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# Individual Rights Under State Constitutions in 2018: What Rights are Deeply Rooted in a Modern-Day Consensus of the States?

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INDIVIDUAL RIGHTS UNDER STATE  
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 DEEPLY ROOTED IN A MODERN-DAY  
 CONSENSUS OF THE STATES?

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 Kathryn L. Dore & Sarah E. Agudo\**

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\* Steven Gow Calabresi is Clayton J. and Henry R. Barber Professor of Law, Northwestern Pritzker School of Law. I am grateful to my Uncle Guido Calabresi and my very good friend and coteacher, Akhil Reed Amar, for encouraging me to write this Article and to finish this project. I would also like to thank Tom Gaylord and Clare Gaynor Willis, two Northwestern Law School librarians, for their assistance in tracking down reputable historical sources during our research process. For this Article, Kathryn L. Dore—with Sarah E. Agudo’s help—did a first draft of modern-day state constitutional rights in 2010, and Sarah E. Agudo did a first draft of state constitutional rights from 1868, which was published in the *Texas Law Review*. Hannah M. Begley did her own unique survey of state constitutional rights in both 1868 and 2017, for which I initially double-checked all coding decisions. James Lindgren then independently coded the 2017–18 constitutional provisions, computing reliability scores between the earlier joint coding and his new one. Differences were resolved by Lindgren and me. When the authors of this Article express their views using such words as “we,” “our,” and “us,” the opinions expressed reflect the views of the two faculty authors, not necessarily the authors who were students when they did the bulk of their work on the project.

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## INTRODUCTION

For the last forty years, Supreme Court Justices, Presidents, Senators, and constitutional law scholars have fiercely debated the question of whether we ought to follow the original public meaning of the text of the Constitution and of the Fourteenth Amendment, or whether we should embrace living constitutionalism and, by extension, more modern rights, like the right to privacy. The originalist camp has included former President Ronald Reagan, former Attorney General Edwin Meese III, former Supreme Court Justice Antonin Scalia, and current Supreme Court Justices Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh as well as Senator Orrin Hatch. The living-constitutionalist camp, which also identifies itself as the pragmatist camp, is represented by former Presidents Bill Clinton and Barack Obama; former Senator and Vice President Joe Biden and current Senator Chuck Schumer; and by Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Three other Justices, Chief Justice John Roberts, Justice Samuel Alito, and former Justice Anthony Kennedy, lean in a conservative direction but largely for practical, as opposed to originalist, reasons.

The same split can be found among constitutional law professors. Professors Michael McConnell, Randy Barnett, Michael Stokes Paulsen, Gary Lawson, John Harrison, and Mike Rappaport all fall in the originalist camp while Professors Bruce Ackerman, William Eskridge, Lawrence Lessig, Reva Siegel, Laurence Tribe, and Pamela Karlan all fall in the living constitutionalist, or pragmatist, camp. Two constitutional law scholars at Yale Law School, Akhil Reed Amar and Jack M. Balkin, have adopted originalist methodologies while reaching liberal political outcomes. Thus, Balkin entitled one of his recent books *Living Originalism*.<sup>1</sup>

We propose in this Article to put aside normative theorizing for the moment and instead to mostly present some data and empirical proof that we think suggest that the two sides of this debate are not really all that far apart. We seek to prove this by comparing the rights that exist in today's state constitutions in 2018 with the rights that existed in state constitutions in 1868, when the Fourteenth Amendment was ratified 150 years ago this year. What our comparison will show is that the original and the living Fourteenth Amendment are not nearly as different as normative theorists have claimed. This is an appropriate way to celebrate the 150th anniversary of the Fourteenth Amendment, which was ratified in July of 2018.

State constitutions are an almost ideal vehicle for measuring what new rights are coming into fashion and what old rights are going out of fashion because they are so much easier to amend than the Federal Constitution. In many states, like California, a 51% majority of the voters can amend the state constitution by passing an initiative or referendum.<sup>2</sup> One would thus expect state constitutional law to be much more up to date than the Federal Consti-

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1 JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

2 See CAL. CONST. art. XVIII, § 4.

tution, which has only been amended seventeen times in the 227 years since the Founders adopted the Federal Bill of Rights.

On the other hand, why might rights not be included in state constitutions? First, perhaps there might be a difference in the locus of power between state and federal governments. For example, education has traditionally been a province of state and local governments so it would more likely be included in a state constitution than in the federal one.<sup>3</sup> Second, some rights (such as wearing a hat or sleeping in bed on one's right side) may have been deemed too trivial to be noted in either state or federal constitutions.<sup>4</sup> Third, personal rights (such as marriage) would be somewhat less likely to be explicitly listed in either sort of constitution than political rights.

This Article is actually the third and final article in a series that began with (A) Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*; and (B) Steven G. Calabresi, Sarah E. Agudo, and Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*<sup>5</sup> This Article looks at what rights are protected by state constitutions today, in 2018, and compares our findings with the data we collected in our earlier two articles, which looked at rights under state constitutional law in 1868 when the Fourteenth Amendment was ratified, and at what rights were protected in state constitutional law in 1791 when the Federal Bill of Rights with its Ninth Amendment was ratified.

Comparing state constitutional-law rights today, in 2018, with rights protected in 1868 when the Fourteenth Amendment was ratified reveals an overwhelmingly similar number of outcomes, but a few startling and counterintuitive differences. We will save the discussion of the major differences for the conclusion of our Article and will first present our data. As to each right, we will discuss what number of states protect that right today in 2018 and what number protected that right in 1868, when the Fourteenth Amendment was ratified, and in 1791, when the Ninth Amendment was ratified.

We begin in Part I by presenting the methodology that we used in compiling our data. We then discuss the data as to each right in Part II and summarize our results in Part III. Last, in Part IV, we analyze the implications of our findings.

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3 See *infra* subsection II.K.4.

4 Philip A. Hamburger, *Trivial Rights*, 70 NOTRE DAME L. REV. 1 (1994).

5 Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7 (2008); Steven G. Calabresi, Sarah E. Agudo & Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451 (2012).

## I. METHODOLOGY

Our method involved four steps: collecting, categorizing, resolving coding differences, and counting. First, we obtained copies of the present-day version of all fifty state constitutions through the official state website of each individual state.<sup>6</sup> Next, at least two of us both separately and jointly examined each state constitution closely. In a comprehensive database, we kept track of each individual right that is discussed below, notating within our records which states protect those rights. Whenever a given state's constitution contained a relevant clause, we included in our database both the pincite of the clause and the text of the clause. Note that this Article is not an exhaustive listing of all rights included in the present-day versions of all fifty state constitutions—instead, it is a sampling of rights that have strong support across the state constitutions. For space reasons, we have not quoted each state constitutional clause that we count in this printed version of our Article. We will, however, post on SSRN a version of our Article that includes the text of each right that we cite in the footnotes. This will make it easier for future scholars to check our work and dispute our state rights counts if they want to do so.

After a collaborative coding was agreed on by at least two coders, the results were described in draft text, with some summary statements of the criteria used in classifying. Then an independent coder, with no knowledge of how any particular state had been coded, did a new coding of the potentially relevant provisions of the 2018 constitutions. This independent coding matched the earlier coding to a very high degree. Indeed, a standard measure of inter-rater reliability, Cohen's Kappa, was computed, producing a score of .915. By convention, a Cohen's Kappa of over .81 is often viewed as "almost perfect or perfect agreement," sufficient for making "definite conclusions."<sup>7</sup> Then Professors Calabresi and Lindgren resolved the differences between the two codings.

After each stage, we counted the number of state constitutions that textually enumerated each individual right (or denied each right) discussed below.<sup>8</sup> Our analysis below usually includes (a) the total number of states that protect each right; (b) what percentage of the states that number constitutes; and (c) what percentage of the overall U.S. population lives in a state that protects each right in 2018. We used the 2010 census (excluding the

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6 Our research is current up to January 4, 2018. The database is on file with the authors.

7 Kevin A. Hallgren, *Computing Inter-Rater Reliability for Observational Data: An Overview and Tutorial*, 8 TUTORIALS QUANTITATIVE METHODS FOR PSYCHOL. 23 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3402032/>. Most of our initial discrepancies in coding resulted from having slightly different interpretations of the coding criteria, rather than different interpretations of the provisions.

8 Because of the enormous amount of data involved, we looked only at rights textually enumerated in state constitutions, and did not extensively look at state court opinions construing those clauses. That project would be a valuable, if not essential, one to undertake in the future.

District of Columbia and U.S. territories) when calculating population totals for rights protected in 2018.

Our analysis discusses a large number of individual positive-law rights that exist under state constitutional law in 2018. Since such a large number of rights were recognized within the state constitutions, we thought it useful to group the rights in question into the following categories: (1) rights bearing on religion; (2) freedom of expression rights; (3) gun rights and clauses bearing on the military; (4) rights against unreasonable searches and seizures; (5) criminal procedure rights; (6) due process rights; (7) property rights; (8) the right to trial by jury; (9) rights against excessive punishment; (10) state constitutional acknowledgements of unenumerated rights; and (11) other state constitutional rights without federal analogs.

These groupings are intended to make the information presented below clearer and more accessible, and we do not mean to suggest or imply any normative arguments for the underlying importance or meaning of the rights by the categorizations we have used here. Finally, we organized the clauses in the order given because we wanted to generally follow the structure of the Federal Constitution's Bill of Rights. Again, this organization is not meant to suggest any normative view of the importance of each right.

## II. THE DATA ON THE STATE CONSTITUTIONS

### A. *Rights Bearing on Religion*

The first set of rights we discuss are rights bearing on religion. We describe these clauses first in order to follow the structure of the Federal Bill of Rights, which protects religious liberty before all other rights by placing it first in the Bill of Rights, at the beginning of the First Amendment.<sup>9</sup> "Religious freedom [was] a central issue in the English Glorious Revolution of 1688, and it was of central concern to the framers and ratifiers of the federal Bill of Rights as well."<sup>10</sup> As we explain below, religious liberty clauses are found in the constitutions of all fifty states, "suggest[ing] that the [religious liberty] rights embodied in the First Amendment are [considered] fundamental" to the states as well today in 2018.<sup>11</sup>

#### 1. Establishment Clauses

According to our analysis, all fifty states today in 2018—comprising 100% of the states and 100% of the U.S. population<sup>12</sup>—prohibit the estab-

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9 U.S. CONST. amend. I.

10 Calabresi & Agudo, *supra* note 5, at 31 (first citing ENCYCLOPEDIA OF RELIGIOUS FREEDOM 115–16 (Catharine Cookson ed., 2003); and then citing CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION: A DOCUMENTARY HISTORY 318–19 (John J. Patrick & Gerald P. Long eds., 1999)).

11 Calabresi & Agudo, *supra* note 5, at 31.

12 2010 Census: *Population Density Data*, U.S. CENSUS BUREAU (2010), <https://www.census.gov/data/tables/2010/dec/density-data-text.html> [hereinafter 2010 Census] (308,143,815 out of 308,143,815 residents). All U.S. population figures in this Article refer

lishment of a state religion in some form within the present-day version of their state constitutions.<sup>13</sup> This represents a small increase from the state constitutions in 1868, when thirty-six out of thirty-seven states had establishment clauses in their state constitutions.<sup>14</sup> It is a striking departure from the practice in 1791, when five of the states had established churches featured in their state constitutions, although it must be acknowledged that eight states out of twelve which drafted constitutions between 1776 and 1791 already had state establishment clauses in their state constitutions.<sup>15</sup> Of the remaining six states in 1791, Rhode Island had a Royal Charter issued by Charles II, which it continued to use as its state constitution and which barred establishments of religion in 1791.<sup>16</sup> Thus, in 1791, only five out of fourteen states did not bar establishments of religion. The original purpose of the Federal Establishment Clause was to serve as a federalism provision, preventing the new national government from interfering with the five state-established churches that existed in 1791. By 1868, with thirty-six states forbidding establishments of religion in their state constitutions, the nonestablishment right

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to the population of the fifty states according to the 2010 Census, excluding the population of Washington, D.C. and the territories.

13 See ALA. CONST. art. I, § 3; ALASKA CONST. art. I, § 4; ARIZ. CONST. art. II, § 12; ARK. CONST. art. II, §§ 24–25; CAL. CONST. art. I, § 4; COLO. CONST. art. II, § 4; CONN. CONST. art. I, § 3; *id.* art. VII; DEL. CONST. art. I, § 1; FLA. CONST. art. I, § 3; GA. CONST. art. I, § 1, paras. 3, 4; *id.* art. I, § 2, para. 7; HAW. CONST. art. I, § 4; IDAHO CONST. art. I, § 4; ILL. CONST. art. I, § 3; IND. CONST. art. I, § 4; IOWA CONST. art. I, § 3; KAN. CONST. Bill of Rights, § 7; KY. CONST. Bill of Rights, § 5; LA. CONST. art. I, § 8; ME. CONST. art. I, § 3; MD. CONST. Declaration of Rights, art. XXXVI; MASS. CONST. art. of amend. XI; MICH. CONST. art. I, § 4; MINN. CONST. art. I, § 16; MISS. CONST. art. III, § 18; MO. CONST. art. I, § 5; MONT. CONST. art. II, § 5; NEB. CONST. art. I, § 4; NEV. CONST. art. I, § 4; N.H. CONST. pt. 1, art. VI; N.J. CONST. art. I, § 4; N.M. CONST. art. II, § 11; N.Y. CONST. art. I, § 3; N.C. CONST. art. I, § 13; N.D. CONST. art. I, § 3; OHIO CONST. art. I, § 7; OKLA. CONST. art. I, § 2; *id.* art. II, § 5; OR. CONST. art. I, §§ 3, 5; PA. CONST. art. I, § 3; R.I. CONST. art. I, § 3; S.C. CONST. art. I, § 2; S.D. CONST. art. VI, § 3; TENN. CONST. art. I, § 3; TEX. CONST. art. I, §§ 6–7; UTAH CONST. art. I, § 4; VT. CONST. ch. 1, art. III; VA. CONST. art. I, § 16; WASH. CONST. art. I, § 11; W. VA. CONST. art. III, § 15; WIS. CONST. art. I, § 18; WYO. CONST. art. I, §§ 18–19.

14 See Calabresi & Agudo, *supra* note 5, at 31. Note that in our earlier analysis, we only coded twenty-seven states as having establishment clauses in their state constitutions in 1868. *Id.* We now believe that was an undercount, though we acknowledge that some of the new additions to our count of states included clauses in their state constitutions that are biased in favor of Christians. In our updated analysis, only one state—Louisiana—did not have an establishment clause. An example of a state with an establishment clause biased in favor of Christians is Connecticut’s constitution, which stated that “[n]o preference shall be given by law to any christian sect or mode of worship” in article I, section 4, and which stated that all religions should be treated “without discrimination” in article I, section 3. CONN. CONST. art. I, §§ 3, 4 (1818). Another example is the Massachusetts Constitution, which held that “every denomination of Christians, demeaning themselves peaceably and as good subjects of the commonwealth, shall be equally under the protection of the law; and no subordination of any [one] sect or denomination to another shall ever be established by law.” MASS. CONST. Declaration of Rights, art. III (1780).

15 See Calabresi, Agudo & Dore, *supra* note 5, at 1470–72.

16 *Id.* at 1543–44.



had become a right of individuals against the government and not merely a right of the states against the federal government. The 2018 data show that this individualistic nature of the nonestablishment right has now been endorsed unanimously by all fifty state constitutions—a huge change from the situation in 1791.

Out of the fifty states with antiestablishment clauses in 2018, twenty-five state constitutions—comprising 50% of the states and 51.4% of the U.S. population<sup>17</sup>—use explicit nonestablishment of religion language.<sup>18</sup> For example, South Carolina’s state constitution says that “[t]he General Assembly shall make no law respecting an establishment of religion.”<sup>19</sup> This is a direct analog to the U.S. Constitution, which states that “Congress shall make no law respecting an establishment of religion.”<sup>20</sup> Other states use slightly modified but equally as explicit antiestablishment language, such as Alabama’s constitution, which requires that “no religion shall be established by law”<sup>21</sup> and New Jersey’s constitution, which prevents any “establishment of one religious sect in preference to another.”<sup>22</sup> The state constitution of Utah, after prohibiting any “establishment of religion,” even goes on to add that “[t]here shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions.”<sup>23</sup>

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17 See *2010 Census*, *supra* note 12 (158,349,926 out of 308,143,815 residents).

18 See ALA. CONST. art. I, § 3; ALASKA CONST. art. I, § 4; ARIZ. CONST. art. II, § 12; ARK. CONST. art. II, § 24; CAL. CONST. art. I, § 4; FLA. CONST. art. I, § 3; HAW. CONST. art. I, § 4; IOWA CONST. art. I, § 3; KAN. CONST. Bill of Rights, § 7; LA. CONST. art. I, § 8; ME. CONST. art. I, § 3; MD. CONST. Declaration of Rights, art. XXXVI; MASS. CONST. art. of amend. XI; MINN. CONST. art. I, § 16; MO. CONST. art. I, § 5; MONT. CONST. art. II, § 5; N.H. CONST. pt. I, art. VI; N.J. CONST. art. I, § 4; PA. CONST. art. I, § 3; S.C. CONST. art. I, § 2; S.D. CONST. art. VI, § 3; TENN. CONST. art. I, § 3; UTAH CONST. art. I, § 4; WASH. CONST. art. I, § 11; WIS. CONST. art. I, § 18.

19 S.C. CONST. art. I, § 2.

20 U.S. CONST. amend. I.

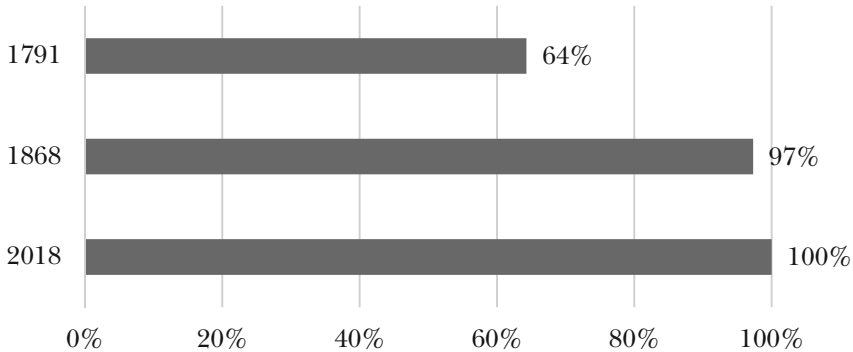
21 ALA. CONST. art. I, § 3.

22 N.J. CONST. art. I, § 4.

23 UTAH CONST. art. I, § 4.

FIGURE 1. ANTIESTABLISHMENT CLAUSES OR OTHER RESTRICTIONS ON STATE RELIGIONS IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



Other state constitutions prohibit the establishment of a state religion by ensuring that the state cannot treat any particular sect or denomination of a religion with discrimination or preference. Connecticut’s constitution, for instance, requires that “[n]o preference shall be given by law to any religious society or denomination in the state”<sup>24</sup> and that “[t]he exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons.”<sup>25</sup> Nevada’s constitution uses a more concise formulation, holding that “[t]he free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State,”<sup>26</sup> and Arkansas’s constitution states that “the General Assembly shall enact suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship.”<sup>27</sup> In total, thirty-one state constitutions in 2018—comprising 62% of the states and 67.5% of the U.S. population<sup>28</sup>—follow this no discrimination or preference approach to prohibiting the establishment of religion.<sup>29</sup> Overall, we have

24 CONN. CONST. art. VII.

25 *Id.* art. I, § 3.

26 NEV. CONST. art. 1, § 4.

27 ARK. CONST. art. 2, § 25.

28 2010 Census, *supra* note 12 (208,067,037 out of 308,143,815 residents).

29 See ALA. CONST. art. I, § 3; ARK. CONST. art. II, § 24; CAL. CONST. art. I, § 4; COLO. CONST. art. II, § 4; CONN. CONST. art. I, § 3; *id.* art. VII; DEL. CONST. art. I, § 1; IDAHO CONST. art. I, § 4; ILL. CONST. art. I, § 3; IND. CONST. art. I, § 4; KAN. CONST. Bill of Rights, § 7; KY. CONST. Bill of Rights, § 5; ME. CONST. art. I, § 3; MASS. CONST. art. of amend. XI; MINN. CONST. art. I, § 16; MISS. CONST. art. III, § 18; NEB. CONST. art. I, § 4; NEV. CONST. art. I, § 4; N.H. CONST. pt. 1, art. VI; N.J. CONST. art. I, § 4; N.M. CONST. art. II, § 11; N.Y. CONST. art. I, § 3; N.D. CONST. art. I, § 3; OHIO CONST. art. I, § 7; PA. CONST. art. I, § 3; S.D. CONST. art. VI, § 3; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 6; VA. CONST. art. I, § 16; W. VA. CONST. art. III, § 15; WIS. CONST. art. I, § 18; WYO. CONST. art. I, § 18.

used broad criteria for determining whether a constitution contained an establishment clause, even including some with expansive free exercise clauses that prohibited control or burdens on religion. For example, we counted states as having establishment clauses if they merely barred government from controlling or interfering with religious conscience.<sup>30</sup>

Additionally, in 2018, thirty-nine states<sup>31</sup>—comprising 78% of the states and 85% percent of the U.S. population<sup>32</sup>—have Blaine Amendments within their state constitutions, which “forbid any kind of government financial aid to educational or other government institutions that have any religious affiliation.”<sup>33</sup> The Blaine Amendments are named after a former Republican presidential nominee, James G. Blaine, who originally proposed an identical amendment for the Federal Constitution—an amendment that Congress never passed.<sup>34</sup> Wyoming’s constitution uses a common Blaine Amendment text saying that “[n]o money of the state shall ever be given or appropriated to any sectarian or religious society or institution.”<sup>35</sup> Oklahoma’s constitution contains another version of this language, saying:

No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.<sup>36</sup>

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30 *E.g.*, N.C. CONST. art. I, § 13 (“All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.”).

31 *See* ALA. CONST. art. I, § 3; *id.* art. IV, § 73; *id.* art. XIV, § 263; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. II, § 12; *id.* art. IX, § 10; CAL. CONST. art. IX, § 8; *id.* art. XVI, § 5; COLO. CONST. art. V, § 34; *id.* art. IX, § 7; DEL. CONST. art. X, § 3; FLA. CONST. art. I, § 3; GA. CONST. art. I, § 2, para. 7; HAW. CONST. art. 10, § 1; IDAHO CONST. art. I, § 4; *id.* art. IX, § 5; ILL. CONST. art. X, § 3; IND. CONST. art. I, § 6; IOWA CONST. art. I, § 3; KAN. CONST. art. VI, § 6; KY. CONST. Bill of Rights, § 5; *id.* § 189; MASS. CONST. art. XVIII, § 2; MICH. CONST. art. I, § 4; *id.* art. VIII, § 2; MINN. CONST. art. I, § 16; *id.* art. XIII, § 2; MISS. CONST. art. VIII, § 208; MO. CONST. art. I, § 7; *id.* art. IX, § 8; MONT. CONST. art. X, § 6; NEB. CONST. art. VII, § 11; NEV. CONST. art. XI, § 10; N.H. CONST. pt. 1, art. 6; *id.* pt. 2, art. 83; N.M. CONST. art. XII, § 3; *id.* art. XXI, § 4; N.Y. CONST. art. XI, § 3; N.D. CONST. art. VIII, § 5; OHIO CONST. art. VI, § 2; OKLA. CONST. art. II, § 5; OR. CONST. art. I, § 5; PA. CONST. art. III, § 15; S.C. CONST. art. XI, § 4; S.D. CONST. art. VI, § 3; *id.* art. VIII, § 16; TEX. CONST. art. I, § 7; *id.* art. VII, § 5(c); UTAH CONST. art. I, § 4; *id.* art. X, § 9; VA. CONST. art. IV, § 16; WASH. CONST. art. I, § 11; *id.* art. IX, § 4; WIS. CONST. art. I, § 18; WYO. CONST. art. I, § 19; *id.* art. III, § 36. The states without a Blaine Amendment are Arkansas, Connecticut, Louisiana, Maine, Maryland, New Jersey, North Carolina, Rhode Island, Tennessee, Vermont, and West Virginia.

32 2010 Census, *supra* note 12 (261,813,731 out of 308,143,815 residents).

33 Calabresi & Agudo, *supra* note 5, at 39.

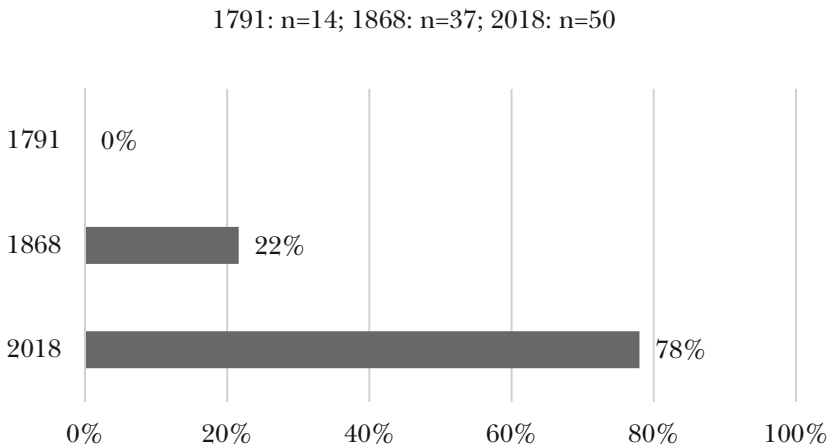
34 *Id.* at 39 nn.105–06 (explaining that the proposed amendment passed in the House, but “failed to garner the necessary two-thirds vote in the Senate”).

35 WYO. CONST. art. I, § 19.

36 OKLA. CONST. art. II, § 5.

We count these clauses as a type of establishment clause because they prevent the government from forcing taxpayers to support any particular religion or pay the salaries of its ministers, priests, rabbis, or imams, thereby shielding all people from an establishment of a state religion, under which individuals could be asked to pay taxes toward the state-supported church. There is a consensus among constitutional law professors that the core evil that James Madison was concerned with when he drafted the Federal Establishment Clause was preventing the government from paying the salaries of church officials.<sup>37</sup> We thus count states that have Blaine Amendments as also having, in effect, an establishment clause.

FIGURE 2. BLAINE AMENDMENTS IN STATE CONSTITUTIONS



There is a striking increase in the number of states that have Blaine Amendments from the situation in 1868 when the Fourteenth Amendment was adopted. At that time, only eight state constitutions out of thirty-seven had Blaine Amendments, and only 22% of the public lived in those states.<sup>38</sup> In 2018, in contrast, thirty-nine states comprising 85% percent of the population live in states that have Blaine Amendments. In 1791, no states had Blaine Amendments in their state constitutions.<sup>39</sup> What accounts for this extraordinary increase in the prevalence of Blaine Amendments from 1791 to 1868 to 2018? Part of the answer can be found in *Separation of Church and State* by Philip Hamburger.<sup>40</sup> Professor Hamburger shows conclusively that most of these clauses began to appear in state constitutions in the 1870s and 1880s, as a wave of anti-Catholic bias arose against new immigrants to the

<sup>37</sup> See, e.g., Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 990 (1999).

<sup>38</sup> See Calabresi & Agudo, *supra* note 5, at 39.

<sup>39</sup> Calabresi, Agudo & Dore, *supra* note 5, at 1477.

<sup>40</sup> PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002).

United States hailing from such Catholic countries as Ireland and Italy.<sup>41</sup> The Protestant majority felt threatened that it would have to fund Catholic parochial schools, and so the movement to adopt Blaine Amendments took off.<sup>42</sup> There was also an increase in the number of agnostics and atheists after Charles Darwin proposed his theory of evolution in 1871, arguing that human beings are descended from ape-like ancestors.<sup>43</sup> As a result, there are more intellectual leaders who have fallen into the secular camp since 1871.<sup>44</sup> This may explain the opposition to government funding of religious schools since secular intellectuals think that biblical creationism is nonsense.

As a matter of the original understanding of the Fourteenth Amendment in 1868 when the Privileges or Immunities Clause was added into the Federal Bill of Rights and made applicable to the states, there can be no question that Blaine Amendments were oddities at best. As a matter of living constitutionalism, however, Blaine Amendments are in effect in an Article V consensus of three-quarters of the states. We believe<sup>45</sup> that the state Blaine Amendments are unconstitutional as a violation of the Free Exercise Clause, as Justice Antonin Scalia argued in his dissent joined by Justice Clarence Thomas in *Locke v. Davey*.<sup>46</sup> The Supreme Court recently took an important step in that direction in its seven–two decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*.<sup>47</sup>

We feel that we should also mention that thirty-four states—comprising 68% of the states and 61.4% of the U.S. population<sup>48</sup>—use a fourth formulation of the establishment clause.<sup>49</sup> These states ban the establishment of a state religion by ensuring that civilians cannot be compelled or forced to attend any church, or to support any church (financially or otherwise). Vermont’s constitution, as an example, provides:

41 *Id.* at 191–92, 201–03.

42 *Id.* at 219–23, 296–302.

43 See Stephen LeDrew, *The Evolution of Atheism: Scientific and Humanistic Approaches*, 25 HIST. HUM. SCI. 70, 75–77 (2012).

44 See *id.*

45 When the authors of this Article express their views using such words as “we,” “our,” and “us,” the opinions expressed reflect the views of at least the two faculty authors, not necessarily the authors who were students when they did the bulk of their work on the project. See *supra* note \*.

46 540 U.S. 712, 725 (2004) (Scalia, J., dissenting).

47 137 S. Ct. 2012 (2017).

48 2010 Census, *supra* note 12 (189,092,274 out of 308,143,815 residents).

49 See ALA. CONST. art. I, § 3; ARK. CONST. art. II, § 24; COLO. CONST. art. II, § 4; CONN. CONST. art. VII; DEL. CONST. art. I, § 1; GA. CONST. art. I, § 1, paras. 3, 4; IDAHO CONST. art. I, § 4; ILL. CONST. art. I, § 3; IND. CONST. art. I, § 4; IOWA CONST. art. I, § 3; KAN. CONST. Bill of Rights, § 7; KY. CONST. Bill of Rights, § 5; ME. CONST. art. I, § 3; MD. CONST. Declaration of Rights, art. XXXVI; MICH. CONST. art. I, § 4; MINN. CONST. art. I, § 16; MO. CONST. art. I, § 5; NEB. CONST. art. I, § 4; N.H. CONST. pt. 1, art. VI; N.M. CONST. art. II, § 11; N.C. CONST. art. I, § 13; OHIO CONST. art. I, § 7; OKLA. CONST. art. I, § 2; OR. CONST. art. I, § 3; PA. CONST. art. I, § 3; R.I. CONST. art. I, § 3; S.D. CONST. art. VI, § 3; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 6; VT. CONST. ch. 1, art. III; VA. CONST. art. I, § 16; WASH. CONST. art. I, § 11; W. VA. CONST. art. III, § 15; Wis. CONST. art. I, § 18.

That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no person ought to, 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 conscience, nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculia[r] mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. 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.<sup>50</sup>

Colorado's constitution contains a similar clause, stating that:

The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.<sup>51</sup>

Protections like these are critically important for religious freedom. Indeed, this type of coercion was one of James Madison's primary concerns when he led the fight to disestablish the Episcopal Church as the established church of Virginia. For instance, in 1784, James Madison fought against a Virginia General Assembly bill that sought "to collect tax money for all Christian churches in the name of 'public morality.' Madison and others saw the bill for what it was: an attempt to prop up the Protestant Episcopal (Anglican) church with taxpayers' money."<sup>52</sup> In the end, then, we count these clauses as anti-establishment of religion clauses because, by prohibiting the state from engaging in coercive practices that force individuals to support any given church, they protect religious liberty at a fundamental level and prevent the establishment—in an indirect way—of a state religion.

Finally, while no state constitutions in 2018 establish a state religion, we think it is worth pointing out that two states express support for Christianity within their religious freedom clauses. Vermont's constitution, to begin with, holds that "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

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50 VT. CONST. ch. 1, art. III (alteration in original).

51 COLO. CONST. art. II, § 4.

52 Joseph Loconte, *James Madison and Religious Liberty*, HERITAGE FOUND. (Mar. 16, 2001), <http://www.heritage.org/political-process/report/james-madison-and-religious-liberty>.

them shall seem most agreeable to the revealed will of God.”<sup>53</sup> Virginia’s constitution, in comparison, states that “it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.”<sup>54</sup> Nevertheless, we still count these states as prohibiting an establishment of religion because their constitutions also contain clear antiestablishment language.<sup>55</sup> The references to Christianity are obviously dated and only an indication of ceremonial deism.

## 2. Free Exercise Clauses

In 2018, free exercise clause analogs—which guarantee citizens the right to freedom of religious worship—are found universally in all fifty state constitutions.<sup>56</sup> All thirty-seven state constitutions in 1868 also had free exercise of religion clauses,<sup>57</sup> so there has been no evolution with respect to this constitutional right. In addition, thirteen out of fourteen state constitutions or colonial charters functioning as a state constitution had free exercise clauses

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53 VT. CONST. ch. 1, art. III.

54 VA. CONST. art. I, § 16.

55 *E.g.*, VT. CONST. ch. 1, art. III (“[T]hat no person ought to, 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 conscience . . . and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship.”); VA. CONST. art. I, § 16 (“That religion . . . can be directed only by reason and conviction, not by force or violence; and, therefore, . . . [n]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief . . . . And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry . . .”).

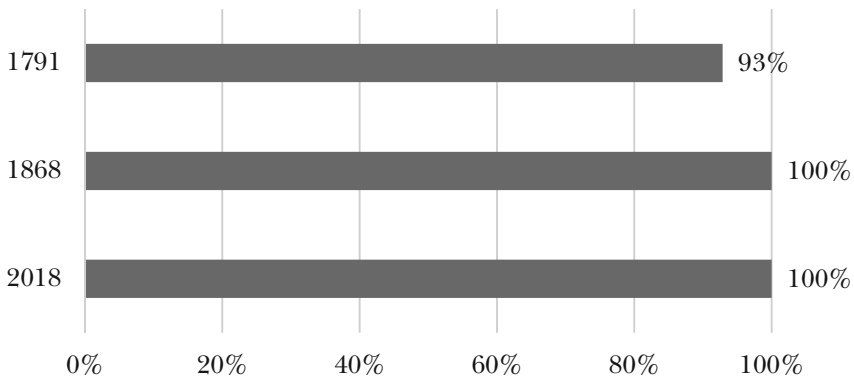
56 *See* ALA. CONST. art. I, § 3; ALASKA CONST. art. I, § 4; ARIZ. CONST. art. XX, § 1; ARK. CONST. art. II, §§ 24–25; CAL. CONST. art. I, § 4; COLO. CONST. art. II, § 4; CONN. CONST. art. I, § 3; *id.* art. VII; DEL. CONST. art. I, § 1; FLA. CONST. art. I, § 3; GA. CONST. art. I, § 1, para. 3; HAW. CONST. art. I, § 4; IDAHO CONST. art. I, § 4; ILL. CONST. art. I, § 3; IND. CONST. art. I, §§ 2–4; IOWA CONST. art. I, § 3; KAN. CONST. Bill of Rights, § 7; KY. CONST. Bill of Rights, § 5; LA. CONST. art. I, § 8; ME. CONST. art. I, § 3; MD. CONST. Declaration of Rights, art. XXXVI; MASS. CONST. pt. 1, art. II; *id.* arts. of amend. XVIII; MICH. CONST. art. I, §§ 2, 4; MINN. CONST. art. I, § 16; MISS. CONST. art. III, § 18; MO. CONST. art. I, § 5; MONT. CONST. art. II, § 5; NEB. CONST. art. I, § 4; NEV. CONST. art. I, § 4; N.H. CONST. pt. 1, arts. IV, V; N.J. CONST. art. I, § 3; N.M. CONST. art. II, § 11; N.Y. CONST. art. I, § 3; N.C. CONST. art. I, § 13; N.D. CONST. art. I, § 3; OHIO CONST. art. I, § 7; OKLA. CONST. art. I, § 2; OR. CONST. art. I, §§ 2–3; PA. CONST. art. I, § 3; R.I. CONST. art. I, § 3; S.C. CONST. art. I, § 2, S.D. CONST. art. VI, § 3; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 6; UTAH CONST. art. I, §§ 1, 4; VT. CONST. ch. 1, art. III; VA. CONST. art. I, § 16; WASH. CONST. art. I, § 11; W. VA. CONST. art. III, § 15; WIS. CONST. art. I, § 18; WYO. CONST. art. I, § 18.

57 Calabresi & Agudo, *supra* note 5, at 33.

in their Bills of Rights in 1791 when the Federal Bill of Rights was ratified.<sup>58</sup> The right to the free exercise of one's religion is more deeply rooted in American history, tradition, and modern-day state constitutional consensus than any other rights and is as deeply rooted as the rights to jury trial and to habeas corpus.<sup>59</sup>

FIGURE 3. FREE EXERCISE OF RELIGION CLAUSES IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



It should be noted that the 1791 free exercise clauses all protected “freedom of *worship*” rather than the “free *exercise* of religion.” One could argue that the federal right to free exercise is even broader than the state rights in 1791 to freedom of worship. We think the words “exercise” and “worship” mean the same thing in these various clauses although it is more of a stretch to say that, for example, running a religious preschool is “worship” rather than an “exercise” of freedom of religion. In the present day, we think the federal language has completely informed and possibly expanded the meaning of the state language providing for freedom of worship.

