

# A GUIDE AND INDEX FOR FINDING EVIDENCE OF THE ORIGINAL MEANING OF THE U.S. CONSTITUTION IN EARLY STATE CONSTITUTIONS AND DECLARATIONS OF RIGHTS\*

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*When the original thirteen states declared independence from Great Britain, their former colonial charters became obsolete. Eleven states quickly addressed this situation by adopting state constitutions and, in some cases, declarations of rights to replace their charters. These state documents greatly influenced the drafting of the United States Constitution. Accordingly, scholars and judges often cite these early state documents when making claims about the original meaning of the U.S. Constitution. This Article provides a concise guide to this practice of finding evidence of the original meaning in these early state constitutions and declarations of rights. It explains the history of the documents, where to find them online, and how writers have used them to discern the original meaning of the U.S. Constitution. The Article includes a comprehensive index, with more than 1700 entries, to help researchers discover relevant provisions.*

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This Article is the seventh in a series of articles I have written about how to use different sources to make claims about the original meaning of the Constitution. The six other articles are: *A Critical Guide to Using the Legislative History of the Fourteenth Amendment To Determine the Amendment's Original Meaning*, 49 CONN. L. REV. 1069 (2017); *A Concise Guide to Using the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397 (2017); *A Concise Guide to Using Dictionaries from the Founding Era To Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358 (2014); *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707 (2012); *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the United States Constitution*, 2009 U. ILL. L. REV. 457; and *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801 (2007).

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## INTRODUCTION

When the original thirteen states declared independence from Great Britain, their former colonial charters became obsolete. Those charters had established governments subservient to the King and Parliament and therefore could not continue to operate without change.<sup>1</sup> Eleven states—all but Connecticut and Rhode Island—quickly addressed this situation by adopting constitutions and, in most states, declarations of rights to replace their charters.

1. See, e.g., CHARTER OF DEL. of 1701 (imposing a requirement on all persons serving in the colonial government of “solemnly promising, when lawfully required, Allegiance to the King as Sovereign”).

These early foundational documents later proved very influential in the formation of the United States Constitution. The Framers at the Federal Constitutional Convention of 1787 discussed these state constitutions and declarations of rights extensively during their debates.<sup>2</sup> Many provisions of the U.S. Constitution are copied almost verbatim from state constitutions and declarations of rights.<sup>3</sup> When arguing for ratification of the Constitution in the *Federalist Papers*, Alexander Hamilton and James Madison made numerous comparisons of the U.S. Constitution to these foundational state documents.<sup>4</sup> Speakers also addressed these state documents during their respective state ratifying conventions.<sup>5</sup> And James Madison relied heavily on the various state declarations of rights when he drafted the Bill of Rights in 1789.<sup>6</sup>

The significant influence of the early state constitutions and declarations of rights on the U.S. Constitution is not surprising. Many of the Framers had participated in state constitutional conventions.<sup>7</sup> Other Framers were very familiar with the state constitutions and declarations of rights because they had been state governors, state legislators, or state judges.<sup>8</sup> The Framers also had easy access to the text of most of these state documents because the Continental Congress had ordered them to be published in a widely distributed book in 1782.<sup>9</sup>

Because of this close connection between the U.S. Constitution and the early state constitutions and declarations of rights, writers often cite the state documents when making claims about the original meaning of the U.S. Constitution. The Supreme Court, for instance, has cited early state constitutions and declarations of rights in more than one hundred cases for this

2. See *infra* Part III.

3. Compare, e.g., U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States . . .”), with MASS. CONST., pt. II, ch. II, § I, art. VII (“The governor of this commonwealth, for the time being, shall be the commander-in-chief of the army and navy . . .”).

4. See *infra* text accompanying notes 243–48.

5. See *infra* text accompanying notes 249–53.

6. See *infra* text accompanying notes 254–57.

7. See *infra* Sections III.A–K. (discussing the experience that the delegates to the Federal Constitutional Convention had in drafting state constitutions).

8. See *infra* Sections III.A–K.

9. See THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA; THE DECLARATION OF INDEPENDENCE; THE ARTICLES OF CONFEDERATION BETWEEN THE SAID STATES; THE TREATIES BETWEEN HIS MOST CHRISTIAN MAJESTY AND THE UNITED STATES, (1782) [hereinafter STATE CONSTITUTIONS], <https://books.google.com/books?id=p24FAAAAQAAJ> [<https://perma.cc/6UHJ-E7W7>]. Further discussion of this source appears below. See *infra* text accompanying notes 17–21.

purpose.<sup>10</sup> One example is *District of Columbia v. Heller*,<sup>11</sup> where the Court held that the Second Amendment protects an individual's right to keep and bear arms.<sup>12</sup> In reaching this conclusion, the Court relied, in part, on provisions in four early state constitutions that were similar to the Second Amendment.<sup>13</sup> References to early state constitutions and declarations of rights may increase in the future because their texts are now readily available online.<sup>14</sup>

Unless lawyers, judges, and law clerks receive instruction about these early state constitutions and declarations of rights, they may feel unprepared to make arguments that rely on these documents or to assess the arguments of others. To address this concern, this Article provides a guide to these documents. Part I explains how researchers can find transcriptions of the early state constitutions and declarations of rights. Part II provides an overview of the state constitutions and declarations of rights in force at the time of the Federal Constitutional Convention of 1787 and the drafting of the Bill of Rights in 1789. Part III describes, with examples, various ways in which early state constitutions influenced the drafting and approval of the U.S. Constitution.

Part IV then explains and critically discusses the three principal ways in which writers typically make claims about the original meaning of the U.S. Constitution that rely on early state constitutions and declarations of rights. One category of claims relies on these documents for evidence of the ordinary meaning of words in the U.S. Constitution. The next set of claims relies on a comparison of the language of the federal and state constitutional provisions. Finally, the third set of claims uses state constitutional provisions as examples from which to discern the meaning of flexible standards in the federal Constitution, such as "due process" or "executive power."

The appendix to this Article contains an extensive index prepared by the author with the help of his research assistants. The index contains one or more entries for every provision in the state constitutions and declarations of rights as they existed at the time of the Federal Constitutional Convention.

Before going further, two initial points regarding scope require brief mention. First, this Article discusses how courts and scholars have used or might use early state constitutions and declarations of rights to support claims about

10. For estimates of the number of cases relying on each of the state constitutions, see *infra* Sections II.A–J. No simple search query on Westlaw or Lexis will reveal all references to state constitutions and declarations of rights. But searching for the name of a state (e.g., Delaware, Maryland, or Virginia) or the state's abbreviation (e.g., "Del.," "Md.," or "Va.") within five or ten words of "constitution" or "rights" and within five or ten words of the year of the documents adoption (e.g., "1776") will locate many cases. Many examples of these cases are cited in this Article.

11. 554 U.S. 570 (2008).

12. *Id.* at 595.

13. See *id.* at 601 (referencing the Massachusetts, North Carolina, Pennsylvania, and Vermont constitutions or declarations of rights).

14. See *infra* Part I (discussing how to find the text of early state constitutions).

the original meaning of the U.S. Constitution. This Article, however, does not address the question of whether or to what extent the original meaning of the U.S. Constitution should influence the decision of modern constitutional questions. Other works ably address that longstanding debate.<sup>15</sup> Suffice it to say, a researcher might be interested in discovering the original meaning of a constitutional provision without necessarily believing that courts or others must follow that meaning today.

Second, the term “original meaning” has more than one definition. The term might refer to the original meaning that the Framers at the Constitutional Convention intended the Constitution to have (the “original intent”). Alternatively, the term might refer to the meaning that the participants in the state ratification debates understood the Constitution to have (the “original understanding”). And still further, the term might refer to what the words and phrases in the Constitution meant objectively, without reference to any individual or group’s subjective intent or understanding (the “original objective meaning” or “original public meaning”). Other works have explored these different definitions at length by providing examples of how they might differ, identifying important figures who have favored one type of meaning over another, and so forth.<sup>16</sup> This Article distinguishes among the different types of original meaning but takes no position on whether one type of meaning should carry more weight in constitutional interpretation.

15. For some of the best known writings arguing that courts should follow the original meaning, see generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631 (1993); and Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). For some of the best known works arguing the opposite, see generally Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CALIF. L. REV. 235 (1989); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

16. See, e.g., Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 N.Y.U. J.L. & LIBERTY 494, 499–502 (2009). For example, Professor Lino Graglia has supported efforts to discern the “original intent,” arguing that by definition “interpreting a document means to attempt to discern the intent of the author.” Lino A. Graglia, *“Interpreting” the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1024 (1992). James Madison famously supported the “original understanding,” contending that “we must look for [the meaning of the Constitution], not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.” James Madison, Remarks to Congress (Apr. 6, 1796), in 5 ANNALS OF CONG. 776 (1796) (Joseph Gales ed., 1855). In contrast, Justice Scalia supported the “original objective meaning,” explaining: “What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.” Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 2018).

# I. RESEARCHING EARLY STATE CONSTITUTIONS AND DECLARATIONS OF RIGHTS

Researchers can find the text of the early state constitutions and declarations of rights in several publications. The classic source for most of the documents is a single volume, first published in 1782, entitled *The Constitutions of the Several Independent States of America; the Declaration of Independence; the Articles of Confederation Between the Said States; the Treaties Between His Most Christian Majesty and the United States of America*.<sup>17</sup> The Continental Congress passed a resolution in 1780 directing three of its members to collect and compile the fundamental documents mentioned in this title,<sup>18</sup> and independent printers in Philadelphia and London subsequently published them in a 168-page book.<sup>19</sup> The Framers of the U.S. Constitution presumably had access to this book when they met in the summer of 1787 and discussed various state constitutions during their debates.<sup>20</sup> The book is now available for free online in a searchable format.<sup>21</sup> Unfortunately, the work is incomplete. The book does not contain the New Hampshire Constitution of 1784 nor the New York Bill of Rights of 1787, both of which postdate the book's publication. In addition, for reasons that are not clear, the book also does not contain the Virginia Bill of Rights of 1776 even though the book contains other state declarations of rights.

Another highly recommended work is Professor Francis Newton Thorpe's seven-volume compilation entitled *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*.<sup>22</sup> Published by the U.S. Government Printing Office in 1909,<sup>23</sup> and often cited by the Supreme Court,<sup>24</sup>

17. STATE CONSTITUTIONS, *supra* note 9.

18. *See id.* The text of the Continental Congress's resolution appears on the first (unnumbered) page.

19. *See id.*

20. *See infra* Part III.

21. *See* STATE CONSTITUTIONS *supra* note 9 (providing the URL for this book at Google Books).

22. THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (Francis Newton Thorpe ed., 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS]. The seven volumes are available online in a searchable format at these internet locations: 1 *id.*, <https://books.google.com/books?id=-3iHAAAAMAAJ> [<https://perma.cc/9BDL-FKGN>] (U.S. and Ala.-D.C.); 2 *id.*, <https://books.google.com/books?id=13mHAAAAMAAJ> [<https://perma.cc/V2LB-RAAK>] (Fla.-Kan.); 3 *id.*, <https://books.google.com/books?id=06AYAAAAIAAJ> [<https://perma.cc/46JK-XSAC>] (Ky.-Mass.); 4 *id.*, <https://books.google.com/books?id=L56HAAAAMAAJ> [<https://perma.cc/5T8D-5TF9>] (Mich.-N.H.); 5 *id.*, <https://books.google.com/books?id=9reHAAAAMAAJ> [<https://perma.cc/B4E2-RET4>] (N.J.-P.I.); 6 *id.*, <https://books.google.com/books?id=7BUZAAAAYAAJ> [<https://perma.cc/5FYX-QVVP>] (P.R.-Vt.); 7 *id.*, <https://books.google.com/books?id=H9SHAAAAMAAJ> [<https://perma.cc/AQA3-8RXP>] (Va.-Wyo.).

23. *See id.*

24. *See, e.g.,* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2633 n.3 (2015) (Thomas, J., dissenting) (citing 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 1688) (referencing the Maryland

this work is now also available online, without cost, in a searchable format.<sup>25</sup> Although this work contains the New Hampshire Constitution of 1784<sup>26</sup> and the Virginia Bill of Rights of 1776,<sup>27</sup> it does not include the Delaware Declaration of Rights of 1776 nor the New York Bill of Rights of 1787.

