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THE U.S. AND THE STATE CONSTITUTIONS: AN UNNOTICED DIALOGUE

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I. INTRODUCTION

Americans are quite used to the fact that we almost all live in jurisdictions where there are two constitutions that apply to us: the U.S. Constitution and the Constitution of the states wherein we reside. But, Americans typically know very little about state constitutional law in the states in which they live—even when they practice as lawyers in a given state. The first year law school curriculum often features mandatory courses on state tort law, state contract law, state property law, and state criminal law. No first year courses, however,

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are offered in state constitutional law, and at many law schools the course is not even offered as an upper level elective.

This fact has obscured a very interesting dialogue that has gone on for many years now in U.S. and state constitutional law. State constitutional law is filled with many clauses and doctrines that complete U.S. constitutional law *in toto* by very explicitly protecting unenumerated individual liberty rights; by guaranteeing state residents the right to a free and appropriate public school education; and by guaranteeing widely the core U.S. constitutional principle of the separation of powers. U.S. constitutional law has, in turn, been a model to which the states have frequently turned in adding rights that were already protected at the federal level to state constitutions. Former Supreme Court Justice William J. Brennan once famously argued that the States should protect individual liberties more vigorously than the federal Supreme Court, which sets only a floor below which rights protection cannot fall. Many observers of the federal Supreme Court believe that it sets—and that it should set—a "federalism discount" for a nation that is the third most populous in the world and the fourth largest territorially. The European Court of Human rights similarly applies a "margin of appreciation" by which it tolerates some variations in rights protection so long as no nation falls through the federal floor.

In the first part of this essay, we will discuss three contributions that we think state constitutional law makes to U.S. constitutional law. In Part II, I will discuss what the state constitution writers have borrowed from the federal constitution.

I. WHAT THE STATES CAN TEACH THE U.S. SUPREME COURT

Our comments here address three subjects: 1) Natural and Inalienable Rights to Freedom and Equality; 2) the provision by governments of a Free Public School Education to every resident of a state; and 3) what the states can teach the Supreme Court about the centrality of the Separation of Powers.

A. NATURAL AND INALIENABLE RIGHTS TO FREEDOM AND EQUALITY

We must begin discussion of this topic by noting that Professor Calabresi opposed substantive due process ardently when he was a law student, a law clerk, and a young lawyer. In the 1980's, he greatly admired Justice Hugo Black's dissent in *Griswold v. Connecticut* lambasting the doctrine of substantive due process; and he greatly admired the speeches criticizing substantive due process by Judge Robert H. Bork, for whom he clerked, and by Attorney General Edwin Meese III, for whom he worked as a young lawyer and an editor of his speeches. The first crack in the foundation of his belief that substantive due process was policy and not law came when Justice Antonin Scalia wrote his opinion in *Michael H. v. Gerald D* and when Chief Justice William Rehnquist wrote the *Michael H. v. Gerald D.* opinion into law in *Washington v. Glucksberg*. Professor Calabresi began to think that at least some substantive due process rights—those that were deeply rooted in American history and tradition—were constitutionally protected. He took sustenance from the opinion in *Corfield v. Coryell* that explained that the original meaning of the Privileges or Immunities Clause was:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; *and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.* What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness

> and safety; *subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.*[1]

It seemed to Professor Calabresi that the italicized passages above supported a "deeply rooted in American history and tradition test" for substantive due process rights and a "police power override" for rights "the government may justly prescribe for the general good of the whole [people]."

He decided in two prior law review articles with Northwestern Law students Sarah E. Agudo and Katherine L. Dore to examine in more detail the question of what individual rights were deeply rooted in American history and tradition either, in 1868, when the Fourteenth Amendment was ratified,[2] or, in 1791, when the federal Bill of Rights was ratified, or in 1791 when the Federal Bill of Rights was ratified.[3] As we said above, our inquiry was prompted solely by the U.S. Supreme Court's decisions in *Washington v. Glucksberg; Michael H. and Gerald D.; Moore v. City of East Cleveland;* and *Bowers v. Hardwick* – all of which suggested that for a right to be protected under Fourteenth Amendment substantive due process, it had to be deeply protected by American history and tradition. At the time we wrote these articles, Professor Calabresi believed that substantive due process rights had to be deeply rooted in American history and tradition, as he said in his article *Substantive Due Process After Gonzales v. Carhart* 106 Mich. L. Rev. 1517 (2008). He expected to find and

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[1] 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (emphasis added).

[2] 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).

[3] Steven G. Calabresi, Sarah E. Agudo, & Katherine 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).

did find that not a single state Bill of Rights in 1791 or in 1869 protected a right to privacy of the kind recognized in such modern cases as *Griswold v. Connecticut* and *Roe v. Wade.*

But, after closely examining individual rights protected under state bills of rights in 1868 and 1791, Professor Calabresi, with the assistance of Northwestern students Sarah E. Agudo and Katherine L. Dore, has changed his mind about the test for discovering rights under substantive due process. It turns out that in 1791, seven of the fourteen State (Georgia, Virginia, New York, New Hampshire, Massachusetts, Pennsylvania, and Vermont) all contained Lockean Natural Rights Guarantees in their State Bills of Rights which provided in effect that:

> Article I. All men 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.[4]

Thus, at least half the States, in 1791, recognized Lockean Natural Rights Guarantees as being deeply rooted in their history and tradition. This raised the disturbing possibility that the rights that are rooted deeply in American history and tradition might be the very same natural law rights that Judge Bork, Attorney General Meese, and Justice Scalia had been criticizing with Professor Calabresi's approval. It turned out that the deeply rooted in history and tradition test is just circular and takes you back to Lockean natural law, since that is the belief that is deeply rooted in American history and tradition. We should say that it takes you back to the Lockean natural law

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[4] The clause reproduced is from the Massachusetts Constitution of 1780, but it is substantially similar to the other Lockean Natural Rights Guarantees.

of Richard Epstein, Randy Barnett, Robbie George, Bernard Siegan, Hadley Arkes, Harry Jaffa and all of the Straussians, and not to the natural law of Ronald Dworkin or Larry Tribe.