The language used in the free exercise clause analogs varies widely from state to state. Some states adhere closely to the rhetoric used in the Federal Constitution,<sup>60</sup> electing to protect “free exercise” by name. For example, Indiana’s constitution holds that “[n]o law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience.”<sup>61</sup> Others provide that all people have a right to worship in whatever way they see fit, according to the dictates of their own conscience. Tennessee’s constitution, for instance, states:

58 Calabresi, Agudo & Dore, *supra* note 5, at 1473.

59 See *infra* notes 229–31, 338–40, 346–48 and accompanying text.

60 U.S. CONST. amend. I.

61 IND. CONST. art. I, § 3.



That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.<sup>62</sup>

Arizona's free exercise clause, in comparison, is quite broad, and it uses some of the most rights-protective language out of all of the free exercise clause analogs, drawing a circle of protection that even encompasses atheism. It provides that "[p]erfect toleration of religious sentiment shall be secured to every inhabitant of this state, and no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship, or lack of the same."<sup>63</sup>

Other states place limitations on the right to worship in their free exercise clause analogs, clarifying that the religious liberty they guarantee cannot be construed to justify otherwise illegal or dangerous behavior. Among other things, such limitations can be used to prohibit polygamous marriages, certain kinds of illicit drug use, and the burning of a widow on her husband's pyre. California's free exercise clause, for example, states that the "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State"<sup>64</sup> and Maine's constitution states that:

All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no person shall be hurt, molested or restrained in that person's liberty or estate for worshipping God in the manner and season most agreeable to the dictates of that person's own conscience, nor for that person's religious professions or sentiments, provided that that person does not disturb the public peace, nor obstruct others in their religious worship . . . .<sup>65</sup>

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62 TENN. CONST. art. I, § 3.

63 ARIZ. CONST. art. XX, § 1. Oklahoma's free exercise clause is similar to Arizona's, except that it doesn't have the "or lack of the same" language and it limits free exercise to some extent by banning polygamy. See OKLA. CONST. art. I, § 2 ("Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil or political rights. Polygamous or plural marriages are forever prohibited.").

64 CAL. CONST. art. I, § 4. Mississippi's constitution contains a similar clause. MISS. CONST. art. III, § 18 ("No religious test as a qualification for office shall be required; and no preference shall be given by law to any religious sect or mode of worship; but the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred. The rights hereby secured *shall not be construed to justify acts of licentiousness injurious to morals or dangerous to the peace and safety of the state*, or to exclude the Holy Bible from use in any public school of this state." (emphasis added)).

65 ME. CONST. art. I, § 3.

In addition, Idaho's constitution indicates that:

The exercise and enjoyment of religious faith and worship shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, or excuse acts of licentiousness or justify polygamous or other pernicious practices, inconsistent with morality or the peace or safety of the state; nor to permit any person, organization, or association to directly or indirectly aid or abet, counsel or advise any person to commit the crime of bigamy or polygamy, or any other crime. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship. Bigamy and polygamy are forever prohibited in the state, and the legislature shall provide by law for the punishment of such crimes.<sup>66</sup>

It is thus clear that many states have included textual caveats that qualify the right to free exercise of religion, ensuring that their free exercise clause analogs are not limitless, and do not validate otherwise illicit actions that disturb the public peace or that harm other people. Neo-Aztecs who wanted to commit a human sacrifice of a consenting neo-Aztec would not be protected in doing so by the free exercise clauses of either the federal or of any of the state constitutions in our opinion. The same thing goes for committing *suttee*, whereby a willing Hindu wife was burned alive on the funeral pyre of her dead husband.<sup>67</sup>

Another difference between the free exercise clause analogs is that four states, Delaware, Maryland, Massachusetts, and Virginia, use language that appears to imply a duty to worship some sort of deity or God.<sup>68</sup> Delaware's constitution, as an example, states:

Although it is the *duty* of all persons frequently to assemble together for the public worship of Almighty God; and piety and morality, on which the prosperity of communities depends, are hereby promoted; yet no person shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his or her own free will and consent; and no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship, nor a preference given by law to any religious societies, denominations, or modes of worship.<sup>69</sup>

We still count these states as providing for the free exercise of religion in their state constitutions because even though they mention a supposed duty to worship, they then go on to provide typical free exercise clause protec-

66 IDAHO CONST. art. I, § 4.

67 Luke Harding, *The Ultimate Sacrifice*, GUARDIAN (Aug. 23, 2002), <https://www.theguardian.com/world/2002/aug/23/gender.uk1>.

68 DEL. CONST. art. I, § 1; MD. CONST. Declaration of Rights, art. XXXVI; MASS. CONST. pt. 1, art. II; VA. CONST. art. I, § 16.

69 DEL. CONST. art. I, § 1 (emphasis added).

tions, such as noting that “no person shall or ought to be compelled to attend any religious worship” and “no power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship.”<sup>70</sup>

Finally, it is worth pointing out that two states used language that appears to be biased in favor of the Christian faith within their free exercise clause analogs. Vermont’s constitution, to begin with, includes the statement that “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.”<sup>71</sup> Likewise, Virginia’s constitution holds that “it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.”<sup>72</sup> Yet, despite their references to Christianity, the free exercise clause analogs of these two states still protect a general right to religious liberty. Indeed, they each prevent people from being “compelled” to worship in any way, and prohibit authorities from interfering with the “free exercise” of religious worship. For those reasons, we count them as states that protect a right to free exercise of religion.<sup>73</sup>

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70 *Id.*

71 VT. CONST. ch. 1, art. III (“That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no person ought to, 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 conscience, nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculia[r] mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship. 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.”).

72 VA. CONST. art. I, § 16 (“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 practice Christian forbearance, love, and charity towards each other. No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities. And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please.”).

73 VT. CONST. ch. 1, art. III; VA. CONST. art. I, § 16.

### 3. References to God in the Preamble

Forty-six of the fifty states in 2018—comprising 92% of the states and 95.5% of the U.S. population<sup>74</sup>—expressly refer to God in the preamble of their state constitutions.<sup>75</sup> A typical example appears in Wisconsin’s constitution, which says that “[w]e, the people of Wisconsin, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquility and promote the general welfare, do establish this constitution.”<sup>76</sup> Some of the states were more creative with their references to God, like the Missouri Constitution, which says “[w]e, the people of Missouri, with profound reverence for the Supreme Ruler of the Universe, and grateful for His goodness, do establish this Constitution for the better government of the state,”<sup>77</sup> and the Massachusetts Constitution, which includes the phrase “acknowledging, with grateful hearts, the goodness of the great Legislator of the universe.”<sup>78</sup> The Texas Constitution utilizes a pithier preamble, simply writing, “[h]umbly invoking the blessings of Almighty God, the people of the State of Texas, do ordain and establish this Constitution.”<sup>79</sup>

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74 2010 Census, *supra* note 12 (294,369,506 out of 308,143,815 residents).

75 See ALA. CONST. pmbl.; ALASKA CONST. pmbl.; ARIZ. CONST. pmbl.; ARK. CONST. pmbl.; CAL. CONST. pmbl.; COLO. CONST. pmbl.; CONN. CONST. pmbl.; DEL. CONST. pmbl.; FLA. CONST. pmbl.; GA. CONST. pmbl.; HAW. CONST. pmbl.; IDAHO CONST. pmbl.; ILL. CONST. pmbl.; IND. CONST. pmbl.; IOWA CONST. pmbl.; KAN. CONST. pmbl.; KY. CONST. pmbl.; LA. CONST. pmbl.; ME. CONST. pmbl.; MD. CONST. pmbl.; MASS. CONST. pmbl.; MICH. CONST. pmbl.; MINN. CONST. pmbl.; MISS. CONST. pmbl.; MO. CONST. pmbl.; MONT. CONST. pmbl.; NEB. CONST. pmbl.; NEV. CONST. pmbl.; N.J. CONST. pmbl.; N.M. CONST. pmbl.; N.Y. CONST. pmbl.; N.C. CONST. pmbl.; N.D. CONST. pmbl.; OHIO CONST. pmbl.; OKLA. CONST. pmbl.; PA. CONST. pmbl.; R.I. CONST. pmbl.; S.C. CONST. pmbl.; S.D. CONST. pmbl.; TENN. CONST. pmbl.; TEX. CONST. pmbl.; UTAH CONST. pmbl.; WASH. CONST. pmbl.; W. VA. CONST. pmbl.; WIS. CONST. pmbl.; WYO. CONST. pmbl. The four states without God in the preamble are New Hampshire, Oregon, Vermont, and Virginia.

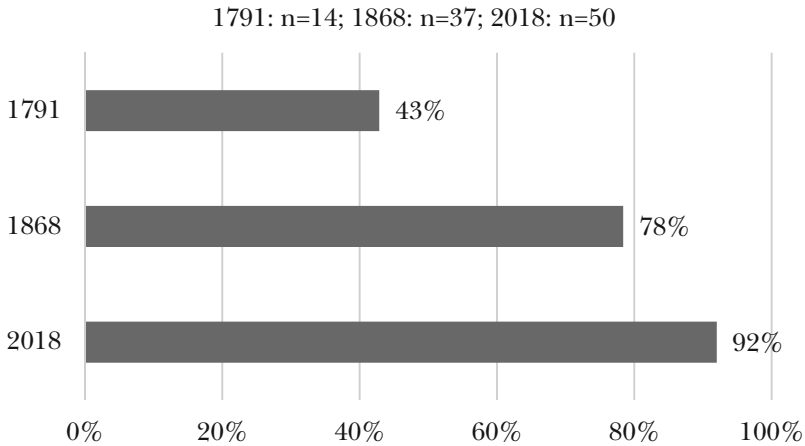
76 WIS. CONST. pmbl.

77 MO. CONST. pmbl.

78 MASS. CONST. pmbl.

79 TEX. CONST. pmbl.

FIGURE 4. REFERENCES TO GOD IN PREAMBLES TO STATE CONSTITUTIONS



Such widespread inclusion of explicit references to God in the preambles of the modern state constitutions is striking because it represents a departure from the Federal Constitution, a document that conspicuously avoids referring to God. Though they largely identified with different sects of the Protestant faith,<sup>80</sup> the Framers left God out of the Constitution for a few key reasons. First, the Framers wanted to leave matters of religion and worship up to the states in order to respect reserved state powers, a value that is both enshrined throughout the Federal Constitution<sup>81</sup> and in other found-

80 See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 240 (1963) (Brennan, J., concurring) (“[O]ur religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.”); see also *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 884 (2005) (O’Connor, J., concurring) (“[T]he Framers lived at a time when our national religious diversity was neither as robust nor as well recognized as it is now. They may not have foreseen the variety of religions for which this Nation would eventually provide a home.”).

81 U.S. CONST. pmb. (“We the People of the United States . . . ordain and establish this Constitution for the United States of America.”); *id.* amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); Anthony J. Minna, *Why God Is in the Declaration but Not the Constitution*, J. AM. REVOLUTION (Feb. 22, 2016), <https://allthingsliberty.com/2016/02/why-god-is-in-the-declaration-but-not-the-constitution/> (“[T]he theory of government underpinning the United States Constitution is popular sovereignty. The government derives its legitimacy from the consent of the governed, not from an assembly of elders, not from a king or a prelate, and not from a higher power. The stirring opening words of the Preamble, ‘We the People of the United States,’ make it clear both who is establishing the govern-

ing documents, such as the Declaration of Independence.<sup>82</sup> In addition, the Federal Constitution sought to achieve strict religious neutrality, both because the Framers valued it for its own sake<sup>83</sup> and because there was a pervasive fear of governmental tyranny, making the Framers and the colonists deeply suspicious of centralized national powers that might attempt to “claim, as European rulers did, that their authority was divine in origin.”<sup>84</sup> The Framers of the Federal Constitution were acutely aware of the fact that the Episcopal or Anglican Church was run by the Archbishop of Canterbury who was appointed by the King of England, one of whose titles was, and still

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ment and for whose benefit it exists. There is no consent required beyond the will of the people for the people to govern themselves.”).

82 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“That to secure these Rights, Governments are instituted among Men, *deriving their just Powers 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 to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.*” (emphasis added)).

83 See Minna, *supra* note 81 (“Eighteenth century America was religiously diverse, and by the time of the Revolution religion was widely viewed as a matter of voluntary individual choice. The Constitution acknowledged these realities and, unlike contemporary European political orders, promoted no sect and took no position whatsoever on theological issues. There is no state religion and Article VI of the Constitution provides that ‘no religious Test shall ever be required as a qualification to any Office or public Trust under the United States.’ The First Amendment to the Constitution, ratified in 1791, provides that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’ The absence of references to a deity in the Constitution is consistent with the strict religious neutrality of the entire document.” (first quoting U.S. CONST. art. VI; and then quoting U.S. CONST. amend I)); see also *id.* (“Whereas the Declaration explained and justified a rebellion to secure God-given rights, the Constitution is a blueprint for stable and effective republican government in a free country. The Preamble to the Constitution declares that its purposes are ‘to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty.’ These are wholly secular objects; religious references are extraneous in a document drafted to further them.” (quoting U.S. CONST. pmb1.)).

84 *Id.* (“And in the early years of the American republic, the people in question were deeply suspicious of power. There was considerable opposition to the Constitution as initially drafted, both in the state conventions called to ratify it and among ordinary Americans. Opponents believed that a centralization of authority would lead to tyranny and argued either for outright rejection or, at a minimum, for amendments to limit the powers of the new government and safeguard liberties. In such an anti-power environment, few Americans wished to see their new rulers claim, as European rulers did, that their authority was divine in origin. In creating a political order based on popular sovereignty, the Founding Fathers thus turned prevailing European political theory on its head. In place of the divine right of monarchs, the Declaration asserted the divine rights of all men, and both the Declaration and the Constitution source the legitimacy of political rule exclusively in the consent of the governed.”).

is, “the Defender of the Faith.”<sup>85</sup> The Framers did not want any President or future Congress to be able to defend the faith by establishing a national church, and this too probably explains the Framers’ decision not to refer to God in the Preamble to the Federal Constitution.

The Framers’ fears are less applicable to the state governments, since the states hold decidedly less power than a centralized national government, and because the states are able to shape their laws and ruling documents to fit the sensibilities of the local population that they serve. For that reason, it is possible that the states included references to God in their constitutions precisely because of popular sovereignty, as well as due to a lack of fear about states governments attempting to amass power under the claim that their power is divine in origin.

There are noticeably more references to God in the preambles of modern 2018 state constitutions than there were in 1868, when only twenty-nine out of thirty-seven state constitutions mentioned God in their preambles.<sup>86</sup> Only six states out of fourteen referred to God in the preambles of their constitutions in 1791.<sup>87</sup> The modern 2018 numbers, again, are forty-six of the fifty states<sup>88</sup>—comprising 92% of the states and 95.5% of the U.S. population.<sup>89</sup> We believe that this fact suggests that living constitutionalism ought to be at least somewhat more deistic than originalist constitutionalism, though we think it is worth noting that increased inclusion of the word “God” in the preamble could be seen as a form of ceremonial deism, discussed in more detail below. Either way, we have no idea at all as to what that would

85 See *Charles Vows to Keep “Defender of the Faith” Title as King*, NAT’L SECULAR SOC’Y (Feb. 9, 2015), <https://www.secularism.org.uk/news/2015/02/charles-vows-to-keep-defender-of-the-faith-title-as-king>.

86 See Calabresi & Agudo, *supra* note 5, at 37. Note that in our original analysis, we coded only twenty-seven states as having a reference to God in the preamble. *Id.* We now believe that framing was too narrow. Under our updated count, the states that mention God in the preamble of their 1868 constitution are Alabama, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin.

87 Calabresi, Agudo & Dore, *supra* note 5, at 1473–75.

88 See ALA. CONST. pmb.; ALASKA CONST. pmb.; ARIZ. CONST. pmb.; ARK. CONST. pmb.; CAL. CONST. pmb.; COLO. CONST. pmb.; CONN. CONST. pmb.; DEL. CONST. pmb.; FLA. CONST. pmb.; GA. CONST. pmb.; HAW. CONST. pmb.; IDAHO CONST. pmb.; ILL. CONST. pmb.; IND. CONST. pmb.; IOWA CONST. pmb.; KAN. CONST. pmb.; KY. CONST. pmb.; LA. CONST. pmb.; ME. CONST. pmb.; MD. CONST. pmb.; MASS. CONST. pmb.; MICH. CONST. pmb.; MINN. CONST. pmb.; MISS. CONST. pmb.; MO. CONST. pmb.; MONT. CONST. pmb.; NEB. CONST. pmb.; NEV. CONST. pmb.; N.J. CONST. pmb.; N.M. CONST. pmb.; N.Y. CONST. pmb.; N.C. CONST. pmb.; N.D. CONST. pmb.; OHIO CONST. pmb.; OKLA. CONST. pmb.; PA. CONST. pmb.; R.I. CONST. pmb.; S.C. CONST. pmb.; S.D. CONST. pmb.; TENN. CONST. pmb.; TEX. CONST. pmb.; UTAH CONST. pmb.; WASH. CONST. pmb.; W. VA. CONST. pmb.; WIS. CONST. pmb.; WYO. CONST. pmb. The four states without God in the preamble are New Hampshire, Oregon, Vermont, and Virginia.

89 2010 Census, *supra* note 12 (294,369,506 out of 308,143,815 residents).

mean except that it suggests continuing themes of theism in American state constitutional law. It perhaps suggests that the words “under God” in the Pledge of Allegiance and the national motto of “In God We Trust” are not constitutionally problematic.

#### 4. Ceremonial Deism

All fifty states have constitutions with rhetoric that can be described as including instances of what might be called “ceremonial deism.”<sup>90</sup> Ceremonial deism is a concept that was introduced by the Supreme Court in recent decades in relation to the inclusion of religious phrases like “In God We Trust” in government-affiliated documents and statements, such as in our national motto.<sup>91</sup> Examples of ceremonial deism include the textual use of phrases such as “Almighty God,”<sup>92</sup> “Sovereign Ruler of the Universe,”<sup>93</sup> “Divine Providence,”<sup>94</sup> and “their Creator”<sup>95</sup> in the state constitutions.

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90 See ALA. CONST. pmbl.; ALASKA CONST. pmbl.; ARIZ. CONST. pmbl.; ARK. CONST. pmbl.; CAL. CONST. pmbl.; COLO. CONST. pmbl.; CONN. CONST. pmbl.; DEL. CONST. pmbl.; FLA. CONST. pmbl.; GA. CONST. pmbl.; HAW. CONST. pmbl.; IDAHO CONST. pmbl.; ILL. CONST. pmbl.; IND. CONST. pmbl.; IOWA CONST. pmbl.; KAN. CONST. pmbl.; KY. CONST. pmbl.; LA. CONST. pmbl.; ME. CONST. pmbl.; MD. CONST. pmbl.; MASS. CONST. pmbl.; MICH. CONST. pmbl.; MINN. CONST. pmbl.; MISS. CONST. pmbl.; MO. CONST. pmbl.; MONT. CONST. pmbl.; NEB. CONST. pmbl.; NEV. CONST. pmbl.; N.H. CONST. pt. I, art. V; N.J. CONST. pmbl.; N.M. CONST. pmbl.; N.Y. CONST. pmbl.; N.C. CONST. pmbl.; N.D. CONST. pmbl.; OHIO CONST. pmbl.; OKLA. CONST. pmbl.; OR. CONST. art. I, § 2; PA. CONST. pmbl.; R.I. CONST. pmbl.; S.C. CONST. pmbl.; S.D. CONST. pmbl.; TENN. CONST. pmbl.; TEX. CONST. pmbl.; UTAH CONST. pmbl.; VT. CONST. ch. 2, §§ 17, 56; VA. CONST. art. II, § 7; WASH. CONST. pmbl.; W. VA. CONST. pmbl.; Wis. CONST. pmbl.; WYO. CONST. pmbl.

91 See *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (“While I remain uncertain about these questions, I would suggest that such practices as the designation of ‘In God We Trust’ as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow’s apt phrase, as a form [of] ‘ceremonial deism,’ protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.” (footnote omitted)); see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O’Connor, J., concurring in the judgment) (explaining how ceremony can strip references to God of their religious significance and replace it with historical significance instead).

92 *E.g.*, IDAHO CONST. pmbl. (“We, the people of the state of Idaho, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this Constitution.”).

93 *E.g.*, ME. CONST. pmbl. (“We the people of Maine, in order to establish justice, insure tranquility, provide for our mutual defense, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with grateful hearts the goodness of the Sovereign Ruler of the Universe in affording us an opportunity, so favorable to the design; and, imploring God’s aid and direction in its accomplishment, do agree to form ourselves into a free and independent State, by the style and title of the State of Maine and do ordain and establish the following Constitution for the government of the same.”).

94 *E.g.*, W. VA. CONST. pmbl. (“Since through Divine Providence we enjoy the blessings of civil, political and religious liberty, we, the people of West Virginia, in and through the



Largely, these phrases appear in the preambles of the state constitutions. However, even the states that do not have a preamble<sup>96</sup> or do not reference God in their preamble<sup>97</sup> still mention God elsewhere in their constitution, such as in their religious liberty clauses<sup>98</sup> or in their oath of office clauses.<sup>99</sup>

We found ceremonial deism in thirty-six of the thirty-seven state constitutions in 1868 when the Fourteenth Amendment was ratified,<sup>100</sup> whereas today all fifty states use such language. We again think this suggests that the living constitution is as theistic as were the original thirty-seven states, which ratified the Fourteenth Amendment, and more theistic than were the original twelve state constitutions as they stood in 1791 when only six out of twelve newly written state constitutions included ceremonial deist language.<sup>101</sup>

It is worth noting that all fifty states have establishment clauses,<sup>102</sup> and yet all fifty states also refer to God in their constitutions.<sup>103</sup> There thus appears to be a unanimous agreement amongst the fifty states that references to ceremonial deism are consistent with the principles of religious neutrality and separation of church and state enshrined both in the Federal Constitution and in their individual state constitutions. This suggests that the Supreme Court has correctly read these references to ceremonial deism as being cultural and historic rather than as being religious in nature. This suggests that the use of the words “under God” in the pledge of allegiance and of “In God We Trust” in the national motto are not constitutionally problematic.

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provisions of this Constitution, reaffirm our faith in and constant reliance upon God and seek diligently to promote, preserve and perpetuate good government in the state of West Virginia for the common welfare, freedom and security of ourselves and our posterity.”).

95 *E.g.*, DEL. CONST. pmb. (“Through Divine goodness, all people have by nature the rights of worshiping and serving their Creator according to the dictates of their consciences, of enjoying and defending life and liberty, of acquiring and protecting reputation and property, and in general of obtaining objects suitable to their condition, without injury by one to another; and as these rights are essential to their welfare, for due exercise thereof, power is inherent in them; and therefore all just authority in the institutions of political society is derived from the people, and established with their consent, to advance their happiness; and they may for this end, as circumstances require, from time to time, alter their Constitution of government.”).

96 New Hampshire, Vermont, and Virginia do not have a preamble affixed to their state constitutions.

97 Oregon does not reference God in the preamble of its state constitution.

98 *E.g.*, OR. CONST. art. I, § 2.

99 *E.g.*, VT. CONST. ch. 2, §§ 17, 56; VA. CONST. art. II, § 7.

100 *See* Calabresi & Agudo, *supra* note 5, at 38. Note that in our original analysis, *id.*, we coded only thirty states as including ceremonial deism. We now believe that all of the states except West Virginia included ceremonial deism in their state constitutions in 1868. Typically, the thirty-six states either mention God in the text of their constitutions (such as in their freedom of religion clauses or in their preambles), or they include phrases like “so help me God” in their oath of office.

101 Calabresi, Agudo, & Dore, *supra* note 5, at 1475–76.

102 *See supra* subsection II.A.1.

103 *See supra* subsection II.A.4.

### B. *Freedom of Expression Rights*

We now turn to the right to freedom of expression, which appears in the Federal First Amendment<sup>104</sup> after the religion clauses and which has largely been used—in all areas of American federal and state constitutional law—to protect against the suppression of freedom of speech or of the use of the printing press.<sup>105</sup> These clauses have been applied purposively, rather than literally, so that they protect freedom of expression via new technologies such as video broadcasting, the internet, and social media use, as well as protecting the freedom of the use of printing presses. We, of course, agree with this purposive interpretation. As we explain below, the right to freedom of expression is not only codified in the Federal Constitution, but it has also been codified in the state constitutions of all fifty states, indicating that the right to freedom of expression is yet another fundamental right that is universally protected by both the federal and all fifty state constitutions.

#### 1. Freedom of the Press

In a display of full constitutional uniformity, all fifty states guarantee freedom of the press to their citizens, although there is some variation in the specific phrasing of their freedom of the press clauses.<sup>106</sup> Some constitutions mention the press specifically, like Rhode Island’s constitution, which states “[t]he liberty of the press being essential to the security of freedom in a state,

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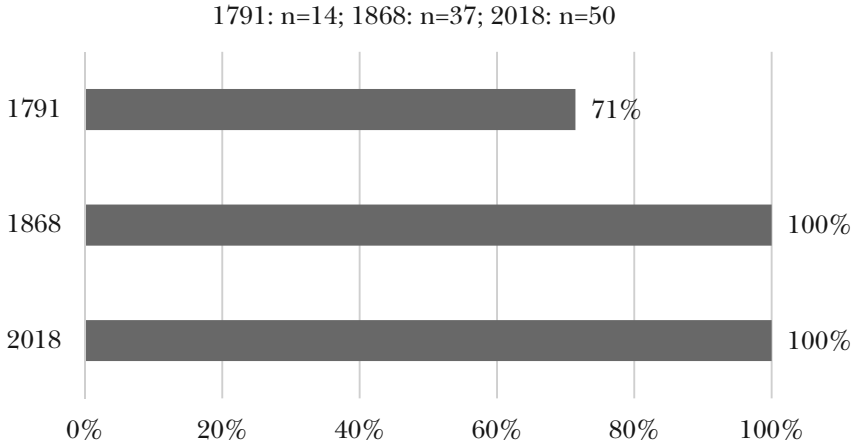
104 U.S. CONST. amend. I.

105 See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003) (explaining that a blanket ban on cross burning is unconstitutional because it represents a content-based restriction on free speech); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (holding that a claimed threat to national security is not a sufficient justification for prior restraint concerning the publication of the Pentagon Papers); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that students wearing black armbands at school to protest the Vietnam War were engaging in symbolic speech, which is protected under the First Amendment); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (stating that the First Amendment protects the publication of all statements about public officials, caveat that false statements which are made with actual malice can be prohibited).

106 See ALA. CONST. art. I, § 4; ALASKA CONST. art. I, § 5; ARIZ. CONST. art. II, § 6; ARK. CONST. art. II, § 6; CAL. CONST. art. I, § 2; COLO. CONST. art. II, § 10; CONN. CONST. art. I, §§ 4–5; DEL. CONST. art. I, § 5; FLA. CONST. art. I, § 4; GA. CONST. art. I, § 1, para. 5; HAW. CONST. art. I, § 4; IDAHO CONST. art. I, § 9; ILL. CONST. art. I, § 4; IND. CONST. art. I, § 9; IOWA CONST. art. I, § 7; KAN. CONST. Bill of Rights, § 11; KY. CONST. Bill of Rights, § 8; LA. CONST. art. I, § 7; ME. CONST. art. I, § 4; MD. CONST. Declaration of Rights, art. XL; MASS. CONST. art. of amend. LXXVII; MICH. CONST. art. I, § 5; MINN. CONST. art. I, § 3; MISS. CONST. art. III, § 13; MO. CONST. art. I, § 8; MONT. CONST. art. II, § 7; NEB. CONST. art. I, § 5; NEV. CONST. art. I, § 9; N.H. CONST. pt. 1, art. XXII; N.J. CONST. art. I, § 6; N.M. CONST. art. II, § 17; N.Y. CONST. art. I, § 8; N.C. CONST. art. I, § 14; N.D. CONST. art. I, § 4; OHIO CONST. art. I, § 11; OKLA. CONST. art. II, § 22; OR. CONST. art. I, § 8; PA. CONST. art. I, § 7; R.I. CONST. art. I, § 20; S.C. CONST. art. I, § 2; S.D. CONST. art. VI, § 5; TENN. CONST. art. I, § 19; TEX. CONST. art. I, § 8; UTAH CONST. art. I, §§ 1, 15; VT. CONST. ch. 1, art. XIII; VA. CONST. art. I, § 12; WASH. CONST. art. I, § 5; W. VA. CONST. art. III, § 7; WIS. CONST. art. I, § 3; WYO. CONST. art. I, § 20.

any person may publish sentiments on any subject, being responsible for the abuse of that liberty.”<sup>107</sup> Other state constitutions contain a less concrete reference to the word “press,” instead guaranteeing the right to write and publish. For example, South Dakota’s constitution holds that “[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.”<sup>108</sup>

FIGURE 5. FREEDOM OF THE PRESS IN STATE CONSTITUTIONS



The great majority of the states—forty-two states, representing 84% of the states and 92.8% of the U.S. population<sup>109</sup>—include the caveat that individuals will be held responsible for any abuse of right to freedom of the press.<sup>110</sup> For example, New Mexico’s constitution states that “[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain

107 R.I. CONST. art. I, § 20.

108 S.D. CONST. art. VI, § 5.

109 See 2010 Census, *supra* note 12 (286,084,134 out of 308,143,815 residents).

110 See ALA. CONST. art. I, § 4; ALASKA CONST. art. I, § 5; ARIZ. CONST. art. II, § 6; ARK. CONST. art. II, § 6; CAL. CONST. art. I, § 2; COLO. CONST. art. II, § 10; CONN. CONST. art. I, § 4; DEL. CONST. art. I, § 5; FLA. CONST. art. I, § 4; GA. CONST. art. I, § 1, para. 5; IDAHO CONST. art. I, § 9; ILL. CONST. art. I, § 4; IND. CONST. art. I, § 9; IOWA CONST. art. I, § 7; KAN. CONST. Bill of Rights, § 11; KY. CONST. Bill of Rights, § 8; LA. CONST. art. I, § 7; ME. CONST. art. I, § 4; MD. CONST. Declaration of Rights, art. XL; MICH. CONST. art. I, § 5; MINN. CONST. art. I, § 3; MO. CONST. art. I, § 8; MONT. CONST. art. II, § 7; NEB. CONST. art. I, § 5; NEV. CONST. art. I, § 9; N.J. CONST. art. I, § 6; N.M. CONST. art. II, § 17; N.Y. CONST. art. I, § 8; N.C. CONST. art. I, § 14; N.D. CONST. art. I, § 4; OHIO CONST. art. I, § 11; OKLA. CONST. art. II, § 22; OR. CONST. art. I, § 8; PA. CONST. art. I, § 7; R.I. CONST. art. I, § 20; S.D. CONST. art. VI, § 5; TENN. CONST. art. I, § 19; TEX. CONST. art. I, § 8; VA. CONST. art. I, § 12; WASH. CONST. art. I, § 5; Wis. CONST. art. I, § 3; WYO. CONST. art. I, § 20.

or abridge the liberty of speech or of the press.”<sup>111</sup> The Rhode Island and South Dakota constitutions, quoted above, also contain the same caveat.<sup>112</sup>

Two additional states have similar limitations on the right to freedom of the press. To begin with, although West Virginia’s constitution did not contain a “responsible for the abuse of that right” caveat, it arguably featured an even steeper limitation on the right to freedom of the press, noting that:

No law abridging the freedom of speech, or of the press, shall be passed; but the Legislature may, by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation.<sup>113</sup>

Similarly, while Utah’s state constitution did not contain the “responsible for the abuse of that right” caveat in relation to the right to freedom of the press, it did apply that right to freedom of communication, which could arguably include freedom of the press. Specifically, Utah’s constitution states that “[a]ll men have the inherent and inalienable right . . . to communicate freely their thoughts and opinions, being responsible for the abuse of that right.”<sup>114</sup>

The other six state constitutions contained no such caveats, thereby allowing them arguably to protect the right to freedom of the press to a greater extent than their counterparts.<sup>115</sup> As an example, South Carolina’s constitution holds that “[t]he General Assembly shall make no law . . . abridging the freedom of speech or of the press”<sup>116</sup> and New Hampshire’s constitution holds that “[f]ree [s]peech and liberty of the press are essential to the security of [f]reedom in a [s]tate: They ought, therefore, to be inviolably preserved.”<sup>117</sup> Still, regardless of any caveats, freedom of the press is secured by all fifty states.

The freedom of the press was protected in all thirty-seven state constitutions in 1868,<sup>118</sup> just as it is protected in all fifty state constitutions today. Ten states out of the twelve that wrote new constitutions between 1776 and 1791 also protected freedom of the press.<sup>119</sup> This is clearly a right that is deeply rooted in history, tradition, and in a modern-day consensus of the fifty states.

111 N.M. CONST. art. II, § 17.

112 See *supra* notes 107–08 and accompanying text.

113 W. VA. CONST. art. III, § 7.

114 UTAH CONST. art. I, § 1.

115 HAW. CONST. art. I, § 4; MASS. CONST. arts. of amend. LXXVII; MISS. CONST. art. III, § 13; N.H. CONST. pt. 1, art. XXII; S.C. CONST. art. I, § 2; VT. CONST. ch. 1, art. XIII.

116 S.C. CONST. art. I, § 2.

117 N.H. CONST. pt. 1, art. XXII.

118 See Calabresi & Agudo, *supra* note 5, at 41.

119 Calabresi, Agudo & Dore, *supra* note 5, at 1478.

## 2. Freedom of Speech

Another core right to expression protected under the Federal Constitution is freedom of speech. As with freedom of the press, all fifty states provide protections for freedom of speech in their state constitutions.<sup>120</sup> A typical formulation can be found in California's constitution, which provides that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."<sup>121</sup> Some states did not include such an explicit textual reference to freedom of speech in their constitutions, merely holding, for example, that "[e]very person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."<sup>122</sup>

In contrast to the other states, Arkansas's constitution does not mention speech or speaking explicitly. Instead, it holds that "[t]he free communication of thoughts and opinions, is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right."<sup>123</sup> We count Arkansas's constitution as protecting freedom of speech despite this lack of an explicit reference because it protects the right to free communication of thoughts and ideas, which we believe encompasses freedom of verbal communication in the form of speech.

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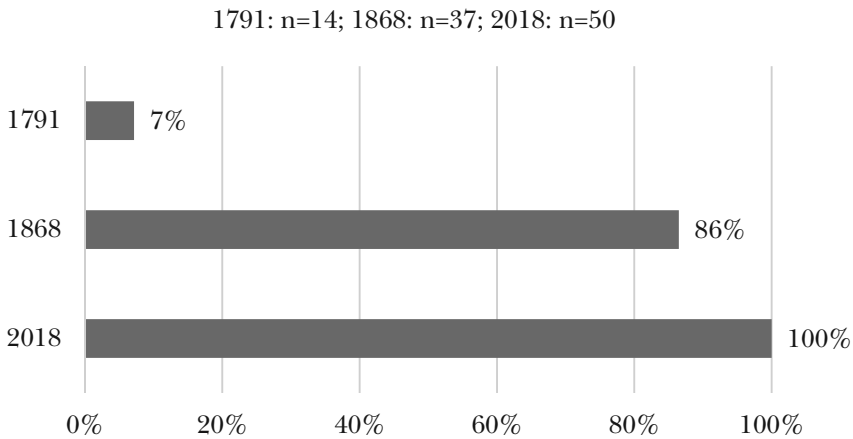
120 See ALA. CONST. art. I, § 4; ALASKA CONST. art. I, § 5; ARIZ. CONST. art. II § 6; ARK. CONST. art. II, § 6; CAL. CONST. art. I, § 2; COLO. CONST. art. II, § 10; CONN. CONST. art. I, §§ 4–5; DEL. CONST. art. I, § 5; FLA. CONST. art. I, § 4; GA. CONST. art. I, § 1, para. 5; HAW. CONST. art. I, § 4; IDAHO CONST. art. I, § 9; ILL. CONST. art. I, § 4; IND. CONST. art. I, § 9; IOWA CONST. art. I, § 7; KAN. CONST. Bill of Rights, § 11; KY. CONST. Bill of Rights, § 8; LA. CONST. art. I, § 7; ME. CONST. art. I, § 4; MD. CONST. Declaration of Rights, art. XL; MASS. CONST. arts. of amend. LXXVII; MICH. CONST. art. I, § 5; MINN. CONST. art. I, § 3; MISS. CONST. art. III, § 13; MO. CONST. art. I, § 8; MONT. CONST. art. II, § 7; NEB. CONST. art. I, § 5; NEV. CONST. art. I, § 9; N.H. CONST. pt. 1, art. XXII; N.J. CONST. art. I, § 6; N.M. CONST. art. II, § 17; N.Y. CONST. art. I, § 8; N.C. CONST. art. I, § 14; N.D. CONST. art. I, § 4; OHIO CONST. art. I, § 11; OKLA. CONST. art. II, § 22; OR. CONST. art. I, § 8; PA. CONST. art. I, § 7; R.I. CONST. art. I, § 21; S.C. CONST. art. I, § 2; S.D. CONST. art. VI, § 5; TENN. CONST. art. I, § 19; TEX. CONST. art. I, § 8; UTAH CONST. art. I, §§ 1, 15; VT. CONST. ch. 1, art. XIII; VA. CONST. art. I, § 12; WASH. CONST. art. I, § 5; W. VA. CONST. art. III, § 7; WIS. CONST. art. I, § 3; WYO. CONST. art. I, § 20.

