaving a wife and children, the wife shall have a child's share, or her dower, at her option; if there be no wife, the estate shall be equally divided among the children and their legal representatives of the first degree. The distribution of all other intestate estates may be regulated by law.

Vermont became the third such state in 1791, with its admission to the union. Vermont adopted a provision similar to North Carolina’s. Therefore, in 1791, three states, or twenty-one percent, prohibited property escheat, comprising fifteen percent of the population; whereas in 1787, these numbers were eight percent of the states comprising eleven percent of the population. The percentage of Southern states with a prohibition of property escheat rose from twenty percent, comprising twenty-two percent of the population, in 1787, to forty percent comprising twenty-seven percent of the population, in 1791. Vermont, the lone Northeastern state prohibiting property escheat, represented seven percent of the Northeastern states comprised four percent of the Northeastern population.

5. Property as Supreme Right

North Carolina’s constitution contained a right designating property as one of the “essential” rights. North Carolina constituted twenty percent of the Southern states and

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175 N.C. CONST. of 1776, art. XLIII.
176 GA. CONST. of 1789, art. IV, § 6.
177 VT. CONST. of 1786, Ch. 2, § 33.
comprised twenty-two percent of the Southern population, and eleven percent of the national population, in 1787. The clause in question reads:

The property of the soil, in a free government, being one of the essential rights of the collective body of the people, it is necessary, in order to avoid future disputes, that the limits of the State should be ascertained with precision. Provided always, That this Declaration of Rights shall not prejudice any nation or nations of Indians, from enjoying such hunting-grounds as may have been, or hereafter shall be, secured to them by any former or future Legislature of this State.  

Between 1787 and 1791, none of the states adopted a clause regarding property as a supreme right. Vermont’s constitution did not contain such a provision. Therefore, in 1791, North Carolina remained the only state with a provision regarding property as a supreme right. Because of Vermont’s admission as a state in 1791, North Carolina accounted for a smaller percentage of the total states, seven percent rather than eight percent in 1787. However, the percentage of the population recognizing a constitutional clause providing for property as a supreme right remained eleven percent in both periods. The Southern numbers also remained the same: North Carolina still constituted twenty percent of the Southern states and twenty-two percent of the Southern population.

6. Suicide

New Hampshire and New Jersey, both Northeastern states, had clauses protecting the property rights of heirs of individuals who committed suicide. These states represented fifteen percent of all states comprising nine percent of the national population, and twenty percent of Northeastern states comprising eighteen percent of the Northeastern population. The two states’

178 N.C. CONST. of 1776, Declaration of Rights § 25.
clauses were nearly identical, with New Jersey’s stating:

That the estates of such persons as shall destroy their own lives, shall not, for that offence, be forfeited; but shall descend in the same manner, as they would have done, had such persons died in the natural way; nor shall any article, which may occasion accidentally the death of any one, be henceforth deemed a deodand, or in anywise forfeited, on account of such misfortune.  

In 1790, Pennsylvania adopted a clause pertaining to suicide, and Vermont had such a clause in 1791. With Vermont’s acceptance as a state, the number of states stipulating that in cases of suicide, property should descend in the same manner it would have otherwise rose from two to four. This meant that between 1787 and 1791, the percentage of state constitutions containing such a provision rose from fifteen percent, comprising nine percent of the national population, to twenty-nine percent, comprising twenty-three percent of the population. All of the states with constitutional provisions regarding suicide were in the Northeast, resulting, in 1791, in forty-four percent of the Northeastern states comprising forty-four percent of the population recognizing such provisions.

7. Notable Absences from Property Rights

No State in 1787 or 1791 had a constitutional clause pertaining to property rights of married women similar to the clauses we found to that effect in state constitutions in 1868. In 1790, Pennsylvania became the first state to adopt a clause regarding suits against the state. The provision read, “Suits may be brought against the commonwealth in such manner, in such courts,

179 N.J. CONST. of 1776, art. XVII.
180 PA. CONST. of 1790, art. IX, § 19.
181 VT. CONST. of 1786, Ch. 2, § 35.
182 The two states with constitutional clauses pertaining to suicide in 1787 were New Hampshire and New Jersey.
and in such cases as the legislature may by law direct.” This clause seems to allow the state legislature to waive state sovereign immunity. By 1791, Pennsylvania represented seven percent of the states comprising twelve percent of the general population. It represented eleven percent of the Northeastern states comprising twenty-two percent of the Northeastern population.

ix. Juries and Grand Juries

1. Criminal Jury

Seven states, or fifty-four percent of the total number of states comprising sixty-nine percent of the population, a majority by both counts, recognized a constitutional right to trial by jury in criminal cases. These states were: Georgia, Maryland, North Carolina, New Jersey, New York, Pennsylvania, and Virginia. In the South, the right was found in eighty percent of the states comprising eighty-six percent of the population. In the Northeast, it was found in thirty-eight percent of the states comprising fifty-two percent of the population. North Carolina, for instance, guaranteed the following constitutional right to its people: “That no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men in open court, as heretofore used.”

Both South Carolina and Vermont adopted provisions generally guaranteeing the right to a trial by jury. South Carolina’s clause linked trial by jury to freedom of the press, stating, “The trial by jury, as heretofore used in this State, and the liberty of the press, shall be forever

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183 PA. CONST. of 1790, art. IX, § 11.
184 Maryland’s constitution was the least clear as to whether there was a criminal jury right as well as a civil jury right. It read: “That the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law, and to the benefit of such of the English statutes, as existed at the time of their first emigration, and which, by experience, have been found applicable to their local and other circumstances, and of such others as have been since made in England, or Great Britain, and have been introduced, used and practised by the courts of law or equity[.]” MA. CONST. of 1776, Declaration of Rights § 3.
185 N.C. CONST. of 1776, Declaration of Rights § 9. Note that the clause only guarantees a criminal jury trial to freemen. The other seven states with criminal jury trial rights do not make the same distinction.
inviolably preserved.” 186 Vermont’s clause enforced the idea of a jury’s role as the finder of fact, stating, “That when an issue in fact, proper for the cognizance of a jury, is joined in a court of law, the parties have a right to a trial by jury; which ought to be held sacred.” 187 Therefore, between 1787 and 1791, the number of states protecting the right to a jury trial in criminal cases rose from seven to nine. 188 The percentage of states guaranteeing a right to criminal trial by jury rose from fifty-four percent in 1787 to sixty-four percent in 1791, corresponding to sixty-nine percent and seventy-six percent of the population, respectively. The percentage of Southern states recognizing a right to a criminal trial by jury rose from eighty percent, with eighty-six percent of the population, in 1787, to one hundred percent in 1791. The percentage of Northeastern states recognizing the right rose from thirty-eight percent, with fifty-two percent of the population, in 1787, to forty-four percent of the states, with fifty-four percent of the population in 1791.

2. Civil Jury

The right to a civil jury trial, found in nine of the thirteen state constitutions, was one of the most prevalent rights. It was found in sixty-nine percent of the total number of state constitutions and was enjoyed by seventy-one percent of the population, a huge supermajority by both counts. These states were: Georgia, Maryland, Massachusetts, North Carolina, New Hampshire, New Jersey, New York, Pennsylvania, and Virginia. In the South, the right to a civil jury was found in eighty percent of the states comprising eighty-six percent of the Southern population. In the Northeast, the right was found in sixty-three percent of the states comprising

186 S.C. CONST. of 1790, art. IX, § 6.
188 In 1787, the seven states guaranteeing the right to a trial by jury in criminal cases were Georgia, Maryland, North Carolina, New Jersey, New York, Pennsylvania, and Virginia.
eighty-percent of the Northeastern population. New Hampshire, for example, had the following constitutional guarantee:

In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless in causes arising on the high seas, and such as relate to mariners wages, the legislature shall think it necessary hereafter to alter it. 189

Between 1787 and 1791, South Carolina190 and Vermont191 both adopted clauses that protected a citizen’s right to a jury in criminal and civil trials alike. Therefore, in 1791 the number of states guaranteeing the right to a jury in a civil trial rose from nine to an impressive eleven—an Article V three-quarters consensus.192 Consequently, the percentage of states guaranteeing the right rose from sixty-nine percent to seventy-nine percent; and, while seventy-one percent of the population lived in states that granted that right in 1787, the number rose to ninety percent in 1791. In the South, the percentage of states guaranteeing a right to a civil jury trial rose from eighty percent, comprising eighty-six percent of the population, in 1787, to one hundred percent in 1791. In the Northeast, the percentage of states guaranteeing the right rose from sixty-three percent, comprising eighty percent of the Northeastern population, in 1787, to sixty-six percent of states comprising eighty-one percent of the population, in 1791.

3. Grand Jury and By Information

North Carolina, in which eleven percent of Americans lived in 1787, prohibited criminal

189 N.H. CONST. of 1784, art. XX.
190 “The trial by jury, as heretofore used in this State, and the liberty of the press, shall be forever inviolably preserved.” S.C. CONST. of 1790, art. IX, § 6.
191 “That when an issue in fact, proper for the cognizance of a jury, is joined in a court of law, the parties have a right to a trial by jury; which ought to be held sacred.” V.T. CONST. of 1786, Dec. of Rights, § 14.
192 In 1787, the nine states guaranteeing the right to a jury in a civil trial were Georgia, Maryland, Massachusetts, North Carolina, New Hampshire, New Jersey, New York, Pennsylvania, and Virginia.
charges by information, stating “That no freeman shall be put to answer any criminal charge, but by indictment, presentment, or impeachment.” 193 Twenty-two percent of the Southern population lived in North Carolina at the time. Although no state had a clause explicitly discussing grand juries, prohibitions on prosecutions by information implicitly require a grand jury indictment as the only alternative. 194

While no state adopted a provision specifically referring to the grand jury between 1787 and 1791, Pennsylvania adopted a ‘by information’ clause in 1790, becoming the second state, after North Carolina, to do so. Unlike North Carolina’s ‘by information’ clause, Pennsylvania’s clause provided several caveats, stating, “That no person shall, for any indictable offence, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, or, by leave of the court, for oppression and misdemeanor in office.” 195 Therefore, in 1791 the percentage of states with a ‘by information’ clause rose from eight percent to fourteen percent, comprising eleven percent and twenty-two percent of the population, respectively. The percentage of Southern states with ‘by information’ clauses remained fixed at twenty percent of states, comprising twenty-two percent of the Southern population, while the percentage of Northeastern states with the provision rose to eleven percent, comprising twenty-two percent of the Northeastern population.