But, to reject Bork, Meese, and Scalia and to embrace Epstein, Barnett, George, Siegan, Arkes, and all of the Straussians is no small thing. This is especially the case since the U.S. Supreme Court Justice Clarence Thomas may very well agree with us. Justice Thomas spoke and wrote favorably about conservative natural law just before he was appointed to the Supreme Court, and he was recently the lone vote on the Supreme Court to overrule the *Slaughter-House Cases*. Yet another natural law thinker we are in company with who is not a libertarian is Robbie George of Princeton, although he and we disagree about same sex marriage. Suffice it to say that we are in good company with many conservative and libertarian natural law scholars. Professor Calabresi's own political philosophy is that he is a Frank Meyer fusionist, which is to say that he is a libertarian-conservative—like his good friend, and Frank Meyer's son, Eugene Meyer, with whom he has happily worked for thirty years on the Federalist Society.

Our misgivings about the "deeply rooted in history and tradition" test became even more pronounced when we examined state constitutional law in 1868. Even more critically, twenty-four States in 1868, the year when the Fourteenth Amendment was ratified, recognized the existence of Lockean Natural Rights Guarantees. This fact is arguably probative of the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment. As Professor Calabresi said in his forthcoming article with Sofia Vickery in the Texas Law Review entitled *On Liberty and the Fourteenth Amendment: the Original Meaning of the Lockean Natural Rights Guarantees* (footnotes with original texts of these 24 Clauses in the Texas Law Review article), nineteen of the twenty-four historical constitutions [in 1868: a majority of the thirty-seven state constitutions in existence] contain typical Lockean Natural rights Guarantees, with each of these nineteen Guarantees including all three elements or parts. Fifteen of the nineteen typical Lockean Natural Rights Guarantees—the California,

Florida, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Nevada, New Jersey, Ohio, Pennsylvania, South Carolina, Virginia, and Wisconsin Guarantees—generally followed this typical form without substantive variation. The remaining four typical Lockean Natural Rights Guarantees—the Delaware, New Hampshire, Kentucky, and Vermont Guarantees—expanded beyond the basic three parts. Five of the atypical Guarantees contained slight variations from the typical Lockean Natural Rights Guarantees form. We refer to these twenty-four Clauses collectively as the Lockean Natural Rights Guarantees throughout the remainder of this Article.

This conclusion stunned Professor Calabresi since it was not at all what he had expected as an historian and a social scientist to find. He had been expecting to find and did indeed find no right to privacy in the state bills of rights of 1791 or 1868, but he found something more sweeping and revolutionary instead. As a good believer in the original public meaning of constitutional texts, Professor Calabresi has accordingly revised his historical beliefs about the original public meaning of the Privileges or Immunities Clause of the Fourteenth Amendment to include a belief in Lockean Natural Law as it was understood in 1868. His newest articles on the Fourteenth Amendment reflect this viewpoint. See e.g. Steven G. Calabresi & Sofia Vickery, *On Originalism and the Fourteenth Amendment: The Original Meaning of the Lockean Natural Rights Guarantees,* forthcoming in the Tex. L. Rev. (2015); and Steven G. Calabresi, *On Liberty, Equality, and the Constitution: A Review of Richard A. Epstein's The Classical Liberal Constitution*, 8 N.Y.U. J.L. & Liberty 839 (2014).

A word at this point is required as to why all the state Lockean Natural Rights Guarantees are relevant to federal constitutional law. Professor Calabresi's initial search for the original meaning of the Privileges or Immunities Clause led him to the famous *Corfield v. Coryell* dicta quote above as to why rights deeply rooted in history and tradition are privileges or immunities that are protected under the Privileges and Immunities Clause of Article IV, Section 2. His review with Sarah E. Agudo of the Reconstruction amendment debates

and of the newspapers that publicized them convinces him that everyone in 1868 understood the Fourteenth Amendment to be applying the Article IV, Section 2 Privileges and Immunities language to the states through the Fourteenth Amendment. The Article IV, Section 2 Clause gave out-of-state residents in another state the same civil rights as were enjoyed by citizens of that state as a matter of state common law, state statutory law, and state constitutional law, but it did not give these citizens the political rights to vote, hold office, or serve on a jury. The Article IV, Section 2 Clause also did not give out-of-state residents equal access to state property as was enjoyed by in state citizens. States can and do charge higher fees to visit state national parks and to attend state universities than they give to in-state residents.

On the facts of *Corfield v. Coryell*, Corfield, a citizen of Delaware had rented his boat to a person who sailed it into New Jersey coastal waters to fish for oysters. New Jersey state law forbade out-of-state residents from fishing for oysters in New Jersey waters so the New Jersey authorities seized and confiscated the boat. Corfield, a citizen of Delaware, sued the New Jersey official responsible, Coryell, claiming that the seizure of his board had violated the Privileges and or Immunities Clause of Article IV, Section 2. Justice Bushrod Washington (George Washington's nephew), riding circuit, decided quite correctly that the Privileges and Immunities Clause of Article IV, Section 2 gave out-of-state residents equal civil rights to in-state residents but not equal rights as to the state property owned by the in-state residents. The oysters in question were clearly New Jersey's property so Justice Washington quite correctly ruled that Corfield, a citizen of Delaware, had no right to farm New Jersey oysters, and he sustained the confiscation of the boat. The only startling error in Justice Washington's opinion is his unsubstantiated claim in dicta that the Privileges and Immunities Clause confers on out-of-state residents in another state *only fundamental rights that are deeply rooted in history and tradition* and not new state civil rights. In an important article, Professor Philip Hamburger has shown that claim to be flat-out wrong.