A more modern resource is William Finley Swindler's nine-volume compendium entitled *Sources and Documents of United States Constitutions*, which was published between 1973 and 1979.<sup>28</sup> This work, which the Supreme Court also frequently cites,<sup>29</sup> is available in many university libraries but is not available online. In addition, Yale University's Avalon Project has put the full text of many (but not all) of the early state constitutions online.<sup>30</sup> The straightforward format of this website generally makes it the easiest to use when it includes the relevant documents. The New York State Unified Court System's website contains a copy of the New York Bill of Rights of 1787, which is not available at the Avalon Project website and not included in either of the collections compiled by the Continental Congress or Professor Thorpe.<sup>31</sup>

## II. OVERVIEW OF THE EARLY STATE CONSTITUTIONS AND DECLARATIONS OF RIGHTS

By the spring of 1776, the Continental Army had been fighting the British forces for a year, and the colonial governments had generally ceased functioning in accordance with their charters.<sup>32</sup> In each of the colonies, a legislative body operating independent of the Crown—called a “convention,” “assembly,” or “provincial congress”—had emerged and assumed governmental powers.<sup>33</sup> The scope of these powers, however, generally was undefined by a written

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constitution); *District of Columbia v. Heller*, 554 U.S. 570, 601 (2008) (citing 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3083) (referencing Pennsylvania's constitution).

25. See sources cited *supra* note 22 (providing online locations for finding the full text of the seven volumes).

26. See 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2453.

27. See 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3812.

28. See generally WILLIAM F. SWINDLER, *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* (1973).

29. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 338 n.9 (2001) (first citing 2 SWINDLER, *supra* note 28, at 203; then citing 6 *id.* at 452; and then 7 *id.* at 177–78) (referencing Delaware, New Jersey, and New York's early constitutions); *Seminole Tribe v. Florida*, 517 U.S. 44, 161 (1996) (Souter, J., dissenting) (citing 6 SWINDLER, *supra* note 28, at 452) (referencing the New Jersey Constitution of 1776).

30. *18th Century Documents 1700-1799*, AVALON PROJECT, [http://avalon.law.yale.edu/subject\\_menus/18th.asp](http://avalon.law.yale.edu/subject_menus/18th.asp) [<https://perma.cc/TEN5-5GCC>].

31. *N.Y. Bill of Rights of January 26, 1787*, N.Y. CTS., [https://www.nycourts.gov/history/legal-history-new-york/documents/Publications\\_New-York-Bill-Of-Rights.pdf](https://www.nycourts.gov/history/legal-history-new-york/documents/Publications_New-York-Bill-Of-Rights.pdf) [<https://perma.cc/RSV3-DQQD>].

32. See JAMES BROWN SCOTT, *THE UNITED STATES OF AMERICA: A STUDY IN INTERNATIONAL ORGANIZATION* 129 (2002).

33. See DARREN PATRICK GUERRA, *PERFECTING THE CONSTITUTION: THE CASE FOR THE ARTICLE V AMENDMENT PROCESS* 43 (2013).

document.<sup>34</sup> On May 15, 1776, to address this uncertain situation, the Continental Congress urged “the respective assemblies and conventions of the United Colonies” to “adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.”<sup>35</sup>

Eleven of the colonies responded by drafting a state constitution or, in a few cases, redrafting a temporary state constitution that leaders in the colony had already hastily put together. Some of these states incorporated a declaration of rights into their new state constitutions while other states either did not have a declaration of rights or created a declaration of rights separate from their new constitution. Connecticut and Rhode Island, however, did not adopt state constitutions. Connecticut simply declared that it would adhere to its colonial charter “so far as an adherence to the same will be consistent with an absolute independence of this State on the Crown of Great Britain.”<sup>36</sup> Although Rhode Island declared independence from Great Britain on May 4, 1776, it did not adopt a state constitution until 1842.<sup>37</sup>

The following discussion provides an overview of what the colonies other than Connecticut and Rhode Island adopted prior to the drafting of the U.S. Constitution in 1787 and the U.S. Bill of Rights in 1789.

#### A. *The Delaware Constitution and Declaration of Rights of September 11, 1776*

When the Framers drafted the U.S. Constitution in the summer of 1787, two foundational documents were in effect in Delaware: the Delaware Constitution of September 11, 1776,<sup>38</sup> and the Declaration of Rights and Fundamental Rules of the Delaware State of September 11, 1776.<sup>39</sup> These documents were the product of a constitutional convention, which the Delaware General Assembly called in July 1776, that met in New Castle, Delaware, from August 27, 1776, until September 11, 1776.<sup>40</sup> Thirty elected delegates—ten from each of Delaware’s three counties—participated at the convention.<sup>41</sup> The

34. *See id.*

35. 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 341–42 (Worthington Chauncey Ford ed., 1906).

36. RESOLUTION APPROVING THE DECLARATION OF INDEPENDENCE (Oct. 10, 1776), reprinted in THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT 3 (Hartford, Case, Lockwood & Brainard Co. 1894).

37. 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3222.

38. DEL. CONST. of 1776, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 91; *see also* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 562 n.a.

39. DEL. DECLARATION OF RIGHTS & FUNDAMENTAL RULES of 1776, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 89. This document is not reprinted in Professor Thorpe’s book. *See* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22.

40. RANDY J. HOLLAND, THE DELAWARE STATE CONSTITUTION: A REFERENCE GUIDE 1–2 (2002).

41. *Id.* at 1.



Delaware Constitution and Declaration of Rights went into effect immediately after the convention, without further input or approval from the General Assembly or the people.<sup>42</sup> Delaware replaced this constitution in 1792.<sup>43</sup>

The Delaware Constitution of 1776, which had only thirty articles, did not dramatically alter the previously existing colonial Delaware government. The most notable change, in article 2, was creating a bicameral legislature.<sup>44</sup> In addition, the constitution contained an important, although limited, antislavery provision. Article 26 provided: “No person hereafter imported into this State from Africa ought to be held in slavery under any pretence whatever; and no negro, Indian, or mulatto slave ought to be brought into this State for sale, from any part of the world.”<sup>45</sup> The Delaware Declaration of Rights, which consisted of twenty-three articles, included many guarantees subsequently found in the U.S. Constitution. For example, in words mostly repeated in the Eighth Amendment, article 16 of the Delaware Declaration of Rights proclaimed that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.”<sup>46</sup>

Delaware sent five delegates to the Federal Constitutional Convention in 1787.<sup>47</sup> Three of these delegates—Richard Bassett, John Dickinson, and George Read—attended the Delaware Constitutional Convention of 1776 and played influential roles in drafting the Delaware Constitution and Declaration of Rights.<sup>48</sup>

The Supreme Court and individual justices have cited the Delaware Constitution and Declaration of Rights of 1776 in a variety of cases interpreting the U.S. Constitution.<sup>49</sup> For example, in *Collins v. Youngblood*,<sup>50</sup> the Court

42. 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 562 n.a.

43. DEL. CONST. of 1792, *reprinted in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 568 n.a.

44. *See* DEL. CONST. of 1776, art. 2, *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 91, and in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 562.

45. *Id.* art. 26, *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 96, and in 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 567.

46. DEL. DECLARATION OF RIGHTS & FUNDAMENTAL RULES of 1776, § 16, *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 90.

47. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 558 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

48. *See* HOLLAND, *supra* note 40, at 1–3.

49. A Westlaw search of [sct:adv:(Del!)/10 (const! rights)/10 “1776”] produces twenty-five cases (as of date of publication). Examples include *Crawford v. Washington*, 541 U.S. 36, 48 (2004) (citing DEL. DECLARATION OF RIGHTS & FUNDAMENTAL RULES of 1776, § 14) (noting that Delaware’s Declaration of Rights provided a right to confront witnesses); *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (citing DEL. DECLARATION OF RIGHTS & FUNDAMENTAL RULES of 1776, § 16) (noting that Delaware’s Declaration of Rights prohibited cruel and unusual punishments); *Faretta v. California*, 422 U.S. 806, 830 n.38 (1975) (citing DEL. DECLARATION OF RIGHTS & FUNDAMENTAL RULES of 1776, § 14) (noting that Delaware’s Declaration of Rights provided a right to counsel).

50. 497 U.S. 37 (1990).

looked to the Delaware Declaration of Rights and other early state constitutions to determine the meaning of the Ex Post Facto Clause in the U.S. Constitution.<sup>51</sup> The Court explained that these documents “appear to have been a basis for the Framers’ understanding of the provision.”<sup>52</sup>

B. *The Georgia Constitution of February 5, 1777*

The Georgia Constitution of February 5, 1777, was in effect in Georgia at the time of the Federal Constitutional Convention of 1787.<sup>53</sup> In April 1776, a provincial congress in Georgia first created a temporary constitution.<sup>54</sup> The delegates elected under this temporary constitution then conducted a constitutional convention from October 1776 to February 1777, producing the Georgia Constitution of February 5, 1777.<sup>55</sup> This constitution immediately went into effect without popular approval. It remained in effect until Georgia replaced it with a revised constitution in 1789.<sup>56</sup>

The Georgia Constitution of 1777 contained sixty-three articles “in no particular sequence.”<sup>57</sup> Although the first article expressly established a separation of powers,<sup>58</sup> giving most of the governmental authority to the state legislature.<sup>59</sup> A notable aspect of the Georgia Constitution was its provision for public schools. Article LIV mandated: “Schools shall be erected in each county, and supported at the general expence of the State, as the legislature shall hereafter point out.”<sup>60</sup> The constitution did not contain a separate bill of rights, but it included guarantees such as a right to indictment by a grand jury and trial by a jury.<sup>61</sup>

Georgia sent six delegates to the Federal Constitutional Convention in 1787.<sup>62</sup> One of these delegates, William Few, had participated in the Georgia Constitutional Convention that drafted the Georgia Constitution of 1777.<sup>63</sup>

51. *Id.* at 43 (citing DEL. DECLARATION OF RIGHTS & FUNDAMENTAL RULES of 1776, § 11).

52. *Id.*

53. GA. CONST. of 1777, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 143; *see also* 2 FEDERAL AND STATE CONSTITUTIONS, note 22, at 777 n.a.

54. *See* MELVIN B. HILL, JR., THE GEORGIA STATE CONSTITUTION: A REFERENCE GUIDE 3 (1994).

55. *See id.*

56. GA. CONST. of 1789, reprinted in 2 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 785.

57. HILL, *supra* note 54, at 4.

58. GA. CONST. of 1777, art. I, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 144, and in 2 FEDERAL AND STATE CONSTITUTIONS, note 22, at 778.

59. *See* HILL, *supra* note 54, at 3.

60. GA. CONST. of 1777, art. LIV, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 151, and in 2 FEDERAL AND STATE CONSTITUTIONS, note 22, at 784.

61. *See id.* arts. XLV, LXI, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 150–51, and in 2 FEDERAL AND STATE CONSTITUTIONS, note 22, at 784–85.

62. *See* 3 FARRAND’S RECORDS, *supra* note 47, at 559.

63. 2 DICTIONARY OF NORTH CAROLINA BIOGRAPHY 194 (William S. Powell ed., 1986).

Members of the Supreme Court have cited the Georgia Constitution of 1777 in several cases for evidence of the original meaning of the U.S. Constitution.<sup>64</sup> For example, in *Murdock v. Pennsylvania*,<sup>65</sup> the petitioners, who sold religious literature, argued that the First Amendment exempted them from a state tax on the sales of books.<sup>66</sup> The majority accepted this argument with qualifications.<sup>67</sup> Justice Reed dissented.<sup>68</sup> He cited several state constitutions, including the Georgia Constitution of 1777, to support his conclusion that such an exemption had not been intended by “contemporary advocates of the adoption of a Bill of Rights.”<sup>69</sup>

C. *The Maryland Constitution and Declaration of Rights of November 11, 1776*

The Maryland Constitution of November 11, 1776,<sup>70</sup> and the Maryland Declaration of Rights of November 11, 1776,<sup>71</sup> were in effect at the time of the Federal Constitutional Convention of 1787. These documents were produced at a state constitutional convention that met in Annapolis, Maryland, from August 14, 1776, to November 11, 1776.<sup>72</sup> The delegates to this convention were elected, but the documents they produced went into effect without being submitted to the voters for approval.<sup>73</sup> The Maryland Constitution of 1776 was replaced in 1851.<sup>74</sup>

The Maryland Constitution of 1776, which had sixty articles, did not greatly change the pre-existing form of government.<sup>75</sup> The Maryland Declaration of Rights, which had forty-seven articles, borrowed heavily from the Virginia Bill of Rights of 1776.<sup>76</sup> Article V notably granted broad suffrage rights, declaring “every man, having property in, a common interest with, and

64. A Westlaw search of [sct: adv: (Ga or Georgia) /10 (const! rights) /10 “1777”] yields nine cases (as of the date of publication).

65. 319 U.S. 105 (1943).

66. *See id.* at 107.

67. *Id.* at 112.

68. Justice Reed wrote a dissent in *Jones v. City of Opelika*, 319 U.S. 584 (1943), that applied to both the *Jones* and *Murdock* cases. *Murdock*, 319 U.S. at 117 (Reed, J., dissenting).