4. Martial Law

New Hampshire and Maryland had constitutional bans on subjecting civilians to martial law. These states made up fifteen percent of the states comprising thirteen percent of the

193 N.C. CONST. of 1776, Declaration of Rights § 8.
195 PA. CONST. of 1790, art. IX, § 10.
population in 1787. New Hampshire comprised eight percent of the Northeastern population and Maryland comprised eighteen percent of the Southern population. Maryland’s clause stated, for example, "[t]hat no person, except regular soldiers, mariners, and marines 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."\textsuperscript{196}

In 1786, Vermont adopted a constitutional ban on subjecting civilians to martial law.\textsuperscript{197} With Vermont’s admission as a state, the number of state constitutions containing such a ban rose from two to three, corresponding to percentages of fifteen percent of the states and thirteen percent of the population in 1787, and twenty-one percent of the states and fifteen percent of the population in 1791.\textsuperscript{198} In the South, the percentage of states banning the subjugation of civilians to martial law remained the same at twenty percent of the states and eighteen percent of the population. However, in the Northeast the percentage of states recognizing a ban on martial law increased from thirteen percent, with eight percent of the population, in 1787, to twenty-two percent, with twelve percent of the population, in 1791.

5. Trial Within the State

Four states, or thirty-one percent of the states comprising thirty-seven percent of the population, had constitutional rights to a trial within one’s own state, county or vicinage. These states were: Georgia, Massachusetts, New Hampshire, and Virginia. The right was found in forty percent of Southern states, comprising forty-six percent of the Southern population, and in twenty-five percent of Northeastern states comprising twenty-eight percent of the Northeastern

\textsuperscript{196} MD. CONST. of 1776, Declaration of Rights § 29.
\textsuperscript{197} VT. CONST. of 1786, Dec. of Rights, § 19.
\textsuperscript{198} In 1787, the two states with constitutional bans on subjecting civilians to martial law were New Hampshire and Maryland.
population. Georgia, for instance, had two separate guarantees, one stating that “[a]ll matters of breach of the peace, felony murder, and treason against the State to be tried in the county where the same was committed. All matters of dispute, both civil and criminal, in any county where there is not a sufficient number of inhabitants to form a court, shall be tried in the next adjacent county where a court is held”\(^{199}\) and another that “[a]ll causes and matters of dispute, between any parties residing in the same county, to be tried within the county.”\(^{200}\)

In 1790, Pennsylvania adopted a clause providing for trial within the vicinage;\(^{201}\) Vermont adopted a similar clause in 1786.\(^{202}\) Thus, between 1787 and 1791, the number of states with a provision regarding trial within the state or vicinage rose from four to six, and the percentage of states recognizing such a provision rose from thirty-one percent to forty-three percent.\(^{203}\) While thirty-seven percent of the population lived in states which recognized this right in 1787, by 1791, that figure had climbed to a near majority of fifty percent of the population. In the South, the percentage of states (40%) recognizing a right to a trial within the state remained the same and comprised 46% of the population; but, in the Northeast, the percentage of states recognizing the right rose from twenty-five percent of states, comprising 28% of the population, in 1787, to forty-four percent of states, comprising fifty-four percent of the population, in 1791.

6. Impartial Judge

Four states, or thirty-one percent of the states in 1787 comprising thirty-five percent of the population, had constitutional rights guaranteeing individuals an impartial judge. These

\(^{199}\) GA. CONST. of 1777, art. IXL.
\(^{200}\) GA. CONST. of 1777, art. XXXVII.
\(^{201}\) PA. CONST. of 1790, art. IX, § 9.
\(^{202}\) VT. CONST. of 1786, Dec. of Rights, § 23.
\(^{203}\) The four states guaranteeing a right to trial within the state in 1787 were Georgia, Massachusetts, New Hampshire, and Virginia.
states were Maryland, Massachusetts, New Hampshire, and Pennsylvania. This was one of the few rights that was more popular in the Northeast, where thirty-eight percent of the states comprising fifty-two percent of the population had the right. In the South, twenty percent of the states comprising eighteen percent of the population had rights to an impartial judge. New Hampshire’s constitution, for example, contained the following clause:

'It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, that the judges of the supreme (or superior) judicial court should hold their offices so long as they behave well; and that they should have honorable salaries, ascertained and established by standing laws.'

No state adopted a clause guaranteeing a right to an impartial judge between 1787 and 1791, and Vermont’s constitution did not contain such a provision, leaving the number of constitutions with such a provision at four. Vermont’s admission as a state did marginally diminish the percentage of states and population recognizing such a right: from thirty-one percent and thirty-five percent respectively, in 1787, to twenty-nine percent and thirty-four percent in 1791. It also slightly narrowed the gap between Northeastern and Southern states with the right. The percentage of Southern states with the right remained fixed at twenty percent of states, with eighteen percent of the population, while the percentage of Northeastern states with the right declined from thirty-eight percent, with fifty-two percent of the population, in 1787, to thirty-three percent, with forty-nine percent of the population, in 1791.

204 N.H. CONST. of 1784, art. XXXV.
205 The four states with a constitutional provision guaranteeing an impartial judge were Maryland, Massachusetts, New Hampshire, and Pennsylvania.
7. Jury Determines Law and Fact

Georgia’s constitution designated the jury as the judge of law and fact. Two percent of the national population and five percent of the Southern population lived in Georgia in 1787. The constitutional clause read:

The jury shall be judges of law, as well as of fact, and shall not be allowed to bring in a special verdict, but if all or any of the jury have any doubts concerning points of law, they shall apply to the bench, who shall each of them in rotation give their opinion.\textsuperscript{206}

Between 1787 and 1791, none of the states added a clause designating the jury as the finder of law and fact. Vermont’s constitution did not contain such a clause. This meant that in 1791, Georgia was still the only state with this type of provision. In 1791, Georgia accounted for seven percent of the states, whereas in 1787, it had accounted for eight percent. The corresponding percentage of the population affected by Georgia’s provision designating the jury as finder of law and fact did not change perceptibly, remaining at two percent. And, Georgia still represented twenty percent of the Southern states and comprised five percent of the Southern population.

8. Notable Absences from Juries and Grand Juries

Strikingly, no state guaranteed a right to indictment by a grand jury in either 1787 or 1791.

\textsuperscript{206} GA. CONST. of 1777, art. XLI.
x. Rights Against Excessive Punishments

1. Excessive Bail

Six states, or forty-six percent—a near majority, had constitutional clauses prohibiting excessive bail. Fifty-eight percent of the total U.S. population lived in these states, which were: Georgia, Maryland, North Carolina, New Hampshire, Pennsylvania, and Virginia. This prohibition was far more common in the South, where the right was enjoyed in eighty percent of the states and by eighty-six percent of the population, a supermajority by both counts. In the Northeast, only twenty-five percent of the states and thirty-one percent of the population had equivalent protections. Pennsylvania’s constitution, for instance, stated: "Excessive bail shall not be exacted for bailable offences: And all fines shall be moderate."\(^{207}\)

In 1790, South Carolina adopted a clause prohibiting excessive bail;\(^ {208}\) and, in 1786, Vermont adopted a similar provision.\(^ {209}\) Therefore, between 1787 and 1791, the number of state constitutions containing such a clause rose from six to eight.\(^ {210}\) In 1791, the number of states increased to a majority of fifty-seven percent of the states, comprising sixty-six percent of the population. The percentage of Northeastern states recognizing a protection against excessive bail increased from twenty-five percent of states, comprising thirty-one percent of the population, to thirty-three percent of states, comprising thirty-four percent of the population, while in the South, the percentage of states with such a provision increased from eighty percent to one hundred percent of states, comprising eighty-six percent and one hundred percent of the population, respectively.

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207 PA. CONST. 1776, Plan or Frame of Government § 29.
208 S.C. CONST. of 1790, art. IX, § 4.
209 VT. CONST. of 1786, Ch. 2, § 30.
210 In 1787, the six states with constitutional provisions prohibiting excessive bail were Georgia, Maryland, North Carolina, New Hampshire, Pennsylvania, and Virginia.
2. Excessive Fines

Seven states, or fifty-four percent of the states comprising sixty-nine percent of the population in 1787 had state constitutions prohibiting the imposition of excessive fines. These states were: Georgia, Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, and Virginia. Like excessive bail prohibitions, excessive fine prohibitions were more common in the South, where eighty percent of the states comprising eighty-six percent of the population had excessive fine clauses. In the Northeast, thirty-eight percent of the states comprising fifty-two percent of the population had excessive fine protections, making them more common in the Northeast than excessive bail protections. North Carolina’s constitution, for instance, stated: “That excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.”

In 1790, South Carolina also adopted a constitutional clause that prohibited excessive fines,211 which resulted in all of the Southern states’ constitutions containing such a provision. This marked an increase from 1787, when eighty percent of the Southern states, comprising eighty-six percent of the Southern population, had such protections.