121 CAL. CONST. art. I, § 2.

122 ARIZ. CONST. art. II, § 6.

123 ARK. CONST. art. II, § 6.

FIGURE 6. FREEDOM OF SPEECH IN STATE CONSTITUTIONS



The fact that 100% of the states provide a right to freedom of speech in their state constitutions is interesting because historically, the right to freedom of the press came before the right to freedom of speech. Indeed, in 1868, only thirty-two out of thirty-seven states protected a right to freedom of speech in their state constitutions,<sup>124</sup> while all thirty-seven states protected a right to freedom of the press.<sup>125</sup> Moreover, in 1791 when the Federal Bill of Rights was ratified, only one state—Pennsylvania—protected freedom of speech.<sup>126</sup> It thus appears that over time the right to freedom of speech has become increasingly fundamental, to the point where it is now a universally acknowledged basic liberty, enshrined both in the Federal Constitution and in the state constitutions of all fifty states. This may reflect state constitutional copying of the Federal Bill of Rights.

### 3. Petition and Assembly

Forty-eight of the fifty states—comprising 96% of the states and 97.6% of the U.S. population<sup>127</sup>—constitutionally protect the right to freedom of petition in their state constitutions.<sup>128</sup> All of these states but Maryland<sup>129</sup> com-

124 See Calabresi & Agudo, *supra* note 5, at 42.

125 *Id.* at 41.

126 See Calabresi, Agudo & Dore, *supra* note 5, at 1479.

127 See *2010 Census*, *supra* note 12 (300,780,711 out of 308,143,815 residents).

128 See ALA. CONST. art. I, § 25; ALASKA CONST. art. I, § 6; ARIZ. CONST. art. II, § 5; ARK. CONST. art. II, § 4; CAL. CONST. art. I, § 3, pt. A; COLO. CONST. art. II, § 24; CONN. CONST. art. I, § 14; DEL. CONST. art. I, § 16; FLA. CONST. art. I, § 5; GA. CONST. art. I, § 1, para. 9; HAW. CONST. art. I, § 4; IDAHO CONST. art. I, § 10; ILL. CONST. art. I, § 5; IND. CONST. art. I, § 31; IOWA CONST. art. I, § 20; KAN. CONST. Bill of Rights, § 3; KY. CONST. Bill of Rights, § 1; LA. CONST. art. I, § 9; ME. CONST. art. I, § 15; MD. CONST. Declaration of Rights, art. XIII; MASS. CONST. pt. 1, art. XIX; MICH. CONST. art. I, § 3; MISS. CONST. art. III, § 11; MO. CONST. art. I, § 9; MONT. CONST. art. II, § 6; NEB. CONST. art. I, § 19; NEV. CONST. art. I,

bine this with the right of assembly. Colorado's clause is typical and reads "[t]he people have the right peaceably to assemble for the common good, and to apply to those invested with the powers of government for redress of grievances, by petition or remonstrance."<sup>130</sup> One state, Delaware, was noticeably more cautious in its clause discussing the freedom of assembly and petition, emphasizing that danger can result from some types of group protests:

Although disobedience to laws by a part of the people, upon suggestions of impolicy or injustice in them, tends by immediate effect and the influence of example not only to endanger the public welfare and safety, but also in governments of a republican form contravenes the social principles of such governments, founded on common consent for common good; yet the citizens have a right in an orderly manner to meet together, and to apply to persons intrusted with the powers of government, for redress of grievances or other proper purposes, by petition, remonstrance or address.<sup>131</sup>

Interestingly, Maryland's constitution is the only one that contains a right to petition without an explicit right to assemble. The clause reads: "That every man hath a right to petition the Legislature for the redress of grievances in a peaceable and orderly manner."<sup>132</sup> Accordingly, we do not count this clause as protecting a right of assembly, though it embraces the general underlying principle of offering the people a source of recourse when the government acts in ways they dislike or disagree with.

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§ 10; N.H. CONST. pt. 1, art. XXXII; N.J. CONST. art. I, § 18; N.Y. CONST. art. I, § 9; N.C. CONST. art. I, § 12; N.D. CONST. art. I, § 5; OHIO CONST. art. I, § 3; OKLA. CONST. art. II, § 3; OR. CONST. art. I, § 26; PA. CONST. art. I, § 20; R.I. CONST. art. I, § 21; S.C. CONST. art. I, § 2; S.D. CONST. art. VI, § 4; TENN. CONST. art. I, § 23; TEX. CONST. art. I, § 27; UTAH CONST. art. I, § 1; VT. CONST. ch. 1, art. XX; VA. CONST. art. I, § 12; WASH. CONST. art. I, § 4; W. VA. CONST. art. III, § 16; WIS. CONST. art. I, § 4; WYO. CONST. art. I, § 21. The two states without a right to assembly and petition in their state constitutions are Minnesota and New Mexico.

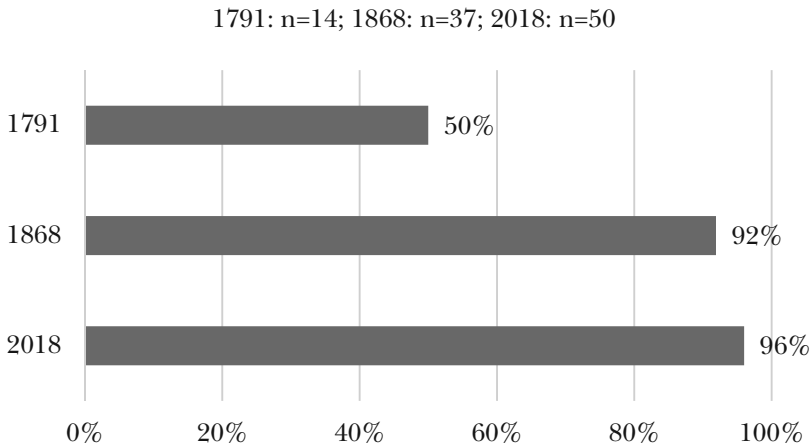
129 MD. CONST. Declaration of Rights, art. XIII.

130 COLO. CONST. art. II, § 24.

131 DEL. CONST. art. I, § 16.

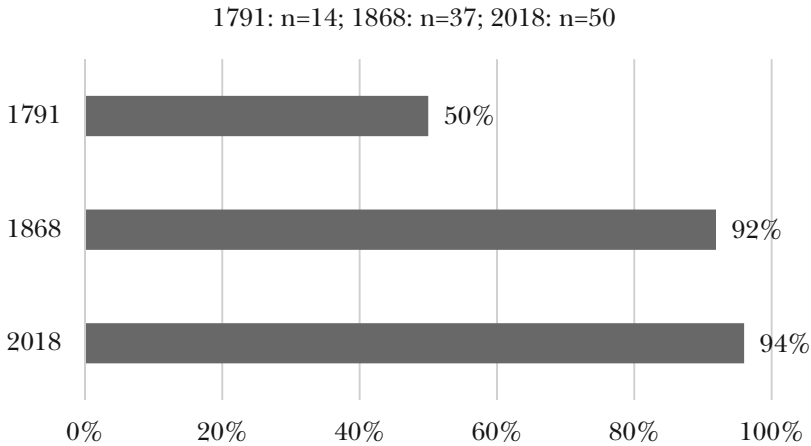
132 MD. CONST. Declaration of Rights, art. XIII.

FIGURE 7. FREEDOM OF PETITION IN STATE CONSTITUTIONS



In 1868 when the Fourteenth Amendment was ratified, thirty-four state constitutions protected the rights of petition<sup>133</sup> and all but Maryland among them protected the related right of assembly. The rights of petition and assembly are thus solidly recognized by both the original and the present-day meaning of the Fourteenth Amendment. In 1791, seven out of twelve states that wrote constitutions between 1776 and 1791 protected the rights of petition and assembly.<sup>134</sup> Support for these rights thus grew immensely between 1791 and 1868.

FIGURE 8. FREEDOM OF ASSEMBLY IN STATE CONSTITUTIONS



133 See Calabresi & Agudo, *supra* note 5, at 43.

134 Calabresi, Agudo & Dore, *supra* note 5, at 1479–80.



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

Gun-related rights, found in the Second Amendment, are the next set of rights protected in the Federal Bill of Rights, of course coming after the First Amendment's protection of freedom of religion, freedom of expression, and freedom to petition and assemble.<sup>135</sup> While "[t]his could be argued to reflect the priority the ratifiers and framers attached to each of these sets of rights," it is worth noting that there were two additional amendments proposed in 1791 that would have been placed ahead of the First Amendment, but they "were not ratified at that time."<sup>136</sup> Moreover, there has long been a famous debate over whether the Second Amendment protects an individual's right to own a gun for his self-defense or whether it protects a collective right of the people of a state to own rifles so they can serve as members of a well-regulated state militia.<sup>137</sup> As we explain below, the states have differing perspectives on this issue, which are reflected throughout their state constitutions in how they protect gun-related rights and in other clauses that bear on the military.

#### 1. The Right to Keep and Bear Arms

Forty-four states in 2018—representing 88% of the states and 74.2% of the U.S. population<sup>138</sup>—provide at least some protection for the right to keep and bear arms within their state constitutions.<sup>139</sup>

Of those, at least thirty-three states—comprising 66% of the states—protect the right to keep and bear arms explicitly as an individual right.<sup>140</sup> Many

135 U.S. CONST. amends. I, II.

136 See Calabresi & Agudo, *supra* note 5, at 49 (citing AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 14–15, 17–18, 36–37 (1998)).

137 *Id.* (citing *District of Columbia v. Heller*, 554 U.S. 570, 605–10 (2008); *id.* at 665–71 (Stevens, J., dissenting)).

138 See *2010 Census*, *supra* note 12 (228,596,031 out of 308,143,815 residents).

139 See ALA. CONST. art. I, § 26; ALASKA CONST. art. I, § 19; ARIZ. CONST. art. II, § 26; ARK. CONST. art. II, § 5; COLO. CONST. art. II, § 13; CONN. CONST. art. I, § 15; DEL. CONST. art. I, § 20; FLA. CONST. art. I, § 8; GA. CONST. art. I, § 1, para. 8; HAW. CONST. art. I, § 17; IDAHO CONST. art. I, § 11; ILL. CONST. art. I, § 22; IND. CONST. art. I, § 32; KAN. CONST. Bill of Rights, § 4; KY. CONST. Bill of Rights, § 1; LA. CONST. art. I, § 11; ME. CONST. art. I, § 16; MASS. CONST. pt. I, art. XVII; MICH. CONST. art. I, § 6; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § 11; N.H. CONST. pt. I, art. II(a); N.M. CONST. art. II, § 6; N.C. CONST. art. I, § 30; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 4; OKLA. CONST. art. II, § 26; OR. CONST. art. I, § 27; PA. CONST. art. I, § 21; R.I. CONST. art. I, § 22; S.C. CONST. art. I, § 20; S.D. CONST. art. VI, § 24; TENN. CONST. art. I, § 26; TEX. CONST. art. I, § 23; UTAH CONST. art. I, § 6; VT. CONST. ch. I, art. XVI; VA. CONST. art. I, § 13; WASH. CONST. art. I, § 24; W. VA. CONST. art. III, § 22; WIS. CONST. art. I, § 25; WYO. CONST. art. I, § 24. The states without a constitutional provision that protects the right to keep and bear arms are California, Iowa, Maryland, Minnesota, New Jersey, and New York.

140 See ALA. CONST. art. I, § 26; ALASKA CONST. art. I, § 19; ARIZ. CONST. art. II, § 26; COLO. CONST. art. II, § 13; CONN. CONST. art. I, § 15; DEL. CONST. art. I, § 20; FLA. CONST. art. I, § 8; ILL. CONST. art. I, § 22; IND. CONST. art. I, § 32; KAN. CONST. Bill of Rights, § 4; KY.

of these constitutions specifically note the personal self-defense element of an individual right to keep and bear arms. For example, Michigan's constitution states that "[e]very person has a right to keep and bear arms for the defense of himself and the state"<sup>141</sup> and Oklahoma's constitution holds that "[t]he right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited."<sup>142</sup> Notably, two states—Alaska and Utah—explicitly suggest the existence of an *individual* right to keep and bear arms in the text of their constitutions. For example, Alaska's constitution states that "[t]he individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State."<sup>143</sup> Three more states (Illinois, Arizona, and Washington) recognize that the right belongs to an "individual citizen."<sup>144</sup>

Out of the remaining eleven states that protect a right to keep and bear arms in their state constitutions,<sup>145</sup> only three of those states restrict the right to keep and bear arms only to the purpose of providing for the common defense.<sup>146</sup> In particular, Massachusetts's constitution states that "[t]he people have a right to keep and to bear arms for the common defence."<sup>147</sup>

Another three states use a militia preamble similar to that in the Second Amendment.<sup>148</sup> South Carolina's constitution uses a typical formulation, holding that "[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

CONST. Bill of Rights, § 1; MICH. CONST. art. I, § 6; MISS. CONST. art. III, § 12; MO. CONST. art. I, § 23; MONT. CONST. art. II, § 12; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § 11; N.H. CONST. pt. 1, art. II(a); N.M. CONST. art. II, § 6; N.C. CONST. art. I, § 30; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 4; OKLA. CONST. art. II, § 26; OR. CONST. art. I, § 27; PA. CONST. art. I, § 21; S.D. CONST. art. VI, § 24; TEX. CONST. art. I, § 23; UTAH CONST. art. I, § 6; VT. CONST. ch. 1, art. XVI; WASH. CONST. art. I, § 24; W. VA. CONST. art. III, § 22; WIS. CONST. art. I, § 25; WYO. CONST. art. I, § 24.

141 MICH. CONST. art. I, § 6.

142 OKLA. CONST. art. II, § 26.

143 ALASKA CONST. art. I, § 19; *see also* UTAH CONST. art. I, § 6 ("The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the Legislature from defining the lawful use of arms.").

144 ARIZ. CONST. art. II, § 26 ("The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men."); ILL. CONST. art. I, § 22 ("Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."); WASH. CONST. art. I, § 24 ("The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.").

145 Arkansas, Georgia, Hawaii, Idaho, Louisiana, Maine, Massachusetts, Rhode Island, South Carolina, Tennessee, and Virginia.

146 ARK. CONST. art. II, § 5; MASS. CONST. pt. 1, art. XVII; TENN. CONST. art. I, § 26.

147 MASS. CONST. pt. 1, art. XVII.

148 HAW. CONST. art. I, § 17; S.C. CONST. art. I, § 20; VA. CONST. art. I, § 13.

infringed.”<sup>149</sup> Besides South Carolina, Hawaii and Virginia also have “right to bear arms” clauses that are nearly perfect analogs to the Second Amendment of the U.S. Constitution, which states that “[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.”<sup>150</sup> Since the Supreme Court of the United States frames the Federal Second Amendment as an individual rights guarantee rather than a collective rights or civic rights guarantee, one could argue that the “right to bear arms” clauses of South Carolina, Hawaii, and Virginia all ought to be considered individual rights, regardless of the fact that they purport to give the people the right to keep and bear arms in order to make them more effective militia members. If so, the number of states in 2018 with individual rights guarantees for the right to keep and bear arms in their state constitutions is thirty-six states, representing 72% of the states.

The final five states that protect a right to keep and bear arms in their state constitutions contained a general grant of the right to keep and bear arms. Some were unqualified, such as Rhode Island’s constitution, which provides that “[t]he right of the people to keep and bear arms shall not be infringed.”<sup>151</sup> Other state constitutions contained caveats or limitations on the right to keep and bear arms, such as Idaho’s constitution, which states that:

The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.<sup>152</sup>

Finally, Louisiana’s constitution even provided a strict scrutiny clause, holding that “[t]he right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny.”<sup>153</sup> This is striking because it indicates that Louisiana values the right to keep and bear arms enough to give it the highest, most stringent standard of judicial review used by U.S. courts.

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149 S.C. CONST. art. I, § 20.

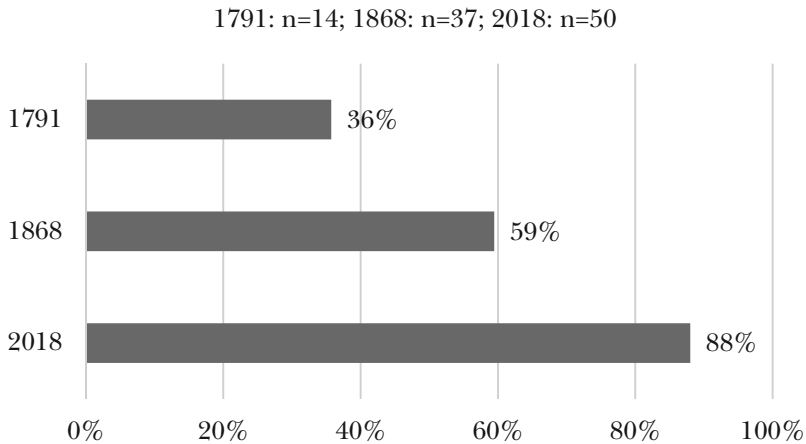
150 U.S. CONST. amend. II.

151 R.I. CONST. art. I, § 22. Note that this clause could also be construed as an individual rights guarantee. If so, that could bring the total number of states with an individual rights guarantee for the right to keep and bear arms in their state constitutions in 2018 up to thirty-seven states, representing 74% of the states and 63.5% of the U.S. population. *See 2010 Census*, *supra* note 12 (195,699,411 out of 308,143,815 residents).

152 IDAHO CONST. art. I, § 11.

153 LA. CONST. art. I, § 11.

FIGURE 9. RIGHT TO KEEP AND BEAR ARMS IN STATE CONSTITUTIONS



There is a striking change between 1868 and 2018 in terms of state constitutional protection of the right to keep and bear arms. In 1868, only twenty-two state constitutions out of thirty-seven, or 59% of the states, had language that explicitly guaranteed the right of the people to keep and bear arms;<sup>154</sup> 61% of the public in 1868 lived in those states.<sup>155</sup> Only twelve states in 1868, about 36%, explicitly protected an individual's right to keep and bear arms for his own defense.<sup>156</sup> Obviously, there has been an enormous increase in the number of states both that protect the right to keep and bear arms by individuals for their own defense and in the number of states that protect gun rights in some way, shape, or form. Only five states out of the twelve that wrote new constitutions and bills of rights between 1776 and 1791 protected the right to keep and bear arms in any way.<sup>157</sup>

This outcome is surprising because many scholars—including Professor Sanford Levinson in a law review article titled *The Embarrassing Second Amendment*—hold that the Second Amendment is a leftover relic of our colonial days.<sup>158</sup> To the contrary, gun rights were not constitutionalized when English settlers were fighting the Native Americans in the eighteenth and early nineteenth centuries, but have mostly been added to state constitutions in the 149 years between 1868 and 2018. Why this happened is a question we will leave for others to investigate, but the first really striking contrast between state constitutional law in 1868 and state constitutional law today is a

154 See Calabresi & Agudo, *supra* note 5, at 50–54.

155 See *id.*

156 See *id.*

157 Calabresi, Agudo & Dore, *supra* note 5, at 1485–87.

158 See Sanford Levinson, Comment, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

substantial growth in the protection of gun rights—rights that are almost never mentioned in foreign constitutions.<sup>159</sup>

## 2. Quartering Soldiers

In the U.S. Constitution, the Third Amendment provides a constraint on military power by prohibiting the quartering of soldiers in private homes.<sup>160</sup> This acts as a means of subordinating the military power to the civil power, thereby protecting the public from abuses of military power. In 2018, forty-two states—representing 84% of the states and 77.1% of the U.S. population<sup>161</sup>—provide a similar no quartering of soldiers clause.<sup>162</sup> Most states protect this right using language that is very similar to the Federal Constitution. For example, Wyoming’s state constitution holds that “[n]o soldier in time of peace shall be quartered in any house without consent of the owner, nor in time of war except in the manner prescribed by law.”<sup>163</sup> The eight states that did not provide a quartering clause are Florida, Georgia, Minnesota, Mississippi, New York, Vermont, Virginia, and Wisconsin.

In 1791, five states out of fourteen barred quartering soldiers,<sup>164</sup> and in 1868, twenty-six out of thirty-seven state constitutions—representing about two-thirds of the states but not quite an Article V three-quarters majority—barred quartering soldiers in peoples’ houses.<sup>165</sup> Today, more than an Arti-

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159 It has been stated that only the United States, Mexico, and Guatemala protect gun rights in their national constitutions. See Ty McCormick, *How Many Countries Have Gun Rights Enshrined in Their Constitutions?*, FOREIGN POL’Y (Apr. 5, 2013), <https://foreignpolicy.com/2013/04/05/how-many-countries-have-gun-rights-enshrined-in-their-constitutions/>.

160 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.”).

161 See *2010 Census*, *supra* note 12 (237,691,777 out of 308,143,815 residents).

162 See ALA. CONST. art. I, § 28; ALASKA CONST. art. I, § 20; ARIZ. CONST. art. II, § 27; ARK. CONST. art. II, § 27; CAL. CONST. art. I, § 5; COLO. CONST. art. II, § 22; CONN. CONST. art. I, § 17; DEL. CONST. art. I, § 18; HAW. CONST. art. I, § 18; IDAHO CONST. art. I, § 12; ILL. CONST. art. I, § 21; IND. CONST. art. I, § 34; IOWA CONST. art. I, § 15; KAN. CONST. Bill of Rights, § 14; KY. CONST. Bill of Rights, § 22; LA. CONST. art. I, § 6; ME. CONST. art. I, § 18; MD. CONST. Declaration of Rights, art. XXXI; MASS. CONST. pt. 1, art. XXVII; MICH. CONST. art. I, § 8; MO. CONST. art. I, § 24; MONT. CONST. art. II, § 32; NEB. CONST. art. I, § 18; NEV. CONST. art. I, § 12; N.H. CONST. pt. 1, art. XXVII; N.J. CONST. art. I, § 16; N.M. CONST. art. II, § 9; N.C. CONST. art. I, § 31; N.D. CONST. art. I, § 19; OHIO CONST. art. I, § 13; OKLA. CONST. art. II, § 14; OR. CONST. art. I, § 28; PA. CONST. art. I, § 23; R.I. CONST. art. I, § 19; S.C. CONST. art. I, § 20; S.D. CONST. art. VI, § 16; TENN. CONST. art. I, § 27; TEX. CONST. art. I, § 25; UTAH CONST. art. I, § 20; WASH. CONST. art. I, § 31; W. VA. CONST. art. III, § 12; WYO. CONST. art. I, § 25.

163 WYO. CONST. art. I, § 25.

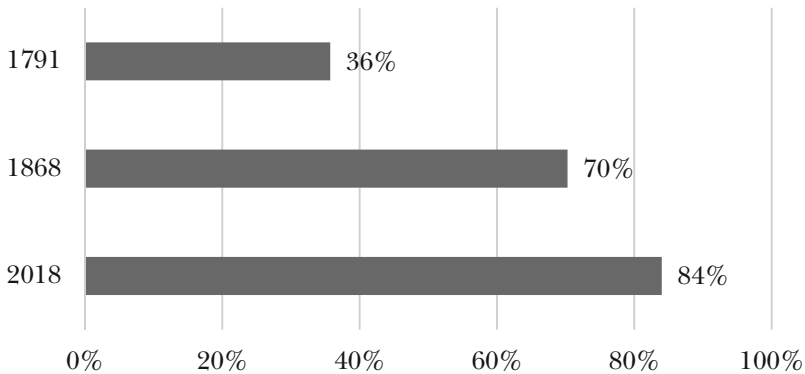
164 Calabresi, Agudo & Dore, *supra* note 5, at 1490–91; 1543.

165 See Calabresi & Agudo, *supra* note 5, at 56–57. Note that our earlier analysis mentioned twenty-seven states with quartering clauses. We now think that was an overcount. *Id.* at 1490–91. The states with quartering clauses in their 1868 state constitutions are: Alabama, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Nevada, New Hamp-

cle V three-quarters majority bars this practice, which has never been engaged in since before 1776 by the British. We assume that one plausible explanation for the added number of states barring this practice is that they have engaged in a form of copying of the Federal Constitution.

FIGURE 10. PROHIBITION OF QUARTERING SOLDIERS IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



#### D. *Rights Against Unreasonable Searches and Seizures*

In the Fourth Amendment, the U.S. Bill of Rights protects individuals against unreasonable searches and seizures by governmental officials such as the police and the FBI, and the Fourth Amendment outlines details about the lawful issuance of warrants.<sup>166</sup> This is the fourth set of rights discussed in the Federal Constitution, coming after freedom of religion, freedom of expression, and gun-related and military rights. Acting as a “core aspect of the right to privacy,” the Fourth Amendment “constitutes a fundamental limit on government power” by ensuring that the state cannot unreasonably

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shire, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, and Tennessee. ALA. CONST. of 1868, art. I, § 31; ARK. CONST. of 1861, art. I, § 22; CAL. CONST. of 1849, art. I, § 13; CONN. CONST. of 1818, art. I, § 19; DEL. CONST. of 1831, art. I, § 18; FLA CONST. of 1868, Declaration of Rights, § 13; ILL. CONST. of 1848, art. VII, § 22; IND. CONST. of 1851, art. I, § 34; IOWA. CONST. of 1857, art. I, § 15; KAN. CONST. of 1859, Bill of Rights, § 14; KY. CONST. of 1850, art. VIII, § 27; ME. CONST. of 1820, art. I, § 8; MD. CONST. of 1864, Declaration of Rights., art. XXVIII; MASS. CONST. of 1780, pt. I, art. XXVII; MICH. CONST. of 1865, art. XVIII, § 9; MO. CONST. of 1865, art. II, § 33; NEV. CONST. of 1864, art. I, § 12; N.H. CONST. of 1784, pt. 1, art. XXVII; N.J. CONST. of 1844, art. I, § 13; N.C. CONST. of 1868, art. I, § 36; OHIO. CONST. of 1851, art. I, § 13; OR. CONST. of 1857, art. I, § 28; PA. CONST. of 1838, art. IV, § 23; R.I. CONST. of 1842, art. I, § 19; S.C. CONST. of 1868, art. I, § 29; TENN. CONST. of 1835, art. I, § 27.

<sup>166</sup> U.S. CONST. amend. IV.

intrude upon individual's private lives.<sup>167</sup> It is not surprising, then, that this right has turned out to be widely recognized in state constitutional law.

### 1. Unreasonable Search and Seizure

As of 2018, all fifty states guarantee the right to be free from unreasonable searches and seizures in their state constitutions.<sup>168</sup> Nevada's constitution follows the typical formulation, stating that "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated."<sup>169</sup> Missouri's constitution was even amended in 2014 to reflect modern technological developments, holding "[t]hat the people shall be secure in their persons, papers, homes, effects, and electronic communications and data, from unreasonable searches and seizures."<sup>170</sup>

A few of the states had abnormal search and seizure clauses. Maryland's constitution, for instance, holds:

That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous [grievous] and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted.<sup>171</sup>

We count this clause as a protection against unreasonable search and seizure because it prohibits general warrants that seek to "search suspected places" or "seize any person or property" without specifying additional details about the search or seizure, which we view as sufficiently in line with a general protection against unreasonable search and seizure.<sup>172</sup> The Framers' primary concern that led them to write the Federal Fourth Amendment was a desire

167 See Calabresi & Agudo, *supra* note 5, at 57.

168 See ALA. CONST. art. I, § 5; ALASKA CONST. art. I, § 14; ARIZ. CONST. art. II, § 8; ARK. CONST. art. II, § 15; CAL. CONST. art. I, § 13; COLO. CONST. art. II, § 7; CONN. CONST. art. I, § 7; DEL. CONST. art. I, § 6; FLA. CONST. art. I, § 12; GA. CONST. art. I, § 1, para. 13; HAW. CONST. art. I, § 7; IDAHO CONST. art. I, § 17; ILL. CONST. art. I, § 6; IND. CONST. art. I, § 11; IOWA CONST. art. I, § 8; KAN. CONST. Bill of Rights, § 15; KY. CONST. Bill of Rights, § 10; LA. CONST. art. I, § 5; ME. CONST. art. I, § 5; MD. CONST. Declaration of Rights, art. XXVI; MASS. CONST. pt. 1, art. XIV; MICH. CONST. art. I, § 11; MINN. CONST. art. I, § 10; MISS. CONST. art. III, § 23; MO. CONST. art. I, § 15; MONT. CONST. art. II, § 11; NEB. CONST. art. I, § 7; NEV. CONST. art. I, § 18; N.H. CONST. pt. 1, art. XIX; N.J. CONST. art. I, § 7; N.M. CONST. art. II, § 10; N.Y. CONST. art. I, § 12; N.C. CONST. art. I, § 20; N.D. CONST. art. I, § 8; OHIO CONST. art. I, § 14; OKLA. CONST. art. II, § 30; OR. CONST. art. I, § 9; PA. CONST. art. I, § 8; R.I. CONST. art. I, § 6; S.C. CONST. art. I, § 10; S.D. CONST. art. VI, § 11; TENN. CONST. art. I, § 7; TEX. CONST. art. I, § 9; UTAH CONST. art. I, § 14; VT. CONST. ch. I, art. XI; VA. CONST. art. I, § 10; WASH. CONST. art. I, § 7; W. VA. CONST. art. III, § 6; WIS. CONST. art. I, § 11; WYO. CONST. art. I, § 4.

169 NEV. CONST. art. I, § 18.

170 MO. CONST. art. I, § 15.

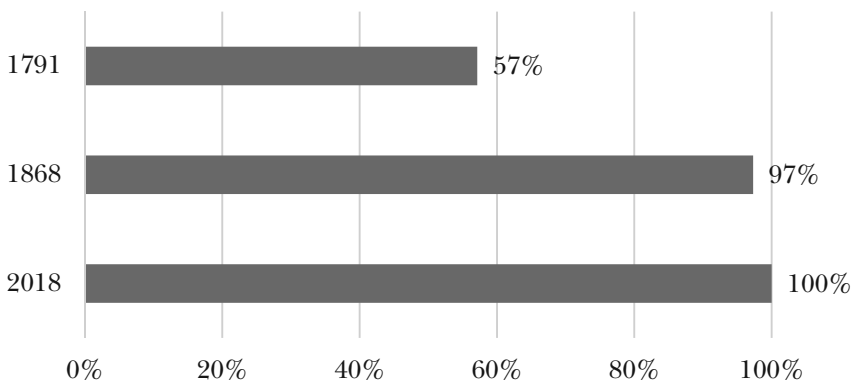
171 MD. CONST. Declaration of Rights, art. XXVI (alteration in original). North Carolina and Virginia had similar clauses. N.C. CONST. art. I, § 20; VA. CONST. art. I, § 10.

172 MD. CONST. Declaration of Rights, art. XXVI.

to outlaw the British practice of conducting general searches, wherein English authorities attempted to find evidence that colonial merchants were failing to pay taxes that they owed to the Crown by conducting general searches in unspecified warehouses.<sup>173</sup> This makes it clear to us that we are right to count the Maryland clause in the way we have done. Other states did not explicitly mention the phrase “search” or “seizure” in their clause, but they still seemed to protect the underlying idea of a right against unreasonable searches and seizures by extending privacy rights to the homes and to the private affairs of all citizens. Arizona’s constitution is an example of that formulation, and it states that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”<sup>174</sup>

FIGURE 11. UNREASONABLE SEARCH AND SEIZURE IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



In 1791, eight states out of fourteen protected their citizens from unreasonable searches and seizures,<sup>175</sup> and, in 1868, an Article V three-quarters majority of thirty-six out of thirty-seven state constitutions banned unreasonable searches and seizures.<sup>176</sup> Today, all fifty states ban unreasonable searches

173 See Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM & MARY L. REV. 197, 218–19 (1993).

174 ARIZ. CONST. art. II, § 8. Washington’s constitution follows a similar format. WASH. CONST. art. I, § 7 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”).

175 Calabresi, Agudo & Dore, *supra* note 5, at 1491–92.

176 See Calabresi & Agudo, *supra* note 5, at 57–58. Note that in our original analysis, *id.*, we coded only thirty-four states as having search and seizure clauses. We now believe this was an undercount, and that the only state without a search and seizure clause in its constitution in 1868 was New York. The two new states that we are now counting—North Carolina and Virginia—discuss search and seizure in their warrant clauses. N.C. CONST. of 1868, art. 1 § 15; VA. CONST. of 1864 Declaration of Rights, § 10. We believe that the text of their warrant clauses ought to be counted as a search and seizure clause as well. For



and seizures. This is an old constitutional right that was overwhelmingly protected in 1868 and for which state constitutional protection has only increased over time.

## 2. Lawful Warrants

The Federal Constitution, in the Fourth Amendment,<sup>177</sup> also sets rules for the issuance of lawful warrants, “a protection that was designed in response to the controversial writs of assistance, which were a significant factor leading up to the American Revolution.”<sup>178</sup> All fifty states<sup>179</sup> contain a similar constitutional clause, typically requiring all warrants: (1) to be supported by oath or affirmation, (2) to describe particularly the person or things to be seized, and (3) to be issued only upon probable cause, thereby closely mirroring the Fourth Amendment.<sup>180</sup> Montana’s constitution, as an example, provides that “[n]o warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.”<sup>181</sup>

Several of the states used unusual formulations of this right against unlawful warrants. To begin with, four states—Maryland, North Carolina,

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example, Virginia’s constitution stated that “general warrants, whereby an officer or messenger 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.” VA. CONST. OF 1864 Declaration of Rights, § 10. Since these clauses carry the general essence or spirit of a search and seizure clause, we have decided to recode North Carolina and Virginia and raise our count to thirty-six states.

177 U.S. CONST. amend. IV.

178 See Calabresi & Agudo, *supra* note 5, at 58.

179 See ALA. CONST. art. I, § 5; ALASKA CONST. art. I, § 14; ARIZ. CONST. art. II, § 8; ARK. CONST. art. II, § 15; CAL. CONST. art. I, § 13; COLO. CONST. art. II, § 7; CONN. CONST. art. I, § 7; DEL. CONST. art. I, § 6; FLA. CONST. art. I, § 12; GA. CONST. art. I, § 1, para. 13; HAW. CONST. art. I, § 7; IDAHO CONST. art. I, § 17; ILL. CONST. art. I, § 6; IND. CONST. art. I, § 11; IOWA CONST. art. I, § 8; KAN. CONST. Bill of Rights, § 15; KY. CONST. Bill of Rights, § 10; LA. CONST. art. I, § 5; ME. CONST. art. I, § 5; MD. CONST. Declaration of Rights, art. XXVI; MASS. CONST. pt. 1, art. XIV; MICH. CONST. art. I, § 11; MINN. CONST. art. I, § 10; MISS. CONST. art. III, § 23; MO. CONST. art. I, § 15; MONT. CONST. art. II, § 11; NEB. CONST. art. I, § 7; NEV. CONST. art. I, § 18; N.H. CONST. pt. 1, art. XIX; N.J. CONST. art. I, § 7; N.M. CONST. art. II, § 10; N.Y. CONST. art. I, § 12; N.C. CONST. art. I, § 20; N.D. CONST. art. I, § 8; OHIO CONST. art. I, § 14; OKLA. CONST. art. II, § 30; OR. CONST. art. I, § 9; PA. CONST. art. I, § 8; R.I. CONST. art. I, § 6; S.C. CONST. art. I, § 10; S.D. CONST. art. VI, § 11; TENN. CONST. art. I, § 7; TEX. CONST. art. I, § 9; UTAH CONST. art. I, § 14; VT. CONST. ch. 1, art. XI; VA. CONST. art. I, § 10; WASH. CONST. art. I, § 7; W. VA. CONST. art. III, § 6; WIS. CONST. art. I, § 11; WYO. CONST. art. I, § 4.

180 U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

181 MONT. CONST. art. II, § 11.

Tennessee, and Virginia—used modified language to bar the issuance of general warrants in their state constitutions.<sup>182</sup> Tennessee’s constitution, for example, holds “that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not be granted.”<sup>183</sup> We count these clauses as protecting a right to lawfully issued warrants because they include many of the same rights-protective restrictions as the Federal Constitution.<sup>184</sup> Moreover, since one of the foundational motivations of the Fourth Amendment was a distaste for writs of assistance—which are a form of general warrant—we count prohibitions against general warrants as a right to lawfully issued warrants.

The lawful warrants clauses in the constitutions of Massachusetts, New Hampshire, and Vermont are also unusual because they neglect to explicitly mention probable cause.<sup>185</sup> Indeed, the Massachusetts Constitution holds that:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.<sup>186</sup>

Similarly, Vermont’s constitution states:

That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.<sup>187</sup>

Overall, we believe that these clauses embody the same general rights protections as the Fourth Amendment of the U.S. Constitution, even though

182 MD. CONST. Declaration of Rights, art. XXVI; N.C. CONST. art. I, § 20; TENN. CONST. art. I, § 7; VA. CONST. art. I, § 10.

183 TENN. CONST. art. I, § 7.

184 Tennessee’s constitution states that an officer may not be “commanded to search suspected places . . . or to seize any person or persons not named.” *Id.* In addition, the Tennessee Constitution arguably references probable cause when it states that warrants cannot be issued “without evidence of the fact committed.” *Id.* In this sense, the Tennessee Constitution appears to protect two out of three elements featured in the Federal Fourth Amendment.

