AMERICA'S FUNDAMENTAL AND VANISHING RIGHT TO BAIL

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"All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." This is the "consensus" text of one of the most fundamental rights in American history. Even before the Bill of Rights was proposed to the states, Congress ensured this right in the U.S. territories with the Northwest Ordinance of 1787 and in the federal courts with the Judiciary Act of 1789. The states protected the right even more strongly—48 states protected this right as recently as a generation ago, and 42 states protected the right in at least one of their state constitutions. When the Fourteenth Amendment was ratified in 1868, more than three-fourths of the states—29 out of the then 37—provided the Consensus Right to Bail in their state constitutions. In these states, persons accused of a crime (other than a capital offense) had the right to be released on bail if they could offer a sufficient surety.

Despite its centrality to America's constitutional history, the Consensus Right to Bail has been ignored in historical and legal scholarship. Based on a statistical analysis of all present and historical state constitutions, this Article presents the "consensus" text of this fundamental right for the first time. The articulation of the right to bail was remarkably consistent across states, hence forming a consensus. Although Congress—through the Judiciary Act of 1789—used different words to express the right to bail, the substance of the right to bail was the same under state and federal law and was stable for 200 years.

Since the 1970s, however, after the election of President Richard Nixon and the start of the "war on crime," the right to bail has been under attack. Through 40 years of legislative and constitutional "reform," the right to bail has been struck from federal law and rescinded or threatened in roughly half of the states. Now, persons accused of crimes are routinely denied bail if they are found to be a

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"flight risk" or a "danger to the community." Only 24 states still provide in their constitutions the strong guarantee, unadulterated by radical reform, of the Consensus Right to Bail.

This Article argues that the Fifth and Fourteenth Amendments render invalid the recent federal and state encroachments on the right to bail. The trend toward abridging the freedom of accused persons not only denies a fundamental textual right of longstanding tradition, but also turns federalism on its head. In the past 30 years, the federal government, which in the 1984 Bail Reform Act curtailed the longstanding federal right to bail, has developed a rich set of criminal laws spanning across areas traditionally reserved to the states; yet, it has failed to provide the same level of constitutional protection for bail historically provided by the states.

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> "From the passage of the Judiciary Act of 1789 to the present . . . federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."
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> –Chief Justice Frederick M. Vinson (1951)[1]

INTRODUCTION

Most students of American constitutionalism[2] are taught that America lacks a constitutional right to bail—a right to release before trial.[3] The Eighth Amendment, we are told, proclaims that bail cannot be excessive, while evading whether or when it must be available.[4] The Federal Fifth and Fourteenth Amendments protect vague rights of "due process,"[5] leaving courts and Congress to tinker with what is "due." Habeas corpus—the right to be heard and released for unlawful detention—cannot be suspended except during invasion or rebellion,[6] yet the Constitution does not say when detention before trial is unlawful.

This Article challenges the standard narrative[7] as it pertains to bail. It starts with the observation that most of the making and interpreting of constitutions in this country has happened at the state level. In state constitutions, from the Founding through the Nixon era, the right to bail was automatic and inalienable for all crimes not punishable by death. Even persons accused of capital crimes were entitled to bail as a matter of constitutional right unless the evidence of their guilt was great. Second, the constitutional right to bail in the states is functionally

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1. Stack v. Boyle, 342 U.S. 1, 4 (1951).

2. For examples of the standard narrative as it pertains to bail, see James B. Jacob, *Criminal Law, Criminal Procedure, and Criminal Justice in* FUNDAMENTALS OF AMERICAN LAW 310 (Alan B. Morrison ed., 1996); DAVID W. NEUBAUER & HENRY F. FRADELLA, AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM 264–65, 274 (10th ed. 2011); JOHN M. SCHEB & JOHN M. SCHEB II, CRIMINAL PROCEDURE 146–47 (6th ed. 2011).

3. Bail is defined as "security required by a court for the release of a prisoner who must appear in court at a future time." BLACK'S LAW DICTIONARY 161 (9th ed. 2009). Unlike many components of the criminal justice system that have evolved significantly over the centuries, the meaning and function of bail has been remarkably consistent. Before American Independence, Blackstone defined bail as "securities for his appearance, to answer the charge against him." 4 WILLIAM BLACKSTONE, COMMENTARIES *296.

4. *See, e.g.*, United States v. Salerno, 481 U.S. 739 (1987) (holding that the Eighth Amendment does not contain a right to bail implicit in the immunity from excessive bail).

5. U.S. CONST. amend. V, § 1 ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV, § 2 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

6. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

7. *See* sources cited in *supra* note 2.

identical to the process that all persons were due under federal law in 1789 as well as when every amendment to the U.S. Constitution, including the Bill of Rights, was proposed.[8] One of the initial acts of the First Congress of the United States was to enshrine the right to bail in the Judiciary Act of 1789, a right that persisted inviolate for almost 200 years. Third, the right to bail, as protected by state constitutions and statutes, as well as the Judiciary Act of 1789, was part of the due process backdrop against which the First and Fourteenth Amendments were ratified. Thus, regardless of whatever other rights should be protected under "due process," the right to bail, as presented in this Article, deserves protection. Automatic bail for all noncapital crimes was the process that was due throughout the United States for most of American history.

In addition to explaining the history and the substance of the fundamental right to bail, which was protected for most of American history, this Article specifies and defends the *text* of this overlooked constitutional right: "All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." This text is based on an analysis of present and historical state constitutions, described below in Part I. Although most states did not have this exact version of the right to bail, this Article uses techniques borrowed from computational biology to derive this "consensus" formulation of the right to bail. The term "Consensus Right to Bail" is used in this Article to refer both to the wording and to the underlying substance of this right.

The Article proceeds in three parts. Part I describes the Consensus Right to Bail that emerged in the American colonies in the seventeenth and eighteenth centuries, and was enshrined in the majority of state constitutions in the nineteenth and twentieth centuries. This right was protected by more than three-fourths of the states—the threshold required for a constitutional amendment—from 1845 until 1982, and it has been protected by at least half of the states from 1812 through the present. Part I then argues that the Fourteenth Amendment should protect this right to bail (along with protection from excessive bail) against state abridgement. This Article is the first to study this Consensus Right to Bail in detail,[9] while drawing

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8. For a discussion of the timing of the Judiciary Act of 1789 relative to the proposal of the first set of federal constitutional amendments that would become the Bill of Rights, see *infra* Section II.A. All of the amendments were ratified when the Consensus Right to Bail was federal law, except the Twenty-Seventh. The Twenty-Seventh Amendment was proposed with those that became the Bill of Rights in 1789 (immediately following the passage of the Judiciary Act), but it was ratified more than two hundred years later in 1992, less than a decade after Congress changed the right to bail that was established by the Judiciary Act.

9. Professor Caleb Foote, a constitutional scholar and advocate for prisoners' rights, was aware of the importance of this right, but in his seminal work he only mentions the right in passing: "[T]he excessive bail clause [and the] clause granting the right to bail in all noncapital cases . . . were first found side by side in the North Carolina Constitution of 1776 and the Pennsylvania Constitution of 1790, and the pattern was widely copied in other states in the nineteenth century." Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 969 (1965). Professor Foote, however, only cites two state constitutions—New Jersey and Connecticut—to support that the right was widely copied. *Id.* at 969 n.47. *See also* June Carbone, *Seeing Through the Emperor's New Clothes:*

the necessary distinction between Right to Bail Clauses and Excessive Bail Clauses present in most state constitutions.[10]

Part II describes the *federal* right to bail provided by the Judiciary Act for the first two centuries of independence. Though expressed in different words, it is identical in substance to the "Consensus Right to Bail Clause" derived from state constitutions. For 200 years in the federal justice system, bail was a matter of right for all noncapital crimes and a matter of discretion for capital crimes. This right was protected by the First Congress in the Judiciary Act of 1789 before they proposed the Bill of Rights to the states. This Part argues that the Framers would have understood the right to bail as central to the baseline of liberty they sought to protect with the Due Process Clause of the Fifth Amendment. In addition to originalist arguments that support a right to bail, the right to bail in noncapital

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Rediscovery of Basic Principles in the Administration of Bail, 34 SYRACUSE L. REV. 517, 532 (1983) (noting the importance of the Pennsylvania Right to Bail Clause as a model for state constitutions after 1776, but citing the constitutions of only North Carolina and Vermont). This Article shows, in Part I, that the right found its way into the vast majority of state constitutions. Most commentators who have argued that the Eighth Amendment embodies a right to bail have completely ignored the role of state constitutions. *See, e.g.*, Lawrence H. Tribe, *An Ounce of Detention: Preventative Justice in the World of John Mitchell*, 56 VA. L. REV. 371 (1970); *see also* sources cited *infra* note 186. An exception is a note written in 1982 by Donald Verrilli—currently President Obama's Solicitor General—while he was a student at Columbia Law School. Donald B. Verrilli, Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328 (1982). Verrilli argued "that the eighth amendment bail clause should be read to guarantee the right to bail." *Id.* at 329. Although he surveyed many state constitutions and noted that the right to bail was often denied only for capital offenses, Verrilli concluded that the "eighth amendment [sic] should be interpreted to guarantee a right to bail for all defendants who do not pose a risk of flight." *Id.* at 361. This Article expands upon Verrilli's historical research, surveying all state constitutions and state constitutional amendments ever ratified (through 2010), as well as statutory and case law, from the Founding to the present, for states lacking a constitutional right to bail. In addition, Verrilli's conclusion, that "risk of flight" should be the basis for whether bail can be denied, undermines the unequivocal nature of the Consensus Right to Bail as proposed in this Article. Bail is a fundamental constitutional right that should be protected by the Federal Constitution: it should be allowed for all noncapital offenses as a matter of right, as well as for all capital offenses where the proof of guilt is not evident or the presumption great.

10. The Appendix of a recent survey of state constitutions from 1868 categorized all Right to Bail Clauses as "Excessive Bail." *See generally* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7 (2008). The treatment of the two bail clauses together lead to an over-count of the number of states with Excessive Bail Clauses (Illinois was counted though it lacks an Excessive Bail Clause), while disregarding the Right to Bail Clause. Although the right to bail is never mentioned in the main text, the Right to Bail Clause exceeds what the authors call the "Article V, three-quarters consensus" or "Article V, federal-constitutional-law-making consensus." *Id.* at 50; *see infra* Figure 3 (showing the prevalence of the Right to Bail Clause in 1868). As discussed in Section I.D *infra*, this Article agrees that the prevalence of rights in state constitutions in 1868 should be an important factor in deciding which rights should be protected by the broad provisions of the Fourteenth Amendment.

cases should be protected by the Fifth Amendment as essential to due process in light of subsequent state constitutional evolution. After all, the federal government has increasingly expanded its criminal jurisdiction, creating federal crimes in areas of law formerly "reserved to the States."[11] It is perversion of both federalism and liberty if the federal government can take over state criminal offenses while not providing the same level of constitutional protections as was historically provided by the vast majority of states in their state constitutions. In addition, the state constitutional experience—where every state that joined the Union after 1776 ensured the Consensus Right to Bail and all but two ensured it in the text of their constitutions—should be sufficient to constitutionalize the federal.

Finally, a complete story of the right to bail in America must chronicle not only the impressive spread of this right for the first 200 years of American history, but also its dramatic decline in the last half-century. Part III describes the fail, and the resultant crisis, of bail. Since the 1970s, the federal government and many of the states have modified the right to bail and taken away what this Article identifies as a fundamental constitutional right.[12] Bail is now routinely denied to persons accused of noncapital crimes if judges consider them a "flight risk" or a "danger to the community." Building on the constitutional arguments presented in Parts I and II, this Part argues that this revocation of the right to bail is a violation of the Fifth, Eighth, Ninth, and Fourteenth Amendments. This war on bail, along with the broader war on crime, began with President Nixon's election in 1968 and was carried out largely by the principal members of Nixon's Attorney General's Office—John Mitchell and William H. Rehnquist.

The Supreme Court has never decided whether bail is a right protected by the Fourteenth Amendment. Chief Justice Rehnquist, writing for the Court in the 1987 case of *United States v. Salerno*,[13] declared the 1984 Federal Bail Reform Act constitutional, citing virtually no history—not even the Judiciary Act of 1789 or a single state constitution. This Article argues that it is time for the Court to revisit that holding. In addition, and perhaps even more importantly, it is time for

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11. U.S. CONST. amend X, § 1.

12. While advocates for prisoners' rights might deplore this change in the right to bail as a travesty of justice, others could point to the many constitutional amendments and statutory changes as evidence that the conservative movement has changed the meaning of the Constitution and has made America safer. From either vantage point, this change could be considered a peculiar type of "constitutional moment"— one where constitutional rights are taken away. Bruce Ackerman coined the term "constitutional moment" to refer to times where the people of America have changed the meaning of constitutional rights outside of the Article V amendment process. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1993); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (2000). The classical examples of constitutional moments are extensions of popular movements that have expanded constitutional rights—during Reconstruction, the New Deal, and the Civil Rights Era. The conservative revolution that started with the "law and order" campaigns of 1968 has moved rights in a different direction—one perhaps best described as a "reverse" constitutional movement. The rescinding of the constitutional right to bail is perhaps the greatest triumph of the conservative revolution, but both liberal and conservative scholars have overlooked its significance.

13. 481 U.S. 739 (1987).

the Court to recognize the centrality of bail to the constitutional history of the states and to protect it under the Fourteenth Amendment. Allowing states and Congress to continue to abridge the right to bail—one of the oldest, and perhaps the most stable, rights in Anglo-American history—threatens any conception of the Constitution as a binding document that protects individual liberties or unpopular minorities.

I. SAFEGUARDING THE RIGHT TO BAIL IN STATE CONSTITUTIONS, STATE STATUTES, AND THE FOURTEENTH AMENDMENT, 1776–1976

A constitutional right to bail emerges from the faded pages of the present and historical state constitutions and their respective constitutional amendments. For two centuries—from 1776 to 1976—it was one of the best-protected constitutional rights in America. This Part presents the findings from a survey of every state constitution from the Founding to the present (approximately 150, as many states have had multiple constitutions) as well as all constitutional amendments related to bail. In addition, the right to bail under state statutes and common law is examined for those states lacking a constitutional right to bail. Out of this analysis, the Consensus Right to Bail Clause emerges: "All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." More than 41 states protected this right by constitution (48 by constitution or statute), far more than the three quarters required for a constitutional amendment.

In addition to a Right to Bail Clause, all state constitutions, except for Illinois, provided for immunity from excessive bail. These two distinct bail provisions worked in concert (along with the writ of habeas corpus) to protect the right to bail in the states. Sections I.A–I.C describe the development of the state right to bail. Section I.D argues why the dual rights to bail—the right to bail for all but capital crimes as well as immunity from excessive bail—should be protected by the Fourteenth Amendment. Section I.E shows how the right to bail was protected even before states acquired statehood—by the Northwest Ordinance and other territorial organic acts.[14] Finally, Section I.F discusses how we should interpret the substance of the Consensus Right to Bail in the twenty-first century, with special emphasis on evolution in the scope of "capital offenses."

A. Before They Were States: Right to Bail in English and Colonial Legal History

The right to bail in the colonies arose primarily out of the inherited statutes and common law of England. This right was protected, refined, and

14. An "organic act" is an act of Congress that establishes a territory, which often not only organizes the territory into a republican polity, but also provides for a mechanism for the territory to become one state (or multiple states). Organic acts also often contained a declaration of rights, guaranteeing territorial residents' most fundamental rights. For an extended discussion of organic acts and their influence on civil rights in America, see Matthew J. Hegreness, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1820 (2011).

strengthened by some of the most fundamental constitutional documents in Anglo-American history: the Magna Carta, issued in 1215; the Statute of Westminster I in 1275; the Petition of Right in 1628; the Habeas Corpus Act of 1679; and the English Bill of Rights of 1689. The origins of bail extend even beyond the Norman Conquest of England to ancient Anglo-Saxon traditions.[15] The thirteenth century, however, saw the emergence of two of the most important constitutional statutes in English history: the Magna Carta (1215), which established the principles of due process embodied by the right to bail, and the Statute of Westminster I (1275), which clearly established which offenses were automatically bailable. The right to bail established in the thirteenth century would persist through the centuries. Unlike a constitutional right such as freedom of speech that is a latecomer to the Anglo-American constitutional tradition and is remarkably labile, the right to bail was incredibly stable (at least until the late twentieth century). English history is, therefore, essential for understanding not only the origins of bail but also the substance of bail in the United States.

The Magna Carta declared: "No freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or Free Custom . . . *nor will We not pass upon him, nor condemn him*, but by lawful Judgment of his Peers, or by the Law of the Land."[16] At first, all offenses, even the most heinous offenses, were bailable, bail being a component of the "ancient common law."[17] Blackstone wrote that in ancient England "all felonies were bailable . . . before and since the [Norman] conquest"[18] These included capital offenses, "till murder was excepted by statute; so that persons might be admitted to bail before conviction in almost every case."[19]

The due-process foundation laid by the Magna Carta with respect to bail was concretized later in the thirteenth century with the Statute of Westminster I in 1275.[20] The Statute of Westminster I declared a list of particularly serious offenses—such as arson, treason, and breaking prison—that would not be bailable. This set of nonbailable offenses remained relatively consistent for the next five centuries, leaving the vast quantity of felonious, as well as nonfelonious, offenses as bailable. Blackstone and Coke, more than 100 years later, recorded similar lists of the few classes of offenses excepted from bail, both based on the Statute of

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15. ELSA DE HAAS, ANTIQUITIES OF BAIL: ORIGIN AND HISTORICAL DEVELOPMENT IN CRIMINAL CASES TO THE YEAR 1275 (1940).

16. Magna Charta, 1225, c. 26 (Eng.), *in* 1 THE STATUTES AT LARGE, FROM MAGNA CHARTA, TO THE END OF THE REIGN OF KING HENRY THE SIXTH 7–8 (Owen Ruffhead, ed., London, Mark Basket 1763) (containing both an English translation and the original Latin) (emphasis added).

17. 4 WILLIAM BLACKSTONE, COMMENTARIES *298.

18. *Id.*

19. *Id.*

20. 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 236 (London, MacMillan & Co.1883); Statute of Westminster, 1275, 3 Edw. 1, c. 15 (Eng.), *in* 1 THE STATUTES AT LARGE, FROM MAGNA CHARTA, TO THE END OF THE REIGN OF KING HENRY THE SIXTH 45–46 (Owen Ruffhead ed., London, Mark Basket 1763) (containing both an English translation and the original Norman French).

Westminister I.[21] For all offenses that were bailable, officers of the crown had no power to deny bail: persons accused of bailable offenses "shall from henceforth be let out by sufficient Surety, whereof the Sheriff will be answerable and that without giving ought of their Goods."[22] Thus, for all of English history, from before the Conquest until the time of American independence, only the most serious of felonies were not bailable, and bail was available not as a matter of judicial discretion but as a matter of right.

The Petition of Right, the Habeas Corpus Act, and the English Bill of Rights are three great pillars of bail that emerged from the constitutional struggles of the seventeenth century. Professor Foote wrote that these three statutes created a "protective structure" that "stands like a three-legged stool."[23]

While the Petition of Right reinforced the principle that a person could not be detained without being charged, the Habeas Corpus Act provided the right mechanism by which a person could obtain release when they were unlawfully detained for bailable offenses. Although the procedure for habeas corpus was not codified until the Habeas Corpus Act, the essence of habeas corpus (which, in Latin, means "you shall have the body") crystallized during the thirteenth century, contemporaneously with the codification of the right to bail in the Magna Carta and the Statute of Westminster I.[24] The writ of habeas corpus is a summons addressed to the custodian of the prisoner demanding that the custodian "shall have the body" of the prisoner before the court and shall explain the cause of detention. If the court decided that the custodian did not have the lawful power to detain the prisoner, the prisoner would be released. In response to persons being denied bail for offenses that were bailable, Parliament passed the Habeas Corpus Act of 1679, strengthening the law of habeas corpus to the level that would be inherited by the United States.[25] The Act acknowledged that "many of the King's subjects have been and hereafter may be long detained in prison, in such cases where by law they are bailable."[26] The act provided for "speedy relief"[27] of all persons imprisoned,

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21. *Compare* 4 WILLIAM BLACKSTONE, COMMENTARIES *296, *with* 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 187–89 (London, M. Flesher & M. Young, 1642).

22. Statute of Westminster, 1275, 3 Edw. 1, c. 15 (Eng.), *in* 1 THE STATUTES AT LARGE, FROM MAGNA CHARTA, TO THE END OF THE REIGN OF KING HENRY THE SIXTH 45–46 (Owen Ruffhead ed., London, Mark Basket 1763) (containing both an English translation and the original Norman French).

23. Foote, *supra* note 9, at 968; *but see* Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L. J. 1139, 1182 (1972) (arguing that "the primary issue in [Darnel's Case leading to the Petition of Right] was not the right to bail, but the discretionary power of the crown to imprison its subjects without notice of the cause"); Verrilli, *supra* note 9, at 344–45 (supporting Foote insofar as it was clear members of Parliament at the time of the Petition of Right "recognized the relationship between this discretionary power not to give notice of the charges and the right to bail").

24. William F. Duker, *The English Origin of the Writ of Habeas Corpus: A Peculiar Path of Fame*, 53 N.Y.U. L. REV. 983, 992–96 (1978).

25. Habeas Corpus Act of 1679, 31 Car. 2, c. 2.

26. *Id*.

27. *Id.* § 2.

and even allowed prisoners to recover the then-monstrous sum of 500 pounds from the highest judicial officers in England, including the Lord Chancellor or the judges of the King's Bench, if they "deny any writ of Habeas Corpus by this act required to be granted."[28]

After the Habeas Corpus Act was passed, only one great loophole remained: Officials could "requir[e] bail to a greater amount than the nature of the case demands."[29] Such excessive bail was a *de facto* denial of bail for bailable offenses, violating the spirit, though not the letter, of the law. The English Bill of Rights closed this final loophole. Like the U.S. Bill of Rights that it inspired, the English Bill of Rights of 1689 forbade "excessive bail."[30] The English Bill of Rights thus prevented de facto denials: when offenses are bailable, the amount set for bail cannot be "excessive."

These constitutional statutes were the pillars of bail in colonial America and shaped the colonists' understanding of bail.[31] Indeed, in the famous New York colonial case of John Peter Zenger, Zenger's counsel demanded upon his arrest for libel in 1734 that he had a fundamental right to be admitted to reasonable bail, citing the Magna Carta, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights.[32] The court agreed that "he might be admitted to bail," but Zenger was not bailed as "he conceived he could not ask any to become his bail on" the terms defined by the court.[33] As this Article will show, all the elements of the English law of bail—right to bail for most crimes, remedy of habeas corpus, and immunity from excessive bail—would reappear in the federal and state constitutional systems in the United States.

Sometimes the colonial charters or colonial laws would alter the baseline. In fact, the substance of the right to bail that would appear in state constitutions and the U.S. federal system was first articulated, albeit in different language, more than a century before Independence in the Massachusetts Body of Liberties of 1641. The very first section under "Rites, Rules, and Liberties concerning Juditiall [sic] proceedings" was the right to bail:

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28. *Id.* § 10.

29. 4 WILLIAM BLACKSTONE, COMMENTARIES *297.

30. *Compare* English Bill of Rights of 1689, 1 W. & M., c. 2, s. 2 ("That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted."), *with* U.S. CONST. amend. XIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

31. *See, e.g.*, A.E. Dick Howard, *Rights in Passage: English Liberties in Early America*, *in* THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 3, 11–13 (Patrick T. Conley & John P. Kaminski eds., 1992) (discussing the influence of the Petition of Right and other English constitutional documents on the Founders).

32. *See A Narrative of the Case of John Peter Zenger, Printer of the New-York Weekly Journal 5*, *in* JOHN ALMON, A LETTER CONCNERING LIBELS, WARRANTS, AND THE SEIZURE OF PAPERS; WITH A VIEW TO SOME LATE PROCEEDINGS, AND THE DEFENCE OF THEM BY THE MAJORITY (1764).

33. *Id.* at 6.

> No mans person shall be restrained or imprisoned by any authority whatsoever, before the law hath sentenced him thereto, if he can put in sufficient securitie, bayle or mainprise, for his appearance, and good behavior in the meane time, unlesse it be in Crimes Capitall, and Contempt in open Court, and in such cases where some expresse act of [the legislature] doth allow it.[34]

The Massachusetts Body of Liberties limited the powers of government by delineating the rights of individuals, much like the later English Bill of Rights of 1689 and the American declarations of liberties.[35] It established the principle that all noncapital crimes should be bailable.

The Pennsylvania Frame of Government of 1682 was the true prototype for the Consensus Right to Bail Clause, as the right would become enshrined in the majority of state constitutions as well as territorial organic acts such as the Northwest Ordinance. It states: "That all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption [of guilt] great."[36] As shown in Section I.B, some states substituted "persons" for "prisoners" and "except" for "unless" and made various other minor variations, but the substance, as well as the text, of the Right to Bail Clause has been remarkably stable through the centuries and throughout the states. The Frame of Government was a constitutional document, limiting legislators, judges, and other governmental officials. Unlike the Massachusetts Body of Liberties, which allowed for the legislature to alter the right to bail, the right established in Pennsylvania was absolute and unequivocal. Echoing this strong form of the right articulated at the end of the seventeenth century, the right to bail became firmly entrenched in both the federal and state constitutional systems throughout the eighteenth and nineteenth centuries, and the first half of the twentieth century.

B. Survey of Every State Constitution from Independence to the Twenty-First Century

In uncovering the right to bail as it existed in state constitutions, this Article analyzes every state constitution and constitutional amendment related to bail from Independence until the present. This Section presents the first half of that analysis: the Right to Bail Clause as it became firmly entrenched between America's Founding and 1976. From comparisons of all the state constitutions, I articulate a Consensus Right to Bail Clause. In addition, this Section describes the

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34. The Massachusetts Body of Liberties of 1641, § 18, *reprinted in* 43 CHARLES WILLIAM ELIOT, AMERICAN HISTORICAL DOCUMENTS: 1000–1904, at 66, 69 (1910).