To prove this point, let us consider whether two same-sex citizens of a state that still denies the right to same-sex marriage decide move to Massachusetts for one year without changing their domicile or voting registration in their homophobic home state. They are U.S. citizens, citizens of the homophobic state in which they declare residence and continue to vote, and they are legal residents of Massachusetts. Does this couple have an Article IV, Section 2 Privileges and Immunities Clause claim to be able to marry in Massachusetts given that the civil rights laws in Massachusetts, today, but not in 1776, give same-sex couples who are Massachusetts citizens a right to same sex marriage? Of course, the out-of-state residents have the same Article IV, Section 2 privilege to marry each other as is enjoyed by Massachusetts citizens. The out-of-state couple cannot vote, run for office, or serve on juries in Massachusetts since those are political rights and they may have to pay an extra fee that Massachusetts citizens do not have to pay when using state property, but the out-of-state couple has the same civil law right to marry under Massachusetts law even though that was not a right that Massachusetts recognized in 1776 when it became part of the Union. The Privileges and Immunities Clause of Article IV, Section 2 gives out-of-state residents in another state the exact same civil rights that in-state residents enjoy. The *Corfield v. Coryell* language quoted above about rights Article IV, Section 2 Privileges and Immunities Clause rights needing to be "deeply rooted in American history and tradition" and as being "subject nevertheless to such just laws as the states may prescribe to protect the rights of the whole [people]" is dicta. All that *Corfield* held was that out-of-state residents of Delaware do not have a right to farm oysters, which belonged to New Jersey as its property. This is an easy case and an obvious conclusion. The *Corfield* dicta about the protection Article IV, Section 2 extended to civil rights is neither binding nor persuasive nor right. Of course, the civil rights a state must extend to out-of-state residents expands when the content of state civil rights for that state's own citizens expands. One would have to be an idiot to think otherwise.

Now apply this language to the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment. It expressly forbids any state "from making any law that shall abridge the Privileges or Immunities of citizens of the United States." The first sentence of the Fourteenth Amendment makes all persons born or naturalized in the United States citizens of the United States and of the state in which they reside. Like the Article IV, Section 2 Clause, the Privileges and Immunities Clause gives all U.S. citizens the civil rights they enjoy under federal and state constitutional law, statutory law, and common law. The Clause does not give out-of-staters equal political rights to vote, hold, office, or serve on juries nor does it give them rights to state property like oyster beds, but it does give them equal civil rights across the board. How do we know what civil rights U.S. citizens have by virtue of the Privileges or Immunities clause? We consult state constitutions, almost all of which say that:

> Article I. All men 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.[5]

The Fourteenth Amendment changes things from the Article IV, Section 2 Privileges and Immunities clause because whereas the latter only guaranteed out-of-state resident equal civil rights with in-state citizens, the Privileges or Immunities Clause begins with the premise that all men are born free and equal, and it denies the states the power they once had to give some citizens or classes of citizens abridged or shortened or lesser rights than other classes of citizens.

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[5] MASS. CONST. of 1780, pt. 1, art. 1.

If a state allows two white people to marry, it cannot prevent a white person and a black person from marrying.[6] Similarly if a state allows a man to marry a woman, it is class legislation and sex discrimination to forbid that man from marrying another man. The Privileges or Immunities Clause gives all citizens from the time of birth on the very same civil rights of federal and of state citizenship that it gives to all of its citizens. The statement to the contrary in the 5 to 4 decision in the *Slaughter-House Cases* is recognized as having been erroneous by every liberal, conservative, and libertarian constitutional scholar who has researched the matter. Instead of protecting substantive constitutional rights like those incorporated by the Fourteenth Amendment through the backdoor of substantive due process, which John Hart Ely rightly derided as "Green-Pastel-Redness," the Supreme Court should come clean and overrule *Slaughter-House* thus rendering its Fourteenth Amendment case law both more originalist and more defensible. The Privileges or Immunities Clause of the Fourteenth Amendment makes the Lockean Natural Rights guarantees an enforceable part of the federal Constitution.

If one compares the Lockean Natural Rights Guarantees of the State Bills of Rights from the time of the framing of the Constitution and of Reconstruction with U.S. Supreme Court Justice Anthony M. Kennedy's opening paragraph in *Lawrence v. Texas*,[7] one finds a striking similarity. Compare the language below from the Massachusetts Constitution of 1780 with the opening paragraph and Justice Kennedy's opinion in *Lawrence v. Texas*:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there

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[6] Loving v. Virginia, 388 U.S. 1 (1967).
[7] 539 U.S. 558 (2003).

> are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions. [8]

> Article I. All men 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.[9]

Federal judicial protection of new un-enumerated constitutional rights is mandatory under Section 1 of the Fourteenth Amendment. As Professor Calabresi explained in *Substantive Due Process After Gonzales v. Carhart* 106 Mich. L. Rev. 1517 (2008), the clause in Section 1 of the Fourteenth Amendment that protects un-enumerated substantive rights is the Privileges or Immunities Clause and not the Due Process Clause. But new substantive due process rights are constitutionally protected because the content of state civil law under the Privileges and Immunities Clause of Article IV is always evolving as states adopt new civil rights laws that apply to out-of-state residents present in another of the fifty states. As Professor Calabresi explains in *On Liberty, Equality, and the Constitution,* he thinks *Lochner v. New York, Griswold v. Connecticut, and Lawrence v. Texas* are all correctly decided, but he disagrees with the U.S. Supreme Courts abortion decision in *Roe v. Wade.*

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[8] *Id.*
[9] MASS. CONST. of 1780, pt. I, art. I.

As we said above seven states comprising 58% of the population of the fourteen states in 1791 had clauses that declared men to be free and equal and to have inalienable rights to enjoy life and liberty, to acquire, obtain, possess, and defend property and to pursue happiness and safety. It is worth emphasizing that half of the states and nearly 60% of the American people lived in states with these clauses at the time of the Framing of the Constitution. By 1868, when the Fourteenth Amendment was adopted, twenty-four states had Lockean Natural Rights Guarantees in their state constitutions. This is a majority of the thirty-seven states in the Union at the time but not a super-majority. It strongly suggests that the Framers of the original constitution and of the Fourteenth Amendment believed that there were unenumerated civil rights that would expand when new civil rights laws were enacted.