69. *Murdock*, 319 U.S. at 123 n.5 (Reed, J., dissenting).

70. MD. CONST. of 1776, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 104, and in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 1691.

71. MD. DECLARATION OF RIGHTS of 1776, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 98, and in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 1686.

72. Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 639 (1998).

73. *See* DAN FRIEDMAN, THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE 2 (2006).

74. *See* MD. CONST. of 1851, reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 1712.

75. *See* FRIEDMAN, *supra* note 73, at 3.

76. *See id.* at 2.

an attachment to the community, ought to have a right of suffrage.”<sup>77</sup> This provision, at least in theory, would have allowed non-whites and Catholics to vote so long as they owned property. An amendment in 1810, however, subsequently restricted the vote to “free white male citizen[s].”<sup>78</sup> None of Maryland’s delegates to the Federal Convention of 1787 participated in drafting the Maryland Declaration of Rights and Constitution of 1776.<sup>79</sup>

Members of the Supreme Court have cited the Maryland Constitution and Declaration of Rights for evidence of the original meaning of the U.S. Constitution in numerous cases.<sup>80</sup> For instance, in *United States v. Brewster*,<sup>81</sup> the Supreme Court held that the Speech and Debate Clause did not prohibit prosecuting a former U.S. senator for taking a bribe.<sup>82</sup> In interpreting the clause, the Court relied in part on a similar provision in article VIII of the Maryland Declaration of Rights of 1776.<sup>83</sup>

#### D. *The Massachusetts Constitution of June 15, 1780*

The Massachusetts Constitution of June 15, 1780, was in effect in Massachusetts when the Federal Constitutional Convention met in 1787.<sup>84</sup> This Massachusetts Constitution was adopted later than those in other states because the first attempt to create a constitution in Massachusetts failed. From June 1777 to February 1778, the Massachusetts legislature, known as the General Court, drafted a constitution for submission to the voters.<sup>85</sup> The eligible voters were all adult males.<sup>86</sup> The voters rejected this first proposed constitution because it did not protect individual rights and did not set up a system of checks and balances.<sup>87</sup> In 1779, Massachusetts held a second constitutional convention

77. MD. DECLARATION OF RIGHTS of 1776, art. V, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 99, and in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 1687.

78. MD. CONST. of 1810, art. XIV, reprinted in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 1705.

79. One participant at the Maryland Convention, Charles Carroll of Carrollton, was elected to represent Maryland at the Federal Constitutional Convention, but he did not attend. 3 FARRAND’S RECORDS, *supra* note 47, at 558.

80. A Westlaw search of [sct:adv:("md" maryland) /10 (const! rights) /10 "1776"] yields thirty-eight cases (as of date of publication).

81. 408 U.S. 501 (1972). The Speech and Debate Clause says: “[F]or any Speech or Debate in either House, they [Senators or Representatives] shall not be questioned in any other Place.” U.S. CONST. art. I, § 6.

82. *Brewster*, 408 U.S. at 525.

83. See *id.* at 547 (citing MD. DECLARATION OF RIGHTS of 1776, art. VIII (“[F]reedom of speech and debates, or proceedings in the Legislature, ought not to be impeached in any other court of judicature.”)).

84. MASS. CONST., reprinted in STATE CONSTITUTIONS, *supra* note 9, at 18, and in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 1888.

85. LAWRENCE M. FRIEDMAN & LYNNEA THODY, THE MASSACHUSETTS STATE CONSTITUTION 9 (2011).

86. LEONARD W. LEVY, SEASONED JUDGMENTS 307 (1995).

87. FRIEDMAN & THODY, *supra* note 85, at 9.

with elected delegates.<sup>88</sup> John Adams, Samuel Adams, and James Bowdoin did much of the drafting.<sup>89</sup> The convention finished its work on March 2, 1780, and the voters approved the new constitution effective June 15, 1780.<sup>90</sup> The Massachusetts Constitution of 1780 was first amended in 1821 when new “Articles of Amendment” were added.<sup>91</sup>

The Massachusetts Constitution of 1780 has a preamble and then is divided into parts, sections, chapters, and articles. “Part the First” includes thirty articles guaranteeing individual rights. The first article of Part the First states a principle of equality: “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.”<sup>92</sup> Courts in the early 1780s held that this provision made slavery unlawful in Massachusetts.<sup>93</sup>

“Part the Second,” which includes five chapters and many sections and articles, establishes the structure of the government. Massachusetts has amended the Constitution of 1780 on numerous occasions but has never replaced it. The Massachusetts Constitution of 1780, accordingly, is one of the oldest written constitutions in the world that is still in effect.

The organization of the Massachusetts Constitution of 1780 is more complicated than other states’ constitutions (which mostly contain a simple list of numbered articles). The following outline may be helpful:

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88. *See id.* at 10.

89. *See id.*

90. *See id.*

91. 1 FRANKLIN B. HOUGH, *AMERICAN CONSTITUTIONS: COMPRISING THE CONSTITUTION OF EACH STATE IN THE UNION, AND THE UNITED STATES, WITH THE DECLARATION OF INDEPENDENCE AND ARTICLES OF CONFEDERATION; EACH ACCOMPANIED BY A HISTORICAL INTRODUCTION AND NOTES, TOGETHER WITH A CLASSIFIED ANALYSIS OF THE CONSTITUTIONS* 617 (Albany, Weed, Parsons & Co. 1872).

92. MASS. CONST., pt. I, art. I, *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 19, *and in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 1889.

93. *See* FRIEDMAN & THODY, *supra* note 85, at 13.

**OUTLINE OF THE MASSACHUSETTS CONSTITUTION OF 1780****PREAMBLE**

**PART THE FIRST** A declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts [Arts. I–XXX]

**PART THE SECOND****Chapter I, THE LEGISLATIVE POWER.**

Section I, The General Court [Arts. I–IV]

Section II, The Senate [Arts. I–IX]

Section III, House of Representatives [Arts. I–XI]

**Chapter II, EXECUTIVE POWER.**

Section I, The Governor [Arts. I–XIII]

Section II, Lieutenant-Governor [Arts. I–III]

Section III, Council, and the Manner of settling Elections by the Legislature [Arts. I–VII]

Section IV, Secretary, Treasurer, Commissary, etc. [Arts. I–II]

**Chapter III, JUDICIARY POWER [Arts. I–V]****Chapter IV, DELEGATES TO CONGRESS****Chapter V, THE UNIVERSITY AT CAMBRIDGE, AND ENCOURAGEMENT OF LITERATURE, ETC.**

Section I, The University [Arts. I–III]

Section II, The Encouragement of Literature, etc.

**Chapter VI. OATHS AND SUBSCRIPTIONS; INCOMPATIBILITY OF AND EXCLUSION FROM OFFICES; PECUNIARY QUALIFICATIONS; COMMISSIONS; WRITS; CONFIRMATION OF LAWS; HABEAS CORPUS; THE ENACTING STYLE; CONTINUANCE OF OFFICERS; PROVISION FOR A FUTURE REVISAL OF THE CONSTITUTION, ETC. [Arts. I–XI]**

Two of the delegates from Massachusetts who participated in the Federal Constitutional Convention in 1787, Nathaniel Gorham and Caleb Strong, had been delegates to the Massachusetts Constitutional Convention.<sup>94</sup> Members of the Supreme Court have cited the Massachusetts Constitution of 1780 in

94. See A.H. EVERETT, JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY 10, 14 (Boston, Dutton & Wentworth 1832).

numerous cases interpreting the U.S. Constitution.<sup>95</sup> For example, in *Faretta v. California*,<sup>96</sup> the Supreme Court held that a criminal defendant in a state case has a right under the Sixth and Fourteenth Amendments to refuse representation by counsel.<sup>97</sup> In reaching this conclusion, the Court observed that the Massachusetts Constitution provided that the accused had a right to be heard “by himself, or his counsel at his election.”<sup>98</sup>

E. *The New Hampshire Constitution of June 2, 1784*

The New Hampshire Constitution of June 2, 1784, was in effect in New Hampshire at the time of the framing of the U.S. Constitution in 1787.<sup>99</sup> This document replaced a temporary constitution that had been adopted on January 5, 1776.<sup>100</sup> The preamble to the temporary constitution explained that creating the constitution was necessary given the “sudden and abrupt departure” of the governor.<sup>101</sup> The preamble further said, “[W]e never sought to throw off our dependence upon Great-Britain, but felt ourselves happy under her protection, while we could enjoy our constitutional rights and privileges.”<sup>102</sup> It further expressed hope that “a reconciliation between us and our parent state can be effected.”<sup>103</sup>

When reconciliation with Great Britain did not occur, the state government therefore called for a new constitutional convention to propose a replacement for the temporary constitution. This convention proposed a new constitution in June 1779, but the voters rejected the replacement in September 1781.<sup>104</sup> At town meetings where the proposal was discussed, additional amendments were proposed.<sup>105</sup> The voters also rejected an amended version of the same proposed constitution in August 1782.<sup>106</sup> New Hampshire then held a third constitutional convention that produced a revised proposal on October 31,

95. A Westlaw search of [sct: adv:(mass!) /10 (const! rights) /10 “1780”] yields fifty-seven cases (as of date of publication).

96. 422 U.S. 806 (1975).

97. *See id.* at 807, 835–36.

98. *See id.* at 829 n.38 (internal quotation marks omitted) (quoting MASS. CONST. pt. I, art. VIII).

99. N.H. CONST. of 1784, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2453. Unlike the other state constitutions discussed in this Article, the New Hampshire Constitution of 1784 is not included in *State Constitutions* because it was approved after the publication date of that work.

100. *See* STATE CONSTITUTIONS, *supra* note 9, at 3–6; *see also* W. F. Dodd, *The First State Constitutional Conventions, 1776–1783*, 2 AM. POL. SCI. REV. 545, 546 (1908).

101. N.H. CONST. of 1776, pmbl., *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2452.

102. *Id.*

103. *Id.*

104. *See* Dodd, *supra* note 100, at 549.

105. *See* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2453 n.b.

106. *See id.*

1783, that included many amendments proposed at town meetings.<sup>107</sup> The voters approved this new constitution, and it became effective on June 2, 1784. New Hampshire replaced this constitution in 1792.<sup>108</sup>

The New Hampshire Constitution of 1784 is divided into two parts. Part I is a “Bill of Rights,” and it contains thirty-eight detailed articles.<sup>109</sup> Part II specifies the “Form of Government,” establishing a government with a bicameral legislature as well as separate executive and judicial branches.<sup>110</sup> Unfortunately, provisions in Part II are difficult to cite because Part II is not divided into numbered articles, sections, or paragraphs.<sup>111</sup>

The New Hampshire Constitution is especially notable because many of the provisions of the New Hampshire Bill of Rights not only contain specific guarantees but also explain the reasons for those guarantees. Here are a few examples:

XXI. In order to reap the fullest advantage of the inestimable privilege of the trial by jury, great care ought to be taken that none but qualified persons should be appointed to serve; and such ought to be fully compensated for their travel, time and attendance.

XXII. The Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved.

XXIII. Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offences.<sup>112</sup>

New Hampshire’s two delegates to the Constitutional Convention of 1787 were John Langdon and Nicholas Gilman. Both men were familiar with the New Hampshire Constitution of 1784. John Langdon had participated in the state convention that drafted this state constitution,<sup>113</sup> and he later held prominent positions in the state government. Although Nicholas Gilman did not participate in drafting the New Hampshire Constitution of 1784,<sup>114</sup> he served in the state government under the new constitution.

107. *See id.*

108. N.H. CONST. of 1792, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2471.

109. *See* N.H. CONST. of 1784, pt. I, arts. I–XXVIII, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2453–56.

110. *See id.* pt. II, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2458.

111. *See id.*

112. *Id.* pt. I, arts. XXI–XXIII, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2456.

113. JAMES FAIRBANKS COLBY, MANUAL OF THE CONSTITUTION OF THE STATE OF NEW HAMPSHIRE 87 (1912).

114. *See id.* at 86–87.