35. *See* Verrilli, *supra* note 9, at 337 n.50 (arguing that limiting government and not defining legislative discretion was the purpose of the bail provision in the Body of Liberties).

36. FRAME OF THE GOVERNMENT OF PENNSYLVANIA of 1682, art. XI, *reprinted in* 5 THORPE, 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 3052, 3061 (1909). For a detailed historical account of the drafting of this document, see Neil Howard Cogan, *The Pennsylvania Bail Provisions: The Legality of Preventive Detention*, 44 TEMP. L.Q. 51 (1970).

spread of the right to bail over time. The second half of this constitutional story—the modification of the bail clauses beginning in the District of Columbia in 1970—is presented in Part III.

1. The Consensus Right to Bail Clause

At some point in their history, 42 of the 50 states had a Right to Bail Clause. Of the original 13 states, more than half have protected the right to bail in their state constitutions, and most of the rest have done so by statute.[37] Of the 37 states that were not one of the original 13 colonies, all but West Virginia and Hawaii adopted a Right to Bail Clause in the their original constitutions. When states spoke, from Vermont[38] to Alaska, their voice was virtually unanimous: The right to bail was a fundamental constitutional right in America.

The Right to Bail Clause in state constitutions has been remarkably consistent over time and among the states.[39] For the 42 states that protected the right to bail in their constitutions, one version of the Right to Bail Clause was chosen for each state—the version that appears in the most constitutions of that state or for the most number of years.[40] Among these versions, the most common

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37. North Carolina and Pennsylvania were the only two states that had the Right to Bail Clause in their original constitutions before 1789, but seven of the original thirteen states protected the Right to Bail Clause by statute at some point in their history (and all but Virginia and New York protected the right by constitutional or statutory provision). The two original states that did not have a state constitution until the nineteenth century, namely, Connecticut and Rhode Island, also included a Right to Bail Clause in their first constitutions. *See infra* Subsection I.C.1 for a detailed discussion of the statutory and constitutional history of bail in the original thirteen states.

38. Vermont is a special case; not one of the original thirteen colonies, Vermont declared its independence and framed a constitution in 1777. Various states claimed ownership to the land, but eventually Vermont was admitted as the fourteenth state in 1791. Act of Feb. 18, 1791, ch. VII, 1 Stat. 191. Vermont has had three constitutions (1777, 1786, and 1793). All three provided for the right to bail for all but capital offenses "when the proof is evident or the presumption great," as well as immunity from excessive bail. VT. CONST. of 1777, ch. 2, §§ XXV, XXVI; VT. CONST. of 1786, ch. 2, § XXX; VT. CONST. of 1793, ch. 2, § XXXIII. Vermont's 1973 Constitution was amended twice (1982 and 1994), substantially weakening the right to bail. *See Vermont's Constitutions*, VT. STATE ARCHIVES & RECORD ADMIN., http://vermont-archives.org/govhistory/constitut.htm (last updated Mar. 26, 2012).

39. Until the revolution in the 1970s, discussed in Part III, states were very faithful to the Consensus Right to Bail text.

40. ALA. CONST. art. I, § 16 ("That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."); ALASKA CONST. art. I, § 11 ("In all criminal prosecutions, ... [t]he accused is entitled . . . to be released on bail, except for capital offenses when the proof is evident or the presumption great."); ARIZ. CONST. art. II, § 22 ("All persons charged with crime shall be bailable by sufficient sureties except for capital offenses when proof is evident or the presumption great.") (before amendment in 1970); ARK. CONST. art. II, § 8 ("All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.") (Arkansas has had four constitutions and in the first two (1864 and 1868) the clause was "That all prisoners shall be

bailable by sufficient securities, unless in capital offences, where the proof is evident or the presumption great"; this current version dates from 1874 and is the version used to assess Arkansas's contribution to the consensus text); CAL. CONST. of 1879, art. I, § 6 ("All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great.") (before amendment in 1974, 1982, and 1994); COLO. CONST. art. II, § 19 ("That all persons shall be bailable by sufficient sureties, except for capital offences, when the proof is evident or the presumption great.") (before amendment in 1983 and 1995); CONN. CONST. of 1955, art. I, § 14 ("All prisoners shall, before conviction, be bailable by sufficient sureties, except for capital offenses, where the proof is evident, or the presumption great."); DEL. CONST. art. I, § 12 ("All prisoners shall be bailable by sufficient sureties, unless for capital offences when the proof is positive or the presumption great."); FLA. CONST of 1887, art. I, § 9 ("All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great."); IDAHO CONST. art. I, § 6 ("All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great."); ILL. CONST. art. 1, § 9 ("All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great.") (before 1982 amendment) (before 1870 it was "That all . . . unless . . . ."); IND. CONST. of 1816, art. I, § 14 ("That all persons shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great.") (changed in 1851 to specifically exempt murder and treason instead of "capital offenses"); IOWA CONST. art. I, § 12 ("All persons shall before conviction, be bailable by sufficient sureties, except for capital offenses, where the proof is evident, or the presumption great."); KAN. CONST. Bill of Rights, § 9 ("All persons shall be bailable by sufficient sureties, except for capital offenses, where proof is evident or the presumption great."); KY. CONST. § 16 ("All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great.") (earlier Kentucky constitutions contained "That all prisoners . . ."); LA. CONST. of 1913, Bill of Rights, art. 12 ("All persons shall be bailable by sufficient sureties, unless for capital offenses where the proof is evident or presumption great.") (currently on its eleventh constitution, Louisiana has had the most state constitutions; the earlier ones followed this form while later ones kept the right but with slightly different language); ME. CONST. art. I, § 10 ("All persons, before conviction, shall be bailable except for capital offences, where the proof is evident or the presumption great.") (before amendment in 1837); MICH. CONST. of 1835, art. I, § 12 ("All persons shall, before conviction, be bailable by sufficient sureties, except for capital offences, when the proof is evident or the presumption great.") (in the 1850 constitution, "capital offences" was changed to "murder and treason"); MINN. CONST, art I, § 7 ("All persons before conviction shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great."); MISS. CONST. art. III, § 29 ("[A]ll persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great.") (as before 1987 amendment); MO. CONST. art. I, § 20 ("That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."); MONT. CONST. art. II, § 21 ("All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great."); NEB. CONST. of 1867, art. I, § 6 ("All persons shall be bailable by sufficient sureties, except for capital offences, where the proof is evident or the presumption great.") (Nebraska's constitution of 1867 contained two Right to Bail Clauses; in the 1875 constitution, "capital offenses" was changed to "treason and murder,"); NEV. CONST. art. I, § 7 ("All persons shall be bailable by sufficient sureties; unless for capital offenses, when the proof is evident, or the presumption great.") (before 1980 amendment); N.J. CONST. art. 1, § 11 ("All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or

formulation of the right to bail, which I call the "Consensus Right to Bail Clause," emerges. It is: "All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." Figure 1 shows the Consensus Right to Bail Clause, with the size of the words weighted by how often they appear in the state constitutions.

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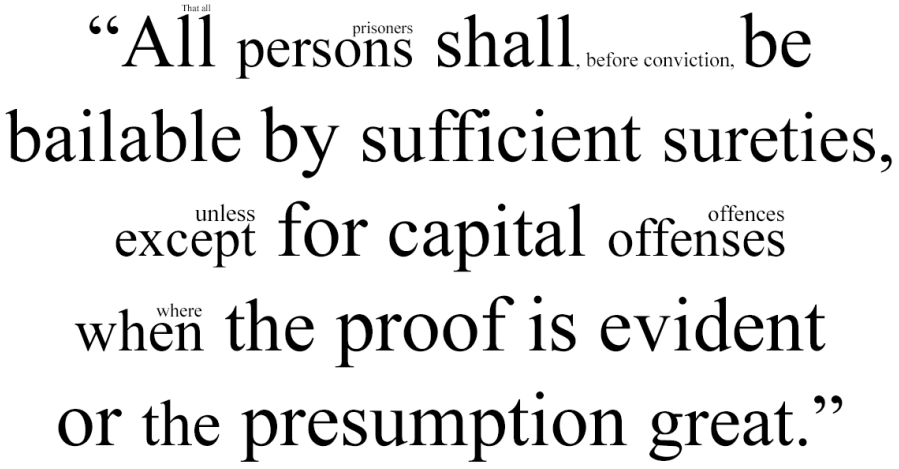
presumption great."); N.M. CONST. art. II, § 13 ("All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.") (before 1988 amendment); N.C. CONST. of 1776, art. 39 ("All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great.") (the right to bail was removed from the N.C. Constitution in 1868); N.D. CONST. art. I, § 11 ("All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great."); OHIO CONST. art. I, § 9 ("All persons shall be bailable by sufficient sureties, except for capital offences where the proof is evident, or the presumption great.") (before amendment in 1998) (in the 1802 constitution it was "That all . . . unless . . . ."); OKLA. CONST. art. 2, § 8 ("All persons shall be bailable by sufficient sureties, except for capital offenses when the proof of guilt is evident, or the presumption thereof is great.") (before 1989); OR. CONST. art. I, § 14 ("Offences (sic), except murder, and treason, shall be bailable by sufficient sureties. Murder or treason, shall not be bailable, when the proof is evident, or the presumption strong."); PA. CONST. art. I, § 14 ("All prisoners shall be bailable by sufficient sureties, unless for capital offense when the proof is evident or presumption great.") (before 1998 amendment); R.I CONST. of 1843, art. I, § 9 ("All persons imprisoned ought to be bailed by sufficient surety, unless for offences punishable by death or by imprisonment for life, when the proof of guilt is evident or the presumption great.") (before 1973 amendment); S.C. CONST. of 1895, art. I, § 20 ("All persons shall, before conviction, be bailable by sufficient sureties, except for capital offences when the proof is evident or the presumption great.") (before 1971 amendment); S.D. CONST. art. VI, § 8 ("All persons shall be bailable by sufficient sureties, except for capital offenses when proof is evident or presumption great."); TENN. CONST. art. I, § 15 ("That all prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great."); TEX. CONST. art. I, § 11 ("All prisoners shall be bailable by sufficient sureties, unless for capital offences when the proof is evident.") ("or the presumption great," was present in Texas's 1845 Constitution, but was omitted from the 1866 and subsequent constitutions); UTAH CONST. art. I, § 8 ("All prisoners shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption strong.") (before 1973 amendment); VT. CONST. of 1777, ch. 2, § XXV ("All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or presumption great.") (the words of this right were reorganized in 1786 to become: "And all prisoners, unless in execution, or committed for capital offences, when the proof is evident or presumption great, shall be bailable by sufficient sureties," which persisted into the 1793 Constitution (the still active constitution though the bail provision was edited in 1982 and 1994)); WASH. CONST. art I, § 20 ("All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great.") (before 2010 amendment); WIS. CONST. art I, § 8 ("All persons shall before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.") (before 1981 amendment); WYO. CONST. art I, § 14 ("All persons shall be bailable by sufficient sureties, except for capital offences when the proof is evident or the presumption great.").

Figure 1: Consensus Right to Bail Clause



This Figure shows every word that appears in the Right to Bail Clause of at least 5 of the 42 states that ever had a Right to Bail Clause. For example, "proof" appears in the Right to Bail Clause in all 42 states that ever had the clause. The height of the other words relative to "proof" (as well as their shading) shows their relative frequency in the state constitutions. For example, "before conviction" appears in 11 states, and thus "before conviction" is approximately a quarter of the height of "proof" in Figure 1.

As Figure 1 shows, there are three other common variations appearing in at least ten states: (1) "prisoners" is substituted[41] for "persons" in ten[42] of the Right to Bail Clauses, with "persons" appearing in 30; (2) "unless" appears instead of "except" in 13 states, with "except" appearing in 29; and (3) "where" is substituted for "when" in 10 states, with "when" appearing in 32.

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41. Actually, since most of the original Right to Bail Clauses used the term prisoners instead of persons, it is more proper to say that "persons" is substituted for "prisoners" in most of the constitutions. The earliest state constitutions with Right to Bail Clauses are Pennsylvania and North Carolina. Both read: "All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or presumption great." N.C. CONST. of 1776, art. 39; PA. CONST. of 1776, art. II, § 28.

42. One of those ten is Rhode Island, which used the words "persons imprisoned." Nine used the words "prisoners," twenty-nine used "persons," one used "persons charged," and one used "offences." Alaska's Right to Bail Clause, which differed most from the consensus, uses "[t]he accused."

2. The Constitutional Evolution of the Right to Bail

The precise formulation of the Consensus Right to Bail Clause, which would dominate American jurisprudence after 1789, was still inchoate when the Federal Constitution was written, though some states granted the right to bail as inherited from English statutes and common law.[43] Of the original 13 states, only North Carolina and Pennsylvania had the Right to Bail Clause in their pre-1789 state constitutions. Connecticut and Rhode Island added a right to bail in their first state constitutions in 1818 and 1843. Delaware and New Jersey added the clause in their second constitutions in 1792 and 1844. South Carolina added the right to its constitution in 1868, but that same year North Carolina omitted the right from its constitution. In sum, only seven of the thirteen original states ever had the Consensus Right to Bail Clause in their state constitutions, and in four of those states the right was added in the nineteenth century, decades after the founding.

In the states that joined the Union after 1789, the story was much different. Of those 37 states, 33 included both a Right to Bail Clause and an Excessive Bail Clause in their original and every subsequent constitution. Of the remaining four states, Hawaii and West Virginia included an Excessive Bail Clause, whereas Illinois and Louisiana included a Right to Bail Clause but not an Excessive Bail Clause in their original constitutions.[44]

Figure 2 shows the spread of both the Right to Bail Clause and the Excessive Bail Clause over time. States are listed in order of their first state constitutions. For example, Connecticut joined the Union at the Founding but did not have a constitution until 1818, so states that joined the Union after the Founding, but prior to 1818, with full-fledged constitutions are listed before Connecticut. Vermont and Texas deserve special mention, as they were both independent republics whose constitutions contained a Right to Bail Clause even before admission to the Union. They are listed by the years of their admission to the Union (1791 and 1845, respectively) rather than the years of their first constitutions.

43. *See infra* Subsection I.C.1 for a discussion of the statutory and common law rights in the original thirteen states.

44. Louisiana would later include both clauses.

Figure 2: Constitutional Bail Provisions by State and Through Time

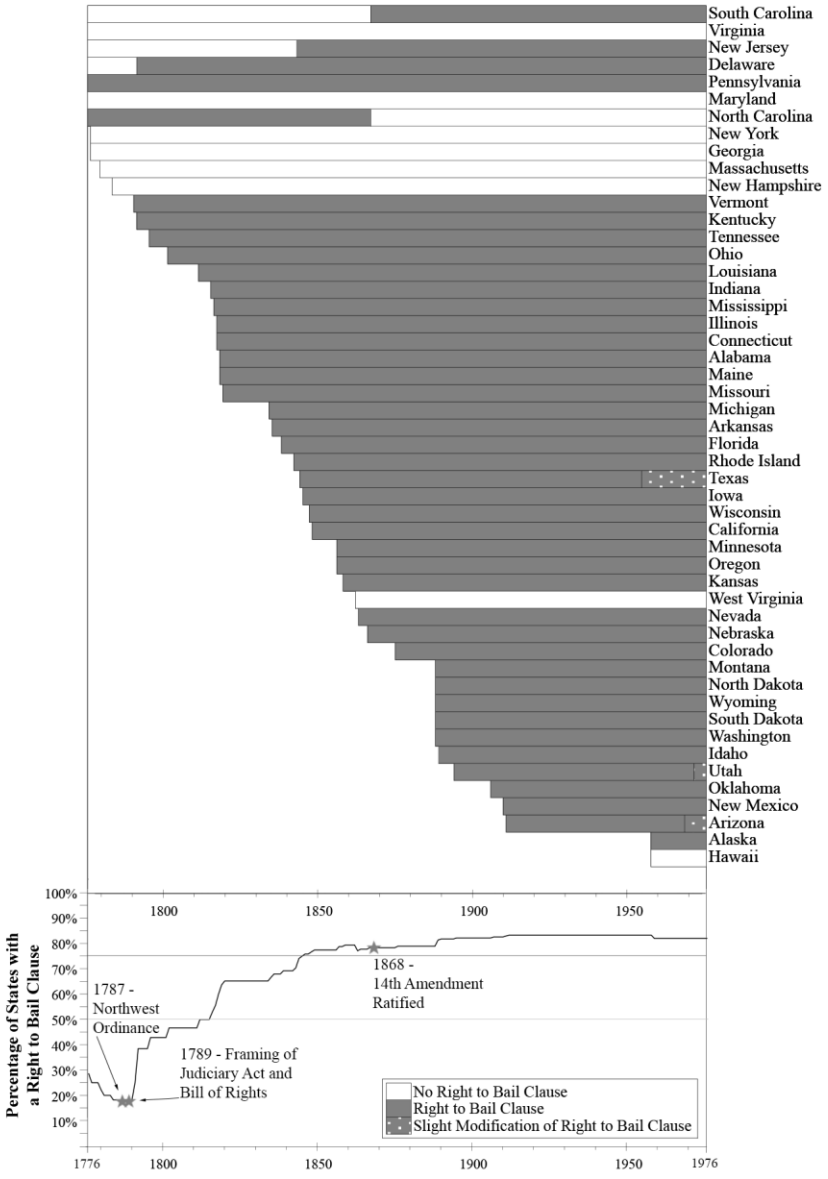

Figure 2 shows the spread of the Right to Bail Clause. The top panel shows data for individual states, listed by date of first constitution and thus beginning with South Carolina's in 1776. Solid gray indicates that a state's constitution contains a Right to Bail Clause at the time. White signifies the absence of a Right to Bail Clause. Solid gray with white polka dots indicates that

the Right to Bail Clause was slightly modified, but remains substantively strong; the meaning of these slight modifications will be revisited in Part III. The bottom panel shows how the percentage of states with a Right to Bail Clause evolved over time. As revealed by the supplementary horizontal gridlines, the first years at which at least 50% and 75% of states had a Right to Bail Clause in their state constitutions are 1812 and 1845, respectively. The text of every Right to Bail Clause (from every state constitution or state constitutional amendment) can be found in the Appendix.

In some of the Right to Bail Clauses, the term "capital offenses" is replaced by "murder or treason" or "offenses for which the maximum imprisonment is life imprisonment." As discussed in Section I.F, these are in many ways functionally equivalent and could be one interpretation of the meaning of "capital offenses." Regardless, the vast majority of Right to Bail Clauses retained the prototypical phrase "capital offenses."

C. The Statutory Right to Bail in States Lacking a Constitutional Right to Bail Clause

As discussed above, besides West Virginia and Hawaii, every state formed after 1789 included a right to bail in its state constitution. This Section will show that the Consensus Right to Bail, which was protected in the vast majority of states by state constitutions, was also protected by statutes in most of the original states that lacked an explicit constitutional right. Including both statutory and constitutional rights, the consensus right—the absolute right to bail for noncapital crimes—was protected by 48 of the 50 states (every state but Massachusetts and Virginia).

1. In the Original States

Simply looking at constitutions suggests that the right to bail was not as strong in the original states as in states that joined the Union after 1789. After all, only seven of the original states even had a Right to Bail Clause, and only two of those clauses were written before the Federal Constitution and Federal Bill of Rights.

A closer look reveals, however, that four out of six original states that never had a Right to Bail Clause in their state constitutions protected the right to bail by statute at some point in their history. In the mid-twentieth century, Maryland adopted a Right to Bail Clause in its procedural rules that was functionally identical to the Consensus Right to Bail Clause for noncapital crimes. It read: "Prior to conviction an accused who is charged with an offense the maximum punishment for which is other than capital shall be entitled to be admitted to bail. In a capital case the accused may be admitted to bail in the discretion of the court."[45] In Maryland, before the right to bail became a statutory

45. Rule 777 of the Maryland Rules of Procedure (adopted January 1962); *see* Turco v. Maryland, 324 F. Supp. 61, 64 (D. Md. 1971), *aff'd sub nom*. Turco v. Warden, Balt. City Jail, 444 F.2d 56 (4th Cir. 1971). Although this provision did not provide the

right, it was protected by the constitutional provision entitling state citizens to the common law and statutes of England,[46] including the Statute of Westminster I of 1275.[47]

From the mid-nineteenth century, both Georgia and New Hampshire enjoyed the Consensus Right to Bail as a statutory right. In Georgia, bail in capital offenses was a matter of discretion, but "all other cases [were] bailable."[48] Under New Hampshire law since the mid-nineteenth century, all persons were bailable except for those accused of capital offenses "where the proof [was] evident or the presumption great."[49]

Massachusetts has the longest history of any state of protecting the right to bail in noncapital cases, as well as judicial discretion to provide bail to persons accused of capital offenses. This right finds its origin in the Massachusetts Body of

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standard by which capital offenses would be bailable (leaving it entirely to the discretion of the courts rather than providing for bail whenever the proof was not evident and the presumption not great), it nonetheless protected the accused for all noncapital crimes to the same extent as the consensus constitutional provision: such person "shall be entitled to be admitted to bail." *Turco*, 34 F. Supp. at 64.

46. With regard to England common law, Maryland's constitution provides:

> That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity.

MD. CONST. Declaration of Rights, art. 5(a)(1).

47. Regarding the constitutional protection of common law rights, Maryland's court of last resort wrote in 1957 that the Statute of Westminster I of 1275, which, as discussed in DE HAAS, *supra* note 15, defined the right to bail for different cases, was "among the British Statutes in force in Maryland. Fischer v. Ball, 129 A.2d 822, 823–24 (Md. 1957).

48. GA. CODE of 1867, § 4649 ("Capital offenses are bailable only before a Judge of the Superior or County Court, and is, in every case, a matter of sound discretion. All other cases are bailable by the committing Court. Excessive bail shall never be demanded.").

49. Before 1867, much of bail was governed by the common law. But in 1867, "radical changes were made as to bail." State v. Ricciardi, 123 A. 606, 606 (N.H. 1924). Two new sections were added: one "that all persons charged with crime are bailable 'except for capital offenses when the proof is evident or the presumption great,' and the other that 'the Supreme Court or any justice thereof, and no other court or justice,' could take bail when the offense was punishable by imprisonment "for twenty years or upward." *Id.* at 606–07. This right to bail was unchanged throughout the early twentieth century. *See id*; *see also* State v. Hutton, 223 A.2d 416 (N.H. 1966). A modified version of this provision still survives in New Hampshire's statutes: "Any person arrested for an offense punishable by up to life in prison, where the proof is evident or the presumption great, shall not be allowed bail." N.H. REV. STAT. ANN. § 597:1–c (2010). The original "capital offenses" was changed to "offenses punishable by death or for murder in the first degree" in 1974. Act of Apr. 3, 1973, ch. 34:4, 1974 N.H. Laws 56, 57–58.

Liberties of 1641 discussed in Section I.A and was reaffirmed by numerous statutes, judicial decisions,[50] and judicial practice for three and a half centuries. Although rape and arson were initially capital offenses along with murder and treason and therefore nonbailable, they were specifically made bailable by statute in the mid-nineteenth century.[51] For bailable offenses, admission to bail was always automatic when sufficient bail was offered.[52] In 1961, the Supreme Judicial Court of Massachusetts held that murder was a bailable offense but that bail in such cases was not "a matter of right but discretionary with the judge."[53] The court cited the Federal Rules of Criminal Procedure for support, which were then "substantially the same as the bail provisions of the Judiciary Act of 1789"[54] as well as the right in most of the states. Referring to the Consensus Right to Bail Clause, the court wrote: "In most of the States of this country all crimes, except capital cases where 'the proof is evident or the presumption great,' are bailable as of right."[55] The right to bail was thus embraced in Massachusetts through centuries of practice and finally by explicit reference to the Consensus Right to Bail Clause. The right to bail in Massachusetts was thus a hybrid statutory/judicial right, where even the approach towards capital defendants was purposively harmonized with other states' practices.

In Virginia, the legislature passed an act in 1785 "directing what prisoners should be let to bail."[56] This act declared that bail could be denied only for

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50. *See, e.g.*, Dunlap v. Bartlett, 76 Mass. (10 Gray) 282, 282 (1857) ("This party not being held for a capital offence, nor it appearing that he ever will be, it is a case for bail. The fact that there is danger that the act may result in a homicide is to be considered by the court in fixing the amount of bail. But not having, as yet appears, committed an offence which is not bailable, he is entitled to bail.").

51. *See* Commonwealth v. Baker, 177 N.E.2d 783, 785 (1961) (discussing the history of bailable offenses). Rape and arson, which like treason were initially not bailable, were specifically made bailable in 1871. *Id.* From 1860 to 1871, treason, rape, and arson were not bailable. *Id.* For a time, at least for women, it appears that rape, treason, and arson were kept as nonbailable, even when the penalty was changed from death to life imprisonment. *See* Commonwealth v. Wyman, 66 Mass. (12 Cush.) 237, 238 (1853) (discussing an 1852 act that changed the penalty for women who committed rape, treason, and arson to life imprisonment). The close association between capital punishment and life without parole is discussed in Subsection I.F.3.

52. MASS. GEN. LAWS ANN. ch. 248, § 19 (West 2010) ("If the prisoner is detained for a cause or crime for which he is bailable, he shall be admitted to bail if sufficient bail is offered."). *See also* THE GENERAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS, ch 144, Habeas corpus. Sec. 25 (Boston, Wright & Potter 1860) (declaring that every person detained for "a cause or offence for which he is bailable, . . . shall be admitted to bail if sufficient bail is offered.").