When we turn to the modern era, we find that in 2010 that thirty-one states out of fifty, more than a three-fifths majority, contain Lockean Natural Rights Guarantees in their state constitutions. We have listed these thirty states here and have footnoted their Lockean Natural Rights Guarantees because of the tremendous importance we attach to them: Alabama,[10] Alaska,[11] Arkansas,[12] California,[13]

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[10] ALA. CONST. art. I, § 1 ("That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.").

[11] ALASKA CONST. art. I, § 1 ("This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.").

[12] ARK. CONST. art. II, § 2 ("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.").

[13] CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring,

possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.").

Colorado,[14] Florida,[15] Hawaii,[16] Idaho,[17] Illinois,[18] Indiana,[19] Iowa,[20] Kansas,[21] Kentucky,[22] Maine,[23] Massachusetts,[24] Montana,[25] Missouri,[26] Nebraska,[27] Nevada,[28] New Mexico,[29] Ohio,[30] Pennsylvania,[31] New Hampshire,[32] New Jersey,[33] New Mexico,[34] North Carolina,[35] Oklahoma,[36] Utah,[37] Vermont,[38] Wisconsin,[39] and Wyoming.[40]

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[14] COLO. CONST. art. II, § 3 ("All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.").

[15] FLA. CONST. art. I, § 2 ("All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.").

[16] HAW. CONST. art. I, § 2 ("All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities.").

[17] IDAHO CONST. art. II, § 1 ("All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety.").

[18] ILL. CONST. art. I, § 1 ("All men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed.").

[19] IND. CONST. art. I, § 1 ("WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the People have, at all times, an indefeasible right to alter and reform their government.").

[20] IOWA CONST. art. I, § 1 ("All men and women are, by nature, free and equal, and have certain inalienable rights--among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.").

[21] KAN. CONST. BILL OF RIGHTS § 1 ("All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.").

[22] KY. CONST. § 1 ("All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:
First: The right of enjoying and defending their lives and liberties.
Second: The right of worshipping Almighty God according to the dictates of their consciences.
Third: The right of seeking and pursuing their safety and happiness.
Fourth: The right of freely communicating their thoughts and opinions.
Fifth: The right of acquiring and protecting property.
Sixth: The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance.
Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons).

[23] ME. CONST. art. I, § 1 ("All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.").

[24] MASS. CONST. pt. I, art. I ("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.").

[25] MONT. CONST. art. II, § 3 ("All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.").

[26] MO. CONST. art. I, § 2 ("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.").

[27] NEB. CONST. art. I, § 1 ("All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other

lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.").

[28] NEV. CONST. art. I, § 1 ("All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness[.]").

[29] N.M. CONST. art. II, § 4 ("All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.").

[30] OHIO CONST. art. I, § 1 ("All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.").

[31] PA. CONST. art. I, § 1 ("All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.").

[32] N.H. CONST. art. I, § 2 ("All men have certain natural, essential, and inherent rights - among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.").

[33] N.J. CONST. art. I, § 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.").

[34] N.M. CONST. art. II, § 1 ("All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.").

[35] N.C. CONST. art. I, § 1 ("We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.").

[36] OKLA. CONST. art. I, § 1 ("All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.").

[37] UTAH CONST. art. 1, § 1 ("All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest

We will have more to say about this striking observation in the conclusion to our essay. We should also note here that in 1791, seven out of thirteen states had clauses that encouraged a frequent recurrence to fundamental principles in their states constitutions. Seven states continued to have such clauses in 1868, and in 2010 the states of Arizona, Illinois, Massachusetts, New Hampshire, North Carolina, South Dakota, Utah, Vermont, and Virginia had such clauses for a total of only eight states of out fifty. It would appear that recurrence to fundamental principles clauses, unlike natural and inalienable rights clauses, are fading out of existence and into legal history.

One other indicia of state protection of unenumerated individual rights is the presence in state constitutions of analogues to the federal Ninth Amendment. Not a single state had a Ninth Amendment analogue in its state constitution or bill of rights in 1791, but by 1868 eighteen of the thirty-seven state constitutions had such analogues. These "baby" Ninth amendment analogues declared that the enumeration of rights in *state* constitutions should not be construed to

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against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.").

[38] VT. CONST. ch. I, art. I ("That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; therefore no person born in this country, or brought from over sea, ought to be holden by law, to serve any person as a servant, slave or apprentice, after arriving to the age of twenty-one years, unless bound by the person's own consent, after arriving to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.").

[39] WIS. CONST. art. 1, § 1 ("All people are born equally free and independent, and have certain inherent rights; among those are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.").

[40] WYO. CONST. art. I, § 1 ("All power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness; for the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish the government in such manner as they may think proper.").

impair or deny other rights in *state constitutions*. By 2010, Ninth Amendment analogues in state constitutions increased to thirty-two states out of fifty, and 64% of the American people lived in states with "baby" Ninth Amendments.

The growing popularity of Ninth Amendments like the growing popularity of Lockean Natural Rights Guarantees shows widespread public support for both liberty and unenumerated constitutional rights. This ought, at least to support, what Professor Randy Barnett has called a presumption of liberty.[41]

The presence of Ninth Amendment analogues in more than a three-fifths majority of the state constitutions in states with 64% of the American people counters the widely expressed theory that the federal Ninth amendment was meant only to not preempt other state constitutional rights. It suggests instead that the federal and state Ninth Amendments mean what they say in protecting a presumption of liberty. Thus, one thing state constitutional law can teach federal constitutional lawyers is that the "deeply rooted in history and tradition" test is circular and does not work.

B. A CONSTITUTIONAL RIGHT TO A PUBLIC SCHOOL EDUCATION

One of the most stunning findings of our research into state constitutions in 1791 and in 1868 was the widespread prevalence of clauses imposing a duty on the states to provide a free public school education to all of its citizens. A duty to provide a service creates in an individual a right to receive the service. Accordingly, American constitutional law is not only a shield against government action—a negative liberty from government—it is also a positive entitlement to government action in the form of a free public school education.