The Supreme Court has relied on the New Hampshire Constitution of 1784 in determining the original meaning of the U.S. Constitution.<sup>115</sup> For example, in *Harmelin v. Michigan*,<sup>116</sup> the Court held that a mandatory sentence of life in prison for possession of 650 grams of cocaine did not violate the Eighth Amendment's prohibition against "cruel and unusual punishment."<sup>117</sup> Writing for the majority, Justice Scalia reasoned that "to use the phrase 'cruel and unusual punishment' to describe a requirement of proportionality would have been an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly."<sup>118</sup> Justice Scalia noted that "[p]roportionality provisions had been included in several State Constitutions . . . [and there] is little doubt that those who framed, proposed, and ratified the Bill of Rights were aware of such provisions, yet chose not to replicate them."<sup>119</sup> He emphasized that the New Hampshire Constitution of 1784 contained both a prohibition of "cruel or unusual punishments" and a requirement that "all penalties ought to be proportioned to the nature of the offence."<sup>120</sup> Justice Scalia presumed the latter provision would not have been necessary if the prohibition against cruel and unusual punishments also required proportional sentences.<sup>121</sup>

#### F. *The New Jersey Constitution of July 2, 1776*

The New Jersey Constitution of July 2, 1776, was in effect in New Jersey at the Federal Constitutional Convention in 1787.<sup>122</sup> After its colonial government collapsed, New Jersey elected a "provincial congress" in May 1776 with delegates from each county. On June 21, 1776, the provincial congress voted to form a government. A committee of ten delegates drafted the constitution over a five-day period. This committee included Dr. John Witherspoon, the President of the College of New Jersey (now Princeton University).<sup>123</sup> The provincial congress debated the draft for just two days and then approved it with minor modifications on July 2, 1776.<sup>124</sup> The constitution was not submitted for approval to the people but remained in effect for sixty-

115. A Westlaw search of [sct:adv: ("n.h." "new hampshire") /10 (const! rights) /10 "1784"] yields twenty-eight cases (as of date of publication).

116. 501 U.S. 957 (1991).

117. *Id.* at 957.

118. *Id.* at 977.

119. *Id.* (footnote omitted) (citations omitted).

120. *See id.* at 978 (citing N.H. CONST. of 1784, pt. I, arts. XVIII, XXXIII).

121. *Id.* at 978 n.9.

122. N.J. CONST. of 1776, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 74; *see also* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2594 n.a.

123. LUCIUS Q. C. ELMER, THE CONSTITUTION AND GOVERNMENT OF THE PROVINCE AND STATE OF NEW JERSEY WITH BIOGRAPHICAL SKETCHES OF THE GOVERNORS FROM 1776 TO 1845, at 28 (Martin R. Dennis & Co. 1872).

124. *See id.* at 28–29.

eight years.<sup>125</sup> On September 20, 1777, a minor amendment substituted the word “State” for “colony,” reflecting New Jersey’s independence.<sup>126</sup>

The New Jersey Constitution of July 2, 1776, had only twenty-three short articles.<sup>127</sup> These articles addressed both the structure of government and individual rights. The constitution was perhaps most famous for its treatment of voting rights. Article IV guaranteed the right to vote to “all inhabitants of this Colony, of full age, who are worth fifty pounds proclamation money.”<sup>128</sup> Women and non-whites who met these qualifications could vote.<sup>129</sup>

New Jersey sent six delegates to the Federal Constitutional Convention of 1787.<sup>130</sup> Three of them would have had an expert understanding of the New Jersey Constitution of 1776. William Paterson signed the New Jersey Constitution of 1776 as the Secretary of the Provincial Congress.<sup>131</sup> David Brearley helped draft the New Jersey Constitution of 1776 and served as the Chief Justice of New Jersey; in this capacity, he decided the case of *Holmes v. Walton*—cited in *State v. Parkhurst*<sup>132</sup>—which struck down a state law as unconstitutional.<sup>133</sup> And William Livingston was the first governor under the new state constitution.<sup>134</sup>

The Supreme Court has relied on the New Jersey Constitution of 1776 in determining the meaning of the U.S. Constitution in various cases.<sup>135</sup> For example, in *Locke v. Davey*,<sup>136</sup> the Supreme Court had to decide whether the

125. The New Jersey Constitution of 1776 was replaced with a new constitution in 1844. See 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2599.

126. See *id.* at 2594 n.b.

127. See N.J. CONST. of 1776, arts. I–XXIII, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 69–74, and in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2594–98.

128. *Id.* art. IV, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 70, and in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2595. “Proclamation money” refers to the value of coins, as decreed by Queen Anne, that were circulating in the colonies. See Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL’Y 1017, 1034 & n.88 (2008).

129. See Jan Ellen Lewis, *Rethinking Women’s Suffrage in New Jersey, 1776–1807*, 63 RUTGERS L. REV. 1017, 1024–25 (2011) (noting “there is abundant record of women voting in New Jersey” after 1797).

130. See *The Founding Fathers: New Jersey*, NAT’L ARCHIVES (Dec. 18, 2018), <https://www.archives.gov/founding-docs/founding-fathers-new-jersey> [https://perma.cc/439A-WSQM].

131. ALEXANDER LEITCH, A PRINCETON COMPANION 353–54 (1978).

132. 9 N.J.L. 427, 444 (N.J. 1802), *aff’d*, 9 N.J.L. 434 (N.J. 1828) (discussing the case of *Holmes v. Walton*). The *Holmes v. Walton* case was not reported. A thorough description of the case appears in Scott’s article. See Austin Scott, *Holmes v. Walton: The New Jersey Precedent*, 4 AM. HIST. REV. 456, 457–58 (1899).

133. See *Parkhurst*, 9 N.J.L. at 446–48 (holding that a law requiring a clerk of court to vacate his position upon being elected to the Senate violated the New Jersey Constitution).

134. See *The Founding Fathers: New Jersey*, *supra* note 130.

135. A Westlaw search of [sct:adv: (“N.J.” “New Jersey”) /10 const! /10 “1776”] yields thirteen cases (as of date of publication).

136. 540 U.S. 712 (2004).

Free Exercise Clause prevented states from denying scholarship money to theology students but not to students in other fields. In his opinion for the majority, Chief Justice Rehnquist observed: “Most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry.”<sup>137</sup> He cited article XVIII of the New Jersey Constitution of 1776 among other provisions.<sup>138</sup> He then said: “The plain text of these constitutional provisions prohibited *any* tax dollars from supporting the clergy. We have found nothing to indicate . . . that these provisions would not have applied so long as the State equally supported other professions or if the amount at stake was *de minimis*.”<sup>139</sup>

G. *The New York Constitution of April 20, 1777, and the New York Bill of Rights of January 26, 1787*

The New York Constitution of April 20, 1777,<sup>140</sup> and the New York Bill of Rights of January 26, 1787,<sup>141</sup> were in effect at the time of the framing of the U.S. Constitution.<sup>142</sup> The New York Constitution was produced by a body calling itself the “Convention of Representatives of the State of New York,” which met at several locations between July 10, 1776, and April 20, 1777.<sup>143</sup> The constitution contains a lengthy preamble detailing the “many tyrannical and oppressive usurpations of the King and Parliament of Great Britain on the rights and liberties of the people.”<sup>144</sup> The preamble is then followed by forty-two substantive articles.<sup>145</sup> These articles mostly address the structure of the government. The New York Constitution notably retained some aspects of the colonial charter that seem unusual for a state constitution today. For example, article XVIII empowered the governor to prorogue the legislature (i.e., discontinue a session of the legislature), just as colonial governors could halt

137. *Id.* at 723.

138. *Id.* Article XVIII of the New Jersey Constitution of 1776 guaranteed that “no person shall ever . . . be obliged to pay tithes, taxes or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry.” N.J. CONST. of 1776, art. XVIII, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 72–73, and in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2597.

139. *Davey*, 540 U.S. at 723.

140. N.Y. CONST. of 1777, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 57, and in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2623.

141. N.Y. BILL OF RIGHTS of 1787, reprinted in 1 LAWS OF THE STATE OF NEW YORK 47 (1813). This document is not included in either *State Constitutions* or Professor Thorpe’s collection.

142. See John P. Kaminski, *A Rein on Government: New York’s Constitution of 1777 and Bill of Rights of 1787*, 1 N.Y. LEGAL HIST. 7, 9 (2005).

143. See PETER J. GALIE, THE NEW YORK STATE CONSTITUTION 2 (2011).

144. N.Y. CONST. of 1777, pmbl., reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2623.

145. See *id.* arts. I–XLII, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 57–68, and in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2628–37.

colonial assemblies.<sup>146</sup> Although the constitution did not contain a separate bill of rights, it did protect some individual rights. For example, article XXXIV provided: “[I]n every trial on impeachment, or indictment for crimes or misdemeanors, the party impeached or indicted shall be allowed counsel, as in civil actions.”<sup>147</sup> The New York Constitution of 1777 was replaced in 1821.<sup>148</sup>

Unlike in other states, the New York legislature enacted the state’s bill of rights as an ordinary law as opposed to a constitutional document.<sup>149</sup> The New York Bill of Rights contained thirteen sections. The most notable feature of the bill of rights is that it was the only declaration of rights at the time of the framing to use the term “due process,” a phrase which appears in four sections.<sup>150</sup> For example, the fifth section says “no person, of what estate or condition soever shall be taken or imprisoned, or disinherited or put to death without being brought to answer by due process of law.”<sup>151</sup>

At least two of the Framers at the Federal Constitutional Convention, Gouverneur Morris and Robert Yates, had a thorough knowledge of the New York Constitution of 1777 because both had participated in the New York state constitutional convention.<sup>152</sup> Another Framers, Alexander Hamilton, was a member of the New York legislature that enacted the New York Bill of Rights in January of 1787.<sup>153</sup> And although not a delegate to the Federal Constitutional Convention, John Jay led the drafting of the New York Constitution and later played a key role in advocating for adoption of the U.S. Constitution as one of the co-authors of the *Federalist Papers*.<sup>154</sup>

Members of the Supreme Court have cited the New York Constitution of 1777 and the New York Bill of Rights of 1787 in many cases when discerning

146. *Id.* art. XVIII, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 62, and in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2632.

147. *Id.* art. XXXIV, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 65, and in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2635.

148. N.Y. CONST. of 1821, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2639.

149. See Act of Jan. 26, 1787, ch. 1, 1787 N.Y. Laws 344 (containing text of the Bill of Rights as originally passed); see also *People ex rel. Darling v. Warden of City Prison*, 139 N.Y.S. 277, 284 (N.Y. App. Div. 1913) (“The provisions of the Bill of Rights, in this State, are embodied in the statutes . . . not in the Constitution.”).

150. See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 441 (2010).

151. Act of Jan. 26, 1787, 1787 N.Y. Laws at 344.

152. See *The Founding Fathers: New York*, NAT’L ARCHIVES (Dec. 19, 2018), <https://www.archives.gov/founding-docs/founding-fathers-new-york> [https://perma.cc/VBR5-LBA5].

153. See *id.*

154. See *id.*

the original meaning of the U.S. Constitution.<sup>155</sup> For example, in *Doe v. Reed*,<sup>156</sup> the Supreme Court held that a state law allowing public disclosure of certain petitions to the state legislature did not violate the First Amendment's Freedom of Speech Clause.<sup>157</sup> In his concurring opinion, Justice Scalia noted that, at the time of the Framing, state constitutions did not protect secrecy in voting.<sup>158</sup> As one example, he cited article VI of the New York Constitution of 1777, which authorized both voice voting and paper ballots.<sup>159</sup>

H. *The North Carolina Constitution of December 18, 1776, and the North Carolina Declaration of Rights of December 17, 1776*

The North Carolina Constitution of December 18, 1776,<sup>160</sup> and the North Carolina Declaration of Rights of December 17, 1776,<sup>161</sup> were in effect in North Carolina at the time of the framing of the U.S. Constitution. These documents were drafted and approved by a provincial congress that met in Halifax, North Carolina, between November 13 and December 18, 1776.<sup>162</sup> These documents went into effect immediately without a popular vote.<sup>163</sup> They remained in effect until the North Carolina Constitution was replaced in 1868.<sup>164</sup>

The North Carolina Constitution of 1776 contained forty-six articles and the North Carolina Declaration of Rights contained twenty-five articles.<sup>165</sup> One of the most notable features of the constitution was that it placed most of the power in the General Assembly. For example, the General Assembly had the power to appoint the governor and to appoint state judges.<sup>166</sup>

155. A Westlaw search for [sct:adv: ("N.Y." "New York") /10 const! /10 "1777"] yields twenty-two cases citing the New York Constitution of 1777, and a Westlaw search for [sct:adv: (("New York" "N.Y.") /15 bill /15 "1787")] yields two cases citing the New York Bill of Rights of 1787 (as of date of publication).

156. 561 U.S. 186 (2010).

157. *See id.* at 202.

158. *See id.* at 226 (Scalia, J., concurring).

159. *Id.* (citing N.Y. CONST. of 1777, art. VI).

160. N.C. CONST. of 1776, *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 122; *see also* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* 22, at 2787 n.a.

161. N.C. DECLARATION OF RIGHTS of 1776, *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 122, *and in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2787.

162. *See* JOHN V. ORTH & PAUL M. NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 4–5 (2013).

163. *See id.* at 5.