Vermont adopted a clause regarding excessive fines, in 1786; however, unlike the other clauses prohibiting excessive fines, Vermont’s clause specified, “all fines shall be proportionate to the offences.”212 With Vermont’s admission as a state in 1791, the percentage of Northeastern states prohibiting excessive fines rose from thirty-eight percent of states comprising fifty-two percent of the population to forty-four percent of states comprising fifty-four percent of the population. Generally, the number of states recognizing the right rose from seven to nine, and

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211 S.C. CONST. of 1790, art. IX, § 4.
212 VT. CONST. of 1786, Ch. 2, § 29.
the percentage of states recognizing the right rose from fifty-four percent of the states comprising sixty-nine percent of the national population, in 1787, to sixty-four percent of the states comprising seventy-six percent of the population, in 1791.²¹³

3. Cruel and Unusual Punishments

Five states, or thirty-eight percent of the total number of states comprising fifty-four percent of the total U.S. population in 1787 had constitutional bans on cruel and unusual punishments. These states were: Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia. Cruel and Unusual Punishment Clauses were far more popular in the South, where they were found in sixty percent of the states, a majority, in which eighty-two percent of the population, a supermajority, resided. In the Northeast, twenty-five percent of the states comprising twenty-eight percent of the population, a minority by both counts, had prohibitions against cruel and unusual punishments. Some of the clauses prohibited cruel and unusual punishments, for example Virginia’s constitution read: “That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²¹⁴ Other clauses prohibited cruel or unusual punishments, which could be interpreted as offering a broader protection than the former version. Massachusetts’ constitution, for example, read: "No magistrate or court of law shall demand excessive bail or sureties, imposed excessive fines, or inflict cruel or unusual punishments."²¹⁵ Maryland’s constitution contained two separate clauses, one prohibiting “cruel and unusual” punishments and the other prohibiting “cruel or unusual”

²¹³ In 1787, the seven states with constitutional provisions prohibiting excessive fines were Georgia, Maryland, Massachusetts, North Carolina, New Hampshire, Pennsylvania, and Virginia.
²¹⁴ VA. CONST. of 1776, Bill of Rights § 9.
²¹⁵ MASS. CONST. of 1780, Pt. 1, art. XXVI.
punishments.\textsuperscript{216}

In 1790, both Pennsylvania\textsuperscript{217} and South Carolina\textsuperscript{218} adopted clauses that only forbade cruel punishment, and made no mention of unusual punishment. If these clauses are still regarded in the ‘Cruel and Unusual Punishment’ mold, then by 1791, the number of state constitutions with clauses regarding cruel and unusual punishment had risen from five to seven, corresponding to fifty percent of the states and seventy-two percent of the population in 1791.\textsuperscript{219} The percentage of Southern states recognizing prohibitions against cruel and unusual punishment rose from sixty percent, with eighty-two percent of the population, in 1787, to eighty percent of states and ninety-five percent of the population, in 1791. In the Northeast, the percentage of states and population recognizing the protection rose from twenty-five percent and twenty-eight percent respectively, in 1787, to thirty-three percent and forty-nine percent in 1791.

4. Proportionality

Three states at the time of the Founding—New Hampshire, Pennsylvania, and South Carolina—comprising twenty-three percent of the total number of states and twenty-three percent of the total U.S. population, had constitutional clauses mandating that penalties be proportionate to the crimes for which they were imposed. This is important because the Supreme Court remains closely divided down to the present day on whether the Eighth Amendment to the U.S. Constitution has a proportionality requirement. Proportionality clauses were found in twenty percent of the Southern states and twenty-five percent of the Northeastern states and applied to fourteen percent and thirteen percent of the regional populations, respectively. New

\begin{footnotes}
\textsuperscript{216} MD. CONST. of 1776, Declaration of Rights §§ 14, 22.
\textsuperscript{217} PA. CONST. of 1790, art. IX, § 13.
\textsuperscript{218} S.C. CONST. of 1790, art. IX, § 4.
\textsuperscript{219} The five states prohibiting cruel and unusual punishments in 1787 were Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia.
\end{footnotes}
Hampshire’s clause, for example, read:

All penalties ought to be proportioned to the nature of the offence. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offences; the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye: For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind.  

In 1786, Vermont adopted a constitutional clause regarding proportionality of punishment; however, the provision related specifically and solely to fines. If this provision is included with the other constitutional provisions regarding proportionality, then, in 1791, the number of state constitutions containing such a provision rose from three to four. In 1787, twenty-three percent of the states and population had provisions regarding proportionality; in 1791, these numbers rose to twenty-nine percent of the states and twenty-four percent of the population. While the percentage of Southern states (20%) and population (14%) with the protection remained the same, the percentage of Northeastern states recognizing the protection increased from twenty-five percent of states, comprising thirty-one percent of the Northeastern population, in 1787, to thirty-three percent of states comprising thirty-four percent of the Northeastern population, in 1791.

5. Sanguinary Laws

Three states, Maryland, New Hampshire, and South Carolina, making up twenty-three percent of the total number of states and comprising twenty percent of the population in 1787,

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220 N.H. CONST. of 1784, art. XVIII.
221 VT. CONST. of 1786, Ch. 2, § 29.
222 In 1787, the three states with constitutional provisions pertaining to proportionality of punishment were New Hampshire, Pennsylvania, and South Carolina.
had constitutional bans on sanguinary laws. These states made up forty percent of the Southern states comprising thirty-two percent of the Southern population, and thirteen percent of the Northeastern states comprising eight percent of the Northeastern population. Maryland’s constitution, for example, stated: “That sanguinary laws ought to be avoided, as far as is consistent with the safety of the State: and no law, to inflict cruel and unusual pains and penalties, ought to be made in any case, or at any time hereafter.”

Vermont adopted a provision that stated that in order “to make sanguinary punishment less necessary, means ought to be provided for punishing by hard labour.” While not an outright ban on sanguinary laws, the clause is at least as strongly worded as similar provisions in other states’ constitutions, which stated that sanguinary laws should be “avoided.” If Vermont’s clause is considered a prohibition on sanguinary laws, then in 1791 the number of states with such provisions rose from three to four. The percentage of states with bans on sanguinary laws increased from twenty-three percent comprising twenty percent of the population in 1787 to twenty-nine percent comprising twenty-one percent of the population, in 1791. The percentage of Southern states and population with such bans was unaltered: forty percent and thirty-two percent respectively, still recognized such a provision, but the percentage of Northeastern states with bans on sanguinary laws increased from thirteen percent comprising eight percent of the population, in 1787, to twenty-two percent of states comprising twelve percent of the population in 1791.

6. Imprisonment for Debt

223 MD. CONST. of 1776, Declaration of Rights § 14.
224 VT. CONST. of 1786, Ch. 2, § 34.
225 The three states with constitutional bans on sanguinary laws in 1787 were Maryland, New Hampshire, and South Carolina.
Two states, North Carolina and Pennsylvania, constitutionally prohibited imprisonment for debt. Together they represented fifteen percent of the total number of states comprising twenty-three percent of the national population in 1787. At the time, North Carolina had twenty-two percent of the Southern population and Pennsylvania had twenty-four percent of the Northeastern population. The two states had almost identical clauses, with Pennsylvania’s reading:

The person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison, after delivering up, bona fide, all his estate real and personal, for the use of his creditors, in such manner as shall be hereafter regulated by law. All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or presumption great. 226

Vermont adopted a constitutional clause prohibiting imprisonment for debt in 1786, 227 and with its admission as a state in 1791 the number of state constitutions containing such prohibitions rose from two to three. 228 In 1787, fifteen percent of the states comprising twenty-three percent of the population prohibited imprisonment for debt; in 1791, these percentages rose to twenty-one percent and twenty-five percent, respectively. In the South, the percentages of states and population recognizing such prohibitions remained the same: twenty percent of the Southern states comprising twenty-two percent of the Southern population forbade imprisonment for debt; while in the Northeast, the percentages increased from thirteen percent of the states comprising twenty-four percent of the population in 1787, to twenty-two percent of the states comprising twenty-seven percent of the population in 1791.

7. Notable Absences from Rights Against Excessive Punishments

226 PA. CONST. 1776, Plan or Frame of Government § 28.
227 VT. CONST. of 1786, Ch. 2, § 30.
228 In 1787, the two states with constitutional prohibitions on imprisonment for debt were North Carolina and Pennsylvania.
None of the 1787 or 1791 constitutions contained any rights pertaining to witness detention, corporal punishment, whipping, penal principles, or prisoners rights. All of these subjects were addressed in state constitutions in 1868 but had apparently not yet been addressed at the time of the Founding.

xi. State Constitutional Acknowledgement of the Existence of Unenumerated or Natural Rights

1. State Constitutional Law Recognition of Natural and Inalienable Rights

Six states explicitly affirmed the existence of natural and inalienable rights in their constitutions. These states—Georgia, Virginia, New York, New Hampshire, Massachusetts, and Pennsylvania—made up forty-six percent of the total number of states representing fifty-eight percent of the total U.S. population in 1787. A substantial majority of Americans lived in states with constitutions that affirmed the existence of natural and inalienable rights. Clauses protecting such rights were more common in the Northeast, where fifty percent of the states comprising seventy percent of the population had them. In the South, forty percent of the states comprising forty-six percent of the population had constitutions acknowledging natural and inalienable rights. The wording of these clauses varied between states. Virginia’s constitution, for instance, stated:

That all men are by nature free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.\footnote{\textit{VA. CONST.} of 1776, Bill of Rights § 1.}
New Hampshire, in comparison, had the following clause in its constitution:

> Among the natural rights, some are in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the Rights of Conscience.\textsuperscript{230}

Three states—New Hampshire, Massachusetts, and Pennsylvania—each had two or three separate clauses recognizing the existence of natural and inalienable rights.

Vermont also chose to guarantee natural and inalienable rights in two separate constitutional clauses,\textsuperscript{231} one of which linked natural and inalienable rights to the state’s prohibition of slavery.\textsuperscript{232} With Vermont’s admission as a state, the number of state constitutions recognizing natural and inalienable rights rose from six to seven, and the percentage of state constitutions containing such provisions rose from forty-six percent of the total number of states comprising fifty-eight percent of the population to fifty percent of the total number of states comprising fifty-nine percent of the population.\textsuperscript{233} The percentage of Southern constitutions protecting natural and inalienable rights remained fixed at forty percent of the states comprising forty-six percent of the Southern population. The percentage of Northeastern state constitutions protecting such rights during the same period rose from fifty percent of the states comprising seventy percent of the Northeastern population to comfortably above the majority mark at fifty-five percent of states comprising seventy-two percent of the population.