53. *Baker*, 177 N.E.2d at 785–87.

54. *Id.* at 786 & n.2.

55. *Id*. Persons accused of a capital offense "may be admitted to bail" where the "proof is not evident or the presumption not great." *Id.*

56. Act of Dec. 5, 1785, ch. XIV *in* A COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, OF A PUBLIC AND PERMANENT NATURE 25 (Richmond, Augustine Davis ed., 1794). The Act read: "Be it enacted by the General Assembly, That those shall be let to bail who are apprehended for any crime not punishable in life or limb:

offenses punishable "by life and limb" or for manslaughter, but only when there is good "cause to believe the party guilty thereof."[57] For all other offenses, persons were bailable.[58] In 1785, Virginia's right was expressed in different language than the consensus constitutional text that would emerge throughout the next century, and it was stingier to prisoners—bail could be denied not only for capital offenses but also for manslaughter and offenses punishable "by limb." By the mid-1800s, the right to bail had been changed so that all persons shall be bailable except those "who are apprehended for any crime not punishable by death, or confinement in the penitentiary."[59] Since Virginia's law protected prisoners less than the Consensus Right to Bail (it made bail discretionary not only for capital offenses but for offenses punishable by confinement in the penitentiary), it is not included in Figure 3 below as having a Consensus Right to Bail Clause.

An absolute right to bail in felony cases was also not protected in New York: Whether bail would be fixed and in what amount was a matter of judicial discretion.[60] By statute, admission to bail before conviction was a "matter of right in misdemeanor cases."[61] New York is thus an exception, along with Virginia, in *not* historically protecting an automatic right to bail for persons accused of noncapital felonies.

2. In West Virginia and Hawaii

Besides some the original thirteen states, only West Virginia and Hawaii did not include the Consensus Right to Bail Clause in their constitutions. Interestingly, West Virginia is not really independent from the original states: It only split from Virginia as a result of the Civil War, and it was never a territorial

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And if the crime be so punishable, but only a light suspicion of guilt fall on the party, he shall in like manner be bailable: but if the crime be punishable in life or limb, or if it be manslaughter, and there be good cause to believe the party guilty thereof, he shall not be admitted to bail." *Id.*

57. *Id.* In addition, underscoring the intimate connection between the right to bail and the immunity from excessive bail, the Act declared: "If any justice . . . refuse to admit to bail any who have right to be so admitted, after they s[h]all have offered sufficient bail, or require excessive bail, he shall be amerced at the discretion of a jury." *Id.*

58. The act also provided that, "no person should be bailed after conviction for any felony." *Id.*

59. See VA. CRIM. CODE of 1848, ch. XVII, § 1 *reprinted in* ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA, PASSED AT THE SESSION COMMENCING DECEMBER 6, 1847, AND ENDING APRIL 5, 1848, at 137 (Richmond, Samuel Shepherd 1848) ("Those shall be let to bail who are apprehended for any crime not punishable by death, or confinement in the penitentiary. And if the crime be so punishable, but only a light suspicion of guilt fall on the accused, he shall in like manner be bailable."). This law, in this form, first appeared in the early 1800s, and persisted at least until 1878. *See* DIGEST OF THE LAWS OF VIRGINIA OF A CRIMINAL NATURE 60–61 (Richmond, J.W. Randolph & English 1878).

60. *See* People *ex rel.* Devore v. Warden of N.Y.C. Prison, 244 N.Y.S.2d 505, 507 (N.Y. Sup. Ct. 1963). The current law on bail and other pretrial proceedings in felony cases is N.Y. CRIM. P. LAW § 180.10 (McKinney 2010).

61. *Devore*, 244 N.Y.S.2d at 508 (quoting People *ex rel.* Shapiro v. Keeper of City Prison, 49 N.E.2d 498, 500 (N.Y. 1943)).

state before acquiring statehood. Ultimately, however, both West Virginia and Hawaii protected the right to bail by statute.

West Virginia still preserves the Consensus Right to Bail via statute: "A person arrested for an offense not punishable by life imprisonment shall be admitted to bail by the court or magistrate. A person arrested for an offense punishable by life imprisonment may, in the discretion of the court that will have jurisdiction to try the offense, be admitted to bail."[62] Before this statute, bailable offenses were determined by the common law.[63]

From its statehood, in 1959, until 1980, the right to bail in Hawaii was protected by statute and was substantially the same as the Consensus Right to Bail. The law read: "All persons charged with criminal offenses shall be bailable by sufficient sureties, unless for offenses punishable by imprisonment for life not subject to parole, when the proof is evident or the presumption great."[64] Instead of limiting refusal of bail to "capital offenses," Hawaii's law allowed bail to be denied for "offenses punishable by imprisonment for life not subject to parole." However, Hawaii abolished its death penalty before it became a state, and it only imposes life without the possibility of parole for first-degree murder or first-degree attempted murder, but not for second-degree murder and lesser offenses.[65] In terms of the offenses rather than the punishment, Hawaii's statute is functionally equivalent to Consensus Right to Bail in states that have not outlawed the death penalty. Interpreting the Consensus Right to Bail Clause in states that lack "capital crimes" is considered in Subsection I.F.3.

D. Bail and the Fourteenth Amendment

The Fourteenth Amendment should protect from state abridgement both the Consensus Right to Bail and immunity from excessive bail. The U. S. Supreme Court has never ruled on whether either right is protected against state abridgement, though it has repeatedly implied that the immunity from excessive bail is protected[66] and that the right to bail may be protected.[67] This Section analyzes the right to bail only from the perspective of the Fourteenth Amendment. Additional due process considerations, such as the presumption of innocence, as

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62. W. VA. CODE ANN. § 62-1C-1 (West 2010). This act was originally passed in 1965. Act of March 5, 1965, ch. 38, 1965 W. Va. Acts 181, 193 (1965), *amended by* Act of March 12, 1983, ch. 58, § 62-1C-1, 1983 W. Va. Acts 334, 334–35 (1983).

63. *See, e.g.*, *Ex parte* Eastham, 27 S.E. 896, 896 (1897) (discussing bail for capital cases).

64. HAW. REV. STAT. § 709-3 (1970); *see* Huihui v. Shimoda, 644 P.2d 968, 976 (1982); *see also* Bates v. Hawkins, 478 P.2d 840, 841 (1970).

65. HAW. REV. STAT. § 706-656 (West 2011).

66. *See* McDonald v. Chicago, 130 S. Ct. 3020, 3035 n.13 (2010).

67. The Supreme Court in 1979 suggested, in dicta, that "[s]tates are required by the United States Constitution to release an accused criminal defendant on bail." Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979). The Court wrote that this would "merely supply one more possibility of release from incarceration by resort to procedures specifically set out in the Bill of Rights." *Id.* The dissent was even more supportive of the right to bail. *Id.* at 149 & n.1 (Stevens, J., dissenting).

well as Eighth Amendment considerations, are discussed in Part II in the context of the federal right to bail. Most of the arguments apply with equal force in the Fourteenth Amendment context, but the Fourteenth Amendment raises additional concerns and in many respects makes an even simpler and stronger case for the constitutional right to bail. From a doctrinal perspective, the Court's standards for Fourteenth Amendment substantive due process protection are more than capacious enough to encompass the Consensus Right to Bail Clause. From an originalist perspective, the right to bail was firmly entrenched in America's due process tradition by the time the Fourteenth Amendment was ratified in 1868.[68] Professor Amar has written: "Surely . . . judges confronting the open-ended language of the Fourteenth Amendment should consider the legal texts of other charters of liberty—Magna Charta, Petition of Right, the English Bill of Rights, state constitutions, and the like—as helpful sources."[69] The right to bail is unique in that it was integral to all these organic documents—and more—that shaped the development of rights in America.

The Court has provided various formulations of the test of whether a particular right is incorporated through the Fourteenth Amendment to the states. In *McDonald v. Chicago*,[70] the Court relied heavily upon the tests from *Duncan v. Louisiana*[71] and *Washington v. Glucksberg*.[72] The Court declared that it "must decide whether the right [in question is] . . . fundamental to *our* scheme of ordered liberty" (the *Duncan* standard), "or as we have said in a related context, whether this right is 'deeply rooted in this Nation's history and tradition'" (the *Glucksberg* standard).[73] These expansive tests for substantive due process protection easily incorporate the Consensus Right to Bail. After all, the right to bail was fundamental to the scheme of ordered liberty in virtually every state, as well as the federal judicial system, for two hundred years. It is deeply rooted not only in "this Nation's history and tradition," but also in English tradition, from the time of the Magna Carta. The Court itself declared in 1971: "Bail, of course, is basic to our system of law."[74]

The Consensus Right to Bail Clause would even qualify for due process protection under the approach to fundamental rights taken by the dissenting Justices in *McDonald*. Like the majority, the dissent relies upon *Duncan*. But the dissent would only apply the *Duncan* standard to protect rights "fundamental in the context of the criminal processes maintained by the American States."[75] The judge is "tasked with evaluating whether a practice 'is fundamental . . . to ordered

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68. *See supra* Part I.B.

69. AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 299 (1998).

70. 130 S. Ct. 3020, 3024 (2010) (deciding that the right to bear arms is incorporated through the Fourteenth Amendment to the states).

71. 391 U.S. 145 (1968).

72. 521 U.S. 702 (1997).

73. *McDonald*, 130 S. Ct. at 3036.

74. Schilb v. Kuebel, 404 U.S. 357, 365 (1971).

75. *McDonald*, 130 S. Ct. at 3097–98 (Stevens, J., dissenting) (quoting *Duncan*, 391 U.S. at 150 n.14).

liberty,' within the context of the 'Anglo-American' system."[76] The case that established this test, *Powell v. Alabama*,[77] stated that one needed to "ascertain settled usages and procedures in English common and statutory law" and then establish that the procedures were followed in America, after Independence, to prove "their suitability to our civil and political institutions."[78] In addition, the right to bail is one of the oldest rights in English history.[79] And the Consensus Right to Bail that emerged in the states and for the federal government shows its "suitability to our civil and political institutions."[80] The absence of the Consensus Right to Bail Clause in the Federal Constitution should not bar the Fourteenth Amendment's protection of the right. Especially for due process rights, the Bill of Rights is neither the beginning nor the end of the Court's inquiry. The *Powell* Court wrote:

> It is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.[81]

The Court is willing to look beyond the four corners of the Federal Constitution in giving substance to the Fourteenth Amendment's Due Process Clause. For example, in *Powell v. Alabama*, the Court discussed various fundamental rights not specifically enumerated in the Federal Constitution that were nonetheless included under fundamental concepts of due process, including notice and hearing rights in both criminal and civil trials.[82]

The Court in *Duncan* embraced a much stricter standard for Fourteenth Amendment protection than it did in *McDonald*. In *Duncan*, the Court considered incorporation appropriate for "fundamental rights" that are "essential to a fair trial."[83] By this test, the Consensus Right to Bail—rather than rights such as the right to bear arms recently incorporated in *McDonald*—warrants Fourteenth Amendment protection. The Court itself has said that Consensus Right to Bail is

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76. *Id.* at 3097.

77. 287 U.S. 45 (1932).

78. Sistrunk v. Lyons, 646 F.2d 64, 68 n.12 (3d Cir. 1981) (discussing *Powell*, 287 U.S. at 65).

79. *See generally* DE HAAS *supra* note 15.

80. Sistrunk, 646 F.2d at 68 n.12.

81. 287 U.S. at 67–68 (quoting Twining v. New Jersey, 211 U.S. 78, 99 (1908)).

82. Some notice and hearing rights for criminal cases are explicit in the Sixth Amendment (and the right to jury trial "preserved" by the Seventh Amendment includes hearing rights for some civil matters), but the Court in *Powell* considered many of them as inherent to due process. For example, the Court comprehends the "right to aid of counsel" in "any case, civil or criminal," to be part of a "hearing" right and thus essential to "due process in the constitutional sense. *Id.* at 69.

83. Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968) (quoting Gideon v. Wainwright 372 U.S. 335, 343–44 (1963)).

important to a fair trial: "This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[84]

The dissent in *McDonald* warned that if the Court "embraces only those rights 'so rooted in our history, tradition, and practice as to require special protection,' then the guarantee would serve little function, save to ratify those rights that state actors have already been according the most extensive protection."[85] It would be a great irony of constitutional history if the Court continues to allow states to take away the fundamental right to bail for all noncapital crimes. After all, the Consensus Right to Bail Clause is one that state actors absolutely "accorded the most extensive protection"—enshrining it in the state declarations of rights—for two hundred years. It is precisely that fundamentality—the fact that states and the federal government universally protected the right to bail for two hundred years—that kept the right from coming before the Court. Like the Excessive Bail Clause, the Right to Bail Clause was one of the most fundamental rights in the state constitutions and did not need federal protection until the right began disappearing from state constitutions.

This Section has considered how the right to bail relates to the doctrinal standards that the Court has set for substantive due process protection under the Fourteenth Amendment, concluding that the right to bail would qualify for protection under every formulation the Court has embraced, including interpretations from both sides of the *McDonald* opinion. An alternative originalist approach, not adopted by the Court, would look at how pervasively the right to bail for all noncapital crimes was protected at the time the Fourteenth Amendment was proposed and ratified. As Figure 3 shows, the right to bail easily crosses the seventy-five percent threshold, far beyond the right to bear arms, which was incorporated in 2010 by the Court in *McDonald*. This Figure even understates the fundamentality of the right to bail because it does not include all of the states (discussed in Section I.C) where the Consensus Right to Bail was a statutory right.

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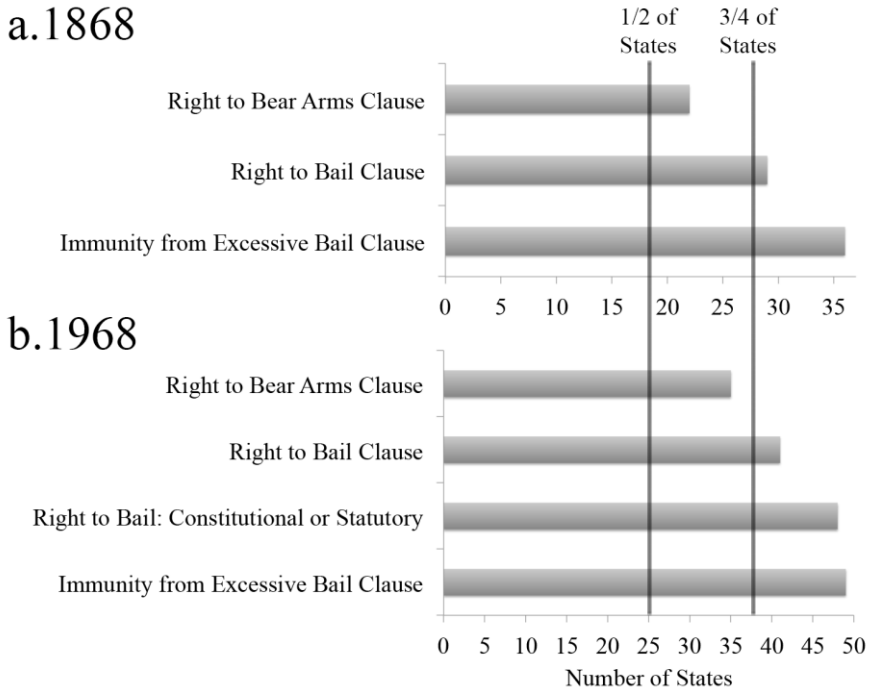
84. Stack v. Boyle, 342 U.S. 1, 4 (1951) (citations omitted). *See also id.* at 8 (Jackson, J., concurring) ("Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one under charge of any offense not punishable by death . . . 'A person arrested for an offense not punishable by death shall be admitted to bail . . .' before conviction."). The importance of bail in context of Fifth Amendment due process is discussed in further detail in Section II.B.

85. McDonald v. City of Chicago, 130 S Ct. 3020, 3098 (2010) (Stevens, J., dissenting) (internal citation omitted).

Figure 3: State Constitutional Provisions in 1868 and 1968: The Right to Bail as the Fourteenth Amendment Was Ratified and as Nixon Was Elected[86]



This Figure shows the frequency of the right to bail in state constitutions in 1868 and 1968. To put the Consensus Right to Bail Clause in perspective, the right to bear arms and the immunity from excessive bail are included. There were 37 states in the Union in 1868 and 50 in 1968. These dates are chosen because the Fourteenth Amendment was ratified in 1868, and Nixon was elected president in 1968 and began the war on bail (see Part III). The constitutional *as well as the statutory* right to bail is shown for 1968, when forty-eight out of the fifty states (as well as the federal government) unequivocally protected the right to bail. The

86. The data for the Right to Bail Clause and Excessive Bail Clause was gathered for this Article. The data for the Right to Bail Clause is displayed in Figure 2 and Figure 4, and can be found in the Appendix. Although independently verified for this Article, the data for right to bear arms can be found in previous work. For 1868, see Calabresi & Agudo, *supra* note 10. For 1968, see Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006). Volokh does not give the number of states that had a Right to Bear Arms Clause in 1968, but he does provide the date at which each state adopted the right to bear arms. Although only six states lacked a Right to Bear Arms Clause in 2006, fifteen lacked one in 1968: California, Delaware, Illinois, Iowa, Maryland, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Virginia, West Virginia, and Wisconsin.

Right to Bear Arms Clause is chosen because that was the clause recently incorporated for the states in *McDonald*.

The Supreme Court has shown that this sort of data is important in informing its inquiry into whether the Fourteenth Amendment's Due Process Clause protects a right. Regarding the right to bear arms, the Court in *McDonald* wrote:

> The right to keep and bear arms was also widely protected by state constitutions at the time when the Fourteenth Amendment was ratified. In 1868, 22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms. . . . A clear majority of the States in 1868, therefore, recognized the right to keep and bear arms as being among the foundational rights necessary to our system of Government.
>
> In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.[87]

Neither the Consensus Right to Bail Clause nor the Excessive Bail Clause has been incorporated. The majority in *McDonald*, however, implies in dicta that the Fourteenth Amendment protects against excessive bail.[88] Figure 3 shows that both the right to bail and the immunity from excessive bail were protected more strongly in 1868 and 1968 than the recently incorporated right to bear arms.

In addition to this strong support for incorporation of the Excessive Bail Clause, every state constitution but Illinois currently has an Excessive Bail Clause. The right is therefore not currently threatened even without Fourteenth Amendment protection (though the right of the federal government to protect it may be tenuous, since it is has never been incorporated). The stakes are much higher for the Consensus Right to Bail, which, as we shall see in Part III, is under attack in both the federal and the state systems.

E. The Northwest Ordinance, Territorial Organic Law, and the Right to Bail

In a previous work,[89] I argued that the privileges and immunities listed in the Northwest Ordinance should inform our reading of the Fourteenth Amendment's Privileges or Immunities Clause and Due Process Clause. The

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87. 130 S. Ct. at 3042 (citations omitted).

88. *Id.* at 3034 n.12. The Court misleadingly cites *Schilb*, where it wrote: "[W]e are not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness." Schilb v. Kuebel, 404 U.S. 357, 365 (1971). The Court in *Schilb* did note, however, that the "Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment." *Id.* Although the *Schilb* Court only cited one opinion that makes this assumption (and, oddly, that single Eighth Circuit opinion notes that their assumption is "contrary to" Supreme Court precedent, Pilkinton v. Circuit Court, 324 F.2d 45, 46 (8th Cir. 1963)), circuit courts have since reaffirmed this holding. *See, e.g.*, Sistrunk v. Lyons, 646 F.2d 64, 67 (3d Cir. 1981).

89. Hegreness, *supra* note 14.

Northwest Ordinance contained a variation of the Consensus Right to Bail Clause. The Ordinance declared: "All persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great."[90] Congress extended this right to bail to almost every territory of the United States, starting with the Ordinance and the Northwest Territories (future states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota) and extending as far as the Philippines,[91] the U.S. Virgin Islands,[92] and Puerto Rico.[93] In addition, the Northwest Ordinance—passed by the Congress under the Articles of Confederation during the same summer that the Constitution was drafted—was a declaration of those rights common to the original 13 states. Its express purpose was to "extend[] the fundamental principles of civil and religious liberty, which form the basis whereon [the original states], their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory."[94] Indeed, Congress often imposed only two conditions on states in order for admittance into the Union: (1) that they be republican and (2) that their constitutions not be repugnant to the principles of the Northwest Ordinance. The ubiquity of the Right to Bail Clause in state constitutions is a testament to the great success of the Northwest Ordinance in accomplishing its purpose.

In 1870, the Supreme Court of Mississippi attributed the origin of the Right to Bail Clause to the Northwest Ordinance:

> Perhaps the original of the section in [Mississippi's] bill of rights, and in the constitutions of nearly all the states, is a clause in the ordinance of 1787 for the government of the territory northwest of the river Ohio. . . . The words of the ordinance are: "All persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great." As that territory was formed into States, this provision in the ordinance was, in terms or with slight modifications, incorporated into their constitutions—and for many years has held a place in the constitutions or statutes of nearly all the states.[95]

As this Article shows, the Right to Bail Clause preceded the Northwest Ordinance, appearing first in Pennsylvania's organic law. The Northwest

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90. NORTHWEST ORDINANCE OF 1787, art. II, *reprinted in* 1 UNITED STATES CODE, LV, LVI (Office of the Law Revision Counsel of the House of Representatives ed., 2006).

91. Philippines Organic Act, ch. 1369, § 5, 32 Stat. 691, 692 (1902) ("That all persons shall before conviction be bailable by sufficient sureties, except for capital offences.").

92. Bill of Rights for Virgin Islands, 48 U.S.C. § 1561 (2006) ("All persons shall be bailable by sufficient sureties in the case of criminal offenses, except for first-degree murder or any capital offense when the proof is evident or the presumption great.").

93. P. R. CONST. art. II, § 11 ("Before conviction every accused shall be entitled to be admitted to bail.").

94. NORTHWEST ORDINANCE of 1787 § 13.

95. Street v. State, 43 Miss. 1, 25 (1870).

Ordinance, however, was undoubtedly crucial in spreading the right to bail throughout the United States. Indeed, except for Hawaii, every state that had a territorial phase protected the right to bail in its original constitution.

The Northwest Ordinance and its Right to Bail Clause was integral to fundamental law—the organic law—of 28 of the 30 states that ratified the Fourteenth Amendment.[96] The states, through their representation in Congress, voted repeatedly for the Right to Bail Clause to be extended to the territories of the United States. In many states, the right to bail is thus among the oldest rights—extending beyond their initial state constitutions to the moment of their births as territories. This experience is further evidence of how essential the right to bail has been to due process and personal liberties in America, and it should inform the Supreme Court's interpretation of the Fourteenth Amendment and the Bill of Rights.

F. Interpreting the Consensus Right to Bail

To understand the limits of the Consensus Right to Bail Clause, it is important to consider the meaning of each of its constituent phrases separately as well as together. This Section examines the Consensus Right to Bail Clause's four separate phrases in four subsections. Of greatest significance is the meaning of "except for capital offenses" considered in Subsection I.F.3. The set of "capital offenses" in most states has expanded and contracted multiple times throughout their histories. Nevertheless, most states still strictly construed "capital offenses," limiting it to offenses that are punishable by death in the present, rather than to those that were ever punishable by death. For example, when the death penalty was abolished by statute or invalidated by courts, most state courts interpreted their Right to Bail Clause to include all crimes, even first-degree murder, as automatically bailable. This is one of only three possible interpretations. All three interpretations would be consistent with the core meaning of the Right to Bail Clause: (1) "capital offenses" could be strictly interpreted to mean only offenses currently punishable by death (the consensus interpretation among state courts); (2) "capital offenses" could be interpreted to include offenses punishable by death as well as those punishable by life imprisonment without the possibility of parole; or (3) "capital offenses" could be interpreted to mean first-degree murder and treason, the quintessential capital crimes. Various interpretive possibilities regarding "capital offense" are considered below as well as the plain meaning of all the other phrases that constitute the Consensus Right to Bail Clause.

1. "All Persons Shall Be Bailable . . . "

The first words of the Consensus Right to Bail Clause, "All persons shall be bailable," are absolute and unequivocal. Its plain meaning proscribes governmental discretion to deny bail: *All* prisoners are bailable for noncapital crimes, even those prisoners for whom the proof against them is evident or the presumption of guilt is great. This interpretation—that judges cannot constitutionally deny the right to bail for bailable offenses—is the near universal

96. *See* Hegreness, *supra* note 14.

interpretation of state courts for the more than two centuries of American independence. Although the U.S. Supreme Court has never interpreted this constitutional guarantee, Justice Field (before he was a U.S Supreme Court Justice) construed California's constitutional Right to Bail Clause as it appeared in 1849: "In all [cases, except capital cases where the proof is evident or presumption great], the admission to bail is a right which the accused can claim, and which no Judge or Court can properly refuse."[97] This unequivocal right to bail for noncapital cases is the focus of this Article.

This understanding that judges could not deny bail for bailable offenses accords with the understanding of bailability under English tradition before American Independence, which, as discussed in Section I.A, was enforced by the writ of habeas corpus. This was not only an American right enshrined in state constitutions but also a right of Englishmen before American independence. As we will see below in Section III.A, it was also the right established for federal crimes by the Judiciary Act of 1789. A recent judicial decision in a U.S federal territory, where the right to bail since the time of the Northwest Ordinance has been substantially the same as the state constitutions, is consistent with the centuries of Anglo-American tradition regarding the unequivocal right to bail for most crimes.[98]

2. "By Sufficient Sureties . . . "

Surety is a word that once meant "a person who binds himself for the payment of a sum of money or for the performance of something else, for another."[99] This personal surety was a third party, that is, a person of sufficient means that would guarantee the appearance of the prisoner at trial, on penalty of forfeiture of the surety's property.[100] Fear of forfeiture of land was a powerful incentive in this system.[101] In America, the system became purely pecuniary. Professional bondsmen would act as sureties who would simply promise to pay a given amount of money if the accused failed to appear at court.[102] Eventually, the entire distinction between the monetary amount of bail and the promises inherent to the surety system was lost. The Supreme Court wrote in 1912:

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97. People v. Tinder, 19 Cal. 539, 542 (1862). *Tinder* was decided the year before Justice Field was appointed to the Supreme Court by Lincoln, when Field was still Chief Justice of the California Supreme Court.