164. N.C. CONST. of 1868, *reprinted in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2800.

165. *See* N.C. CONST. of 1776, arts. I–XLVI, *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 125–30, *and in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* 22, at 2790–94; N.C. DECLARATION OF RIGHTS of 1776, arts. I–XXV, *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 122–24, *and in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* 22, at 2787–89.

166. *See* N.C. CONST. of 1776, art. XV, *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 128, *and in* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* 22, at 2791.

North Carolina sent five delegates to the Federal Constitutional Convention of 1787: William Blount, Richard Dobbs Spaight, Hugh Williamson, William R. Davie, and Alexander Martin.<sup>167</sup> None of these men appears to have served in the Fifth Provincial Congress that drafted the North Carolina Constitution of 1776,<sup>168</sup> but all held important state governmental positions in North Carolina and therefore would have been familiar with the terms of the constitution and the declaration of rights.<sup>169</sup>

Members of the Supreme Court have relied on the North Carolina Constitution and Declaration of Rights of 1776 in discerning the original meaning of the U.S. Constitution.<sup>170</sup> For example, in *United States v. Hubbell*,<sup>171</sup> Justice Thomas wrote a concurrence in which he expressed the view that “the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of any incriminating evidence.”<sup>172</sup> Justice Thomas noted that many state constitutions and declarations of rights at the time, including the North Carolina Declaration of Rights, said that no person could be required to “give” evidence against himself.<sup>173</sup> These provisions suggest that the privilege against self-incrimination extends not merely to testifying but also to responding to a subpoena duces tecum.<sup>174</sup>

#### I. *The Pennsylvania Constitution of September 28, 1776*

When the U.S. Constitutional Convention met in 1787, Pennsylvania was governed by the Pennsylvania Constitution of September 28, 1776.<sup>175</sup> This constitution was drafted by a state convention consisting of delegates from each county in Pennsylvania.<sup>176</sup> The Pennsylvania Constitution went into effect without any further approval by the people<sup>177</sup> and was replaced in 1790.<sup>178</sup>

167. *The Founding Fathers: North Carolina*, NAT’L ARCHIVES (Dec. 19, 2018), <https://www.archives.gov/founding-docs/founding-fathers-north-carolina> [https://perma.cc/E9W8-22FV].

168. *See id.*

169. *See id.*

170. A Westlaw search for [sct:adv: (“N.C.” “North Carolina”) /5 (const! rights) /5 “1776”] yields twenty-three cases (as of date of publication).

171. 530 U.S. 27 (2000).

172. *Id.* at 49 (Thomas, J., concurring).

173. *See id.* (citing N.C. DECLARATION OF RIGHTS of 1776, art. VII).

174. *See id.*

175. PA. CONST. of 1776, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 75; *see also* 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3081 n.a.

176. *See* Jeffrey P. Bauman, *Pennsylvania: Virtue, Liberty, and Independence*, in THE CONSTITUTIONALISM OF AMERICAN STATES 146, 149 (George E. Connor & Christopher W. Hammons eds., 2008).

177. *See id.*

178. PA. CONST. of 1790, reprinted in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3092.

The Pennsylvania Constitution of 1776 consisted of a preamble and two chapters. Chapter I is a “Declaration of the Rights of the Inhabitants of the State of Pennsylvania.”<sup>179</sup> It contains sixteen articles guaranteeing freedom of speech, jury trials, and other liberties.<sup>180</sup> Chapter II provided the “Plan or Frame of Government” and had forty-seven sections.<sup>181</sup>

The Pennsylvania Constitution was notable for several reasons. Unlike the constitutions in other states, it created a government consisting of a powerful single-chamber legislature and no independent governor.<sup>182</sup> And much like Congress under the Articles of Confederation, the legislature elected its own president for a one-year term.<sup>183</sup> The constitution was also one of the most democratic of the time because it extended the right to vote to “[e]very freeman of the full age of twenty-one years, having resided in this state for the space of one whole year next before the day of election for representatives, and paid public taxes during that time.”<sup>184</sup>

Two of the Pennsylvania delegates to the Federal Constitutional Convention of 1787 had participated in the convention that drafted the Pennsylvania Constitution of 1776.<sup>185</sup> One was Benjamin Franklin, who had been one of the principal drafters of the Pennsylvania Constitution,<sup>186</sup> and the other was George Clymer.<sup>187</sup>

The Supreme Court has cited the Pennsylvania Constitution of 1776 as an aid in discerning the meaning of the U.S. Constitution in many cases.<sup>188</sup> For

179. PA. CONST. of 1776, ch. II, *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 76, and in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3082.

180. *Id.* ch. I, arts. I–XVI, *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 76–78, and in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3082–84.

181. *Id.* ch. II, §§ 1–47, *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 79–88, and in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3084–91.

182. *Id.* ch. II, § 2 (creating single-chamber legislature), *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 79, and in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3084; *id.* ch. II, § 19 (specifying the selections, composition, and powers of the president and executive council), *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 79, 83–84, and in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3084, 3086–87.

183. *Id.* ch. II, § 19, *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 83, and in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3087.

184. *Id.* ch. II, § 6, *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 79, and in 5 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3084.

185. *See The Founding Fathers: Pennsylvania*, NAT’L ARCHIVES (Sept. 18, 2019), <https://www.archives.gov/founding-docs/founding-fathers-pennsylvania> [<https://perma.cc/3QH5-3ARF>] (describing the Pennsylvania delegates to the Federal Constitutional Convention).

186. *See id.*

187. *See id.*; *see also* PENNSYLVANIA CONSTITUTIONAL CONVENTION, THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, THE MINUTES OF THE CONVENTION THAT FORMS THE PRESENT CONSTITUTION OF PENNSYLVANIA, TOGETHER WITH THE CHARTER TO WILLIAM PENN, THE CONSTITUTIONS OF 1776 AND 1790, AND A VIEW OF THE PROCEEDINGS OF THE CONVENTION OF 1776, at 45 (Harrisburg, John S. Wiestling Market 1825).

188. A Westlaw search of [sct:adv: (“Pa.” “Penn!”) /5 (const!) /5 “1776”] yields twenty-one cases (as of the date of publication).

example, in *Atwater v. City of Lago Vista*,<sup>189</sup> the Supreme Court concluded that the Fourth Amendment does not prohibit a warrantless arrest for a minor criminal offense.<sup>190</sup> Writing for the majority, Justice Souter reasoned that the Fourth Amendment was modeled on provisions like article X of the Pennsylvania Constitution of 1776 and other similar state constitutions.<sup>191</sup> Because these states historically empowered their police to make warrantless misdemeanor arrests, the Court concluded the practice did not violate the Fourth Amendment as originally understood.<sup>192</sup>

J. *The South Carolina Constitution of March 19, 1778*

The South Carolina Constitution of March 19, 1778, was in effect when the Federal Constitutional Convention met in the summer of 1787.<sup>193</sup> This constitution, however, was not the first in South Carolina. A “Provincial Congress” in South Carolina had created a temporary constitution on March 26, 1776.<sup>194</sup> The state legislature that was formed under this constitution then drafted and approved the South Carolina Constitution of March 19, 1778.<sup>195</sup> This constitution was not submitted to the people, but it remained in effect until replaced in 1790.<sup>196</sup>

The Constitution of 1778 had forty-five sections and mostly concerned the structure of government; it did not contain a separate bill of rights.<sup>197</sup> The South Carolina Constitution of 1778 was perhaps the most religiously oriented and the least democratic of all the state constitutions. For example, article XXXVIII provided: “The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State.”<sup>198</sup> Article XII provided: “[N]o person shall be eligible to a seat in the . . . senate unless he be of the Protestant religion . . . .”<sup>199</sup> And article XIII similarly provided: “No person shall be eligible to sit in the house of representatives unless he be of the

189. 532 U.S. 318 (2001).

190. *Id.* at 354.

191. *See id.* at 339.

192. *See id.*

193. S.C. CONST. of 1778, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 131; *see also* 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3248 n.a.

194. *See* COLE BLEASE GRAHAM, JR., THE SOUTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE 10 (2007).

195. *See id.* at 11.

196. S.C. CONST. of 1790, reprinted in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3248 n.a, 3258.

197. *See* S.C. CONST. of 1778, §§ I–XLV, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 131–42, and in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3248–57.

198. *Id.* § XXXIII, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 139, and in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3255.

199. *Id.* § XII, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 134, and in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3250.



Protestant religion . . . .”<sup>200</sup> The South Carolina Constitution of 1778 was also notable because it restricted voting to white Protestant men who owned at least fifty acres of land.<sup>201</sup>

South Carolina’s delegation to the Federal Constitutional Convention of 1787 was highly familiar with the South Carolina Constitution of 1778. John Rutledge was the President of South Carolina under the state constitution of 1776 when the Constitution of 1778 was drafted, and he opposed its adoption.<sup>202</sup> Charles Cotesworth Pinckney, Charles Pinckney, and Pierce Butler all served in the South Carolina legislature in 1778.<sup>203</sup>

Members of the Supreme Court have relied on the South Carolina Constitution of 1778 in determining the original meaning of the U.S. Constitution in a few cases.<sup>204</sup> In his concurrence in the judgment in *Holder v. Hall*,<sup>205</sup> Justice Thomas asserted that “there is no principle inherent in our constitutional system, or even in the history of the Nation’s electoral practices, that makes single-member districts the ‘proper’ mechanism for electing representatives to governmental bodies.”<sup>206</sup> As part of the support for this proposition, Justice Thomas cited the South Carolina Constitution and other state constitutions that set up multi-member districts for selecting legislatures.<sup>207</sup>

#### K. *The Virginia Bill of Rights of June 12, 1776, and Constitution of June 29, 1776*

At the time of the Federal Constitutional Convention of 1787, the Virginia Constitution of June 29, 1776,<sup>208</sup> and the Virginia Bill of Rights of June 12, 1776,<sup>209</sup> were in effect in Virginia. These documents were drafted and approved by a general convention of delegates from counties and incorporated entities that met at a convention in Williamsburg from May 6, 1776, until July 5, 1776.<sup>210</sup> The delegates included most of the prominent Virginia politicians of the era.

200. *Id.* § XIII, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 136, and in 6 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3252.

201. *See id.*

202. *See* GRAHAM, *supra* note 194, at 32 n.29.

203. *See The Founding Fathers: South Carolina*, NAT’L ARCHIVES (last updated Dec. 19, 2018), <https://www.archives.gov/founding-docs/founding-fathers-south-carolina> [https://perma.cc/A9YH-3E62] (describing the delegates to the Federal Constitutional Convention from South Carolina).

204. A Westlaw search of [sct:adv:("S.C." "south carolina") /5 (const!)/5 "1778"] yields four cases (as of date of publication).

205. 512 U.S. 874 (1994).

206. *Id.* at 897 (Thomas, J., concurring in the judgment).

207. *See id.* at 898 n.4 (citing S.C. CONST. of 1778, art. XIII).

208. VA. CONST. of 1776, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 117; *see also* 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3814 n.a.

209. VA. BILL OF RIGHTS of 1776, reprinted in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3812 n.a. This document is not included in *State Constitutions*.

210. *See* JOHN DINAN, THE VIRGINIA STATE CONSTITUTION 3–6 (2d ed. 2014).

George Mason was the principal drafter of the Virginia Bill of Rights,<sup>211</sup> and he received assistance from James Madison.<sup>212</sup> Thomas Jefferson also sent suggestions, but they arrived late because he was in Philadelphia at the Constitutional Convention drafting the Declaration of Independence.<sup>213</sup> The documents were not submitted to the people for approval.<sup>214</sup> The constitution was revised in 1831.<sup>215</sup>

The Virginia Constitution was not divided into articles or numbered paragraphs.<sup>216</sup> It contains a preamble, a declaration of independence, and provisions establishing the new form of government.<sup>217</sup> The Virginia Bill of Rights has sixteen sections and is famous for being the first written bill of rights in North America.<sup>218</sup> George Mason modeled the Virginia Bill of Rights on the English Bill of Rights but made significant changes.<sup>219</sup> Like the New Hampshire Bill of Rights, a notable feature of the Virginia Bill of Rights is that most articles not only state the right protected but also explain the reason for its protection. For example, section 12 said: “That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments.”<sup>220</sup>

Most of the delegates that Virginia sent to the Federal Constitutional Convention in 1787 were familiar with the Virginia Constitution and Bill of Rights. John Blair, James Madison, George Mason, and Edmund Randolph all attended the Virginia Convention of 1776.<sup>221</sup> Only George Washington—who

211. *Id.* at 4.

212. *See id.* at 4–5.

213. *See id.* at 5.

214. *See id.* at 6.

215. VA. CONST. of 1831, reprinted in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3819.

216. *See* VA. CONST. of 1776, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 117–21, and in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3814–19.

217. *See id.*, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 117–21, and in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3814–19.