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[41] RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2005).

As early as 1791, five states, in which 39% of the U.S. population lived, imposed a duty on the state government to provide all children with a free public school education. These states included: Georgia, Massachusetts, North Carolina, New Hampshire, and Pennsylvania. Pennsylvania, for example, included the following clause in its state constitution:

> (1) the legislature shall, as soon as conveniently may be, provide, by law; for the establishment of schools throughout the State, in such manner that the poor may be taught gratis. (2) the arts and sciences shall be promoted in one or more seminaries of learning….

To our utter astonishment, we discovered that thirty-one out thirty-seven states in the union in 1868, when the Fourteenth Amendment was adopted, recognized a poor individual's right to attend a free public school in unequivocal language contrary to the implication of Chief Justice Warren's opinion in *Brown v. Board of Education.* We count as being in this category of states any state whose constitution contained mandatory language which made the establishment of free public schools open to all students obligatory. Astonishingly, this first group of state constitutions includes thirty of the thirty-seven states, which were in the Union in 1868. These states included: Alabama, Arkansas, California, Delaware, Florida, Georgia, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, West Virginia, and Wisconsin.

In 2010, the following states provided an individual right to attend a free public school at state expense: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, West Virginia,

Wisconsin, and Wyoming. The vast majority of the American people today live in jurisdictions, which provide for free public schools. The fundamental right to a public school educations is deeply rooted in American history and tradition and in present day consensus, although equal funding for all public schools in a state remains a matter of deep contention.

C. SEPARATION OF POWERS CLAUSES

James Madison famously wanted to add a separation of powers clause to the federal Constitution, but he lost on this point. Ever since, the federal separation of powers has been deduced from the three Vesting Clauses of Article I, II, and III read together holistically. The states, however, have had more success in enacting explicit separation of powers clauses. The most famous of these comes from the Massachusetts Constitution of 1780 which provides that:

> Art. XXX. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.

Only five out of fourteen states had such separation of powers clauses in 1791.

By 1868, when the Fourteenth Amendment was ratified, the situation had improved greatly thanks to the huge influence of the federal model. Twenty-nine states out of thirty-seven—an Article V three-quarters of the states consensus—had separation of powers clauses in their state constitutions.

By 2010, the situation had improved even further. Thirty-six states included separation of powers clauses in their state constitutions: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine,

Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wyoming.

The separation of powers principle is vigorously growing in American constitutional law, and it may yet one day get the paramount importance it so richly deserves.

II. WHAT THE FEDERAL CONSTITUTION HAS TAUGHT TO THE STATES

A. RIGHTS BEARING ON RELIGION

1. Establishment Clause Analogs

At the time of the framing of the U.S. Constitution and Bill of Rights in 1791, only six states comprising 36%of the then-total U.S. population prohibited the establishment of a state religion. This is not surprising, because as Akhil Amar points out in *The Bill of Rights: Creation and Reconstruction*, the purpose of the federal Establishment clause in the First Amendment was to protect the State established churches from a federal establishment of religion. By 1868, twenty-seven states—or two-thirds of the thirty-seven states that formed the United States had what were in our view establishment clauses in their state constitutions. This is a two-thirds super-majority of the states in 1868, but not an Article V three-quarters majority of the states.

By 2011, forty-five states, comprising 89% of the United States population, prohibit the establishment of a state religion. As with the 1787 state constitutions, some state constitutional clauses use explicit non-establishment language, while others prohibit the state from requiring its citizens to financially or otherwise support any particular religion. For example, Alaska's constitution states that "[n]o law shall be made respecting an establishment of religion . . . ." Georgia's constitution states, "[n]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious

denomination or of any sectarian institution." Some states combine the two types of clauses, thus making both an explicit guarantee of non-establishment and prohibiting the state from requiring financial support or itself financially supporting any particular religion. For example, Indiana's constitution provides, "[n]o preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent."

In contrast to the 1787 constitutions, no constitution in 2010 established a state religion. The federal Constitution has definitely taught the states that establishments of religion are a bad idea.

2. Free Exercise

In 1791, thirteen states out of fourteen had Free Exercise Clauses in their state constitutions, and by 1868 all thirty-seven states had Free Exercise Clauses. In 2010, free exercise analogs, guaranteeing citizens the right to freedom of religious worship, are found universally in all fifty state constitutions. The only other type of clause found in all of the states is the free speech analog. As in 1787, the language of free exercise clauses varies widely from state to state. Some of this variation arises in the language used to describe the right. Many states explicitly use the phrase "free exercise."

For example, Indiana's constitution provides, "[n]o law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience." Other states provide more obliquely that there will be no abridgment of rights on the basis of religion. For example, Alabama's constitution states, "the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles." There is also disparity in the apparent scope of the protected right. Arizona uses some of the most protective language, drawing a circle that encompasses atheism. Its clause reads, "[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." Other states provide qualifications. For example, California's provision states, "[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."

1. Specific References to God in the Preambles

State constitutional law has definitely not followed federal constitutional law in driving references to religion out of the public square. In 1791, six states out of fourteen specifically mentioned God in the preambles of their state constitutions. By 1868, twenty-seven—or two-thirds of the state constitutions but not an Article V super-majority—contained an explicit reference to God in the preamble of their state constitution. By 2010, an Article Five super-majority of forty-five states, representing 92% of the nation's population, had a reference to God in the preamble of their constitution. A typical example appears in Minnesota's constitution, which states, "[w]e, the people of the state of Minnesota, grateful to God for our civil and religious liberty, and desiring to perpetuate its blessings and secure the same to ourselves and our posterity, do ordain and establish this Constitution." A particularly poetic example from Montana's constitution states, "[w]e the people of Montana, grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution."