185 MASS. CONST. pt. 1, art. XIV; N.H. CONST. pt. 1, art. XIX; VT. CONST. ch. 1, art. XI.

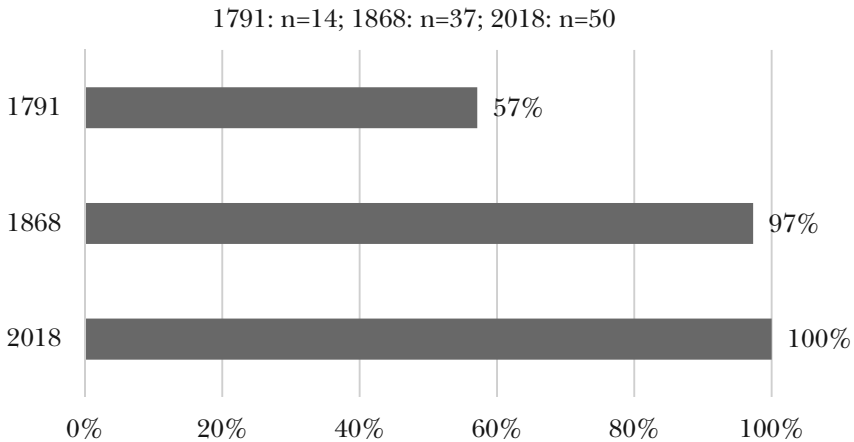
186 MASS. CONST. pt. 1, art. XIV.

187 VT. CONST. ch. 1, art. XI.

they do not textually refer to probable cause or prohibit general warrants by name. This is because they indicate that warrants must be based on oath or affirmation and must particularly describe the person or property to be searched or seized. In that regard, they include at least two out of three of the protections outlined in the Federal Constitution, thereby guarding against most of the repugnant elements of a general warrant. They even arguably protect the third portion of the Fourth Amendment—probable cause—by stating that warrants must have a “sufficient foundation”<sup>188</sup> or must follow “the formalities prescribed by the laws.”<sup>189</sup> In that sense, we believe that they ought to be counted as protecting against unlawful warrants.

Finally, the constitutions of Arizona and Washington contain another unusual formulation of the right against unlawful warrants. Washington’s constitution, for instance, holds that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”<sup>190</sup> Though this clause does not mention any of the three elements of the Fourth Amendment, we still count it as protecting a right against unlawful warrants because it extends a privacy right to the homes and private affairs of citizens and requires any intrusions to be based upon “authority of law.”<sup>191</sup> Ultimately, according to caselaw in both Arizona and Washington, these clauses have been read to grant the same—or even greater, in the case of homes—rights protections compared to the Fourth Amendment.<sup>192</sup> As such, we count them in our analysis as protecting the right to lawful warrants.

FIGURE 12. WARRANTS CLAUSES IN STATE CONSTITUTIONS



188 *Id.*

189 MASS. CONST. pt. 1, art. XIV.

190 WASH. CONST. art. I, § 7.

191 *Id.*

192 *See, e.g.,* *State v. Wilson*, 350 P.3d 800 (Ariz. 2015); *State v. Bolt*, 689 P.2d 519 (Ariz. 1984) (in banc); *State v. Eisfeldt*, 185 P.3d 580 (Wash. 2008) (en banc); *State v. Simpson*, 622 P.2d 1199 (Wash. 1980) (en banc).

Eight out of twelve states that wrote new constitutions between 1776 and 1791 had warrant requirements,<sup>193</sup> thirty-six states out of thirty-seven had warrant requirements in 1868,<sup>194</sup> and all fifty have such requirements today. This is an ancient right, which remains foundational in modern state constitutional law.

### *E. Criminal Procedure Rights*

The fifth major subject discussed in the Federal Bill of Rights is constitutional criminal procedure. Throughout both the Fifth and Sixth Amendments,<sup>195</sup> the U.S. Constitution safeguards criminal defendants from numerous rights infringements, including protections against double jeopardy, self-incrimination, and the suspension of the writ of habeas corpus. As such, we turn now to a discussion of how the fifty states have framed these rights within their own constitutions.

#### 1. Double Jeopardy

Forty-five states—representing 90% of the states and 91.5% of the population<sup>196</sup>—have double jeopardy clauses that prevent citizens from being tried in a court of law more than once for the same offense.<sup>197</sup> The Idaho Constitution uses a typical formulation, stating that “[n]o person shall be twice put in jeopardy for the same offense.”<sup>198</sup> Alabama uses another common format, holding “[t]hat no person shall, for the same offense, be twice put in jeopardy of life or limb.”<sup>199</sup> Some states offer more detail in their double jeopardy clauses, such as Colorado’s constitution, which provides that “[n]o person shall be . . . twice put in jeopardy for the same offense. If the jury disagree, or if the judgment be arrested after the verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have

193 Calabresi, Agudo & Dore, *supra* note 5, at 1492.

194 See Calabresi & Agudo, *supra* note 5, at 58.

195 U.S. CONST. amends. V, VI.

196 See 2010 Census, *supra* note 12 (282,087,313 out of 308,143,815 residents).

197 See ALA. CONST. art. I, § 9; ALASKA CONST. art. I, § 9; ARIZ. CONST. art. II, § 10; ARK. CONST. art. II, § 8; CAL. CONST. art. I, §§ 15, 24; COLO. CONST. art. II, § 18; DEL. CONST. art. I, § 8; FLA. CONST. art. I, § 9; GA. CONST. art. I, § 1, para. 18; HAW. CONST. art. I, § 10; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 10; IND. CONST. art. I, § 14; IOWA CONST. art. I, § 12; KAN. CONST. Bill of Rights, § 10; KY. CONST. Bill of Rights, § 13; LA. CONST. art. I, § 15; ME. CONST. art. I, § 8; MICH. CONST. art. I, § 15; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 22; MO. CONST. art. I, § 19; MONT. CONST. art. II, § 25; NEB. CONST. art. I, § 12; NEV. CONST. art. I, § 8; N.H. CONST. pt. 1, art. XVI; N.J. CONST. art. I, § 11; N.M. CONST. art. II, § 15; N.Y. CONST. art. I, § 6; N.D. CONST. art. I, § 12; OHIO CONST. art. I, § 10; OKLA. CONST. art. II, § 21; OR. CONST. art. I, § 12; PA. CONST. art. I, § 10; R.I. CONST. art. I, § 7; S.C. CONST. art. I, § 12; S.D. CONST. art. VI, § 9; TENN. CONST. art. I, § 10; TEX. CONST. art. I, § 14; UTAH CONST. art. I, § 12; VA. CONST. art. I, § 8; WASH. CONST. art. I, § 9; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 8; WYO. CONST. art. I, § 11.

198 IDAHO CONST. art. I, § 13.

199 ALA. CONST. art. I, § 9.

been in jeopardy.”<sup>200</sup> The states without double jeopardy clauses are Connecticut, Maryland, Massachusetts, North Carolina, and Vermont.

Although only one state out of fourteen protected against double jeopardy in 1791,<sup>201</sup> thirty-one states out of thirty-seven in 1868 banned double jeopardy when the Fourteenth Amendment was ratified.<sup>202</sup> There was an Article V consensus that double jeopardy was unconstitutional in 1868 when the Fourteenth Amendment was ratified. Forty-five states—representing 90% of the states and 91.5% of the population<sup>203</sup>—ban it today.<sup>204</sup> This suggests that *Palko v. Connecticut*, which held that double jeopardy was not a fundamental right in 1937, was erroneously decided both as a matter of the original meaning of the Fourteenth Amendment, when it was ratified in 1868, and as a matter of living constitutionalism, which has seen support for the right continuing to exist.<sup>205</sup> *Palko* was overruled and the Fourteenth Amendment was correctly held to bar double jeopardy in *Benton v. Maryland*, a case that was decided in 1969.<sup>206</sup>

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200 COLO. CONST. art. II, § 18.

201 Calabresi, Agudo & Dore, *supra* note 5, at 1499.

202 See Calabresi & Agudo, *supra* note 5, at 59.

203 See 2010 Census, *supra* note 12 (282,087,313 out of 308,143,815 residents).

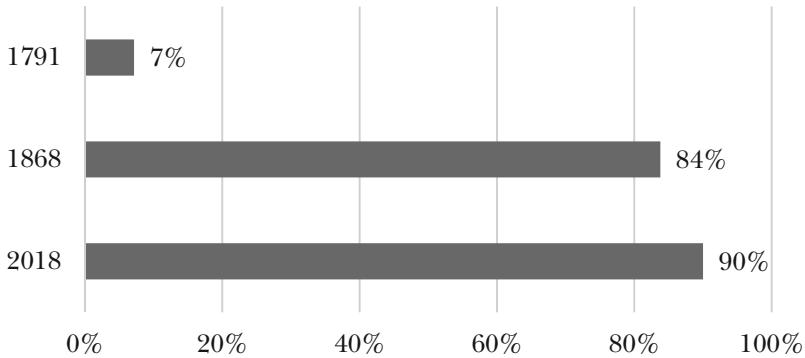
204 See ALA. CONST. art. I, § 9; ALASKA CONST. art. I, § 9; ARIZ. CONST. art. II, § 10; ARK. CONST. art. II, § 8; CAL. CONST. art. I, §§ 15, 24; COLO. CONST. art. II, § 18; DEL. CONST. art. I, § 8; FLA. CONST. art. I, § 9; GA. CONST. art. I, § 1, para. 18; HAW. CONST. art. I, § 10; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 10; IND. CONST. art. I, § 14; IOWA CONST. art. I, § 12; KAN. CONST. Bill of Rights, § 10; KY. CONST. Bill of Rights, § 13; LA. CONST. art. I, § 15; ME. CONST. art. I, § 8; MICH. CONST. art. I, § 15; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 22; MO. CONST. art. I, § 19; MONT. CONST. art. II, § 25; NEB. CONST. art. I, § 12; NEV. CONST. art. I, § 8; N.H. CONST. pt. 1, art. XVI; N.J. CONST. art. I, § 11; N.M. CONST. art. II, § 15; N.Y. CONST. art. I, § 6; N.D. CONST. art. I, § 12; OHIO CONST. art. I, § 10; ORLA. CONST. art. II, § 21; OR. CONST. art. I, § 12; PA. CONST. art. I, § 10; R.I. CONST. art. I, § 7; S.C. CONST. art. I, § 12; S.D. CONST. art. VI, § 9; TENN. CONST. art. I, § 10; TEX. CONST. art. I, § 14; UTAH CONST. art. I, § 12; VA. CONST. art. I, § 8; WASH. CONST. art. I, § 9; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 8; WYO. CONST. art. I, § 11.

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

206 *Benton*, 395 U.S. at 793–96.

FIGURE 13. DOUBLE JEOPARDY IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



## 2. Habeas Corpus

All fifty states have provisions in their constitutions that forbid the state legislature from suspending the writ of habeas corpus.<sup>207</sup> The great majority of those states—thirty-six states—include the same specific qualification in their habeas corpus clause, stating that the writ of habeas corpus may only be suspended in cases of rebellion or invasion, or in order to protect the public's safety.<sup>208</sup> Alaska's constitution offers a good example, as it provides that

<sup>207</sup> See ALA. CONST. art. I, § 17; ALASKA CONST. art. I, § 13; ARIZ. CONST. art. II, § 14; ARK. CONST. art. II, § 11; CAL. CONST. art. I, § 11; COLO. CONST. art. II, § 21; CONN. CONST. art. I, § 12; DEL. CONST. art. I, § 13; FLA. CONST. art. I, § 13; GA. CONST. art. I, § 1, para. 15; HAW. CONST. art. I, § 15; IDAHO CONST. art. I, § 5; ILL. CONST. art. I, § 9; IND. CONST. art. I, § 27; IOWA CONST. art. I, § 13; KAN. CONST. Bill of Rights, § 8; KY. CONST. Bill of Rights, § 16; LA. CONST. art. I, § 21; ME. CONST. art. I, § 10; MD. CONST. art. III, § 55; MASS. CONST. pt. 2, ch. 6, art. VII; MICH. CONST. art. I, § 12; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 21; MO. CONST. art. I, § 12; MONT. CONST. art. II, § 19; NEB. CONST. art. I, § 8; NEV. CONST. art. I, § 5; N.H. CONST. pt. 2, art. XCI; N.J. CONST. art. I, § 14; N.M. CONST. art. II, § 7; N.Y. CONST. art. I, § 4; N.C. CONST. art. I, § 21; N.D. CONST. art. I, § 14; OHIO CONST. art. I, § 8; OKLA. CONST. art. II, § 10; OR. CONST. art. I, § 23; PA. CONST. art. I, § 14; R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 18; S.D. CONST. art. VI, § 8; TENN. CONST. art. I, § 15; TEX. CONST. art. I, § 12; UTAH CONST. art. I, § 5; VT. CONST. ch. 2, § 41; VA. CONST. art. I, § 9; WASH. CONST. art. I, § 13; W. VA. CONST. art. III, § 4; WIS. CONST. art. I, § 8; WYO. CONST. art. I, § 17.

<sup>208</sup> See ALASKA CONST. art. I, § 13; ARK. CONST. art. II, § 11; CAL. CONST. art. I, § 11; COLO. CONST. art. II, § 21; CONN. CONST. art. I, § 12; DEL. CONST. art. I, § 13; FLA. CONST. art. I, § 13; GA. CONST. art. I, § 1, para. 15; HAW. CONST. art. I, § 15; IDAHO CONST. art. I, § 5; ILL. CONST. art. I, § 9; IND. CONST. art. I, § 27; IOWA CONST. art. I, § 13; KAN. CONST. Bill of Rights, § 8; KY. CONST. Bill of Rights, § 16; ME. CONST. art. I, § 10; MICH. CONST. art. I, § 12; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 21; NEV. CONST. art. I, § 5; N.J. CONST. art. I, § 14; N.M. CONST. art. II, § 7; N.Y. CONST. art. I, § 4; N.D. CONST. art. I, § 14; OHIO CONST. art. I, § 8; OR. CONST. art. I, § 23; PA. CONST. art. I, § 14; R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 18; S.D. CONST. art. VI, § 8; TENN. CONST. art. I, § 15; UTAH CONST. art. I,

“[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or actual or imminent invasion, the public safety requires it.”<sup>209</sup>

Two more states, Massachusetts and New Hampshire, contain limited habeas corpus clauses that follow a different, distinctive pattern. New Hampshire’s constitution, for instance, holds that “[t]he 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 most urgent and pressing occasions, and for a time not exceeding three months.”<sup>210</sup> Massachusetts has a similar clause, but gives a larger time window for the suspension of the writ of habeas corpus, stating that the “the writ of habeas corpus shall be enjoyed in this commonwealth 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 limited time not exceeding twelve months.”<sup>211</sup>

Finally, twelve states provide an unqualified right to the writ of habeas corpus, stating, as Maryland’s constitution does, that “[t]he General Assembly shall pass no Law suspending the privilege of the Writ of *Habeas Corpus*.”<sup>212</sup> Of these states, Texas and Vermont had unusual formulations of their unqualified habeas corpus clauses. Texas’s constitution, for instance, states that “[t]he writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual,”<sup>213</sup> and Vermont’s constitution holds that “[t]he Writ of Habeas Corpus shall in no case be suspended. It shall be a writ issuable of right; and the General Assembly shall make provision to render it a speedy and effectual remedy in all cases proper therefor.”<sup>214</sup>

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§ 5; VA. CONST. art. I, § 9; WASH. CONST. art. I, § 13; WIS. CONST. art. I, § 8; WYO. CONST. art. I, § 17.

209 ALASKA CONST. art. I, § 13.

210 N.H. CONST. pt. 2, art. XCI.

211 MASS. CONST. pt. 2, ch. 6, art. VII.

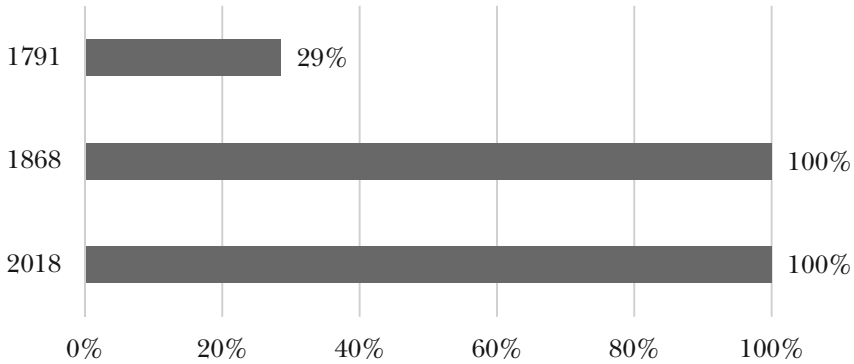
212 MD. CONST. art. III, § 55. The other eleven states are Alabama, Arizona, Louisiana, Missouri, Montana, Nebraska, North Carolina, Oklahoma, Texas, Vermont, and West Virginia. See ALA. CONST. art. I, § 17; ARIZ. CONST. art. II, § 14; LA. CONST. art. I, § 21; MO. CONST. art. I, § 12; MONT. CONST. art. II, § 19; NEB. CONST. art. I, § 8; N.C. CONST. art. I, § 21; OKLA. CONST. art. II, § 10; TEX. CONST. art. I, § 12; VT. CONST. ch. 2, § 41; W. VA. CONST. art. III, § 4.

213 TEX. CONST. art. I, § 12.

214 VT. CONST. ch. 2, § 41.

FIGURE 14. HABEAS CORPUS PROTECTION IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



Although only four states out of fourteen guaranteed the right to habeas corpus in their constitutions in 1791,<sup>215</sup> all thirty-seven states guaranteed the right to habeas corpus in 1868, when the Fourteenth Amendment was ratified.<sup>216</sup> There has been no change in the constitutional status of this cornerstone right of Anglo-American law from 1868 to the present day. The small number of states protecting the right of habeas corpus in 1791 as compared to the Article V three-quarters consensus on this issue in 1868 suggests that Amar is right that the framing era was more collectivist than the individualistic era of Reconstruction in 1868.<sup>217</sup>

### 3. Self-Incrimination

The right against self-incrimination is also widely protected in 2018 by state bills of rights. Forty-eight of the states—representing 96% of the states and 96.2% of the U.S. population<sup>218</sup>—have a provision in their state constitutions that guarantees an individual right against self-incrimination.<sup>219</sup> Colo-

215 Calabresi, Agudo & Dore, *supra* note 5, at 1492–93.

216 See Calabresi & Agudo, *supra* note 5, at 59–60. Note that in our original analysis, *id.*, we coded only thirty-six states as having habeas corpus clauses, but we now believe upon further review that all thirty-seven states had habeas corpus clauses in their state constitutions in 1868.

217 See *id.* at 115 (citing AMAR, *supra* note 136).

218 See *2010 Census*, *supra* note 12 (296,305,566 out of 308,143,815 residents).

219 See ALA. CONST. art. I, § 6; ALASKA CONST. art. I, § 9; ARIZ. CONST. art. II, § 10; ARK. CONST. art. II, § 8; CAL. CONST. art. I, §§ 15, 24; COLO. CONST. art. II, § 18; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 9; GA. CONST. art. I, § 1, para. 16; HAW. CONST. art. I, § 10; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 10; IND. CONST. art. I, § 14; KAN. CONST. Bill of Rights, § 10; KY. CONST. Bill of Rights, § 11; LA. CONST. art. I, § 13; ME. CONST. art. I, § 6; MD. CONST. Declaration of Rights, art. XXII; MASS. CONST. pt. I, art. XII; MICH. CONST. art. I, § 17; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 26; MO. CONST. art. I, § 19; MONT. CONST. art. II, § 25; NEB. CONST. art. I, § 12; NEV. CONST.



rado's constitution uses one common formulation, stating that "[n]o person shall be compelled to testify against himself in a criminal case."<sup>220</sup> Kansas's constitution similarly holds that "[n]o person shall be a witness against himself,"<sup>221</sup> and Maine's constitution indicates that "[i]n all criminal prosecutions" "the accused shall not be compelled to furnish or give evidence against himself or herself."<sup>222</sup>

Some states provide for a more nuanced right. Oklahoma, for example, states that "[n]o person shall be compelled to give evidence which will tend to incriminate him, except as in this Constitution specifically provided"<sup>223</sup> and then goes on to hold that:

Any person having knowledge or possession of facts that tend to establish the guilt of any other person or corporation under the laws of the state shall not be excused from giving testimony or producing evidence, when legally called upon so to do, on the ground that it may tend to incriminate him under the laws of the state; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence. All other provisions of the Constitution or the laws of this state in conflict with the provisions of this constitutional amendment are hereby expressly repealed.<sup>224</sup>

Ohio's constitution is also unusual, providing that "[n]o person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel."<sup>225</sup>

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art. I, § 8; N.H. CONST. pt. 1, art. XV; N.M. CONST. art. II, § 15; N.Y. CONST. art. I, § 6; N.C. CONST. art. I, § 23; N.D. CONST. art. I, § 12; OHIO CONST. art. I, § 10; OKLA. CONST. art. II, § 21; OR. CONST. art. I, § 12; PA. CONST. art. I, § 9; R.I. CONST. art. I, § 13; S.C. CONST. art. I, § 12; S.D. CONST. art. VI, § 9; TENN. CONST. art. I, § 9; TEX. CONST. art. I, § 10; UTAH CONST. art. I, § 12; VT. CONST. ch. 1, art. X; VA. CONST. art. I, § 8; WASH. CONST. art. I, § 9; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 8; WYO. CONST. art. I, § 11. The states without a self-incrimination clause are Iowa and New Jersey.

220 COLO. CONST. art. II, § 18.

221 KAN. CONST. Bill of Rights, § 10.

222 ME. CONST. art. I, § 6.

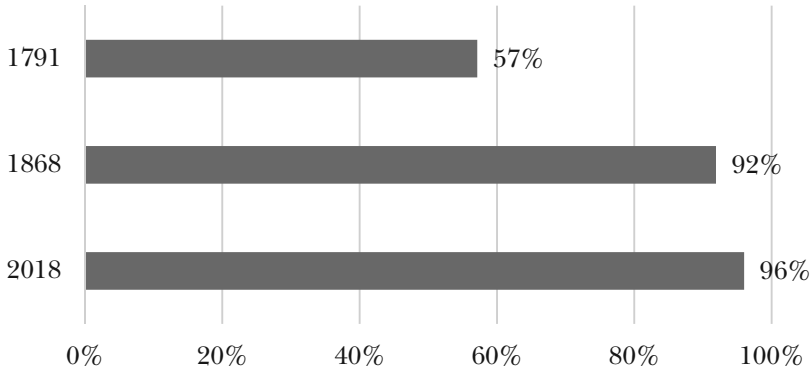
223 OKLA. CONST. art. II, § 21.

224 *Id.* § 27.

225 OHIO CONST. art. I, § 10.

FIGURE 15. PROTECTION AGAINST SELF-INCRIMINATION IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



Eight out of twelve states that wrote new constitutions between 1776 and 1791 protected the right against self-incrimination.<sup>226</sup> Thirty-four of the thirty-seven states in 1868, an Article V three-quarters majority, protected the right against self-incrimination in 1868.<sup>227</sup> Today, forty-eight of the states—representing 96% of the states and 96.2% of the U.S. population<sup>228</sup>—protect this right.<sup>229</sup> The cornerstone nature of the right against self-incrimination in U.S. constitutional law is important because under the civil-law legal tradition, which prevails in Continental Europe, Latin America, and in Asia (except for India), there is no fundamental right not to incriminate oneself. The issue is also important because Justice Hugo Black wrote a powerful dissent in *Adamson v. California*<sup>230</sup> to Justice Felix Frankfurter's majority opinion

226 Calabresi, Agudo & Dore, *supra* note 5, at 1493–94.

227 See Calabresi & Agudo, *supra* note 5, at 60–61.

228 See 2010 Census, *supra* note 12 (296,305,566 out of 308,143,815 residents).

229 See ALA. CONST. art. I, § 6; ALASKA CONST. art. I, § 9; ARIZ. CONST. art. II, § 10; ARK. CONST. art. II, § 8; CAL. CONST. art. I, §§ 15, 24; COLO. CONST. art. II, § 18; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 9; GA. CONST. art. I, § 1, para. 16; HAW. CONST. art. I, § 10; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 10; IND. CONST. art. I, § 14; KAN. CONST. Bill of Rights, § 10; KY. CONST. Bill of Rights, § 11; LA. CONST. art. I, § 13; ME. CONST. art. I, § 6; MD. CONST. Declaration of Rights, art. XXII; MASS. CONST. pt. I, art. XII; MICH. CONST. art. I, § 17; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 26; MO. CONST. art. I, § 19; MONT. CONST. art. II, § 25; NEB. CONST. art. I, § 12; NEV. CONST. art. I, § 8; N.H. CONST. pt. 1, art. XV; N.M. CONST. art. II, § 15; N.Y. CONST. art. I, § 6; N.C. CONST. art. I, § 23; N.D. CONST. art. I, § 12; OHIO CONST. art. I, § 10; OKLA. CONST. art. II, § 21; OR. CONST. art. I, § 12; PA. CONST. art. I, § 9; R.I. CONST. art. I, § 13; S.C. CONST. art. I, § 12; S.D. CONST. art. VI, § 9; TENN. CONST. art. I, § 9; TEX. CONST. art. I, § 10; UTAH CONST. art. I, § 12; VT. CONST. ch. I, art. X; VA. CONST. art. I, § 8; WASH. CONST. art. I, § 9; W. VA. CONST. art. III, § 5; Wis. CONST. art. I, § 8; WYO. CONST. art. I, § 11. The states without a self-incrimination clause are Iowa and New Jersey.

230 332 U.S. 46 (1947), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964).

holding that the right not to incriminate oneself is a fundamental right and that the Fourteenth Amendment incorporates the entire Federal Bill of Rights against the states.<sup>231</sup> Since thirty-four out of thirty-seven state constitutions protected the right not to incriminate oneself in 1868, an Article V three-quarters majority of the states makes it clear that Black was right and Frankfurter was wrong on the original meaning of the Fourteenth Amendment with respect to this issue. *Adamson* was correctly overruled in *Malloy v. Hogan*,<sup>232</sup> and support for the right has only grown since 1868.

#### 4. Confrontation

The Confrontation Clause in the Federal Bill of Rights guarantees criminal defendants the right to confront any witnesses against them.<sup>233</sup> In the modern day, forty-seven states—comprising 94% of the states and 98.4% of the U.S. population<sup>234</sup>—guarantee criminal defendants the right to confrontation in their state constitutions.<sup>235</sup> Wisconsin’s constitution uses a typical format, stating that “[i]n all criminal prosecutions the accused shall enjoy the right . . . to meet the witnesses face to face.”<sup>236</sup> Utah’s constitution follows another common formulation, holding that “[i]n criminal prosecutions the accused shall have the right . . . to be confronted by the witnesses against him.”<sup>237</sup> It is worth noting that the Utah Constitution more closely tracks the Federal Constitution, which provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”<sup>238</sup> The states without a confrontation clause are Idaho, Nevada, and North Dakota.

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231 See AMAR, *supra* note 136, at 213–14.

232 *Malloy*, 378 U.S.1.

233 U.S. CONST. amend. VI.

234 See 2010 Census, *supra* note 12 (303,203,091 out of 308,143,815 residents).

235 See ALA. CONST. art. I, § 6; ALASKA CONST. art. I, § 11; ARIZ. CONST. art. II, § 24; ARK. CONST. art. II, § 10; CAL. CONST. art. I, § 15; COLO. CONST. art. II, § 16; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 16; GA. CONST. art. I, § 1, para. 14; HAW. CONST. art. I, § 14; ILL. CONST. art. I, § 8; IND. CONST. art. I, § 13; IOWA CONST. art. I, § 10; KAN. CONST. Bill of Rights, § 10; KY. CONST. Bill of Rights, § 11; LA. CONST. art. I, § 16; ME. CONST. art. I, § 6; MD. CONST. Declaration of Rights, art. XXI; MASS. CONST. pt. 1, art. XII; MICH. CONST. art. I, § 20; MINN. CONST. art. I, § 6; MISS. CONST. art. III, § 26; MO. CONST. art. I, § 18(a); MONT. CONST. art. II, § 24; NEB. CONST. art. I, § 11; N.H. CONST. pt. 1, art. XV; N.J. CONST. art. I, § 10; N.M. CONST. art. II, § 14; N.Y. CONST. art. I, § 6; N.C. CONST. art. I, § 23; OHIO CONST. art. I, § 10; OKLA. CONST. art. II, § 20; OR. CONST. art. I, § 11; PA. CONST. art. I, § 9; R.I. CONST. art. I, § 10; S.C. CONST. art. I, § 14; S.D. CONST. art. VI, § 7; TENN. CONST. art. I, § 9; TEX. CONST. art. I, § 10; UTAH CONST. art. I, § 12; VT. CONST. ch. I, art. X; VA. CONST. art. I, § 8; WASH. CONST. art. I, § 22; W. VA. CONST. art. III, § 14; WIS. CONST. art. I, § 7; WYO. CONST. art. I, § 10.

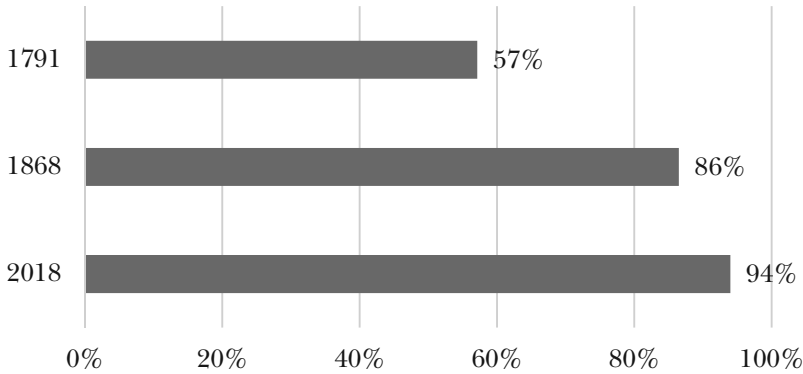
236 WIS. CONST. art. I, § 7.

237 UTAH CONST. art. I, § 12.

238 U.S. CONST. amend. VI.

FIGURE 16. CONFRONTATION CLAUSES IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



Eight states out of twelve that wrote new constitutions between 1776 and 1791 included confrontation clauses,<sup>239</sup> and thirty-two out of thirty-seven states, an Article V three-quarters consensus, had confrontation clauses in their state constitutions in 1868 when the Fourteenth Amendment was ratified.<sup>240</sup> Today, forty-seven states—comprising 94% of the states and 98.4% of the population<sup>241</sup>—guarantee criminal defendants the right to confrontation in their state constitutions.<sup>242</sup> This right was a fundamental right in 1868, and it has come to be protected even more thoroughly over time.

239 Calabresi, Agudo & Dore, *supra* note 5, at 1497.

240 See Calabresi & Agudo, *supra* note 5, at 63.

241 See *2010 Census*, *supra* note 12 (303,203,091 out of 308,143,815 residents).

242 See ALA. CONST. art. I, § 6; ALASKA CONST. art. I, § 11; ARIZ. CONST. art. II, § 24; ARK. CONST. art. II, § 10; CAL. CONST. art. I, § 15; COLO. CONST. art. II, § 16; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 16; GA. CONST. art. I, § 1, para. 14; HAW. CONST. art. I, § 14; ILL. CONST. art. I, § 8; IND. CONST. art. I, § 13; IOWA CONST. art. I, § 10; KAN. CONST. Bill of Rights, § 10; KY. CONST. Bill of Rights, § 11; LA. CONST. art. I, § 16; ME. CONST. art. I, § 6; MD. CONST. Declaration of Rights, art. XXI; MASS. CONST. pt. 1, art. XII; MICH. CONST. art. I, § 20; MINN. CONST. art. I, § 6; MISS. CONST. art. III, § 26; MO. CONST. art. I, § 18(a); MONT. CONST. art. II, § 24; NEB. CONST. art. I, § 11; N.H. CONST. pt. 1, art. XV; N.J. CONST. art. I, § 10; N.M. CONST. art. II, § 14; N.Y. CONST. art. I, § 6; N.C. CONST. art. I, § 23; OHIO CONST. art. I, § 10; OKLA. CONST. art. II, § 20; OR. CONST. art. I, § 11; PA. CONST. art. I, § 9; R.I. CONST. art. I, § 10; S.C. CONST. art. I, § 14; S.D. CONST. art. VI, § 7; TENN. CONST. art. I, § 9; TEX. CONST. art. I, § 10; UTAH CONST. art. I, § 12; VT. CONST. ch. 1, art. X; VA. CONST. art. I, § 8; WASH. CONST. art. I, § 22; W. VA. CONST. art. III, § 14; WIS. CONST. art. I, § 7; WYO. CONST. art. I, § 10.

### F. *Due Process Rights*

The Fifth and Fourteenth Amendments to the U.S. Constitution each contain a due process clause,<sup>243</sup> both of which ensure that individuals cannot be deprived of life, liberty, or property without due process of law. In 2018, forty-nine states—comprising 98% of the states and 97.1% of the U.S. population<sup>244</sup>—include a similar clause in their state constitutions, thereby protecting due process rights at the state level.<sup>245</sup> New Jersey is the only state without a due process clause. Louisiana’s due process clause closely mirrors the Federal Constitution, providing that “[n]o person shall be deprived of life, liberty, or property, except by due process of law.”<sup>246</sup> Another common formulation can be found in Vermont’s constitution, which holds that no person can “be justly deprived of liberty, except by the laws of the land, or the judgment of the person’s peers.”<sup>247</sup> Kansas’s constitution uses a final typical format, stating that “[a]ll persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.”<sup>248</sup>

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243 U.S. CONST. amend V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”); *id.* amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

244 See *2010 Census*, *supra* note 12 (299,351,921 out of 308,143,815 residents).

245 See ALA. CONST. art. I, §§ 6, 13; ALASKA CONST. art. I, § 7; ARIZ. CONST. art. II, § 4; ARK. CONST. art. II, §§ 8, 21; CAL. CONST. art. I, §§ 7(a), 15, 24, 29; COLO. CONST. art. II, § 25; CONN. CONST. art. I, § 8; DEL. CONST. art. IV, § 37; FLA. CONST. art. I, § 9; GA. CONST. art. I, § 1, para. 1; HAW. CONST. art. I, § 5; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 2; IND. CONST. art. I, § 12; IOWA CONST. art. I, § 9; KAN. CONST. Bill of Rights, § 18; KY. CONST. Bill of Rights, §§ 11, 14; LA. CONST. art. I, §§ 2, 22; ME. CONST. art. I, §§ 6, 6-A; MD. CONST. Declaration of Rights, arts. XIX, XXIV; MASS. CONST. pt. 1, arts. XI, XII; MICH. CONST. art. I, § 17; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 14; MO. CONST. art. I, § 10; MONT. CONST. art. II, § 17; NEB. CONST. art. I, § 3; NEV. CONST. art. I, § 8; N.H. CONST. pt. 1, art. XV; N.M. CONST. art. II, § 18; N.Y. CONST. art. I, §§ 1, 6; N.C. CONST. art. I, § 19; N.D. CONST. art. I, §§ 9, 12; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, §§ 7, 29; OR. CONST. art. I, § 10; PA. CONST. art. I, §§ 9, 11; R.I. CONST. art. I, §§ 2, 10; S.C. CONST. art. I, § 3; S.D. CONST. art. VI, § 2; TENN. CONST. art. I, § 8; TEX. CONST. art. I, §§ 13, 19; UTAH CONST. art. I, §§ 7, 11; VT. CONST. ch. 1, art. X; VA. CONST. art. I, §§ 8, 11; WASH. CONST. art. I, § 3; W. VA. CONST. art. III, § 10; WIS. CONST. art. I, § 8; WYO. CONST. art. I, § 6. The state without a due process clause is New Jersey.

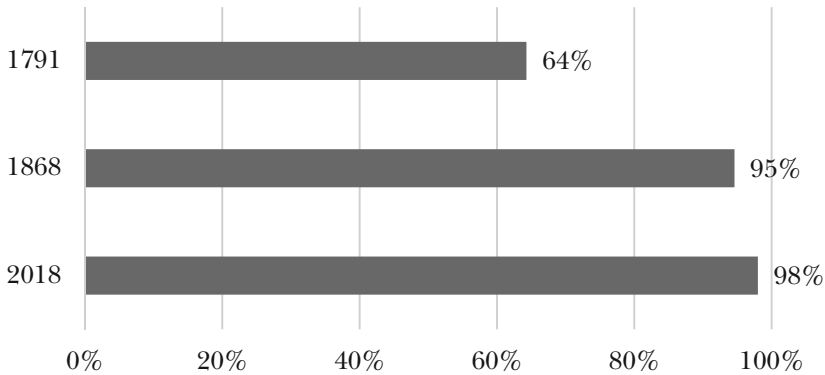
246 LA. CONST. art. I, § 2.

247 VT. CONST. ch. 1, art. X. This “law of the land” language is derived from the old English Magna Carta. See *Washington v. Glucksberg*, 521 U.S. 702, 756–57 (1997) (Souter, J., concurring in the judgment) (mentioning that prior to the ratification of the Fourteenth Amendment of the Federal Constitution, state constitutions commonly contained either due process clauses similar to that found in the Fifth Amendment of the Federal Constitution, or they contained language from the old English Magna Carta, which served as a textual antecedent to the due process clause).