218. *See* VA. BILL OF RIGHTS of 1776, §§ 1–16, reprinted in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3813–14; 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, 856 (2014).

219. *See* John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution’s Eighth Amendment*, 27 WM. & MARY BILL RTS. J. 989, 997 (2019).

220. VA. BILL OF RIGHTS of 1776, § 12, reprinted in 7 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 3814. In contrast, other declarations of rights often provide the same protections but do not provide reasons. *See, e.g.*, DEL. DECLARATION OF RIGHTS & FUNDAMENTAL RULES of 1776, § 23, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 90 (“[T]he liberty of the press ought to be inviolably preserved.”).

221. *See The Founding Fathers: Virginia*, NAT’L ARCHIVES (last updated Dec. 19, 2018), <https://www.archives.gov/founding-docs/founding-fathers-virginia> [<https://perma.cc/H3FL-TMER>] (identifying the Virginia delegates to the Federal Constitutional Convention).

was busy fighting the Revolutionary War—and James McClurg had not participated at the Virginia Constitutional Convention.<sup>222</sup>

The Supreme Court has cited the Virginia Constitution and Bill of Rights in many cases.<sup>223</sup> In *Marsh v. Chambers*,<sup>224</sup> the Supreme Court held that opening a session of a state legislature with a prayer does not violate the Establishment Clause.<sup>225</sup> In reaching this conclusion, the Court relied in part on the Virginia Bill of Rights of 1776. Writing for the majority, Chief Justice Burger reasoned:

In 1776, the Virginia Convention adopted a Declaration of Rights that included, as Article 16, a guarantee of religious liberty that is considered the precursor of both the Free Exercise and Establishment Clauses . . . . Virginia was also among the first to disestablish its church. Both before and after disestablishment, however, Virginia followed the practice of opening legislative sessions with prayer.<sup>226</sup>

### III. RELEVANCE OF EARLY STATE CONSTITUTIONS

Before discussing the principal ways that parties might use state constitutions and declarations of rights to support claims about the original meaning of the Constitution, some discussion of the relevance of these documents is in order. The Framers brought a wealth of knowledge and experience to the project of creating the federal government. They were versed in history and political science, and they had years of governmental leadership experience.<sup>227</sup> Yet few, if any, other sources had more influence on the form and content of the U.S. Constitution and Bill of Rights than the state constitutions and declarations of rights.

The federal Constitution was not the first constitution drafted in the United States. On the contrary, as shown above, eleven of the states had drafted constitutions—some of them even had drafted more than one.<sup>228</sup> At least twenty of the fifty-five Framers at the Federal Constitutional Convention had participated in drafting state constitutions.<sup>229</sup> Others, such as William Paterson

222. *See id.*

223. The Westlaw search [sct:adv:(virginia va) /10 (const! rights) /10 “1776”] yields forty-one cases (as of date of publication).

224. 463 U.S. 783 (1983).

225. *Id.* at 794–95.

226. *Id.* at 787 n.5.

227. *See* Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707, 1712–17 (2012) [hereinafter Maggs, *Guide to Convention Records*] (describing the participants at the Federal Constitutional Convention).

228. *See supra* Part II.

229. These Framers, as discussed in Part II, *supra*, were Richard Bassett, John Blair, David Brearly, Pierce Butler, George Clymer, Charles Cotesworth Pinckney, John Dickinson, William Few, Benjamin Franklin, Nathaniel Gorham, Alexander Hamilton, John Langdon, James Madison, George Mason,

of New Jersey, had served in various capacities in state governments under the new state constitutions.<sup>230</sup> The state constitutions and declarations of rights were therefore constantly on the Framers' minds as they drafted the U.S. Constitution.

In some instances, speakers at the Federal Constitutional Convention argued that the Constitution should follow the approach of their state constitutions. One example concerns the Origination Clause, which says: "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."<sup>231</sup> The last phrase of this clause uses the same words that the Massachusetts Constitution of 1789 used in a similar clause.<sup>232</sup> Evidence further shows that the Framers intended the phrase to have the same meaning as the Massachusetts Constitution because they specifically cited the Massachusetts Constitution when they were revising the Origination Clause. Madison recorded the events of September 8, 1787, as follows: "It was moved to strike out the words 'and shall be subject to alterations and amendments by the Senate' and insert the words used in the Constitution of Massachusetts on the same subject—'but the Senate may propose or concur with amendments as in other bills'—which was agreed to."<sup>233</sup>

Another example concerns the Incompatibility Clause, which prevents members of the legislature from serving in the executive branch.<sup>234</sup> On August 14, 1787, Charles Pickney argued, unsuccessfully, against including this provision in the U.S. Constitution because state constitutions did not contain a similar proscription. According to Madison, Pinckney asserted:

No State has rendered the members of the Legislature ineligible to offices. In S- Carolina the Judges are eligible into the Legislature. It cannot be supposed then that the motion will be offensive to the people. If the State Constitutions should be revised he believed restrictions of this sort wd [sic] be rather diminished than multiplied.<sup>235</sup>

In other instances, speakers criticized the state constitutions, with the evident hope that the new federal Constitution would be superior. For example,

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Gouverneur Morris, William Paterson, Charles Pinckney, Edmund Randolph, George Read, John Rutledge, Caleb Strong, and Robert Yates.

230. See *The Founding Fathers: New Jersey*, *supra* note 130.

231. U.S. CONST. art. I, § 7, cl. 1.

232. MASS. CONST. pt. II, ch. I, § III, art. VII ("All money bills shall originate in the house of representatives; but the senate may propose or concur with amendments, as on other bills."), *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 30, *and in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 1899.

233. 2 FARRAND'S RECORDS, *supra* note 47, at 552 (Madison's Notes).

234. See U.S. CONST. art. I, § 6, cl. 2.

235. 2 FARRAND'S RECORDS, *supra* note 47, at 287 (Madison's Notes).

on May 29, 1787, James McHenry recorded Governor Randolph's critique of the state constitutions in this manner:

None of the constitutions have provided sufficient checks against the democracy. The feeble Senate of Virginia is a phantom. Maryland has a more powerful senate, but the late distractions in that State, have discovered that it is not powerful enough. The check established in the constitution of New York and Massachusetts is yet a stronger barrier against democracy, but they all seem insufficient.<sup>236</sup>

Several members specifically suggested that the federal Convention learn from the mistakes in the state conventions. For instance, on July 10, 1787, Gouverneur Morris of Pennsylvania<sup>237</sup> argued against imposing too many requirements on how the federal government would take a census. Madison recorded: "He [Morris] was always agst. [sic] such Shackles on the Legislr. [sic] They had been found very pernicious in most of the State Constitutions."<sup>238</sup> Similarly, on August 22, 1787, James Wilson argued against including an ex post facto clause in the Constitution given that the state legislatures had ignored such clauses in their own constitutions. He said: "If these prohibitions in the State Constitutions have no effect, it will be useless to insert them in this Constitution. Besides, both sides will agree to the principle & will differ as to its application."<sup>239</sup>

Sometimes speakers saw the state constitutions as imposing limits on what the Convention could propose. For example, on July 23, 1787, the Convention discussed the possibility of requiring state legislatures (as opposed to state ratifying conventions) to approve the constitution.<sup>240</sup> George Mason opposed this idea on grounds that some of the state legislatures would not have power under their respective constitutions to perform this function. According to Madison's notes from July 23, 1787, Mason said:

236. 1 *id.* at 27 (McHenry's Notes). Another example concerns the power of Congress to override the President's veto. An earlier draft of the Constitution would have required three-fourths of each House to vote. But the Convention approved a resolution on September 12 to lower the requirement to two-thirds. James Madison spoke in favor of the reduction, citing experience under state constitutions: "It was an important principle in this & in the State Constitutions to check legislative injustice and incroachments. The Experience of the States had demonstrated that their checks are insufficient. We must compare the danger from the weakness of two-thirds with the danger from the strength of three-fourths. He thought on the whole the former was the greater." 2 *id.* at 587 (Madison's Notes).

237. Gouverneur Morris was a delegate from Pennsylvania to the federal convention. He was not a "governor": his first name was the maiden name of his mother, Sarah Gouverneur. See Anne Cary Morris, *Gouverneur Morris*, 20 THE N.Y. GENEALOGICAL & BIOGRAPHICAL RECORD 23, 23 (1989). For more about his participation at the federal convention, see Maggs, *Guide to Convention Records*, *supra* note 227, at 1714, 1721.

238. 1 FARRAND'S RECORDS, *supra* note 47, at 571 (Madison's Notes).

239. 2 *id.* at 376 (Madison's Notes).

240. *Id.* at 88.

The Legislatures have no power to ratify it. They are the mere creatures of the State Constitutions, and cannot be greater than their creators. And he knew of no power in any of the Constitutions, he knew there was no power in some of them, that could be competent to this object.<sup>241</sup>

The Convention returned to this issue on August 31, 1787, before deciding that state ratifying conventions should approve the federal Constitution.<sup>242</sup>

Experience with state constitutional provisions likely also shaped what participants at the state ratifying conventions understood the U.S. Constitution to mean. After the Constitutional Convention approved the Constitution, proponents of ratification compared its provisions to those in state constitutions. In the *Federalist Papers*, James Madison and Alexander Hamilton expressly referred to the various state constitutions in many passages. They evidently believed that one of the clearest ways of explaining the U.S. Constitution was to compare it to state constitutions. For example, in *Federalist No. 39*, James Madison contrasted the impeachment clause in the U.S. Constitution with similar provisions in state constitutions.<sup>243</sup> He wrote: “In several of the States . . . no constitutional provision is made for the impeachment of the chief magistrate. And in Delaware and Virginia he is not impeachable till out of office. The President of the United States is impeachable at any time during his continuance in office.”<sup>244</sup> In addressing the executive branch in *Federalist No. 70*, Alexander Hamilton explained how the U.S. Constitution did not divide the President’s powers among others.<sup>245</sup> In this regard, he concluded that the U.S. Constitution was most like those of New York and New Jersey.<sup>246</sup> He stated, “New York and New Jersey, if I recollect right, are the only States which have intrusted the executive authority wholly to single men.”<sup>247</sup>

Participants at the state ratification debates also compared the proposed federal Constitution to their state constitutions. Most of their remarks concerned the lack of a Bill of Rights in the federal Constitution.<sup>248</sup> Many speakers expressed skepticism at the argument that limiting the powers of the

241. *Id.*

242. *Id.* at 476 (Madison’s Notes) (discussing whether state constitutions would permit ratifying conventions to speak for the state in deciding whether to ratify the Constitution).

243. THE FEDERALIST NO. 39 at 278 (James Madison) (Clinton Rossier ed., 1961).

244. *Id.* at 242.

245. THE FEDERALIST NO. 70, *supra* note 243, at 522–23 (Alexander Hamilton).

246. *Id.* at 515.

247. *Id.*

248. See Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 473, 478 (discussing concerns at the ratification debates about the lack of a bill of rights).

federal government to specific subjects, without expressly guaranteeing rights, would suffice to prevent tyranny.<sup>249</sup>

Various speakers also compared the wording of federal constitutional provisions to similar wording in their state constitutions. For example, at the Massachusetts ratifying convention, speakers observed that the Massachusetts Constitution restricted suspension of the writ of habeas corpus to a period of twelve months, but the Suspension Clause in the U.S. Constitution had no such restriction.<sup>250</sup> The records of the debate say:

Dr. TAYLOR asked, why this darling privilege was not expressed in the same manner it was in the Constitution of Massachusetts. [Here the honorable gentleman read the paragraph respecting it, in the constitution of that state, and then the one in the proposed Constitution.] He remarked on the difference of expression, and asked why the time was not limited.

Judge DANA said, the answer, in part, to the honorable gentleman, must be, that the same men did not make both Constitutions; that he did not see the necessity or great benefit of limiting the time.<sup>251</sup>

Many of the participants at the state ratification debates did more than simply complain about the lack of a Bill of Rights in the proposed federal Constitution. They went further and proposed a total of approximately two hundred amendments covering about one hundred topics, many of which were aimed at protecting individual rights.<sup>252</sup> Most of these proposed amendments sought to add protections from the federal government that were already provided by state law.<sup>253</sup>

When James Madison drafted his proposal for a Bill of Rights, all but two guarantees were found in these two hundred amendments.<sup>254</sup> One was the requirement of just compensation for private property taken by the government.<sup>255</sup> The other, which did not make its way into the final Bill of Rights approved by Congress, prohibited state laws that violated certain

249. *See id.* at 483.

250. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 108 (Jonathan Elliot ed., 2d ed., n.p. 1830).

251. *Id.* (alteration in original).

252. CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, at xi (Helen E. Veit et al., eds., 1991).

253. *See id.*

254. *See id.* at xiv.