\section*{2. Fundamental Principles}

Six states, or forty-six percent of the total number of states and a huge sixty-seven

\begin{itemize}
\item \textsuperscript{230} N.H. CONST. of 1784, art. I, § 4.
\item \textsuperscript{231} VT. CONST. of 1786, Preamble; VT. CONST. of 1786, Dec. of Rights, § 1.
\item \textsuperscript{232} VT. CONST. of 1786, Dec. of Rights, § 1.
\item \textsuperscript{233} In 1787, the six states with constitutional provisions protecting natural and inalienable rights were Georgia, Virginia, New York, New Hampshire, Massachusetts, and Pennsylvania.
\end{itemize}
percent supermajority of the population, encouraged frequent recurrence to fundamental principles in their state constitutions in 1787. These states were: Virginia, Massachusetts, North Carolina, New York, New Hampshire, and Pennsylvania. In the South, this accounted for forty percent of the states comprising sixty-four percent of the population. In the Northeast, fifty percent of the states comprising seventy percent of the population had constitutional clauses that referred to fundamental principles. New Hampshire’s constitution, for instance, stated:

A frequent recurrence to the fundamental principles of the Constitution, and a constant adherence to justice, moderation, temperance, industry, frugality, and all the social virtues, are indispensably necessary to preserve the blessings of liberty and good government; the people ought, therefore, to have a particular regard to all those principles in the choice of their officers and representatives: and they have a right to require of their law-givers and magistrates, an exact and constant observance of them in the formation and execution of the laws necessary for the good administration of government.234

Vermont adopted a provision encouraging frequent recurrence to fundamental principles in its state constitution in 1786.235 Therefore, with Vermont’s admission as a state, in 1791, the number of state constitutions with fundamental principles clauses rose from six, or forty-six percent of the total number of state constitutions, to seven, or fifty percent of the total number of state constitutions.236 The percentage of the population living in such states rose from sixty-seven percent to sixty-eight percent. And, while the percentage of Southern states and population recognizing fundamental principles in their states constitutions remained at forty percent and sixty-four percent, respectively, the percentage of Northeastern state constitutions referencing fundamental principles rose from fifty percent of states and seventy percent of the Northeastern population, in 1787, to fifty-five percent of states and seventy-two percent of the

234 N.H. CONST. of 1784, art. XXXVIII.
236 In 1787, the six states with constitutional provisions urging frequent recurrence to fundamental principles were Virginia, Massachusetts, North Carolina, New York, New Hampshire, and Pennsylvania.
population, in 1791.

3. Tenth Amendment Analogs

Massachusetts and New Hampshire, together comprising fifteen percent of the total number of states and fourteen percent of the total U.S. population in 1787, had analogs to the Tenth Amendment of the United States Constitution that reserved for the states any power not expressly delegated to the United States. This is significant because James Madison knowingly and deliberately omitted the word “expressly” from the Tenth Amendment to the U.S. Constitution. These two Northeastern states made up twenty-five percent of the states and twenty-eight percent of the population in that region. The clauses were almost identically worded, with Massachusetts’ stating:

The people of this commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter be, by them expressly delegated to the United States of America, in Congress assembled.237

Between 1787 and 1791, none of the states added a tenth amendment analog to its constitution. Vermont’s constitution did not contain such a provision. Therefore, in 1791, Massachusetts and New Hampshire remained the only states with tenth amendment analogs. This led to a marginal reduction in the percentage of states recognizing the right: Massachusetts and New Hampshire accounted for fifteen percent of the states in 1787 and fourteen percent of the states in 1791. The general population protected by the right, however, remained at fourteen percent. There was also a small reduction in the percentage of the Northeastern states

237 MASS. CONST. of 1780, Pt. 1, art. IV.
recognizing the right: the two states accounted for twenty-five percent of the Northeastern states and twenty-eight percent of the Northeastern population in 1787; they accounted for twenty-two percent of the states and twenty-seven percent of the population in 1791.

4. Notable Absences from State Constitutional Acknowledgement of the Existence of Unenumerated or Natural Rights

Notably, even though many state constitutions had Ninth Amendment analogs in their State constitutions in 1868, not a single state had such an analog in 1787 or in 1791. A Ninth Amendment analog is a clause that essentially says that the enumeration of certain rights in a state constitution shall not be construed to deny or disparage other rights that may be retained by the people. The complete absence of Ninth Amendment analogs at the Founding even at a time when about half the states had clauses protecting natural and inalienable rights suggests to us that the Ninth Amendment language was not widely understood in 1791, when the Ninth Amendment was adopted, as being protective of natural and inalienable rights. Instead, it must have been intended to reiterate that the national government only had implied powers that were truly “necessary and proper.”

xii. Right to Travel

1. Immigration

Four states, or thirty-one percent of the total number of states comprising thirty-four percent of the total U.S. population recognized a constitutional right to freely immigrate into or
back to their home state. These states were: North Carolina, New York, Pennsylvania, and Rhode Island. Regionally, this breaks down to twenty percent of the Southern states comprising twenty-two percent of the Southern population and thirty-eight percent of the Northeastern states comprising forty-six percent of the Northeastern population. The right to immigrate was one of the very few rights set forth in Rhode Island’s charter. It read as follows:

[I]tt shall bee lawfull to and for the inhabitants of the sayd Colony of Providence Plantations, without let or molestation, to passe and repasse with freedome, into and through the rest of the English Collonies, vpon their lawfull and civill occassions, and to converse, and hold commerce and trade, with such of the inhabitants of our other English Collonies as shall bee willing to admitt them thereunto, they behaveing themselves peaceably among them.238

Vermont’s constitution provided a right to immigrate to the state that was comparable to the right in other state constitutions.239 This increased the number of states recognizing such a right from four to five. While North Carolina, representing twenty percent of the Southern states and twenty-two percent of the Southern population, remained the only Southern state to have a constitutional right to immigration, the percentage of Northeastern states with the right increased from thirty-eight percent of states and forty-six percent of the Northeastern population, in 1787, to forty-four percent of states and forty-eight percent of the population, in 1791.

2. Emigration

Two states, Pennsylvania and Rhode Island, gave non-residents the right to emigrate from their state. These states made up fifteen percent of the total number of states and twenty-five percent of the Northeast. The Pennsylvania Constitution’s clause, for example, stated: “That all

238 R.I. CHARTER of 1662, ¶ 10.
239 VT. CONST. of 1786, Ch. 2, § 36.
men have a natural inherent right to emigrate from one state to another that will receive them, or to form a new state in vacant countries, or in such countries as they can purchase, whenever they think that thereby they may promote their own happiness.”

In 1786, Vermont also adopted a provision allowing for free emigration from the state. Thus, in 1791, the number of states recognizing the right to freely emigrate grew from two to three. In 1787, fifteen percent of the states and fourteen percent of the population recognized a right of emigration; whereas by 1791, twenty-one percent of the states comprising sixteen percent of the population recognized this right. The right to emigrate continued to be one exclusively found in the Northeast, with the percentage of Northeastern states and population recognizing the right increasing from twenty-five percent and twenty-seven percent respectively, in 1787, to thirty-three percent and thirty-one percent in 1791.

xiii. Equality Rights

1. Equal Protection of the Laws Clauses

Two states, Massachusetts and Pennsylvania, had clauses in their state constitutions that we would today recognize as performing the function played in federal constitutional law by the equal protection doctrine. Together Massachusetts and Pennsylvania made up fifteen percent of the total number of states and they account for twenty-two percent of the total national population. Both states are in the Northeast, and they represented twenty-five percent of the Northeastern states and forty-four percent of the population of the Northeast. The two states used different wording in securing what was, in effect, the equal protection of the laws.

240 PA. CONST. 1776, Declaration of Rights § 15.
242 The two states protecting a right to emigrate in 1787 were Pennsylvania and Rhode Island.
Massachusetts’ constitution thus stated:

> No man, or corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural.\(^{243}\)

In comparison, Pennsylvania’s constitutional provision was much weaker and more ambivalent—reasonable minds may differ on whether this clause afforded equal protection of the laws. It read: “That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proposition towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto.”\(^{244}\)

Vermont’s 1786 territorial constitution contained a fairly strong equal protection-like clause stating that, “…it is our indispensable duty to establish such original principles of government as will best promote the general happiness of the people of this State, and their posterity, and provide for future improvements, without partiality for, or prejudice against, any particular class, sect, or denomination of men whatever.”\(^{245}\) With Vermont’s admission as a state in 1791, the number of states effectively providing for equal protection rose from two, representing fifteen percent of the states comprising twenty-two percent of the national population, to three, representing twenty-one percent of the states comprising twenty-four percent of the population.\(^{246}\) Equal protection clauses continued to be found exclusively in the Northeast, with twenty-five percent of the Northeastern states comprising forty-four percent of the Northeastern population possessing a constitutional right to equal protection of the laws in

\(^{243}\) MASS. CONST. of 1780, Pt. 1, art. VI.

\(^{244}\) PA. CONST. 1776, Declaration of Rights § 8.

\(^{245}\) VT. CONST. of 1786, Preamble.

\(^{246}\) In 1787, the two states with constitutional provisions providing for equal protection of the laws were Massachusetts and Pennsylvania.
1787, and thirty-three percent of the states comprising forty-seven percent of the population possessing such a right in 1791.

2. Privileges and Immunities Clauses

Remarkably, eight states, sixty-two percent of the total number of states, nearly a two-thirds super-majority, had privileges or immunities clauses in their state constitutions in 1787. These states were: Connecticut, Massachusetts, North Carolina, New Hampshire, New Jersey, New York, Rhode Island, and Virginia. Sixty-nine percent of the total U.S. population, or over a two-thirds super-majority, lived in states that had privileges and immunities clauses. Such clauses were among the most common individual rights protecting clauses in state constitutional law at the time. Privileges or immunities clauses were also among the few that were more common in the Northeast, where seventy-five percent of the states comprising seventy-three percent of the population had privileges and immunities clauses. In the South, forty percent of the states comprising sixty-four percent of the population lived under state constitutional regimes with such clauses. Massachusetts’s constitution provided: “And no 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 judgment of his peers, or the law of the land.”