248 KAN. CONST. Bill of Rights, § 18. We count “due course of law” language as a form of a due process clause, because we believe that it is synonymous with the phrase “due process of law.” *Due Course of Law*, BLACK’S LAW DICTIONARY (2d ed. 1910).

FIGURE 17. DUE PROCESS OR LAW OF THE LAND CLAUSES IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



The language used in the state due process clauses has shifted over time. In 1868, the majority of the state constitutions that contained due process clause analogs used rhetoric like Vermont’s constitution, guaranteeing due process rights by referencing “the law of the land.”<sup>249</sup> The typical formulation in 1868 was that no person can be deprived of life, liberty or property “but by the judgment of his peers or the law of the land.”<sup>250</sup> Today, more states use the due process of law formulation than use the law of the land language, which actually dates back to Magna Carta signed by King John in 1215.<sup>251</sup> The two formulations mean the same thing, which is why we believe that substantive due process is an oxymoron and why it is the Privileges or Immunities Clause of the Fourteenth Amendment that is the guarantee for most of our enumerated and unenumerated rights. In 1791, nine out of twelve states that wrote new constitutions between 1776 and 1791 included due process clauses that all used the traditional Magna Carta language authorizing deprivations of life, liberty, or property by the law of the land.<sup>252</sup> No state used the due process of law language. This suggests that when the Fifth Amendment Due Process Clause was ratified in 1791, an Article V three-quarters majority of the twelve states that had written new constitutions

249 See Calabresi & Agudo, *supra* note 5, at 66 (“All in all, eighteen of the thirty states with due process clauses in 1868 used the ‘by the law of the land’ language while fourteen used the words ‘due process of law.’”). Note that in our original analysis, *id.*, we coded thirty states as having due process of law clauses in their state constitutions in 1868. We now believe—upon further review—that thirty-five out of thirty-seven states had such clauses. The only states in 1868 without due process clauses were New Jersey and Wisconsin.

250 *Id.* at 65–66 (quoting N.H. CONST. of 1784, pt. 1, art. XV).

251 See *English Translation of Magna Carta*, BRIT. LIBR. (July 28, 2014), <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation#>.

252 Calabresi, Agudo & Dore, *supra* note 5, at 1500.

believed that people could be deprived of life, liberty, or property by the law of the land. The original understanding of the Fifth Amendment Due Process Clause was thus a belief in procedural but not substantive due process. By 1868, thirty-five out of thirty-seven states used the due process of law language,<sup>253</sup> and in 2018, thirty-seven states use a “due process of law” provision,<sup>254</sup> seventeen states use a “due course of law” provision,<sup>255</sup> and sixteen states use a “law of the land” provision,<sup>256</sup> though it is worth noting that there is significant overlap, such that many states use more than one formulation in their state constitutions.<sup>257</sup>

### G. Property Rights

The next major topic addressed within the Federal Constitution is property rights.<sup>258</sup> In particular, the Takings Clause of the Fifth Amendment provides that the federal government may not use its eminent domain powers to seize private property without giving just compensation to the property owner.<sup>259</sup> As we describe below, state constitutional law also addresses the fundamental questions of how the state may interact with property owners without violating their private property rights.

253 See *supra* note 244.

254 ALA. CONST. art. I, §§ 6, 13; ALASKA CONST. art. I, § 7; ARIZ. CONST. art. II, § 4; ARK. CONST. art. II, § 8; CAL. CONST. art. I, §§ 7(a), 15, 24, 29; COLO. CONST. art. II, § 25; CONN. CONST. art. I, § 8; DEL. CONST. art. IV, § 37; FLA. CONST. art. I, § 9; GA. CONST. art. I, § 1, para. 1; HAW. CONST. art. I, § 5; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 2; IOWA CONST. art. I, § 9; LA. CONST. art. I, §§ 2, 22; ME. CONST. art. I, § 6-A; MICH. CONST. art. I, § 17; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 14; MO. CONST. art. I, § 10; MONT. CONST. art. II, § 17; NEB. CONST. art. I, § 3; NEV. CONST. art. I, § 8; N.H. CONST. pt. 1, art. XV; N.M. CONST. art. II, § 18; N.Y. CONST. art. I, § 6; N.D. CONST. art. I, §§ 9, 12; ORLA. CONST. art. II, §§ 7, 29; R.I. CONST. art. I, § 2; S.C. CONST. art. I, § 3; S.D. CONST. art. VI, § 2; UTAH CONST. art. I, § 7; VA. CONST. art. I, § 11; WASH. CONST. art. I, § 3; W. VA. CONST. art. III, § 10; WIS. CONST. art. I, § 8; WYO. CONST. art. I, § 6.

255 CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; IND. CONST. art. I, § 12; KAN. CONST. Bill of Rights, § 18; KY. CONST. Bill of Rights, § 14; ME. CONST. art. I, § 19; MISS. CONST. art. III, § 24; NEB. CONST. art. I, § 13; N.C. CONST. art. I, § 18; OHIO CONST. art. I, § 16; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, §§ 13, 19; UTAH CONST. art. I, § 11; W. VA. CONST. art. III, § 17.

256 ARK. CONST. art. II, § 21; DEL. CONST. art. I, §§ 7, 9; HAW. CONST. art. I, § 8; KY. CONST. Bill of Rights, § 11; ME. CONST. art. I, § 6; MD. CONST. Declaration of Rights, arts. XIX, XXIV; MASS. CONST. pt. 1, art. XII; MINN. CONST. art. I, § 2; N.H. CONST. pt. 1, art. XV; N.Y. CONST. art. I, § 1; N.C. CONST. art. I, § 19; PA. CONST. art. I, § 9; R.I. CONST. art. I, § 10; TENN. CONST. art. I, § 8; TEX. CONST. art. I, § 19; VA. CONST. art. I, § 8.

257 See *e.g.*, KY. CONST. Bill of Rights, §§ 11, 14; TEX. CONST. art. I, § 19; VA. CONST. art. I, §§ 8, 11.

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

259 U.S. CONST. amend. V.

## 1. Takings Clauses

Takings clauses, like the one found in the Fifth Amendment of the Federal Constitution,<sup>260</sup> place important limitations on the governmental power of eminent domain. In 2018, forty-nine states—representing 98% of the states and 96.9% of the U.S. population<sup>261</sup>—have takings clauses in their state constitutions.<sup>262</sup> Wisconsin’s constitution uses a typical formulation of the clause, providing that “[t]he property of no person shall be taken for public use without just compensation therefor.”<sup>263</sup> Other states include additional detail in their takings clauses. Ohio’s constitution, for example, states that:

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money; and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.<sup>264</sup>

Arizona’s constitution also provides additional detail, holding that:

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made, paid into court for the owner, secured by bond as may be fixed by the court, or paid into the state treasury for the owner on such terms and conditions as the legislature may provide, and no right of way shall be appropriated to the use of any corporation other than municipi-

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260 *Id.* (“[N]or shall private property be taken for public use, without just compensation.”).

261 See 2010 *Census*, *supra* note 12 (298,608,332 out of 308,143,815 residents).

262 See ALA. CONST. art. I, § 23; ALASKA CONST. art. I, § 18; ARIZ. CONST. art. II, § 17; ARK. CONST. art. II, §§ 22–23; *id.* art. XII, § 9; CAL. CONST. art. I, § 19; COLO. CONST. art. II, §§ 14–15; CONN. CONST. art. I, § 11; DEL. CONST. art. I, § 8; FLA. CONST. art. X, § 6; GA. CONST. art. I, § 3, para. 1; HAW. CONST. art. I, § 20; IDAHO CONST. art. I, § 14; ILL. CONST. art. I, § 15; IND. CONST. art. I, § 21; IOWA CONST. art. I, § 18; KAN. CONST. art. XII, § 4; KY. CONST. Bill of Rights, § 13; LA. CONST. art. I, § 4; ME. CONST. art. I, § 21; MD. CONST. art. III, § 40; MASS. CONST. pt. I, art. X; MICH. CONST. art. X, § 2; MINN. CONST. art. I, § 13; MISS. CONST. art. III, § 17; MO. CONST. art. I, § 26; MONT. CONST. art. II, § 29; NEB. CONST. art. I, § 21; NEV. CONST. art. I, § 8; N.H. CONST. pt. 1, arts. XII(a), XIV; N.J. CONST. art. I, § 20; N.M. CONST. art. II, § 20; N.Y. CONST. art. I, § 7; N.D. CONST. art. I, § 16; OHIO CONST. art. I, § 19; OKLA. CONST. art. II, §§ 23–24; OR. CONST. art. I, § 18; PA. CONST. art. I, § 10; R.I. CONST. art. I, § 16; S.C. CONST. art. I, § 13; S.D. CONST. art. VI, § 13; TENN. CONST. art. I, § 21; TEX. CONST. art. I, § 17(d); UTAH CONST. art. I, § 22; VT. CONST. ch. 1, arts. II, IX; VA. CONST. art. I, §§ 6, 11; WASH. CONST. art. I, § 16; W. VA. CONST. art. III, § 9; WIS. CONST. art. I, § 13; WYO. CONST. art. I, §§ 32–33.

263 WIS. CONST. art. I, § 13.

264 OHIO CONST. art. I, § 19.



pal, until full compensation therefore be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.<sup>265</sup>

All in all, then, although the states may differ in their particular phrasing of the takings clause, forty-nine of them offer this protection for private property.

The state without a takings clause, North Carolina, did have references to eminent domain in its constitution. Specifically, the North Carolina Constitution indicated that eminent domain may not be used for health-care facilities,<sup>266</sup> capital projects for industry,<sup>267</sup> capital projects for agriculture,<sup>268</sup> or higher-education facilities.<sup>269</sup> However, since these clauses did not discuss the power of eminent domain generally (e.g., by clarifying when the power of eminent domain can legitimately be used), and did not provide the typical protection of just compensation for any private property seized under the eminent domain power, we do not count North Carolina's constitution as including a takings clause.

In 1791, when the Federal Bill of Rights was ratified, six out of twelve states that had written new constitutions between 1776 and 1791 had takings clauses in their state constitutions.<sup>270</sup> By 1868, when the Fourteenth Amendment was ratified, thirty-three out of thirty-seven states—a three-quarters Article V consensus—had takings clauses.<sup>271</sup> Today, every state but one<sup>272</sup> has such a clause. This protection for private property, then, has only grown in scope over time, and it is a right that is deeply rooted in American history and tradition as well as by an overwhelming consensus of the state constitutions today in 2018.

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265 ARIZ. CONST. art. II, § 17.

266 N.C. CONST. art. V, § 8.

267 *Id.* art. V, § 9.

268 *Id.* art. V, § 11.

269 *Id.* art. V, § 12.

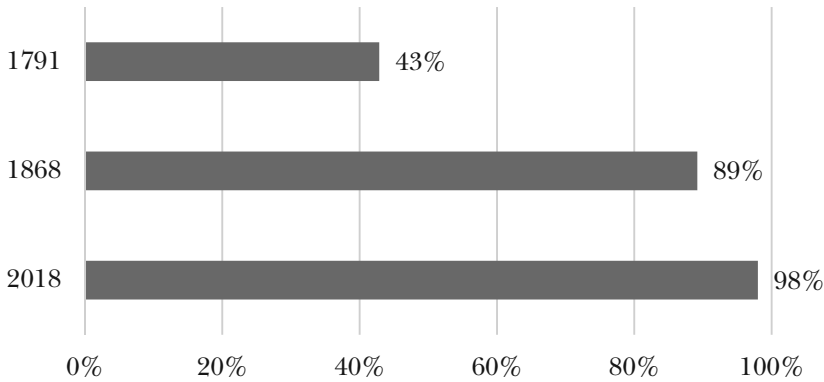
270 Calabresi, Agudo & Dore, *supra* note 5, at 1505–06.

271 *See* Calabresi & Agudo, *supra* note 5, at 72.

272 *See generally* N.C. CONST.

FIGURE 18. TAKINGS CLAUSES IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



## 2. Monopolies

One question “that arose early in the history of the Fourteenth Amendment was whether the Amendment conferred on individuals a fundamental right” to be protected against monopolistic market powers.<sup>273</sup> The U.S. Supreme Court addressed this question directly in 1873 in *The Slaughter-House Cases*,<sup>274</sup> where it held that there is “no fundamental right to be free of monopolies.”<sup>275</sup> Since “the *Slaughter-House* decision has never been overruled, and remains a binding precedent which [the courts are] bound to follow,”<sup>276</sup> the Federal Constitution does not include any protections against monopolies.

The state constitutions diverge from the Federal Constitution regarding the prohibition of monopolies, as they resoundingly protect this form of economic freedom. In 2018, forty-five of the states—comprising 90% of the states and 88.6% of the U.S. population<sup>277</sup>—prohibit the existence of monopolistic powers in some way within their state constitutions.<sup>278</sup> Of

273 Calabresi & Agudo, *supra* note 5, at 73.

274 *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

275 Calabresi & Agudo, *supra* note 5, at 73.

276 *Meadows v. Odom*, 356 F. Supp. 2d 639, 642 (M.D. La. 2005) (“While many legal scholars and lower courts may have criticized portions of the *Slaughter-House* opinion, it is equally clear that the *Slaughter-House* decision has never been overruled, and remains a binding precedent which this Court is bound to follow.”).

277 See 2010 Census, *supra* note 12 (272,883,000 out of 308,143,815 residents).

278 See ALA. CONST. art. IV, § 103; ALASKA CONST. art. VIII, §§ 3, 15, 17; ARIZ. CONST. art. XIV, § 15; ARK. CONST. art. II, § 19; CAL. CONST. art. I, § 7; COLO. CONST. art. II, § 11; *id.* art. XV, §§ 4–6, 13; CONN. CONST. art. I, § 1; GA. CONST. art. III, § 6, para. 5(c)(1); HAW. CONST. art. I, § 21; IDAHO CONST. art. I, § 2; *id.* art. XI, §§ 1, 5, 12; ILL. CONST. art. I, § 16; IND. CONST. art. I, § 23; IOWA CONST. art. VIII, § 12; KAN. CONST. Bill of Rights, art. II; KY. CONST. Bill of Rights, § III; LA. CONST. art. III, § 12; *id.* art. XII, § 12; ME. CONST. art. I, § 23; MD. CONST. Declaration of Rights, art. XLI; MASS. CONST. pt. 1, art. VI; MINN. CONST.

those, twenty-one states—representing 42% of the states and 36.5% of the U.S. population<sup>279</sup>—explicitly reference monopolies or monopolistic power structures within their relevant constitutional provisions.<sup>280</sup> Wyoming’s constitution, for instance, provides that “[p]erpetuities and monopolies are contrary to the genius of a free state, and shall not be allowed. Corporations being creatures of the state, endowed for the public good with a portion of its sovereign powers, must be subject to its control.”<sup>281</sup> New Mexico uses another formulation, stating that “[t]he legislature shall enact laws to prevent trusts, monopolies and combinations in restraint of trade.”<sup>282</sup>

Out of the remaining twenty-four states with antimonopoly clauses, fifteen states had constitutional clauses banning the state from granting any corporation or group special privileges or immunities that are not equally granted to all other civilians.<sup>283</sup> Virginia’s constitution utilizes a common formulation, stating that “[t]he General Assembly shall not enact any local, special, or private law . . . [g]ranteeing to any private corporation, association, or individual any special or exclusive right, privilege, or immunity.”<sup>284</sup> South Dakota’s constitution uses another format, holding that “[n]o law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations.”<sup>285</sup>

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art. XIII, § 6; MISS. CONST. art. VII, §§ 198, 198-A; MO. CONST. art. I, § 13; *id.* art. XI, §§ 2, 9, 12; MONT. CONST. art. XIII, §§ 1, 6; NEB. CONST. art. III, § 18; *id.* art. X, §§ 4, 7; NEV. CONST. art. XV, § 4; N.H. CONST. pt. 2, art. LXXXIII; N.J. CONST. art. IV, § 7; N.M. CONST. art. IV, §§ 24, 26, 38; N.Y. CONST. art. III, § 17; N.C. CONST. art. I, § 34; N.D. CONST. art. XII, § 16; OHIO CONST. art. II, § 1e(B)(1); OKLA. CONST. art. II, § 32; *id.* art. V, § 44; OR. CONST. art. I, § 20; PA. CONST. art. I, § 17; S.D. CONST. art. VI, § 18; TENN. CONST. art. I, §§ 22, 29; TEX. CONST. art. I, § 26; UTAH CONST. art. XII, § 20; VT. CONST. ch. 2, § 63; VA. CONST. art. IV, § 14; WASH. CONST. art. I, § 12; *id.* art. XII, § 22; W. VA. CONST. art. XI, §§ 3, 9, 11; WIS. CONST. art. IV, § 31; WYO. CONST. art. I, §§ 30–31. The five states without any monopolies clauses are Delaware, Florida, Michigan, Rhode Island, and South Carolina.

279 See *2010 Census*, *supra* note 12 (112,551,100 out of 308,143,815 residents).

280 See ALA. CONST. art. IV, § 103; ARIZ. CONST. art. XIV, § 15; ARK. CONST. art. II, § 19; GA. CONST. art. III, § 6, para. 5(c)(1); MD. CONST. Declaration of Rights, art. XLI; MINN. CONST. art. XIII, § 6; MISS. CONST. art. VII, §§ 198, 198-A; MONT. CONST. art. XIII, § 6; NEV. CONST. art. XV, § 4; N.H. CONST. pt. 2, art. LXXXIII; N.M. CONST. art. IV, § 38; N.C. CONST. art. I, § 34; N.D. CONST. art. XII, § 16; OHIO CONST. art. I, § 1e(B)(1); OKLA. CONST. art. II, § 32; *id.* art. V, § 44; TENN. CONST. art. I, § 22; TEX. CONST. art. I, § 26; UTAH CONST. art. XII, § 20; VT. CONST. ch. 2, § 63; WASH. CONST. art. XII, § 22; WYO. CONST. art. I, § 30.

281 WYO. CONST. art. I, § 30.

282 N.M. CONST. art. IV § 38.

283 See CAL. CONST. art. I, § 7; CONN. CONST. art. I, § 1; IND. CONST. art. I, § 23; KY. CONST. Bill of Rights, § 3; LA. CONST. art. III, § 12; ME. CONST. art. I, § 23; MASS. CONST. pt. I, art. VI; NEB. CONST. art. III, § 18; N.J. CONST. art. IV, § 7; N.Y. CONST. art. III, § 17; OR. CONST. art. I, § 20; S.D. CONST. art. VI, § 18; VA. CONST. art. IV, § 14; W. VA. CONST. art. XI, § 3; WIS. CONST. art. IV, § 31.

284 VA. CONST. art. IV, § 14.

285 S.D. CONST. art. VI, § 18.

We count these clauses as a type of antimonopoly clause because they prohibit the state from granting special monopolistic privileges to any corporation that are not equally granted to all other citizens and corporations. We believe this approach is supported by Justice Field's dissent in *The Slaughter-House Cases*, where he stated:

If exclusive privileges of this character can be granted to a corporation of seventeen persons, they may, in the discretion of the legislature, be equally granted to a single individual. If they may be granted for twenty-five years, they may be equally granted for a century, and in perpetuity. If they may be granted for the landing and keeping of animals intended for sale or slaughter they may be equally granted for the landing and storing of grain and other products of the earth, or for any article of commerce. If they may be granted for structures in which animal food is prepared for market they may be equally granted for structures in which farinaceous or vegetable food is prepared. They may be granted for any of the pursuits of human industry, even in its most simple and common forms. Indeed, upon the theory on which the exclusive privileges granted by the act in question are sustained, there is no monopoly, in the most odious form, which may not be upheld.<sup>286</sup>

Thus, since these states prohibit the granting of special privileges and immunities to any corporations or groups, we believe that they have thereby protected civilians against monopolies within their state constitutions.

By the same token—although these cases are less cut and dry—eight additional states protect against monopolistic powers in their constitutions by ensuring that no law making an irrevocable grant of special privileges or immunities shall be passed.<sup>287</sup> Idaho's constitution, for example, states that “no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature,”<sup>288</sup> and Missouri's constitution provides “[t]hat no . . . law . . . making any irrevocable grant of special privileges or immunities, can be enacted.”<sup>289</sup> Though these clauses appear to allow the state to grant temporary monopolistic powers, we count them as antimonopoly clauses overall because they prohibit the perpetual granting of

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286 *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 89 (1872) (Field, J., dissenting); see also *id.* at 119–22 (Bradley, J., dissenting) (holding that monopolies, which are “exclusive right[s], given to one person, or corporation, to the exclusion of all others” necessarily abridge the privileges of those other citizens).

287 See COLO. CONST. art. II, § 11; HAW. CONST. art. I, § 21; IDAHO CONST. art. I, § 2; ILL. CONST. art. I, § 16; IOWA CONST. art. VIII, § 12; KAN. CONST. Bill of Rights, § 2; MO. CONST. art. I, § 13; PA. CONST. art. I, § 17. Iowa's constitution is interesting because it appears to try to have its cake and eat it too by including two types of antimonopolistic language. IOWA CONST. art. VIII, § 12 (“Subject to the provisions of this article, the general assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two thirds of each branch of the general assembly; and no exclusive privileges, except as in this article provided, shall ever be granted.”). We count Iowa here as having the second, more limited form of antimonopoly language, just to be conservative with our analysis.

288 IDAHO CONST. art. I, § 2.

289 MO. CONST. art. I, § 13.

special privileges or immunities. In that sense, these eight states do have antimonopoly clauses in their state constitutions, though the clauses are less powerful than the ones featured in their counterparts discussed above.

It is worth noting that three of those eight states also had additional clauses related to limiting monopolistic powers in their state constitutions, such as Colorado's constitution, which provided that "[n]o telegraph company shall consolidate with, or hold a controlling interest in, the stock or bonds of any other telegraph company owning or having the control of a competing line, or acquire, by purchase or otherwise, any other competing line of telegraph,"<sup>290</sup> and that "[n]o railroad corporation, or the lessees or managers thereof, shall consolidate its stock, property or franchises with any other railroad corporation owning or having under its control a parallel or competing line."<sup>291</sup>

The final state with antimonopoly language in its constitution is Alaska. Alaska's constitution discusses monopolies within the context of natural resources, holding that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use,"<sup>292</sup> and that "[l]aws and regulations governing the use or disposal of natural resources shall apply equally to all persons similarly situated with reference to the subject matter and purpose to be served by the law or regulation."<sup>293</sup> Alaska's constitution also prohibits monopolistic fisheries, stating:

No exclusive right or special privilege of fishery shall be created or authorized in the natural waters of the State. This section does not restrict the power of the State to limit entry into any fishery for purposes of resource conservation, to prevent economic distress among fishermen and those dependent upon them for a livelihood and to promote the efficient development of aquaculture in the State.<sup>294</sup>

Since Alaska provides these robust protections for natural resources and prohibits the existence of monopolistic forces in the fishery industry, we count it as a constitution with antimonopoly language. Thus, overall, forty-five states include antimonopoly clauses in their state constitution in one form or another.

This is a fairly large shift from the legal situation that existed in 1868 when the Fourteenth Amendment was ratified. At that time, only twenty-two out of thirty-seven states—representing 59.5% of the states—had some form of antimonopoly clause, and only five states had clauses directly using the

290 COLO. CONST. art. XV, § 13.

291 *Id.* art. XV, § 5. Other states aside from these eight also included clauses about monopolies that referred to particular industries. For example, West Virginia discussed railroad monopolies. W. VA. CONST. art. XI, § 11 ("No railroad corporation shall consolidate its stock, property or franchise with any other railroad owning a parallel or competing line, or obtain the possession or control of such parallel or competing line, by lease or other contract, without the permission of the Legislature.").

292 ALASKA CONST. art. VIII, § 3.

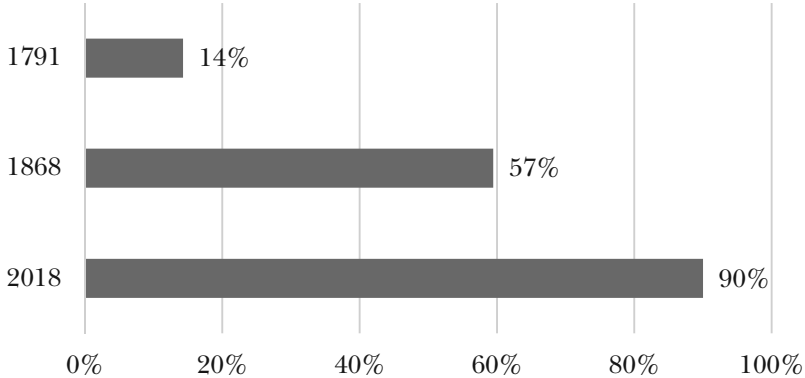
293 *Id.* art. VIII, § 17.

294 *Id.* art. VIII, § 15.

word “monopoly.”<sup>295</sup> In 1791, when the Federal Bill of Rights was ratified, only two out of fourteen states had clauses barring monopolies,<sup>296</sup> even though Thomas Jefferson strongly but unsuccessfully urged James Madison to include one in the Federal Bill of Rights.

FIGURE 19. LIMITING MONOPOLIES IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



The right to be free of either government-created monopolies or of private monopoly power appears to have grown up or gained traction almost entirely in the modern era. We see this as a striking finding.

### 3. Legal Recourse for Property-Related Injuries

Though the Federal Constitution does not include an equivalent analog, over three-quarters of the states provide a right to legal recourse for any injuries sustain related to private property. Indeed, thirty-nine states—representing 78% of the states—contain these legal recourse clauses.<sup>297</sup> Alabama’s

<sup>295</sup> See Calabresi & Agudo, *supra* note 5, at 73. Note that in our earlier analysis, we only coded a state as having a monopoly clause in its state constitution if that clause expressly used the word “monopoly.” *Id.* There were only five such states. *Id.* We now view that approach as too narrow and believe that twenty-two of the states in 1868 should be considered as having an antimonopoly clause. Those states are: Alabama, Arkansas, Connecticut, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oregon, Tennessee, Texas, Vermont, and Virginia.

<sup>296</sup> Calabresi, Agudo & Dore, *supra* note 5, at 1506.

<sup>297</sup> See ALA. CONST. art. I, § 13; ARIZ. CONST. art. II, § 11; ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KAN. CONST. Bill of Rights, § 18; KY. CONST. Bill of Rights, § 14; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MD. CONST. Declaration of Rights, art. XIX; MASS. CONST. pt. 1, art. XI; MINN. CONST. art. I, § 8; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. 1, art. XIV; N.C. CONST. art. I, § 18; N.D. CONST.

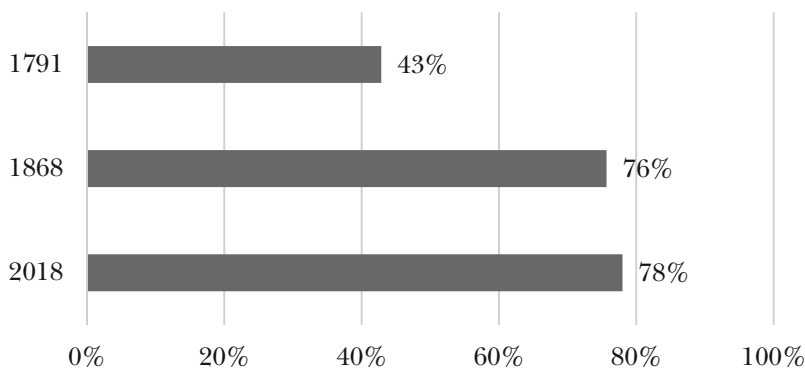
constitution utilizes a typical approach, holding “that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.”<sup>298</sup> Some states used slightly modified language. One such state is Wisconsin, and its constitution states that:

Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.<sup>299</sup>

Thus, thirty-nine states include provisions in their constitutions mandating that the court system address any injuries related to private property.<sup>300</sup>

FIGURE 20. LEGAL RECOURSE CLAUSES IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



Six out of twelve state constitutions written between 1776 and 1791 had legal recourse clauses.<sup>301</sup> When the Fourteenth Amendment was ratified in 1868, twenty-eight states out of thirty seven states had legal recourse clauses.<sup>302</sup> Today, the percentage of states with such clauses has increased slightly to thirty-nine states out of fifty—78% of the states in 2018, compared to 76% percent in 1868.

art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13 (does not specifically mention delay); UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. IV; WASH. CONST. art. I, § 10; W. VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 8.

298 ALA. CONST. art. I, § 13.

299 WIS. CONST. art. I, § 9.

300 Among these thirty-nine state constitutions, only Texas’s clause fails to mention delay or promptness. TEX. CONST. art. I, § 13.

301 Calabresi, Agudo & Dore, *supra* note 5, at 1506–07.

302 See Calabresi & Agudo, *supra* note 5, at 73–74.

### H. *The Right to Trial by Jury*

The next major right protected in the Federal Constitution is the right to trial by jury. Specifically, the Sixth Amendment of the U.S. Constitution guarantees the right to trial by jury in all criminal cases,<sup>303</sup> and the Seventh Amendment ensures that jury trials are used in all civil- or common-law suits where more than twenty dollars is at issue.<sup>304</sup> We turn now to a discussion of how the states treat this fundamental American right.

#### 1. Criminal Juries

In another display of constitutional homogeneity, all fifty states protect a right to trial by jury in criminal cases within their state constitutions.<sup>305</sup> Kansas's constitution uses a typical formulation, holding that "[t]he right of trial by jury shall be inviolate."<sup>306</sup> Other states include additional rules about criminal jury trials in their constitutional clauses, such as giving guidelines about the appropriate size of juries and establishing rules under which the parties to a case may waive their right to trial by jury. Idaho's constitution, for instance, states that:

The right of trial by jury shall remain inviolate; but in civil actions, three-fourths of the jury may render a verdict, and the legislature may provide that in all cases of misdemeanors five-sixths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of all parties, expressed in open court, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions the jury may consist of twelve or of any number less than twelve upon which the parties may agree in open court. Provided, that in cases of misdemeanor and in civil actions within the jurisdiction of any court inferior to the district

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303 U.S. CONST. amend. VI.

304 U.S. CONST. amend. VII.

305 See ALA. CONST. art. I, § 11; ALASKA CONST. art. I, § 11; ARIZ. CONST. art. II, § 23; ARK. CONST. art. II, §§ 7, 10; CAL. CONST. art. I, § 16; COLO. CONST. art. II, § 23; CONN. CONST. art. I, § 19; DEL. CONST. art. I, §§ 4, 7; FLA. CONST. art. I, §§ 16, 22; GA. CONST. art. I, § 1, para. 11; HAW. CONST. art. I, § 14; IDAHO CONST. art. I, § 7; ILL. CONST. art. I, § 13; IND. CONST. art. I, §§ 13, 19; IOWA CONST. art. I, §§ 9, 10; KAN. CONST. Bill of Rights, §§ 5, 10; KY. CONST. Bill of Rights, § 7; LA. CONST. art. I, § 17; ME. CONST. art. I, § 6; MD. CONST. Declaration of Rights, arts. V, XXI; MASS. CONST. pt. 1, arts. XII, XV; MICH. CONST. art. I, §§ 14, 20; MINN. CONST. art. I, §§ 4, 6; MISS. CONST. art. III, § 31; MO. CONST. art. I, §§ 18(a), 22(a); MONT. CONST. art. II, §§ 24, 26; NEB. CONST. art. I, §§ 6, 11; NEV. CONST. art. I, § 3; N.H. CONST. pt. 1, art. XVI; N.J. CONST. art. I, §§ 9, 10; N.M. CONST. art. II, §§ 12, 14; N.Y. CONST. art. I, § 2; N.C. CONST. art. I, § 24; N.D. CONST. art. I, § 13; OHIO CONST. art. I, §§ 5, 10; OKLA. CONST. art. II, §§ 19, 20; OR. CONST. art. I, §§ 11, 16; PA. CONST. art. I, §§ 6, 9; R.I. CONST. art. I, §§ 10, 15; S.C. CONST. art. I, § 14; S.D. CONST. art. VI, §§ 6, 7; TENN. CONST. art. I, §§ 6, 9; TEX. CONST. art. I, §§ 10, 15; UTAH CONST. art. I, §§ 10, 12; VT. CONST. ch. I, arts. X, XII; VA. CONST. art. I, § 8; WASH. CONST. art. I, §§ 21, 22; W. VA. CONST. art. III, §§ 13, 14; WIS. CONST. art. I, §§ 5, 7; WYO. CONST. art. I, §§ 9, 10.

306 KAN. CONST. Bill of Rights, § 5.



court, whether such case or action be tried in such inferior court or in district court, the jury shall consist of not more than six.<sup>307</sup>

In contrast, Hawaii's constitution couches the right to criminal juries in a clause that lists multiple other jury-related rights guarantees. It holds:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, or of such other district to which the prosecution may be removed with the consent of the accused . . . .<sup>308</sup>

In this sense, the right to trial by jury in criminal cases is clearly considered a universal right in 2018, at least according to the state constitutions.

Eleven out of twelve states that wrote new constitutions between 1776 and 1791 included a right to jury trial in criminal cases—a three-quarters Article V consensus.<sup>309</sup> Moreover, a unanimous majority of thirty-seven states guaranteed the right to criminal jury trials in 1868 when the Fourteenth Amendment was ratified.<sup>310</sup> It would appear from looking only at the bare text of state constitutional law that not much has changed since 1868. In practice, however, only about 5% of all criminal cases end up being tried by a jury, while the other 95% are plea bargained with prosecutors. In our view, part of the reason for this shift is the high expense of modern jury trials, which we believe have a high cost due to the use of ridiculous rules on voir dire—and with respect to peremptory challenges—all of which tend to make criminal jury trials for everyone unaffordable. Legislatures have responded to this situation by giving enormous charging discretion to prosecutors at both the federal and the state level, which is why 95% of all cases end up being plea bargained. Matters are not helped by the fact that 95% of all jury trials end with a conviction and almost no convictions are overturned by courts on appeal. An innocent criminal defendant threatened with thirty years of imprisonment unless he pleads guilty to a crime, which leads to five years of imprisonment, will choose to plead guilty. This is a bad problem commonly referred to as the “trial tax”<sup>311</sup> which we believe urgently needs to be fixed.

Modern civil-law countries like France and Germany use a mixed bench for criminal trials, such as by using three professional judges and nine lay-

307 IDAHO CONST. art. I, § 7.

308 HAW. CONST. art. I, § 14.

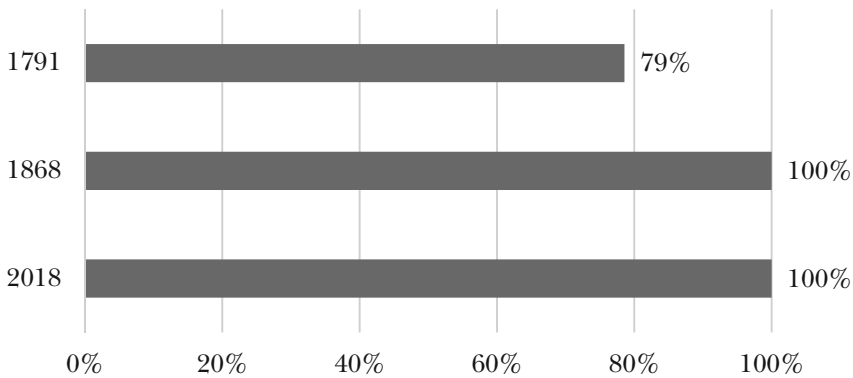
309 Calabresi, Agudo & Dore, *supra* note 5, at 1510–11.

310 See Calabresi & Agudo, *supra* note 5, at 76–77. In our original analysis, we only coded thirty-six states as having a guarantee to a criminal jury trial in their state constitutions in 1868. *Id.* On further review, we believe this was an undercount and that a unanimous thirty-seven states—including Louisiana—guaranteed the right to jury trials in criminal cases in their constitutions in 1868. See, e.g., LA. CONST. of 1868 tit. 1, art. VI.