98. Browne v. Virgin Islands, No. 2008-022, 2008 WL 4132233, at *3 (V.I. S. Ct. Crim. Aug. 29, 2008). ("By its plain language, [the Virgin Islands Organic Act] requires the detention of any defendant charged with first degree murder when the trial court finds the proof evident or the presumption of guilt great. However, all other defendants, including those charged with first degree murder where the proof is not evident and the presumption not great, are bailable on sufficient sureties.").

99. 2 BOUVIER'S LAW DICTIONARY 1073 (Bos. Book Co. 1897).

100. *See* Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 966 (1961).

101. *See* RONALD GOLDFARB, RANSOM: A CRITIQUE OF THE AMERICAN BAIL SYSTEM 93 (1965).

102. *Id.* at 95.

> The distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary. If, as in this case, the bond was for $40,000, that sum was the measure of the interest on anybody's part, and it did not matter to the government what person ultimately felt the loss, so long as it had the obligation it was content to take.[103]

Indeed, surety now can mean the promise to pay a sum of money in the event that another person fails to fulfill an obligation, or even the "money" itself.[104] Courts have recently split over whether the Right to Bail Clause in their state constitutions prohibits "cash-only bail."[105]

"Sufficient" is a qualification on sureties. It was meant to encompass "(1) the surety's ability to pay in the event of nonappearance and (2) the sufficiency of the surety in making sure the prisoner is present for further court proceedings."[106] It also afforded a degree of discretion to the judicial officer in granting bail.[107] That such bail cannot be excessive, however, is made clear by the Excessive Bail Clauses present in every state constitution except that of Illinois. The exact interplay between the Sufficient Surety Clause and the Excessive Bail Clause in determining whether the amount set for bail is "sufficient" or "excessive" is outside the scope of this Article. This Article seeks to outline, not precisely define, this "new" constitutional right to bail.

3. "Except for Capital Offenses . . . "

The Right to Bail Clause has only one provision—"except for capital offenses"—that may justify dynamic interpretation.[108] The plain meaning of this proviso is the same today as it was two hundred years ago: "Capital offenses" are

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103. Leary v. United States, 224 U.S. 567, 575–76 (1912).

104. "Surety" includes "money given as a guarantee that someone will do something." Fragoso v. Fell, 111 P.3d 1027, 1033 & n.5 (Ariz. Ct. App. 2005) (citing many modern dictionaries).

105. Many states have held that cash-only bail is constitutional. *See, e.g.*, *Ex parte* Singleton, 902 So. 2d 132, 135 (Ala. Crim. App. 2004); *Fragoso*, 111 P.3d at 1031; State v. Gutierrez, 140 P.3d 1106, 1111 (N.M. 2006) (concluding that, "cash-only bail . . . does not violate the New Mexico Constitution . . ."). For the opposite view, see State v. Brooks, 604 N.W.2d 345, 353 (Minn. 2000); Smith v. Leis, 835 N.E.2d 5, 16 (Ohio 2005); State v. Hance, 910 A.2d 874, 882 (Vt. 2006).

106. Joseph Buro, *Bail-Defining Sufficient Sureties: The Constitutionality of Cash-Only Bail*, 35 RUTGERS L.J. 1407, 1414 (2004).

107. *See, e.g.*, *Gutierrez*, 140 P.3d at 1111 ("[B]y including the qualifying term 'sufficient' in the sufficient sureties clause, the framers must have intended to confer a measure of discretion for person overseeing the bailing process, [which] interpretation [was] consistent with the purpose of bail, which is to secure the defendant's appearance at trial.").

108. I use dynamic interpretation to mean interpreting statutes and constitutions according to their purposes as well as changed circumstances. *See generally* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

those offenses for which death is a punishment.[109] Nevertheless, the set of capital offenses has been constricted in most states as imprisonment has gradually replaced execution in our justice system. Seventeen states now outlaw the death penalty,[110] and others have outlawed it at various times throughout their histories. In addition, it is possible that the Supreme Court will declare capital punishment unconstitutional for particular crimes, as it did in *Kennedy v. Louisiana* for "crimes against individuals" that do not "take the life of the victim."[111] A question of interpretation arises: Should "capital offenses" be interpreted literally, so that only currently capital offenses are excluded from the absolute right to bail? Or should "capital offenses" be interpreted broadly to include offenses that were once capital?

If it were only a statutory standard, few would doubt that the Consensus Right to Bail Clause should be read literally.[112] Indeed, states that abolished the death penalty before 1950[113] read the "except for capital offenses" provision literally, and either changed[114] their constitutional Right to Bail Clause or interpreted it to mean that all offenses were bailable since no offenses were capital. For example, following the abolition of the death penalty, the Supreme Court in Wisconsin, in 1865, wrote an especially laconic opinion. It read, in its entirety: "The court are of opinion [sic] that since the abolition of capital punishment in this

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109. Capital offense: "A crime for which the death penalty may be imposed.—Also termed *capital crime*." BLACK'S LAW DICTIONARY 1186 (9th ed. 2009). BLACK'S LAW DICTIONARY indicates that the term dates from the sixteenth century.

110. *Listing of U.S. States Without the Death Penalty*, DEATH PENALTY NEWS (Mar. 11, 2011), http://deathpenaltynews.blogspot.com/2011/03/listing-of-us-states-without-death.html.

111. 554 U.S. 407, 447 (2008).

112. Most dynamic interpreters still interpret unambiguous statutes according to their plain meaning. *See, e.g.*, HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1958), *excerpted in* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 718 (4th ed. 2007).

113. The first states to abolish the death penalty (without later reinstating it) were: Michigan (1846), Rhode Island (1852), Wisconsin (1853), Maine (1887), Minnesota (1911), and Massachusetts (1947). *Listing of U.S. States Without the Death Penalty*, *supra* note 110.

114. Michigan, which abolished the death penalty in 1846, changed "except for capital offences" to "except for murder and treason" in its 1850 constitution. *Compare* MICH. CONST. of 1835, art. I, § 12, *with* MICH. CONST. of 1850, art. VI, § 29. Rhode Island had an unusual version in its constitution (written in 1843) that already denied bail for offenses punishable by life imprisonment: "All persons imprisoned ought to be bailed by sufficient surety, unless for offences punishable by death or by imprisonment for life, when the proof of guilt is evident or the presumption great." R.I. CONST., art. I, § 9 (amended 1984 & 1986). Maine amended its constitution in 1837 so that "capital offenses" captured all offenses that were ever capital in Maine since they adopted their constitution in 1819: "No person before conviction shall be bailable for any of the crimes which now are or have been denominated capital offenses since the adoption of the Constitution, when the proof is evident or the presumption great, whatever the punishment of the crime may be." ME. CONST. art. I, § 10 (amended 1837); *see* Maureen Dea, *Denial of Bail under Maine's "Proof Evident or Presumption Great" Standard*, 39 ME. L. REV. 391, 392 (1987).

state, persons charged with murder are in all cases bailable. The motion is granted."[115] This Wisconsin opinion has been echoed in many other jurisdictions, including Arizona in 1917 and 1973 (during the two-year period in the early twentieth century when the death penalty was abolished by popular vote and then again when the Arizona statute imposing the death penalty had been struck down by the U.S. Supreme Court),[116] Kansas in 1908 (repealed capital punishment for murder in 1907 but reinstated it in 1935),[117] South Dakota in 1925 (death penalty abolished in 1915 but reinstated in 1933),[118] Minnesota in 1958,[119] Texas in 1972 (where the Court's opinion in *Furman v. Georgia*[120] put a temporary stop to capital punishment),[121] Ohio in 1972 (in a response to *Furman*),[122] New Jersey in 1972,[123] and Louisiana in 1979 (for offenses for which the U.S. Supreme Court declared could not be capital without violating the Eighth Amendment).[124]

Capital punishment has been a labile penalty. Many states abolished it by ballot only to later to vote to reinstate it. In addition, the gavels of both state and

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115. *In re* Perry, 19 Wis. 676, 677 (1865).

116. *In re* Welisch, 163 P. 264, 264–65 (Ariz. 1917) ("The people of Arizona at the last election, through the adoption of an initiated measure submitted to the voters, abolished capital punishment for murder, so that now all persons charged with the crime of murder, however diabolical or atrocious it may be, and howsoever evident may be the proof of guilt thereof, as well as all other crimes not punishable with death, may, before conviction, demand admission to bail as a strict legal right, which no judge or court can properly refuse."); *In re* Tarr, 508 P.2d 728, 729 (Ariz. 1973). The death penalty was abolished in 1916 but was restored in 1918. *Id.*

117. *In re* Schneck, 96 P. 43, 43 (Kan. 1908) (holding that whether an offense was committed before the abolition of the death penalty determines whether prisoner is entitled to bail as a matter of right).

118. City of Sioux Falls v. Marshall, 204 N.W. 999, 1001 (S.D. 1925) ("By virtue of our constitutional provision (article 6, § 8), and since the abolition of capital punishment, bail before conviction is a matter of absolute right in all cases.").

119. State v. Pett, 92 N.W.2d 205, 209 (Minn. 1958) (holding that after the abolition of the death penalty, "a defendant charged with murder in the first degree" cannot be denied bail). "[U]nder our constitution the court had no discretion except in fixing the amount of bail." *Id.*

120. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (holding that the "imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments").

121. *Ex parte* Contella, 485 S.W.2d 910, 911 (Tex. Crim. App. 1972) ("[T]he question which is before the Court is whether, in terms of our Constitution and statute, bail may now be denied in cases in which, prior to the holding in Furman v. Georgia, Supra, the death penalty could have been imposed. We conclude that bail may not be denied in such cases.").

122. Edinger v. Metzger, 290 N.E.2d 577, 578 (Ohio Ct. App. 1972).

123. State v. Johnson, 294 A.2d 245, 252 (N.J. 1972) (holding that murder in the first degree was bailable after the state's death penalty statute was declared unconstitutional).

124. State v. Polk, 376 So. 2d 151, 153 (La. 1979) (holding that prisoners could not be denied bail for offenses for which the death penalty has been declared unconstitutional, especially when legislative inaction about reclassifying the offenses was the reason the offenses were still nominally capital).

federal courts have struck down many death penalty statutes. Throughout all of this chaos, however, the Consensus Right to Bail Clause, and its interpretation before 1980, remained remarkably consistent. With few exceptions,[125] bail was automatically available to any person arrested for any noncapital crime. The instant a crime became noncapital—whenever the legislature abolished the death penalty or a court struck down an unconstitutional capital statute—a person accused of the crime would become bailable as a matter of right. Once the death penalty was reinstated, however, the crimes again became bailable only when the proof of guilt was not evident or the presumption not great.

Despite the close historical connection[126] between noncapital offenses and automatic bailability, changes in recent decades might justify the court considering first-degree murder a "capital offense," whatever the existing penalty, which is usually death or life without parole. Life without parole in its current form was adopted by only one state before the second half of the twentieth century, and by 48 states since then.[127] In general, life without parole is a substitute for capital punishment and, like capital punishment, applies primarily to first-degree murder.[128] The modern development of life without parole developed alongside

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125. A few states have held that murder is still a "capital offense" within the meaning of the Consensus Right to Bail Clause when the death penalty or specific capital statutes are declared unconstitutional. People v. Anderson, 493 P.2d 880, 899 n.45 (Cal. 1972); State v. Flood, 269 So. 2d 212, 214 (La. 1972) ("Those offenses classified as capital before *Furman v. Georgia* are still classified as capital offenses and those charged with an offense punishable by death before *Furman v. Georgia* are not entitled to bail where the proof is evident or the presumption great."); Blackwell v. Sessums, 284 So. 2d 38, 39 (Miss. 1973) ("[E]ven though we no longer impose the death penalty, nevertheless, murder falls within a class of cases referred to as capital cases that are not bailable offenses when the proof is evident or presumption of guilt is great."); *In re* Kennedy, 512 P.2d 201 (Okla. Crim. App. 1973).

126. This Section has focused on the close connection of capital offenses and nonbailability in the American states. The connection, however, has much deeper roots. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *271 ("For what is there that a man may not be induced to forfeit, to save his own life; and what satisfaction or indemnity is it to the public, to seize the effects of them who have bailed a murderer, if the murderer himself be suffered to escape with impunity?").

127. Alaska is the only state that currently does not have life without parole as a sentence. Mississippi is the only state whose life-without-parole sentencing began before 1950 (it began in 1880). *See Year That States Adopted Life Without Parole (LWOP) Sentencing*, DEATH PENALTY INFORMATION CENTER (Aug. 2, 2010), http://www.deathpenaltyinfo.org/year-states-adopted-life-without-parole-lwop-sentencing.

128. For a list of crimes that are punishable by death, organized by state, see *Crimes Punishable by the Death Penalty*, DEATH PENALTY INFORMATION CENTER (Dec., 2011), http://www.deathpenaltyinfo.org/crimes-punishable-death-penalty#BJS. For the majority of states, only first-degree murder is punishable by death. This was the consensus among the states in the mid-twentieth century, before the Court's famous cases invalidating the death penalty and before states began to take away the right to bail. *See infra* Part III. By the end of 1958, capital punishment was authorized for murder in forty-four states. John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223,

both the demise of the right to bail, considered in Part III, and pervasive abolition or obsolesce of the death penalty. The courts could thus interpret "capital offenses" to mean "first-degree murder." Such an interpretation not only adjusts for the rise of life imprisonment but also anticipates future changes in the law of capital punishment. For example, if the death penalty is abolished in all fifty states by a ruling of the U.S. Supreme Court, it still may make sense to not allow bail for prisoners accused of first-degree murder when the proof of guilt is evident and the presumption great.[129] Drawing the line at murder also accords with the English constitutional tradition before 1776.[130] First-degree murder is the quintessential "capital crime."[131]

Perhaps one other crime that should be considered a "capital offense" (regardless of punishment) is "treason," as one of the most common variations in the Consensus Right to Bail Clause is substituting "capital offenses" for "murder and treason." Restricting "capital offenses" to murder and treason not only captures the essence of the clause in those states that varied slightly from the consensus right before 1970 but also accords with English tradition before 1776[132] and the Court's recent articulation in *Kennedy v. Louisiana* of when the death penalty is appropriate.[133]

A more liberal interpretation of "capital offenses" that includes all first-degree murder (and perhaps treason) may be appropriate for a judicially enforced due process standard, even if it departs slightly from the text of the Consensus Right to Bail Clause. After all, constitutional standards are meant to endure.

1230 (1969). The next most common capital crime—rape—failed to gain a Consensus Right to Bail (only twenty-two states). *Id.*

129. This reasoning accords with those few state courts that continued to consider certain offenses "capital offenses" even after the death penalty was declared unconstitutional. *See, e.g.*, Jones v. Sheriff, Washoe Cnty., 509 P.2d 824, 824 (Nev. 1973); People v. Anderson, 493 P.2d 880, 899 n.45 (Cal. 1972). Admittedly, states where crimes are made noncapital by court decisions are in a different situation from states where crimes are made noncapital by the will of the people. In states where crimes are made non-capital by judicial fiat, there may be a justification for courts to still consider them "capital crimes," as the *people* of the state never decapitalized the crimes.

130. DE HAAS *supra* note 15.

131. Murder is the one offense that was capital throughout the early republic. *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 6 (2002). Indeed, in Pennsylvania in the late seventeenth century, which as discussed in Section I.A boasted the very prototype for the Consensus Right to Bail Clause, only murder was capital. *Id.* at 8. Eventually, however, even Pennsylvania added capital crimes. *Id.*

132. Offenses for which Justices of the Peace could not bail (but for which judges of the King's Bench could) included treason, murder, persons already convicted of felony and having escaped prison, and persons charged with arson. 4 WILLIAM BLACKSTONE, COMMENTARIES *273.

133. The Court has held that the death penalty is unconstitutional for "crimes against individuals" that do not "take the life of the victim." Kennedy v. Louisiana, 554 U.S. 407, 447 (2008). The limitation of this holding to "crimes against individuals" means that crimes against the state, such as treason, may be properly deemed "capital crimes," even when the life of the "victim" (which would be the "state" in such cases) is not taken.

Compared to most state constitutions, it is virtually impossible to amend the United States Constitution. Standards enforced through the Fourteenth Amendment must be significantly flexible to adhere to their original purpose even as state and federal law evolves. Further, the "rule of recognition" for protection of a right must be clear before it is afforded constitutional protection.[134] In the case of the Consensus Right to Bail, it was unequivocally embraced by 48 of the 50 states, 42 of them by constitutional provision. Few rights enjoy such an impressive democratic and constitutional pedigree.

4. "When the Proof is Evident or the Presumption Great"

The majority of states and territories have interpreted their constitutional provisions to mean that the government has the burden of proof in demonstrating that the "proof is evident or the presumption great."[135] This majority interpretation is simply an extension of the presumption of innocence and principles of due process: Guilt must be shown before a prisoner is deprived of his or her liberty. The question remains: What does the "proof is evident, or the presumption great" mean precisely? Certainly it must mean proof or presumption *of guilt*. So the proof of guilt must be evident, meaning "clear,"[136] to the judicial officer, or the presumption, meaning an "inference as to the existence or truth of the fact"[137] of guilt, must be great. It is the judge, however, who must decide just what constitutes "evident" proof or a "great" presumption. Some state courts have adopted bright-line rules. For example, Justice Field, interpreting California's provision, declared that indictment by a grand jury "does of itself furnish a presumption of the guilt of

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134. For a discussion of "rules of recognition," see H.L.A. HART, THE CONCEPT OF LAW 94–95 (2d ed. 1994). The rule of recognition for constitutional rights presented in the Article is one where rights become constitutional by long application in the states. This differs markedly from other theories of constitutionalization, where pivotal "constitutional moments" of heightened political activity and popular sovereignty can change a constitution outside the formal amendment process. *See generally* 1 ACKERMAN, *supra* note 12; 2 ACKERMAN, *supra* note 12.

135. *See* Simpson v. Owens, 85 P.3d 478, 487 n.15 (Ariz. Ct. App. 2004) ("In fact, almost all of the states employing the 'proof evident or presumption great' standard for bail place the burden upon the State.") (internal citation omitted). The *Simpson* court collected cases from Arkansas, Colorado, Florida, Hawaii, Iowa, Kentucky, Maine, Nevada, New Jersey, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Vermont. *Id; see also* State v. Kauffman, 108 N.W. 246, 246 (S.D. 1906) (discussing what constitutes "evident proof, or great presumption" and acknowledging that a defendant in a "criminal action is presumed to be innocent until the contrary is proved").

136. Webster's defines "evident" as "clear to the vision or understanding." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 433 (11th ed. 2003). The definition for "evident" has been remarkably stable. *See* WEBSTER'S INTERNATIONAL DICTIONARY 117 (1892) ("Evident: Clear to the vision or understanding; plain; obvious.").

137. The legal definition of "presumption" is "an inference as to the existence of a fact not certainly known that the law requires to be drawn from the known or proven existence of some other fact." MERRIAM-WEBSTER'S DICTIONARY OF LAW 376 (1996). The common definition that could also be compatible with its use in the Consensus Right to Bail Clause is "the ground, reason, or evidence lending probability to a belief." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 983 (11th ed. 2003).

the defendant too great to entitle him to bail as a matter of right under the Constitution."[138]

But can bail still be granted as a matter of discretion, when the proof is evident or the presumption great, even if bail is not a "matter of right"? Most of this Article has focused on those offenses that are always bailable. Certainly, *all* persons are not bailable for capital crimes when the proof is evident or the presumption great. But may *some* persons still be bailable? The constitutional words can bear two interpretations: Under one interpretation, *no* persons are bailable for capital crimes when the proof is evident or the presumption great;[139] under an alternative interpretation, bail becomes a matter of judicial and legislative discretion.[140] This Article takes no position on whether bail should be allowed for capital crimes when the proof is evident or the presumption great. It is important to note, however, that bail should be automatic as a matter of right, even for capital offenses, when the proof is not evident and the presumption not great.

II. BAIL IN THE FEDERAL SYSTEM AND THE CONSTITUTIONALIZATION OF A STATUTORY STANDARD, 1789–1984

In 1789, the First Congress worked to establish the right to bail as well as immunity from excessive bail: Congress passed the Judiciary Act of 1789 to guarantee the right to bail and then proposed the Eighth Amendment to the states. The Federal Constitution protects the third pillar of bail—the privilege of habeas corpus—in Article I.[141] The Federal Constitution, therefore, does not explicitly guarantee the right to bail, and the Court has held that the Eighth Amendment does not protect an absolute right to bail.[142] A leading scholar on bail, Professor Foote,

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138. People v. Tinder, 19 Cal. 539, 543 (1862); *see also* State v. Mills, 13 N.C. (2 Dev.) 420, 421–22 (1830) ("For after bill found, a Defendant is presumed to be guilty to most, if not to all purposes, except that of a fair and impartial trial before a petit jury. This presumption is so strong, that in the case of a capital felony, the party cannot be let to bail.").

139. The Supreme Court of the Virgin Islands recently embraced the restrictive interpretation of the bail provision. Browne v. Virgin Islands, No. 2008-022, 2008 WL 4132233, at *3 (V.I. S. Ct. Crim. Aug. 29, 2008) ("By its plain language, section 3 of the [Revised Organic Act], known as the "Bill of Rights," requires the detention of any defendant charged with first degree murder when the trial court finds the proof evident or the presumption of guilt great.").

140. Justice Field favored this reading: "The admission to bail in capital cases, where the proof is evident or the presumption is great, *may be made a matter of discretion, and may be forbidden by legislation*, but in no other cases." *Tinder*, 19 Cal. at 542 (emphasis added). For support of this more permissive reading, see Ariana Lindermayer, Note, *What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail*, 78 FORDHAM L. REV. 267 (2009).

141. U.S. CONST. art I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

142. United States v. Salerno, 481 U.S. 739, 752 (1987) (The Eighth Amendment "says nothing about whether bail shall be available at all.").

has called the absence of the right to bail in the Federal Constitution an "anomaly"[143] that resulted from "inadvertent draftsmanship of George Mason."[144] Foote argues that the right to bail should be read into the Eighth Amendment.[145]

This Article argues instead that the right to bail was included in the Federal Constitution through the Fifth Amendment's Due Process Clause (as well as through the Fourteenth Amendment). The preexisting right to bail is implied from the Excessive Bail Clause and the Habeas Corpus Clause. Although this Article assumes that the Due Process Clause was intended to protect the right to bail, it is possible to deny this interpretation while accepting that bail is one of those rights not "enumerate[d] in the Constitution" but nonetheless "retained by the people."[146]

In addition, the Consensus Right of Bail Clause derived from state constitutional tradition should inform the substance of the federal right to bail implicit in both of the Constitution's Due Process Clauses, i.e., the Fifth and Fourteenth Amendments. Not only do the foundations in state constitutions strengthen the originalist arguments for a right to bail, but they also define the contours of the right as it should be protected against abridgement by the federal government. This Article argues that the right to bail should be protected absolutely against both federal and state abridgement except for those capital cases when the proof of guilt is evident or the presumption of guilt is great.

A. Establishing the Federal Right to Bail

Unlike the Consensus Right to Bail in the states, where the three pillars of bail (Consensus Right to Bail Clause, Habeas Corpus Clause, and Excessive Bail Clause) were often localized in the same section of each state constitution and implemented simultaneously, the three pillars of bail in the federal system were cemented in three separate acts of popular sovereignty over a five-year period. Habeas corpus was protected in the unamended Constitution, which became the law of the land in 1788.[147] The right to bail was protected in the Judiciary Act of 1789. And the immunity from excessive bail was protected in the Eighth Amendment, ratified in December 1791. This separation—in both time and space—of the three pillars of bail in the federal system has likely led to a pervasive underappreciation of their inextricable connection. Remove one of the pillars—as

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143. Foote, *supra* note 9, at 969.

144. Caleb Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1125 (1965).

145. Foote, *supra* note 9, at 965–72.

146. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

147. By its terms, the Constitution was established upon the ratification of nine states: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." U.S. CONST. art. VII. New Hampshire, the ninth state, ratified the Constitution on June 21, 1788. On September 13, 1788, the Congress of the Confederation certified that the new Constitution had been ratified. *See* MALCOLM TOWNSEND, HANDBOOK OF UNITED STATES POLITICAL HISTORY 96 (1905).

the states and the federal system began to do in the second half of the twentieth century—and the entire structure of pretrial liberty is liable to collapse.

1. Bail and the Privilege of the Writ of Habeas Corpus

The original Constitution, as drafted in 1787, contains very few substantive rights, privileges, or immunities. In fact, though it contains some limitations on the federal government, such as no "Bill of Attainder," no "ex post facto law," no "direct tax," and no "Title of Nobility," it arguably[148] contains only one substantive privilege or immunity of citizens: the "*Privilege* of the Writ of Habeas Corpus."[149] This right is not absolute, but it can be abridged only in extreme circumstances ("in Cases of Rebellion or Invasion [when] the public Safety may require it").[150] The Privilege of the Writ of Habeas Corpus is therefore special. It is the only right so fundamental that the Framers protected it in the original Constitution.

Although the writ of habeas corpus provides relief for all types of unlawful imprisonment, the prototypical function of habeas corpus is protection against the denial of bail for a bailable offense. For example, the preamble of the Habeas Corpus Act of 1679, providing the substance and procedure of the writ as it was incorporated in the U.S. Constitution, cited, as the motivation for the Act, the long detention in prison for persons "in such Cases where by Law they are baylable."[151] The privilege of habeas corpus thus presumes the existence of bailable offenses. Implicit in the habeas corpus clause, therefore, is a right to bail.