2. Ceremonial Deism

I had always thought that Ceremonial Deism was an Eighteenth Century phenomenon, which had passed away, but state constitutional law suggests it is alive and well notwithstanding the misgivings of the U.S. Supreme court. Six states had constitutions with rhetoric that could be described as exemplifying ceremonial deism in

1791, and thirty states—an Article V three-quarters majority—had such language in their state constitutions in 1868. By 2010, forty-seven states, representing 94%of the population, had constitutions with rhetoric that can be described as exemplifying "ceremonial deism." Much of the ceremonial deism that occurs in the state constitutions is in the preamble, so there is a significant overlap between our "Specific References to God in the Preambles" and this category.

A few states that do not have ceremonial deism clauses in their preambles have such clauses in the body of their constitutions, frequently within provisions forbidding establishment of religion and guaranteeing the right to free exercise. Thus, Tennessee's constitution provides:

> 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.

B. RIGHTS OF FREEDOM OF SPEECH AND OF THE PRESS AND OF ASSOCIATION, AND OF POLITICAL PARTICIPATION

1. Freedom of the Press

Ten states out of fourteen guaranteed the freedom of the press in 1791 when the Bill of Rights was ratified and that number rose such that all thirty-seven state constitutions out of thirty-seven protected freedom of the press when the Fourteenth Amendment was ratified in 1868. Moreover, all fifty of the states today guarantee freedom of the press in their state constitutions, although there is some variation in the specificity and apparent strength of the guarantee. Thus, some constitutions mention "the press" specifically, like Rhode Island's, which states:

> The liberty of the press being essential to the security of freedom in a state, any person may publish sentiments on any subject, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, unless published from malicious motives, shall be sufficient defense to the person charged.

While others contain the vaguer right to "publish." For example, South Dakota's constitution states: "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

The great majority (forty-two) of the free speech clauses include the caveat that appears in both of the clauses above that persons may publish, "being responsible for the abuse of that liberty" or "right." West Virginia's constitution contains a more specific caveat, stating:

> 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.

Seven state constitutions contain no such qualification. New Hampshire's constitution, for example, states: "[f]ree speech and liberty of the press are essential to the security of freedom in a state: [t]hey ought, therefore, to be inviolably preserved."

2. Freedom of Speech

Ironically, only two states—Pennsylvania and Vermont—protected freedom of speech in the state constitutions in 1791, but by 1868 thirty-two out of thirty-seven—an Article V majority—protected the freedom of speech. Today, all of the states except for Ar-

kansas have constitutional provisions guaranteeing the right to freedom of speech. Obviously, the example set by the federal First Amendment came to be copied in virtually all of the state constitutions. This means that today 99% of the nation's population enjoys a right to free speech as a matter of state as well as federal constitutional law. Arkansas's free expression clause reads:

> The liberty of the press shall forever remain inviolate. The 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. In all criminal prosecutions for libel, the truth may be given in evidence to the jury; and, if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party charged shall be acquitted.

Many other states have clauses similar to the one in Arkansas's constitution that reads: "all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right." But, other states' clauses, like Nebraska's, for example, explicitly include the right to speak: "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty . . . ."

3. Assembly and Petition

Seven states out of fourteen had state constitutional rights granting the freedom of assembly and the right to petition for the redress of grievance. By 1868, thirty-four out of thirty-seven states also protected that right in their state constitutions. This shows again the powerful effect of the Federal Bill of Rights on the evolution of state constitutional law. In 2010, forty-seven states, comprising 94% of the population, had state constitutional rights guaranteeing the freedom of assembly and petition. 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."

4. Suffrage

Some form of the right to vote was explicitly recognized in nine out of fourteen states in 1791. Even in 1868, only seven state constitutions explicitly mentioned a right to vote, although many may have assumed it. In 2010, all of the states explicitly recognize their citizens' right to vote and provide some constitutional limits on that right. Many states also provide that felons or incompetent persons do not have the right to vote. We noted these provisions, but did not count them.

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

1. State Constitutional Rights to Keep and Bear Arms

Five states out of fourteen in 1791 included explicit constitutional clauses on "the right to keep and bear arms." By 1868, this number had grown to twenty-two states constitutions—a majority of the thirty-seven states but not a super-majority. In 2010, forty-three states, representing 86% of the national population, provided at least some protection for the right to keep and bear arms.

Of the forty-three states protecting some form of the right to bear arms, only twenty-four states provide for an unqualified right to use arms in self-defense. For the most part, these clauses closely follow the language of the Federal Constitution's Second Amendment.

2. Quartering Soldiers

Five states in 1791 forbade quartering soldiers in people's houses in time of peace or in time of war without the legislature's consent. In 1868, twenty-one states—a majority but not a two-thirds majority of the states—had provisions in their state constitutions that prohibited

the quartering of soldiers in private homes without the consent of the owner in times of peace. In 2010, forty-one states, or 82%, representing 76% of the population (an Article V majority) have these clauses. These clauses generally provide, "[n]o soldier or member of the militia shall, in time of peace, be quartered in any house, without the consent of the owner or occupant, nor in time of war, except in a manner provided by law."

D. FOURTH AMENDMENT RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES

1. Search and Seizure

Eight states out of fourteen forbade general warrants and unreasonable searches and seizures in their state constitutions in 1791. By 1868, that number had grown such that thirty-four out of thirty-seven states, an Article V super-majority, forbade unreasonable searches and seizures. As of 2010, forty-eight states, a full 96% of the states, representing 94% of the population, have search and seizure clauses in their state constitutions. A typical clause is Colorado's, which reads: "[t]he people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures."

2. Warrants and Probable Cause

In 1791, eight states out of fourteen required that warrants must not issue except on probable cause, and by 1868, thirty-six states out of thirty-seven had such clauses. A similarly high number of states have provisions in their constitutions requiring all warrants to be supported by oath or affirmation, to describe particularly the person or things to be seized, and to be issued only with probable cause. That is forty-eight states, or 96%, representing 94% of the population have the clauses. As in 1868, these clauses are invariably paired with search-and-seizure clauses, as they are in the Fourth Amendment. These clauses typically state, as does Mississippi's, that, "no warrant

shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized."