311 See, e.g., Portia Allen-Kyle, *The Lakeith Smith Case Demonstrates the System's Brokenness*, ACLU (April 12, 2018), <https://www.aclu.org/blog/smart-justice/lakeith-smith-case-demonstrates-systems-brokenness> (“[S]entences after trial are much harsher than those given to people who accept plea bargains. It is often called a ‘trial tax’ . . .”).

person judges who all deliberate together in the jury room to decide a case. Under such a system, conviction requires a vote of at least eight–four that the defendant is guilty. In our view, there are many reasons to think that a mixed bench system may be preferable to the jury trial system that we use in America today. One such reason is that while there is some plea bargaining that now goes on in Germany, Italy, and France, plea bargaining and the “trial tax” are not nearly as big of a problem in those countries as they are in the United States.<sup>312</sup>

FIGURE 21. RIGHT TO CRIMINAL JURIES IN STATE CONSTITUTIONS  
1791: n=14; 1868: n=37; 2018: n=50



## 2. Civil Juries

Forty-nine states—representing 98% of the states and 98.5% of the U.S. population<sup>313</sup>—guarantee the right to jury trials in all civil- or common-law cases within their state constitutions.<sup>314</sup> Thirty-six of those states—represent-

312 See Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective*, 12 INT’L CRIM. JUST. REV. 22, 24 (2002).

313 See 2010 Census, *supra* note 12 (303,610,443 out of 308,143,815 residents).

314 See ALA. CONST. art. I, § 11; ALASKA CONST. art. I, § 16; ARIZ. CONST. art. II, § 23; ARK. CONST. art. II, § 7; CAL. CONST. art. I, § 16; COLO. CONST. art. II, § 23; CONN. CONST. art. I, § 19; DEL. CONST. art. I, § 4; FLA. CONST. art. I, § 22; GA. CONST. art. I, § 1, para. 11; HAW. CONST. art. I, § 13; IDAHO CONST. art. I, § 7; ILL. CONST. art. I, § 13; IND. CONST. art. I, § 20; IOWA CONST. art. I, § 9; KAN. CONST. Bill of Rights, § 5; KY. CONST. Bill of Rights, § 7; ME. CONST. art. I, § 20; MD. CONST. Declaration of Rights, art. V; MASS. CONST. pt. 1, art. XV; MICH. CONST. art. I, § 14; *id.* art. IV, § 44; MINN. CONST. art. I, § 4; MISS. CONST. art. III, § 31; MO. CONST. art. I, § 22(a); MONT. CONST. art. II, § 26; NEB. CONST. art. I, § 6; NEV. CONST. art. I, § 3; N.H. CONST. pt. 1, art. XX; N.J. CONST. art. I, § 9; N.M. CONST. art. II, § 12; N.Y. CONST. art. I, § 2; N.C. CONST. art. I, § 25; N.D. CONST. art. I, § 13; OHIO CONST. art. I, § 5; OKLA. CONST. art. II, § 19; OR. CONST. art. I, § 17; PA. CONST. art. I, § 6; R.I. CONST. art. I, § 15; S.C. CONST. art. I, § 14; S.D. CONST. art. VI, § 6; TENN. CONST. art. I, § 6; TEX. CONST. art. I, § 15; UTAH CONST. art. I, § 10; VT. CONST. ch. 1, art. XII; VA. CONST. art. I, § 11; WASH. CONST. art. I, § 21; W. VA. CONST. art. III, § 13; WIS. CONST. art. I, § 5; WYO. CONST. art. I, § 9. The state without a civil juries clause is Louisiana.

ing 72% of the states and 67.4% of the U.S. population<sup>315</sup>—explicitly mentioned the right to a civil jury trial in the text of their relevant constitutional clauses.<sup>316</sup> Oregon’s constitution, for instance, provided that “[i]n all civil cases the right of Trial by Jury shall remain inviolate.”<sup>317</sup> The other thirteen states did not explicitly mention civil juries. Illinois was one such state, and its constitution holds that “[t]he right of trial by jury as heretofore enjoyed shall remain inviolate.”<sup>318</sup>

As with the criminal jury clauses, some states provide additional details and guidelines about the right to a civil jury trial within their relevant constitutional clauses. Michigan’s constitution, as an example, states that “[t]he legislature may authorize a trial by a jury of less than 12 jurors in civil cases.”<sup>319</sup> The Minnesota Constitution gives even greater detail about civil jury trials, holding that:

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315 See *2010 Census*, *supra* note 12 (207,744,099 out of 308,143,815 residents).

316 See ALASKA CONST. art. I, § 16; ARIZ. CONST. art. II, § 23; ARK. CONST. art. II, § 7; CAL. CONST. art. I, § 16; COLO. CONST. art. II, § 23; GA. CONST. art. I, § 1, para. 11; HAW. CONST. art. I, § 13; IDAHO CONST. art. I, § 7; IND. CONST. art. I, § 20; ME. CONST. art. I, § 20; MD. CONST. Declaration of Rights, art. V; MASS. CONST. pt. 1, art. XV; MICH. CONST. art. I, § 14; *id.* art. IV, § 44; MINN. CONST. art. I, § 4; MISS. CONST. art. III, § 31; MO. CONST. art. I, § 22(a); MONT. CONST. art. II, § 26; NEB. CONST. art. I, § 6; NEV. CONST. art. I, § 3; N.H. CONST. pt. 1, art. XX; N.J. CONST. art. I, § 9; N.M. CONST. art. II, § 12; N.Y. CONST. art. I, § 2; N.C. CONST. art. I, § 25; N.D. CONST. art. I, § 13; OHIO CONST. art. I, § 5; OKLA. CONST. art. II, § 19; OR. CONST. art. I, § 17; PA. CONST. art. I, § 6; R.I. CONST. art. I, § 15; S.D. CONST. art. VI, § 6; UTAH CONST. art. I, § 10; WASH. CONST. art. I, § 21; W. VA. CONST. art. III, § 13; WIS. CONST. art. I, § 5; WYO. CONST. art. I, § 9.

317 OR. CONST. art. I, § 17.

318 ILL. CONST. art. I, § 13. We count this clause as protecting a right to civil juries because, as a historical matter, the right to a jury trial in both civil and criminal cases was already established in Illinois prior to the drafting of this constitutional clause, making the “heretofore” reference include both criminal and civil juries as a basic right. See *Kakos v. Butler*, 63 N.E.3d 901, 906 (Ill. 2016) (“This court has long interpreted the phrase ‘as heretofore enjoyed’ to mean ‘the right of a trial by jury as it existed under the common law and as enjoyed at the time of the adoption of the respective Illinois constitutions.’” (quoting *People v. Lobb*, 161 N.E.2d 325, 331 (Ill. 1959))).

Other states, like Kansas, also provide general protections of the right to a jury trial in their state constitutions. KAN. CONST. Bill of Rights, § 5. Given the “backdrop” of English common law that helped shape the legal system in America, we think these general protections imply a right to both criminal and civil juries, since both rights were protected in England. See Calabresi & Agudo, *supra* note 5, at 77. This view “is confirmed by examination of Noah Webster’s authoritative 1828 *American Dictionary of the English Language*,” which defines petty juries

as usually consisting “of twelve men” who “attend courts to try matters of fact in civil causes, and to decide both the law and the fact in criminal prosecutions.”

The original public meaning of a clause generally protecting the right to a jury trial would thus most likely have been understood . . . as applying to civil as well as criminal juries.

*Id.* at 78 (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

319 MICH. CONST. art. IV, § 44.

The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy. A jury trial may be waived by the parties in all cases in the manner prescribed by law. The legislature may provide that the agreement of five-sixths of a jury in a civil action or proceeding, after not less than six hours' deliberation, is a sufficient verdict. The legislature may provide for the number of jurors in a civil action or proceeding, provided that a jury have at least six members.<sup>320</sup>

As such, the right to a civil jury trial appears to be well established within the state constitutions.

The lone state without a right to civil jury trials—the southern state of Louisiana—is the only state in the Union with a tie to the civil-law legal tradition of France and Spain under which there is no right to jury trial, rather than the common-law tradition, which originated in England and Wales.<sup>321</sup> A crucial difference between the civil-law and common-law traditions is that the civil-law tradition “does not rely on jury trials.”<sup>322</sup> It is thus understandable that Louisiana, which was once a part of Spain and then a part of France,<sup>323</sup> would decline to offer a right to civil jury trial.

Twelve out of twelve states that wrote new constitutions between 1776 and 1791 included the right to civil jury trial.<sup>324</sup> Moreover, thirty-six states out of thirty-seven guaranteed a right to civil jury trial in 1868 when the Fourteenth Amendment was adopted.<sup>325</sup> There can be no question but that the right to civil jury trial is deeply rooted in American history and tradition. The situation in reality, however, is much more complex. No civil-law nation provides a right to civil jury trial, and two-thirds of the world's people probably live in civil-law countries with no right to civil jury trial. England and Wales have abandoned the use of civil jury trials in all civil cases except for slander and libel cases.<sup>326</sup> Canada and Australia have also abandoned the use of civil jury trial.<sup>327</sup> Thus the United States stands alone among the countries of the world in making any use at all of civil jury trial, and even in the United States, the institution is dying out. We do not use civil jury trials in administrative law cases, and jury trial in civil cases has been mostly elimi-

320 MINN. CONST. art. I, § 4.

321 See Calabresi & Agudo, *supra* note 5, at 77 (citing Christopher Osakwe, *Louisiana Civil Law: The Cinderella of American Law*, 60 TUL. L. REV. 1105, 1105–06 (1986)).

322 *Id.*; see also Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 461 (1997) (explaining that, although they experimented to some extent with jury trials, most countries with a civil-law tradition have abandoned the practice in favor of “a ‘mixed court’ composed of a panel having both professional and lay judges”).

323 See Robert Lee, *The True Cost of the Louisiana Purchase*, SLATE (Mar. 1, 2017), [http://www.slate.com/articles/news\\_and\\_politics/history/2017/03/how\\_much\\_did\\_the\\_louisiana\\_purchase\\_actually\\_cost.html](http://www.slate.com/articles/news_and_politics/history/2017/03/how_much_did_the_louisiana_purchase_actually_cost.html) (“Spain had ceded the Louisiana Territory to France, and [France], in turn, offloaded it to American diplomats . . .”).

324 Calabresi, Agudo & Dore, *supra* note 5, at 1511–12.

325 See Calabresi & Agudo, *supra* note 5, at 77–78.

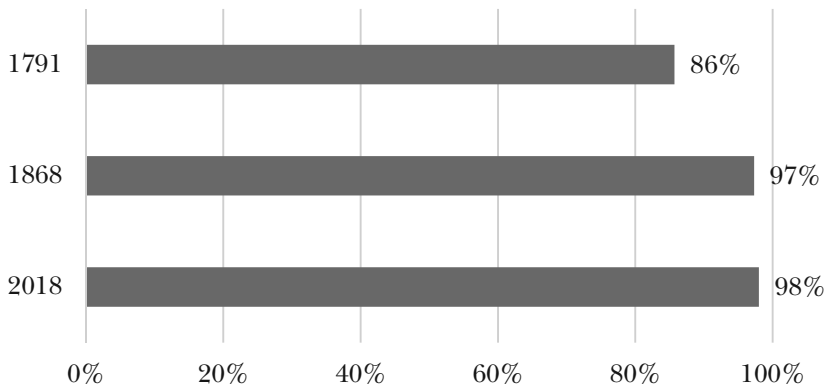
326 See Gerald Walpin, *America's Failing Civil Justice System: Can We Learn from Other Countries?*, 41 N.Y. L. SCH. L. REV. 647, 652 (1997).

327 *Id.*

nated by the combination of arbitration agreements and settling cases before they go to trial. It may be only a matter of time before the civil jury trial disappears in the United States, despite these state constitutional protections. The U.S. Supreme Court also has held, incorrectly in our view, that there is no right to civil jury trial in administrative law cases.<sup>328</sup> Since almost all important federal civil cases involve administrative law rather than the common law, the Supreme Court has, in effect, abolished the right to civil jury trial even though it has been supported by an Article V majority of three-quarters of the states in 1791, 1868, and 2018.

FIGURE 22. RIGHT TO CIVIL JURIES IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



### I. *Rights Against Excessive Punishment*

The Eighth Amendment of the U.S. Constitution focuses on the important topic of protecting civilians from excessive punishment.<sup>329</sup> Specifically, it forbids the state from exacting on the civilian population excessive bail, excessive fines, and cruel and unusual punishment. However, it is worth noting that:

One ambiguity of the Cruel and Unusual Punishment Clause is whether it forbids *all* disproportionate punishments or only a certain set of punishments that were thought to be cruel and unusual 200 years ago, like drawing and quartering. Debate has also focused on the question of whether the Cruel and Unusual Punishment Clause forbids practices that would be condemned, as *Trop v. Dulles* says, under the “evolving standards of decency that mark the progress of a maturing society.”<sup>330</sup>

328 *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 455 (1977).

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

330 See Calabresi & Agudo, *supra* note 5, at 81 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

Unsurprisingly, the states have a lot to say on this subject within their 2018 state constitutions, which we describe in greater detail below.

### 1. Excessive Bail

Forty-eight states in 2018—representing 96% of the states and 89.7% of the U.S. population<sup>331</sup>—provided that excessive bail ought not to be permitted within their state constitutions.<sup>332</sup> Many of the states paired up their protection against excessive bail with their protection against excessive fines and cruel and unusual punishment, merging their excessive punishment clause into one neat package. This format often closely tracked the Eighth Amendment.<sup>333</sup> One typical example, Iowa’s constitution, states that “[e]xcessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted.”<sup>334</sup> Other states kept their excessive punishment clauses separate. Alabama’s constitution, for instance, uses an independent clause for the protection against excessive bail, holding “[t]hat all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great; and that excessive bail shall not in any case be required.”<sup>335</sup>

Nine states out of twelve, which wrote constitutions between 1776 and 1791, recognized a right to be free of demands for excessive bail.<sup>336</sup> The right to be free of demands for excessive bail was also recognized by thirty-six out of thirty-seven state constitutions when the Fourteenth Amendment was ratified in 1868.<sup>337</sup> This is an Article V supermajority. The right to be free of

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331 See *2010 Census*, *supra* note 12 (276,511,873 out of 308,143,815 residents).

332 See ALA. CONST. art. I, § 16; ALASKA CONST. art. I, § 12; ARIZ. CONST. art. II, § 15; ARK. CONST. art. II, § 9; CAL. CONST. art. I, § 12; COLO. CONST. art. II, § 20; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 11; GA. CONST. art. I, § 1, para. 17; HAW. CONST. art. I, § 12; IDAHO CONST. art. I, § 6; IND. CONST. art. I, § 16; IOWA CONST. art. I, § 17; KAN. CONST. Bill of Rights, § 9; KY. CONST. Bill of Rights, art. XXV; MASS. CONST. pt. I, art. XXVI; MICH. CONST. art. I, § 16; MINN. CONST. art. I, § 5; MISS. CONST. art. III, § 29; MO. CONST. art. I, § 21; MONT. CONST. art. II, § 22; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 6; N.H. CONST. pt. I, art. XXXIII; N.J. CONST. art. I, § 12; N.M. CONST. art. II, § 13; N.Y. CONST. art. I, § 5; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 9; OR. CONST. art. I, § 16; PA. CONST. art. I, § 13; R.I. CONST. art. I, § 8; S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 23; TENN. CONST. art. I, § 16; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 9; VT. CONST. ch. 2, § 40; VA. CONST. art. I, § 9; WASH. CONST. art. I, § 14; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 6; WYO. CONST. art. I, § 14. The two states without an excessive bail clause are Florida and Illinois.

333 U.S. CONST. amend. VIII.

334 IOWA CONST. art. I, § 17.

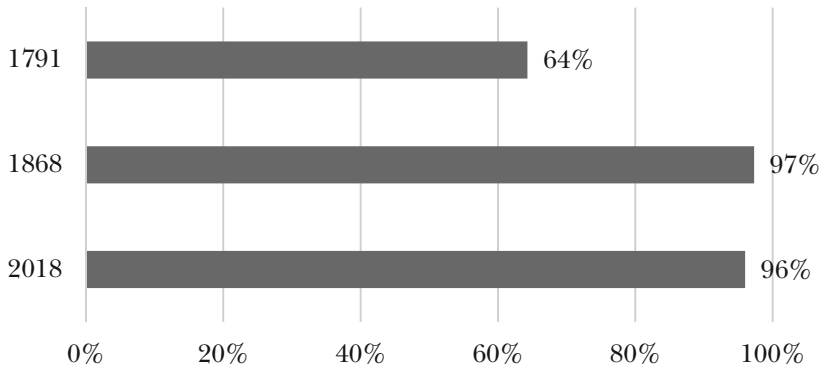
335 ALA. CONST. art. I, § 16.

336 Calabresi, Agudo & Dore, *supra* note 5, at 1516–17.

337 See Calabresi & Agudo, *supra* note 5, at 81–82. Note that in our original analysis, we counted all thirty-seven states as having excessive bail clauses. *Id.* We now revise that number to thirty-six and argue that the Illinois Constitution did not contain an excessive bail clause in 1868.

demands for excessive bail is thus a right deeply rooted in American history and tradition as well as by a huge consensus of the states today, in 2018.

FIGURE 23. RIGHT AGAINST EXCESSIVE BAIL IN STATE CONSTITUTIONS  
1791: n=14; 1868: n=37; 2018: n=50



## 2. Excessive Fines

Forty-eight states in 2018—comprising 96% of the states and 94.4% of the U.S. population<sup>338</sup>—provide in their state constitutions that excessive fines cannot be imposed as a form of punishment upon criminal defendants.<sup>339</sup> Wyoming utilizes a typical clause, stating that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted.”<sup>340</sup> Vermont’s constitution includes an unusual formulation, holding that “all fines shall be proportioned to the offences.”<sup>341</sup> We count Vermont’s clause as an excessive fines clause because as a definitional matter, a fine that is proportioned to the offense cannot be excessive. In that

338 See *2010 Census*, *supra* note 12 (290,779,811 out of 308,143,815 residents).

339 See ALA. CONST. art. I, § 15; ALASKA CONST. art. I, § 12; ARIZ. CONST. art. II, § 15; ARK. CONST. art. II, § 9; CAL. CONST. art. I, § 17; COLO. CONST. art. II, § 20; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 11; FLA. CONST. art. I, § 17; GA. CONST. art. I, § 1, para. 17; HAW. CONST. art. I, § 12; IDAHO CONST. art. I, § 6; IND. CONST. art. I, § 16; IOWA CONST. art. I, § 17; KAN. CONST. Bill of Rights, § 9; KY. CONST. Bill of Rights, § 17; ME. CONST. art. I, § 9; MD. CONST. Declaration of Rights, art. XXV; MASS. CONST. pt. 1, art. XXVI; MICH. CONST. art. I, § 16; MINN. CONST. art. I, § 5; MISS. CONST. art. III, § 28; MO. CONST. art. I, § 21; MONT. CONST. art. II, § 22; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 6; N.H. CONST. pt. 1, art. XXXIII; N.J. CONST. art. I, § 12; N.M. CONST. art. II, § 13; N.Y. CONST. art. I, § 5; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 9; OR. CONST. art. I, § 16; PA. CONST. art. I, § 13; R.I. CONST. art. I, § 8; S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 23; TENN. CONST. art. I, § 16; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 9; VT. CONST. ch. 2, § 39; VA. CONST. art. I, § 9; WASH. CONST. art. I, § 14; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 6; WYO. CONST. art. I, § 14.

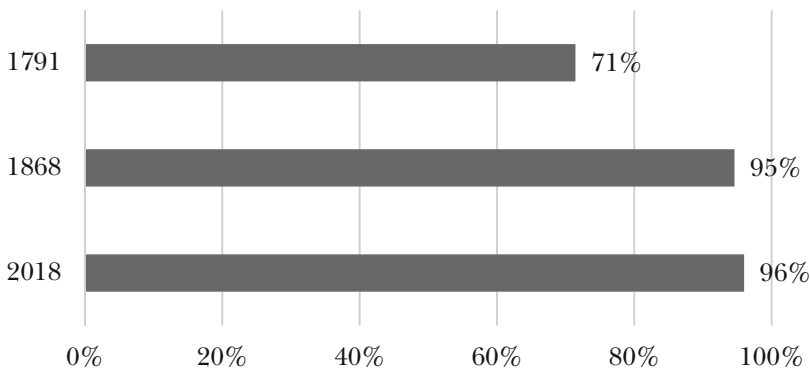
340 WYO. CONST. art. I, § 14.

341 VT. CONST. ch. 2, § 39.

sense, Vermont's constitution necessarily protects civilians against excessive fines.

The two states without an excessive fines clause are Illinois and Louisiana. This is interesting because while Illinois did not have an excessive bail or an excessive fines clause, Louisiana's constitution did contain an excessive bail clause. In that sense, it appears that Louisiana's constitution values protecting against excessive bail, but does not value protecting against excessive fines as a form of punishment. On the flip side, Florida's constitution did not contain an excessive bail clause but does contain an excessive fines clause, making it a mirror image of Louisiana. We are unsure what implications this observation has, but thought it was worth pointing out.

FIGURE 24. RIGHT AGAINST EXCESSIVE FINES IN STATE CONSTITUTIONS  
1791: n=14; 1868: n=37; 2018: n=50



Ten states out of twelve that wrote new constitutions between 1776 and 1791 banned excessive fines.<sup>342</sup> Thirty-five states out of thirty-seven recognized the right to be free of excessive fines in 1868 when the Fourteenth Amendment was ratified.<sup>343</sup> The right to be free of excessive fines is thus a right that is deeply rooted in American history and tradition as well as by a huge consensus of the states today, just like the right to be free from excessive bail.

### 3. Cruel and Unusual Punishment

Historically, the ban on cruel and unusual punishment has its roots in the English Bill of Rights of 1689.<sup>344</sup> Indeed, the language of the English Bill of Rights of 1689 was near-exactly replicated in the Federal Eighth Amend-

342 Calabresi, Agudo & Dore, *supra* note 5, at 1517–18.

343 See Calabresi & Agudo, *supra* note 5, at 82.

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



ment,<sup>345</sup> which was then reproduced in many state constitutions.<sup>346</sup> Presently, and throughout the longstanding history of the ban on cruel and unusual punishment, spirited debates have been waged over which punishments ought to be rightfully considered cruel and unusual.<sup>347</sup> In particular, much of the debate centers on whether the death penalty should be seen as cruel or unusual, and whether it should be prohibited on that basis.<sup>348</sup>

Forty-seven of the states in 2018—representing 94% of the states and 94.5% of the U.S. population<sup>349</sup>—had clauses in their state constitutions banning cruel and unusual punishment.<sup>350</sup> A typical formulation, such as the one used in Ohio’s constitution, holds that “[e]xcessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.”<sup>351</sup> There were slight differences in how the states phrased their clauses. In particular, some states banned “cruel and unusual punish-

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

346 *E.g.*, WASH. CONST. art. I, § 14 (“Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.”).

347 *See, e.g.*, *Furman v. Georgia*, 408 U.S. 238, 281 (1972) (Brennan, J., concurring) (describing four possible principles that could be used to determine whether a given punishment is cruel or unusual, including whether or not the given punishment represents an affront to human dignity, whether the punishment is “inflicted in wholly arbitrary fashion,” whether the punishment is “clearly and totally rejected throughout society,” and whether the punishment is “patently unnecessary”); *see also* *Gregg v. Georgia*, 428 U.S. 153, 169–73 (1976) (explaining the history of the ban on cruel and unusual punishment and the evolution of the debate about what constitutes cruel and unusual punishment in American jurisprudence).

348 The Supreme Court has repeatedly found that the death penalty does not constitute cruel and unusual punishment, but left-leaning judges have continued to dissent in these cases. *See, e.g.*, *Glossip v. Gross*, 135 S. Ct. 2726, 2776–77 (2015) (Breyer, J., dissenting) (calling for a full briefing on whether the death penalty violates the Constitution and stating that it is highly likely, in his view, that the death penalty does violate the Eighth Amendment).

349 *See 2010 Census, supra* note 12 (291,113,345 out of 308,143,815 residents).

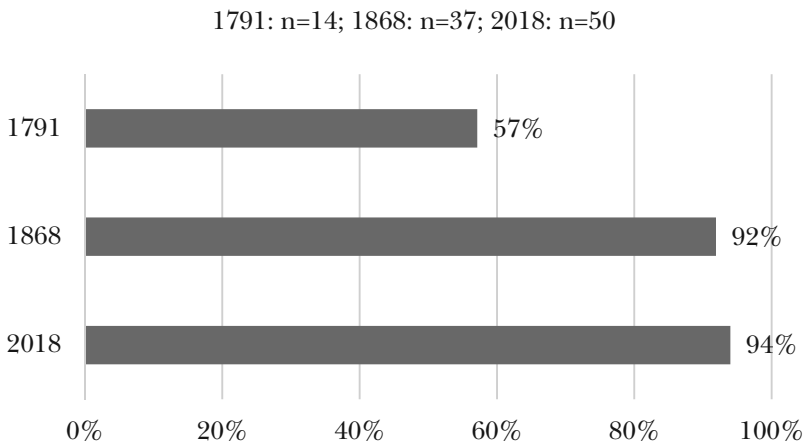
350 *See* ALA. CONST. art. I, § 15; ALASKA CONST. art. I, § 12; ARIZ. CONST. art. II, § 15; ARK. CONST. art. II, § 9; CAL. CONST. art. I, § 17; COLO. CONST. art. II, § 20; DEL. CONST. art. I, § 11; FLA. CONST. art. I, § 17; GA. CONST. art. I, § 1, para. 17; HAW. CONST. art. I, § 12; IDAHO CONST. art. I, § 6; IND. CONST. art. I, § 16; IOWA CONST. art. I, § 17; KAN. CONST. Bill of Rights, § 9; KY. CONST. Bill of Rights, § 17; LA. CONST. art. I, § 20; ME. CONST. art. I, § 9; MD. CONST. Declaration of Rights, art. XXV; MASS. CONST. pt. 1, art. XXVI; *id.* arts. of amend. CXVI; MICH. CONST. art. I, § 16; MINN. CONST. art. I, § 5; MISS. CONST. art. III, § 28; MO. CONST. art. I, § 21; MONT. CONST. art. II, § 22; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 6; N.H. CONST. pt. 1, art. XXXIII; N.J. CONST. art. I, § 12; N.M. CONST. art. II, § 13; N.Y. CONST. art. I, § 5; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 9; OR. CONST. art. I, § 16; PA. CONST. art. I, § 13; R.I. CONST. art. I, § 8; S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 23; TENN. CONST. art. I, § 16; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 9; VA. CONST. art. I, § 9; WASH. CONST. art. I, § 14; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 6; WYO. CONST. art. I, § 14. The three states without a cruel and unusual punishment clause are Connecticut, Illinois, and Vermont.

351 OHIO CONST. art. I, § 9.

ments,”<sup>352</sup> others prohibited “cruel or unusual punishment,”<sup>353</sup> and still others outlawed “cruel punishment” without a reference to unusual.<sup>354</sup> Nevertheless, at the end of the day, forty-seven states included clauses in their state constitutions that acted as analogs to the Eighth Amendment of the Federal Constitution, thereby protecting their civilians from excessive punishment in this regard.

Eight states out of twelve that wrote new constitutions between 1776 and 1791 banned either “cruel and unusual” or “cruel” punishments.<sup>355</sup> In 1868, when the Fourteenth Amendment was ratified, thirty-four states out of thirty-seven had cruel and unusual punishment clauses in their state constitutions.<sup>356</sup> The right to be free from cruel or unusual punishments is thus a right that is deeply rooted in American history and tradition, as well as by a huge consensus of the states today.

FIGURE 25. RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT  
IN STATE CONSTITUTIONS



#### 4. Proportional Punishment

Finally, thirteen states—comprising 26% of the states and 16.4% of the U.S. population<sup>357</sup>—went one step further and required, in some shape or form, that all punishments be proportioned to the offense committed.<sup>358</sup>

352 *E.g.*, TENN. CONST. art. I, § 16.

353 *E.g.*, TEX. CONST. art. I, § 13.

354 *E.g.*, S.D. CONST. art. VI, § 23.

355 Calabresi, Agudo & Dore, *supra* note 5, at 1518–19.

356 *See* Calabresi & Agudo, *supra* note 5, at 82–83.

357 *See* 2010 Census, *supra* note 12 (50,594,773 out of 308,143,815 residents).

358 *See* ILL. CONST. art. I, § 11; IND. CONST. art. I, § 16; ME. CONST. art. I, §§ 9, 14; MD. CONST. Declaration of Rights, art. XVI; NEB. CONST. art. I, § 15; N.H. CONST. pt. 1, art. XVIII; OR. CONST. art. I, §§ 13, 15, 16; R.I. CONST. art. I, § 8; S.C. CONST. art. I, § 15; TENN.

The states used three noteworthy language variations when they banned disproportionate punishment. First, eight states used explicit language when discussing the proportionality of punishment in their state constitutions. New Hampshire's constitution, for example, states that:

All penalties ought to be proportioned to the nature of the offense. 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 offenses, 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 the lightest offenses. 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.<sup>359</sup>

Nebraska's constitution uses a more concise formulation, simply holding that "[a]ll penalties shall be proportioned to the nature of the offense."<sup>360</sup> Second, four states banned disproportionate punishment by ensuring that punishments do not utilize unnecessary rigor.<sup>361</sup> Tennessee's constitution used a common format, stating "[t]hat no person arrested and confined in jail shall be treated with unnecessary rigor."<sup>362</sup> Third, four states outlawed sanguinary or corporal punishments in their state constitutions.<sup>363</sup> Maryland's constitution, for example, provides "[t]hat sanguinary Laws ought to be avoided as far as it 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,"<sup>364</sup> and South Carolina's constitution states that

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CONST. art. I, §§ 13, 32; UTAH CONST. art. I, § 9; W. VA. CONST. art. III, § 5; WYO. CONST. art. I, §§ 15, 16.

359 N.H. CONST. pt. 1, art. XVIII.

360 NEB. CONST. art. I, § 15.

361 OR. CONST. art. I, § 13; TENN. CONST. art. I, § 13; UTAH CONST. art. I, § 9; WYO. CONST. art. I, § 16. The Oregon Constitution includes both an explicit reference to proportionality and an "unnecessary rigor" reference within their state constitution. *Compare* OR. CONST. art. I, § 13 ("No person arrested, or confined in jail, shall be treated with unnecessary rigor."), *with* OR. CONST. art. I, § 16 ("Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense."). We count these four clauses as banning disproportionate punishment because, by definition, using the appropriate amount of rigor would lead to a proportional punishment.

362 TENN. CONST. art. I, § 13.

363 ME. CONST. art. I, §§ 9, 14; MD. CONST. Declaration of Rights, art. XVI; N.H. CONST. pt. 1, art. XVIII; S.C. CONST. art. I, § 15. Maine and New Hampshire both included explicit references to proportionality as well as references to sanguinary punishments in their state constitutions. We count these four clauses as requiring proportional punishment because the words "sanguinary" and "corporal" imply bloody, overly harsh punishments that constitute a form of unnecessary rigor, thereby implying disproportionality to the offense. ME. CONST. art. I, § 9; N.H. CONST. pt. 1, art. XVIII. In practice, these types of clauses limit punishment based on proportionality reasoning, so we count them as a type of proportional punishment clause.

364 MD. CONST. Declaration of Rights, art. XVI.

“[e]xcessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained.”<sup>365</sup> Though corporal and sanguinary punishments do not always raise questions of proportionality as applied to particular cases, the concern for proportionality in punishment is the likely motivation for restricting or eliminating these classes of penalties.

Strikingly, Illinois’s constitution contains a proportionality clause even though it did not include clauses explicitly referencing excessive bail, excessive fines, or cruel and unusual punishment. It holds that “[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.”<sup>366</sup> It could be argued that by stating that “[a]ll penalties” must be proportional to the seriousness of the offense, Illinois’s constitution is inherently implying that bail and fines must not be excessive, and that punishments must not be cruel and unusual. However, we did not count their constitution as protecting those rights since they did not include an explicit reference to those rights within their state constitution. In addition, we did not include Vermont in our total because—though it forbids disproportional fines in its constitution<sup>367</sup>—it does not impose this limiting principle to incarceration.

Four states out of the twelve that wrote new constitutions between 1776 and 1791 required that punishments be proportional to the crime committed.<sup>368</sup> In 1868, when the Fourteenth Amendment was ratified, twelve states out of thirty-seven had proportionality requirements in their state constitutions.<sup>369</sup> The right to be punished in a way that is proportionate to the offenses one might commit thus has some basis in state constitutional law both in 1868 and in 2018, but there is not an Article V consensus of three-quarters of states endorsing this constitutional right. It may be that the right to be free of disproportionate punishments is an unenumerated constitutional right, as we shall discuss below.

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365 S.C. CONST. art. I, § 15.

366 ILL. CONST. art. I, § 11.

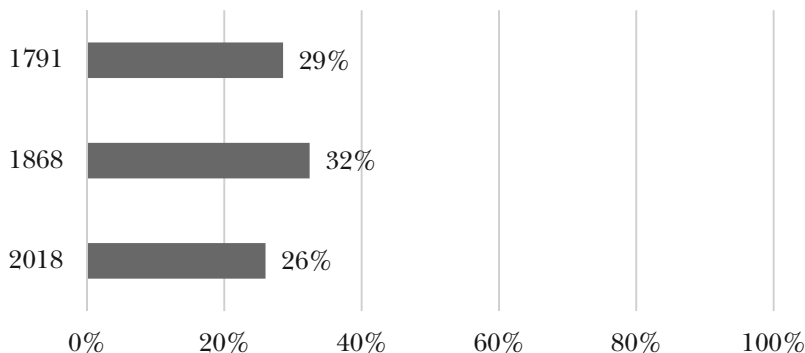
367 VT. CONST. ch. 2, § 39 (“And all fines shall be proportioned to the offences.”).

368 Calabresi, Agudo & Dore, *supra* note 5, at 1519–20.

369 See Calabresi & Agudo, *supra* note 5, at 83–85. Note that in our original analysis, we coded only nine states as having proportionality requirements in their state constitutions in 1868. *Id.* We have now counted clauses banning sanguinary punishments or “infamous punishments” as proportionality clauses, bringing the total up to twelve. The twelve states are Illinois, Indiana, Maine, Maryland, Massachusetts, New Hampshire, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, and West Virginia. See ILL. CONST. of 1848, art. XIII, § 14; IND. CONST. of 1851, art. I, § 16; ME. CONST. of 1820, art. I, § 9; MD. CONST. of 1864, Declaration of Rights art. XIV; MASS. CONST. of 1780, pt. 1, art. XII; N.H. CONST. pt. 1, art. XXVIII; OHIO CONST. art. I, § 9; OR. CONST. of 1857, art. I, § 16; R.I. CONST. of 1842, art. I, § 8; S.C. CONST. of 1868, art. I, § 16; TENN. CONST. of 1835, art. I, § 16; W. VA. CONST. of 1872, art. III, § 5.

FIGURE 26. PROPORTIONAL PUNISHMENT CLAUSES IN  
STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



Some lawyers have argued that *Weems v. United States*<sup>370</sup> bans disproportionate punishments, but the modern Supreme Court rejected this view by a five–four vote in upholding the constitutionality of California’s three-strikes law, which imposed life imprisonment for anyone convicted of committing three felonies, even in cases where the felonies are minor.<sup>371</sup> Since we think the three-strikes policy is a clear example of disproportionate punishment, it appears that the Supreme Court does not consider this right to be enshrined in the Federal Constitution. We find it very odd that the Eighth Amendment would require proportionality as to bail and fines, which involve losses of property, but that it would not require proportionality as to much more serious losses such as those involving the loss of life or liberty. The Eighth Amendment is one sentence long: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>372</sup> Under the canon of construction known as *noscitur a sociis*—a text acquires its meaning from the company it keeps—the Cruel and Unusual Punishment Clause should be read to harmonize with the bans on “excessive” bail and fines. We would read the Cruel and Unusual Punishments Clause as banning “excessive” deprivations of life and liberty and as therefore containing a proportionality requirement.

#### J. State Constitutional Acknowledgement of Unenumerated Rights

The Ninth Amendment of the U.S. Constitution states that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>373</sup> Certain scholars have argued

370 217 U.S. 349 (1910).

371 See *Ewing v. California*, 538 U.S. 11 (2003).

372 U.S. CONST. amend. VIII.

373 U.S. CONST. amend. IX.

that the text of the Ninth Amendment inherently “secures natural-law unenumerated rights from congressional intrusion.”<sup>374</sup> These scholars further argue that the drafters of the Fourteenth Amendment used intentionally vague language because they “wanted it to protect ‘fundamental rights,’ . . . as ‘a delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives direction for finding.’”<sup>375</sup> Others contend that the clause was placed in the Constitution “simply to avoid arguments that the federal Bill of Rights preempted the protection of other rights such as those in state bills of rights,” thereby defending our nation from overly broad interpretations of federal power.<sup>376</sup> This “raises rather insistently the question of whether state bills of rights” contain “what Professor John Yoo has called ‘baby Ninth Amendments.’”<sup>377</sup> As we discuss below, it turns out that many of them do.

### 1. Recognition of “Lockean” Rights and Natural or Unalienable Rights

Thirty-nine of the states—representing 78% of the states, which is an Article V consensus of three-quarters of the states, and comprising 74.6% of the U.S. population<sup>378</sup>—include Lockean rights clauses in their state constitutions that refer to a contractarian understanding of fundamental rights that exist in a natural law form, prior to the creation of the state.<sup>379</sup> These states have essentially “declared as a matter of positive state constitutional law” that there exist certain unenumerated natural, inalienable, inviolable, or inherent basic rights.<sup>380</sup> Arkansas’s constitution uses a typical formulation, holding that:

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374 Calabresi & Agudo, *supra* note 5, at 87 (citing DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* 197 (2007)). Indeed, these scholars contend that the Ninth Amendment was established to preserve these federal unenumerated rights. *Id.*

375 *Id.* at 87 n.363 (citing FARBER, *supra* note 374, at 69).

376 *Id.* at 87 (citing Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 *TEX. L. REV.* 597, 600–01 (2005)). See generally FARBER, *supra* note 374.

377 *Id.* at 87 & n.365 (citing John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 *EMORY L.J.* 967, 968–69 (1993)).