"And no 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 judgment of his peers, or the law of the land."

The state of Connecticut, which had very few individual rights in its constitution at the time, nonetheless had the following clause:

[A]ll, and every the Subjects of Us, Our Heirs, or Successors, which shall go to inhabit within the said Colony, and every of their Children, which shall happen to be born there . . . shall have and enjoy all Liberties and Immunities of free and natural Subjects within any the Dominions of Us, Our Heirs or Successors, to all Intents, Constructions and Purposes whatsoever, as if they and

247 MASS. CONST. of 1780, Part 1, Art. 12.
every of them were born within the realm of *England*.248

In 1790, South Carolina adopted a clause regarding privileges and immunities. However, instead of guaranteeing the protection of *citizens’* privileges and immunities, South Carolina guaranteed the protection to “civil and religious societies” and corporations.249 If we include South Carolina’s clause as one guaranteeing privileges and immunities, then in 1791, the number of state constitutions containing privileges and immunities clauses increased from eight to nine.250 In 1787, sixty-two percent of the total number of states comprising sixty-nine percent of the population guaranteed some protection of privileges and immunities; in 1791, sixty-four percent of the total number of states comprising seventy-four percent of the general population recognized such a guarantee. South Carolina’s adoption of a privileges and immunities clause also shifted the balance between the Northeastern and Southern states, with the right becoming as prevalent in the South as in the Northeast. This occurred because Vermont’s admission as a state caused the right to become slightly less prevalent in the Northeast: in 1787, seventy-five percent of the Northeastern states comprising seventy-three percent of the Northeastern population had the right; in 1791, it belonged to sixty-seven percent of the states comprising seventy-percent of the population. At the same time, the percentage of Southern states with the right increased from forty percent of the states comprising sixty-four percent of the population in 1787 to sixty percent of the states comprising seventy-eight percent of the population in 1791.

It is perhaps not surprising that so many state constitutions would include privileges and immunities clauses at the Founding when one remembers that the Articles of Confederation, America’s governing national document prior to the Constitution, also contained a privileges and immunities clause. Such clauses doubled not only as guarantees of fundamental individual rights

248 CONN. Charter of 1662, ¶ 6.
249 S.C. CONST. of 1790, art. VIII, § 2.
250 The eight states with constitutional privileges and immunities clauses in 1787 were Connecticut, Massachusetts, North Carolina, New Hampshire, New Jersey, New York, Rhode Island, and Virginia.
but also served as equal protection clauses because they often forbade the giving of a lesser or
abridged set of privileges or immunities to one class of citizens as compared to another class of
citizens.

3. Feudalism

Three states, or twenty-three percent of the total number of states comprising forty-three
percent of the national population in 1787, had constitutional prohibitions against feudalism.
These states were: Massachusetts, North Carolina, and Virginia. This again is striking as a
matter of state anti-discrimination law. Prohibitions against feudalism were more common in the
South, where forty percent of the states comprising sixty-four percent of the population had such
protections. In the Northeast, only Massachusetts, in which twenty-one percent of the
Northeastern population resided, had a clause banning feudalism. Virginia’s anti-feudalism
clause, for example, read: “That no man, or set of men, are entitled to exclusive or separate
emoluments or privileges from the community, but in consideration of public services; which,
not being descendible, neither ought the offices of magistrate, legislator, or judge to be
hereditary.” 251 Massachusetts’s clause read: “No man, nor corporation, or association of men,
have any other title to obtain advantages, or particular and exclusive privileges, district from
those of the community, than what arises from the consideration of services rendered to the
public; and this title being in nature neither hereditary, nor transmissible to children, or
descendants, or relations by blood, the idea of a man born a magistrate, law-giver, or judge, is
absurd and unnatural.” 252

In 1790, South Carolina adopted a clause prohibiting feudalism that read, “The legislature

251 VA. CONST. of 1776, Bill of Rights § 4.
252 MASS. CONST. of 1780, Part 1, Art. 6.
shall, as soon as may be convenient, pass laws for the abolition of the rights of primogeniture, and for giving an equitable distribution of the real estate of intestates.”

Thus, between 1787 and 1791, the number of states with a provision prohibiting or limiting feudalism rose from three to four. In 1787, twenty-three percent of the states comprising forty-three percent of the national population recognized such a prohibition; in 1791, these numbers grew to forty-four percent of the states comprising forty-eight percent of the population. While the percentage of Northeastern states with the right declined slightly (due to Vermont’s admission as a state), from eight percent of states and twenty-one percent of the population, to seven percent of the states and twenty percent of the population, the percentage of Southern states with prohibitions against some form of feudalism increased from forty percent of states comprising sixty-four percent of the population in 1787 to sixty percent of the states comprising seventy-eight percent of the population in 1791.

4. No Titles of Nobility Clauses

Six states, or forty-six percent of the total number of state constitutions in 1787 comprising fifty-seven percent of the population, a relatively large proportion, had constitutional clauses prohibiting the granting of titles of nobility. These states were: Georgia, Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia. The clauses were far more common in the South, where eighty percent of the states comprising eighty-six percent of the population, a super-majority by both counts, prohibited titles of nobility. In the Northeast, only twenty-five percent of the states comprising twenty-eight percent of the population had similar constitutional limitations. Massachusetts, for example, had the following clause:

253 S.C. CONST. of 1790, art. X, § 5.
254 The three states with constitutional provisions prohibiting feudalism in 1787 were Massachusetts, North Carolina, and Virginia.
No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, law-giver, or judge, is absurd and unnatural.\textsuperscript{255}

Georgia’s constitution offered only a partial ban, which read as follows: “[N]or shall any person who holds any title of nobility be entitled to a vote, or be capable of serving as a representative, or hold any post of honor, profit, or trust in this State, whilst such person claims his title of nobility.”\textsuperscript{256}

In 1790, Pennsylvania\textsuperscript{257} and South Carolina\textsuperscript{258} both adopted clauses that forbade the state legislatures from granting titles of nobility. Thus, between 1787 and 1791, the number of states with prohibitions on titles of nobility rose from six to eight.\textsuperscript{259} While forty-six percent of the states and fifty-seven percent of the population had such prohibitions in 1787; a majority of fifty-seven percent of the states comprising a super-majority of seventy-four percent of the population recognized the no title of nobility rule in 1791. All of the Southern states in 1791 prohibited the granting titles of nobility, whereas eighty percent of the Southern states comprising eighty-six percent of the Southern population had prohibited such titles in 1787. In 1791 in the Northeast, thirty-three percent of the states comprising forty-nine percent of the population prohibited titles of nobility in their state constitutions, whereas only twenty-five percent of the states comprising twenty-eight percent of the population had prohibited them in 1787.

\textsuperscript{255} MASS. CONST. of 1780, Pt. 1, art. VI. This clause is also coded as an anti-feudalism clause above.
\textsuperscript{256} GA. CONST. of 1777, art. XI.
\textsuperscript{257} PA. CONST. of 1790, art. IX, § 24.
\textsuperscript{258} S.C. CONST. of 1790, art. IX, § 5.
\textsuperscript{259} In 1787, the six states with constitutional provisions prohibiting state legislatures from granting titles of nobility were Georgia, Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia.
5. Prohibit Slavery

Only Delaware prohibited the importation of slaves in its constitution in 1787. Two percent of the national population resided in Delaware, and it represented three percent of the Northeastern population. The clause read as follows: “No person hereafter imported into this State from Africa ought to be held in Slavery under any pretence whatever; and no negro, Indian, or mulatto slave ought to be brought into this State, for sale, from any part of the World.”

In 1791, Vermont became the second state, after Delaware, to have a constitutional clause regarding the prohibition of slavery. The clause read:

That all men are born equally free and independent, and have certain natural, inherent and unalienable rights; amongst which are, the enjoying and defending of life and liberty—acquiring, possessing and protecting property—and pursuing and obtaining happiness and safety. Therefore no male person, born in this country, or brought from over sea, ought to be holden by law to serve any person, as a servant, slave, or apprentice, after he arrives to the age of twenty-one years; nor female, in like manner, after she arrives to the age of eighteen years; unless they are bound by their own consent after they arrive to such age; or bound by law for the payment of debts, damages, fines, costs, or the like.

Thus, in 1791, the percentage of states prohibiting slavery rose from eight percent of states comprising two percent of the national population, to fourteen percent of states comprising four percent of the population. The right remained recognized exclusively in the Northeast, with twenty-two percent of the Northeastern states comprising eight percent of the Northeastern population now recognizing such a prohibition, whereas thirteen percent of the states comprising three percent of the Northeastern population had recognized it in 1787.