It may be argued that this right to bail implied by habeas corpus is simply a right to have the line between bailable and nonbailable offenses clearly drawn and not a right to bail for any particular offenses. In other words, it could be argued that the right to bail under the Habeas Corpus Clause is like many fundamental rights in the English constitutional system: dependent upon acts of the legislature and subject to the modification by the majority will. Such an interpretation runs counter to the spirit of an unalterable constitution as epitomized by the Federal Constitution itself and in particular by the Federal Bill of Rights. In

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148. The only other times any of the words "right[s]", "privilege[s]", "immunit[y/ies]", or "freedom[s]" appear in the original Constitution are in Article I, Section 6, Clause 1 ("The Senators and Representatives shall . . . be privileged from Arrest during the Attendance at the Session of their respective Houses"), Article I, Section 8, Clause 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive *Right* to their respective Writings and Discoveries") (emphasis added), and Article IV, Section 2, Clause 1 ("The Citizens of each State shall be entitled to the *Privileges* and *Immunities* of the Citizens in the several States") (emphasis added). The privilege from arrest is for federal legislators and not citizens. The right to writings and discoveries is discretionary: Congress has power to secure it. And the privileges and immunities of citizens in the several states are not defined by the Constitution. Only the privilege of the writ of habeas corpus is a true right, privilege, or immunity of citizens of the United States.

149. U.S. CONST. art. I, § 9, cl. 2 (emphasis added).

150. *Id.*

151. Habeas Corpus Act of 1679, 31 Car. 2, c. 2 (U.K.).

addition, even if the right to bail implicit in the Habeas Corpus Clause was initially uncertain, it was concretized by the Judiciary Act in 1789, the Fifth and Sixth Amendments in 1791, two centuries of stability in federal bail law, and the Consensus Right to Bail codified in forty-eight of the fifty states.

2. Automatic Bail for All Federal Crimes Not Punishable by Death as Established by the Judiciary Act of 1789

Like the majority of state constitutions, the federal system, for almost two hundred years, provided for both the right to bail for all noncapital crimes as well as immunity from excessive bail. As one of their first acts under the Federal Constitution, the First Congress passed the Judiciary Act of 1789. It defined the right to bail for all federal crimes:

> [U]pon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law.[152]

Like the consensus constitutional right to bail in the states, the federal statutory right to bail was unequivocal for noncapital crimes: "[U]pon *all* arrests in criminal cases, bail *shall be admitted*, except where the punishment may be death."[153] No judge, justice, or magistrate had any power to deny bail for any offense that was not a capital offense. Further, the unamended Constitution provided the remedy if bail was denied: the privilege of the writ of habeas corpus. This right to bail was reaffirmed in the mid-twentieth century when the judiciary adopted the Federal Rules of Criminal Procedure.[154] Rule 46(a)(1) codified and standardized the administration of the right in all the federal courts. It read: "A person arrested for an offense not punishable by death shall be admitted to bail . . . before conviction."[155] Justice Jackson interpreted this provision as "command[ing] allowance of bail for one under charge of any offense not punishable by death."[156] The Federal Rules made clear that the right to bail established by the Judiciary Act only applied "before conviction," but did not change the substance of the right in any significant way.

For capital offenses the federal law is also plain: Bail *may* be allowed as a matter of discretion for federal judges. The federal standard for granting bail in capital crimes was more flexible than the state standard (whether the proof is evident or the presumption great). For capital crimes, judges were authorized to use their discretion in admitting bail "regarding the nature and the circumstances

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152. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91.

153. *Id.* (emphasis added).

154. The power to make rules was given to the Supreme Court in the Rules Enabling Act, ch. 651, 48 Stat. 1064 (1934) (codified at 28 U.S.C. §§ 2072, 2074 (2006)).

155. Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J., concurring) (quoting an older version of FED. R. CRIM. P. 46(a)(1)).

156. *Id.*

of the offense, and of the evidence, and the usages of law."[157] This Article argues, however, that this flexible authorization should nevertheless be constrained by the articulation of the Consensus Right to Bail in the states, especially because the federal government has invaded areas of criminal jurisdiction traditionally reserved to states.

3. Immunity from Excessive Bail as Established by the Eighth Amendment

In the first few months of government under the Constitution, the First Congress proposed protections for the right to bail as well as for the immunity from excessive bail. On September 25, 1789, the day after George Washington signed the Judiciary Act into law,[158] the Bill of Rights cleared both houses.[159] Congress had been debating both the Bill of Rights and the Judiciary Act for months. The Senate had passed the Judiciary Act in mid-July after referring its drafting to committee in April,[160] and the Eighth Amendment had first been proposed in the House of Representatives by James Madison in June[161] after declaring his intention to introduce constitutional amendments on May 4.[162] The Eighth Amendment went into effect in December 1791, more than two years after the Judiciary Act of 1789 established the right to bail and more than three years after the Constitution went into effect. The Eighth Amendment provision that "[e]xcessive bail shall not be required,"[163] like the Fifth and Ninth Amendments, was thus passed and ratified against the backdrop of a right to bail for all but capital crimes.

Immunity from excessive bail was the last of the three pillars of bail to be erected in not only the federal system but also in the English constitutional tradition. Indeed, immunity from excessive bail as a legal concept is both unintelligible and inadministrable unless the right to bail is presupposed. In order to protect persons from excessive bail, it must first be established that the offense is bailable. With virtual unanimity, the federal government and the states spoke with unwavering clarity for two centuries: All noncapital offenses are bailable.

B. Constitutionality of the Right to Bail

The constitutionality of the Consensus Right to Bail for all but capital crimes is the leitmotif of this Article. Many of the reasons for the protection of the right to bail against state abridgement under the Fourteenth Amendment, discussed

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157. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91.

158. *Id.* at ch. 20, 1 Stat. 73, 93.

159. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1160 (1991).

160. The Senate passed the Judiciary Act on July 17, 1789 by a vote of 14 to 6. 1 ANNALS OF CONG. 50–51 (1789) (Joseph Gales ed., 1834). Three months earlier, on April 7, 1789, the day after a quorum was first reached in the Senate, a committee was established "to bring in a bill for organizing the Judiciary of the United States." *Id.* at 18.

161. Madison proposed his initial draft of a bill of rights in the House of Representatives on June 8, 1789. *See id.* at 439–40.

162. *Id.* at 247.

163. U.S. CONST. amend. VIII.

in Part I, also apply to federal abridgement. The right to bail is the quintessential liberty interest protected by Anglo-American "law of the land" and "due process of law."[164] This liberty interest—the freedom from imprisonment before conviction—should be protected by the Fifth Amendment, the Ninth Amendment, the Eighth Amendment, and the Habeas Corpus Clause.

Instead of arguing for a right to bail from a primarily doctrinal perspective, as is common in legal literature, this Part attempts to apply novel historical arguments for the constitutionalization of the right to bail. This Article is the first to discuss the full extent of the right to bail in the states, and thus this Part focuses on the significance of these historical developments in the states for the federal right to bail.

1. Bail and the Presumption of Innocence

Before proceeding to the historical support for the right to bail in state and federal laws and constitutions, this Subsection briefly discusses the Court's own arguments for the right to bail, which have largely shaped academic discourse. In *Stack v. Boyle*, one of the few Court cases about bail, the Court affirmed the right to freedom from confinement before conviction, relating the right to bail to the presumption of innocence.[165] The Court wrote:

> From the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedure, federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[166]

In this single statement, the Court enfolds many justifications for the fundamentality of the right to bail: the longstanding nature of the right (its "traditional" quality, as evidenced by its 1789 origin); the unequivocal nature of the right (the law clearly expressed that noncapital offenses were bailable); the importance of the right to a fair trial (allowing the accused to prepare his/her defense); and the prevention of punishment prior to conviction (preventing deprivation of liberty before judgment by his or her peers). All of these considerations implicate due process. Although the Court has not followed its own precedent in *Stacks* (since it was formally a statutory rather than constitutional case), *Stacks* nonetheless informs constitutional discourse. Although many of the justifications raised in *Stacks* for the right to bail are echoed here, much more could be said that is outside the scope of this Article about the right to the

164. *See* DE HAAS, *supra* note 15.
165. 342 U.S. 1, 4 (1951).
166. *Id.* at 3 (citations omitted).

"unhampered preparation of a defense" and the "presumption of innocence" and how they relate to bail.

2. Right to Bail and the Eighth Amendment

Others have persuasively argued that the right to bail is implicit in the Eighth Amendment's Excessive Bail Clause by relying on the principle of the presumption of innocence as established in case law. This Article proposes that another clause of the Eighth Amendment—the Cruel and Unusual Punishment Clause—should also protect the right to bail for noncapital crimes. The Court interprets the Eighth Amendment dynamically. In *Trop v. Dulles*, the Court wrote: "[T]he words of the [Eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[167] This Article proposes that courts interpret the Eighth Amendment to protect the right to bail. It is "unusual" in our system of justice to punish persons before conviction. In addition, the sources of the evolving standards "that mark the progress of a maturing society"[168]—the Judiciary Act and the state constitutions—are particularly authoritative in the case of the right to bail.

While the Court's own doctrinal standards for the Cruel and Unusual Punishment Clause should command protection of the right to bail, departures from the Consensus Right to Bail may appear even more unconstitutional from an originalist reading of the Eighth Amendment:

> The framers of the Bill of Rights understood the word "unusual" to mean "contrary to long usage." Recognition of the word's original meaning will precisely invert the "evolving standards of decency" test and ask the Court to compare challenged punishments with the longstanding principles and precedents of the common law, rather than shifting and nebulous notions of "societal consensus" and contemporary "standards of decency."[169]

Under this standard, pretrial detention for noncapital crimes is indeed "unusual." Such detention was essentially unknown and contrary to statutory and constitutional law in all the states and under federal law for the first two centuries of American history. Denials of bail for noncapital crimes, even if supported by current popular opinion and "standards of decency," are therefore unusual because they were virtually unknown, under either state or federal law, for the first two centuries of United States history.

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167. Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

168. *Id.* at 101.

169. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1825 (2008).

3. The Fifth Amendment and the Constitutionalization of a Federal Statutory and State Constitutional Right

In addition to the reasons for the fundamentality of the right to bail discussed in *Stack v. Boyle* and considered above, this Article provides another reason for the constitutionalization of the right to bail for noncapital offenses: the ubiquity of the right in state constitutions. The privileges and immunities of citizens with respect to "States," protected by the Court through the Due Process Clause of the Fourteenth Amendment, are often given substance by the Bill of Rights, the 1789 Federal Constitution, and federal statutory and doctrinal standards.[170] The right to bail is a vivid example of the reverse—where state constitutional rights should inform the meaning of the Due Process Clause of the Fifth Amendment. Every state that joined the Union after 1789 secured the right to bail either in their state codes or their state constitution. Although not among the initial Eastern states that breathed life into the Constitution, these states nevertheless comprise a vast majority of the Union. Their voices should be considered in interpreting the meaning of due process. They guaranteed the right to bail as an essential component of America's constitutions. This same right, in different words, was protected in the Due Process Clause of the Fifth Amendment of the Federal Constitution. In addition, the right to bail was the essence of due process from as early as the Magna Carta.[171] Although the precise content of the right to bail may have been unsettled at the time of America's Founding, the state constitutional experience should be more than sufficient to constitutionalize the federal statutory standard embodied by the Judiciary Act.

Just as the right to bail became more concrete after 1789, many constitutional uncertainties in the 1789 Constitution and 1791 Bill of Rights were settled by experience. For example, the Court in 1970 held in *Winship*[172] that defendants in criminal trials must be acquitted in the absence of proof of guilt "beyond a reasonable doubt." This phrase "beyond a reasonable doubt" does not even appear until 1798, after the adoption of the Constitution and the Bill of Rights. Nevertheless, the right became a constitutional right from longstanding practice in the criminal justice system of the federal and state governments. Professor Amar has called it an "example of an uncontroversial, unenumerated, post-Founding fundamental right."[173] In addition, common law crimes were often considered to be a proper exercise of the judicial power at the founding,[174] but changing sentiment induced the Court to declare them unconstitutional in 1812.[175]

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170. For example, when the Court incorporates a federal right through the Fourteenth Amendment, it incorporates "not merely the 'core' of a particular right" but also "all the ancillary rules and specific details developed in federal judicial interpretations." Sistrunk v. Lyons, 646 F.2d 64, 70 n.25 (3d Cir. 1981).

171. *See* DE HAAS, *supra* note 15.

172. *In re* Winship, 397 U.S. 358, 364 (1970).

173. Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1756 (2011).

174. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 89 n.341 (2001).

175. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).

Similarly, the constitutionality of the Alien and Sedition Acts was debated by the Federalists and Republicans in the late eighteenth century, though few would argue today, or even in 1868 when the Fourteenth Amendment was ratified, that such restraints on speech could be constitutional. The meaning of freedom of speech, like most of the freedoms in the Bill of Rights, has evolved.

Compared to a right such as the freedom of speech, the right to bail was remarkably stable for two centuries. The right to bail under the Judiciary Act of 1789 was interpreted identically to the federal bail right in 1980. And judicial interpretations of the Right to Bail Clauses in the states proved remarkably consistent through time and across the states, as discussed in Section I.F. This stability, as well as the ubiquity of the Consensus Right to Bail, should color the Court's interpretation of the Due Process Clause of the Fifth Amendment.

4. Protecting the State Baseline Right to Bail in Light of the Expansion of Federal Criminal Jurisdiction

The reasons for the protection of the Consensus Right to Bail under federal law are particularly compelling in light of the vast expansion of federal criminal jurisdiction. Not protecting the Consensus Right to Bail under the Bill of Rights means allowing the federal government to invade areas of criminal jurisdiction that were intended to be "reserved to the States"[176] while not requiring the federal government to meet the minimum level of protection guaranteed by 48 states, most since before they were states, until at least 1970. As we will see in Part III, this is precisely the constitutional vision embraced by the Court in the mid-1980s, without even mentioning the pervasiveness of the Consensus Right to Bail in the states. This Court-sanctioned invasion of state jurisdiction without protection of the traditional constitutional rights of state citizens is both antifederalist and antifreedom.

5. The Privilege of Habeas Corpus, the Sixth Amendment, and the Right to Bail

As discussed in Subsection II.A.1 above, the privilege of habeas corpus presupposes a right to bail. The inclusion of the privilege of habeas in the original constitution to the noticeable exclusion of other rights of the people—not freedom of speech, not immunity from excessive bail or cruel and unusual punishment, not the right to bear arms, not even due process of law[177]—underscores the importance to the Framers of preventing unlawful detention. Further protection against unlawful detention comes in the Sixth Amendment. The Sixth Amendment's right "to be informed of the nature and cause of the accusation"[178] was borrowed from the Habeas Corpus Act of 1679[179] and is intimately connected with the right to bail

Detention prior to conviction violates the most fundamental principles of Anglo-American criminal justice. In addition to falling directly under the

176. U.S. CONST. amend. X.
177. *See* discussion *supra* Section II.A.1 and note 151.
178. U.S. CONST. amend. VI.
179. *See* Meyer, *supra* note 23, at 1190.

protection of the Due Process Clause of the Fifth Amendment, the right to bail can be seen in the penumbras of the Sixth Amendment as well as the Habeas Corpus Clause of the U.S. Constitution.

C. Response to Possible Objections: **Expressio Unius** *and the Federal Right to Bail*

Some have argued that the existence of the affirmative right to bail in the Judiciary Act of 1789, as well as in state constitutions and fundamental documents such as the Northwest Ordinance of 1787, demonstrates that the members of Congress knew how to express an affirmative right to bail, and that the absence of the right in the Bill of Rights suggests that it was not meant to be protected.[180] *Expressio unius* arguments—where the inclusion of one thing implies the exclusion of others—whatever their general merit, are rendered grossly inappropriate in this context by the express words of the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[181] In addition, the Fifth Amendment declares: "No persons shall . . . be deprived of life, liberty, or property, without due process of law." Due process, as established in English tradition and the Judiciary Act of 1789, provides that no persons be deprived of their liberty before conviction except for some capital offenses. Only one comment from Congress was recorded regarding the Eighth Amendment's immunity from excessive bail,[182]

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180. For a view that the presence of the right in contemporary documents, "compound[s] the ambiguity" over whether the Eighth Amendment was "meant to be a shorthand expression of both rights," see THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 108-17, at 1566–67 (2d Sess. 2004). "It appears, therefore, that Congress was aware in 1789 that certain language conveyed a right to bail and that certain other language merely protected against one means by which a pre-existing right to bail could be abridged." *Id.* at 1567.

181. U.S. CONST. amend. IX.

182. Only two comments on the Eighth Amendment were preserved in the *Annals of Congress*, only one of which relates to the immunity from excessive bail:

> Mr. SMITH, of South Carolina, objected to the words "nor cruel and unusual punishments;" the import of them being too indefinite.
>
> Mr. LIVERMORE.—The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

1 ANNALS OF CONG. 754 (1789) (Joseph Gales ed., 1834). Livermore's principal objection is with the outlawing of "cruel and unusual punishment." His only objection to the immunity

and nothing suggests that the First Congress meant to undermine centuries of due process tradition by implying the abandonment of one of the most fundamental rights in Anglo-American history. A better reading of the actions of the First Congress—protecting the dual bailment rights but in separate documents (Judiciary Act and the Bill of Rights)—is that they specifically meant to protect both rights in perpetuity for all federal crimes.

III. THE UNCONSTITUTIONAL ASSAULT ON BAIL, 1979–2011

In the last half century, the right to bail in America has been gradually eroded. The ubiquity of the Consensus Right to Bail as a statutory and constitutional right peaked in the 1960s, when 48 states protected the right to bail (41 in their constitutions). The right to bail was also preserved under federal law for federal crimes in the District of Columbia and in the territories. In 1970, the balance began to shift.

Congress enacted the District of Columbia Crime Act in 1970 in connection with the Nixon administration's "law and order" campaign. It was a radical departure from federal and state law for two reasons: (1) it allowed for the detention of noncapital defendants without bail; and, (2) it instructed the courts to consider a person's dangerousness when making bail determinations.

Then, starting in the late 1970s, states began to change their constitutions to mirror the law in the District of Columbia. Over the next two decades, more than a dozen states and the federal government revoked the constitutional right to bail for all but capital crimes that was the bedrock of due process in America. This Part documents this radical change in the law of pretrial detentions. It shows how the right has changed in state constitutions. It also documents the changes in the right to bail under D.C., state, and federal statutes.

Many articles have argued that the Federal Bail Reform Act of 1984 is unconstitutional. These articles principally focus on doctrinal standards, especially the presumption of innocence as developed in statutory and constitutional cases.[183]

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from excessive fines is that "it lies with the court to determine," i.e., it is too indeterminate. *Id.* at 754.

183. *See, e.g.*, Kevin F. Arthur, *Preventive Detention: Liberty in the Balance*, 46 MD. L. REV. 378 (1987); Michael J. Eason, *Eighth Amendment—Pretrial Detention: What Will Become of the Innocent?* United States v. Salerno*, 107 S.Ct. 2095 (1987)*, 78 J. CRIM. L. & CRIMINOLOGY 1048, 1078 (1988); Keith Eric Hansen, *When Worlds Collide: The Constitutional Politics of* United States v. Salerno, 14 AM. J. CRIM. L. 155 (1987); Lawrence H. Tribe, *An Ounce of Detention: Preventative Justice in the World of John Mitchell*, 56 VA. L. REV. 371 (1970). *Cf.* Samuel Wiseman, *Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause*, 36 FORDHAM URB. L.J. 121 (2009) (arguing that the Bail Reform Act of 1984 violated the constitutional principles of antidiscrimination and anticoercion that animated the Excessive Bail Clause). Those arguing for the constitutionality of the Federal Bail Reform Act generally argue on the same grounds—importance of presumption of innocence. *See, e.g.*, John B. Howard, Jr., *The Trial of Pretrial Dangerousness: Preventive Detention After* United States v. Salerno, 75 VA. L. REV. 639, 678 (1989). Some articles foresaw the destruction of the right to bail and sought to prevent it. *See, e.g.*, Steven Duke,

This Article has taken a different approach, arguing for a right to bail from a historical and originalist perspective, starting with the common law of England but drawing support from the ubiquity of the Consensus Right to Bail in state constitutions, as well as state statutory and federal law. The constitutional arguments for why this right to bail should be protected are advanced in Parts I and II. This Part simply chronicles the erosion of that right in the last few decades.

While this Article agrees that the Bail Reform Act of 1984 is unconstitutional, and thus that *Salerno* was wrongly decided, the argument is even stronger for the unconstitutionality of the state constitutional changes. The right to bail was much stronger and clearer when the Fourteenth Amendment was ratified in 1868 (and stronger still when Nixon was elected in 1968) than when the Bill of Rights was proposed in 1789.

A. The First Battle in the War on Bail: Removing the Right to Bail in the District of Columbia in 1970

As discussed in Part II, before the modern war on bail, former Federal Rule of Criminal Procedure 46(a)(1), which originated from the Judiciary Act of 1789, provided that before conviction a "person arrested for an offense not punishable by death shall be admitted to bail," and that one "arrested for an offense punishable by death may be admitted to bail."[184] This right was absolute for all non-capital crimes.[185]

Later, Congress enacted the Bail Reform Act of 1966.[186] Although it did not significantly change the right to bail, it was, nonetheless, the first law to

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Bail Reform for the Eighties: A Reply to Senator Kennedy, 49 FORDHAM L. REV. 40 (1980) (warning of the threat of pretrial detention advocated by Sen. Kennedy to the liberties of the accused).

184. Stack v. Boyle, 342 U.S. 1, 8 (1951) (Jackson, J., concurring) (quoting an older version of FED. R. CRIM. P. 46(a)(1)).

185. Although the plain meaning of the text was clear, and state and federal courts had protected the absolute right to bail for noncapital crimes for almost two centuries, Justice Harlan, in a memorandum, prefigured the Court's lack of appreciation for the right to bail. Justice Harlan stated in 1961 that Federal Rule of Criminal Procedure 46(a)(1) did not withdraw district courts' authority to revoke bail in a noncapital case. Fernandez v. United States, 81 S. Ct. 642, 644 (1961) ("[I] believe that, on principle, District Courts have authority, as an incident of their inherent powers to manage the conduct of proceedings before them, to revoke bail during the course of a criminal trial, when such action is appropriate to the orderly progress of the trial and the fair administration of justice."). At issue in *Fernandez* was the revocation of bail to fifteen defendants who were on trial for conspiracy to violate a narcotics law. *Id.* at 643. Justice Harlan held that it would not interfere with the trial judge's decision because it was not "arbitrary or capricious." *Id.* at 645. In his opinion, Harlan notes that his attention was called to only one "reported decision directly on point . . . a 1911 decision of" a district court. *Id.* at 644. Harlan seems to be unaware of the longstanding history of the right to bail in the states, under the Judiciary Act, or in English common law.

186. For discussions of the battles over bail in the 1960s–1980s, including the Congressional debates, see Keith Eric Hansen, *When Worlds Collide: The Constitutional Politics of* United States v. Salerno, 14 AM. J. CRIM. L. 155 (1987).

change the structure of bail as established in the Judiciary Act of 1789. Noncapital defendants remained bailable before trial. However, instead of giving judges complete discretion for capital defendants or asking them to consider whether the proof of guilt was evident or the presumption great, it asked judges to consider the likelihood a suspect would flee and whether a suspect was a danger to the community. This is the first law in America—colonial, territorial, federal, or state—that allowed judges to consider "danger to the community or any other person" as a reason for denying bail, albeit for the limited case of a defendant seeking release *after* conviction. The community protection aim of the 1966 Act would go on to dominate the war on bail after 1970.

As shown in Figure 3, in Part I, the right to bail was better protected in 1968 than in any other time in history. Alaska and Hawaii entered the Union in 1959 (both then protected the right to bail), and Maryland and West Virginia changed their statutes in 1962[187] and 1965,[188] respectively, to better protect the Consensus Right to Bail. The 1960s were thus the high point in the constitutional history of the right to bail. In the same decade, however, Ronald Reagan was elected governor of California (1966) and Richard Nixon was elected president of the United States (1968), both after campaigning for "law and order."[189] Eleven days after his inauguration, in February 1969, President Nixon echoed this theme, calling for "temporary pretrial detention" for persons whose "pretrial release presents a clear danger to the community."[190]

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187. *See supra* note 45.

188. *See supra* note 62.

189. *See* Arthur, *supra* note 183, at 378 n.11.

190. Congressional Quarterly, *Presidential Report*, 127 CONG. Q. WKLY. REP. 238 (1969) (statement by President Nixon). The constitutionality of Nixon's views on bail were defended by then-Attorney General John Mitchell. John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969). Hermine Herta Meyer, from the Office of the Deputy Attorney General, published a long law review article in 1972 (in two parts) with a similar title, *Constitutionality of Pretrial Detention*. Meyer's article stated that the "views expressed in this article are those of the author and do not necessarily reflect the position of the Department of Justice." Meyer, *supra* note 23, at 1140. Nevertheless, these articles are clear evidence that the Attorney General himself and members of Attorney General's office were so concerned about the "constitutionality" of the Act for the District of Columbia that they entered the academic debate in law journals. This strikes me as an example of reverse-impact litigation, where a series of coordinated laws, test cases, and articles initiated by the federal government eventually led to the Court in *Salerno* sanctioning the removal of a constitutional right. I think it is no coincidence that the author of the Court's opinion in *Salerno* was Chief Justice Rehnquist, who was John Mitchell's chief lawyer as Assistant Attorney General in 1969–1971 and a Nixon appointee to the Court (assuming office in January 1972). For his role in Watergate, Mitchell became the only U.S. Attorney General ever to be convicted of illegal activities. He may also be the only Attorney General to have masterminded the statutory and judicial destruction of a constitutional right.