378 See *2010 Census*, *supra* note 12 (230,009,053 out of 308,143,815 residents).

379 See ALA. CONST. art. I, § 1; ALASKA CONST. art. I, § 1; ARK. CONST. art. II, § 2; CAL. CONST. art. I, § 1; COLO. CONST. art. II, § 3; CONN. CONST. art. I, § 1; DEL. CONST. pmbl.; FLA. CONST. art. I, § 2; HAW. CONST. art. I, § 2; IDAHO CONST. art. I, § 1; ILL. CONST. art. I, § 1; IND. CONST. art. I, § 1; IOWA CONST. art. I, § 1; KAN. CONST. Bill of Rights, § 1; KY. CONST. Bill of Rights, § 1; LA. CONST. art. I, § 1; ME. CONST. art. I, § 1; MASS. CONST. arts. of amend. CVI; MO. CONST. art. I, § 2; MONT. CONST. art. II, § 3; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § 1; N.H. Const. pt. 1, arts. I, II, III; N.J. CONST. art. I, § 1; N.M. CONST. art. II, § 4; N.C. CONST. art. I, § 1; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 1; OKLA. CONST. art. II, § 2; OR. CONST. art. I, § 1; PA. CONST. art. I, § 1; S.D. CONST. art. VI, § 1; TEX. CONST. art. I, § 3; UTAH CONST. art. I, § 1; VT. CONST. ch. I, art. I; VA. CONST. art. I, § 1; W. VA. CONST. art. III, § 1; WIS. CONST. art. I, § 1; WYO. CONST. art. I, § 2.

380 Calabresi & Agudo, *supra* note 5, at 88.

All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.<sup>381</sup>

Massachusetts's constitution contains another common format, stating that:

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.<sup>382</sup>

Some states used less clear-cut references to this Lockean principle of natural or unalienable rights. Missouri's constitution, for instance, holds:

That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design.<sup>383</sup>

And Oregon's constitution provides less clearly that:

We declare that all men, when they form a social compact are equal in right; that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish the government in such manner as they may think proper.<sup>384</sup>

We believe these constitutional provisions capture the underlying contractarian understanding of natural rights and liberties that was enshrined in Locke's writing. In that sense, we count them as states that protect a Lockean understanding of inherent and unalienable rights.

These references to Lockean natural rights

deserve special mention because their presence in state constitutions . . . could be read to indicate a belief that certain rights . . . exist in and of themselves as preexisting entitlements. In other words, it suggests that our constitutions and bills of rights do not *create* rights but simply *declare* or *recognize* their existence.<sup>385</sup>

381 ARK. CONST. art. II, § 2.

382 MASS. CONST. art. of amend. CVI.

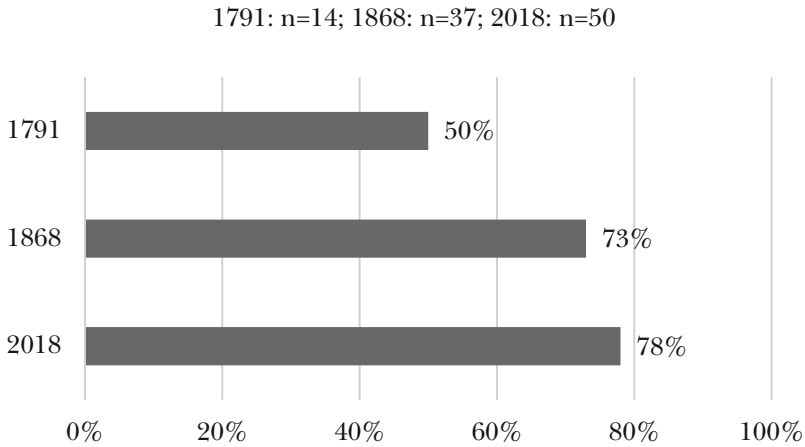
383 MO. CONST. art. I, § 2.

384 OR. CONST. art. I, § 1.

385 See Calabresi & Agudo, *supra* note 5, at 88.

Though positivists might reject this view as antiquated, it is worth noting that over three-quarters of the states in 2018 include these Lockean rights clauses in their constitutions—some states have even added or reaffirmed their Lockean rights clauses in recent years<sup>386</sup>—indicating that this understanding of fundamental rights is both current and widespread through our nation.

FIGURE 27. LOCKEAN RIGHTS CLAUSES IN STATE CONSTITUTIONS



This is undoubtedly an undercount of the states with Lockean rights clauses for two reasons. First, we did not count a constitution as containing a Lockean rights clause if it merely stated that governments “are established to protect and maintain individual rights.”<sup>387</sup> Such a provision does not assume that governments create positive rights, but rather assumes that individual rights preexist the government (which the government then protects and maintains), yet the continuing validity of these rights outside government protection is not made explicit after the government is formed. Second—and more significantly—we separated out one class of Lockean clauses for special treatment in the next section, what we call “Lockean power clauses.” These are clauses that recognize the right and legitimate power of the people to reform or abolish their form of government. While most states have what we call both Lockean rights clauses and Lockean power clauses, only New York has neither.

In 1868, when the Fourteenth Amendment was ratified, twenty-seven out of thirty-seven state constitutions—only one state short of an Article V three-quarters consensus—had Lockean rights clauses in their state constitu-

386 *E.g.*, CAL. CONST. art. I, § 1 (added in 1974); FLA. CONST. art. I, § 2 (added in 1998); HAW. CONST. art. I, § 2 (added in 1978).

387 ARIZ. CONST. art. II, § 2 (1912); WASH. CONST. art. I, § 1 (1889).



tions.<sup>388</sup> The first state to add such a clause was Virginia in June 1776.<sup>389</sup> Indeed, George Mason's first draft of Virginia's bill of rights included a Lockean rights clause that was ultimately copied by Pennsylvania and Massachusetts, as well as by many other states.<sup>390</sup> The most relevant copying of George Mason's language was by Thomas Jefferson in the Declaration of Independence, which Congress ratified on July 4, 1776 and which we believe is a source of federal constitutional law.<sup>391</sup> Consider first George Mason's initial draft of a Lockean rights proviso, which was published in newspapers throughout the thirteen colonies in May 1776:

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.

That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.<sup>392</sup>

Now compare George Mason's language above, which Thomas Jefferson took and, in Professor Calabresi's view, improved greatly in the text of the Declaration of Independence:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable 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 Powers 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 to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.<sup>393</sup>

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388 See ALA. CONST. of 1868, art. I, § 1; CAL. CONST. of 1849, art. I, § 1; CONN. CONST. of 1818, art. I, § 1; DEL. CONST. of 1831, pmb.; FLA. CONST. of 1868, Declaration of Rights, § 1; ILL. CONST. of 1848, art. XIII, § 1; IND. CONST. of 1851, art. I, § 1; IOWA CONST. of 1857, art. I, § 1; KAN. CONST. of 1859, Bill of Rights, § 1; KY. CONST. of 1850, art. XIII, §§ 1, 4; LA. CONST. of 1868, tit. I, art. I; ME. CONST. of 1820, art. I, § 1; MASS. CONST. of 1780, Declaration of Rights, art. I; MO. CONST. of 1865, art. I, § 1; NEB. CONST. of 1866, art. I, § 1; NEV. CONST. of 1864, art. I, § 1; N.H. CONST. of 1784, pt. I, arts. I, II, III; N.J. CONST. of 1844, art. I, § 1; N.C. CONST. of 1868, art. I, § 1; OHIO CONST. of 1851, art. I, § 1; OR. CONST. of 1857, art. I, § 1; PA. CONST. of 1838, art. IX, § 1; S.C. CONST. of 1868, art. I, § 1; TEX. CONST. of 1866, art. I, §§ 2, 21; VT. CONST. of 1793, ch. I, art. I; VA. CONST. Declaration of Rights of 1776, § 1; WIS. CONST. of 1848, art. I, § 1.

389 *Virginia Declaration of Rights*, AVALON PROJECT (last visited Sept. 23, 2018), [http://avalon.law.yale.edu/18th\\_century/virginia.asp](http://avalon.law.yale.edu/18th_century/virginia.asp).

390 *Id.*

391 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

392 *Virginia Declaration of Rights*, *supra* note 389.

393 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

To us, it seems self-evident that the Declaration of Independence codified nationally the Lockean equality right guarantees that almost three-quarters of the states used in their state constitutions in 1868 when the Fourteenth Amendment was ratified, and that many more use today in 2018. Pauline Maier makes this argument in her book *American Scripture: Making the Declaration of Independence*.<sup>394</sup> Seven states out of twelve that had written constitutions between 1776 and 1791, in fact, included Lockean natural rights clauses,<sup>395</sup> even though—as Akhil Reed Amar, in *The Bill of Rights: Creation and Reconstruction*, has correctly argued—the period of the Founding was more collectivist than was the more individualistic period of Reconstruction.<sup>396</sup>

Some have argued that the right to enjoy life and liberty or to seek and obtain happiness and safety are too vague as guarantees to be judicially enforceable. We disagree. We think that the widespread inclusion of Lockean rights provisos in the state constitutions supports Professor Randy Barnett's argument that there should be a presumption of liberty in constitutional law rather than a presumption of constitutionality.<sup>397</sup>

We recognize that since there is no judicial review clause in the Constitution—the way Congress has a Commerce Clause, and the President has the Commander in Chief power—that when cases challenging the legality of certain governmental decisions reach the courts, the legislature and the executive branch (which we think are coequal constitutional interpreters to the courts) have already asserted that the government action in question was constitutional. Professor Calabresi made this argument in his book review of Professor Barnett's book, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, and he still adheres to departmentalism as he explained in that book review.<sup>398</sup>

However, Professor Calabresi now thinks that when the government deprives someone of life, liberty, or property, it must show, by a preponderance of the evidence (i.e., by 51% of the evidence), that the law it has passed, as *Corfield v. Coryell* said in dicta, is a just law enacted “for the general good of the whole” people.<sup>399</sup> Professor Calabresi thus thinks that where the evidence of unconstitutionality is 50% to 50%, there should be a presumption of constitutionality for departmentalist reasons. We disagree with the rational basis test as it was used in *Williamson v. Lee Optical*<sup>400</sup> and with *United States v. Carolene Products Co.*,<sup>401</sup> since they do not recognize the presumption

394 PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* (1997).

395 Calabresi, Agudo & Dore, *supra* note 5, at 1522–23.

396 See generally AMAR, *supra* note 136.

397 See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* (2004).

398 Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081 (2005) (reviewing BARNETT, *supra* note 397).

399 *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230).

400 348 U.S. 483 (1955).

401 304 U.S. 144 (1938).

of liberty. We agree on presumption of liberty grounds with *Lochner v. New York*,<sup>402</sup> *Griswold v. Connecticut*,<sup>403</sup> and *Lawrence v. Texas*,<sup>404</sup> and with *Obergefell v. Hodges*.<sup>405</sup> Professor Calabresi continues to think that *Roe v. Wade*<sup>406</sup> is wrongly decided because he believes that life begins at fourteen days after conception, when a fertilized egg becomes implanted in a woman's uterus. Once that has happened, Professor Calabresi believes that the fetus is a person with Fourteenth Amendment rights that cannot be violated by having an abortion.

Professor Calabresi does not believe that there is a right to privacy in the Fourteenth Amendment, but he does think there is a right to enjoy liberty and to seek and obtain happiness and safety. In our view, the Connecticut law outlawing the use of birth control violated this right, as did laws criminalizing same-sex sexual relationships and same-sex marriage. Professor Calabresi's views are set forth in a more sustained way in an article titled *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*.<sup>407</sup>

The widespread presence of Lockean clauses in state constitutional law both today and in 1868 suggests that the enumerated rights in the Federal Bill of Rights should be applied purposively rather than literally, in a way that enhances liberty rather than restricting it. We thus agree with *Sherbert v. Verner*, which interpreted the word "prohibit" in the Free Exercise Clause to mean causing "any burden," rather than criminally prohibiting the free exercise of religion.<sup>408</sup>

We also think that even though the First Amendment read literally applies only to acts of Congress, the federal courts have, of course, been right to apply it to executive branch actions as well. We think both (1) that the First Amendment's guarantee of freedom of speech and of the press ought not to be read literally as to apply only to printing presses, and (2) that it should also apply to freedom of expression on the internet, via video broadcasting, in personal letters, and in private diaries. Again, we would read "freedom of speech and of the press" to mean freedom of expression. We would allow petitions to be made via email and not only on parchment, and we would protect the right of the people to assemble in an internet chat room as well as in public parks. For this reason, we believe that freedom of expression ought to apply to new forms of communication, rather than merely historical forms.

We would also read the Second Amendment right to keep and bear arms in a liberty-enhancing way and we are thus persuaded that the Court cor-

402 198 U.S. 45 (1905), *overruled in part by* *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

403 381 U.S. 479 (1965).

404 539 U.S. 558 (2003).

405 135 S. Ct. 2584 (2015).

406 410 U.S. 113 (1973).

407 Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299 (2015).

408 See *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963).

rectly decided *District of Columbia v. Heller*.<sup>409</sup> We would read the Fourth Amendment as forbidding telephone wiretaps, as the Warren Court did when it overruled a contrary Supreme Court opinion by Chief Justice Taft from the 1920s.<sup>410</sup> We also think it applies to the attaching of GPS devices to cars, as the Supreme Court recently held,<sup>411</sup> and to the bringing of drug-sniffing dogs up to someone's front door, as in *Florida v. Jardines*.<sup>412</sup> Professor Calabresi would even go further and protect privacy on the internet, including the so-called right to have information forgotten.

We agree with Justices Scalia and Thomas's broad, liberty-enhancing reading of the Confrontation Clause as requiring a face-to-face encounter with one's accuser.<sup>413</sup> Moreover, we also agree that there is and should be a regulatory takings doctrine even if regulations do not literally seize and evict you from your property.<sup>414</sup> We would enforce the "public use" language in the Takings Clause and thus would agree with the four dissenting Justices in *Kelo v. City of New London*.<sup>415</sup>

We would also apply the Seventh Amendment right to civil jury trials to administrative law civil cases and we thus disagree with the Supreme Court's hyperliteral reading of the Seventh Amendment in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*.<sup>416</sup> We all think that, if ever a civil jury trial is needed, it is in police brutality lawsuits or in other civil cases to which the federal government is a party. In particular, Professor Calabresi regards the opinion in *Atlas Roofing* as shameful, disgraceful, and completely inconsistent with the purposive approach that the Supreme Court has taken to other parts of the Bill of Rights.

And, finally, we would, as we indicated above, read the Eighth Amendment as containing a proportionality requirement for deprivations of life and liberty just as it does expressly for deprivations of property via excessive bail or excessive fines.

We feel comfortable in taking this purposive approach to the Bill of Rights precisely because we think that the Lockean clauses suggest that we should do so. It is difficult to see how an individual can enjoy life and liberty or seek and obtain happiness and safety in a world where the Bill of Rights is not read with a presumption of liberty in mind. That is what we think the Lockean clauses mean.<sup>417</sup>

409 554 U.S. 570 (2008).

410 *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled in part by Katz v. United States*, 389 U.S. 347 (1967).

411 *Grady v. North Carolina*, 135 S. Ct. 1368 (2015) (per curiam).

412 569 U.S. 1 (2013).

413 *See, e.g., Marx v. Texas*, 528 U.S. 1034 (1999) (Scalia, J., dissenting to denial of certiorari).

414 *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

415 545 U.S. 469 (2005).

416 430 U.S. 442 (1977).

417 *See Calabresi & Vickery, supra* 407.

## 2. Ninth Amendment Analogs

Thirty-three states in 2018—representing 66% of the states—contain clauses that are analogous to the Ninth Amendment in the Federal Constitution.<sup>418</sup> These “baby Ninth Amendments,” in contrast to the Federal Constitution, “declared that the enumeration of rights in *state* constitutions should not be construed to impair or deny other rights retained by the people.”<sup>419</sup> Utah’s constitution utilizes a formulation that is almost identical to the Federal Constitution, holding that “[t]his enumeration of rights shall not be construed to impair or deny others retained by the people.”<sup>420</sup>

Two-thirds of the states include baby Ninth Amendment clauses in their state constitutions, indicating that their constitutions were not intended to limit rights retained by the people, a position enjoying widespread support today. Three additional states—Massachusetts, New Hampshire, and West Virginia<sup>421</sup>—which lack a direct Ninth Amendment analog—have what might be called a “baby Tenth Amendment,” an even stronger assertion that some rights are reserved to the people.

Not a single state out of fourteen had a Ninth Amendment analog in 1791, at the time of the ratification of the Federal Ninth Amendment,<sup>422</sup> which is perhaps not surprising given that seven out of twelve state constitutions at this time had Lockean rights clauses.

Again, scholars disagree over whether or not “the principal thrust of the federal Ninth Amendment is . . . a protection for unenumerated, natural-law individual rights.”<sup>423</sup> Professor Akhil Reed Amar has contended that the baby Ninth Amendments “present in the state constitutions in 1868 at the time of the ratification of the Fourteenth Amendment may intimate a transformation of the Ninth Amendment from a federalism clause in 1791 to more of ‘a free-floating affirmation of unenumerated rights.’”<sup>424</sup> We think

418 See ALA. CONST. art. I, § 36; ALASKA CONST. art. I, § 21; ARIZ. CONST. art. II, § 33; ARK. CONST. art. II, § 29; CAL. CONST. art. I, § 24; COLO. CONST. art. II, § 28; FLA. CONST. art. I, § 1; GA. CONST. art. I, § 1, para. 29; HAW. CONST. art. I, §§ 15, 22; IDAHO CONST. art. I, § 21; ILL. CONST. art. I, § 24; *id.* art. II, § 2; IOWA CONST. art. I, § 25; KAN. CONST. Bill of Rights, § 20; LA. CONST. art. I, § 24; ME. CONST. art. I, § 24; MD. CONST. Declaration of Rights, art. III; MICH. CONST. art. I, § 23; MINN. CONST. art. I, § 16; MISS. CONST. art. III, § 32; MONT. CONST. art. II, § 34; NEB. CONST. art. I, § 26; NEV. CONST. art. I, § 20; N.J. CONST. art. I, § 21; N.M. CONST. art. II, § 23; N.C. CONST. art. I, § 36; OHIO CONST. art. I, § 20; OKLA. CONST. art. II, § 33; OR. CONST. art. II, § 33; R.I. CONST. art. I, § 24; UTAH CONST. art. I, § 25; VA. CONST. art. I, § 17; WASH. CONST. art. I, § 30; WYO. CONST. art. I, § 36.

419 Calabresi & Agudo, *supra* note 5, at 89. The states with baby Ninth Amendments were: Alabama, California, Florida, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, and South Carolina.

420 UTAH CONST. art. I, § 25.

421 MASS. CONST. pt. I, art. IV; N.H. CONST. pt. I, art. VII; W. VA. CONST. art. I, § 2.

422 Calabresi, Agudo & Dore, *supra* note 5, at 1525.

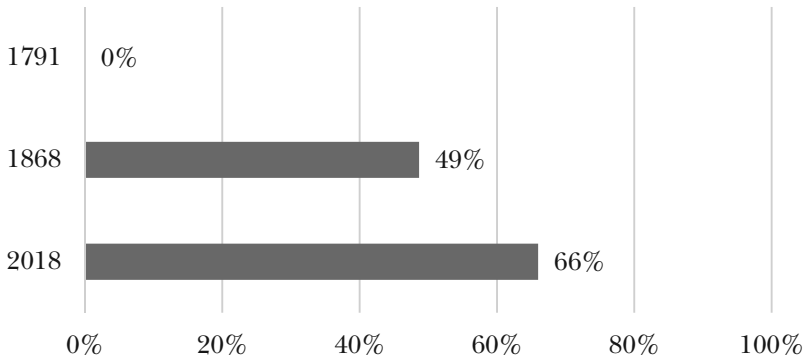
423 Calabresi & Agudo, *supra* note 5, at 90 (citing Lash, *supra* note 376, at 715).

424 *Id.* (quoting AMAR, *supra* note 136, at 280).

there is ample evidence that the states embrace this idea of natural, unalienable rights, indicated both by their inclusion of baby Ninth Amendments and by their inclusion of Lockean rights language, as discussed above. For this reason, we believe unenumerated rights are protected by their state constitutional law and by the Fourteenth Amendment through its Privileges or Immunities Clause.

FIGURE 28. NINTH AMENDMENT ANALOGS IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



### K. Other State Constitutional Rights Without Federal Analogs

We have now exhausted the list of rights secured by the Federal Bill of Rights in the U.S. Constitution. There are, however, a few additional rights we found in state constitutions “that are of great interest to federal constitutional case law.”<sup>425</sup> We turn to a discussion of those rights now.

#### 1. Power over Government

Forty-nine of the states in 2018—representing 98% of the states and 93.7% of the U.S. population<sup>426</sup>—include Lockean power clauses in their state constitutions.<sup>427</sup> These clauses give citizens considerable power over

<sup>425</sup> *Id.* at 92.

<sup>426</sup> See *2010 Census*, *supra* note 2 (288,765,713 out of 308,143,815 residents).

<sup>427</sup> See ALA. CONST. art. I, § 2; ALASKA CONST. art. I, § 2; ARIZ. CONST. art. II, § 2; ARK. CONST. art. II, § 1; CAL. CONST. art. II, § 1; COLO. CONST. art. II, §§ 1–2; CONN. CONST. art. II, § 2; DEL. CONST. pmbll.; FLA. CONST. art. I, § 1; GA. CONST. art. II, § 2, paras. 1–2; HAW. CONST. art. I, § 1; IDAHO CONST. art. I, § 2; ILL. CONST. art. I, § 1; IND. CONST. art. I, § 1; IOWA CONST. art. I, § 2; KAN. CONST. Bill of Rights, § 2; KY. CONST. Bill of Rights, § 4; LA. CONST. art. I, § 1; ME. CONST. art. I, § 2; MD. CONST. Declaration of Rights, art. I; MASS. CONST. pt. I, arts. IV, V, VII; MICH. CONST. art. I, § 1; MINN. CONST. art. I, § 1; MISS. CONST. art. III, §§ 5–6; MO. CONST. art. I, § 1; MONT. CONST. art. II, §§ 1–2; NEB. CONST. art. I, § 1; NEV. CONST. art. I, § 2; N.H. CONST. pt. I, arts. I, III, VII, VIII; N.J. CONST. art. I, § 2(a); N.M. CONST. art. II, §§ 2–3; N.C. CONST. art. I, §§ 2–3; N.D. CONST. art. I, § 2; OHIO CONST.

their state governments, such as by indicating that all political power is inherent in the people, or by granting citizens an innate right to alter or reform the government if it fails to properly protect their interests. These clauses have their roots in both the writing of John Locke and in the Declaration of Independence.<sup>428</sup> Nine states out of twelve that wrote their constitutions between 1776 and 1791 had such clauses,<sup>429</sup> which is an Article V three-quarters majority of the states that chose to write new constitutions—something Rhode Island and Connecticut initially refused to do.

Some state Lockean power clauses use stronger language than others, but all of the clauses give citizens power over their state governments and indicate that, at least to some extent, the state government is answerable to the people. An example of a strong Lockean power clause is Oregon's:

We declare that all men, when they form a social compact are equal in right: that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; and they have at all times a right to alter, reform, or abolish the government in such manner as they may think proper.<sup>430</sup>

Massachusetts's constitution includes another strong Lockean power clause. It states that "[a]ll power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them,"<sup>431</sup> and that:

Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.<sup>432</sup>

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art. I, § 2; OKLA. CONST. art. II, § 1; OR. CONST. art. I, § 1; PA. CONST. art. I, § 2; R.I. CONST. art. I, § 1; S.C. CONST. art. I, § 1; S.D. CONST. art. VI, §§ 1, 26; TENN. CONST. art. I, § 1–2; TEX. CONST. art. I, § 2; UTAH CONST. art. I, § 2; VT. CONST. ch. 1, arts. V, VI, VII; VA. CONST. art. I, §§ 2–3; WASH. CONST. art. I, § 1; W. VA. CONST. art. II, § 2; *id.* art. III, §§ 2–3; Wis. CONST. art. I, § 1; WYO. CONST. art. I, § 1.

428 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable 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 Powers 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 to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.”).

429 Calabresi, Agudo & Dore, *supra* note 5, at 1481.

430 OR. CONST. art. I, § 1.

431 MASS. CONST. pt. I, art. V.

432 MASS. CONST. pt. I, art. VII.

In this sense, many of the state Lockean power clauses grant sweeping power to the citizens, allowing them great influence over their state governments.

Weak Lockean power clauses, in contrast, do not mention any specific right to alter, reform, or abolish the government, yet they still indicate that the government's power is derived from the people and that governments can only operate in a just manner when they have the consent of their citizenry. Washington's constitution, for example, states that "[a]ll political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."<sup>433</sup> It is worth pointing out that some states, like Colorado and Montana, have constitutions that contain both a weak and a strong formulation of this Lockean right to power over the government.

Four states have constitutions that contain a Lockean power clause alongside a caveat indicating that the people can only alter and reform their state governments in ways that are not contrary to the Federal Constitution.<sup>434</sup> Mississippi's constitution, for example, provides that:

The people of this state have the inherent, sole, and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they deem it necessary to their safety and happiness; Provided, Such change be not repugnant to the constitution of the United States.<sup>435</sup>

Oklahoma's constitution has a similar clause. It states that:

All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it: Provided, such change be not repugnant to the Constitution of the United States.<sup>436</sup>

As such, four of the states limit the extent to which the people can exercise power over their state governments. Still, almost 100% of the states include a Lockean power clause in their state constitutions in 2018. The Declaration of Independence represents the only legal assertion of this right to alter and abolish forms of government at the federal level in American history, to our knowledge.

The eleven slave states that rebelled against the Union from 1860 to 1865 claimed they were exercising a Lockean power to alter and abolish their form of government. This was the Confederacy's legal claim to legitimacy during the War of the Rebellion, as Abraham Lincoln called it, between 1861 and 1865. In fact, the eleven southern states ceded their sovereignty when they, by convention, chose to ratify the Constitution, and the Constitution

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433 WASH. CONST. art. I, § 1.

434 COLO. CONST. art. II, § 2; MISS. CONST. art. III, § 6; N.C. CONST. art. I, § 3; OKLA. CONST. art. II, § 1.

435 MISS. CONST. art. III, § 6.

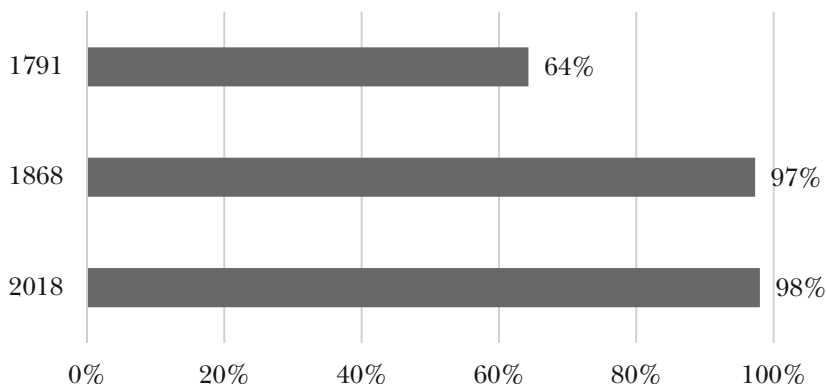
436 OKLA. CONST. art. II, § 1.



makes it perfectly clear that “We the People of the United States” are sovereign.<sup>437</sup> This is why Article IV, Section 3 of the Constitution explicitly allows new states to join the Union, but there is no clause specifying a way to leave the Union. Accordingly, we think that state secession, absent a constitutional amendment providing for it, is an illegal act, and thus agree completely with Abraham Lincoln.

FIGURE 29. LOCKEAN POWER CLAUSES IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



## 2. Class-Based Legislation

Forty-six of the states in 2018—representing 92% of the states and 88.9% of the U.S. population<sup>438</sup>—include protections against class-based legislation in their state constitutions.<sup>439</sup> In essence, class-based legislation is any law that separates the population into groups such that one group is advantaged

437 U.S. CONST. pmbi.

438 See 2010 Census, *supra* note 12 (273,791,017 out of 308,143,815 residents).

439 See ALA. CONST. art. I, §§ 22, 29; ALASKA CONST. art. I, §§ 3, 15; ARIZ. CONST. art. II, §§ 9, 13, 16, 29; ARK. CONST. art. II, §§ 3, 17, 18, 19; CAL. CONST. art. I, §§ 7, 8, 22, 31; COLO. CONST. art. II, § 11; CONN. CONST. art. I, §§ 1, 18, 20; DEL. CONST. art. I, §§ 15, 19; GA. CONST. art. I, § 1, paras. 2, 7, 10, 20, 25; HAW. CONST. art. I, §§ 3, 5, 8, 9, 21; IDAHO CONST. art. I, §§ 2, 4; ILL. CONST. art. I, §§ 3, 16, 17, 18, 19; *id.* art. III, § 8; IND. CONST. art. I, §§ 23, 30, 35; IOWA CONST. art. I, § 6; KAN. CONST. Bill of Rights, arts. II, 12, 19; KY. CONST. Bill of Rights, arts. III, V; LA. CONST. art. I, §§ 3, 12; *id.* art. III, § 12; *id.* art. XII, § 12; ME. CONST. art. I, §§ 6-A, 11, 23; MD. CONST. Declaration of Rights, arts. XXVII, XLII; MASS. CONST. pt. I, arts. VI, VII; MINN. CONST. art. I, §§ 2, 15; *id.* art. XII, § 1; MO. CONST. art. I, §§ 2, 13, 30; MONT. CONST. art. II, §§ 4, 31; NEB. CONST. art. I, §§ 3, 15, 16, 25, 30; N.H. CONST. pt. I, arts. II, IX, X; N.J. CONST. art. I, § 5; *id.* art. IV, § 7; N.M. CONST. art. II, § 18; *id.* art. IV, § 26; *id.* art. VII, § 3; N.Y. CONST. art. I, §§ 1, 11; N.C. CONST. art. I, §§ 11, 19, 29, 32, 33; N.D. CONST. art. I, §§ 21, 22; OHIO CONST. art. I, §§ 2, 12, 17; OKLA. CONST. art. II, §§ 15, 36, 51; OR. CONST. art. I, §§ 20, 25, 29; PA. CONST. art. I, §§ 17, 19, 24, 26; R.I. CONST. art. I, § 2; S.C. CONST. art. I, §§ 3, 4; S.D. CONST. art. VI, §§ 3, 12, 18; TENN. CONST. art. I, §§ 12, 30; *id.* art. XI, § 8; TEX. CONST. art. I, §§ 3, 4, 19, 21; UTAH CONST. art. I, §§ 23, 24; *id.* art. IV, § 1; VT. CONST. ch. I, art. VII; VA. CONST. art. I, §§ 3, 4, 11; WASH. CONST. art.

and one group is relegated to a form of second-rate or second-class citizenship. This relegation can occur through laws that grant special benefits to some groups that are not equally granted to others. For example, we have argued that banning same-sex marriage creates a form of second-class citizenship for LGBTQ people, by granting special advantages to heterosexual couples that are not equally granted to all people in committed relationships.<sup>440</sup>

Some of the states ban class legislation by including in their state constitutions a type of privileges or immunities clause that prevents the government from granting any special privileges or immunities to one individual (or group of individuals) that are not equally granted to all civilians. Washington's constitution, for instance, holds that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."<sup>441</sup> Oregon's constitution similarly states that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."<sup>442</sup> We count these clauses as protecting against class-based legislation because they prevent the government from consigning some groups to a form of second-class citizenship by stripping them of entitlements and benefits given to others. Thirty-nine of the state constitutions—representing 78% of the states and 78.7% of the U.S. population<sup>443</sup>—include this type of privileges or immunities clause.<sup>444</sup>

This is a striking increase in the number of state constitutions having privileges or immunities clauses compared to 1868 when the Fourteenth Amendment was ratified. Only nineteen out of thirty-seven states had privi-

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I, §§ 8, 12, 15, 28; W. VA. CONST. art. II, § 4; *id.* art. III, §§ 18, 19; WIS. CONST. art. I, §§ 12, 14; WYO. CONST. art. I, §§ 2, 3, 34; *id.* art. III, § 27; *id.* art. VI, § 1.

440 For a detailed discussion of the history of bans on class- or caste-based legislation in American jurisprudence, see Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648 (2016), which discusses same-sex marriage.

441 WASH. CONST. art. I, § 12.

442 OR. CONST. art. I, § 20.

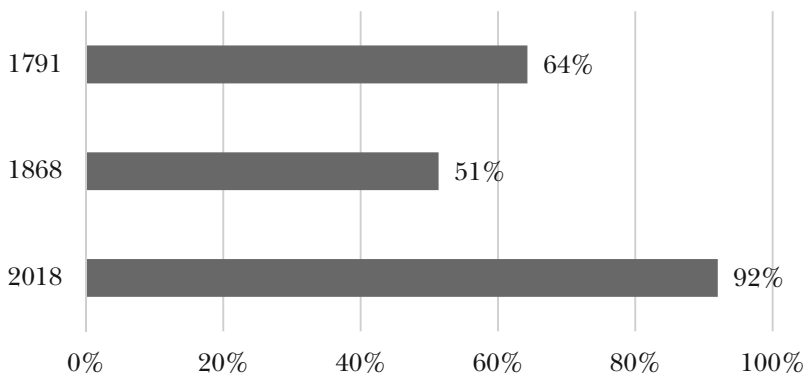
443 See 2010 Census, *supra* note 12 (242,395,676 out of 308,143,815 residents).

444 See ALA. CONST. art. I, § 22; ALASKA CONST. art. I, § 15; ARIZ. CONST. art. II, §§ 9, 13, 29; ARK. CONST. art. II, §§ 18, 19; CAL. CONST. art. I, § 7; COLO. CONST. art. II, § 11; CONN. CONST. art. I, § 1; GA. CONST. art. I, § 1, para. 10; HAW. CONST. art. I, § 21; IDAHO CONST. art. I, § 2; ILL. CONST. art. I, § 16; IND. CONST. art. I, § 23; IOWA CONST. art. I, § 6; KAN. CONST. Bill of Rights, § 2; KY. CONST. Bill of Rights, § 3; LA. CONST. art. I, § 12; *id.* art. XII, § 12; ME. CONST. art. I, § 23; MASS. CONST. pt. I, art. VI; MINN. CONST. art. XII, § 1; MO. CONST. art. I, § 13; MONT. CONST. art. II, § 31; NEB. CONST. art. I, § 16; N.J. CONST. art. IV, § 7; N.M. CONST. art. IV, § 26; N.C. CONST. art. I, § 32; N.D. CONST. art. I, § 21; OHIO CONST. art. I, §§ 2, 17; OKLA. CONST. art. V, § 51; OR. CONST. art. I, § 20; PA. CONST. art. I, § 17; S.C. CONST. art. I, § 3; S.D. CONST. art. VI, § 12; TENN. CONST. art. XI, § 8; TEX. CONST. art. I, § 3; UTAH CONST. art. I, § 23; VA. CONST. art. I, § 4; WASH. CONST. art. I, §§ 8, 12; W. VA. CONST. art. III, § 19; WYO. CONST. art. III, § 27.

leges or immunities clauses in 1868.<sup>445</sup> Nine out of the twelve states that wrote constitutions between 1776 and 1791 included either privileges or immunities clauses or equal protection clauses that forbade class legislation.<sup>446</sup> We suspect that many state constitutions adopted since 1868 have copied the privileges or immunities language found in the Fourteenth Amendment. This may explain why there are more states today with these clauses than there were in 1868.

FIGURE 30. LIMITS ON CLASS-BASED LEGISLATION IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



Five additional states include language in their state constitutions that could arguably be conceived of as another form of a privileges or immunities clause.<sup>447</sup> Vermont's constitution, to begin with, holds:

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.<sup>448</sup>

New Hampshire's constitution, by comparison, states that:

445 See Calabresi & Agudo, *supra* note 5, at 96–97. Note that in our earlier analysis, *id.*, we only coded thirteen states as having privileges or immunities clauses. We believe that was an undercount, and now contend that nineteen states had privileges or immunities clauses in their state constitutions in 1868. Those states are Alabama, Arkansas, Connecticut, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Missouri, Nebraska, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Texas, and Virginia.

446 Calabresi, Agudo & Dore, *supra* note 5, at 1527–29.

447 MASS. CONST. pt. I, art. VII; N.H. CONST. pt. I, art. X; R.I. CONST. art. I, § 2; VT. CONST. ch. I, art. VII; VA. CONST. art. I, § 3.

448 VT. CONST. ch. I, art. VII.

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 nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.<sup>449</sup>

For these reasons, we think it is reasonable to claim that forty-four states—representing 88% of the states and 84.4% of the U.S. population<sup>450</sup>—include a privileges or immunities clause in their state constitution that advocates for the prohibition of class- and caste-based legislation by ensuring that all civilians are granted the same types of advantages and benefits from the government.<sup>451</sup>

Additionally, twenty states in 2018—representing 40% of the states and 35.1% of the U.S. population<sup>452</sup>—include clauses in their state constitutions that ban the existence of hereditary distinctions or titles of nobility.<sup>453</sup> Maryland’s constitution contains a typical clause, providing “[t]hat no title of nobility or hereditary honors ought to be granted in this State.”<sup>454</sup> Pennsylvania’s constitution similarly holds that “[t]he Legislature shall not grant any title of nobility or hereditary distinction, nor create any office the appointment to which shall be for a longer term than during good behavior.”<sup>455</sup> We count these clauses as prohibiting class legislation because they prevent the government from granting certain individuals—by virtue of their family history, which is often tied to class—certain honors or privileges. In this sense, we believe that these clauses prohibit class-based legislation.