In summary, there were a number of state constitutional clauses at the Founding that recognized the principle that everyone was equal before the law. This principle was expressed in

260 DEL. CONST. of 1776, art. 26.
261 VT. CONST. of 1786, Dec. of Rights, § 1.
bans on feudalism and titles of nobility, or in the form guarantees of equal protection or of equal privileges or immunities. There were, however, no clauses guaranteeing generality in the law, as existed in 1868, nor was the equal protection principle widely recognized as being incompatible with slavery, though it obviously was.

xiv. Absence of State Constitutional Prohibitions of Certain Named Vices

We found absolutely no state constitutional clauses prohibiting certain named vices like lotteries, dueling, or the sale of alcohol in 1787 or in 1791, whereas there were a number of such clauses in state constitutions in 1868.

xv. Government Structure

1. Separation of Powers

Six states, or forty-six percent of the states, had explicit separation of powers clauses in their state constitutions in 1787. Fifty-six percent of the American people – a majority - lived in states with such clauses in their constitutions. These states were: Delaware, Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia. These separation of powers clauses explicitly mandated the separation of the legislative, executive, and judicial branches of government, but James Madison complains in the Federalist Papers that they were “mere parchment barriers” that were frequently breached in practice. Such clauses were more common in the South, where sixty percent of the states, a majority, comprising eighty-two

262 No notable absences from this category.
percent of the population, a huge super-majority, had separation of powers clauses. In the Northeast, thirty-eight percent of the states comprising thirty-one percent of the population had similar clauses. The New Hampshire state constitution, for example, said:

In the government of this state, the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be kept as separate from and independent of each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.\(^\text{264}\)

None of the states adopted a separation of powers clause between 1787 and 1791, and Vermont did not have such a clause in its constitution. Therefore, with Vermont’s admission as a state, the number of states with such a provision remained fixed at six, while the percentage of states with the provision declined slightly from forty-six percent of states comprising fifty-six percent of the population in 1787 to forty-three percent of the states comprising fifty-five percent of the population in 1791.\(^\text{265}\) Separation of powers clauses remained more prevalent in the South, with sixty percent of the Southern state constitutions comprising eighty-two percent of the Southern population having a separation of powers clause. In the Northeast, the percentage of states with a separation of powers provision declined slightly, from thirty-eight percent of states comprising thirty-one percent of the Northeastern population in 1787 to thirty-three percent of states comprising thirty percent of the population in 1791.

2. Power to Suspend or Dispense With the Laws

Five states, or thirty-eight percent of the total number of state constitutions in 1787 comprising a fifty-four percent majority of the population, had constitutional clauses restricting

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\(^{264}\) N.H. CONST. of 1784, art. XXXVII.

\(^{265}\) The six states with constitutional separation of powers clauses were Delaware, Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia.
the power to suspend or dispense with laws to the legislature. These states were: Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia. The clauses were more common in the South, where sixty percent of the states, a majority, comprising eighty-two percent of the Southern population, a super-majority, had them. In the Northeast, twenty-five percent of the states comprising twenty-eight percent of the population, a minority by both counts, had similar rights. Maryland, for example, had the following clause: “That no power of suspending laws, or the execution of laws, unless by or derived from the Legislature, ought to be exercised or allowed.”

By 1868, many state constitutions had adopted related “take care” clauses in which the governor was given the explicit power and duty to take care that the laws be fully and faithfully executed. However, none of the earlier constitutions in 1787 had explicit take care clauses, indicating that they began to be adopted by states at some intermediate time between 1787 and 1868. Take care clauses are partly structural and partly a matter of individual right. Structurally, they give the power of dispensing with enacted law only to the legislature and not to the governor. As a matter of individual rights, however, they give each individual the right to rely on enacted statutory law and to compel the executive to follow it.

Pennsylvania, in 1790, and Vermont, in 1786, both adopted clauses restricting to the legislature the sole power to suspend or dispense with the laws. Thus, with Vermont’s admission as a state in 1791, the number of state constitutions containing such restrictions rose from five to seven. Consequently, the percentage of state constitutions containing a clause regarding the power to suspend or dispense with the laws rose from thirty-eight percent to a near majority of fifty-percent and the corresponding percentage of the population affected by such provisions rose

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266 MD. CONST. of 1776, Declaration of Rights § 7.
267 Cite to our 1868 article.
268 PA. CONST. of 1790, art. IX, § 12.
269 VT. CONST. of 1786, Dec. of Rights, § 17.
270 In 1787, the five states with clauses restricting to the legislature the sole power to suspend or dispense with the laws were Maryland, Massachusetts, North Carolina, New Hampshire, and Virginia.
from fifty-four percent to a super-majority of sixty-seven percent. The percentage of Southern states and population with such restrictions did not change, remaining at sixty percent and eighty-two percent, respectively, but the percentage of Northeastern states with a restriction regarding the power to suspend or dispense with the laws rose from twenty-five percent of states comprising twenty-eight percent of the population to forty-four percent of states comprising fifty-four percent of the population.

3. Taxes

Five states, or thirty-eight percent of states comprising forty-six percent of the population had constitutional clauses restricting the power to impose taxation solely to the legislature. These states were: Maryland, Massachusetts, North Carolina, New Hampshire, and Pennsylvania. No taxation without representation was the constitutional rule in these states. Restriction of the power to tax to the legislature was found in forty percent of the Southern states and thirty-eight percent of the Northeastern states, and applied to forty percent and fifty-two percent of the regional populations, respectively. North Carolina’s constitution, for instance, stated: “That the people of this State ought not to be taxed, or made subject to the payment of any impost or duty, without the consent of themselves, or their Representatives in General Assembly, freely given.”  

In 1786, Vermont adopted a constitutional clause regarding taxation that read, “And previous to any law being made to raise a tax, the purpose, for which it is to be raised ought to appear evident to the Legislature to be of more service to the community, than the money would

271 N.C. CONST. of 1776, Declaration of Rights § 16.
be if not collected.”

In 1791, therefore, the number of state constitutions containing clauses pertaining in some general way to taxation rose from five to six. The percentage of states and population recognizing such provisions rose from thirty-eight percent comprising forty-six percent of the population respectively, to forty-three percent comprising forty-seven percent. The percentage of Southern states and population with constitutional clauses regarding taxation remained the same at forty percent, while the percentage of Northeastern states and population with such provisions rose from thirty-eight percent comprising fifty-two percent in 1787, to forty-four percent comprising fifty-four percent in 1791.

4. Right of Speech or Debate in the Legislature

Three states, or twenty-three percent of the total number of states and of the population in 1787 gave legislators a constitutional right to free speech or debate in the legislature. These states were: Maryland, Massachusetts, and New Hampshire. Twenty-percent of the Southern states comprising eighteen percent of the Southern population, and twenty-five percent of the Northeastern states comprising twenty-eight percent of the Northeastern population had these rights. Massachusetts, for example, had the following constitutional clause: "The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.”

North Carolina had a weaker protection that should be mentioned but was not counted in the tally. It stated: “That any member of either House of General Assembly shall have liberty to dissent from, and protest against any act or resolve,

272 VT. CONST. of 1786, Dec. of Rights, § 10.
273 The five states with constitutional clauses regarding taxation in 1787 were Maryland, Massachusetts, North Carolina, New Hampshire, and Pennsylvania.
274 MASS. CONST. of 1780, Pt. 1, art. XXI.
which he may think injurious to the public, or any individual, and have the reasons of his dissent entered on the journals.”

Between 1787 and 1791, two states, Georgia and Pennsylvania, added clauses to their constitutions that guaranteed legislators a constitutional right to free speech or debate in the legislature. Vermont’s constitution also contained such a clause. Therefore by 1791, the number of state constitutions that gave legislators a right to free speech and debate in the legislature had risen from three to six. In 1787, twenty-three percent of the states and of the population had protected legislators’ right to free speech and debate; in 1791, forty-three percent of the states comprising thirty-nine percent of the population protected the right. The percentage of states with the right increased in both the South and the Northeast: In 1787, the right belonged to twenty-three percent of the Southern states comprising eighteen percent of the Southern population, and twenty-five percent of the Northeastern states comprising twenty-eight percent of the Northeastern population; in 1791, the right belonged to forty-percent of the Southern states comprising twenty-two percent of the Southern population, and forty-four percent of the Northeastern states comprising fifty-four percent of the Northeastern population.

5. Privilege from Civil Process (for Legislators)

New Hampshire’s constitution protected legislators from civil process. Four percent of the national population and eight percent of the Northeastern population resided in New Hampshire. The clause read: “No member of the house of representatives or senate, shall be

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275 N.C. CONST. of 1776, art. XLX.
277 PA. CONST. of 1790, art. I, § 17.
278 VT. CONST. of 1786, Dec. of Rights, § 16.
279 In 1787, the three states guaranteeing legislators a constitutional right to free speech or debate in the legislature were Maryland, Massachusetts, and New Hampshire.
arrested or held to bail on mean process, during his going to, returning from, or attendance upon
the court.”

In 1790, South Carolina became the second state, after New Hampshire, to have a
constitutional clause protecting legislators from civil process. The clause read:

The members of both houses shall be protected in their persons
and estates, during their attendance on, going to, and returning
from, the legislature, and ten days previous to their sitting, and
ten days after the adjournment of the legislature. But these
privileges shall not be extended so as to protect any member who
shall be charged with treason, felony, or breach of the peace.

Therefore, by 1791, the percentage of state constitutions containing such a clause had risen from
eight percent of the states comprising four percent of the national population, to fourteen percent
of the states comprising ten percent of the population. The right had previously only appeared in
the Northeast, where, in 1787, it belonged to thirteen percent of the states comprising eight
percent of the population. By 1791, with the admission of Vermont as a state, those numbers had
declined marginally, to eleven percent of the states comprising seven percent of the population.

With South Carolina’s adoption of the clause above, the right spread to the South. In 1791,
South Carolina represented twenty percent of the Southern states and fourteen percent of the
Southern population.

6. Privilege from Arrest (for Legislators)

Massachusetts, in which ten percent of the national population and twenty-one percent of
the Northeastern population resided, had a constitutional clause stating that: "no member of the
house of representatives shall be arrested, or held to bail on mean process, during his going unto,

280 N.H. CONST. of 1784, Pt. 2, House of Representatives.
returning from, or his attending the general assembly."  

In 1789, Georgia adopted a clause protecting legislators from arrest while they were in
the general assembly, or in transit to or there-from.  

In 1790, Pennsylvania and South Carolina
adopted a similar provisions.  

Therefore, by 1791, the number of state constitutions that
contained a clause protecting legislators from arrest rose from one to four.

7. Inviolable Constitution

North Carolina, in which eleven percent of the national population and twenty-two
percent of the Southern population lived, had a constitutional clause which deemed its
Declaration of Rights inviolable.  Similar clauses, usually deeming the entire state constitution
inviolable, were frequently found in later constitutions.  

The North Carolina clause read:

“That the Declaration of Rights is hereby declared to be part of the Constitution of this State, and
ought never to be violated, on any pretence whatsoever.”