255. *Id.*; *see also* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 834 (1995).

freedoms.<sup>256</sup> The right to just compensation was protected in the Massachusetts Constitution.<sup>257</sup>

#### IV. PRINCIPAL WAYS OF USING EARLY STATE CONSTITUTIONS TO SUPPORT CLAIMS ABOUT THE ORIGINAL MEANING OF THE U.S. CONSTITUTION

No single work could catalog all the different ways in which lawyers, judges, and scholars might use early state constitutions to make claims about the original meaning of the U.S. Constitution. The legal mind is so clever and creative that it constantly finds new ways to argue about the relevance of evidence. Therefore, what follows is a description of the three most common approaches: using early state constitutions and declarations of rights (1) to show the ordinary meaning of words in the founding era; (2) to compare federal and state constitutional provisions; and (3) to use state constitutional protections as examples of those eventually adopted in the Federal Constitution.

##### A. *Ordinary Meaning of Words in the Founding Era*

Writers often make claims about the original objective meaning (sometimes called the “public meaning”) of words in the Constitution as opposed to the meaning subjectively intended by the Framers or understood by the participants at the state ratifying conventions.<sup>258</sup> In so doing, they typically rely on dictionaries from the Founding Era, on the theory that these dictionaries may indicate the ordinary meaning of the words at the time of the Framing.<sup>259</sup> But dictionary definitions are not perfect; for example, they may be inaccurate or incomplete. To guard against such potential problems, the most diligent of these writers bolster their claims by canvassing period writings for actual examples of the words’ usage.<sup>260</sup>

For instance, in his extensive effort to discern the objective meaning of the word “commerce” in the Commerce Clause,<sup>261</sup> Professor Randy Barnett examined every instance of the word “commerce” in the records of the

256. See CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, *supra* note 252, at xiv. The proposal said: “No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.” 1 ANNALS OF CONG. 435 (Joseph Gales ed., 1834) (proceedings of June 8, 1789).

257. See MASS. CONST. pt. I, art. X (“[W]henver the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.”), *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 21, and in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 1891.

258. See *supra* Part I (discussing these different meanings).

259. See Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 364–65 (2014).

260. See *id.* at 365–66.

261. U.S. CONST. art. I, § 8, cl. 3.



Constitutional Convention, the ratification debates, and the *Federalist Papers*.<sup>262</sup> He later augmented his study by examining every use of the term “commerce” in the *Pennsylvania Gazette* from 1731 to 1800.<sup>263</sup> He concluded from these examples that the term “commerce” almost invariably referred to buying, selling, and transporting goods rather than to economic activity more generally.<sup>264</sup>

Early state constitutions and declarations of rights are another source that researchers might examine when attempting to discern the ordinary meaning of words in the U.S. Constitution at the time of its adoption. For example, in addition to looking at the records of the Constitutional Convention, the state ratifying conventions, the *Federalist Papers*, and a period newspaper, Professor Barnett might also have looked to see how state constitutions use the word “commerce.” The word “commerce” appears in the Maryland Declaration of Rights of 1776,<sup>265</sup> the Massachusetts Constitution of 1780,<sup>266</sup> and the New Hampshire Constitution of 1784.<sup>267</sup> If these documents used “commerce” to refer to buying, selling, and transporting goods, they would provide additional evidence of the original objective meaning of the word. Electronic searches of early state constitutions and declarations of rights can instantly locate other words used in the U.S. Constitution and similarly provide evidence of their original objective meaning.

Examples of word usage in early state constitutions and declarations of rights in fact may provide better evidence of the meaning of words in the U.S. Constitution than examples of word usage from other sources. A potential difficulty in canvassing written sources to determine the meaning of words is that words often have different meanings when used in different contexts. When looking at state constitutions and declarations of rights, their shared contextual nexus with the U.S. Constitution—serving as foundational legal writings—diminishes (although does not eliminate) potential ambiguity arising from context-dependent differentiation of word meaning.

262. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 104, 114–25 (2001) [hereinafter Barnett, *Original Meaning*].

263. See Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 856–57 (2003).

264. See Barnett, *Original Meaning*, *supra* note 262, at 146.

265. MD. CONST. of 1776, art. XXXIX, *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 103, *and in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 1690.

266. MASS. CONST. pt. II, ch. 2, § II, *reprinted in* STATE CONSTITUTIONS, *supra* note 9, at 21, *and in* 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 1891.

267. N.H. CONST. of 1784, pt. II, *reprinted in* 4 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 2467.

B. *Comparing Federal and State Constitutional Provisions*

Writers making claims about the original meaning of the Federal Constitution also frequently compare its provisions to those of state constitutions. As a hypothetical example, a litigant might claim that the guarantee of the “freedom of the press” in the First Amendment of the U.S. Constitution originally had the same meaning as the guarantee of the “liberty of the press” in Part the First, article XVI of the Massachusetts Constitution of 1780.<sup>268</sup> Claims of this kind are common because most of the clauses in the U.S. Constitution address subjects that were previously addressed in state constitutions. Such claims may address the original intent, original understanding, or original objective meaning of the U.S. Constitution.

The index in the appendix to this Article may help researchers find clauses in state constitutions that relate to the same subjects as provisions in the U.S. Constitution. Researchers can also look for state constitutional provisions using the electronically searchable collections described in Part II above. After identifying a relevant provision in a state constitution, two steps follow. The first step is to prove the meaning of the state constitutional provision. The second step is to explain why the federal constitutional provision either likely had the same meaning as the state constitutional provision or instead likely had a different meaning.

Justice Frankfurter’s dissenting opinion in *Harris v. United States*<sup>269</sup> followed this two-step approach.<sup>270</sup> In that case, Justice Frankfurter compared the Fourth Amendment’s warrant requirement to a similar provision in the Massachusetts Constitution of 1780.<sup>271</sup> Illustrating the first step, Justice Frankfurter observed that the Massachusetts Supreme Judicial Court had interpreted the Massachusetts provision to mean that searches are unreasonable unless authorized by a warrant.<sup>272</sup> Illustrating the second step, Justice Frankfurter concluded that the Fourth Amendment originally must have had the same meaning as the Massachusetts provision because the language of the two provisions was nearly identical.<sup>273</sup>

1. *Proving the Meaning of a State Constitutional Provision*

The first step in the two-step approach is crucial. Claims based on a comparison of federal and state constitutional provisions are useful only when

268. See MASS. CONST. pt. I, art. XVI, reprinted in STATE CONSTITUTIONS, *supra* note 9, at 22, and in 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 22, at 1892.

269. 331 U.S. 145 (1947), overruled by *Chimel v. California*, 395 U.S. 752 (1969).

270. *Id.* at 155. (Frankfurter, J., dissenting). The Supreme Court later adopted Justice Frankfurter’s position in *Chimel*. 395 U.S. at 768.

271. *Harris*, 331 U.S. at 158.

272. See *id.* at 161 (citing *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329, 336 (1841)).

273. See *id.* at 160–61.

the proponents of these claims can provide convincing evidence of what the state constitutional provisions meant. For instance, in the hypothetical example above, merely identifying the similarity of the phrases “freedom of the press” in the First Amendment and “liberty of the press” in the Massachusetts Constitution of 1780 is not enough to show the meaning of the First Amendment. Also needed is evidence about the meaning of the phrase “liberty of the press” in the Massachusetts Constitution.

In a few instances, researchers can demonstrate the meaning of state constitutional provisions by pointing to judicial decisions that interpreted them. The dissenting opinion in *Harris*, cited above, is one example of this approach.<sup>274</sup> Another example is *Williams v. Florida*,<sup>275</sup> in which a criminal defendant challenged his trial by a six-person jury.<sup>276</sup> The Supreme Court had to decide whether the right to trial by jury required a twelve-person jury.<sup>277</sup> The court said: “We do not pretend to be able to divine precisely what the word ‘jury’ imported to the Framers, the First Congress, or the States in 1789. It may well be that the usual expectation was that the jury would consist of 12 . . . .”<sup>278</sup> The Court then observed that many state constitutions used the term “jury,” and that state courts had interpreted this term to mean twelve-person juries.<sup>279</sup>

In other instances, researchers can discern the meaning of a phrase in a state constitution through context. For example, in his dissent in *Morrison v. Olson*,<sup>280</sup> Justice Scalia explained his view that the grant of “executive power” to the President meant all executive powers, and not just some executive powers.<sup>281</sup> In support of that position, Justice Scalia observed that the Massachusetts Constitution not only granted executive power to the President but also specifically said that the legislative and judicial branches “shall never exercise the executive” power.<sup>282</sup> Accordingly, if the federal constitutional provisions vesting the executive power in the president had the same meaning as the Massachusetts clause vesting the executive power in the governor, then the federal clause would mean the President alone has all of the executive power.

In other instances, jurists have discerned the meaning of similarly worded state constitutional provisions by looking at how the state legislature understood the provisions. For example, in his dissent in *District of Columbia v.*

274. See *id.* at 161.

275. 399 U.S. 78 (1970).

276. See *id.* at 79–80.

277. *Id.* at 86.

278. *Id.* at 98.

279. See *id.* at 98, n.45.

280. 487 U.S. 654 (1988).

281. *Id.* at 709 (Scalia, J., dissenting) (“It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are.”).

282. *Id.* at 697.

*Heller*,<sup>283</sup> Justice Breyer disagreed with the majority's conclusion that the Second Amendment created an individual right to keep arms in one's home.<sup>284</sup> Justice Breyer observed that the Second Amendment was very similar to article XVII of the Massachusetts Constitution.<sup>285</sup> He further observed that Massachusetts passed a law against keeping guns loaded with gunpowder in houses.<sup>286</sup> He therefore reasoned that the Massachusetts legislature did not understand the Massachusetts constitutional provision to bar legislation restricting the keeping of guns in homes.<sup>287</sup>

Legal minds certainly can find countless other ways to discern the meaning of state constitutional provisions. But in searching for their meaning, researchers should keep in mind the type of original meaning that they wish to prove. The cases above suggest efforts to discern the original objective meaning of the state constitutions based on the language of the state constitutions or authoritative interpretation of this language by the courts or legislatures. But if the goal is to discern the original intent of the Framers, then in most instances the relevant question is not what the language of a state constitutional provision objectively meant but instead what the Framers thought the state constitutional provision meant. This might be shown through their comments at the Federal Convention or elsewhere. On the other hand, if the goal is to determine the original understanding of the ratifiers, then the relevant question is what the ratifiers thought the state constitutional provision meant.

## 2. Explaining What the Comparison Shows

The second step in making a claim about the meaning of a federal constitutional provision based on a comparison to a state constitutional provision is to explain what the comparison shows. This step is difficult because comparisons usually involve many ambiguities and because generalizations are usually subject to exceptions. Lawyerly skill in analyzing text and making arguments will determine whether the explanations are convincing.

Identical or similar language in the U.S. Constitution and a state constitution often suggests that the provisions had the same original meaning. That was the conclusion of Justice Frankfurter in *Harris* in his comparison of the warrant requirement in the Fourth Amendment and the Massachusetts Constitution of 1780.<sup>288</sup> In many instances, the justification for the conclusion that similar provisions imply similar meanings is that the drafters of the original

283. 554 U.S. 570 (2008).

284. *See id.* at 681 (Breyer, J., dissenting).

285. *See id.* at 686.

286. *See id.* at 685.

287. *See id.* at 685–86.

288. *Harris v. United States*, 331 U.S. 145, 161 (1947) (Frankfurter, J., dissenting); *see also supra* notes 269–73 and accompanying text.

Constitution or Bill of Rights simply wanted to copy the approach of the state constitutions. They perhaps liked what the states had done, and they anticipated that state ratification conventions would prefer federal provisions that replicated state provisions.<sup>289</sup>

But similar language does not necessarily mean that the two documents have the same meaning. In *Carmell v. Texas*,<sup>290</sup> the Supreme Court held that a Texas law violated the Ex Post Facto Clause in Article I, Section 10, by reducing the quantum of evidence needed to convict a defendant of a particular criminal offense.<sup>291</sup> The United States argued as amicus curiae that the Ex Post Facto Clause did not prohibit such legislation, citing the early Massachusetts, Maryland, North Carolina, and Delaware constitutions.<sup>292</sup> Each of them specifically prohibited only laws punishing actions that previously were not unlawful.<sup>293</sup> But the Supreme Court was unpersuaded. It said that definitions in the state constitutions would only be relevant if the Court were to “accept the premise” that they “purported to express the *exclusive* definition of an *ex post facto* law.”<sup>294</sup>

As a corollary, differences in federal and state constitutional provisions usually suggest that the two provisions had different original meanings. The case of *Harmelin* provides an example. In that case, Justice Scalia observed that the Eighth Amendment prohibits cruel and unusual punishment, while some state constitutions prohibit not only cruel and unusual punishment but also disproportionate punishment.<sup>295</sup> Based on this difference in language, Justice Scalia reasoned that the Eighth Amendment does not prohibit disproportionate sentences.<sup>296</sup>

But sometimes different language in federal and state provisions may not indicate a different meaning. For example, in his concurring opinion in *Minnesota v. Carter*,<sup>297</sup> Justice Scalia observed an ambiguity in the Fourth Amendment. He explained:

The Fourth Amendment protects “[t]he right of the people to be secure in *their* persons, houses, papers, and effects, against unreasonable searches and seizures . . . .” It must be acknowledged that the phrase “their . . . houses” in this provision is, in isolation, ambiguous. It could mean “their respective houses,” so that the protection extends to each person only in his *own* house. But it could also mean “their respective

289. 1 ANNALS OF CONG., *supra* note 256, at 433.