Nine states hold that all laws ought to be instituted for the benefit of the whole, rather than for the enjoyment of a specific subgroup of citizens.<sup>456</sup> Wyoming’s constitution, for instance, states that “[a]ll laws of a general

449 N.H. CONST. pt. I, art. X.

450 See 2010 Census, *supra* note 12 (259,939,107 out of 308,143,815 residents).

451 For additional analysis, see Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL’Y 983 (2013).

452 See 2010 Census, *supra* note 12 (108,018,101 out of 308,143,815 residents).

453 See ALA. CONST. art. I, § 29; ARIZ. CONST. art. II, § 29; ARK. CONST. art. II, § 19; CONN. CONST. art. I, § 18; DEL. CONST. art. I, § 19; IND. CONST. art. I, § 35; KAN. CONST. Bill of Rights, § 19; ME. CONST. art. I, § 23; MD. CONST. Declaration of Rights, art. XLII; MASS. CONST. pt. I, art. VI; N.H. CONST. pt. I, art. IX; N.C. CONST. art. I, § 33; OHIO CONST. art. I, § 17; OR. CONST. art. I, § 29; PA. CONST. art. I, § 24; S.C. CONST. art. I, § 4; TENN. CONST. art. I, § 30; VA. CONST. art. I, § 4; WASH. CONST. art. I, § 28; W. VA. CONST. art. III, § 19. Georgia’s constitution also contains a similar clause. GA. CONST. art. I, § 1, para. 25 (“The social status of a citizen shall never be the subject of legislation.”).

454 MD. CONST. Declaration of Rights, art. XLII.

455 PA. CONST. art. I, § 24.

456 See IOWA CONST. art. I, § 6; MASS. CONST. pt. I, art. VI; N.H. CONST. pt. I, art. X; N.D. CONST. art. I, § 22; R.I. CONST. art. I, § 2; UTAH CONST. art. I, 24; VT. CONST. ch. I, art. VII; VA. CONST. art. I, § 3; WYO. CONST. art. I, § 34.

nature shall have a uniform operation,”<sup>457</sup> and Rhode Island’s constitution provides:

All free governments are instituted for the protection, safety, and happiness of the people. All the laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied protection of the laws. No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state. Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof.<sup>458</sup>

We count these states as including bans on class-based legislation in their state constitutions because we believe that they promote the underlying value of ensuring that laws do not benefit certain groups to the exclusion of others, both because these laws must have a uniform operation and because they must be made for the good of the whole.

Finally, two additional states have clauses explicitly outlawing any feudal class systems. Minnesota’s constitution, for example, holds that “[a]ll lands within the state are allodial and feudal tenures of every description with all their incidents are prohibited. Leases and grants of agricultural lands for a longer period than 21 years reserving rent or service of any kind shall be void.”<sup>459</sup> Wisconsin’s constitution includes a similar provision, stating that:

All lands within the state are declared to be allodial, and feudal tenures are prohibited. Leases and grants of agricultural land for a longer term than fifteen years in which rent or service of any kind shall be reserved, and all fines and like restraints upon alienation reserved in any grant of land, hereafter made, are declared to be void.<sup>460</sup>

We count these clauses as banning class-based legislation because they prohibit feudalism, a system which discriminates in a class-based manner by definition. Feudalism, “like a system of racial-caste apartheid, violates the notion that all citizens are born equal” by creating conditions in which a feudal lord can essentially hold an individual in a state of perpetual servanthood, necessarily relegating that individual to a form of second-rate citizenship.<sup>461</sup> As such, we think that bans on feudalism constitute bans on class legislation.

We found bans on feudalism and allodium in twenty-eight out of thirty-seven state constitutions in 1868 when the Fourteenth Amendment was ratified—an Article V three-quarters consensus.<sup>462</sup> Four state constitutions

457 WYO. CONST. art. I, § 34.

458 R.I. CONST. art. I, § 2.

459 MINN. CONST. art. I, § 15.

460 WIS. CONST. art. I, § 14.

461 Calabresi & Agudo, *supra* note 5, at 94.

462 *Id.* at 97–98.

banned feudalism in 1791.<sup>463</sup> Twenty states banned titles of nobility in 1868<sup>464</sup> and eight states out of twelve that wrote constitutions between 1776 and 1791 banned title of nobility.<sup>465</sup> Nineteen out of thirty-seven in 1868 had equal protection of the laws clauses.<sup>466</sup> We thus think the Fourteenth Amendment both as an original matter, and as a matter of present-day consensus, bans class legislation enacted by the states, a conclusion leading us to agree with Justice Field's dissenting opinion in the *Slaughter-House Cases*.<sup>467</sup>

### 3. Separation of Powers

Forty of the states in 2018 comprising 80% of the states and 79.7% of the U.S. population<sup>468</sup>—had clauses in their state constitutions explicitly requiring a separation of powers among the legislative, executive, and judicial branches of the state government.<sup>469</sup> New Jersey's constitution uses a typical clause, stating that "[t]he powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."<sup>470</sup> Mississippi's constitution adds additional detail, noting that "[t]he powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another."<sup>471</sup> and that:

No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall,

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463 Calabresi, Agudo & Dore, *supra* note 5, at 1529–31.

464 See Calabresi & Agudo, *supra* note 5, at 98–99.

465 Calabresi, Agudo & Dore, *supra* note 5, at 1531–32.

466 See Calabresi & Agudo, *supra* note 5, at 94–96.

467 83 U.S. (16 Wall.) 36, 93 (1872) (Fields, J., dissenting).

468 See 2010 Census, *supra* note 12 (245,621,129 out of 308,143,815 residents).

469 See ALA. CONST. art. III, §§ 42, 43; *id.* amend. 905; ARIZ. CONST. art. III; ARK. CONST. art. IV, §§ 1–2; CAL. CONST. art. III, § 3; COLO. CONST. art. III; CONN. CONST. art. II; FLA. CONST. art. II, § 3; GA. CONST. art. I, § 2, para. 3; IDAHO CONST. art. II, § 1; ILL. CONST. art. II, § 1; IND. CONST. art. III, § 1; IOWA CONST. art. III, § 1; KY. CONST. §§ 27–28; LA. CONST. art. II, §§ 1–2; ME. CONST. art. III, §§ 1–2; MD. CONST. Declaration of Rights, art. VIII; MASS. CONST. pt. I, art. XXX; MICH. CONST. art. III, § 2; MINN. CONST. art. III, § 1; MISS. CONST. art. I, §§ 1–2; MO. CONST. art. II, § 1; MONT. CONST. art. III, § 1; NEB. CONST. art. II, § 1; NEV. CONST. art. III, § 1; N.H. CONST. pt. I, art. XXXVII; N.J. CONST. art. III, § 1; N.M. CONST. art. III, § 1; N.C. CONST. art. I, § 6; OKLA. CONST. art. IV, § 1; OR. CONST. art. III, § 1; R.I. CONST. art. V; S.C. CONST. art. I, § 8; S.D. CONST. art. II; TENN. CONST. art. II, §§ 1–2; TEX. CONST. art. II, § 1; UTAH CONST. art. V, § 1; VT. CONST. ch. II, § 5; VA. CONST. art. I, § 5; W. VA. CONST. art. V, § 1; WYO. CONST. art. II, § 1.

470 N.J. CONST. art. III, § 1.

471 MISS. CONST. art. I, § 1.

of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.<sup>472</sup>

Thus the vast majority—well over a three-quarters Article V consensus—of the states have an explicit protection of the separation of powers doctrine within their state constitutions.

It is worth noting that the ten states without explicit separation of powers clauses—Alaska, Delaware, Hawaii, Kansas, New York, North Dakota, Ohio, Pennsylvania, Washington, and Wisconsin—do have distinct articles for each branch of government within their state constitutions. In turn, those separate articles restrict each branch of government by describing its limited powers and duties, thereby implicitly imparting a separation of powers doctrine into their state constitutions. This approach to the separation of powers is not unlike that of the Federal Constitution, which also lacks an explicit separation of powers clause but certainly establishes and protects the separation of powers at the federal level.

Still, the disconnect here between the Federal Constitution and the state constitutions of the forty states with an explicit separation of powers clause “is striking” because, as scholars like Professor Bruce Ackerman have observed, James Madison “proposed adding a separation of powers clause to the Federal Constitution but the framers declined to do so.”<sup>473</sup> Ackerman has argued that this exclusion was intentional and meaningful,<sup>474</sup> but the evidence suggests the clause was rejected as being redundant because the three vesting clauses had already constitutionalized the separation of powers at the federal level. Some have suggested that “the separation of powers is less strictly followed at the state than at the federal level,”<sup>475</sup> but our data suggest that in 2018, 80% of the states recognize a fundamental right to the separation of powers. “What, if anything, a court ought to do with this data is a subject for another day.”<sup>476</sup>

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472 *Id.* § 2.

473 See Calabresi & Agudo, *supra* note 5, at 104 (citing Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 319 n.4 (1992)). This proposed separation of powers clause died in the Senate. See 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1028, 1146 (Leon Friedman et al. eds., 1971).

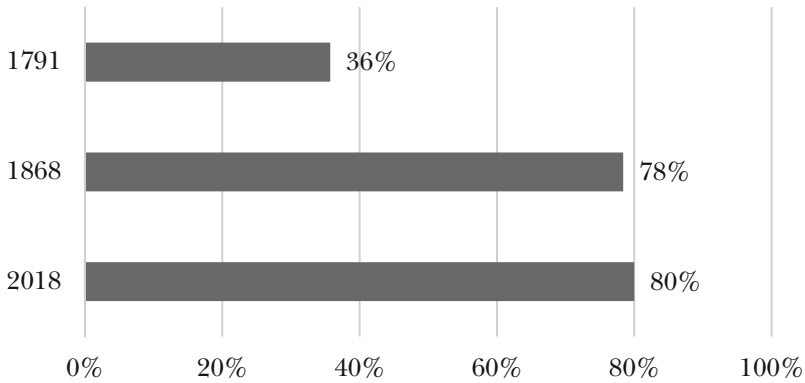
474 See Ackerman, *supra* note 473, at 319 n.4 (arguing that the exclusion of a separation of powers clause in the Federal Constitution was “by no means unintentional”).

475 See Calabresi & Agudo, *supra* note 5, at 104 (citing Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1189 (1999)).

476 *Id.*

FIGURE 31. SEPARATION OF POWERS IN STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



Five states out of twelve that wrote new constitutions between 1776 and 1791 had explicit separation of powers clauses,<sup>477</sup> and twenty-nine states out of thirty-seven in 1868 when the Fourteenth Amendment was ratified had specific separation of powers clauses in their state constitutions.<sup>478</sup> This was an Article V three-quarters consensus of the states in 1868. Support for the separation of powers has grown since 1791, and in both 1868 and today, in 2018, there have been an Article V three-quarters of the states consensus in favor of constitutionalizing the separation of powers idea. We conclude that the separation of powers principle is therefore deeply rooted in American history and tradition as well as in a present day Article V consensus of the states.

This is relevant not only to Fourteenth Amendment cases in our view, but also to Ninth Amendment cases, because we think one of the unenumerated rights enjoyed by American citizens is a right not to face a governmental official who is exercising two or three of the powers of government as opposed to one. This casts doubts on the rarely used historical practice of allowing some federal judges to also simultaneously hold an executive office, as occurred when Chief Justice John Jay negotiated the Jay Treaty with Great Britain, or when Chief Justice Earl Warren chaired an executive branch prosecutorial inquiry into the question of who had assassinated President John F. Kennedy.

#### 4. Education and Public Schools

Another right we found in the state constitutions in 1868 was “in many ways the most important, and perhaps the most surprising,” and that was the right to a free public school education.<sup>479</sup> We found that more than thirty of

477 Calabresi, Agudo & Dore, *supra* note 5, at 1533–34.

478 See Calabresi & Agudo, *supra* note 5, at 103–04.

479 *Id.* at 108.



the thirty-seven states had guaranteed a right to a free public school education as of 1868.<sup>480</sup> Thus when the Fourteenth Amendment was ratified, an Article V consensus was that a free public school education was a fundamental right.<sup>481</sup>

We found that today, in 2018, all fifty states include clauses or entire articles in their state constitutions that recognize a constitutional duty to provide a free public school education through a system of state-funded common schools.<sup>482</sup> Indiana's constitution, for example, holds that:

Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and provide, by law, for a general and uniform system of Common Schools, wherein tuition shall without charge, and equally open to all.<sup>483</sup>

Idaho's constitution uses another common format, stating that "[t]he stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools."<sup>484</sup> While public schools are required in all fifty state constitutions, in the text of the constitutional guarantee not all of them are

480 Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 MICH. ST. L. REV. 429, 460.

481 *Id.*

482 See ALA. CONST. art. XIV; *id.* art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI; *id.* art. XI, § 1; ARK. CONST. art. XIV; *id.* art. XIV, § 1; CAL. CONST. art. IX; *id.* art. IX, §§ 1, 5; COLO. CONST. art. IX; *id.* art. IX, § 2; CONN. CONST. art. VIII; *id.* art. VIII, § 1; DEL. CONST. art. X; *id.* art. X, § 1; FLA. CONST. art. IX; *id.* art. IX, § 1; GA. CONST. art. VIII; *id.* art. VIII, § 1, para. 1; HAW. CONST. art. X; *id.* art. X, § 1; IDAHO CONST. art. IX; *id.* art. IX, § 1; ILL. CONST. art. X; *id.* art. X, § 1; IND. CONST. art. VIII; *id.* art. VIII, § 1; IOWA CONST. art. IX, pt. 2, § 3; KAN. CONST. art. VI; *id.* art. VI, § 1; KY. CONST. arts. CLXXXIII–CLXXXIX; LA. CONST. art. VIII; *id.* art. VIII, pmb.; ME. CONST. art. VIII; *id.* art. VIII, § 1; MD. CONST. art. VIII, *id.* art. VIII, § 1; *id.* Declaration of Rights, art. XLIII; MASS. CONST. pt. II, ch. V, § 2; MICH. CONST. art. VIII; *id.* art. VIII, § 2; MINN. CONST. art. XIII; *id.* art. XIII, § 1; MISS. CONST. art. VIII; *id.* art. VIII, § 201; MO. CONST. art. IX; *id.* art. IX, § 1; MONT. CONST. art. X; *id.* art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI; *id.* art. XI, § 2; N.H. CONST. pt. II, art. LXXXIII; N.J. CONST. art. VIII; *id.* art. VIII, § 4, pt. 1; N.M. CONST. art. XII; *id.* art. XII, § 1; N.Y. CONST. art. XI; *id.* art. XI, § 1; N.C. CONST. art. I, § 15; *id.* art. IX; *id.* art. IX, § 2; N.D. CONST. art. VIII; *id.* art. VIII, § 1; OHIO CONST. art. VI; *id.* art. VI, § 2; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII; *id.* art. VIII, §§ 2–3; PA. CONST. art. III, pt. B; *id.* art. III, pt. B, § 14; R.I. CONST. art. XII; *id.* art. XII, § 1; S.C. CONST. art. XI; *id.* art. XI, § 3; S.D. CONST. art. VIII; *id.* art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII; *id.* art. VII, § 1; UTAH CONST. art. III, § 4; *id.* art. X; *id.* art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. I, § 15; *id.* art. VIII; *id.* art. VIII, § 1; WASH. CONST. art. IX; *id.* art. IX, §§ 1, 2; W. VA. CONST. art. XII; *id.* art. XII, §§ 1, 12; WIS. CONST. art. X; *id.* art. X, § 3; WYO. CONST. art. I, § 23; *id.* art. VII; *id.* art. VII, § 1.

483 IND. CONST. art. VIII, § 1.

484 IDAHO CONST. art. IX, § 1.

explicitly made free of charge to pupils or their families, though we think that would usually be assumed.

The fact that all fifty state constitutions establish this duty “could be said to create a right on the part of individuals” to a state-funded education, at least at the state level.<sup>485</sup> Such a possibility is monumentally important because “[i]n *Prigg v. Pennsylvania*, the Supreme Court held that the individual constitutional right of slave owners to recover fugitive slaves implied that the federal government had the power to pass a federal fugitive-slave law—a power not expressly spelled out” in the Federal Constitution.<sup>486</sup> By the same token, one could argue that the U.S. government possesses the power under Section Five of the Fourteenth Amendment to pass a uniform system of federal education law, or to establish a federal right to be educated at the public expense, since all fifty of the states include a similar duty in their state constitutions, thereby establishing this right as a matter of positive state constitutional law.

Part of the reason why this is an extraordinary finding is because of its implication on the way we conceptualize American constitutionalism. Indeed, “it is usually argued that a distinctive feature of American constitutionalism is that it guarantees negative liberties against government but not positive claims for entitlements from government.”<sup>487</sup> Though that observation generally tends to be accurate, our data on state constitutional rights in 2018 “suggest that there may be at least one very fundamental positive-law entitlement that all Americans have long possessed”—the right to a free and open public education.<sup>488</sup>

As we noted above, we found that in 1868, when the Fourteenth Amendment was ratified, a serious argument could be made that thirty-six of the thirty-seven states had constitutions that imposed a duty on them to provide free public schools.<sup>489</sup> While one could quibble with three or four of these state constitutional clauses,<sup>490</sup> there is absolutely no doubt that there was an Article V consensus of three-quarters of the states that there exists a fundamental right to a free public school education.

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485 Calabresi & Agudo, *supra* note 5, at 108.

486 *Id.* (citing *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615 (1842)).

487 *Id.* (citing *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983)).

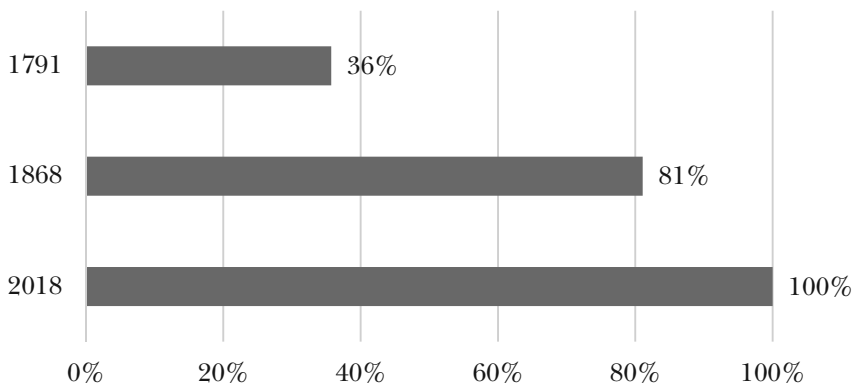
488 *Id.*

489 *See id.* at 108–11.

490 One could argue, for instance, that Delaware, Illinois, New Jersey, and Virginia all lacked public school clauses based on their phrasing. Our prior analysis argues that every state but Illinois should be considered as having a guarantee to a public school education in 1868. *See* Calabresi & Agudo, *supra* note 5, at 108–11.

FIGURE 32. EDUCATION AND PUBLIC SCHOOLS IN  
STATE CONSTITUTIONS

1791: n=14; 1868: n=37; 2018: n=50



In fact, even in 1791, we found that five state constitutions out of the twelve that had been drafted between 1776 and 1791 imposed a duty on the state to provide a free public school education.<sup>491</sup> This is one of the few fundamental positive entitlements that the Constitution enacts, given that it is mostly a charter of negative liberties to be free of certain governmental actions. The right to a free public school education is thus deeply rooted in American history and tradition as well as in a current consensus of the fifty states. We thus disagree with the dicta in *San Antonio Independent School District v. Rodriguez*, which denies that there is a fundamental right to a free public school education in American constitutional law.<sup>492</sup>

A state may choose, as most states have, to fund public school education mostly with local taxes to preserve local control over what is taught in the public schools, but it does not follow from that that there is no federal constitutional right to a public school education. That right clearly exists and is protected by the Fourteenth Amendment.<sup>493</sup>

### III. SUMMARY

The following graphs summarize our findings. Figure 33 is a graph of the state constitutional rights with federal analogs, shown by the number of states protecting each right. Figure 34 is a similar graph of the state constitutional rights with federal analogs, shown instead by the percentage of the U.S. population (excluding the District of Columbia) that lives in a state protecting each right. Figure 35 is a graph of the state constitutional rights *without* federal analogs, ranked by the number of states protecting each right.

491 See Calabresi, Agudo & Dore, *supra* note 5, at 1540–41.

492 *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17–18 (1973).

493 See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Calabresi & Perl, *supra* note 480.

Figure 36 shows similar results ranked by the percentage of the population that lives in a state protecting each right.

FIGURE 33. STATE RIGHTS IN 2018 WITH FEDERAL ANALOGS  
(BY NUMBER OF STATE)

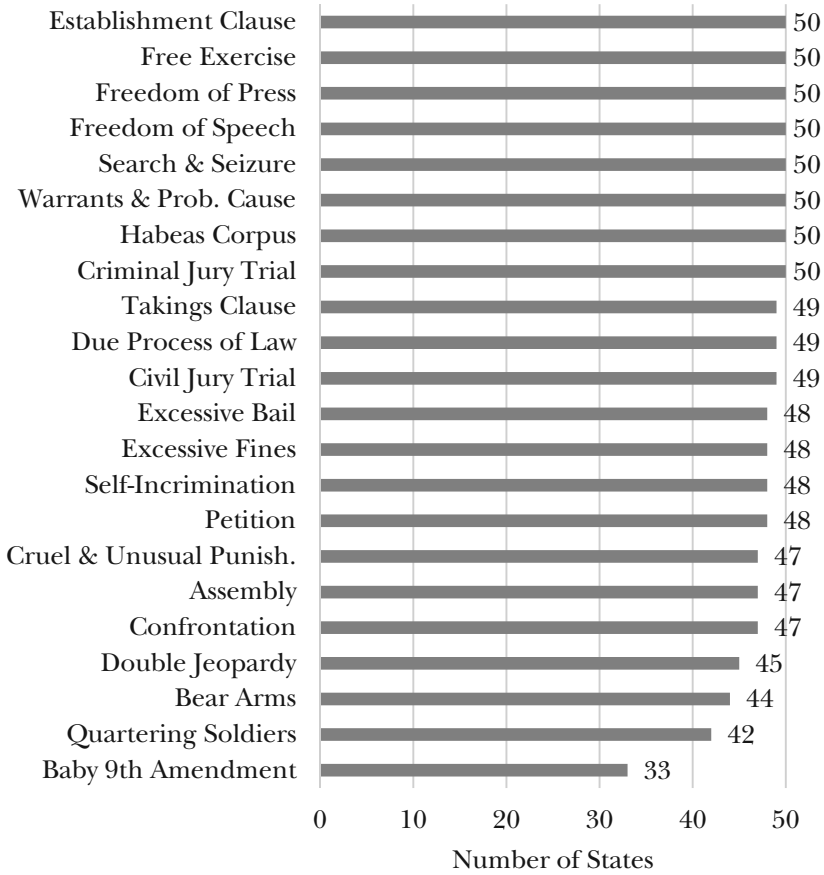


FIGURE 34. STATE RIGHTS IN 2018 WITH FEDERAL ANALOGS  
(BY POPULATION)

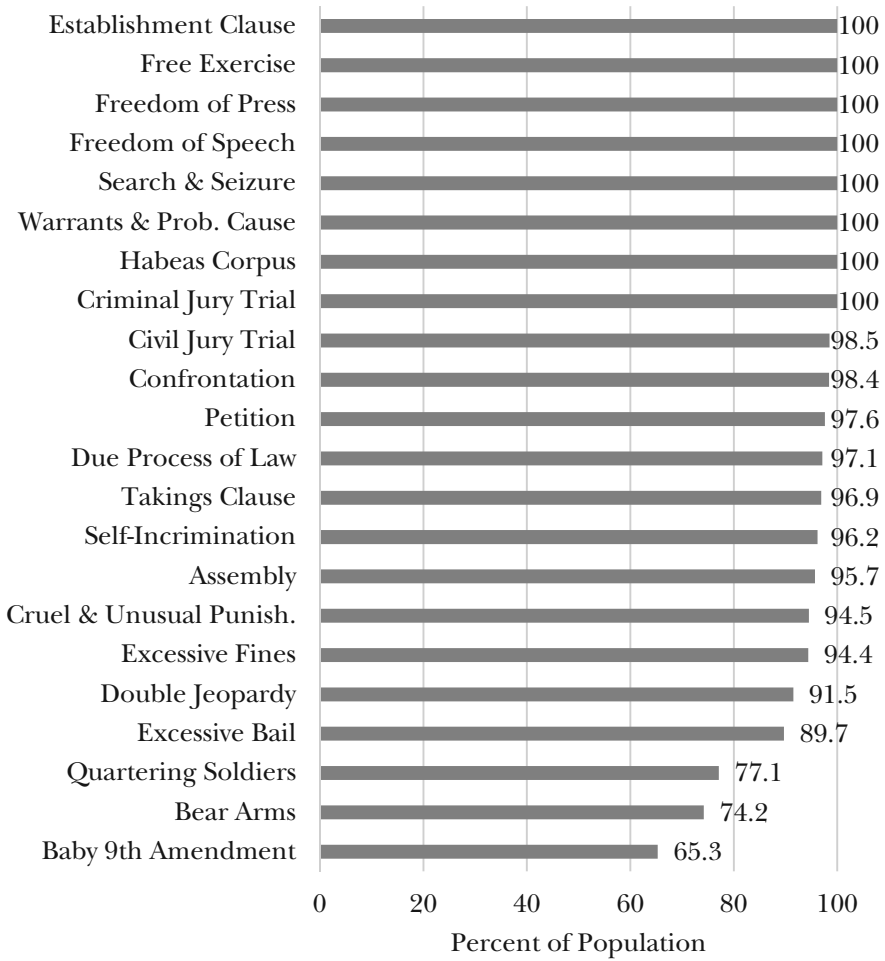


FIGURE 35. STATE RIGHTS IN 2018 WITHOUT FEDERAL ANALOGS  
(BY NUMBER OF STATES)

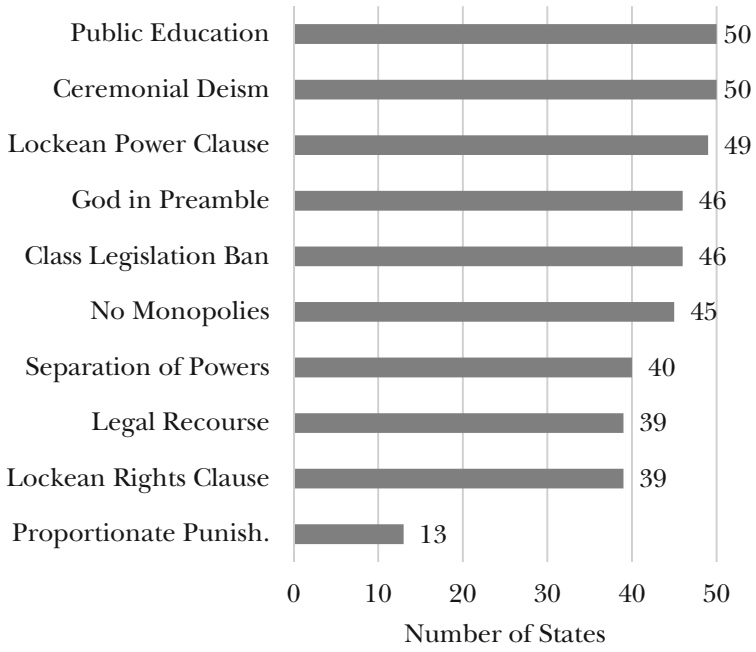
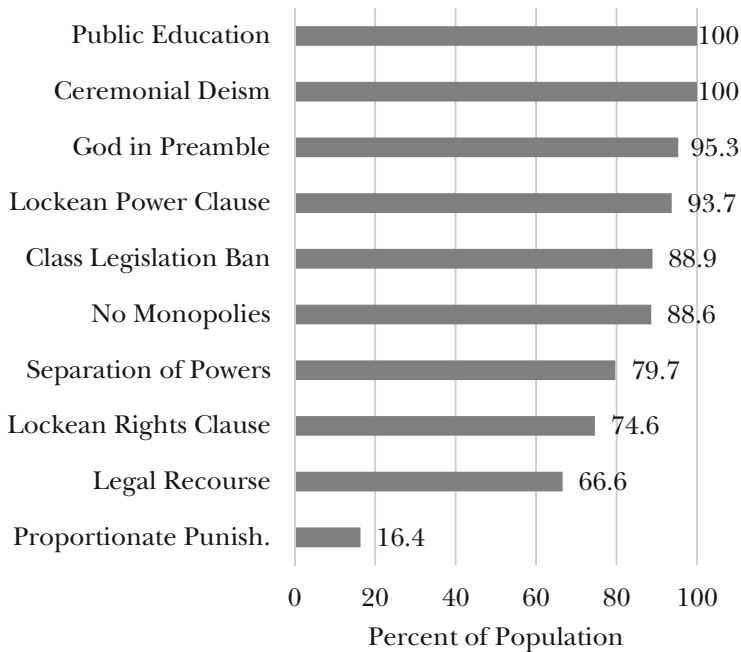


FIGURE 36. STATE RIGHTS IN 2018 WITHOUT FEDERAL ANALOGS  
(BY POPULATION)



#### IV. DISCUSSION AND CONCLUSION

The first conclusion that we are led to by the data is how overwhelmingly similar the state bills of rights are today in 2018, compared to the state bills of rights in 1868 when the Fourteenth Amendment was ratified. There has been some evolution and change between the original list of rights in 1868 and the modern-day 2018 list of rights, but to a remarkable degree very little has changed. This suggests to us that an empirically based living Constitution and former Justice Scalia's dead Constitution, as he famously called it, are close siblings even if they are not identical twins.

The second conclusion supported by the data is that religious freedom appears to be at least as important in America today as it was in 1868, an assertion illustrated by the increase in modern times of references to God and to ceremonial deism within the state constitutions. We are also struck by the evolution that has occurred in the last 226 years with respect to the Establishment Clause. In 1791, many states had established churches, and the federal ban on the establishment of religion was seen as a protection of states' rights, as opposed to being seen as an individual rights issue. By 1868, this had almost totally changed. There were no established state churches in 1868 and a two-thirds (but not an Article V three-fourths majority) of the states had antiestablishment clauses in their state constitutions. Now, in 2018, all fifty states have come to the view that their state bills of rights should prohibit the establishment of religion. What is most striking about this evolu-

tion is that, while the free exercise of religion clauses were considered cornerstone rights through their widespread inclusion in state constitutional law clauses in 1791, 1868, and 2018, the antiestablishment right is a newer and younger entitlement. To an originalist, then, the Establishment Clause is an arguably less important idea than the Free Exercise Clause, which goes back to America's founding.

A third conclusion we are led to believe is that Blaine Amendments, which forbid state money from going to religious officials or institutions, are not justified if one looks at state constitutional law in 1868, whereas they are justified if one looks at the modern-day 2018 state constitutions. This is one area of constitutional law where an originalist might justifiably find state Blaine Amendments to be a violation of the Free Exercise Clause, while a living constitutionalist or pragmatist who values the 2018 state constitutions above the historical constitutions would come out the other way.

A fourth conclusion is that Second Amendment gun rights clauses are much more prevalent in state constitutions today than they were in 1868, when the Fourteenth Amendment was ratified. In this sense, the modern-day state constitutions offer much more evidence that the right to own a gun is an individual right, rather than a collective right to own a rifle to serve in your state's National Guard unit or to protect the common defense. This increase may reflect a backlash arising from the attempt among twentieth-century elites to disarm substantial portions of the populace. From the evidence, one might conclude that living constitutionalism ought to be pro-gun, even though few constitutions elsewhere in the world currently protect the right to own a gun.<sup>494</sup>

A fifth conclusion that bears noting is that whereas most states in 1868 did not have due process of law clauses in their state bills of rights (instead having *per legem terrae* clauses, which said that no person could be deprived of life, liberty, or property except by the law of the land or by the judgment of their peers), that is no longer the case.<sup>495</sup> By 2018, most states have dropped the phrase "except by the law of the land or by the judgment of his peers" and replaced it with the phrase "except by due process of law." This could suggest a move in state constitutional law toward endorsing the use of substantive due process in the living Constitution, as opposed to the Constitution of 1868.

A sixth conclusion that was particularly disturbing to Professor Calabresi (as a former law clerk of Judge Robert H. Bork and Justice Antonin Scalia) was the discovery of the Lockean rights clauses, which were included in two-thirds of the 1868 state bills of rights and in three-quarters of today's state constitutional bills of rights. These clauses provide clear textual support for providing constitutional protection to at least some unenumerated constitu-

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494 See McCormick, *supra* note 159. The English Bill of Rights of 1689 did protect the right of all Protestant citizens of the realm to keep and bear arms, but modern English law does not protect gun rights in the way American constitutional law does. This clause is therefore nothing more than a historical curiosity.

495 See Calabresi & Agudo, *supra* note 5, at 65–66.



tional rights. The existence of the Lockean rights clauses is a big problem for the Bork-Scalia school of originalism, but it would not have troubled many professors and lawyers of a more libertarian bent, such as Professors James Lindgren and Randy Barnett.<sup>496</sup>

A seventh conclusion is that the state constitutions tend to protect a right to equal citizenship by prohibiting second-rate or second-class forms of citizenship. This is seen both in their protection of Lockean rights guarantees as well as in their prohibition of class-based legislation. Both of these rights are protected by a three-quarters majority of the states in 2018, indicating that they enjoy an Article V consensus across the states. We find this conclusion to be striking because it indicates that the right to be free from class- or caste-based legislation is widespread throughout American history and is supported by a present-day consensus of Americans, lending further support to our argument that both originalists and pragmatists ought to oppose laws that create second-rate forms of citizenship.<sup>497</sup>

The eighth and final conclusion, which is perhaps surprising, is the widespread nature of the right of individual children to a state-funded public education. This right is both deeply rooted in American history and tradition, and is upheld by a consensus of state constitutions in 2018. Indeed, arguably thirty-six out of thirty-seven states in 1868 imposed a duty in their state constitution on the state legislature to provide everyone with a free public school education. Even in 1791, five states out of twelve that had written constitutions imposed such a duty, and today, of course, all fifty state constitutions impose such a duty. There is thus an unenumerated fundamental right to a free public school education in the United States, which is protected by the Fourteenth Amendment and which Congress could enforce using Section Five of the Fourteenth Amendment.

This leads to a parting thought which concerns the relevance of state bills of rights in 1868 to the original public meaning of the Privileges or Immunities Clause of the Fourteenth Amendment. We agree with Justice Field's dissenting opinion in *The Slaughter-House Cases*. He asserts that fundamental common-law rights like the right to pursue your own profession are

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496 For example, Attorney General Edwin Meese III, who was a big fan and friend of Professor Bernard Siegan of the San Diego School of Law, a professor who believed that *Lochner v. New York* was correctly decided. Attorney General Meese told Professor Calabresi that he believed *Lochner v. New York* was correctly decided when Professor Calabresi worked for him as a Special Assistant in 1985 to 1987. This puts Meese in the unenumerated constitutional rights camp. Meese indeed tried unsuccessfully to put both Siegan and Professor Richard Epstein on the federal courts of appeals. Siegan was stopped by the Senate, and Epstein said he would take only the Supreme Court and nothing less. Nonetheless, Meese's views—as well as the views of Siegan, Epstein, and now Professor Randy Barnett—show that there is substantial support among self-professed originalists for recognizing and enforcing unenumerated rights.

497 For further analysis on this question, see Calabresi & Begley, *supra* note 440, where we contend that the historical evidence indicates that the Federal Constitution must protect rights like same-sex marriage in order to ensure that LGBTQ minorities are not relegated to a subservient form of citizenship.

privileges or immunities of state citizenship that are protected by the Fourteenth Amendment, a guarantee arising because everyone who is born or naturalized is both a citizen of the United States *and of the state wherein they reside*.<sup>498</sup> Thus, we believe that the state constitutional law fundamental rights of all Americans are equally protected by the Privileges or Immunities Clause of the Federal Fourteenth Amendment. That Clause not only incorporates the Federal Bill of Rights against the states, as Justice Hugo Black and Akhil Reed Amar have eloquently argued, but also protects all of one's fundamental rights under state constitutional law as well.

Further, since the states have all protected in their constitutions many of the same rights enshrined in the Federal Bill of Rights, this has implications for Supreme Court caselaw on the incorporation and application of the Federal Bill of Rights to the states. Even if Justice Black or Professor Amar were wrong about incorporation (which we consider unlikely), nevertheless all the same rights—and then some—would be protected by the Federal Fourteenth Amendment, due to their widespread protection as a matter of state constitutional law. By federally protecting rights of state citizenship, the Fourteenth Amendment federally protects all the rights in the state bills of rights in 1868. That includes versions of all the rights in the Federal Bill of Rights. Justice Samuel Alito, the author of *McDonald v. City of Chicago*,<sup>499</sup> cited approvingly Professor Calabresi's 2008 *Texas Law Review* article with Sarah E. Agudo in incorporating against the states the Second Amendment, which in *Heller* the Supreme Court had said guaranteed an individual right to keep and bear arms. Only twenty-two states out of thirty-seven had Second Amendment analogues in 1868—a majority but not a supermajority. In contrast, Lockean rights clauses appeared in at least twenty-four and arguably in twenty-seven state constitutions in 1868. They must therefore be incorporated against the states by the Fourteenth Amendment as well—along with the right to a free public school education.

We hope we have now established that our data on the growth and evolution of state bills of rights are useful to federal constitutional law, as well as to the ongoing debates between originalists and living constitutional pragmatists. Ultimately, under both camps' readings of the Fourteenth Amendment, that Amendment protects a plethora of rights.

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498 See *supra* note 461 and accompanying text.

499 561 U.S. 742 (2010).