E. CRIMINAL PROCEDURE

1. Double Jeopardy

Not a single state constitution in 1791 protected accused persons against double jeopardy, guaranteed them a right of appeal, or guaranteed them a presumption of innocence. In 1790, Pennsylvania adopted the first state constitutional bar on double jeopardy. In 1868, thirty-one states out of thirty-seven—an Article V super-majority—had clauses protecting against double jeopardy. Today, forty-four of the states, a full 88%, representing 90% percent of the United States' population, have clauses that prohibit citizens from being tried more than once for the same offense. Frequently double jeopardy clauses are paired with self-incrimination clauses. Florida's clause is typical and provides, "[n]o person shall . . . be twice put in jeopardy for the same offense . . . ."

2. Habeas Corpus

Four state constitutions recognized a right to habeas corpus in 1791, and by 1868, thirty-six of the States, well over an Article V three-fourths majority, had provisions forbidding the state legislature from suspending the writ of habeas corpus. In 2010, forty-nine states, representing 98% of the states and United States population, have such provisions, with Alabama standing out as the sole state without such a provision. A few states provide for an unqualified right, stating, as Maryland, that "[t]he General Assembly shall pass no Law suspending the privilege of the Writ of Habeas Corpus." The great majority of the states qualify that the writ may be suspended in cases of rebellion or invasion, providing, as does New Jersey, "[t]he privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion the public safety may require it."

3. Self-incrimination

Eight states recognized a privilege against self-incrimination in 1791, and this number rose to thirty-four out of thirty-seven states in 1868. In 1868, an Article V three-fourths majority of the states had the right, and the same is true today. Forty-eight of the states, leaving out only Iowa and New Jersey, have a provision guaranteeing the individual's right against self-incrimination; those forty-eight states represent 96% of the states and 94% of the United States population.

Most states' self-incrimination provisions provide, as does Wyoming's, that "[n]o person shall be compelled to testify against himself in any criminal case." Some, however, like Oklahoma's, provide for a more nuanced right: "[a]ny 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."

4. Confrontation

Eight states in 1791 guaranteed criminal defendants the right to confront the witnesses against them, but this number grew to thirty-two out of thirty-seven states, an Article V supermajority, in 1868. The Confrontation Clause in the Bill of Rights guarantees criminal defendants the right to confront the witnesses against them. In 2010, forty-seven states, or 94%, representing 98% of the population, had clauses guaranteeing criminal defendants the right to confront witnesses against them. Connecticut has a typical confrontation clause, which provides, "[i]n all criminal prosecutions, the accused shall have a right . . . to be confronted by the witnesses against him . . . ."

F. EIGHTH AMENDMENT ANALOGUES

In 1791, nine states out of fourteen, forbade excessive bail; ten states out of fourteen forbade the imposition of excessive fines; and eight states prohibited cruel or unusual punishments in some way or another. In addition, three states required that punishments be proportionate for the offense of which a defendant was convicted while three states prohibited sanguinary laws, and two states prohibited imprisonment for debt. No state prohibited whipping or other corporal punishment and no state prohibited the death penalty.

In 1868, all thirty-seven state constitutions provided that excessive bail ought not to be required of criminal defendants; thirty-five states—an Article V consensus of three-quarters of the states—prohibited excessive fines; and thirty-four states—also an Article V consensus of three quarters of the states, had clauses which in different variations forbade cruel and unusual punishments. In addition, nine states required that all penalties and punishments be proportioned to the offense; five states had prisoners' rights clauses in their state constitutions; three states forbade sanguinary laws; one state forbade whipping; three states prohibited corporal punishment; and twenty-eight states out of thirty-seven—an Article V majority—forbade imprisonment for debt.

In 2010, forty-six states comprising 76% of the American population forbade excessive bail; forty-six states including 92% of the American population forbade excessive fines; forty-three states comprising 91% of the American population forbade cruel and unusual punishments; ten states comprising 11% of the American population forbade punishments that were disproportionate to the crime; seven states comprising 10% of the American population provided at least some protection for prisoner rights; and two states comprising 2% of the American people banned sanguinary laws; while one state banned whipping and another banned corporal punishment.

This date suggests that the federal protection in the Eighth Amendment against excessive bail, fines, and cruel and unusual punishments resonated greatly with the American people, but that other

more esoteric state protections against excessive punishment did not. There is little to suggest here that the death penalty in general has become unconstitutional although we agree with Justice Kennedy that it violates the Eighth Amendment and the Lockean Natural Rights Guarantees to apply it to juveniles or the mentally impaired.

G. ECONOMIC LIBERTIES

1. Takings Clauses

The federal Takings Clause in the Fifth Amendment was entirely James Madison's doing. No state had asked for a federal takings clause when they ratified the Constitution, and Madison appears to have slipped the clause into the Fifth Amendments' protections for criminal procedure with no-one much noticing. Only six states in 1791 had takings clauses in their state constitutions comprising 48% of the federal population at the time.

By 1868, the situation had greatly changed with thirty-three states out of thirty-seven including takings clauses—an Article V three-quarters majority. The situation has only improved with the passage of time. By 2010, forty-nine out of fifty states comprising 98% of the national population had added takings clauses to their state constitutions. This seems to be yet another instance of the framers of the state constitutions following the lead of the federal constitution.

2. Bans on Monopolies

Thomas Jefferson pled to no avail with James Madison to add a clause banning monopolies to the federal Bill of Rights, but Madison disagreed because he so highly regarded intellectual property and so there is no such clause in the federal Constitution. The Fourteenth Amendment, according to the four dissenting justices in *The Slaughter-House Cases*, with whom Professor Calabresi agrees, did argue correctly that state laws forbidding monopolies were a form of class legislation that was banned by the Fourteenth Amendment. Two states in 1791, Maryland and North Carolina, did bar monopolies in their State constitutions.