290. 529 U.S. 513 (2000).

291. *Id.* at 552.

292. *Id.* at 534–35, 535 n.25.

293. *See id.*

294. *Id.*

295. *Harmelin v. Michigan*, 501 U.S. 957, 985 (1991).

296. *See id.*

297. 525 U.S. 83 (1998).

and each other's houses," so that each person would be protected even when visiting the house of someone else.<sup>298</sup>

Justice Scalia compared the language of the Fourth Amendment to similar provisions in the early Massachusetts, New Hampshire, New York, and North Carolina constitutions.<sup>299</sup> Some of these state constitutional provisions had different wording, saying that "every subject" has a right to be secure in "his houses."<sup>300</sup> This language does not contain the ambiguity that Justice Scalia identified in the Fourth Amendment. Despite this difference in wording, Justice Scalia concluded that the Fourth Amendment and the state provisions had the same meaning.<sup>301</sup> Other states, including Pennsylvania and Vermont, used the word "their" just like in the Fourth Amendment.<sup>302</sup> But Justice Scalia reasoned: "There is no indication anyone believed that the Massachusetts, New Hampshire, New York, and North Carolina texts, by using the word 'his' rather than 'their,' narrowed the protections contained in the Pennsylvania and Vermont Constitutions."<sup>303</sup>

These examples show that generalizations do not suffice when comparing federal constitutional provisions to early state constitutional provisions. Each case is unique. Proponents of claims must advance convincing arguments, based on all relevant considerations, for why the federal provisions have or do not have the same meaning as the state provisions.

### C. *Using State Constitutional Protections as Examples*

The U.S. Constitution sometimes uses open-ended standards, such as "due process" and "unreasonable searches," instead of formal rules. In other instances, the Constitution relies on concepts such as the separation of powers that are vague at the margins. Scholars and jurists sometimes make claims about the meaning of these open-ended standards or general concepts by looking at more specific provisions in early state constitutions and declarations of rights. The thought in these cases, often unexpressed, is that state constitutions can show specific applications of these standards and concepts.

For example, in *Davis v. Beason*,<sup>304</sup> the Court considered whether the guarantee of free exercise of religion in the First Amendment limited laws prohibiting polygamy.<sup>305</sup> The Court noted that every state prohibited polygamy

298. *Id.* at 92 (Scalia, J., concurring) (alteration in original) (omissions in original) (citation omitted) (quoting U.S. CONST. amend. IV).

299. *Id.* at 93.

300. *Id.* (quoting MASS. CONST. pt. I, art. XIV; and N.H. CONST. of 1784, § XIX).

301. *See id.* at 94, 96.

302. *Id.* at 93 (citing PA. CONST. of 1776, art. X; and VT. CONST. of 1777, ch. I, § XI).

303. *See id.*

304. 133 U.S. 333 (1890).

305. *Id.* at 336–37.

and looked to early state constitutions for guidance as to the meaning of free exercise.<sup>306</sup> The Court said:

The constitutions of several States, in providing for religious freedom, have declared expressly that such freedom shall not be construed to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the State. Thus, the constitution of New York of 1777 provided as follows: “The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: Provided, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.”<sup>307</sup>

The Court thus concluded that the Free Exercise Clause did not bar the federal government from penalizing polygamy, even if polygamy were practiced for religious purposes.<sup>308</sup>

Members of the Supreme Court also have consulted state constitutions for specific examples in many other contexts. For instance, as explained in the earlier discussion of *Marsh*,<sup>309</sup> the Supreme Court concluded that the Establishment Clause did not prohibit a state from opening a legislative session with a prayer because many state constitutions have similar clauses but the legislatures in these states have opened their sessions with prayers.<sup>310</sup> Likewise, in *Holder*, also discussed above,<sup>311</sup> Justice Thomas concluded that there was no general constitutional principle prohibiting multi-representative districts at the time of the Framing because many state constitutions specifically provided for them.<sup>312</sup> And in his dissent in *Zivotofsky ex rel. Zivotofsky v. Kerry*,<sup>313</sup> Justice Thomas concluded that the recognition of other states is an executive function, rather than a legislative function, based in part on how the drafters of the Massachusetts Constitution of 1780 defined executive power.<sup>314</sup>

Claims about the original meaning of the Federal Constitution based on examples and counterexamples found in state constitutions vary in their persuasiveness. The Framers sometimes sought to make the U.S. Constitution

306. *Id.* at 341.

307. *Id.* at 348 (quoting N.Y. CONST. of 1777, art. 38). The Court noted similar provisions in the constitutions of twelve additional states. *Id.*

308. *See id.* *Davis* remains a noteworthy example of the usage of state constitutional provisions to understand federal constitutional guarantees, though the *Davis* holding has been called into substantial question by *Romer v. Evans*, 517 U.S. 620, 634 (1996).

309. *See supra* notes 224–26 and accompanying text for relevant discussion.

310. *See Marsh v. Chambers*, 463 U.S. 783, 788–89, 791 (1983).

311. *See supra* notes 205–07 and accompanying text.

312. *See Holder v. Hall*, 512 U.S. 874, 898 (Thomas, J., concurring in the judgment).

313. 135 S. Ct. 2076 (2015).

314. *See id.* at 2098 (Thomas, J., concurring in the judgment and dissenting in part).

consistent with state constitutions. The evidence regarding the Origination Clause and Incompatibility Clause provide examples.<sup>315</sup> But the drafters did not invariably do so. The Federal Constitution, for example, set up a very different governmental structure from states such as Pennsylvania, which had a single chamber legislature and no independent executive branch.<sup>316</sup> And the federal government specifically barred religious tests for office while South Carolina required such a test.<sup>317</sup> Thus, a few examples or counterexamples usually are not enough to prove the meaning of the U.S. Constitution. In the author's opinion, examples and counterexamples may be persuasive when they are many in number and uniform in their content.

### CONCLUSION

Eleven states adopted state constitutions before the United States adopted the federal Constitution in 1788. The historical record shows that experience with these state constitutions greatly influenced the drafting and ratification of the U.S. Constitution. For this reason, lawyers, jurists, and scholars often rely on early state constitutions in making claims about the original meaning of the U.S. Constitution. This guide seeks to help those making such claims and those evaluating such claims by others. The process requires an understanding not only of what the state constitutions say but also about the principal ways the state constitutions may help show the meaning of the U.S. Constitution.

As detailed in this Article, some claims rely on state constitutions merely for examples of the ordinary meaning of words in the U.S. Constitution. Other claims attempt to draw conclusions about the meaning of provisions in the U.S. Constitution by comparing them to provisions in state constitutions. This process is difficult because it requires both an understanding of what the state constitutions meant and an explanation of why the federal Constitution might have had the same meaning or a different meaning. Finally, state constitutions may provide illustrations of the meaning of open-ended standards in the U.S. Constitution.

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315. *See supra* notes 231–35 and accompanying text.

316. *See supra* Section II.I.

317. *See supra* Section II.J.



**Appendix: Index of Early State Constitutions and Declarations of Rights**

## Source Abbreviations:

DE-C	Delaware Constitution of September 11, 1776
DE-R	Delaware Declaration of Rights of September 11, 1776
GA-C	Georgia Constitution of February 5, 1777
MA-C	Massachusetts Constitution of June 15, 1780
MD-C	Maryland Constitution of November 11, 1776
MD-R	Maryland Declaration of Rights of November 11, 1776
NC-C	North Carolina Constitution of December 18, 1776
NC-R	North Carolina Declaration of Rights of December 17, 1776
NH-C	New Hampshire Constitution of June 2, 1784
NJ-C	New Jersey Constitution of July 2, 1776
NY-C	New York Constitution of April 20, 1777
NY-R	New York Bill of Rights of January 26, 1787
PA-C	Pennsylvania Constitution of September 28, 1776
SC-C	South Carolina Constitution of March 19, 1778
VA-R	Virginia Bill of Rights of June 12, 1776
VA-C	Virginia Constitution of June 29, 1776

admiralty (*see courts, admiralty*)affirmation (*see oath*)aliens (*see naturalization*); *citizenship* PA-C § 42; *oaths* NY-C art. XLII; *property ownership* NC-C art. XLamendment of constitution (*see constitution, amendments*)amerce (*see fines*)arms *prohibition on bringing to elections* DE-C art. 28; NY-R ¶ 9; *right to keep or bear* MA-C pt. 1, art. XVII; NC-R art. XVII; PA-R art. XIII; *training* VA-R § 13army (*see military*)assembly *right of* MA-C pt. 1, art. XIX; NC-R art. XVIII; NH-R art. XXXII; PA-R art. XVIattorney general *incompatibility of other offices* NC-C art. XXX; *role in impeachment* VA-C ¶ 15; *salary* NC-C art. XXI; *selection of* DE-C art. 5; MA-C pt. 2, ch. 1, art. IX; NC-C art. XXX; SC-C art. XXIX; VA-C ¶ 13; *tenure of office* MD-C art. XL

attorneys authorization to practice GA-C art. LVIII; NY-C art. XXVII;  
*malpractice* GA-C art. LVIII; *right to counsel in criminal prosecutions* (see  
counsel)

bail excessive prohibited DE-R art. 16; GA-C art. LXI; MA-C pt. 1, art. XXVI;  
 MD-R art. XXII; NC-R art. X; NH-R art. XXXIII; NY-R ¶ 8; PA-C § 29;  
 VA-R § 9; *in general* NC-C art. 39; PA-C § 28

bill of rights (see declaration of rights)

bills of attainder prohibited MA-C pt. 1, art. XXV; MD-R art. XVI; NY-C art.  
 XLI

borders (see boundaries)

boundaries NC-R art. XXV; VA-C ¶ 20

bribes (see executive officers, prohibition on holding office for profit); *disqualification  
 from office for bribery or corruption* MA-C pt. 2, ch. VI, art. II; MD-C art.  
 LIV; NH-C ¶ 78; NH-R art. XVI; PA-C § 26

captures GA-C art. XLIV

censorship PA-C § 47

census NY-C art. V; NY-C art. V; NY-C art. XII

charges right to be informed of criminal DE-R art. 14; MA-C pt. 1, art. XII; MD-  
 R art. XIX; NC-R art. VII; NH-R art. XV; NY-R ¶ 3; PA-R art. IX; VA-R  
 § 8

charities PA-C § 45

chief magistrate (see executive (chief))

clergy ineligibility for office DE-C art. 29; GA-C art. LXII; NC-C art. XXXI;  
*right to select* SC-C art. XXXVIII; *support to* MD-C art. XXXIII

clerk of court (see judicial officers, clerk of court)

commissions civil or military GA-C art. XXI; GA-C art. XXXIV; MA-C pt. 2,  
 ch. VI, art. IV; NY-C art. XXIV

common good (see common welfare)

common law abrogation of English law regarding religion NY-C art. XXXV;  
*continuation of* DE-C art. 25; MD-R art. III; *reception of* MD-R art. III; NJ-  
 C art. XXII; NY-C art. XXXV

common welfare prohibition against specific benefits MA-C pt. 1, art. VII; PA-R  
 art. V; *purpose of government* MA-C pt. 1, art. VII

commonwealth name of (see name of state/commonwealth)

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confrontation of witnesses (see witnesses, *right to confront*)

Congress, United States *selection of delegates to* DE-C art. 11; GA-C art. XVI; MA-C pt. 2, ch. IV; MD-C art. XXVII; NC-C art. XXXVII; NH-C ¶ 62; NY-C art. XXX; PA-C § 11; SC-C art. XXII; VA-C ¶ 9

conscience *inalienable right of* NH-R art. IV

conscientious objectors (see military, *conscientious objectors*)

constitution *amendment* DE-C art. 30; GA-C art. LXIII; MD-C art. LIX; NH-C ¶ 82; SC-C art. XLIV; *copies of* MA-C pt. 2, ch. VI, art. XI; *supremacy* NY-C art. XXXV

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continuation of pre-independence laws and legislation (see laws, *continuation of*)

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