The concept of preventive detention was first proposed to Congress by Attorney General John N. Mitchell in 1969.[191] Although unwilling to change federal law at the time, Congress was willing to test detention for dangerous, noncapital defendants in the District of Columbia. It passed the 1970 District of Columbia Court Reform and Criminal Procedure Act (the "D.C. Act") which allowed pretrial detention of up to sixty days on the ground of dangerousness.[192] The 1970 D.C. Act allowed judges to consider dangerousness and risk of flight when setting bail in noncapital cases. The constitutionality of the Act was upheld by the D.C. Court of Appeals in *United States v. Edwards*.[193]

The government's argument, which the D.C. Court of Appeals's opinion in *Edwards* adopted, relied on three law review articles for the idea that the Eighth Amendment did not provide for a constitutional right to bail. Two of those articles were written by members of Nixon's Department of Justice team: then-Attorney General John Mitchell, who would later go to prison for his central role in Watergate, and Hermine Herta Meyer, from the Office of the Deputy Attorney General.[194] Thus, only one of the articles relied upon by the court is not tainted by association with the governmental office that crafted the very bill whose constitutionality was challenged. The great victory in Nixon and Mitchell's effort to destroy the right to bail came in 1987, when Chief Justice Rehnquist, who had been Mitchell's right-hand man as Assistant Attorney General when the D.C. Act and Mitchell's article were written, wrote the majority opinion in *Salerno*.

B. The Federal Destruction of the Right to Bail

Encouraged by the experiment with pretrial detention in the District of Columbia and the D.C. Circuit's opinion in *Edwards* upholding the constitutionality of the D.C. Act, Congress passed the Bail Reform Act of 1984 as part of its comprehensive crime control legislation of the mid-1980s.[195] This Act

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191. Louis M. Natali, Jr., *Redrafting the Due Process Model: The Preventive Detention Blueprint*, 62 TEMP. L. REV. 1225, 1227 n.15 (1989).

192. D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 155(c), 84 Stat. 570 (1970).

193. United States v. Edwards, 430 A.2d 1321 (D.C. 1981) (en banc), *cert. denied*, 455 U.S. 1022 (1982).

194. *See supra* note 190. The other article that supported the government's position was written by William F. Duker, who would later be convicted of four felonies and sentenced to thirty-three months in prison after pleading guilty to "mail fraud, filing false claims, making false statements, and obstructing a federal audit." *See In re* Duker, 242 A.D.2d 853, 853–54 (N.Y. App. Div. 1997) (disbarment proceedings). Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 263, 266 (1999) (describing his crime as well as his history as a lawyer). A "prosecutor described the crime as 'one of the most serious cases of legal fraud' the United States has prosecuted." Benjamin Weiser, *Prison Term for Lawyer Who Overcharged U.S.*, N.Y. TIMES, Dec. 11, 1997, at B3. Then-Judge Sonia Sotomayor considered a lesser term but decided against it because of the "serious nature of Mr. Duker's criminal conduct." *Id.*

195. Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976, 1976 (codified at 18 U.S.C. §§ 3141–3150 (1994). The entire statute was known as the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976, 1976 (1984).

was crucial to the war on bail. Like the 1970 D.C. Act, it supported the denial of bail, even in noncapital cases.[196] Instead of an automatic right to bail, it allowed judges to balance the rights of the accused against the interests of the community.

Before these Acts, federal judges would consider the risk that the accused would not appear at trial only in an attempt to set the reasonable amount of bail. The risk of flight, however, was never a constitutionally valid ground in noncapital cases for denying bail or even for setting bail too high.[197] The Bail Reform Act of 1984 completely changed bail law, allowing both risk of flight and danger to the community as valid reasons for denying bail in non-capital cases.

C. The Supreme Court's Complicity in the Unconstitutional Denial of Bail

The Court, in *United States v. Salerno*, upheld the Bail Reform Act against Fifth and Eighth Amendment challenges.[198] The Court's opinion, written by Chief Justice Rehnquist, held that the Eighth Amendment was not violated by denial of bail and resulting pretrial detention solely on grounds that a defendant was dangerous to the community, because the Eighth Amendment does not grant an absolute right to bail.

The Court, however, specifically disclaimed that their decision touched upon the power of the federal government to define the classes that are bailable: "[W]e need not decide today whether the Excessive Bail Clause speaks at all to

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196. The Act states that the federal judge shall "order the detention of the person prior to trial" if "no condition or combinations of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." *Id.* at 1978–79. This Act stands in stark contrast to an affirmative right to bail for all but capital crimes. Indeed, the presumption under the Act is that appearance and safety cannot be assured for various classes of noncapital crimes, including many drug crimes. *Id.* at 1979. The Act provides various factors that the judicial officer shall consider in deciding whether to allow bail, including the nature of the crime, the weight of evidence against the accused, and his ties to the community. *Id.* at 1980. The right to bail is even more attenuated pending sentencing and release than before trial. A person who has been found guilty can only be released pending appeal if the judicial officer finds "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community [and] the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial." *Id.* at 1981–82.

197. *See* Stack v. Boyle, 342 U.S. 1 (1951) (affirming a right to bail and undermining the lower court's seemingly arbitrary assignment of excessive bail in light of the risk of flight). Justice Jackson wrote:

> Admission to bail always involves a risk that the accused will take flight. That is a calculated risk, which the law takes as the price of our system of justice. We know that Congress anticipated that bail would enable some escapes, because it provided a procedure for dealing with them.

Id. at 8 (Jackson, J., concurring). Ironically, Justice Jackson's law clerk the next term (October 1952), William Rehnquist, would play a key role—if not *the* key role—in destroying the right to bail; first in the Attorney General's Office and then as Chief Justice and author of the *Salerno* opinion.

198. United States v. Salerno, 481 U.S. 739, 754 (1987).

Congress' power to define the classes of criminal arrestees who shall be admitted to bail."[199] Whether the "Eighth Amendment imposes some substantive limitations on [Congress's] powers in this area"[200] has never been decided by the Court. This Article argues that such a limitation does indeed exist, and that the Bail Reform Act exceeds those limits.

Despite destroying two-hundred years of American and almost a millennium of Anglo-American tradition, the Court cites very little history in its opinion. Neither the majority nor the two dissenting opinions wrote anything about the Consensus Right to Bail in the states, about ancient traditions disfavoring pretrial detention, or about the historical meaning of due process and the law of the land. Indeed, none of the opinions cited a single statute or constitution besides the Bail Reform Act and the Federal Constitution, not even the Judiciary Act of 1789. Only two cases from before the twentieth century were cited: *Coffin v. United States*, cited by Justice Marshall's dissent for the existence of "a presumption of innocence in favor of the accused [that is] undoubted law, axiomatic and elementary, and . . . enforcement [of which] lies at the foundation of the administration of our criminal law";[201] and *Wong Wing v. United States*, cited by the majority for the proposition that there was no constitutional barrier to the detention of aliens pending deportation proceedings.[202] The majority opinion also failed to mention the "presumption of innocence" in the context of pretrial detention despite the Bail Reform Act explicitly stating: "Nothing in this section shall be construed as modifying or limiting the presumption of innocence."[203] Chief Justice Rehnquist undermined the presumption of innocence in earlier opinions, so this interpretative decision is unsurprising.[204]

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199. *Id.*

200. *Id.*

201. *Id.* at 763 (Marshall, J., dissenting) (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

202. *Id.* at 748 (majority opinion) (citing Wong Wing v. United States, 163 U.S. 228 (1896)).

203. *See* Louis M. Natali, Jr., *Redrafting the Due Process Model: The Preventive Detention Blueprint*, 62 TEMP. L. REV. 1225, 1235–36 (1989) (quoting 18 U.S.C. § 3142(j) (1982 & Supp. V. 1987)) (discussing Rehnquist's avoidance of the presumption of innocence in *Salerno*).

204. *Id.* In *Bell v. Wolfish*, Justice Rehnquist, writing for the majority, attempted to abolish the presumption of innocence except how it relates to the burden of proof:

> The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial. It is "an inaccurate, shorthand description of the right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; . . .' an 'assumption' that is indulged in the absence of contrary evidence." Without question, the presumption of innocence plays an important role in our criminal justice system. "The principle that there is a presumption

Justice Marshall, in his dissent, wrote of the majority opinion: "Theirs is truly a decision which will go forth without authority, and come back without respect."[205] Unfortunately, his and Stevens's dissent lacked historical evidence for the right to bail and instead rested its opinions entirely on the presumption of innocence. Still, the dissents are "faithful to the 'fundamental principles as they have been understood by the traditions of our people and our law.'"[206] The three dissenters recognized that the Court improperly "employed a rational basis test to assess the alleged denial of a fundamental right."[207]

This Article argues that *Salerno* was wrongly decided, but for different reasons than those argued by the dissent or by other academic articles. This Article attempts to trace the development of a fundamental and concrete right to bail, as embodied in the Consensus Right to Bail Clause. But, even if the Court follows *Salerno* as a correctly decided decision, it can nonetheless protect the right to bail in the states under the Fourteenth Amendment. The next Section of this Article reveals that such protection is overdue.

D. When Constitutional Amendments are Unconstitutional: Removal of the Right to Bail from State Constitutions

Following the federal government, states began to remove their constitutional protections of the right to bail. Different state constitutions established different formulations for when bail could be denied, but most followed the Bail Reform Act and made it lawful to deny bail to persons who courts find pose a danger to the community or are likely to flee.[208] The timing of these removals of the constitutional right to bail for all noncapital crimes can be seen in Figure 4. The texts of the constitutional amendments themselves can be found in the Appendix.

> of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.

441 U.S. 520, 533 (1979) (citations omitted).

205. *Salerno*, 481 U.S. at 767 (Marshall, J., dissenting).

206. *Id.* at 769 (Stevens, J., dissenting) (quoting Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

207. Arthur, *supra* note 183, at 391.

208. *See, e.g.*, Miller v. Eleventh Judicial Dist. Court, 154 P.3d 1186, 1188 (Mont. 2007) ("[I]n order to protect the rights of a person who is accused of a non-capital crime, the law requires that such person shall be released pending trial if reasonable conditions can be imposed to protect the community or any particular individual. Sections 46-9-106, 108, 111, MCA. These conditions may, *inter alia*, include a reasonable bail. A defendant is presumed innocent prior to a verdict, and he must be released absent a finding by the trial court that he will likely flee if bail is not imposed. The release shall be on conditions designed to protect the community, unless the trial court finds that there are no conditions that can be imposed on the defendant's release that will adequately ensure the protection of any person or the community.").

Figure 4: State Abridgment of the Constitutional Right to Bail Clause

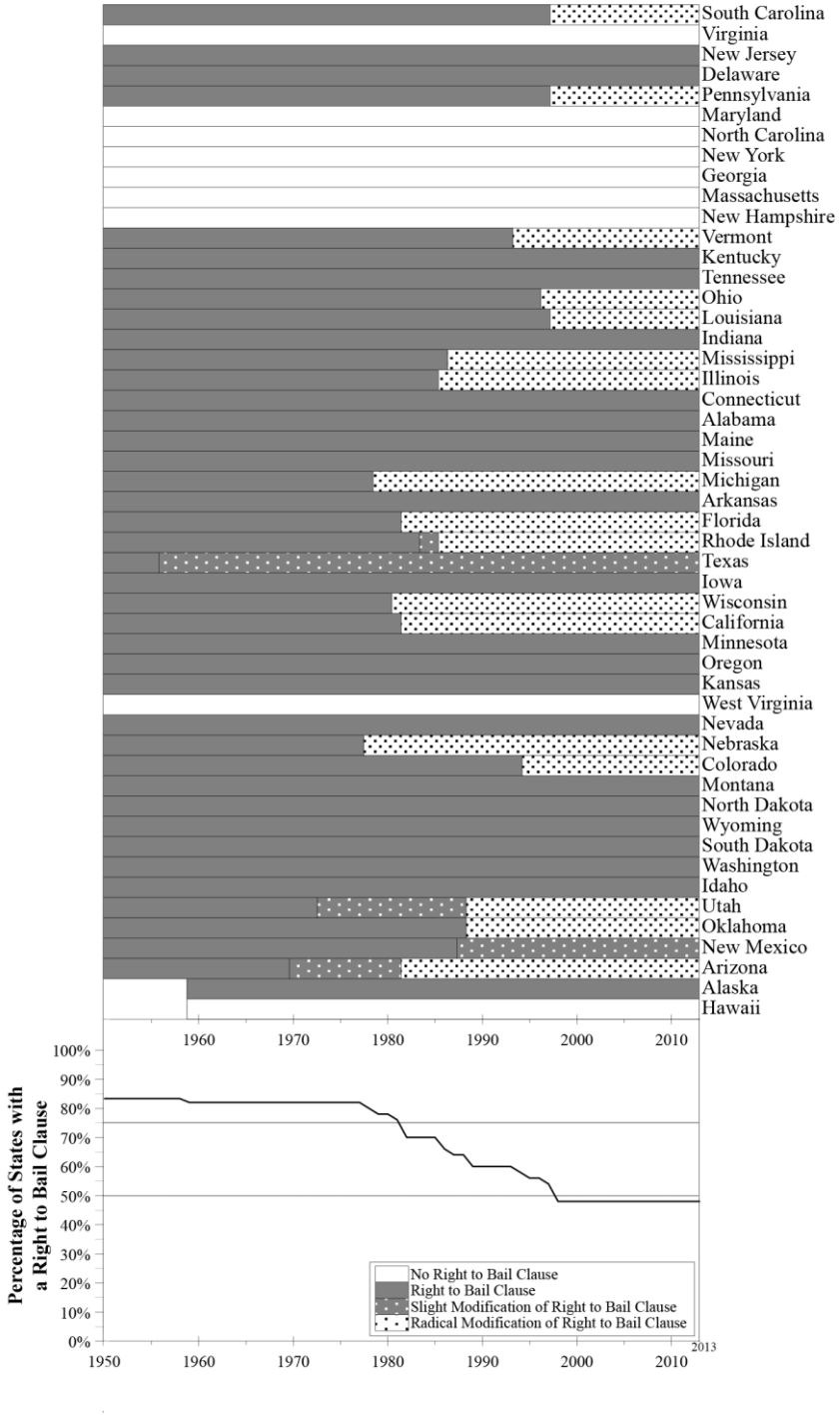

Figure 4 shows the weakening of the Right to Bail Clause after 1950. This graph is a continuation of Figure 2, which shows the states only until 1976. As in Figure 2, solid gray indicates that a state's constitution contains a Right to Bail Clause at the time. Solid white signifies the absence of a Right to Bail Clause. White with gray polka dots indicates that the Right to Bail Clause still appears in the constitution but that the right to bail has been significantly abridged. Like the Federal Bail Reform Act of 1984, most of these abridgements allow bail to be denied when a person is a flight risk or a danger to the community.

As presented in Figure 2, gray with white polka dots indicates that the Right to Bail Clause was modified slightly but still relied on bright-line rules and not vague standards such as the dangerousness of a defendant when determining whether accused persons are entitled to bail. Classification invariably involves some judgment. For example, Texas changed its constitution in 1956 so that bail could be denied to persons "theretofore twice convicted of a felony." Texas amended this provision twice subsequently, but danger to the community was never at issue, and the provision only involves repeat offenders. Since Texas retains a bright-line rule, it is not considered as having abridged the right to bail, since all persons still receive bail automatically except for capital offenses when the proof is evident or unless they are repeat offenders. Most of the states whose constitutions are identified as having a "slight modification" also contain clauses limiting the right to bail for repeat offenders. One other state coded as such is Nebraska, which changed its constitution to exclude accused rapists from the right to bail. "All persons shall be bailable by sufficient sureties, except for treason, *sexual offenses involving penetration by force or against the will of the victim*, and murder, where the proof is evident or the presumption great."[209] Again, none of the constitutions coded in gray with white polka dots included dangerousness or flight risk as a reason for denying bail.

The bottom panel shows the percentage decline of the unaltered Right to Bail Clause. The frequency of the clause falls from 80% of state constitutions in 1978 to 48% in 1998. The text of every Right to Bail Clause (from every state constitution or state constitutional amendment) can be found in the Appendix.

E. The State Statutory Erosion of the Right to Bail

In addition to the revocations of the formal constitutional right to bail in many states, states in which the right to bail was a statutory standard also began to undermine the fundamental right in the late twentieth century. For example, mirroring the changes in federal law and in the dozens of states that have recently modified their constitutional provisions regarding bail, Massachusetts took away the fundamental right to bail in 1994, allowing courts to deny bail on account of dangerousness.[210] Maryland, Georgia, New Hampshire, North Carolina, and

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209. NEB. CONST. art. I, § 9 (as amended in 1978) (emphasis added).

210. H.B. 4305, 1994 Mass. Legis. Serv. Ch. 68 (Mass. 1994) (the Act that changed Section 58 of chapter 276 of the General Laws in order to restrict the "release on

Hawaii have changed their laws since the mid-1970s so that bail judges can now routinely deny bail for noncapital crimes when the prisoner is a flight risk or a danger to the community.[211] West Virginia, however, still protects the right to bail

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bail of certain persons"). The Massachusetts bail statute now allows for pretrial detention without bail for suspects on account of "dangerousness." It applies to any felony that involves or has a "substantial risk" of involving "physical force" against another. MASS. GEN. LAWS ch. 276 § 58A(1) (2010). The current law allows bail to be denied or conditions placed on the released for any felony that involves "physical force" if release will not "assure the appearance of the person . . . or will endanger the safety of any other person or the community." *Id.* § 58A(2). Like the Federal Constitution, and unlike most state constitutions, the Massachusetts constitution only prohibits "excessive bail." MASS. CONST. pt 1, art. XXVI; Commonwealth v. Baker, 177 N.E.2d 783, 786 n.3 (Mass. 1961) ("The only provision of our Constitution touching the subject of bail is art. XXVI of the Declaration of Rights prohibiting excessive bail.").

211. Maryland began taking away the fundamental right to bail in the 1980s. *See* MD. CODE ANN., Md. Rules, Rule 4-216 (West 2010) (originally adopted Apr. 6, 1984) (effective July 1, 1984) (amended many times subsequently). The right to bail was not changed from 1962–1984. For discussion of initial adoption, see *supra* note 45 and accompanying text. Maryland's current law allows for judicial offers to deny bail if "no condition of release will reasonably ensure (1) the appearance of the defendant as required and (2) the safety of the alleged victim, another person, and the community." MD. CODE. ANN., Rules, Rule 4-216(b) (West). Like the Federal Bail Reform Act of 1984, Maryland Rule 4-216(d) contains a list of facts for officers to consider when deciding whether to allow bail, including "family ties, employment status and history, financial resources, reputation," and "length of residence" in Maryland.

Georgia law now provides that bail can be denied when a person is a flight risk, poses "[a] significant threat or danger to any person, to the community, or to any property in the community," or poses a significant risk of intimidating witnesses or otherwise obstructing the administration of justice. GA. CODE ANN. § 17-6-1(e) (West 2010). The Georgia law that had been in place since the nineteenth century was modified in 1973, when the words "capital offenses" were replaced with specific offenses that the legislature intended to be bailable by discretion, including "giving, selling, [or] offering for sale . . . any narcotic drug." *See* Reed v. State, 213 S.E.2d 147, 148 (Ga. Ct. App. 1975) (upholding constitutionality of the amendment).

Since the mid-nineteenth century, all persons in New Hampshire were bailable except for capital offenses "where the proof is evident or the presumption great." Automatic eligibility to bail is still the default under New Hampshire law, but so many exceptions have been carved that the default is now nugatory. *See* N.H. REV. STAT. ANN. § 597:1 (2010) ("Except as provided in RSA 597:1-a, 597:1-c, or 597:1-d, all persons arrested for an offense shall be eligible to be released pending judicial proceedings upon compliance with the provisions of this chapter."). This bail law was amended significantly in 1993 so that the court now "shall not release" a person convicted of one of many types of offenses (including violent felonies) unless the court finds by a preponderance of the evidence that some set of conditions "will assure the person's appearance and assure that release will not pose a danger to the safety of the person or of any person or the community." N.H. REV. STAT. ANN. § 597:1-d (2010) (implemented by 1993 N.H. Laws 258:2).

North Carolina is an exception because it removed the right to bail from its state constitution in 1868. It is the only state constitution to ever remove the Right to Bail Clause (all the other forty-one states that ever had a Right to Bail Clause still preserve it, albeit many of them in a greatly attenuated form). Nevertheless, in 1937, the legislature of North

by statute, which means that 50% of the states (24 through their constitutions and one through statutes) continue to protect the right to bail without radical modification.

F. The Court's Complicity in the Repeal of the Right to Bail as an Example of the Danger of Living Constitutionalism

In cases such as *Lawrence v. Texas*,[212] the Court decided that homosexual sodomy was a protected "exercise of . . . liberty under the Due Process Clause of the Fourteenth Amendment."[213] The Court in *Lawrence* rejected its own determination in *Bowers v. Hardwick* that the "American laws targeting same-sex couples" have ancient roots.[214] Instead, the Court determined that such laws "did not develop until the last third of the 20th century."[215] The "last third of the 20th century" is precisely when states and the federal government began eliminating the right to bail. Criminals may be less politically powerful than homosexuals, but some would argue that this simply means that the courts should more vigorously protect their constitutional rights.[216]

Carolina resurrected the Consensus Right to Bail by statute: "That upon the arrest . . . it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him, and it shall further by the duty of the officer making said arrest, except in capital cases, to have bail fixed in a reasonable sum, and the person so arrested shall be permitted to give bond." 1937 N.C. Sess. Laws 481; *see* State v. Exum, 195 S.E. 7 (N.C. 1938). This statute was repealed in 1973. 1973 N.C. Sess. Laws 566. Under current North Carolina law, judicial officers are instructed to take account of such things as family ties, employment, character, and mental conditions. N.C. GEN. STAT. ANN. § 15A-534(c) (West 2010). The ultimate determination, however, is whether any conditions will "reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses." *Id.*

Prior to 1980 in Hawaii, the law read: "(a)ll persons charged with criminal offenses shall be bailable by sufficient sureties, unless for offenses punishable by imprisonment for life not subject to parole, when the proof is evident or the presumption great." HAW. REV. STAT. § 804-3 (1970); *see* Huihui v. Shimoda, 644 P.2d 968, 976 (Haw. 1982). The law, as changed multiple times in the 1980s, now allows bail to be denied where the charge is for a serious crime, and:

> (1) There is a serious risk the person will flee;
> (2) There is a serious risk that the person will obstruct or attempt to obstruct justice, or therefore, injure, or intimidate, or attempt to thereafter, injure, or intimidate, a prospective witness or juror;
> (3) There is a serious risk that the person poses a danger to any person or the community; or
> (4) There is a serious risk that the person will engage in illegal activity.

HAW. REV. STAT. § 804-3 (2010).

212. 539 U.S. 558 (2003).

213. *Id.* at 564.

214. *Id.* at 570.

215. *Id.*

216. *See* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends

The end of the Court's opinion in *Lawrence* is particularly relevant to considerations of the constitutionality of the repeal of the right to bail:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[217]

The irony of this quotation applied to the right to bail is that those who "drew and ratified the Due Process Clause[] of the Fifth Amendment" actually were "specific" regarding bail. Before they proposed the Fifth Amendment, they protected the right to bail for all noncapital offenses in the Judiciary Act of 1789. The history of the right to bail is an example where a living constitution has led to dramatically less freedom: a far cry from *Lawrence*'s vision of a "search for greater freedom."

Justice Scalia has criticized the idea of a living constitution, arguing that dynamic interpretations of the constitution do not always lead to greater freedom. "Some people are in favor of the Living Constitution because they think it always leads to greater freedom. . . . Why would you think that? It's a two-way street. And indeed, under the aegis of the Living Constitution, some freedoms have been taken away."[218] Scalia discussed the two examples—right to confrontation and right to a jury—where the Court took rights away, only to have precedent subsequently reversed and the rights reinstated by an originalist Court.[219]

The vanishing right to bail for noncapital cases is a particular vivid example of a fundamental constitutional right being taken away as society becomes tougher on crime.

CONCLUSION

For centuries—from the Norman Conquest to the twenty-first century—the right to bail before trial was a right of all persons. The right was absolute for all but capital crimes. Bail was never punitive, and the presumption of innocence was a basic tenet of justice. Americans adopted the right to bail in the organic law of the United States after Independence, enshrining it in state constitutions, in territorial organic acts, and in federal law. Before the First Congress proposed the

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seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); *see generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (arguing that the Warren Court was and the courts should be particularly careful to protect the rights of "discrete and insular minorities").

217. 539 U.S. at 578–79.

218. Justice Antonin Scalia, "Constitutional Interpretation the Old Fashioned Way," Remarks at the Woodrow Wilson International Center for Scholars (Mar. 14, 2005).

219. *Id.*

Eighth Amendment to the states, declaring that excessive bail shall not be required, it defined the baseline right to bail in the Judiciary Act of 1789. Since 1970, however, the federal government and many states have altered their laws and constitutions in order to abridge the right to bail. Without an underlying right to bail, the Excessive Bail Clause is a nullity. Further, now that formerly unconstitutional detention has been recategorized as lawful, the writ of habeas corpus has lost much of its protective function.

Abridgements of the right to bail have reverberations beyond criminal law. For example, the lawfulness of detention before or without trial is the focus of much of the controversy surrounding immigration and the war on terror. If illegal immigrants or terror suspects who are detained by the federal government are in fact "persons" (constitutionally speaking) accused of "offenses," they should be protected by the Consensus Right to Bail Clause.