By 1868, five states out of thirty-seven banned monopolies in their state constitutions, and by 2010 eleven states: Arizona, Arkansas, Colorado, Georgia, Idaho, Kentucky, Maryland, Minnesota, North Carolina, Tennessee, and Texas had banned monopolies in their state constitutions. There thus appears to be a growing constitutional trend in the United States toward banning monopolies, which are after all a form of class legislation which the Fourteenth Amendment flatly prohibits.

H. DUE PROCESS

Nine out fourteen states had due process clauses in 1791, and by 1868 that number had grown to include thirty states out of thirty-seven in 1868—or an Article V, three-quarters majority, These state constitutions explicitly prohibited the deprivation of life, liberty, or property without due process of law or by the law of the land. A similar percentage, forty-five states, or 90%, representing 89% of the population, protect the same right today. Arizona's clause is typical, providing, "[n]o person shall be deprived of life, liberty, or property without due process of law."

Our 1868 paper distinguished between "law of the land" clauses and "due process of law" provisions. In 1868, the majority of the constitutions used "law of the land" language. Today, the opposite is true, with thirty-four states having "due process of law" provisions and only sixteen states having "law of the land" provisions. Five states have both types of provisions, and we reiterate that this suggests some differentiation between the meaning of the two provisions, and that there is no Article V, three-fourths majority supporting the idea that due process clauses have substantive content.

I. JURIES

In 1791, eleven states, comprising 88% of the population, recognized a constitutional right to trial by jury in criminal cases. Twelve states in 1791 recognized a right to jury trial in civil cases in states comprising 92% of the national population. If ever there was a right

that was deeply rooted in American history and tradition, it is the right to trial by jury.

In 2010, the right to criminal jury trial was protected in forty-seven out of fifty states comprising 97% of the population. In 2010, the right to civil jury trial was protected in forty-six out of fifty states comprising 95% of the population. As a formal matter, the American legal system is profoundly committed to the right to jury trial, which is very deeply rooted in our history and tradition. In practice, however, trial by jury has almost disappeared in the American legal system. Plea bargains with all powerful prosecutors have replaced the right to criminal jury trial in 90% or more of the criminal docket.

On the civil law side of things, jury trial has fared a little better. 66% of all civil cases now settle without being tried to a jury but the remaining 35% do get a civil jury trial. Clearly, criminal and civil jury trial are in a state of crisis in the United States today, and no serious effort is being made to address this crisis. The constitutional law on the books is hugely at variance with the constitutional law in practice.

J. PRIVILEGES OR IMMUNITIES, EQUAL PROTECTION, AND BANS ON FEUDALISM

One striking finding of our article on state constitutions in 1791 is that eight states at that time had privileges or immunities clauses that banned class legislation and required a form of equal protection of the laws. Three states in 1791 banned feudalism, three states had equal protection clauses, three states banned feudalism, and eight states banned titles of nobility.

By the time the Fourteenth Amendment was ratified in 1868, these numbers had risen such that nineteen states—a bare majority—specifically guaranteed some kind of equal protection of the laws. Thirteen states in 1868 had privileges or immunities clauses that explicitly prohibited either the deprivation or the unequal provision of privileges or immunities through class legislation. Thus, the Oregon Constitution of 1857, in article 1, Section 21 said that "[n]o law shall

be passed granting to any citizen or classes of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens." By 1868, twenty-eight out of thirty-seven states—or an Article V, three-quarters majority—had clauses in their state constitutions that explicitly prohibited feudalism. Twenty states out of thirty-seven banned titles of nobility.

By 2010, seventeen states had privileges or immunities clauses. These states included: Arizona, Arkansas, California, Connecticut, Georgia, Hawaii, Idaho, Indiana, Iowa, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Washington, and Wyoming. An additional, forty-two states had equal protection clauses in their state constitutions in 2010. These states included: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming.

The equal protection of the laws principle and the ban on class legislation is a pervasive aspect of state constitutional law over the last two-hundred and twenty-five years.

III. CONCLUSION

Our survey of individual rights protected in state bills of rights in 2010 reaches the unsurprising conclusion that the states have protected constitutionally almost all of the individual rights protected by the original Constitution and Bill of Rights and by the Fourteenth Amendment. Some additional rights, however, are protected at the state level. American constitutional culture has accepted the rights in the federal Constitution and Bill of Rights as being deeply rooted in American history and tradition despite their dubious origin as sub-

stantive due process decisions. There is no question that the incorporation of the Bill of rights is and should be a *fait accomplis.* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998).

A more interesting question is: what is the continuing significance in American constitutional law for the Lockean Natural Rights Guarantees identified in our prior articles on state bills of rights in 1791 and 1868? We think it creates a presumption of liberty, as Randy Barnett has argued, and that it instructs federal judges to construe the federal Bill of rights generously and purposively. We think the state constitutional guarantees of a right to a free public school education suggest that *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973) is wrongly decided. We think each state should give a voucher to any child within that state between the ages of five and eighteen to be redeemed at a state certified private school, which is forbidden from discriminating on the basis of race, sex, sexual orientation, religion, or disability. Finally, we think the state separation of powers clauses should cause the U.S. Supreme Court to treat the separation of powers principle far more seriously than it presently does.

State constitutions and bills of rights are in general much more comprehensive today than they were in 1776 or in 1868. This reflects in part the fact that state constitutions are in general much easier to amend than the federal Constitution. In many states, like California, a simple majority of the voters can amend a state Constitution. In contrast, the federal constitution can only be amended in general by a two-thirds vote of both Houses of Congress and three-quarters of the state legislatures. Since the Founding era ended in 1791, two-hundred and fourteen years ago, the federal Constitution has only been amended seventeen times. 5% of the U.S. population distributed across thirteen out of the least populous of the fifty U.S. states could in theory defeat a constitutional amendment that was favored by 95% of the U.S. population. State constitutions and bills of rights are thus a much better barometer of what individual rights are coming into or are going out of style than the federal Constitution. In other words, if we care about what the consensus of the American people think

today about bills of rights, we should examine state rather than federal constitutions.