In 1790, Pennsylvania became the second state, after North Carolina, to adopt a provision
pertaining to the inviolability of its constitution.  However, unlike North Carolina’s inviolability
clause, which only stated that its Declaration of Rights was inviolable, Pennsylvania proclaimed
that its entire constitution was inviolable.  The clause stated, “To guard against transgressions of
the high powers which we have delegated, we declare, that everything in this article is excepted
out of the general powers of government, and shall forever remain inviolate.”  

In 1791, when Vermont became a state, it was the third state to have a constitutional provision regarding its

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282 MASS. CONST. of 1780, Pt. 2, Ch. 1, art. X.
286 N.C. CONST. of 1776, art. XLIV.
287 PA. CONST. of 1790, art. IX, § 26.
constitution’s inviolability. Vermont’s clause was more like North Carolina’s than Pennsylvania’s, echoing the language of North Carolina’s clause, and stating, “The declaration of the political rights and privileges of the inhabitants of this State, is hereby declared to be a part of the Constitution of this Commonwealth; and ought not to be violated on any pretence whatsoever.”

Therefore, by 1791, the percentage of state constitutions with a provision regarding the constitution’s inviolability rose from eight percent of states comprising eleven percent of the population to thirty-three percent of states comprising twenty-two percent of the population. The percentage of Southern states with inviolable constitution clauses remained at twenty percent of states comprising twenty-two percent of the population, while the percentage of Northeastern states with such clauses rose to twenty-two percent of the states comprising twenty-seven percent of the Northeastern population.

8. Uniform Government

Virginia, in which twenty-one percent of the national population and forty-two percent of the South population resided, gave its people the right to a uniform government, and in doing so also prohibited the formation of separate, independent governments within the state. This is perhaps more than a little ironic given that in the 1860’s the separate state of West Virginia was to be carved out of the rest of the state! The uniform government clause read: “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.”

Between 1787 and 1791, none of the states adopted a clause guaranteeing the right to a

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288 VT. CONST. of 1786, Ch II, § 39.
289 VA. CONST. of 1776, Bill of Rights § 14.
uniform government. Vermont’s constitution did not contain such a provision. Therefore, in 1791, Virginia remained the only state with a clause guaranteeing uniform government. In 1787, Virginia accounted for eight percent of the states comprising twenty-one percent of the national population; by 1791, with Vermont’s admission to the Union, those numbers had declined marginally to seven percent of the states comprising twenty percent of the population. In the South, Virginia still accounted for twenty percent of the states and forty-two percent of the population.

xvi. Affirmative Rights to a Public-School Education and to Welfare

1. Duty to provide a Public-School Education

Strikingly, four out of thirteen states, or thirty-one percent, in 1787 had clauses recognizing some kind of affirmative constitutional duty for the state to provide for a public school education. Nearly one third of the U.S. population, twenty-nine percent, lived in these states when the U.S. Constitution was proposed. The states were Georgia, North Carolina, New Hampshire, and Pennsylvania. Georgia and North Carolina represented forty percent of the Southern states, while New Hampshire and Pennsylvania represented twenty-five percent of the Northeastern states. Twenty-seven percent of all Southerners and thirty-one percent of all Northerners in 1787 thus lived in states whose constitutions imposed some kind of duty on the state to provide a public school education. Pennsylvania, for example, had the following clause in its constitution:

A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such

\[^{290}\text{No notable absences from this category.}\]
salaries to the masters paid by the public, as may enable them to instruct youth at low prices: And all useful learning shall be duly encouraged and promoted in one or more universities.\footnote{PA. CONST. 1776, Plan or Frame of Government, § 34.}

In 1790, Pennsylvania adopted a new constitutional provision regarding public school education. Thus, it replaced its 1776 clause, with a clause that provided:

(1) The legislature shall, as soon as conveniently may be, provide, by law, for the establishment of schools throughout the State, in such manner that the poor may be taught gratis.

(2) The arts and sciences shall be promoted in one or more seminaries of learning.\footnote{PA. CONST. of 1790, art. VII, § 1.}

In 1786, Vermont had also adopted a weak constitutional provision pertaining to public school education, which provided that “a competent number of schools ought to be maintained in each town for the convenient instruction of youth.”\footnote{VT. CONST. of 1786, Ch II, § 37.} Therefore, with Vermont’s admission as a state, in 1791, if one counts the somewhat equivocal Vermont state constitutional language as recognizing some kind of a right to an education, the number of states guaranteeing a right to a public school education rose from four, corresponding to thirty-one percent of the total number of states comprising twenty-nine percent of the national population, to five, comprising to thirty-six percent of the states and thirty-one percent of the population.\footnote{The four states guaranteeing the right to a public education in 1787 were Georgia, North Carolina, New Hampshire, and Pennsylvania.} In the Northeast, the percentage of states with a right to public education rose from twenty-five percent of the states comprising thirty-one percent of the Northeastern population, to thirty-three percent of the states comprising thirty-four percent of the population. In the South, the percentage of states with the right remained the same: at forty percent of the Southern states comprising twenty-seven percent of the Southern population.
2. Other Affirmative Rights to Government or Public Institutions

Georgia, which represented two percent of the national population comprising five percent of the Southern population, mandated the construction of a court-house and jail in its constitution. The clause stated: “A court-house and jail shall be erected at the public expense in each county, where the present convention or the future legislature shall point out and direct.”

Vermont, which represented two percent of the national population comprising four percent of the Northeastern population, adopted a clause that specifically provided for the encouragement and protection of religious and charitable societies. The clause read:

And all religious societies, or bodies of men, that may be hereafter united or incorporated, for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estate, which they in justice ought to enjoy, under such regulations as the General Assembly of this State shall direct.

3. Indian Rights

Three Northeastern states—Connecticut, New York, and Rhode Island—had constitutional clauses discussing the rights of Indians, or the duties of citizens to the Indians. Together these states made up twenty-three percent of the states comprising eighteen percent of the national population and thirty-five percent of the Northeastern population in 1787. Each state’s approach was very different. Connecticut’s constitution encouraged inviting Indians to adopt Christianity. It read:

“[W]hereby Our said People Inhabitants there, may be so religiously, peaceable and civilly governed, as their good Life and orderly Conversation may win and invite the Natives of the Country to the Knowledge and Obedience of the only true GOD, and the

295 GA. CONST. of 1777, art. LX.
296 VT. CONST. of 1786, Ch II, § 38.
Saviour of Mankind, and the Christian Faith, which in Our Royal Intentions, and the adventurers free Possession, is the only and principal End of this Plantation.” 297

New York, in comparison, had a constitutional clause protecting the property rights of Indians. 298

Finally, Rhode Island, the state with so few constitutionally enshrined individual rights in 1787, had no less than three separate constitutional clauses encouraging the conversion of the “poore [sic] ignorant Indian natives,” and, most ominously, stating “…that itt shall and may bee lawfull to and for the sayd Governour...upon just causes, to invade and destroy the native Indians, or other enemyes of the sayd Collony.” 299 There were no additional rights pertaining to Indians added between 1787 and 1791.

IV. DISCUSSION AND CONCLUSIONS

We have been looking at State Bills of Rights in 1787 and in 1791 to get a sense of the cultural views about individual rights that prevailed at the time of the Founding of the Constitution. In his magisterial book on The Bill of Rights: Creation and Reconstruction, Yale Law Professor Akhil Amar makes the by now famous argument that the original federal Bill of Rights was more of a communitarian document than a libertarian one. Professor Amar rightly shows how the Reconstruction Framers of the Fourteenth Amendment recast the federal Bill of Rights in a much more individualistic way.

Professor Amar is absolutely right in his comments on the contrast between the intellectual climates of 1791 and 1868 with respect to national Bills of Rights guarantees. The Framers were not ready in 1787 or in 1791 to impose a nation empowering, individualistic Bill

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297 CONN. Charter of 1662, ¶ 6.
298 “And whereas it is of great importance to the safety of this State that peace and amity with the Indians within the same be at all times supported and maintained; and whereas the frauds too often practised towards the said Indians, in contracts made for their lands, have, in divers instances, been productive of dangerous discontents and animosities: Be it ordained, that no purchases or contracts for the sale of lands, made since the fourteenth day of October, in the year of our Lord one thousand seven hundred and seventy-five, or which may hereafter be made with or of the said Indians, within the limits of this State, shall be binding on the said Indians, or deemed valid, unless made under the authority and with the consent of the legislature of this State.” N.Y. CONST. of 1777, art. XXXVII.
299 R.I. CHARTER of 1662, ¶ 8.
of Rights with a uniform meaning in all thirteen of the original States. But, Professor Amar does not address two puzzles that are raised by his findings. The first is that we all know the Framing generation was made famous by the statement in the Declaration of Independence that “All men are created equal and are endowed by their Creator with certain inalienable natural rights among which are the rights to Life, Liberty and the Pursuit of Happiness.” This language seems pretty uncommunitarian and individualistic to most of us and it was of central importance at the Framing as a part of American Scripture. Second, Professor Amar does not discuss at length the State Bills of Rights in 1787 or 1791 to see what the individual rights climate was like within the community of the States. Our article now fills that gap.

We conclude that eight out of fourteen States in 1791 – a majority -- had State Bills of Rights that were substantially fuller and more rights protective and individualistic than was the federal Bill of Rights. The States we would include on this list are: Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont, Virginia, and more arguably Delaware. Another two States – South Carolina and Georgia – arguably had Bills of Rights that were roughly comparable to the federal Bill while another two States – New Jersey and New York – essentially lacked a Bill of Rights. (New York presents a unique puzzle because its Constitution incorporates word for word the Declaration of Independence with its invocation of natural and inalienable rights). Finally, two States – Connecticut and Rhode Island – retained their Colonial Charters issued by King Charles II and did not try to write new State constitutions or declarations of rights. In both cases, the Colonial Charters were especially prized for the ancient colonial liberties of freedom of religion they were thought to embody. In Connecticut’s case, the Fundamental Orders of the Hartford Colony were thought to have been embodied in the State’s Charter while in the case of Rhode Island the Charter was the most progressive document of its time on the subject of religious liberty.
What our findings suggest is that while Professor Amar is right about the communitarian reading the Framers gave the federal Bill of Rights in 1791, it must also be acknowledged that the federal Bill was passed in a climate where eight States out of fourteen had State Bills of Rights that were quite libertarian, individualistic, and invoking of natural law. Thus, Bill of Rights libertarianism, individualism, and natural law rhetoric did not start with the Abolitionist movement and Reconstruction but was present from the beginning in the original united colonies. State Bill of Rights libertarianism did grow between 1791 and 1868, but it was already present in 1791 in a majority of the fourteen States.