This Article shows that the abridgements of the right to bail that started after 1970 would have been plainly unconstitutional in the 1970s and 1980s under the Supreme Court's standards for due process protection. Now, however, in the twenty-first century, the calculus has changed. The number of states that protect the right to bail in their constitutions has fallen from forty-one to twenty-five. America's most recent tradition has been to abridge the right to bail. Under the standards set forth in cases such as *Lawrence v. Texas*, where the Court stays in tune with modern trends when deciding constitutional cases, the opponents of bail may have successfully deconstitutionalized a fundamental right. Whether the Consensus Right to Bail Clause merits constitutional protection depends largely on one's theory of constitutional interpretation. Nevertheless, any theory of interpretation that gives special weight to longstanding traditions and the rights of unpopular minorities should protect the Consensus Right to Bail as one of the most important rights in America's constitutional history.

APPENDIX – RIGHT TO BAIL CLAUSES IN STATE CONSTITUTIONS AND AMENDMENTS: 1776 TO 2013[220]

Reference	Right to Bail
ALABAMA	
Ala. Const. of 1819	art. I, § 17. All persons shall, before conviction, be bailable by sufficient securities, except for capital offences, when the proof is evident, or the presumption great: and the privilege of the writ of "habeas corpus" shall not be suspended, unless when, in cases of rebellion, or invasion, the public safety may require it.
Ala. Const. of 1861	art. I, § 17. All persons shall, before conviction, be bailable by sufficient securities, except for capital offenses, when the proof is evident, or the presumption great; and the privilege of the writ of "habeas corpus" shall not be suspended, unless when, in cases of rebellion, or invasion, the public safety may require it.
Ala. Const. of 1865	art. I, § 17. That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offences, when the proof is evident, or the presumption great; and that excessive bail shall not, in any case, be required.
Ala. Const. of 1867	art. I, § 18. That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offences when the proof is evident, or the presumption great. Excessive bail shall not, in any case, be required.
Ala. Const. of 1875	art. I, § 17. That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great; and that excessive bail shall not, in any case, be required.
Ala. Const. of 1901	art. I, § 16. That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great; and that excessive bail shall not in any case be required.
ALASKA	
Alaska Const. of 1959	art. I, § 11. Rights of Accused. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than

220. Most of the historical Right to Bail Clauses (before 1909) can be found in FRANCIS NEWTON THORPE, 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 (1909). Two other key historical sources of state constitution are the compendia by Poore and by Swindler. BENJAMIN PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (1878); DOCUMENTS OF UNITED STATES CONSTITUTIONS (William F. Swindler and D. Musch eds., 2d series, 1982–1986). [hereinafter Swindler]. Data for the current constitutions for all fifty states are from Westlaw (all current constitutions were last verified Nov. 2, 2013). The historical Right to Bail Clauses from print sources were also checked against state constitutions from the NBER/University of Maryland State Constitution Project (which is largely based on Thorpe), http://www.stateconstitutions.umd.edu (last visited November 7, 2013).

	twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.
ARIZONA	
Ariz. Const. of 1912	art. II, § 22. All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great. Amendment [1970] art. II, § 22. All persons charged with crime shall be bailable by sufficient sureties, except for: 1. Capital offenses, when the proof is evident or the presumption great. 2. Felony offenses, committed when the person charged is already on bail on a separate felony charge and where the proof is evident or the presumption is great as to the present charge. [Amendment effective November 27, 1970.] Amendment [1982] art. II, § 22. Bailable offenses Section 22. A. All persons charged with crime shall be bailable by sufficient sureties, except for: 1. Capital offenses when the proof is evident or the presumption is great. 2. Felony offenses committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge. 3. Felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident or the presumption great as to the present charge. B. The purposes of bail and any conditions of release that are set by a judicial officer include: 1. Assuring the appearance of the accused. 2. Protecting against the intimidation of witnesses. 3. Protecting the safety of the victim, any other person or the community. Amendments [2002, 2006] art. II, § 22. A. All persons charged with crime shall be bailable by sufficient sureties, except: 1. For capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age or molestation of a child under fifteen years of age when the proof is evident or the presumption great. 2. For felony offenses committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge. 3. For felony offenses if the person charged poses a substantial danger to any other person or the community, if no conditions of release which may be imposed will reasonably assure the safety of the other person or the community and if the proof is evident or the presumption great as to the present charge. 4. For serious felony offenses as prescribed by the legislature if the person charged has entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge. B. The purposes of bail and any conditions of release that are set by a

	judicial officer include: 1. Assuring the appearance of the accused. 2. Protecting against the intimidation of witnesses. 3. Protecting the safety of the victim, any other person or the community.
ARKANSAS	
Ark. Const. of 1836	art. II, § 16. That all prisoners shall be bailable by sufficient securities, unless in capital offences, where the proof is evident or the presumption great: And the privilege of the writ of Habeas Corpus shall not be suspended, unless where, in case of rebellion or invasion, the public safety may require it.
Ark. Const. of 1864	art. II, § 16. That all prisoners shall be bailable by sufficient securities, unless in capital offences, where the proof is evident or the presumption great. And the privilege of the writ of *habeas corpus* shall not be suspended, unless where in case of rebellion or invasion the public safety may require it.
Ark. Const. of 1868	art. I, § 9. No person shall be held to answer a criminal offense unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases of petit larceny, assault, assault and battery, affray, vagrancy and such other minor cases as the general assembly shall make cognizable by justices of the peace; or arising in the army or navy of the United States, or in the militia when in actual service in time of war or public danger; and no person, after having once been acquitted by a jury, for the same offence shall be again put in jeopardy of life or liberty; but if, in any criminal prosecution, the jury be divided in opinion, the court before which the trial shall be had may in its discretion discharge the jury, and commit or bail the accused for trial at the same or the next term of said court; nor shall any person be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses[—]murder and treason[—]when the proof is evident or the presumption great; and the privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require.
Ark. Const. of 1874	art. II, § 8. No person shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury, except in cases of impeachment, or cases such as the General Assembly shall make cognizable by justices of the peace, and courts of similar jurisdiction; or cases arising in the army and navy of the United States; or in the militia, when in actual service in time of war or public danger; and no person, for the same offense, shall be twice put in jeopardy of life or liberty; but if, in any criminal prosecution, the jury be divided in opinion, the court before which the trial shall be had, may, in its discretion, discharge the jury, and commit or bail the accused for trial, at the same or the next term of said court; nor shall any person be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.
CALIFORNIA	
Cal. Const. of 1849	art. I, § 7. All persons shall be bailable by sufficient sureties: unless for capital offences, when the proof is evident or the presumption great.
Cal. Const. of 1879	art. I, § 6. All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great.

	Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishment be inflicted. Witnesses shall not be unreasonably detained, nor confined in any room where criminals are actually imprisoned. Amendment [renumbered in 1974 and amended in 1982] art. I, § 12. A person shall be released on bail by sufficient sureties, except for: (a) Capital crimes when the facts are evident or the presumption great.; (b) Felony offenses involving acts of violence on another person when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or (c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released. Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. A person may be released on his or her own recognizance in the court's discretion. Amendment [1994] art. I, § 12. A person shall be released on bail by sufficient sureties, except for: (a) Capital crimes when the facts are evident or the presumption great; (b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or (c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released. Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. A person may be released on his or her own recognizance in the court's discretion.
COLORADO	
Colo. Const. of 1876	art. II, § 19. That all persons shall be bailable by sufficient sureties, except for capital offences, when the proof is evident or the presumption great. Amendment [1983] art. II, § 19. Right to bail exceptions. (1) All persons shall be bailable by sufficient sureties except: (a) For capital offenses when proof is evident or presumption is great; or (b) When, after a hearing held within ninety six

	hours of arrest and upon reasonable notice, the court finds that proof is evident or presumption is great as to the crime alleged to have been committed and finds that the public would be placed in significant peril if the accused were released on bail and such person is accused in any of the following cases: (I) A crime of violence, as may be defined by the general assembly, alleged to have been committed while on probation or parole resulting from the conviction of a crime of violence; (II) A crime of violence, as may be defined by the general assembly, alleged to have been committed while on bail pending the disposition of a previous crime of violence charge for which probable cause has been found; (III) A crime of violence, as may be defined by the general assembly, alleged to have been committed after two previous felony convictions, or one such previous felony conviction if such conviction was for a crime of violence, upon charges separately brought and tried under the laws of this state or under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States which, if committed in this state, would be a felony (c) When a person has been convicted of a crime of violence at the trial court level, and such a person is appealing such conviction or awaiting sentencing for such conviction, and the court finds that the public would be placed in significant peril if the convicted person were released on bail. (2) Except in the case of a capital offense, if a person is denied bail under this section, the trial of the person shall be commenced not more than ninety days after the date on which bail is denied. If the trial is not commenced within ninety days and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set the amount of the bail for the person. (3) This section shall take effect January 1, 1983, and shall apply to offenses committed on or after said date. [Repealed and reenacted, with amendments, November 2, 1982 Effective January 1, 1983.] Amendment [1995] art. II, § 19. Right to bail exceptions. (1) All persons shall be bailable by sufficient sureties pending disposition of charges except: (a) For capital offenses when proof is evident or presumption is great; or (b) When, after a hearing held within ninety-six hours of arrest and upon reasonable notice, the court finds that proof is evident or presumption is great as to the crime alleged to have been committed and finds that the public would be placed in significant peril if the accused were released on bail and such person is accused in any of the following cases: (I) A crime of violence, as may be defined by the general assembly, alleged to have been committed while on probation or parole resulting from the conviction of a crime of violence; (II) A crime of violence, as may be defined by the general assembly, alleged to have been committed while on bail pending the disposition of a previous crime of violence charge for which probable cause has been found; (III) A crime of violence, as may be defined by the general assembly, alleged to have been committed after two previous felony convictions, or one such previous felony conviction if such conviction was for a crime of violence, upon charges separately brought and tried under the laws of this state or under the laws of any other state, the United States, or any territory subject to the jurisdiction of the United States which, if committed in this state, would be a felony; or (c) (Deleted by amendment.) (2) Except in the case of a capital offense, if a person is denied bail under this section, the trial of the person shall be commenced

	not more than ninety days after the date on which bail is denied. If the trial is not commenced within ninety days and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set the amount of the bail for the person. (2.5) (a) The court may grant bail after a person is convicted, pending sentencing or appeal, only as provided by statute as enacted by the general assembly; except that no bail is allowed for persons convicted of: (I) Murder; (II) Any felony sexual assault involving the use of a deadly weapon; (III) Any felony sexual assault committed against a child who is under fifteen years of age; (IV) A crime of violence, as defined by statute enacted by the general assembly; or (V) Any felony during the commission of which the person used a firearm. (b) The court shall not set bail that is otherwise allowed pursuant to this subsection (2.5) unless the court finds that: (I) The person is unlikely to flee and does not pose a danger to the safety of any person or the community; and (II) The appeal is not frivolous or is not pursued for the purpose of delay. (3) This section shall take effect January 1, 1995, and shall apply to offenses committed on or after said date. [Repealed and reenacted, with amendments, November 2, 1982 Effective January 1, 1983. (See L. 82, p. 685.); as amended November 8, 1994 Effective upon proclamation of the Governor, January 19, 1995.]
CONNECTICUT	
Conn. Const. of 1818	art. I, § 14. All prisoners shall, before conviction, be bailable by sufficient sureties except for capital offences, where the proof is evident, or the presumption great; and the privileges of the writ of Habeas Corpus shall not be suspended, unless, when, in case of rebellion or invasion, the public safety may require it; nor in any case, but by the legislature.
Conn. Const. of 1955	art. I, § 14. All prisoners shall, before conviction, be bailable by sufficient sureties, except for capital offenses, where the proof is evident, or the presumption great; and the privileges of the writ of habeas corpus shall not be suspended, unless, when in case of rebellion or invasion, the public safety may require it; nor in any case, but by the legislature.
Conn. Const. of 1965	art. I, § 8. In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by indictment or information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless on a presentment or an indictment of a grand jury, except in the armed forces, or in the militia when in actual service in time of war or public danger. Amendment [1982] art. I, § 8. In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall

	be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law, except in the armed forces, or in the militia when in actual service in time of war or public danger. Amendment [1996] art. I, § 8. a. In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless upon probable cause shown at a hearing in accordance with procedures prescribed by law, except in the armed forces, or in the militia when in actual service in time of war or public danger. b. In all criminal prosecutions, a victim, as the General Assembly may define by law, shall have the following rights: (1) the right to be treated with fairness and respect throughout the criminal justice process; (2) the right to timely disposition of the case following arrest of the accused, provided no right of the accused is abridged; (3) the right to be reasonably protected from the accused throughout the criminal justice process; (4) the right to notification of court proceedings; (5) the right to attend the trial and all other court proceedings the accused has the right to attend, unless such person is to testify and the court determines that such person's testimony would be materially affected if such person hears other testimony; (6) the right to communicate with the prosecution; (7) the right to object to or support any plea agreement entered into by the accused and the prosecution and to make a statement to the court prior to the acceptance by the court of the plea of guilty or nolo contendere by the accused; (8) the right to make a statement to the court at sentencing; (9) the right to restitution which shall be enforceable in the same manner as any other cause of action or as otherwise provided by law; and (10) the right to information about the arrest, conviction, sentence, imprisonment and release of the accused. The General Assembly shall provide by law for the enforcement of this subsection. Nothing in this subsection or in any law enacted pursuant to this subsection shall be construed as creating a basis for vacating a conviction or ground for appellate relief in any criminal case.
DELAWARE	
Del. Const. of 1776[221]	[No Right to Bail Clause.]

221. From Declaration of Rights and Fundamental Rules of The Delaware State.

Del. Const. of 1792	art. I, § 12. All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is positive, or the presumption great; and when persons are confined on accusation for such offences, their friends and counsel may at proper season have access to them. art. I, § 13. The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.
Del. Const. of 1831	art. I, § 12. All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is positive or the presumption great; and when persons are confined on accusation for such offenses, their friends and counsel may at proper seasons have access to them. art. I, § 13. The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.
Del. Const. of 1897	art. I, § 12. All prisoners shall be bailable by sufficient sureties, unless for capital offences when the proof is positive or the presumption great; and when persons are confined on accusation for such offences their friends and counsel may at proper seasons have access to them.
FLORIDA	
Fla. Const. of 1839	art. I, § 11. That all persons shall be bailable, by sufficient securities, unless in capital offences, where the proof is evident or the presumption strong; and the privilege of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.
Fla. Const. of 1861	art. I, § 11. That all persons shall be bailable, by sufficient securities, unless in capital offences, where the proof is evident, or the presumption is strong; and the privilege of habeas corpus shall not be suspended unless, when, in case of rebellion or invasion, the public safety may require it.
Fla. Const. of 1865	art. I, § 11. That all persons shall be bailable by sufficient securities, unless in capital offences, where the proof is evident, or the presumption is strong; and the habeas-corpus act shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.
Fla. Const. of 1868	Decl. of Rights, § 7. All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident, or the presumption great.
Fla. Const. of 1887	Decl. of Rights, § 9. All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great.
Fla. Const. of 1968	art. I, § 14. Bail. Until adjudged guilty, every person charged with a crime or violation of municipal or county ordinance shall be entitled to release on reasonable bail with sufficient surety unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great. Amendment [1982] art. I, § 14. Pretrial release and detention. Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons,

	assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.
GEORGIA	
Ga. Const. of 1777[222]	[No Right to Bail Clause.]
Ga. Const. of 1789	[No Right to Bail Clause.]
Ga. Const. of 1798	[No Right to Bail Clause.]
Ga. Const. of 1861[223]	[No Right to Bail Clause, but a Due Process Clause.]
Ga. Const. of 1865	[No Right to Bail Clause, but a Due Process Clause.]
Ga. Const. of 1868	[No Right to Bail Clause, but a Due Process Clause.]
Ga. Const. of 1877	[No Right to Bail Clause, but a Due Process Clause.]
Ga. Const. of 1945	[No Right to Bail Clause, but a Due Process Clause.]
Ga. Const. of 1976	[No Right to Bail Clause, but a Due Process Clause.]
Ga. Const. of 1983	[No Right to Bail Clause, but a Due Process Clause.]
HAWAII	
Haw. Const. of 1959	[No Right to Bail Clause.]
Haw. Const. of 1968	[No Right to Bail Clause.]
Haw. Const. of 1978	[No Right to Bail Clause.]
IDAHO	
Idaho Const. of 1890	art. I, § 6. All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
ILLINOIS	
Ill. Const. of 1818	art. VIII, § 13. That all persons shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it.
Ill. Const. of 1848	art. XIII, § 13. That all persons shall be bailable by sufficient sureties, unless for capital offenses where the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public

222. Swindler, *supra* note 220, at 433, 449.

223. The 1861 rebel constitution is classified as a separate constitution by Swindler. Swindler, *supra* note 220, at 416.

	safety may require it.
Ill. Const. of 1870	art. II, § 7. All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.
Ill. Const. of 1970	art. I, § 9. BAIL AND HABEAS CORPUS All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. The privilege of the writ of habeas corpus shall not be suspended except in cases of rebellion or invasion when the public safety may require it. Amendment [1982] art. I, § 9. All persons shall be bailable by sufficient sureties, except for capital offenses and offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction where the proof is evident or the presumption great. The privilege of the writ of habeas corpus shall not be suspended except in cases of rebellion or invasion when the public safety may require it. Amendment [1986] art. I, § 9. All persons shall be bailable by sufficient sureties, except for the following offenses where the proof is evident or the presumption great: capital offenses; offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction; and felony offenses for which a sentence of imprisonment, without conditional and revocable release, shall be imposed by law as a consequence of conviction, when the court, after a hearing, determines that release of the offender would pose a real and present threat to the physical safety of any person. The privilege of the writ of habeas corpus shall not be suspended except in cases of rebellion or invasion when the public safety may require it. Any costs accruing to a unit of local government as a result of the denial of bail pursuant to the 1986 Amendment to this Section shall be reimbursed by the State to the unit of local government.
INDIANA	
Ind. Const. of 1816	art. I, § 14. That all persons shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety may require it.
Ind. Const. of 1851	art. I, § 17. Offenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable when the proof is evident, or the presumption strong.
IOWA	
Iowa Const. of 1846	art. I, § 12. No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses where the proof is evident, or the presumption great.
Iowa Const. of 1857	art. I, § 12. No person shall after acquittal, be tried for the same offence. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offences where the proof is evident, or the presumption great.
KANSAS	
Kan. Const.	Bill of Rights, § 9. All persons shall be bailable by sufficient sureties

of 1859	except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.
KENTUCKY	
Ky. Const. of 1792	art. XII, § 16. That all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or presumption great, and the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.
Ky. Const. of 1799	art. X, § 16. That all prisoners shall be bailable by sufficient securities, unless for capital offences, when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.
Ky. Const. of 1850	art. XIII, § 18. That all prisoners shall be bailable by sufficient securities, unless for capital offences, when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.
Ky. Const. of 1891	Bill of Rights, § 16. All prisoners shall be bailable by sufficient securities, unless for capital offenses when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.
LOUISIANA	
La. Const. of 1812	art. VI, § 19. All prisoners shall be bailable by sufficient securities unless for capital offences, where the proof is evident or presumption great, and the privilege of the writ of Habeas Corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.
La. Const. of 1845	tit. VI, art. 108. All prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it.
La. Const. of 1852	tit. VI, art. 104. All prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident or presumption great, or unless after conviction for any offence or crime punishable with death or imprisonment at hard labor. The privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it.
La. Const. of 1861	tit. VI, art. 104. All prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident or presumption great, or unless after conviction for any offence or crime punishable with death or imprisonment at hard labor. The privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion, the public safety may require it.
La. Const. of 1864	tit. VII, art. 106. All persons shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident or presumption great, or unless after conviction for any offence or crime punishable with death or imprisonment at hard labor. The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

La. Const. of 1868	tit. I, art. 7. All persons shall be bailable by sufficient securities, unless for capital offences, where the proof is evident or the presumption great, or unless after conviction for any crime or offence punishable with death or imprisonment at hard labor. The privilege of the writ of habeas corpus shall not be suspended.
La. Const. of 1879	Bill of Rights, art. 9. Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishments inflicted. All persons shall be bailable by sufficient sureties, unless for capital offenses where the proof is evident or the presumption great; or unless after conviction for any crime or offense punishable with death or imprisonment at hard labor.
La. Const. of 1898	Bill of Rights, art. 12. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. All persons shall be bailable by sufficient sureties, unless for capital offenses where the proof is evident or presumption great, or unless after conviction for any crime or offense punishable with death or imprisonment at hard labor.
La. Const. of 1913	Bill of Rights, art. 12. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. All persons shall be bailable by sufficient sureties, unless for capital offenses where the proof is evident or presumption great, or unless after conviction for any crime or offense punishable with death or imprisonment at hard labor.
La. Const. of 1921	art. I, § 12. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. All persons shall be bailable by sufficient sureties, except the following: First, persons charged with capital offense where the proof is evident or the presumption great; second, persons convicted of felonies, provided that where a minimum sentence of less than three years at hard labor is actually imposed, bail shall be allowed pending appeal and until final judgment.
La. Const. of 1974	art. I, § 18. Right to Bail Section 18. Excessive bail shall not be required. Before and during a trial, a person shall be bailable by sufficient surety, except when he is charged with a capital offense and the proof is evident and the presumption of guilt is great. After conviction and before sentencing, a person shall be bailable if the maximum sentence which may be imposed is imprisonment for five years or less; and the judge may grant bail if the maximum sentence which may be imposed is imprisonment exceeding five years. After sentencing and until final judgment, a person shall be bailable if the sentence actually imposed is five years or less; and the judge may grant bail if the sentence actually imposed exceeds imprisonment for five years. Amendment [1998] art. I, §18. (A) Excessive bail shall not be required. Before and during a trial, a person shall be bailable by sufficient surety, except when he is charged with a capital offense and the proof is evident and the presumption of guilt is great. After conviction and before sentencing, a person shall be bailable if the maximum sentence which may be imposed is imprisonment for five years or less; and the judge may grant bail if the maximum sentence which may be imposed is imprisonment exceeding five years. After sentencing and until final judgment, a person shall be bailable if the sentence actually imposed is five years or less; and the judge may grant bail if the sentence actually imposed exceeds imprisonment for five years. (B) However, a person charged with a crime of violence as defined by law

	or with production, manufacture, distribution, or dispensing or possession with intent to produce, manufacture, distribute, or dispense a controlled dangerous substance as defined by the Louisiana Controlled Dangerous Substances Law, and the proof is evident and the presumption of guilt is great, shall not be bailable if, after a contradictory hearing, the judge or magistrate finds by clear and convincing evidence that there is a substantial risk that the person may flee or poses an imminent danger to any other person or the community.
MAINE	
Me. Const. of 1819	art. I, § 10. All persons, before conviction, shall be bailable except for capital offences, where the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall, not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it. Amendment [1837] art. I, § 10. No person before conviction, shall be bailable for any of the crimes which now are, or have been denominated capital offenses since the adoption of the Constitution, when the proof is evident or the presumption great, whatever the punishment of the crime may be. And the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.
MARYLAND	
Md. Const. of 1776	[No Right to Bail Clause.]
Md. Const. of 1851	[No Right to Bail Clause.]
Md. Const. of 1864	[No Right to Bail Clause.]
Md. Const. of 1867	[No Right to Bail Clause.]
MASSACHUSETTS	
Mass. Const. of 1780	[No Right to Bail Clause.]
MICHIGAN	
Mich. Const. of 1835	art. I, § 12. No person for the same offence shall be twice put in jeopardy of punishment; all persons shall, before conviction, be bailable by sufficient sureties, except for capital offences, when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it.
Mich. Const. of 1850	art. VI, § 29. No person, after acquittal upon the merits, shall be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for murder and treason, when the proof is evident or the presumption great.
Mich. Const. of 1909	art. II, § 14. No person, after acquittal upon the merits, shall be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for murder and treason when the proof is evident or the presumption great.
Mich. Const. of 1964	art. I, § 15. No person shall be subject for the same offense to be twice put in jeopardy. All persons shall, before conviction, be bailable by sufficient sureties, except for murder and treason when the proof is evident or the presumption great.

	Amendment [1979] art. I, § 15. No person shall be subject for the same offense to be twice put in jeopardy. All persons shall, before conviction, be bailable by sufficient sureties, except that bail may be denied for the following persons when the proof is evident or the presumption great: (a) A person who, within the 15 years immediately preceding a motion for bail pending the disposition of an indictment for a violent felony or of an arraignment on a warrant charging a violent felony, has been convicted of 2 or more violent felonies under the laws of this state or under substantially similar laws of the United States or another state, or a combination thereof, only if the prior felony convictions arose out of at least 2 separate incidents, events, or transactions. (b) A person who is indicted for, or arraigned on a warrant charging, murder or treason. (c) A person who is indicted for, or arraigned on a warrant charging, criminal sexual conduct in the first degree, armed robbery, or kidnapping with intent to extort money or other valuable thing thereby, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person. (d) A person who is indicted for, or arraigned on a warrant charging, a violent felony which is alleged to have been committed while the person was on bail, pending the disposition of a prior violent felony charge or while the person was on probation or parole as a result of a prior conviction for a violent felony. If a person is denied admission to bail under this section, the trial of the person shall be commenced not more than 90 days after the date on which admission to bail is denied. If the trial is not commenced within 90 days after the date on which admission to bail is denied and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set the amount of bail for the person. As used in this section, "violent felony" means a felony, an element of which involves a violent act or threat of a violent act against any other person. This section, as amended, shall not take effect until May 1, 1979.
MINNESOTA	
Minn. Const. of 1857	art I, § 7. No person shall be held to answer for a criminal offense without due process of law, and no person for the same offense shall be put twice in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. All persons shall before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when in case of rebellion or invasion the public safety may require. Amendment [1904] art I, § 7. No person shall be held to answer for a criminal offense without due process of law, and no person for the same offense shall be put twice in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. All persons shall before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when in case of rebellion or invasion the public safety may require.
Minn. Const.	art I, § 7. No person shall be held to answer for a criminal offense without

of 1974	due process of law, and no person shall be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. All persons before conviction shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great. The privilege of the writ of habeas corpus shall not be suspended unless the public safety requires it in case of rebellion or invasion.
MISSISSIPPI	
Miss. Const. of 1817	art I, § 17. That all prisoners shall, before conviction, be bailable, by sufficient securities, except for capital offences, when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.
Miss. Const. of 1832	art I, § 17. That all prisoners shall before conviction be bailable by sufficient securities, except for capital offences, where the proof is evident, or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless, when in case of rebellion or invasion, the public safety may require it.
Miss. Const. of 1861	art I, § 17. That all prisoners shall before conviction, be bailable by sufficient securities, except for capital offences, where the proof is evident , or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless, when in a case of rebellion or invasion, the public safety may require it.
Miss. Const. of 1868	art I, § 8. Cruel or unusual punishment shall not be inflicted, nor shall excessive fines be imposed; excessive bail shall not be required, and all persons, shall before conviction, be bailable by sufficient sureties, except for capital offences, when the proof is evident, or presumption great.
Miss. Const. of 1890	art III, § 29. Excessive bail shall not be required; and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great. Amendment [1987] art III, § 29. Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great. In the case of offenses punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment, a county or circuit court judge may deny bail for such offenses when the proof is evident or the presumption great upon making a determination that the release of the person or persons arrested for such offenses would constitute a special danger to any other person or to the community or that no condition or combination of conditions will reasonably assure the appearance of the person as required. In any case where bail is denied before conviction the judge shall place in the record his reasons for denying bail. Any person who is charged with an offense punishable by imprisonment for a maximum of twenty (20) years or more by life imprisonment and who is denied bail prior to conviction shall be entitled to an emergency hearing before a justice of the Mississippi Supreme Court. Amendment [1995] art III, § 29. (1) Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital

	offenses (a) when the proof is evident or presumption great; or (b) when the person previously has been convicted of a capital offense or any other offense punishable by imprisonment for a maximum of twenty (20) years or more. (2) If a person charged with committing any offense that is punishable by death, life imprisonment or imprisonment for one (1) year or more in the penitentiary or any other state correctional facility is granted bail and (a) if that person is indicted for a felony committed while on bail; or (b) if the court, upon hearing, finds probable cause that the person has committed a felony while on bail, then the court shall revoke bail and shall order that the person be detained, without further bail, pending trial of the charge for which bail was revoked. For the purposes of this subsection (2) only, the term "felony" means any offense punishable by death, life imprisonment or imprisonment for more than five (5) years under the laws of the jurisdiction in which the crime is committed. In addition, grand larceny shall be considered a felony for the purposes of this subsection. (3) In the case of offenses punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment, a county or circuit court judge may deny bail for such offenses when the proof is evident or the presumption great upon making a determination that the release of the person or persons arrested for such offenses would constitute a special danger to any other person or to the community or that no condition or combination of conditions will reasonably assure the appearance of the person as required. (4) In any case where bail is denied before conviction, the judge shall place in the record his reasons for denying bail. Any person who is charged with an offense punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment and who is denied bail prior to conviction shall be entitled to an emergency hearing before a justice of the Mississippi Supreme Court. The provisions of this subsection (4) do not apply to bail revocation orders.
MISSOURI	
Mo. Const. of 1820	art. XIII, § 11. That all persons shall be bailable by sufficient sureties, except for capital offences, when the proof is evident or the presumption great; and the privilege of the writ of *habeas corpus* can not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.
Mo. Const. of 1865	art. I, § 20. That all persons shall be bailable by sufficient sureties, except for capital offences, when the proof is evident or the presumption great.
Mo. Const. of 1875	art. I, § 24. That all persons shall be bailable by sufficient sureties except for capital offenses, when the proof is evident or the presumption great.
Mo. Const. of 1945	art. I, § 20. That all persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.
MONTANA	
Mont. Const. of 1889	art. III, § 19. All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.
Mont. Const. of 1973	art. II, § 21. All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great.

NEBRASKA	
Neb. Const. of 1866–1867[224]	art. I, § 6. All persons shall be bailable by sufficient sureties, except for capital offences, where the proof is evident or the presumption great. Excessive bail shall not be required; nor excessive fines imposed, nor cruel and unusual punishments inflicted. art. I, § 8. No person shall be held to answer for a criminal offence unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by Justices of the peace, or arising in the army or navy, or in the militia, when in actual service in time of war or public danger; and no person for the same offence shall be put twice in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offences, when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require.
Neb. Const. of 1875	art. I, § 9. All persons shall be bailable by sufficient sureties, except for treason and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Amendment [1978] art. I, § 9. All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.
NEVADA	
Nev. Const. of 1864	art I, § 7. All persons shall be bailable by sufficient sureties; unless for capital offenses, when the proof is evident, or the presumption great. Amendment [1980] art I, § 7. Bail; exception for capital offenses and certain murders. All persons shall be bailable by sufficient sureties; unless for Capital Offenses or murders punishable by life imprisonment without possibility of parole when the proof is evident or the presumption great.
NEW HAMPSHIRE	
N.H. Const. of 1784	[No Right to Bail Clause.]
N.H. Const. of 1792	[No Right to Bail Clause.]

224. In the 1866–1867 Nebraska Constitution, the Right to Bail Clause appeared in two clauses.

NEW JERSEY	
N.J. Const. of 1776[225]	[No Right to Bail Clause.]
N.J. Const. of 1844	art. I, § 10. No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or presumption great.
N.J. Const. of 1947	art. 1, § 11. No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great.
NEW MEXICO	
N.M. Const. of 1911	art. II, § 13. All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Amendment [1988] art. II, § 13. All persons shall, before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Bail may be denied by the district court for a period of sixty days after the incarceration of the defendant by an order entered within seven days after the incarceration, in the following instances: A. the defendant is accused of a felony and has previously been convicted of two or more felonies, within the state, which felonies did not arise from the same transaction or a common transaction with the case at bar; B. the defendant is accused of a felony involving the use of a deadly weapon and has a prior felony conviction, within the state. The period for incarceration without bail may be extended by any period of time by which trial is delayed by a motion for a continuance made by or on behalf of the defendant. An appeal from an order denying bail shall be given preference over all other matters.
NEW YORK	
N.Y. Const. of 1777	[No Right to Bail Clause.]
N.Y. Const. of 1821	[No Right to Bail Clause.]
N.Y. Const. of 1846	[No Right to Bail Clause.]
N.Y. Const. of 1894	[No Right to Bail Clause.]
N.Y. Const. of 1938	[No Right to Bail Clause.]

225. New Jersey's first constitution contained very few rights. It did, however, incorporate the law of England: "[T]he common law of England, as well as so much of the statute law, as have been heretofore practiced in this Colony, shall still remain in force . . . ." N.J. CONST. of 1776, art. XXII.

NORTH CAROLINA	
N.C. Const. of 1776	art. 39 (not in Declaration of Rights). That the person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison after delivering up, bona fide, all his estate, real and personal, for the use of his creditors, in such manner as shall hereafter be regulated by law. All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great.
N.C. Const. of 1868	[No Right to Bail Clause.]
N.C. Const. of 1971	[No Right to Bail Clause.]
NORTH DAKOTA	
N.D. Const. of 1889	art. I, § 6. All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained, nor be confined in any room where criminals are actually imprisoned.
N.D. Const. of 1981	art. I, § 11. All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained, nor be confined in any room where criminals are actually imprisoned.
OHIO	
Ohio Const. of 1802	art. VIII, § 12. That all persons shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it.
Ohio Const. of 1851	art. I, § 9. All persons shall be bailable by sufficient sureties, except for capital offences where the proof is evident, or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted Amendment [1997] art. I, § 9. All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offence where the proof is evidence, or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted. The general assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to article iv, section 5(b) of the constitution of the state of Ohio.

OKLAHOMA	
Okla. Const. of 1907	art. 2, § 8. All persons shall be bailable by sufficient sureties, except for capital offenses when the proof of guilt is evident, or the presumption thereof is great. Amendment [1988] art. 2, § 8. A. All persons shall be bailable by sufficient sureties, except that bail may be denied for: 1. capital offenses when the proof of guilt is evident, or the presumption thereof is great; 2. violent offenses; 3. offenses where the maximum sentence may be life imprisonment or life imprisonment without parole; 4. felony offenses where the person charged with the offense has been convicted of two or more felony offenses arising out of different transactions; and 5. controlled dangerous substances offenses where the maximum sentence may be at least ten (10) years imprisonment. On all offenses specified in paragraphs 2 through 5 of this section, the proof of guilt must be evident, or the presumption must be great, and it must be on the grounds that no condition of release would assure the safety of the community or any person. B. The provisions of this resolution shall become effective on July 1, 1989.
OREGON	
Or. Const. of 1857	art. I, § 14. Offenses, except murder and treason, shall be bailable by sufficient sureties. Murder and treason shall not be bailable where the proof is evident or the presumption strong.[226]
PENNSYLVANIA	
Pa. Const. of 1776	art. II, § 28. The person of a debtor, where there is not a strong presumption of fraud shall not be continued in prison, after delivering up, bona fide, all his estate real and personal, for the use of his creditors, in such manner as shall be hereafter regulated by law. All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or presumption great.
Pa. Const. of 1790	art. IX, § 14. That all prisoners shall be bailable by sufficient sureties unless for capital offences, when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.
Pa. Const. of 1839	art. IX, § 14. That all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.
Pa. Const. of 1874	art. I, § 14. All prisoners shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.
Pa. Const. of	art. I, § 14. All prisoners shall be bailable by sufficient sureties, unless for

226. The version in the chart is from THORPE, *supra* note 220. Westlaw listed this article with slightly different punctuation, spelling, and "and/or" "when/where" substitutions: "art. I, § 14; Offences (sic), except murder, and treason, shall be bailable by sufficient sureties. Murder or treason, shall not be bailable, when the proof is evident, or the presumption strong."

1969	capital offense when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not suspended, unless when in case of rebellion or invasion the public safety may require it. Amendment [1998] art. I, § 14. All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community when the proof is evident or presumption great; and the privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.
RHODE ISLAND	
R.I. Const. of 1986	art. I, § 9. All persons imprisoned ought to be bailed by sufficient surety, unless for offenses punishable by imprisonment for life, or for offenses involving the use or threat of use of a dangerous weapon by one already convicted of such an offense or already convicted of an offense punishable by imprisonment for life or for an offense involving the unlawful sale, distribution, manufacture, or delivery of any controlled substance punishable by imprisonment for ten years or more, when the proof of guilt is evident or the presumption great. Nothing in this section shall be construed to confer a right to bail, pending appeal of a conviction. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety shall require it; nor ever without the authority of the general assembly. Amendment [1988] art. I, § 9. All persons imprisoned ought to be bailed by sufficient surety, unless for offenses punishable by imprisonment for life, or for offenses involving the use or threat of use of a dangerous weapon by one already convicted of offenses or already convicted of an offense punishable by imprisonment for life, or for an offense involving the unlawful sale, distribution, manufacture, delivery, or possession with intent to sell, distribute or deliver any controlled substance punishable by imprisonment for ten (10) years or more, when the proof of guilt is evident or the presumption great. Nothing in this section shall be construed to confer a right to bail, pending appeal of a conviction. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety shall require it; nor ever without the authority of the general assembly.
SOUTH CAROLINA	
S.C. Const. of 1776	[No Right to Bail Clause.]
S.C. Const. of 1778	[No Right to Bail Clause.]
S.C. Const. of 1790	[No Right to Bail Clause.]
S.C. Const. of 1861	[No Right to Bail Clause.]
S.C. Const. of 1865	[No Right to Bail Clause.]
S.C. Const.	art. I, § 16. All persons shall, before conviction, be bailable by sufficient

of 1868	sureties, except for capital offences, when the proof is evident or the presumption great; and excessive bail shall not, in any case, be required, nor corporal punishment inflicted.
S.C. Const. of 1896	art. I, § 20. All persons shall, before conviction, be bailable by sufficient sureties, except for capital offences when the proof is evident or the presumption great Amendment [1971] art. I, § 15. All persons shall, before conviction, be bailable by sufficient sureties, but bail may be denied to persons charged with capital offenses or offenses punishable by life imprisonment, giving due weight to the evidence and to the nature and circumstances of the event. Excessive bail shall not be required; nor shall excessive fines be imposed; nor shall cruel, nor corporal, nor unusual punishment be inflicted; nor shall witnesses be unreasonably detained. Amendment [1998] art. I, § 15. All persons shall be, before conviction, bailable by sufficient sureties, but bail may be denied to persons charged with capital offenses or offenses punishable by life imprisonment, or with violent offenses defined by the General Assembly, giving due weight to the evidence and to the nature and circumstances of the event. Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained.
SOUTH DAKOTA	
S.D. Const. of 1889	art. VI, § 8. All persons shall be bailable by sufficient sureties, except for capital offenses when proof is evident or presumption great. The privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.
TENNESSEE	
Tenn. Const. of 1796	art. XI, § 15. That all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident of the presumption great. And the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it.
Tenn. Const. of 1834	art. I, § 15. That all prisoners shall be bailable by sufficient sureties, unless for capital offences when the proof is evident or the presumption great. And the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it.
Tenn. Const. of 1870	art. I, § 15. That all prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great. And the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in case of rebellion or invasion, the General Assembly shall declare the public safety requires it.
TEXAS	
Tex. Const. of 1845	art. I, § 9. All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great; but this provision shall not be so construed as to prohibit bail after indictment found, upon an examination of the evidence by a judge of the supreme or district court, upon the return of a writ of habeas corpus, returnable in the

	county where the offence is committed.
Tex. Const. of 1866	art. I, § 9. All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident; but this provision shall not be so construed as to prohibit bail after indictment found, upon an examination of the evidence by a judge of the supreme or district court, upon the return of a writ of habeas corpus, returnable in the county where the offence is committed; or to such other counties as the same may by consent of parties be made returnable.
Tex. Const. of 1869	art. I, § 9. All prisoners shall be bailable upon sufficient sureties, unless for capital offences, when the proof is evident; but this provision shall not be so construed as to prohibit bail after indictment found, upon an examination of the evidence by a judge of the supreme or district court, upon the return of the writ of habeas corpus, returnable in the county where the offence is committed.
Tex. Const. of 1876	art. I, § 11. All prisoners shall be bailable by sufficient sureties, unless for capital offences when the proof is evident; but this provision shall not be so construed as to prevent bail after indictment found, upon examination of the evidence in such manner as may be prescribed by law.[227] Amendment [1956] art. I, § 11a. MULTIPLE CONVICTIONS; DENIAL OF BAIL–. Any person accused of a felony less than capital in this State, who has been theretofore twice convicted of a felony, the second conviction being subsequent to the first, both in point of time of commission of the offense and conviction therefor may, after a hearing, and upon evidence substantially showing the guilt of the accused, be denied bail pending trial, by any judge of a court of record or magistrate in this State; provided, however, that if the accused is not accorded a trial upon the accusation with sixty (60) days from the time of his incarceration upon such charge, the order denying bail shall be automatically set aside, unless a continuance is obtained upon the motion or request of the accused; provide, further, that the right of appeal to the Court of Criminal Appeals of this State is expressly accorded the accused for a review of any judgment or order made hereunder. Amendment [1977] art. I, § 11a. MULTIPLE CONVICTIONS; DENIAL OF BAIL. (a) Any person (1) accused of a felony less than capital in this State, who has been theretofore twice convicted of a felony, the second conviction being subsequent to the first, both in point of time of commission of the offense and conviction therefor, (2) accused of a felony less than capital in this State, committed while on bail for a prior felony for which he has been indicted, or (3) accused of a felony less than capital in this State involving the use of a deadly weapon after being convicted of a prior felony, and upon evidence substantially showing the guilt of the accused of the offense in (1) or (3) above, of the offense committed while on bail in (2) above, may be denied bail pending trial, by a district judge in this State, if said order denying bail pending trial is issued within seven calendar days subsequent to the time of incarceration of the accused; provided, however,

227. Article I, section 11 of the Texas Constitution is still current law, but the right to bail is modified by section 11a, which was added in 1956.

	that if the accused is not accorded a trial upon the accusation under (1) or (3) above, the accusation and indictment used under (2) above within sixty (60) days from the time of his incarceration upon the accusation, the order denying bail shall be automatically set aside, unless a continuance is obtained upon the motion or request of the accused; provided, further, that the right of appeal to the Court of Criminal Appeals of this State is expressly accorded the accused for a review of any judgment or order made hereunder, and said appeal shall be given preference by the Court of Criminal Appeals. Amendment [1993] art. I, § 11a. MULTIPLE CONVICTIONS; DENIAL OF BAIL. (a) Any person (1) accused of a felony less than capital in this State, who has been theretofore twice convicted of a felony, the second conviction being subsequent to the first, both in point of time of commission of the offense and conviction therefor, (2) accused of a felony less than capital in this State, committed while on bail for a prior felony for which he has been indicted, (3) accused of a felony less than capital in this State involving the use of a deadly weapon after being convicted of a prior felony, or (4) accused of a violent or sexual offense committed while under the supervision of a criminal justice agency of the State or a political subdivision of the State for a prior felony, after a hearing, and upon evidence substantially showing the guilt of the accused of the offense in (1) or (3) above, of the offense committed while on bail in (2) above, or of the offense in (4) above committed while under the supervision of a criminal justice agency of the State or a political subdivision of the State for a prior felony, may be denied bail pending trial, by a district judge in this State, if said order denying bail pending trial is issued within seven calendar days subsequent to the time of incarceration of the accused; provided, however, that if the accused is not accorded a trial upon the accusation under (1) or (3) above, the accusation and indictment used under (2) above, or the accusation or indictment used under (4) above within sixty (60) days from the time of his incarceration upon the accusation, the order denying bail shall be automatically set aside, unless a continuance is obtained upon the motion or request of the accused; provided, further, that the right of appeal to the Court of Criminal Appeals of this State is expressly accorded the accused for a review of any judgment or order made hereunder, and said appeal shall be given preference by the Court of Criminal Appeals. (b) In this section: (1) "Violent offense" means: (A) murder; (B) aggravated assault, if the accused used or exhibited a deadly weapon during the commission of the assault; (C) aggravated kidnapping; or (D) aggravated robbery. (2) "Sexual offense" means: (A) aggravated sexual assault; (B) sexual assault; or (C) indecency with a child.
UTAH	
Utah Const. of 1895	art. I, § 8. All prisoners shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption strong. Amendment [1973] art. I, § 8. [Offenses bailable.] All prisoners shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption strong or where a person is accused of the commission of a felony while on probation or parole, or while free on bail awaiting trial on

	a previous felony charge, and where the proof is evident or the presumption strong. Amendment [1989] art. I, § 8. [Offenses bailable.] (1) All persons charged with a crime shall be bailable except: (a) persons charged with a capital offense when there is substantial evidence to support the charge; or (b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge; or (c) persons charged with a crime, as defined by statute, when there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to self or any other person or to the community or is likely to flee the jurisdiction of the court if released on bail. (2) Persons convicted of a crime are bailable pending appeal only as prescribed by law.
VERMONT	
Vt. Const. of 1777	ch. 2, § XXV. The person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison after delivering up, bona fide, all his estate, real and personal, for the use of his creditors, in such manner as shall be hereafter regulated by law. All prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident or presumption great.
Vt. Const. of 1786	ch. 2, § XXX. The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up and assigning over, bona fide, all his estate, real and personal, in possession, reversion or remainder, for the use of his creditors, in such manner as shall be hereafter regulated by law. And all prisoners, unless in execution, or committed for capital offences, when the proof is evident or presumption great, shall be bailable by sufficient sureties: nor shall excessive bail be exacted for bailable offences.
Vt. Const. of 1793[228]	ch. 2, § 33. The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up and assigning over, bona fide, all his estate, real and personal, in possession, reversion or remainder, for the use of his creditors, in such manner as shall be hereafter regulated by law. And all prisoners, unless in execution, or committed for capital offences, when the proof is evident or presumption great, shall be bailable by sufficient sureties; nor shall excessive bail be exacted for bailable offences. Amendments [1982, 1994]

228. Swindler, *supra* note 220, at 507, 513. VT. CONST. of 1793, ch. 2, § XXXIII. Chapter 2 is the frame of government, so the clause is not within the declaration of rights. The right to bail was amended twice. The first, in 1982, did not change the substance of the right but merely excluded offenses punishable for life imprisonment in addition to capital offenses. Adopted as Article 49 by the electorate, March 2, 1982. The 1994 amendment was a radical change, including all violent offenses or threats to persons as offenses for which bail could be denied. Adopted as Article 51 by the electorate on November 8, 1994. All amendments can be viewed at: http://vermont-archives.org/govhistory/governance/constitution/proposals.html. Current version and amendments verified also on Westlaw.

	ch. 2, § 40. Excessive bail shall not be exacted for bailable offenses. All persons shall be bailable by sufficient sureties, except as follows: (1) A person accused of an offense punishable by death or life imprisonment may be held without bail when the evidence of guilt is great. (2) A person accused of a felony, an element of which involves an act of violence against another person, may be held without bail when the evidence of guilt is great and the court finds, based upon clear and convincing evidence, that the person's release poses a substantial threat of physical violence to any person and that no condition or combination of conditions of release will reasonably prevent the physical violence. A person held without bail prior to trial under this paragraph shall be entitled to review de novo by a single justice of the Supreme Court forthwith. (3) A person awaiting sentence, or sentenced pending appeal, may be held without bail for any offense. A person held without bail prior to trial shall be entitled to review of that determination by a panel of three Supreme Court Justices within seven days after bail is denied. Except in the case of an offense punishable by death or life imprisonment, if a person is held without bail prior to trial, the trial of the person shall be commenced not more than 60 days after bail is denied. If the trial is not commenced within 60 days and the delay is not attributable to the defense, the court shall immediately schedule a bail hearing and shall set bail for the person. No person shall be imprisoned for debt.
VIRGINIA	
Va. Const. of 1776	[No Right to Bail Clause.]
Va. Const. of 1830	[No Right to Bail Clause.]
Va. Const. of 1850	[No Right to Bail Clause.]
Va. Const. of 1861[229]	[No Right to Bail Clause.]
Va. Const. of 1864	[No Right to Bail Clause.]
Va. Const. of 1870	[No Right to Bail Clause.]
Va. Const. of 1902	[No Right to Bail Clause.]
Va. Const. of 1971	[No Right to Bail Clause.]
WASHINGTON	
Wash. Const. of 1889	art. 1, § 20. All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great.

229. The 1861 Virginia Constitution was not counted as a constitution by Thorpe, but it was referenced in Thorpe. THORPE, *supra* note 220, at 3852.

	Amendment [2010] art. 1, § 20. All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great. Bail may be denied for offenses punishable by the possibility of life in prison upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature.
WEST VIRGINIA	
W. Va. Const. of 1863	[No Right to Bail Clause.]
W. Va. Const. of 1872	[No Right to Bail Clause.]
WISCONSIN	
Wis. Const. of 1848	art I, § 8. No person shall be held to answer for a criminal offence, unless on the presentment, or indictment of a Grand Jury, except in cases of impeachment, or in cases cognizable by Justices of the Peace, or arising in the Armv or Navy, or in the militia when in actual service in time of war or public danger; and no person for the same offence shall be put twice in jeopardy of punishment nor shall be compelled in an criminal case to be a witness against himself; all persons shall before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion, or invasion, the public safety may require. Amendment [1870] art. I, § 8. No person shall be held to answer for a criminal offense without due process of law, and no person for the same offense, shall be put twice in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself. All persons shall before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion the public safety may require it. Amendment [1981] art. I, § 8. Prosecutions; double jeopardy; self-incrimination; bail; habeas corpus. (1) No person may be held to answer for a criminal offense without due process of law, and no person for the same offense may be put twice in jeopardy of punishment, nor may be compelled in any criminal case to be a witness against himself or herself. (2) All persons, before conviction, shall be eligible for release under reasonable conditions designed to assure their appearance in court, protect members of the community from serious bodily harm or prevent the intimidation of witnesses. Monetary conditions of release may be imposed at or after the initial appearance only upon a finding that there is a reasonable basis to believe that the conditions are necessary to assure appearance in court. The legislature may authorize, by law, courts to

	revoke a person's release for a violation of a condition of release. (3) The legislature may by law authorize, but may not require, circuit courts to deny release for a period not to exceed 10 days prior to the hearing required under this subsection to a person who is accused of committing a murder punishable by life imprisonment or a sexual assault punishable by a maximum imprisonment of 20 years, or who is accused of committing or attempting to commit a felony involving serious bodily harm to another or the threat of serious bodily harm to another and who has a previous conviction for committing or attempting to commit a felony involving serious bodily harm to another or the threat of serious bodily harm to another. The legislature may authorize by law, but may not require, circuit courts to continue to deny release to those accused persons for an additional period not to exceed 60 days following the hearing required under this subsection, if there is a requirement that there be a finding by the court based on clear and convincing evidence presented at a hearing that the accused committed the felony and a requirement that there be a finding by the court that available conditions of release will not adequately protect members of the community from serious bodily harm or prevent intimidation of witnesses. Any law enacted under this subsection shall be specific, limited and reasonable. In determining the 10-day and 60-day periods, the court shall omit any period of time found by the court to result from a delay caused by the defendant or a continuance granted which was initiated by the defendant. (4) The privilege of the writ of habeas corpus shall not be suspended unless, in cases of rebellion or invasion, the public safety requires it.
WYOMING	
Wyo. Const. of 1889	art I (Declaration of Rights), § 14. All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishment be inflicted.