Where then did State Bill of Rights libertarianism, individualism, and natural law rhetoric come from? On this subject, we are deeply indebted to Georg Jellinek whose brilliant little book entitled *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern History* was translated into English and published in 1901 by famed scholar Max Farrand. Jellinek notes many people just assume that the idea of an American Bill of Rights was just a spin off of the similarly named English Bill of Rights of 1689 and of the Petition of Right of 1628 and the Magna Charta of 1215.  

As Jellinek writes,

"a deep cleft separates the American declarations from the English enactments that have been mentioned. The historian of the American revolution says of the Virginia declaration that it protested against all tyranny in the name of the eternal laws of man’s being: The English petition of right in 1688 was historic and retrospective; the Virginia declaration came directly out of the heart of nature and announced governing principles in all peoples in all future times. The English laws that establish the rights of subjects are collectively and individually confirmations, arising out of special conditions, or interpretations of existing law. Even Magna Charta contains no new right, as Sir Edward Coke, the great authority on English law perceived as early as the beginning of the seventeenth century. The English statutes are far removed from any purpose to recognize general rights of man, and the have neither the power nor the intention to restrict the legislative agents or to establish principles for future legislation. According to English law, Parliament is omnipotent and all statutes enacted or confirmed by it are of equal value.

The American declarations, on the other hand, contain precepts which stand

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higher than the ordinary lawmaker. … The American laws are not laws of a higher kind only, they are the creations of a higher lawmaker. … According to them the individual is not the possessor of rights through the state, but by his own nature he has inalienable and indefeasible rights. The English laws know nothing of this. They do not wish to recognize an eternal, natural right, but one inherited from their fathers, “the old undoubted rights of the English people.”

Jellinek adds that “Of thirteen articles of the [English] Bill of Rights, only two contain stipulations that are expressed in the form of rights of the subject, while one refers to freedom of speech in Parliament.” In contrast, Jellinek notes that the American State Bills of Rights at the time of the Founding

“begin with the statement that all men are born free and equal, and these declarations speak of rights that belong to “every individual,” all mankind,” or “every member of society.” They enumerate a much larger number of rights than the English declarations, and look upon these rights as innate and inalienable. Whence comes this conception in American law? It is not from the English law.”

Jellinek concludes that the libertarian, individualistic, natural rights flavor of many of the original State Bills of Rights in the U.S. came from the radical Protestantism of the early settlers of America and especially of New England. He says that:

“This sovereign individualism in the religious sphere led to practical consequences of extraordinary importance. From its principles there finally resulted the demand for, and the recognition of, full unrestricted liberty of conscience, and then the asserting of this liberty to be a right not granted by any earthly power and therefore by no earthly power to be restrained.

But the Independent movement could not confine itself to ecclesiastical matters, it was forced by logical necessity to carry its fundamental doctrines into the political sphere.”

Jellinek concludes that:

“The idea of establishing inalienable, inherent and sacred rights of the individual is not of political but of religious origin. What has been held to be the work of the [American and French] Revolution[s] was in reality a fruit of the Reformation and its struggles. Its first apostle was not [Jefferson or] LaFayette but Roger Williams, who, driven by powerful

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301 Id. at 46–48.
302 Id. at 49
303 Id. at 56.
304 Id. at 60.
and deep religious enthusiasm, went into the wilderness in order to found a government of religious liberty . . . ”305

We mentioned above that eight out of fourteen State constitutions in 1791 had very libertarian, individualistic, and natural rights invoking State Bills of Rights. Two more for a total of ten out of fourteen were as rights protective as was the federal Bill of Rights. What was the first textual progenitor of these State Declarations of Rights given that they had very little in common with the English Bill of Rights and other similar English documents? The answer is that the Virginia Declaration of Rights of 1776 was the progenitor of most of these other documents. The Virginia Declaration was written by George Mason before the Declaration of Independence and it inspired the famous language about “All men being created equal” and possessing natural and inalienable rights! The Virginia Declaration of Rights thus began by saying:

“That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact, deprive or divest their posterity; namely the enjoyment of life and liberty, with the means of acquiring and possessing property; and pursuing and obtaining happiness and safety.”

Thomas Jefferson felicitously rewrote this language in the Declaration of Independence to say that:

“We hold these truths to be self-evident; that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among men, deriving their just power from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government . . .”

Historian Pauline Maier in American Scripture: Making the Declaration of Independence acknowledges Jefferson’s deriving of this famous language from the Virginia Declaration of Rights, Article I.

305 Id. at 77.
306 Virginia Declaration of Rights, Article I.
Rights. Thus it was the State Bills of Rights at the Founding that inspired the Declaration of Independence and not the other way around.

The Virginia Declaration of Rights of 1776 predated the Declaration of Independence and the federal Bill of Rights and was broader and more comprehensive than was the federal bill. In fact,

“the bill of rights James Madison [originally] proposed on June 8, 1789 … would have looked more like those of the states [had Madison’s original proposal been adopted]. Madison moved that “a declaration” be “prefixed to the Constitution” in the traditional manner, and that it assert:

That all power is originally vested in, and consequently derived from the people.

That government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

That the people have an indubitable, inalienable, and indefeasible right to reform or change their government, whenever it be found adverse or inadequate to the purposes of its institution.”

As Pauline Maier notes, “These provisions were essentially a pared down version of the Virginia Declaration of Rights …” No one knows why for sure Madison dropped this language, but it was becoming clear to slave holders by 1789 that proclaiming that all people were born free and equal was a problem for the “peculiar institution.” In any event, the prefatory language Madison originally suggested was in fact dropped which arguably made the federal Bill of Rights ratified in 1791 less protective of individual liberty than were a majority of the State Declarations of Rights at that point in time.

Strikingly, the original State Declarations of Rights also had a huge impact on European and global human rights law – a role which is often not appreciated today. As Georg Jellinek’s

308 Id.
book translated by Max Farrand clearly shows, it was the original American State Declarations of Rights after 1778 that inspired the French Revolutionary Declaration of the Rights of Man and of the Citizen which was passed on August 26, 1789. The French Declaration remains good constitutional law in France today in 2012 and is enforced by the French Constitutional Court. Just as important is the fact the Declaration of the Rights of Man and of the Citizen inspired classical liberal constitution writers in Europe and in Latin America in the Nineteenth and Twentieth Centuries, and it continues to have a global impact today.

Consider the opening clauses of the French Revolutionary Declaration of the Rights of Man and of the Citizen of 1789:

“Article 1. Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.

Article 2. The aim of all political associations is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression. …

Article 4. Liberty consists in the freedom to do everything which injures no-one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law. ”

Here we find an echo of the libertarian, individualistic, natural rights adhering language of the Virginia Declaration of 1776 and of the Declaration of Independence of that same year. Jellinek discusses how Thomas Jeffersona and Benjamin Franklin arranged in 1778 and in 1783 to have the American State Declarations of Rights published in French so as to make them available to a European audience. The Marquis de Lafayette, a well known friend of George Washington’s and a hero of the American War of Independence, actually wrote the Declaration of the Rights of Man and of the Citizen of 1789.309 We will not rehearse Jellinek’s whole case here, but he makes an overwhelmingly powerful argument that it was the original American State

309 Jellinek at 14-21.
Declarations of Rights and not the Declaration of Independence or the proposed federal Bill of Rights of 1789 which inspired the French Revolutionary Declaration of the Rights of Man and of the Citizen. The original State Bills of Rights were thus hugely consequential in Europe and around the world. They had an enormous impact on global history.

One final interesting point that deserves mention is that the famous English philosopher and politician Edmund Burke famously criticized the French Revolutionary Declaration of the Rights of Man and of the Citizen of 1789. Burke though the language at best vapid and at worst dangerous and incendiary. He later blamed the Declaration for the French Revolutionary Reign of Terror in part on the Declaration of 1789! Jellinek takes issue with Burke and argues that the very same language in the Virginia Declaration of Rights and in other U.S. state declarations of rights produced no Reign of Terror. Jellinek wisely argues that it is not the open ended language of abstract Declarations of Rights that lead to violence but instead the fact that the French Revolutionaries tore down all the foundation stones of their prior regimes whereas the American States built a new edifice on the cornerstones of religious liberty that were laid in the 169 years between the founding of the Jamestown Colony in 1607 and American independence in 1776.310

The Virginia Declaration of Rights of 1776 and a majority of the other founding State constitutions were libertarian and individualistic and not communitarian in any way. Some State Constitutions in 1787 and in 1791 were not yet rights protective, but this was an exception and not the rule. Two States without Bills of Rights clung to ancient charters associated with liberty – Connecticut and Rhode Island – while the situation was muddied by partially rights-protective provisions in South Carolina, Georgia, and even New York which incorporated the Declaration of Independence into its State Constitution. Only New Jersey’s new Constitution was totally devoid of rights protective language or history. In the years between 1791 and 1868, the

310 Jellinek, at 43-45.
tradition of State constitutional protection of liberty expanded greatly, but there was libertarianism at the Founding long before the publication of John Stuart Mill’s On Liberty in 1859. Indeed, the State constitutional tradition of libertarianism was so strong that it infused the French Revolutionary Declaration of the Rights of Man and of the Citizen of 1789, and from there it spread all over the modern world. This is truly the greatest triumph of State constitutional law.